

ANALYSIS

Ohio Environmental Law Practice Manual

Thompson Hine LLP

ENVIRONMENTAL



Publication Update

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Anderson's

Ohio Environmental Law

Practice Manual

Latest Statutory, Regulatory and Judicial Developments in Ohio Environmental Law

This practice manual, which covers Ohio's state environmental laws and the state's regulatory obligation to comply with applicable federal laws, has been updated with the latest statutory, regulatory, and case law developments by the environmental practice group at Thompson Hine LLP.

Chapter 2 (Air Emissions) explains Ohio's air permit to install and operate program and U.S. EPA's New Source Review permit process. Also covered are the Trump Administration's position on U.S. EPA's initiatives to address greenhouse gas emissions from new, existing, and modified power plants and the status of the utility industry "Cross State Air Pollution Rule," as well as recent Supreme Court decisions. The chapter also reports on the revised National Ambient Air Quality Standards for ozone and particulate matter and summarizes Ohio EPA's general permit for air emissions associated with shale oil and natural gas production.

Chapter 4 (Wetland and Streams) discusses the status of U.S. EPA's and the Army Corp.'s 2015 final "waters of the united states" rule that attempted to resolve jurisdictional ambiguities under the Clean Water Act but has now been stayed pending judicial review. This Chapter further discusses the impact of President Donald Trump's executive order to review and revise the rule, which could significantly reduce the Clean Water Act's jurisdiction to certain non-traditional navigable waters and adjacent waters regardless of flow.

Chapter 6 (ODNR Regulation of Water and Flood Management)

reports that on June 1, 2016, Ohio EPA adopted new rules to address cyanotoxins in public drinking water. The rules, 3745-90 and 3745-89, are in response to U.S. EPA issuing national health advisory levels for two cyanotoxins—microcystins and cylindrospermopsin. The rules are applicable to public water systems that use surface water and certified laboratories and are part of Ohio’s multi-agency effort to address hazardous algae blooms.

Chapter 7 (Drinking Water Regulation) discusses Ohio’s 2016 legislative efforts and rulemaking to address recent drinking water emergencies resulting from lead impacted drinking water from aging infrastructure. These developments impose additional notification and response requirements where lead is detected in public water systems.

Chapter 8 (Permitted Waste Facilities) discusses three recent developments, including Ohio EPA’s new beneficial use program rules, creation of the Division of Environmental Response, Investigation and Enforcement (ERIE), and U.S. EPA’s final hazardous waste generator improvements rule. The revamp of the beneficial use program includes materials like foundry sands, sewage sludge, and dredged material, and is discussed in detail. ERIE now handles emergency response actions and ensures enforcement is efficient and consistent across divisions. The final U.S. EPA generator rules will have affect Ohio EPA’s rules as they must incorporate more stringent requirements and may add other federal requirements as it sees fit.

Chapter 9 (Contaminated Sites) discusses pending Senate Bill 2 which would expand Ohio EPA authority under [R.C. Chapter 3734](#) to conduct investigations and initiate appropriate actions to address threats to public health or safety where solid wastes or construction and demolition debris are disposed of.

Chapter 10 (Brownfield Development) discusses Ohio EPA’s rescission of certain chapters of its vapor intrusion guidance; Ohio EPA’s new vapor intrusion policy regarding response actions, and timeframes for concentrations of common vapor intrusion chemicals when receptors are present; and Ohio EPA’s updated Environmental Covenant.

Chapter 12 (Storage Tanks) discusses the intricacies of aboveground and underground storage tanks. Note that the Bureau of Underground Storage

Tank Regulations anticipates enacting new rules that incorporate federal UST regulations, update UST construction and operation standards, change soil and groundwater action levels, and increase closure sampling requirements for pipe runs.

Chapter 14 (Toxic Chemical Release and Emergency Preparedness) discusses the interplay between the federal and state entities that implement the Emergency Planning and Community Right-To-Know Act and the notification requirements that govern toxic chemical releases. To efficiently collect reports associated with toxic chemicals, facilities must submit Toxic Release Inventory forms through U.S. EPA's online-reporting software, Central Data Exchange (CDX), which automatically sends the reports to the state where the facility is located.

Chapter 16 (Criminal) discusses the structure of Ohio's environmental enforcement agencies and criminal penalties a person may face if he/she violates environmental laws. It thoroughly details how a business owner should respond to a search warrant, whether criminal or administrative.

Chapter 17 (Agriculture) reports that in January 2016, the Ohio Department of Agriculture's Division of Soil and Water Conservation (DSWC) was established through a transfer of programs from the Ohio Department of Natural Resources. DSWC implements agricultural and non-point source water pollution programs, including the Agricultural Pollution Abatement Rules, which place restrictions on the land application of manure in proximity to distressed watersheds.

Chapter 18 (Mining and Oil and Gas Leasing) discusses Ohio's surface mining and oil and gas laws, including the permit specifications and fee associated with these programs. The Chapter also discusses the Ohio Supreme Court decision *D&L Energy v. Ohio Division of Oil & Gas Resources Management*, which affirmed that the Division Chief has general authority to revoke permits under the oil and gas regulatory regime.

Chapter 19 (Fish and Wildlife) discusses that Ohio is a member of the Interstate Wildlife Violator Compact, an agreement that recognizes suspension of hunting, fishing and trapping licenses in member states.

Chapter 21 (Asbestos and Lead) reports that by March 9, 2017, community and non-transient community public water systems in Ohio were

required to identify areas that are known or likely contain lead service lines. Almost all water systems provided maps to Ohio EPA in response to the new law.

Chapter 23 (Energy Initiatives and Climate Change) discusses U.S. EPA's Clean Power Plan GHG emissions regulations and the judicial challenges that ensued, and the Trump Administration's plan to roll back the Obama EPA's rules and the Paris agreement. It also discusses Governor Kasich's veto of House Bill 554, which would have extended the "freeze" on Ohio's renewable energy and energy efficiency mandates. Now, the efficiency mandates put in place in 2008 will resume, although two years behind schedule.

Chapter 24 (Historic Preservation) discusses the Section 106 process, which requires that developers assess the historical or archeological effects of a project. Ohio encourages communities to nominate buildings to the National Register and offers a tax incentive program that provides a 25% tax credit for the rehabilitation expenses to owners and lessees of historically significant buildings.

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Thompson Hine LLP

*Environmental Practice Group, Cincinnati, Cleveland, Columbus and
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CHAPTER 1

ORGANIZATION AND PROCEDURES

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§ 1.01. Organization of Environmental Responsibility

[1] State Agencies

The central environmental agency of the state government is the Ohio Environmental Protection Agency (Ohio EPA), which is headed by the Director of Environmental Protection. Founded in 1972, Ohio EPA now administers a broad range of regulatory programs, including:

- state laws pertaining to chemical emergency planning;
- community right-to-know;
- toxic chemical release reporting;
- cessation of chemical handling operations;
- the prevention, control and abatement of air and water pollution;

- public water supplies;
- comprehensive water resource management planning;
- products that contain mercury; and
- the disposal and treatment of solid wastes, infectious wastes, construction and demolition debris, hazardous waste, sewage, industrial waste, and other wastes.¹

Ohio EPA’s headquarters are located in Columbus, with five district offices that assist headquarters in the issuance of permits and field work. Their contact information is as follows:

Northwest District Office 347 North Dunbridge Rd. Bowling Green, Ohio 43402 (419) 352-8461	District Chief: Shannon Nabors shannon.nabors@epa.state.oh.us
Southwest District Office 401 E. Fifth Street Dayton, Ohio 45402 (937) 285-6357	District Chief: Bonnie Buthker bonnie.buthker@epa.state.oh.us
Northeast District Office: 2110 E. Aurora Rd Twinsburg, Ohio 44087 (330) 963-1200	District Chief: Kurt Princic kurt.princic@epa.state.oh.us
Southeast District Office 2195 Front Street Logan, Ohio 43138 (740) 385-8501	Acting District Chief: Holly Tucker Holly.Tucker@epa.ohio.gov
Central District Office 50 West Town Street, Suite 700 Columbus, Ohio 43215 (614) 728-3778	District Chief: Isaac Robinson isaac.robinson@epa.state.oh.us

Other state agencies with environmental responsibilities include:

- Department of Agriculture, which has jurisdiction over pesticides and certain discharges from combined animal feeding operations;²
- Department of Natural Resources (ODNR), which has jurisdiction over wild, scenic and recreational river areas, specified forest preserves, litter control and recycling, geological surveying, oil and gas well drilling and monitoring, parks and recreation, water craft and waterways;³
- Air Quality Development Authority, which has specified powers to assist in the financing of pollution control facilities;⁴

- Environmental Review Appeals Commission (ERAC), which has original and exclusive appellate jurisdiction over certain specified actions of Ohio EPA;⁵
- Emergency Response Commission, which has jurisdiction over emergency response and preparedness plans;⁶
- Hazardous Waste Facility Approval Board, which has jurisdiction over the siting and construction of hazardous waste treatment, storage and disposal facilities;⁷
- Ohio Water Development Authority, which has authority to assist the financing of water pollution control projects;⁸
- Power Siting Board of the Public Utilities Commission which licenses major electric and gas generation and transmission facilities;⁹
- The State Fire Marshall, which regulates underground storage tanks.¹⁰

[2] Municipal Role

Ohio has three types of municipal governments—cities, townships and villages. Each has primary responsibilities for zoning and land use controls within its borders. Many municipalities also enact their own environmental ordinances, often dealing with noise, forest and soil conservation, and refuse disposal. Some municipalities, like the city of Cleveland, have enacted their own “smoke ordinances” and other environmental standards such as management of petroleum products as part of their fire code. Certain areas, such as the siting of major utility facilities and the permitting, location, and spacing of oil and gas wells and production operations, are specifically reserved by statute to the state and are not properly the subject of municipal regulations, although the scope of state versus municipal regulation has been the subject of litigation in recent years.¹¹

In addition to municipal governments that regulate diverse local environmental matters, Ohio has various regional organizations that regulate specific, ancillary activities. These include: solid waste management districts;¹² health districts;¹³ conservancy districts;¹⁴ county water supply districts;¹⁵ watershed districts,¹⁶ and sewer districts, including regional water and sewer districts.¹⁷

[3] Federal Role

Federal oversight is provided by the Region V Office of the United States Environmental Protection Agency, located in Chicago. This includes, among other things, approval and oversight of Ohio's State Implementation Plan under the Clean Air Act, review of state water quality standards and plans under the Clean Water Act, providing expertise and guidance to Ohio EPA staff on policy issues, maintenance and control of the national priorities list for Superfund matters, as well as coordination of federal prosecutions, both civil and criminal, for violations of federal environmental laws. Region V staff also often participate and assist in the training of Ohio EPA staff. In short, there is regular interaction and cooperation between Region V of the United States Environmental Protection Agency and the Ohio EPA.

Footnotes — § 1.01:

- ¹ R.C. 3745.01.
- ² R.C. Chapter 921.
- ³ R.C. Chapters 1501, 1505, 1509, 1546, 1547, 3736.
- ⁴ R.C. Chapter 3706.
- ⁵ R.C. 3745.02–3745.05.
- ⁶ R.C. Chapter 3750.
- ⁷ R.C. 3734.05.
- ⁸ R.C. Chapter 6121.
- ⁹ R.C. Chapter 4906.
- ¹⁰ R.C. Chapter 3737.
- ¹¹ R.C. 3704.11, 4906.13, 6111.032, 1509.02; *Morrison v. Beck Energy Corp.*, 2015-Ohio-485, 2015 Ohio LEXIS 299 (Feb. 17, 2015).
- ¹² R.C. Chapter 343.
- ¹³ R.C. Chapters 3709, 4736.
- ¹⁴ R.C. Chapter 6101.
- ¹⁵ R.C. Chapter 6103.

¹⁶ R.C. Chapter 6105.

¹⁷ R.C. Chapters 6117, 6119.

§ 1.02. Organization of the State Court System

In Ohio, the trial level court of general jurisdiction is called the court of common pleas.¹⁸ There is a common pleas court in each of the state's 88 counties.¹⁹ Appeals from that court initially go to an intermediate appellate court, called the court of appeals. There are 12 district courts of appeal corresponding to different geographical areas of the state.²⁰ The highest court in the state is the Supreme Court of Ohio, located in Columbus.

Challenges to environmental regulations are difficult to bring directly in the state court system. Any person who was a "party to a proceeding before the Director" of Ohio EPA may appeal to the ERAC, located in Columbus, for an order vacating or modifying the action of the Director.²¹ "Person" includes individuals or legal entities, whether or not the person is an applicant for or a holder of a license, permit, or variance.²² The term "action" includes the "adoption, modification or repeal of a rule or standard" as well as permit decisions.²³ The term "party to a proceeding" means "a person who appears in person, or by his attorney, and presents his position, arguments or contentions as to the lawfulness and reasonableness of such proposed rule, amendment or rescission."²⁴ In order to have standing to challenge final Ohio EPA rules, a person must be affected by the Ohio EPA rule and have appeared, submitted evidence, or otherwise participated in the rule-making proceeding conducted by Ohio EPA.²⁵ The exclusivity of the ERAC appeals process precludes other judicial challenges to an Ohio EPA order except appeal of those orders to the court of appeals as provided in [R.C. 3745.06](#).²⁶

It is difficult to challenge environmental regulations through declaratory judgment actions. In the leading case of *Fortner v. Thomas* (1970), [22 Ohio St. 2d 13, 257 N.E.2d 371](#), the Ohio Supreme Court held that the Ohio Constitution precluded judicial review of quasi-legislative decisions of administrative agencies. However, in *Burger Brewing Co. v. Liquor Control Comm'n* (1973), [34 Ohio St. 2d 93, 296 N.E.2d 261](#), the Ohio Supreme Court permitted a party to challenge the construction and validity of an administrative regulation through a declaratory judgment action, distinguishing *Fortner v. Thomas* (1970), [22 Ohio St. 2d 13, 257 N.E.2d 371](#),

on the basis that *Fortner* involved “premature declarations or advice upon potential controversies” as opposed to the true controversy present in *Burger Brewing Co. v. Liquor Control Comm’n* (1973), 34 Ohio St. 2d 93, 296 N.E.2d 261. A party adversely affected by an order of the ERAC may appeal to the Tenth District Court of Appeals located in Columbus. If the appeal arises from an alleged violation of a law or regulation, the party may appeal to the court of appeals of the district in which the violation allegedly occurred.²⁷

Footnotes — § 1.02:

¹⁸ R.C. 2305.01.

¹⁹ R.C. 2301.01.

²⁰ R.C. 2501.01.

²¹ R.C. 3745.04; OAC 3746-5-01.

²² OAC 3746-1-01(I).

²³ R.C. 3745.04; OAC 3746-1-01(A); *Jackson County Environmental Committee v. Schregardus* (1994), 95 Ohio App. 3d 527, 642 N.E.2d 1142.

²⁴ *Cincinnati Gas & Electric Co. v. Whitman* (Nov. 19, 1974), 10th Dist. App. No. 74AP-151, 11 Ohio Op. 3d 192, 198, 1974 Ohio App. LEXIS 3290; *Martin v. Schregardus* (Sept. 30, 1996), 10th Dist. App. Nos. 96 APH 04-433, 96 APH 04-434, 1996 Ohio App. LEXIS 4288.

²⁵ *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St. 3d 216, 218, 513 N.E.2d 302, 305.

²⁶ *State ex rel. Williams v. Bozarth* (1978), 55 Ohio St. 2d 34, 36–37, 377 N.E.2d 1006, 1008; *Warren Molded Plastics, Inc. v. Williams* (1978), 56 Ohio St. 2d 352, 353–54, 384 N.E.2d 253, 255.

²⁷ R.C. 3745.06.

§ 1.03. Environmental Impact Review

There is no environmental impact statement or review process in Ohio. Instead, environmental impacts of proposed or final actions are evaluated as part of the permitting process described in § 1.05 below.

§ 1.04. Enforcement Procedures

[1] Judicial Proceedings

Ohio's environmental laws are enforced through Ohio EPA and the Attorney General. Thus, the Attorney General, upon request of the Director of Ohio EPA, will prosecute any person who violates or is threatening to violate the air, water, solid, or hazardous waste laws or other environmental laws of Ohio, by bringing an action for an injunction, civil penalty, or any other appropriate proceeding in any court of competent jurisdiction (typically, the court of common pleas).²⁸ The courts of common pleas have jurisdiction to grant prohibitory and mandatory injunctive relief and to require payment of civil penalties upon showing of violations of state law or regulations.²⁹ Finally, criminal proceedings may be brought, as explained in [Chapter 22 below](#).

[\[2\] Administrative Procedures](#)

The Director also possesses authority under the air, water and solid and hazardous waste laws to issue various forms of administrative orders requiring compliance. Thus, the Director can issue, modify, or revoke orders that require the abatement or prohibition of emissions violating applicable emission standards or other requirements of the air pollution laws, or that require emission control devices or measures to ensure compliance with applicable emission standards or other requirements under those laws.³⁰ The Director may issue, modify, suspend, or revoke enforcement orders to a permit or license holder or other person, directing that person to abate violations, or to prevent any threatened violations, or to comply with terms and conditions dealing with solid and hazardous waste; and if an emergency exists, the Director may issue an order without notice or hearing requiring such action to be taken as necessary to meet the emergency.³¹ The Director may also issue orders to prevent, control or abate water pollution, including orders to require construction of new disposal systems or the modification or alteration of existing disposal systems, or the prohibition of additional connections or extensions to sewer systems, or otherwise requiring compliance with applicable standards.³² The Director's issuance of an administrative enforcement order, with a schedule to achieve compliance, does not necessarily insulate a violating source from citizen's suits.³³

Ohio has adopted a procedure for handling verified complaints alleging violations of the state's environmental laws.³⁴ An officer of a state agency or political subdivision, acting in a representative capacity, or any private citizen

who is or will be aggrieved or adversely affected by a violation may file with the Director a written complaint, verified by the affidavit of the complainant, alleging a violation. After receiving a complaint, the Director must undertake a prompt investigation, including a discussion of the complaint with the alleged violator. If the Director determines that a violation has occurred, is occurring, or will occur, he may enter the necessary order, he may request the Attorney General to commence appropriate legal proceedings, or he may dismiss the complaint if he determines that a violation has not occurred.³⁵ Any hearings convened pursuant to this section will be supervised by a hearing examiner designated by the Director.³⁶ The agency and the alleged violators are parties to the hearing. Furthermore, the complaining person has the right to be a party to the hearing if she so chooses.

Finally, Ohio law makes it clear that the administrative procedures set forth in Ohio's organic environmental laws do not preclude, abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property.³⁷ Although Ohio EPA employs its own staff of lawyers, including a separate legal advisor to the Director as well as lawyers assigned to the various regulatory programs, the primary enforcement attorneys work for the Environmental Enforcement Section of the Attorney General's Office in Columbus.³⁸

[3] Self-Audit Privileges

Ohio has enacted a law which establishes a privilege of non-disclosure in criminal, civil, and administrative proceedings for companies that voluntarily undertake environmental audits. The law also grants immunity for administrative and civil penalties (but not significant economic benefit penalties), as long as the owner or operator submits an audit report to the Ohio Environmental Protection Agency in the required format and identifies the audit report as privileged information. In addition, the owner or operator must make a good-faith effort to bring the site into compliance.³⁹ The benefits of the law are difficult to secure because of the wide-range of exclusions and the significant burden of proving entitlement.⁴⁰ The self-audit privilege law was set to expire on January 1, 2014, but the sunset provision was removed by the 130th General Assembly in Senate Bill 59, thereby indefinitely extending the law's applicability.⁴¹

²⁸ See R.C. 3704.06 (civil penalty and injunction actions for air pollution violations); R.C. 3714.11 (civil penalty and injunction actions for construction and demolition debris violations); R.C. 3734.13 (civil penalty and injunction actions for solid and hazardous waste violations).

²⁹ R.C. 3704.06, 3734.10 and 6111.07.

³⁰ R.C. 3704.03(R).

³¹ R.C. 3734.13.

³² R.C. 6111.03(H) and (J).

³³ *Natural Resources Defense Council, Inc. v. Vygen Corp.* (N.D. Ohio 1992), 803 F. Supp. 97.

See Hardy, *Director's Findings and Orders Issued by Ohio EPA Do Not Bar Citizen's Suit for NPDES Violation*, 1 Ohio Env'tl. Monthly 9 (November 1992).

³⁴ R.C. 3745.08.

³⁵ R.C. 3745.08(B).

³⁶ R.C. 3745.08(C).

³⁷ R.C. 3704.09, R.C. 3734.11 and R.C. 6111.08.

³⁸ See <http://www.ohioattorneygeneral.gov/About-AG/Organizational-Structure/Environmental-Enforcement> (last viewed Mar. 30, 2017).

³⁹ S.B. 138 (Dec. 12, 1996); R.C. 3745.70 to R.C. 3745.73. Amendments to Ohio's Environmental Audit Privileges and Immunities Law went into effect in September 1998. The law, originally enacted in March 1997, allows companies to evaluate their own environmental non-compliance and correct any violations to avoid penalties or public notification. After passage of the law, U.S. EPA threatened to strip Ohio of its authority to implement federal environmental programs unless the law was amended. The September 1998 amendments reflect a compromise between Ohio EPA and U.S. EPA. The amendments kept the heart of the law intact, but placed some additional limitations on when a company can rely on the law's privilege and immunity provisions. The amendments clarify that a company must promptly disclose a violation and come into compliance within a reasonable time in order to claim the privilege. The amendments also include additional limitations on when a company can claim civil and administrative immunity. Companies cannot claim immunity for violations that resulted in a significant economic benefit to the facility owner or operator. The amendments prohibit immunity if the violations constituted a pattern of environmental violations within the past three years. Companies also cannot claim immunity for violations that resulted in serious harm or for violations of a specific administrative or judicial order. U.S. EPA and Ohio EPA have not reached an agreement whereby U.S. EPA would accept Ohio's audit bill.

⁴⁰ R.C. 3745.71(C), (E), R.C. 3745.72(A).

⁴¹ R.C. 3745.72(F).

§ 1.05. Permitting Procedures

[1] Permit Application

Applications for most types of permits are made to Ohio EPA's district offices, where they are initially reviewed and often transferred to headquarters in Columbus for final evaluation. Most permits are subject to Ohio's Administrative Procedure Act, including the Act's adjudicatory procedures.⁴²

Ohio EPA cannot refuse to issue a permit without first affording the applicant an opportunity for an administrative adjudicatory hearing.⁴³ Any applicant who feels aggrieved by the agency's proposal to reject a permit application or to impose unacceptable conditions on the permit is entitled to an adjudication hearing, which is a "trial-type" proceeding "on the record" before a hearing examiner who is admitted to the practice of law in Ohio.⁴⁴ The hearing examiner submits to the Director a written report setting forth his findings of fact and conclusions of law and recommended action, which may be approved, modified, or disapproved by the Director.⁴⁵ A recommendation of the hearing examiner does not become final until the Director confirms and approves it, as indicated by an order entered by the Director into Ohio EPA's record of proceedings.⁴⁶ After the order is entered into the official journal, any appeal may be prosecuted to the ERAC.⁴⁷

Under Ohio law, no person may install a new source of air pollutant, a new water pollution disposal system, or a solid waste disposal facility, or modify such a facility without first obtaining a permit to install from the Director.⁴⁸ The regulations specify the application procedures for new sources, as well as the criteria for decision by the agency on these applications.⁴⁹ The procedures for Ohio National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act and permits for the underground injection control program are governed by specific regulations.⁵⁰ The requirements for Ohio's "Title V" air pollution program for "major" sources likewise are found in specific provisions.⁵¹

Before taking final action on a permit application, the Director must issue a "proposed action," which allows aggrieved persons to request an adjudication hearing or public meeting. A specific chapter on procedural requirements specifies the rules for:

- requests for adjudication hearings and objections to agency action;

- authority and duties of hearing examiners;
- intervention;
- motion practice;
- prehearing conferences;
- discovery;
- adjudication hearing procedure;
- burden of proof;
- report of the hearing examiner or presiding officer, and related matters.⁵²

[2] Permit Review by Ohio EPA Certified Engineers

Ohio's General Assembly provided an alternative permit review mechanism known as "compliance reviews" in 1993 to expedite application processing. Under that law, a "compliance review" entails the review of an application for a permit, or for renewal or modification of a permit or plan approval for an existing or proposed facility submitted under the Air Pollution Control Law, the Solid, Infectious and Hazardous Waste Law, the Safe Drinking Water Law, or water pollution control law for compliance with performance standards under applicable laws and regulations.⁵³ This program does not cover the evaluation of an application for the installation and operation of a hazardous waste facility or the renewal, modification or revision of a permit issued for such a facility. Other permits *not* covered under the program are:

- a permit to establish or modify an infectious waste treatment facility;
- a permit to install a solid waste incineration facility that also treats infectious waste; or
- a permit to modify a solid waste incinerator to treat infectious waste.

Under this law, Ohio EPA is mandated to adopt rules to establish a program for the certification of professional engineers to conduct such compliance reviews. For this purpose, engineers include both professional engineers registered under the Professional Engineers and Surveyors law, and firms, partnerships, associations or corporations providing engineering

services in Ohio in compliance with this law.⁵⁴

Under the law, Ohio EPA is required to maintain a current list of all engineers indicating the types of permits, permit renewals and plan approvals that each engineer is certified to review, and the types or categories of facilities, sources, or activities in connection with which the engineer is certified. An applicant for a permit under any of the laws specified above, may submit a written request to the Director to have the compliance review conducted by a certified engineer. The request must accompany the permit application, indicate the applicant's choice from among the certified engineers on Ohio EPA's list and be accompanied by separate certifications by the applicant and the engineer indicating that the applicant does not have, and has not had during the preceding two years, a financial interest in the engineer and has not employed or retained the engineer to perform services for the applicant during the preceding two years. Additionally, a request may be accompanied by a draft proposal for conducting the compliance review developed by the applicant and the engineer.⁵⁵

Ohio EPA must approve or disapprove a request to have the compliance review conducted by a certified engineer within seven days of receiving the request. If the agency fails to mail notice within seven days after receiving the request, the law conclusively presumes that Ohio EPA has approved the requests, including the choice of the engineer, and Ohio EPA must enter into a contract with that engineer.⁵⁶ The commencement of any work under such a contract is contingent on the agency's receipt from the applicant of an amount equal to 110% of the amount specified in the contract, excluding any contingencies for any additional work that may be needed to complete the review properly and that was not anticipated when the contract was made. Money so received must be deposited into the permit review fund. The Director must use the money in this fund to pay the cost of compliance reviews conducted pursuant to contracts and to administer the certification program.⁵⁷

Footnotes — § 1.05:

⁴² R.C. Chapter 119; R.C. 3745.05.

⁴³ *General Motors Corp. v. McAvoy* (1980), 63 Ohio St. 2d 232, 407 N.E.2d 527.

⁴⁴ R.C. 119.09.

⁴⁵ OAC 3745-47-16.

⁴⁶ R.C. 119.09.

⁴⁷ R.C. 3745.04; OAC 3746-5-06.

⁴⁸ OAC 3745-31-02 (governing Permits to Install); OAC Chapters 3745-32 (water quality certifications), 3745-33 (NPDES permits), and 3745-34 (underground injection control permits).

⁴⁹ OAC 3745-31-05.

⁵⁰ OAC Chapters 3745-32 (water quality certifications), 3745-33 (NPDES permits), and 3745-34 (underground injection control permits).

⁵¹ R.C. 3704.036; OAC Chapter 3745-77 (eff. Mar 22, 2012).

⁵² OAC Chapter 3745-47 (eff. Apr. 2, 2012).

⁵³ R.C. 3745.14.

⁵⁴ R.C. 3745.14.

⁵⁵ R.C. 3745.14.

⁵⁶ R.C. 3745.14(D).

⁵⁷ R.C. 3745.14(E).

§ 1.06. Freedom of Information and Open Meetings

[1] Freedom of Information Law

Ohio has no freedom of information act. However, Ohio does have a “Public Records Act” that allows “public records,” defined in the act, to be made available to the public upon request.⁵⁸

Under Ohio’s “Public Records Act,” “public records” must be made available for inspection, or copies made at reasonable cost, during regular business hours.⁵⁹ “Public records” do not include confidential law enforcement investigatory, medical, or trial preparation records.⁶⁰ As a practical matter Ohio EPA records and files are available for public inspection at the agency’s district offices and headquarters if prior arrangements are made with the public information officer of the appropriate office to inspect those files. The files, books and records of the agency other than communications with the Attorney General, materials or information

obtained or prepared during the pendency of litigation for use in that litigation, materials or information not available for public inspection pursuant to statute or rule, and privileged materials or information pursuant to statutory provisions relating to trade secrets are required to be available to the public during regular business hours for review and copying, whether or not litigation is pending.⁶¹ Ohio EPA’s rules require it to provide facilities for the inspection of all its files and a machine or device for copying of papers and documents for which it may charge a fee commensurate with the cost to the agency of providing this equipment.⁶² Similar practices are followed by the other state agencies mentioned in § 1.01[1] above.⁶³

State agencies are not only required to provide access to the public records, they are also obligated to copy and mail them, but “may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing.”⁶⁴

Ohio EPA Public Information Officers by District or Division:

Ohio EPA - Central Office Attn. Rich Boudier P.O. Box 1049 Columbus, Ohio 43216-1049 (614) 644-2782 (614) 644-3184 FAX	Ohio EPA - Northwest District Office Attn. Cheryl Gulley 347 North Dunbridge Road Bowling Green, Ohio 43402 (419) 373-3086 (419) 352-8468 FAX
Ohio EPA - Southwest District Office Attn. Penny Prather 401 East Fifth Street Dayton, Ohio 45402-2911 (937) 285-6025 (937) 285-6249 FAX	Ohio EPA - Northeast District Office Attn. Nicole Patella 2110 E Aurora Road Twinsburg, Ohio 44087-1969 (330) 963-1200 (330) 487-0769 FAX
Ohio EPA - Southeast District Office Attn. Angie Hardesty 2195 Front Street Logan, Ohio 43138 (740) 385-8501 (740) 385-6490 FAX	Ohio EPA - Central District Office Attn. Lisa Oltman 50 W. Front Street, Suite 700 Columbus, Ohio 43215 (614) 728-0793 (614) 728-3898 FAX

[2] Open Meetings Law

Ohio’s Open Meeting Act, applicable to all public bodies, including Ohio EPA, requires that meetings must be open to the public at all times with certain exceptions, such as executive sessions, and the minutes of any regular or special meeting must be properly recorded and open to public inspection.

There are certain exceptions to this law, including executive sessions of public body meetings to confer with an attorney concerning disputes involving the public body that are subject to pending or imminent court action.⁶⁵

Footnotes — § 1.06:

⁵⁸ R.C. 149.43(A)(1).

⁵⁹ R.C. 149.43(B).

⁶⁰ R.C. 149.43(A).

⁶¹ OAC 3745-47-20.

⁶² OAC 3745-47-20(B).

⁶³ R.C. 149.43.

⁶⁴ R.C. 149.43(B).

⁶⁵ R.C. 121.22.

CHAPTER 2

AIR EMISSIONS

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I.

PROCEDURAL CONTEXT

§ 2.01. Scope

This chapter covers:

- Ohio’s New Source Permit Program [see § 2.03 below].
- Emission standards and requirements [see § 2.04 below].
- Hazardous Air Pollutant regulation, implemented through National Emission Standards for Hazardous Air Pollutants (“NESHAPS”) and Maximum Achievable Control Technology (“MACT”) provisions [see § 2.05 below].
- Ohio’s Title V permit program [see § 2.06 below].
- Shale oil and gas developments [see § 2.07 below].
- Enforcement of Ohio’s Air Pollution Control laws [see § 2.08 below].

§ 2.02. Air Emissions Overview

[1] Federal

Ohio has a comprehensive statutory and regulatory program to control emissions of air contaminants. As with the other major environmental media (water and solid wastes), the basic framework for the State’s air program is established by federal law, in this case the federal Clean Air Act.¹ The cornerstone of the Clean Air Act is the setting and attainment of National Ambient Air Quality Standards (“NAAQS”) intended to protect public health and welfare. To date, U.S. EPA has established NAAQS for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. The task of meeting and attaining the NAAQS rests with the various states through the adoption and implementation of State Implementation Plans (“SIPs”), which are state rulemakings that must be approved by U.S. EPA. Specific permitting requirements and emission

limitations are imposed on individual and mobile sources. If a state fails to adopt a SIP deemed acceptable by U.S. EPA, the Agency will issue a Federal Implementation Plan (“FIP”), imposing rules upon the state.

Those areas (typically counties) where the NAAQS are met are referred to as “attainment” areas; areas not meeting the NAAQS are “non-attainment” areas. An area may be attainment for certain pollutants and non-attainment for others. U.S. EPA requires pre-construction “New Source Review” and permitting of major stationary sources and major modifications of major stationary sources. The requirements for new or modified sources in non-attainment areas are more rigorous than for new or modified sources in attainment areas.

Under the Clean Air Act, U.S. EPA requirements limit emissions of a universe of compounds known as “hazardous air pollutants,” impose an obligation to use state of the art control technologies on certain new industrial sources of emissions, control utility industry emissions of pollutants which may result in “acid rain,” require the phase out of ozone-depleting compounds, and require “Title V” operating permits for “major” sources. As discussed below, while U.S. EPA retains authority to enforce these regulatory programs, Ohio EPA has been delegated authority to implement the requirements through its permitting processes.

[2] State

Ohio’s air pollution control legislation is set forth at [Ohio Revised Code Chapter 3704](#). The primary purposes of the Ohio Clean Air Act are to:

“protect and enhance the quality of the State’s air resources so as to promote the public health, welfare, economic vitality, and productive capacity of the people of the state”; and to

“enable the State, through the director of environmental protection, to adopt and maintain a program for the prevention, control and abatement of air pollution that is consistent with the federal Clean Air Act.”²

The Director of Ohio EPA has broad powers under Ohio law. The Director may adopt rules regarding (1) the prevention, control and abatement of air pollution; (2) permit requirements for the installation, construction, modification, and operation of air emission sources; and (3) monitoring

requirements for emissions, ambient air quality, and meteorological conditions. The Director also is empowered to issue orders requiring the abatement or prohibition of emissions that violate statutory or regulatory requirements.³

Under Ohio EPA regulations, generally all but the smallest of air sources (generally, less than 10 pounds a day of any pollutant and no more than one ton per year of any hazardous air pollutants⁴) require either a Permit to Install (“PTI”) or Permit to Install and Operate (“PTIO”) prior to construction (or modification), and, if applicable, a Title V permit soon after commencing operation. To obtain a PTI, which is required for air sources that must obtain a Title V permit, or a PTIO for smaller sources, the source owner or operator must demonstrate that the source will utilize the “Best Available Technology” (BAT) to control emissions.⁵ BAT is currently determined on a case-by-case basis and may be an add-on control technology (e.g., a baghouse, incinerator, or scrubber system), operational process controls (e.g., use of low solvent paint or coatings), or operational methods (e.g., periodic application of dust suppression chemicals), depending on the type of source and emissions. (For a discussion of how Ohio EPA implements BAT, see [§ 2.03\[2\].](#))

Permits to install and permits to operate may include emission limitations, operational restrictions, monitoring requirements, and record keeping and reporting requirements.

Ohio EPA implements its air program through its five district offices and 9 local air agencies. Permits typically are negotiated at the local office, but ultimately are issued out of the central office in Columbus. The local air agencies and district offices are listed as follows:

Portsmouth City Health Dept. Cindy Charles, Director 605 Washington Street, Third Floor Portsmouth, Ohio 45662 (740) 353-5156 FAX # (740) 353-3638	Cleveland Department of Health Division of Air Quality David Hearne, Commissioner 75 Erieview Plaza, 2nd Floor Cleveland, Ohio 44114-2080 216-664-2297 FAX # (216) 420-8047
Lake County General Health District Bert Mechenbier, Supervisor Air Pollution Control 33 Mill Street Painesville, Ohio 44077	Division of Air Pollution Control Canton City Health Dept. Terri Dzienis, Administrator 420 Market Avenue, N. Canton, Ohio 44702-1544 (330) 489-3385

(440) 350-2543 FAX # (440) 350-2548	FAX # (330) 489-3335
Toledo Environmental Services Karen Granata, Administrator 348 South Erie Toledo, Ohio 43604 (419) 936-3015 FAX # (419) 936-3959	Regional Air Pollution Control Agency Jenny Marsee, Administrator 117 South Main Street Dayton, Ohio 45422-1280 (937) 225-4435 FAX # (937) 225-3486
Southwest Ohio Air Quality Agency Brad Miller, Director 250 William Howard Taft Road Cincinnati, Ohio 45219-2660 (513) 946-7777 FAX # (513) 946-7778	Akron Regional Air Quality Management District Sam Rubens, Administrator 1867 West Market Street Akron, Ohio 44313 (330) 375-2480 FAX # (330) 375-2402
Ohio EPA, CDO Kelly Toth, APC Supervisor Air Pollution Group 50 West Town Street, Suite 700 Columbus, Ohio 43215 (614) 728-3778 FAX # (614) 728-3898	Mahoning-Trumbull APC Agency Tara Cioffi, Administrator 345 Oak Hill Ave, Suite 200 Youngtown, OH 44502 (330) 743-3333 FAX # (330) 744-1928
Ohio EPA, NWDO Mark Budge, Manager Air Pollution Group 347 North Dunbridge Road Bowling Green, Ohio 43402 (419) 352-8461 FAX # (419) 352-8468	Ohio EPA, NEDO Tim Fischer, Manager, Air Pollution Group 2110 East Aurora Road Twinsburg, Ohio 44087 (330) 425-9171 FAX # (330) 487-0769
Ohio EPA, SWDO Craig Osborne, Manager Air Pollution Group 401 East Fifth Street Dayton, Ohio 45402-2911 (937) 285-6357 FAX # (937) 285-6249	Ohio EPA, SEDO Lisa Duvall, Manager Air Pollution Group 2195 Front Street Logan, Ohio 43138 (740) 380-5217 FAX # (740) 385-6490

Ohio EPA’s enforcement of the State’s air law, rules, and permit terms and conditions may consist of notices of violation, consensual or unilateral administrative orders, or, in more significant circumstances, referral to the Office of the Attorney General for civil or criminal judicial proceedings.

Footnotes — § 2.02:

- ¹ 42 U.S.C. § 7401 *et seq.*
- ² R.C. 3704.02(A).
- ³ R.C. 3704.03.

⁴ OAC 3745-15-05.

⁵ R.C. 3704.03. The Ohio General Assembly enacted AM SUB SB 265 on March 29, 2006. It was signed by the governor and went into effect August 3, 2006. AM SUB SB 265 requires Ohio EPA to define BAT by regulation by August 3, 2009 and prohibits BAT for sources that have a potential to emit (taking into account air pollution controls installed on the source) less than 10 tons per year of an air contaminant or air contaminant precursor. AM SUB SB 265 was challenged in certain respects by the Sierra Club in *Sierra Club v. Korleski*, Case No. 2:08-CV-865 (S.D. Ohio). On February 2, 2010, Magistrate Abel entered an order that concluded that AM SUB SB 265 was inconsistent with the federal Clean Air Act, insofar as it did not require BAT for smaller emissions units that have a potential to emit under 10 tons per year. On May 25, 2012, the Sixth Circuit Court of Appeals overturned the District Court’s ruling. The court held that the citizen suit provision of the Clean Air Act does not allow suits against regulators, only sources that violate an emission standard. *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012). Until U.S. EPA approves Ohio EPA’s 10 ton per year BAT exemption, Ohio EPA is imposing BAT on these smaller sources.

II.

THE OHIO AIR POLLUTION CONTROL PROGRAM

§ 2.03. New Source Permits

[1] Overview

Under Ohio law, owners or operators of most new stationary sources of air pollution must obtain either a permit to install (“PTI”) or permit to install and operate (“PTIO”) from Ohio EPA prior to commencing construction.⁶ Under AM SUB SB 265, Ohio EPA published a list of activities that are permissible prior to obtaining a permit, such as laying footers.⁷ Owners and operators may also need a PTI or PTIO before implementing modifications to procedures or equipment that increase “allowable emissions” (described in [Section 2.03\[2\] below](#)) from an air pollution source or result in emissions of an air pollutant not previously emitted.⁸ A PTI or PTIO outlines technical and design requirements for a new or modified source, and specifies a source’s allowable air pollutant emissions. Where applicable, owners and operators of new or modified sources also must comply with U.S. EPA’s New Source Performance Standards⁹ and New Source Review requirements,¹⁰ which are incorporated by reference in Ohio’s PTI regulations. [OAC Chapter 3745-31](#) specifies the PTI or PTIO application procedures for new or modified sources of air pollution, as well as the criteria for decision used by Ohio EPA.

[2] Permits to Install and Permits to Install and Operate

An owner or operator cannot install or construct a new source of air pollution without first obtaining either a PTI or PTIO from Ohio EPA. Certain pre-construction activities can also trigger permitting requirements.¹¹ PTIs are required for sources that trigger Title V permitting requirements, which are based on a source's potential or actual emissions.¹² PTIOs are required for sources that do not trigger Title V permitting requirements, and allow both the construction and operation of a source.¹³ Ohio EPA broadly defines "new source" as any air contaminant source where the installation or construction occurred after January 1, 1974.¹⁴ *De minimis* sources of air pollution are exempt from permitting requirements. This exemption applies to air emissions of particulate matter, nitrogen oxides, organic compounds, sulfur dioxide, carbon monoxide, or lead from sources whose "potential to emit" (discussed in [Section 2.06\[3\]](#)) (or documented actual emissions) do not exceed ten pounds per day of any pollutant, 25 tons per year from all "similar" sources at the facility, or one ton per year of hazardous air pollutants.¹⁵ No PTI or PTIO is required for certain kinds of equipment as well, including, among other things: fuel-fired indirect heat exchangers that burn fuel to produce steam, hot water, or hot air and which have an input capacity of less than one million British thermal units per hour at maximum capacity; materials stored in tanks of less than five hundred gallons capacity; and incinerators having a capacity for serving no more than five households. A complete list of PTI or PTIO exemptions is specified in the rules.¹⁶ Although they are exempt from the requirement to obtain a PTI or PTIO, owners or operators who utilize some of the exemptions may be required to comply with certain record keeping, reporting, and notification requirements.¹⁷

Ohio EPA also includes within its definition of "new source" any modification to a source that occurred after January 1, 1974. Consequently, either a PTI or PTIO must be obtained before an air pollutant source undergoes any physical change, or change in the method of operation, that results in the emission of an air pollutant not previously emitted by the source or results in an increase of the allowable emissions of such source.¹⁸ "Allowable emissions" means the emission rate of an air contaminant source calculated using the maximum rated capacity of the air contaminant source, and the most stringent of the following: (1) the applicable standards set forth in [40 C.F.R. Parts 60, 61, and 63](#); or (2) the applicable SIP emissions limitation, including those with a future compliance date; or (3) the emission

rate by a permit condition that is federally enforceable or legally and practically enforceable by the state, including those with a future compliance date.¹⁹

Multiple emissions units at separate facilities may be aggregated and considered a single source for purposes of Title V and New Source Review (see [Section 2.03\[3\]](#) below) permitting if the units are: under common control, belong to the same industrial grouping, and are located on one or more “contiguous or adjacent properties.”²⁰ U.S. EPA does not include a bright line distance criterion in its interpretation of “adjacent.” Rather, it looks to such factors as nature of the relationship between facilities and the degree of interdependence among the facilities. On August 7, 2012, the U.S. Court of Appeals for the Sixth Circuit struck down the agency’s interpretation, holding in *Summit Petroleum Corp. v. EPA*²¹ that “adjacent” was not ambiguous and that the concept is purely physical and geographical. On December 21, 2012, U.S. EPA issued a memorandum responding to the *Summit* decision, indicating that it will continue to look to the interdependence/interrelatedness of facilities in all states except Ohio, Michigan, Tennessee, and Kentucky, which are under the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. A trade group representing major manufacturers sued U.S. EPA over the memorandum. In May 2014, a federal court of appeals vacated the memorandum, finding that the Agency’s would-be policy violated its own “regional consistency regulations” set forth at [40 C.F.R. Part 56](#).²²


U.S. EPA issued a proposed rule addressing aggregation of multiple sites for air permitting purposes within the oil and natural gas sector.²³ Under the agency’s “preferred” option, multiple sites would be considered a single source if they share the same SIC code, are under common control, and are contiguous or are located within a short distance of one another. U.S. EPA proposed one-quarter of a mile would constitute “a short distance.” A second proposed approach would have equipment presumed to be “adjacent” if “proximate or functionally interrelated.” U.S. EPA issued its final rules on June 3, 2016.²⁴ Under the final rule, for emitting locations to be considered “adjacent” and therefore aggregated, the sites must be located within a quarter-mile of each other and share common equipment.

 **Warning:** Although the definition of “allowable emissions”

includes an emission rate contained in a permit condition that is legally and practicably enforceable by the state, Ohio EPA has taken the position that only permit limits established by permits that have been issued in draft format for public comment (as opposed to the common practice of issuing permits as a final action without public comment) are to be considered.

The initial step in obtaining a PTI or PTIO is to complete the Permit to Install and Operate Application form, Additional Information form, the Specific Emissions Unit Information form for each new source, and the Emissions Activity Category form.²⁵ The completed forms are submitted to the local Ohio EPA District Office or Local Air Agency, where they undergo an initial review for completeness before being sent to the Ohio EPA Central Office, Permit Management Unit for technical review. The applicant must demonstrate that the new or modified source will employ BAT to control air pollutant emissions. AM SUB SB 265 prohibits the case-by-case insertion of BAT and forces Ohio EPA to define BAT for source categories in rules beginning August 3, 2009. Ohio EPA has not met this deadline, and instead has promulgated a policy that calls for a case-by-case determination until such rules are issued.²⁶ Ohio EPA has recognized the tenuous position it is in and notes that it will issue permits without BAT upon request of the regulated entity, but will also send such permits to U.S. EPA, which may result in an enforcement action against both Ohio EPA and the permittee by U.S. EPA. AM SUB SB 265 further restricts the ability of Ohio EPA to impose BAT except for NAAQS pollutants or precursors beginning August 3, 2009. Finally, Ohio EPA may no longer impose BAT for sources that have a potential to emit of less than 10 tons per year (taking into account pollution control technology).²⁷ According to the regulatory definition, BAT is any combination of work practices, raw material specifications, throughput limitations, source design characteristics, evaluation of the annualized cost per ton of air pollutant removed, and air pollution control devices that have been previously demonstrated to Ohio EPA to operate satisfactorily in Ohio or other states with similar air quality on substantially similar sources of air pollution.²⁸ Whether a new or modified source satisfies the BAT requirement is presently determined by Ohio EPA on a case-by-case basis and, in practice, often is established in individual permits as an emission limitation rather than a specified control technology.

If the application is approved, Ohio EPA will issue a draft, proposed, or final PTI or PTIO. The applicant is allowed 18 months to begin construction of the new air pollution source after Ohio EPA issues either a final PTI or PTIO. Ohio EPA is required to issue a final PTI or PTIO within 180 days after it receives a completed application.²⁹ Nonetheless, the time it takes to obtain a PTI varies depending on several factors, including the size of the new source and the current workload of Ohio EPA. Consequently, at least six months to more than one year may be needed to obtain a final PTI or PTIO.

 **Strategic Point:** Ohio EPA has created a “rush list” for PTI and PTIO applications requiring a faster than normal processing time. Applicants can get on the list by contacting Ohio EPA and providing the following information: (1) a date when the applicant must know Ohio EPA’s decision on a permit application; and (2) a description of the adverse consequences the applicant would suffer if Ohio EPA could not issue a final permit by the date provided. Ohio EPA prioritizes its permit work based on the information provided.

Ohio EPA also has developed model general PTIs and model general PTIOs for use by certain specified sources, including: certain boilers; dry cleaning operations; miscellaneous metal parts painting lines; ready mix concrete batch plants; unpaved roadways and parking areas; paved roadways and parking areas; and storage piles.³⁰ The model general permits provide uniform terms and conditions for each source category. The model permits enable applicants associated with specific source categories to quickly determine whether they qualify for one of the general permits and the terms and conditions of their permit. After receipt of a completed application and confirmation that the applicant satisfies the criteria of the model permit, Ohio EPA will issue the applicant a general PTI or general PTIO incorporating the terms and conditions of the model permits.

Express PTIOs are available to certain new or modified sources of air pollutants that are able to meet specific criteria.³¹ A new source seeking express permits to install and operate must: submit a PTIO application; demonstrate compliance with best available technology; have maximum uncontrolled emissions of less than five tons per year for particulate matter, sulfur dioxide, nitrogen oxides, and organic compounds; not be subject to U.S. EPA New Source Performance Standards; and not be subject to a

promulgated standard for a hazardous air pollutant.³² Permit fees, in the amount of \$75 per source apply, as well as the requirement to comply with Ohio's environmental laws and regulations.³³

[3] New Source Review

Congress initially adopted New Source Review as part of the 1977 amendments to the Clean Air Act to control air pollution from new and certain modified existing industrial facilities and power plants. Ohio has incorporated the U.S. EPA's New Source Review program by reference in the state's PTI regulations.³⁴ Ohio also has adopted regulations that incorporate revisions to the New Source Review program that U.S. EPA finalized in 2002 and 2003 (discussed below). Ohio EPA is responsible for implementation, compliance assistance, and enforcement of the New Source Review standards. U.S. EPA maintains concurrent enforcement authority.

As discussed above, U.S. EPA sets NAAQS for criteria pollutants (lead, carbon monoxide, ozone, sulfur dioxide, nitrogen oxide, and particulate matter). In addition, in 2011, Ohio EPA promulgated regulations that set carbon dioxide (the most common greenhouse gas) as a pollutant regulated in the new source review context.³⁵ Ohio's SIP sets forth the State's plan to attain the NAAQS in Ohio. Regions of Ohio that exceed the NAAQS for any criteria pollutant are designated as non-attainment areas, whereas regions in compliance with NAAQS are attainment areas. The purpose of New Source Review is to permit industrial growth in non-attainment areas, while ensuring progress towards compliance with NAAQS in those areas. New Source Review also is intended to prevent significant deterioration of air quality in areas where attainment of NAAQS has already been achieved for any criteria pollutant. The required control technology for new or modified sources in attainment areas is best available control technology ("BACT") and is the lowest achievable emissions rate ("LAER") in non-attainment areas.³⁶

New Source Review is applicable to the construction of new "major stationary sources" in attainment areas (referred to as "Prevention of Significant Deterioration" or "PSD" permitting) and non-attainment areas (referred to as "Non-Attainment New Source Review"). In attainment areas, a new major stationary source is any stationary source that emits, or has the potential to emit, two hundred fifty tons per year or more of any criteria pollutant.³⁷ A new major stationary source in a non-attainment area is any

stationary source that emits, or has the potential to emit, one hundred tons per year or more of any criteria pollutant.³⁸ New Source Review is also applicable to “major modifications” to existing major stationary sources; i.e., modifications to major stationary sources that will result in a “significant net emissions increase.”³⁹ An actual (past emissions)-to-projected-actual emissions calculation is employed to determine whether a modification to an existing source will result in a significant increase in emissions which are specified, on a pollutant-by-pollutant basis.⁴⁰ A table indicating what constitutes, in tons per year, a significant net emissions increase for each of 13 pollutants, is set forth at [OAC 3745-31-01\(MMMMM\)](#). Whether emissions from a new source will trigger New Source Review is determined using a potential emissions calculation.⁴¹

In 2002 and 2003, U.S. EPA promulgated regulations pertaining to the New Source Review program.⁴² The regulations established plant-wide applicability units, codified a clean unit exemption, codified an exemption for pollution control and prevention projects, adopted an actual-to-projected actual emission calculation for major modifications of stationary sources, and redefined what constitutes routine maintenance, repair, and replacement (which do not constitute a major modification). The 2002 and 2003 U.S. EPA New Source Review reforms have been adopted in Ohio’s PTI regulations, but the future of these reforms are unclear in light of recent litigation.⁴³

For a discussion of the applicability of the New Source Review permit program to GHG emission sources, see [§ 23.14\[4\]\[b\]](#).

For a discussion of the dispute over how U.S. EPA aggregates emissions sources at “adjacent” facilities for purposes of New Source Review (and Title V) permitting, see [Section 2.03\[2\]](#) above.

[\[4\] New Source Performance Standards](#)

Ohio has incorporated the U.S. EPA New Source Performance Standards (“NSPS”) by reference in the state’s PTI regulations.⁴⁴ NSPS are emission standards for new, reconstructed, and modified affected facilities within certain source categories that U.S. EPA has concluded cause or significantly contribute to air pollution. The standards promote the use of best air pollution control technology. The rules apply to sources in specified categories constructed or modified since the proposal of an applicable standard. As of

this writing, U.S. EPA has adopted NSPS rules for over 75 categories, all of which are found at [40 C.F.R. Part 60](#). Ohio EPA is responsible for implementation, compliance assistance, and enforcement of the NSPS program. U.S. EPA maintains concurrent enforcement authority.

Two years after announcing its intention to issue NSPS for greenhouse gas (“GHG”) emissions from new power plants and refineries, U.S. EPA took a first step in 2012: On April 20 it proposed limits for GHG emissions for new electric utility generating units.⁴⁵ The proposed rule has met with significant opposition within the utility industry as it would require coal- and natural gas-fired power plants to emit no more than 1,000 pounds per megawatt hour of carbon dioxide. Following receipt of 2.5 million comments, U.S. EPA withdrew the 2012 proposal and issued revised NSPS for the utility industry in early 2014.⁴⁶ The new proposal distinguished between coal-fired electric generating units and natural gas-fired combustion turbines, setting different emission standards. However, the limit for coal-fired units remained extremely aspirational: 1,100 lbs CO₂/MWhr. The most efficient existing coal-fired units typically do not achieve 1,800 lbs CO₂/MWhr. Thus, coal-based power plants’ only option is to implement carbon capture and sequestration (“CCS”).

U.S. EPA issued the final GHG standards for new electric generating units on October 23, 2015.⁴⁷ Industry and various states promptly challenged the rulemaking, asserting that CCS is not the “best system of emission reduction” (“BSE”) that has been “adequately demonstrated” to meet the criterion for NSPS under the Clean Air Act.⁴⁸ Oral arguments before the U.S. Court of Appeals for the District of Columbia are scheduled for April 17, 2017.

U.S. EPA also recently issued NSPS to control methane and volatile organic compound emissions from sources within the oil and gas sector.⁴⁹ See [Chapter 23](#) at § 23.14[4][d].

Further complicating the picture, President Trump has identified EPA’s GHG emissions regulations as an impermissible drag on the nation’s energy production.

⚠ Warning: If CCS as the NSPS control technology survives judicial and Trump administration scrutiny, it could be considered

“Best Available Control Technology” and therefore required in pre-construction Prevention of Significant Deterioration permitting exercises.

U.S. EPA’s issuance of the final NSPS GHG rules for new power plant units triggered an obligation to issue GHG emission guidelines for existing electric generating units pursuant to its authority under Clean Air Act Section 111(d). See the discussion of U.S. EPA’s “Clean Power Plan” regulations in Chapter 23 at § 23.14[4][d].

[5] Air Toxics Policy

In 1994, Ohio EPA became concerned that the federal Clean Air Act had not gone far enough in restricting the emissions of certain air pollutants Ohio EPA deemed potentially hazardous to human health. In response to this concern, Ohio EPA developed an “Air Toxics Policy” that was incorporated in the PTI process through Ohio EPA’s interpretation of BAT requirements.⁵⁰ In August, 2006, AM SUB SB 265 went into effect adopting Ohio EPA’s policy into law, with some modifications. Under that law, any compound listed in [OAC 3745-114-01](#) is an air toxic compound. A PTI applicant must provide Ohio EPA with computer modeling to determine the maximum ambient ground level concentration (“MAGLC”) of an air toxic compound at the applicant’s property line if the allowable emissions of an air toxic compound from a new or modified source of emissions are greater than or equal to one ton per year. New or modified sources whose emissions of air toxic compounds exceed 80% of the MAGLC concentrations must adopt BAT, control air toxic compound emissions so as to not exceed the MAGLC, and demonstrate no health hazards through modeling.⁵¹ Sources which emit air toxic compounds below 80% of the MAGLC must submit an annual statement certifying that their emissions remain as modeled.⁵²

Footnotes — § 2.03:

⁶ See generally [OAC Chapter 3745-31](#).

⁷ [R.C. 3704.03](#); [OAC 3745-31-33](#). Whether a permit to install is required for any given activity depends, in part, on whether PSD or non-attainment NSR is applicable, and the activity involved. The risk of beginning any given activity is borne by the party undertaking the activity.

⁸ [OAC 3745-31-01\(QQQ\)](#).

- ⁹ See 40 C.F.R. Part 60 and incorporated by reference in OAC 3745-31-01(AAAAAA);
- ¹⁰ See 40 C.F.R. Part 52 and incorporated by reference in various sections of OAC 3745-31-01.
- ¹¹ OAC 3745-31-33 describes activities that do not require a permit to install.
- ¹² OAC 3745-31-02(A)(1)(a).
- ¹³ OAC 3745-31-02(A)(1)(b).
- ¹⁴ OAC 3745-31-01(UUU).
- ¹⁵ OAC 3745-15-05.
- ¹⁶ OAC 3745-31-03.
- ¹⁷ OAC 3745-31-03.
- ¹⁸ OAC 3745-31-01(QQQ).
- ¹⁹ OAC 3745-31-01(K).
- ²⁰ 40 C.F.R. § 71.2.
- ²¹ 690 F.3d 733 (6th Cir. 2012), mandate issued 10/31/12.
- ²² *National Environmental Development Association’s Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014).
- ²³ 80 Fed. Reg. 56579 (Sept. 18, 2015).
- ²⁴ 81 Fed. Reg. 35622 (June 3, 2016).
- ²⁵ The Permit to Install forms can be downloaded from Ohio EPA’s webpage at <http://epa.ohio.gov/dapc/fops/eac/eacforms.aspx> (last visited Mar. 22, 2017).
- ²⁶ See Ohio EPA’s current BAT guidance, “BAT Requirements for Permits Issued On or After February 7, 2014,” at <http://www.epa.ohio.gov/Portals/27/sb265/Final20140207Post090803BATv11.pdf>.
- ²⁷ As discussed above, this aspect of AM SUB SB 265 was initially held to be illegal and contrary to the federal Clean Air Act by a Magistrate Judge in the U.S. District Court for the Southern District of Ohio. *Sierra Club et al. v. Korleski*, Case No. 2:08-CV-865 (Feb. 2, 2010). However, the Sixth Circuit Court of Appeals overturned the District Court decision. *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012).
- ²⁸ OAC 3745-31-01(T).
- ²⁹ R.C. 3704.034(E); OAC 3745-31-06. In the decision of *State ex rel. Ohio Attorney General v. Shelly Holding Co.*, 191 Ohio App. 3d 421 (Franklin County 2010), the court upheld a determination that it would be inappropriate to impose penalties on sources that commenced construction 180 days

after submitting a permit application, placing the blame for such situation on Ohio EPA. This decision seems to stand for the proposition that a source may commence construction 180 days after submitting an approvable permit application, though doing so is not without substantial risk.

³⁰ OAC 3745-31-29.

³¹ OAC 3745-31-05(g).

³² OAC 3745-31-05(G)(1).

³³ R.C. 3745.11 (fee of \$75); OAC 3745-31-05 (compliance with other requirements).

³⁴ OAC 3745-31-05(A)(2)(c).

³⁵ OAC 3745-31-34(A) (setting New Source Review thresholds for CO₂ of 75,000 tons per year, but conditioning such regulations on federal regulations).

³⁶ BACT is defined in OAC 3745-31-01(S) and LAER is defined in OAC 3745-31-01(GGG).

³⁷ OAC 3745-31-01(LLL)(2).

³⁸ OAC 3745-31-01(LLL)(1).

³⁹ OAC 3745-31-01(JJJ).

⁴⁰ OAC 3745-31-01(JJJ)(4)(a).

⁴¹ OAC 3745-31-01(JJJ)(4)(a)(l).

⁴² 67 Fed. Reg. 80186 (Dec. 31, 2002); 68 Fed. Reg. 61248 (Oct. 27, 2003).

⁴³ Several court decisions impact how New Source Review is implemented in Ohio. On June 24, 2005, the U.S. Court of Appeals for the District of Columbia Circuit published a decision in the case of *New York v. United States EPA* (D.C. Cir. 2005), 413 F.3d 3. The court affirmed the use of the past actual-to-projected actual emissions test, the use of a 10-year look back for selecting a two-year baseline, and the use of plant wide applicability limits (PALs). The court, however, struck from the rule the Clean Unit applicability test and the exemption of Pollution Control Projects which cause a collateral increase of some pollutants. The court also did not accept the industry argument in favor of the hourly emissions test for “modification.” This is contrary to the decisions in *TVA v. Whitman* (11th Cir. 2003), 336 F.3d 1236 and *United States v. Duke Energy Corp.* (4th Cir. 2005), 411 F.3d 539. The U.S. Supreme Court granted *certiorari* in the *Duke Energy* case and concluded that U.S. EPA could interpret the federal PSD regulations to consider whether emission would be increased as a result of a modification on an annual basis. *Envtl. Def. v. Duke Energy Corp.* (2007), 127 S. Ct. 1423, 167 L. Ed. 2d 295. Finally, on March 17, 2006, the U.S. Court of Appeals for the District of Columbia Circuit published a decision in the case of *State of New York, et al. v. U.S. EPA* (D.C. Cir. 2006), 443 F.3d 880, which struck down U.S. EPA’s equipment replacement provision, contained at 40 C.F.R. § 52.21(cc). The provision formerly allowed a facility to avoid New Source Review when undertaking small-scale equipment replacement that resulted in de minimus emissions increases.

⁴⁴ OAC 3745-31-05(A)(2)(c).

⁴⁵ 77 Fed. Reg. 22392 (Apr. 13, 2012).

⁴⁶ 79 Fed. Reg. 1430 (Jan. 8, 2014).

⁴⁷ 80 Fed. Reg. 64510 (Oct. 23, 2015).

⁴⁸ North Dakota v. EPA, D.C. Cir., No. 15-1381. *See also* 42 U.S.C. § 7410(a).

⁴⁹ 81 Fed. Reg. 35824 (June 3, 2016).

⁵⁰ <http://www.epa.ohio.gov/dapc/atu.aspx> (last visited Mar. 22, 2017).

⁵¹ R.C. 3704.03(F).

⁵² R.C. 3704.03.

§ 2.04. Emissions Standards

[1] Emissions Standards Program Overview

Ohio's air pollution control standards include requirements for reporting malfunctions of air pollution control equipment,⁵³ restrictions on stack heights,⁵⁴ ambient air quality standards, and emissions limitations for various pollutants such as particulate matter and sulfur dioxide.⁵⁵ There also are specific limitations on the emissions of carbon monoxide and nitrogen oxides.⁵⁶ The regulations also include prohibitions on open burning,⁵⁷ procedures for emergency episodes,⁵⁸ and motor vehicle emission inspections.⁵⁹ To prevent the release of hazardous substances, Ohio has adopted an accidental release prevention program.⁶⁰

Ohio has abundant reserves of high sulfur coal and has had difficulties in the past developing and imposing sulfur dioxide emission regulations. For many years, Ohio's sulfur dioxide program was administered by the federal government because of the state's failure to promulgate an enforceable and approvable sulfur dioxide implementation plan under the federal Clean Air Act. The current regulations, however, do satisfy federal law and prescribe boiler-specific limitations for major sources in terms of allowable emissions per million Btu actual heat input from the boiler.⁶¹ Special programs exist for acid rain control.⁶²

Ohio's air pollution standards include specific emission limitations for: carbon monoxide; photochemically reactive materials; hydrocarbons; and

related materials from industrial processes, such as automobile or light-duty truck assembly plants, coating lines, enameling lines, printing lines, packaging processes, petroleum refineries, asphalt plants, dry cleaning facilities and numerous other industries.⁶³ Ohio has prohibited the sale of fluorocarbon aerosol products.⁶⁴

In 2005, U.S. EPA adopted the Clean Air Interstate Rule (“CAIR”), designed to reduce utility emissions in “upwind” states in order to assist “downwind” states to meet ozone and particulate matter NAAQS.⁶⁵ Three years later, the Court of Appeals for the District of Columbia rejected CAIR, but let the rules stand pending U.S. EPA’s issuance of substitute regulations.⁶⁶ The Agency’s response came in 2011, when it issued the Cross State Air Pollution Rule (“CSAPR”).⁶⁷ Employing an allowance trading mechanism, CSAPR required power plants in 28 states to reduce emissions of nitrogen oxides and sulfur dioxide. Once again, however, the D.C. Circuit Court of Appeals ruled in favor of the various parties challenging U.S. EPA’s rulemaking, and struck down CSAPR.⁶⁸ The court ruled that the regulations (1) improperly required some upwind states to reduce their emissions by more than their contribution to downwind ambient air quality exceedances, and (2) erroneously imposed Federal Implementation Plans rather than allowing states the opportunity and time to adopt their own plans to reduce power plant emissions.

Going full circle, the Supreme Court upheld CSAPR,⁶⁹ remanding the proceedings to the Court of Appeals for the District of Columbia. In December 2014, U.S. EPA re-set CSAPR’s implementation dates with Phase I effective January 1, 2015 and Phase II effective January 1, 2017.⁷⁰ Only allowances created or banked under CSAPR (as opposed to CAIR) may be used to meet emission reduction requirements under the rule.

On remand from the Supreme Court, the D.C. Circuit rejected the broader challenges to CSAPR but agreed that U.S. EPA’s 2014 emission budgets overcontrolled SO₂ and NO_x emissions in 14 states (including Ohio) and thus were invalid.⁷¹ However, the court did not vacate the CSAPR, but rather instructed U.S. EPA to revisit the emissions budgets.

The agency proposed reconfigured NO_x emissions for 23 states and made adjustments for 11 states that were part of the D.C. Circuit remand.⁷² The final rules, which apply to 22 states (North Carolina was dropped), were issued on

October 26, 2016.⁷³

Some view CSAPR as borderline irrelevant, in light of the Mercury Air Toxics Standards rulemaking, which will require many electric generating units to install emission control systems, or face retirement (see § 2.05). However, the tightening of the ozone NAAQS (see § 2.04[6]) could bring CSAPR back to center stage.

As mentioned above, Ohio has promulgated SIPs for photochemical oxidants, hydrocarbons, particulate matter, sulfur dioxide, ozone and carbon monoxide, which have been approved by the U.S. EPA under the Clean Air Act.⁷⁴ Ohio's regulations include special inspection and maintenance programs for automobiles, including anti-tampering programs and tail pipe emission testing to control carbon monoxide and hydrocarbon pollution.⁷⁵ Local air pollution laws are not preempted by state air pollution laws unless clearly inconsistent.⁷⁶ Thus, many municipalities have enacted their own air pollution codes.

[2] Emission Limit Checklist

- Identify the amount and type of air pollutants emitted at a facility.
- Identify the type of facility and the operations creating the air pollutants.
- Determine whether the pollutants are regulated particulate matter, ozone or volatile organic compounds, sulfur dioxides, nitrogen oxides, lead, or carbon monoxide.
- Determine applicable requirements in [OAC Chapters 3745-17, 3745-18, 3745-21, 3745-23, and/or 3745-71](#).
- Determine whether the facility meets applicable requirements, including control equipment requirements, work practice requirements, and emissions limit requirements.

[3] Particulate Matter

Particulate matter is any material, other than water in uncombined form, that is or has been airborne.⁷⁷ Ohio regulates particulate matter through [OAC Chapter 3745-17](#). U.S. EPA has set NAAQS for “fine” and “coarse”

particulate matter. Fine particulate matter consists of particles less than or equal to 2.5 micrometers in diameter (PM_{2.5}), while coarse particulate matter consists of particles with diameters of less than or equal to 10 micrometers (PM₁₀). On January 15, 2013, U.S. EPA revised the PM_{2.5} NAAQS, lowering the annual average standard from 15 micrograms per cubic meter to 12 ug/m³.⁷⁸ The 24-hour average PM_{2.5} standard remained 35 ug/m³. Also unchanged were the PM₁₀ 24-hour standard (150 ug/m³) and PM₁₀ annual standard 50 ug/m³. In order to meet the standards, Ohio EPA has promulgated emission limits for individual sources of air pollution within [OAC Chapter 3745-17](#) (in addition to other requirements, such as BAT imposed through the permitting process).

Ohio EPA has promulgated standards for opacity, prohibiting visible particulate emissions from any stack from exceeding twenty percent as a six minute average, with certain exceptions.⁷⁹ Furthermore, Ohio EPA has placed restrictions on fugitive dust emissions in certain locations within the state.⁸⁰ Fugitive emissions are emissions that come from anywhere but a stack.⁸¹ Requirements for fugitive dust emissions include the use of reasonable available control measures, including, but not limited to, the use of water as a dust suppressant or the use of hoods or fans to capture the dust emissions.⁸² Various other, more specific, requirements exist depending on the type of process creating the fugitive emissions, such as the covering of open bodied vehicles when transporting materials likely to become airborne.⁸³

Furthermore, specific requirements exist for incinerators and fuel burning equipment.⁸⁴ Restrictions based on process rate and required control efficiency also exist for industrial processes.⁸⁵ These restrictions limit total particulate based on the amount of materials that are processed and require at least an eighty percent control efficiency—meaning that the facility’s uncontrolled emissions must be reduced by at least eighty percent through the use of control technology.⁸⁶

⚠ Warning: The requirements of [OAC Chapter 3745-17](#) are independently enforceable and could become the basis of a separate violation from a permitting violation if they are not met. Furthermore, the requirements may be imposed as part of the permit review process in Ohio.

The U.S. EPA has designated certain counties in Ohio as non-attainment for PM_{2.5}, or particulate matter having less than a 2.5 micron diameter. While this has triggered specific requirements within installation permits regarding non-attainment new source review, it may also be the impetus for tighter standards under future revisions to [OAC Chapter 3745-17](#).

[4] Sulfur Dioxide

Sulfur Dioxide, or SO₂, is a pollutant often created through the burning of sulfur containing products, such as coal. U.S. EPA has set the ambient air quality standard for sulfur dioxide at 75 parts per billion as a 24 hour average, or 0.03 parts per million as an annual arithmetic mean and 0.14 parts per million as a 24-hour average.⁸⁷ To meet this standard, Ohio EPA has promulgated emissions limits for individual sources of air pollution within [OAC Chapter 3745-18](#).

The requirements in [OAC Chapter 3745-18](#) include limitations on the allowable emission rate of sulfur dioxide based on the process rate of the source.⁸⁸ This chapter imposes more specific requirements depending on the county in which the source is located.⁸⁹

[5] Nitrogen Oxides

Ohio regulates Nitrogen Oxides, more commonly known as NO_x, through [OAC Chapters 3745-14](#), [3745-23](#), and [3745-24](#). On January 22, 2010, U.S. EPA revised the ambient air quality standard for nitrogen dioxide (NO₂) to 100 parts per billion as one-hour standard, and 53 parts per billion as an annual average.⁹⁰ Ohio EPA will have to revise existing regulations to implement this standard. NO_x sources in Ohio must employ the “latest available control techniques and operating practices in accordance with best current technology.”⁹¹ Restrictions on NO_x emissions also exist on gas, oil, and coal-fired boilers.⁹² Furthermore, NO_x sources in any ozone non-attainment area that emit twenty-five tons or more of NO_x or VOCs must submit emission statements yearly by November 15, outlining, among other things, the facility’s NO_x and VOC emissions.⁹³

Ohio has also enacted a NO_x budget trading program.⁹⁴ This program

allows sources to submit requests for a federally-enforceable NO_x budget trading permit.⁹⁵ It also is one method by which Ohio EPA meets the requirements of Title IV of the Clean Air Act, as allocations under the program are given for electrical generating facilities.⁹⁶ Ohio is authorized a set number of NO_x allowances on an annual basis.⁹⁷ The program itself is a complete trading program including provisions for applicability, allocations, monitoring, banking, penalties, trading protocols and program administration.⁹⁸ It allows facilities with high NO_x emissions to purchase NO_x allowances from facilities that have excess NO_x allowances to sell resulting for example, from the implementation of additional control technology or reduced operation of the source. Some sources, such as electric generating units and facilities with large industrial boilers are automatically enrolled in the program.⁹⁹ Other sources may opt in to the program.¹⁰⁰

[6] Carbon Monoxide, Ozone, and Volatile Organic Compounds

Ohio regulates carbon monoxide (CO) and volatile organic compounds (VOCs) through the enactment of [OAC Chapter 3745-21](#). Carbon monoxide is created through the inefficient burning of carbon-based fuels. The exposure of various VOCs with sunlight creates ground level ozone. Thus, the control of VOCs is necessary to achieve compliance with the NAAQS for ozone.

The ambient air quality standard for carbon monoxide is nine parts per million by volume eight hour arithmetic mean concentration, or thirty-five parts per million by volume one hour arithmetic mean.¹⁰¹ The ambient air quality standard for ozone is 0.12 parts per billion by a one hour arithmetic mean and 75 parts per billion as an eight hour daily maximum average.¹⁰²

Carbon monoxide control is, for the most part, achieved through [OAC 3745-21-08](#), which prohibits the installation of specific sources of carbon monoxide without appropriate control equipment installed.¹⁰³ For example, the rule prohibits sources that inefficiently burn fuels that create carbon monoxide, like kerosene, unless the carbon monoxide gasses are burned in an afterburner at 1300 degrees Fahrenheit for at least 0.3 seconds.¹⁰⁴

Standards for VOC emissions from stationary sources are found in [OAC 3745-21-09](#). Ohio EPA has issued draft changes to this regulation, in conjunction with the five year period for regulations to be reviewed by the

promulgating agency, and in light of the non-attainment designations by U.S. EPA for the eight hour ozone standard.¹⁰⁵ The type and amount of limitations on VOC emissions is source and county specific.¹⁰⁶ Furthermore, VOC sources in non-attainment areas for ozone that emit twenty-five tons or more of NO_x or VOCs must submit emission statements yearly by November 15, outlining, among other things, the facility's NO_x and VOC emissions.¹⁰⁷ Finally, VOC emissions may trigger the applicability of reasonably available control technology studies in specific counties that have historically been non-attainment under the one hour ozone standard, and have been designated non-attainment under the new eight hour ozone standard.¹⁰⁸

In 2008, U.S. EPA lowered the 8-hour ozone NAAQS from 80 ppb to 75 ppb. After much debate and deliberation, in late 2014 U.S. EPA once again proposed to tighten the ozone NAAQS, to a range of 65–70 ppb.¹⁰⁹ The Agency solicited comments on whether the standard should be lowered to 60 ppb.

U.S. EPA announced its decision to lower the ozone NAAQS from 75 ppb to 70 ppb on October 1, 2015.¹¹⁰ The agency must make attainment and non-attainment designations by October 1, 2017. States with counties designated as non-attainment must then submit plans to U.S. EPA by 2020 demonstrating how they will meet the new standards. The new standard is under fire over concerns that it could significantly impede economic growth and does not adequately address background ozone levels.

Industry and various states have challenged the revised ozone standard, while environmental groups are asserting that the standard is not stringent enough. Oral arguments are set for April 19, 2017.¹¹¹ The Republican-led Congress is considering legislation that would defer implementation of the revised standard while the Trump administration is pondering strategies for pulling back the 70 ppb decision.

⚠ Warning: While the Clean Air Act prohibits U.S. EPA from considering costs in setting NAAQS, the Agency has estimated that the cost of meeting a 70 ppb ozone standard will be \$3.9 billion annually (and the cost of meeting a 65 ppb standard will be \$15 billion/year). If so, this would be one of the most costly single regulations U.S. EPA has ever issued. This will be a priority issue for

Ohio industry. It is also a hot button for public health and environmental organizations—ozone exposure has been linked to asthma and other adverse health effects.

To achieve the tighter ozone standard, states will have to adopt stricter VOC and NO_x emission limits. 2011–2013 ozone monitoring indicate that 358 counties across the country would not meet a 70 ppb standard; 558 would not meet 65 ppb. Non-attainment status triggers the most stringent of Clean Air Act mandated pre-construction requirements for major sources (100 tons/per year of any criteria pollutant) and major modifications of major sources. New Source Review applicants must demonstrate that they will employ the “Lowest Achievable Emission Reduction” control technology and procure emissions offsets to ensure that progress is made in attaining the NAAQS.

[7] Lead Emissions

Ohio regulates lead in air emissions through [OAC Chapter 3745-71](#). U.S. EPA has set the ambient air quality standard for lead at 1.5 micrograms per cubic meter as a maximum arithmetic mean during any calendar quarter.¹¹² However, Ohio does not impose any specific requirements within the rules on any sources except for Master Metals, Incorporated, a source previously located in Cleveland, Ohio.¹¹³ Nevertheless, new sources must demonstrate that they will not cause an exceedance of the NAAQS, including the requirements for lead, as part of the PTI review process.¹¹⁴ In 2016, U.S. EPA determined that the current lead standard is sufficient to protect public health.¹¹⁵

[8] Other Considerations

Ohio has set forth low Reid vapor pressure fuel requirements for all gasoline sold or dispensed for use in the major metropolitan areas within the state which require the use of ethanol blenders.¹¹⁶ Kraft pulp mills are subject to limits on total reduced sulfur.¹¹⁷ Infectious waste incinerators must meet specified emission limits and incorporate design parameter and operating restrictions as well as conform to rigorous record-keeping requirements.¹¹⁸ Solid waste landfills must curtail their gaseous emissions such as methane gas through the installation of control requirements in accordance with

prescribed rules and plans.¹¹⁹ Open burning is also tightly controlled under [OAC Chapter 3745-19](#) to meet NAAQS standards for particulate matter. Ohio EPA has also implemented rules regulating the VOC content of consumer products as well as architectural and industrial coatings sold or offered for sale in Ohio.¹²⁰ Finally, Ohio enforces the NESHAP for asbestos abatement, but has added some distinctions to its regulations, such as alternative compliance methods with renovations.¹²¹

[9] Operating Restrictions, Monitoring, Record Keeping and Reporting Requirements

Emissions limitations imposed in the Ohio regulations for the criteria pollutants may be based on source operating limitations. Such limitations may include, for example, a requirement to operate control equipment so as to maintain compliance with a particulate emission limitation, limits on the amount of a particular pollutant in raw materials, or limits on hours of operation.

Specific operating restrictions, monitoring, and reporting requirements are most often included in permits and are specifically authorized by [R.C. 3704.03\(I\)](#). AM SUB SB 265 prohibits Ohio EPA from inserting certain additional terms and conditions regarding monitoring, record-keeping, or reporting requirements into permits that differ from federal or state rules.

The PTI and PTIO provisions of [OAC 3745-31-05](#) require sources, within the permitting process, to meet emissions standards and allow Ohio EPA to insert terms “necessary to ensure compliance.”¹²² Moreover, when re-applying for a new permit to operate and install, sources must often demonstrate compliance and submit reports to Ohio EPA in conjunction with the renewal process.¹²³

Footnotes — § 2.04:

⁵³ [OAC § 3745-15-06](#).

⁵⁴ [OAC § 3745-15-16](#).

⁵⁵ See, e.g., [OAC Chapters 3745-17 and 3745-18](#).

⁵⁶ [OAC Chapters 3745-17, 18, 21 and 23](#).

⁵⁷ [OAC Chapter 3745-19](#).

- 58 OAC Chapter 3745-25.
- 59 OAC Chapter 3745-26.
- 60 OAC Chapter 3745-104.
- 61 OAC Chapter 3745-18.
- 62 OAC Chapter 3745-103.
- 63 OAC Chapter 3745-21.
- 64 R.C. 3704.15.
- 65 70 Fed. Reg. 25162 (May 12, 2005).
- 66 *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).
- 67 76 Fed. Reg. 48208 (Aug. 8, 2011).
- 68 *EME Homer City v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).
- 69 *EPA v. EME Homer City Generation LP.*, 572 U.S. ___, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014).
- 70 79 Fed. Reg. 71674 (Dec. 3, 2014).
- 71 *EME Homer City Generation LP v. EPA*, D.C. Cir., No. 11-1302, 7/28/15.
- 72 80 Fed. Reg. 75706 (Dec. 3, 2015).
- 73 81 Fed. Reg. 74504 (Oct. 26, 2016).
- 74 40 C.F.R. § 52.1870 *et seq.*
- 75 R.C. 3704.14; OAC Chapters 3745-26 and 3745-80. Ohio EPA, over the objections of several environmental groups, discontinued the tailpipe inspection program in southwestern Ohio. Ohio EPA plans to maintain compliance with NAAQS standards by reducing other sources of VOCs and other ozone precursors, such as NO_x.
- 76 R.C. 3704.11.
- 77 OAC 3745-17-01.
- 78 78 Fed. Reg. 3086 (Jan. 15, 2013).
- 79 OAC 3745-17-07.
- 80 OAC 3745-17-08.
- 81 OAC 3745-17-08; OAC 3745-17-01.

- 82 OAC 3745-17-08.
- 83 OAC 3745-17-08.
- 84 OAC 3745-17-09; OAC 3745-17-10.
- 85 OAC 3745-17-11.
- 86 OAC 3745-17-11.
- 87 40 C.F.R. § 50.4.
- 88 OAC 3745-18-06.
- 89 OAC 3745-18-07 *et seq.*
- 90 40 C.F.R. § 50.11.
- 91 OAC 3745-23-06.
- 92 OAC 3745-23-06.
- 93 OAC 3745-24-01 *et seq.*
- 94 OAC 3745-14-01 *et seq.*
- 95 OAC 3745-14-03.
- 96 OAC 3745-14-05.
- 97 OAC 3745-14-03.
- 98 OAC 3745-14-01 *et seq.*
- 99 OAC 3745-14-01(C).
- 100 OAC 3745-14-09.
- 101 40 C.F.R. § 50.8.
- 102 40 C.F.R. § 50.9; 40 C.F.R. § 50.10.
- 103 OAC 3745-21-08.
- 104 OAC 3745-21-08.
- 105 See <http://www.epa.ohio.gov/dapc/DAPCrules.aspx> (last visited Mar. 22, 2017).
- 106 OAC 3745-21-09.
- 107 OAC 3745-24-01 *et seq.*

[108](#) [OAC 3745-21-11](#).

[109](#) 79 Fed. Reg. 75234 (Dec. 17, 2014).

[110](#) 80 Fed. Reg. 65292 (Oct. 26, 2015).

[111](#) *Murray Energy v. EPA*, D.C. Cir., No. 15-1385, 11/17/16.

[112](#) [40 C.F.R. § 50.12](#).

[113](#) [OAC 3745-71-06](#); By way of background, Master Metals, Inc., which operated lead smelting operations, caused a SIP call by U.S. EPA, requiring Ohio EPA to take action to rectify the lead air emissions. 58 Fed. Reg. 11967. Ohio EPA responded by issuing an order to Master Metals, Inc. to make improvements or be shut down. The company did not do so, and subsequently shut down. Nevertheless, Ohio EPA amended the regulations to address U.S. EPA's SIP call, and imposed the regulations should the facility operator or future owner desire to make the required facility modifications and resume operations. 60 Fed. Reg. 54946.

[114](#) [OAC 3745-31-05](#).

[115](#) 81 Fed. Reg. 71906 (Oct. 18, 2016).

[116](#) [OAC Chapter 3745-72](#).

[117](#) [OAC 3745-73-03](#).

[118](#) [OAC Chapter 3745-75](#).

[119](#) [OAC Chapter 3745-76](#).

[120](#) [OAC Chapters 3745-112 and 3745-113](#).

[121](#) [40 C.F.R. Part 61, Subpart M; OAC Chapter 3745-20](#).

[122](#) [OAC 3745-31-05\(D\)](#). *See also General Electric Lighting v. Koncelik* (Mar. 31, 2006), 2006-Ohio-1655, 2006 Ohio App. LEXIS 1509 (holding, among other things, that operational restriction that imposed a parametric operational restriction that required the facility to operate its electrostatic precipitator within a voltage and amperage range was unreasonable since it did not assure compliance with the underlying particulate matter restriction).

[123](#) [OAC 3745-35-02](#).

§ 2.05. Hazardous Air Pollutants—NESHAPS and MACT

U.S. EPA has been tasked by Congress, in Section 112 of the Clean Air Act, to develop emissions standards for “major sources” and “area sources” of hazardous air pollutants (“HAPs”).¹²⁴ These emissions standards are known as the National Emissions Standards for Hazardous Air Pollutants, or

NESHAPS. “Major sources” are stationary sources with the potential to emit 10 tons per year or more of any one hazardous air pollutant or 25 tons per year or more of any combination of HAPs.¹²⁵ “Area sources” are stationary sources of air pollution that emit HAPs that are not major sources.¹²⁶ The universe of HAPS is set forth in Section 112 of the Clean Air Act, but U.S. EPA has exercised its authority to add or subtract from the list.¹²⁷

The NESHAPS are set by the U.S. EPA to achieve the “maximum degree of reduction” of HAPs that the U.S. EPA determines is achievable, taking into account the cost of achieving the emission reduction, any non-air quality health and environmental impacts, and energy requirements for achieving the reduction.¹²⁸ NESHAPS for new sources of HAPs cannot be less stringent than the emissions reductions achieved by existing sources of HAPs.¹²⁹ NESHAPS are defined based on the type of facility for major sources, (for example, bulk gasoline terminals¹³⁰ or epoxy resin manufacturers¹³¹) or can be defined based on the emissions released from a facility for both major and area sources, (for example, fugitive benzene emissions¹³² or mercury emissions).¹³³

NESHAPS typically contain an emissions standard, expressed in some unit of weight of emissions over a period of time, (for example, pounds per day¹³⁴ or tons per year¹³⁵). NESHAPS also may contain testing, monitoring, record keeping, and reporting requirements.¹³⁶

These federal requirements are incorporated by reference in Ohio’s PTI and PTIO regulations.¹³⁷ They are specifically included in the criteria Ohio EPA must apply when determining whether to issue a PTI or PTIO.¹³⁸ Furthermore, compliance with NESHAPS also is required and incorporated into Ohio’s permit to operate program.

Maximum Achievable Control Technology (“MACT”) is defined by Ohio EPA to mean an emission limit that is set based on the most stringent emission limit achieved in practice by the best controlled similar source, and reflects the maximum degree of emissions reduction that Ohio EPA determines is achievable, taking into consideration the costs of achieving the reduction and any non-air quality health and environmental impacts and energy requirements.¹³⁹ A MACT determination is required by Ohio EPA prior to issuing a permit for constructing or modifying a major source of HAPs.¹⁴⁰ Some major sources of HAPs, for example research and development facilities, are exempt from this requirement.¹⁴¹ A proposed

compliance date for MACT standards must be submitted with any Title V permit application.¹⁴²

On March 21, 2011, U.S. EPA published final NESHAPS rules for “major” and “area” industrial, institutional, and commercial boilers and process heaters.¹⁴³ Simultaneously, acknowledging that its rulemaking hand had been forced by a court-ordered deadline, U.S. EPA initiated a reconsideration of certain aspects of the rules pertaining to major sources. The Agency finalized the major source “Boiler MACT” rules on January 31, 2013¹⁴⁴ and the area source Boiler MACT rules on February 1, 2013.¹⁴⁵ The final rules establish 19 subcategories for boilers and process heaters, setting numeric limits for mercury, hydrogen chloride, sulfur dioxide, non-mercury metals, particulate matter, and volatile organic compounds. The revised rule replaced numeric dioxin standards with work practice standards. The compliance deadline for major boilers and process heaters is January 31, 2016 (but sources may request an additional year).

With respect to area boilers and process heaters, gas-fired units are not regulated. Coal, oil, and biomass-fueled units with more than 10 million Btu/hour heat input are subject to mercury and carbon monoxide emission limits. Biomass and oil-fired units with less than 10 million Btu/hour heat input are subject only to work practice standards. Area sources must comply with the new MACT standards by March 21, 2014 (but also may request an additional year).

U.S. EPA estimates that approximately 200,000 boilers and heaters at 90,000 facilities will be subject to the final rules’ work practice standards while about 14,500 existing boilers and heaters located at 1,700 facilities must meet the new numeric emissions limits.

On February 16, 2012, U.S. EPA issued the Mercury and Air Toxics Standards (“MATS”) under the NESHAPS program, applicable to coal- and oil-fired electric utility generating units.¹⁴⁶ The MATS set aggressive numeric emission limits for mercury, filterable particulate matter (as a surrogate for toxic metals), and hydrogen chloride (as a surrogate for acid gases). While natural gas is growing as a primary utility fuel source, coal-fired plants still generate approximately 45 percent of the nation’s electric power. Affected plants must comply with the new standards by April 16, 2015.

Shortly after issuance, U.S. EPA announced that it would “reconsider” certain aspects of the rulemaking, subsequently proposing modest revisions to MATS on November 30, 2012.¹⁴⁷ The proposal relaxed the mercury emissions limit for certain new coal-fired units and modified monitoring requirements. The Agency made final adjustments to the MATS rules on March 29, 2013. In challenging the rules, industry claimed that virtually every coal-fired plant will have to be retrofitted, retired, or converted to an alternative fuel and challenged the MATS rulemaking. On April 15, 2014, the D.C. Circuit upheld the MATS regulation, holding that the Clean Air Act did not expressly require U.S. EPA to consider costs as it developed the regulations, though the Act did not prohibit the Agency from doing so.¹⁴⁸


Industrial interests contested the Court of Appeals’ decision, claiming that U.S. EPA acted unreasonably in failing to consider the estimated annual compliance costs of \$9.6 billion when determining whether the standards are “appropriate and reasonable” pursuant to Section 112(n)(1)(A). In November 2014, the Supreme Court granted certiorari to several appeals, limiting its review to a single question: whether U.S. EPA’s interpretation of “appropriate” is unreasonable because it refused to consider a key factor—costs—when determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.¹⁴⁹

In June 2015, the Supreme Court struck down the MATS rule, holding that U.S. EPA failed to conduct the statutorily-required cost-benefit analysis, and remanded the case to the D.C. Circuit.¹⁵⁰ The D.C. Circuit then remanded the rule to U.S. EPA, but allowed the rule to remain in effect pending the agency’s re-visitation of the cost-benefit analysis.¹⁵¹ U.S. EPA has indicated that it will release its analysis in the first half of 2016. Twenty states and various industry groups unsuccessfully petitioned the Supreme Court for a stay of the MATS rule pending the agency’s cost-benefit reconsideration.

U.S. EPA completed its cost evaluation in April 2016, concluding that the benefits of regulating mercury, nickel, arsenic, and other toxics outweigh the costs. The battle continues.

Existing electric generating units must comply with the MATS by April 16, 2015 and demonstrate compliance within 180 days thereafter. If it is determined that U.S. EPA incorrectly assessed costs of the regulatory program, the future of not only MATS, but other NESHAPS/MACT

rulemakings may be vulnerable to challenge.

 **Strategic Point:** MACT and NESHAPS standards applicable to major sources of HAPs are often burdensome and expensive. A facility should consider voluntarily limiting hazardous air pollutant emissions in its permits below applicability thresholds to avoid these requirements.

Footnotes — § 2.05:

¹²⁴ 42 U.S.C. § 7412(c).

¹²⁵ 42 U.S.C. § 7412.

¹²⁶ 42 U.S.C. § 7412(a)(1).

¹²⁷ 42 U.S.C. § 7412(a)(2); 40 C.F.R. 61 subpt. A and 40 C.F.R. 63 subpt. C.

¹²⁸ 42 U.S.C. § 7412(b).

¹²⁹ 42 U.S.C. § 7412(d)(2).

¹³⁰ 40 C.F.R. § 63.420(d)(3).

¹³¹ 40 C.F.R. § 63.520.

¹³² 40 C.F.R. § 61.110.

¹³³ 40 C.F.R. § 61.50.

¹³⁴ 40 C.F.R. § 61.52.

¹³⁵ 40 C.F.R. § 61.162.

¹³⁶ *See, e.g.*, 40 C.F.R. § 60.137 *et seq.*

¹³⁷ OAC 3745-31-01.

¹³⁸ OAC 3745-31-05.

¹³⁹ OAC 3745-31-01(MMM).

¹⁴⁰ OAC 3745-31-28.

¹⁴¹ OAC 3745-31-28.

¹⁴² OAC 3745-77-03.

¹⁴³ 76 Fed. Reg. 15608 (Mar. 21, 2011) and 76 Fed. Reg. 15554 (Mar. 21, 2011).

¹⁴⁴ Fed. Reg. 7138 (Jan. 31, 2013) (40 C.F.R. § 63.7480 *et seq.*).

¹⁴⁵ 78 Fed. Reg. 7488 (Feb. 1, 2013) (40 C.F.R. § 63.11193 *et seq.*).

¹⁴⁶ 77 Fed. Reg. 9304 (Feb. 16, 2012), 40 C.F.R. § 63.9980 *et seq.* (subpart UUUUU).

¹⁴⁷ 77 Fed. Reg. 71323 (Nov. 30, 2012).

¹⁴⁸ *White Stallion Energy Ctr. LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

¹⁴⁹ Certiorari was granted in *State of Michigan, et al. v. EPA*, ___ U.S. ___, 135 S. Ct. 702, 190 L. Ed. 2d 434 (2014); *Utility Air Regulatory Group v. EPA*, ___ U.S. ___, 135 S. Ct. 702, 190 L. Ed. 2d 434 (2014), and *National Mining Association v. EPA*, ___ U.S. ___, 135 S. Ct. 703, 190 L. Ed. 2d 434 (2014).

¹⁵⁰ *Michigan v. EPA*, ___ U.S. ___, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015).

¹⁵¹ *White Stallion Energy Ctr. LLC v. EPA*, D.C. Cir., No. 12-1100, order issued 12/15/15.

§ 2.06. Title V Permits

[1] Overview

Title V of the federal Clean Air Act governs operating permits for major sources of air pollution.¹⁵² Presently, Ohio administers a federally approved Title V permit program, meaning that Ohio EPA issues Title V permits after review by Region V of U.S. EPA.¹⁵³ Title V permits are federally enforceable, meaning that permit terms and conditions (other than terms and conditions designated as “state only” requirements) are enforceable by U.S. EPA and the Department of Justice, private citizens through the use of citizen suits, as well as the State of Ohio.¹⁵⁴ Title V permits incorporate all applicable requirements found in regulations governing emissions, permits to install, permits to operate, and other “applicable requirements” in one permit.¹⁵⁵

[2] Applicability

Title V permits are required for major sources and affected sources. Major sources are sources that emit, or have the potential to emit, ten tons per year of any single HAP, twenty-five tons per year of any combination of HAPs, or one hundred tons per year of any other air pollutant, including VOCs/ozone, lead, particulate matter, SO₂, NO_x and CO.¹⁵⁶ Fugitive

emissions are not considered in calculating potential to emit, with several exceptions for certain processes and sources.¹⁵⁷ Lower emissions thresholds apply within NAAQS non-attainment areas classified as “serious,” “severe,” or “extreme.”¹⁵⁸

[3] Potential to Emit

Potential to emit is defined as the “maximum capacity of a stationary source to emit any air pollutant under its physical and operational design.”¹⁵⁹ An owner or operator of a source may consider reductions in emissions due to air pollution control equipment or limits on hours of operation, but only if those limits are “federally enforceable or legally and practicably enforceable by the state.”¹⁶⁰ Ohio EPA interprets this to include permit terms in federally enforceable PTIOs, issued pursuant to [OAC 3745-31-05](#), and in state permits to install, which are part of the SIP, if those permits undergo the draft to final process and include required public comment and notification to U.S. EPA.

Ohio EPA further presumes an inherent physical limitation in the Title V context for sources that can prove that their actual emissions never exceeded 20% of the Title V threshold.¹⁶¹ To take advantage of this definition, facility owners must notify Ohio EPA in writing that they are invoking this provision.

[4] Exemptions

Exceptions exist to Title V applicability. These include certain sources that otherwise would be subject to Title V simply because they are subject to the NESHAP for asbestos, or are subject to NSPS for residential wood heaters.¹⁶² Most notably, an exception exists for “synthetic minor” sources.¹⁶³ A synthetic minor source is a source that would be classified as a major source in the absence of restrictions on the potential to emit of the source.¹⁶⁴ An owner or operator may agree to limit emissions through the use of control technology or hours of operation, resulting in emissions that are less than the Title V thresholds. These limits become federally enforceable in a federally enforceable PTIO under [OAC 3745-35-05\(D\)](#).

For a discussion of the applicability of the Title V permit program to emitters of Greenhouse Gas Emissions, see [§ 23.14\[4\]\[b\]](#).

[5] Startup, Shutdown, and Malfunctions

Ohio EPA requires that all Title V permits contain a provision requiring the permit holder to submit quarterly deviation reports, including those “deviations” that are attributable to malfunctions, even where the malfunction protocol of [OAC 3745-15-06](#) is followed.¹⁶⁵ While such a malfunction would typically not constitute a violation of state statute or regulations, it is viewed as a violation of federal law, unless the emergency provisions of [OAC 3745-77-07\(G\)\(3\)](#) are met, since the malfunction provisions of [OAC 3745-15-06](#) have not been approved as part of Ohio’s SIP.¹⁶⁶

U.S. EPA has historically recognized that increased emissions are often associated with periods of shutdown or startup of an emissions unit.¹⁶⁷ Ohio EPA makes no exception in the regulations for periods of startup or shutdown from requirements contained within a Title V permit, but may exclude such periods in the permit itself.

Ohio air rules, like those of most states, provide relief from otherwise applicable emission limits under certain circumstances during periods of operational startup, shutdown, and malfunction.¹⁶⁸ However, on February 22, 2013, U.S. EPA proposed calling for 36 states (including Ohio) to submit revised State Implementation Plans which would eliminate such relief in the event of startups and shutdowns, and curtailed protection following malfunctions.¹⁶⁹ On September 17, 2014, U.S. EPA supplemented its 2013 proposed SIP call, eliminating the malfunction affirmative defense provision as an option for the states.¹⁷⁰

U.S. EPA issued its SIP call in final form in May 2015, requiring 36 states (including Ohio) to revise their state air emissions rules.¹⁷¹ Those states were to submit rules to the agency by November 22, 2016.

Ohio EPA issued draft revised startup, shutdown, and malfunction rules in October 2016.¹⁷² Like many states, Ohio’s approach features both numeric emission limits and work practices. During a scheduled maintenance of air pollution control systems, if emissions source shutdown may result in damage to the source or is impractical, the facility must notify Ohio EPA. The notice must include emissions estimates and a description of “all feasible interim control measures” to be implemented during the maintenance. All practical measures must be taken to minimize pollution control system

downtime. Finally, the facility must report any emissions limits exceedances, and inform the agency upon completion of the maintenance.

Under the draft rules, a facility must notify Ohio EPA immediately after emission limits are exceeded due to an equipment malfunction. The emissions unit owner or operator may request that the Ohio EPA establish alternative limits to apply during the malfunction period (and/or during startup and shutdown). The alternative limits may be numeric limits or work practice standards; either way, they must represent “best engineering practices.”

Finally, facilities must take measures to minimize the frequency and duration of the startups, shutdowns, and malfunctions, as well as the impact of emissions upon ambient air quality.

The final SIP call faces numerous legal challenges. Several states and industry groups have filed suit, asserting that U.S. EPA has not established that NAAQS are being exceeded as a result of emissions during startup, shutdown and/or malfunction, and that the historic exemptions during such periods do not break the chain of “continuous compliance.” Rather, exercising best efforts to minimize emissions (called for in many existing state air programs) constitutes “continuous” compliance.¹⁷³ Stay tuned.

[6] Monitoring, Recordkeeping and Reporting

Title V permits contain significant monitoring, recordkeeping, and reporting requirements.¹⁷⁴ This includes monitoring, recordkeeping, and reporting requirements found under applicable requirements, such as emissions standards for a particular industry. If an applicable requirement does not contain periodic monitoring, Ohio EPA may insert monitoring, recordkeeping, or reporting requirements applicable to the source.¹⁷⁵

Reporting under the Title V program includes semi-annual reports of any deviation of monitoring, recordkeeping and reporting requirements, quarterly deviation reports describing any deviation from any emission limit or operational restriction, and an annual compliance certification by the responsible official certifying compliance with all terms or conditions of the Title V permit.¹⁷⁶

[7] Modifications

Modifications to Title V permits are processed by Ohio EPA as administrative amendments, minor modifications, or significant modifications.¹⁷⁷ Administrative amendments are defined in the guidance as making a “small administrative change” in the permit.¹⁷⁸ This includes changes in ownership, correction of typographical errors, correction of addresses, increases in monitoring frequency, or the permanent shutdown of any emissions unit.¹⁷⁹

Minor modifications are defined as those modifications that do not violate any applicable requirement, does not involve any significant changes to existing monitoring, recordkeeping, or reporting requirements, do not require any case-by-case determinations of applicable emissions limits, and are not a modification under Title I of the Clean Air Act.¹⁸⁰ For minor modifications or administrative amendments, once the facility submits an application, it can immediately choose to comply with the revised applicable requirements of the permit, rather than the existing permit.¹⁸¹

Significant changes to the facility, including modifications under Section 111 of the Clean Air Act (new source performance standards), modifications under Section 112 of the Clean Air Act (hazardous air pollutants), significant changes in existing monitoring, recordkeeping, or reporting requirements are processed under the significant modification procedure.¹⁸² If the modification would be prohibited by the existing Title V permit, the facility must wait to make the changes until the final modified permit is issued.¹⁸³ If the modification would not be prohibited by the existing Title V permit, the facility can make the change immediately upon submittal of the application to Ohio EPA.¹⁸⁴

[8] Responsible Official Certifications

The Title V permit program requires that “responsible officials” certify the truth, accuracy, and completeness of any application form, report, or compliance certification, including the quarterly semi-annual and annual compliance reports discussed above.¹⁸⁵ Furthermore, such certifications must be “based on information and belief formed after reasonable inquiry.”¹⁸⁶

A responsible official, for a corporation, is the president, secretary, treasurer, or vice-president in charge of a principal business function, or any other person who may have a different title than president, secretary,

treasurer or vice-president, but performs the same functions for the corporation, such as a chief executive officer, chief operating officer, or executive director.¹⁸⁷ A responsible official also can delegate to a representative the ability to perform the functions of the responsible official if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities and either: (1) the facility or facilities that the representative is responsible for employs 250 or more persons; or (2) the facility or facilities that the representative is responsible for has gross annual sales exceeding \$25 million dollars, adjusted to second quarter 1980 dollars; or (3) the delegation authority to the representative is approved in advance by the director.¹⁸⁸ For partnerships or sole proprietorships, a general partner or the proprietor is the responsible official.¹⁸⁹ For municipalities or other public agencies, the ranking elected official or a principal executive officer responsible for the overall operations of the agency, principal geographic unit, or installation can act as the responsible official.¹⁹⁰

U.S. EPA has defined “reasonable inquiry” as taking “reasonable steps to ensure what he or she signs is true, accurate, and complete.”¹⁹¹ However, “EPA does not view compliance certification requirements as imposing a duty on the source to search out and review every possible document to determine its relevance on the issue of the source’s compliance.”¹⁹² Ohio EPA has not issued guidance concerning the responsible official’s reasonable inquiry duty.

Whether a responsible official has met the reasonable inquiry requirements will be based on the particular facts and circumstances. The following is a general checklist to assist responsible officials with meeting the requirement:

- Obtain a copy of the Title V permit for the facility, including any amendments or modifications.
- Review the report being sent to Ohio EPA and U.S. EPA and ask for explanations of excursions and deviations.
- Understand the general procedures used to prepare the report, including the data reviewed and the people interviewed.
- Determine whether standard procedures were followed in preparing

the report and identify any deviations.

- Determine whether all relevant data and records were reviewed to identify excursions and deviations.
- Ensure that all persons having knowledge of the operations and emission units or who possess other relevant information have been spoken to. Look at employee turnover of anyone involved in the air emission unit operation, maintenance, or data collection.
- Identify any judgment calls of, or ambiguous areas in, the permit conditions or regulatory requirements that resulted in a decision that excursions or deviations did not occur.
- Determine the nature of any deviations and non-compliance issues noted in the report [identifying for the responsible official the nature and scope of potential liability may bring to mind other non-compliance circumstances that the preparer inadvertently omitted].
- Determine whether there have been any changes in the methods of operation, changes in raw materials, and installation or modification of equipment that should be identified and discussed.
- Determine whether there is any other credible evidence that may indicate non-compliance with any applicable requirement.
- Determine whether the persons preparing the report believe it is accurate and complete to the best of their knowledge.
- Determine whether there are any additional resources that are needed to ensure that the persons preparing the report are collecting, properly analyzing, and correctly reporting data and other information required under the Title V permit.
- Document the responsible official's efforts and reasonable inquiry findings.

Ohio EPA provides forms for the annual compliance certification.¹⁹³ Submitting an inaccurate compliance certification can result in up to \$25,000 in penalties.¹⁹⁴ The potential liability would not only extend to the corporate entity, but to the responsible official as well, under the theory of personal participation.¹⁹⁵

Footnotes — § 2.06:

- ¹⁵² 42 U.S.C. § 7661 *et seq.*
- ¹⁵³ 60 Fed. Reg. 42045.
- ¹⁵⁴ 42 U.S.C. § 7661 *et seq.*; R.C. 3704.036; OAC Chapter 3745-77.
- ¹⁵⁵ 42 U.S.C. § 7661c; 40 C.F.R. § 70.6; R.C. 3704.036; OAC 3745-77-07.
- ¹⁵⁶ OAC 3745-77-01(X); OAC 3745-77-02.
- ¹⁵⁷ OAC 3745-77-01(X)(2).
- ¹⁵⁸ OAC 3745-77-01(X)(3).
- ¹⁵⁹ OAC 3745-77-01(CC).
- ¹⁶⁰ OAC 3745-77-01(CC).
- ¹⁶¹ Ohio EPA Engineering Guide #61, <http://www.epa.ohio.gov/dapc/engineer/eguides.aspx> (last visited Mar. 22, 2017).
- ¹⁶² OAC 3745-77-02(C).
- ¹⁶³ OAC 3745-77-02(C).
- ¹⁶⁴ OAC 3745-77-01(II); *See also* Ohio EPA Engineering Guide #61, governing PTE, <http://www.epa.ohio.gov/dapc/engineer/eguides.aspx> (last visited Mar. 22, 2017).
- ¹⁶⁵ OAC 3745-77-07(A)(3)(c)(iii).
- ¹⁶⁶ 40 C.F.R. § 52.1870 (Ohio's SIP).
- ¹⁶⁷ State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983).
- ¹⁶⁸ OAC 3745-14-11(D), 3745-15-06(A)(3), 3745-15-06(C), 3745-17-07(A)(3)(c), and 3745-17-07(B)(11)(f).
- ¹⁶⁹ 78 Fed. Reg. 12460 (Feb. 22, 2013).
- ¹⁷⁰ 79 Fed. Reg. 55920 (Sept. 17, 2014).
- ¹⁷¹ 80 Fed. Reg. 33840 (June 12, 2015).
- ¹⁷² OAC 3745-15-01, 3745-15-06. The draft rules may be found at http://epa.ohio.gov/dapc/regs/3745_14.aspx, http://epa.ohio.gov/dapc/regs/3745_15.aspx, and http://epa.ohio.gov/dapc/regs/3745_17.aspx.

- 173 Walter Coke Inc. v. EPA, D.C. Cir. , No. 15-1166, 12/2/16.
- 174 OAC 3745-77-07(A)(3).
- 175 OAC 3745-77-07(A)(3); R.C. 3704.03.
- 176 OAC 3745-77-07.
- 177 OAC 3745-77-08.
- 178 OAC 3745-77-01(C); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 179 OAC 3745-77-01(C); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 180 OAC 3745-77-08(C); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 181 OAC 3745-77-06 (application shield); OAC 3745-77-08(c)(1)(f); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 182 OAC 3745-77-08(c)(3); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 183 http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 184 OAC 3745-77-06 (application shield); http://www.epa.ohio.gov/portals/27/title_v/3-9-05guidancefinal.pdf (last visited Mar. 22, 2017).
- 185 OAC 3745-77-03(D); OAC 3745-77-07(A)(3)(c)(iv).
- 186 OAC 3745-77-03(D); OAC 3745-77-07(A)(3)(c)(iv).
- 187 OAC 3745-77-01(II)(1).
- 188 OAC 3745-77-01(II)(1).
- 189 OAC 3745-77-01(II)(2).
- 190 OAC 3745-77-01(II)(3).
- 191 60 Fed. Reg. 45562 (Aug. 31, 1995).
- 192 62 Fed. Reg. 8313 (Feb. 24, 1997).
- 193 See http://www.epa.ohio.gov/dapc/title_v.aspx (last visited Mar. 22, 2017).
- 194 R.C. 3704.05(H); R.C. 3704.06(C).

¹⁹⁵ See *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999) (holding environmental CERCLA liability akin to tort liability and noting that Ohio law allows corporate officers to be held personally liable for torts committed in the scope of employment along with corporation); *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App. 3d 388, 581 N.E.2d 1110, 1113; *Bowes v. Cincinnati Riverfront Coliseum, Inc.* (1983), 12 Ohio App. 3d 12, 465 N.E.2d 904, 911.

§ 2.07. Shale Oil and Gas Developments

The shale oil and gas hydraulic fracturing boom in Ohio and numerous other states (see [Chapter 18](#)) has brought with it concerns over environmental impacts. U.S. EPA and Ohio EPA have leapt into action, seeking to limit air emissions from “fracking”-related activities.

On February 1, 2012, Ohio EPA issued a final general permit for air emissions associated with shale oil and natural gas production. Eligible operations would not need to apply for the traditional, individual source-specific air PTIO. Ohio EPA determined that most of the activities associated with the drilling and completion phases of well development are generally exempt from air permitting requirements due to the temporary nature of these operations, their limited duration, their exemption by rule or their *de minimis* nature. As for the oil and/or natural gas production phase, the general permit covers a variety of emission sources found at most shale gas production sites, including internal combustion engines, turbine-powered generators, dehydration systems, storage tanks, flares, and unpaved roadways. The permit incorporates, where applicable, various NESHAP requirements for certain processes, as well as New Source Performance Standards for certain processes. In addition to incorporating applicable federal standards, the model general permit also imposes emissions limits on glycol dehydration units; spark ignition internal combustion engines; stationary diesel-fired compression ignition diesel internal combustion engines; vertical fixed roof flush vessel/storage tanks; combustor/flare; and ancillary equipment such as compressors, pumps, piping, and gas-water/condensate/oil separators.

U.S. EPA soon followed suit. On August 16, 2012, the agency issued rules regulating emissions of volatile organic compounds, sulfur dioxide, benzene, toluene, ethyl benzene, and xylene from fracking operations and certain equipment used in upstream and midstream sectors of the oil and gas industry.¹⁹⁶ U.S. EPA claims that the rules also are expected to reduce emissions of methane, one of the primary greenhouse gases. The rules create

new categories and expand existing categories of regulated operations under the NSPS and NESHAPS programs. It is believed that most VOC emissions associated with fracking occur as wells are being prepared for production. During “flowback,” fracking fluids, water, VOCs, methane and various hazardous air pollutants, rise through the well to the surface. U.S. EPA has set a phased approach to control such emissions. In Phase I (currently in effect), emissions must be flared, or the gas must be captured through “green completion” technology. Green completions involve the capture and routing of fluids and gas to storage tanks and gas lines, reinjection into wells or use as an onsite fuel source or “another useful purpose.”

In Phase 2, which begins January 1, 2015, all well operators must employ green completions.

In addition to well completion operations, the NSPS rule addresses pneumatic controllers and storage tanks. The NESHAP rule imposes requirements for storage tanks and glycol dehydrators located at well sites.

Footnotes — § 2.07:

¹⁹⁶ 40 C.F.R. 60 subpt. OOOO (New Source Performance Standards), and 40 C.F.R. subpts. HH and HHH (National Emission Standards for Hazardous Air Pollutants), 77 Fed. Reg. 49490 (Aug. 16, 2012).

§ 2.08. Enforcement

[1] Introduction

Ohio’s air pollution laws are enforced by both U.S. EPA and Ohio EPA. While Chapter 21 discusses enforcement procedure in great detail and Chapter 22 discusses criminal enforcement, some discussion of enforcement relating to air pollution control law is provided below.

[2] Federal


Ohio has been delegated authority to administer programs under the federal Clean Air Act by U.S. EPA. However, U.S. EPA retains separate authority to enforce the Clean Air Act requirements.¹⁹⁷ Furthermore, citizen suits are authorized to enforce the federal Clean Air Act requirements.¹⁹⁸ Because Ohio has an approved SIP, before a citizen suit or federal enforcement may be brought for any violation of the SIP, a would-be plaintiff

or U.S. EPA must give prior notice to the State of Ohio and the alleged violator of the Clean Air Act.¹⁹⁹ For federal enforcement, such notice must be given 30 days prior to the Administrator of the U.S. EPA taking administrative, civil, or criminal action. For citizen suits, such notice must be given to the Ohio EPA, U.S. EPA, and the alleged violator 60 days prior to any action. The citizen suit may not be brought where the State of Ohio or the Administrator has “commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.”²⁰⁰

One effective and speedy remedy at U.S. EPA’s disposal is the use of administrative orders and penalties under [42 U.S.C. § 7413\(d\)](#). U.S. EPA may seek up to \$37,500 per day of each violation, but may not exceed \$295,000 in the aggregate through administrative penalties.²⁰¹ The violation of administrative orders also can be the basis for additional fines, penalties, or even potentially criminal enforcement.

Civil actions also are brought by the U.S. EPA and Department of Justice, often with the Ohio Attorney General’s Office intervening. The civil suit provisions allow for up to \$37,500 per day per violation as well as injunctive relief.²⁰² The penalty outcomes of civil enforcement actions are negotiated under the U.S. EPA civil penalty policy.²⁰³ Furthermore, almost all actions, whether negotiated through a consent order or resolved through trial, include injunctive relief to come into compliance with the law.²⁰⁴

Criminal actions for violations of the federal Clean Air Act are felonies if prosecuted by the federal government.²⁰⁵ For the most part, a violation must be knowingly committed to constitute a crime.²⁰⁶ The federal statute applies a negligence standard for the release of a hazardous air pollutant that places another person in imminent danger of death or serious bodily injury.²⁰⁷ Since almost all air pollution control violations under Ohio law are misdemeanors, criminal prosecution of air pollution control violations are handled, for the most part, by the federal government through the Department of Justice and applicable U.S. Attorney’s office. Depending on the violation, penalties can result in a fine and up to either two or five years imprisonment.²⁰⁸

 **Warning:** The “knowingly” standard within the criminal provisions of [42 U.S.C. § 7413](#) does not require a knowing violation

of the law. It is enough that an individual defendant knows of the underlying facts constituting the violation.²⁰⁹ Thus, operating a air contaminant source without a permit could be the basis of a criminal enforcement action, even though the defendant did not know of the need for a permit.

[3] State

Ohio law does not provide for citizen suits, but does allow individual citizens to submit verified petitions for violations.²¹⁰ Upon receipt of such a “verified complaint,” Ohio EPA is required to investigate whether a violation has occurred, is occurring, or is likely to occur and, if so, take enforcement action. Ohio air pollution control enforcement is handled administratively through Director Findings and Orders.²¹¹

Civil actions are brought by the Ohio Attorney General’s Environmental Enforcement Section, upon referral to that office of the action by Ohio EPA.²¹² The State may obtain injunctive relief and mandatory civil penalties of up to \$25,000 per day, per violation for a violation of Ohio’s air pollution laws.²¹³ As a practical matter, Ohio EPA also utilizes the U.S. EPA’s civil penalty policy in conducting negotiations for penalties. Furthermore, the Ohio Attorney General’s Office employs an informal policy of attempting to negotiate with alleged violators prior to bringing an action, except in cases of an imminent threat to human health or the environment, but requires any resolution of an enforcement case be handled through a filed complaint and consent order.

The Ohio Supreme Court has held that a facility is out of compliance with its air permit and subject to civil penalties starting on the date of a failed stack test and continuing every day thereafter until the facility demonstrated compliance with the permit terms.²¹⁴ A violation is presumed to continue if the State can (1) prove the occurrence of a violation of permit requirements, (2) establish that the permit holder was notified of the violation, and (3) make a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice.²¹⁵ The violation does not end until the facility conducts a subsequent stack test proving compliance, receives a new permit with revised emissions limits, or on the date the facility can show it would pass a stack test due to facility modifications.²¹⁶ The permit holder may also rebut the State’s case by

demonstrating with affirmative evidence that the violation of the stack test requirement was not of a continuing nature.²¹⁷

Practice Tip: Once the State has met its burden of showing a continuing violation, a facility may offer rebuttal evidence to mitigate penalties. Such rebuttal evidence includes days of nonoperation or subsequent modifications to a facility; data from continuous emission monitoring systems; expert testimony; bypassing and control equipment malfunction; operating conditions documented during the stack testing no longer existed; mechanical failures were repaired; and raw materials and fuels were changed.

Ohio criminal air pollution violations are generally classified as misdemeanors, and, for that reason, are rarely brought.²¹⁸ Exceptions are made to that policy for some categories of smaller cases, such as open burning violations or possibly asbestos handling, while larger cases are generally handled by the federal government.

Footnotes — § 2.08:

¹⁹⁷ 42 U.S.C. § 7413.

¹⁹⁸ 42 U.S.C. § 7604.

¹⁹⁹ 42 U.S.C. § 7413 and 42 U.S.C. § 7604.

²⁰⁰ 42 U.S.C. § 7604.

²⁰¹ 42 U.S.C. § 7413; see Civil Monetary Penalty Inflation Adjustments, 78 Fed. Reg. 66643 (Nov. 6, 2013).

²⁰² 42 U.S.C. § 7413; see Civil Monetary Penalty Inflation Adjustments, 78 Fed. Reg. 66643 (Nov. 6, 2013).

²⁰³ www.epa.gov/enforcement/air-enforcement (last visited Mar. 22, 2017).

²⁰⁴ 42 U.S.C. § 7413(b).

²⁰⁵ 42 U.S.C. § 7413.

²⁰⁶ 42 U.S.C. § 7413.

²⁰⁷ 42 U.S.C. § 7413(c).

²⁰⁸ 42 U.S.C. § 7413(c).

- ²⁰⁹ *United States v. Kelley Tech. Coatings*, 157 F.3d 432 (6th Cir. 1998).
- ²¹⁰ R.C. 3745.08.
- ²¹¹ R.C. 3704.03(R) and R.C. 3704.03(S).
- ²¹² R.C. 3704.06.
- ²¹³ R.C. 3704.06.
- ²¹⁴ *State ex rel. Ohio Attorney General v. Shelly Holding Co., et al.*, 135 Ohio St. 3d 65 (2012).
- ²¹⁵ *State ex rel. Ohio Attorney General v. Shelly Holding Co., et al.* (2012), 2012-Ohio-5700, 2012 Ohio LEXIS 3107 (citing 42 U.S.C. § 7413(e); OAC 3745-31-01(AAAAAA)(2)(mmm)).
- ²¹⁶ *State ex rel. Ohio Attorney General v. Shelly Holding Co., et al.* (2012), 2012-Ohio-5700, 2012 Ohio LEXIS 3107, at *8.
- ²¹⁷ *State ex rel. Ohio Attorney General v. Shelly Holding Co., et al.* (2012), 2012-Ohio-5700, 2012 Ohio LEXIS 3107, at *28–*29.
- ²¹⁸ R.C. 3704.99; *but see* R.C. 3734.99 (open burning of scrap tires would constitute a felony, and, in the case of asbestos, improper disposal as opposed to handling could similarly be prosecuted under that section).

CHAPTER 3

WATER POLLUTION

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I.

INTRODUCTION

§ 3.01. Scope

This chapter covers:

- Ohio EPA Water Pollution Control Authority [*see § 3.02 below*].
- Water Quality Standards [*see § 3.03 below*].

- Ohio's Point Source Permitting Programs [*see § 3.04 below*].
- Storm water Discharge Permitting [*see § 3.05 below*].
- Ohio's Antidegradation Requirements [*see § 3.06 below*].
- Regulation of Underground Injection Wells [*see § 3.07 below*].
- Enforcement of Water Pollution Control Law in Ohio [*see § 3.08 below*].

II.

WATER POLLUTION CONTROL

§ 3.02. Ohio EPA Authority

Ohio has a comprehensive statutory and regulatory program to control discharges of pollutants to waters of the state. The basic framework for the State's water quality regulatory program was established by federal law. The Federal Water Pollution Control Act¹ was enacted in 1972 with the objective of restoring and maintaining the chemical, physical and biological integrity of the waters of the United States.² Commonly known as the Clean Water Act, the federal statute generally prohibits discharges of pollutants to the nation's waterways unless and until a prospective discharger obtains a permit to do so.³ Under the Clean Water Act, a state may seek and obtain from U.S. EPA delegated authority for regulating dischargers of pollutants to waters of the state, subject to federal oversight.⁴ Ohio, like the vast majority of states, has obtained this delegated authority from U.S. EPA.

Ohio's water quality legislation is set forth at [Ohio Revised Code Chapter 6111](#).⁵ The legislature has provided the Director of Ohio EPA broad powers under Ohio water quality control law.⁶ Activities the Director may undertake to implement Chapter 6111 include:

- (1) development of plans and programs for the prevention, control and abatement of new or existing water pollution;
- (2) adopting, amending or rescinding regulations to implement its water pollution control authorities;
- (3) issuing, revoking, modifying or denying permits to discharge

pollutants to the waters of the state;

- (4) issuing, modifying or revoking administrative orders to prevent, control or abate water pollution;
- (5) collecting and disseminating information relating to the prevention, control and abatement of water pollution;
- (6) consulting with state and local government as well as industrial representatives and other interested persons regarding water quality matters; and
- (7) administering federal, state and other grants relating to water quality control matters.⁷

Footnotes — § 3.02:

¹ 33 U.S.C. § 1251 *et seq.*

² 33 U.S.C. § 1251(a).

³ 33 U.S.C. § 1311(a).

⁴ 33 U.S.C. § 1342(b).

⁵ R.C. Chapter 6111.

⁶ R.C. 6111.03.

⁷ R.C. 6111.03.

§ 3.03. Water Quality Standards

[1] Establishment and Revision of Water Quality Standards

Ohio EPA has promulgated regulations setting forth water quality standards for the state. Generally, these standards classify each lake or stream segment in the state for particular uses and prescribe water quality criteria which must be met by dischargers in order to maintain these uses.⁸ Water quality standards contain two primary elements: (1) designated uses (also known as beneficial uses); and (2) the specific water quality criteria designed to protect and measure attainment of the uses.⁹

Water quality standards are ambient standards applicable to the

conditions in the relevant water bodies rather than characteristics of permittee discharges. These ambient standards are developed through a complex, technical process of reverse calculation procedures involving steps that include the use of regulatory mechanisms such as total maximum daily loads and wasteload allocations aimed at identifying sufficiently protective pollutant levels.¹⁰ Once established, the water quality standards serve as the foundation for calculating appropriate water quality based effluent limitations that regulate the discharge of pollutants into surface waters under the permit programs.

One primary element of the standards, known as designated uses or beneficial use designations, describes the existing or potential uses of specific waterbodies. They take into consideration the use and value of each waterbody for public water supplies, protection and propagation of aquatic life, and water recreation. Examples of several specific beneficial use designations utilized in Ohio include: public water supply, primary contact recreation, industrial use and aquatic life uses (such as warmwater habitat, etc.).¹¹

Ohio EPA studies and assigns use designations for aquatic life, water supply and recreation uses for each waterbody in the state.¹² For each general use designation (such as aquatic life or recreation), various more specific use designations have been established in order that criteria tailored to the unique uses may be applied.¹³ Individual waterbodies may be assigned more than one use designation. The Clean Water Act requires Ohio and all other states to evaluate and revise as necessary all water quality standards at least once every three years.¹⁴ In order to establish and revise use designations, Ohio EPA uses several biological evaluation methods. These include the Index of Biotic Integrity, the Modified Index of Well-Being and the Invertebrate Community Index. These biological indices measure species richness, trophic composition, diversity, presence of pollution-tolerant individuals or species, abundance of biomass, and the presence of diseased organisms. In establishing and revising use designations, Ohio EPA samples reference sites and uses the results to set minimum criteria index scores as thresholds for attaining certain designated use classifications.

The other primary element of the standards, water quality criteria, include three major components: (1) narrative criteria; (2) numeric criteria; and (3)

antidegradation provisions. These criteria serve to assist Ohio EPA in its efforts to assure that designated uses are being attained.

The narrative criteria are general, subjective water quality criteria that apply to all surface waters. They are required where numeric criteria cannot be established or are not sufficient to protect designated uses.¹⁵ These narrative criteria provide general prohibitions such as that all waters shall be “free from” sludge, floating debris, oil and scum, color and odor producing materials, substances that are harmful to human, animal or aquatic life, and nutrients in concentrations that may cause nuisance growth of aquatic plants.¹⁶

Numeric criteria are painstakingly derived estimations of concentrations of chemicals and degrees of aquatic life toxicity that a waterbody can tolerate without adversely impacting its beneficial uses. Types of numeric criteria utilized in Ohio include chemical criteria, “Whole Effluent Toxicity” (“WET”) criteria, biological criteria and nutrient criteria.

Chemical criteria include both aquatic life, human health and wildlife criteria for individual chemicals. These criteria are derived from studies of biological organisms’ sensitivity to specific chemicals or combination of chemicals.¹⁷ Whereas many of the chemical criteria that have been established apply statewide, certain criteria addressing certain toxics have been tailored specifically and differ between the Ohio River and Lake Erie drainage basins.¹⁸ For each pollutant for which numeric chemical criteria are established, distinct numeric criteria are developed to protect human health, aquatic life and wildlife from the risks presented by the particular pollutant. The criteria established for human, wildlife, and aquatic populations may differ notably depending upon that chemical’s varying potential impacts on these organism populations. The population deemed most sensitive to the risks posed by that chemical pollutant will generally be assigned the most stringent numeric criterion. These differences among human health, aquatic and wildlife criteria are often critical distinctions utilized in setting permit effluent limits where the receiving water body is designated for some, but not all, potential uses.

Whole Effluent Toxicity (WET) measures the harmful effects of effluent on living organisms. A bioassay or toxicity test measures the degree of response of an exposed test organism to a specific chemical or effluent. WET protocols have been established for both acute and chronic toxicity tests.

WET provisions are designed to address the cumulative effects of chemicals present in an effluent that cannot be addressed effectively using chemical-specific criteria. In establishing effluent limits for dischargers, Ohio EPA is required to consider the possible imposition of WET limits under certain circumstances.¹⁹ Specific procedures for developing WET limits in Ohio for particular discharges have been established by rule.²⁰ Also, minimum monitoring requirements for gauging compliance with WET limits have been established.²¹

Biological and nutrient criteria are relatively recent additions to the regulatory landscape in Ohio. Biological criteria are used to evaluate the attainment of aquatic life uses.²² The data collected in these assessments are used to characterize aquatic life impairment and to help diagnose the cause(s) of this impairment. Nutrient criteria are established and utilized to ensure aquatic life is not excessively impaired by loadings of nutrients typically arising from non-point sources.

Antidegradation is a federally required component of each state's water quality standards.²³ The antidegradation provisions describe the conditions under which water quality may be lowered in surface waters. The antidegradation process is addressed in more detail in § 3.06 of this Chapter.

[2] Total Maximum Daily Loads

The Clean Water Act requires the development of a Total Maximum Daily Load ("TMDL") to address waters where the water quality standards are impaired.²⁴ Each state is required to submit a prioritized list of impaired waters to U.S. EPA for approval (this list is known as a "§ 303(d) list") once every three years. Ohio EPA's § 303(d) list indicates the waters of Ohio that are currently impaired and require TMDL development in order to meet water quality standards. In recent years, Ohio EPA has completed many TMDLs and has begun development of various additional TMDLs for specific reaches of certain impaired waterbodies.

Generally, a TMDL is a written, quantitative assessment of water quality problems in a waterbody and contributing sources of pollution. TMDLs specify the amount a pollutant needs to be reduced to meet water quality standards, allocates pollutant load reductions, and provides the basis for taking regulatory actions (including permitting decisions) needed to restore a

waterbody.

In Ohio, a TMDL must identify, quantify and aggregate existing and projected loads of the subject pollutant to the waterbody from all point, non-point and background sources, in a manner such that the sum of these loads do not exceed the water's carrying capacity less the sum of a specified margin of safety and a measure of capacity that may be reserved for future growth.²⁵ Various of the key elements in the TMDL regulatory equation described above can become the subject of intense deliberation among the stakeholders in the TMDL development process. For example, determining an appropriate "Margin of Safety" can be a fairly subjective exercise since the controlling regulatory authorities allow the Margin of Safety to be expressed by "leaving a portion of the loading capacity unallocated or by using conservative modeling assumptions to establish [waste load allocations] and [load allocations]."²⁶ Also, while Ohio EPA's TMDL rules provide authority for TMDLs to include reserved allocations for future needs, including future growth and additional sources, they do not *require* that any allocation be reserved for future needs.²⁷ Another key issue facing stakeholders with interests in how developing TMDLs may significantly impact future projects or initiatives (which might require a slice of the TMDL allocation to succeed) is the extent to which and accuracy with which loading contributions from difficult-to-evaluate non-point sources and sediment sources are accounted for in the TMDL process.²⁸

Ohio EPA uses a 12-step project-management-based approach in developing TMDLs. The process utilizes existing state monitoring, modeling, permitting, and grant programs to advance the various TMDL objectives. The process contains four broad, overlapping phases: (1) assessing waterbody health (including biological, chemical, habitat issues); (2) developing a restoration target, (3) implementing the solution; (4) validating (primarily through data collection) to monitor progress. Ohio EPA uses various mechanisms to foster stakeholder participation throughout the TMDL process.

[3] Watershed Issues

Ohio EPA has promulgated a set of rules establishing a program designed to facilitate pollutant trading among discharges within watersheds under certain circumstances.²⁹ The Ohio water quality trading program has its roots

in U.S. EPA’s 2003 Water Quality Trading Policy.³⁰ A principal aim of the program is to provide an efficient and cost effective mechanism to achieve water quality standards. Where an upstream discharger might have at its disposal a more cost effective means to reduce a given pollutant beyond the level required by law for that discharger, it now might be eligible to take action to make that additional reduction and “sell” the resulting pollution reduction credits to a downstream discharger looking for a cost effective means to achieve a regulatory mandate to effect additional loading reductions for that same pollutant. Under the Ohio program, trades of such credits must generally occur within one watershed³¹ and cannot cause exceedance of a water quality standard, impairment of an existing use or be used to achieve compliance with a technology-based effluent limit.³² Under the Ohio trading program, point sources may purchase credits from non-point sources (such as agricultural interests, for instance) under certain circumstances. These non-point sources can generate credits for trades by reducing loadings through implementation of certain Best Management Practices or habitat restoration projects.³³ The trading program requires various recordkeeping and reporting requirements of its participants.³⁴ The trading program rules also specify a mechanism for determining the trading ratios (the mass of pollutant that must be reduced to receive a water quality credit) for various types of water quality credit trades.³⁵ Approved trading activities are managed by Ohio EPA by incorporating provisions into the NPDES permits of trading parties that authorize trades, designate failures to fulfill trade-dictated obligations as violations, and set criteria for revoking trade plans.³⁶

Footnotes — § 3.03:

⁸ R.C. 6111.041; *see also* OAC Chapter 3745-1.

⁹ OAC 3745-1-07.

¹⁰ These mechanisms are discussed in § 3.03[2].

¹¹ The various specific use designations are each defined at OAC 3745-1-07(B).

¹² These use designations are organized by watershed and set forth at OAC 3745-1-08 through 3745-1-34.

¹³ *See* OAC 3745-1-07(B)(1)–(4). For example, more than 10 aquatic use designations, including “warm water,” “cold water,” and “seasonal salmonid,” have been established. Also, in 2009, Ohio EPA revised and expanded the recreational uses. Changes include distinctions between and specific numeric criteria for several categories of primary contact recreation. *See* OAC 3745-1-07(B)(4).

¹⁴ 33 U.S.C. § 1313(c).

¹⁵ See R.C. 6111.56(C).

¹⁶ See OAC 3745-1-04.

¹⁷ Ohio, like some other states, establishes its own numeric criteria from such studies and other relevant data. U.S. EPA has established federal water quality criteria for more than 150 pollutants. While these federal criteria are not federally imposed upon states, they are often relied upon as guidance in establishing state criteria. See 33 U.S.C. § 1314(a)(1); 63 Fed. Reg. 67,547 (Dec. 7, 1998).

¹⁸ See OAC 3745-1-31 and 3745-1-32.

¹⁹ OAC 3745-33-07(B); see also OAC 3745-1-07(C).

²⁰ OAC 3745-2-09.

²¹ OAC 3745-33-07(B)(11).

²² OAC 3745-1-07(A)(6).

²³ 40 C.F.R. § 131.12.

²⁴ 33 U.S.C. § 1313.

²⁵ OAC 3745-2-12(B).

²⁶ OAC 3745-2-12(J).

²⁷ OAC 3745-2-12(K).

²⁸ See OAC 3745-2-12(F) and (L).

²⁹ See OAC 3745 Chapter 5.

³⁰ U.S. EPA, Office of Water, “Water Quality Trading Policy” (Jan. 13, 2003).

³¹ See OAC 3745-5-04; note, however, that the Director has discretion to allow trades between point sources in different watersheds where the proposed trade “will achieve the purposes” of the trading program.

³² OAC 3745-5-03(A).

³³ OAC 3745-5-3(C), (D) and (E).

³⁴ OAC 3745-5-12.

³⁵ OAC 3745-5-10.

³⁶ OAC 3745-5-11.

§ 3.04. Point Source Discharge Permitting

[1] Permits To Install

Ohio water pollution control law requires a Permit To Install (“PTI”) for the installation or modification of any wastewater “disposal system.”³⁷ Covered “disposal systems” are defined to include treatment works for disposing of sewage, sludge, sludge material, industrial waste and other waste.³⁸ For purposes of this PTI mandate for wastewater disposal systems, “installation” includes any commencement of actual construction or erecting, locating or affixing any treatment works or disposal system.³⁹ “Modifications” of disposal systems that would require a PTI include any physical change in or any change in the method of operation for any treatment works to allow it to process water pollutants in materially increased quantities, materially different character or materially higher concentrations.⁴⁰ Disposal systems requiring a PTI include sewerage systems.⁴¹ “Sewerage system” is defined to include pipelines, conduits, pumping stations and other devices and facilities that convey regulated wastewater.⁴² Accordingly, the expansions of sewage collection systems commonly associated with new development in suburban and some rural areas are generally considered modifications of disposal systems that necessitate a PTI. Certain disposal systems are exempt from the PTI requirement, including certain systems for one, two or three family dwellings, certain coal waste facilities regulated under other authorities, oil and grease interceptors meeting certain requirements, certain not-for-profit car washes, mobile carpet cleaners and power washers meeting specified requirements, certain water recycling systems within buildings and smaller oil and water separators meeting specified criteria.⁴³ PTI applications must include detailed plans and require that various mandated documents must be certified by a professional engineer.⁴⁴ In order to approve an application for a PTI, Ohio EPA must find that the installation and operation of the proposed new or modified facility will not violate applicable laws, including water quality standards or other applicable effluent standards established by Ohio EPA or federal authorities.⁴⁵ Under Ohio law, a PTI must be obtained prior to commencing construction on a new or modified disposal system or facility.⁴⁶ PTIs generally include terms calling for termination of the PTI eighteen months after issuance if the permit holder has not commenced the installation or modification.⁴⁷ Ohio EPA typically advises prospective applicants that Agency review of a completed application will take approximately six

months, longer for a complex project. If the proposed installation or modification may increase the quantity of pollutants that will be discharged to the receiving water, the application may also be subject to antidegradation review,⁴⁸ which will typically add time to the permitting process. Securing a PTI does not diminish a regulated party's separate obligation under Ohio water pollution control law to also secure an operating permit in order to commence the discharge of pollutants to waters of the state. Permits to operate are [covered in more detail in § 3.04\[2\]](#).

[2] NPDES Program

Ohio EPA has been authorized under the federal Clean Water Act to issue point source wastewater discharge permits under the National Pollution Discharge Elimination System ("NPDES") in Ohio.⁴⁹ Like the Clean Water Act, Ohio law broadly governs the discharge of pollutants, defined to include any liquid, gaseous or solid waste substance resulting from any process of industry, manufacture, trade or business, garbage, refuse, oil, domestic sewage and dredged or fill material.⁵⁰ Such discharges are generally prohibited except to the extent authorized by a valid NPDES permit issued by Ohio EPA.⁵¹ The Ohio NPDES permit process requires prospective point source dischargers of pollutants to waters of the state to prepare and submit a detailed permit application.⁵² If the Agency's preliminary decision is to issue the permit, Ohio EPA will generally issue a draft permit containing proposed effluent limitations, a proposed schedule of compliance for meeting those limitations and a description of any other proposed restrictions or conditions that are necessary. Thereafter, there will be public notice of the draft notice and a 30-day public comment period on the draft permit.⁵³ Ohio EPA routinely includes permit conditions that require the permit-holder to monitor and sample discharges and to submit monthly reports.⁵⁴ Various pollutant-specific effluent limitations, operating conditions and compliance schedules may also be included. (More detail concerning the development of effluent limits and other permit conditions is set forth in [§ 3.04\[4\] below](#).) Ohio EPA commonly advises prospective permittees that the NPDES permitting process can commonly be navigated from the submission of a complete application to permit issuance in about six months, although longer timeframes will be required for complex discharges and where antidegradation review⁵⁵ is necessary. Ohio NPDES permits are valid for a fixed term that may not exceed five years. A permit-holder who wishes to renew an existing permit

must submit a written request for issuance at least 180 days prior to the expiration of the permit.⁵⁶ In considering a renewal application, Ohio EPA will consider the permittee's compliance history and may deny the renewal application where compliance failures are determined to have occurred.⁵⁷ Such a denial of a renewal application could be appealed to the Environmental Review Appeals Commission, in which case the expiring permit terms remain in effect until a final decision is rendered.⁵⁸

Ohio EPA is authorized to utilize general permits to address certain common types of discharges in situations where individualized permits may not be necessary or efficient.⁵⁹ The rules governing general permits specify that Ohio EPA will utilize a general permit only where the sources involve similar operations, discharge similar wastestreams, and require similar limitations, conditions and monitoring mandates.⁶⁰ Facilities interested in coverage for their discharge under a general permit must be certain their discharge meets the relevant general permit's eligibility criteria and file a "Notice of Intent" with Ohio EPA prior to commencing the discharge in order to be covered under the general permit. Ohio EPA has promulgated general permits for a number of source categories, including non-contact cooling water, coal surface mining, household sewage treatment systems, certain small sanitary discharges and a number of types of storm water discharges. More information concerning these general permits may be accessed at <http://www.epa.ohio.gov/dsw/permits/gpfact.aspx>.

[3] Pretreatment Program

Discharges of wastewater from industrial or commercial facilities to sanitary sewers which are treated at a publicly owned wastewater treatment plant ("POTW") are regulated in Ohio through a pretreatment program which has the practical effect of extending federal and state water pollution control requirements to the industrial users of the POTW. Dischargers to waters of the state through a POTW, commonly known as indirect dischargers, are subject to a variety of permitting requirements that are generally imposed by the POTW but can be enforced at the state or federal levels as well. The Clean Water Act requires states to establish pretreatment programs and provides a regulatory framework.⁶¹ A central purpose of Ohio's pretreatment program is preventing the introduction of pollutants into a POTW which would disrupt the operation of the wastewater treatment plant and/or the

collection system and also to prevent pollutants from passing through the POTW in concentrations that would violate the POTW's NPDES Permit.⁶²

In Ohio, POTWs with design flows above certain threshold levels which receive specified types of industrial discharges are required to establish a local pretreatment program.⁶³ Municipal entities operating POTWs are provided authority under Ohio law to establish regulatory mandates governing dischargers and waste streams entering their collection system. Local pretreatment programs that are developed by local governments that operate POTWs must be approved by Ohio EPA.⁶⁴ Requirements to implement and enforce the requirements of the local pretreatment program are often incorporated into the NPDES permit which Ohio EPA issues to the POTW. In sewered areas where the POTW has not yet established an Ohio EPA-approved pretreatment program, Ohio EPA directly regulates and permits industrial users.⁶⁵ Ohio EPA maintains a database of local governments with approved pretreatment programs.⁶⁶

Certain indirect industrial dischargers with the potential to create more of an impact on their POTW's discharge, either through the volume or characteristics of their discharge, are designated by regulation as "Significant Industrial Users"⁶⁷ and are subject to additional pretreatment regulation. More than fifty industry-specific national categorical pretreatment standards have been promulgated by U.S. EPA, establishing effluent standards that are tailored to industrial group characteristics.⁶⁸ Federal pretreatment regulations also impose a number of general pretreatment standards upon all regulated industrial users, which are generally expressed as narrative discharge prohibitions.⁶⁹ In Ohio, Significant Industrial Users are subject to any federal pretreatment standards applicable to their industry or discharge category as well as individual indirect discharge permitting from Ohio EPA where their POTW does not have an approved pretreatment program.⁷⁰

A significant aspect of any local pretreatment program is the set of local limits established by the POTW. Local limits are established in order to help the POTW meet its NPDES requirement by requiring industrial indirect dischargers to pretreat their discharges before they enter the sewers. Local limits, often tailored to the needs and treatment or volume limitations of the specific collection and treatment systems, may impose more stringent effluent limitations than would the otherwise applicable federal categorical

pretreatment standards and also may regulate pollutants not addressed by such federal standards.⁷¹

[4] Effluent Limitations and Other Permit Requirements

When developing NPDES permit effluent limitations, Ohio EPA permit writers must follow a two-step approach per federal and state statutory authority.⁷² First, a permit writer must ensure the permit imposes any applicable, industry-specific technology-based limitations that have been established through federal rulemakings.⁷³ These technology-based limits are generally derived from federal standards set by rule as the result of detailed assessments of the capabilities of treatment technologies that are deemed achievable in a particular industry. These technology-based standards, where applicable to a discharger, are utilized in permit development regardless of the quality of the discharger's receiving water. More stringent, water-quality-based effluent limits may be imposed in addition where necessary to achieve water quality standards for the pollutant in question in the discharger's receiving water.⁷⁴

The pollutant or parameter-specific effluent limitations included in NPDES permits also may vary in the manner they are expressed and the frequency with which compliance is measured. Both concentration-based and mass-based effluent limits are often imposed. Permittees are often required to demonstrate compliance with separate limits for the same pollutant to address distinct chronic and acute toxicity risks to human, aquatic and/or wildlife receptors. For example, daily maximum concentration limits may be utilized to address such acute risks, whereas additional periodic average limits may address the chronic risks.

In establishing water-quality-based effluent limitations where such limits are needed to achieve water quality standards, factors considered include the TMDL for the receiving water, the applicable Waste Load Allocation and an appropriate dilution factor. The appropriate dilution factor will relate directly to whether and to what extent a mixing zone is permitted for the subject effluent limit. In Ohio, mixing zones are generally allowed with some exceptions where permittees can successfully navigate the mixing zone demonstration requirements.⁷⁵

Effluent limits may also be established for "indicators," which are

intended to represent impacts of difficult-to-measure and/or aggregate impacts. Whole Effect Toxicity (“WET”) limitations are examples of such indicator limitations. Ohio EPA has promulgated detailed rules for establishing WET limits.⁷⁶

Prospective permittees facing proposed effluent limits that will be difficult to satisfy may seek potential relief through a number of available regulatory mechanisms. For example, as discussed in § 3.03[3] above, Ohio EPA has promulgated a water quality credit trading program. In addition, where specific conditions are present, Ohio EPA may allow compliance with an effluent limit to be achieved over time after the effective date of the permit through a “Schedule Of Compliance” that is incorporated into the permit.⁷⁷ Also, under certain specific situations, permit applicants may also be able to achieve relief from onerous effluent limits through a point source-specific variance.⁷⁸

Footnotes — § 3.04:

³⁷ R.C. 6111.03(J), 6111.44 and 6111.45; see also OAC 3745 Chapter 42.

³⁸ R.C. 6111.01(G).

³⁹ OAC 3745-42-02(P).

⁴⁰ OAC 3745-42-02(Q).

⁴¹ R.C. 6111.01(E).

⁴² R.C. 6111.01(E).

⁴³ OAC 3745-42-02(B).

⁴⁴ OAC 3745-42-03.

⁴⁵ OAC 3745-42-04(A).

⁴⁶ R.C. 6111.44.

⁴⁷ See OAC 3745-42-02(D). Note that the rules provide the Director with discretion to extend this period by twelve months upon receipt of a timely written request from the permittee. OAC 3745-42-02(D)(3).

⁴⁸ The antidegradation policy and process is addressed in § 3.06 below.

⁴⁹ OAC Chapter 3745-33.

- ⁵⁰ OAC 3745-33-01(P).
- ⁵¹ R.C. 6111.04(A).
- ⁵² OAC 3745-33-03.
- ⁵³ OAC 3745-33-03.
- ⁵⁴ OAC 3745-33-05.
- ⁵⁵ The antidegradation review process is addressed in more detail in § 3.06 below.
- ⁵⁶ OAC 3745-33-09.
- ⁵⁷ See OAC 3745-33-04(C)(2) and OAC 3745-36-03(G)(2).
- ⁵⁸ See R.C. 119.06 and OAC 3745-33-04(C)(2).
- ⁵⁹ See OAC 3745-38-02.
- ⁶⁰ OAC 3745-38-02.
- ⁶¹ 40 C.F.R. Part 403.
- ⁶² OAC 3745-3-02.
- ⁶³ OAC 3745-3-03(A).
- ⁶⁴ OAC 3745-3-03.
- ⁶⁵ See OAC 3745-36-03 and 3745-36-06.
- ⁶⁶ For a list of approved pretreatment programs, see www.epa.state.oh.us/dsw/pretreatment/approved_programs.aspx.
- ⁶⁷ The term “Significant Industrial User” is defined at OAC 3745-36-02(U).
- ⁶⁸ See 40 C.F.R. Part 403. The categorical standards are set forth at 40 C.F.R. Parts 405–471.
- ⁶⁹ Examples of such general pretreatment standards are prohibitions against pollutants that would create a fire or explosion, cause corrosion or structural damage to the POTW, or having a pH lower than 5; see 40 C.F.R. § 403.5.
- ⁷⁰ OAC 3745-36-03.
- ⁷¹ See OAC 3745-3-09(B).
- ⁷² See 33 U.S.C. §§ 1311, 1312; R.C. Chapter 6111.
- ⁷³ See 40 C.F.R. Parts 405–471. Where no relevant technology-based federal effluent guidelines have yet been established, the permit writer may nevertheless develop technology-based effluent limits

by applying the subjective “best professional judgment” standard. See [40 C.F.R. § 125.3](#).

⁷⁴ See [OAC 3745-33-05\(A\)](#).

⁷⁵ See [OAC 3745-1-06](#). Thermal mixing zones and mixing zones for bioaccumulative chemicals of concern are each subject to specific restrictions.

⁷⁶ [OAC 3745-33-07\(B\)](#).

⁷⁷ [OAC 3745-33-05\(F\)](#).

⁷⁸ [OAC 3745-33-07\(D\)](#).

§ 3.05. Storm Water Discharge Permitting

[1] General

When the federal Clean Water Act was amended in the Water Quality Act of 1987, Congress established a schedule under which EPA was required to establish regulations and issue permits for storm water discharges. The 1987 Act required that EPA regulate storm water discharges “associated with industrial activity” and discharges from municipal separate storm sewer systems.⁷⁹


Storm water is defined as “storm water runoff, snow melt runoff, and surface runoff and drainage.”⁸⁰ Under U.S. EPA’s initial storm water permitting regulations promulgated in 1990 dischargers had three options for obtaining coverage under a storm water permit, including coverage under a general permit; application for a permit through a “group application”; or an individual storm water permit. Currently, both in Ohio and nationally, only the general permit and individual permit options remain. A storm water discharger may apply for an NPDES permit by filing a Notice of Intent to be covered by a general permit issued by Ohio EPA. Ohio EPA has issued several general permits for storm water discharges associated with industrial activity, certain small municipal storm sewer systems and construction activity. If a facility cannot qualify for coverage under a general permit, it must submit an individual storm water permit application. The preparation of the individual application can be quite burdensome, requiring detailed information about the facility, the waterbody receiving its discharge and data concerning the discharge and its constituents. The three principal types of regulated storm water discharge are industrial, municipal and construction

discharges. Permitting for each of these categories of discharge is addressed in Sections 3.05[2], [3] and [4] of this Chapter.

[2] Industrial Discharges

The definition of storm water discharge associated with industrial activity is complex.⁸¹ In general, the term means the discharge from any point source used for collecting and conveying storm water which is directly related to manufacturing, processing, or materials storage areas at an industrial facility. This regulatory definition includes two primary components. First, the definition identifies what types of facilities are considered to have industrial activity based on industry NAICS codes.⁸² Second, it defines what portions of these facilities are considered to include industrial activity. These regulated areas include industrial plant yards, material handling sites, refuse sites, shipping and receiving areas, manufacturing buildings and raw material storage areas.⁸³

The regulations have been revised to allow industrial facilities with no exposure of industrial materials and activities to storm water to obtain a conditional “no exposure” exemption from the storm water permit requirement.⁸⁴ To obtain the “no exposure” exemption, the facility operator must submit a written certification that a condition of no exposure exists at the facility.

 **Warning:** The “no exposure” exemption can be extinguished without warning if the permittee causes or allows exposure of industrial materials or activities to storm water to resume.

The definition of “storm water discharge associated with industrial activity” excludes discharges from facilities engaged in wholesale, retail, service, or commercial activities.⁸⁵ This definition also excludes storm water discharged from areas that are separate from industrial activities, including office buildings and parking lots, unless the drainage is combined with storm water drained from areas used for industrial activities.⁸⁶ U.S. EPA or Ohio EPA retains the authority to require a permit for discharges falling outside this definition that contribute to water quality violations or are significant contributors of pollutants to water bodies.⁸⁷

Ohio EPA has promulgated rules establishing requirements for industrial

storm water discharge permits.⁸⁸ The Agency has also promulgated a general permit for storm water discharges associated with industrial activity.⁸⁹ Most industrial storm water discharges are eligible for coverage under this general permit.⁹⁰

[3] Municipal Discharges

Under the 1987 amendments to The Clean Water Act, storm water discharges from municipal separate storm sewers (“MS4s”) were designated for regulation in two phases. The Phase I MS4 regulations addressed storm water discharges from large⁹¹ and medium⁹² MS4s. Large and medium MS4s were required, under the Phase I regulations, to develop Storm Water Management Plans and apply for individual NPDES permits by deadlines in the early 1990s.⁹³

The Phase II MS4 regulations established permitting requirements for storm water discharges from Small MS4s. Small MS4s are defined to include all MS4s other than Large or Medium MS4s, so long as the Small MS4 is either located within an “urbanized area”⁹⁴ or designated as subject to regulation by Ohio EPA.⁹⁵ Small MS4s subject to permitting were required to apply for permit coverage by March 10, 2003.⁹⁶ Ohio EPA has promulgated general permits for use by certain types of Small MS4s.⁹⁷ Storm water discharge permits for Small MS4s utilize storm water management plans, which must include six designated “minimum control measures,” as their principal means of imposing controls on these discharges.⁹⁸ The six “minimum control measures” address public education and outreach, public participation, illicit discharge detection and elimination, construction site runoff control, post-construction storm water management and pollution prevention measures.⁹⁹

[4] Construction Discharges

Certain construction activities are also subject to storm water permitting. The definition of “storm water discharge associated with industrial activity” includes construction activities disturbing five or more acres of land.¹⁰⁰ Storm water permitting requirements have been imposed on these larger construction sites since 1992. The federal Phase II storm water regulations promulgated in 1999 extended construction storm water permitting mandates to smaller construction sites where only one to five acres of land are

impacted.¹⁰¹ Ohio EPA has promulgated general permits for use by regulated construction storm water discharges.¹⁰² A principal requirement of the construction general permits is preparation and implementation of a Storm Water Pollution Prevention Plan, which must address certain sediment and erosion control standards and post-construction best management practice standards. In 2009, U.S. EPA promulgated rules mandating various enhanced erosion and sediment controls for certain stormwater permittees.¹⁰³ These 2009 rules also established a numerical turbidity effluent limitation that applied to permittees of large sites (20 or more acres) beginning in August, 2011, and were extended to apply also to smaller sites (10 acres or more) in 2014.

Footnotes — § 3.05:

⁷⁹ 33 U.S.C. § 1342(p).

⁸⁰ 40 C.F.R. § 122.26(b)(13).

⁸¹ The term is defined at 40 C.F.R. § 122.26(b)(14). The scope of “storm water discharge associated with industrial activity” is discussed in greater detail at 55 Fed. Reg. 48007-15 (Nov. 16, 1990).

⁸² The list of covered industrial groups are set forth at 40 C.F.R. § 122.26(b)(14). Generally, they include all of the primary manufacturing and industrial sectors as well as certain transportation, power generation, waste treatment and disposal as well as construction sectors.

⁸³ 40 C.F.R. § 122.26(b)(14).

⁸⁴ 60 Fed. Reg. 68721, 68840 (Dec. 8, 1999) (codified at 40 C.F.R. § 122.26(g)).

⁸⁵ See 55 Fed. Reg. 48007 (Nov. 16, 1990).

⁸⁶ See 55 Fed. Reg. 48007 and 48010 (Nov. 16, 1990).

⁸⁷ 33 U.S.C. § 1342(p)(2)(E).

⁸⁸ OAC 3745-39-04.

⁸⁹ For more information on this general permit, see www.state.oh.us/dsw/permits/GP-IndustrialStormwater.html.

⁹⁰ Industrial storm water discharges not eligible for general permit coverage include landfills, petroleum bulk terminals and certain mining and coal pile runoff discharges as well as certain discharges to high quality waters.

⁹¹ Large MS4s are defined as MS4s serving a population of 250,000 or greater. 40 C.F.R. § 122.26(b)(4); OAC 3745-39-01(7).

⁹² Medium MS4s are defined as MS4s serving populations between 100,000 and 250,000. 40 C.F.R. § 122.26(b)(7); OAC 3745-39-01(8).

⁹³ Storm water permit requirements for large and medium MS4s are set forth at OAC 3745-39-04.

⁹⁴ “Urbanized area” designation is determined by the 2000 census. OAC 3745-39-03(A).

⁹⁵ OAC 3745-39-03(A)(1)(b).

⁹⁶ OAC 3745-39-03(B)(3).

⁹⁷ See http://epa.ohio.gov/dsw/permits/GP_MS4StormWater.aspx (last visited June 2, 2016).

⁹⁸ OAC 3745-39-03(C)(1) and (2).

⁹⁹ OAC 3745-39-03(C)(2)(a)–(f).

¹⁰⁰ 40 C.F.R. § 122.26(b)(14).

¹⁰¹ 40 C.F.R. § 122.26(b)(15).

¹⁰² See http://epa.ohio.gov/dsw/permits/GP_MS4StormWater.aspx (last visited June 2, 2016) .

¹⁰³ 74 Fed. Reg. 62,996 (Dec. 1, 2009).

§ 3.06. Antidegradation

Antidegradation is a federally required component of each state’s water quality standards.¹⁰⁴ Ohio law sets forth in detail the state’s antidegradation policy.¹⁰⁵ The antidegradation provisions describe the conditions under which water quality may be lowered in surface waters. Existing beneficial uses must be maintained and protected. Further, water quality better than that needed to protect existing beneficial uses must be maintained unless lower quality is deemed necessary to allow important economic or social development.¹⁰⁶

Navigating the antidegradation review process is a prerequisite to obtaining various water quality related permits and approvals in Ohio. It is mandated where certain triggering conditions are present that indicate the proposed activity will lower water quality.¹⁰⁷ Antidegradation review can be required in various permitting scenarios, including where a discharger seeks a new or modified PTI for a treatment works, industrial or storm water NPDES permit or a permit to impact wetlands.¹⁰⁸

In 2003, Ohio EPA promulgated significant revisions to its antidegradation regulations.¹⁰⁹ These rules detail numerous specific scenarios

where antidegradation review will be required and also where activities are exempt from such review.¹¹⁰ Public participation procedures are a significant component of the antidegradation review process. A sliding scale from minimal to elaborate public participation mandates (corresponding generally to the relative proposed impacts and quality of the receiving water) are required of projects navigating the process.¹¹¹

The quality and regulatory status of the receiving water will often significantly impact the criteria and process mandated to navigate the antidegradation review process. Water bodies designated “outstanding national resource waters” (as well as other high quality waters) are subject to enhanced standards and procedural requirements where discharges impacting such waters go through antidegradation review.¹¹² Certain regulatory exclusions and waivers can provide some measure of relief in certain situations from antidegradation review requirements.¹¹³

Footnotes — § 3.06:

¹⁰⁴ 40 C.F.R. § 131.12.

¹⁰⁵ R.C. 6111.12.

¹⁰⁶ R.C. 6111.12.

¹⁰⁷ See R.C. 6111.12 and OAC 3745-1-05.

¹⁰⁸ OAC 3745-1-05; OAC 3745-1-54.

¹⁰⁹ See OAC 3745-1-05, 3745-1-50; 3745-1-54.

¹¹⁰ OAC 3745-1-05(B)(2).

¹¹¹ OAC 3745-1-05(C)(3).

¹¹² See OAC 3745-1-05(C)(4).

¹¹³ See OAC 3745-1-05(D).

§ 3.07. Underground Injection Wells

Ohio EPA also has authority to regulate the underground injection of sewage, industrial waste, and other liquid wastes into wells. Pursuant to this authority, Ohio EPA has developed a program controlling underground injection that has been approved by the U.S. EPA pursuant to the Safe

Drinking Water Act.¹¹⁴ The framework for regulation in Ohio of discharges of wastewaters via injection to underground wells is laid out in both the Revised Code and a set of regulations promulgated by Ohio EPA.¹¹⁵ Pursuant to this Underground Injection Control (“UIC”) program, no person may drill a new well or convert an existing well for injecting sewage, industrial waste or other waste without first securing a UIC permit from Ohio EPA.¹¹⁶ Under Ohio law, the Director is required to evaluate UIC permit applications by determining whether the proposed discharges would comply with the federal Clean Water Act, the federal Safe Drinking Water Act and Ohio water pollution control law.¹¹⁷ Ohio EPA is also required to seek input from the Ohio Department of Natural Resources on certain mineral resource, geologic and seismic implications of the discharges proposed in such permit applications.¹¹⁸

Three primary types of UIC wells are regulated by Ohio EPA.¹¹⁹ Class I wells are generally used to inject large volumes of hazardous and non-hazardous liquid wastes thousands of feet below ground into porous geologic formations. Only a handful of these highly regulated wells operate currently in Ohio. Extensive data concerning geologic formations, stability and seismic conditions are among the information requirements to site a Class I well.¹²⁰ Operating restrictions upon Class I wells also demand various measures to ensure the wastewaters safely reach their intended destination.¹²¹

Class IV wells are generally used by hazardous or radioactive wastes or operators of hazardous waste treatment facilities to inject hazardous or radioactive wastes into or in the vicinity of an aquifer that may be used for drinking water.¹²² These wells are broadly prohibited except in very limited situations.¹²³ The narrow circumstances under which a Class IV well may be permitted involve injection of contaminated ground water that has been treated and is being reinjected after treatment into the same formation from which it was drawn.¹²⁴ Detailed closure plans must be approved and implemented prior to closure of Class IV wells.¹²⁵

Class V wells are generally shallow wells commonly used to inject various non-hazardous fluid wastes directly below the land surface into or above aquifers that might be utilized for drinking water.¹²⁶ This relatively common variety of injection well has been utilized for decades or longer in a variety of industries, more frequently today in rural and un-sewered areas. All Class V wells must be registered with Ohio EPA.¹²⁷ Class V wells injecting

industrial or certain other wastes must secure a permit to drill and a permit to operate.¹²⁸ Certain Class V wells injecting only sanitary wastes must be permitted by Ohio EPA's Division of Surface Water and also registered as a Class V well.¹²⁹

Footnotes — § 3.07:

¹¹⁴ R.C. 6111.043; OAC Chapter 3745-34.

¹¹⁵ See R.C. 6111.043 and OAC 3745 Chapter 34.

¹¹⁶ R.C. 6111.043(C) and (E).

¹¹⁷ R.C. Chapter 6111.

¹¹⁸ R.C. 6111.044.

¹¹⁹ Two other types of UIC wells, commonly known as “Class II” and “Class III” wells, are related to certain specific mining and oil and gas operations. Class II and Class III wells are regulated in Ohio by the Ohio Department of Natural Resources.

¹²⁰ See OAC 3745-34-51 and 3745-34-37.

¹²¹ *E.g.*, OAC 3745-34-38 and 3745-34-50.

¹²² OAC 3745-34-08.

¹²³ OAC 3745-34-08(A).

¹²⁴ OAC 3745-34-08(C).

¹²⁵ OAC 3745-34-08(B).

¹²⁶ OAC 3745-34-04(E).

¹²⁷ OAC 3745-34-11(L).

¹²⁸ OAC 3745-34-11.

¹²⁹ OAC 3745-34-11-(A) and 3745-34-11(D).

§ 3.08. Enforcement

[1] Introduction

Ohio's water pollution laws are enforced by U.S. EPA and Ohio EPA and, in some instances, by local government entities. While [Chapter 15 below](#)

discusses enforcement procedure in great detail and [Chapter 16 below](#) discusses criminal enforcement, some discussion of enforcement as relates to water pollution control law is provided below.

[2] Federal

Ohio has been designated authority to administer programs under the federal Clean Water Act by U.S. EPA. However, U.S. EPA retains separate authority to enforce the Clean Water Act requirements.¹³⁰ Citizen suits are authorized to enforce the federal Clean Water Act requirements.¹³¹ For citizen suits, notice must be given to the Ohio EPA, U.S. EPA, and the alleged violator 60 days prior to any action.¹³² A citizen suit may not be filed where the State of Ohio or the Administrator has “commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.”¹³³

One effective and relatively expedient enforcement tool at U.S. EPA’s disposal to address violations of Clean Water Act requirements is the use of administrative orders and penalties. However, when utilizing this enforcement mechanism, U.S. EPA is limited by statute in the amount of civil penalties it may seek. In an administrative enforcement action, U.S. EPA may seek only \$11,000 per violation up to a maximum of \$37,500 per enforcement proceeding.¹³⁴ The violation of administrative orders that may arise from such administrative enforcement proceedings also can be the basis for additional fines, penalties, or even potentially criminal enforcement where a knowing violation may arise from failure to comply with an administrative order.

Civil actions also are brought by the U.S. EPA and Department of Justice. In some situations, the Ohio Attorney General’s Office may intervene in these enforcement matters. The civil suit provisions under the federal Clean Water Act allow for up to \$37,500¹³⁵ per day per violation as well as injunctive relief.¹³⁶ Civil penalty amounts arrived at in civil enforcement actions are typically negotiated with reference to the various factors laid out in U.S. EPA’s civil penalty policy.¹³⁷ Furthermore, most actions, whether negotiated through a consent order or resolved through trial, result in agreements or orders that also include injunctive relief to come into compliance with the law.¹³⁸

While a majority of enforcement actions proceed administratively or as civil actions seeking penalties and injunctive relief as remedies, the Clean Water Act provides for criminal enforcement as well.¹³⁹ Criminal actions for violations of the federal Clean Water Act are generally classified as felonies if prosecuted by the federal government.¹⁴⁰ Both knowing violations¹⁴¹ and also even negligent violations of certain Clean Water Act mandates may also be prosecuted criminally under certain circumstances.¹⁴² However, the statutory maximum criminal fines and terms of imprisonment are naturally elevated for knowing violations.¹⁴³

[3] State

Ohio law does not provide for citizen suits, but does allow individual citizens to submit verified petitions to Ohio EPA in order to precipitate state investigation, and perhaps enforcement, of alleged violations.¹⁴⁴ Most commonly, however, Ohio water pollution control enforcement matters are handled administratively and are resolved via direct dialogue with Ohio EPA through Director's Findings and Orders.

Civil actions are brought by the Ohio Attorney General's Environmental Enforcement Section, upon referral to that office of the action by Ohio EPA. The State may seek injunctive relief and civil penalties of up to \$25,000 per day, per violation for a violation of Ohio's water pollution laws.¹⁴⁵ As a practical matter, Ohio also utilizes the U.S. EPA's civil penalty policy¹⁴⁶ in conducting negotiations over civil penalties. Generally, the Ohio Attorney General's Office employs an informal policy of attempting to negotiate with alleged violators prior to bringing an action, except in cases of an imminent threat to human health or the environment. Where the Attorney General's pre-filing negotiations do lead to settlement prior to the filing of suit, the State will typically nevertheless require that the resolution is memorialized through a filed complaint and consent order. Purposeful violations of Ohio's water pollution statute are also punishable criminally by fines up to \$25,000 and prison terms up to four years per offense.¹⁴⁷

Enforcement against alleged violators of pretreatment standards or permits may be pursued by either the POTW receiving the discharge or, in some cases, the State. Often the POTW will pursue enforcement administratively in the first instance. Typically, POTWs will only refer matters involving their indirect discharges to the State for enforcement where

their efforts to resolve the matter through informal negotiations have not been successful.

Footnotes — § 3.08:

¹³⁰ 33 U.S.C. § 1319(a).

¹³¹ 33 U.S.C. § 1365.

¹³² 33 U.S.C. § 1365(b).

¹³³ 33 U.S.C. § 1365(b)(1)(B).

¹³⁴ Class I administrative penalties are limited to these maximums by statute. See 33 U.S.C. § 319(g)(2) and 40 C.F.R. § 19.4. Note that Class II administrative penalties are subject to higher maximum penalty amounts (\$37,500 per violation and \$187,500 per case) but also require additional process. 33 U.S.C. § 1319(g)(2)(B).

¹³⁵ 40 C.F.R. § 19.4.

¹³⁶ 33 U.S.C. § 1319.

¹³⁷ U.S. EPA, Clean Water Act Civil Penalty Policy (Feb. 11, 1986), revised effective March 1, 1995.

¹³⁸ 33 U.S.C. § 1319.

¹³⁹ 33 U.S.C. § 1319.

¹⁴⁰ 33 U.S.C. § 1319.

¹⁴¹ 33 U.S.C. § 1319(c)(2).

¹⁴² 33 U.S.C. § 1319(c)(1).

¹⁴³ Compare 33 U.S.C. § 1319(c)(1), (c)(2) and (c)(3).

¹⁴⁴ R.C. 3745.08.

¹⁴⁵ R.C. 6111.07 and 6111.99.

¹⁴⁶ U.S. EPA, Clean Water Act Civil Penalty Policy, (Feb. 11, 1986), revised effective March 1, 1995.

¹⁴⁷ R.C. 6111.99.

CHAPTER 4

WETLANDS AND STREAMS

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I.

INTRODUCTION

§ 4.01. Scope

This chapter examines the intertwined federal and state jurisdiction over Ohio’s wetlands and streams:

- The nature and extent of federal jurisdiction [§§ 4.02 and 4.03 *below*].
- Ohio’s jurisdiction over wetlands and streams [§§ 4.04 and 4.05 *below*].

- The important classifications of wetlands and streams upon which the regulations operate [[§ 4.06 below](#)].
- The permit process for filling wetlands and streams [[§§ 4.07–4.14 below](#)].
- A brief word about enforcement is presented in [[§ 4.15 below](#)].

II.


DETERMINING APPLICABLE JURISDICTION

§ 4.02. Federal Jurisdiction under Rivers and Harbors Act

[1] Defining Jurisdiction and “Navigable Waters”

Pursuant to the Commerce Power, the federal Government has authority over navigation.¹ The federal government has exercised this authority under statute since the passage of the Refuse Law in 1899, more commonly known today as the Rivers and Harbors Act.² The purpose of this statute was to keep navigable waters, in particular rivers and harbors used for commercial navigation, free from obstruction. The Army Corps of Engineers implements and enforces the Rivers and Harbors Act.

“Navigable waters” under the Rivers and Harbors Act are defined in the traditional sense as, generally, those waters used or capable of being used for commercial navigation. Determination of what constitutes navigable is thus bounded by this test, but is subject to judicial determination and rulemaking.³ Further, most federal navigable rivers in Ohio have a point known as “the head of navigation,” which constitutes the upstream limit of commercial navigation and the point at which jurisdiction under the Rivers and Harbors Act ends.

 **Strategic Point:** Authority and regulation under the Rivers and Harbors Act overlaps with federal authority under the Clean Water Act. Any obstruction or fill placed into the navigable waters subject to the Rivers and Harbors Act, such as a dock, water intake or erosion control structure, requires a permit under Section 10 of the Act in addition to any state and federal requirements under the Clean Water Act.

Footnotes — § 4.02:

¹ U.S. Const., Article I, § 8.

² 33 U.S.C. § 401 *et seq.*

³ The Corps' regulations themselves admit that “precise definitions of ... ‘navigable waters’ ... cannot be made conclusively by administrative agencies.” 33 C.F.R. § 329.3. See 33 C.F.R. § 329.1 *et seq.* for a full discussion of the multiple factors involved in determining “navigability.”

§ 4.03. Federal Water Pollution Control Act

Known more generally as the Clean Water Act, the Federal Water Pollution Control Act⁴ extends far beyond the reach of the Rivers and Harbors Act. The Clean Water Act governs the quality of “navigable waters.” Yet unlike the Rivers and Harbors Act, the CWA defines “navigable waters” as “waters of the United States, including the territorial seas.”⁵ The Clean Water Act prohibits any discharge of pollutants, including any dredge or fill material, into the “waters of the United States” without a permit. Clean Water Act Section 404 requires that dredge or filling activities must be permitted by the Army Corps of Engineers.⁶ By regulation and case law, the definition of “waters of the United States” was extended to almost any surface water body or wetland. That interpretation of federal CWA jurisdiction was seriously challenged by the decision of the U.S. Supreme Court in *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001). In that decision, the Supreme Court invalidated one regulatory interpretation of jurisdiction premised on authority under the federally-enforced migratory bird treaties as being outside the scope of the Commerce Power. In so doing, the Court also openly questioned whether Congress intended CWA regulation to extend beyond traditional “navigable waters.” A period of uncertainty ensued, where the Army Corps continued to assert a broad interpretation of jurisdiction, but various federal courts reached differing results. The split in Circuits eventually led to the Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a 4-1-4 decision that has produced even greater uncertainty. While the EPA and the Army Corps have attempted to alleviate this uncertainty as discussed below, federal courts continue to disagree as to the controlling standard in *Rapanos*.⁷

U.S. EPA and the Army Corps issued “interim” jurisdictional guidance (“Interim Jurisdictional Guidance”) on December 2, 2008 to implement the

Rapanos decision and to respond to public comments to the agencies' 2007 *Rapanos* jurisdictional guidance document. Specifically, the Interim Jurisdictional Guidance states that the agencies will assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally, and wetlands that directly abut tributaries. The Interim Jurisdictional Guidance states that the most controversial jurisdictional determinations will be made on a case-by-case basis focused on whether the waters have a "significant nexus" with a "Traditional Navigable Water." Further, the Interim Jurisdictional Guidance states that the Army Corps will not generally assert jurisdiction over swales or erosional features, or ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. The U.S. EPA and Army Corps make clear, however, that the Interim Jurisdictional Guidance is merely for guidance in making "navigable water" determinations and any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law.

⚠ Warning: On June 29, 2015, U.S. EPA and the Army Corps released the final Clean Water Rule to clarify protection under the CWA for streams and wetlands, and to attempt to resolve the jurisdictional ambiguities following *Rapanos*.⁸ Under the final rule, "waters of the United States" would include: traditional navigable waters; interstate waters; territorial seas; and impoundments. "Waters of the United States" would also include many tributaries, "adjacent waters," and waters having a "significant nexus" to navigable waters based on standards set forth in the rule. Specifically, for the first time, U.S. EPA defined "tributary" in the rule, and classifies them as waters of the United States where a bed, bank and ordinary high-water mark can be identified. The rule also clarifies the concept of covered "adjacent waters," which would be all adjacent waters within set distances from navigable waters. Finally, U.S. EPA re-worked the *Rapanos* test for "other waters" qualifying as waters of the United States, and instead defines specific isolated waters (e.g., western vernal pools, prairie potholes, etc.) and waters with a significant nexus (i.e., waters that can significantly affect the integrity of

navigable water) to navigable waters as additional jurisdictional waters.

U.S. EPA published the rule and commented that it narrowed previous interpretations of waters of the United States and provided greater certainty to the long disputed jurisdictional dispute. Industry groups, however, criticized the rule claiming it impermissibly expanded the definition of jurisdictional waters, and challenged the rule in the Court of Appeals for the Sixth Circuit. On October 9, 2015, the Sixth Circuit stayed the applicability of the final rule pending further action by the court,⁹ and on February 22, 2016 the court held it that it would retain jurisdiction over challenges to the final rule.¹⁰ As of April 2017, the final rule remains stayed while parties continue to dispute the appropriate legal venue. To further complicate matters, newly elected President Donald Trump issued an Executive Order on February 28, 2017 ordering U.S. EPA to “review” the final rule and propose a new rule defining navigable waters in a manner consistent with Justice Anthony Scalia’s opinion in *Rapanos* which narrowed the definition of waters of the state and would unlikely capture most non-traditional navigable waters.¹¹ Thus, it seems unlikely that the final rule will become effective as drafted, as it continues to be subject to judicial scrutiny and no longer has the support of the President of the United States nor U.S. EPA. During this stay and/or potential review of the final rule by U.S. EPA, U.S. EPA and the Army Corps will continue to apply the Interim Jurisdictional Guidance discussed above but parties may now have stronger arguments for less restrictive interpretations of *Rapanos* given the plurality decision and the shift in stated federal policy.

Footnotes — § 4.03:

⁴ 33 U.S.C. § 1251 *et seq.*

⁵ 33 U.S.C. § 1362(7).

⁶ 33 U.S.C. § 1344.

⁷ *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2007); *Nat’l Ass’n of Home Builders v. United States Army Corps of Eng’rs*, 699 F. Supp. 2d 209 (D.D.C. 2010), *vacated on other grounds*, 663 F.3d 470 (D.C. Cir. 2011).

⁸ 80 Fed. Reg. 37054 (June 29, 2015).

⁹ *Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015).


¹⁰ *Murray Energy Corp. v. United States DOD (In re EPA & DOD Final Rule)*, 817 F.3d 261 (6th Cir. 2016).

¹¹ <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic> (last visited Apr. 11, 2017).

§ 4.04. Ohio Jurisdiction over Wetlands and Streams

The CWA provides that states may undertake primary implementation and enforcement of the CWA. One of the reasons that Ohio EPA was created was to accept delegation of the CWA program. Ohio's then-existing water quality authorities were amended in order to meet the requirements of the CWA.

Long before the passage of the Clean Water Act, however, the State of Ohio had asserted jurisdiction of “waters of the state,” which are defined as essentially any water in the state except “those private waters that do not combine or effect a junction with natural surface or underground waters.”¹² Notably, this state jurisdiction is not tied to the “navigability” of the water, in contrast to federal authority.¹³ Indeed, the definition includes regulation of groundwater.

 **Strategic Point:** Because of jurisdiction over “waters of the state,” some Ohio regulators have spoken in terms of the state “owning” the groundwater. Since the Ohio Supreme Court has clarified that landowners own real property rights in the groundwater beneath their property,¹⁴ regulation and interpretations are undergoing reconsideration.

Ohio statutory authority actually is broader than the authority under the CWA. Specifically, **R.C. Chapter 6111** governs not just the addition of pollutants to water, but expressly reaches and prohibits anyone from putting “wastes” where they may threaten to enter water. Because the definition of “waste” includes not only any “pollutant” but also virtually anything that is not water itself, the state of Ohio possesses extremely broad authority.¹⁵

When the extent of federal jurisdiction was pulled back in the wake of the U.S. Supreme Court decision in *SWANCC*, Ohio quickly instituted an “isolated wetlands” regulatory regime that filled the perceived regulatory gap over wetlands that were not hydrologically connected to federal “navigable waters.” This regime is premised on Ohio’s authority over “waters of the state.” Specifically, “isolated wetlands” in Ohio are defined as “wetlands that are not subject to the Federal Water Pollution Control Act.” Discharges of dredge or fill material into Ohio isolated wetlands without a permit is prohibited.¹⁶

Determination of whether a wetland is isolated or “non-isolated” (or “adjacent”) is made by the Army Corps as part of a “jurisdictional review.”¹⁷ The Corps has adopted a process for allowing appeals of jurisdictional determinations.¹⁸

Footnotes — § 4.04:

¹² R.C. 6111.01(H) (“ ‘waters of the state’ means all streams, lakes, ponds, marshes, watercourses, waterways, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface or underground, natural or artificial, regardless of the depth of strata in which underground water is located, that are situated wholly or partially within this state or within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.”).

¹³ See discussion of Ohio “navigability” law in Chapter 8.

¹⁴ *State, ex rel. McNamara, v. City of Rittman*, 107 Ohio St. 3d 243 (2006), *aff’d sub nom. Hensley v. City of Columbus*, 557 F.3d 693 (6th Cir. 2009); for a complete discussion, see [Chapter 5](#) below.

¹⁵ R.C. 6111.01(D).

¹⁶ R.C. 6111.021.

¹⁷ During the jurisdictional review, the Army Corps will also make determinations regarding the existence and types of jurisdictional streams on the property. See [§ 4.06](#) below.

¹⁸ 33 C.F.R. § 331.

III.

DETERMINING TYPES OF WETLANDS AND STREAMS

§ 4.05. Delineating and Categorizing Wetlands

Wetlands are defined for regulatory purposes as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”¹⁹

⚠ Warning: Wetlands are not always wet. Wetlands are defined by the three elements of land having (1) sufficient hydrology, (2) hydrological plants, and (3) hydrological soil types. Only two elements must be present at any time to constitute a “wetland.”

In the field, wetlands are delineated to determine their scope and location in accordance with procedures in the 1987 Army Corps of Engineer Manual, Technical Report Y-87-1, “Field Guide for Wetland Delineation.”²⁰ Delineators generally will mark the boundary by flagging and then recording the boundaries with a Global Positioning System (GPS). A wetlands delineation is valid for only five years.

⚠ Warning: Because wetlands are water bodies and thus have dynamic boundaries, actual delineations are required because no inventory captures the constant changes. However, a listing on the Nationwide Inventory of Wetlands and aerial photographs showing wet areas in the past, while insufficient for delineation, are relevant evidence where an alleged wetland has been filled without a permit.


In Ohio, wetlands must also be categorized for purposes of antidegradation review²¹ and, ultimately, for mitigation requirements, based on “the wetland’s relative functions and values, sensitivity to disturbance, rarity and potential to be adequately compensated for by wetland mitigation.”²² Typically, this information is collected during the wetland delineation, though it is not expressly part of the delineation process.

Checklist: Wetland functions and values

The following is a non-exclusive list of wetland functions and values relevant to categorizing Ohio wetlands:

- Nutrient removal or transformation

- Sediment or containment retention
- Water storage
- Sediment stabilization
- Shoreline stabilization
- Maintenance of biodiversity
- Recreation
- Education and research
- Habitat for threatened or endangered species
- Regional significance functions

 **Strategic Point:** While Ohio regulations state that for categorizing wetlands the director of Ohio EPA will consider results of a wetland evaluation method acceptable to the director,²³ in practice Ohio Rapid Assessment Method (ORAM) is used most often.²⁴ For isolated wetlands, ORAM Version 5.0 is specified by statute.²⁵

Wetlands are categorized as Category 1 (low quality and function),²⁶ Category 2 (moderate quality and function)²⁷ and Category 3 (high quality and function).²⁸ As noted below, the relevant category determines the alternative analysis required prior to obtaining Ohio certification under the Clean Water Act and the level of any required mitigation.

Footnotes — § 4.05:

¹⁹ 40 C.F.R. § 230.3(t) (The definition of “wetland” was not changed in U.S. EPA’s final rule on waters of the United States (80 FR 37115), which is currently stayed as discussed in the Warning in [Section 4.03 above](#). Thus, the pre-final rule federal citation for this definition remains in this publication); OAC 3745-1-02(B)(97).

²⁰ OAC 3745-1-02(B)(97).

²¹ “Antidegradation” refers to the process of review and the requirements predicate to issuance of any permit that might lower existing water quality. R.C. 6111.12.

²² OAC 3745-1-54.

²³ OAC 3745-1-54(B)(2)(a)(ii).

²⁴ <http://www.epa.ohio.gov/dsw/401/ecology.aspx> (last visited Apr. 11, 2017).

²⁵ R.C. 6111.02(A).

²⁶ OAC 3745-1-54(C)(1) (describing and giving examples).

²⁷ OAC 3745-1-54(C)(2) (describing and giving examples).

²⁸ OAC 3745-1-54(C)(3) (describing and giving examples).

§ 4.06. Determining Stream Types

[1] Stream Classification Based on Flow

Similar to wetlands, which are not always wet, streams do not have to carry water over the course of an entire year in order to be subject to regulation. Some streams are “intermittent,” meaning streams that flow for part of the year.²⁹ Other streams are ephemeral, which means they carry water only during a runoff event.³⁰ Streams that generally carry flow year round are termed “perennial.”³¹ As noted below, classification based on flow affects the level of regulation. The Army Corps asserts jurisdiction over all streams that are tributary to navigable waters within the terms of the 2008 Interim Jurisdictional Guidance, as well as non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally.³² The State of Ohio asserts jurisdiction over all streams as “waters of the state.”

[2] Categorizing Stream Quality

Ohio EPA, in consultation with the Ohio Department of Natural Resources,³³ categorizes water bodies, including streams, in terms of water quality and ecological or recreational value for purposes of antidegradation review.³⁴ Categories range from “limited quality waters” to “general high quality waters,” “superior high quality waters” or “outstanding quality waters.”³⁵ Like the wetlands antidegradation process, the level of alternatives analysis, treatment level and mitigation increases with each higher quality category. Depending on the category of water, the director must reserve and maintain a specified level of remaining pollutant assimilative capacity. This level of reserve also increases with each higher category.³⁶ Waters that are designated other than as “general high quality waters” are listed in tables

attached to [OAC 3745-1-05](#).³⁷

Footnotes — § 4.06:

²⁹ R.C. 3745.114(G)(2).

³⁰ R.C. 3745.114(G)(1).

³¹ R.C. 3745.114(G)(3).

³² See Warning at § 4.03 above.

³³ ODNR is responsible for designating State Scenic Rivers, of which ODNR counts 14 in Ohio. Designation as “scenic” restricts access and use of the attendant waters and land. See [OAC Chapter 1501:17](#).

³⁴ [OAC 3745-1-05\(E\)](#).

³⁵ [OAC 3745-1-05\(A\)\(10\)](#) & (12).

³⁶ [OAC 3745-1-05\(C\)\(6\)](#).

³⁷ See Tables 5-4 to 5-7 attached to [OAC 3745-1-05](#). For example, all of Lake Erie is designated as a “superior high quality water.”

IV.


NAVIGATING WETLAND AND STREAM PERMITTING PROCESS

§ 4.07. CWA Section 404 Process

The Clean Water Act prohibits the discharge of any pollutants, including dredge or fill material, into jurisdictional waters without a permit. Permits for dredge and fill activities are issued by the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act.³⁸ The Army Corps cannot issue a 404 permit without providing the delegated state or local enforcement entity the opportunity to certify that the dredging or filling will not violate water quality standards that the state is responsible for enforcing.³⁹ Permits from the Army Corps under Section 404 can take several forms.

The process starts with an application to the relevant Army Corps regional office. An application to the Corps regional office also constitutes a request to Ohio EPA for a water quality certification under Section 401. (See

§ 4.11 below.)

 **Strategic Point:** The Corps strongly encourages pre-application consultation and can make jurisdictional determinations prior to application.⁴⁰

Footnotes — § 4.07:

³⁸ 33 U.S.C. § 1344.

³⁹ 33 U.S.C. § 1341.

⁴⁰ 33 C.F.R. § 325.1(b).

§ 4.08. Section 404 Individual Permits


Generally, for impacts to 0.50 acres or more of wetlands or 300 linear feet of perennial and intermittent stream, or 500 feet of combined (ephemeral, linear and intermittent wetlands), an Individual Permit from the Corps is required. This permit requires its own Public Notice, a possible Public Hearing and a separate 401 certification from Ohio EPA.⁴¹ The permit must include detailed alternatives and socioeconomic analysis. In practice, individual permits have required from 6 months to a year lead time.

Footnotes — § 4.08:

⁴¹ 33 C.F.R. § 325.5(b).


§ 4.09. Small Impacts and Nationwide Permits Under Section 404


For impacts less than 1/10th of an acre, no permit is required by the Army Corps and no mitigation is required. However, a post-construction notice is required.

 **Warning:** Ohio's isolated wetlands regimes do not have a de minimus threshold under which no permit is required.

For small impacts between one-tenth to one-half of an acre, or for specified recurring activities such as maintenance, the Corps has issued (and Ohio EPA has certified) a series of Nationwide Permits (“NWPs”) tailored to

specific types of activities commonly the subject of Section 404 permitting. These permits do not require an application, but most of them require Pre-Construction Notification, which allows the Corps to review the notice and determine if an individual or regional permit is required.

 **Strategic Point:** If a project can use a Nationwide Permit, then it generally proceeds much more quickly than awaiting issuance and certification of a general or individual permit.⁴²

 **Warning:** A person can combine two or more NWP's, but can only use the same Nationwide Permit once per project or property, which the Army Corps construes expansively under their “single and complete project” policy.⁴³


Footnotes — § 4.09:

⁴² 33 C.F.R. § 325.5(c)(2).

⁴³ 33 C.F.R. § 330.2(i); 33 C.F.R. § 330.6(c).

§ 4.10. Compliance with Other Federal Requirements

All Section 404 permits, including Nationwide Permits, attach general conditions to every authorization to dredge or fill.⁴⁴ For example, these conditions include a requirement that when an applicant discovers any previously unknown historic or archeological remains, the applicant must cease work and notify the Corps so the Corps can determine whether the remains are subject to the National Historic Preservation Act.⁴⁵ In addition, Army Corps district offices are entitled to attach additional conditions to all permits, including Nationwide Permits.⁴⁶

 **Warning:** As a federal undertaking, issuance of a 404 permit must also comply with the Endangered Species Act and coordinate with the U.S. Fish and Wildlife Service. In practice in Ohio, the applicant must contact the USFWS for a determination of habitat for the Indiana Bat within a 5 mile radius of the project. If identified habitat is within the 5 mile radius, the applicant faces timing and activity restrictions as well as other obligations.

Footnotes — § 4.10:

⁴⁴ General conditions are published at [33 C.F.R. § 325](#), App. A.

⁴⁵ See [Chapter 24](#) below.

⁴⁶ [33 C.F.R. § 325.4](#).

§ 4.11. Ohio EPA Section 401 Certifications

Ohio EPA must certify that any impacts to wetlands or streams will occur in compliance with state water quality standards under the Clean Water Act. This review of proposed impacts is called an “antidegradation review.” Different levels of analysis apply based on the category of wetland at issue.

The Section 401 certification process starts with the submittal of an application to Ohio EPA, which requires extensive documentation regarding the proposed project and pre-consultation with other agencies such as the Ohio Department of Natural Resources.⁴⁷ Ohio EPA recently committed to specific timeframes in order to expedite the process. Ohio EPA will make a Completeness Review of the application within 15 days of receipt. The required Public Notice must be sent to the appropriate newspaper within 21 days. The application will be processed in 180 days.⁴⁸

Footnotes — § 4.11:

⁴⁷ [OAC 3745-32-03\(B\)](#).

⁴⁸ [R.C. 6111.30](#); [OAC 3745-32-03\(C\)](#).

§ 4.12. Alternatives Analysis

Ohio alternatives analysis is a tiered scheme that applies the least rigorous analysis to low quality, Category 1 wetlands and progressively more rigorous scrutiny as the category and water quality go up.

For example, an applicant to fill a Category 1 wetland must show (1) no practical alternative with less impact exists, (2) storm water and water quality controls will be installed, (3) the impact will not result in significant degradation to the aquatic ecosystem, and (4) the designated use is replaced by a category 2 or category 3 wetland.⁴⁹

An applicant to fill a Category 2 wetland must meet all the requirements for Category 1 plus undertake a more in-depth review of alternatives and

efforts for minimization. In addition, the applicant must show that filling the Category 2 wetland is “necessary to accommodate important social and economic development in the area where the water body is located,”⁵⁰ though these terms are not defined.

An applicant to fill a Category 3 wetland faces all the requirements for Category 1 and Category 2 wetlands, as well as an overall presumption that alternatives exist. Not only must the applicant show that the project meets “important social and economic development in the area,” the applicant must also separately show that the project “is necessary to meet a demonstrated public need.”⁵¹ “Public need” is defined as “an activity or project that provides important tangible and intangible gains to society, that satisfies the expressed or observed needs of the public where accrued benefits significantly outweigh reasonably foreseeable detriments.”⁵²

⚠ Warning: The presumption against filling a Category 3 wetland expressed in the regulations is strong, and Ohio EPA interpretation makes it more so. Ohio EPA has in the past required a demonstration of “public need”—defined as an activity or project that provides important tangible or intangible *gains to society*—that is separate and unrelated to any *social or economic benefit*, on the theory that the regulations for Category 3 separately recite both requirements. Consequently, identifying a public need that “provides important gains to society” but is not a “social benefit” has proven exceedingly rare to date.

Footnotes — § 4.12:

⁴⁹ OAC 3745-1-54(D)(1)(a).

⁵⁰ OAC 3745-1-54(D)(1)(b).

⁵¹ OAC 3745-1-54(D)(1)(c).

⁵² OAC 3745-1-50(II).

§ 4.13. Mitigation Requirements

The policy of the Army Corps and of Ohio EPA is to have No “Net Loss” of wetlands. To effect that, the Army Corps has a basic policy of requiring at

least 1.5 acres of mitigation for every acre filled. In addition, the Army Corps can and does require financial assurance for completion of mitigation projects.⁵³

Ohio EPA's mitigation requirements under the 401 certification program are more expansive, with ratios as high as 4 acres for every acre filled, depending on the category and other characteristics of the wetland. Filled wetlands must be replaced with wetlands of the same or higher quality. Mitigation ratios increase if the mitigation is not onsite. For Category 2 and 3 wetlands, mitigation must be in the same watershed.⁵⁴

Mitigation often is accomplished through purchasing mitigation credits from approved wetlands mitigation banks that are intended to establish the "functions" of wetlands that are eliminated elsewhere. Other methods of mitigation include restoring or creating wetlands, preserving wetlands, and enhancing wetlands.⁵⁵

Wetland mitigation banks recognized by the Army Corps and Ohio EPA must enter into a written agreement with the Mitigation Banking Review Team (MBRT) pursuant to a 1995 Army Corps guidance document.⁵⁶ The MBRT includes the Army Corps, U.S. Fish and Wildlife Service, Natural Resource Conservation Service, ODNR and Ohio EPA. Upon entering into an agreement, mitigation bankers are entitled to sell up to 30% of credits to fund construction. Mitigation banks must have a "long-term manager" to assume maintenance in perpetuity.

Footnotes — § 4.13:

⁵³ See, e.g., 33 C.F.R. § 325.4(d).

⁵⁴ OAC 3745-1-54.

⁵⁵ OAC 3745-1-54.

⁵⁶ See "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks," effective December, 1995, 60 Fed. Reg. 58605 (Nov. 28, 1995).

§ 4.14. Permitting under Ohio's Isolated Wetlands Regime

Ohio's permitting scheme for filling Isolated Wetlands comports closely with the Section 401 certification outlined above, with some changes. By statute, Isolated Wetlands must be assessed using ORAM 5.0.⁵⁷ Ohio EPA has

specified different levels of review depending the size and category of wetland impacted and has also specific timeframes for review.⁵⁸

Footnotes — § 4.14:

⁵⁷ R.C. 6111.02(A).

⁵⁸ R.C. 6111.022–.024.

§ 4.15. Enforcement

Filling wetlands and streams is subject to penalties up to \$51,570 per violation, with each day constituting a new violation.⁵⁹ “Knowing” unlawful filling activities are subject to criminal prosecution. Violation of the Clean Water Act can be a felony.⁶⁰ Violations of [Ohio Revised Code Chapter 6111](#) are subject to fines of up to \$25,000 and one year in prison.⁶¹ Ohio EPA and the Army Corps are also entitled to injunctive relief to require illegal fill to be removed and wetlands and streams to be restored.⁶² For example, by regulation, any Ohio wetland filled without a permit or authorization is presumed to be a Category 3, high quality wetland, which has the correspondingly highest mitigation ratio. The burden shifts to the owner to prove that it was not a Category 3 wetland.⁶³

For a more complete discussion of agency enforcement in general and under the Clean Water Act in particular, see [Chapter 16](#) below on criminal enforcement; [Chapter 15](#) below on civil enforcement; and [Chapter 3](#) above on water pollution.

Footnotes — § 4.15:

⁵⁹ 33 U.S.C. § 1319; 40 C.F.R. § 19.4.

⁶⁰ 33 U.S.C. § 1319(c).

⁶¹ R.C. 6111.99.

⁶² 33 U.S.C. § 1319(b); R.C. 6111.07.

⁶³ OAC 3745-1-54(B)(6).

CHAPTER 5

WATER RIGHTS, COASTAL MANAGEMENT AND LAKE ERIE

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I.

INTRODUCTION

§ 5.01. Scope

This chapter covers:

- Ohio’s common law related to water rights [*see §§ 5.02–5.04 below*].
- Dispute resolution in the context of common law water rights [*see §§ 5.05–5.06 below*].
- Navigability and public trust rights in Ohio waters [*see § 5.07 below*].
- Lake Erie and coastal management in Ohio [*see § 5.08 below*].

II.

WATER RIGHTS AND COMMON LAW OF WATER


§ 5.02. The Common Law and Water

Ohio’s common law addresses water issues under numerous doctrines that have enduring and dispositive effects on the use, control and regulation of water. The common law defines property rights, dispute resolution

mechanisms, uses of water, and distinguishes between public and private access to water. As with all common law, the prevailing common law doctrines relating to water in Ohio have evolved from historical doctrines and precedents and will continue to evolve.

§ 5.03. Classifying “Types” of Water Under the Common Law

The common law developed different rules to address water issues contingent on the locus of the water in the dispute. For example, Ohio’s early common law clearly distinguished “riparian water” (water in a defined channel) from “ground water” (a.k.a. any subterranean “percolating” water) from “surface water” (today, more commonly called “storm water” or “runoff”). While distinctions in applicable doctrines between these “types” of water are less pronounced, differences remain.

 **Strategic Point:** Ohio’s water jurisprudence is full of doctrines that are no longer applicable.

Natural Flow—Most notably: This doctrine provided that a riparian property owner could use water to any extent as long as, after use, the water continued downstream in the same quality and quantity as it would flow in nature.¹

Unlimited Ground Water Usage—Until 1984 when the Ohio Supreme Court applied the “reasonable use” doctrine, Ohio did not recognize any torts or correlative rights by neighboring land users who used or pumped ground water on their property and thereby damaged another’s use of ground water or surface water.²

Surface Water—Until 1980 Ohio courts utilized doctrines of “dominant” and “servient” estates with respect to adjudicating disputes over surface water (storm water).

Footnotes — § 5.03:

¹ See Restatement (2d) Torts, Chapter 41, Introduction.

² *Cline v. American Aggregates Corp.*, 15 Ohio St. 3d 384 (1984), *overruling Frazier v. Brown*, 12 Ohio St. 294, 311 (1861).

§ 5.04. Riparian and Littoral Rights

[1] Difference Between Riparian and Littoral Water and Other Water

The chief distinguishing feature of riparian and littoral water from other water is that, where water is located in a defined channel or waterbody, property rights attach to the use of that water. These rights are real property rights to use water; the water itself is not owned as a chattel. The nature of that property right is defined largely by the Ohio Constitution and tort law.

[2] Riparian Right Defined

A riparian right is “[a] real property right attendant to land that allows the landowner to make use of a body of water.”³ Examples of riparian rights include use of water for domestic use, irrigation, watering livestock, and power generation. Some courts have recognized ingress to and egress from waterways as a “riparian right.” Ohio law recognizes no definitive list of uses of water that are or are not riparian rights. Instead, the limits of use are defined by the Ohio Constitution, tort law and the application of the “reasonable use” doctrine as specified below.

[3] Littoral Rights

Littoral rights are the right to use of a lake, as distinguished from use of riparian water (stream or river). Courts often conflate “riparian rights” with “littoral rights.” Littoral rights include a property right to wharf out to navigable waters.⁴

[4] Riparian and Littoral Rights Are Real Property

Riparian rights are real property and may be “the subject of bargain and sale either with or separate from the land.”⁵ This longstanding doctrine under Ohio law, that riparian rights are severable from the riparian land and may be bought and sold like timber or mineral rights separate from the underlying fee, in practice has been rarely employed in Ohio. Nonetheless, specific examples exist of deeds of water rights as property being transferred without transferring the fee.⁶ Ohio statutory law in specific contexts, such as with respect to conservancy districts, recognizes uses of water as saleable property.⁷

Footnotes — § 5.04:

³ *Mansfield v. Balliett*, 65 Ohio St. 451 (1902).

⁴ *State, ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303 (1943).

⁵ *Mansfield v. Balliett*, 65 Ohio St. 451 (1902).

⁶ See, e.g., *Portage Cty., et al. v. City of Akron*, 156 Ohio App. 3d 657 (Portage Cty. 2004).

⁷ See also R.C. 6101.24.

§ 5.05. Ground Water Rights Are Real Property

In December 2005, the Ohio Supreme Court for the first time recognized in *McNamara v. City of Rittman* the use of ground water as a real property right, part of the bundle of rights attendant to ownership of land.⁸ Government interference with that right, by pumping water or otherwise, can constitute a taking.⁹ The Supreme Court placed groundwater rights on par with riparian rights, which implicitly recognized that the right to use ground water can be transferred separate and apart from the fee ownership of land.¹⁰

Effective January 1, 2009, the Ohio Constitution was amended to explicitly grant a property owner a property interest in the “reasonable use of groundwater underlying the property owner’s land.”¹¹ This amendment reaffirms the *McNamara* decision and requires the continued application of the reasonable use doctrine discussed below. Further, the amendment makes clear that any interference with this property right by the government constitutes a “taking,” and the property owner must be compensated accordingly pursuant to [Article 1, Section 19 of the Ohio Constitution](#).¹²

The implications of the *McNamara* decision, as well as the January 2009 amendment to the Ohio Constitution, will continue to unfold for many years. For example, many regulations administered by Ohio EPA and Ohio Department of Natural Resources were implemented under the prior regime when ground water use was never “owned” and when a taking of property was never considered.¹³ Further, with substantial increases in hydraulic natural gas drilling (i.e., “fracking”) in Ohio, there are growing concerns with the impact of these activities on groundwater in these areas. These concerns will likely lead to increased litigation against drillers in the future based on interference (real or perceived) with these newly acquired rights in

groundwater.

Footnotes — § 5.05:

⁸ *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433 (2005), *aff'd sub nom. Hensley v. City of Columbus*, 557 F.3d 693 (6th Cir. 2009).

⁹ *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433 (2005), *aff'd sub nom. Hensley v. City of Columbus*, 557 F.3d 693 (6th Cir. 2009). In an unpublished decision, however, the Court of Appeals for the Sixth Circuit may have limited potential takings claims under *McNamara* by holding that a landowner only has property rights in groundwater to the extent he/she *actually* uses that water; not merely by virtue of the groundwater's existence. *Baker v. Chevron U.S.A., Inc.*, 2013 U.S. App. LEXIS 16219 (6th Cir. Aug. 2, 2013) (unpublished). Nevertheless, the precedential value of this case is questionable as it was not published.

¹⁰ *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433 (2005), *aff'd sub nom. Hensley v. City of Columbus*, 557 F.3d 693 (6th Cir. 2009).

¹¹ Ohio Const. art. I, § 1.19(b)(C).

¹² Ohio Const. art. I, § 1.19(b)(C).

¹³ Until 1984, Ohio law allowed a landowner to make unlimited use of ground water without regard to neighboring property owners. From 1984 until 2005, Ohio courts and statutes applied a “reasonable use” rule to the use of ground water, thereby imposing some limit on a landowner's use of ground water.

§ 5.06. Reasonable Use and Dispute Resolution

[1] Reasonable Use Doctrine

The doctrine of “reasonable use of water” is the prevailing doctrine under the common law controlling use of riparian water, littoral water and ground water in Ohio. This doctrine has been the law of Ohio for over 100 years when it fully supplanted the natural flow theory. Courts have applied the reasonable use doctrine to complaints surrounding both water quality and water quantity issues, though the thrust has been as a mechanism for quantity allocation among competing uses. Water quality disputes under the common law have largely been supplanted by regulation under the Clean Water Act and other statutory and regulatory regimes. Nonetheless, the reasonable use doctrine retains flexibility to address water quality issues particularly where they are related to water quantity disputes.

While the reasonable use doctrine was adopted under Ohio law by the

Ohio Supreme Court in 1902 relative to riparian rights and in 1984 relative to ground water, those common law precedents were confirmed and shaped by statutory adoption of [R.C. 1521.17](#) in 1988, as well as the legislative adoption of such rights in the Ohio constitutional amendment in 2009. In light of the *McNamara* decision and recognition of ground water use as a real property right, the reasonable use analysis speaks more directly to valuation of use, where property concepts can provide finality, than to offering any definitive or final resolution to conflicting uses.

[2] Resolving Water Rights Disputes Under R.C. 1521.17

[a] Overview

The boundaries of common law riparian and littoral property rights in the resolution of disputes with respect to ground water and riparian and littoral water are governed by [Revised Code 1521.17](#).

[b] R.C. 1521.17(A)


This section statutorily adopts “reasonable use” as the controlling doctrine for water use in Ohio.

[c] R.C. 1521.17(B)

This section adopts the principles of the Restatement (Second) of Torts Section 858 (850), Chapter 41. The statute specifically lists factors that are directly recited in Restatement Section 850(A) that courts must consider in determining reasonable use. These factors are:

1. Purpose of the use
2. Suitability of the use to the water body, stream or aquifer
3. Economic value of the use
4. Social value of the use
5. Extent and amount of harm caused by the use
6. Practicability of avoiding the harm
7. Protection of existing values in land and investments

8. The justice of requiring the user causing harm to change

 **Strategic Point:** The Restatement (Second) of Torts, Chapter 41 is not the law of Ohio, but includes comments that provide important illustrations and additional discussion to demonstrate how these factors are to be used in resolving water rights disputes under the reasonable use doctrine and for placing the tort concepts of reasonable use into the dominant real property realm.¹⁴

[d] R.C. 1521.17(C)

This section recognizes that reasonable use actions, though bounded by statute, remain common law actions. This section further establishes that where priority of use is a factor in determining the common law actions, primacy shall go to those uses that are recorded pursuant to ODNR registration of withdrawals required under [R.C. 1521.16](#).

[3] Defenses in Reasonable Use Actions

Reasonable use disputes involving riparian and littoral rights are not merely tort actions. Although a cause of action for unreasonable use of water sounds in tort, it is based upon the property right of the landowner making the claim, much like a claim for trespass. The cause of action “retains the property basis of the common law rules pertaining to ground water.”¹⁵

Therefore, property doctrines such as prescriptive rights and adverse possession may apply to protect longstanding uses. The Restatement (Second) of Torts Chapter 41 recognizes that the reasonable use doctrine is limited by other property doctrines.¹⁶ In addition, with all types of water, equitable defenses such as laches may apply.¹⁷

[4] Related Common Law Causes of Action

While [R.C. 1521.17](#) and some courts have recognized “unreasonable use of water” as a stand alone cause of action, a prudent plaintiff will also plead nuisance, negligence, trespass¹⁸ and other similar common law causes of action that apply to the facts.

Footnotes — § 5.06:

¹⁴ See, e.g., *McNamara v. City of Rittman*, 107 Ohio St. 3d at 247 (quoting Restatement of Torts

§ 858, Comment b).

¹⁵ *McNamara v. City of Rittman*, 107 Ohio St. 3d at 247.

¹⁶ See Restatement (2d) Torts, Chapter 41.

¹⁷ See, e.g., *Munn v. Horvitz*, 175 Ohio St. 521 (1964) (laches, prescriptive rights and other legal concepts apply in the context of reasonable use regime even to bar claims of a municipality against another governmental unit).

¹⁸ *City of Mansfield v. Balliett*, 65 Ohio St. 451 (1902); *Portage Cty., et al. v. City of Akron*, 156 Ohio App. 3d 657 (Portage Cty. 2004).

§ 5.07. Surface Water (Storm Water)

The common law defines “surface water” as water that is not yet in a defined channel or waterbody or is not in an aquifer. Even where surface water is collected and channeled in underground pipes, it does not lose its character as “surface water” until it enters the ground or a watercourse or is combined with sewage or other wastes.¹⁹

Because “surface water” by definition does not include water that is in a “watercourse, lake or aquifer,” surface water is generally excluded from the “reasonable use” doctrine specified in [Revised Code 1521.17](#). In 1980, however, the Ohio Supreme Court adopted a “reasonable use” regime specific to surface water.²⁰ This doctrine focuses not on use of water, but on use of land, and specifically states that each owner of land is entitled to a reasonable use of land:

In resolving surface water disputes, courts of this state will apply a reasonable-use rule under which a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make *reasonable use of his land*, even though the flow of surface waters is altered and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable.²¹

One landowner may harm his neighbor through development or activity that causes surface water to increase or decrease, but only as long as the harm is reasonable. The court essentially set up a fact-based, case-by-case regime to determine unreasonableness with respect to surface water disputes.

Footnotes — § 5.07:

¹⁹ *Crawford v. Rambo*, 44 Ohio St. 279 (1886); *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App. 3d 709, 2005-Ohio-4852 (Hamilton Cty. App., 2005).

²⁰ *McGlashan v. Spade Rockledge Development Company*, 62 Ohio St. 2d 55 (1980).

²¹ *McGlashan v. Spade Rockledge Development Company*, 62 Ohio St. 2d 55 (1980) at Syllabus (emphasis added).

§ 5.08. Navigability and Public Trust Rights

[1] Navigable and Non-Navigable Defined

Ohio common law categorizes riparian and littoral water into “navigable” and “non-navigable.” Navigable waters are those that are open to the public and subject to all public trust rights. Non-navigable waters are private waters from which the public can be excluded. Navigability under Ohio law, which forms the basis for public trust rights, is a distinct body of law from the federal concepts of “navigability” under the Clean Water Act and the Rivers and Harbors Act.²²

[2] Determining When Waters Are Navigable and Non-Navigable

With the exception of Lake Erie, Ohio common law defines when rivers and lakes are open to the public. The standard is less than clear. Traditionally, Ohio law recognized as navigable those waters where the waters could be “used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and traveled upon water.”²³

In the 1950s, the Ohio Supreme Court expanded the potential reach of “navigability” beyond the traditional commerce-based definition of navigable waters to include, potentially, waters that may be subject to recreational navigation.²⁴ However, this rule by the Ohio Supreme Court is “permissive” in that it states a court “may” find a river to be navigable if it meets certain criteria. Later decisions clarify that recreation alone does not make a water navigable and open to the public.²⁵ Therefore, absent a specific judicial determination, there is no definitive way to determine whether a water is navigable under Ohio law.

The waters of Lake Erie are governed by statute, not the common law. The Fleming Act, passed in 1917 by the Ohio General Assembly, today [Revised Code Section 1506.10–11](#), specifically declared that the waters, submerged lands and artificially-filled lands of Lake Erie to be now and always have been owned by the State of Ohio in trust for the people. No such statute applies similarly to inland waters in Ohio.

[3] Common Law and Public Trust Rights

Public Trust Rights in Ohio traditionally are limited to fishery, navigation and water commerce.²⁶ In addition, the Ohio Supreme Court also has stated that recreational navigation is as important as commerce in terms of the public policy of the State with respect to water.²⁷ Consequently, recreational navigation may be considered a public trust right in those waters that are navigable waters in Ohio. The Restatement (Second) of Torts states that “public rights in water” “may be exercised by any person ... who can obtain legal access to the water.” However, “in most jurisdictions, public rights are not absolute property rights and the state may regulate their exercise under the police power. It may prefer one use over another [... .]”²⁸

[4] Rights in Non-Navigable Waters

Rights in non-navigable waters include a separate private right to dam those waters and exclude the public from the resulting waterbody, even where recreational boating could occur.²⁹

[5] Ingress and Egress as Property Rights

Older decisions suggest that a right of ingress and egress to riparian water falls under the umbrella of “riparian rights,” which would include these activities as real property within the bundle of riparian rights associated with land. However, in [State, ex rel. Andersons v. Masheter, 1 Ohio St. 2d 11 \(1964\)](#), the Ohio Supreme Court excluded rights of ingress and egress from the scope of real property worthy of compensation under a properly authorized government taking.

Footnotes — § 5.08:

²² [Portage Cty., et al. v. City of Akron, 156 Ohio App. 3d 657 \(Portage Cty. 2004\)](#).

²³ [East Bay Sporting Club v. Miller, 118 Ohio St. 360 \(1928\)](#); [Toledo Liberal Shooting Co. v.](#)

Erie Shooting club, 90 F. 680, 682 (6th Cir. 1898) (specifically noting that presence of duckboats or canoes does not make a water “navigable” and open to the public).

²⁴ *Coleman v. Schaeffer*, 163 Ohio St. 202 (1954); *Mentor Harbor Yachting Club v. Mentor Lagoons*, 170 Ohio St. 193 (1959).

²⁵ *Ohio Water Service v. Ressler*, 173 Ohio St. 33 (1962) (citing *Mentor Harbor Yachting Club*, 170 Ohio St. 193 (1959) for proposition that recreation alone does not make a water “navigable”); *Portage County Bd. of Comm’rs v. Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (“The capacity of a body of water for recreational boating is something to be considered but, standing alone, is not determinative [of navigability.]”).

²⁶ *State, ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303 (1948).

²⁷ *Mentor Harbor Yachting Club v. Mentor Lagoons*, 170 Ohio St. 193 (1959).

²⁸ Restatement (2d) Torts, 865, Comment *g*.

²⁹ *State, ex rel. McElroy v. City of Akron*, 173 Ohio St. 189 (1962).

III.

LAKE ERIE PUBLIC TRUST, COASTAL MANAGEMENT AND REGULATION

§ 5.09. Evaluating Overlapping Regulation of Lake Erie and Its Shore

ODNR has multiple roles with respect to water and a pre-eminent role with respect to the waters of Lake Erie.³⁰ Lake Erie is an international water body and Ohio’s only Great Lake. Lake Erie is considered “navigable” under both federal and Ohio law, with multiple attendant legal rights, regulations and prohibitions. Common law property rights intersect with regulation by ODNR and others, such as the Army Corps of Engineers, as discussed below.

For a discussion of other water-related regulations administered by ODNR, please see [Chapter 6](#) “ODNR Regulation of Water and Flood Management.”

Footnotes — § 5.09:

³⁰ The Ohio Department of Natural Resources was founded in 1949 through a consolidation of existing programs and divisions. Consequently, organizational authority by statute is directed to the program chiefs, subject to the oversight of the Director of ODNR. This distinguishes the agency from the Ohio EPA, where all authority is vested in the Director of Ohio EPA. In reviewing ODNR’s role

with respect to regulation of water or other entities, it is important to remember this structure.

§ 5.10. Public Trust and “Navigability” in Lake Erie

[1] Statutory Public Trust in Waters

In 1917, the General Assembly passed the Fleming Act, a statutory confirmation of a public trust in the waters and submerged lands of Lake Erie. Today, the Fleming Act is codified at [R.C. 1506.10](#) and [1506.11](#). The text of [R.C. 1506.10](#), which has generated considerable controversy in recent years, provides (in part):

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters flowing in front of or flowing past their lands. Any artificial encroachments by the public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to [section 1506.11 of the Revised Code](#), shall not be considered as having prejudiced the rights of the public to such domain.

The landward extent of regulation under this statute remains a matter of great controversy. On one hand, the statute uses the term “southerly shore of Lake Erie” and the “natural shoreline” for the line demarcating public rights. A natural shoreline moves as the lake level rises and falls.³¹ ODNR in practice has interpreted the statutory grant of authority to extend to the “Ordinary High Watermark.” Moreover, ODNR has “adopted” as its definition of “southerly shore of Lake Erie” the Army Corps’ determination of a fixed Ordinary High Watermark, set for purposes of delineating Army Corps jurisdiction.³²

⚠ Warning: The demarcation between private Lake Erie lakefront and public trust territory was nearly changed in 2010 following a decision of the Lake County Court of Common Pleas in *State ex rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.*, in which the court held that “the proper definition of the boundary line for the public territory of Lake Erie is the water’s edge, wherever that movable boundary may be at any given time [...]”

[2] Delegation of State Regulation of Public Trust

While ODNR has been delegated the duty of acting on behalf of the trustee,³³ lakefront municipalities possess delegated statutory authority with respect to the waters and submerged lands of Lake Erie. For example, [R.C. 721.08](#) delegates authority to control and manage waters and submerged lands up to two miles from the shore. [R.C. 721.05](#) authorizes a lakefront municipality to take artificially created land, and the improvements thereon, without paying compensation, when the city is acting to advance public trust purposes, including fishing, navigation and water commerce. Where municipal regulation played a more primary role until the 1950’s, state agencies now have taken the lead. Deference to municipal decision-making is recognized in the requirement that, before a submerged land lease is issued, an applicant must obtain a municipal resolution confirming that the city has no plans to use the applicable territory for the purpose of fishing, navigation or water commerce.³⁴

[3] Federal Regulation of “Navigable” Waters

Lake Erie is subject to federal law as a navigable water under both the River and Harbors Act³⁵ and the Clean Water Act.³⁶ Federal authority over waters considered navigable under federal law is plenary. The Army Corps by regulation has established the “Ordinary High Watermark” of Lake Erie, and consequently the extent of federal jurisdiction, at 573.4 IGLD.³⁷ In actuality, the level of the lake rises and falls constantly, yet for federal jurisdictional purposes, the extent of jurisdiction is set.

As explained below, all activities or projects on the lakefront or in designated harbors must satisfy the applicable federal requirements in addition to the state regulation by ODNR, Ohio EPA and others.

Footnotes — § 5.10:

³¹ See also R.C. 1506.11(A), which defines “territory” to which a submerged land lease is required as “waters and lands presently underlying waters of Lake Erie” and also references the “natural shoreline.”

³² See § 5.10[3] below.

³³ R.C. 1506.10 (“The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state’s rights designated in this section.”).

³⁴ R.C. 1506.11; see also R.C. 721.11 (making leases under R.C. 1506.11 subject to municipal right to maintain roads and railroads on land leased from the state).

³⁵ 33 U.S.C. § 401 *et seq.*

³⁶ 33 U.S.C. § 1251 *et seq.*

³⁷ See 33 C.F.R. § 329. “IGLD” stands for “International Great Lakes Datum 1985.”

§ 5.11. Owning and Developing Lake Erie Lakefront Property

[1] Checklist for Owning and Developing Lake Erie Lakefront

- Have I completed due diligence on erosion potential and title to the shore?
- Does the property include artificial land made by filling the waters of Lake Erie?
- Do I need a Submerged Land Lease?
- Do I need a Shore Structure Permit?
- Is the property subject to Coastal Erosion Zone regulation?
- Have I obtained Army Corps and Ohio EPA approvals or permits for the project?

With multiple overlapping regulatory schemes, Lake Erie lakefront property faces a complex array of applicable regulations. Complexity is amplified by evolving legal doctrines and uncertainty caused by legal challenges to regulatory practices.

[2] Developing Lakefront Property

[a] Regulatory Requirements Triggered by Development of Lakefront Property


Developing Lake Erie lakefront property in Ohio, whether for erosion control or other development, triggers a number of regulatory requirements. Most of the requirements have been collected and summarized in a booklet prepared by the ODNR Office of Coastal Management, which accompanies a combined permit application.³⁸ The relevant regulatory regimes are described below.

[b] Submerged Land Lease Regulation

ODNR requires a lease for private development of lakefront land pursuant to [R.C. 1506.11](#). No person may develop or improve property that is between the natural shoreline of Lake Erie and the international boundary with Canada without first entering into an agreement with the ODNR director for lease of the state-owned land on which the development or improvement occurs. The ODNR director may enter into such a lease only if the development or improvement can be accomplished without impairment of the public right of navigation, water commerce, and fishery and without prejudice of the littoral rights of lakefront property owners to make a reasonable use of the waters flowing through or past their properties.

[c] Shore Structure Permits

Lake Erie shoreline owners must obtain construction permits prior to any shore construction pursuant to [R.C. 1506.40](#). No person may construct a beach, groin, or other structure to control erosion, wave action, or inundation “along or near the Ohio shoreline of Lake Erie,” including related islands, bays, and inlets, without first obtaining a shore structure permit.³⁹ The application for a shore structure permit will include detailed plans and specifications prepared by a registered professional engineer. ODNR may issue a temporary shore structure permit if it is determined necessary to safeguard life, health, or property. Whoever violates [R.C. 1560.40](#) will be fined not less than one hundred dollars nor more than five hundred dollars for each offense. Each day of violation constitutes a separate offense. [R.C. 1506.99](#).

 **Warning:** The language “along or near the Ohio shoreline” is not

defined in the statute or in regulation, leaving unclear the extent of landward jurisdiction subject to this requirement. This can lead to disputes as discussed in the Warning at § 5.10[1] above.


[d] Coastal Erosion Areas

ODNR has identified coastal erosion areas, defined as areas anticipated to be lost by Lake Erie-related erosion within thirty years if no erosion control measures are implemented, pursuant to [R.C. 1506.06](#). Any person who has received notice that his or her property has been included in a coastal erosion area shall not sell that property without informing the purchaser that it is included in a coastal erosion area.⁴⁰ No person shall erect, construct or redevelop a permanent structure on land within a designated Lake Erie coastal erosion zone without a permit.⁴¹ The director shall issue a permit where an effective erosion control measure approved by the director protects the site.⁴²

[e] Consistency with Coastal Management Policies

Lakefront projects must be consistent with Coastal Management Program pursuant to [R.C. 1506.03](#). No project or activity directly affecting the coastal area⁴³ that is proposed by or subject to the approval of any agency of the state shall be implemented or approved until the ODNR director has determined that it is consistent with the policies of the coastal management program.

The Coastal Management Program is a required feature of Ohio's delegation pursuant to the federal Coastal Management Zone Act of 1972, [16 U.S.C. § 1451 et seq.](#) The Ohio Coastal Management Document includes a broad array of 41 named coastal management policies.⁴⁴

 **Strategic Point:** In practice, most lakefront development projects that require ODNR permits are consistent, and consistency is certified via the application for and the issuance of the permit. This requirement, however, can become an issue when other state agencies fail to certify consistency prior to a final agency action. A list of Ohio coastal management policies is attached to this chapter as Appendix 5-A.

[f] Federal and Ohio EPA Approval of Lakefront Projects

As noted above, Lake Erie is a navigable water subject to the federal Rivers and Harbors Act and the Clean Water Act. Any project that results in the filling of the waters of Lake Erie must obtain the required permits from the Army Corps of Engineers as well as the necessary water quality certification from Ohio EPA. See [Chapter 4](#) above (“Wetlands and Streams”).

[3] Lakefront Property Due Diligence Issues

Ohio’s lakefront property is among the most valuable real property in the entire state. But the vicissitudes of fixed real property lines overlaying a dynamic, “living” body of water are many. Adding to the complexity is an uneven history in the implementation of regulation. Given the uncertain nature of the ownership of the lakefront shoreline, a prudent owner or buyer should check the relevant sources to determine if “unapproved” filling has occurred.

First, the buyer should review the records and aerial photographs of the ODNR Coastal Management Office in Sandusky, Ohio. The Coastal Management Office holds aerial photographs back to the 1920s. These records can indicate if filling has occurred on or in front of the property.

Second, fill alone does not prove that land is artificially created land and, therefore subject to public trust.⁴⁵ Fill may have been deposited on dry land. Furthermore, for many decades, local political subdivisions permitted fills. When state agencies undertook active management of the program in the 1950’s, the General Assembly preserved pre-existing municipal and local authorizations. Specifically, [R.C. 1506.11\(D\)](#) provides that upland owners who received local authorization prior to October 13, 1955 shall be granted a lease.

Third, depending on circumstances, a buyer should investigate the nature of the fill for environmental purposes and in order to satisfy the elements of the Innocent Purchaser Defense under CERCLA.⁴⁶

Fourth, a buyer should get qualified engineering analysis about erosion potential, slope stability, etc.

[4] Beach Management

The Ohio Department of Health has developed water quality standards

and procedures for monitoring and posting advisories of water quality at beaches, along Lake Erie and across Ohio. The Ohio regulations are at [OAC 3745-1-07](#) and satisfy the requirements of the Beach Environmental Assessment and Coastal Health Act of 2000, which amended the federal Clean Water Act. Monitoring and advisory posting are implemented by ODNR, local health districts and others.

Footnotes — § 5.11:

³⁸ A copy of the permit and lease application booklet can be obtained at <http://www.ohiodnr.com> or by calling the Ohio Office of Coastal Management.

³⁹ The application form for a shore structure permit and detailed instructions are provided in the ODNR Coastal Permits and Lease Booklet, which is available at <http://coastal.ohiodnr.gov/permits> or by calling the ODNR Office of Coastal Management.

⁴⁰ No state agency, county, township, or municipality shall use the fact that property has been identified as a coastal erosion area as a basis for: (1) failing to enter into or renew a lease issued under [R.C. 1506.11](#), (2) failing to issue or renew a permit required by law (except under [R.C. 1506.07](#)), (3) taking private property for public use, or (4) determining what constitutes just compensation in the exercise of the power of eminent domain.

⁴¹ [R.C. 1506.07\(B\)](#).

⁴² [R.C. 1506.07\(B\)](#).

⁴³ “Coastal Areas” is defined as “the waters of Lake Erie, the islands in the lake, and the lands under and adjacent to the lake, including the transitional areas, wetlands and beaches.” Landward, it includes land “only to the extent necessary to include shorelands, the uses of which have a direct and significant impact on coastal waters as determined by the director of natural resources.” [R.C. 1506.01\(A\)](#).

⁴⁴ A list of the policies is included at the end of this Chapter as Appendix 5-A.

⁴⁵ *See, e.g.*, [OAC 1501-6-02\(W\)](#) (instructing director of ODNR to determine natural shoreline on the basis of “best practical measures” including earliest known maps, charts and photographs); *see also* OAG 93-025 (determination of natural shoreline is a question of fact).

⁴⁶ [42 U.S.C. § 9601 et seq.](#)

§ 5.12. Other Regulation of Lake Erie by ODNR

[1] Great Lakes Diversions

ODNR regulates diversions from the Lake Erie Basin to another basin. On June 27, 2008, former Governor Strickland signed the Great Lakes-St.

Lawrence River Basin Resources Compact (Am. H.B. 416), otherwise known as the “Great Lakes Compact,” which, among others, restricts all new or increased diversions of water resources from the Great Lakes-St. Lawrence River Basin into another watershed. This Compact has been ratified by all of the Great Lakes states, as well as the President of the United States. For a complete discussion of this program, see [Chapter 6](#) below.

[2] Salvage of Watercraft and Aircraft

No person shall engage in activities to recover, alter, salvage, or destroy any abandoned property located on, in, or in the vicinity of and associated with a submerged watercraft or aircraft in the Ohio portion of Lake Erie without first obtaining a permit from the ODNR director approved by the director of the Ohio Historical Society.⁴⁷ The state is the owner of all abandoned property submerged in Lake Erie under [R.C. 1506.33](#).

[3] Regulation of Lake Erie Fishing

ODNR through its Division of Wildlife regulates sport and commercial fishing of Lake Erie.⁴⁸

[4] Boating and Watercraft on Lake Erie

ODNR Division of Watercraft regulates boating on all waters of the state, including Lake Erie. ODNR’s jurisdiction is concurrent with federal jurisdiction exercised by the United States Coast Guard and jurisdiction exercised by local political subdivisions.

Footnotes — § 5.12:

⁴⁷ [R.C. 1506.32](#).

⁴⁸ See, e.g., [R.C. 1533.341](#) (authorizing ODNR to establish a fish quota management system for Lake Erie fishery resources); [R.C. 1533.41](#) (prohibiting gill nets in Lake Erie).

Appendix 5-A

Projects that are subject to the approval of state agencies and that directly affect Ohio’s coast area are required to be consistent with Ohio’s coastal management policies ([R.C. 1506.03](#)). The Ohio Coastal Management Document identifies forty-one (41) coastal management policies, which are listed below.

Lake Erie Coastal Erosion Area Management	Lakeshore Recreation and Access
Shore Erosion Control	Lake Erie Beaches and Public Bathing
Floodplain Management	Recreational Boating
Flood Protection and Mitigation	Fishing and Hunting
Shore Erosion and Flood Hazard Mitigation Assistance	Surplus Public Property
Water Quality	Preservation of Cultural Resources
Environmental	Fisheries Management
Contaminants: Prevention and Emergency Response	Fisheries Research and Interstate Cooperation
Nonpoint Source Pollution	Wildlife Management
Potable Water Supply	Air Quality
Areas of Concern Remedial Action Plans	Hazardous, Solid and Infectious Waste Management
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CHAPTER 6

ODNR REGULATION OF WATER AND FLOOD MANAGEMENT

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§ 6.01. Introduction

The Ohio Department of Natural Resources' (ODNR) Division of Water Resources regulates water in Ohio through a number of different regulations. ODNR regulations address withdrawal and consumptive use of water, well drilling and well abandonment. The Division of Water Resources also regulates diversions of water out of the Great Lakes and Ohio River basins.

The Division of Water Resources implements dam construction, safety and maintenance regulations, and administers the state of Ohio's floodplain management program. Local entities, such as conservancy districts, also administer aspects of flood management in Ohio.

For discussion of ODNR's regulation and management of Lake Erie and its coastal zone through the Office of Coastal Management, see [Chapter 5](#).


§ 6.02. Registration of Water Withdrawals and Consumptive Uses

[1] Water Withdrawal Registration

Any person who owns a facility with the capacity to withdraw waters of the state in an amount greater than one hundred thousand gallons per day must register the facility with the Division of Water Resources within three months after the facility is completed.¹ Any person who owns a registered facility will file a report annually with the chief listing: (1) the amount of water withdrawn per day by the facility, (2) the return flow, and (3) any other information the chief may require by rule. Whoever fails to register a facility or file an annual report is guilty of a misdemeanor of the fourth degree.²

[2] Large Consumptive Uses

No person may withdraw water in an amount that would result in a new or increased consumptive use of more than two million gallons (2 MGD) of water per day without first obtaining a permit from the ODNR director.³ A major utility facility subject to regulation under [O.R.C. Chapter 4906](#) need not obtain a permit. A public water system need not obtain a permit if: (1) it was in operation on the effective date of this section and no substantial changes are proposed for that system; (2) it encompasses only water distribution facilities; or (3) the Ohio EPA (under [R.C. 6109.07](#)) has applied the criteria specified in [R.C. 1501.34](#) in reviewing and approving the plans. In current practice, Ohio EPA does not apply the specified criteria.

 **Strategic Point:** This regulation has been invoked rarely, because “consumptive use” is exclusive of any return water.

Where this regulation applies, it includes an extensive review by the

agency. The ODNR director will not approve an application if: (1) public water rights in navigable waters will be adversely affected; (2) the facility's current and/or proposed withdrawal and consumptive use does not incorporate maximum feasible conservation practices, considering available technology and the nature and economics of the various alternatives; (3) the proposed withdrawal and consumptive uses do not reasonably promote the protection of the public health, safety, and welfare; (4) the proposed withdrawal will have a significant detrimental effect on the quantity or quality of water resources and related land resources in this state; (6) the proposed withdrawal is inconsistent with regional or state water plans; (7) insufficient water is available for the withdrawal and other existing legal uses of water resources are not adequately protected.⁴

[3] Well Logs and Well Abandonment

For over 50 years, ODNR has required that well logs be collected and forwarded to ODNR. These logs have formed a significant database for ODNR's development of groundwater maps. More recently, authority over well abandonment has been exercised by ODNR.

Any person who constructs a well must keep a careful and accurate log of the construction of the well, showing: (1) the character, including, without limitation, the lithology, color, texture, and grain size, the name, if known, and the depth of all formations passed through or encountered; (2) the depths at which water is encountered; (3) the static water level of the completed well; (4) a copy of the record of all pumping tests and analyses related to those tests, if any; (5) construction details, including lengths, diameters, and thickness of casing and screening and the volume, type of material, and method of introducing gravel packing and grouting into the well; (6) the type of pumping equipment installed, if any; (7) the name of the owner of the well, the address of the location where the well was constructed, and a description of the location of the property where the well was constructed; (8) the signature of the individual who constructed the well and filed the well log; and (9) any other information required by the chief. The log shall be furnished to the Division of Water Resources within 30 days after the completion of the well.⁵

Similarly, any well abandoned in Ohio must comply with ODNR requirements and an abandonment report must be filed with the ODNR.⁶

Whoever fails to keep and submit a well log is guilty of a misdemeanor of the fourth degree.⁷

[4] Groundwater Investigations

Upon request from local government officials, the Division of Water Resources chief may hold meetings or public hearings to assist in the resolution of conflicts between ground water users, presenting the available technical information relevant to the conflicts and the ground water resource. Following the meetings or public hearings, the chief will prepare a report and may make recommendations about the use of the ground water resource.⁸

Footnotes — § 6.02:

¹ R.C. 1521.16.

² R.C. 1521.99.

³ R.C. 1501.33.

⁴ R.C. 1501.34.

⁵ R.C. 1521.05.

⁶ R.C. 1521.05.

⁷ R.C. 1521.99.

⁸ R.C. 1521.03(E). For a more complete discussion of groundwater disputes, see [Chapter 5](#).

§ 6.03. Great Lakes—Ohio River Watershed Diversions


No person may divert water in quantities greater than one hundred thousand gallons per day out of the Lake Erie basin or the Ohio River watershed to another basin without a permit from ODNR.⁹ Under the Ohio statute, a withdrawal across the Continental Divide does not constitute a statutory diversion if the water is returned to the original basin.¹⁰


When the ODNR director receives an application to divert water out of the Lake Erie basin that will result in a new or increased consumptive use totaling more than five million gallons per day or whenever a major utility facility subject to regulation under [R.C. Chapter 4906](#) proposes to make such withdrawal, the director will notify the governors and premiers of the other

Great Lakes states and provinces, water management agencies of those states and provinces, and (when appropriate) the international joint commission, and will solicit their comments and concerns.¹¹ In accordance with the federal Water Resources Development Act of 1986,¹² the director will not approve a permit for any diversion out of the Lake Erie Basin unless the governor of each great lakes state approves it.

Where regulation is triggered, an analysis by the agency is involved. The director will not approve a permit application filed under this section if he determines that: (1) during the life of the project, some or all of the water to be diverted will be needed for use within the basin; (2) the proposed diversion would endanger the public health, safety, or welfare; (3) the proposed diversion is not for a reasonable and beneficial use and is not necessary to serve the applicant's needs; (4) reasonable efforts have not been made to develop and conserve water resources in the importing basin and further development of those resources would not result in overriding adverse economic, social, or environmental impacts; (5) the proposed diversion is inconsistent with regional or state water plans; (6) the proposed diversion, alone or in combination with other diversions and water losses, will have a significant adverse impact on in-stream uses or on economic or ecological aspects of water levels.¹³

Each permit holder will submit an annual report containing such information as the director may require by rule to ODNR. Whoever violates [R.C. 1501.32](#) or the terms or conditions of a permit issued under that section will be fined not more than ten thousand dollars for each day of violation.

 **Strategic Point:** Similar to the registration of Large Consumptive Uses, this statute has rarely been triggered because return water is not included within a “diversion” so the threshold is rarely met.

 **Warning:** On October 3, 2008, President George W. Bush signed into law the Great Lakes-St. Lawrence River Basin Water Resources Compact. The Compact was adopted by Ohio, the other Great Lake states and two Canadian provinces and may result in new regulations that significantly broaden requirements applicable to diversions, institutionalize conservation and efficiency programs, and establish Councils to enforce its provisions. As a first step in implementing the

goals of the Compact, in December 2009, the parties subject to the Compact committed to gather annually and share accurate information on all water withdrawals in excess of 100,000 gallons per day or of a greater average in any 30-day period. In 2013, the parties issued their first assessment of the cumulative impacts of withdrawals, consumptive uses, and diversions of waters from the Great Lakes-St. Lawrence River Basin covering the timeframe of 2006–2010. The assessment will be used by the parties to review decision-making standards and their application.

ODNR released the Final Report of the Ohio Great Lakes Compact Advisory Board on December 17, 2010. The Advisory Board was established within House Bill 416 (127th General Assembly) to develop recommendations for implementing the Great Lakes-St. Lawrence River Basin Water Resources Compact within Ohio. The Report was submitted to the Governor and the General Assembly on December 15, 2010, and as a result, the Advisory Board has officially completed their work and disbanded. The work of the Board was divided into three focus areas: (1) developing a baseline of existing water withdrawals, diversions, and consumptive uses; (2) developing water conservation and efficiency goals and objectives and developing a water conservation and efficiency program; and (3) developing recommendations for implementing a water withdrawal regulation management program.

Existing water withdrawal facilities were consulted to update and ensure that their withdrawal, consumptive use, and diversion capabilities/quantities were appropriate. Requests were made of other unregistered facilities to register their facility and capacities as part of Ohio's Water Withdrawal Facility Registration Program. These values were used to develop the baseline lists and submitted on December 8, 2009 to the Compact Council and Regional Body in accordance with Section 4.12 of the Compact.

Ohio's water conservation and efficiency goals are set forth in Section 4.2.1 of the Compact. In 2012, Ohio codified these goals in [Ohio Revised Code Chapter 1522](#). [Ohio Revised Code Chapter 1522](#) provides for voluntary watershed-wide goals, objectives, and standards for water conservation and efficiency. There are no mandatory water conservation requirements for any water users. Implementation of Ohio's goals, objectives, and standards is the

responsibility of ODNR via its Water Conservation and Efficiency Program which was last reviewed by ODNR in December 2013. At present, ODNR’s program focuses on education concerning the value of water conservation and efficiency, as well as promotion of voluntary conservation activities.

Footnotes — § 6.03:

⁹ R.C. 1501.32; OAC 1501-2-01.

¹⁰ *Portage Cty., et al. v. City of Akron*, 156 Ohio App. 3d 657 (Portage Cty. 2004).

¹¹ R.C. 1501.35.

¹² Water Resources Development Act of 1986, 100 Stat. 4230, 42 U.S.C. § 1962d-20.

¹³ RC 1501.32.

§ 6.04. Designated Wild and Scenic Recreational Rivers

ODNR has designated wild, scenic, or recreational river areas pursuant to R.C. 1547.81 subject to restrictions and regulatory requirements on lands or projects affecting these rivers.¹⁴ The area designated includes lands adjacent to the watercourse in sufficient width to preserve, protect, and develop the natural character of the watercourse, but does not include any lands more than one thousand feet from the normal waterlines of the watercourse unless an additional width is necessary to preserve water conservation, scenic, fish, wildlife, historic, or outdoor recreation values.

Any structures and channel modifications in designated river areas must be approved by ODNR.¹⁵ No state department, state agency, or political subdivision shall build or enlarge any highway, road, or structure or modify or cause the modification of the channel of any watercourse within a wild, scenic, or recreational river area outside the limits of a municipal corporation without having first obtained approval of the plans for the highway, road, or structure or channel modification from the ODNR director. Upon petition by the director, the court of common pleas shall enjoin work on any highway, road, or structure or channel modification for which such approval has not been obtained.

Footnotes — § 6.04:

¹⁴ As used in R.C. 1547.81 to 1547.86, “watercourse” means a substantially natural channel with

recognized banks and bottom, in which a flow of water occurs, with an average of at least ten feet mean surface water width and at least five miles of length. R.C. 1546.01.

¹⁵ R.C.1547.82.

§ 6.05. State of Ohio Harmful Algal Bloom Response Strategy

[1] Harmful Algae Blooms (HABs)

Cyanobacteria, which often are called “blue-green algae,” are naturally occurring bacteria found in lakes, ponds, and slow-moving streams. They can dramatically increase in number and form harmful algal blooms (HABs) under the right water conditions. These typically occur during the warmer months of the year and in the presence of large quantities of nutrients upon which the bacteria feed, particularly nitrogen and phosphorus that are used as fertilizers in agricultural, commercial, and residential settings. HABs can take the appearance of foam, scum, or mats on the surface of water. Despite the name “blue-green algae,” other colors associated with HABs include brown and red.

HABs produce toxins that affect the skin, liver, and nervous system of people and animals following direct contact with impacted water, breathing of impacted water droplets, and/or swallowing impacted water. Health problems associated with HABs can include skin rashes, runny eyes and nose, sore-throat/asthma-like symptoms, diarrhea, vomiting, and liver, kidney, or neurotoxicity. HABs also cause water quality deterioration associated with excessive biomass production, such as depleted dissolved oxygen levels, fish kills, and taste and odor problems in drinking water. Adverse economic impacts, primarily those resulting from lost recreational use of impacted water bodies, are associated with HABs, as well.

[2] Agency Responsibilities

The Harmful Algal Bloom Response Strategy is Ohio’s multi-agency approach to addressing HABs in Ohio recreational waters.¹⁶ The ODNR, Ohio Department of Health (ODH), and Ohio Environmental Protection Agency (OEPA) are responsible for the following under the strategy:

ODNR

- Monitor state park lakes for HAB development

- Sample when blooms are sighted in contact recreational areas
- Post advisories at state park lakes
- Provide outreach to the public about HABs
- Coordinate with the U.S. Army Corps of Engineers on jointly managed lakes
- Create advisory signage templates

ODH

- Review illness reports and determine if they are related to cyanotoxins
- Determine advisory thresholds in consultation with ODNR and Ohio EPA
- Advise the public about private lake HAB issues
- Provide information to the public about safety and health effects
- Provide one web site for posting HAB advisories to the public through the BeachGuard application
- Coordinate with local health districts when responding to a potential HAB and post advisories when necessary, including sampling on public beaches not located at state parks
- Communicate with Ohio EPA and ODNR as described in the communication protocol when advisories will be posted by local health districts
- Monitor National Oceanic and Atmospheric Administration (NOAA) satellite imagery to evaluate HAB risks in open waters

OEPA

- Monitor NOAA satellite imagery and other information to identify bloom formation
- Use various screening tools to assist in determining the presence of a cyanobacteria and cyanotoxins
- Collect and review Algal Bloom Reports and forward as appropriate for

response

- Maintain a database and state-reported HAB data
- Maintain the ohioalgaeinfo.com website
- Provide HAB sample collection guidance for private lakes and other private water bodies and refer them to The Ohio State University (OSU) Extension, local health districts or ODH for additional assistance
- Assist with sampling at public lakes as needed
- Assist in determining the presence of a cyanobacteria bloom by microscopic review to determine genera
- Sample for cyanotoxins and phytoplankton as part of the Inland Lakes Monitoring Program
- Provide HAB sampling protocols and train others in sample collection
- Provide outreach to the public about HABs¹⁷

[3] Public Water System Response Strategy

In 2016, Ohio EPA adopted new rules to address cyanotoxins in public drinking water. The rules, [OAC 3745-90](#) and [OAC 3745-89](#), are in response to U.S. EPA issuing national health advisory levels for two cyanotoxins—microcystins and cylindrospermopsin. The rules are applicable to public water systems that use surface water and certified laboratories, and establish:

- Microcystins action levels in drinking water based on U.S. EPA's health advisory levels;
- Monitoring requirements for public water systems using surface water;
- Treatment techniques;
- Recordkeeping requirements;
- Laboratory certification, analytical techniques, and reporting; and
- Public notification requirements for violations and action level exceedances.

[4] Prevention of HABs

ODNR, ODH, and OEPA are also taking steps to prevent HABs by reducing nutrient runoff from agricultural lands that is contributing to the nitrogen and phosphorus loading in distressed watersheds. Wetlands are being restored in and around certain distressed waters, such as Grand Lake St. Marys, where wetlands that filter sediment and nutrients out of waters that reach the lake are being re-established along the lake's feeder tributaries. Efforts are also underway to limit the level of nutrients certain wastewater treatment plants can discharge to distressed watersheds.

Footnotes — § 6.05:

¹⁶ <http://epa.ohio.gov/portals/35/hab/HABResponseStrategy.pdf>.

¹⁷ <http://epa.ohio.gov/portals/35/hab/HABResponseStrategy.pdf>.

§ 6.06. Regulation of Dams, Dikes, and Levees

[1] Regulated by Division of Water Resources

The Division of Water Resources regulates the construction of Ohio's dams, dikes, and levees; inspects existing dams; and has authority to require owners of dams, dikes, and levees to perform repairs, maintenance, and other remedial measures that are deemed necessary to protect life, health, or property.

[2] Classifications

Dams are classified from Class I (most restricted) to Class IV (least restricted), depending on their height, storage capacity, and the degree of the probable loss of life and property should the dam fail.¹⁸ Dikes and levees are also classified from Class I to Class IV; however, their status depends only upon the degree of the probable loss of life and property should they fail.¹⁹ An emergency action plan and operation, maintenance, and inspection manual are required for all Class I, Class II, and Class III structures.²⁰

[3] Construction

No person may construct a dam in a watercourse for the purpose of storing, conserving, or retarding water or for any other purpose, nor construct any dike or levee to divert or retain floodwater without first obtaining a

construction permit from the ODNR, Division of Water Resources.²¹ Obtaining a construction permit is a two-part process. An applicant must first submit a preliminary design report for the structure to the Division of Water Resources.

Checklist for Dam Construction Permit:

- A general description of the structure and its proposed classification;
- Maps showing the location of the proposed structure; the county, township and section lines; the outline of the reservoir; the state, county, and township roads; utilities; any structure or facility affected by the proposed dam, dike, or levee; the topography of the reservoir; and identifying the ownership of all property that would be inundated by the reservoir;
- A written report of the surficial conditions (i.e., geology, topography, and cultural features), logs of borings in the foundation and in the borrow areas, and results of seismic and resistivity subsurface investigations;
- Typical cross-sections of the structure showing proposed elevations, slopes, pool levels, and top width;
- Preliminary design assumptions, tentative conclusions, and references pertaining to hydrologic and hydraulic parameters as drainage area, rainfall and runoff data, inflow hydrographs, area-capacity-elevation data, flood routings, in addition to geologic and geotechnical engineering assumptions;
- A description of how streamflow will be diverted during construction of the structure;
- A preliminary cost estimate of the structure; and
- Any other pertinent information as may be required by the Division of Water Resources.²²

The Division of Water Resources will notify the applicant in writing within forty-five days of receipt of a complete preliminary design report whether the report is approved, disapproved, or requires modification.²³ The

written notification will also designate the Division of Water Resources classification for the proposed structure.

After the preliminary design report is approved, the second step in the construction permit application process is the submittal of three copies of the final design report.²⁴ The final design report shall also include a completed construction permit application, a statutory filing fee, and a surety bond. If the proposed structure would endanger life, health, or property because of improper or inadequate design, the Division of Water Resources may reject the permit application, subject to the appeal procedures of Ohio's Administrative Procedure Act.²⁵ The Division of Water Resources shall issue a construction permit within thirty days of receipt of an approved final design report.²⁶ Only after receiving a permit from the Division of Water Resources may construction of the structure commence. The construction permit application requirements apply to dam removals as well.²⁷

[4] Permit Exemptions

Certain smaller-sized dams are exempt from the construction permit requirement, including:

- Dams that are less than ten feet in height and which have a storage capacity of not more than fifty acre-feet at the elevation at the top of the dam;
- Dams, regardless of height, that have a storage capacity of not more than fifteen acre-feet at the elevation at the top of the dam; and
- Dams, regardless of height, that are six or less feet in height.²⁸

Only those dams, dikes, and levees that are classified as Class IV are exempt from the construction permit requirement.²⁹ They remain, however, subject to the jurisdiction of the Division of Water Resources.

[5] Safety

Owners of dams, dikes and levees that violate safety regulations or that were constructed without first obtaining a permit are required to bring their structures into compliance with the Division of Water Resources. The owner must obtain a construction permit if a permit was not obtained prior to a structure's construction.³⁰ Owners of structures found to violate safety

regulations will receive from the Division of Water Resources a dam safety inspection report that lists the remedial measures that must be undertaken.³¹ The requirement to obtain a construction permit or undertake the remedial measures may be avoided if one of the following occurs:

- Removal of the structure;
- Breach of the structure;
- Modification of the height of the structure so as to exempt it from the construction permit and periodic inspection requirement; or
- Modification of the purpose of the structure so that it no longer meets the definition of a dam, dike, or levee.

Owners of Class I, Class II, and Class III dams are required to pay an annual dam safety fee;³² the fee amount owed is based on the class of dam and the dam's height, linear foot length and per-acre foot of volume of water impounded. All fees are deposited in the dam safety fund.

Ohio has adopted two loan programs to assist dam owners in funding safety-related repairs and improvements. The Ohio Water Development Authority (OWDA) offers local governments (city, village, county, state agency, water/sewer/conservation district) loans to finance design and construction of improvements and repairs to dams as mandated by the ODNR. Any such project is eligible to receive OWDA financing, provided plans have been approved by and an inspection report has been obtained from, ODNR. The local government must dedicate a source of repayment and have user charges or other appropriate revenues in place adequate to meet annual loan repayments to OWDA. The OWDA's Dam Safety Linked Deposit Program provides lower than market rate loans to individuals, private organizations, and businesses for improvements and repairs to dams as mandated by the ODNR.

[6] Maintenance

Repairs and maintenance of existing structures are also subject to the oversight of the Division of Water Resources. Certain items of repair and maintenance must be designed by a registered professional engineer and submitted to the Division of Water Resources for approval prior to the commencement of the work.³³ All existing Class I, Class II, and Class III

structures are subject to a periodic inspection by the Division of Water Resources to ensure that their continued operation and use does not constitute a hazard to life, health, or property.³⁴ Inspections of existing Class IV structures will be conducted at the discretion of the Division of Water Resources.

Footnotes — § 6.06:

- ¹⁸ OAC 1501:21-13-01.
- ¹⁹ OAC 1501:21-13-09.
- ²⁰ OAC 1501:21-15-07; OAC 1501:21-15-06.
- ²¹ R.C. 1521.06(A).
- ²² OAC 1501:21-5-02.
- ²³ OAC 1501:21-5-02(C).
- ²⁴ OAC 1501:21-5-04.
- ²⁵ R.C. 1521.06(D).
- ²⁶ OAC 1501:21-5-03.
- ²⁷ R.C. 1521.062(F).
- ²⁸ R.C. 1521.06(A)(1)–(3).
- ²⁹ OAC 1501:21-13-09(A)(4); OAC 1501:21-19-01(C).
- ³⁰ R.C. 1521.06(A).
- ³¹ OAC 1501:21-21-02; OAC 1501:21-21-03.
- ³² R.C. 1521.063.
- ³³ OAC 1501:21-21-03(B).
- ³⁴ OAC 1501:21-21-01.

§ 6.07. Floodplain Management

[1] National Flood Insurance Program

Created in 1968, and managed by the Federal Emergency Management

Agency (FEMA), the National Flood Insurance Program (NFIP) makes federally backed flood insurance available to members of participating communities. To be eligible for flood insurance, a community must develop and enforce a comprehensive floodplain management program that complies with the requirements of the NFIP. FEMA also provides funding for local communities to implement pre-disaster measures designed to reduce flood damage and claims made under the NFIP. In Ohio, FEMA grant monies are provided to ODNR, which distributes them to local communities to fund mitigation efforts. ODNR is also responsible for assisting local communities with their development of flood management and mitigation programs that satisfy the requirements of the NFIP.

[2] ODNR Administration of NFIP

The Division of Water Resources has authority to make detailed investigations of all factors relating to floods, floodplain management, and flood control in the state of Ohio.³⁵ It may adopt rules for the delineation and mapping of floodplains, development within a one hundred year floodplain, and assist governments with their development of comprehensive floodplain management programs. All state agencies and political subdivisions, prior to the expenditure of funds for the construction of buildings, structures, roads, bridges, etc. in locations subject to flooding, must comply with flood damage reduction standards.³⁶ Wherever economically feasible, state agencies and political subdivisions responsible for existing publicly owned facilities must apply flood-proofing measures in order to reduce potential flood damage. Before awarding funding or financing or granting a license, permit, or other authorization for a development located within a one hundred year floodplain, a permitting state agency must require the applicant to demonstrate that the development will comply with the flood damage reduction standards adopted by the chief of the Division of Water Resources.

The Division of Water Resources also possesses statutory authority to construct improvements within watersheds, rivers, and streams, including reservoirs, dams, dikes, canals, and storage impoundments, and may make loans and grants to governmental agencies for water management and to acquire, construct, and equip water management improvements.³⁷

[3] Local Implementation

Each municipality or county that has within its boundaries a one hundred year floodplain and that adopts a floodplain management ordinance will submit the ordinance to ODNR for review.³⁵ If the ODNR finds that the ordinance complies with the flood damage reduction standards, it will forward it to FEMA for final approval. ODNR will send written notice to the county or municipality stating the nature of the noncompliance if it determines that a county or municipality that has adopted a floodplain management ordinance fails to administer or enforce it.

Practice Point: In practice, developers of land do not deal with ODNR but with the local political subdivision that maintains the flood management map for that community for participation in the national flood insurance program. Changes to the floodplain map are made at the local level, usually by the City Engineer or County Engineer.

Footnotes — § 6.07:

³⁵ R.C. 1521.03.

³⁶ R.C. 1521.14.

³⁷ R.C. 1521.04; R.C. 1523.01.

³⁸ R.C. 1521.18.

§ 6.08. Conservancy Districts

Ohio's Conservancy Act of 1914 permits the creation of regional political subdivisions known as Conservancy Districts, which provide flood protection and other services for communities located within a district.³⁹ The Conservancy Act became law in the aftermath of a devastating Dayton flood in 1913 that killed hundreds of Ohioans and caused millions of dollars in property damage. Since its passage, Ohioans have created 57 Conservancy Districts. Of these, 19 remain active, five have merged with another district, 10 have been dissolved, and 23 are currently inactive. One of the oldest and most successful districts is the Miami Conservancy District, which is located within the watershed of the Great Miami River in southwest Ohio where the 1913 flood struck hardest. The dams, dikes, and levees constructed by the Miami Conservancy District between 1918 and 1922, which are still in use

today and were the largest public works project of their kind in the world at the time of their construction, have protected communities in the Miami Valley from flooding by the Great Miami River more than 1,500 times over the last 80 years.

Conservancy Districts are independent political subdivisions of the state of Ohio that may be formed at the initiative of local landowners or communities to address flooding and other water management problems.⁴⁰ Conservancy Districts are under the direct jurisdiction of a conservancy court that reviews and approves the actions of the district. The conservancy court consists of one common pleas judge from each county that is part of the Conservancy District.⁴¹ The conservancy court is also responsible for the appointment of a district's board of directors and board of appraisers, who serve five-year terms.⁴² A Conservancy District will continue to exist until dissolved by its conservancy court.

Conservancy Districts are granted a variety of powers beyond flood control under the Conservancy Act. They may construct or modify dams, dikes, levees, and watercourses within the district, but are not required to obtain a permit from the Division of Water Resources in order to do so.⁴³ Conservancy Districts also possess the power of eminent domain and may levy special assessments and issue bonds.⁴⁴ Water quality and quantity studies may be conducted by Conservancy Districts, as well, so long as the studies do not conflict with the activities of other agencies and Ohio EPA is provided with a written report summarizing the findings of any study.⁴⁵

Footnotes — § 6.08:

³⁹ R.C. 6101.01 *et seq.*; R.C. 6101.04.

⁴⁰ R.C. 6101.05; *State ex rel. Cromwell v. Myers*, 80 Ohio App. 357 (Montgomery Cty. 1947).

⁴¹ R.C. 6101.07.

⁴² R.C. 6101.10.

⁴³ R.C. 6101.15.

⁴⁴ R.C. 6101.17.

⁴⁵ R.C. 6101.15.

CHAPTER 7

DRINKING WATER REGULATION

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[1] Department of Health and Private Water Systems

[2] Municipal Regulation of Drinking Water

V. TRENDS SHAPING DRINKING WATER REGULATION

§ 7.13. Trends Shaping Drinking Water Regulation

I.

INTRODUCTION

§ 7.01. Scope

This chapter covers drinking water laws, including:

- History and sources of law [*see* § 7.02 *below*].
- Constructing and operating public water systems [*see* §§ 7.03–7.11

below].

- Regulation of water sources and well-siting [*see § 7.05 below*].
- Maximum contaminant levels, treatment, and monitoring [*see §§ 7.07–7.08 below*].
- Cross connection bans and backflow prevention [*see § 7.09 below*].
- Public notification and consumer reporting [*see § 7.10 below*].
- Enforcement [*see § 7.11 below*].
- Private water systems and regulation by health departments [*see § 7.12 below*].
- Municipal regulation of drinking water [*see § 7.12 below*].
- Trends shaping drinking water law [*see § 7.13 below*].

II.

HISTORY AND SOURCES OF REGULATION

§ 7.02. Federal Safe Drinking Water Act and Ohio Regulation

The State of Ohio has regulated public water systems directly since at least 1908 with the passage of the statute creating the Ohio Board of Health. Prior to that, the General Assembly authorized municipalities to protect municipal water systems and their sources of water both within and outside their municipal boundaries. With the passage of the Federal Safe Drinking Water Act of 1974,¹ which set federal baseline requirements for public water systems, Ohio amended its existing statutory regime to enable the Director of Ohio EPA to assume and retain primary enforcement authority under the federal regime.² Consequently, federal requirements, in statute or regulation, can be found in **R.C. Chapter 6109** and in Ohio regulations, such as **OAC Chapters 3745-81, 3745-82 and 3745-83**. The Drinking Water program is part of Ohio EPA's Division of Drinking and Ground Water (DDAGW). Private water systems remain regulated by local health districts.

Footnotes — § 7.02:

¹ 42 U.S.C. § 300f *et seq.*

² R.C. 6109.03.

III.

PUBLIC WATER SYSTEMS

§ 7.03. Defining Public Water Systems

A water system is subject to regulation under **R.C. Chapter 6109** if it is “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances if the system has at least 15 service connections and/or regularly serves at least twenty-five individuals.”³ By regulation, Ohio EPA has defined “regularly serves” as serving an average of at least 25 people daily at least sixty days out of the year.⁴

Certain systems are exempt from regulation under **R.C. Chapter 6109**. These include systems that consist only of distribution and storage facilities, and do not have collection and treatment works,⁵ systems that obtain all water from a public water system,⁶ a system that does not sell water to any person⁷ or is a carrier which conveys passengers in interstate commerce.⁸ A public water system must be licensed and renew its license annually.⁹

Footnotes — § 7.03:

³ R.C. 6109.01(A).

⁴ OAC 3745-81-01(P)(11).

⁵ R.C. 6109.02(A).

⁶ R.C. 6109.02(B).

⁷ R.C. 6109.02 (C).


⁸ R.C. 6109.02(D).

⁹ R.C. 6109.21.

§ 7.04. Water System Plan Approval

No person shall begin construction or installation, or make a substantial change in a public water system until Ohio EPA approves plans for the activity.¹⁰ Moreover, before entering into a financial commitment to initiate

construction or expand capacity of a public water system, a person must notify the director of Ohio EPA.¹¹

 **Strategic Point:** “Substantial change” is a term of art which is partially defined in the regulations. It includes, but is not limited to, changes in facilities, equipment or process, but it excludes repairs, maintenance and “like-kind replacement.”¹²

Ohio regulations specify requirements for a public water system plan.¹³ Standards to review the technical sufficiency of plan applications are specified by regulation, which identifies various publications published by Ohio EPA and certain interest groups. Ohio EPA will also consider generally acceptable engineering design practices and standards of the American Water Works Association.

Caution: The Director’s time for review is not circumscribed by a regulatory limit. Also, the Director is accorded with considerable discretion. Practically, applicants should plan for the time and expense of lengthy approval process.

Caution: Some small public water systems are required to place funds in escrow with Ohio EPA to ensure proper installation, construction and operation of the system.¹⁴

Footnotes — § 7.04:

¹⁰ R.C. 6109.07.

¹¹ OAC 3745-81-03.

¹² OAC 3745-91-01(C).

¹³ OAC 3745-91-01 through -12.

¹⁴ R.C. 6109.08; OAC Chapter 3745.92.

§ 7.05. Regulatory Review of Water Sources and Well-Siting


Ohio drinking water laws for public water systems are focused on provision of clean and safe water for human consumption. Consequently, direct regulatory authority over source water focuses on water “treatability”

and consists of a general review of available water quantity.

An exception to the limited authority described above is the broad regulation by Ohio EPA of the use and placement of wells for public water systems. The location of any well used in a public water system must comply with specific setback requirements in relation to potential sources of contamination, property boundaries, surface waters, roads and buildings.¹⁵ The well must be constructed to meet requirements for the geologic conditions.¹⁶ Once a well is constructed, it must undergo pump tests, sampling and disinfection and an Ohio EPA inspector must confirm compliance before the well can be licensed and used.¹⁷

Caution: The general requirements for well drilling, well construction, well log reporting and water withdrawal registration are set forth in the Ohio Department of Natural Resources regulations, described in [Chapter 6 above](#).

In terms of water quantity, Ohio EPA may require an investigation to determine if sufficient quantity exists for the intended purpose,¹⁸ and a pump test to determine safe yield and drawdown.¹⁹ Yet, Ohio EPA has stated that the purpose of these regulations is only to determine whether a well will meet the proposed design capacity. Regulations do not specify that Ohio EPA must or should consider impacts to other current or proposed uses. Ohio EPA has stated that other current and proposed uses are considered only to the degree that they could interfere with the ability of the proposed well to meet design capacity.

 **Strategic Point:** The question of reconciling competing uses of an aquifer or water body is not a regulatory question for Ohio EPA, but one of property rights and determination of reasonable use. See [Chapter 5 above](#).

While Ohio EPA has limited direct regulatory authority over the source of supply, it exercises significant indirect regulation of source issues.²⁰ All public water systems must undertake periodic sanitary surveys.²¹ Ohio EPA's extensive source water protection program is designed to enable systems to identify and address potential sources of contamination and to develop contingency plans.²² All community water systems annually must report

information to their users regarding the source of supply.²³ Further, as of September 1, 2009, certain large community public water systems must develop or update a source water protection plan upon receipt of Ohio EPA plan approval for installing a new well.²⁴ Ultimately, the Ohio EPA Director retains authority, originating with the Board of Health law of 1908, to notify a public water system that the system is contaminated and to order system changes.²⁵

Footnotes — § 7.05:

¹⁵ OAC 3745-9-04.

¹⁶ OAC 3745-9-05 and -06.

¹⁷ OAC 3745-9-08 and -09.

¹⁸ OAC 3745-9-04(A)(15).

¹⁹ OAC 3745-9-09(B).

²⁰ See, e.g., OAC 3745-9-02(F) (“The director shall not issue a plan approval for a well ... which will cause or contribute to contamination of the well or the groundwater.”).

²¹ OAC 3745-81-60.

²² 42 U.S.C. § 300h-7 (requiring well head protection in state programs since 1986). Ohio EPA does not mandate that local systems undertake source water protection assessments, but strongly encourages and assists with the process.

²³ OAC 3745-96-02.

²⁴ OAC 3745-91-10.

²⁵ R.C. 6109.14 through 6109.20.

§ 7.06. Classifying Public Water Systems

[1] Operator Classification

The owner of a public water system is responsible for complying with requirements to place operation of a system under control of an operator who has achieved and maintains the proper certification.²⁶ For purposes of determining appropriate level operating expertise, public water systems are classified into Class A, I, II, III, and IV. Classification is based on (1) indicators of potential health risk, (2) the source of the water supply, (3) the

quality of the source, (4) the complexity of the treatment and distribution, (5) the amount of water consumption, and (6) the system's potential for public health hazards.²⁷

[2] Classification Based on Size

Public water systems are categorized based on the size of the population served. This classification is used to determine feasibility of treatment technologies, implementation schedules and a host of other regulations. Most people in Ohio get water from the largest systems, known as “community water systems,” or CWS, which face the most stringent regulations. A community water system is defined as a public water system that has at least 15 service connections used by year-round residents or that regularly serves at least 25 year-round residents.²⁸ A “noncommunity water system”, or NCWS, is any public water system that is not a CWS.²⁹ A NCWS can be a “nontransient noncommunity water system,” defined as a NCWS that regularly serves 25 of the same residents in a six month period.³⁰ If a NCWS serves less than 25 of the same residents in a six month period, it is classified as a “transient noncommunity water system.”³¹

[3] Classification Based on Source Water


Public water systems also are classified in terms of the source water in order to determine the appropriate modes of treatment processes and technology. For example, source water that is open to the atmosphere and subject to surface water runoff is classified as “surface water.”³² Surface water systems must monitor and remove contaminants originating in the atmosphere and from land, contaminant origins that groundwater systems do not often encounter.³³ Source water that comes from a well and meets other criteria is considered “groundwater,”³⁴ though not all water from a well is classified as groundwater. Many systems use groundwater recharge systems or are otherwise so connected to surface water that treatment for human consumption must eliminate risks and contaminants found in surface water, such as microbial diseases.³⁵ Ground water sources that require surface water treatment are termed “groundwater under direct influence of surface water” or GWUDI.

Footnotes — § 7.06:

- ²⁶ OAC 3745-7-02.
- ²⁷ OAC 3745-7-03.
- ²⁸ R.C. 6109.01(E); OAC 3745-81-01(P)(11)(a).
- ²⁹ OAC 3745-81-01(P)(11)(b).
- ³⁰ OAC 3745-81-01(P)(11)(b)(i).
- ³¹ OAC 3745-81-01(P)(11)(b)(ii).
- ³² OAC 3745-81-76(A).
- ³³ See, e.g., OAC 3745-81-71 to -75.
- ³⁴ OAC 3745-81-76(B).
- ³⁵ OAC 3745-81-76.

§ 7.07. Maximum Contaminant Levels and Treatment

The regulatory backbone of the federal Safe Drinking Water Act³⁶ are the treatment standards that apply to water piped for human consumption. The upper limit of permissible contaminants in treated, or “finished,” water delivered to any user are called Primary Maximum Contaminant Levels (MCLs).³⁷ Pursuant to the federal Safe Drinking Water Act, U.S. EPA is required every five years to study additional contaminants and determine if new MCLs should be instituted, so the number is never static.³⁸

 **Strategic Point:** MCLs are health based standards that apply to drinking water but do not apply generally to the environment.³⁹ Nonetheless, MCLs are often referenced in other areas of environmental regulation, such as in the groundwater standards of the Voluntary Action Program.⁴⁰

A key treatment concept underlying the federal Safe Drinking Water Act is the requirement that a public water system install Best Available Technology or BAT. BAT is defined as the best technology, treatment techniques or other means which the Director may approve, after examination for efficacy under field conditions and taking cost into consideration, for a public water system to use for achieving compliance with a MCL.⁴¹ In some instances, BAT is specified by rule.⁴² In other cases, determination of BAT is

a point of negotiation between public water systems and Ohio EPA.

Ohio drinking water regulations also require monitoring of “Secondary Maximum Contaminant Levels.” These secondary MCLs are defined as “the advisable maximum level of a contaminant in water which is delivered to a free-flowing outlet of the ultimate user of a public water system.”⁴³ Secondary MCLs have been established for aluminum, chloride, color, odor, corrosivity, fluoride, and others.⁴⁴

Public water systems must meet MCLs and other standards throughout the system, not just as water leaves the treatment facility. Systems must maintain a specified minimum chlorine residual while it travels through the distribution system to users, but it also cannot exceed maximum levels of chlorine anywhere in the system.

Footnotes — § 7.07:

³⁶ Public Law 104-182, 104th Congress.

³⁷ OAC 3745-81-01(M)(2).

³⁸ 42 U.S.C. § 300g-1(b).

³⁹ See, e.g., *D & J Co. v. Stuart*, 146 Ohio App. 3d 67 (Ohio App. 6 Dist.) (Sept. 14, 2001) (denying contractual claims for damage based on contamination in soil and groundwater exceeding MCLs because MCLs are irrelevant where property served by a public water system).

⁴⁰ See, e.g., OAC 3745-300-08(E).

⁴¹ OAC 3745-81-01(B)(3).

⁴² See, e.g., OAC 3745-81-12.

⁴³ OAC 3745-82-01(B).

⁴⁴ OAC 3745-82-02.

§ 7.08. Monitoring and Certified Labs

Compliance with MCLs is determined by extensive monitoring requirements on public water systems. Ohio regulations and individual licenses specify the timing, frequency, location and method of monitoring hundreds of contaminants. Regulations also specify reporting and record-keeping requirements.⁴⁵ Monitoring occurs at the source, throughout the

treatment system, throughout the distribution system and even at the user's tap. Monitoring requirements vary depending on the classification of the public water system in terms of size and source water. All sample analysis must be conducted by a state-certified laboratory.⁴⁶

Footnotes — § 7.08:

⁴⁵ OAC 3745-81-33.

⁴⁶ OAC Chapter 3745-89.

§ 7.09. Cross Connection Ban and Backflow Prevention

In order to maintain the quality of piped water in a public water system, the Safe Drinking Water Act bans all cross connections between the public water system and any auxiliary water system a user may have.⁴⁷ Users who have an auxiliary system which uses any water source other than the public water system—such as a separate pond or groundwater for a fire suppression system—must have approved backflow prevention devices.⁴⁸

Footnotes — § 7.09:

⁴⁷ R.C. 6109.13; OAC 3745-95-02.

⁴⁸ OAC 3745-95-06.

§ 7.10. Public Notification and Consumer Reporting

Public water systems are required to provide notification of certain violations using language specified in Ohio regulations.⁴⁹ In addition, public water systems must make required statements when disruptive events occur, such as water main breaks that result in loss of water or water pressure. Annually, public water systems are required to report to their customers on the source of water supply, information on detected contaminants, compliance with drinking water laws, health warnings and other information.⁵⁰

Footnotes — § 7.10:

⁴⁹ OAC 3745-81-32.

⁵⁰ OAC Chapter 3745-96.

§ 7.11. Enforcement

Operation of a public water system in violation of [R.C. Chapter 6109](#) or an Ohio EPA rule, plan approval, license, variance or exception is subject to injunctive relief and a civil penalty of up to \$25,000 per day per violation.⁵¹

⚠ Warning: Under the Safe Drinking Water Act and Ohio statute, the Director of Ohio EPA has the authority to levy an administrative penalty as part of a unilateral administrative order.⁵²

Footnotes — § 7.11:

⁵¹ [R.C. 6109.31](#), [6109.32](#) and [6109.33](#).

⁵² [R.C. 6109.23](#); [OAC 3745-81-04](#).

IV.

PRIVATE WATER SYSTEMS

§ 7.12. Private Water Systems and Local Regulation

[1] Department of Health and Private Water Systems

Private water systems are any source of water for human consumption that does not qualify as a “public water system.”⁵³ The Public Health Council, under the Ohio Department of Health, is charged with developing the “sanitary code” applicable to “private water systems.”⁵⁴

Sanitary regulations adopted by the Public Health Council form a baseline of regulation that cities and local health districts must meet, though local regulation can be more stringent. Local health departments issue permits to construct, alter or seal private water systems pursuant to [OAC Chapter 3701-28](#). Local health departments inspect and enforce regulation of private water systems, though subject to oversight by the director of the department of health.⁵⁵

The Ohio Department of Health also has authority to investigate outbreaks of illness, which can include illness that may arise from potable water.⁵⁶

[2] Municipal Regulation of Drinking Water

Municipalities long have had authority to operate and regulate their own water systems, under both statute and the Ohio Constitution. The Ohio Constitution provides that municipalities may operate a public water utility, enact local sanitary regulations and exercise eminent domain outside their municipal boundaries.⁵⁷ By statute, municipal ordinances to protect the sources of supply are valid within municipalities and up to 20 miles outside municipal boundaries.⁵⁸ Municipalities are entitled to enact ordinances and regulations for the operation of their system and to exercise eminent domain outside municipal boundaries.⁵⁹

Footnotes — § 7.12:

⁵³ R.C. 3701.344(A) (“private water system” is any well, cistern, or other such system that provides water for human consumption and that does not meet the definition of “public water system” at R.C. 6109.01(A)); OAC 3701-28-01(PPP).

⁵⁴ R.C. 3701.33.

⁵⁵ R.C. 3701.344(B).

⁵⁶ R.C. 3701.14.

⁵⁷ Ohio Const. Art. XVIII, Sections 3, 4, 7 and 10.

⁵⁸ R.C. 743.25, 743.14, 743.17.

⁵⁹ R.C.743.02; see *Portage County, et al. v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954 (2006) (upholding city’s exercise of police power to restrict recreational access to municipal reservoir).

V.

TRENDS SHAPING DRINKING WATER REGULATION

§ 7.13. Trends Shaping Drinking Water Regulation

Various trends have influenced the application of current regulations and the direction of developing regulation. An understanding of such trends is critical to effective understanding of Ohio law. For example, due to heightened concerns and threats of terrorism in the United States, responses to the risks of sabotage and other terrorist attacks must now be considered in the preparation and maintenance of public drinking water systems.

Specifically, public water systems are now required to conduct vulnerability analyses and to prepare emergency plans for continued operation in the event of various challenges. Ohio EPA maintains a webpage with important information to meet these challenges.⁶⁰

Further, in August 2014, the City of Toledo, Ohio was completely cut off from its drinking water supply (Lake Erie) due to the presence of toxins from massive algae blooms in the western basin of Lake Erie.⁶¹ Over 400,000 residents of the City and surrounding suburbs were without drinking water for multiple days while the City, Ohio EPA and U.S. EPA attempted to address the presence of these toxins. This event has resulted in attempts to legislate and/or pass additional regulatory measures to better combat the formation of algae blooms and to improve the water quality in the Lake Erie drainage basin. Nevertheless, these issues are not limited to Lake Erie, as samples taken from algae blooms in lakes throughout the State have identified new and more prevalent blooms never before detected in Ohio waters.⁶²

Lastly, the endless issue of maintaining aging infrastructure in an era when many central cities are losing population relative to ex-urban areas strains limited budgets at the same time new regulatory demands are made. Outside of Ohio, the risks of aging infrastructure on drinking water systems became a reality in 2015 as the City of Flint, Michigan discovered lead levels in City drinking water exceeding health standards following the City's switch to a new drinking water source leading to the leaching of lead into drinking water from the City's aging drinking water infrastructure.⁶³ This ongoing issue has led to other municipalities in Ohio to more thoroughly evaluate their own drinking water systems, which has uncovered some additional lead impacts to water to a lesser extent than discovered in Flint, Michigan.⁶⁴ In response to these recent issues, Ohio's Governor, John Kasich signed House Bill 512 which became effective on September 9, 2016. HB 512 requires Ohio EPA to amend current drinking water rules to improve lead detection notifications for community water systems and nontransient, non-community public water systems.⁶⁵

Footnotes — § 7.13:

⁶⁰ <http://epa.ohio.gov/ddagw/security.aspx> (last visited Apr. 11, 2017); see also OAC Chapter 3745-85 (regulating public water system contingency planning).

⁶¹ <http://www.glc.org/wp-content/uploads/2017/03/GLC-Water-Infrastructure-Priorities-for-the-Great-Lakes-030217.pdf> (last visited Apr. 11, 2017).

⁶² <http://www.epa.ohio.gov/ddagw/HAB.aspx> (last visited Apr. 11, 2017).

⁶³ <https://www.epa.gov/flint> (last visited Apr. 11, 2017).

⁶⁴ http://www.epa.state.oh.us/ddagw/pws/advisory_map.aspx (last visited Apr. 3, 2016).

⁶⁵ <http://epa.ohio.gov/Portals/28/documents/rules/final/HB512Final.pdf> (last visited Apr. 11, 2017).

CHAPTER 8

PERMITTED WASTE FACILITIES AND OPERATIONS

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I.

PROCEDURAL CONTEXT

§ 8.01. Scope

This chapter covers:

- Solid Waste [see § 8.05 *below*].
- Transfer Facilities [see § 8.05[5] *below*].
- Scrap Tires [see § 8.05[6] *below*].
- Residual Waste [see § 8.05[7] *below*].
- Construction and Demolition Debris [see § 8.06 *below*].
- Hazardous Waste [see § 8.07 *below*].
- Medical and Infectious Waste [see § 8.11 *below*].
- Recyclable Materials [see § 8.08 *below*].
- Enforcement [see §§ 8.12 and 8.13 *below*].
- Coal Combustion Waste [see § 8.14 *below*].
- Omnibus Regulatory Reform Act of 2012 [see § 8.15 *below*].

§ 8.02. Procedural Context—Complying with Waste Management Requirements

The differences in the potential threat that various types of wastes present to human health and the environment result in different statutory and regulatory procedures for the proper management of each type of waste. Attorneys must be alert to basic handling and permitting requirements associated with various waste streams to avoid potential pitfalls that face clients who create or encounter regulated waste material.

II.

THE OHIO WASTE CONTROL PROGRAM

§ 8.03. Checklist for Managing Waste Materials

- Identify all potential waste producing processes.
- Identify laboratories capable of providing waste analysis.
- Evaluate all wastes to determine nature and characteristics.
- Analyze recycling potential and pollution prevention or material substitution possibilities.
- Establish proper storage area for waste materials.
- Ensure that employee training and documentation relevant to handling wastes.
- Establish procedures to timely remove and dispose of waste materials.
- Ensure all necessary permits are current.
- Establish recordkeeping procedures to provide validation for waste test results.

§ 8.04. History of Ohio's Waste Regulatory Program

Before the creation of the Ohio Environmental Protection Agency (Ohio EPA) in 1972, Ohio Department of Health and local health boards and

departments administered Ohio's solid waste regulatory program.¹ Pre 1972, the state department adopted rules governing the construction and operation of sanitary landfills in Ohio, and the local health boards and health departments issued annual operating licenses and conducted compliance inspections, respectively. When Ohio EPA was created in 1972,² the Ohio General Assembly divested the Ohio Department of Health of all of its rule-making authority in the solid waste area and gave that authority to Ohio EPA, where it has been implemented by a subject matter division variously named (over the years) the "Division of Solid Waste Management," the "Division of Hazardous and Solid Waste Management," the "Division of Solid and Infectious Waste Management," and the "Division of Materials and Waste Management" (its current title). The local health boards and health departments, however, retained their respective regulatory duties (licensing and inspection) under the supervision of Ohio EPA, so that, in the solid waste arena. The division of authority is as follows: Ohio EPA adopts the substantive regulations governing solid waste management (including the design of solid waste facilities, such as sanitary landfills, solid waste transfer stations, and construction and demolition debris facilities), and issues construction permits, called permits to install, through its solid waste division (however named), while the local health departments and health boards conduct routine compliance inspections and issue annual operating licenses.

Ohio amended its waste laws to conform with the requirements of the federal Resource Conservation and Recovery Act (RCRA) and the regulations promulgated thereunder, first in 1979,³ before United States Environmental Protection Agency (USEPA) issued administrative regulations governing the identification, generation, storage, treatment, and disposal of hazardous waste in 1980, and again in 1981,⁴ after USEPA issued its first set of hazardous waste regulations. After the 1980 amendment, Ohio EPA renamed its Division of Solid Waste Management as the Division of Hazardous and Solid Waste Management and granted that the Division expanded responsibilities over hazardous waste regulation.

As the 1980s progressed, Ohio EPA concluded it was administratively unwieldy to attempt to administer both Ohio's hazardous waste laws and regulations and Ohio's solid waste laws and regulations through a single subject matter division. By the middle of that decade, Ohio EPA decided to separate these programs into two separate Agency divisions—the Division of

Solid Waste Management and the Division of Hazardous Waste Management.

The next major change in this administrative scheme came in 1989, when the Ohio General Assembly enacted the first of Ohio's statutory laws governing the generation, transportation, and disposal of infectious waste.⁵ Upon enactment of H.B. 592, the Ohio EPA Director delegated responsibility for administering the new infectious waste laws to the renamed Division of Solid and Infectious Waste Management.

In April 2011, former Ohio EPA Director Scott Nally announced that he was rearranging the administrative framework by which his Agency had been administering Ohio's waste laws since 1989. Specifically, Director Nally consolidated three of Ohio EPA's subject matter divisions, the Division of Emergency and Remedial Response,⁶ the Division of Hazardous Waste Management (DHWM), and the Division of Solid and Infectious Waste Management (DSIWM), into two divisions with new names. The Division of Environmental Response and Revitalization (DERR) absorbed functions related to cleanup at permitted hazardous waste facilities. The Division of Materials and Waste Management (DMWM) absorbed solid, infectious, and hazardous waste permitting and regulatory functions previously housed in the former Divisions of Hazardous Waste Management and Solid and Infectious Waste Management.

DMWM oversees the proper handling of wastes and promotes reuse and recycling of materials and waste generated in Ohio. This Division is responsible for:

- issuing permits to regulate hazardous waste treatment, storage, and disposal facilities;
- issuing of permits, licenses, and or registrations to regulate:
 - o solid waste disposal facilities,
 - o solid waste transfer facilities,
 - o composting facilities,
 - o scrap tire facilities and transporters,
 - o construction and demolition disposal landfills,

- o infectious waste treatment facilities,
- o infectious waste generators and transporters;
- administrating state and local planning for long-term solid waste management;
- inspecting hazardous waste generators and facilities subject to permits, registrations, and licenses;
- using fees collected from the sale of new tires to clean up scrap tire dumps;
- using penalty money to address environmental problems at abandoned and orphaned waste sites; and
- providing technical support to regulated entities, health departments, and citizens.

In 2011, the clean-up programs have moved into DERR. This division oversees:

- voluntary cleanups;
- brownfields revitalization;
- closure and corrective action at sites regulated by hazardous waste permits;
- federal facilities cleanup;
- state remedial cleanup;
- Superfund cleanups; and
- site assessment and field sampling.

From 2012 to 2015, Ohio EPA considered revamping its solid waste regulatory program. Even though it did not make as extensive changes as it planned, Ohio EPA, in 2015, excluded source separated recyclables from the flow control authority⁷ of Ohio's solid waste management districts,⁸ and replaced Ohio's Solid Waste Advisory Council with an entity named the "Ohio Materials Management Advisory Council" to emphasize the shift in emphasis from waste disposal to materials management and re-use.⁹

Alert: In 2016, Ohio EPA created the Division of Environmental Response, Investigation and Enforcement (ERIE) to conduct emergency response actions, which DERR used to handle.¹⁰ Additionally, ERIE provides technical and investigative support for resolving environmental crimes and ensures compliance and enforcement is efficient and consistent across all divisions and district of Ohio EPA.

Footnotes — § 8.04:

¹ Ohio had no hazardous waste regulatory program until the first of Ohio’s hazardous waste laws, Ohio S.B. 266, became law in 1979 (following enactment of the federal Resource Conservation and Recovery Act in 1976) and no infectious waste regulatory program until Ohio’s solid waste law was extensively amended by enactment of Ohio Substitute Amended House Bill 592 in 1989.

² By enactment of [R.C. Chapter 3745](#).

³ See Ohio S.B. 266.

⁴ See Ohio S.B. 269.

⁵ See Ohio Amended Sub. H.B. 592. The infectious waste provisions of H.B. 592 were codified at [R.C. 3734.021 through 3734.027](#).

⁶ This Division was created in the early 1980s as a response to the enactment of the Federal Comprehensive Environmental Response, Compensation and Liability Act in 1980, to oversee the cleanup of hazardous waste sites, both disposal sites and spill sites. It had formerly been an “office” within the then Division of Solid Waste Management.

⁷ See [R.C. 343.011](#), [343.011](#) and [343.015](#).

⁸ See [R.C. 343.01 et seq.](#)

⁹ See [R.C. 3734.45](#).

¹⁰ Environmental Response, Investigation and Enforcement, Ohio EPA, *available at* <http://epa.ohio.gov/derie/Home.aspx> (discussing ERIE’s role at Ohio EPA).

§ 8.05. Managing Solid Waste

[1] Definitions

“Solid wastes” are “unwanted”¹¹ residual solid or semisolid material that results from industrial, commercial, agriculture and community operations.¹² The determination that a material is “unwanted” is based upon an objective

examination of the facts surrounding the generation and handling of the subject materials.¹³ Solid waste includes garbage, scrap tires, combustible and noncombustible materials, and street dirt and debris. However, certain materials are excluded from the definition of solid waste such as:

- Earth or material from construction, mining, or demolition operations;
- Nontoxic fly ash and bottom ash;¹⁴
- Nontoxic, nonhazardous, unwanted fired and unfired, glazed and unglazed, structural products made from shale and clay products;¹⁵
- Nontoxic foundry sand;
- Slag; and
- Other substances that are not inimical to public health.¹⁶

A “solid waste facility” is any site, location, tract of land or building used for the transfer, incineration, composting, sanitary landfilling, or other method of disposal or transfer of solid waste.

The Division of Materials and Waste Management oversees the permitting and regulation of new and modified solid waste facilities in Ohio.

[2] Beneficial Use of By-Products

An interesting twist is Ohio EPA’s treatment of what it calls “beneficial use by-products.”¹⁷

Alert: Ohio EPA enacted new Beneficial Use Program rules in [OAC 3745-599](#), which became effective on March 31, 2017. The following materials are included in the rules:

- foundry sands
- drinking water treatment residuals
- waste materials burned for energy recovery
- sewage sludge (biosolids) incinerator ash and
- dredged material from federal navigation channels in Lake Erie

When beneficial use by products are used according to specified

conditions, they may be used as an ingredient in construction materials, like cement or concrete, or used as a fuel or ingredient in combustion units with no input or authorization required by Ohio EPA. There are general permits for dredged material, drinking water treatment materials, foundry sand, and biosolids incinerator ash. A person seeking coverage under a general beneficial use permit must complete a Notice of Intent, amongst other things.¹⁸ If a beneficial use by product does not have a general permit, a person may apply for an individual permit and submit the appropriate fee.¹⁹

For materials not included in [OAC Chapter 3745-599](#), like paper sludge or baghouse dust, Ohio EPA continues to offer permits known as Land Application Management Plans (“LAMPs”)²⁰ and Integrated Alternative Waste Management Plans (“IAWMPs”) pursuant to [R.C. 3734.02\(G\)](#).²¹

[R.C. 3734.125](#) grants the Director authority to adopt rules in accordance with [R.C. Chapter 119](#) that establish requirements governing the beneficial use of materials from a horizontal gas well that have come into contact with refined oil based substances which are not technologically enhanced naturally occurring radioactive material.²² Ohio EPA has still not promulgated rules regarding this topic and this was not addressed in the new beneficial use rules.


[3] Obtaining Solid Waste Facility Permits to Install and Licenses

Ohio law bans the open burning or dumping of solid waste.²³ In so doing, the law effectively prohibits the disposal of solid waste in Ohio anywhere except a properly permitted and licensed solid waste disposal facility. No person may construct or operate a solid waste disposal facility without a permit to install issued by Ohio EPA²⁴ and annually obtaining an operating license issued by the Board of Health of the health district in which the facility is located, respectively.²⁵

To secure a permit to install authorizing the construction of a new solid waste disposal facility or the expansion of an existing facility, an application must be submitted to Ohio EPA²⁶ for the review of the Division of Materials and Waste Management, describing, among other things, the geology and hydrogeology of the proposed landfill site and demonstrating, among other things, that the new facility (or any portion of the existing facility) will be designed in accordance with comprehensive and complex design regulations

imposed by Ohio EPA, operated in accordance with Ohio EPA's sanitary landfill operations regulations, and closed in such a manner so as to protect the public health and safety and the environment.²⁷ Financial assurances sufficient to guarantee proper closure and post-closure care of the landfill must be submitted to secure a permit to install.²⁸ By statute, Ohio EPA may not issue a permit to install authorizing the construction of a new solid waste disposal facility or the expansion of an existing one until the applicant demonstrates all of the following:

- The proposed facility (or expansion) is not located within the boundaries of a state park or any unit of the natural park system;²⁹
- The permit applicant has exhibited sufficient reliability, competency, and expertise to be entrusted with the operation of a sanitary landfill;³⁰
- Neither the permit applicant nor any of its key employees or major shareholders has been convicted of any one of twenty-one specifically enumerated criminal offenses which include, without limitation, murder, kidnapping, robbery, certain drug-related offenses, and arson;³¹
- The permit applicant has a history of environmental compliance and is currently in substantial compliance with all applicable environmental laws and regulations.³²


 **Timing:** An applicant for a permit to install a new solid waste facility or modify an existing one must submit its permit application at least 270 days before the proposed installation or operation start date.³³ The applicant must concurrently file an application for an operating license with the appropriate board of health.³⁴ Applications for the renewal of annual operating licenses for existing facilities must be submitted on or before September 30th of the year preceding the year for which the operating license is sought.³⁵ Failure to submit a renewal application within the established time frame results in a requirement to pay an additional fee that is equal to 10% of the application fee for each week that the application is late.

Both permits to install and permits to operate are transferable.

An operating license may be transferred to a new owner upon consent of the appropriate licensing authority. The prospective new owner must comply

with the background investigation requirements discussed in § 8.12 below. The licensing authority may establish new terms and conditions in the transferred license that are considered appropriate to ensure compliance.³⁶

While the construction of solid waste landfills must comply with minimum standards, a permit to install may establish additional construction requirements. The construction requirements contained in the permit are not required to mimic the requirements contained in the rules.

 **Strategic Point:** Differences between the construction requirements contained in the rules and the permit to install should be resolved in favor of the requirements identified in the permit.³⁷

In 2013, Ohio’s 10th District Court of Appeals was asked in *Citizens Against American Landfill Expansion v. Korleski*³⁸ to decide under what circumstances a solid waste facility permit to install (“PTI”) could be issued allowing the construction of a vertical expansion over unlined units of an existing sanitary landfill that were installed and permitted prior to the promulgation in 1991 of USEPA’s Subtitle D regulations.³⁹ Those regulations require, *inter alia*, that new sanitary landfill units installed after the issuance of the Subtitle D regulations be designed and constructed with artificial liners and leachate control systems to control the collection and release of leachate.

In the *Citizens Against American Landfill Expansion* case, a citizens group, joined by the local solid waste district, opposed the issuance of a PTI authorizing the expansion of Waste Management’s American Landfill, located near Canton, Ohio, because the permit application did not account for the billions of gallons of water which the citizens group alleged must have infiltrated the waste mass of the old fill during most of its history. The citizens group maintained that much of the water either remained in the older fill, which would cause stability problems for the proposed vertical expansion, or had escaped the fill, polluting the groundwater underlying the unlined portions of the old fill in violation of R.C. 6111.04(A) and R.C. 3734.44(D).⁴⁰

After finding that the record contained credible evidence that insufficient water was present in the older fill to pose a stability problem, the Court of Appeals then turned its attention to whether the prohibition against water pollution contained in R.C. 6111.04(A)(1) could be separately asserted in

opposition to a landfill PTI application, and found that it could not:

We conclude that the legislature intended to primarily regulate (and prohibit) possible leachate releases from landfills under Ohio's solid waste laws codified at [R.C. Chapter 3734](#). Solid waste facility PTIs must be assessed under that specific body of law rather than [R.C. Chapter 6111](#). ... [W]hen assessing the *potential* risks to groundwater posed by the proposed expansion, [the tribunal below] properly looked first to the EPA's own regulations governing solid waste disposal.⁴¹

[4] Operating Solid Waste Facilities

An operator of an Ohio solid waste disposal facility may not accept for disposal certain types of wastes, such as:


- Asbestos or asbestos containing waste material that is subject to the provisions of NESHAP, [40 C.F.R. Part 61, Subpart M](#);
- Containerized bulk liquids or non-containerized liquids;
- Polychlorinated biphenyls (PCB) or PCB containing wastes as defined in [40 C.F.R. Part 761](#);
- Materials that are designated as infectious wastes pursuant to [OAC 3745-27-01\(I\)\(6\)](#);
- Yard wastes as that term is defined in [OAC 3745-27-01\(Y\)\(1\)](#);
- Whole scrap tires (or shredded scrap tires) as defined in [OAC 3745-27-01\(S\)\(6\)](#);
- Hazardous waste as defined in [OAC 3745-27-01\(H\)\(1\)](#);
- Low level radioactive wastes as that term is defined in [R.C. 3734.27](#).⁴²

In addition, in 2012, the Ohio General Assembly banned the comingling of aluminum production wastes with other solid wastes at sanitary landfills in Ohio. *See § 8.15 infra*.

The operation of a solid waste landfill is subject to general requirements concerning noise, dust and odor control, the suppression or control of insects, rodents and other vectors, and litter control, as well as specific requirements concerning the following:

- Daily cover;
- Intermediate cover;
- Final cover;
- Waste placement;
- Surface water management;
- Leachate management;
- Daily inspections and log keeping;
- Annual reporting; and
- Closure and post-closure.⁴³

The owner or operator of a solid waste landfill must keep a copy of the plan for the final closure and post-closure care of the landfill in the operating record for the landfill.

 **Timing:** The owner or operator must implement the provisions of the closure and post-closure plan within 7 days of the expiration of the operating license where a renewal application has not been submitted or the application has been denied.⁴⁴ Closure activities must also begin within seven days where the operating license has been suspended or revoked.⁴⁵

Exception: An operating landfill that has additional approved capacity and simply stops accepting wastes for a period of not more than 1 year and then resumes operating within that year is not required to start closure.⁴⁶

[5] Solid Waste Transfer Facilities

A “solid waste transfer facility” is used to transfer solid wastes from one vehicle or container to another for eventual transport to a disposal facility. Transfer facilities do not include facilities that handle scrap tires.⁴⁷ (See § 8.05[6] below.) As is the case for other types of solid waste facilities, transfer stations must obtain a permit to install from the Director of Ohio EPA and, concurrently, submit disclosure statements and undergo a background

investigation.⁴⁸ (See § 8.12 below.) Transfer stations are subject to siting criteria prohibiting the location of facilities in a floodplain and within 200 feet of any surface waters.⁴⁹ Operational requirements include:

- Maintaining access roads;
- Confining waste handling to the smallest practical area; and
- Controlling vectors, noise, odors, and dust so as not to create a nuisance or health hazard.

⚠ Warning: Transfer facilities may not accept items such as hazardous wastes, asbestos and asbestos containing material, low level radioactive waste, untreated infectious waste, yard waste, waste oil, lead-acid batteries, and whole or shredded scrap tires.⁵⁰

Transfer stations must start closing a facility when the owner or operator declares that the facility will stop accepting waste. Closure is also mandatory when the license expires and the owner or operator has not submitted a renewal application.

Closure requirements consist of the following:

1. Cleaning all waste handling areas;
2. Removing all solid wastes;
3. Removing and disposing of leachate; and
4. Posting signs at all access gates that the facility is closed.⁵¹

Alert: During Ohio EPA’s reorganization of [OAC Chapter 3745](#), it rescinded many of the rules regarding solid waste transfer facilities that were in [OAC 3745-27](#) and moved these rules to 3745-555.

[6] Managing Scrap Tires as Solid Waste


“Scrap tires” are unwanted or discarded tires that have been removed from their original use by the original owner or manufacturer. Scrap tires include pieces as well as the whole tire.⁵²

Ohio law prohibits the transportation of scrap tires for storage,

processing, or disposal except to one of the following facilities: (1) a scrap tire recovery facility duly authorized under Ohio law to accept such scrap tires;⁵³ (2) a scrap tire monocell or monofill duly licensed under Ohio law;⁵⁴ (3) a scrap tire storage facility duly licensed under Ohio law;⁵⁵ (4) a properly licensed solid waste incinerator or energy recovery facility; (5) a facility located within the state of Ohio that will beneficially use the scrap tires,⁵⁶ or (6) a facility located outside the state of Ohio legally permitted to accept scrap tires for collection, storage, disposal, processing, or beneficial use.

Ohio law prohibits the transportation of scrap tires except by a transporter that has obtained a certificate of registration from Ohio EPA,⁵⁷ and authorizes Ohio EPA's Director to establish by rule a manifesting system for tracking the transportation of scrap tires in Ohio.⁵⁸

Ohio law also confers upon Ohio EPA's Director the authority to create a comprehensive notification, registration and/or permitting system for scrap tire collection,⁵⁹ storage or recovery facilities, scrap tire monocells and monofills, and facilities that beneficially use⁶⁰ scrap tires.⁶¹ Ohio law also gives the Ohio EPA Director the power to adopt rules governing the design, construction, operation and/or closure of those facilities.⁶²

 **Strategic Point:** The beneficial use of up to 100 scrap tires is allowed without Ohio EPA approval, unless the scrap tires are causing a public nuisance or potential harm to the environment.⁶³ There are “pre-approved” uses that do not require Ohio EPA approval prior to the implementation of the construction project.⁶⁴


[7] Managing Residual Waste

“Residual solid waste” is a classification of solid waste that includes:

- Certain wastes generated by fuel burning operations that use coal as the primary fuel;
- Certain wastes from foundry operations such as air pollution control dust and wastewater treatment plant sludge;
- Certain wastes from pulp and papermaking operations;
- Certain wastes from steelmaking operations such as air pollution control equipment;

- Certain wastes from wastewater treatment plant operations;
- Certain wastes from finishing operations;
- Wastes from gypsum processing plant operations;
- Wastes from lime processing operations; and
- Wastes from portland cement operations.⁶⁵


Residual solid wastes are subject to specialized rules that allow a solid waste landfill to be licensed as a residual waste landfill facility where one or a combination of residual solid wastes are disposed of exclusively.⁶⁶

 **Timing:** A permit to install with detailed plans addressing specific construction and operational requirements must be submitted to and approved by the Director of Ohio EPA before a residual waste facility is established or an existing landfill is modified.⁶⁷ The facility must also obtain a license from the Director prior to operation.⁶⁸

Before disposing, residual wastes must be sampled and tested to determine and confirm that the wastes can be disposed of in the specific type of residual waste landfill.⁶⁹ Residual waste facilities must also follow operational requirements such as groundwater monitoring as well as closure and post-closure requirements.⁷⁰

[8] Requirements of Rule 13 of the Solid Waste Regulations

No person may grade, drill, excavate or build upon a solid waste facility without express permission unless authorized under the facility permit.⁷¹ “Facility” means the limits of solid waste placement, solid waste handling area, or area of hazardous waste treatment, storage, or disposal.⁷²

 **Warning:** The Rule 13 ban applies to active and inactive non regulated solid waste disposal facilities.

Footnotes — § 8.05:

¹¹ There is decisional law in Ohio holding that the mere fact that a generator of waste material is reusing such material in a beneficial manner does not mean that the material is not “unwanted” for purposes of R.C. 3734.01(E). See *State v. Neville*, 1998 Ohio App. LEXIS 5519 (Ohio Ct. App. Noble County, Nov. 17, 1998).

¹² R.C. 3734.01(E).

¹³ See *State v. Neville*, 1998 Ohio App. LEXIS 5519 (Ohio Ct. App. Noble County Nov. 17, 1998); *Omnisource Corp. v. Lucas County*, 2006 U.S. Dist. LEXIS 316 (N.D. Ohio Jan. 6, 2006) (regulation of auto shredder residue as “solid waste” under R.C. Chapter 3734 imported into Ohio from Michigan does not impermissibly burden interstate commerce).

¹⁴ Including ash that results from the combustion of coal or coal in combination with scrap tires, where tires comprise not more than half of heat input in any given month. See R.C. 3734.01(E). See also § 8.15 below regarding December 2014, USEPA final rule regarding non-toxic fly ash.

¹⁵ R.C. 3734.01.

¹⁶ R.C. 3734.01(E).

¹⁷ “Beneficial use by-product” means a solid waste, industrial waste or other waste having properties necessary or preferred for beneficial use. OAC 3745-55-02. See <http://epa.ohio.gov/dmwm/Home/BeneficialUse.aspx>.

¹⁸ OAC 3745-599-210.

¹⁹ OAC 3745-599-310-350.

²⁰ OAC 3745-42-13.

²¹ This statutory provision allows the Director to grant exemptions from provisions of Ohio’s solid and hazardous waste laws and regulations. See OAC 3745-27-05 (regarding alternative solid waste disposal methods).

²² In 2014, Ohio EPA also amended the provisions of OAC 3745-27-78 governing the beneficial use/reuse of scrap tires.

²³ R.C. 3734.03.

²⁴ OAC 3745-27-02.

²⁵ R.C. 3734.05(A)(1). If a solid waste district established pursuant to R.C. 3734.52 creates a solid waste disposal zone which designates where solid waste facilities may be located, no permit may be issued authorizing the siting of a solid waste facility outside of such zone. *Clarke v. Bd. of County Comm’rs*, 2006-Ohio-1271, 2006 Ohio App. LEXIS 1161 (2006).

²⁶ R.C. 3745.05(A)(2); OAC 3745-27-02.

²⁷ See OAC 3745-27-06 through 3745-27-11. In 2014, *a propos* of groundwater pollution that might result from the issuance of a landfill permit to install in *Citizens Against American Landfill Expansion v. Korleski*, 2014-Ohio-123, 2014 Ohio App. LEXIS 101, 9 N.E.3d 386 (Franklin County Court of Appeals 2014), the Court of Appeals of Franklin County, Ohio, ruled that, so long as an application for a solid waste PTI demonstrates that the proposed facility will be designed, constructed and operated in accordance with the ground water protection provisions of Ohio EPA’s solid waste regulations, the mere fact that pollution of ground water may occur once the facility is up and running in violation of the prohibition against ground water pollution contained in R.C. 6111.04 is not grounds

for denying the PTI application.

²⁸ R.C. 3734.09.

²⁹ R.C. 3734.02(M).

³⁰ R.C. 3734.44(A).

³¹ R.C. 3734.44(B).

³² R.C. 3734.44(D).

³³ R.C. 3734.05(A).

³⁴ R.C. 3734.05(A).

³⁵ R.C. 3734.05(A).

³⁶ R.C. 3734.05(A)(1).

³⁷ OAC 3745-27-08.

³⁸ 2014-Ohio-123, 2014 Ohio App. LEXIS 101 (Franklin County 2014).

³⁹ 40 C.F.R. Part 258.

⁴⁰ R.C. 3734.44(D) forbids the issuance of solid waste facility PTIs unless the Director of Ohio EPA finds that the permit applicant has a history of compliance with Ohio's environmental laws, including its water pollution laws. R.C. 6111.04(A)(1) prohibits the pollution of the waters of the state. R.C. 6111.01(H) defines the term "waters of the state" to include groundwater.

⁴¹ *Citizens Against American Landfill Expansion v. Koncelik*, 2014-Ohio-123, ¶ 40 (Ohio Ct. App. Franklin County 2014) (emphasis in original).

⁴² OAC 3745-27-19(E)(8).

⁴³ *See generally* OAC 3745-27-19.

⁴⁴ OAC 3745-27-11(C).

⁴⁵ OAC 3745-27-11(C)(1)(c), (d).

⁴⁶ OAC 3745-27-11(C)(1)(e).

⁴⁷ OAC 3745-27-01(S)(28).

⁴⁸ OAC 3745-555-300.

⁴⁹ OAC §§ 3745-555-110 to 3745-555-150, and 3745-555-320.

⁵⁰ OAC 3745-555-650

⁵¹ OAC 3745-555-700.

⁵² R.C. 3734.01(Z); OAC 3745-27-01(S)(6).

⁵³ A “scrap tire recovery facility” is a facility used to process scrap tires to recover usable products, materials, or energy. See OAC 3745-27-01(S)(13).

⁵⁴ A “scrap tire monofill” is a landfill dedicated solely to the disposal of scrap tires, and a “scrap tire monocell” is a cell of a sanitary landfill dedicated solely to the disposal of scrap tires. See OAC 3734-27-01(S)(11) and (13).

⁵⁵ A “scrap tire storage facility” is a facility used for the storage of scrap tires prior to the transportation to a disposition facility, a recovery facility, or a facility where the scrap tires will be beneficially used. See OAC 3745-27-01(S)(15).

⁵⁶ The term “beneficial use” means the processing use of a scrap tire in a manner that results in a commodity for sale or exchange, see OAC 3745-27-01(B)(1), or in any manner authorized by OAC 3745-27-78.

⁵⁷ R.C. 3734.83; OAC 3745-27-54.

⁵⁸ R.C. 3734.83(B); OAC 3734-27-57.

⁵⁹ OAC 3745-27-61. A “scrap tire collection facility” is a facility that receives and stores whole scrap tires from the general public prior to their transportation to a scrap tire storage facility, monocell, monofill, or recovery facility.

⁶⁰ OAC 3745-27-01(B); 3745-27-78.

⁶¹ See OAC 3745-27-54 through 3745-27-75.

⁶² R.C. 3734.70 through 3734.80.

⁶³ OAC 3745-27-78(A).

⁶⁴ OAC 3745-27-78(D), (E).

⁶⁵ OAC 3745-30-01(B).

⁶⁶ OAC 3745-30-02. Ohio’s residual waste rules were upheld in *Buckeye Power, Inc. v. Korleski*, 183 Ohio App. 3d 179, 2009-Ohio-2232, 916 N.E.2d 820 (2009).

⁶⁷ R.C. 3734.05; OAC 3745-30-05; OAC 3745-30-07.

⁶⁸ OAC 3745-30-02(C).

⁶⁹ OAC 3745-30-03; OAC 3745-30-04.

⁷⁰ OAC 3745-30-08; OAC 3745-30-14; OAC 3745-30-09; OAC 3745-30-10.

⁷¹ OAC 3745-27-13.

⁷² OAC 3745-27-13(B).

§ 8.06. Managing Construction and Demolition Debris

[1] C&DD Is Material Resulting from the Alteration, Construction or Destruction of Manmade Structures


“Construction and Demolition Debris” (C&DD) is material resulting from the alteration, construction, destruction, rehabilitation, or repair of manmade structures.⁷³ In [Chapter 3714 of the Revised Code](#), the Ohio General Assembly granted the Ohio EPA Director the authority to adopt rules governing the design, construction, operation and closure of construction and demolition debris (“CDD”) landfills, and the power to issue orders to abate violations of [R.C. Chapter 3714](#) and the rules adopted thereunder. As is explained, *supra*, similar to the regulation of solid waste facilities in Ohio, the Ohio EPA Director is empowered by law to issue permits to install new or modified CDD landfills, while the boards of health are empowered by law to issue annual operating licenses to such facilities and to perform periodic inspections.⁷⁴

Exceptions: C&DD does not include materials that are considered solid, infectious or hazardous waste, materials from mining operations, nontoxic fly ash, spent non-toxic foundry sand, slag, and reinforced or non-reinforced concrete, asphalt, building or paving brick or stone that is stored for a period of less than two years for recycling.⁷⁵


In addition to C&DD, three types of solid wastes are allowed to be disposed of in a C&DD landfill:

1. Incidental packaging materials associated with construction materials;
2. Tree stumps, trunks and clean branches that are larger than four inches in diameter; and
3. Asbestos materials where an air pollution control permit has already been issued to the C&DD facility.⁷⁶


[2] Obtaining License for C&DD Facility

 **Warning:** The installation and operation of a C&DD disposal facility requires an annual license that is issued by Ohio EPA.⁷⁷

The local health department may issue the license where it has been granted the authority to operate the solid waste program on behalf of the Ohio EPA.⁷⁸ A \$3,000 fee must accompany the annual license application. Where the fee is paid to the health department rather than Ohio EPA as the licensing authority, the board of health can keep one-half of the fee for the administration and enforcement of the C&DD requirements.⁷⁹ While the modification of an existing facility requires the submission of an application containing the proposed plans and specifications, there is no fee associated with the application.⁸⁰

 **Strategic Point:** The licensing authority may issue an exemption from the C&DD licensing requirements where the proposed disposal is at a location unlikely to adversely affect the public health, safety or the environment, or create a fire hazard.⁸¹ Unlike Ohio's solid waste regulatory program, Ohio's C&DD regulatory program does not on its face require the disposal of C&DD solely at a properly licensed C&DD facility.

[3] Complying with C&DD Facility Siting and Operating Requirements

 **Warning:** C&DD disposal facility siting requirements prohibit the construction of a C&DD facility in a 100-year floodplain or within the boundaries of a sole source aquifer.⁸²

Exception: A facility operating or under construction on July 24, 1990 is not subject to the foregoing prohibition.⁸³


C&DD facilities must follow design, operating and closure requirements such as a leachate management limiting the level of leachate to one foot,⁸⁴ and a two-layer cap system.⁸⁵ Operating requirements include, but are not limited to, keeping records that identify waste loads that were accepted or rejected,⁸⁶ managing any leachate outbreaks,⁸⁷ and monitoring groundwater where the disposal facility is located near wells or an aquifer.⁸⁸ Closure provisions include requirements to minimize maintenance and the formation and release of leachate.⁸⁹


[4] Complying with Legislation Imposing More Stringent Requirements

On December 22, 2005, significant amendments to [R.C. Chapter 3714](#), Ohio's C&DD statute, which came into the law, required Ohio EPA to establish standards and procedures for the issuance of permits to install (PTIs) for new and modified C&DD facilities.⁹⁰ The legislation also imposed more stringent construction and operating requirements on C&DD facilities.⁹¹ Ohio EPA's first set of implementing regulations became final on August 31, 2007, modifying the C&DD rules set forth at [OAC 3745-400](#). Under the 2007 rules, an owner or operator of a C&DD landfill must obtain an operating license from the appropriate authority, Ohio EPA, or a delegated Health District.⁹² Detailed design plans and plan drawings must be submitted as part of the license application for a new or modified CDD landfill, including specifications for a recompacted soil liner, an elaborate cap system, groundwater monitoring system, and leachate collection system.⁹³ Additionally, a "site characterization" report is required, demonstrating through an analysis of hydrogeologic data, the appropriateness of the soil liner and groundwater monitoring plans.⁹⁴ Quarterly groundwater monitoring will be required initially, followed by annual sampling.⁹⁵ Following construction of the landfill, the owner/operator must submit a "construction certification report," signed off on by a professional engineer.⁹⁶

Ohio EPA's 2007 rules also imposed prohibitions on acceptance of certain types of wastes,⁹⁷ mandate maintenance of daily logs,⁹⁸ and provided a roadmap for proper daily operation of the landfill.⁹⁹ Finally, owner/operators are required to demonstrate financial assurance for implementing the landfill's closure plan.¹⁰⁰

The 2005 amendments to [R.C. Chapter 3714](#) also imposed certain disclosure statement and background investigation requirements on applicants, which are similar to the requirements for owners and operators of solid and hazardous waste facilities (*see § 8.12 below*).¹⁰¹

 **Timing:** A new owner must submit a disclosure statement to Ohio EPA no later than 120 days prior to the proposed acquisition of the facility by the transferee.¹⁰²

 **Warning:** Ohio EPA may deny an application or a transfer if the Director determines that the applicant or transferee has a "history of

substantial non-compliance” with environmental laws that indicates that such a party “lacks sufficient reliability, expertise and competence” to operate the C&DD facility.¹⁰³

[5] C&DD Rulemaking

In January 2010, Ohio EPA released a second set of C&DD rules in draft form for stakeholder comment which it claimed would minimize the environmental impacts from new and expanding construction and demolition debris landfills. Public comments were taken through April 1, 2011.

In aid of this rule-making, in 2011 Ohio EPA began hydrologic investigations at various operating C&DD landfills. The purpose of this evaluation was to provide the Agency with information necessary to evaluate whether it should include additional or expanded groundwater monitoring rules in its pending C&DD facility rule-making. In January 2011, Ohio EPA issued revisions to January 2010, draft rules. These revisions included extensive siting, design, and operating requirements to prevent groundwater problems. New and expanding C&DD landfills would be required to obtain a permit prior to construction, as well as an annual operating license. Enhanced requirements for new and expanding C&DD landfills would include:

- more stringent engineering requirements that include more elaborate liners caps;
- more extensive ground water monitoring requirements specifically designed to detect if there are any impacts from the operation of the facility;
- more stringent odor monitoring requirements on a daily basis and addressing odors that are noted, including maintaining a log of odor complaints from neighbors;
- inspecting for indications of surface and subsurface fires and addressing those that are noted; and
- providing five years of post-closure care, as well as adequate financial assurance to provide environmentally protective closure and post-closure care of the landfill.

In 2005, the Ohio General Assembly required Ohio EPA to revise its

construction and demolition debris disposal regulations. The Agency published draft regulations in 2006 and received extensive comments from interested parties. In response to comments received, Ohio EPA conducted additional technical studies, including an evaluation of leachate data from Ohio's C&DD landfills. In 2007, Ohio EPA also sampled all of the operating C&DD landfills and one closed C&DD landfill in Ohio where access to leachate existed (30 C&DD landfills).

An Ohio EPA study completed in 2009 concluded that leachate from Ohio C&DD landfills poses a threat to public health and the environment if released to ground water or surface water. The purported threat is caused by a variety of organic parameters, metals, and inorganic parameters. The degree of risk associated with the threat by a release is dependent upon how the C&DD was disposed, site conditions, and circumstances surrounding the site, which often change over time.

Some of the rules originally proposed for these facilities in 2006 are now included in new, multi-program chapters. These rules—which cover permitting, licensing, ground water monitoring, site investigation, design and construction—were released for comment concurrently with the C&DD rules.

After imposing an initial cut off date of April 1, 2011, for the submittal of public comment on its proposed C&DD rules and after substantial push-back from the regulated community, Ohio EPA extended the public comment period several times in 2011. Final rules governing facility construction, final closure, and post-closing care, financial assurance of closure and post-closure care, and wording of financial instruments became effective on August 1, 2012. New leachate control rules became final and effective on January 1, 2013.

Footnotes — § 8.06:

⁷³ OAC 3745-400-01(F).

⁷⁴ R.C. 3714.051, 3714.06, 3714.08, 3714.09, and 3714.12.

⁷⁵ R.C. 3714.01(C); OAC 3745-400-01(F).

⁷⁶ OAC 3745-400-11(F)(2)(a), (b), (c).

⁷⁷ R.C. 3714.05 and 3714.051.

- 78 R.C. 3714.06(A).
- 79 R.C. 3714.07.
- 80 R.C. 3714.06(A); OAC 3745-400-15.
- 81 R.C. 3714.04.
- 82 R.C. 3714.03; OAC 3745-400-06(B).
- 83 OAC 3745-400-06(A).
- 84 OAC 3745-400-07(F).
- 85 OAC 3745-400-07(G).
- 86 OAC 3745-400-11(B).
- 87 OAC 3745-400-11(O).
- 88 OAC 3745-400-11(R).
- 89 OAC 3745-400-12.
- 90 R.C. 3714.02(A).
- 91 R.C. 3714.02.
- 92 OAC 3745-400-11(C)(1).
- 93 OAC 3745-400-07.
- 94 OAC 3745-400-09.
- 95 OAC 3745-400-10.
- 96 OAC 3745-400-08(A).
- 97 OAC 3745-400-11(F)(2).
- 98 OAC 3745-400-11(B)(9).
- 99 OAC 3745-400-11.
- 100 OAC 3745-400-13.
- 101 R.C. 3714.052.
- 102 R.C. 3714.052(D).
- 103 R.C. 3714.052(B).

§ 8.07. Managing Hazardous Waste

[1] Hazardous Waste Is Waste That Is Specifically Listed as Such or That Has Hazardous Waste Characteristics

A “hazardous waste” is a substance that, once it becomes waste,¹⁰⁴ is either specifically listed in the regulations as a hazardous waste¹⁰⁵ (called a “listed” hazardous waste) or which testing discloses is toxic, ignitable, corrosive, or reactive (called a “characteristic” hazardous waste).¹⁰⁶ Generally, mixing a characteristic hazardous waste with a non-hazardous waste produces a hazardous waste (for regulatory purposes) only if the resulting mixture demonstrates the hazardous characteristic upon testing.¹⁰⁷ In contrast, mixing a listed hazardous waste with a non-hazardous waste produces a hazardous waste for regulatory purpose.¹⁰⁸

A material becomes a “waste,” and, if characteristically hazardous or included in one of Ohio EPA’s hazardous waste lists, a hazardous waste, when discarded. However, there is case law in Ohio that holds that a retailer did not violate Ohio’s hazardous waste laws when it transferred ownership of materials that did not qualify as a hazardous waste at the time of transfer to a recycling company, but that later became a hazardous waste when the recycling company failed to recycle or purposely dispose of them.¹⁰⁹


The USEPA delegated the administration of the federal hazardous waste management program in Ohio to the Ohio EPA. As discussed above, currently, Ohio EPA’s Division of Materials and Waste Management (DMWM) is responsible for implementing the hazardous waste management program in Ohio. That program involves the regulation of hazardous wastes from the moment the relevant activity creates the waste until it reaches its final disposition. This comprehensive hazardous waste regulatory structure, now administered in Ohio by DMWM, is commonly called the “cradle-to-grave” system, as the regulations address hazardous wastes from their initial generation to the point of waste disposal, and all handling in between. The rules apply to all facilities that generate, transport, treat, store, or dispose of hazardous waste.¹¹⁰

As previously discussed, on April 21, 2011, Ohio EPA announced it was consolidating three of its operating divisions into two. The former Divisions of Hazardous Waste Management, Emergency and Remedial Response, and


Solid and Infectious Waste Management (DSIWM) were consolidated into two: (1) a newly created Division of Materials and Waste Management (DMWM) that absorbed the permitting and regulatory functions formerly administered by DHWM and DSIWM; and (2) a newly created Division of Environmental Response and Revitalization (DERR) that absorbed functions related to cleanup at permitted hazardous waste facilities and unpermitted sites that have suffered spills of hazardous materials.

[2] Obtaining Hazardous Waste Facility Permit

The establishment or operation of a hazardous waste facility requires the submission of an application for an installation and operation permit. The application must contain detailed plans and specifications. It is a violation¹¹¹ of Ohio law to commence construction of a hazardous waste facility before permit issuance.¹¹²

 **Timing:** The application must be submitted at least 180 days before the proposed start date for the operation of the facility.¹¹³

An applicant must also submit a disclosure statement to the state Attorney General and undergo a background check (*see § 8.12 below*).¹¹⁴

 **Warning:** The applicant must also engage in an extensive public information process that includes notifying the legislative authority where the facility is proposed to be located. The applicant then must hold at least one public meeting in the proposed location of the facility to inform the community of the proposed hazardous waste management activities.¹¹⁵

A hazardous waste facility must follow siting criteria that does not allow the location of a facility within 2000 feet of the following:

1. Any residence, school, hospital, jail, or prison;
2. Any naturally occurring wetland; and
3. Any floodplain where the facility is not designed, constructed and maintained to prevent a washout in the event of a 100-year flood.¹¹⁶

Each aspect of the actual operation of a hazardous waste facility is

subject to extensive requirements that include everything from personnel training¹¹⁷ and the equipment required to be present at a facility¹¹⁸ to the required aisle space (for storage facilities),¹¹⁹ reports¹²⁰ and recordkeeping that must be maintained by a facility.¹²¹ Hazardous waste facilities must also follow detailed closure and post-closure requirements that include the development of a written plan minimizing the need for further maintenance and the installation of controls to limit or eliminate threats to human health and the environment as well as the post-closure escape of hazardous waste and contaminated run-off.¹²² Facilities must also demonstrate a financial ability to properly close the facility.¹²³ Releases from waste management units may subject the facility to Ohio EPA “corrective action” remedial requirements,¹²⁴ now overseen by Ohio EPA’s newly created Division of Environmental Response and Revitalization.

[3] Shale and Clay Product Wastes

Until 2015, how to characterize waste products resulting from the manufacture or production of shale and clay products, such as ceramic roofing tiles, remained uncertain in Ohio. In Ohio Amended House Bill 64, Ohio’s 2015 biennial budget bill, the Ohio General Assembly acted to address that uncertainty by excluding such products from the definition of “solid waste” contained in [R.C. 3734.01\(S\)](#), while at the same time establishing a regulatory scheme that specifically addresses such products, which scheme does the following:

- Prohibits a person from using, managing, or disposing of certain structural products created from clay or shale in a manner resulting in any of specified occurrences, including:
 - An exceedance of a water quality standard;
 - An exceedance of a primary or secondary maximum contaminant level established for safe drinking water purposes; or
 - An emission of an air contaminant;
- Generally prohibits a person from placing, accumulating, or storing for further processing structural products in specified locations, including within the boundaries of a sole source aquifer;
- Authorizes the Director or the Director’s authorized representative to

enter property to inspect and investigate conditions or examine records relating to alleged noncompliance with the above prohibitions and to apply for a warrant permitting the entrance and inspection or examination; and

- Excludes certain shale and clay products from regulation as solid wastes under [R.C. Chapter 3734](#).

H.B. 64 also prohibits a person from placing, accumulating, or storing for further processing such structural products in any of the following locations:

- (1) Within the boundaries of a sole source aquifer;
- (2) Within the boundaries of a source water protection area; or
- (3) Above an unconsolidated aquifer capable of yielding at least 100 gallons per minute.

The 2015 budget bill specifically stipulates that the prohibition regarding placement, accumulation, or storage does not apply to structural products that have been sold or distributed in the stream of commerce as desired commodities. The Director or the Director's authorized representative may enter private or public property to inspect and investigate conditions or examine records relating to alleged noncompliance with the above prohibitions and may apply for a warrant permitting the entrance and inspection or examination. Anyone who violates any of the above prohibitions must pay a civil penalty of not more than \$10,000 per day of violation. Additionally, the Attorney General, upon the request of the Director, must bring an action for an injunction against the person. Finally, under the act and by operation of continuing law, a purposeful violation is a felony punishable by a fine of not more than \$25,000, imprisonment for not more than four years, or both, and a knowing violation is a misdemeanor punishable by a fine of not more than \$10,000, imprisonment for not more than one year, or both. Each day of violation is a separate offense.

The Director is given authority to adopt rules establishing procedures and requirements that are necessary to administer the above provisions.

[4] Complying with Hazardous Waste Generator Requirements

Hazardous waste generators are categorized by the amount of hazardous

waste they create. “Conditionally exempt small quantity generators” (CESQGs) generate less than 100 kilograms (220 pounds) of hazardous waste in a month. While a CESQG does not have to obtain a generator identification number from USEPA, it must properly evaluate the generated wastes and keep the information on file for review to demonstrate proper treatment and disposal of its hazardous wastes.¹²⁵ A CESQG can mix hazardous waste with used oil if the used oil will be burned for energy recovery. The used oil will be subject to the regulatory requirements for used oil.¹²⁶

“Small quantity generators” (SQGs) generate 100 to 1000 kilograms (220–2,200 pounds) of hazardous waste in a month. An SQG cannot keep more than 6,000 kilograms (13,228 pounds) on site.¹²⁷ While a SQG must follow more detailed requirements for managing and disposing of hazardous wastes than a CESQG, the requirements are considerably less than for a “large quantity generator” (LQG), who creates more than 1,000 kilograms of hazardous waste in a month. An LQG must comply with the full panoply of hazardous waste requirements, including waste manifests,¹²⁸ written waste management practices,¹²⁹ dating and marking of storage tanks,¹³⁰ inspections; personnel training; preparedness and prevention measures; contingency planning; and recordkeeping and annual reporting.¹³¹ An LQG also faces more restrictive limitations on the total number of days that waste can be accumulated on site without a storage permit before being shipped for disposal (90 days as opposed to 180 days for a SQG).¹³²

On January 24, 2013, Ohio EPA issued a final rule modifying the hazardous waste generator reporting obligations codified at [Section 3745-52-41 of the Ohio Administrative Code](#). Specifically, Ohio EPA changed the reporting period for Large Quantity Generators from annual reporting to biennial reporting.

Alert: U.S. EPA signed the final Hazardous Waste Generator Improvements Rule, which updates hazardous waste generator regulations to make the rules easier to understand, facilitate compliance, and provide greater flexibility.¹³³ The rules will be effective May 30, 2017 only in states that do not have final authorization of their base RCRA programs. Since Ohio has authorization, it must modify its program to reflect the federal

regulations' more stringent regulations. The more stringent provisions include: (1) Requiring SQGs, LQGs, and transfer facilities to better define the risks of hazardous wastes accumulated in tanks, containers, drip pads, and containment buildings and when hazardous waste is accumulated in satellite accumulation areas; (2) requiring LQGs to notify EPA or their authorized state when they plan to close their facilities; (3) requiring SQGs to re-notify every four years; (4) requiring LQGs to submit a biennial report that identifies all of the hazardous wastes generated in the calendar year, not just for the months the facility was an LQG; (5) requiring LQGs updating their contingency plans to prepare a quick reference guide for their contingency plans to assist responders in an emergency; and (6) requiring facilities that recycle hazardous waste without storing the waste to prepare and submit a Biennial Report. Be on the lookout for Ohio EPA to update their rules with the more stringent federal rules and any other federal regulations it decides to incorporate.


[5] Complying with Hazardous Waste Transporter Requirements


A hazardous waste transporter that either begins or ends the transportation of hazardous waste in the state must register with and obtain a uniform permit from the Public Utilities Commission of Ohio (PUCO). A transporter must also obtain a USEPA identification number from Ohio EPA.¹³⁴ Transporters cannot accept loads of hazardous waste for transport unless they are accompanied by a hazardous waste manifest. The transporter must keep copies of the manifest for three years.¹³⁵ Transporters can store containerized manifested wastes for up to ten days at a transfer facility without being subject to additional regulatory requirements.¹³⁶

[6] Avoiding Violations That Frequently Occur

While there are many requirements concerning the management of hazardous waste by all the entities involved in the hazardous waste system, certain violations appear on a frequent basis. For instance, generators often fail to evaluate all the waste streams present at a facility; hazardous waste containers will not have labels identifying that the materials are hazardous wastes; accumulation dates are absent or generators have exceeded maximum allowable storage periods; hazardous waste containers will be open or in poor

condition; failure to train facility personnel (and document the training); and failure to inspect and log waste storage areas.

 **Strategic Point:** All waste streams should be segregated and employees trained as to where hazardous wastes should be located within a facility. All waste evaluation information such as Material Safety Data Sheets, laboratory reports, and any other information should be retained on file with easy access.

 **Strategic Point:** Inspections schedules should be established and the results documented and retained in files that are easily accessible. All paperwork relating to hazardous waste should be reviewed to determine that it is correct and current. A procedure should be established to ensure that all required reports are submitted to agency personnel in a timely manner.

Footnotes — § 8.07:

¹⁰⁴ *But see Paxton v. Wal-Mart Stores, Inc.*, 176 Ohio App. 3d 364, 2008-Ohio-2487, 891 N.E.2d 1269 (2008) (retailer did not violate R.C. Chapter 3734 where it transferred ownership of materials to a recycler for recycling when materials did not qualify as “hazardous waste” at time of transfer).

¹⁰⁵ See R.C. 3734.01(J); OAC 3745-51(30)–(33).

¹⁰⁶ R.C. 3734.01(J); O.A.C. 3745-51-21; O.A.C. 3745-51-22; O.A.C. 3745-51-23; O.A.C. 3745-51-24.

¹⁰⁷ See OAC 3745-57-03(G).

¹⁰⁸ See OAC 3745-51-03(A)(2)(E), 3745-51-03(C)(2)(a).

¹⁰⁹ *Paxton v. Wal-Mart Stores, Inc.*, 176 Ohio App. 3d 364, 891 N.E.2d 1269 (Lucas County Court of Appeals 2008).

¹¹⁰ DMWM personnel review permit applications and write renewal and modified permits; review closure plans and oversee facility implementation; respond to complaints; inspect hazardous waste handlers; prepare recommendations for enforcement; oversee the cleanup of hazardous waste sites; provide technical assistance; review corrective action-related documents and oversee their implementation; interact with and respond directly to the public and the regulated community; and coordinate their activities with other Ohio EPA divisions.

¹¹¹ R.C. 3734.05(C).

¹¹² OAC 3745-50-40; R.C. 3734.11(A); *Garringer v. New Jasper Twp. Bd. of Zoning*, 2010-Ohio-6223, 2010 Ohio App. LEXIS 5228 (Greene County Court of Appeals 2010) (owners of auto

salvage yard can be charged and convicted of violating Ohio's hazardous waste laws when they dispose of and store hazardous wastes without the required permitting and are, in fact, operating an unpermitted hazardous waste facility; *State ex rel. Ohio Attorney General v. LG Development Corp.*, 2010-Ohio-1676, 187 Ohio App, 3d 211, 931 N.E. 2d 642 (Lucas County Court of Appeals 2010) .

113 R.C. 3734.05(C).

114 R.C. 3734.42.

115 R.C. 3734.05(C).

116 R.C. 3734.05(D)(2)(g); OAC 3745-54-18.

117 OAC 3745-54-16.

118 OAC 3745-54-32.

119 OAC 3745-54-35.

120 OAC 3745-54-75; OAC 3745-54-76; OAC 3745-54-17.

121 OAC 3745-54-70; OAC 3745-54-73; OAC 3745-54-74.

122 OAC 3745-55-11; OAC 3745-55-12.

123 OAC 3745-55-40 *et seq.*

124 OAC 3745-54-100; OAC 3745-54-101.

125 OAC 3745-51-05.

126 OAC 3745-51-05(J).

127 OAC 3745-52-44.

128 OAC 3745-52-20.

129 OAC 3745-52-27.

130 OAC 3745-52-30 to 3745-52-33.

131 OAC 3745-52-41. In December of 2012, Ohio EPA issued nine proposed rules, the purpose of which was to change the reporting frequency from annual reporting to biennial reporting. Those proposed rules became effective in February of 2013.

132 OAC 3745-52-34.

133 Final Rule: Hazardous Waste Generator Improvements, U.S. EPA, *available at* <https://www.epa.gov/hwgenerators/final-rule-hazardous-waste-generator-improvements>.

134 OAC 3745-53-11.

¹³⁵ OAC 3745-53-20.

¹³⁶ OAC 3745-53-12.

§ 8.08. Managing Recyclable Materials

“Recycling” involves the use, reuse or reclamation of a material.¹³⁷ Hazardous wastes that are recycled are known as “recyclable materials.” Individuals that handle recycled hazardous wastes must follow the same regulatory requirements that exist for generators, transporters and storage facilities¹³⁸ (see § 8.07 above). Generators and transporters that handle recycled hazardous wastes must notify Ohio EPA that they are engaged in a regulated waste activity. The owners and operators of facilities that store recyclable materials before they are recycled must also obtain a hazardous waste installation and operation permit.¹³⁹ Certain recyclable materials are governed by the requirements for hazardous waste boilers and industrial furnaces, where applicable, as well as the permit requirements in the hazardous waste management system.¹⁴⁰ These recycled materials are hazardous wastes that are:

1. Used in a manner that constitutes disposal;
2. Burned for energy recovery in boilers or industrial furnaces;
3. Used as a source to reclaim precious metals; or
4. Reclaimed spent lead-acid batteries.

Certain reclaimed materials are exempt from the hazardous waste permit requirements. They include the following:

- Industrial ethyl alcohol that is reclaimed;
- Scrap metal;
- Recycled used oil that was a hazardous waste only because it exhibited a hazardous waste characteristic; and
- Certain types of fuel produced from oil bearing hazardous wastes from petroleum refining production and transportation activities.¹⁴¹


Individuals that handle these materials are not required to notify the Ohio EPA that they are engaged in a regulated waste activity.¹⁴²

In a rulemaking published October 30, 2008, USEPA declared its intention to exempt “hazardous secondary materials” from the definition of “solid waste.”¹⁴³ However, the new rule, which became effective December 29, 2008, specifies that a hazardous secondary material is not a waste only if certain conditions are met, which conditions impose new regulatory requirements upon persons generating and/or managing such materials.

Generators recycling the material on site must notify USEPA, have proper containment, and may not engage in “speculative accumulation”; furthermore, the recycling must be “legitimate.”¹⁴⁴ “Legitimate” recycling is that which provides a useful contribution to the recycling process or to a product or intermediate of the recycling process, and the recycling process must produce a valuable product or intermediate.¹⁴⁵ A hazardous secondary material provides a useful contribution if it contributes valuable ingredients to a product or intermediate; replaces a catalyst or carrier in the recycling process; is the source of a valuable constituent recovered in the recycling process; is recovered or regenerated by the recycling process; or is used as an effective substitute for a commercial product.¹⁴⁶

Hazardous secondary materials generated and then transferred to another person for recycling are subject to the same conditions for exemption, plus a duty on the generator’s part to determine that each recycler intends to properly and legitimately recycle the hazardous secondary material rather than simply discard it. Further, the generator must determine that the recycler will manage the hazardous secondary material in a manner that is “protective of human health and the environment.”¹⁴⁷ Recyclers who do not generate the recyclable materials must not only meet a host of record keeping and operating standards, but also must demonstrate financial assurance for the recycling operations and carry liability insurance.¹⁴⁸

Note that the new recycling provisions only become effective in Ohio and other states authorized to administer RCRA hazardous waste programs once those states formally adopt such rules. In any event, it is likely that the new federal rules will be challenged as industry will undoubtedly argue that materials that are not “solid waste” simply may not be regulated under the federal hazardous waste statutory programs.

 **Warning:** While reclaimed ethyl alcohol is exempted from regulation as a hazardous waste, the material is regulated from the

point of generation to redistillation by the Federal Bureau of Alcohol, Tobacco and Firearms.

For fuels to be produced by refining oil-bearing hazardous waste to qualify as exempt they must be inserted into a part of the process designed to remove contaminants; this would typically mean insertion prior to distillation.

⚠ Warning: Hazardous wastes that will be reclaimed for their precious metal content may lose any applicable exemptions if they are accumulated speculatively. Such materials would then become subject to all applicable hazardous waste requirements. To avoid a claim of speculative accumulation, a generator must keep records showing the volume of materials on hand at the beginning of a calendar year, the amount of materials generated or received during the calendar year, and the amount of waste remaining at the end of the calendar year.

Footnotes — § 8.08:

¹³⁷ OAC 3745-51-01(C)(7).

¹³⁸ OAC 3745-51-06(A)(1).

¹³⁹ OAC 3745-51-06(C)(1).

¹⁴⁰ OAC 3745-51-06(A)(2); OAC 3745-266 *et seq.*

¹⁴¹ OAC 3745-51-06(A)(2).

¹⁴² OAC 3745-51-06(A)(3).

¹⁴³ 73 Fed. Reg. 64668 (Oct. 30, 2008).

¹⁴⁴ 40 C.F.R. § 261.4.

¹⁴⁵ 40 C.F.R. § 260.43(b).

¹⁴⁶ 40 C.F.R. § 260.43(b)(1).

¹⁴⁷ 40 C.F.R. § 261.4.

¹⁴⁸ 40 C.F.R. § 261.4(a)(24)(vi).

§ 8.09. Managing Solvent Contaminated Wipes

[1] History

On July 13, 2013, USEPA published a final rule modifying federal hazardous waste rules pertaining to wipes contaminated with certain solvents which, under prior law, would have been managed as hazardous waste. Specifically, USEPA’s final rule revises the regulatory definition of “solid waste” to conditionally exclude solvent-contaminated wipes that are cleaned and reused, and revises the federal regulatory definition of “hazardous waste” to conditionally exclude solvent contaminated wipes that are disposed. USEPA explained its action as follows: “The purpose of this final rule is to provide a consistent regulatory framework that is appropriate to the [low] level of risk posed by solvent contaminated wipes”¹⁴⁹ The exclusions set forth in the final rule require that no free liquids are associated with the wipes, and are contingent upon the generator complying with certain container, labeling, accumulation time, and record keeping requirements specified in the final rule.

On October 31, 2015, Ohio EPA modified its hazardous waste rules to incorporate these changes into Ohio’s hazardous waste program.¹⁵⁰ Ohio’s rule is now functionally identical to the federal rule.

In Ohio, reusable and disposable wipes are excluded from regulation under Ohio’s hazardous waste rules when certain conditions are met. Generators who fail to follow the requirements of this rule will lose the conditional exclusions from the definition of solid waste or hazardous waste, and may become subject to the full requirements of the solid and hazardous waste regulations. The conditions that a generator must meet are outlined below.

[2] Solvent Contaminated Wipes Covered by This Exclusion

Following are the solvent contaminated wipes covered by this exclusion:

- Wipes that contain one or more F001–F005 listed solvents listed in [OAC rule 3745-51-31](#) or the corresponding P- or U- listed solvents. The solvents found in [OAC rule 3745-51-31](#) include:

Acetone	1,2-Dichlorobenzene	Methanol
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Benzene	Methyl isobutyl ketone	Methyl ethyl ketone
n-Butanol	Ethyl acetate	Toluene
Chlorobenzene	1,1,2- Trichloroethane	Methylene chloride
Creosols	Ethyl benzene	Xylenes
Cyclohexanone	2-Ethoxyethanol	Trichloroethylene*
Tetrachloroethylene	Isobutyl alcohol	(*For reusable wipes only.)

- Wipes that exhibit a hazardous characteristic resulting from a solvent listed in [OAC 3745-51-20 to 3745-51-24](#) when that characteristic results from an F001–F005 solvent listed in [OAC rule 3745-51-31](#).
- Wipes that exhibit only the hazardous characteristic of ignitability when containing one or more non-listed in [OAC 3745-51-33](#).
- Under [OAC 3745-51-04\(A\)\(26\)](#), solvent-contaminated wipes that are sent for cleaning and reuse are not solid wastes provided the following conditions of the exclusion are met:
 - (1) The wipes, when accumulated, stored, and transported, must be contained in containers that are: (i) closed; (ii) non-leaking; and (iii) capable of holding free liquids. [A plastic can liner will qualify as a container provided it meets these three conditions.]
 - (2) Containers must be labeled “Excluded Solvent-Contaminated Wipes.”
 - (3) 180 day accumulation limit from the moment a wipe is first placed into the container.
 - (4) Must not contain free liquids at the point they are sent off-site. “Free liquids” are defined in [OAC 3745-50-10\(A\)\(51\)](#). “No free liquids” is defined [OAC 3745-50-10\(A\)\(88\)](#) and is based on the EPA methods test 9095B (paint filter liquids test) or other authorized state standard.
 - (5) Free liquids must be managed according to hazardous waste rules.
 - (6) Maintain the required documentation:
 - Name and address of the laundry, dry cleaner, landfill, or combustor;

- Documentation that the 180-day accumulation time limit is being met;
- Description of the process the generator is using to meet the “no free liquids” condition.

(7) The laundry or dry cleaners’ discharge is regulated under Clean Water Act.

[3] What the Exclusion for the Laundering of Solvent Contaminated Wipes Does Not Include

The exclusion for the laundering of solvent contaminated wipes does not include:

- Wipes that contain listed hazardous waste other than solvents;
- Wipes that exhibit the characteristic of toxicity, corrosivity, or reactivity due to non-listed solvents or contaminants other than solvents.

[4] Disposal of Solvent Contaminated Wipes

Under [OAC 3745-51-04\(B\)\(18\)](#) (Hazardous Waste Exemption), solvent-contaminated wipes, except for wipes that are hazardous waste due to the presence of trichloroethylene, that are sent for disposal are not hazardous wastes from the point of generation provided the following conditions are met:

- (1) The wipes, when accumulated, stored, and transported, must be contained in containers that are: (i) closed; (ii) non-leaking; and (iii) capable of holding free liquids. [A plastic can liner will qualify as a container provided it meets these three conditions.]
- (2) Labeling: Containers must be labeled “Excluded Solvent-Contaminated Wipes.”
- (3) 180 day accumulation limit from the moment a wipe is first placed into the container.
- (4) Must not contain free liquids at the point they are sent off-site. “Free liquids” are defined in [OAC 3745-50-10 \(A\)\(51\)](#). “No free liquids” is defined [OAC 3745-50-10\(A\)\(88\)](#) and is based on the EPA methods

test 9095B (paint filter liquids test) or other authorized state standard.

(5) Free liquids must be managed according to hazardous waste rules.

(6) Documentation required:

- Name and address of landfill or combustion facility;
- Documentation that the 180 day limit is met;
- Description of the process used to ensure no free liquids are present.

(7) Disposal in one of the following:

- Municipal Waste or Industrial Waste Landfill that is permitted, licensed, or otherwise authorized by Ohio and meets the requirements of [rule 3745-27-08](#) or [3745-29-08 of the Administrative Code](#); or
- Is permitted, licensed, or otherwise authorized by another state that has this exemption; or
- Disposal in a permitted hazardous waste landfill; or
- A Municipal Waste Combustor regulated under Section 129 of the Clean Air Act; or
- A Hazardous Waste Combustor, Boiler, or Industrial Furnace regulated under OAC rules 3745- 57, 68 or 266.

[5] Exclusions

The exemption for the disposal of solvent contaminated wipes does not include:

- Wipes that contain listed hazardous waste other than F001 to F005 solvents.
- Wipes that exhibit the characteristic of toxicity, corrosivity, or reactivity due to non-listed solvents or contaminants other than solvents.
- Wipes that are hazardous waste due to the presence of trichloroethylene (TCE).

- OILY RAGS (are not covered by the exclusion for laundering or the exemption for disposal).

Rags containing or otherwise contaminated with used oil are regulated under the used oil rules if the used oil has not been removed by a physical separation process (wringing or centrifuging). If the rags have been drained or otherwise had the used oil removed from them and there are no visible signs of free flowing used oil, they are waste that must be evaluated to determine if they are or are not a hazardous waste.

Footnotes — § 8.09:

¹⁴⁹ 78 Fed. Reg. 46448 (July 31, 2013).

¹⁵⁰ OAC 3745-50-10(88), (118) and (159); 3745-51-04(A)(26) and (B)(18).

§ 8.10. Managing Electronic Waste

[1] General Requirements

Electronic waste or “e- waste” is a term used to describe old, end-of-life electronic appliances and devices. Examples of “e-waste” include:

- Computers;
- Monitors;
- Fax machines and copiers;
- Television sets;
- Stereo/audio equipment;
- Phones (including cell phones);
- Personal digital assistants (PDAs);
- Game consoles; and
- Electronics from industrial sources.

As the use of electronics has proliferated over the last 50 years, the volume of used, obsolete products grows. In the year 2000, the National Safety Council projected that nearly 250 million computers will become

obsolete in the next five years and mobile phones will be discarded at a rate of 130 million per year after 2005. “eCycling” is reusing or recycling these consumer electronics.

Computer monitors and older TV picture tubes contain an average of four pounds of lead. In addition to lead, electronics can contain chromium, cadmium, mercury, beryllium, nickel, zinc, and brominated flame retardants. When electronics are not disposed of or recycled properly, these toxic materials can present an environmental risk.

When a business properly recycles electronic equipment (including donating it for reuse), Ohio EPA does not regard it as a waste. Therefore, it is not regulated under Ohio’s hazardous waste laws. However, if a business does not recycle discarded electronic equipment, or does so improperly, it is Ohio EPA’s position that so-called e-waste must be evaluated to determine if it exhibits a characteristic of hazardous waste (ignitability; corrosivity; reactivity; or toxicity).¹⁵¹ [Ohio Administrative Code Sections 3745-51-20 through 3745-51-24](#) describe these characteristics. In particular, e-waste may exhibit the characteristic of toxicity ([OAC Section 3745-51-24](#)) for lead. E-waste that will be disposed which exhibits a hazardous characteristic must be managed according to Ohio’s hazardous waste regulations.

Specifically, Ohio EPA classifies used electronic equipment exhibiting a characteristic of hazardous waste as a “characteristic by-product.” Ohio EPA classifies unused electronic equipment (defective) as off-specification commercial chemical products. [OAC Section 3745-51-02\(C\)\(3\)](#) states that characteristic by-products and off-specification commercial chemical products are not wastes when reclaimed. Therefore, if the e-waste is recycled, the recycler is recovering material of value from the equipment being recycled, and the recycling processes 75% of the national product at the beginning of the year before the end of the year, the recycler is not “speculatively accumulating,” and the discarded electronics are not considered a waste.

It is worth noting that Ohio’s hazardous waste rules do not require a facility that properly recycles electronic equipment (e.g., does not speculatively accumulate broken cathode ray tubes (*see* [§ 8.10\[2\]](#))) to obtain a hazardous waste permit. However, the owner/operator of the facility must evaluate any waste generated from the recycling process and manage it

accordingly. Ohio EPA's Division of Air Pollution Control may require the owner/operator to obtain an air permit for its recycling equipment.

[2] Cathode Ray Tube (CRT) Waste

A specific subset of e-waste, discarded cathode ray tubes (CRTs), has gained special regulatory attention. Because CRT glass typically has enough lead in it to be a characteristically hazardous waste when discarded, USEPA has adopted an exclusion from its hazardous waste rule specifically for CRT waste.

Under the CRT exclusion (also known as USEPA's "CRT rule"), used CRTs and CRT glass being recycled that meet the requirements of the exclusion are conditionally excluded from the hazardous waste regulations. As long as the used CRTs and CRT glass meet the requirements of this exclusion, they are not considered by USEPA to be a solid or hazardous waste under the Resource Conservation and Recovery Act (RCRA) ([40 C.F.R. § 261.4\(a\)\(22\)](#)). On the other hand, if the exclusion's conditions are not met, both USEPA and Ohio EPA will regard discarded CRTs as waste, and, if characteristically hazardous (most likely for lead), such discarded CRTs will be hazardous waste which must be managed as such.

Note that the CRT exclusion applies only in RCRA-authorized states that have adopted the exclusion, such as Ohio (*see* [OAC §§ 3745-51-04; 3745-51-39](#)), and states where USEPA administers the RCRA program. Facilities handling CRTs also may be subject to other federal and state laws and regulations, including those covering worker safety and transportation.

The federal CRT exclusion covers three different types of CRT materials:

- Used, intact CRTs—CRTs whose vacuum has not been released.
- Used, broken CRTs—CRT glass removed from the CRT housing or casing whose vacuum has been released. This category includes unprocessed CRT glass.
- Processed CRT glass—CRT glass that has been sorted in preparation for recycling.

Under the federal CRT exclusion, different requirements apply to different categories of CRT materials, especially regarding the export of

CRTs to a foreign country.¹⁵²

Used, intact CRTs exported to a foreign country for reuse are subject to a one-time export notification (40 C.F.R. § 261.41). Exporters must send the notification to the appropriate USEPA Regional Administrator to inform the USEPA Regional Office that they intend to export intact CRTs for reuse, and must provide contact information and a statement that they are exporting the CRTs for reuse. The exporters must keep copies of normal business records demonstrating that each shipment of exported CRTs will be reused. Exporters must retain records for three years.

Used CRTs (either intact or broken) exported to a foreign country for recycling are subject to export notice and consent requirements (40 C.F.R. § 261.40 and 40 C.F.R. § 261.39(a)(5), respectively). Exporters must send the export notice to USEPA at least 60 days prior to export. The notice may cover exports occurring during a 12-month or shorter period, and must include address and contact information about the exporter and foreign recycler, a description of the recycling, the planned frequency of export shipments, means of transport, total quantity of CRTs proposed to be shipped over the export period, and information about any transit countries. Exporters shipping used CRTs for recycling under the CRT exclusion are prohibited from shipping until they have received a USEPA Acknowledgement of Consent (AOC) letter documenting the consent USEPA has received from the country of import and any transit countries. A copy of the AOC letter must accompany each export shipment. If a shipment cannot be delivered to the recycler listed in the notice for any reason, the exporter must notify USEPA of the need to change the destination recycler and obtain consent prior to shipping to a different recycler.

Processed CRT glass exported for CRT glass making or lead smelting is not subject to export requirements of the CRT exclusion. CRT glass destined for export *must still, however, meet the requirements for processed CRT glass in 40 C.F.R. § 261.39(c)*. Specifically, under the CRT exclusion, the generator must be able to demonstrate that the exported CRT glass is being used for CRT glass making or lead smelting and not disposed in the receiving country, and that it is not being speculatively accumulated prior to being exported.

Processed CRT glass excluded under a different solid waste exclusion

(for example, CRTs being used as an effective substitute as a fluxing agent at a copper smelter) are not subject to hazardous waste export requirements. However, generators claiming a solid waste exclusion must be able to demonstrate that their CRT glass meets the terms of the exclusion (40 C.F.R. § 261.2(f)).

Note: In March 2012, USEPA proposed revisions to the export provisions of the CRT exclusion in order to better track exports of CRTs and ensure safe management of these materials abroad. As of the date of this writing (April 2014), USEPA has not taken final action.

CRTs that are either disposed of or recycled domestically are essentially subject to the same regulatory regimen as are other commercial or industrial wastes (e.g., the generator must determine whether they would exhibit a hazardous characteristic if disposed and dispose of them only at a properly permitted hazardous waste disposal facility, and the recycler must satisfy the speculative accumulation rule).

Ohio has adopted rules, similar to the federal rule, that provide several conditional exclusions from the hazardous waste management standards for CRTs and CRT glass destined for recycling. These rules are intended by Ohio EPA to increase the collection and recycling of CRTs, and to reduce the amount of lead in landfills by allowing the lead to be reused to make new CRT glass or sent to lead smelters. Under Ohio's rule, used, unbroken CRTs are not regulated as hazardous waste unless they are stored for more than a year. Ohio EPA has stated that its intent in adopting its rule is to establish more manageable standards for unbroken CRTs because the risk of lead releases from them is very low. Since the risk is so low, the storage limitation on unbroken CRTs applies only to collectors or recyclers.

In Ohio, there is an exclusion from the hazardous waste rules for CRTs that come from a residential household. Household CRTs are not subject to the hazardous waste rules if they are kept separate from regulated CRTs.

Regarding CRTs that come from businesses:

- Used intact CRTs destined for recycling from businesses are conditionally excluded from the definition of waste as long as they are

not speculatively accumulated (defined in [OAC rule 3745-51-01](#)) by the collector or the processor.

- Used intact and/or broken CRTs from businesses destined for disposal are subject to regulation as a hazardous waste because Ohio EPA believes there is a likelihood that glass from broken CRTs will exhibit the toxicity characteristic for lead. A business generator has the option to sample and analyze representative samples of the different types of glass to demonstrate that the glass is not hazardous waste.
- Used broken CRTs and processed CRT glass from businesses in Ohio undergoing recycling are excluded from Ohio's definition of waste if they are managed in accordance with [OAC 3745-51-39](#) as outlined below:
 - A. Used broken CRTs are not wastes if they meet the following conditions:
 - (1) They are stored in a building (with a roof, floor and walls) or placed in a container that is constructed, filled, and closed to minimize releases to the environment of CRT glass;
 - (2) Each container is labeled or marked clearly with one of the following phrases: "Used cathode ray tube(s)—contains leaded glass" or "Leaded glass from televisions or computers," and is labeled "Do not mix with other glass materials";
 - (3) They are transported in a container meeting the above requirements;
 - (4) Not accumulated speculatively as defined in OAC rule; and
 - (5) If the glass is used as an ingredient in a product that is placed on the land or used as a substitute for a product that will be used on the land, the requirements of [OAC rules 3745-266-20 to 3745-266-23](#) must be complied with instead of the requirements of [OAC 3745-51-39](#).
 - B. Used, broken CRTs undergoing "CRT processing" are not wastes if they meet the following requirements:

- (1) The waste is not speculatively accumulated as defined in [OAC rule 3745-51-01](#);
- (2) All processing activities must be performed within a building with a roof, floor, and walls; and
- (3) No activities are performed that use temperatures high enough to volatilize lead from CRTs.

It should be emphasized that the rules for speculative accumulation come into play at two points in the processing of the CRT glass:

- The first time is during the storage of broken or unbroken CRT before the funnel glass and the tube glass are separated.
- The second time for the clock to begin on speculative accumulation is after the tube glass has been separated, sized, and stored (processed) prior to further recycling.

Processed glass from used CRTs destined for recycling at a CRT glass manufacturer or lead smelter after processing is not a waste in Ohio unless it is accumulated speculatively. In addition, processed CRT glass that is used as an ingredient to make a product without being reclaimed is excluded unless it is used in products that are placed on the ground in a manner constituting disposal or are accumulated speculatively. If the glass from used CRTs is used on the land or used to make products that are used on the land, it is necessary to comply with the requirements of [OAC rules 3745-266-20 to 3745-266-23y](#). This may require the person who is making the product to obtain a hazardous waste storage permit and to demonstrate that the lead in the product has undergone a chemical reaction in the course of producing the product so as to become inseparable by physical means and meets the requirements for land disposal. The person who is shipping the processed glass for use in a product placed on the land must manage the glass destined for such use in accordance with the hazardous waste generator rules found in [OAC chapter 3745-52](#).

Based on USEPA guidance, CRT glass that is recycled in the following ways is also excluded:

- Used as a fluxing agent in copper smelting;

- Used as a substitute for lead oxide in ceramic tiles.

The rule also regulates the export of CRTs for recycling and reuse. The importation and exportation of CRTs is administered by U.S. EPA. These rules are found in [OAC rules 3745-51-40 and 3745-51-41](#). Exporters shipping broken or unbroken CRTs to another country for recycling must notify EPA and receive written consent from the receiving country through EPA before shipments can be made. This requirement is similar to those applicable to exporters of hazardous waste, which are found at [40 C.F.R. Part 262](#). Exporters shipping used, unbroken CRTs for reuse as computers to another country must submit a one-time notification to EPA.

Footnotes — § 8.10:

¹⁵¹ If discarded, residential e-waste would presumably meet the exclusion from “hazardous waste” for residential waste set forth in [40 C.F.R. § 261.4\(b\)](#).

¹⁵² At least historically, there has been a major export market for discarded CRTs.

§ 8.11. Managing Medical and Infectious Wastes

[1] Infectious Waste Is Waste Containing or Possibly Containing Infectious Agents

Infectious waste is defined by categories that, with the exception of blood and blood products, cultures, and sharps, depend upon the presence of infectious agents or the possibility of the presence of infectious agents. Prior to the enactment of 2012’s Omnibus Regulatory Reform Act (Senate bill 294), the categories of infectious wastes included the following:

1. Cultures and stocks of infectious agents and associated biologicals and discarded live and attenuated vaccines;
2. Laboratory wastes that were, or were likely to have been, in contact with infectious agents;
3. Pathological wastes that include human and animal tissues, organs, body parts and body fluids and excreta that are contaminated with or likely to be contaminated with infectious agents;
4. Waste materials from the rooms of humans or animal enclosures that have been isolated because of diagnosed communicable disease;

5. Human and animal blood specimens and blood products that are being disposed of, provided that the animals were or are likely to have been exposed to a zoonotic or infectious agent;
6. Contaminated carcasses, body parts, and bedding of animals intentionally exposed to infectious agents during research, the production of biologicals, or testing;
7. Sharp wastes used in the treatment or inoculation of human beings or animals;
8. Waste materials generated in the diagnosis, treatment or immunization of human beings or animals; and
9. Other wastes a generator designates as infectious wastes.¹⁵³

[2] Infectious Waste Generator Requirements

A “small generator of infectious waste” generates less than 50 pounds of infectious waste per month. Generating 50 pounds or more per month leads to classification as a “large generator of infectious waste.” A large generator must submit a registration application to the Director of Ohio EPA.¹⁵⁴

🕒 **Timing:** The registration application must be submitted no later than 30 days after the last day of the month the generator met or exceeded the 50 pound threshold. A registration renewal application must be submitted at least 30 days prior to the expiration of the existing registration.

In lieu of a renewal application, the generator may submit a reversion to small generator form stating that it is no longer generating 50 pounds or more of infectious waste per month.¹⁵⁵

Small generators must place all discarded hypodermic needles, syringes, and scalpel blades and infectious wastes associated with such “sharps” in a “sharps container.”¹⁵⁶ Specimen cultures and cultures of viable infectious agents must either be rendered non-infectious on the premises where generated or be rendered non-infectious at an off-site facility owned by the generator or at a properly licensed facility.¹⁵⁷ Small generators also must maintain records of waste generation.¹⁵⁸ Large generators of infectious wastes

must segregate infectious wastes, place all “sharps” in a “sharps container,” place all non-sharps infectious waste in red or conspicuously labeled plastic bags labeled with the international biohazard symbol, and dispose of the infectious waste at a licensed disposal facility after treatment rendering the wastes non-infectious.¹⁵⁹ Large generators also must develop a spill containment and cleanup procedure.¹⁶⁰

[3] Infectious Waste Transporter Requirements

Under law in effect prior to September 5, 2012, infectious waste transporters were regulated by Ohio EPA and were required to submit an application for a registration certificate, along with the requisite application fee, to the Director of Ohio EPA.¹⁶¹ Since the passage of Senate Bill 294 in 2012, Ohio EPA no longer regulates the transportation of infectious waste. In particular, after September 5, 2012, [OAC §§ 3745-27-31](#) (Standards for Infectious Waste Transportation), [3745-27-33](#) (Shipping Paper Requirements), and [3145-29-36\(B\)](#) (Transportation Registration Requirements) became ineffective.

Although Ohio EPA ceased to regulate the transportation of infectious waste after September 5, 2012, the Public Utilities Commission of Ohio, as agent for the U.S. Department of Transportation, continued to regulate the transportation of infectious waste. Substantive requirements applicable to transporters of such wastes can be found in [49 C.F.R. § 171 through 49 C.F.R. § 180](#), and include packaging, labeling, and transport requirements broadly similar to former provisions of the Ohio Administrative Code.

[4] Infectious Waste Treatment Facility Requirements

A permit to install must be submitted to the Director of Ohio EPA for review by DMWM to establish or modify an infectious waste treatment facility. An operating license must also be obtained from the board of health (or the Director of Ohio EPA where the facility will be located in a health district where the board of health is not approved to administer the infectious waste program).¹⁶² A treatment facility handling infectious waste must follow operational standards that prescribe specific treatment options such as:

- Incineration;
- Autoclaving;

- Chemical treatment using a sodium hypochlorite solution for cultures;
- Applied heat encapsulation for sharps;
- Chemical treatment using peracetic acid and grinding; or
- Alternative treatment technologies that have been approved by the Director of Ohio EPA.¹⁶³

Footnotes — § 8.11:

¹⁵³ R.C. 3734.01(R); OAC 3745-27-01(I)(6).

¹⁵⁴ OAC 3745-27-36(A)(1).

¹⁵⁵ OAC 3745-27-36(A)(3)(b).

¹⁵⁶ OAC 3745-27-30(A)(2).

¹⁵⁷ OAC 3745-27-30(A)(3).

¹⁵⁸ OAC 3745-27-30(A)(5) and (6).

¹⁵⁹ OAC 3745-27-30(B).

¹⁶⁰ OAC 3745-27-30(B).

¹⁶¹ OAC 3745-27-31(B).

¹⁶² R.C. 3734.05; OAC 3745-27-37.


¹⁶³ OAC 3745-27-32.


§ 8.12. Complying with Environmental Background Investigation Process


Individuals or entities that apply for or already have a solid waste, infectious waste, or hazardous waste facility permit, and prospective owners of off-site waste facilities within the state must file disclosure statements with the Director of Ohio EPA and the Environmental Background Investigation Unit (EBIU) of the Ohio Attorney General’s Office.¹⁶⁴ Applicants for permits, other than modifications or renewals, must file disclosure statements at the same time a permit application is filed with the Director of Ohio EPA, and update them periodically after permit issuance. The applicant may also receive a specific written notice from the Attorney General requiring the

filing of a disclosure statement by a specific date. The Attorney General will send a written notice to existing permit holders who have not filed a disclosure statement specifying the date by which a disclosure statement must be filed. Annual updates are required.¹⁶⁵ The new owner of an existing facility must file a disclosure statement at least 180 days before the change in ownership.¹⁶⁶

Additionally, any individual required to be listed in the disclosure statement shall be fingerprinted for identification and investigation purposes.¹⁶⁷ The fingerprints are entered into the Retained Applicant Fingerprint Database (RAPBACK), which is administered by the Attorney General's Bureau of Criminal Identification and Investigation. Information to be entered in the data base includes the name and fingerprints of each officer, director, partner, or key employee of an applicant, permittee, or prospective owner of an interest that collects, transfers, transports, treats, stores, or disposes of solid wastes, infectious wastes, or hazardous waste or processes solid wastes that consist of scrap tires. RAPBACK provides real time information about an individual's arrest record and reports that information to the licensing entity if an arrest is made. In this case, if a report is generated through RAPBACK indicating that an individual has been arrested for a disqualifying offense, the Attorney General is to forward this information to the Director of the Ohio Environmental Protection Agency.

 **Strategic Point:** Where a submission includes state and federal fingerprint cards for required individuals, ensure such cards are legible to facilitate the process. Fingerprint cards will only need to be submitted once where all new release and authorization forms have previously been submitted.

 **Strategic Point:** A party may take ownership of the facility after the 180-day period has passed. However, if the Director has not approved the transfer, the parties must include a provision in the sales contract expressly making the change in ownership subject to the Director's approval and expressly negating the transaction if the change of ownership is disapproved by the Director.¹⁶⁸

 **Strategic Point:** Parties who do not wish to or cannot wait 180 days to close on a transaction may request a waiver from this

requirement pursuant to [R.C. 3704.02\(G\)](#).

The requirements for disclosure statements are defined by statute and regulation.¹⁶⁹ The EBIU provides comprehensive disclosure statement forms for use by applicants and proposed new owners.

Disclosure statement forms and instructions can be obtained at <http://www.ohioattorneygeneral.gov/Files/Forms/Forms-for-Business-and-Nonprofit/Environmental-Background-Investigation-Unit-Forms>.

The EBIU conducts background investigations on owners and operators of solid, infectious and hazardous waste facilities and reports its findings to the Director of the Ohio EPA within 180 days after receipt of the disclosure statement.¹⁷⁰ The Director will then approve or deny a permit to operate based, in part, upon the findings contained within the EBIU report concerning the applicant's environmental compliance, competence, reliability, and criminal history. The Director may *not* issue a permit or license (1) unless the Director finds that the applicant has exhibited "sufficient reliability, expertise and competency" to operate a solid waste facility; (2) if any individual or business concern required to be listed in the disclosure statement has been convicted of any one of the listed serious crimes (e.g., murder, kidnapping, extortion, theft, etc.) or of knowingly or recklessly committing a criminal violation of a federal or state environmental law, unless the individual or business concern has affirmatively demonstrated rehabilitation; or (3) unless the Director finds that the applicant has a history of compliance with environmental laws in Ohio and other jurisdictions.¹⁷¹ When there is a proposed change of ownership, the Director must disapprove the change of ownership if the disclosure statement or background investigation report contains information that if submitted with a permit application would require denial of the permit pursuant to the criteria described above.¹⁷² The Director's final decision may be appealed to the Environmental Review Appeals Commission.¹⁷³

Periodic disclosure updates must be filed after the initial submission of disclosure statements and transmission of the completed EBIU investigative report to the Director of Ohio EPA.¹⁷⁴ Persons subject to the background investigation and reporting requirements set forth in [R.C. 3734.42\(F\)](#) to update their background reports every three years. The Ohio Attorney General via the Federal Bureau of Investigation (FBI) must perform a

criminal background investigation every three years on every officer, director, partner, or key employee of an applicant, permittee, or prospective owner of an interest that collects, transfers, transports, treats, stores, or disposes of solid wastes, infectious wastes, or hazardous waste or processes solid wastes that consist of scrap tires. These background checks would presumably coincide with the filing of updated disclosure statements which also to take place every three years.

🕒 **Timing:** Quarterly Update and Personal History Disclosure statements that include state and federal fingerprint cards must be submitted within 90 days of hiring for any new key employee, partner, officer, director, new individual who owns or controls the applicant or permittee, new partners of any business concern owning or controlling the applicant or permittee, or new officer or director of a related corporation.¹⁷⁵

If the applicant or permittee is a governmental entity, the updated disclosure submission must be filed for each new key employee whose primary duty includes the operation of the facility. Where the applicant or permittee is a governmental entity but the operator of the facility is a business concern the updated submission must be filed for each new individual who is the operator, as well as each new key employee, partner, officer, or director of the operator.¹⁷⁶ A Maintenance or Quarterly Update submission must also be made on behalf of a new business concern within 90 days after the acquisition or formation of a business that includes a business concern as a new partner. A business concern that owns or controls the applicant or permittee—as well as a governmental entity that has a business concern acting as the operator of a facility—must also file Quarterly Updates.

A Biennial update must also be filed with all the disclosure statements contained in the initial submission.¹⁷⁷ However, the update only has to reflect any changes that have occurred since the date of the last filing. Where there have been no changes since the last submission, the applicant or permittee may simply file a Notarized Affidavit to that effect.¹⁷⁸

Footnotes — § 8.12:

¹⁶⁴ R.C. 3734.42(A)(1).

¹⁶⁵ R.C. 3734.42(D).

¹⁶⁶ R.C. 3734.42(F)(1).

¹⁶⁷ R.C. 3734.42(A).

¹⁶⁸ R.C. 3734.42(F)(2).

¹⁶⁹ See generally OAG 109:6-1 *et seq.*, and R.C. 3734.42.

¹⁷⁰ R.C. 3734.42(A)(3).

¹⁷¹ R.C. 3734.44.

¹⁷² R.C. 3734.42(F)(1).

¹⁷³ R.C. 3745.04.

¹⁷⁴ R.C. 3734.42(D).

¹⁷⁵ R.C. 3734.42(D).

¹⁷⁶ A “key employee” is any individual who is employed in a supervisory position for the subject facility, or any individual who can make discretionary decisions for the subject facility. See OAC 109:6-1-01(M).

¹⁷⁷ R.C. 3734.42(D).

¹⁷⁸ R.C. 3734.42(D).

§ 8.13. Judicial and Administrative Enforcement Considerations

The major enforcement provisions of R.C. Chapter 3734 appear in five interrelated sections: R.C. 3734.11, 3734.10, 3734.13, 3734.101, and 3734.99.


R.C. 3734.11 provides that no person shall violate any provision of R.C. Chapter 3734,¹⁷⁹ any rule adopted by the Director of EPA pursuant to R.C. Chapter 3734,¹⁸⁰ any order issued by the Director pursuant to R.C. 3734.13,¹⁸¹ or any permit or license issued under R.C. Chapter 3734.¹⁸² R.C. 3734.11 also prohibits making any false material statement or representation in any affidavit, disclosure form, or any other document required by Ohio’s solid waste regulatory program¹⁸³ to be submitted either to Ohio EPA or the Ohio Attorney General’s Office.¹⁸⁴


R.C. 3734.10, in turn, empowers the Ohio Attorney General, at the written request of the Director of Ohio EPA,¹⁸⁵ to file a civil action seeking to explain any threatened or on-going violation of any provision of R.C. Chapter 3734 (including any of the R.C. 3734.4 prohibitions) or any rule, permit, license or variance issued thereafter.¹⁸⁶ The statute expressly states that venue for actions under R.C. 3734.10 lies in the Court of Common Pleas for the county in which the violation is occurring or threatened.


R.C. 3734.13 is the enforcement provision most often relied upon by the State of Ohio for violations, past and present, of R.C. Chapter 3734. R.C. 3734.13(A) grants the Ohio EPA Director authority to issue administrative orders requiring that persons currently violating or threatening to violate any provision of R.C. Chapter 3734, or any rule, permit, license or variance issued under it, cease and desist. R.C. 3734.13(C), in turn, authorizes the Ohio Attorney General, at the written request of the Ohio EPA Director, to file a civil action seeking the imposition of civil penalties of not more than \$10,000 for each day of each violation of the state's solid and hazardous waste laws, regulations, orders or permits issued thereunder, and not more than \$25,000 for each day of any violation of the state's PCB regulatory program.¹⁸⁷ Broadly speaking, the courts have not found any intent requirement for establishing a violation of R.C. Chapter 3734 as a trigger for the imposition of civil penalties under R.C. 3734.13(C).¹⁸⁸ Instead, culpability is generally considered as a factor to be weighed by the court when it decides the exact amount of the civil penalty award, if any.¹⁸⁹


R.C. 3734.101 contains Ohio's version of Section 7002 of the federal Resource Conservation and Recovery Act, the federal hazardous and solid waste citizens suit provision.¹⁹⁰ Originally added to R.C. Chapter 3734 in 1984¹⁹¹ at USEPA's insistence as a precondition to that agency's delegation of the federal solid and hazardous waste regulatory program to Ohio, R.C. 3734.101 allows any person who claims to be aggrieved or adversely affected by an alleged violation of any provision of R.C. Chapter 3734, or any rule, permit, license, variance or order issued thereafter,¹⁹² to file a civil action on his or her own behalf against the alleged perpetrator in the Court of Common Plea of the county in which the alleged violation is said to be occurring. Unlike RCRA section 7002, the only relief available under R.C. 3734.101 is an injunction compelling compliance.¹⁹³


Finally, [R.C. 3734.99](#) imposes criminal liability for reckless¹⁹⁴ violations of various provisions of [R.C. Chapter 3734](#). Generally speaking, sanctions escalate with multiple violations.

 **Strategic Point:** The Ohio Attorney General's office, based upon *State v. Alexander Brothers, Inc.*¹⁹⁵ and its progeny, takes the position that it is not required to prove irreparable injury or the inadequacy of legal remedies in order to secure an injunction under [R.C. 3734.10](#). As neither the Ohio legislature nor the Ohio Supreme Court has yet to speak on this issue, this remains an open question under the Ohio law.


 **Strategic Point:** Except for orders issued in an emergency, administrative orders issued pursuant to [R.C. 3734.13\(A\)](#) must be issued as proposed orders with an opportunity for an evidentiary hearing conducted by a hearing officer on behalf of the Director prior to the order becoming final and effective as required by Ohio's Administrative Procedures Act, [R.C. Chapter 119](#).


 **Strategic Point:** Similar to its federal counterpart, [R.C. 3734.101](#) expressly requires that a prospective plaintiff notify the Director of Ohio EPA and the Ohio Attorney General of the alleged violation(s) and wait 150 days before filing a lawsuit for injunctive relief.¹⁹⁶ If the Director issues an enforcement order under [R.C. 3734.13\(A\)](#) against the alleged violators at any time during the 150 day notice period, or the Ohio Attorney General (or the prosecuting attorney or Chief Legal Officer of the political subdivision where the alleged violation is occurring) has filed a civil or criminal action to require the violator to come into compliance during the 150 day notice period, private actions under [R.C. 3734.101](#) are barred.¹⁹⁷

 **Strategic Point:** Financial inability to comply with an administrative order issued pursuant to [R.C., 3734.13\(A\)](#) has been held to afford an affirmative defense to a charge that the defendant's failure to comply constituted a criminal violation of [R.C. 3734.13\(A\)](#) punishable under [R.C. 3734.99](#).¹⁹⁸

 **Strategic Point:** An employee who in the performance of his duties directly commits a criminal violation of a provision of [R.C.](#)

Chapter 3734, may be indicted and convicted under R.C. 3734.99 and 2901.24; the fact that he committed the violation while acting on behalf of his employer affords no defense.¹⁹⁹

 **Strategic Point:** Pursuant to Ohio EPA policy, no administrative enforcement case may be older than 545 days from the date the enforcement referral is received by the Central Office. For negotiated administrative orders, the average time from the date of enforcement referral to final order will be 365 days.

 **Strategic Point:** All parties should be prepared to discuss all potential issues at meetings designed to facilitate a negotiated resolution of any alleged violations. Advance contact should be made with agency personnel to identify any factual statements made by the agency that are a basis of disagreement; to ascertain whether the alleged violator is incapable of complying or simply unwilling to comply with a proposed order; and to identify any information that may mitigate any proposed penalty amount.

Footnotes — § 8.13:

¹⁷⁹ R.C. 3734.11(A).

¹⁸⁰ R.C. 3734.11(A). The Director's principal rule-making powers may be found in R.C. 3734.02 (solid waste), 3734.12 (hazardous waste), and 3734.021 (infectious waste).

¹⁸¹ R.C. 3734.11(A).

¹⁸² R.C. 3734.11(B).

¹⁸³ R.C. 3734.11(D). That section also prohibits operating a solid waste facility within the boundaries of a state or national park. See R.C. 3734.11(C).

¹⁸⁴ Solid and hazardous waste facilities submit annual disclosure statements to the Ohio Attorney General's office pursuant to R.C. 3734.41 *et seq.*

¹⁸⁵ The statute also allows county prosecutors and the chief legal officer of Ohio municipal corporations to file injunction actions under R.C. 3734.10 at the request of their respective boards of health or legislative authorities.

¹⁸⁶ While an injunction compelling compliance is the only relief available under R.C. 3734.10, at least the Ohio EPA Director may ask the Ohio Attorney General under R.C. 3734.13 to seek the imposition of civil penalties against persons who violate R.C. Chapter 3734 in the same action in which the Attorney General seeks injunctive relief under R.C. 3734.10.

¹⁸⁷ See R.C. 3734.122. In contrast, violations of Ohio's scrap tire program carry a civil penalty of \$250 per day of violation. R.C. 3734.13(C).

¹⁸⁸ See, e.g., *State ex rel. Petro v. RSV, Inc.*, 2006 Ohio 376, 2006 Ohio App. LEXIS 320 (2006) (no showing of recklessness required for imposition of civil penalties under R.C. 3734.13 (C)).

¹⁸⁹ The statutory penalties are maximums only.

¹⁹⁰ 42 U.S.C. § 6972.

¹⁹¹ SOE, H.B. 506 (effective Aug. 1, 1984).

¹⁹² Not including violations of R.C. 3734.90 *et seq.*, Ohio's statutory law governing scrap tires, which are expressly excluded from the ambit of R.C. 3734.101.

¹⁹³ *State ex rel. Schoener v. Board of County Comm'rs*, 84 Ohio App. 3d 794, 619 N.E.2d 2 (1992).

¹⁹⁴ See R.C. 3734.99(A).

¹⁹⁵ 43 Ohio App. 2d 154, 334 N.E.2d 492 (1974).

¹⁹⁶ R.C. 3734.101(B).

¹⁹⁷ *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St. 3d 590, 1995-Ohio-301, 653 N.E.2d 646 (1995) (landfill company failed to exhaust administrative remedies).

¹⁹⁸ *State v. Schachner*, 131 Ohio App. 3d 808, 723 N.E. 7d 1127 (1994).

¹⁹⁹ *State v. Stirnkorb*, 63 Ohio App. 3d 778, 580 N.E.2d 69 (1990).

§ 8.14. Coal Combustion Residues

Coal combustion waste (CCW) is inorganic material that remains after pulverized coal is burned for electricity production. Industry estimates that as much as 136 million tons were generated in 2008, when a breach in an impoundment pond at the Tennessee Valley Authority's (TVA's) Kingston, TN, power plant released 1.1 billion gallons of coal ash slurry. After the TVA impoundment pond failure, this issue gained national attention. The cleanup cost has been estimated to reach \$1.2 billion.

An April 2010 risk assessment by USEPA has caused USEPA to conclude that CCW disposal in unlined landfills and surface impoundments presents substantial risks to human health and the environment from releases of toxic constituents (particular arsenic and selenium) into surface water and

groundwater. Those releases are largely prevented when the waste is disposed of in landfills and surface impoundments equipped with composite liners.

Throughout 2011, the disposal of CCW was essentially exempt from federal regulation. Instead, it was regulated in accordance with requirements established by individual states. Inconsistencies among state regulatory programs were identified by USEPA in a May 2000 regulatory determination as one reason that national standards to regulate CCW were appropriate. More recently, USEPA called into question the effectiveness of some state regulatory programs in protecting human health and the environment. In particular, USEPA cited data from a 2009 state survey that showed that 60% of states do not require liners or groundwater monitoring for surface impoundments.

On June 21, 2010, USEPA proposed two regulatory options to manage the waste. The first would draw on USEPA's existing authority to identify CCW as hazardous and regulate it under the waste management standards established under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The second option would establish regulations applicable to CCW disposal units under RCRA's Subtitle D solid waste management requirements. Under Subtitle D, USEPA does not have the authority to implement or enforce its proposed requirements. Instead, USEPA would rely on states or citizen suits to enforce the new standards.

Industry groups, environmental and citizen groups and state agency representatives have expressed concerns over USEPA's proposal. The primary questions regarding the Subtitle C proposal relate to its ultimate impact on energy prices, state program implementation costs, and CCW recycling opportunities. Concerns about the Subtitle D proposal primarily come from environmental groups and relate to whether regulation of CCW through Subtitle D would sufficiently protect human health and the environment, given USEPA's lack of authority to enforce it. Commenters have proposed various legislative options in response to these varied concerns. Some suggest Congress should designate CCW as hazardous waste under Subtitle C. Alternatively, others suggest prohibiting USEPA from regulating the material under Subtitle C and/or providing USEPA with direct authority to develop criteria applicable to landfills and surface impoundments that receive CCW under Subtitle D. Congress might also consider a new subtitle under RCRA directing USEPA to develop disposal facility criteria similar to those under Subtitle D, but providing USEPA with federal

enforcement authority similar to Subtitle C, without explicitly designating the material a hazardous waste.

On December 19, 2014, following USEPA's earlier determination that the risks posed by coal ash did not warrant its regulation as hazardous waste under Subtitle C, the Agency issued a Final Rule regulating coal ash as solid waste under Subtitle D of RCRA.²⁰⁰ In general, the Final Rule applies to owners and operators of existing and new coal combustion residual (CCR) landfills and surface impoundments—including all lateral expansions—that dispose or otherwise engage in solid waste management of CCRs generated from the combustion of coal at electric utilities. The rule also applies to *inactive* CCR surface impoundments located at *active* electric utilities (regardless of the fuel type—e.g., coal, natural gas, oil—used at the facility to produce electricity) that do not receive CCR after the rule's effective date but still contain both CCR and liquids, *unless* the impoundments are closed within three years of the rule's publication date.

The Final Rule does *not* apply to the following:

- CCR landfills that ceased receiving CCR prior to the effective date of the rule;
- CCR units at facilities that have ceased producing electricity prior to the effective date of the rule;
- Combustion wastes generated at facilities that are not part of an electric utility or are generated primarily from combustion of fuels other than coal;
- CCR placement in active or abandoned underground or surface coal mines;
- Municipal solid waste landfills that receive CCR; or
- Practices that meet the definition of a beneficial use of CCR.

USEPA's decision to include a "beneficial use" exclusion in the Final Rule is significant, given that nearly half of all CCR generated is used beneficially in a variety of industrial, commercial, and residential products, such as concrete, wallboard, and bricks. The Final Rule sets forth a four-part test for determining whether a use is a "beneficial use" and therefore not

covered by the rule: (1) the CCR provides a functional benefit; (2) the CCR substitutes for the use of a virgin material; (3) the use of CCR meets relevant product specifications, regulatory standards, or design standards when available, and when such standards are not available, CCRs are not used in excess quantities; and (4) when 12,400 or more tons of un-encapsulated coal ash is used in non-road applications, the use presents no greater risk of release to the environment than use of other materials or will meet all benchmarks for protection of the environment and public health.

Importantly, the Final Rule does not affect beneficial use applications started *before* the effective date of the rule. *Only* applications starting *after* the effective date of the rule will be subject to the criteria set forth above.

The Final Rule establishes national minimum criteria for existing and new CCR landfills and surface impoundment, as well as all lateral expansions thereof. These criteria include: location restrictions; design and operating criteria; groundwater monitoring and corrective action; closure requirements and post-closure care; and recording keeping, notification, and internet posting requirements.

Location Restrictions: The Final Rule establishes restrictions for CCR disposal units that relate to their location (1) over aquifers; (2) near wetlands; (3) near fault lines; (4) in seismic impact zones; and (5) at sites classified as “unstable” (e.g., areas with poor foundation conditions, areas susceptible to mass movements, and karst terrains). Existing CCR landfills must meet *only* the requirements related to “unstable areas.” All other CCR disposal units (including expansions) must meet all of the criteria. Owners and operators of existing CCR units must demonstrate that their units meet the location restrictions currently, through engineering enhancements, or established alternatives set forth in the Final Rule. If the requisite demonstration cannot be made, the unit must be closed. New units must be built in compliance with the requirements.

Design and Operating Criteria: The Final Rule establishes minimum requirements for the design and operation of CCR disposal units, including: (1) use of a composite liner system (or an equally effective alternative) in all CCR disposal units except for existing landfills (an existing surface impoundment may also meet this requirement if it was constructed with at least two feet of compacted soil of a specified hydraulic conductivity); (2)

minimum structural integrity requirements for new and existing surface impoundments (and all lateral expansions of them), along with periodic assessments of structural integrity, potential hazards, and safety factors; some surface impoundments may also be required to develop an emergency action plan; and (3) operating criteria, including air criteria for all CCR units, run-on and run-off controls for CCR landfills, hydrologic and hydraulic capacity requirements for CCR surface impoundments, and periodic inspection requirements for all CCR units.

Groundwater Monitoring and Corrective Action: Owners and operators of CCR units must install a system of groundwater monitoring wells and develop procedures for sampling these wells and for analyzing the data collected to detect the presence of hazardous constituents (e.g., toxic metals) and other monitoring parameters (e.g., pH, total dissolved solids) released from the units. Where hazardous constituents are in the groundwater at “statistically significant level[s] over the established background concentrations,” the owner or operator of the CCR unit must notify the relevant state authority, conduct assessment monitoring, and, if necessary, initiate corrective action.

Closure Requirements and Post-Closure Care: Closure of CCR units is triggered in one of three ways. First, a unit must be closed when it fails to meet technical criteria: (a) the CCR unit cannot meet the location criteria or the engineering demonstrations that the unit can still operate safely even though it does not meet the location restrictions; (b) an unlined CCR surface impoundment is found to contaminate groundwater in excess of a groundwater protection standard; or (c) a CCR surface impoundment cannot demonstrate that it meets the minimum factors of safety regarding structural integrity of the CCR unit. Second, a unit must be closed when it receives the known final waste shipment or when the owner or operator removes the known final volume of CCRs from the unit for beneficial use. Third, for “idled” CCR units, the rule establishes a presumption that the owner or operator must initiate closure of the unit no later than two years after the most recent receipt of CCRs or most recent date that CCRs were removed from the unit for beneficial use, whichever is later. The Final Rule sets forth procedures for an owner or operator to rebut this presumption and obtain additional time. Closure must be achieved by removing the CCRs and decontaminating the unit or by leaving the coal ash in place and installing a

final cover system. Groundwater monitoring and corrective action (if necessary) must continue after closure.

Recordkeeping, Notification, and Internet Posting: The Final Rule requires owners and operators of CCR units to record certain information in the facility's operating record (e.g., groundwater monitoring results, corrective action reports, fugitive dust control plans, etc.). In addition, owners and operators must notify the state when they place information in the operating record, and must maintain a publicly accessible internet site that sets forth this information.

The Final Rule does not require permits, does not require states to adopt or implement the requirements, and EPA cannot enforce the requirements. Instead, EPA will rely on states and the public to enforce the requirements through RCRA citizen suits. In addition, if a state chooses to incorporate the federal standards into its laws, the state can take enforcement action under its independent state authority.

USEPA is "strongly encouraging" states to revise their Solid Waste Management Plans ("SWMPs") to include the federal standards. USEPA would then review and approve the SWMPs, provided they demonstrate that the minimum federal requirements in the Final Rule will be met. According to USEPA, a facility that operates in accordance with an agency-approved plan will be able to "beneficially use that fact in a citizen suit brought to enforce the federal criteria," and furthermore, "a court will accord substantial weight to [that] fact."

On a related subject, on June 7, 2013, USEPA issued proposed revised Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category ("ELG Proposal").²⁰¹ The ELG Proposal focuses on regulation of leachate and water discharges from CCR surface impoundments and landfills.

With both the ELG Proposal and Final Rule impacting impoundments and landfills that store CCR materials, there is a natural intersection between the two rules that must be considered when determining compliance strategies. This is difficult, however, since a final ELG rule has not yet been issued.²⁰² EPA discusses this conundrum in the Preamble to the Final Rule, explaining that when it established timeframes for implementing the technical

criteria required by the Final Rule, it accounted for the ELG rule. More specifically, the agency stated that

the implementation timeframes in this rule will not require owners or operators of CCR units to make decisions about those CCR units without first understanding the implications that such decisions would have for meeting the requirements of [the ELG] rule. For example, this final rule requires the closure and post-closure plans to be prepared following the anticipated publication of the ELG ... rule[] so that owners or operators of CCR units can take into consideration th[e] final rule[] as they prepare the closure and post-closure care plans.²⁰³

EPA went on to explain that

[t]his is also particularly true in the situation where the minimum criteria in the CCR rule could potentially require a surface impoundment to either undergo RCRA closure or retrofit with a composite liner. A decision on what action to take with that unit may ultimately be directly influenced by the requirements of the ELG rule; for example, if the final ELG rule requires a conversion to dry handling of fly ash, then it may not make economic sense for an electric utility to retrofit a surface impoundment that contains wet-handled fly ash since it would be required to cease that practice under the ELG rule. Thus, under the final timeframes in this rule, any such decision will not have to be made by the owner or operator of a CCR unit until well after the ELG rule is final and the regulatory requirements are well understood. In this example, the earliest date that a CCR surface impoundment may be triggered into a retrofit or closure decision is approximately February 2017 The ELG rule is scheduled to be finalized in September 2015 and its effective date is 60 days following its publication. Thus, there is ample time for the owners and operators of CCR units to understand the requirements of both regulations and to make the appropriate business decisions.²⁰⁴

Thus, according to USEPA, where there is overlap between the Final Rule and the ELG rule, the agency has built into the Final Rule sufficient time for affected entities to review and consider the ELG rule (once it is finalized) before compliance with the Final Rule is required.

Although USEPA has thus decided to regulate fly ash as a solid waste

subject to USEPA’s RCRA Subtitle D regulations, that likely is not what will happen in Ohio because the Ohio General Assembly has expressly defined the term “Solid Waste” to exclude non-toxic fly ash.²⁰⁵ Although Ohio EPA has not yet made a final decision as to what response it will make to the Final Rule, right now, sources at Ohio EPA have indicated that non toxic fly ash disposal facilities in Ohio will continue to be regulated by Ohio EPA’s water pollution regulatory program, codified in [R.C. Chapter 6111](#).

Footnotes — § 8.14:

²⁰⁰ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21302 (Apr. 17, 2015).

²⁰¹ 78 Fed. Reg. 34432 (June 7, 2013).

²⁰² EPA is expected to finalize the ELG Proposal in September 2015.

²⁰³ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21302, 21428 (Apr. 17, 2015).

²⁰⁴ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21302, 21428 (Apr. 17, 2015).

²⁰⁵ See [R.C. § 3734.01\(E\)](#).

CHAPTER 9

CONTAMINATED SITES

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I.

INTRODUCTION

§ 9.01. Scope

This chapter covers:

- Ohio EPA's Division of Environmental Response and Revitalization [*see § 9.03 below*].
- Ohio EPA's authority under the solid and hazardous waste law [*see § 9.04 below*].
- Ohio EPA's authority under the water pollution law [*see § 9.05 below*].
- Spill reporting requirements [*see § 9.07 below*].
- Ohio's Cessation of Regulated Operations law [*see § 9.08 below*].

§ 9.02. Overview

This chapter discusses Ohio's contaminated sites liability and cleanup programs, including Ohio EPA authority under hazardous waste, water protection and other statutes to enjoin or effect cleanup. This chapter also discusses significant features of contaminated sites liability under Ohio law and protections for lenders.

II.

CONTAMINATED SITES CLEANUP AND LIABILITY PROVISIONS

§ 9.03. Division of Environmental Response and Revitalization (DERR)

[1] DERR Authority

In June of 2011, Ohio EPA announced a reorganization of several of the divisions that exercised jurisdiction over hazardous and solid wastes and remediations. As a result of the reorganization, the former Divisions of Emergency and Remedial Response, Hazardous Waste Management, and Solid and Infectious Waste Management combined into two newly renamed divisions. The Divisions of Hazardous Waste Management and Solid and Infectious Waste merged to form the Division of Materials and Waste Management (DMWM). The clean-up aspects of the Division of Hazardous Waste Management merged with the Division of Emergency and Remedial Response to form the Division of Environmental Response and Revitalization (DERR). Under the new structure, DMWM will deal with permits, licenses, and other authorization; cessation of regulated operations (*see* § 9.08); scrap tire cleanups and orphan landfill cleanups; inspections; enforcement; compliance assistance; and waste reduction, recycling, and sustainability. DERR, on the other hand, will regulate voluntary cleanups under VAP; brownfields revitalization; RCRA closure; RCRA corrective action; Federal facilities cleanup; state remedial cleanup; emergency response; Superfund cleanups; and site assessment and field sampling.

This chapter focuses on DERR's jurisdiction over those sites which are not otherwise regulated under the Ohio EPA solid and hazardous waste programs. DERR's authority extends to a wide variety of sites, including

contaminated manufacturing facilities, places where the solid and hazardous waste closure requirements do not apply and unlicensed storage and disposal facilities.

DERR's mission within OEPA is to prevent, respond to, remove and cleanup releases or threats of releases of hazardous wastes, hazardous substances and pollutants through compliance monitoring, emergency response, enforcement and voluntary actions. Thus, within the division, there are four major environmental program areas, including the Site Assessment & Brownfield Revitalization Program (SABR), the Voluntary Action Program (VAP), the Remedial Response Program, and the Emergency Response Program. DERR develops and administers state rules under the Spill Prevention Control and Counter Measures Program to help industry prevent spills.¹ DERR also oversees a program to phase out polychlorinated biphenyls (PCBs).

Calling it DERR's "new look" for the 21st century, DERR leadership on March 2, 2009 implemented modest reorganizational changes and a realignment of programs into two sections. The overall purposes of this reorganization are to increase efficiency in delivering technical support services to the districts and better align the cleanup work ongoing in Ohio and DERR's funding streams.

First, the Assessment, Cleanup and Reuse Section (ACRE) will focus on the assessment and cleanup of contaminated and potentially contaminated properties that threaten human health and the environment. ACRE includes the remedial response program (including site assessment and non-emergency removals); the VAP program (review of site projects); enforcement for both programs; the Site Investigation Field Unit (SIFU) and oversight of operation and maintenance at sites under cleanup orders.

Second, the Site Assistance and Brownfield Revitalization Program (SABR) will focus on assisting local governments with the cleanup and marketing of contaminated and potentially contaminated properties at conferences, through the web and other venues. This program will oversee certification, tracking, and training of VAP professionals and labs; manage the federal brownfield grant; administer Clean Ohio Fund activities; coordinate VAP grant-funded technical assistance and targeted brownfield assessments; coordinate BUSTR sites; manage the brownfield inventory;

manage the upcoming environmental insurance program; and manage marketing and outreach for DERR, including the annual Ohio Brownfield Conferences.

The Remedial Response Program uses the enforcement of existing laws and regulations to ensure that contaminated land, air, or water is remediated, often along the lines of the federal cognate programs. Those sites falling within the jurisdiction of DERR are often the subject of intensive, site-specific negotiations regarding procedures to:

- investigate and determine the nature and extent of the contamination;
- assess the environmental and health risks associated with the contamination;
- identify feasible alternatives for responding to those risks; and
- select cleanup strategies that meet applicable law.

In many cases, the debates center around the selection of methodologies that will meet the applicable requirements of state and federal law (much like the federal process).

[2] Contaminated Sites

[a] Contaminated Sites Databases

DERR has several databases, which are available to the public upon request. The DERR database is an index of sites throughout Ohio for which DERR's district offices maintain files. The database is *not* a record of contaminated sites in Ohio. According to DERR, not all sites in the database are contaminated, and a site's absence from the database does not imply that it is uncontaminated. This database is also not a list of brownfield sites. Not all sites in the database meet the federal or state definitions of brownfields, and many properties in Ohio that would qualify as brownfields are not in the database.

The DERR database contains basic site information only. Site information maintained in the database includes the name and address of the site; its latitude and longitude; whether the property is, to Ohio EPA's knowledge, being cleaned up in accordance with VAP or is receiving

technical assistance through the VAP; and whether Clean Ohio Fund money has been issued to remediate the site. The data contained in the DERR database can be obtained upon request to DERR.

To obtain environmental information now from the state regarding a particular site (for example, as to any environmental assessments performed on that property), the DERR webpage directs inquiry to the appropriate district office, or to a specified person at DERR by e-mail.² DERR also maintains a list of “Sites Scheduled for Investigation, Cleanup or Long-Term Monitoring” and a list of sites, sorted by county, that are part of DERR’s workload for the state’s fiscal year, which can be found on DERR’s website.

DERR also maintains a voluntary, statewide inventory of brownfield properties. Properties included in the Ohio Brownfield Inventory may be in various stages of assessment and cleanup. Information on the Ohio Brownfield Inventory includes details such as location, past use, utilities available and proximity to major roads, airports and public transportation. Because there is no requirement for owners of brownfield properties to notify Ohio EPA, the Ohio Brownfield Inventory is not a complete list of all properties in Ohio that meet the definition of a brownfield. Interested parties can visit the online inventory on DERR’s website at <http://www.epa.state.oh.us/derr>. In addition to the online inventory, Ohio EPA also produces the Guide to the Ohio Brownfield Inventory. This guide provides a general overview of brownfield properties included in the inventory.

⚠ Warning: DERR has discontinued its practice of publishing its “Master Sites List,” which had identified sites that posed a threat to the environment or human health or safety. It was last updated in 1997 and last published in 1999.

DERR has several other archived databases that are available from DERR upon request. These databases are no longer maintained and may contain inaccurate or outdated information. Therefore, Ohio EPA disclaims any responsibility for wrong or misleading entries. “OLDSWLF” is a list of about 1,200 old abandoned dumps or landfills. This database was developed from Ohio EPA staff notebooks and other information dating from the mid-1970s. “SIABASE” is a database of about 2,800 sites of “pits, ponds and

lagoons” where various types of sludge were dumped over many years. The data were collected during the 1970s and published by U.S. EPA in 1980. “TOWNGAS” is a list of 82 sites of coal gas generators in Ohio. These plants produced gas for street lights in the communities in which they were located. TOWNGAS was developed from a database from Radian Corporation along with information from the Ohio Historical Society and various public libraries.

[b] No Innocent Purchaser Defense

Ohio does not expressly provide a defense to an innocent purchaser or a “bona fide prospective purchaser” who is a potentially responsible person for the contamination under the law solely because of ownership of the site as established in CERCLA.³

[c] Ohio’s Environmental Lien Provision

Ohio law provides for a lien to be entered against any real property that the state cleans up with funds from the state environmental cleanup fund. The lien is not a superlien. It is subordinate to other liens, mortgages, and interests of bona fide purchasers that attach or are acquired before the lien is perfected.⁴

[d] Site-Specific Cleanup Standards

DERR follows a site-specific approach to establish cleanup levels at contaminated sites. The division seeks to increase site cleanups by providing several combinations of cleanup options including voluntary action, emergency response, time critical and non-time critical removal actions, as well as closely supervised fully detailed remedial cleanup actions. This strategy involves working with other Ohio EPA divisions as well as taking a multi-media approach to achieve site cleanup. Information regarding available cleanup strategies will be maintained by the DERR integrated information management system. DERR decision documents can be found at www.epa.state.oh.us/derr/remedial/cleanup_plans/cleanupplans.aspx.

DERR generally follows the National Contingency Plan (NCP) provisions when conducting cleanups at hazardous waste sites.⁵ Thus, site-specific cleanup standards are developed by Ohio EPA that comply with the

Risk Assessment Guidelines for CERCLA sites. The generic standards and the procedures for developing site specific standards under VAP may not be sufficient for cleanups regulated under the other Ohio EPA programs. The Ohio EPA convened an internal task force to review the cleanup standard-setting processes under the various different programs and divisions within the agency to determine the feasibility of standardizing the cleanup standards.

There is a variance mechanism under Ohio's solid and hazardous waste law. If the applicant can demonstrate that its activities are unlikely to adversely affect the public health or safety or the environment, the director of the Ohio EPA may issue a variance from any requirement to obtain a permit, license, or to comply with the manifest system or other requirements of Ohio's laws.⁶

Alert: Ohio EPA completed guidance for the assessment of vapor intrusion to indoor air called "Sample Collection and Evaluation of Vapor Intrusion to Indoor Air For Remedial Response and Voluntary Action Programs" (May 2010). This document can be downloaded through a link on the VAP website (<http://epa.ohio.gov/derr/volunt/volunt.aspx>). According to Ohio EPA, this guidance was developed by using established guidance from U.S. EPA, the Interstate Technology Resource Council, the American Society of Testing and Materials, and other states, with special credit to the California Environmental Protection Agency for permission to use its "Interim Final Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air (2004)" as a template. Ohio EPA will generally expect vapor intrusion to be assessed under site cleanups directed by Ohio EPA staff or under the Voluntary Action Program whenever there is soil or groundwater contamination and a completed exposure pathway. Ohio EPA's Guidance describes a step-wise approach of eight action items for the assessment of vapor intrusion into structures. Special consideration is given for potential vapor intrusion to residential structures.

In June 2015, U.S. EPA, Office of Solid Waste and Emergency Response (OSWER), issued its final guidance for the evaluation of vapor intrusion to indoor air ("U.S. EPA VI guidance"). The U.S. EPA VI guidance, similar to Ohio EPA's guidance, emphasizes a

“multiple-lines of evidence” approach when evaluating the VI pathway. U.S. EPA refers to the Vapor Intrusion Screening Level (“VISL”) Calculator as the preferred frontline screening methodology, and de-emphasizes reliance on mathematical models, the use of which is included in Ohio EPA’s VI guidance. Ohio EPA has acknowledged that this has led to some confusion on which tool to use to screen out the VI pathway or evaluate compliance with applicable standards for VAP.

DERR has announced that for remedial response and RCRA sites, it is recommending the use of the U.S. EPA VI guidance for VI investigations, along with some aspects of Ohio EPA’s VI guidance. For more specific information, DERR recommends that the interested party contact the appropriate program manager. Similarly, for VAP, DERR advises the use of the VISL Calculator for screening, with emphasis on further sampling (soil gas and indoor air) if site concentrations exceed screening levels. Mathematical modeling, which is permitted under the VAP rule, may have utility but should be evaluated on a site-specific basis. With respect to the Johnson and Ettinger model for vapor intrusion to indoor air specifically DERR believes that the appropriateness of using this model has been called into question. However, no further action letters that include VI demonstrations may continue to rely on mathematical modeling conducted in accordance with the VAP rules and Ohio EPA’s VI guidance until such time the guidance is updated. DERR strongly recommends a party consult with the program manager if the project has VI issues, especially if the party has or would like to rely upon VI modeling.⁷

Alert: Under certain circumstances, DERR will consider allowing a liable party under an order to proceed with a cleanup meeting the VAP standards. This approach may have substantial benefits for the liable party.

[3] Ohio’s Hazardous Waste Cleanup Program Covers RCRA Hazardous Waste But Not Petroleum

Ohio’s definition of hazardous waste⁸ includes any substance identified

by regulation as hazardous waste under [Section 3001 of RCRA](#)⁹ and does not include any substance that is subject to the Atomic Energy Act of 1954.¹⁰ Petroleum and natural gas products are not exempt from the definition. However, petroleum is not included within the category of substances for which the state cleanup fund can be used to perform cleanups in the event of a release.¹¹

[4] Ohio Defines Potentially Responsible Parties as Site Owners and Facility Owners

Ohio defines a potentially responsible person for purposes of liability for hazardous waste site cleanup as the owner of the land on which a facility is located or the owner of the facility.¹² A facility is defined as “any site, location, tract of land, installation, or building used for incineration, composting, sanitary landfilling, or other methods of disposal of solid wastes or, if the solid wastes consist of scrap tires, for the collection, storage, or processing of the solid wastes; for the transfer of solid wastes; for the treatment of infectious wastes; or for the storage, treatment, or disposal of hazardous waste.”¹³

Footnotes — § 9.03:

¹ R.C. 6111.03.

² www.epa.state.oh.us/derr.

³ See 42 U.S.C. § 9601(35)(A), (40).

⁴ R.C. 3734.20(B).

⁵ See generally 40 C.F.R. Part 300. The NCP establish a formalized process for the investigation and remediation of sites, generally including specific requirements for remedial investigations and feasibility studies and remedy selection.

⁶ R.C. 3734.02(A).

⁷ For more information on U.S. EPA technical documents for VI, see <https://www.epa.gov/vaporintrusion>. For Ohio EPA DERR guidance, see <http://www.epa.ohio.gov/portals/30/rules/Vapor%20Intrusion%20to%20Indoor%20Air.pdf>.

⁸ R.C. 3734.01(J).

⁹ 42 U.S.C. § 6921.

¹⁰ 42 U.S.C. § 2014 *et seq.*

¹¹ See R.C. 3734.28.

¹² R.C. 3734.22.

¹³ R.C. 3734.01(N).

§ 9.04. Ohio EPA Authority Under the Solid and Hazardous Waste Law, R.C. Chapter 3734

[1] Ohio EPA Asserts Broad Authority Under Chapter 3734

Ohio EPA regulates the use, treatment, and storage of hazardous materials as well as the disposal of solid and hazardous waste under authority delineated in [R.C. Chapter 3734](#). The agency's jurisdiction extends to all sites subject to RCRA and all solid waste facilities governed by the chapter. As discussed below, authority to conduct specific actions—such as conducting investigations, issuing cleanup orders, performing cleanup, and pursuing judicial enforcement actions—is expressly provided by statute. Whether the agency is authorized under Chapter 3734 to respond to spills and contamination may depend upon when and how the contamination occurred.

[2] RCRA Authority

Ohio EPA has authority from U.S. EPA to administer the RCRA program in the state. Ohio's regulations are extensive and generally closely track the federal regulations. Ohio's regulations include specific closure and post-closure requirements and associated financial responsibility requirements for hazardous waste treatment, storage and disposal (TSD) facilities.¹⁴ See [Chapter 8](#) above.

Ohio's regulations also include corrective action requirements applicable to regulated units.¹⁵ In addition, an owner or operator of a facility seeking a TSD permit must implement corrective action for all releases of hazardous waste or constituents from any waste management unit at the facility, regardless of the time at which waste was placed in such unit.¹⁶ Ohio EPA has developed a comprehensive framework for the implementation of the RCRA corrective action program through the TSD permitting process and orders issued pursuant to [R.C. 3734.20](#) (discussed below).

Ohio EPA will utilize the corrective action requirements for regulated

units and waste management units; however, this authority should be limited to TSD facilities that have or had RCRA permits and possibly at facilities that should have been permitted. Ohio EPA potentially could attempt to impose corrective action requirements at properties where it finds that spills or releases occurring after RCRA was enacted constitute a “pattern of disposal” (see discussion below) that trigger RCRA permitting requirements.

[3] State Regulation of Underground Storage Tank Sites (USTs)

The Ohio State Fire Marshal administers the state’s UST regulations. The regulations contain requirements for the siting, installation, monitoring, and closure of USTs within the state. The state has also established a Petroleum UST Financial Assurance Fund to reimburse owners for the cost of corrective actions or damages to persons or property resulting from the release of petroleum from a UST. *See Chapter 12 below.*

[4] Specific Actions Authorized by R.C. Chapter 3734

[a] Criminal Prosecution and Injunctions for Violating Requirements of R.C. Chapter 3734

Upon the request of Ohio EPA¹⁷, local board of health, or local governing body, the AG shall criminally prosecute or bring an action for injunction against any person who has violated, is violating or is threatening to violate [R.C. Chapter 3734](#) or a license or permit issued under the chapter.¹⁸ The State of Ohio was permitted to pierce the corporate veil in order to impose personal liability on the sole shareholder, director, and officer of a corporation for violations of the laws governing solid waste landfills, resulting in danger to the public and the environment. In this case the State, through the Attorney General, was able to secure summary judgment on an enforcement action brought pursuant to [R.C. 3734.10](#).¹⁹ Jurisdiction is in the court of common pleas, which will issue a preliminary and permanent injunction upon a showing that the defendant has violated, is violating, or is threatening to violate a requirement imposed under [R.C. Chapter 3734](#).²⁰

[b] State Investigations to Ensure Compliance with R.C. Chapter 3734

Ohio EPA or the local board of health is required to conduct investigations and inquiries upon written request of any person into any

alleged violations of [R.C. Chapter 3734](#).²¹ Ohio EPA may also conduct such investigations upon its own initiative.²²

[c] Ohio's Authority to Investigate Hazardous Waste Contamination, Initiate Actions to Enforce Pollution Abatement, and Perform Cleanup

If Ohio EPA has reason to believe that hazardous waste was treated, stored, or disposed of at any location in the state, then it may investigate (through such means as making inquiries, obtaining records, or collecting samples) to determine if conditions constitute a substantial threat to public health or safety or are causing or contributing to or threatening to cause or contribute to air, water, or soil pollution.²³


This authority extends to hazardous waste facilities, solid waste facilities, and any location where Ohio EPA has reason to believe hazardous waste was treated, stored, or disposed of²⁴, and arguably could include areas of historic contamination predating RCRA or Ohio's solid and hazardous waste regulations. Under the statute, Ohio EPA is authorized, as part of its investigation, to seek a search warrant through the court of common pleas.²⁵

If Ohio EPA determines that conditions at such sites constitute a substantial threat to public health or safety or are causing or contributing to (or threatening to cause or contribute to) air or water pollution, or soil contamination, then it is required to initiate "appropriate action" under the waste or water pollution laws, or under any legal or equitable remedy.²⁶ If Ohio EPA's orders issued pursuant to its authorities under Chapters 3704, 3734 or 6111 to abate the pollution are not complied with, then Ohio EPA may perform the remedy necessary to abate or prevent the pollution or the threats to public health and safety.²⁷ Thereafter, upon written request from Ohio EPA, the AG shall institute a civil action to recover the cleanup costs.²⁸ Unreimbursed cleanup costs are recorded by Ohio EPA and constitute a lien against the property.²⁹


Ohio has established an Environmental Protection Remediation Fund to pay for cleanup costs and enforcement expenses incurred by the state.³⁰ Any funds that the state expends may be recouped from responsible parties.³¹ Ohio EPA may recover the cost of investigation and measures performed to abate or prevent pollution incurred by Ohio EPA or its contractors.³² However, Ohio

EPA is not permitted to recover “normal overhead items” such as payroll costs, travel costs, and enforcement-related costs, even if a responsible party has agreed to reimburse such costs in a Director’s Final Findings and Orders. See *State ex rel. DeWine v. Mass Realty, LLC*, 2012 Ohio 146, 2012 Ohio App. LEXIS 117 (Ct. Appeals Hamilton County 2012).

Alert: H.B. No. 59 was introduced in the General Assembly in response to the *Mass Realty* decision. The original bill would have amended [R.C. 3734.20](#) to clarify that Ohio EPA may include in administrative consent orders with responsible parties provisions that the responsible parties agree to reimburse Ohio EPA for the agency’s costs. This provision was deleted from H.B. No. 59 before it was signed into law. Thus, the *Mass Realty* decision remains in effect.

 **Warning:** Ohio EPA interprets [R.C. 3734.20](#) to give it authority over solid and hazardous waste landfills that ceased operation before the solid and hazardous waste regulations were adopted. Ohio EPA’s position is based on the fact that a solid or hazardous waste “facility” is defined broadly without reference to any date of statutory or regulatory enactment.³³ Ohio EPA has attempted to expand its authority even further by at times taking the position that the presence of contamination in soil or groundwater from spills or releases (regardless of when the spills or releases occurred) constitute a “pattern of disposal” (undefined in any statute or regulation) which could result in the site being considered a solid or hazardous waste facility.


Ohio EPA also requires a “Rule 13” permit before any excavating, drilling, or other activity upon or into any solid or hazardous waste facility.³⁴ The requirements apply to sites having landfills even if they ceased operating before regulatory requirements were adopted.³⁵ Ohio EPA asserts that the requirements apply to sites contaminated by historic or more recent spills or releases where a “pattern of disposal” exists, though that term is undefined in regulation or statute. See [Chapter 8](#) above.

 **Strategic Point:** Some practices, such as the “Rule 13” requirement for a permit to drill into solid or hazardous waste landfills that were never regulated, have developed a general

acceptance, but are based on an expansive reading of the agency's authority and could be challenged.

[d] Any Person Aggrieved May Bring a Civil Action for Violations of Rules Under R.C. Chapter 3734: Subject to Notice and Other Limitations

Ohio's "citizen suit" provision allows any adversely affected person to sue after first providing at least 150 days' notice of the alleged violation to Ohio EPA, the AG, and the alleged violator.³⁶ If, by the expiration of the 150 days, Ohio EPA (with the AG's concurrence) issues an administrative enforcement order requiring compliance or the AG initiates a civil or criminal action to obtain compliance, then the citizen suit will be barred.³⁷ Otherwise, the citizen suit may proceed in the court of common pleas, and the court may compel compliance and award the plaintiff costs and reasonable attorneys and expert witness fees. Costs and fees may also be awarded to the defendant if the court finds that the action was brought in bad faith.³⁸ For further discussion of this provision, see [Chapter 15](#) below.

 **Strategic Point:** The citizen suit provision in Chapter 3734 has not been widely used. Environmental groups or other plaintiffs may be discouraged from bringing suits where the alleged violator has 150 days to attempt to negotiate an order with Ohio EPA that would bar the citizen suit.

[e] Ohio EPA May Issue Enforcement Orders Compelling Compliance with R.C. Chapter 3734 Requirements, Licenses, and Permits

Ohio EPA may issue orders to any person to "abate a violation or prevent a threatened violation" of the chapter.³⁹ These orders, known as Director's Final Findings and Orders (DFFOs), are issued in accordance with the agency's procedural rules and include an opportunity for a hearing. These procedural rules are discussed in more detail below. Ohio EPA's authority under [R.C. 3734.13](#) is limited to abating a violation or threatened violation of [R.C. Chapter 3734](#).

Alert: Ohio EPA potentially could attempt to use this authority where it finds that spills or releases constitute a "pattern of disposal" that triggers permitting requirements. Ohio EPA may have difficulty

successfully asserting this authority to require cleanup of historic disposal or releases that pre-date the solid and hazardous waste requirements.

Alert: Parties who challenge the legality of Ohio EPA’s unilateral orders under Chapters 3734 or 6111 (discussed below) are *not* subject to treble damages or other penalties.

[f] Ohio EPA May Issue Emergency Enforcement Orders to Protect Public Health or Safety or the Environment

Ohio EPA may, without notice or hearing, issue an order requiring action to address an “emergency ... requiring immediate action to protect the public health or safety or environment.”⁴⁰ The order, effective immediately, requires the recipient’s immediate compliance. The recipient may request a hearing, which shall be provided as soon as possible and not later than 30 days. An emergency order remains in effect for not more than 120 days.⁴¹

Alert: The statute is not expressly limited to solid or hazardous waste violations and the term “emergency” is undefined, so potentially such orders might be issued to address spills and historic contamination. A limit to this potentially expansive cleanup authority is that the agency likely would be unable to order long term remediation because an emergency order is limited in duration to, at most, 120 days.

[g] Actions to Compel Compliance

Upon written request by Ohio EPA, the AG may bring a civil action compelling compliance with [R.C. Chapter 3734](#) requirements, licenses, and permits. The civil action may be brought in any court with jurisdiction, and may seek injunctive relief (such as a temporary restraining order or a preliminary or permanent injunction) and civil penalties of up to \$10,000 per day per violation for most violations, and up to \$25,000 per day per violation of PCB-related requirements.⁴² See [Chapter 15 below](#).

Alert: Ohio EPA has the authority under [R.C. § 3734.122](#) to promulgate rules governing operations at facilities engaged for profit in the storage and disposal of PCBs, substances, equipment, and

devices containing or contaminated with PCBs. Ohio EPA has not exercised that authority. Ohio EPA asserts authority over properties contaminated with PCBs under its cleanup authorities in Chapters 3734 and 6111. See [Chapter 15](#) below.

[h] Penalties

[R.C. 3734.99](#) specifies the penalties for reckless or knowing violations of the solid and hazardous waste statutes and regulations, or violations of an order issued under the chapter. These penalties include potential fines of up to \$25,000 per day of violation and possible imprisonment.⁴³ See [Chapter 15](#) below.

Alert: Pending Senate Bill 2 would expand Ohio EPA authority under [R.C. Chapter 3734](#) to conduct investigations, expend money from the Environmental Protection Remediation Fund, and initiate appropriate actions to address a substantial threat to public health or safety where solid waste or construction and demolition debris are disposed of, rather than only at locations where hazardous waste was disposed of as under current law.

Footnotes — § 9.04:

¹⁴ [OAC Chapter 3745-55](#).

¹⁵ [OAC 3745-54-100](#).

¹⁶ [OAC 3745-54-101](#).

¹⁷ Much of Ohio EPA's authority under Chapter 3734 and Chapter 6111 (discussed below) is exercised through the Director of Ohio EPA (Director). For simplicity, we have generally referred to Ohio EPA's authority in this chapter.

¹⁸ [R.C. 3734.10](#).

¹⁹ [State ex rel. Petro v. Mercomp, Inc.](#), 167 Ohio App. 3d 64, 853 N.E. 2d 1193 (Ct. Appeals Cyahoga County 2006).

²⁰ [R.C. 3734.10](#).

²¹ [R.C. 3734.10](#).

²² [R.C. 3734.10](#).

- ²³ R.C. 3734.20(A).
- ²⁴ R.C. 3734.20(A).
- ²⁵ R.C. 3734.20(A).
- ²⁶ R.C. 3734.20(B).
- ²⁷ R.C. 3734.20(B).
- ²⁸ R.C. 3734.20(B).
- ²⁹ R.C. 3734.20(B).
- ³⁰ R.C. 3734.28.
- ³¹ R.C. 3734.20(B).
- ³² R.C. 3734.20(B).
- ³³ *See* R.C. 3734.01(N).
- ³⁴ OAC 3745-27-13.
- ³⁵ *See, e.g.,* OAC 3745-27-13(D)(2)(a).
- ³⁶ R.C. 3734.101(A), (B).
- ³⁷ R.C. 3734.101(C).
- ³⁸ R.C. 3734.101(E).
- ³⁹ R.C. 3734.13(A).
- ⁴⁰ R.C. 3734.13(B).
- ⁴¹ R.C. 3734.13(B).
- ⁴² R.C. 3734.13 (C).
- ⁴³ R.C. 3734.99.

§ 9.05. Ohio EPA Authority Arising Under the Water Pollution Law, R.C. Chapter 6111

[1] Ohio EPA Asserts Broad Authority Under Chapter 6111

R.C. Chapter 6111 vests Ohio EPA with broad authority to prohibit

parties from causing “pollution,” which is defined as placing sewage, sludge, industrial, and other wastes (broadly defined)⁴⁴ in the waters of the state.⁴⁵ “Waters of the state” include virtually all groundwater and surface water in the state.⁴⁶

R.C. 6111.04(A) provides that “no person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial wastes or other wastes in a location where they cause pollution of any waters of the state.”⁴⁷ Such action is declared a public nuisance.⁴⁸ This far-reaching prohibition is capable of application to a wide range of circumstances, including situations where historic contamination potentially may impact waters of the state.

The prohibitions under **R.C. Chapter 6111** date back to the early twentieth century. The Ohio General Assembly amended Chapter 6111 to comport with the Federal Water Pollution Control Act of 1972 and to delegate authority to Ohio EPA.

The prohibitions do not apply if the “pollution” is authorized by a valid, unexpired permit.⁴⁹ The statute provides other exceptions, including certain mining activities, injection wells used to produce oil and gas, or application of materials for agricultural purposes.⁵⁰ For further discussion, see **Chapters 3** (Water Pollution) and **4** (Wetlands).

[2] Ohio EPA Retains Broad Authority to Investigate Alleged Water Pollution and Issue Orders, Including Emergency Orders, to Prohibit or Abate Pollution or to Require Compliance with Water Pollution Standards and Rules

Ohio EPA may initiate investigations into alleged pollution or noncompliance with orders or permits.⁵¹ An investigation by Ohio EPA is required upon written complaint by any person.⁵²


Ohio EPA also may issue orders to “prevent, control or abate” water pollution by such means as prohibiting or abating discharges of sewage, industrial, or other wastes into waters of the state and requiring compliance with standards adopted under the law or by permit.⁵³ These actions may include unilateral administrative orders to prohibit or abate discharges or to require compliance with standards. This authority is limited to ordering the cleanup necessary to stop or abate the discharge of wastes into the waters of

the state. See *Heiby Oil Co. v. Schregardus*, 92 Ohio App. 3d 46, 53 (1993).

It is not clear whether Ohio EPA legally can issue cleanup orders under R.C. 6111.03(H) to abate discharges to waters of the state relating to contamination that occurred many years ago. In *Heiby Oil Co.*, the court held that the natural seepage of waste occurring at a facility was a discharge for the purposes of R.C. 6111.03(H) and clarified that Ohio EPA's authority is not limited to the initial discharge, which occurred when gasoline leaked from an aboveground tank. See *Heiby Oil Co. v. Schregardus*, 92 Ohio App. 3d 46, 54 (1993). However, it is not clear whether the court would have reached the same result if the initial discharge had occurred many years prior to Ohio EPA's unilateral action.

Ohio EPA also may issue orders to prevent, control, or abate the use and disposal of sludge or the effects of the use of sludge or sludge materials on land, air, or waters of the state.⁵⁴ As under R.C. Chapter 3734, the issuance of orders under R.C. 6111.03 is subject to compliance with Ohio EPA's procedural requirements (including the right to a hearing), as is discussed in more detail below.

Ohio EPA may issue emergency orders, without notice or hearing, which are effective immediately and must be immediately followed.⁵⁵ If requested by the person against whom the order is directed, a hearing must be scheduled as soon as possible, and in no event later than twenty days after the request.⁵⁶ Emergency orders may be issued where "the director officially determines that an emergency exists requiring immediate action to protect the public health or welfare."⁵⁷ The orders are effective for up to sixty days.⁵⁸

 **Strategic Point:** "Emergency" is not defined, and the language of the emergency provision is not limited to circumstances surrounding actual or threatened water pollution. However, an argument could be made that the Director may issue an emergency order under R.C. 6111.06 to address contamination only if it causes or threatens to cause water pollution.

In addition to issuing orders, Ohio EPA may initiate a civil action to compel compliance with the chapter or an order issued under the chapter or to ensure compliance with federal water pollution laws.⁵⁹

The broad language in [R.C. 6111.04](#) provides Ohio EPA with substantial authority to require responsible parties to clean up soil and groundwater contamination. The primary limitation on the authority is that waste, spills or other releases must at least threaten to cause water pollution.

[3] The AG, Upon Ohio EPA’s Written Request, May Bring an Action for Injunctive Relief and Civil and Criminal Fines and Penalties to Enforce the Requirements of R.C. Chapter 6111

Actions may be brought to enjoin a violation or threatened violation of [R.C. Chapter 6111](#).⁶⁰ Where an injunction is sought to enforce a final order, the finding by the Director, after hearing, is *prima facie* evidence of the underlying facts.⁶¹ Civil penalties of up to \$10,000 per day of violation and criminal penalties, including fines and imprisonment, may be imposed.⁶²

Footnotes — § 9.05:

⁴⁴ [R.C. 6111.01\(D\)](#).

⁴⁵ [R.C. 6111.01\(A\)](#).

⁴⁶ [R.C. 6111.01\(H\)](#).

⁴⁷ [R.C. 6111.04\(A\)\(1\)](#).

⁴⁸ [R.C. 6111.04\(A\)\(2\)](#).

⁴⁹ [R.C. 6111.04\(A\)\(2\)](#).

⁵⁰ [R.C. 6111.04\(F\)](#).

⁵¹ [R.C. 6111.05](#).

⁵² [R.C. 6111.05](#).

⁵³ [R.C. 6111.03\(H\)](#).

⁵⁴ [R.C. 6111.03\(J\)\(2\)](#).

⁵⁵ [R.C. 6111.06\(C\)](#).

⁵⁶ [R.C. 6111.06\(C\)](#).

⁵⁷ [R.C. 6111.06\(C\)](#).

⁵⁸ [R.C. 6111.06\(C\)](#).

⁵⁹ R.C. 6111.03(K).

⁶⁰ R.C. 6111.07.

⁶¹ R.C. 6111.07(B).

⁶² R.C. 6111.09 & 6111.99.

§ 9.06. Depending Upon the Nature of Ohio EPA Enforcement Action Taken, Procedural Requirements and Appeal Options Vary

[1] Ohio EPA's Orders and Other Enforcement Actions Generally Must Follow Administrative Procedures, Including, Where Applicable, an Opportunity for a Hearing

Under Ohio's Administrative Procedures Act (discussed more fully in [Chapter 15 below](#)), Ohio EPA must follow administrative procedures before taking enforcement actions and issuing orders. Although certain actions, such as emergency orders, are exempt by statute from these procedural requirements, most other agency actions must conform to Ohio EPA's notice and hearing process.⁶³

[2] Invitation to Negotiate Final Findings and Orders

Ohio EPA often will commence an action against a responsible party by notifying such party of the contaminant release and inviting the party to negotiate a DFFO to investigate and cleanup the site. Upon receipt of such notice, parties often enter into negotiations with the agency to resolve issues and avert agency enforcement. Ohio EPA may use the threat of harsher enforcement action (for example, referral to the AG or issuance of an emergency or unilateral administrative order) as an incentive to negotiate DFFOs. Accordingly, although Ohio EPA's authority to direct cleanup or compel other action in a specific instance may be uncertain, parties may nevertheless agree through negotiated DFFOs to conduct remediation activities which might not otherwise fall within the agency's jurisdiction. Practically, these negotiated DFFOs operate to extend the agency's authority over many cleanups and facilities.

[3] Proposed Actions

Ordinarily, Ohio EPA's actions regarding the clean up of sites are issued as final and are appealable to the Environmental Review Appeals Commission (ERAC). Ohio EPA uses information from the RI/FS to develop a "Preferred Plan" that outlines Ohio EPA's evaluation of possible remediation alternatives and presents the option preferred by Ohio EPA. Upon completion of a 30-day public comment period and a public meeting, Ohio EPA issues a "Decision Document" as a final action of the Director, which may be appealed to ERAC (a process discussed in detail in [Chapter 15](#) below).⁶⁴ After the Decision Document is issued, Ohio EPA often attempts to negotiate with a responsible party to design and implement the selected remedy. If an agreement is reached, the responsible party and Ohio EPA will memorialize the agreement in a DFFO.

[4] Final Agency Action Taken Without an Adjudication Hearing

As discussed above, Ohio EPA may issue orders under the solid and hazardous waste and water pollution laws and, in some cases, issue emergency orders. Emergency orders may be issued without notice or hearing, are immediately effective, and require immediate compliance. The party against whom the emergency order is directed is afforded a hearing as soon as possible and not later than thirty or twenty days after issuance for emergency orders issued under Chapter 3734 and Chapter 6111, respectively.⁶⁵

[5] Statute of Limitations for Civil or Administrative Penalties

Actions brought by Ohio EPA, the AG, or other governmental authority for violations of any environmental law and seeking civil or administrative penalties must be brought within five years of knowledge of the facts upon which the action is based.⁶⁶ If the agency was aware of the facts prior to the effective date of the provision (July 23, 2002), then the action must be commenced not later than five years after the effective date.⁶⁷ This provision could apply to actions brought to enforce cleanup of contamination, and might bar untimely actions for penalties. An action for injunctive relief, including an order to remediate contamination, however, would not be barred.⁶⁸

⁶³ R.C. 119.06 (orders not adopted in accordance with procedures are invalid).

⁶⁴ R.C. 119.06 (orders not adopted in accordance with procedures are invalid).

⁶⁵ R.C. 3734.13(B); R.C. 6111.06(C).

⁶⁶ R.C. 3745.31(B)(2).

⁶⁷ R.C. 3745.31(B)(1).

⁶⁸ R.C. 3745.31(E).

§ 9.07. Spill Reporting

[1] Ohio Requirements

In addition to the federal requirements for the reporting of certain spills to the National Response Center and other agencies,⁶⁹ Ohio has several of its own spill reporting requirements. Depending upon the nature of the release, the State Fire Marshal (614-752-8200) or the Ohio EPA Emergency Response Unit (800-282-9378 or 614-224-0946) must be notified.

[2] Underground Storage Tank Leaks

The owners or operators of an underground storage tank (UST) containing hazardous substances, including petroleum, regulated under [OAC Chapter 1301:7-9](#)⁷⁰ must report a release or suspected release to the State Fire Marshall and local fire department within twenty-four hours of discovery.⁷¹ Spills or overflow of twenty-five gallons or less that do not reach a surface water body and that are cleaned up within twenty-four hours need not be reported.⁷²

Under the Ohio Fire Code, the owner and operator of an UST containing flammable or combustible liquids (that is not an UST regulated under [OAC Chapter 1301:7-9](#)) must report within 24 hours to the local fire official and the State Fire Marshal when (1) any test, sampling or monitoring result indicates that a release may have occurred, or (2) a gas chromatography or equivalent method detects a concentration of at least 100 ppm of total hydrocarbons in a soil sample, or (3) any spill or overfill of petroleum exceeds 25 gallons or causes a sheen on any surface water. These events then trigger an investigation to confirm that a release has occurred.⁷³ In addition,

the owner and operator of a UST must report to the State Fire Marshal and to local fire officials within 24 hours after confirmation of a release during tank closure, closure assessment or subsequent sample analysis.⁷⁴

[3] Air and Water

Malfunctions of air pollution control equipment that cause the emission of an air contaminant in violation of any applicable laws must be reported immediately to the nearby Ohio EPA district office or local air pollution control agency.⁷⁵ As a general rule, the Ohio National Pollutant Discharge Elimination System (NPDES) permits include a standard provision for notifying Ohio EPA of the breakdown of water pollution control equipment, by-passes and other unpermitted discharges, as well as the submission of quarterly discharge monitoring reports that would show exceedances of permissible standards. The regulations respecting industrial discharges to publicly owned treatment works (POTW) also include a provision for notice to the POTW upon discovery of any “slug loading,” *i.e.*, malfunctions leading to large volumes in short time frames.⁷⁶ For further discussion, see [Chapter 2](#) (Air Emissions) and [Chapter 3](#) (Water Pollution).

[4] Spills

Ohio requires that spills of the following substances in excess of their assigned reportable quantity be immediately reported to the State Emergency Response Commission (SERC) at 1-800-282-9378 or 614-224-0946 and the National Response Center at 1-800-424-8802:

- extremely hazardous substances;⁷⁷
- CERCLA hazardous substances.⁷⁸

Spills of oil and petroleum products must also be reported to SERC in the following situations:

- the spill is into or upon navigable waters in an amount which causes a visible film or sheen upon the surface of the water;
- 25 gallons or more are released into the environment, excluding navigable waters; or
- 210 gallons or more are released into the environment, excluding

navigable waters, from an oil and gas extraction storage facility.⁷⁹

[5] Toxic Chemical Releases

Ohio EPA administers a toxic chemical release reporting program.⁸⁰ This program parallels the reporting requirements established in title III of the federal Superfund Amendment and Reauthorization Act of 1986. A “covered facility” includes facilities with ten or more employees, within the Standard Industrial Classification Codes 20 through 39, which had manufactured, processed or otherwise used toxic chemicals in excess of the established threshold quantities.⁸¹ The regulations include reporting requirements, schedules for reporting and prescribed forms for notification.⁸² See [Chapter 14](#) below for a more detailed discussion of the Ohio Toxic Chemical Release Reporting requirements.

Footnotes — § 9.07:

⁶⁹ See, e.g., 42 U.S.C. §§ 9603, 11004.

⁷⁰ See [Chapter 12](#) below for a more detailed discussion of the UST regulations.

⁷¹ OAC 1301:7-9-03(C)(1).

⁷² OAC 1301:7-9-03(C)(2).

⁷³ OAC 1301:7-7-28.

⁷⁴ OAC 1301:7-7-28.

⁷⁵ OAC 3745-15-06(B).

⁷⁶ OAC 3745-3-05.

⁷⁷ See 40 C.F.R. Part 355, Appendix A & B.

⁷⁸ See 40 C.F.R. Part 302, Table 302.4.

⁷⁹ See generally OAC Chapter 3750-25-01.

⁸⁰ See generally OAC Chapter 3745-100.

⁸¹ OAC 3745-100-05.

⁸² OAC 3745-100-06, -100-7, -100-9, -100-11.

§ 9.08. Cessation of Regulated Operations

[1] General Requirements

In order to prevent abandoned or terminated industrial operations from becoming a source of exposure to asbestos or hazardous substances, Ohio has enacted a law entitled “Cessation of Regulated Operations.”⁸³ This regulatory scheme applies to the discontinuation or termination of “regulated operations”⁸⁴ where extremely hazardous substances, flammable substances, hazardous chemicals, petroleum and hazardous wastes have been produced, used, stored or otherwise handled. Under this law, the owner or operator of regulated operations must give notice of its plans to cease those operations, and upon cessation of operations, secure the building, structure, or outdoor location against unauthorized entry, submit information concerning hazardous chemical usage to the authorities, and drain or remove regulated substances from stationary items that will remain at the facility.⁸⁵

[2] Regulated Operations

“Regulated operations” under this law means the “production, use, storage or handling” of “regulated substances,” such as extremely hazardous substances, hazardous substances, flammable substances and petroleum.⁸⁶ The law applies to “reporting facilities,” which are those facilities where regulated operations occur and the owner or operator of the facility is required to submit a list of hazardous chemicals or one or more material safety data sheets and is required to submit annual emergency and hazardous chemical inventory forms under Ohio community-right-to-know-laws any time on or after July 1, 1996.⁸⁷ The requirements do not apply to equipment operated by a public utility, oil or gas production operations, or underground storage tanks regulated by other code provisions.⁸⁸ There are specific requirements applicable to the holders of first mortgages upon abandonment of a regulated facility by the property’s owner.⁸⁹ Ohio EPA has adopted extensive regulations to implement these requirements.⁹⁰ The rules exempt facilities that were not “reporting facilities” for the three consecutive years prior to ceasing regulated operations.⁹¹

Alert: Ohio EPA has stated that the law does not apply if a facility has a change in ownership but regulated operations continue without interruption. Ohio EPA also has stated that the law does apply if a reporting facility continues to operate but is changing from

manufacturing to an office-oriented business because, according to Ohio EPA, the facility has ceased its regulated operations.⁹²

[3] Required Actions

Not less than 30 days after the cessation of all regulated operations at the facility, the owner or operator of the reporting facility must submit to Ohio EPA, the local emergency planning committee and the fire department a notice of cessation of all regulated operations at the facility.⁹³ The owner or operator must designate a contact person at the facility as part of the written notification.⁹⁴ The owner or operator also must establish security for the abandoned building within thirty days after the cessation of the regulated operations.⁹⁵

Within 90 days of cessation of regulated operations the owner or operator must undertake additional steps, including, among other things:

- submit information concerning current hazardous chemical usage;⁹⁶
- take inventory of regulated substances;⁹⁷
- drain or remove all regulated substances from tanks and equipment and legally transfer it from the facility;⁹⁸
- properly dispose of all debris and non-stationary equipment that are contained or are contaminated with a regulated substances;⁹⁹ and
- certify compliance.¹⁰⁰

Alert: A responsible party is not required under the law to abate asbestos-containing materials applied to or incorporated into a building or structure because such asbestos-containing material is excluded under the definition of “hazardous substance.”¹⁰¹

After receipt of the owner or operator’s compliance certification, Ohio EPA will inspect the facility to confirm that all requirements have been met.¹⁰² Ohio EPA will coordinate with the designated contact person for the facility to schedule the inspection and the contact person must accompany the inspector during the inspection.¹⁰³ Thus, upon termination of operations involving “regulated substances” such as petroleum or hazardous chemicals, the owner or operator must take steps to ensure that every stationary tank,

vat, electrical transformer, vessel, pipe or debris that contained such substances, or is possibly contaminated with such substances, does not become a source of exposure to the environment through facility security requirements, and an operation and maintenance plan.

Under certain circumstances, a holder of a first mortgage (holder) on a reporting facility has responsibilities under the law. Within fifteen days after a reporting facility has been “abandoned” by the owner, the holder must secure the property and post warning signs and submit to Ohio EPA notice of the abandonment of the facility by the owner and the holder’s compliance with the requirements to secure the facility and post warning signs.¹⁰⁴ “Abandoned by the owner” means that all fee owners have indicated in writing to the holder that they and all tenants have abandoned all rights of possession to the reporting facility and the first mortgage loan on the property is in default and the holder has been unable to contact the mortgagee regarding the default within specified time frames.¹⁰⁵

The holder must continue the security measures and maintain the warning signs until title to the property has been transferred or until the holder has filed a release of mortgage with the county recorder.¹⁰⁶ The holder must notify the Ohio EPA, and the local emergency planning committee thirty days before the date the holder will cease to maintain security and warning signs at the facility.¹⁰⁷

Actions undertaken by the holder required by the law does not cause the holder to be an owner, operator or mortgagee in possession of the facility or subject the holder to cleanup liability under state law.¹⁰⁸

Ohio EPA may issue orders directing the owner or operator of a reporting facility to abate a violation of [R.C. Chapter 3752](#).¹⁰⁹ Upon the request of Ohio EPA, the AG may criminally prosecute or bring a civil action for an injunction and civil penalties against any person who violates this law.¹¹⁰ Violators of this law are subject to civil penalties of not more than \$10,000 for each day of violation.¹¹¹ Any person who recklessly violates this law are subject to penalties of not more than \$25,000 or imprisoned for less than four years, or both.¹¹²

Footnotes — § 9.08:

⁸³ [R.C. Chapter 3752](#); see generally Ohio EPA Guidance Document, “Cessation of Regulated

Operations (CRO)” (April 2014), available at http://www.epa.ohio.gov/portals/32/pdf/CRO_Guidance.pdf.

⁸⁴ R.C. 3752.01(T).

⁸⁵ R.C. 3752.04, 3752.06 and 3752.07; *see generally* OAC Chapter 3745-352.

⁸⁶ R.C. 3752.02(T), (U).

⁸⁷ R.C. 3752.01(V). *See* R.C. 3750.07 and 3750.08.

⁸⁸ R.C. 3752.02.

⁸⁹ R.C. 3752.11.

⁹⁰ *See* OAC Chapter 3745-352.

⁹¹ OAC 3745-352-10(D)(5).

⁹² “Cessation of Regulated Operations (CRO) Frequently Asked Questions & Answers,” available at <http://www.epa.ohio.gov/dmwm/Home/Cro.aspx#114132787-frequently-asked-questions>.

⁹³ R.C. 3752.04.

⁹⁴ R.C. 3752.05.

⁹⁵ R.C. 3752.07.

⁹⁶ R.C. 3752.06(A)(1), (2).

⁹⁷ R.C. 3752.06(A)(3).

⁹⁸ R.C. 3752.06(A)(4).

⁹⁹ R.C. 3752.06(A)(5).

¹⁰⁰ R.C. 3752.06(A)(6).

¹⁰¹ R.C. 3752.01(K).

¹⁰² R.C. 3752.08(A).

¹⁰³ R.C. 3752.08(A).

¹⁰⁴ R.C. 3752.11(B)(1), (2).

¹⁰⁵ R.C. 3752.11(A)(2).

¹⁰⁶ R.C. 3752.11(B)(1).

¹⁰⁷ R.C. 3752.11(C).

108 R.C. 3752.11(D).

109 R.C. 3752.16.

110 R.C. 3752.17.

111 R.C. 3752.17(C).

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CHAPTER 10

BROWNFIELDS REDEVELOPMENT

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I.

INTRODUCTION

§ 10.01. Scope

This chapter covers:

- The Voluntary Action Program [*see § 10.03 below*].
- Uniform Land Use Covenants [*see § 10.04 below*].
- Brownfield Cleanup Financing [*see § 10.05 below*].
- Changes to ACRE and SABR [*see § 10.06 below*].

§ 10.02. Overview

The primary focus of this chapter is on Ohio's Voluntary Action Program (VAP). Programs providing various forms of financial assistance to brownfields redevelopers are also described, and other statutory programs that are relevant to the cleanup of contaminated sites, such as uniform land use covenants.

Note: A massive revision of the VAP rules ([OAC Chapter 3745-300](#)) became effective on August 1, 2014.

II.

OHIO VAP

§ 10.03. Voluntary Action Program (VAP)

[1] Background

For years property owners, prospective real estate purchasers, and environmental professionals have wrestled with the question of “how clean is clean?” There was little regulatory guidance in Ohio and there was no formal procedure to obtain the state’s review of the adequacy of proposed individual cleanup measures, let alone binding and generally applicable answers to, this question.

To address this concern, the Ohio General Assembly enacted Ohio’s VAP in July of 1994. Since then, the Ohio EPA has focused on the development and promulgation of extensive rules to implement this program. The final set of rules became effective in December 1996, with subsequent updates pursuant to [R.C. 119.032](#) on March 1, 2009 and August 1, 2014.

Ohio’s VAP grew out of a legislative recognition that acres of former manufacturing, but potentially valuable, land sat idle because of fears of immense liability and cleanup costs which scared off potential developers, businesses and banks. Until [R.C. Chapter 3746](#) was enacted, and the implementing regulations promulgated in [OAC Chapter 3745-300](#), no one could undertake voluntarily a cleanup project with the assurance it would satisfy the state. The statute establishes a voluntary program which answers the “how clean is clean” question, minimizes governmental red tape, maximizes resources and expertise in the private sector, and provides tax relief as an incentive. Because Ohio grew concerned about continued urban sprawl at the expense of urban revitalization, it decided to level the playing field between the development of greenfields and brownfields by making the cleanup of contaminated urban lands a more cost effective alternative. Thus, Ohio offers financial relief to people undertaking voluntary cleanups in the form of loans, grants and tax abatements (*see* [§ 10.05](#)).

Ohio’s VAP allows persons deemed responsible for the contamination to participate in the program (*see* [§ 10.03\[3\]\[b\]](#)) and VAP participants may use generic numerical cleanup levels or establish cleanup levels through the use of site-specific risk assessment procedures (*see* [§ 10.03\[4\]\[b\]](#)). On completion of a voluntary cleanup, a certified professional may issue the participant a no further action (NFA) letter stating that the site has been cleaned to state standards (*see* [§ 10.03\[4\]\[d\]](#)). An unusual feature of the Ohio VAP is that state oversight is not required. The participant may request that

the certified professional forward the NFA to Ohio EPA. That agency may then issue the participant a covenant not to sue which provides liability protections against future state claims (see § 10.03[4][e]). The state also adopted a program in conjunction with the U.S. EPA, which creates a separate procedural track to obtain relief from both state and federal liability, but which requires greater state oversight and public participation (see § 10.03[5]).

[2] A Two Track Program

As a result of a July 31, 2001 Memorandum of Agreement (MOA) with U.S. EPA (modified on July 24, 2004, February 13, 2006, and November 8, 2007), there are two different VAP options, both utilizing the same codified regulations as the basic prescription for successfully completing a VAP cleanup. The “Classic VAP Track” can lead to a covenant not to sue from the State of Ohio, but it is necessary to follow the additional steps prescribed under the MOA to bind the federal government. The following sections initially outline the basic requirements of the “Classic VAP Track” and then describe the additional steps a volunteer must take to obtain federal acceptance under the “MOA Track.”

Alert: NFAs for volunteers participating in the MOA Track will be exempt from the random audit pool (as discussed in § 10.03[4][d]) because of the thorough review given prior to the issuance of the NFA, closely along the lines of an audit.

[3] Eligibility Under Ohio’s VAP Is Broad for Both Properties and Persons

[a] All Property Is Eligible Unless Specifically Excluded

All properties are eligible for VAP unless specifically excluded. The following properties are excluded:

- properties for which a voluntary cleanup is precluded by federal law or regulations adopted under federal law including, but not limited to, the Federal Water Pollution Control Act Amendments of 1972,¹ the Resource Conservation and Recovery Act (RCRA),² the Toxic Substances Control Act (TSCA),³ the Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA),⁴ and the Safe Drinking Water Act;⁵

- those portions of property where closure of a hazardous waste or solid waste facility is required under Ohio hazardous or solid waste laws;
- property subject to Ohio's oil and gas laws;
- property for which Ohio EPA has issued a letter notifying the owner or operator that an Ohio EPA enforcement order will be issued as a result of a release or threatened release of a hazardous substance or petroleum posing a substantial threat to public health or safety or the environment and the person subject to the order does not present sufficient evidence to Ohio EPA that the person has entered into the voluntary action program and is proceeding expeditiously to address the threat;
- National Priorities List (NPL) sites;
- property subject to the federal Safe Drinking Water Act or state underground injection control programs;
- [42 U.S.C. § 300f et seq.](#)
- PCB-contaminated property subject to action under TSCA or [40 C.F.R. Part 761](#); and
- property subject to state or federal enforcement.⁶

The VAP management obtained legislative changes to the laws regulating underground storage tanks in [R.C. 3737.87](#) and [3737.88](#) and to VAP eligibility criteria in [R.C. 3746.02\(a\)\(3\)](#) and [OAC 3745-300-02\(b\)\(6\)](#) to allow the use of VAP in lieu of corrective action when the State Fire Marshall and the Bureau of Underground Storage Tank Regulations (BUSTR) determine that there is no financially viable responsible person capable of undertaking or completing the corrective action to leaking underground storage tanks pursuant to the BUSTR program. BUSTR reports there are over 3,000 backlogged sites in Ohio awaiting corrective action because of the lack of financially responsible parties (so-called Class C sites). With the legislative fix, the VAP program would provide an alternative.

Alert: With the signing of House Bill 153 on June 30, 2011, volunteers can now follow the VAP program requirements to address

petroleum releases from underground storage tank systems (UST) under certain conditions. Properties with a covered UST are subject to BUSTR requirements for tank closure, sampling, and cleanup of soil and groundwater. But if BUSTR determines that a petroleum release from the site constitutes a “Class C” release, the site may follow the VAP cleanup requirements. A Class C release means one that was caused by a person or entity that BUSTR has specifically determined to not be a viable person capable of undertaking or completing the required assessment and cleanup under BUSTR’s program. BUSTR classifies the release of petroleum from a UST system as a Class C release when the responsible person (RP) is not accessible (for example, an individual is deceased or a corporation is bankrupt) or the RP is specifically determined to be financially unable to assess and cleanup the release.

If seeking a Class C designation, the RP or the volunteer must complete BUSTR’s financial inability to pay (FITP) form. BUSTR conducts a review of the information to make the Class C determination. As of July, 2011, BUSTR has determined that over 120 sites have Class C releases. A list of those properties can be accessed at the VAP program website. Provided the person conducting the voluntary action is not responsible for the release, the sites with Class C releases can use the VAP program (as described later in this chapter) to assess and cleanup the sites. Note, however, the BUSTR rules for UST closure (for example, the removal of the UST system) remain applicable and dictate the procedure for the closure of all UST systems that have not been previously closed.

To implement this legislative and programmatic change, the Agency has promulgated new rules, including, for example, a definition of a “Class C release” in [OAC 3745-300-01\(A\)\(24\)](#) and [OAC 300-02\(B\)\(6\)](#).

The Ohio General Assembly made changes to the VAP program and to the BUSTR Corrective Action statute effective September 3, 2012 in Senate Bill 294. As a result of these changes, petroleum UST releases, regardless of whether they are designated Class C or not, are now eligible for coverage under VAP. The legislative changes are found in [R.C. 3746.02](#) and [R.C. 3737.88](#). There are two caveats to

expanded VAP coverage: (1) the volunteer cannot be a responsible party, as defined by BUSTR, or be the subject of a BUSTR administrative order or referral to the Attorney General's Office; and (2) the property, on which the UST release exists, must include other non-BUSTR hazardous substances that are being addressed under the VAP. The aim of the new legislation was to expand the VAP process beyond "Class C releases" to include sites where there may be viable responsible parties. See [R.C. 3737.88\(A\)\(3\)\(b\)](#). In other words, the General Assembly elected to extend the VAP benefits beyond Class C release sites, that is, those where no viable responsible party exists, to other petroleum releases, subject to the caveats mentioned above.

BUSTR has amended its corrective action rule to equate an Ohio EPA Covenant Not to Sue to a BUSTR "no further action" determination. [OAC 1301:7-9-13\(R\)\(3\)](#). Thus, any volunteer retains the option of performing the corrective actions outside of the VAP program and within the long standing BUSTR corrective action standards. BUSTR reports that dozens of volunteers or non-responsible parties each year address sites by the traditional BUSTR No Further Action letter.

Alert: The Ohio Development Services Agency, in partnership with Ohio EPA and the Department of Commerce, BUSTR, has announced a new resource to help clean up abandoned gas and service stations in Ohio. Called the Abandoned Gas Station Cleanup Grant, the monies will fund the assessment and cleanup of BUSTR Class C sites. Local government entities who own the eligible property or who have an agreement with the landowner may apply. The applicant and the property owner cannot have contributed to the prior release of petroleum or other hazardous substance on the site. Eligible activities include up to \$100,000 for assessment and up to \$500,000 for cleanup. Other eligible activities include costs to empty and remove the underground tanks, the abatement of asbestos, lead or other contamination, demolition and site clearance. Priority will be given to vacant gas or service station projects where cleanup provides the greatest environmental, community and economic impact. Applications open in January 2016.

Alert: Because of the 2011 (H.B. 153) and 2012 (S.B. 294) changes

expanding VAP eligibility to sites with USTs, U.S. EPA, in November 2013, notified Ohio EPA that it will be necessary to modify the 2007 MOA to address the newly eligible sites.

[b] Eligible Persons Include Those Deemed Responsible for the Contamination

As discussed above, the program focuses on “properties” in terms of eligibility. Thus, any person undertaking voluntary action⁷ will be eligible unless that person had received a letter notifying him or her of potential enforcement orders regarding the subject property.⁸

To avoid the possible application of the “state enforcement” bar, property owners and developers must use foresight in planning their strategy so they can demonstrate “sufficient evidence of entry and participation” in the voluntary program before notification of possible enforcement.⁹

[4] VAP Procedures

[a] Phase I and Possibly Phase II Property Assessments Must be Conducted

To determine whether a property requires cleanup, or whether “no further action” is necessary, Phase I and in some cases, Phase II property assessments must be conducted. The purpose of a Phase I property assessment under the VAP is to determine whether there is any reason to believe that a release of hazardous substances or petroleum has or may have occurred on, or is emanating from the property.¹⁰ This includes any release from management, handling, treatment, storage or disposal activities from onsite or offsite activities. The purpose of a Phase I assessment is to characterize a property for the purposes of participation in the VAP and to determine the necessity and initial scope of Phase II property assessment.¹¹ The regulations specify the requirements for a Phase I assessment, including the proper steps and the documentary details of the final report.¹² The new American Society for Testing and Materials (ASTM) 1527-13 Phase I Standard and the Phase I under the VAP Rules, as proposed to be updated, are coming closer together.

If the Phase I assessment reveals information that establishes “any reason

to believe that a release has or may have occurred,” a Phase II assessment must be conducted.¹³ The VAP participant must utilize information from a Phase I assessment or a Phase II assessment to determine that a property is eligible for state sign-off as meeting cleanup standards. The detailed requirements for a Phase II properties assessment are set forth in the VAP rules.¹⁴

[b] Required Cleanup Levels Are Based on Site’s Future Use or Site-Specific Risk Assessments, but “Variances” and “Case By Case Determinations” Are Available

In general, VAP cleanups must reach established generic soil numerical cleanup levels based on the future use of the property.¹⁵ Three categories of future use have been established—residential, commercial, and industrial.¹⁶ Generic standards also have been established for construction or excavation activities.¹⁷ With the new rules taking effect on August 1, 2014, there has been a change to the historical practice of “variances” from generic standards. The new feature is called a “case-by-case” determination. Whereas variances flow from R.C. 3746.04(B)(11) and 3746.09, “case-by-case “ determinations derive from R.C. 3746.04(B)(12). A variance only changes an applicable standard like soil generic standards, vapor intrusion limits, and applies to all environmental media. To qualify the volunteer must show it would be technically infeasible to comply with the applicable standard, or costs exceed the economic benefit, and the alternative standard improves environmental conditions, protects public health and safety, and promotes or preserves employment opportunities or reuse of the property.

A “case-by-case” determination renders a generic numeric or risk derived ground water standard inapplicable to a property; it does not apply to other media or standards, being limited to ground water only. The alternate standard or special site-specific terms must be the subject of a public comment process. The application processes for variances and “case-by-case” determinations are nearly identical, and once the application is deemed complete, there will be a public meeting and notice, a proposed action (approval or denial) and a final administrative action. This process must be completed before the VAP Certified Professional issues an NFA letter. A good rule of thumb for a schedule is six to eight months, depending upon the complexity of the technical review. Instead of the flat five-figure variance fee

under the former rules and schedules, the new rules contemplate the reimbursement of the actual costs incurred out of a technical assistance account. An applicant may withdraw a variance or “case-by-case” application at any time prior to final action by the Director, but all costs incurred to that point are non-refundable.

A good example of the effective use of a variance follows: property and groundwater are contaminated with a VOC migrating off the property at levels in excess of applicable standards. In that case the soil is excavated, the ground water is treated, the VOC levels are reduced, but not compliant. With incomplete exposure pathways, the community on municipal water, and additional remedies unlikely to net additional VOC reductions at the property line, a variance might be justified on the basis of technical infeasibility. A good example of a “case-by-case” determination follows: a brownfield contains an unregulated landfill with hazardous substances in contact with the upper groundwater zone. Because it is not practical to excavate the landfill, the volunteer petitions the Director that the “residential use” standards for the protection of the groundwater to be inapplicable and commits to potable groundwater use restriction.

In addition, the statute makes it clear that a voluntary action is regulated to achieve, at most, only the background level of a hazardous substance, or petroleum, even if the cleanup level as otherwise determined from the applicable regulations would call for a more stringent level of remediation.¹⁸

Ohio EPA completed guidance for the assessment of vapor intrusion to indoor air called “Sample Collection and Evaluation of Vapor Intrusion to Indoor Air For Remedial Response and Voluntary Action Programs” (May 2010). This document can be downloaded through a link on the VAP website (<http://epa.ohio.gov/derr/volunt/volunt.aspx>). According to Ohio EPA, this guidance was developed by using established guidance from U.S. EPA, the Interstate Technology Resource Council, the American Society of Testing and Materials, and other states, with special credit to the California Environmental Protection Agency for permission to use its “Interim Final Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air (2004)” as a template. Ohio EPA will generally expect vapor intrusion to be assessed under site cleanups directed by Ohio EPA staff or under the Voluntary Action Program whenever there is soil or groundwater

contamination and a completed exposure pathway. Ohio EPA's Guidance describes a step-wise approach of eight action items for the assessment of vapor intrusion into structures. Special consideration is given for potential vapor intrusion to residential structures. Following are the eight action items:

- If a preliminary site assessment like a Phase I or Site Assessment gives reason to believe that a release of volatile and toxic hazardous substances and/or petroleum has occurred on the property, then
- Determine which compounds are appropriate for further consideration by reference to federal Superfund and Cal EPA guidance, in particular for chlorinated compounds, hydrocarbons, naphthalene, some PAHs, PCBs, mercury, hydrogen sulfide
- Identify the source of the contamination, the primary release mechanism, the affected media, the contaminant transport mechanism, the exposure media and routes, and current or potential receptors (including receptors within 100 feet from the contaminant plume)
- Conduct soil sampling, ground water, and/or soil gas/sub slab sampling as necessary (cannot rely solely on direct indoor air samples); follow the standard operating procedures for sampling, including direct push, sub slab and indoor air
- Use the federally approved Johnson & Ettinger VI model, Version 3.1 and the U.S. EPA OSWER VI Guidance (November, 2002) screening levels to evaluate the data (soil to indoor air, ground water to indoor air, soil gas to indoor air) and the April, 2013 draft Vapor Intrusion Guidance
- Calculate the potential risk and hazard from VI exposure pathways
- If risk goals are exceeded, more sampling will be necessary and remedy selection will be necessary
- Remedies might include soil removal and soil vapor extraction, ground water remedies, institutional controls, and engineering controls (sub-slab depressurization system, vapor barriers, ventilation systems).

If the sampling and assessment reveal an imminent threat to human health and the environment, the Ohio EPA expects notification of the fact.

Alert: On May 24, 2016, DERR rescinded Chapter 10 (Data Evaluation) and Chapter 11 (Modeling the Vapor Intrusion Pathway) because DERR determined that guidance in those chapters was out of date and no longer appropriate for use for any cleanups under DERR's programs. DERR stated that until it revises those chapters, remediating parties should rely on U.S. EPA's June 2015 vapor intrusion guidance and U.S. EPA's Vapor Intrusion Screening Level (VISL) calculation.

In June, 2015, U.S. EPA, Office of Solid Waste and Emergency Response (OSWER), issued its final guidance for the evaluation of vapor intrusion to indoor air ("U.S. EPA VI guidance"). The U.S. EPA VI guidance, similar to Ohio EPA's guidance, emphasizes a "multiple-lines of evidence" approach when evaluating the VI pathway. U.S. EPA refers to the Vapor Intrusion Screening Level ("VISL") Calculator as the preferred frontline screening methodology, and de-emphasizes reliance on mathematical models, the use of which is included in Ohio EPA's VI guidance. Ohio EPA has acknowledged that this has led to some confusion on which tool to use to screen out the VI pathway or evaluate compliance with applicable standards for VAP.

DERR has announced that for remedial response and RCRA sites, it is recommending use of the U.S. EPA VI guidance for VI investigations, along with some aspects of Ohio EPA's VI guidance. For more specific information, DERR recommends that the interested party contact the appropriate program manager. Similarly, for VAP, DERR advises the use of the VISL Calculator for screening, with emphasis on further sampling (soil gas and indoor air) if site concentrations exceed screening levels. Mathematical modeling, which is permitted under the VAP rule, may have utility but should be evaluated on a site-specific basis. With respect to the Johnson and Ettinger model for vapor intrusion to indoor air specifically DERR believes that the appropriateness of using this model has been called into question. However, no further action letters that include VI demonstrations may continue to rely on mathematical modeling conducted in accordance with the VAP rules and Ohio EPA's VI guidance until such time the guidance is updated. DERR strongly recommends a party consult with the program manager if the project has VI issues, especially if the party has or would like to rely upon VI modeling.¹⁹

In August 2016, DERR released guidance to establish response actions and time frames for concentrations of common vapor intrusion chemicals when receptors are present. Response actions may include sampling, mitigation, and/or activities to reduce exposure to vapor intrusion chemicals. The guidance addresses various chemicals but has a specific emphasis on sites with a potentially complete pathway for Trichloroethene (TCE) concentrations where sensitive receptors (i.e., women of childbearing age) may be exposed. The guidance provides time frames for response for residential and commercial exposures to TCE based on levels in groundwater, sub-slab soil gas, and indoor air including a requirement to immediately relocate receptors if an “imminent hazard response action level” of TCE is detected in indoor air. The guidance is available at <http://www.epa.state.oh.us/derr/EnvironmentalResponseandRevitalization.asp>

The remedy may involve an Operations and Maintenance (O&M) Plan that obligates the Volunteer to perform ongoing operations and/or maintenance of a remedy as a condition of approval. Under [Ohio Admin. Code Rule 3745-300-11](#), the remedy may be an indefinite obligation such as the maintenance of a concrete barrier, or a more finite obligation such as an obligation to monitor groundwater for a period of time to demonstrate compliance post remedy. There is a Site Assistance and Brownfield Revitalization (SABR) compliance coordinator who oversees the O&M Plan, including timely annual reporting under [Ohio Rev. Code Ann. § 3746.12\(A\)\(2\)\(a\)](#) and [Ohio Admin. Code 3745-300-11\(A\)\(4\)](#) and [\(E\)\(4\)\(n\)\(iii\)](#). The contents of an O&M plan are governed by [Ohio Admin. Code 3745-300-11\(E\)\(1\)](#) and [\(E\)\(2\)](#). The Ohio EPA has posted templates online for the O&M Agreements, O&M Plans and O&M Reports to facilitate drafting. Agency staff review the reports to verify that they have addressed all of the Plan requirements. If the Report is incomplete, the Agency will issue an Initial Notice of Omission Letter, and possibly a Second Notice of Omission Letter. Staff time spent reviewing the O&M Plan Report and obtaining requested follow up information will be billed to the Volunteer. Unsatisfactory responses can lead to a Notice of Noncompliance and Opportunity to Cure under [Ohio Rev. Code Ann. § 3746.12\(B\)](#).

Special standards have also been adopted for groundwater depending on the classification of the groundwater and whether the contamination is from on or off the property.²⁰ Ohio EPA’s groundwater protection requirements for

voluntary cleanups are designed to address the risk that contaminated groundwater poses to residents and the environment.

Some sites in highly urbanized areas rely on community water systems to supply residents with safe drinking water, so groundwater that contains chemicals from prior industrial activities poses no appreciable risk to the community. Because in such instances the groundwater is not being used and will not be used in the foreseeable future for drinking water purposes, Ohio EPA will issue a groundwater classification known as Urban Setting Designation or “USD.”²¹ This classification recognizes that cleanup to drinking water standards is not necessary because no one will be drinking the groundwater. Other possible exposures to contaminated groundwater still must be addressed even with an USD. For example, a volunteer must assess potential risks to building inhabitants from vapor intrusion of volatile contaminants. In addition, if contaminated groundwater makes its way to a stream, the resulting discharge may not be permitted to result in an adverse impact on the aquatic life in the stream, nor can it harm people who might swim in the water. A request for an USD must be approved by the Director of the Ohio EPA, subject to public participation.²² There have been some significant instances of brownfields redevelopment projects in urban areas, such as Cleveland and Akron, that have used the USD tool.

The program allows the use of institutional and engineering controls restricting access to, or use of, the property as a strategy to tailor cleanup objectives to particular property use categories (e.g., industrial).²³

As a general proposition, pollution’s impact on groundwater presents the most difficult of technical and legal questions. As a result, Ohio’s VAP has been forced to deal with a variety of technical questions of interest to volunteers and their certified professionals. This has led to the development of 15 separate guidance documents known as “Groundwater Frequently Asked Questions” (FAQs) which address such questions as the definition of a saturated zone, classification of groundwater by determining yield, the demonstration of the protection of groundwater meeting unrestricted potable use standards (POGWMUPS) and the determination of chemicals of concern (COCs). These documents may be obtained from Ohio EPA by calling 614-644-2924 or downloading them from <http://epa.ohio.gov/derr/rules/guidance.aspx#119153116-vap>.

Ohio EPA recently released information called Post-Remedy Verification Ground Water-Monitoring Guidance for VAP Properties as part of its compendium of technical guidance documents. The guidance addresses such subjects as: groundwater monitoring conducted after achievement of standards at the point of compliance; rebound after completion of the remedy; prescription of the time frame to confirm on-going compliance (e.g., eight consecutive quarterly sampling events); commencement date for the sampling after pump and treat remedy has finished and ground water elevations have returned to pre-pumping conditions; monitored natural attenuation; and statistical analysis. Generally, remedial activities must achieve applicable standards within five years, inclusive of verification monitoring. *See also* U.S. EPA Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at Groundwater Monitoring Wells [OSWER 9283.1-44].

Variances from generic numerical standards or property-specific risk assessment procedures may be used if a certified professional (*see* § 10.03[8]) can demonstrate to Ohio EPA in a “no further action letter” that:

- it is technically infeasible to comply with the applicable standards, or the costs of complying with the applicable standards exceeds the economic benefits; and
- the proposed alternative standards will result in an improvement of environmental conditions at the property and will ensure the protection of public health and safety.²⁴

In addition, the statute makes it clear that a voluntary action is regulated to achieve, at most, only the background level of a hazardous substance, or petroleum, even if the cleanup level as otherwise determined from the applicable regulations would call for a more stringent level of remediation.²⁵

Ohio EPA publishes and periodically updates its VAP Program Chemical Information Database and Applicable Regulatory Standards (CIDARS) in EXCEL format for use in determining applicable generic standards, reference doses, and cancer slope factors for risk assessments. Covering approximately 145 chemicals, a link to this database can be found under “Guidance” on the VAP website.

Alert: Ohio EPA recently completed a review of the VAP rules to

satisfy [R.C. 119.032](#), which requires all state agencies to review each of their rules every five years. Ohio EPA announced substantial revisions to the VAP rules, which were developed with input from environmental groups, businesses, environmental consultants, environmental lawyers, and other stakeholders. The final rules went into effect on August 1, 2014. Many of the revisions can be characterized as organizational or administrative changes. However, the final rules also include substantive revisions that will affect future VAP cleanups. For example, the final rules include, among other things, more stringent generic standards for certain constituents, the removal of specific vapor intrusion models, and certain new requirements on certified laboratories.

Because of a growing reliance on institutional controls and operations and maintenance agreements, the August 1, 2014 rules reflect a shift in agency resources to focus on post-remedy audits and oversight of institutional controls and operation and maintenance agreements. In addition, the new rules address procedures to change a remedy after a Covenant Not to Sue has been issued. The new rules propose a new method of constructing Generic Numerical Cleanup Standards, moving away from “Monte Carlo” probabilistic methods to a deterministic “point value method.” Additionally, the new approach develops Generic Indoor Air Standards as a way to simplify the Vapor Intrusion pathway.

⚠ Warning: NFA letters submitted after the effective date of the new rules (August 1, 2014) will be required to follow the revised rules. This could create substantial hardship for volunteers with ongoing investigations and cleanups which may be required to hit a “moving target” to obtain a covenant not to sue. Ohio EPA announced its plans to issue standardized NFA Letter Template Guidance.

Alert: The Agency periodically issues Technical Guidance Compendium documents for use by the certified professional in determining whether a cleanup adequately addresses requirements. Two important ones became effective on October 21, 2011, “Reasonably Anticipated Complete Exposure Pathways” and

“Conducting Remedies in the VAP for Complete and Reasonably Anticipated to be Complete Pathways.” These two new documents, together with the entire collection of TGC documents, can be found at: http://epa.ohio.gov/Portals/30/vap/tgc/TGC_Index.pdf. The Ohio EPA expects to update the Technical Guidance Compendium documents with the new rules and new rule citations.

[c] The Cleanup Must Be Certified by a Certified Professional (CP)

Remediation techniques under the program include active remediation (e.g., excavation), passive remediation (e.g., bioremediation), institutional controls, engineering controls, and monitored natural attenuation.²⁶

Ohio EPA does not conduct direct oversight of VAP cleanups. Rather, it is a CP, hired by the participant in the VAP program, who must certify that a cleanup has been performed to state standards.²⁷ In making this determination, the CP must use the services of a certified laboratory (*see* § 10.03[8] *below*). The website for information on Ohio’s VAP —<http://epa.ohio.gov/derr/volunt/volunt.aspx>—includes a listing of certified professionals and laboratories who are eligible to provide services on behalf of volunteers in the program. Ohio EPA issues a semi-annual VAP Technical Decision Compendium for use by CPs on wide-ranging topics, including eligibility, use of generic standards and risk assessment procedures, sampling and remedies.

The VAP program routinely schedules updating sessions for CPs to discuss topics of current interest and issues facing the program. At one session, the VAP management focused on the standards of conduct expected of CPs under [OAC 3745-300-05\(E\)\(2\)\(a\)](#), in particular, the requirement that the CP holds “paramount” the public health, safety, and welfare and the environment in the performance of his/her professional services. The management stressed the “stewardship” role of the CP, meaning the exercise of independent and objective best professional judgment. The agency personnel discussed the case of a CP who lost his certification for failure to adhere to these principles. The legal staff also stressed the importance of the CP’s obligation under [OAC 3745-300-05\(E\)\(2\)\(b\)](#) to report the discovery of “imminent hazards” during the course of the CP’s work, including the requirement to explain that obligation to the CP’s client, typically the volunteer.

Ohio EPA has been developing “disciplinary guidance” for CPs. In assessing whether to take a disciplinary action, individual CP statistics on NFA letters will be evaluated. Such statistics include the number of NFAs issued by the CP; the number of NFA deficiency letters issued to the CP in the last five years; the number of denials of requests for covenants not to sue letters issued based on the CP’s NFA letters in the last five years; and the number and type of inadequacies identified in the CP’s NFA letters in the last five years, both through initial NFA letter reviews and audits. The nature and severity or type of deficiencies in the voluntary action opinions will also be reviewed based on the VAP rule requirements and the risk implications (i.e., threats to human health). Overall, the deficiencies will be compared to the CP standards of conduct to complete an assessment as set forth in [OAC 3745-300-05\(E\)](#) (failure to act with care and diligence; failure to hold paramount public health, safety, welfare and the environment; failure to make a good faith and diligent effort to obtain all relevant data, reports or other information). If the deficiencies were significant in number or substantial in type, Ohio EPA can file a disciplinary case to suspend applicable licenses.

Alert: The August 1, 2014 rulemaking increases the certification period for the CP from one to three years, while still maintaining the requirement for payment of an annual certification fee. See rules [OAC 3745-300-05\(A\)\(6\)](#), [\(C\)\(3\)](#), and [OAC 3745-300-03\(B\)\(2\)](#). Additionally, the required amount of professional development hour units (PDHUs) a CP must earn changes from the current minimum of 24 PDHUs per certification year to 36 PDHUs per three year certification period. See rule [OAC 3745-300-05\(C\)\(1\)](#).

[d] A Certified Professional May Issue an NFA Letter

On the satisfactory completion of a VAP cleanup, the CP will prepare an NFA letter certifying that the site has been cleaned to state VAP standards.²⁸ Ohio EPA provides an NFA letter form to be used by CPs for all NFAs issued to volunteers and submitted to the agency. The form can be downloaded from the VAP website.²⁹ The NFA letter does not afford any liability protections to the participant. The letter does not need to be sent to Ohio EPA for approval; but the participant may decide to do so in order to obtain a covenant not to sue (see [§ 10.03\[4\]\[e\]](#) below). Although Ohio EPA does not conduct oversight of VAP cleanups, the program contemplates

systematic and periodic audits of the no further action letters it receives.³⁰

Ohio EPA audits 25 percent of all NFA letters submitted under the VAP. These audits are conducted by the VAP field auditing unit (FAU). The selected NFA letters are chosen from three audit pools; the mandatory audit pool, priority audit pool, and random audit pool.³¹ The audits may be limited only to a review and analysis of the documents pertaining to an NFA letter in order to determine compliance with VAP rules or the audit may also include sampling and analysis of soils, surface water, air, sediments or groundwater. The purpose of the audit is to determine whether, after completion of the voluntary action, the property meets applicable standards. The VAP FAU also can conduct an audit to review the qualifications of, and work performed by, CPs and certified laboratories in order to determine if they possess the qualifications to perform work under the VAP which results in the issuance of NFA letters that are consistent with applicable standards.³² Examples of audits included the agency's determination that a certified professional failed to perform a Phase I Property Assessment in conformance to the standards of the American Society for Testing and Materials (ASTM) Practice E-1527, as required by VAP and inquiry as to whether the residual concentrations of the primary contaminant of concern at the property could result in groundwater contamination.

Alert: On May 5, 2011, Ohio EPA issued guidance called the "VAP No Further Action Letter (NFA) Review Process." This guidance is accessible on the web site, and outlines the procedures when Ohio EPA determines that a submitted NFA contains deficiencies, such as technical issues and/or finalization of an operation and maintenance plan and/or an environmental covenant. The review process allows the CP and volunteer two opportunities to correct the deficiencies. The first opportunity follows the issuance of a comment letter titled, "Initial Notice of Deficiency" (INOD). If the volunteer/CP fails to respond to this comment letter by the stated deadline, or does not satisfy the issues raised by the Ohio EPA NFA review team, Ohio EPA will issue an additional comment letter titled, "Final Notice of Deficiency" (FNOD), providing the volunteer a second opportunity to submit a sufficient response. The agency warns that it expects strict adherence to the specified time-lines and promises improved Ohio EPA internal review times as well. Generally, there is a sixty (60)-day

response period for the INOD, particularly to accommodate legal and technical negotiations over operations and maintenance agreements and environmental covenants when they are integral to the clean-up strategy. The guidance also contemplates a 60-day response period for the FNOD as well. After that time period, the agency will reach a decision on whether to issue the Covenant Not to Sue (see [Brownfields Law & Practice § OH.01\[2\]\[e\]](#) (Michael B. Gerrard ed., Matthew Bender)) or deny the requested covenant.

When the clean-up strategy that underpins the NFA relies on an operation and maintenance agreement and/or an environmental covenant, Ohio EPA now demands that the CP's affidavit include the specifics of a proposed Environmental Covenant (see [Brownfields Law & Practice § OH.01\[7\]](#) (Michael B. Gerrard ed., Matthew Bender)) and/or Operation and Maintenance Agreement (OMA). The guidance for this new requirement is found in a memorandum posted on the website on May 5, 2011. See also [OAC rule 3745-300-13\(O\)](#). The agency expects the CP's affidavit to include these details at the time of the issuance of the NFA for agency review. Thus, where proposed environmental covenants and proposed OMAs constitute requisite components of an NFA letter, Ohio EPA interprets [OAC rule 3745-300-13\(E\)](#) to incorporate the details of that document into the CP affidavit at the time of submission of the NFA.

Ohio EPA has given notice of its intent to develop additional guidance on what it expects in terms of proposed remedies. It will look for the CP's identification of current and "reasonably anticipated pathways" and the proposal of a remedy that comports with applicable standards. Thus, for example, ground water contamination will trigger a vapor intrusion analysis when a building exists over the contamination, or is likely to be part of the redevelopment. Ohio EPA expects the NFA to address each pathway that it is anticipated to be complete, and to set forth a remedy for that pathway. In a key change, the new guidance will require that all necessary remedies must be initiated prior to the issuance of the NFA letter. If a complete or reasonably anticipated to be complete pathway does not comply with applicable standards, Ohio EPA expects a remedy, and will require it to be built prior to the issuance of the NFA letter. This new requirement will eliminate the historical practice of "interim" and "contingent" remedies.

At its October 7, 2013 VAP CP Professional Annual Training session, Ohio EPA expressed its intention to utilize a new format for an NFA. CPs and their Volunteer clients should consult the Technical Assistance on the website.

[e] A Participant May Request a Covenant Not to Sue

A person who has been issued an NFA letter from a CP may request the CP to submit the original letter to Ohio EPA requesting a formal covenant not to sue.³³ After remediation, a CP must prepare an NFA letter to demonstrate that the site is protective of human health and the environment. Ohio EPA VAP officials will then determine whether a covenant not to sue will be issued or denied.

There has been considerable discussion between the VAP staff and CPs regarding the scope of the covenant not to sue (CNS). Effective December 1, 2009, the liability release in the CNS template will be broader than before; previously, it had not included conditions that were not addressed in the NFA (i.e., there was no liability release of conditions “missed” in the NFA, and thus, any such conditions discovered after the fact did not void the NFA/CNS). With the clarified CNS template, the discovery of a “pre-NFA” release will require the property owner to notify the VAP and “cure” that omission, or the agency will revoke the CNS. Likewise, the clarification in the scope of the CNS now means that it is not possible to use VAP to negotiate clean-up levels on a pollutant specific basis. The NFA and CNS will need to focus on all conditions on the property. Both are property-specific, not contaminant-specific.

On May 9, 2011, the Ohio EPA posted on its VAP website a matrix to explain the pathways for a “Post CNS Cure Process” when either periodic agency verification or periodic self-evaluation reveals a departure from or non-compliance with applicable standards. These pathways spell out the opportunities for the volunteer to pursue a CNS amendment and/or modification of an OMA or an environmental covenant with a goal of achieving a “Notice of Return to Compliance” (NORC) and a return to periodic verification. Otherwise, the volunteer risks CNS revocation or voidance.³⁴

A covenant not to sue will protect the person from all civil liability to the

state to perform additional investigational or remedial activities at the site except for claims for natural resource damages the state may have under CERCLA³⁵ and for claims that the state may have under Section 107³⁶ of CERCLA.³⁷ The covenant not to sue also does not cover:

- third-party tort actions;
- releases after the volunteer submitted the NFA; and
- releases missed or improperly evaluated during the VAP process.

⚠ Warning: The covenant not to sue may not protect the volunteer or subsequent property owners from contamination discovered after the covenant is issued.

A covenant not to sue may be transferred to other persons as long as the person receiving the covenant complies with any conditions in the covenant such as the maintenance of institutional or engineering controls.³⁸ Since 1995, Ohio EPA has issued over 500 covenants not to sue. A list of NFAs and covenants issued since the beginning of the VAP are accessible on the VAP website <http://epa.ohio.gov/derr/volunt/volunt.aspx>. The list provides summary information on the property, its address, the responsible volunteer and pertinent chronological data.

[f] Public Participation is Not Required, but Ohio EPA May Choose to Inspect

Ohio's "Classic" VAP does not require public notification or participation at any stage of the approval process, except for approval of an USD for groundwater or in connection with "Variances" and "Case-By-Case Determinations." But Ohio EPA may audit an NFA, as discussed in § 10.03[4][d], or may require submission of supporting documents and data from the CPs and laboratories in order to verify qualifications and audit performance. Ohio EPA may also inspect and investigate properties undergoing voluntary cleanup.³⁹

[g] Post Covenant Not to Sue Remedy Changes

Partially in response to requests for guidance during the stakeholder meetings during the five-year rule review process, Ohio EPA announced

significant changes to address post CNS remedy changes. A volunteer need not secure agency approval for remedy changes, but this new process will provide comfort if followed. In order to ensure that the CNS remains in good standing, the volunteer can alert the agency of the remedy change through a Remedy Revision Notice. The required elements of the Notice include a description of the revised remedy; a statement by the CP that the property complies with applicable standards under the revised remedy; the information used by the CP to support that conclusion; a new or revised operations and maintenance agreement; and a new or revised environmental covenant, as applicable. The Notice will ask for either a “remedy revision acknowledgement” or a “remedy revision approval.” If the volunteer asks for the acknowledgment, Ohio EPA would not undertake further review, but the Agency reserves the right to audit the site. To secure the approval, the volunteer would establish a Technical Assistance Account to cover the costs of Ohio EPA review. A “remedy review acknowledgment” would not trigger agency review, or the funding of a Technical Assistance Account, unless the revised remedy requires the development of a new operations and maintenance plan or a new environmental covenant.

The new rulemaking also addresses the situation where the completed pathway has left the volunteer’s property and becomes beyond its control to address with a remedy. For contamination that has emanated from the property to an off property receptor, the volunteer can demonstrate it is unable to implement a remedy despite “best efforts,” in which case the volunteer can omit the pathway from the voluntary action.

[5] Ohio Has Entered a Memorandum of Agreement (MOA) with U.S. EPA That Allows for Relief from Federal Liability in Exchange for Greater Agency and Public Involvement

On July 31, 2001, Ohio EPA and U.S. EPA Region V entered into a MOA regarding federal interest at contaminated sites cleaned up in Ohio (most recent update was 2007). The MOA created a formal, separate track for volunteers desiring to obtain formal federal relief. Parties in Ohio may now undertake cleanup under the “Classic VAP Track” (i.e., the traditional VAP procedure) or the “MOA Track.” Unlike the traditional program, the MOA Track imposes additional requirements, including formal notification of the entry into the system, greater opportunities for public involvement through

public review and comment periods and more Ohio EPA oversight during the actual site work. Thus, voluntary remediation participants may now choose between the traditional VAP Track, which does not provide formal federal comfort, or the MOA Track, which imposes greater agency oversight but offers the promise of federal liability comfort. The MOA Track does not contemplate new or additional regulations. The volunteer will follow the existing procedures and rules but commits to more administrative review as the project proceeds.

The original MOA Track process contained four review and approval steps including (1) approval of the volunteer's notice of entry/initial eligibility determination; (2) approval of Phase II sampling plan; (3) approval of determination of whether the property meets applicable VAP standards where available or site-specific standards; and (4) approval of the remedial action work plan. The VAP MOA was amended on July 24, 2004 and February 13, 2006. The February 13, 2006 modification changed the VAP MOA Track review and approval process from four review and approval steps to two.

The MOA was most recently modified on November 8, 2007 to expressly provide that U.S. EPA does "not plan or anticipate taking action" under CERCLA or RCRA at facilities that operated under RCRA interim status permits and are subject to RCRA corrective action requirements provided such facilities completed a voluntary action in compliance with the MOA Track procedures and received a covenant not to sue. The MOA is now referred to as the "RCRA and VAP MOA."⁴⁰ The MOA does not apply to various sites identified in the MOA, including sites that are subject to RCRA corrective action pursuant to a state or federal permit or order. Under the current MOA Track the volunteer must undertake the following steps, which are set forth on Form #1 (revised July, 2015), "Ohio EPA RCRA and VAP MOA Track: Procedures for Participation," which is available at <http://www.epa.ohio.gov/portals/30/vap/docs/FORM01.pdf>.

1. Conduct an initial investigation to determine if the property is eligible for the VAP;
2. Set up a document repository at a public location (e.g., a public library) in the vicinity of the property;


3. Notify Ohio EPA of the volunteer's intent to participate by submitting a Notice of Entry;
4. Publish notice of the volunteer's intent to enter into the program in a local newspaper (Ohio EPA will also publish such notice in its Weekly Review);
5. The volunteer must complete and sign an agreement to follow the MOA Track procedures and to reimburse Ohio EPA for document review and oversight costs;
6. Submit an Initial Eligibility Determination form to Ohio EPA;
7. Ohio EPA review and approval of notice of entry/initial eligibility determination;
8. Conduct VAP Phase I and, if necessary, Phase II investigations;
9. After Phase II, determine if the property meets applicable VAP standards where available (if standards are not available for the chemicals of concern on the property, conduct a risk assessment and prepare risk assessment report);
10. Create a remedial action work plan (RAP) if necessary (or Ohio EPA will approve a no further action (NFA) letter if no remediation is necessary);
11. Submit the Phase I, Phase II, Risk Assessment, and RAP to Ohio EPA and publish notice in the local newspaper indicating that the work plan is available for public review and a 30-day comment period (Ohio EPA must address all comments on the RAP);
12. After Ohio EPA approval of the RAP, implement the remedy; and
13. Submit NFA letter to Ohio EPA (and receive covenant not to sue if Ohio EPA determines that voluntary action was conducted in compliance with the rules and the site is deemed protective of human health and the environment).


Under the MOA Track, all documents that the volunteer submits during oversight are made available for public review in a public repository. Ohio EPA will hold a public meeting any time there is a request or if Ohio EPA

determines there is a significant public interest.

If the volunteer obtains a covenant not to sue, U.S. EPA Region V will not pursue a removal or remedial action unless the Ohio EPA revokes the covenant not to sue or Region V determines the site presents an imminent and substantial endangerment.

Ohio EPA maintains a list of sites participating in the MOA Track on the VAP webpage, <http://epa.ohio.gov/derr/volunt/volunt.aspx>. In November 2013, U.S. EPA notified Ohio EPA that the legislative changes in 2011 and 2012 that expand VAP eligibility to sites with USTs will require modifications to the 2007 version of the MOA.

 **Warning:** U.S. EPA and Ohio EPA expressly reserve their respective rights in the MOA under federal and state laws concerning the property. By its express terms, the MOA “does not have any legally binding effect, does not create any legal rights or obligations, and does not in any way alter the authority or ability of Ohio EPA or U.S. EPA Region 5 under state or federal law.” In addition, U.S. EPA’s stated “plan” to not take action at properties that complete the VAP MOA Track cleanup contains numerous stated exceptions, including, for example, where a site presents an imminent and substantial endangerment to public health or welfare or the environment.

 **Strategic Point:** Because the VAP rules are complex, it is advisable for a property owner to engage counsel and a CP early in the planning process. With experienced counsel and a CP, any “gray” areas in the rules can be identified, and resolved proactively with Ohio EPA before substantial resources have been expended in implementing a NFA strategy. Counsel and a CP will assist in evaluating the advantages and drawbacks in deciding between the “Classic” VAP program and the “MOA Track.” In very general terms, prospective volunteers should assess whether the VAP benefits (Ohio EPA review and the covenant not to sue) outweigh the detriments, including the additional costs and time necessary to complete a VAP cleanup.

[6] Cost Recovery Actions

The volunteer who conducted a VAP cleanup may recover certain costs against responsible parties.⁴¹ Responsible parties include any person who, at the time when any of the hazardous substances identified and addressed by a voluntary action or released at or upon the property that is the subject of the voluntary action, was the owner or operator of the property, and any other person who caused or contributed to a release of hazardous substances at or upon the property.⁴²

Persons are not held liable for the costs of conducting a voluntary cleanup action or for the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum when they, without participating in the management of a property, hold indicia of ownership in a contaminated site primarily to protect a security interest.⁴³

The same liability protections are extended to fiduciaries and trustees as long as the fiduciary or trustee:

- neither caused nor contributed to a release; and
- after acquiring ownership or control of the property, conducts site activities in compliance with all applicable environmental laws.⁴⁴

For purposes of this statutory provision, volunteers may recover the costs of Phase I and Phase II assessments, sampling plans, remedial plans, remedial activities and such other actions a volunteer considers to be necessary or appropriate to address contamination, that has been followed by the issuance of a “no further action certificate” indicating that the property complies with applicable standards.⁴⁵ The volunteer may also recover reasonable attorney’s fees, court costs and other expenses in connection with the cost recovery action.⁴⁶

A civil action for cost recovery may be commenced in the court of common pleas of the county in which the property on which the voluntary action is conducted is located.⁴⁷ There is a three-year time limit after the applicable “no further action certificate” was submitted to the Ohio EPA for commencing the cost recovery action.⁴⁸ The liability of the owners, operators, and others is based on their respective degrees of responsibility. The statute sets forth the factors a court may consider in liability allocation.⁴⁹

There is very little reported case law that construes the cost recovery provisions under Ohio's law. In one case, an Ohio appellate court held that the cost recovery provisions of [R.C. Chapter 3746](#) expressly waive any claim of sovereign immunity in a cost recovery action brought by a volunteer against a state agency (such as the Department of Transportation).⁵⁰ In a later phase of this same litigation, the Court of Appeals ruled that [R.C. 3746.23](#) limits compensation to actions that constitute "voluntary action." In that decision, the court ruled that the demolition of a building was not part of a covered voluntary action cleanup. The court also disallowed the property owners' claimed entitlement to future cleanup costs and litigation costs because they are "inherently speculative." The court further ruled that diminution in value does not fall within the definition of "costs incurred for performing a voluntary action"⁵¹

The prerequisite for such a cost recovery action is a "voluntary action," and that will include, at a minimum, the issuance of a NFA. Thus, cleanup expenditures that did not yield a CP generated NFA did not rise to a "voluntary action," and a court dismissed the cost recovery action for that reason.⁵²

Alert: The VAP statute provides a limited immunity from tort actions for personal injury or property damage arising out of a voluntary action.⁵³

In one highly controversial decision, the Court of Appeals for Hamilton County held that Ohio EPA cannot recover certain "response" costs in an enforcement action against a property owner.⁵⁴ Ohio EPA sought to recover its costs of investigation under [Ohio Rev. Code Ann. § 3734.20\(B\)](#) and [Ohio Rev. Code Ann. § 3745.01\(C\)](#), but the appellate court narrowly read those provisions. Ohio EPA has taken the position that the decision is binding only in Hamilton County, it does not address federal law such as the cost recovery provisions of CERCLA, and, therefore, Ohio EPA will continue to pursue response costs like oversight costs from responsible parties.

In an unpublished opinion, a federal court rejected efforts to use the cost recovery statute for cleanup costs for a facility that had siding coated with polychlorinated biphenyls because of the operation of an

asset purchase agreement.⁵⁵

[7] VAP Fees

Effective August 1, 2014, the VAP program has adopted a new procedure for collecting fees for participation in the program as a volunteer, CP or certified laboratory. The regulations include a schedule of specified fee levels for the certification and renewal of certification of professionals and laboratories and for the various steps along the path towards an NFA and covenant not to sue. For all activities not specifically covered in the schedule of fees, Ohio EPA will collect additional fees to cover the actual and indirect costs incurred by the agency for the agency's involvement. This includes such activities as site-specific technical assistance, reviewing urban setting designations, monitoring compliance with operations and maintenance plans and institutional controls, and enforcing and administering compliance schedule agreements.⁵⁶

⚠ Warning: The Ohio EPA has discontinued the alternative direct billing schedule under the “Pay As You Go Option” (PAYGO).

[8] Laboratories and Environmental Professionals Involved in the VAP Must Be Certified

As stated above, the certification that VAP cleanups have met state standards must be made by CPs. Ohio EPA's requirements for one to become a CP include:

- a bachelor's degree in a relevant field;
- at least eight years of relevant professional experience; and
- professional competence, knowledge, and good moral character.⁵⁷

In making the determination of whether a VAP cleanup has met state standards, the CP must use the services of a certified laboratory.⁵⁸ A certified laboratory will receive a certificate from Ohio EPA that enables it to perform analysis for parameter group(s) or analyte(s) using specific methods as set forth in the laboratory's certificate. Both in-state and out-of-state laboratories may be certified under VAP. The statute and implementing rules set forth the requirements for certification, including initial demonstration of competency,

periodic performance evaluations, system audits and system audit reports, and compliance with precise analytical methods for conducting analyses.⁵⁹ The certificate is only applicable to analyses conducted to support NFA letters.⁶⁰

[9] Experience to Date in Brownfields Development

Although Ohio's VAP was slow in taking off, it has gained considerable momentum over the last several years as the volunteers, certified professionals and regulatory staff have become more experienced with the process. The home page for the Ohio VAP—<http://epa.ohio.gov/derr/volunt/volunt.aspx>—includes summaries of pertinent information on all NFAs submitted and covenants not to sue issued, as well as updated information on USD groundwater classifications and county specific metal concentrations naturally occurring in soil.

The agency publishes a periodically updated list of properties for which an NFA had been issued and for which a CNS had been sought, with pertinent information on the property, the sponsoring volunteer, and the status of the CNS. Since 1995, Ohio EPA has issued over 500 CNSs. A summary of NFA letters that received a CNS can be found on the VAP website.

For reasonably current information on the level of activity in the VAP program, one can access the power point presentations used by the agency for CP training and updates.⁶¹ Each year, the Agency includes a link to these power points within its website.

The Annual Report to the Legislature often contains useful information on the activities of VAP. In 2014, for example, 67 NFA letters were issued by CPs and 46 CNSs were issued by Ohio EPA.

The program has developed a procedure for providing technical assistance to volunteers and CPs. A packet containing a sample letter to follow when requesting assistance and a cost worksheet explaining how the program calculates its charges for billing for this technical assistance is available from the agency and on the website. If a volunteer or CP has reviewed the technical assistance packet and has made the decision to move forward, the program will assign a technical assistance reviewer and a billing number. The reviewer will provide an estimated cost for the project based on

which Ohio EPA staff members will be involved in reviewing the project and how much of each staffers' time the project likely will require. A call to VAP at (614) 644-2924 can secure a VAP technical assistance packet. Alternatively, an interested volunteer may refer to the guidance, "Estimating Average Cost of VAP Technical Assistance," available at <http://epa.ohio.gov/portals/30/vap/docs/TA%20Billable%20Hours%20Estima> for information on costs. On a semi-annual basis the Ohio EPA VAP sends to all CPs its update to the VAP Technical Decision Compendium which provides guidance under the VAP rules. The updated index can be found at <http://epa.ohio.gov/derr/rules/guidance.aspx#119153116-vap>.

The VAP has proved to be a useful tool for redevelopment. However, a number of significant problems have reduced its impact, including: (1) The length of time necessary to complete voluntary cleanups often does not fit the needs of developers or other remediating parties. The use of CPs is intended to reduce regulatory oversight; however, that often proves to be untrue. (2) Regulations implementing the cleanup standards are lengthy and complicated. Ohio EPA has attempted to stream-line the investigation and cleanup requirements, but they often remain excessive in practice. (3) Because of the complexity and onerous investigation and reporting requirements, cleanups under the VAP may be cost prohibitive. (4) A state covenant not to sue may not protect a property owner from Superfund liability or third party claims.

While the VAP has promise, many developers and other parties ultimately decide that the benefit of the covenant not to sue is outweighed by the substantial costs and other problems. The decision whether to participate requires a case by case decision considering many factors, including the scope of contamination, federal and state regulatory interest, timing issues, and costs.

Footnotes — § 10.03:

¹ 33 U.S.C. § 1251 *et seq.*

² 42 U.S.C. § 6921 *et seq.*

³ 15 U.S.C. § 2601 *et seq.* Rule revisions now will allow volunteers to enter into the VAP while proceeding in parallel with polychlorinated biphenyl (PCB) remediation under TSCA. OAC 3745-300-02(C).

⁴ 42 U.S.C. § 9601 *et seq.*

⁵ 42 U.S.C. § 300f *et seq.*

⁶ R.C. 3746.02(A); OAC 3745-300-02(C).

⁷ *Voluntary action* is defined in the statute without regard to whether the person undertaking such action was also the cause of the contamination. R.C. 3746.01(R).

⁸ The provisions of R.C. 3746.02(A)(5) set forth the prohibition that may apply to an owner or operator of a property who received a notification regarding possible enforcement action.

⁹ OAC 3745-300-02(D).

¹⁰ OAC 3745-300-06(B).

¹¹ R.C. 3746.04(B)(3); OAC 3745-300-06(B).

¹² OAC 3746-300-06.

¹³ OAC 3745-300-07(A)(1).

¹⁴ OAC 3745-300-07.

¹⁵ OAC 3745-300-08.

¹⁶ OAC 3745-300-08(B)(2)(c).

¹⁷ OAC 3745-300-08(B)(2)(c)(iv). Ohio EPA has updated the rules to incorporate fresh research and more accurate information since the adoption of the original rules. As a result of this update, the commercial and industrial land-use categories have been combined since there is little difference in the standards. Backup for the generic standards can be found in the February, 2002 “Support Document for the Development of Generic Numerical Standards and Risk Assessment Procedures.”

¹⁸ Ohio Rev. Code Ann. § 3746.06.

¹⁹ For more information on U.S. EPA technical documents for VI, see <https://www.epa.gov/vaporintrusion/> (last visited June 2, 2016). For Ohio EPA DERR guidance, see <http://www.epa.ohio.gov/portals/30/rules/Vapor%20Intrusion%20to%20Indoor%20Air.pdf>.

²⁰ See generally OAC 3745-300-10.

²¹ OAC 3745-300-10(D).

²² OAC 3745-300-10(D)(2).

²³ R.C. 3746.05. On December 22, 2004, Ohio’s version of the Uniform Environmental Covenants Act became effective, adding R.C. 5301.80 to 5301.92. These provisions spell out the requirements for any deed restrictions on future use that are employed as part of a strategy for determining cleanup objectives. Among the important features of the law is a requirement for prior agency approval before the use restriction is filed with the local county recorder. See discussion in §

10.04 below.

²⁴ OAC 3745-300-12(E).

²⁵ R.C. 3746.06.

²⁶ OAC 3745-300-15.

²⁷ OAC 3745-300-13.

²⁸ R.C. 3746.10(A).

²⁹ The VAP's website is found at: <http://epa.ohio.gov/derr/volunt/volunt.aspx>.

³⁰ R.C. 3746.17; OAC 3745-300-14.

³¹ OAC 3745-300-14(A)(3), (4), and (5).

³² OAC 3745-300-14(B).

³³ R.C. 3746.12(A).

³⁴ See Ohio Rev. Code Ann. § 3746.12(B)(3).

³⁵ 42 U.S.C. § 9601 *et seq.*

³⁶ 42 U.S.C. § 9607.

³⁷ R.C. 3746.12(A)(1).

³⁸ R.C. 3746.14(C); R.C. 3746.12(B)(1).

³⁹ R.C. 3746.18, 3746.21.

⁴⁰ The MOA and Procedures for Participation (revised July 2015) are available on the VAP website at <http://epa.Ohio.gov/derr/volunt/volunt.aspx>.

⁴¹ R.C. 3746.23.

⁴² R.C. 3746.23(B).

⁴³ R.C. 3746.26.

⁴⁴ R.C. 3746.27.

⁴⁵ R.C. 3746.23(A).

⁴⁶ R.C. 3746.23(A)(7).

⁴⁷ R.C. 3746.23(C).

⁴⁸ R.C. 3746.23(C).

⁴⁹ R.C. 3746.23(D).

⁵⁰ *Spring Industries, Inc. v. Ohio Dept. of Transp.*, No. 1998AP100109, 1999 Ohio App. LEXIS 1534 (Ohio Ct. App., 5th Dist., Tuscarawas County, Mar. 16, 1999).

⁵¹ *Burrell Industries, Inc., fka Spring Industries, Inc. v. State of Ohio Dept. of Transp.*, No. 2000AP090064, 2001 Ohio App. LEXIS 2777 (Ohio Ct. App., 5th Dist., Tuscarawas County, June 4, 2001).

⁵² *Paxton v. Wal-Mart Stores, Inc.*, 176 Ohio App. 3d 364, 2008-Ohio-2487, 891 N.E.2d 1269 (Ohio Ct. App. Lucas County 2008).

⁵³ R.C. 3746.24. See *Oros v. Hull & Assocs.*, 302 F. Supp. 2d 839 (N.D. Ohio 2004).

⁵⁴ *State ex rel. DeWine v. Mass Realty, LLC*, 197 Ohio App. 3d 653, 2012-Ohio-146, 968 N.E.2d 558 (2012).

⁵⁵ *Lockheed Martin Corp. v. Goodyear Tire & Rubber Co.*, 529 Fed. Appx. 700, 2013 U.S. App. LEXIS 13993, 2013 FED App. 638N (6th Cir. 2013).

⁵⁶ OAC 3745-300-03(C)–(F).

⁵⁷ OAC 3745-300-05(B)(2).

⁵⁸ OAC 3745-300-04.

⁵⁹ R.C. 3746.04(B)(6); OAC 3746-300-04.

⁶⁰ OAC 3745-300-04(B)(1).

⁶¹ See http://ohioepa.custhelp.com/app/answers/detail/a_id/392/~/~training-for-certified-professionals-under-the-voluntary-action-program.

III.

UNIFORM LAND USE COVENANTS

§ 10.04. Uniform Land Use Covenants

[1] Use of Covenants Under VAP

Often the volunteer’s strategy for securing the NFA and CNS is to agree to restrictions on the uses of, and allowable activities on, the property. To address this situation, Ohio’s General Assembly enacted the Uniform Environmental Covenants Act. An NFA letter submitted with a CNS request

is an “environmental response project” that is subject to this law.⁶²

If the property’s remedy relies on “activity and use limitations” (formerly known as “use restrictions”) to restrict property use, the volunteer must provide to the CP a “proposed environmental covenant” that complies with [Ohio Rev. Code Ann. Section 5301.82](#). The proposed environmental covenant, with its activity and use limitations, is a remedy to support the CP’s issuance of an NFA letter.⁶³ The Ohio EPA VAP website includes a May, 2005 Guidance: Developing Proposed Environmental Covenants with “Activity and Use Limitations” for Properties under Ohio’s Voluntary Action Program, as updated January 2011. Within this guidance, a volunteer can find language for the development of proposed environmental covenants in coordination with the Environmental Covenant Template, an Ohio EPA template for use with all agency environmental response projects. The guidance urges the volunteer to contact the Ohio EPA Legal Office at 614-644-3037 to answer any questions.

Alert: Ohio EPA updated the VAP Environmental Covenant template in November 2016. It is available at the VAP web page. The new template contains new language to notify and direct property owners to implement engineering controls as needed to comply with applicable standards. The new activity and use limitation on engineering control implementation supplements the role of the Operation and Maintenance plan and agreement. According to Ohio EPA, the new limitation provides notice to successor owners to avoid overlooked site engineering controls.

The appropriate type and language for the property’s activity and use limitation will be property-specific and will result from a Phase II assessment and the determination of the applicable standards in accordance with [Ohio Admin. Code Sections 3745-300-07\(D\)\(5\) and 3745-300-15](#). The limitations may vary based on:

- the type of completed exposure pathway (i.e., existing and reasonably-anticipated pathways determined pursuant to [Ohio Admin. Code Section 3745-300-07\(D\)\(2\)](#));
- affected media;

- receptors; and
- VAP standards applicable to the property.

The VAP Guidance includes suggestions for developing restrictions such as a “Limitation for Commercial or Industrial Land Uses” or a “Limitation Prohibiting Ground Water Extraction and Use.”

[2] The UECA and How it Can Benefit Redevelopment

The UECA⁶⁴ provides a uniform statutory mechanism to create and enforce future land use restrictions (called “environmental covenants”) binding present and future owners of affected property. The UECA promotes the use of more flexible cleanup standards because regulators can be more confident that land use restrictions—used to minimize risks associated with contaminated property—will be legally recognized and enforceable. In turn, these more flexible standards may mean less expensive and faster cleanups.

[3] Creation of an Environmental Covenant

An environmental covenant imposes restrictions on the property, such as limitations on permissible land or groundwater use. An environmental covenant that complies with the UECA “runs with the land,” meaning that it binds current and future landowners to the land use or activity restrictions.⁶⁵

The UECA applies where an environmental covenant is necessary for a response project implemented under certain Ohio cleanup or environmental protection programs, including the remedial response, hazardous waste remediation, and wetlands mitigation programs, as well as the VAP and the Clean Ohio Fund (see § 10.05[1]).⁶⁶ Ohio EPA’s Director may enter into environmental covenants for such environmental response projects subject to the agency’s review. The state Fire Marshal has similar authority with respect to underground storage tank cleanups.

The UECA only covers land use restrictions which are subject to agency review or approval. Accordingly, land use restrictions which parties might voluntarily place on property independent of state or federal agency involvement—as might occur at sale to ensure continued industrial, versus residential use—are not impacted by the UECA.

Because they are interests in real property, environmental covenants must

be filed in the office of the county recorder⁶⁷ and include certain information, such as a description of the activity and use restrictions on the property, a real property description, and a listing of who holds the covenant (e.g., the landowner or other entity).⁶⁸

[4] Modifying or Terminating an Environmental Covenant

An environmental covenant may be amended or terminated by consent of: (i) the applicable agency; (ii) current owner of the property; (iii) all original signatories to the covenant, except where the right to consent is waived or under other limited circumstances; and (iv) holders of an interest in the real property.⁶⁹ The covenant is perpetual unless it is limited by its terms, or terminated by consent or by court action, foreclosure of a priority interest, or, under certain instances, operation of eminent domain.⁷⁰

[5] Impact of an Environmental Covenant on Easements, Mortgages, and Other Property Interests Predating the UCEA

Preexisting interests, if given priority under other law, will not be affected by the creation of an environmental covenant.⁷¹ The owner of the preexisting interest may, however, agree to subordinate that interest to the environmental covenant.⁷²

[6] Enforcement of an Environmental Covenant

Any person who signs an environmental covenant is bound by terms of the covenant, including a state agency if the agency thereby expressly assumes an obligation.⁷³

A wide range of entities may seek to enforce environmental covenants. Under the UECA, a civil action for injunctive and other equitable relief enforcing an environmental covenant may be maintained by parties to the covenant (or any party that the covenant, by its terms, indicates may do so), U.S. EPA, applicable Ohio agency, local governmental unit, and any person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant.⁷⁴

Alert: On December 1, 2009, Ohio EPA revised the CNS template, which is accessible on the VAP website. The CNS provides liability protection for all pre-NFA letter releases of hazardous substances and

petroleum at the property, except for releases post-NFA letter; natural resource damage claims; costs pursuant to U.S. EPA action; and costs for responding to imminent and substantial threats. In any instance where the property is found to not comply with applicable standards for a pre-NFA release, or in a case where pre-NFA releases were not properly described in the NFA, a “cure” implemented by the volunteer will preserve the CNS. Volunteers will develop and enter into a compliance schedule agreement while working with Ohio EPA through VAP technical assistance to bring the property back into compliance. Failure to do so could result in the revocation of the CNS pursuant to [ORC 3746.12\(B\)](#). Recognizing that it may be difficult to maintain a CNS in good standing if circumstances change over time, Ohio EPA is working on draft guidance to spell out what authority it has regarding compliance. The “cure process” may lead to further investigations, additional demonstrations that the property meets applicable standards, additional remedies, CNS amendments, operations and maintenance creations or modifications, and environmental covenant changes.

[Ohio Rev. Code Ann. § 3746.10\(C\)\(3\)\(b\)](#) directs the preparation of an environmental covenant that meets the requirements of [Ohio Rev. Code Ann. § 5301.82](#), meaning a “servitude or legal device that creates an obligation that runs with the land arising under an environmental response project that imposes activity and use limitations.” Conformity to the Environmental Covenant Template satisfies [Ohio Rev. Code Ann. § 5301.82](#). The environmental covenant is enforceable by the Ohio EPA as a signatory. It is used in lieu of an unrestricted use clean up; it can be used in combination with engineering controls but not to impose engineering controls. It is recorded as a deed and adheres to the property.

In 2004, the General Assembly directed Ohio EPA to maintain a record of properties for which covenants not to sue were issued that involve institutional controls or activity and use limitations that restrict the use of the properties to comply with applicable standards. The records must describe the use restrictions or activity and use limitations applicable to the property. At least once every five years Ohio EPA must conduct a visual inspection of each listed property to determine whether the property is being used in compliance with the applicable institutional controls or activity and use

limitations.⁷⁵

Footnotes — § 10.04:

⁶² Ohio Rev. Code Ann. §§ 5301.80–5301.92, effective December 30, 2004.

⁶³ Ohio Rev. Code Ann. §§ 3746.10(C)(3)(b) and 3746.11(A).

⁶⁴ H.B. 516 codified at R.C. 5301.80 *et seq.*

⁶⁵ R.C. 5301.85(A).

⁶⁶ R.C. 5301.80(E).

⁶⁷ R.C. 5301.88.

⁶⁸ R.C. 5301.82.

⁶⁹ R.C. 5301.90(A).

⁷⁰ R.C. 5301.89.

⁷¹ R.C. 5301.89.

⁷² R.C. 5301.86.

⁷³ R.C. 5301.84.

⁷⁴ R.C. 5301.91.

⁷⁵ R.C. 3746.171.

IV.

BROWNFIELD CLEANUP FINANCING

§ 10.05. Brownfield Development Financial Assistance and Incentives Are Available to VAP Participants

[1] Funding Options for Brownfield Programs Are Undergoing Change

There has been considerable change in the funding options under Ohio's brownfield programs. For years there were funds available under programs known as Clean Ohio Revitalization Fund, Jobs Ready Sites Program, and various water development accounts. Ohio has announced a different focus in funding, with a decided bias on job creation and economic development.

Because the program is in a state of flux, the reader should consult the Ohio Department of Development website for current information and contact information and work closely with regional network partners whose contact information is found on the website for Jobs Ohio and the Site Assistance and Brownfield Revitalization section of DERR, which provides technical assistance to the Ohio Department Services Agency and Jobs Ohio to help administer the Clean Ohio Fund.

[2] Jobs Ohio Revitalization Program and Incentives

With the winding down of the Clean Ohio Fund and the emergence of the Jobs Ohio Revitalization Fund, there are changing dynamics for the various programs. Clean Ohio funding requests are now processed by the private, non-profit agency known as JobsOhio and the JobsOhio Network. The Network consists of six regional growth groups within Ohio, including the Regional Growth Partnership for the Northwest Region; the Dayton Development Coalition for the Western Region; the Cincinnati USA Partnership for the Southwest Region; Team NEO/Cleveland+ for the Northeast Region; Columbus 2020 for the Central Region; and the Appalachian Partnership for Economic Growth for the Southeast Region. JobsOhio and its Network Partners evaluate prospective projects for job creation and economic benefits, and will refer their recommendations to the Director of the Ohio Developmental Services Agency or the Clean Ohio Council for review and potential approval.

Monies have been allocated to the JobsOhio Fund for use in (1) Phase II assessment grants, (2) asbestos and lead-based paint abatement grants, and (3) site improvement loans and gap grants starting in March 2014. JobsOhio will provide grants up to \$200,000 for Phase II services, including environmental testing, lab fees, and work completed by a VAP CP toward completion of a VAP Phase II. Eligible applicants include businesses, non-profits, or local governments where a potential end user has expressed a clear interest in reuse of the site (through a letter of intent, option, or lease on site) and a plan for job retention or creation of new jobs. Note that the shift to “Eligible Sites” takes on a job creation/retention perspective instead of the traditional concepts of brownfield properties. JobsOhio will prioritize job retention/creation projects within targeted industry sectors. Eligible sites include an abandoned or under-utilized contiguous property where

redevelopment for the immediate/primary purpose of job creation or retention is complicated by significant redevelopment challenges (which is slightly different in concept than the “brownfield” definition in the former Clean Ohio Fund) and where an “All Appropriate Inquiry” AAI or OEPA VAP Phase I Assessment has identified the need for the Phase II assessment. Ohio EPA’s Targeted Brownfield Assessment (TBA) Program can provide grant assistance funding to local governments such as counties, cities, villages, townships, and port authorities for the AAI or Phase I study or for technical assistance (TA). Local governments must be the applicants for TBA projects like Phase I studies, certified asbestos inspections, water quality stream surveys by qualified Ohio EPA surface water professionals, and limited phase II screening evaluations.

JobsOhio will provide grants up to \$500,000 for demolition, asbestos abatement, lead-based paint abatement if coupled with asbestos abatement, disposal of universal waste, and site preparation. Eligible applicants are the same as those qualifying for the Phase II grants, but the applicant must provide a detailed development and business plan, including project financing and job creation/retention. Eligible sites do not require an AAI or a Phase I, but JobsOhio likely will require an asbestos inspection. (Ohio EPA’s TBA Program can assist local governments with asbestos inspections.)

JobsOhio will provide site improvement loans for up to 75% of eligible costs up to a maximum of \$5,000,000 for site improvement loans and gap grants. The terms of the Site Improvement Loans can be up to 10 years. Principle and interest will be deferred during site revitalization with repayment beginning on occupancy or after five years (whichever comes first). Outstanding loan principle may be reduced annually on a negotiated basis based on performance, such as income tax from job creation. JobsOhio will provide gap grants up to \$1,000,000 that will be coupled with Site Improvement Loans to fill funding gaps where remediation costs exceed the anticipated net gain in land and improvement value. The grants are only available where a confirmed end user will create jobs within a period not to exceed five years. Eligible costs include demolition, environmental remediation, building renovation, site preparation, and infrastructure. Eligible sites follow the same criteria as Phase II grant sites. Eligible applicants must have a specific business plan, financing plan, and schedule for redevelopment and job creation to occur (with a least 20 jobs at a wage rate commensurate

with the local market). For “brownfield” projects that receive loans and gap grants, an NFA letter must issue within three years of the loan and grant agreements. If the NFA relies on an institutional control or an environmental covenant, there must be a CNS as well. Ohio EPA can provide grant-funded technical assistance with voluntary cleanup work when the local government is the applicant.

To contact Ohio EPA for assistance, call Martin Smith at (614) 644-4829 or contact him at martin.smith@epa.ohio.gov. For direct contact with the Ohio Development Services Agency/Office of Redevelopment for questions regarding the Ohio Brownfield Fund, contact erin.hazelton@development.ohio.gov or (614) 728-1258.

[3] Other Funding Programs for VAP Participants

Other state programs may provide funding for participants in VAP, including the ODOD, the Ohio Water Development Authority, and the Ohio Pollution Prevention Loan Program.⁷⁶ The VAP website⁷⁷ provides access to program fact sheets and other descriptive information on the features of each of these programs, including eligibility, interest rates (e.g., direct lending at favored rates and credit enhancement), and the availability of financial assistance for the preliminary costs of determining the nature and scope of the required remediation, as well as for the actual remediation costs. Names and phone numbers for persons who can answer specific questions regarding the unique details of these programs are also set forth in this information.

The ODOD currently administers the Brownfield Revolving Loan Fund (RLF). The RLF, capitalized by a grant from U.S. EPA, offers below-market rate loans to assist with the remediation of brownfield properties to return them to a productive economic use in Ohio communities. Eligible borrowers must own the property and not be considered a potentially responsible party for the environmental conditions of the property.⁷⁸

Ohio EPA currently administers a grant from U.S. EPA to provide technical assistance to communities, port authorities and other public entities. The grant can be used for Ohio EPA technical review of reports, recommendations for investigations and cleanup decisions, as well as limited sampling and screening performed by Ohio EPA’s Site Investigation Field Unit. A request for this grant should be directed to Ohio EPA, at

http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx.

Ohio EPA offers free technical assistance to public entities that have an ownership interest in a property under consideration for VAP cleanup. Information concerning this service can be obtained at www.epa.state.oh.us/derr/vap/docs/Procedures%20for%20Grant.pdf. In addition, public entities can place brownfield properties on the Ohio Brownfield Inventory, a statewide inventory that may help attract developers and end users for the property. Information concerning the inventory can be found at http://epa.ohio.gov/derr/SABR/brown_dtb/browndtb.aspx.

[4] Tax Abatements and Tax Exemptions

Ohio also provides an automatic tax abatement relating to VAP cleanups. After issuing a covenant not to sue for a property under the VAP, Ohio EPA will certify to the Ohio Tax Commissioner and to the Ohio Director of Development that a covenant has been issued and the prescribed remedies or remedial activities have occurred at that property. Upon receipt by the Tax Commissioner of the certification, the Tax Commissioner must issue an order granting exemption from real property taxation of the resulting increase in the assessed value of land constituting property that is described in the certification and of the increase in the assessed value of improvements, buildings, fixtures and structures situated on that land at the time the order is issued. No sale or other transfer of the property affects an exemption that has been granted.⁷⁹

In addition to the automatic tax abatement, legislative authorities may grant a tax exemption for a specified number of years, not to exceed ten, of a specified portion, up to 100 percent of the assessed value of tangible personal property first used in business at the project site and of the increase in the assessed valuation of buildings, improvements, structures, and fixtures constituting the project site. A legislative authority must make findings and conclusions relating to enterprise zones, and must enter into an agreement with an enterprise under which the enterprise agrees to remediate the facility and to spend an amount equal to at least 250 percent of the true value and money of the land, buildings, improvements, structures and fixtures, constituting the facility, as determined for purposes of property taxation immediately prior to the approval of the agreement.⁸⁰

In a decision issued February 11, 2004, the Ohio Supreme Court confirmed that property tax exemptions issued for environmental remediation under VAP can apply to increases in property value that result from renovations and other improvements over and above the increase resulting solely from environmental remediation.⁸¹ That case involved the rehabilitation of a former hotel property that required the abatement of asbestos and the proper removal of chemicals. At the time of the project the tax assessment of the defunct hotel property was set at \$1,049,990, and the Tax Commissioner fixed the value of the real estate parcel at that level for 10 years even though the rehabilitation and modernization greatly increased the value of the improved real estate. The Supreme Court held that the statute does not require payment of taxes on the increased property value if the property has secured a covenant not to sue from Ohio EPA. The Tax Commissioner is permitted under the statute to issue to the local county auditor an exemption order that applies to the increased value of the land, and the increased value of any buildings, improvements, fixtures, or structures, that were on the land when the Tax Commissioner issued the exemption order, regardless of whether that increase resulted from environmental cleanup or other investments. Consequently, under this ruling, even if environmental contamination or asbestos abatement is a minor issue in a project, and its remediation or abatement is only a portion of the total redevelopment expense, the increase in value resulting from other investments to the land and buildings will be exempt from property taxes for 10 years, upon compliance with the VAP requirements.

⚠ Warning: Due to ambiguities in the language of the tax abatement statute, the timing of the remediation, construction of property improvements, and the issuance of the covenant not to sue may be critical factors in determining whether an abatement will be granted and the size of the abatement.⁸²

Alert: The General Assembly has given volunteers two limited opportunities to decline this automatic tax exemption. For a property issued a tax exemption order on or after March 29, 2007, the property owner has sixty days to give notice of its intent to decline the exemption. For properties which received the tax exemption order before that date, there was a limited window to exercise the

declination.⁸³

According to the VAP 2014 Legislative Report (August, 2015), 306 properties in 2014 received \$16.9 million in tax exemptions for the increases in assessed value of land, buildings and structures, or properties that were issued NFA letters by CPs.

[5] VAP Environmental Insurance Program

Effective July 20, 2009, a VAP volunteer will be able to obtain Pollution Legal Liability insurance at a 10% discount off the standard premium rate. In order to take advantage of this insurance program it is necessary to utilize one of the insurance carriers selected by the Agency. It is also necessary to register with the Agency for this insurance. The Agency's web-site contains a list of brokers, carriers, and forms for entry into the program.

The VAP Environmental Insurance Program (EIP) is not a cost cap insurance; that is, it is not insurance to cover cost overruns when planned remediation ends up costing more than anticipated. Instead, it is a Pollution Legal Liability policy, which focuses primarily on the costs and risks associated with potential contamination both on and off the property, as well as unanticipated contamination found during site cleanup and/or redevelopment. This insurance can be used to:

- replace an escrow for the unexpected cost of remediation, which would insure against the chance of discovering new contamination, third party lawsuits/claims, and/or the environmental legacy of the operation;
- fill liability gaps created by contaminant exclusions not covered under the VAP (e.g., asbestos and lead paint);
- provide protection from costs that could destabilize business or municipal budgets due to unexpected cleanup;
- provide a tool to establish financial stability for estimated clean-up costs; and/or
- address liability concerns and costs for Natural Resource Damage Assessments that are not covered under the VAP.

The VAP EIP provides flexible, customized offerings for VAP

volunteers, developers, property owners, and financiers. To participate eligible applicants must provide a notice letter to the VAP, together with related voluntary action information like a Phase I, Phase II, or Remedial Action Plan report. The VAP will complete a technical assistance review based on participating insurance carrier guidelines and issue a technical assistance comment letter that identifies any additional information that the underwriter may need. The Ohio EPA's role will be that of facilitator and educator—that is, conducting technical reviews of VAP investigative and remedial work to facilitate both the participant and the insurer such that the participant receives insurance coverage that meets its needs at a discounted premium.

Under this VAP EIP program, there will be a 10% discount of the premium cost. Eligible applicants include volunteers who have entered into the MOA VAP track or the Pay-As-You-Go VAP programs, and developers, property owners, financiers, volunteers, and/or applicants who have set up a VAP “technical assistance account.” (See § OH.01[9].) To participate in the VAP EIP, the eligible applicant must provide a notice letter to the VAP stating its desire to participate in the program. With the letter the applicant should include any Phase I and Phase II reports that are available. The VAP staff will complete a technical assistance review based on participating insurance carrier guidelines. On completion of the review, the VAP staff will issue a technical assistance comment letter and will provide a list of additional documents the applicant should furnish with the application. With the assistance of the applicant's insurance broker and the information provided, the applicant should be able to develop a package for quotes (which will include the 10% discount). For more information, contact Nancy Zikmanis, nancy.zikmanis@epa.state.oh.gov (330-963-1160) or Amy Yersavich, amy.yersavich@epa.state.oh.us (614-644-2924).

Footnotes — § 10.05:

⁷⁶ The Ohio Department of Development can be contacted at (614) 644-8201. The Ohio Water Development Authority can be contacted at (614) 466-5822. The Ohio Pollution Prevention Loan Program can be contacted at (614) 644-3469. The Ohio Water Pollution Control Loan Fund, which is administered by Ohio EPA's Division of Environmental and Financial Assistance, provides low-interest loans to qualified public and private entities for investigation and cleanup and can be contacted at (614) 644-2798. Parties can obtain information about the loan fund at <http://www.epa.state.oh.us/defa/comguide.html>.

⁷⁷ <http://epa.ohio.gov/derr/volunt/volunt.aspx>

⁷⁸ See https://development.ohio.gov/cs/cs_brownfield.htm.

⁷⁹ R.C. 5709.87.

⁸⁰ R.C. 5709.88.

⁸¹ *Columbus City School Dist. Bd. of Education v. Wilkins*, 101 Ohio St. 3d 112, 802 N.E.2d 637 (2004).

⁸² See, e.g., *Kinnear Road Redevelopment, LLC v. Joseph Testa, Tax Commissioner of Ohio*, Case No. 2013-1407 (EXEMPTION), 2015 Ohio Tax LEXIS 2366 (May 13, 2015) (finding that tax commissioner erred in final determination by failing to order exemption of any new improvements added to the property after January 1, 2012 when tax exemption order issued on March 25, 2013).

⁸³ Am. Sub. H.B. 699, known as the 2006 capital budget bill of the 126th General Assembly, enacted R.C. 5709.87(C)(1)(b).

V.

ORGANIZATION AND RESOURCES

§ 10.06. DERR

The Ohio VAP program is part of the larger Division of Environmental Response and Remediation (DERR). This division provides responses to spills and releases; supervises the cleanup and closure of RCRA regulated sites; and of course, the VAP program. DERR continually refreshes its website, and provides numerous links to rules, technical guidance, annual reports, power point presentations, and geographic maps of the properties benefiting from the program. Because of the recent rule changes, the power point materials for the initial and refresher CP training sessions are quite timely and helpful.

§ 10.07. VAP Resources and Contacts

The VAP website continually updates fact sheets. When, for example, a new Technical Compendium Guidance document issues, the website notes that fact prominently. Thus, the experienced CP and legal professional look to the website to see what is new. Each year, the VAP sponsors an annual training session for CPs. The power point materials from this seminar are routinely posted on the website. This information will contain useful new developments on rules, fees, policy interpretations, and practical guidance.

The presenters not only are persons from the VAP program, but will include representatives of the Ohio Department of Development who can explain and update the various funding sources, as well as experienced environmental professionals who describe leading edge technical issues “from the field.” For the latest on the availability of funds such as grants and loans, the Department of Development presentation provides useful and timely information. In addition, Ohio EPA convenes a two-day, annual conference that attracts many different professionals. The presentations from these conferences also provide a wealth of timely information. These presentations likewise are accessible on the VAP website.

Contacts in the VAP are as follows.

Division of Environmental Response and Revitalization

Peter Whitehouse, Chief

Peter.Whitehouse@epa.ohio.gov

614-644-2896

50 West Town Street

P.O. Box 1049

Columbus, Ohio 43215-1049

Website:

[http://www.epa.state.oh.us/Default.aspx?
alias=www.epa.state.oh.us/derr](http://www.epa.state.oh.us/Default.aspx?alias=www.epa.state.oh.us/derr)

For information on the VAP Rules, contact Emily Patchen at (614) 728-5441 or Emily.Patchen@epa.ohio.gov.

For information on the RCRA Rules, contact Ed Lim at (614) 644-2824 or Ed.Lim@epa.ohio.gov.

CHAPTER 11

BUYING AND SELLING BROWNFIELD PROPERTIES

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I.

INTRODUCTION

§ 11.01. Scope

This chapter covers:

- Potential liability concerns associated with brownfield properties [see § 11.03 *below*].
- Steps in purchasing brownfield properties [see §§ 11.04–11.05 *below*].
- Obtaining a loan in connection with the purchase of a brownfield property [see § 11.06 *below*].
- Insurance products used in brownfield redevelopment projects [see § 11.08 *below*].
- Recurrent problems in brownfield transactions [see §§ 11.11–11.13 *below*].

§ 11.02. Overview

One of the by products of industrial development has been the proliferation of contaminated sites scattered throughout Ohio. Such sites, which have become known as “brownfield” sites, are often abandoned or under-utilized because fears of substantial liability and cleanup costs have scared off potential developers, businesses and banks. Over the past few years, there has been a growing recognition of the need to remove the environmental and legal barriers that have stalled redevelopment and reuse of brownfield properties.

The redevelopment of brownfield properties is increasing in Ohio due to many factors, including financial incentives from state and federal governments, diminishing greenfield sites,¹ and increasing pressure to prevent urban sprawl and loss of farmlands. In addition, the Ohio Voluntary Action Program has resulted in objective cleanup standards, allowing risk-based cleanups based on use of the property and use of engineering and institutional controls, and providing liability protection to parties which clean up properties. Moreover, lenders have developed a better understanding of the risks associated with brownfield redevelopment.

As a result of these factors, parties are now more inclined to purchase brownfield properties than they were previously. However, the sale and

purchase of brownfield properties can be more complicated than with greenfield properties and can present difficult issues during due diligence, contract negotiations and, most significantly, after the closing when redevelopment occurs, a cleanup is conducted or third party claims arise.

This chapter identifies the primary risks of liability associated with brownfield properties, due diligence issues, common contract provisions addressing environmental liabilities and various problems that frequently arise during and after the sale of brownfield properties and offers some suggestions on how to avoid such problems. It also discusses the role of environmental insurance in brownfield transactions.

Footnotes — § 11.02:

¹ The term “greenfields” generally refers to undeveloped sites which require little or no environmental remediation.

II.

LIABILITY CONCERNS ASSOCIATED WITH BROWNFIELD PROPERTIES

§ 11.03. Overview of Potential Liabilities

[1] Background

The primary reason brownfield properties remain vacant and unproductive is that buyers and lenders fear the potentially huge liabilities associated with cleanup, natural resources damages and toxic tort litigation. In most cases, such liabilities attach as soon as a party owns or operates a contaminated property. The costs of cleanup and other liabilities may far exceed the value of the property. This problem is acute in single property transactions where environmental liabilities may be material. Summarized below are some of the primary legal mechanisms under which liability is imposed on owners and operators.

[2] State Law Liabilities

Ohio laws may make the owner of property from which hazardous substances are released, or threatened to be released, strictly liable (and

sometimes jointly and severally liable) to the state (and sometimes third parties) for any necessary cleanup costs.² Owners and operators of contaminated property may also be liable to the state or other parties for damages under state common law.³ See [Chapter 9](#) above for a detailed discussion of relevant Ohio liability provisions.

[3] CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, commonly called Superfund) to identify and clean up inactive hazardous waste disposal sites and to impose liability for the costs of remedying hazardous conditions on the parties responsible for creating or contributing to such conditions and other designated parties.⁴ Section 107(a) of CERCLA identifies the categories of persons responsible for the costs associated with remedying a contaminated site.⁵ The parties include, among others, current “owners and operators”⁶ of any “facility”⁷ from which “hazardous substance”⁸ are “released,”⁹ or threatened to be released, and persons owning or operating the facility at the time of waste disposal.¹⁰ Current owners and operators are liable to the federal government for any necessary cleanup costs (and potentially liable to other persons who incur necessary response costs), even though the hazardous substances may have been deposited by a previous owner or operator.

Since the passage of CERCLA, it has become increasingly obvious that environmental liabilities must be evaluated by buyers and their lenders prior to completing the acquisition of real property. This heightened awareness is directly attributable to the liability provisions in CERCLA which in many circumstances imposes retroactive, strict and joint and several liability for cleanup costs associated with contaminated property. Buyers could be forced to pay all of the costs to clean up contaminated property, even if they did not cause the contamination and even if the contamination occurred prior to the enactment of CERCLA.¹¹

The statutory defenses to Superfund liability are extremely narrow. The defenses include releases caused by an act of God and act of war.¹² CERCLA provides a defense for contamination caused solely by a “third party.” The third party must be someone “other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant.”¹³

Such defense also requires the defendant to show by a preponderance of the evidence that it acted with due care concerning the hazardous substances and took precautions against any foreseeable acts or omissions by others.¹⁴

[4] The Innocent Landowner Defense

The innocent landowner defense may be available if the owner proves by a preponderance of the evidence that: (1) a party other than the owner was the sole cause of the release of hazardous substances; (2) the owner acquired the property after the hazardous substances were disposed of; (3) the owner did not know and had no reason to know the property was contaminated; (4) the owner made all “appropriate” inquiries at the time of the transaction with respect to previous ownership or use of the property; and (5) the owner exercised due care upon the discovery of the hazardous substance.¹⁵ The innocent landowner defense is extremely narrow and has only been upheld in a few cases. The newer bona fide purchaser and contiguous landowner defenses may have more relevance to brown fields purchasers and are discussed in more detail below.

The biggest issue with regard to the innocent landowner defense is whether the party conducted “all appropriate inquiry.” In the past, courts typically interpreted this requirement narrowly and thus a purchaser generally was required to undertake an extensive environmental investigation to avail itself of the CERCLA defense.

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Amendments”). The Brownfields Amendments created CERCLA liability defenses for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.¹⁶ The Brownfields Amendments clarified the requirements necessary to establish the new defenses and the existing innocent landowner defense.

The CERCLA provisions require persons asserting the innocent purchaser, bona fide purchaser and contiguous property defenses to conduct “all appropriate inquiries” into the prior ownership and uses of a property before or at the time a property is acquired. In the Brownfields Amendments, Congress required U.S. EPA to establish standards and practices for the conduct of “all appropriate inquiries.”¹⁷ The final rule satisfies this

requirement and is discussed in § 11.04.¹⁸

The conduct of “all appropriate inquiries,” however, is only one requirement for obtaining relief from CERCLA liability. Persons who acquire property must comply with additional statutory criteria in order to satisfy the requirements of the defenses. One such requirement is a new landowner’s duty to take “reasonable steps” to stop a continuing release or prevent a threatened release at an acquired property.¹⁹ The final rule does not address what constitutes “reasonable steps,” which will be decided by the courts on a case-by-case basis.

ASTM E2790-11 sets forth a four-step process for identifying “continuing obligations” necessary to maintain the CERCLA defenses. The first step involves a review of the Phase I findings to determine if there are environmental impacts to the property. If there have been environmental impacts on the property, the second step involves an assessment of whether any cleanup activities have occurred in the past. The third step involves an assessment of whether “initial” continuing obligations should be conducted, such as removing a leaking drum or installing an engineering barrier. Step four involves implementing ongoing plans necessary to prevent future releases at the property. It is possible that courts will look to the ASTM standard to determine if a party preserved its defenses under CERCLA.

⚠ Warning: Courts will determine if a landowner meets the eight statutory obligations under the bona fide prospective purchaser defense. In *Ashley II of Charleston, LLC vs. PCS Nitrogen, Inc.*,²⁰ a South Carolina district court ruled that a landowner did not meet three of the eight requirements, including establishing that the disposal occurred before Ashley took title, that Ashley did not exercise appropriate care once it took title, and that it was not affiliated with a potentially liable party. The case is a good reminder of the need for strict compliance with the statutory elements of the defense and that purchasers should not rely on the bona fide purchaser defense as a sole means to allocate environmental liability. It is much more prudent to allocate liabilities through contractual provisions and appropriate financial assurance mechanisms.

[5] Understanding Select Superfund Issues

[a] “As Is” Clauses and the Transfer of CERCLA Liability

Under Ohio and Sixth Circuit law, parties can transfer CERCLA liabilities in contractual provisions, including through the use of “as is” clauses. Courts typically find that “as is” clauses, coupled with an assumption of liabilities, release and/or indemnification agreement is sufficient to transfer CERCLA liability.²¹ Courts look to state law to determine whether a contractual provision is valid to transfer CERCLA liability. The contract must reflect an intent to include environmental liabilities. In other words, the contractual provision must be sufficiently broad to encompass the transfer of environmental liabilities. For example, in analyzing whether a release was effective to transfer CERCLA liabilities, the Sixth Circuit has held, that under Ohio law, a release will not be effective where evidence clearly indicates that, at the time they signed the release, the parties had neither foreseen nor considered the specific cause which later gave rise to the claim.²²

[b] Successor Liability


Under the general principles of successor liability, a corporation that merely purchases the assets of another entity is not typically responsible for the debts and liabilities of the selling entity unless the asset purchase falls into one of the following exceptions:

1. The successor expressly or impliedly assumed the predecessor’s debt;
2. The transaction is a de facto merger or consolidation;
3. The successor is a “mere continuation” of the predecessor; or
4. The transaction is a fraudulent attempt to avoid liability.²³

In the CERCLA context, courts broadly interpret the scope of successor liability.²⁴ The de facto merger and “mere continuation” theories are very fact specific. Under the de facto doctrine, a court may impose successor liability if: (1) there is continuity of management, personnel, physical location, assets and operations; (2) there is a continuity of shareholders; (3) the seller ceases operations, liquidates and dissolves as soon as legally practicable; and (4) the purchasing corporation assumes the obligations of the seller necessary for the uninterrupted continuation of the business.²⁵ The mere continuation exception is similar to the de facto merger exception in that courts consider whether the purchasing corporation is simply a “new hat” for the seller.

[c] CERCLA Liability for Lessees

Courts have found lessees to be owners and operators that are liable under CERCLA. A lessee's ownership can stem from its control over the property that rises to the level of de facto owner.²⁶ Courts may find a lessee to be an operator if the lessee exercised control over the contamination and disposal of the contamination.²⁷ In *Bestfoods*, the Court defined an operator as one who "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."²⁸ Operation requires the exercise of direction over the facilities' activities.²⁹ Thus, the determination of whether a lessee is an operator of a facility for purposes of CERCLA liability is a fact-specific inquiry.

 **Strategic Advice:** Though U.S. EPA has issued guidance that it will not typically seek cleanup costs from tenants who lease contaminated properties, tenants should still conduct "all appropriate inquiries" prior to entering any lease in order to attempt to preserve defenses under CERCLA.³⁰ Under the U.S. EPA guidance, tenants can derive bona fide prospective purchaser status from a landlord that maintained compliance with bona fide prospective purchaser elements or if the tenant satisfies all bona fide prospective purchaser steps.

[6] RCRA

The Resource Conservation and Recovery Act (RCRA) regulates the generation, storage, handling, transportation and disposal of hazardous wastes.³¹ **Section 7003 of RCRA**³² allows the U.S. EPA to bring suit against any person, including any past or present generator, transporter, owner, or operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste which may present an imminent and substantial endangerment³³ to health or the environment.³⁴ The current owner of a property from which there is a release of hazardous waste which may present an imminent and substantial endangerment is potentially responsible for abating the problem under **Section 7003 of RCRA**, even though the hazardous waste may have been deposited by a previous owner or

operator.³⁵

Footnotes — § 11.03:

² See, e.g., R.C. 3734.19–3734.22, 6111.04 and 6111.07.

³ State common law claims may include trespass, private nuisance, public nuisance, negligence, negligence per se, strict liability for abnormally dangerous activity contribution and/or indemnity.

⁴ 42 U.S.C. § 9601 *et seq.*

⁵ 42 U.S.C. § 9607(a).

⁶ 42 U.S.C. § 9601(20).

⁷ 42 U.S.C. § 9601(9).

⁸ 42 U.S.C. § 9601(14).

⁹ 42 U.S.C. § 9601(22).

¹⁰ 42 U.S.C. § 9607(a)(1) and (2).

¹¹ See, e.g., *Donahey v. Bogle* (C.A. 6 1993), 987 F.2d 1250, citing *United States v. Ward* (E.D.N.C. 1985), 618 F. Supp. 884, 893 and 899.

¹² 42 U.S.C. § 9607(b)(1–2).

¹³ 42 U.S.C. § 9607(b)(3).

¹⁴ 42 U.S.C. § 9607(b)(3).

¹⁵ 42 U.S.C. § 9601(35).

¹⁶ 42 U.S.C. §§ 9601(40), 9607(q).

¹⁷ 42 U.S.C. § 9601(35)(B)(ii).

¹⁸ 70 Fed. Reg. 66070 (Nov. 1, 2005).

¹⁹ 42 U.S.C. § 9601(35)(B)(ii).

²⁰ 2010 U.S. Dist. LEXIS 104772 (D.S.C. Sept. 30, 2010).

²¹ See *AM International v. International Forging Equipment Corp.* (C.A. 1993), 982 F.2d 989, 994; *Niecko v. Emro Marketing Co.* (C.A.6 1992), 973 F.2d 1296, 1300; *Velsicol Chemical Corp. v. Reilly Indus., Inc.* (E.D. Tenn. 1999) 67 F. Supp. 2d 893, *aff'd*, 229 F.3d 1155 (6th Cir. 2000).

²² *AM International, Inc. v. Int'l Forging Equipment Corp.* (C.A. 6 1993), 982 F.2d 989.

²³ See *Anspec Co. v. Johnson Controls, Inc.* (C.A. 6 1992), 922 F.2d 1240, citing *Louisiana-*

Pacific Corp. v. Asarco (C.A. 9 1990), 909 F.2d 1260, 1263; *United States v. Vermont Am. Corp.* (E.D. Mich. 1994), 871 F. Supp. 318.

²⁴ See *Anspec Co. v. Johnson Controls, Inc.* (C.A. 6 1992), 922 F.2d 1240.

²⁵ See *Anspec Co. v. Johnson Controls, Inc.* (C.A. 6 1992), 922 F.2d 1240, citing *Louisiana-Pacific Corp. v. Asarco* (C.A. 9 1990), 909 F.2d 1260, 1263; *United States v. Vermont Am. Corp.* (E.D. Mich. 1994), 871 F. Supp. 318.

²⁶ See *Commander Oil Corp. v. Barlo Equipment Corp.* (C.A. 2 2000), 215 F.3d 321.

²⁷ See *U.S. v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

²⁸ See *U.S. v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 66–67 (1998).

²⁹ See *U.S. v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 71 (1998).

³⁰ See EPA Memorandum, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision (Dec. 5, 2012), available at <https://www.epa.gov/sites/production/files/2015-08/documents/tenants-bfpp-2012-mem-note.pdf>.

³¹ See 42 U.S.C. § 6901 *et seq.*

³² 42 U.S.C. § 6973(a).

³³ Courts generally have held that the term “imminent” does not limit the application of RCRA Section 7003 to emergency-type situations. An endangerment may be imminent if the conditions giving rise to it are present, even though the harm may not be realized for years. See, e.g., *Meghriq v. KFC Western*, 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996).

³⁴ 42 U.S.C. § 6973(a).

³⁵ See *United States v. Waste Industries*, 734 F.2d 159 (4th Cir. 1984).

III.

STEPS IN PURCHASING BROWNFIELD PROPERTIES

§ 11.04. Considerations for Purchasing Brownfield Properties

[1] Background

After selecting a brownfield property that is available and suitable for a buyer’s needs, there are various steps that should be taken before a transaction is consummated, including the performance of an appropriate environmental site assessment (ESA).


[2] Assess Financial Incentives

Federal, state and local governments provide various tax incentives, financing and other financial considerations to buyers of brownfield properties. A buyer should identify the available incentives early in the process. Some incentives are available only to governmental entities. Thus, in some cases, it is worthwhile to partner with governmental entities and to structure the transaction to be eligible for particular incentives. See § 10.05 above for a detailed discussion of financial incentives relating to brownfields redevelopment.

[3] Due Diligence

Before a buyer can assess its potential liability for environmental matters in connection with a contemplated acquisition, it must perform a thorough investigation regarding the property ownership and operation history. The investigation should include, in particular, how hazardous substances (in the broadest possible sense, including, for example, petroleum) have been handled over the years by the seller and the seller's predecessors (as well as by neighboring businesses and possibly by trespassers).³⁶ Once a buyer has certain factual information about a seller's property, the buyer can decide how it wants to handle potential environmental liability in the purchase agreement and conduct its negotiations accordingly.


In almost all cases, prospective buyers will need the assistance of an environmental consultant to help assess the environmental condition of a property. The first decision facing a prospective buyer is the selection of the consultant. There are many choices of consultants ranging from large international firms to sole practitioners. The different firms and consultants offer varying degrees of experience, qualifications and costs. A buyer will benefit from retaining an experienced consultant in connection with the purchase of a brownfield property that has a more complicated history of operations, more difficult strategic questions concerning the need for Phase II environmental assessment sampling, and which carry a greater risk of significant liabilities. As discussed below, consultants often are asked to attempt to quantify environmental risks. Having a consultant with extensive experience with investigations and remediation becomes very important for that task.

 **Strategic Advice:** When conducting due diligence, it is important to utilize a “team approach” where a client representative, environmental attorney and consultant are all on the same team that advises the business representatives. The environmental team needs to understand the purposes of the environmental site investigation. The environmental team should resolve issues of site access, responsibility for assessment costs timing, control, confidentiality, sharing of results and basis for termination of the purchase agreement. Finally, the environmental team should work closely with the real estate or corporate attorney.

A prospective buyer usually can obtain advice from its environmental counsel, who likely will have had experience with a variety of consulting firms and can recommend an appropriate consultant for the particular matter. In the absence of such advice from counsel, prospective purchasers can collect information from consultants. In general, marketing information provided by consultant is not sufficient. The prospective purchaser should request at least the following information from candidate consulting firms:


- (i) resumes of all persons who might be used to staff the project;
- (ii) a typical scope of work for environmental assessments;
- (iii) example of reports (redacted if necessary to protect confidentiality of prior clients);
- (iv) capabilities to conduct Phase II sampling and remediation work;
- (v) summary of prior relevant experience;
- (vi) rate schedule; and
- (vii) references from clients and attorneys.

After a consultant is retained, it is important to negotiate a contract for environmental consulting services. The consulting services agreements should include the following key provisions: a description of the scope of services (which may incorporate by reference the consultant’s proposal); the cost expressed as a lump sum or to be billed on a time and materials basis; the schedule for project completion; limit of liability and indemnification provisions; and the amount of insurance that the consultant must obtain.

 **Strategic Advice:** The buyer should pay particular attention to the staffing of the project to ensure that competent and experienced persons perform the work in the most cost-effective manner. Buyers should not assume that persons described in marketing information or even the proposal will conduct the assessment.

It often is advisable to have the buyer's counsel retain the environmental consultant on the buyer's behalf so that the consultant's report and other communications by and with the consultant may be protected from disclosure by the attorney-client privilege. The benefit of this approach is that the documents prepared by the consultant should arguably be protected from discovery in a judicial or administrative proceeding and should not have to be disclosed in response to an information request by a governmental agency.

The assertion of the attorney-client privilege regarding environmental assessment reports and other communications in connection with a transaction is not without risk. Courts may find that the privilege is inapplicable under specific circumstances, for example, because the court finds that the communications were made not for the purpose of the client obtaining legal advice, but for business or technical purposes.³⁷ In addition, the privilege likely is waived if the report is provided to the party on the other side of the transaction or the lender. It generally is advisable to take reasonable steps to establish and preserve the privilege with respect to due diligence activities, including documenting that the consultant is retained by counsel to assist counsel in providing legal advice to the buyer and taking reasonable steps to preserve the confidentiality of the communications. However, it also is advisable to ensure that reports are carefully drafted to avoid inappropriate characterizations or speculative comments in the event that a court finds such documents are not privileged or the buyer chooses to waive the privilege.

 **Strategic Advice:** The seller should require the prospective buyer to sign a confidentiality agreement for any environmental reports or files provided by the seller and for the data and reports generated by the buyer during the contingency period.

The innocent landowner or bona fide prospective purchaser defenses rarely should determine the type or amount of due diligence. The prospective

purchaser should conduct due diligence to determine in a cost-effective manner whether any material liabilities exist. This is preferred over reliance on the innocent landowner or bona fide prospective purchaser defenses which merely gives the buyer an uncertain chance to escape liability through litigation. Prospective purchasers of brownfield properties face physical constraints (e.g., size of the property, inaccessible areas, and latent contamination), timing constraints, cost constraints and limitations imposed by the current owner concerned about discovering previously unknown problems.

[4] ESA Elements

[a] Transaction Screen

The Transaction Screen is an initial “audit” of the property and does not need to be handled by an environmental consultant. The Transaction Screen process consists of the Transaction Screen Questionnaire, observation of site conditions and review of available government records. The Transaction Screen is not recommended for industrial properties and most commercial properties, and would not satisfy CERCLA “all appropriate inquiry” requirements.

[b] Phase I ESA

On December 31, 2013, U.S. EPA published a Final Rule recognizing that ASTM 1527-13 complies with the standards for all appropriate inquiries discussed above in § 11.03[4].³⁸ As of October 6, 2014, U.S. EPA no longer recognizes the previous standard, ASTM 1527-05.³⁹ The main changes from the old 1527-05 ASTM standard include new and amended definitions of recognized environmental conditions, an explicit focus on vapor intrusion, and updated regulatory file review requirements. In June 2015, U.S. EPA issued technical guidance regarding vapor intrusion. Under the guidance, U.S. EPA makes clear that vapor intrusion is a priority for federal and state agencies.⁴⁰ U.S. EPA plans to reopen vapor intrusion issues at closed sites. When purchasing property, a buyer should determine if historic environmental assessments relating to vapor intrusion meet current standards.

The Phase I ESA has five general components: (1) records review, (2) site reconnaissance, (3) interviews with owners and operators, (4) interviews

with government officials, and (5) preparation of a Phase I report. This standard takes into account the business needs of the users and recognizes that most assessments are conducted in connection with business transactions. The Phase I must be performed by a qualified environmental consultant.

The primary objectives of “all appropriate inquiries” under the new all appropriate inquiry final rule⁴¹ are to identify the following types of information about the subject property:

1. Current and past property uses and occupancies;
2. Current and past uses of hazardous substances;
3. Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
4. Current and past corrective action and response activities undertaken to address past and on-going releases of hazardous substances;
5. Engineering controls;
6. Institutional controls; and
7. Properties adjoining or located in close proximity to the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.⁴²

The all appropriate inquiry rule requires “all appropriate inquiries” into the past ownership and uses of property for a period of time as far back in the history of the subject property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial or governmental purposes.⁴³

⚠ Warning: U.S. EPA removed the reference in the All Appropriate Inquiries Rule to the ASTM E1527-05 standard. Therefore, environmental professionals and prospective purchasers must use the ASTM E1527-13 standard.

[c] Non-ASTM Phase I Issues

The ASTM standards were designed to satisfy the requirements of the CERCLA innocent purchaser defense and may not address all environmental liabilities relating to the property. In some cases, it is advisable to assess other potential environmental concerns that fall outside the scope of a standard ASTM Phase I assessment, including, for example, whether operations are in compliance with environmental regulations, whether buildings contain asbestos-containing materials or lead paint, whether radon levels are a concern, whether there is lead in the drinking water and whether wetlands are present.

[d] Phase II ESA

The Phase II ESA contemplates sampling and chemical analysis of soils and water sources in suspect areas. The results of the Phase II will assist in determining whether contamination exists, the source, degree and extent of the contamination and the need to undertake remedial action.

At the conclusion of a Phase I assessment, a consultant should provide recommendations concerning the need for Phase II sampling of soil and/or groundwater. It often is necessary to conduct Phase II sampling in connection with the purchase of a brownfield property; however, the decision must be made on a case-by-case basis considering a number of factors. Such factors include: the value of the property; the time available to conduct the assessment; cost; whether the consultant already has sufficient information to quantify environmental risks within acceptable ranges; the potential magnitude of reasonably expected worst-case risks; the level of risk acceptable to the buyer and its lender; and whether the buyer will assume liabilities or such liabilities will be allocated to another party. If the consultant believes that the proposed sampling will sufficiently increase its understanding of the risks or could eliminate significant uncertainties about environmental conditions, it generally is worthwhile to undertake the work. Of course, the Phase II sampling may be too costly in the context of some transactions.

In the event that Phase II sampling is recommended, the buyer and seller should negotiate an agreement setting forth the parties' understanding of the scope of the Phase II assessment and other terms and conditions regarding the work. Such agreements generally provide that the buyer will be responsible for repairing any damage to the property and be liable for the negligent acts

of it or its representatives. The agreement also should establish the allowable scope of the buyer's Phase II activities and provide that the buyer will share the data with the seller (if the seller wants to see it).

⚠ **Warning:** If contamination is discovered as a result of the investigation, a statutory reporting obligation may arise. Typically, reporting obligations are the responsibility of the current owner or operator. The parties should address this issue and provide for the timely delivery of the findings to the seller so that reporting obligations can be met. See [Chapter 9](#) above for a discussion of Ohio release reporting requirements.

⚠ **Warning:** The buyer should be aware that conducting intrusive sampling on contaminated properties could expose the buyer to Superfund liability, even if the property is not purchased. In *K.C. 1986 Ltd. Pshp. v. Reade Mfg.*, 33 F. Supp. 2d 1143 (W.D. Mo. 1998), responsible parties under CERCLA sued an environmental consultant which had been retained by a prospective purchaser of the site to perform a pre-acquisition environmental assessment. The plaintiffs alleged that the consultant was a liable party under CERCLA because its installation of monitoring wells during the assessment contributed to the groundwater contamination at the site by creating a conduit allowing contaminants to migrate to an underlying aquifer. *K.C. v. Reade, supra* at 1147. The court denied the consultant's summary judgment motion on liability. *K.C. v. Reade, supra* at 1150 The court held it could not excuse the consultant from liability as a matter of law because genuine issues of material fact existed, which if proven by the plaintiffs, could subject the consultant to liability as an operator of the site.⁴⁴ If the consultant can be liable under these circumstances, the prospective purchaser could be liable as well. Thus, it is conceivable that a prospective purchaser could discover contamination and walk away from the deal, but not CERCLA liability, despite never being in the chain of title. The *Reade* case should encourage a buyer to retain a capable, experienced environmental consultant and to obtain appropriate terms and conditions in the consulting services agreement, rather than discourage it from conducting sampling at a potentially contaminated

property.

One of the most significant roles of the environmental consultant is to assist environmental counsel and the prospective buyer in quantifying the potential liabilities associated with the property. This is when the benefits of retaining an experienced environmental consultant who also has extensive experience in remediating properties will be realized. Experienced environmental counsel will be able to provide advice concerning liability if environmental contamination is discovered in the future. The environmental consultant will provide advice concerning the probability that environmental contamination exists on the property and the range of costs that could be incurred if such contamination is found.

The quantification of environmental liabilities in the context of due diligence usually is more of an art than a science. In almost all cases, the consultant does not have complete information about environmental conditions at the property because complete delineation of soil and groundwater contamination generally is cost-prohibitive in the context of environmental due diligence. Nevertheless, an experienced consultant can provide ranges of potential future costs, including most-likely and reasonable worst case costs, and identify the consultant's confidence level in such cost estimates.

An experienced consultant will consider that risk-based cleanups are acceptable under the Ohio Voluntary Action Program and other Ohio cleanup programs, which may allow higher concentrations of contamination to remain on-site and may eliminate any cleanup obligations if contamination will not affect off-site receptors and parties on-site can be protected by engineering or institutional controls. By obtaining this information from an environmental consultant, the prospective purchaser will gain important insights into the probability and magnitude of potential liabilities.

[5] Practical Limits of the Due Diligence Investigation

[a] Physical Constraints

There are often physical constraints to an environmental assessment, such as the size of the site, enclosed parts of structures, underground tank leakage or seepage and other contamination problems not visible to the eye.

[b] Timing Constraints

There will often be a sense of urgency to close the deal. However, the purchase contract should allow enough time to complete the environmental review. A purchaser generally should request at least thirty days to allow for a simple Phase I ESA, and more complicated sites or the need to conduct invasive sampling will add time to the diligence process.

[c] Cost Constraints

Due diligence environmental reviews can be expensive, particularly if extensive sampling activities are performed or groundwater monitoring wells are needed.

[d] Concerns of the Current Owner

Environmental due diligence may lead to problems for the seller. For instance, the buyer may discover a problem which must be reported to a federal or state environmental agency. Also the buyer may make inquiries of governmental officials that raise concerns about the property. Finally, a buyer may cause or aggravate an environmental problem as a result of investigations. The seller will want to address these potential problems in the purchase agreement, for example, by requiring seller's express permission before the buyer contacts an agency about the property or conducts sampling activities.

Footnotes — § 11.04:

³⁶ This chapter addresses due diligence associated with the purchase of real property rather than an ongoing business. The purchase of an ongoing business raises additional due diligence issues, including the business's compliance with environmental laws and potential liability for off-site disposal of hazardous substances.

³⁷ See, e.g., *Gerrits v. Brannen Banks of Florida, Inc.*, 138 F.R.D. 574, 577 (D. Colo. 1991); *Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc.* (W.D. Tenn. 1999), 190 F.R.D. 505 (holding certain documents, even though prepared by an attorney, were not entitled to privilege where purpose was purely business, not legal). Cf. *In re OM Group Sec. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005) (even though forensic accountants were retained for both legal and business purposes by attorney, attorney-client privilege applied).

³⁸ 78 Fed. Reg. 79319 (2013).

³⁹ 40 C.F.R. § 312, 79 Fed. Reg. 60087 (Oct. 6, 2014).

⁴⁰ <https://www.epa.gov/vaporintrusion>.

⁴¹ 40 C.F.R. § 312.1 *et seq.*

⁴² 40 C.F.R. § 312.20.

⁴³ 40 C.F.R. § 312.24.

⁴⁴ 40 C.F.R. § 312.24.

§ 11.05. Establishing Allocation of Liability

There are alternatives for dealing with the buyer's and seller's liability in connection with a brownfield property. The buyer may accept the liability, in whole or in part, have the seller retain it, in whole or in part, or transfer it, in whole or in part, to a third party such as an insurance company.⁴⁵ The allocation is determined through negotiation of the purchase agreement.

Most purchase and sale agreements involving brownfield properties have two basic provisions concerning environmental matters: representations and warranties and indemnification. Typical "buyer oriented" representations and warranties include, among other things, that:

- the seller is in full compliance with all applicable federal, state and local environmental statutory and regulatory requirements;
- there are no pending environmental, civil, criminal or administrative proceedings against the seller or involving the property;
- the seller knows of no threatened civil (including actions by private parties), criminal or administrative proceedings against it relating to environmental matters;
- the seller knows of no facts or circumstances which may give rise to any future civil, administrative or criminal proceedings against it relating to environmental matters;
- there have been no releases of hazardous substances, broadly defined, at the property;
- there are no pending or threatened claims for enforcement actions concerning the property; and

- the seller has provided copies of all material and environmental reports to the buyer.

Representations and warranties are important because they are a valuable tool for the buyer to obtain information about the site, provide a mechanism for the buyer to terminate the agreement if the representations and warranties are not true at the time of the closing and can provide the buyer with a claim for losses resulting from a breach of the representations and warranties.

In some cases, the seller may attempt to sell the property “as is, where is” with no representations and warranties. This issue, as well as the form of any representations and warranties, often is intensely negotiated. From a buyer’s standpoint, representations and warranties should be obtained when purchasing a brownfield property, unless from a business perspective the transaction merits assuming the risks of an “as is” deal. From a seller’s standpoint, it may be acceptable to give representations and warranties if they are qualified “to the seller’s knowledge” or are otherwise limited.

 **Strategic Point:** Buyers should attempt to:


- Obtain broad warranties and representations from the seller.
- Negotiate indemnification from all liabilities resulting from the seller’s breach of warranties or representations.
- Make seller perform or fund remediation of existing conditions.


 **Strategic Point:** Sellers should attempt to:

- Limit warranties, representations and indemnification granted to buyer.
- Have buyer acknowledge the past uses of the property and its current condition.
- Limit obligations regarding remediation of existing conditions.

Whether the seller will indemnify the buyer or the buyer will indemnify the seller and the terms and conditions of the indemnification also are intensely negotiated. In some cases, the seller may expressly retain all liability for environmental matters arising out of it or its predecessor’s activities, i.e., from pre-closing contamination, and indemnify the buyer for

such liabilities. However, there can be many variations on the scope of the indemnity. Issues that are negotiated include how long the indemnification will survive and what types of claims are subject to the indemnification. If a seller is required to give an indemnification to close the sale, it may try to limit the indemnification by indemnifying only against third party claims, putting a term limitation on the indemnification (for example, six months or three years), establishing a basket⁴⁶ or cap on the indemnity, limiting the indemnity to specific types of problems and/or placing other limitations or conditions on the indemnity.

 **Warning:** Note, however, that allocation of liability is only binding between the parties and does not prevent environmental agencies or third-parties from pursuing buyer.

 **Strategic Advice:** In order to avoid risk of unsecured claims (e.g., seller bankruptcy), buyer should require seller to provide some type of financial mechanism to back the obligation such as escrow, letter of credit or insurance policy. Buyer should also consider requiring the parent company of seller to guarantee the seller's indemnification obligations.

If the seller is unwilling to indemnify the buyer for environmental liabilities, or will provide only a limited indemnification, a buyer must consider whether it will have legal recourse against the seller or other previous owners or operators outside the purchase agreement. As discussed in [Chapter 10](#) above, the Ohio Voluntary Action Program provides a volunteer with the right to recover certain eligible costs (including cleanup costs and attorneys' fees from responsible parties).

CERCLA may provide such recourse if there has been a release of hazardous substances at the facility.⁴⁷

The United States Supreme Court, in a unanimous decision in *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007), ruled that potentially responsible parties ("PRPs") do in fact have a cause of action to recover costs from other PRPs under Section 107 of CERCLA where there is no corresponding legal action (suit or settlement) by U.S. EPA or a state under CERCLA Sections 106 or 107.

In 2004, the Supreme Court declined to address this issue in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). In *Cooper*, the Court established the requirement that a private party must first be sued pursuant to either Section 106 or Section 107(a) of CERCLA or engage in a formal settlement with the government before that party could seek contribution under Section 113(f). The *Cooper* civil action requirement left many PRPs who had voluntarily undertaken cleanup of a site or brownfield without a remedy because pre-*Cooper* precedent had barred a PRP from using Section 107 for cost recovery in all of the circuits that had addressed the issue. Indeed, historically only “innocent parties” have been able to use Section 107.

In *Atlantic Research*, a PRP voluntarily conducted a cleanup of a site that it had leased from the government and then sought recovery under both Section 107(a) and Section 113(f)(1) from the United States as a PRP. The Court rejected the government’s concern that allowing a PRP to bring a Section 107(a) cost recovery action would create friction between CERCLA Sections 107 and 113. According to the Court, the remedies available in Sections 107(a) and 113(f) complement each other by providing causes of action “to persons in different procedural circumstances.”⁴⁸ The Court held “[b]ecause the plain terms of Section 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action.”⁴⁹ Thus, the decision allows a liable party to impose joint and several liability on another PRP under Section 107. It is important to check the case law in the relevant jurisdiction when asserting or defending such claims because various federal district courts have further refined the requirements associated with these actions.

The *Atlantic Research* decision will have a significant impact on Superfund cleanups as well as brownfield redevelopment. After *Cooper*, PRPs around the country who had voluntarily conducted remediation were concerned they would face difficulties in recouping cleanup costs or would be unable to coerce nonparticipating PRPs to join a cleanup action. Further, PRPs feared that they would have to resort to state and/or common law causes of actions which can create other substantial obstacles, such as less favorable statutes of limitation. Ultimately, the “chilling effect” PRPs faced in the last two and half years since *Cooper* was decided has been eliminated, and PRPs have regained CERCLA as a powerful tool to use in recovering

remediation costs for site cleanups and redevelopment of brownfield properties.

Nonetheless, parties in a transaction still have allocation issues relating to historic contamination. In order to recover cleanup costs under CERCLA, the costs must be “necessary” and consistent with the National Contingency Plan. Additionally, often times there are no responsible parties that are financially worth pursuing.

In certain circumstances, buyers agree to indemnify sellers for environmental liabilities. If the buyer is accepting the risk of environmental liability associated with a property, it should attempt to quantify such risk, for example, by obtaining a consultant’s estimate of what a cleanup would cost and the likelihood that a cleanup would ever be required. The buyer can then attempt to adjust the purchase price to reflect the risk it is assuming.

The parties can also consider transferring the liabilities to a third party, such as an insurance company. Numerous insurance products have developed in recent years which can be tailored to fit the specific circumstances and level of risks acceptable to the parties. A more detailed discussion of insurance products is provided below.

⚠ Warning: Courts generally will uphold agreements between parties to allocate liability. However, these agreements are not enforceable *vis-à-vis* the government. In other words, the government retains the authority under various statutes (e.g., Superfund) to impose liability on the liable party, but that party can transfer the liability to another party via a contract or insurance policy.

Footnotes — § 11.05:

⁴⁵ Environmental insurance is discussed in § 11.07 below.

⁴⁶ A basket is a mechanism to limit the indemnity by providing that the indemnity is not triggered until the dollar amount in the basket exceeds a specified level, for example, until cleanup costs exceed \$100,000. The basket may apply to the costs to address a particular contamination problem, for example, the costs to remediate groundwater contamination, or cleanup costs in the aggregate.

⁴⁷ The buyer may have other remedies under RCRA Section 7002(a)(1)(B) (RCRA’s citizen suit provision), 42 U.S.C. § 6972(a)(1)(B), or state statutory or common law.

⁴⁸ *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 2338, 168 L. Ed. 2d

28 (2007).

⁴⁹ *Atlantic Research Corp.*, 127 S. Ct. at 2339.

IV.

OBTAINING A LOAN

§ 11.06. Borrowing Money for Contaminated Properties

Lenders have been skittish about providing financing to purchasers of contaminated or potentially contaminated properties since CERCLA and RCRA were enacted. In the late 1980's, developing CERCLA case law suggested lenders could be subject to liability if they foreclosed on a contaminated property or became too involved in the day-to-day management of the borrower's operation.⁵⁰ Banks became particularly concerned when the U.S. Court of Appeals for the Eleventh Circuit suggested in *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), that banks could forfeit their immunity from CERCLA liability if they had the mere capacity to control their borrower's operations. *Fleet Factors*, *supra* at 1557–58.

In response to *Fleet Factors*, the U.S. EPA promulgated its lender liability rule in 1992.⁵¹ The rule rejected the *Fleet Factors* decision by providing that lenders were not liable if they exercised financial oversight over a borrower's operation but also provided that lenders could become liable if they actually controlled operation of the business.⁵² In 1994, the United States Court of Appeals for the District of Columbia Circuit held that the U.S. EPA had no authority to promulgate the rule limiting lenders' liability in Superfund cases, although it did not address the substance of the rule.⁵³ By vacating the U.S. EPA's lender liability rule, the court intensified the uncertainty the lenders faced concerning environmentally distressed properties.

On September 30, 1996, Congress enacted amendments to CERCLA and RCRA that clarify the scope of the secured creditor exemption contained in both statutes.⁵⁴ Both the CERCLA and RCRA lender liability protections clarify the circumstances under which a lender can be deemed liable as an "owner or operator" under the Acts.

The general rule is that a secured party which takes title to property to

protect the security interest without “participating in management” of the property is not liable.⁵⁵ The amendments expressly state that “participation in management” requires actual participation in the management or operational affairs of a facility and does not include merely having the capacity to influence, or the unexercised right to control facility operators.⁵⁶ Thus, Congress rejected the language contained in the *Fleet Factors* decision. Congress also clarified when a lender will be considered to be “participating in management.” When the borrower is still in possession of the facility, the lender is “participating in management” if the lender exercises decision making control over environmental compliance for the facility so that it has undertaken responsibility for the overall management of the facility or over substantially all of the operational functions of the facility other than environmental compliance.⁵⁷ The amendments contain a list of nine categories of actions that do *not* constitute participation in management.⁵⁸

The amendments also allow lenders to foreclose, re-lease or sell its collateral so long as the lender attempts to divest itself of the facility “at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.”⁵⁹ However, the amendments do not contain certain of the “bright-line tests” that were contained in the lender liability rule. Thus, lenders will face some uncertainty whether their actions are consistent with the exemption.

The amendments also provide that a lender may maintain business operations, wind down operations, and take measures to preserve, protect and prepare the facility for sale or disposition without incurring CERCLA liability.⁶⁰ However, lenders remain at risk when engaged in post-foreclosure activities since all such activities will be scrutinized to determine if the lender crossed the line from protecting its security interest to being an operator of the facility. Additionally, the amendments do not protect a lender for post-foreclosure compliance issues not covered by the amendments.

The amendments contain many helpful clarifications of the secured creditor exemption although they fall short of immunizing lenders from liability. The amendments still leave some room for confusion, which aggressive plaintiffs will attempt to exploit, and which gives lenders reason to continue to be cautious about lender liability particularly in the current

unstable economic climate.

Footnotes — § 11.06:

⁵⁰ See, e.g., *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989).

⁵¹ 57 F.R. 18344 (1992) (codified at 40 C.F.R. § 300.1100) (vacated).

⁵² 40 C.F.R. § 300.1100 (vacated).

⁵³ *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994).

⁵⁴ Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, H.R. 3610, Pub. L. No. 104-208 (Sept. 30, 1996).

⁵⁵ See 42 U.S.C. §§ 9601(20) and 6991(b)(h)(9).

⁵⁶ See 42 U.S.C. §§ 9601(20) and 6991(b)(h)(9).

⁵⁷ See 42 U.S.C. §§ 9601(20) and 6991(b)(h)(9).

⁵⁸ 42 U.S.C. § 9601(20)(F)(iv).

⁵⁹ 42 U.S.C. § 9601(20)(E)(ii).

⁶⁰ 42 U.S.C. § 9601(20)(E)(ii).

V.

INSURANCE

§ 11.07. Risk Transfer with Insurance

Over the last several years, environmental insurance has emerged as a tool to allocate the potential risks of environmental liability in brownfield transactions and cleanups, as well as in other commercial transactions and cleanup projects. An environmental insurance policy can be tailored to cover virtually any environmental risk.

The most common type of policies is pollution legal liability policies (“PLL policies”). PLL policies can help seal real estate transactions that might otherwise go awry due to the uncertainty of environmental conditions or historical usage by providing buyers and sellers with a risk-transfer alternative to protect against such uncertainty. Such policies may relieve the

pressure on the buyer who is reluctant to lose future value in his purchase, the seller who wants to close its books on sold-off assets, and the lender who wants to protect the value of the collateralized property and the borrower's ability to pay back the loan.

§ 11.08. Policies and Coverages

[1] PLL Policies

A PLL policy allows the insured to select the coverage appropriate for the risks of a particular facility. The insured typically can choose from a menu of site-specific environmental coverages, including on-site and off-site coverages for property damage, bodily injury and cleanup costs triggered by pollution conditions. Coverage options may include:

1. Coverage for on-site cleanup of unknown pre-existing conditions triggered by discovery.
2. Coverage for on-site cleanup of unknown pre-existing conditions and diminution in value triggered by discovery.
3. Coverage for on-site cleanup of pre-existing conditions triggered by a third-party claim or government-ordered cleanup.
4. Coverage for third-party claims for cleanup costs, property damage and/or bodily injury resulting from off-site pollution conditions.
5. Coverage for bodily injury, property damage or cleanup costs associated with a non-owned disposal site, i.e., coverage for Superfund liability.

Exception: PLL policies generally exclude coverage for known liabilities or pollution conditions. In some cases, coverage can be obtained for known problems; for example, for contamination remaining after a VAP cleanup is completed.

[2] Key Terms and Conditions

[a] Review of Critical Terms and Conditions

There are key terms and conditions in an environmental insurance policy that affect who is covered under the policy, what claims are covered and

excluded, and other rights and obligations of the insured. In order to ensure that the policy provides the desired protection against environmental liability and that the insured does not have any unpleasant surprises down the road, it is important for the insured and its environmental attorney to carefully review all of the terms and conditions of the policy. Several key terms and conditions are summarized below.

[b] Named Insureds and Additional Insureds


Both the named insured and additional insureds are covered under the policy. The primary difference between the named insured and the additional insureds is that only the named insured has the right to cancel the policy. Additional insureds may be the shareholders, directors and/or officers of a corporation. The nature of certain transactions also may warrant including additional insureds in a policy. For example, if the seller of a facility agrees to indemnify the buyer for environmental contamination and the seller may be the named insured and the buyer an additional insured.

[c] Term

The policy term can either be fixed or rolling. Fixed term policies are generally three to ten years, but may be longer. Rolling term policies allow the insured to roll the policy over the end of each year to maintain coverage for a certain number of years. For example, in a five year rolling term policy, the insured can elect at the end of each year to roll the policy over to maintain a five year period of coverage. One benefit of a rolling term policy is that the insured may be able to continue the policy indefinitely without having to renegotiate the terms and conditions of the policy. However, the insurance company has to agree to the roll over and may choose not to extend the policy or to increase the premium if new information is available that the insurance company believes materially increase the risk of liability.

[d] Deductibles and Policy Limits

Deductibles vary widely depending on the type of policy and known risks. Policy limits can range from under \$1,000,000 to tens of millions of dollars. Deciding on the amount of the deductibles and the policy limits is a judgment call to be made by the insured based on the level of risk involved and the amount of the premium.

 **Strategic Point:** In order to assess what options may be available, the party seeking to obtain insurance should ask insurance companies for quotes for policies with various deductibles, policy limits and terms.

[e] Exclusions

Most insurance policies carry standard exclusions. It is advisable to consult with an insurance broker and attorney to ensure that the exclusions are appropriate considering the scope of coverage sought to be obtained. Some common exclusions include liability resulting from intentional or illegal acts or omissions; liability due to any civil, administrative or criminal fines or penalties; and liability to others under a contract or agreement.

[f] Unknown Condition

This term needs to be limited to conditions known by certain individuals. An insured does not want to risk losing coverage because of the knowledge of an employee that was never disclosed to upper management. Furthermore, if known conditions will be covered, this needs to be specifically disclosed in the policy.

[g] Earned Premiums

An earned premium provision allows the insured to terminate the policy within a certain period of time, for example, sixty days, and receive a refund of a percentage of premium paid. The time period within which cancellation is permitted and the percentage of premium refunded are negotiable.

[h] Definitions

The insured should not assume that all exclusions are clearly listed in the exclusions section of the policy. Definitions of key terms often exclude coverage of certain types of claims. For example, standard policy language often excludes contamination from underground storage tanks from the definition of covered pollution conditions. Therefore, the definitions should be reviewed carefully.

[i] Reporting

Reporting to the insurance company often is required upon “discovery” of a claim or pollution condition. One issue that may arise with regard to reporting is what constitutes “discovery.” It may be unclear how much information about a condition is necessary for that condition to have been “discovered” for purposes of triggering the reporting obligation.

[j] Assignment

Many policies typically prohibit the assignment of a policy. This item can also be negotiated, and is of concern particularly for future commercial transactions. At the very least, the policy should provide that the insurance company will not unreasonably refuse to allow the assignment of the policy.

[k] Cancellation

The insured should identify the insurance company’s grounds for cancelling the policy. Such grounds often include failing to disclose in the application a condition which substantially increases the likelihood of on-site or off-site environmental damage and changing the nature or extent of operations at the insured site so as to substantially increase the likelihood of on-site or off-site environmental damage.


[l] Payment


Typically, the insured is required to pay the full amount of the premium up front. However, in some rolling term policies the premium may be paid each year. Like many of the other terms and conditions in an insurance policy, the timing of premium payment may be negotiable.

§ 11.09. What Information is Required

The process of obtaining environmental insurance begins with completing an application for insurance. The information provided in the application, for example, a description of the operations conducted at the facility, type and quantity of hazardous materials used and prior history of contamination, allows the insurance company to evaluate the potential risk of on-site and off-site liability associated with the facility. Failure to accurately complete the application can result in the insurance company cancelling the policy or denying a claim.

At a minimum, insurance companies generally require a Phase I environmental assessment of the facility. This may be required either as part of the application or as a condition to binding coverage. A Phase II environmental assessment also may be required if additional investigation is warranted.

 **Strategic Point:** Once a Phase I environmental assessment has been performed, it often becomes a judgment call whether to collect additional data concerning areas of potential concern identified by the consultant. The benefit of collecting additional data is that this may eliminate or reduce unknown risks, which can substantially lower premiums. The disadvantage of collecting additional data is that this may confirm that there is a serious environmental condition, which may result in exclusions from coverage or increased premiums.

 **Strategic Point:** The applicant should require the insurance company to execute a confidentiality agreement before providing it with sensitive information and documents concerning the facility. The insured also should evaluate the effect of providing the insurance company with privileged documents. Disclosing privileged documents to third parties such as the insurance company may have the effect of waiving the privilege in future litigation or enforcement actions.

§ 11.10. Other Issues to Consider

[1] Tips on Environmental Insurance

There are numerous issues that may arise in connection with environmental insurance. Although a detailed discussion of all these issues is beyond the scope of this chapter, a few of the issues to be aware of are discussed briefly below.

[2] Named Insureds and Additional Insureds

The named insured should consider the effect of additional insureds on its rights and obligations under the policy. For example, it may be advisable in some cases to negotiate that the reporting obligation is triggered only by the

discovery of a claim or pollution condition by the named insured. This would protect the named insured in the event that an additional insured discovers the claim or pollution condition and does not inform the named insured of such discovery. This could occur for example, where a tenant (additional insured) discovers a pollution condition on the insured property and does not inform the owner (named insured) of this discovery.

[3] Insured vs. Insured Clause

An insured vs. insured clause excludes coverage for claims by one insured against another insured except for claims under an indemnity agreement in an “insured contract.” By way of example, assume that a seller of property agrees to indemnify the buyer for third-party claims related to contamination and obtains an environmental insurance policy in which it is the named insured and the buyer is an additional insured. It is unclear if such a policy would cover the seller if the buyer sues the seller to enforce the indemnity since this may not be a “third-party” claim. In addition, policies generally exclude claims by one insured against another insured. In order to avoid the uncertainty in coverage that may result if one insured sues another insured, it is advisable to modify the insured vs. insured clause in the policy through an endorsement. In this example, the buyer’s and seller’s agreement, should be listed as an “insured contract” in the endorsement of the policy.

[4] Stability of Insurance Company

A person or entity obtains environmental insurance to guard against the risk of incurring significant costs associated with an environmental condition or, in some cases, of being financially devastated by such costs. Therefore, the stability of the insurance company and the ability of the insured to collect on a claim should be carefully considered when choosing an insurer.

VI.

RECURRENT PROBLEMS IN BROWNFIELD TRANSACTIONS

§ 11.11. Environmental Disputes Impacting Commercial Transactions

Parties involved in the purchase and sale of brownfield properties may become involved in disputes concerning responsibility for cleanup of contamination, the level of cleanup, control of the cleanup, coordination of cleanup activities and site development operations and other issues unique to brownfield properties. There are several reasons why these problems (discussed below) arise. To begin, buyers and sellers may fail to identify problems prior to the closing, which may cause the parties to inadequately address allocation issues in the agreement. A buyer who is saddled with an expensive cleanup often will explore legal claims against the seller. Further, the principals for the buyer and/or seller may desire to avoid tough decisions which are viewed as potential deal-killers during contract negotiations, may not consult environmental lawyers and engineers or may consult them at the latter stages of negotiations when it may be difficult to structure the transaction appropriately to address environmental liabilities. Problems also may arise because the use of broad or vague language to allocate liabilities often will not address the myriad of issues that may arise once contamination is discovered and cleanup is necessary. In addition, sloppy drafting of purchase agreements may lead to uncertainties concerning respective parties' responsibilities.

§ 11.12. Problems Which May Arise

[1] Indemnity for Pre-Closing Contamination

A recurrent problem in brownfield transactions arises when the seller broadly indemnifies the buyer for losses and liabilities arising from pre-closing contamination without elaboration. Although the buyer may think that such an indemnity leaves little room for disagreement among the buyer and seller, that is not necessarily the case. There are many issues that this arrangement does not address including: applicable cleanup standards; future use of the property that could increase or decrease cleanup costs; costs incurred due to the buyer's activities; whether a third party claim is required to trigger the indemnity as opposed to the discovery of contamination that may present a health or environmental risk; and who controls the cleanup.

[2] Applicable Laws

It may be difficult to determine if cleanup is "required by applicable

laws,” a popular phrase in indemnity agreements. Many buyers of Ohio properties who have discovered significant contamination after the closing have been disappointed to learn that there may not be any applicable, self-implementing cleanup obligations to trigger the seller’s indemnity obligation to clean up to the extent “required by applicable laws” and there is no governmental agency or other third party involved to bring a third party claim to trigger the obligations.

Moreover, parties may argue about the level of cleanup that the seller must conduct. Phrases such as “conduct a cleanup in accordance with applicable laws” or “cleanup to attain applicable cleanup standards” do not address whether the cleanup must meet standards for residential, commercial or industrial uses, whether published generic standards or site-specific risk-based standards are acceptable or whether the seller can use institutional or engineering controls.⁶¹

[3] Participation in the Cleanup

Agreements often do not specify the buyer’s right to participate in a cleanup conducted by the seller. This may leave the buyer without explicit authority to review, comment on and approve a seller’s cleanup plans. If things go smoothly, the parties may cooperate and the seller may give the buyer some opportunity to review and comment. Unless addressed in the purchase agreement, if the relationship sours, the buyer may have little recourse if the seller chooses to exclude it from the process.

[4] Proof Problems

A buyer may have difficulty proving that discovered contamination resulted from pre-closing releases. This problem occurs most often where the buyer conducts operations using hazardous substances, particularly if it uses similar hazardous substances as the seller. Issues of proof become more difficult as significant time passes after the closing.

[5] Cleanup Under State Voluntary Action Programs

Parties may agree that a seller will conduct a cleanup under the Ohio VAP to obtain a covenant not to sue or to meet Ohio VAP standards without participating in the formal Ohio VAP. This approach generally provides

needed structure to post-closing activities. Problems, however, may arise for transactions involving formal participation in the Ohio VAP relating to the eligibility of sites to participate in the Ohio VAP, the scope of cleanup (the scope of cleanup varies widely depending on the use of risk-based levels, natural attenuation, institutional and engineering controls) and increased costs.

Two other factors must be considered when considering a Ohio VAP cleanup as part of a transaction: cost and schedules. The cost and time to complete a Ohio VAP cleanup is highly variable depending on the size and location of the property, the nature and magnitude of the environmental problem and the level of Ohio EPA oversight in the cleanup. The cost and schedule factors can lead to a number of other potential problems if not adequately addressed up front, including problems relating to the level of the buyer's involvement in the process or disruption of the buyer's operations or development activities.

Another way the parties can effectively reduce uncertainties concerning the required scope of cleanup is to require the seller to remediate soils and groundwater to meet generic published standards for specified uses of the property (e.g., residential, commercial or industrial). For example, the seller may promise that if soil contamination is discovered, the seller will remove the contamination to meet generic standards for industrial use set forth in the Ohio VAP. While reducing uncertainty, this approach can greatly increase the seller's cleanup costs by requiring it to remove contaminants even if there is no legal requirement or health or environmental need to do so. For example, the seller may be required to excavate inaccessible soil from under a building slab to meet the generic level, something that regulators rarely require unless necessary to protect human health or the environment.

[6] Demolition, Construction and Renovation

Buyers often will demolish existing buildings and construct new facilities or substantially renovate existing buildings. These activities may lead to problems. For example, the buyer's construction and the seller's cleanup activities may interfere with one another or the buyer's activities may identify new environmental problems. Further, unless addressed in the agreement, disputes may arise over which party must pay for the buyer's increased construction costs arising from the need to dispose of contaminated

excavated soils that are not clean fill, health and safety measures to protect construction workers and extra work to avoid interrupting the seller's cleanup activities.

Contractors also may raise issues in connection with demolition, construction and renovation activities. Contractors may have concerns related to the health and safety of their employees who are not trained to handle hazardous substances or wastes and their potential liability under OSHA and common law for failure to adequately train and protect such workers.⁶² Contractors also may be concerned that their reuse, handling or movement of contaminated soil on-site or arrangement for disposal of contaminated soil off-site may trigger liability under CERCLA. These concerns are justified since persons who arrange for the disposal of hazardous substances may incur liability under CERCLA and because contractors which have caused hazardous substances to be dispersed around a site, for example, through grading or excavation activities, may be liable under CERCLA on the theory that they were operators of a facility and "disposed" of hazardous substances.⁶³

Prior to demolition, construction or renovation activities, buyers should determine, with the assistance of counsel, whether moving soil around the property, reusing soil on-site or disposing or reusing of soil off-site could expose them to liability. In addition to liability under CERCLA, buyers should evaluate the risk of environmental liability under other federal, state and local laws and regulations. For example, the handling, movement or reuse of contaminated soil may constitute the disposal of solid waste or hazardous waste under state solid waste laws or RCRA and, in turn, trigger requirements for the handling, management and disposal of such soil. Reuse of contaminated soil also may be regulated by municipal codes. For example, the Cincinnati Municipal Code regulates the reuse of contaminated soil if the soil contains certain contaminants above specified levels.⁶⁴ Construction costs can sky-rocket if soil taken off-site must be disposed of as solid or hazardous waste rather than reused as clean fill. Disputes may arise if such costs are not clearly allocated in the purchase agreement.

[7] Limitations on the Buyer's Future Use of the Property

The buyer's use of the property may be subject to limitations relating to the seller's obligation to clean up or to indemnify the buyer. To fulfill its

cleanup obligation, the seller may wish to rely on the use of engineering or institutional controls. The seller's obligation to indemnify the buyer may provide exceptions for losses arising from the buyer's activities on the site that disturb or exacerbate the contamination. Additionally, a seller may request that a buyer agree to various activity and use limits and agree to an environmental covenant that would run with the land. For any site that is part of the Ohio VAP, there is an Ohio EPA template that must generally be followed in connection with any activity and use restrictions that will run with the land.

The buyer may face other obligations or restrictions relating to agency no further action approvals, covenants not to sue or other applicable legal requirements. No further action approvals and covenants not to sue may be conditioned on the buyer's agreement to and compliance with use and other restrictions, as discussed above.

Footnotes — § 11.12:

⁶¹ Engineering controls are man-made structures or systems that eliminate or mitigate human or environmental exposure to hazardous substances, such as caps and groundwater gradient systems. Institutional controls are documented restrictions which limit access to or the use of a property such that exposure to hazardous substances are eliminated or mitigated, and include commercial or industrial use restrictions and prohibitions against groundwater use.

⁶² OSHA's Hazardous Waste Operations and Emergency Response rule specifies certain training requirements (commonly known as "HAZWOPER" training) for employees that handle hazardous materials. See 29 C.F.R. § 1910.120.

⁶³ See, e.g., *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004).

⁶⁴ Cincinnati Municipal Code Chapter 1031.

§ 11.13. Tips to Avoid Problems

[1] Establish Open Communication

Buyers and sellers should be made aware of the many issues and complications unique to brownfield properties. There is a higher likelihood of success if both parties understand these issues before a purchase agreement is executed.

[2] Pay Attention to Cleanup Issues

The parties to a brownfield transaction should pay proper attention to cleanup issues in the purchase agreement. Unless there is a perceived significant advantage to do otherwise,⁶⁵ parties should make an effort to identify the issues and appropriately address them.

[3] Perform Appropriate Due Diligence

The buyer should perform appropriate due diligence to develop an understanding of potential liabilities. In addition, it often is easier to allocate responsibility for known problems rather than (sometimes speculative) unknown conditions.

[4] Consider Environmental Insurance

The parties should explore insurance options early in the process since obtaining a policy can be time-consuming and delay could scuttle a deal. Obtaining insurance often involves a coordinated effort among the buyer and seller and their respective lawyers and consultants. The buyer's lender also will be interested and may establish the key coverage requirements. Insurance considerations also may affect the type and degree of the buyer's due diligence efforts.

[5] Consider a VAP Cleanup

Requiring cleanup under the Ohio VAP often is beneficial because it involves specified levels of investigation and cleanup, some government oversight and receipt of a covenant not to sue. An alternative to requiring cleanup under the Ohio VAP is to require cleanup to the Ohio VAP generic standards, even if a Ohio VAP is not entered. This eliminates many arguments about the necessary scope of the cleanup, but may lead to a more expensive cleanup.

[6] Sellers Can Benefit from Pre-Sale Preparation

Many prospective brownfield transactions falter once environmental conditions and potential liabilities are scrutinized, often when the lenders get involved. This may occur after substantial transaction costs have been incurred by both the buyer and seller, including the time spent by a company's real estate manager to market the property. There may be an advantage in proactively identifying, and, in some cases, remediating

problems before the property is placed on the market. By identifying the potential problems through Phase I and Phase II assessments, the seller can structure and price a proposed transaction in a reasonable manner and increase the likelihood that the transaction will be consummated. The seller and buyer can negotiate acceptable terms and conditions and allocation of known and unknown liabilities.

[7] Involve Potential Lenders Early in the Process

Lenders have become more amenable about providing financing involving brownfield properties, provided they are given sufficient information to quantify the risk and protection against liability. The buyer should inquire early in the process about the criteria used by the bank to evaluate the proposed financing. By understanding the criteria early in the process, the buyer can tailor its due diligence efforts and contract negotiations accordingly. If the lender is too conservative, the buyer can shop for better terms from other lenders.

Footnotes — § 11.13:

⁶⁵ In some cases, a buyer or seller may have a weak bargaining position and will prefer vague contract terms rather than negotiating specific language that likely will be more favorable to another party.

CHAPTER 12

STORAGE TANKS

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§ 12.06. Aboveground Storage Tanks

§ 12.01. Scope

This Chapter addresses:

- The regulatory framework applicable to storage tanks in Ohio [*see § 12.02 below*].
- Ohio and federal law governing the installation, operation and removal of underground storage tanks and the Bureau of Underground Storage Tank Regulations [*see § 12.03 below*].
- Enforcement procedures under Ohio law [*see § 12.04 below*].
- Overview of recent federal legislation altering the underground storage tank regulatory landscape [*see § 12.05 below*].
- Ohio and federal law governing the operation of aboveground storage tanks [*see § 12.06 below*].

§ 12.02. Storage Tank Regulation in Ohio

This chapter provides an overview of the regulations that govern the installation, operation, and closure of storage tanks, both underground and aboveground. It also provides practical advice and guidance for installation, operation, and closure of storage tanks. Storage tanks, and in particular underground storage tanks, are subject to significant environmental regulation in Ohio. The State Fire Marshal estimates that over 7,500 facilities are registered as operators of underground storage tank (UST) systems in Ohio. Those facilities, which operate a total of 21,585 registered USTs, reported 360 releases in 2016. The number of unregistered USTs and undocumented releases is unknown, but it is safe to say the numbers are significant. Contamination associated with USTs typically is the result of

faulty equipment, poor construction, or sub-par maintenance. The consequences of tank spills, leaks, and releases can be far-reaching and present a heavy financial burden for the owner or operator of a tank system.

As with USTs, the chief threat posed by aboveground storage tanks (ASTs) relates to the potential for the release of petroleum or other hazardous materials into surrounding soil, groundwater and surface waters. ASTs are under the jurisdiction of Ohio EPA, the State Fire Marshal, and delegated local fire departments. USTs are primarily regulated by the Bureau of Underground Storage Tank Regulations (BUSTR), with additional regulatory oversight by Ohio EPA and the State Fire Marshal.

 **Strategic Point:** USTs are regulated more extensively than ASTs due to the following:

- Significant historical contamination from hazardous materials stored in USTs;
- The greater threat posed by UST contamination due to the proximity of UST equipment to the soil and groundwater; and
- The higher environmental contaminant exposure because UST containment is subterranean, and therefore out of view, making leak detection more difficult.

§ 12.03. Underground Storage Tanks

[1] UST Regulation Sources

There are four sources of UST regulation in Ohio:

- a. The federal Resource Conservation and Recovery Act (RCRA), [42 U.S.C. § 6991 et seq.](#), and regulations promulgated thereunder at [40 C.F.R. Part 280](#);
- b. The Ohio Fire Code, [OAC 1301:7-7-34](#), for flammable and combustible liquids;
- c. [R.C. 3737.87–3737.99](#)– and the BUSTR regulations, [OAC 1301:7-9-01](#) to -20, for “regulated substances”; and
- d. [R.C. Chapter 3734](#) and the regulations promulgated at [OAC 3745-50](#)

to 3745-69 apply to tanks storing hazardous wastes (discussed in § 12.03[3]).

[2] Ohio Fire Code Regulations

[a] Applicability

The Ohio Fire Code is dedicated to the “[p]revention, control and mitigation of dangerous conditions related to storage, use, dispensing, mixing and handling of flammable and combustible liquids.”¹ A “combustible liquid” is defined as a liquid having a closed cup flash point at or above 100 degrees Fahrenheit.² A “flammable liquid” is a liquid having a closed cup flash point below 100 degrees Fahrenheit.³ These regulations apply in addition to those administered under the Ohio Revised Code by the BUSTR.

[b] Permit Requirements

The Fire Code requires that a permit be obtained for the following: installation; alterations to tanks, piping, or appurtenances; abandonment; and removal or temporary removal of tanks from service. The provisions governing the issuance of permits are found under [OAC 1301:7-7-01](#). Permits are available from persons identified as “fire code officials” under [OAC 1301:7-7-02](#).

[c] Fire Safety Requirements

Fire protection is required under the Fire Code for the “storage, use, dispensing, mixing, handling and on-site transportation of flammable and combustible liquids.”⁴

The Fire Code requires that every regulated facility:

- (1) provide portable fire extinguishers and hose line;
- (2) conduct a site assessment to determine the threat of fire or explosion from a potential spill;
- (3) provide spill control and secondary containment where the “maximum allowable quantity per control area is exceeded;” and
- (4) post warning signs to identify the hazards of storing or using flammable liquids.⁵

[d] Aboveground Storage Tanks

Aboveground storage tanks (ASTs) receive slightly more stringent treatment under the Fire Code than do their underground counterparts. For example, the aboveground tank storage of flammable and combustible liquids is prohibited by the Fire Code on premises to which the public has access, with limited exceptions.⁶ In addition to the safety requirements imposed on storage tanks generally, above-ground storage tanks may also be required to have foam fire protection and fire protection for supports.⁷ Aboveground tanks located inside buildings are required to be equipped with a device to prevent overflow of the tank contents into the surrounding building.⁸ ASTs are also subject to different operating pressure limits and some types of aboveground tanks also have distinct location requirements.⁹ Further, aboveground tanks may not be filled to more than 95 percent of their capacity and overfill prevention systems must be in place.¹⁰ Finally, spill containers with a capacity of at least five gallons must be provided for each fill pipe connection for fuel deliveries.¹¹

See also the discussion of Aboveground Storage Tanks in [§ 12.06](#) *below*.

[e] UST Installation

Underground storage tanks are regulated separately, in part, from aboveground storage tanks. For example, underground storage tanks must not contain petroleum products comprised of mixtures of a nonpetroleum nature, unless compatibility is demonstrated.¹² Further, USTs must be installed in accordance with the following guidelines:

- (1) Tanks must be located with respect to existing foundations and supports such that the loads carried by those supports cannot be transmitted to the tank;
- (2) The distance from any part of a tank storing liquids to the nearest wall of a basement, pit, cellar or lot line cannot be less than three feet;
- (3) There must be at least one foot between USTs;
- (4) The tank must be placed on a foundation and surrounded with at least six inches of non-corrosive, inert material; and
- (5) Tanks must be equipped with a spill container and overfill prevention

system.¹³

[f] Tank Closure and Abandonment

The Fire Code provides specific procedures for the treatment of USTs that are abandoned or temporarily taken out of service. Tanks that are temporarily taken out of service must have the fill line, gauge opening, vapor return, and pump connection secured against tampering. Vent lines must remain open in accordance with the general provisions governing tank safety and operation.¹⁴

Additionally, for aboveground tanks, if the tank is temporarily taken out of service, it must have all connecting lines isolated from the tank and be secured against tampering.¹⁵ In general, aboveground tanks taken out of service for 90 days are to be closed pursuant to the general procedures for tank removal.¹⁶

Subject to a few exceptions, any UST that has been taken out of service for one year or more must either be removed or abandoned in place.¹⁷ Abandoned USTs must be abandoned according to the following requirements:

- (1) Flammable and combustible liquids must be removed from the tank and piping;
- (2) The suction, inlet, gauge, vapor return, and vapor lines must be disconnected;
- (3) The tank must be filled completely with an approved inert solid material;
- (4) Remaining underground piping must be capped or plugged;
- (5) A record of tank size, location, and date of abandonment must be maintained; and
- (6) All exterior above-grade fill and vent piping must be permanently removed.¹⁸

[g] Removal

For the removal of both aboveground and underground storage tanks, the

Fire Code imposes the following requirements:

- (1) Flammable and combustible liquids must be removed from the tank and connecting piping;
- (2) Piping at the tank openings that is no longer in use must be disconnected;
- (3) Piping must be removed from the ground, except where a fire code official determines that removal is not practical;
- (4) Tank openings must be capped or plugged, leaving a 0.125 inch to 0.25 inch diameter opening for pressure equalization;
- (5) Tanks must be purged of vapor and inverted before removal; and
- (6) All exterior above-grade fill and vent piping must be permanently removed.¹⁹

Once a tank is removed, it must then be disposed of in accordance with federal, state, and local regulations.

[h] Leak Detection

Leak detection is prominently addressed in the Fire Code. The Fire Code requires the maintenance of daily inventory records for USTs and mandates that each UST be equipped with a method of leak detection that is designed and installed in accordance with NFPA 30, as listed in [OAC 1301:7-7-47](#).²⁰ Before being placed in service, tanks must be tested (including testing for tightness) in the presence of a fire code official.²¹

Leaking tanks must be promptly emptied, repaired, and returned to service, abandoned, or removed.²² However, it is the ultimate decision of the local fire official whether or not the repair of leaking or deteriorated underground storage tanks containing flammable or combustible liquids will be permitted within his/her jurisdiction.²³

[3] Bureau of Underground Storage Tank Regulations

[a] Jurisdiction

BUSTR, a bureau of the Ohio Department of Commerce, Office of the

State Fire Marshal, has primary authority in Ohio for the regulation of most underground storage tanks containing petroleum or hazardous substances. “Hazardous substances” are those materials listed in [OAC 1301:7-9-03](#), excluding materials regulated by Ohio EPA as “hazardous wastes.” U.S. EPA has delegated to BUSTR authority to implement and enforce Subchapter IX of RCRA, which provides the federal authority for regulation of underground storage tanks. The BUSTR enabling statute and regulations²⁴ are generally consistent with the federal RCRA requirements.

Alert: BUSTR expects to enact new UST regulations in 2017. BUSTR anticipates filing the draft rules with the Joint Committee on Agency Rule Review (JCARR) in early 2017.²⁵ JCARR reviews proposed new, amended, and rescinded rules from Ohio agencies to ensure they do not exceed agency rule-making authority. The proposed rules incorporate new federal UST regulations that added new terms, revised definitions, and updated UST construction and operation standards. Among other things, the BUSTR rules also rescind the rule concerning sensitive areas; add three new chemicals of concern; change soil and groundwater action levels; and increase closure sampling requirements for pipe runs.

[b] Applicability

[R.C. Chapter 3737](#) and the BUSTR regulations apply to “owners” and “operators” of USTs or UST systems. The term “underground storage tank,” for purposes of [R.C. Chapter 3737](#), means tanks and associated piping used to contain “regulated substances” (defined as petroleum or hazardous substances), provided that at least ten percent of the volume of the tanks and associated piping is beneath the surface of the ground.²⁶ However, the term **excludes** the following:

- a. Pipeline facilities and gathering lines regulated under the Natural Gas Pipeline Safety Act, [49 U.S.C. § 2001](#);
- b. Farm or residential tanks with a maximum capacity of 1,100 gallons, which are used for storing motor fuel for noncommercial purposes (i.e., not for resale);
- c. Tanks used for storing heating fuel for consumptive purposes on the

premises where stored;²⁷

- d. Surface impoundments, pits, ponds, or lagoons;
- e. Storm water or waste water collection systems;
- f. Flow-through process tanks;
- g. Storage tanks located in underground areas such as basements or mines, where the tanks are located on or above the surface of the floor;
- h. Septic tanks; and
- i. Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations.²⁸


An “operator” of an UST is the person in daily control of, or having responsibility for the daily operation of, the UST.²⁹

Determining who is the “owner” of an UST requires a determination of when the tank was last in use. If the tank was last in use on or after November 8, 1984, the “owner” is the person who currently owns the tank.³⁰ If the tank was last in use before November 8, 1984, the “owner” is the person who owned the tank immediately before the discontinuation of its use.³¹ In either case, the term “owner” also includes any person holding a legal, equitable, or possessory interest of any kind in the underground storage tank or the property where it is located, including a trust, vendor, vendee, lessor, or lessee.³² Thus, a person may be liable for failure of a tank to meet applicable regulatory requirements solely by virtue of one’s ownership (or lease) of property where an UST is located. However, the term “owner” does *not* include any person who, without participating in the management of an UST and without otherwise being engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person’s security interest in the tank.³³

[c] Permit Requirements

The installation, repair, and removal of USTs must be supervised by personnel certified by the Fire Marshal.³⁴ In addition, the installation, repair, abandonment, or removal of USTs requires prior issuance of a permit by the Fire Marshal or the local fire department.³⁵

To obtain a permit, a permit application must be submitted to the Fire Marshal, accompanied by drawings and related information.³⁶ If, after review, the permitting authority determines that the proposed activity complies with BUSTR regulations, and the appropriate fee is paid, a permit will be issued.³⁷ Once issued, a permit may be revoked upon discovery of any violations of the BUSTR regulations, for violations of permit-specific conditions, or for any false statement or misrepresentation as to a material fact on the permit application.³⁸ All activity requiring a permit must be supervised by a contractor certified under [OAC 1301:7-9-11](#), and inspected by an employee of the Fire Marshal or an UST inspector certified pursuant to [OAC 1301:7-9-15](#).³⁹

 **Strategic Point:** The Fire Marshal or local fire department with delegated authority may give verbal approval to allow actions before issuing a permit.

[d] Registration Requirement

UST owners must register new and existing USTs by submitting an annual registration application and fee to the Fire Marshal.⁴⁰ UST systems taken out of service (but not removed) after January 1, 1974 in a manner not in compliance with the Ohio Fire Code (or then applicable tank requirements) also must be registered.⁴¹ For new tanks, the application and fee are due within 30 days of bringing the tanks into service.⁴² For existing tanks, the application and fees must be submitted on or before July 1 of each year.⁴³ The registration requirements do not apply to the following classes of tanks:

- a. USTs holding hazardous wastes listed or identified under [Chapter 3745-51 of the Ohio Administrative Code](#);
- b. A wastewater treatment tank system that is part of a wastewater treatment facility regulated under §§ 307(b) or 402 of the federal Clean Water Act;
- c. Equipment or machinery containing regulated substances for operational purposes, such as hydraulic lift tanks and electrical equipment tanks;
- d. USTs with capacity of 110 gallons or less;

- e. USTs containing a de minimis concentration of regulated substances; and
- f. Emergency spill or overflow containment USTs that are expeditiously emptied after use.⁴⁴

Practice Aid: The registration application for USTs can be found at http://www.com.ohio.gov/documents/fire_COM5211.pdf.


Owners or operators of new UST systems must submit an installation application to the Fire Marshal within 30 days of bringing the system into service.⁴⁵ If the new UST system is installed in a location for which there is no current registration, the owner of the new system must submit a new facility registration application.⁴⁶ If the new UST system is installed at a location with an existing registration, the owner must submit a modified registration application.⁴⁷ Where ownership of an UST system is transferred, within 30 days of the transfer, the new owner must submit a transfer of UST registration application to the Fire Marshal.⁴⁸

[e] Standards and Operating Requirements for UST Systems


BUSTR's regulations governing operating requirements for UST systems are located in [OAC 1301:7-9-06](#). All owners and operators must maintain and operate spill and overfill prevention equipment.⁴⁹ The regulations require owners and operators to ensure that the volume available in every receiving UST is greater than the volume of product to be transferred to the tank and that all transfer operations be actively monitored.⁵⁰ Further, owners and operators are required to report, investigate and clean up any spills and overfills, inspect all spill prevention equipment after each delivery, dispose of any substances or debris from the equipment, and ensure all spill prevention equipment is in good operating condition.⁵¹

UST owners and operators also are required to maintain and operate corrosion protection equipment; systems equipped with cathodic protection systems must be inspected every three years after the first six months after installation.⁵² Records of these inspections must be maintained at the facility or at an alternate secure location for five years.⁵³ UST piping also is regulated, with mandatory yearly inspections to detect degradation such as visible corrosion, peeling, cracking or excessive distortion of the UST and piping

components, and clogged filters or sludge buildup.⁵⁴ Submersible and dispenser containment equipment must also be inspected on a yearly basis for proper operation and the presence of water, regulated substances, and debris.⁵⁵

 **Strategic Point:** In the context of buying and selling property that includes an UST system, inspection records can often be a good indication of the maintenance and operation of the system.

Secondary containment for USTs also is subject to inspection for tightness, beginning December 31, 2005 for new equipment, and every three years thereafter.⁵⁶ The equipment subject to inspection includes: (1) new containment equipment; (2) all containment equipment associated with USTs containing hazardous substances; and (3) all containment equipment associated with USTs installed in sensitive areas.⁵⁷

 **Warning:** Tank tightness testing can be done in more than one manner; however, regardless of the manner selected, the testing should be performed with care as excessive pressure used for testing may actually damage older UST systems.

As discussed in more detail below, UST owners and operators are required to operate and maintain release detection equipment, including daily product inventory control, and inspect the equipment on a monthly basis to ensure its integrity.⁵⁸ A reporting duty is triggered if a release detection method fails to achieve a passing result or goes into alarm.⁵⁹ Proper leak detection methods for piping and containment systems include automatic leak detectors (tested annually) and underground piping subject to an annual precision test conducted by an independent inspector, and a monthly on-site test.⁶⁰ Release detection methods for hazardous substance USTs in sensitive areas also are subject to annual testing requirements.⁶¹


[f] Release Detection and Reporting Requirements

[i] USTs

USTs containing one or more of the hazardous substances listed at [OAC 1301:7-9-03\(D\)](#) are subject to release reporting requirements under [OAC 1301:7-9-03](#). As defined in the regulations, a release of a hazardous substance

means “any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of a hazardous substance(s) into ground water, a surface water body, subsurface soils or otherwise into the environment,” including releases occurring while transferring or attempting to transfer hazardous substances into an UST.⁶² A “suspected release” means evidence that a release of a hazardous substance exists.⁶³ Such evidence may be obtained through: (1) monitoring results from a release detection method, unless contradicted by further data or by a monitoring device found to be defective; (2) unusual operating conditions observed by the owner or operator, unless immediately repaired; (3) the presence of free hazardous substances discovered during removal of an UST system; (4) discovery of hazardous substance vapors within or along building foundations or other subsurface manmade structures; (5) the presence of free hazardous substances in a monitoring or observation well on UST property; (6) the presence of hazardous substances observed on a water body on UST property; or (7) the presence of hazardous substances in an UST secondary containment system on the UST site.⁶⁴

Owners and operators of USTs must report a release of hazardous substances or suspected release to the Fire Marshal and local fire department within 24 hours of discovery, with the exception that spills or overfills of twenty-five gallons or less that do not reach a surface water body and are cleaned up within 24 hours need not be reported.⁶⁵ Compliance with BUSTR reporting requirements does not relieve the owner or operator from compliance with any other applicable state, federal or local law, regulation, or ordinance.⁶⁶

 **Strategic Point:** One of the more common compliance scenarios that arises in Ohio with regard to UST releases involves the presence of a leak from an old UST system on land, purchased by a landowner who is unaware of the UST’s presence. Generally speaking, upon discovery of the release, the current owner of the property will be held responsible. BUSTR takes the position that if the material is a regulated substance, it does not matter when the release occurred. Instead of tracking down the owner who was responsible for creating the release, BUSTR will typically require the current owner to perform the cleanup, and will hold that owner liable for its cost. Consequently, to avoid potentially burdensome remediation costs, prospective landowners should perform appropriate due diligence

before purchasing land in Ohio that could be the site of a historic UST release. BUSTR's position, however, is not the only viable legal interpretation regarding liability. Engaging an environmental attorney to protect your interests against BUSTR's enforcement position is advisable should these circumstances arise.

BUSTR regulations require the owner or operator to monitor all USTs at least every 30 days for releases, with certain exceptions.⁶⁷ Underground piping and containments must also be equipped and monitored for releases at least every 30 days, with a few exceptions.⁶⁸

[ii] Underground Piping Requirements

Underground piping that contains a regulated substance must be monitored for releases by the owner or operator as follows: (1) underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector attached to the piping; (2) underground piping that conveys regulated substances under suction must have a line tightness test conducted at least once every 36 month period, unless that owner or operator can demonstrate: (a) the underground piping operates at less than atmospheric pressure; (b) the piping is sloped so that its contents will drain back into the tank if suction is released; (c) only one check valve is included in each suction line; and (d) the check valve is located directly below and as close as practical to the suction pump.⁶⁹ Furthermore, new underground piping and containment systems must be monitored with sensors capable of detecting a liquid release before the release reaches the lowest penetration in the containment system.⁷⁰ Finally, any alarm from a sensor in any containment system must be evaluated within 24 hours to confirm proper operation or to confirm the presence of a release.⁷¹

[iii] USTs Containing Hazardous Substances in “Sensitive Areas”

The BUSTR regulations contain special provisions for release detection requirements for UST systems located in specified “sensitive areas” above and beyond those applicable to other USTs. Subject to a few exceptions, existing UST systems located in sensitive areas must be equipped, operated, and maintained pursuant to the performance standards for new UST systems set forth in [OAC 1301:7-9-06\(B\)](#).⁷² In addition, sensitive area USTs must

generally satisfy the release detection requirements for new UST systems included in [OAC 1301:7-9-07\(B\)](#).⁷³

[iv] Release Detection Methods

BUSTR's regulations prescribe particular methods of release detection.⁷⁴ Manual tank gauging must be conducted weekly.⁷⁵ During tank gauging, liquid level measurements must be taken at the beginning and end of a time period of at least 36 hours during which no liquid is added to or removed from the tank, measurements must be based on an average of two consecutive stick readings from the beginning and ending of the period, and equipment used must be capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch.⁷⁶ Equipment for automatic tank gauging that tests for the loss of regulated substance and conducts inventory control must be able to detect a two-tenth of a gallon per hour leak rate from any portion of the tank.⁷⁷ Interstitial monitoring between the UST system and a secondary barrier immediately around or beneath the UST system may be used, but only if the UST system is designed, constructed, and installed to detect a release from any portion of the tank that routinely contains a regulated substance.⁷⁸

[v] Release-Related Recordkeeping Requirements

All UST system owners and operators are required to maintain the following records: (1) all written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for the life of the UST and for five years after closure of the system; (2) the results of any sampling, testing, or monitoring must be maintained for at least two years, with the results of tank tightness testing retained until the next test is conducted; and (3) written documentation of all calibration, maintenance, and repair of release detection equipment permanently located at the facility must be maintained for the life of the equipment and for two years thereafter.⁷⁹

[g] Release Response and Corrective Action

As indicated above, confirmed and suspected releases from petroleum USTs must be reported to the State Fire Marshal and the local fire department

within 24 hours of discovery by the owner or operator, with the exception of spills or overfills of twenty-five gallons or less that occur during transfer, do not reach a surface water body, and are cleaned up to pre-release conditions within 24 hours.⁸⁰ If a spill or overfill occurs during transfer of petroleum product into an UST and the spill results in a release to a nearby surface water body or a release of more than twenty-five gallons, the owner or operator must immediately contain the release to the extent practicable.⁸¹

In some cases, a release from an UST may be suspected but is not readily apparent, in which case an investigation process may be commenced to detect leaks that escape immediate discovery. According to the regulations, the purpose of such an investigation is to “determine if a closed-in-place, removed, or existing UST system is leaking or has leaked, to identify the source of a release,” and to determine the extent of that release.⁸²

The initial steps consists of an UST system evaluation, which includes both aboveground and below ground inspection for releases.⁸³ The second step is a tightness test, which must be conducted within seven days of the discovery of a suspected release, and the results of the test reported to the Fire Marshal within 24 hours.⁸⁴ If free product is discovered in an UST and leads to suspicion of a release, the owner or operator must demonstrate, within seven days of discovery, that the secondary containment system is tight and has not released petroleum into the environment.⁸⁵ The third step is a “site check,” which requires that within 90 days of: (1) a failed tightness test for secondary containment; (2) discovery of a suspected spill; or (3) an observed release, the owner or operator must “determine whether subsurface soil or ground water on an UST site have concentrations of chemicals of concern above the action levels” set forth under the Code.⁸⁶ A site check must include: (1) a “Tier 1” Source Investigation (described in subsection [g] below); (2) closure of an UST system or portion of an UST that is the potential source of the release; or (3) collection of a minimum of three samples from soil immediately below the source of the suspected release.⁸⁷

Once a release has been confirmed, the owner or operator of an UST system has an obligation to mitigate the release. The following actions must be taken within 24 hours of the release to mitigate the harm: (1) all immediate action necessary to prevent further petroleum release; (2) inspection for aboveground releases or exposed below ground releases and necessary steps

to prevent migration of releases; (3) continued monitoring and mitigation of additional fire and safety hazards posed by vapors or free product that have migrated to subsurface structures; (4) management of excavated soil containing contaminants; (5) identification and mitigation of fire, explosion, vapor and safety hazards where a receptor is known to have been affected; and (6) testing of drinking water wells within three days of discovery of the release.⁸⁸ In addition to mitigation duties, owners and operators must submit a written report to the Fire Marshal within 20 days of beginning immediate corrective actions, which must specify the date and time the release was discovered, the address and location of affected property, an overview of activities leading to the discovery, the type and amount of product released, a description of the UST system and its operation status, a description of the amount and disposition of any materials generated, and copies of the site maps, plans, and related photographs.⁸⁹

Where an owner or operator discovers the presence of free product in an UST system, he must immediately implement a free product recovery program and remove free product in a manner that minimizes the spread of contaminants to previously unaffected areas.⁹⁰ The owner must also notify the Fire Marshal within 24 hours upon commencing removal activities and submit a written report on a monthly basis thereafter until removal is complete.⁹¹

[h] The Tier System for Corrective Action

BUSTR has devised a Tier System for corrective action, designed to address cleanup through a multi-step approach. The process begins with a “Tier 1 Source Investigation,” which is designed to determine the concentrations of chemicals of concern in the source area. A Tier 1 Source Investigation includes the following components: (1) a Source Investigation to identify potential sources of a release, chemicals of concern, and a subsurface investigation to determine the presence and concentrations of chemicals of concern and geologic characteristics of the UST site; (2) an Action Level Determination; and (3) preparation of a Tier 1 Source Investigation Report, which must be submitted to the Fire Marshal.⁹²

If the Source Investigation Report indicates the presence of contaminants in concentrations above acceptable levels, the owner or operator must submit a Tier 1 Delineation Notification to define the extent of the contamination

and its potential effect on groundwater, and in particular on drinking water use.⁹³ In connection with the Tier 1 Delineation Notification, testing on groundwater and drinking water in the vicinity of the release is required, and a summary of the results must be submitted.⁹⁴ The Fire Marshal will determine the appropriate course of subsequent action. If the concentrations of contaminants exceed applicable action levels, which are set forth at [OAC 1301:7-9-13\(J\)](#), the owner or operator may be required to conduct an Interim Response Action, a Tier 2 Evaluation, a Tier 3 Evaluation, or to submit a Remedial Action Plan.⁹⁵ Each of these options is designed to provide a detailed remediation plan of action, and must be tailored to the circumstances at individual release sites.

Once the Fire Marshal determines the appropriate course of remediation action, a monitoring plan typically is required to demonstrate that all appropriate remediation activity has been completed and that no further action is required.⁹⁶

Checklist for Compliance with the Tier System for Corrective Action:

- Select an environmental professional—not just a contractor—who has substantial experience with the BUSTR Tier System.
- Confirm that the selected environmental professional has experience with evaluating alternative pathways and resolution options to minimize the burdens under the Tier System.
- Ensure that the selected environmental professional has experience in navigating the Tier System from initial discovery through the No Further Action resolution.
- Confirm that the selected environmental professional has experience with the practical aspects of corrective action, including issues such as location and procedures for soil sampling and data collection.
- Ensure that the selected environmental professional has a comprehensive understanding of the BUSTR corrective action time frames.

[i] Voluntary Corrective Action

In addition to the mandatory corrective action provisions under the Tier System, BUSTR oversees a voluntary corrective action program. Voluntary corrective action is defined as “any and all corrective action undertaken by a person who is not an owner or operator ... or otherwise potentially liable for the costs of corrective action in ... response to a release or suspected release from a petroleum UST system”⁹⁷ According to the BUSTR regulations, any person having legal, equitable, or possessory interest in a parcel of property may undertake a voluntary corrective action in response to a release or suspected release from a petroleum UST system.⁹⁸ Once the person who undertook the voluntary corrective action demonstrates that remediation standards have been met, the Fire Marshal will issue a notice that no further corrective action is required.⁹⁹ In undertaking the voluntary corrective action, the party has not thereby assumed any liability or responsibility for the release.¹⁰⁰

[j] Tank Closure

BUSTR regulations impose tank closure obligations upon owners, operators, and in some cases, those who simply own the land where an UST is located.¹⁰¹ The closure regulations cover cases in which USTs have been out of use for under 90 days (“temporarily out of service”), over 90 days (“temporary closure”), over twelve months, and when an UST has been abandoned. UST systems that have been temporarily taken out of service must have the fill line, gauge opening, and dispensing unit secured against tampering, but the vent lines are to remain open and functioning.¹⁰² If an UST system is out of service for more than 90 days, the vent lines are to be left open and functioning, all other lines, pumps, manways, and ancillary equipment must be capped and secured, the UST system must be emptied such that all regulated substances have been removed to the point that no more than one inch of residue remains, and the owner or operator must secure an out-of-service permit.¹⁰³ If an UST system is out of service for more than 12 months, the owner, operator, or anyone with a legal possessory interest in the land where the UST is located is obligated to: (1) within 30 days, place the UST system back into service; (2) within 30 days, permanently remove, close-in-place, or perform a change-in-service of the system; or (3) request an extension of the twelve month out-of-service period, which must be submitted in writing to the Fire Marshal.¹⁰⁴ Extensions are granted at the discretion of the Fire Marshal.

BUSTR also provides requirements for the closure in place of UST systems (as opposed to physical removal of the UST). An UST system may not be closed in place unless approved in writing by a certified fire safety inspector.¹⁰⁵ An UST system may be closed in place for the following reasons: (1) the system is located near or under equipment that will likely be damaged or weakened if the UST system is removed; (2) the system is situated in a location where the removal is physically impossible; or (3) removal of the UST system may expose people or the environment to unreasonable hazards.¹⁰⁶

Practice Point: When removing an UST, it is necessary to engage an UST installer/remover who has been certified under the Fire Marshal's training and competency requirements.

Permanent removal requirements for UST systems are found in [OAC 1301:7-9-12\(G\)](#), which provides that (1) all UST systems or any part of an UST system permanently removed must be removed from the ground, unless a certified safety inspection authorizes closure-in-place; (2) all UST systems being permanently removed must comply with the cleaning, removal, and safety requirements of the American Petroleum Institute Recommended Practice; (3) the UST must be maintained in a safe condition by regularly monitoring to ensure that explosive vapors do not accumulate; (4) all liquid and residue must be removed from the UST before it leaves the site; (5) the UST must be rendered unusable and free of explosive vapors by crushing or cutting up the UST, or by perforating the UST with holes before the UST leaves the site; (6) all backfill from tank activity excavation, piping trenches, dispensing unit areas, and remote fill pipe trenches must be removed; (7) no more than twelve inches of native soils may be removed from the side walls and bottom of the tank cavity excavation, piping trenches, dispensing unit areas, and remote fill pipe trenches; and (8) backfill and native soils removed from the tank cavity excavation, piping trenches, dispensing unit areas and remote fill pipe trenches may be stored on site for up to 120 days with proper containment.¹⁰⁷

Before closure, a change in storage of materials from regulated to non-regulated substances, or a period in which an UST system is out of service, BUSTR requires that the owner or operator conduct a Closure Assessment. A Closure Assessment must include the following: (1) a visual evaluation of the

UST site to identify evidence of past or present operation problems; (2) soil samples for permanent removal of UST systems or modification of piping and dispensers are to be taken from each UST cavity excavation, piping run excavation, remote fill area, and dispenser island; and (3) water samples for permanent removal.¹⁰⁸ If the soil samples collected and analyzed are found to contain contaminants at levels higher than the appropriate action levels, the owner or operator must conduct corrective action at the site. Once the Closure Assessment is complete, the owner or operator must submit a Closure Assessment Report summarizing pertinent information for the facility and the results of the Closure Assessment, including UST system data, waste disposal data, sampling data, and laboratory data.¹⁰⁹ Once a Closure Assessment has been performed that indicates the site meets applicable action levels, a No Further Action letter (NFA) may be obtained from BUSTR, noting that all corrective action steps have been completed and no further remedial action is required for compliance with BUSTR regulations.

Checklist for Navigating UST No Further Action Letters:

- Enlist an environmental attorney with experience obtaining, interpreting, and maintaining NFAs.
- Ensure that the attorney can articulate the scope of the NFA, including any limitations on future use of the land, such as a deed restriction.
- If land subject to a NFA is purchased, the purchaser should engage an environmental attorney to analyze the scope and application of the NFA under applicable legal requirements.

[k] Financial Responsibility

BUSTR regulations create a two-part program to ensure that each UST owner or operator maintains sufficient financial reserves or insurance to address certain contingencies relating to the ownership or operation of USTs. First, all petroleum UST owners and operators must participate annually in the Petroleum Underground Storage Tank Financial Assurance Fund (the “Fund”) to obtain coverage for corrective actions and third-party liability resulting from UST spills, releases or leaks.¹¹⁰ Effective April 1, 2015, the annual fee is \$400 per tank for a \$55,000 deductible or \$600 per tank for an

\$11,000 deductible.¹¹¹ The annual fee must be submitted to the Petroleum Underground Storage Tank Release Compensation Board (PUSTRCB) by July 1 of each year.¹¹²

Second, all petroleum UST owners and operators must annually demonstrate financial responsibility for the applicable deductible referenced above.¹¹³ There are seven mechanisms available under the rule to demonstrate financial responsibility:

- (1) financial test of self-insurance;
- (2) guarantee;
- (3) insurance or risk retention group coverage;
- (4) surety bond;
- (5) letter of credit;
- (6) trust fund; or
- (7) any combination of the foregoing mechanisms.¹¹⁴

Owners and operators that satisfy the following requirements are eligible for reimbursement of corrective action costs from the Fund:

- (1) submit an application for reimbursement within one year from the date of the release or suspected release;
- (2) possess a valid certificate of coverage;
- (3) obtain authorization from the Fire Marshal to perform the corrective action;
- (4) demonstrate that the corrective action costs are necessary;
- (5) establish that the UST from which the suspected release or release occurred was properly registered or good cause existed for the failure to register it;
- (6) comply with orders issued under [Sections 3737.88 and 3737.882 of the Ohio Revised Code](#);
- (7) demonstrate financial responsibility for the deductible amount;

- (8) submit registration applications without any false attestations;
- (9) satisfy the suspected release and release reporting requirements set forth in [OAC 1301:7-9-13](#); and
- (10) comply with applicable regulations, other than those regarding registration.¹¹⁵

The maximum disbursement from the fund for any single petroleum release is the difference between the deductible amount and \$1 million, not to exceed a per person annual disbursement of \$1 million for owners/operators of up to 100 USTs, \$2 million for owners/operators of 101–200 USTs, \$3 million for owners/operators of 201–300 USTs, and a maximum of \$4 million for owners/operators of more than 300 USTs.¹¹⁶ To receive funding, however, the owner or operator must demonstrate PUSTRCB financial responsibility for the first \$50,000 of the cost of corrective action and compensation.¹¹⁷

[I] Operator Training

BUSTR regulations provide for three classes of operators, each of which must undergo training to operate a UST.¹¹⁸ All UST operators must be trained and certified, and owners and operators must maintain documentation identifying Class A, Class B, and Class C operators and provide a list of all designated operators for a UST site to the fire marshal, upon request.¹¹⁹ For a full list of requirements for each class of UST operator, see [OAC 1301:7-9-19\(C\)](#).

Footnotes — § 12.03:

- ¹ [OAC 1301:7-7-34\(A\)](#).
- ² [OAC 1301:7-7-34\(B\)\(1\)](#).
- ³ [OAC 1301:7-7-34\(B\)\(1\)](#).
- ⁴ [OAC 1301:7-7-34\(C\)\(2\)](#).
- ⁵ [OAC 1301:7-7-34\(C\)](#).
- ⁶ [OAC 1301:7-7-34\(D\)\(1\)\(a\)](#).
- ⁷ [OAC 1301:7-7-34\(D\)\(2\)\(i\)\(i\)\(a\)–\(c\)](#).

⁸ OAC 1301:7-7-34(D)(2)(i)(iv).

⁹ OAC 1301:7-7-34(D)(2)(i)(v)(a).

¹⁰ OAC 1301:7-7-34(D)(2)(i)(vi)(f).

¹¹ OAC 1301:7-7-34(D)(2)(i)(vi)(h).

¹² OAC 1301:7-7-34(D)(2)(k)(i).

¹³ OAC 1301:7-7-34(D)(2)(k)(ii)–(iv).

¹⁴ OAC 1301:7-7-34(D)(2)(m)(i)(a).

¹⁵ OAC 1301:7-7-34(D)(2)(m)(ii)(a).

¹⁶ OAC 1301:7-7-34(D)(2)(m)(ii)(b).

¹⁷ OAC 1301:7-7-34(D)(2)(m)(i)(c).

¹⁸ OAC 1301:7-7-34(D)(2)(m)(i)(d).

¹⁹ OAC 1301:7-7-34(D)(2)(n).

²⁰ OAC 1301:7-7-34(D)(2)(l).

²¹ OAC 1301:7-7-34(D)(2)(l).

²² OAC 1301:7-7-34(D)(2)(g)(x)(a).

²³ OAC 1301:7-7-34(D)(2)(g)(xi)(a).

²⁴ R.C. 3737.87 *et seq.*; OAC 1301:7-9-01 to 20.

²⁵ *BUSTR Rules: Second Draft*, Ohio.gov, available at http://com.ohio.gov/documents/fire_BUSTR_rule_Introduction.pdf.

²⁶ R.C. 3737.87(P); OAC 1301:7-9-02(B)(64).

²⁷ Note, however, that the “heating oil exemption” may be lost if the oil is used for a secondary purpose, such as the fuel for an emergency generator at the facility.

²⁸ OAC 1301:7-9-02(B)(64)(a)–(i).

²⁹ OAC 1301:7-9-02(B)(38).

³⁰ R.C. 3737.87(H)(1); OAC 1301:7-9-02(B)(41)(a).

³¹ R.C. 3737.81(H)(2); OAC 1301:7-9-02(B)(41)(b).

³² R.C. 3737.81(H)(2); OAC 1301:7-9-02(B)(41)(b).

33 R.C. 3737.87(H)(2); OAC 1301:7-9-02(B)(41)(b). The exclusion for a person holding “indicia of ownership in an underground storage tank system primarily to protect the person’s security interest” is similar to the secured lender exemption under CERCLA.

34 OAC 1301:7-9-12(D)(2).

35 OAC 1301:7-9-12(D)(1).

36 OAC 1301:7-9-10(C)(4).

37 OAC 1301:7-9-10(C)(4)(a).

38 OAC 1301:7-9-10(C)(4)(c).

39 OAC 1301:7-9-10(D).

40 OAC 1301:7-9-04(B), (C).

41 OAC 1301:7-9-04(B).

42 OAC 1301:7-9-04(C).

43 OAC 1301:7-9-04(B).

44 OAC 1301:7-9-01(C).

45 OAC 1301:7-9-04(C)(1).

46 OAC 1301:7-9-04(C)(2).

47 OAC 1301:7-9-04(C)(3).

48 OAC 1301:7-9-04(D)(1).

49 OAC 1301:7-9-06(D)(8).

50 OAC 1301:7-9-06(D)(8).

51 OAC 1301:7-9-06(D)(8).

52 OAC 1301:7-9-06(D)(2).

53 OAC 1301:7-9-06(D)(2).

54 OAC 1301:7-9-06(D)(4).

55 OAC 1301:7-9-06(D)(6).

56 OAC 1301:7-9-06(D)(6).

57 OAC 1301:7-9-06(D)(6).

58 See OAC 1301:7-9-07.

59 OAC 1301:7-9-07(D).

60 OAC 1301:7-9-07(D).

61 OAC 1301:7-9-06(D).

62 OAC 1301:7-9-03(B)(1).

63 OAC 1301:7-9-03(B)(2).

64 OAC 1301:7-9-03(B)(2).

65 OAC 1301:7-9-03(C)(1).

66 OAC 1301:7-9-03(C)(2).

67 OAC 1301:7-9-07(B), (C).

68 OAC 1301:7-9-07(B), (C).

69 OAC 1301:7-9-07(D)(2).

70 OAC 1301:7-9-07(D)(3).

71 OAC 1301:7-9-07(D)(3).

72 OAC 1301:7-9-06(C)(6).

73 OAC 1301:7-9-07(C)(3), (D)(3).

74 Additionally, testing methods to ensure that release detection equipment functions properly are codified at OAC 1301:7-9-07(F), which includes tightness testing for USTs, tightness testing for piping, and testing for containment systems and ancillary equipment.

75 OAC 1301:7-9-07(D)(1)(b).

76 OAC 1301:7-9-07(D)(1)(b).

77 OAC 1301:7-9-07(D)(1)(c).

78 OAC 1301:7-9-07(D)(1)(d). This section includes detailed requirements for detection methods for interstitial monitoring.

79 OAC 1301:7-9-07(E).

80 OAC 1301:7-9-13(D), (E).

81 OAC 1301:7-9-13(E).

82 OAC 1301:7-9-13(F).

83 OAC 1301:7-9-13(F)(1).

84 OAC 1301:7-9-13(F)(2)(a), (b).

85 OAC 1301:7-9-13(F)(2)(c).

86 OAC 1301:7-9-13(F)(3)(a).

87 OAC 1301:7-9-13(F)(3)(b). BUSTR prescribes detailed requirements for removal of an UST system upon the occurrence of specified conditions and provides sampling requirements for soil samples taken from the areas beneath the sources of release.

88 OAC 1301:7-9-13(G)(1).

89 OAC 1301:7-9-13(G)(2).

90 OAC 1301:7-9-13(G)(3).

91 OAC 1301:7-9-13(G)(3).

92 OAC 1301:7-9-13(H).

93 OAC 1301:7-9-13(H)(3)(c).

94 OAC 1301:7-9-13(I).

95 Each of these potential courses of action is described in detail in the Ohio Administrative Code at OAC 1301:7-9-13(K)–(N) but have not been addressed at length in this discussion for the sake of brevity.

96 OAC 1301:7-9-13(O).

97 OAC 1301:7-9-14(B)(1).

98 OAC 1301:7-9-14(C)(1).

99 OAC 1301:7-9-14(C)(2).

100 OAC 1301:7-9-14(C)(3).

101 OAC 1301:7-9-12.

102 OAC 1301:7-9-12(E)(2).

103 OAC 1301:7-9-12(E)(3).

104 OAC 1301:7-9-12(E)(6).

105 OAC 1301:7-9-12(F).

¹⁰⁶ OAC 1301:7-9-12(F).

¹⁰⁷ OAC 1301:7-9-12(G).

¹⁰⁸ OAC 1301:7-9-12(I)(2). Appropriate action levels for testing of the samples can be found at OAC 1301:7-9-12(I)(3).

¹⁰⁹ OAC 1301:7-9-12(J).

¹¹⁰ OAC 1301:7-9-05(G), 3737-1-04.

¹¹¹ OAC 3737-1-04(I), 3737-1-06(B); *2017 Tank Fees*, Ohio PUSTRCB, available at <http://www.petroboard.com/>.

¹¹² OAC 3737-1-04(D).

¹¹³ OAC 1301:7-9-05(G)(2). For UST classes exempt from the financial responsibility requirements, see OAC 1301:7-9-05(B).

¹¹⁴ OAC 1301:7-9-05; *Financial Responsibility Guidelines*, PUSTRCB, available at http://www.com.ohio.gov/documents/fire_FinRespFact.pdf.

¹¹⁵ OAC 3737-1-07(A).

¹¹⁶ R.C. 3737.91(D)(3).

¹¹⁷ R.C. 3737.91(E)(1).

¹¹⁸ OAC 1301:7-9-19.

¹¹⁹ OAC 1301:7-9-19(D).

§ 12.04. Enforcement

Chapter 3737 of Ohio Revised Code grants the Fire Marshal authority to implement and enforce BUSTR rules and regulations. This enforcement authority extends to entering and inspecting UST facilities, ordering corrective action, and requesting the Attorney General to institute civil proceedings. If a party subject to corrective action fails to comply with a directive of the Fire Marshal, that party may be assessed a civil penalty of up to \$10,000 for each day that the violation continues.¹²⁰ Action by the Attorney General may result in imposition of a civil penalty and/or injunctive relief.¹²¹ Any restrictions on the use of real property to enable a responsible party to complete corrective action must be contained in a deed or similar instrument, such as an environmental covenant, which must be recorded in the office of

the county recorder.

Ohio law imposes strict liability for costs incurred for corrective or enforcement action on UST owners and operators, subject to a few exceptions.¹²² No indemnification, hold harmless agreement, or conveyance is effective to transfer liability away from the responsible party.¹²³

Footnotes — § 12.04:

¹²⁰ R.C. 3737.882(C)(2).

¹²¹ R.C. 3737.882.

¹²² R.C. 3737.89.

¹²³ R.C. 3737.89(D).

§ 12.05. Federal Changes to UST Laws

[1] The UST Compliance Act of 2005¹²⁴

[a] Overview

On August 8, 2005, President Bush signed the Energy Policy Act of 2005 (the “Act”) into law. The Act is an omnibus law spanning a wide variety of areas of concern within the energy field. It constitutes an effort by the federal government to respond to the increasing costs of fuel, and attempts to direct the national focus to seeking and developing renewable sources of energy. The Act was also designed to establish greater transparency in the oil and electricity markets to limit market manipulation and increase the reliability of energy sources. Among its chief effects, the Act imposes greater monitoring and reporting requirements on regulated entities, which have increased compliance costs and related enforcement actions.

Subtitle B of Title XV focuses on USTs. Subtitle B amends the Solid Waste Disposal Act (SWDA), including amendments to trust fund distribution methods, inspection requirements, operator training, remediation of spills of fuel containing oxygenated fuel additives, release prevention, compliance and enforcement, delivery prohibitions, federal facilities, tanks on tribal lands, new measures to protect groundwater, and authorization of appropriations.

[b] Trust Fund Distribution

The Act requires U.S. EPA to distribute at least 80 percent of available funds to pay costs under cooperative agreements between owners/operators and U.S. EPA for corrective actions, necessary administrative expenses, or enforcement. Funds are distributed to states based on a prescribed allocation process that considers the particular circumstances underlying each state's request, including the number of federally-regulated USTs in the state, the number of leaking USTs, and the state's current performance in regulating USTs. The amount recoverable by the individual owner or operator is based on his or her demonstrated ability to pay, while still maintaining his or her business operations.

[c] Inspection of Underground Storage Tanks

Regulated USTs that had not been inspected since December 22, 1998 were required to be inspected by the Agency or a delegated state agency that receives funding under the Act by August 8, 2007. The inspection had to determine compliance with the Act and its regulations. Once the initial inspection was completed, regular inspections must take place every 3 years thereafter. Additionally, by August 8, 2009, U.S. EPA was required to compile and submit to Congress information on alternative compliance assurance programs, and by August 8, 2010, the inspecting authority was to have completed the first three-year inspection cycle.

[d] Operator Training

On August 8, 2007, U.S. EPA published guidelines specifying training requirements for persons with primary and daily responsibility for the on-site operation and maintenance of UST systems, as well as for those with primary responsibility for responding to related emergencies.¹²⁵ The guidelines take into account existing state training programs, current training programs employed by tank owners and operators, the high turnover rate of tank operators and personnel, the frequency of improvement in UST technology, the nature of the business, and the differences in the scope and length of training needed for various personnel. Further, the guidelines set forth the minimum requirements that a state's UST program must contain. By August 8, 2009, each state was required to have in place training requirements consistent with the guidelines published by U.S. EPA. State guidelines were

to be developed in cooperation with tank owners and operators and take into consideration existing state-mandated training programs. By August 8, 2012, states were to ensure that all three classes of operators were trained according to state-specific training requirements.

[e] Remediation from Oxygenated Fuel Additives

The Act provides federal funding for corrective actions with respect to release of fuels containing an oxygenated fuel additive that presents a threat to human health or welfare or to the environment. These corrective actions are to be carried out through a cooperative effort between U.S. EPA and the individual states.

[f] Release Prevention, Compliance, and Enforcement

Funds from the SWDA Trust Fund may be used to conduct inspections, issue orders, and bring actions by U.S. EPA or states for violations of state and/or federal regulations. For government-owned tanks, within two years after enactment of the Act, states receiving funding were required to submit compliance reports that list the location and owner of each UST that is out of compliance with the SWDA, and specify the date of the most recent inspection, and actions taken and planned to ensure future compliance. Further, each state must maintain a record of USTs regulated under this Act.

[g] Delivery Prohibition

Effective August 8, 2007, it became illegal to deliver, deposit, or accept a regulated substance into an UST at a facility identified by U.S. EPA or an individual state to be ineligible for such delivery, deposit, or acceptance. On August 8, 2006, U.S. EPA, with input from the states, UST owners, and product delivery industries, published guidelines detailing the processes and procedures it will use to implement these delivery prohibitions. The guidelines include the criteria for determining which UST facilities are ineligible, the mechanisms for identifying ineligible facilities, the process for reclassifying ineligible facilities, and processes for providing adequate notice to UST owners, operators, and supplier industries that an UST has been determined to be ineligible. However, U.S. EPA may give special consideration to USTs located in rural areas, where declaring its ineligibility would jeopardize the availability of fuel in remote areas. Civil penalties

attach for violations of these provisions.

[h] Federal Facilities

Each department, agency, or instrumentality of the federal government with jurisdiction over USTs or engaged in activity that involves the installation, operation, maintenance, or closure of an UST, or delivery to or acceptance of any regulated substance by an UST is subject to the requirements of this Act. Within one year from enactment of this Act, each federal agency that owns or operates an UST was required to submit a compliance report listing the location and owner of each UST, all tanks that are not in compliance with the Act, the date of the most recent inspection, each violation, the operator training programs currently in place, and any actions taken and planned to ensure future compliance.

[i] Secondary Containment

By February 8, 2007, each state receiving funding under Subtitle I of the SWDA was required to issue regulations mandating at least one of the following to afford greater protection to groundwater near or adjacent to an UST: (1) mandatory secondary containment for new tank and piping systems and for reconstructed portions of existing USTs; or (2) evidence of financial responsibility sufficient to cover the potential costs of corrective action related to future releases caused by improper manufacture or installation as well as installer certification.

Footnotes — § 12.05:

¹²⁴ Pub. L. No. 109-58, Energy Policy Act of 2005, Subtitle B, 1522–1540.

¹²⁵ See EPA, *Grant Guidelines to States for Implementing the Operator Training Provision of the Energy Policy Act of 2005*, available at https://www.epa.gov/sites/production/files/2014-02/documents/otgg_final080807.pdf (last visited Mar. 22, 2017).


§ 12.06. Aboveground Storage Tanks

ASTs are defined as tanks or other containers that are aboveground, partially buried, bunkered, or in a subterranean vault.¹²⁶ A permit is required to install, alter, place temporarily out of service, remove, abandon, or otherwise dispose of a flammable or combustible liquid AST or any line or dispensing device connected thereto.¹²⁷ Generally speaking, permits are

available from the list of officers identified in [R.C. 3737.14](#), but may be obtained from the Fire Marshal when they are not otherwise available from any other listed officer.

Spills or leaks from ASTs may result in contamination of soils, groundwater, or runoff to surface waters. To protect against such releases, U.S. EPA adopted Spill Prevention Control and Countermeasures (SPCC) regulations, which require owners and operators of ASTs to prepare and comply with written, site-specific plans for spill prevention.¹²⁸ The SPCC regulations apply to non-transportation-related facilities with a total aboveground oil storage capacity of more than 1,320 gallons (only containers with a capacity of 55 gallons or more are counted) or a combined underground oil storage capacity greater than 42,000 gallons and, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful into navigable waters.¹²⁹ In Ohio, the rules are administered by local fire departments operating under delegated authority from the State to each county.

Federal regulations governing ASTs also include several preventive measures designed to reduce the threat of contamination from unintended releases. All ASTs must have secondary containment to contain spills and allow for easier leak detection.¹³⁰ As an initial matter, the secondary containment must be constructed to hold up to 110 percent of the contents of the largest tank plus freeboard for precipitation and must be impermeable to materials being stored (methods include berms, dikes, liners, vaults, and double-walled tanks). Second, the owner or operator of an AST is required to routinely monitor the equipment to ensure that it does not leak. Immediately after installation, an audit by a professional engineer should be conducted to ensure proper construction and fittings. Thereafter, the owner or operator should conduct periodic inspections to monitor operating conditions. ASTs that have been out of operation for any period of time should be maintained and monitored, and, if left inactive for an extended period of time, should be removed.¹³¹

 **Strategic Point:** In addition to the requirements listed above, the federal government also recommends the following preventive measures for ASTs:

- Corrosion protection for the tank;

- Sealants on all surfaces that come into contact with storage tanks;
- Periodic cleanup of the containment areas;
- Measures to prevent evaporation, such as installation of a low-pressure valve and covers for the structure; and
- Registration programs for exempt tanks to expand the state's oversight role during the construction and operation of ASTs.¹³²

Alert: U.S. EPA must create new regulations that establish procedures, methods, equipment, and other requirements to prevent hazardous substance discharges. Most likely, the new regulations will resemble the SPCC regulations in place for oil.

Section 311(b)(5) of the federal Clean Water Act requires persons in charge of facilities (which would include ASTs) to immediately notify the National Response Center of discharges of “harmful quantities” of oil or a hazardous substance to navigable waters or adjoining shorelines.¹³³ For oil spills, U.S. EPA has determined that a “harmful quantity” is any quantity that causes a sheen or film on the receiving water, any quantity causing a sludge or emulsion beneath the surface of the water or upon the shoreline, or any quantity that exceeds an applicable water quality standard.¹³⁴

U.S. EPA has designated approximately 300 substances as “hazardous substances” and has identified the “reportable quantity” for each for purposes of Section 311 spill reporting.¹³⁵ Any release of a reportable quantity of a hazardous substance within a 24-hour period from an AST to a navigable water must be reported to the National Response Center.

Similarly, releases of reportable quantities of hazardous substances must be reported to the National Response Center and Ohio EPA under Section 103 of CERCLA and Section 304 of EPCRA.¹³⁶ Releases of petroleum products, while not subject to CERCLA, *are* subject to reporting requirements under EPCRA. Note, however, that under EPCRA, reporting is *not* required for releases that result in exposure to persons solely within the boundaries of the site on which the AST is located.¹³⁷

Practice Point: Releases/discharges are to be reported immediately

by telephone to the following offices:

U.S. EPA National Response Center (800) 424-8802

Ohio EPA (800) 282-9378

Necessary components of the required spill notification include: (1) location and source of the release; (2) chemical name or identity of any substance involved in the release and whether it is “extremely hazardous,” as defined at [40 C.F.R. § 355](#); (3) an estimate of the quantity of any substance released into the environment; (4) the time and duration of the release; (5) the environmental medium or media into which the substance was released; (6) any known or anticipated acute or chronic health risks associated with the release, and if known to the informant, advice regarding necessary medical attention; (7) proper precautions to take as a result of the release; and (8) the name and telephone number of the person or persons to contact regarding the release.¹³⁸

A follow-up written notification must be submitted within 30 days of the release.¹³⁹ The written notice must update all information provided in the initial verbal notification, as well as various additional information.¹⁴⁰ Failure to comply with either the verbal or written notification requirements can subject the owner or operator to civil or criminal penalties.¹⁴¹

Footnotes — § 12.06:

¹²⁶ See U.S. EPA, *Source Water Protection Practices Bulletin, Managing Above Ground Storage Tanks to Prevent Contamination of Drinking Water*, August 2010, available at <http://cantonohio.gov/water/pdf/SWProtection%20App%20D.pdf> (last visited Mar. 22, 2017).

¹²⁷ [OAC 1301:7-7-01\(E\)](#).

¹²⁸ See [40 C.F.R. § 112.3](#).

¹²⁹ [40 C.F.R. § 112.1](#).

¹³⁰ [40 C.F.R. § 112.7](#).

¹³¹ See U.S. EPA, *Source Water Protection Practices Bulletin, Managing Above Ground Storage Tanks to Prevent Contamination of Drinking Water*, August 2010, available at <http://cantonohio.gov/water/pdf/SWProtection%20App%20D.pdf> (last visited Mar. 22, 2017), citing requirements from [40 C.F.R. Part 112](#).

¹³² See [40 C.F.R. Part 112](#).

- 133 33 U.S.C. § 1321(b)(5).
- 134 40 C.F.R. § 110.3; OAC 3750-25-20.
- 135 40 C.F.R. § 117.3.
- 136 42 U.S.C. § 9603(a), 40 C.F.R. § 302.4; 42 U.S.C. § 11004, 40 C.F.R. § 355.40.
- 137 40 C.F.R. § 355.31; OAC 3750-25-01(B).
- 138 OAC 3750-25-25(A)(1)(d).
- 139 OAC 3750-25-25(A)(2)(a).
- 140 OAC 3750-25-25(A)(2)(b).
- 141 OAC 3750-25-25(B).

CHAPTER 13

RADIOACTIVE WASTE

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I.

OVERVIEW OF THE REGULATION OF RADIOACTIVE WASTE

§ 13.01. Introduction to Radioactive Waste

There are two kinds of radioactive waste: high-level radioactive waste and low-level radioactive waste. The majority of high-level radioactive waste generated in Ohio is fuel from the hot core of commercial nuclear power plants. A small percentage of high-level radioactive waste is additionally comprised of the waste materials that remain after the fuel from nuclear power plants is processed. Generally, all other radioactive material is considered low-level radioactive waste. Low-level radioactive waste in Ohio is generated by industries, research laboratories, hospitals, academic

institutions, government facilities, and some consumer products.

§ 13.02. Jurisdiction Over Radioactive Waste

[1] Role of the State of Ohio

In Ohio, the Department of Health (DOH) has general authority to regulate radiation, as it functions as Ohio's statutorily-designated radiation control agency.¹ The Director of Health possesses statutory authority to administer and enforce rules regulating generators of low-level radioactive waste.² Ohio has a Low-Level Radioactive Waste Facility Development Authority for licensing of handlers and registration of subject facilities.³ High-level radioactive waste storage is regulated by the Federal Nuclear Regulatory Commission ("NRC").

[2] Role of the Federal Government in Regulating Radioactive Waste

The federal government regulates radioactive waste through its agencies. Four federal agencies have promulgated regulations governing radioactive waste: (1) NRC; (2) the United States Environmental Protection Agency ("U.S. EPA"); (3) the Department of Transportation ("DOT"); and (4) the Department of Energy ("DOE"). The scope of the federal government's role in regulating radioactive waste to protect human health and the environment includes the following:

- NRC: Training and protection of employees from radiation at licensed facilities;⁴
- NRC: Requirements of low-level radioactive waste disposal facilities;⁵
- EPA: Protection of the public from radiation;⁶
- DOT: General requirements for the packing and transportation of radioactive waste;⁷
- DOE: Oversees programs and facilities related to DOE-generated radioactive waste.⁸

While the federal government's role in regulating radioactive waste is more expansive than that of the states, under the federal Atomic Energy Act, states may assume some aspects of federal regulatory authority over

radioactive materials pursuant to cooperative agreements with the NRC.

Footnotes — § 13.02:

¹ R.C. 3748.02.

² R.C. 3748.05.

³ OAC 3747 *et seq.*

⁴ 10 C.F.R. § 19; 10 C.F.R. § 51.

⁵ 10 C.F.R. § 61.

⁶ 40 C.F.R. § 190.

⁷ 49 C.F.R. §§ 171–179.

⁸ See, e.g., DOE Directive Order O435.1 (July 9, 1999).

§ 13.03. Midwest Interstate Low-Level Radioactive Waste Compact

Under the Low-Level Radioactive Waste Policy Act (as amended in 1985), states can join together to form compacts to promote building regional radioactive waste disposal facilities.⁹ Ohio has adopted the “Midwest Interstate Compact on Low Level Radioactive Waste” (“Midwest Compact”).¹⁰ The Midwest Compact gives the State of Ohio the right to exclude waste from a disposal facility from a state that is not part of the compact. Member states of the Midwest Compact include Minnesota, Wisconsin, Iowa, Missouri, Indiana, and Ohio.¹¹

Footnotes — § 13.03:

⁹ Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (Jan. 15, 1986).

¹⁰ R.C. 3747.01.

¹¹ See Midwest Interstate Low-Level Radioactive Waste Compact Commission, *About MCC*, at <http://midwestcompact.org/about/> (last visited Mar. 30, 2017).

§ 13.04. Ohio as a NRC Agreement State

The federal Atomic Energy Act allows states to regulate certain aspects

of radioactive waste traditionally reserved for the federal government. In 1999, Ohio became an NRC Agreement State, which means that most licenses in the state are subject to state regulation in lieu of federal regulations.¹² By virtue of its status as an NRC Agreement State, Ohio regulates licenses relating to source materials, by-product materials, and special nuclear materials in quantities not sufficient to form a critical mass. Critical mass is the smallest mass of fissionable material that will support a self-sustaining chain reaction.

While NRC Agreement States are permitted to regulate specific aspects of radioactive waste, the NRC retained jurisdiction over Ohio's two nuclear power plants, the Davis-Besse Nuclear Power Station and the Perry Nuclear Power Station, as well as the USEC Portsmouth Gaseous Diffusion Plant, and 19 material licenses.¹³

Footnotes — § 13.04:

¹² Regulatory Agreements: State of Ohio: Discontinuance of Certain Commission Regulatory Authority Within the State, 64 Fed. Reg. 49029 (Sept. 9, 1999).

¹³ Regulatory Agreements: State of Ohio: Discontinuance of Certain Commission Regulatory Authority Within the State, 64 Fed. Reg. 49029 (Sept. 9, 1999).

II.

TRANSPORTING RADIOACTIVE WASTE

§ 13.05. Jurisdiction Over Transporting Radioactive Waste

Federal and state agencies have authority over the shipment of radioactive waste. At the federal level, both the DOT and NRC have developed regulations for the packaging, labeling, routing, and shipment of radioactive waste.¹⁴ DOT regulations govern packaging of radioactive waste, carriers of radioactive materials, and restrictions for transport, including routing, handling, and storage. NRC regulations govern the design, use, and maintenance of shipping containers. The Public Utilities Commission of Ohio (“PUCO”) operates as Ohio’s routing agency for radioactive materials. The PUCO works closely with the Ohio Emergency Management Agency (“Ohio EMA”) and the DOH to conduct inspections of shipments of radioactive waste.¹⁵

Footnotes — § 13.05:

¹⁴ 49 C.F.R. §§ 171–179; 10 C.F.R. § 71.

¹⁵ The Public Utilities Commission of Ohio, *Radioactive Shipments and Security*, at <http://www.puco.ohio.gov/puco/index.cfm/be-informed/consumer-topics/radioactive-shipments-and-security/> (last visited Mar. 30, 2017).

§ 13.06. Role of Ohio Agencies

[1] Notification

A carrier of radioactive waste must notify Ohio EMA seven days prior to bringing a shipment of radioactive waste into Ohio. PUCO is then alerted within 24 hours of the shipment. If the shipment is for non-highway route controlled quantity shipments, the carrier is not required to provide advanced notification to the appropriate Ohio agencies.¹⁶

[2] Inspection of Carriers

PUCO assigns an inspector for radioactive waste shipments that enter Ohio. Inspections include a radiation survey, hazardous materials inspection, vehicle inspection, and review of the driver’s qualifications. The PUCO attempts to conduct the inspection at the nearest point of entry into the state.¹⁷

Footnotes — § 13.06:

¹⁶ The Public Utilities Commission of Ohio, *Radioactive Shipments and Security*, at <http://www.puco.ohio.gov/puco/index.cfm/be-informed/consumer-topics/radioactive-shipments-and-security/> (last visited Mar. 30, 2017).

¹⁷ The Public Utilities Commission of Ohio, *Radioactive Shipments and Security*, at <http://www.puco.ohio.gov/puco/index.cfm/be-informed/consumer-topics/radioactive-shipments-and-security/> (last visited Mar. 30, 2017).

III.

DISPOSAL OF RADIOACTIVE WASTE

§ 13.07. Laws and Regulations Governing the Disposal of Radioactive Waste

In 1980, Congress passed the Low-Level Radioactive Waste Policy Act

(as amended in 1985) that requires states to develop plans for disposing of their own low-level radioactive waste.¹⁸ Additionally, the Act encourages states to enter into interstate compacts¹⁹ in order to develop regional plans for disposing of radioactive waste. Ohio is the host state for the Midwest Compact. The specifics of the Midwest Compact are codified in Ohio law.²⁰

Footnotes — § 13.07:

¹⁸ Low-Level Radioactive Waste Policy Amendments Act of 1985, [Pub. L. No. 99-240](#), [99 Stat. 1842](#) (Jan. 15, 1986).

¹⁹ The Act defines a compact as “a compact entered into by two or more states” to share in the disposal of low-level radioactive waste. See [42 U.S.C. § 2021b](#).

²⁰ [R.C. 3747.01](#).

§ 13.08. Siting Requirements for Radioactive Waste Disposal

Both federal and Ohio law outline criteria for siting radioactive waste disposal facilities. Federal siting requirements for the land disposal of low-level radioactive waste are designed to meet performance objectives that: (1) protect the general public from radiation; (2) prevent individuals from inadvertently entering a disposal site; (3) protect individuals during operations; and (4) establish post-closure requirements.²¹ A complete list of federal siting criteria are listed in [10 C.F.R. § 61](#) and includes General Provisions (Subpart A), Licenses (Subpart B), Performance Objectives (Subpart C), Technical Requirements for Land Disposal Facilities (Subpart D), Financial Assurance (Subpart E), Participation by State Governments and Indian Tribes (Subpart F), and Records, Reports, Tests, and Inspections (Subpart G).

The Ohio legislature has enacted additional radioactive waste disposal facility siting criteria.²² These criteria are separated into two categories—exclusionary criteria and preference criteria. Exclusionary criteria set a floor for achieving and maintaining compliant disposal facilities. Preference criteria specify factors used to set sites apart for selection purposes.

Footnotes — § 13.08:

²¹ [10 C.F.R. § 61](#), subpt. C.

²² [R.C. 3748.04](#).

§ 13.09. Licensing Requirements for Disposal Facilities

The NRC licenses all radioactive disposal facilities in the United States. In order to obtain a license, a facility must first demonstrate compliance with certain performance objectives that includes an analysis of the long-term stability of the site.²³ In addition, the application must contain a detailed analysis of the design criteria, construction plans, operating plans, closure plans, technical analyses, emergency response plans, radiation protection, and quality and financial assurances.²⁴ The NRC must follow a specified process in reviewing license applications.²⁵ The NRC is currently involved in a rulemaking process to revise its regulations for Licensing Requirements for Land Disposal of Radioactive Waste.²⁶

Footnotes — § 13.09:

²³ 10 C.F.R. § 61.13.

²⁴ 10 C.F.R. § 61, subpt. B.

²⁵ 10 C.F.R. § 61.23.

²⁶ See 79 Fed. Reg. 4102 (Jan. 24, 2014) (Low Level Radioactive Waste Disposal Rulemaking and Strategic Assessment of Low-Level Radioactive Waste Regulatory Program).

§ 13.10. Waste Acceptance Criteria

In order for a radioactive waste disposal facility to properly accept waste, the waste must meet certain criteria defined by federal and state law. Federal regulations outline waste acceptance criteria.²⁷ Ohio law, however, implies that NRC regulations merely set minimum standards for the acceptance of low-level radioactive waste.²⁸ Federal and Ohio regulations on waste acceptance criteria may be broken down into the following areas:

- (1) waste that cannot be accepted;
- (2) contents of a waste container;
- (3) package requirements; and
- (4) acceptance requirements.²⁹

For a facility to properly accept radioactive waste, each container must be recorded on a waste manifest, be properly labeled, and have limits on its

radioactive contents.³⁰ Failure to comply with waste acceptance criteria can result in the return of the waste to the generator and/or the imposition of fines and penalties.³¹

Footnotes — § 13.10:

²⁷ 10 C.F.R. §§ 61.55 and 61.56.

²⁸ R.C. 3748.04.

²⁹ See generally 10 C.F.R. §§ 61.55–61.56; 10 C.F.R. § 71; R.C. 3747.01.

³⁰ 10 C.F.R. § 71; 49 C.F.R. §§ 172–173.

³¹ R.C. 3748.99.

§ 13.11. Naturally Occurring Radioactive Material in Oil and Gas Drilling Waste

Hydraulic fracturing for oil and natural gas in the Marcellus and Utica Shale formations in Ohio has increased significantly in recent years. Naturally occurring radioactive material (NORM), including radium-226 and radium-228, may be present in some shale formations in Ohio and in the resulting drilling waste. By statute, if the radionuclide concentrations of NORM are increased by human activities, the material may be categorized as technologically enhanced naturally occurring radioactive material (TENORM).³²

In 2013, the General Assembly added [R.C. 1509.074](#) to Ohio's Oil and Gas law. This provision contains new testing and disposal requirements for TENORM waste generated from the construction, operation, or plugging of horizontal hydraulically-fractured wells. For example, unless certain exceptions apply,³³ owners must determine the concentrations of radium in representative samples if the material is TENORM.³⁴ Some types of TENORM waste from oil and gas drilling are spent drilling muds, tank bottoms, and pipe scale. However, Ohio law excludes drill cuttings³⁵ from the definition of TENORM.³⁶ Therefore, NORM may be disposed of in solid waste landfills in Ohio. In contrast, TENORM containing radium-226 or radium-228 (or a combination of the two) in concentrations equal to or greater than 5 pico-Curies per gram may not be disposed of in solid waste landfills in Ohio.³⁷ Such waste must be disposed of in a licensed low-level

radioactive waste disposal site. In October 2013, Ohio EPA initiated Early Stakeholder Outreach to consider whether to develop rules for solid waste landfills and transfer facilities that want to accept TENORM wastes containing radium-226 or radium-228 in concentrations less than 5 pico-Curies per gram above natural background. To date, Ohio EPA has not yet promulgated or proposed such rules.

Footnotes — § 13.11:

³² R.C. 3748.01(X).

³³ See R.C. 1509.074(a)(2).

³⁴ R.C. 1509.074.(A)(1).

³⁵ Per R.C. 3748.01(Y), “drill cuttings” are defined as “the soil, rock fragments, and pulverized material that are removed from a borehole and that may include a de minimus amount of fluid that results from a drilling process.”

³⁶ R.C. 3748.01(X).

³⁷ R.C. 3734.02(P)(2).

CHAPTER 14

TOXIC CHEMICAL RELEASE AND EMERGENCY PREPAREDNESS

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I.

INTRODUCTION

§ 14.01. Scope

This chapter covers:

- Federal and State Overview [*see § 14.02 below*].
- State and Local Agencies [*see § 14.03 below*].
- Extremely Hazardous Substance Reporting [*see § 14.04[1] below*].
- Community Right-To-Know Reporting [*see § 14.04[2] below*].
- Toxic Release Inventory Reporting [*see § 14.04[3] below*].
- Emergency Release Notification [*see § 14.04[4] below*].

- Accidental Release Prevention [*see § 14.04[5] below*].
- Enforcement [*see § 14.05 below*].

II.

CHEMICAL RELEASE AND EMERGENCY PREPAREDNESS REGULATORY MANDATES

§ 14.02. Overview of Federal Authorities and State Programs

Ohio has established and implements a number of related but distinct regulatory programs to address risks posed by the use and storage of certain chemicals, chemical releases, and chemical emergencies. These state regulatory regimes arose from federal legislative mandates. Most of these federal mandates come from the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA),¹ although facility-specific risk planning requirements result from federal Clean Air Act (CAA)² mandates. These various regulatory programs, while driven by federal legislative mandates, are partly and, in some cases, substantially reliant upon state implementation or participation.³

Beyond requiring states to establish State Emergency Response Commissions (SERCs) and a network of local planning entities, EPCRA imposes four primary emergency planning and reporting mandates:

First, under EPCRA Sections 302 and 311, certain facilities are required to make one-time reports to specific state and local government entities where quantities of certain chemicals designated as either Extremely Hazardous Substances or Hazardous Chemicals at the facility exceed specified Threshold Planning Quantities (TPQs) at any time.⁴ These one-time reports are generally accomplished by submitting a Material Safety Data Sheet (MSDS) for each Extremely Hazardous Chemical and/or Hazardous Chemical exceeding the applicable TPQ to the state and local entities.

Second, facilities subject to the one-time MSDS reporting requirement under EPCRA Sections 302 and 311 are also subject to annual chemical inventory reporting obligations under EPCRA Section 312.⁵

Third, EPCRA Section 313 established the Toxic Release Inventory

reporting requirements, which requires certain, specified industries (mostly manufacturing sectors) to report annually if any individual facility manufactures, processes, or uses in specified ways quantities of Toxic Chemicals that exceed certain Toxic Chemical-specific regulatory thresholds.⁶

Fourth, EPCRA imposes emergency notification requirements on any facility owner or operator where any release of more than a specified Reportable Quantity of any hazardous chemical has occurred.⁷

As described more fully in §§ 14.03 and 14.04 below, Ohio laws and regulations largely mirror these federal mandates.⁸ One additional Ohio regulatory program mandating chemical Risk Management Planning (RMP) activities arises from the federal CAA Section 112(r) requirements.⁹ As described more fully in § 14.04 below, the Ohio regulations implementing the federal RMP requirements generally follow the federal regulatory framework.¹⁰

Footnotes — § 14.02:

¹ 42 U.S.C. § 11001 *et seq.*

² 42 U.S.C. § 7401 *et seq.*

³ For example, EPCRA is structured such that a network of state and local emergency planning and response entities are established to implement many of EPCRA's mandates at the state level. See 42 U.S.C. § 11001(a), (b) and (c).

⁴ 42 U.S.C. § 11002; 42 U.S.C. § 11021.

⁵ 42 U.S.C. § 11022.

⁶ 42 U.S.C. § 11023.

⁷ 42 U.S.C. § 11004.

⁸ See R.C. Chapters 3750 and 3751; OAC 3745-100.

⁹ 42 U.S.C. § 7412(r).

¹⁰ See OAC 3745-104 and 40 C.F.R. Part 68.

§ 14.03. State and Local Agencies

Ohio, like the other states, plays an integral role in implementing

EPCRA’s mandates at the state and local level. In enacting EPCRA, Congress directed state governors to establish a State Emergency Response Commission (SERC).¹¹ Ohio established its own SERC known as the Emergency Response Commission (ERC) in 1987.¹² EPCRA also directed state-created SERCs to establish emergency planning districts and Local Emergency Planning Committees (LEPC).¹³ Ohio’s ERC has accordingly established a number of emergency planning districts and LEPCs throughout the state.¹⁴

The ERC has a variety of mandates, including promulgating rules that establish state regulatory requirements equivalent to EPCRA, creating the state’s LEPCs, and working with Ohio EPA, the State Fire Marshal, and other state and local agencies in implementing and enforcing the regulatory programs.¹⁵ The regulations promulgated by the ERC to date largely mirror the federal EPCRA regulatory framework. However, the statutory language directing the ERC to establish and maintain state emergency response, right-to-know and release reporting programs “consistent with and equivalent in scope, coverage and content” to federal EPCRA, has been judicially interpreted to prescribe only baseline requirements and not prevent the ERC from promulgating rules that would be more stringent than federal EPCRA requirements.¹⁶ Ohio EPA also plays a vital role in implementing these requirements, including a primary role in emergency response to release notification and an enforcement role.

Footnotes — § 14.03:

¹¹ 42 U.S.C. § 11001(a).

¹² See Ohio Executive Order 87-16 (1987).

¹³ 42 U.S.C. § 11001(b) and (c).

¹⁴ In Ohio, each county has been designated an emergency planning district, with the exception of the district that combines Montgomery and Greene Counties. That district is known as the Montgomery Greene County Local Emergency Response Council. Each planning district has its own LEPC, initially established by the ERC.

¹⁵ Several state agencies maintain permanent seats on the ERC, including Ohio EPA, the State Fire Marshal, the Emergency Management Agency, the Attorney General, the Department of Transportation, the Department of Health, the Highway Patrol, and the Public Utilities Commission. Appointed seats on the Commission are allocated to local government, industry, environmental advocacy and firefighting representatives.

¹⁶ *Ohio Chamber of Commerce v. State Emergency Response Commission*, 64 Ohio St. 3d 619 (1992).

§ 14.04. Notification, Reporting, Planning and Recordkeeping Requirements

[1] Extremely Hazardous Substances Reporting

As outlined in § 14.02 above, federal EPCRA Section 302 requires facilities with any one or more Extremely Hazardous Substances¹⁷ in amounts exceeding Threshold Planning Quantities¹⁸ to notify state and local officials. This reporting requirement has been incorporated in Ohio law since 1988.¹⁹ This requirement is applicable to all “facilities,”²⁰ a broadly defined term, whereas several of the other reporting mandates discussed in this Chapter are applicable to a narrower universe of entities.²¹ Facilities have 60 days after accumulating on site a TPQ of any EHS to provide notification to the ERC and the LEPC.²² Facilities subject to this requirement shall also designate a facility emergency coordinator and notify the LEPC of the coordinator’s identity.²³

[2] Community Right-To-Know Reporting

[a] Material Safety Data Sheet Reporting

Community Right-To-Know reporting requirements, including MSDS reporting and annual inventory reporting, apply to all facilities that are required under the Occupational Safety and Health Administration’s Hazard Communication Standard²⁴ to have an MSDS available on site for each Hazardous Chemical²⁵ present above certain thresholds.²⁶ Facilities covered by the Right-To-Know reporting mandates must submit—one time only—an MSDS (or a list with equivalent hazard information) for each Hazardous Chemical produced, used or stored at the facility in an amount equal to or greater than a TPQ to the LEPC and their local fire department.²⁷ TPQs are generally 10,000 pounds for OSHA Hazardous Chemicals and range from 1 to 500 pounds for Extremely Hazardous Substances.²⁸ Where, after making an initial MSDS submission, a facility obtains a new Hazardous Chemical in a quantity equal to or exceeding a TPQ for the first time, it must supplement prior reporting by providing the LEPC and local fire department the new

chemical's MSDS or equivalent hazard information within 90 days after reaching the TPQ.²⁹

Trap: Failing to submit MSDS forms for new chemicals or mixtures is a common compliance problem. The best practice to prevent this problem typically involves environmental management system protocols that force analysis, review, and action whenever new materials are introduced into a facility.

[b] Annual Inventory Reporting

In addition to MSDS reporting, facilities covered³⁰ by Community Right-To-Know reporting requirements are also subject to annual inventory reporting. Covered facilities must submit annual inventory reports to the SERC, LEPC, and local fire department by March 1 each year covering activity at the facility during the preceding year.³¹ Compared to initial MSDS reporting, annual inventory reporting gives the public and first responders more detailed information about Hazardous Chemicals, including additional data on the identity, quantity, location, and potential health and environmental risks posed by such chemicals. Because Hazardous Chemicals and Extremely Hazardous Substances are often present in mixtures or trade name products stored or used at facilities, various calculations must be performed to determine whether TPQs have been exceeded and to determine specific quantity data needed for inventory reporting.

⚠ Warning: Sulfuric acid, an Extremely Hazardous Substance with a TPQ of 500 pounds, is often found in batteries used to power fork trucks at industrial and commercial facilities. One battery may have sufficient quantities of sulfuric acid to exceed the TPQ and trigger EPCRA Sections 302, 311, and 312.

Under the federal rules, annual inventory reporting data must be submitted either in general form (known as “Tier I” data) or in a more detailed form (known as “Tier II” data).³² Whereas Tier I data requirements address maximum and average daily amounts and general locations of regulated chemicals at facilities, Tier II data requirements generally mandate more detailed information on each regulated chemical and its location and manner of storage.³³ Ohio requires submission of the more detailed Tier II

information.³⁴ Regulated facilities can secure relief from disclosing information subject to trade secret protection where certain criteria are satisfied and procedures are followed.³⁵

[3] Toxic Release Inventory Reporting

Releases of “Toxic Chemicals” from a facility that occur in the ordinary course of business over a calendar year are potentially subject to annual Toxic Release Inventory (TRI) reporting under EPCRA Section 313 and corresponding Ohio law.³⁶ The scope of the releases covered by the statute range from emergency releases to releases that occur during normal business operations, such as waste disposal or permitted air emissions. The specific regulatory list of Toxic Chemicals³⁷ subject to TRI reporting is distinct from the universe of Hazardous Chemicals and Extremely Hazardous Substances subject to MSDS and Annual Inventory reporting. Generally, a facility is obligated to make a chemical-specific TRI report for any calendar year where the facility:

- (1) has ten or more full-time employees;
- (2) falls within Standard Industrial Classification Codes 20–39, 5169, 5171, or a few others that are subject to certain exceptions and/or limitations; and
- (3) manufactures, processes, or otherwise uses any regulated toxic chemical in excess of the applicable threshold quantity.³⁸

Toxic Chemicals that are “manufactured”³⁹ or “processed”⁴⁰ are generally subject to 25,000 pound annual reporting thresholds,⁴¹ whereas Toxic Chemicals “otherwise used”⁴² are typically subject to 10,000 pound annual thresholds.⁴³ Toxic Chemicals subject to special concern, often referred to as “persistent bioaccumulative toxics” (e.g., lead), are subject to far more stringent annual reporting thresholds, including some thresholds that are well below one pound per year.⁴⁴ When a facility analyzes whether annual reporting thresholds have been exceeded, small amounts of regulated Toxic Chemicals present in mixtures that fall below established regulatory *de minimis* thresholds need not be counted toward annual reporting thresholds.⁴⁵ Various regulatory exemptions, including specific exemptions for Toxic Chemicals present within manufactured articles,⁴⁶ structural components,⁴⁷ and janitorial or facility maintenance components⁴⁸ may also be invoked where

exemption criteria are satisfied to reduce quantities of Toxic Chemicals used that must be counted toward annual reporting thresholds.

Where a reporting obligation is triggered by exceeding an annual threshold at a covered facility in a given year, the facility must prepare, certify, and submit TRI reporting forms to Ohio EPA electronically, using the TRI online-reporting software provided by U.S. EPA by July 1 of the following year.⁴⁹ U.S. EPA online-reporting software, Central Data Exchange (CDX), allows facilities to submit annual TRI reports, which are automatically sent to U.S. EPA and the state where the facility is located.⁵⁰ TRI reporting obligations are generally satisfied by completing and submitting a detailed form, known as “Form R,” that requires specific data regarding the facility, release, and destination of the Toxic Chemical in question.⁵¹ An abbreviated form, known as “Form A,” which requires less data than “Form R,” may be utilized to satisfy the reporting obligation where specified usage and release maximums are not exceeded for the Toxic Chemical that calendar year.⁵² Facilities may be eligible to submit Form A if: (1) the reported chemical is not a Persistent, Bioaccumulative, Toxic Chemical; (2) the reported chemical has not been manufactured, processed, or otherwise used in excess of 1,000,000 lbs.; and (3) the total annual waste management (i.e., recycling, treatment, energy recovery, disposal, or other releases) of the chemical does not exceed 500 lbs.⁵³ Facilities subject to TRI annual reporting may be eligible to limit their TRI submission if they can satisfy a trade secret claim.⁵⁴

[4] Emergency Release Notification

Facility owners or operators may be required to notify federal, state and local authorities immediately upon the sudden release of specified reportable quantities of certain substances to the environment from any facility (including certain vehicles and vessels) at which the regulated substances are produced, used, or stored. This Ohio statutory⁵⁵ and regulatory⁵⁶ mandate largely parallels the federal release reporting mandates of CERCLA Section 103⁵⁷ and EPCRA Section 304.⁵⁸

A “release,” for purposes of this reporting mandate, includes “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of into the environment...”⁵⁹ Releases to the environment of “Extremely Hazardous Substances,”⁶⁰

“Hazardous Substances”⁶¹ or oil⁶² in amounts equal to or exceeding the reportable quantity⁶³ applicable to the released substance trigger the reporting obligations.⁶⁴ Reportable quantities for “Extremely Hazardous Substances” and “Hazardous Substances” generally range from one to 500 pounds and are in substance-specific federal regulatory lists that Ohio authorities adopt by reference.⁶⁵ For releases of oil, the reportable quantity depends upon whether the release is to land or a water body. For an oil release to a water body, a reportable quantity is “any amount which causes a film or sheen upon or discoloration of the surface of the waters or causes a sludge or emulsion to be deposited beneath the surface of the waters.”⁶⁶ For an oil release to land, the reportable quantity is generally 25 gallons.⁶⁷

Certain releases of reportable quantities of regulated materials may fall into one or more exclusions from the reporting obligation. For example, where the release results only in exposure to persons solely within the site on which the facility is located, the release does not trigger these reporting obligations.⁶⁸ Also, “federally permitted releases,” such as releases of otherwise reportable quantities of regulated substances in compliance permits issued under federal environmental programs, such as air emission or wastewater discharge permits, are exempt from this release reporting mandate.⁶⁹ Further, certain “continuous releases” may not be reportable where specified criteria are satisfied.⁷⁰

Where a reportable release under this program has occurred within any 24 hour period, the owner or operator of the facility has several obligations. First, an immediate verbal notification must be made to state and local officials.⁷¹ This verbal notification must be given within 30 minutes after a person at the facility (or aboard the vessel) has knowledge of the release, unless notification within that time is impracticable under the circumstances.⁷² To the extent known at the time verbal notification is given and that response to the release or discharge will not be delayed, the verbal notice must include the following:

- (1) location and source(s) of release;
- (2) identity of released substance and whether it is an extremely hazardous substance;
- (3) estimated quantity of substance released;

- (4) time and duration of release;
- (5) environmental medium/media into which release occurred;
- (6) known or anticipated health risks and known advice regarding medical attention for exposed persons;
- (7) proper precautions to take in response to release; and
- (8) name and phone number of a facility contact person.⁷³

Subsequent to the immediate verbal notification, owners or operators of a facility where a reportable release has occurred must also, as soon as practicable but no later than 30 days after the release, submit a written, follow-up notice of the release to designated state and local officials.⁷⁴ This written notice must set forth and update the verbal notice and also must include the following additional information:

- (1) name and address of facility owner/operator;
- (2) time, date and duration of release;
- (3) time and date of discovery of release;
- (4) actions taken responding to and containing release;
- (5) assigned Ohio EPA spill number and National Response Center case number;
- (6) location (street address) of facility from which release occurred;
- (7) location of release;
- (8) chemical name(s) and CAS registry number(s) of substance(s) involved;
- (9) identity of media impacted and extent of impact;
- (10) chronological summary of incident;
- (11) relevant manifests, bills of lading and lab analyses;
- (12) any extenuating circumstances that may have caused release;
- (13) any known or anticipated acute or chronic health risks;

- (14) any appropriate advice regarding necessary medical attention for exposed individuals; and
- (15) summary of all actions taken to prevent a recurrence.⁷⁵

In addition, a continuing obligation exists to update the relevant state and local officials of any changes to the information provided in the written notice for one year after the release.⁷⁶ Where any such reported information changes or is updated, an updated written notice must be submitted within three days after the owner or operator learns of the additional information.⁷⁷

[5] Accidental Release Prevention

The 1990 Amendments to the federal Clean Air Act added a mandate that U.S. EPA promulgate regulations aimed at prevention of accidental air releases of certain regulated substances.⁷⁸ U.S. EPA established a list of regulated substances on January 31, 1994⁷⁹ and issued rules implementing the accidental release prevention program on June 20, 1996.⁸⁰ Ohio enacted legislation adopting a program paralleling these mandates in 1998.⁸¹

Beginning in 1999,⁸² Ohio facilities with more than a specified threshold quantity of any regulated substance were required to prepare and submit a Risk Management Plan (RMP) addressing release risks associated with the presence of the regulated substance. Ohio EPA promulgated rules, effective August 13, 1999, implementing this accidental release prevention program.⁸³ The RMP regulatory mandates apply to any facility having on-site, in any single process, any regulated substance in excess of an established threshold quantity.⁸⁴ The regulated substances generally include certain acutely toxic chemicals, flammable gases, and volatile flammable liquids.⁸⁵ Facilities storing flammable substances for fuel (or held for sale as fuel) or agriculturally-used ammonia are exempt from the RMP requirements.⁸⁶

Covered facilities must generally assess the potential risks posed by a potential accidental release from the facility, develop an RMP aimed at minimizing those risks, submit an RMP to Ohio EPA, and update the plan every five years.⁸⁷

Ohio EPA's RMP rules divide covered facilities into three groups (known as programs one, two, and three) on the basis of risk-related criteria.⁸⁸ RMP requirements vary depending on which program applies to a given covered

facility, escalating from the more limited program one requirements to the more onerous program three requirements.⁸⁹ Required RMP elements can include hazard assessments, maintenance plans, operating procedures, training, emergency response programs, and certifications.⁹⁰

⚠ Warning: On July 31, 2014, U.S. EPA published a Request for Information (RFI) as a first step in making potential revisions to the RMP regulations. U.S. EPA sought information and data on specific regulatory elements and process safety management approaches, the public and environmental health and safety risks they should address, and the costs and burdens they may entail. The RFI comment period ended on October 29, 2014. In March 2016, the EPA published the Proposed Rule regarding accidental release and RMPs, and the final rule was published January 13, 2017. In response to the final rule, EPA received a petition from RMP Coalition requesting a reconsideration and request for stay for the RMP rule amendments. On March 16, 2017, EPA published a final rule that provided a 90-day administrative stay of the effective date of the RMP rule amendments, delaying the effective date to June 19, 2017.

Footnotes — § 14.04:

¹⁷ A list of the more than 350 regulated EHSs is set forth at [40 C.F.R. Part 355, Appendix A](#).

¹⁸ The TPQs vary from chemical to chemical, ranging from 1 to 10,000 pounds, and are found at [40 C.F.R. Part 355, Appendices A and B](#).

¹⁹ [R.C. 3750.05](#).

²⁰ [R.C. 3750.01\(D\)](#).

²¹ Compare the scope of Community Right-to-Know and Toxic Release Inventory reporting mandates addressed in § 14.04[2] and 14.04[3] of this Chapter, respectively.

²² [R.C. 3750.05\(B\)](#).

²³ [R.C. 3750.05\(B\)](#).

²⁴ [29 C.F.R. § 1910.1200](#); see also [Chapter 22](#) below.

²⁵ [29 C.F.R. § 1910.1200](#).

²⁶ [R.C. 3750.07\(A\)](#).

²⁷ R.C. 3750.07(B).

²⁸ OAC 3750-30-27.

²⁹ R.C. 3750.07(D).

³⁰ R.C. 3750.08(A).

³¹ R.C. 3750.08(A).

³² 40 C.F.R. § 370.40.

³³ Compare 40 C.F.R. § 370.41 with 40 C.F.R. § 370.42.

³⁴ OAC 3750-30-20(B), (C), and (D).

³⁵ See R.C. 3750.09; OAC 3750-60.

³⁶ OAC 3745-100.

³⁷ OAC 3745-100-10.

³⁸ OAC 3745-100-05(B).

³⁹ OAC 3745-100-01(M).

⁴⁰ OAC 3745-100-01(T).

⁴¹ OAC 3745-100-06(A)(3).

⁴² OAC 3745-100-01(Q).

⁴³ OAC 3745-100-06(B).

⁴⁴ OAC 3745-100-16.

⁴⁵ OAC 3745-100-08(A).

⁴⁶ OAC 3745-100-08(B).

⁴⁷ OAC 3745-100-08(C)(1).

⁴⁸ OAC 3745-100-08(C)(2).

⁴⁹ OAC 3745-100-11.

⁵⁰ U.S. EPA, “Frequent Questions: Electronic Data; States; Tribes,” *available at* https://ofmpub.epa.gov/apex/guideme_ext/f?p=104:7:::P7_ID:8.

⁵¹ OAC 3745-100-11(A)–(B).

⁵² See OAC 3745-100-14 and 3745-100-15; also see U.S. EPA, “Basics of TRI Reporting,” available at <https://www.epa.gov/toxics-release-inventory-tri-program/basics-tri-reporting>.

⁵³ See OAC 3745-100-14(A).

⁵⁴ See R.C. 3751.04 and OAC 3745-100-13.

⁵⁵ R.C. 3750.06.

⁵⁶ OAC 3750-25.

⁵⁷ 42 U.S.C. § 9603.

⁵⁸ 42 U.S.C. § 11004.

⁵⁹ R.C. 3750.01(L).

⁶⁰ OAC 3750-20-30.

⁶¹ OAC 3750-20-50.

⁶² OAC 3750-1-01(AA).

⁶³ OAC 3750-1-01(GG).

⁶⁴ OAC 3750-25-25.

⁶⁵ OAC 3750-25-10.

⁶⁶ OAC 3750-25-20(A)(1).

⁶⁷ OAC 3750-25-20(A)(2).

⁶⁸ R.C. 3750.06(E); OAC 3750-25-01(B)(1).

⁶⁹ OAC 3750-25-01(B)(2).

⁷⁰ OAC 3750-25-01(B)(3).

⁷¹ R.C. 3750.06(C); OAC 3750-25-25(A)(1).

⁷² OAC 3750-25-25(A)(1)(a).

⁷³ OAC 3750-25-25(A)(1)(d).

⁷⁴ OAC 3750-25-25(A)(2)(a).

⁷⁵ OAC 3750-25-25(A)(2)(b).

⁷⁶ R.C. 3750.06(D)(5).

⁷⁷ R.C. 3750.06(D)(5).

⁷⁸ 42 U.S.C. § 7412(r).

⁷⁹ 59 Fed. Reg. 4478 (Jan. 31, 1994).

⁸⁰ 61 Fed. Reg. 31668 (June 20, 1996).

⁸¹ R.C. Chapter 3753.

⁸² Preparation and submission of RMPs by covered facilities were required by U.S. EPA as of June 21, 1999 and by Ohio EPA by January 3, 2000.

⁸³ See generally OAC 3745-104.

⁸⁴ R.C. 3753.03; OAC 3745-104-05.

⁸⁵ See OAC Chapter 3745-104-04. The list of regulated substances is included as an Appendix to this rule and also as Tables associated with 40 C.F.R. § 68.130.

⁸⁶ OAC 3745-104-03.

⁸⁷ R.C. 3753.03.

⁸⁸ OAC 3745-104-05.

⁸⁹ OAC 3745-104-06(B), (C), and (D).

⁹⁰ See OAC 3745-104.

§ 14.05. Enforcement

Enforcement action may be taken by federal or state authorities.⁹¹ U.S. EPA Region V will generally initiate federal enforcement in Ohio. Most enforcement actions arising from failures to comply with release notification, MSDS reporting, inventory reporting or TRI reporting may seek civil penalties of up to \$37,500 for each violation. Each day of a continuing violation constitutes a separate violation.

U.S. EPA calculates proposed penalties based upon established policy documents specific to the type of EPCRA violation. In 1999, U.S. EPA established a civil penalty policy addressing violations of release notification, MSDS reporting and inventory reporting violations.⁹² In 1992, the Agency established a civil penalty policy addressing TRI reporting violations.⁹³ U.S. EPA often updates the civil penalty policies annually to include changes to

the civil monetary penalty inflation adjustment rule. Certain violations, including knowing and willful failures to fulfill emergency release notification requirements, are potentially subject to federal criminal enforcement.⁹⁴

EPCRA also provides authority for any person to initiate a citizen suit to enforce certain failures to (a) fulfill certain emergency notification requirements, (b) complete and submit inventory forms, and (c) complete and submit required TRI forms.⁹⁵ Citizen suit authority under EPCRA is limited such that civil action may not be initiated where “diligent prosecution” is underway or until 60 days after prescribed notifications have been made to U.S. EPA, the State, and the alleged violator.⁹⁶

Ohio law also provides for state enforcement of these regulatory requirements via mechanisms paralleling federal enforcement, such as administrative orders or civil or criminal actions.⁹⁷ However, penalties imposed can vary where the State rather than U.S. EPA acts as the enforcement authority.⁹⁸ Ohio law also provides for criminal sanctions for certain willful or reckless violations of these requirements.⁹⁹

Footnotes — § 14.05:

⁹¹ 42 U.S.C. § 11045(a); 42 U.S.C. § 11046(a).

⁹² See U.S. EPA Office of Regulatory Enforcement, Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right to Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, *available at* <http://www.epa.gov/sites/production/files/documents/epcra304.pdf> (1999).

⁹³ See Enforcement Response Policy for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act, U.S. EPA, *available at* <https://www.epa.gov/sites/production/files/2017-03/documents/epcra313erpamendments2017.pdf>.

⁹⁴ 42 U.S.C. § 11045(b)(4).

⁹⁵ 42 U.S.C. § 11046(a)(1).

⁹⁶ 42 U.S.C. § 11046(d) and (e).

⁹⁷ R.C. 3750.18; R.C. 3750.20.

⁹⁸ See R.C. 3750.20; R.C. 3751.10. For example, failures to address MSDS or inventory reporting mandates have maximum civil penalties of \$10,000 per violation per day, whereas TRI reporting violations have \$25,000 per day civil penalty maximums.

99 See R.C. 3750.99; 3751.99.

CHAPTER 15

ADMINISTRATIVE AND CIVIL ENVIRONMENTAL ENFORCEMENT AND LITIGATION¹

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I.

INTRODUCTION

§ 15.01. Scope

This chapter covers:

- The structure and organization of the Ohio Court System, including the Ohio Environmental Review and Appeals Commission [see §§ 15.02–15.03 *below*].
- The Agencies’ general enforcement authority, mechanisms for enforcement, protection from enforcement and the use of settlement strategies in enforcement actions [see § 15.04 *below*].
- The availability of citizens suits in Ohio [see § 15.05 *below*].
- Overview of general Ohio principles governing fact and expert discovery [see § 15.06 *below*].
- Summary of common law claims, available damages and applicable statute of limitations in private party environmental litigation [see § 15.07 *below*].
- The availability of insurance for environmental claims [see § 15.08 *below*].

II.

OVERVIEW OF THE COURT SYSTEM

§ 15.02. Organization of the State Court System

In Ohio, the trial level court of general jurisdiction is called the court of common pleas. There is a common pleas court in each of the state’s 88 counties.² Appeals from that court initially go to an intermediate appellate court, called the court of appeals. There are 12 district courts of appeal corresponding to different geographical areas of the state.³ The highest court in the state is the supreme court, located in Columbus.

There is no common environmental court within the state that hears alleged violations of state environmental laws and regulations. Suits for all alleged violations, whether criminal or civil, are venued within the particular county where the alleged violations took place. Appeals associated with such cases are subsequently heard in the appellate court with jurisdiction over the particular county court of common pleas where the violation is alleged to

have occurred.⁴

Footnotes — § 15.02:

² R.C. 2301.01.

³ R.C. 2501.01.

⁴ R.C. 3745.06.

§ 15.03. Ohio Environmental Review and Appeals Commission

[1] Jurisdiction

Contrary to the decentralized determination of alleged violations of environmental laws and regulations, challenges to orders and other actions of the Director of Ohio EPA, as well as all challenges to environmental regulations, are brought before the Environmental Review and Appeals Commission (ERAC) that is venued in Columbus, Ohio. Any person who was a “party to a proceeding before the Director” of Ohio EPA may appeal to ERAC for an order vacating or modifying the action of the Director.⁵ “Person” includes individuals, legal entities, or political subdivisions that are not the applicant or holder of a license, permit, or variance from the applicable state agency.⁶ An “action” of the Director includes the adoption, modification or repeal of a rule or standard; the issuance, modification, or revocation of any lawful order other than an emergency order; the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate; or the approval or disapproval of plans and specifications.⁷

[2] Composition of Commission

ERAC is composed of three members, who are appointed by the governor and confirmed by the Ohio Senate.⁸ Each member serves a six year term.⁹ Each member must have “extensive experience in pollution control and abatement technology, ecology, public health, environmental law, economics of natural resource development, or related fields.”¹⁰ Furthermore, no more than two members may be of the same political party, and at least two members “shall represent the public interest.”¹¹ Finally, two members of the ERAC constitute a quorum, and two votes are required for any action of the commission to be valid.¹²

[3] Scope of Authority

ERAC has the power to hear appeals, which are final actions of the Director of Ohio EPA and local boards of health.¹³ Final actions include the issuance of rules, licenses, permits, and other orders.¹⁴ ERAC also has the power to stay any orders or actions of the Director of Ohio EPA.¹⁵ On any appeal, ERAC may affirm the action, vacate and remand the action to Ohio EPA, or modify the action.¹⁶

Practice Point: Although the legislative grant of jurisdiction to the ERAC set forth in [R.C. 3745.04](#) is exclusive, it is also limited, and litigation that does not fall within the four corners of the legislative grant of jurisdiction—i.e., challenges to “actions” of the Director—may be made in Ohio’s trial courts under Ohio’s Declaratory Judgment Act, [R.C. 2721.01 et seq.](#) In such litigation, the Director is neither an indispensable nor necessary party unless he had some involvement in the matter to be adjudicated by the court.¹⁷

[4] Procedural Rules

ERAC has the power to promulgate rules governing proceedings before it.¹⁸ Procedural rules before ERAC are codified in [OAC Chapter 3746](#). Procedures largely mimic and follow the Ohio Civil Rules of Procedure, and the regulations cover such subjects as joinder, intervention, participation by amicus curiae, contents of a notice of appeal, requirements for the agency to file an answer, certification of the administrative record, brief formats, procedures regarding discovery, and other rules.¹⁹

A notice of appeal, including the original and four copies, must be filed with ERAC within thirty days of the date of the action being appealed.²⁰ The notice of appeal must be accompanied by a \$70 appeal fee, but the fee may be waived in cases of hardship.²¹ If the fee is not included with the notice of appeal and is not submitted within five days of the appeal, ERAC may dismiss the appeal.²² Within three days of filing the appeal with ERAC, the appellant must file a copy of the appeal with Ohio EPA.²³ The notice of appeal must contain the name, address, and telephone number of the appellant, and must include a copy of the action being appealed.²⁴ Furthermore, the notice of appeal must contain the assignments of error and the relief sought.²⁵ Following the notice of appeal, Ohio EPA, through the

Ohio Attorney General's Office will prepare an answer and may begin preparation of the administrative record.²⁶

ERAC has a two track system for appeals. If settlement discussions are ongoing, the parties will submit joint status reports to ERAC, typically on a quarterly basis. If settlement does not seem possible, a scheduling order will be issued, similar to that used by common pleas courts in civil actions, setting forth discovery deadlines, dispositive motion deadlines, identification of lay and expert witnesses, and providing a hearing date.

Practice Point: The Ohio legislature amended [R.C. 3745.05](#) in 2009 to require ERAC to issue an order within a defined time period. As a result, ERAC ordered one hour de novo hearings to clear its docket. On October 9, 2009, the Franklin County Common Pleas Court ruled that the new decision deadlines the legislature imposed were inconsistent with the statutory requirements, and thus, not mandatory.²⁷ Additionally, the court found that the one-hour hearings were inconsistent with due process.²⁸ A bill was introduced (H.B. 324) to nullify the deadlines and increase ERAC's funding in 2009 but was not passed. For now, the ERAC process remains the same, except ERAC is issuing early requests for case management orders and status reports.

[5] Certification of Administrative Record

Within seven days after the receipt of the notice of appeal, the Director or statutory agency is required to prepare a record of the proceedings out of which the appeal arises.²⁹ The certified record includes "all papers, exhibits documents, correspondence, and the transcript of proceedings, if any, including exhibits relating to the action from which the appeal arises."³⁰ If the certified record is not complete, and the documents were involved with the agency's decision-making, Ohio EPA may supplement the record.³¹

Practice Point: The seven day deadline is often impossible for Ohio EPA or other administrative agencies to meet, and continuances of the deadline are routinely sought and granted.

Furthermore, the certified record is not considered evidence until it is moved into evidence during the hearing. This will inevitably be done by the

Assistant Attorney General handling the appeal at the conclusion of the hearing.

Finally, Ohio EPA is not authorized to conduct further review or justify its decision with facts that were not in existence at the time of the hearing. The prohibition against post-hoc justification has resulted in reversals of the both ERAC decisions and actions of Ohio EPA.³²

[6] Evidentiary Rules, Including Expert Testimony

The Ohio Rules of Evidence are not applicable to hearings held by ERAC.³³ However, any evidence that is submitted must be “probative and relevant.”³⁴ As a practical matter, ERAC is liberal in the evidence that is allowed in its *de novo* hearings. Experience has shown that there are limits to the relaxed evidentiary standards, including for hearsay that is either testimonial or contained in unauthenticated and unverified documents.

For the most part, the relaxed rules of evidence permit expert opinion testimony on issues that may not meet the requirements of expert testimony in court. Limits do apply, however, and the Tenth District Court of Appeals has upheld ERAC’s exclusion of expert testimony that included legal conclusions, which ERAC determined was outside the scope of permissible testimony.³⁵

Practice Point: ERAC typically requires that a foundation be laid for any expert opinion, including properly qualifying the expert.

[7] Burden of Proof

The standard of proof in an ERAC proceeding is whether the Director’s action was both reasonable and lawful.³⁶ [Ohio Revised Code Section 3745.05](#) defines the scope of the Commission’s powers in reviewing final actions of the Director as follows: “If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable it shall make a written order affirming the action, if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from”³⁷ Thus, in order for ERAC to uphold the decision of the Director, ERAC must find that the Director’s order is lawful and reasonable.³⁸

ERAC will vacate a decision by the Director if it is either unreasonable or unlawful. ERAC defines “unreasonable” to mean that the action was not in accord with reason, or that it had no valid factual foundation.³⁹ In determining whether the action under appeal rests upon a valid factual foundation, ERAC will generally defer to the opinion of the Director’s expert witness if two otherwise qualified expert witnesses disagree on a matter within their expertise.⁴⁰ Finally, “an action of the Director is unlawful if it is not in accordance with law.”⁴¹

[8] Checklist for Filing an ERAC Appeal

- File original Notice and four copies within 30 days of action being appealed;
- Include the \$70.00 filing fee;
- Include in Notice of Appeal:
 - Name of Appellant;
 - Address of Appellant;
 - Telephone number of Appellant;
 - Copy of action being appealed;
 - Assignments of Error; and
 - Relief sought;
- Within three days of filing Notice of Appeal, provide copy of Appeal to Ohio EPA.

[9] Right to Appeal an ERAC Ruling

ERAC decisions can be appealed to either the court of appeals for Franklin County (in Columbus), or, if administrative findings and orders or other actions involving alleged violations of a law or regulation are at issue, to the court of appeals of the district in which the violation was alleged to have occurred.⁴² The notice of appeal must be filed with both ERAC and the Court.⁴³ The notice of appeal must also be served on the Director of Ohio EPA by certified mail.⁴⁴

Unlike typical appeals, the court of appeals may grant a request to admit

additional evidence when a party can show “that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission.”⁴⁵ The court of appeals applies a liberal standard of review, affirming ERAC decisions if they are supported by “reliable, probative, and substantial evidence and [are] in accordance with law.”⁴⁶ If the court of appeals does not find that the order is supported by “reliable, probative, and substantial evidence and is in accordance with law,” it “shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.”⁴⁷ With respect to air quality or water quality standards, if it finds such standards to be deficient, the court must order the Director of Ohio EPA to modify the standard to comply with the laws governing air and water pollution.⁴⁸

[10] Use of Deliberative Privilege

There is no deliberative privilege afforded to Ohio agencies under Ohio public records law.⁴⁹ This privilege, applicable to federal agencies under the Freedom of Information Act, provides an exemption from disclosure for documents “received by the decisionmaker on the subject of the decision prior to the time the decision is made.”⁵⁰ These include documents submitted by one agency to a second agency that has final decisional authority, recommendations made by inspectors lacking authority to take final agency action, and internal working papers in which opinions are expressed and policies formulated and recommended.⁵¹ Ohio law does not recognize such a privilege, and courts addressing the privilege have explicitly rejected it.⁵²

The Ohio Supreme Court, however, has recognized the “judicial mental process” privilege, couched in Ohio common law, protecting information decisionmakers use or receive in instances of Ohio EPA adjudications or information revealing the thought-processes of ERAC commissioners.⁵³

Furthermore, Ohio EPA may be able to rely on the attorney-client privilege. After an ongoing dispute about whether or not the attorney-client privilege applied between state agency attorneys and the agencies that employ them (not including the Attorney General’s Office), the Ohio Supreme Court confirmed in 2005 that such a privilege does exist.⁵⁴ As such, the attorney-client privilege also may be asserted to prevent the disclosure of some of the deliberative process—at least where an agency attorney and the

agency are concerned.⁵⁵

Footnotes — § 15.03:

- ⁵ R.C. 3745.04, OAC 3746-5-01.
- ⁶ OAC 3746-1-01(I).
- ⁷ R.C. 3745.04, OAC 3746-1-01(A); *Jackson County Environmental Committee v. Schregardus* (1994), 95 Ohio App. 3d 527.
- ⁸ R.C. 3745.02.
- ⁹ R.C. 3745.02.
- ¹⁰ R.C. 3745.02.
- ¹¹ R.C. 3745.02.
- ¹² R.C. 3745.02.
- ¹³ R.C. 3745.04.
- ¹⁴ R.C. 3745.04.
- ¹⁵ R.C. 3745.04.
- ¹⁶ R.C. 3745.05.
- ¹⁷ See *Nat'l Solid Wastes Mgmt. Ass'n v. Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist.*, 2008-Ohio-6585 (Ohio Ct. App., Stark County), *rev'd on other grounds*, 2010-Ohio-228 (Ohio Ct. App., Stark County) (holding that the solid waste rules being challenged were not adopted by Ohio EPA pursuant to R.C. 3734.05, but were local rules, and thus not enforceable by Ohio EPA).
- ¹⁸ R.C. 3745.03.
- ¹⁹ OAC Chapter 3746.
- ²⁰ R.C. 3745.04; OAC 3746-5-06; OAC 3746-5-07.
- ²¹ R.C. 3745.04; OAC 3746-5-06.
- ²² R.C. 3745.04; OAC 3746-5-06.
- ²³ R.C. 3745.04; OAC 3746-5-06.
- ²⁴ OAC 3746-5-07.
- ²⁵ OAC 3746-5-07.
- ²⁶ OAC 3746-5-08.

- ²⁷ *AEP Ohio, et al. v. State of Ohio, et al.* (Oct. 9, 2009), Case No. 09-CV-14494.
- ²⁸ *AEP Ohio, et al. v. State of Ohio, et al.* (Oct. 9, 2009), Case No. 09-CV-14494.
- ²⁹ OAC 3746-5-12.
- ³⁰ OAC 3746-5-12.
- ³¹ OAC 3746-5-12.
- ³² *Concerned Citizens of Central Ohio, et al. v. Schregardus*, 148 Ohio App. 3d 31 (2002); *Burlington Preservation Org. v. Burlington Terminal, Inc.*, 1977 Ohio ENV LEXIS 9, at *18 (“the Director must base his final action on the record”).
- ³³ *Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati*, 159 Ohio App. 3d 806, 825, 2005 Ohio 1153.
- ³⁴ *Citizens to Protect Environment, Inc. v. Universal Disposal, Inc.* (1988), 56 Ohio App. 3d 45.
- ³⁵ *Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati*, 159 Ohio App. 3d 806, 2005 Ohio 1153.
- ³⁶ *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App. 2d 61, 69–70; *Citizens Against Am. Landfill Expansion v. Koncelik*, 2014 Ohio 123, *12.
- ³⁷ R.C. 3745.05 (emphasis added).
- ³⁸ *Portage Landfill & Dev. Co. v. Shank*, 1987 Ohio ENV LEXIS 22, at *18–19.
- ³⁹ *Portage Landfill & Dev. Co. v. Shank*, 1987 Ohio ENV LEXIS 22, at *18–19. *See also Belmont County Defenders v. Jones*, 2001 Ohio ENV LEXIS 14, at *14 (holding that the Director is not authorized to offer “after-the-fact corrections” to final actions in order to establish a valid factual foundation.).
- ⁴⁰ *See, e.g., CF/Water v. Schregardus*, 1994 Ohio ENV LEXIS 15, at *18 (noting “the well-accepted tenant that an administrative agency’s interpretation of its own rules and regulations must be accorded deference by a reviewing tribunal” and holding that where both expert witnesses are “credible,” ERAC “will defer to the action of the Director where the action is otherwise reasonable and lawful.”).
- ⁴¹ *Copperweld Steel Co. v. Shank*, 1989 Ohio ENV LEXIS 16, at *18. *See, e.g., City of Olmsted Falls v. Jones*, 2002 Ohio ENV LEXIS 3, at *25 (holding that the action of the Director was unlawful where Ohio law did not authorize the Director the power to waive the state’s authority to act on a permit application); *Citizens Against Am. Landfill Expansion v. Koncelik*, 2014 Ohio 123, *49 (affirming Director’s order to grant permit for landfill expansion by finding the decision was supported by reliable, probative, and substantial evidence and was in accordance with law).
- ⁴² R.C. 3745.06.
- ⁴³ R.C. 3745.06.

⁴⁴ R.C. 3745.06.

⁴⁵ R.C. 3745.06.

⁴⁶ R.C. 3745.06.

⁴⁷ R.C. 3745.06.

⁴⁸ R.C. 3745.06.

⁴⁹ *State of Ohio ex rel. District 1199 v. Gulyassy* (1995), 107 Ohio App. 3d 729.

⁵⁰ *Senate of Puerto Rico v. United States Dept. of Justice* (D.C. Cir.1987), 823 F.2d 574, 584, 262 U.S. App. D.C. 166; *Schell v. United States Dept. of Health & Human Services* (6th Cir. 1988), 843 F.2d 933, 939.

⁵¹ *State of Ohio ex rel. District 1199 v. Gulyassy* (1995), 107 Ohio App. 3d 729.

⁵² *State of Ohio ex rel. District 1199 v. Gulyassy* (1995), 107 Ohio App. 3d 729.

⁵³ *TBC Westlake v. Hamilton County Bd. of Revision* (1998), 81 Ohio St. 3d 58.

⁵⁴ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990.

⁵⁵ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990.


III.

ENVIRONMENTAL ENFORCEMENT BY THE AGENCIES

§ 15.04. Enforcement Procedures

[1] Federal Enforcement Role

While state environmental laws and regulations essentially track the requirements and prohibitions established in their federal counterparts, the responsibility for enforcing federal laws and regulatory requirements generally falls to U.S. EPA and the Department of Justice unless the authority for enforcing the specific program area has been delegated to the state, or the federal requirement is specifically incorporated within the relevant state statute and associated regulations.⁵⁶

 **Warning:** The state statutory scheme provides that the Director

of Ohio EPA may advise, consult and cooperate with the federal government to further the purposes of the state's environmental statutes.⁵⁷ The result of this provision is the creation of joint state and federal task forces that combine resources to investigate and prosecute violations of state and federal statutory requirements in both state and federal court.

[2] State Enforcement Role

The Attorney General of Ohio is the Chief Law Officer of the state and all its departments. In that respect, the Attorney General will appear for the state when required by the governor or the general assembly in any court or tribunal where the state is a party, or where the state is directly interested.⁵⁸ Consequently, state environmental statutes provide that the Ohio Attorney General or the local state prosecutorial authority will initiate civil or criminal actions upon receiving a request from the Director of Ohio EPA, the respective board of health or the legislative authority of the particular political subdivision.⁵⁹

The enforcement of state environmental statutes and regulations will take the form of a civil or criminal enforcement action that the state Attorney General initiates in state court or an administrative enforcement order that the Director of Ohio EPA issues. Enforcement remedies in a civil action may include injunctive relief and/or civil penalties.⁶⁰ Any enforcement action for civil or administrative penalties must be commenced within five years of the time when the agency actually knows or was informed of the occurrence, omission, or facts on which the cause of enforcement action is based.⁶¹ If the agency actually knew or was informed of an occurrence, omission or fact on which a cause of action is based prior to July 23, 2002, then the action must be commenced within five years of that date.⁶²

[3] Federal Oversight and Over Filing

Although U.S. EPA delegates its enforcement authority to the individual states to enforce violations of federal environmental laws, it retains the power to enforce federal laws where the delegated state authorities have failed. In such circumstances, the federal government retains the right to either revoke the delegated authority given to state environmental protection agencies, which U.S. EPA is reluctant to do, or to engage in a process known as

“overfiling.” Overfiling occurs in cases where the federal government files its own enforcement action against a violator on the grounds that the state agency’s enforcement efforts failed to sufficiently enforce the infraction.⁶³ Overfiling often occurs in cases in which violators have negotiated settlements with a state agency, to which the U.S. EPA objects. Therefore, even after the state enforcement action has been settled, the federal government may bring an enforcement action to enforce federal environmental laws.⁶⁴ The power of the government to overfile, however, was limited in at least one case where enforcement authority under the Resource Conservation and Recovery Act was expressly, and entirely, delegated to the states.⁶⁵

[4] Notices of Violation and Director’s Final Findings and Orders

The enforcement of the requirements under the environmental statutory scheme is generally performed on an escalating system or scale where the ultimate level of enforcement is the initiation of a civil or criminal court action. As discussed in the previous section, the initiation of a civil or criminal enforcement action requires the Director of Ohio EPA to initiate a referral to the state Attorney General.

In the alternative, a district office of Ohio EPA or a local air agency may issue a Notice of Violation (NOV) upon discovery of an alleged violation. The NOV serves to identify the violations and place the company or party receiving it on notice of the proposed violation. NOVs are always issued unilaterally. A written response to an NOV may be required, which can begin a dialogue between the agency and the regulated entity as to the entity’s compliance status. NOVs are not final actions of the Director of Ohio, and thus, cannot be appealed to ERAC. If a settlement is reached with Ohio EPA in connection with a NOV, such a settlement typically will be codified in the Director’s Final Findings and Orders (DFFOs).

Practice Point: Continued violations after receipt of a NOV may provide the basis for proving intent to constitute a criminal offense or aggravation of the willfulness component of a civil penalty.

DFFOs also are used as an independent enforcement mechanism. DFFOs can be issued unilaterally or can be agreed orders. They are actions of the

Director, and are considered official enforcement actions. While there is no statutory requirement to do so, Ohio EPA usually attempts to negotiate mutually acceptable terms to make the document an agreed order (which then typically contains a provision preventing appeal to ERAC). Ohio EPA, however, will issue DFFOs unilaterally if agreement cannot be reached or the regulated entity refuses to discuss the alleged violation or proposed remediation.

In practice, most DFFOs will contain a statement of the factual basis for the Director's action in issuing the orders and two action components consisting of the remedial measures necessary to eliminate or prevent the alleged or potential violation, as well as the monetary penalty amount. The monetary penalty component is usually based on a matrix requiring factual inputs that are relevant to the particular area of regulation. For example, the determination of a monetary penalty relating to hazardous waste violations uses a version of the U.S. EPA RCRA civil penalty policy adjusted to the state statutory maximum penalty of \$10,000.00. This matrix categorizes the potential for harm and the extent of deviation from compliance as minor, moderate, or major. The result of this matrix is a range for the proposed monetary penalty where a minor potential for harm combined with a minor deviation would result in a proposed monetary penalty in the range of \$40.00 to \$200.00. A major potential for harm combined with a major deviation would result in a proposed penalty range of \$8,000.00 to the statutory maximum of \$10,000.00 for the violation.⁶⁶ As another example, Ohio EPA uses U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy to calculate initial settlement demands for violations of Ohio's air pollution laws and regulations. Other divisions of Ohio EPA that are responsible for the enforcement of water and solid waste requirements will use a similar model that will be tailored to provide inputs that are relevant to the particular regulatory program and statutory penalties for violation.

A party that does not waive the right has the ability to appeal the DFFOs to ERAC, which has exclusive jurisdiction to hear all such appeals by any person who was a party to a proceeding before the Director that resulted in the issuance of the order.⁶⁷ See § 15.03 above. The question of whether a person is a party to the action turns on whether the person presented written or oral arguments to the Director on the subject matter of the orders and whether the person was affected by the Director's action.⁶⁸ In order for a

person to show that he or she qualifies to file an appeal as a party affected by the Director's action in issuing the DFFOs, the person must show that the challenged action has caused, or will cause a concrete injury.⁶⁹ The injury itself must be an actual injury and it must be immediate or have a realistic danger of happening as a result of the orders the person wishes to challenge.⁷⁰

⚠ Warning: The Director's issuance of an administrative enforcement order does not necessarily protect the violator from a citizen's suit. *See § 15.05 below.*

While the option of DFFOs logically should occur prior to the initiation of any civil or criminal action, there is no statutory requirement that the Director attempt this remedy before initiating a court action through the state Attorney General. Moreover, while the issuance of DFFOs is an administrative remedy, the failure to comply with such orders can form the basis for a subsequent civil or criminal action.⁷¹

Practice Point: Ohio EPA appears to be following a new enforcement procedure for certain violations. In some cases, the Agency has begun to skip the NOV, warning letters and subsequent letters inviting parties to participate in a negotiation, and is proceeding directly to negotiations for DFFOs. If a facility inspection identifies a substantial violation, Ohio EPA has been requesting a meeting with the facility and providing proposed DFFOs at that initial meeting, only allowing the facility a very short time to agree to a final Administrative Order on Consent before referral to the Attorney General's Office. Based on the Director's public remarks, it was understood that this expedited process would be reserved for minor violations. However, Ohio EPA has used it in cases where the proposed penalty has approached \$100,000.

[5] Verified Complaints Alleging Violations of State's Environmental Laws

An officer of a state agency or political subdivision, acting in a representative capacity, or any private citizen who is or will be aggrieved or adversely affected by a violation, may file a written complaint, verified by an affidavit, with the Director of Ohio EPA. The Director must promptly

conduct an investigation to determine whether the violation occurred, is occurring or will occur. A mandatory component of this investigation responsibility is that the Director engage in a conversation with the alleged violator.⁷²

If the Director determines that a violation “has occurred, is occurring, or will occur,” the Director may enter an order as may be necessary or request that the Attorney General initiate an appropriate legal action. The Director also may, in his or her discretion, dismiss the complaint if it appears that the alleged violation has been terminated and violations of the same kind are not likely to happen again. Where the investigation determines that the alleged violation did not happen, is not happening or will not happen, he is required to dismiss the complaint.⁷³ Should the Director determine it is necessary to have a hearing, the Director must provide public notice 20 days prior to the hearing in the county where the violation is alleged and the hearing may be conducted by the Director or a hearing examiner appointed by the Director. The individual who filed the complaint may participate as a party in the hearing by filing a written notice of his intent to participate with the Director.⁷⁴ If the Director does dismiss the complaint, the individual that filed the Complaint would be able to appeal this “action” of the Director to ERAC as long as he or she has standing.

[6] An Exception to Enforcement: The Privilege of Non-Disclosure

Ohio law provides an incentive for persons to be proactive and engage in voluntary environmental corrective action. Information that results from a qualifying environmental audit is deemed privileged and is not admissible as evidence or subject to discovery in any civil or administrative proceeding.⁷⁵ The privilege attached to information derived from an environmental audit does not apply to criminal investigations or proceedings.⁷⁶ Where an audit report is obtained, reviewed, or used in a criminal proceeding the privilege is not waived and is still applicable in any subsequent civil or administrative proceeding.⁷⁷

The privilege does not apply, however, to the information collected in an audit in the following circumstances: (1) where it is not asserted by the person to whom the privilege belongs; (2) the owner of the privilege voluntarily testifies as to the information; (3) the court or presiding administrative officer finds that the privilege does not apply; (4) the

information is required to be collected, developed, maintained, reported, disclosed publicly, or otherwise made available to a government agency; (5) the information was obtained from a source other than the audit; (6) the information was collected, developed, made or maintained in bad faith or for a fraudulent purpose; or (7) the owner of the privilege waives the privilege.⁷⁸

Where the owner or operator conducts an environmental audit and voluntarily discloses information contained in the report concerning an alleged violation to the Director, the owner or operator is immune from administrative or civil penalties for the specific violation with the exception of any economic benefit component of a potential penalty.⁷⁹ The determination that a disclosure is “voluntary” requires several factors to be met: (1) that the disclosure is made promptly after the information is received through the audit; (2) that there is a reasonable, good faith effort made to achieve compliance as quickly as practicable; (3) that the owner or operator cooperates during the state investigation of the cause, extent, nature, and effects of the noncompliance; (4) that the disclosure was not required by any law, prior litigation, or order; and (5) that the owner or operator did not know or have reason to know that a government investigation or enforcement action concerning the alleged violation had been commenced; and (6) that compliance with environmental laws applicable to the information disclosed is achieved as quickly as practicable, or as reasonably ordered by the relevant authority.⁸⁰

The law further grants immunity for administrative and civil penalties, so long as the owner or operator submits a voluntary disclosure to Ohio EPA that meets the requirements of the law. The final component requires the owner or operator to make a good-faith effort to bring his or her facility or site into compliance with environmental laws.⁸¹ The privilege is not applicable where the owner or operator engaged in or committed significant violations constituting a pattern of continuous or repeated violations within three years prior to disclosure.⁸² Moreover, the privilege does not apply where the specific violation results in serious harm or in imminent and substantial endangerment to human health or the environment, or where the specific violation is a violation of a specific requirement in an administrative or judicial order.⁸³

Practice Tip: As noted in Chapter 1, in Senate Bill 59, the 130th

General Assembly removed the January 1, 2014 sunset date for the self-audit privilege law, thereby extending the law's applicability for an indefinite period of time.⁸⁴

[7] Use of SEPS as a Settlement Strategy

In addition to the formal enforcement procedures discussed above, many environmental violations in Ohio are resolved through alternate out-of-court means. Among these options are Supplemental Environmental Projects (SEPs), which are environmentally beneficial projects that a violator agrees to undertake when settling an enforcement action. In order to qualify as a SEP, the project must improve, protect, or reduce risks to public health or the environment, be undertaken in settlement of an enforcement action, and must be a project that the alleged violator is not otherwise legally required to perform.⁸⁵

Once the project has met the minimum qualification threshold, it must follow these parameters: (1) the project cannot be inconsistent with any provision of the underlying statute; (2) all penalty payments must be deposited into the Treasury; (3) all projects must advance at least one of the objectives of the environmental statutes that form the basis for the enforcement action and have an adequate nexus, meaning that the project will reduce the likelihood of similar future violations, it will reduce the adverse impact to public health or the environment from the violation or it will reduce the overall risk to public health or the environment; (4) U.S. EPA (or Ohio EPA) may not play any role in managing or controlling funds set aside to complete the SEP; and (5) the type and scope of each project must be defined in a signed settlement agreement.⁸⁶ SEPs also must meet funding limitations restricting U.S. EPA's use of SEP-designated funds.⁸⁷

In Ohio, SEPs are most often paired with a pollution prevention component. According to Ohio EPA, the benefit of adding a pollution prevention component to the SEP framework is a reduction in waste generation, in addition to treatment and control. This aspect of the program allows Ohio EPA to function in a proactive role to actively reduce future pollution threats which would not normally be addressed under a typical enforcement settlement that only addressed termination or cleanup of a particular violation. Pollution prevention SEPs allow Ohio EPA to also focus on prevention of waste generation as a byproduct of settlement, and therefore,

have found favor with Ohio enforcement authorities.

Practice Tip: Ohio EPA has approved SEPs without a strict reading of the nexus requirement.

⚠ Warning: Ohio EPA may not agree to a dollar-for-dollar reduction in the penalty, and in most cases, some monetary penalty must still be paid.

[8] Criminal Enforcement Process

The primary direction for the criminal enforcement of environmental requirements in Ohio will come from the Office of the Ohio Attorney General.⁸⁸ The authority to engage in a criminal prosecution concerning environmental violations, however, is one that is shared with both county and municipal prosecutors.⁸⁹ As a practical matter, only the prosecutor offices serving the largest of the 88 Ohio counties have resources sufficient to warrant both an investigatory and prosecutorial staff dedicated to environmental prosecutions. Thus, most of the felony-related prosecutions in the environmental arena will be the result of a collaborative effort between the local, county or municipal prosecutor, the Attorney General's Office, and the Ohio EPA.

The prosecutorial process itself will normally begin with an investigation performed by the Ohio EPA in conjunction with the specialized criminal investigative unit in the Attorney General's Office.⁹⁰ In some instances, local authorities, such as health departments or an agency with responsibilities related to environmental protection and authority such as a solid waste authority or wastewater treatment authority, may conduct an investigation in a specialized area.

Subsequent to the completion of an investigation, the investigatory agency will refer the matter to the Attorney General or the local prosecutor for prosecution.⁹¹ Should the matter be referred to the Attorney General, the general procedure will find the prosecutor from the Attorney General's Office cross-designated as a special assistant prosecutor for the relevant county or municipality. While the Attorney General's Office has statutory authority under the environmental statutory scheme to prosecute criminal violations of the various environmental requirements, as a practical matter, the prosecution

will proceed as a joint prosecution between the Attorney General's Office and the local prosecutor's office by way of indictment in the case of felony charges, or complaint if the matter solely involves misdemeanor charges.⁹²

In some instances, the investigation of an alleged violation may be performed in a task force environment that involves federal authorities in addition to state and local investigatory agencies. In those situations, a joint prosecution between the state and federal authorities may be jurisdictioned in federal court with the U.S. Attorney's Office as the lead prosecutorial agency. The import of such a prosecution is that, while the state environmental statutes generally provide for a *mens rea* of recklessness,⁹³ the federal environmental statutory scheme generally provides for knowing felonies and negligent misdemeanors.⁹⁴

⚠ Warning: As a result of the use of the sentencing guidelines in the federal system, an individual found guilty of an environmental crime runs a greater risk of incarceration to some degree than in the state system. While the state system has a system of factors that must be considered for sentencing, there is no corresponding numerical structure that mandates incarceration at a certain point.⁹⁵

Footnotes — § 15.04:

⁵⁶ See, e.g., R.C. 3704.05(H),(J),(K); R.C. 3734.02.

⁵⁷ R.C. 3745.01(C).

⁵⁸ R.C. 109.02.

⁵⁹ See, e.g., R.C. 3704.06; R.C. 3734.10; R.C. 6111.07.

⁶⁰ R.C. 3704.06; R.C. 3734.10; R.C. 3734.13; R.C. 6111.07; R.C. 6111.09.

⁶¹ R.C. 3745.31(B)(1).

⁶² R.C. 3745.31(B)(2).

⁶³ See, e.g., *Harmon Indus. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999).

⁶⁴ *United States v. Smithfield Foods, Inc.* (C.A. 4 1999), 191 F.3d 516.

⁶⁵ See *Harmon Indus. v. Browner* (C.A. 8 1999), 191 F.3d 894 (holding that since RCRA delegated complete administration and enforcement authority under the statute to states, the federal government could not engage in overfiling where it felt that a delegated state agency was not

sufficiently enforcing the statute). This decision suggests that similar statutes that delegate the enforcement authority to the states would likely carry a similar prohibition on federal overfiling.

⁶⁶ <http://epa.ohio.gov/portals/32/pdf/Enforcement%20Settlement%20Fact%20Sheet%20revised.pdf> (last visited Mar. 21, 2015).

⁶⁷ R.C. 3745.04.

⁶⁸ *Martin v. Schregardus*, Franklin App. No. 96APH04-433, 1996 Ohio App. LEXIS 4288.

⁶⁹ *City of Olmstead Falls v. Jones*, Franklin App. No. 02AP-753, 2003 Ohio App. LEXIS 1425.

⁷⁰ *Johnson's Island Property Owners' Ass'n v. Schregardus*, Franklin App. No. 96APH10-330, 1997 Ohio App. LEXIS 2839.

⁷¹ R.C. 3704.05, R.C. 3704.06, R.C. 3704.99; R.C. 3714.13, R.C. 3714.99; R.C. 3734.11, R.C. 3734.13, R.C. 3734.99; R.C. 6111.07, R.C. 6111.99.

⁷² R.C. 3745.08(B).

⁷³ R.C. 3745.08(C).

⁷⁴ R.C. 3745.08; R.C. 3704.06(E).

⁷⁵ R.C. 3745.71(B) (amended for other purposes June 2009).

⁷⁶ R.C. 3745.71(C) (amended for other purposes June 2009).

⁷⁷ R.C. 3745.71(C) (amended for other purposes June 2009).

⁷⁸ R.C. 3745.71(C) (amended for other purposes June 2009).

⁷⁹ R.C. 3745.72(A) (amended for other purposes June 2009).

⁸⁰ R.C. 3745.72(B) (amended for other purposes June 2009).

⁸¹ R.C. 3745.72(B)(2) (amended for other purposes June 2009).

⁸² R.C. 3745.72(E)(1) (amended for other purposes June 2009).

⁸³ R.C. 3745.72(E) (amended for other purposes June 2009).

⁸⁴ R.C. 3745.72(F).

⁸⁵ See <http://www.epa.gov/enforcement/supplemental-environmental-projects-seps> (last visited Apr. 1, 2016)).

⁸⁶ Sylvia K. Lowrance (March 22, 2002), U.S. EPA Memorandum, *Supplemental Environmental Projects (SEPS) Policy*, available at <http://www.epa.gov/sites/production/files/documents/sepguide-mem.pdf> (last visited Apr. 1, 2016).

⁸⁷ Sylvia K. Lowrance (March 22, 2002), U.S. EPA Memorandum, *Supplemental Environmental Projects (SEPS) Policy*, available at <http://www.epa.gov/sites/production/files/documents/sepguide-mem.pdf> (last visited Apr. 1, 2016).

⁸⁸ Environmental Criminal Enforcement is discussed in detail in [Chapter 16](#) below.

⁸⁹ R.C. 309.08; see §§ 16.05–16.07 below.

⁹⁰ See §§ 16.03–16.04 below.

⁹¹ Cf. R.C. 3704.06; R.C. 3714.11; R.C. 3734.10; R.C. 3746.22; R.C. 6111.07(B).

⁹² See § 16.06 below.

⁹³ See § 16.07 below.

⁹⁴ See, e.g., 33 U.S.C. § 1319(c)(1), (2); 42 U.S.C. § 7413(c)(1), (2).

⁹⁵ See, R.C. 2929.11; R.C. 2929.12; R.C. 2929.21; R.C. 2929.22.

§ 15.05. Citizens Suits

Under federal law, most of the major environmental statutes include a citizen suit provision. These provisions typically grant the right to any citizen, meaning any person who has an interest that is or may be adversely affected by an alleged violation of the relevant act, to commence a civil action on his or her own behalf against any person or against the Administrator of U.S. EPA as long as the Administrator of EPA has not commenced and is not diligently prosecuting a civil or criminal action against the violator.⁹⁶ Nearly half of the Circuit Court of Appeals follow the line of reasoning that a regulator's enforcement action bars a citizen suit as diligent prosecution regardless of whether the enforcement action has concluded.⁹⁷

Citizen groups must also have standing to bring the lawsuit. Organizations must demonstrate standing by showing: (1) one of their members would have standing; (2) the interests at stake in the litigation are connected to the purpose of the organization; and (3) an individual member of the organization is not required to participate directly. There is generally a low bar for citizen groups to have standing to bring the case. Groups only need to show limited evidence demonstrating a reasonable fear of being harmed by alleged emissions or discharges of the defendants.

Practice Tip: It is predicted that there will be an increase in the

number of citizens' suits that will be filed, especially with regard to the Clean Water Act.

Ohio, however, has not adopted the citizen suit model for the vast majority of its environmental programs. In fact, only the solid and hazardous waste laws in Ohio incorporate a citizen suit process for private grievances, which in fact only exists as an extension of Ohio EPA's implementation of RCRA.⁹⁸ Under this provision, the citizen is required to give the Director, the state Attorney General and the alleged violator notice by certified mail that details the alleged violations 150 days before any action is commenced.⁹⁹ Should the Director issue an enforcement order addressing the violation or a civil or criminal action concerning the violation be initiated by the Attorney General or local prosecutorial authority within 150 days of the required notice, the private citizen is prohibited from commencing an individual action.¹⁰⁰ The citizen, however, may intervene in any administrative or civil enforcement action as a matter of right.¹⁰¹

Aside from the limited availability of a citizen suit in [R.C. 3734.101](#), the majority of the remainder of the Ohio environmental programs have adopted the verified complaint model. Under the verified complaint process, an officer of a state agency or political subdivision, acting in a representative capacity, or any private citizen who is or will be aggrieved or adversely affected by a violation, may file a written complaint, verified by an affidavit, with the Director of Ohio EPA.¹⁰² The Director must then conduct an investigation into the alleged violation.¹⁰³

Footnotes — § 15.05:

⁹⁶ 33 U.S.C. § 1365(a)–(b), 42 U.S.C. § 7604(a)–(b), and 15 U.S.C. § 2619(a)–(b).

⁹⁷ See e.g., *In Group Against Smog and Pollution (GASP) v. Shenango*, 810 F.3d 116 (3d. Cir. Jan. 6, 2016).

⁹⁸ R.C. 3734.101.

⁹⁹ R.C. 3734.101(B).

¹⁰⁰ R.C. 3734.101(C)(1)(a),(b).

¹⁰¹ R.C. 3734.101; R.C. 6111.08; R.C. 3704.09.

¹⁰² R.C. 3745.08; see § 15.04[5].

¹⁰³ See § 15.04[5] for a full discussion of verified complaints.

IV.

PRIVATE PARTY ENVIRONMENTAL LITIGATION

§ 15.06. Fact and Expert Discovery


[1] Ohio Rules Governing Discovery

[a] General Discovery Methods

The procedural rules governing an environmental lawsuit differ for each potential court where a matter may be filed. Courts organized under the laws of Ohio are generally governed by either the Ohio Rules of Civil Procedure or Ohio Rules of Appellate Procedure, depending on whether the court is a trial or appellate institution.

Practice Tip: Always check to see if the presiding court has its own set of local civil rules supplementing the controlling Ohio or federal civil rules. Once the matter is assigned to a specific judge, check with the judge's chambers to establish whether the judge has a standing order that further dictates the manner in which discovery, motion practice, pre-trial preparation, or trial is to proceed.

Under **Civil Rule 26(A)**, the methods available for discovery include: (1) depositions upon oral exam or written questions; (2) written interrogatories; (3) requests for production of documents, electronically stored information, or things; (4) requests for permission to enter land or property for inspection or other purposes; (5) physical or mental examinations; and (6) requests for admissions. Courts have broad discretion to govern the discovery process.¹⁰⁴

 **Strategic Point:** Case management orders are commonly used in Ohio courts to control and focus discovery, as well as dispositive motion practice and trial preparation. Limitations imposed through case management orders can restrict or expand the number of discovery requests and depositions permitted, the timing of discovery, the subject matter of the discovery directed to a party, and other matters.

[b] Scope of Permissible Discovery

The scope of permissible discovery in Ohio is broad. Parties may obtain discovery regarding:

any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.¹⁰⁵

Not only does this standard suggest a broad scope for environmental litigation discovery, but: “[it] is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁰⁶

[c] Discovery of a Corporation

Under the Ohio Rules of Civil Procedure, “any party may take the testimony of any person, including a party, by deposition upon oral examination.”¹⁰⁷ When the “person” whose testimony is sought is a public or private corporation, partnership, or association, such testimony is sought through **Civ. R. 30(B)(5)**. This discovery tool is particularly important to business defendants engaged in environmental litigation, as any corporate witness, or witnesses, offered in response to a **Civ. R. 30(B)(5)** discovery request must testify as to the *organization’s* general knowledge, as opposed to the witness’ own personal knowledge.¹⁰⁸

Under **Civ. R. 30(B)(5)**, a party may depose “a public or private corporation or a partnership or association”¹⁰⁹ The party seeking to take a deposition gives notice which “designate[s] with reasonable particularity the matters on which examination is requested.”¹¹⁰ The organization is then required to produce employees, officers, agents, or other persons to testify on its behalf on matters known or available to the organization.¹¹¹

⚠ Warning: Under **Civ. R. 30(B)(5)**, an offered corporate witness is required to be prepared to testify as to all matters known or available to the corporation. Failure to prepare a Rule 30(B)(5) designee, or designees, on the noticed topics with respect to *all* the

corporation’s knowledge—and not just the designee’s knowledge—may serve as grounds for a [Civ. R. 37](#) motion for failure to make discovery.

[Civ. R. 33](#) imposes a duty similar to the [Civ. R. 30\(B\)\(5\)](#) duty upon corporations in the form of corporate interrogatories. [Civ. R. 33](#) requires corporations to designate a corporate representative to answer interrogatories served upon the corporation.¹¹² In so doing, “the organization shall choose one or more of its proper employees, officers or agents to answer the interrogatories, and the employee, officer or agent shall furnish such information as is known or available to the organization.”¹¹³ A trial attorney, whether educated on the corporation’s relevant knowledge or not, may not sign the answers on the corporation’s behalf. Rather, an appropriate corporate representative, or representatives, must attest to the responses.¹¹⁴ Trial counsel must, however, sign as to all objections.¹¹⁵

While the burden on a corporation to answer sworn interrogatories can be significant depending on the scope of the allegations and nature of the necessitated response, [Civ. R. 33\(C\)](#) allows designated business records to serve as the corporation’s response to a party’s interrogatory requests.¹¹⁶

[d] Electronic Discovery

The Ohio Supreme Court adopted amendments to the Ohio Rules of Civil Procedure to specifically address issues related to electronically stored information (“ESI”). Ohio generally modeled its electronic discovery rule amendments after the federal rules. The Ohio rules related to ESI, effective in July 2008, acknowledge that courts may address issues related to ESI during pretrial conferences,¹¹⁷ expressly (rather than implicitly, as before) include ESI in the scope of permissible discovery,¹¹⁸ limit discovery of ESI when production is unduly burdensome or expensive,¹¹⁹ provide factors for a judge to consider when a party seeks sanctions for lost or destroyed potentially relevant ESI,¹²⁰ and expressly provide that parties may use subpoenas to seek ESI from nonparties and allow the party issuing a subpoena to specify the form of ESI production.¹²¹

[e] Ohio Public Records Act Requests

The obligations and requirements established in the Ohio Public Records

Act only apply to “public records,” which are broadly defined to include records kept by a public office.¹²² To qualify as a record, the item must contain information that is stored on a fixed mediums such as paper, computers and film and be created, received, or sent under the jurisdiction of a public office. Moreover, the item must document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.¹²³ A public office does not have an obligation to provide access to an item or create an item that does not exist in order to respond to a request for information even if it is only a matter of compiling information from existing records.¹²⁴ Additionally, a public office does not have a duty to provide records that are acquired after a request for records is complete.¹²⁵

Any person, including corporations, individuals, and even other governmental agencies, may request public records.¹²⁶ The requestor does not have to be an Ohio resident and may designate someone else as the person who will inspect the documents or as the person to receive the copies.¹²⁷ There is no requirement within the Public Records Act for a request to be made in writing, although a writing may be requested.¹²⁸

Practice Tip: There is no specific language required to make a request to inspect public records, however, the requester must at least identify the records requested with sufficient clarity to enable the public office to identify, retrieve and review the records.¹²⁹

There are two primary obligations imposed upon public offices by the Public Records Act. First, to provide prompt inspection of public records. While prompt means without delay and with reasonable speed, compliance is determined within the context of the specific factual circumstance that is presented.¹³⁰ Moreover, the standard contemplates the opportunity for legal review.¹³¹

The second obligation is to provide copies of public records within a reasonable period of time. Similar to the consideration of what constitutes “prompt,” a reasonable period of time is determined based on the facts and circumstances of each particular case and again, contemplates the opportunity for legal review.¹³² While a public office cannot charge a person to inspect public records,¹³³ it may charge the actual cost of producing the copies,¹³⁴ unless the cost is already set by statute.¹³⁵ While the public office need only

use its normal office staff to fulfill the “reasonable period of time” requirement at no additional labor charge to the requestor, the public office may, with the consent of the requestor, have the documents produced more quickly.¹³⁶ The public office is not required to allow a requester to make the copies of requested documents.¹³⁷ A public office does not have a duty to provide copies of public records free of charge to a requestor who indicates an inability or unwillingness to pay for them.¹³⁸

While a public office is required to mail copies of public records upon request, the public office may require the prepayment of postage and the cost of mailing supplies in addition to the cost of copies.¹³⁹ The public office also may adopt policies and procedures concerning mailing out public records that include a limitation of ten records per month to any one requester unless the requester certifies its use is non-commercial.¹⁴⁰

In accordance with the Ohio Public Records Act, Ohio EPA provides that files, books and records are available to the public during regular business hours for review and copying, whether or not litigation is pending.¹⁴¹ The exceptions to this availability are: (1) communications with the Attorney General; (2) materials or information obtained or prepared during the pendency of litigation for use in that litigation; (3) materials or information not available for public inspection pursuant to statute or rule; and (4) privileged materials or information pursuant to statutory provisions relating to trade secrets.¹⁴² Ohio EPA also will provide facilities for the inspection of all its files and a machine or device for copying of papers and documents for which it may charge a fee commensurate with the cost to the agency of providing this equipment.¹⁴³


[f] The Attorney Client Privilege and the Attorney Work Product Privilege

Under Ohio law, private communications between a client and an attorney fall within the attorney-client privilege.¹⁴⁴ Where the client is a corporation, the same privilege applies.¹⁴⁵ Communications made within the attorney-client privilege are not subject to discovery—unless the client waives the privilege, and a party shows “good cause” exists for the discovery.¹⁴⁶

The attorney work product doctrine affords additional confidentiality

protections to partes.¹⁴⁷ This doctrine provides that any “materials” made by an attorney for a party “in anticipation of litigation,” are only discoverable upon a showing of “good cause.”¹⁴⁸ Unlike the attorney-client privilege, the protections afforded by the attorney work product doctrine are not absolute in the absence of a waiver. Some Ohio courts, however, generally provide greater protection to attorney work product relating to attorney opinions and impressions, than to recorded facts—such as witness statements.¹⁴⁹ Nonetheless, where appropriate, a court may order the production of attorney work product where a party meets their burden of demonstrating “good cause.”¹⁵⁰

Practice Point: Typically, a party in litigation will need to produce a log of all documents withheld as privileged.

 **Strategic Point:** Ohio law also offers varying degrees of protection to other privileged and confidential information, such as trade secrets. Parties can seek to shield this information from production to an opposing party, in whole or part, by seeking a protective order from the court upon motion.¹⁵¹ Alternatively, with respect to confidential business information, the parties may negotiate a confidentiality agreement that limits the opposing party’s ability to disclose and/or use any confidential information produced in the course of litigation.

Like most privileges, attorney-client privileges and attorney work product protections may be waived. Analysis of attorney-client privilege waiver differs under Ohio law depending on whether the privilege is being asserted as a matter of statutory or common law. [R.C. 2317.02](#) statutorily bars attorneys from testifying concerning their client’s communications. However, Ohio common law also protects attorney-client communications more generally.¹⁵²

Where a party asserts its statutory privilege, the privilege will not be deemed waived except in those narrow cases where there is express consent from the client, or where the client voluntarily testifies.¹⁵³ In contrast, the common law attorney-client privilege may be waived in a number of circumstances including: (1) where the client divulges the testimony to a third-party;¹⁵⁴ (2) where the party puts the privileged information into question

through an affirmative act—such as filing a lawsuit;¹⁵⁵ and (3) where abrogation of the privilege is required by law.¹⁵⁶ Vigilance with respect to waiver issues is vital, as Ohio law holds that once there is partial waiver or disclosure of privileged material, the waiver will be extended to all other protected material relating to the same subject matter.¹⁵⁷

While little Ohio law analyzes when attorney-work product may be deemed waived, [Civ. R. 26](#) makes plain that the privilege is not absolute.¹⁵⁸

[2] Experts


[a] Discovery Relating to Expert Witnesses

In 2012, [Rule 26 of the Ohio Rules of Civil Procedure](#) was amended to significantly limit the scope of expert discovery. The old rules distinguished between consulting and testifying experts and provided separate discovery rules for each category.

Under new Rule 26(B)(5), a party may discover facts known or opinions held by an expert retained or specially employed in anticipation of litigation or preparation for trial only (1) upon a showing that the party seeking discovery is unable to obtain facts and opinions on the same subject by other means without undue hardship; or (2) upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.¹⁵⁹ However, a party may serve an interrogatory seeking the identity of experts that are expected to testify at trial and the subject matter of the expert's expected testimony.¹⁶⁰ Once the expert is identified, the opposing party is entitled to conduct discovery of that witness concerning the facts known to the expert and opinions held by the expert that are relevant to the stated subject matter of his or her anticipated testimony at trial.¹⁶¹

Practice Point: Under the 2012 Amendments to Rule 26, draft expert reports are privileged from disclosure as work product, and communications between attorneys and testifying experts are also protected work product except for three categories: (1) communications that relate to compensation for the expert's study or testimony; (2) communications containing facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; and (3) communications containing any

assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.¹⁶² These amendments were intended to align Ohio practice with the 2010 amendments to the Federal Rules of Civil Procedure relating to a party's ability to obtain discovery from expert witnesses who are expected to be called at trial. Although Ohio appellate courts have not yet ruled on the scope of the new Rule 26(b)(5), federal courts applying the 2010 amended federal rule have found that parties seeking to show exceptional circumstances for discovery of a draft expert report carry a "heavy burden,"¹⁶³ and the privilege "extends work product protection to most communications between trial counsel and experts."¹⁶⁴

 **Strategic Point:** In Ohio, it is common for local rules to govern the exchange of information relating to expert testimony—for example, compelling submittal of expert reports, and regulating the timing of expert depositions. Always consult the local rules concerning expert discovery at the outset of environmental litigation.

[b] Admissibility of Expert Evidence in Ohio

Ohio courts follow the U.S. Supreme Court and the majority of states, in holding that trial courts must serve as a gatekeeper with respect to scientific expert testimony falling within **Evidence Rule 702**. Accordingly, Ohio courts must ensure that evidence an expert submits is "not only relevant, but reliable."¹⁶⁵

The U.S. Supreme Court first articulated the governing three-pronged test for determining whether expert testimony is sufficiently reliable in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). This standard has been codified in the Ohio Rules of Evidence,¹⁶⁶ and the Ohio Supreme Court relies on *Daubert* in interpreting Ohio's codified expert reliability requirement.¹⁶⁷ Therefore, to be deemed admissible, expert testimony must meet the following test:

- (1) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

- (2) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and
- (3) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
 - (a) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles.
 - (b) The design of the procedure, test, or experiment reliably implements the theory.
 - (c) The particular procedure, test, or experiment was conducted in a way that will yield as accurate result.

The latter three-pronged test pertains to the reliability of the basis for the expert's opinion, and was developed from the progeny of *Daubert*.¹⁶⁸ The application of this codified *Daubert* test is applied in a consistent manner to expert evidence used in environmental litigation.¹⁶⁹

Footnotes — § 15.06:

¹⁰⁴ *Stegawski v. Cleveland Anesthesia Group* (1987), 37 Ohio App. 3d 78.

¹⁰⁵ Civ. R. 26(B).

¹⁰⁶ Civ. R. 26(B).

¹⁰⁷ Civ. R. 30(A).

¹⁰⁸ Civ. R. 30(B)(5).

¹⁰⁹ Civ. R. 30(B)(5).

¹¹⁰ Civ. R. 30(B)(5).

¹¹¹ Civ. R. 30(B)(5).

¹¹² Civ. R. 33(A)(1).

¹¹³ Civ. R. 33(A)(1).

- 114 *Inzano v. Johnston* (1986), 33 Ohio App. 3d 62.
- 115 Civ. R. 33(A)(3).
- 116 Civ. R. 33(C).
- 117 Civ. R. 16(8).
- 118 Civ. R. 26(A), B(1), and (B)(3); Civ. R. 34.
- 119 Civ. R. 26(B)(4).
- 120 Civ. R. 37(F).
- 121 Civ. R. 45(A) and (D)(2).
- 122 R.C. 149.43(A)(1).
- 123 R.C. 149.011(G). *Cf. State ex rel. Carr v. Caltrider* (May 16, 2001), 2001 Ohio Misc. LEXIS 41.
- 124 *State ex rel. Fant v. Mengel* (1991), 62 Ohio St. 3d 197, 198; *State ex rel. Kerner v. State Teachers Retirement Bd.* (1998), 82 Ohio St. 3d 273; *State ex rel. White v. Goldsberry* (1999), 85 Ohio St. 3d 153.
- 125 *Cf. State ex rel. Taxpayers Coalition v. City of Lakewood* (1999), 86 Ohio St. 3d 385.
- 126 *Franklin County Sheriff's Dept. v. State Employment relations Bd.*(1992), 63 Ohio St. 3d 498.
- 127 R.C. 1.59 (General Provisions, Chapter 1, Definitions); 1990 Ohio Atty. Gen. Ops. No. 90-050; *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, *superseded on other grounds*; *State ex rel. Finnerty v. Custodian of Records, Strongsville Police Dept.* (1994), 96 Ohio App. 3d 569.
- 128 *Franklin County Sheriff's Dep't v. State Employment Relations Bd.* (1992), 63 Ohio St. 3d 498; R.C. 149.43(B)(5).
- 129 R.C. 149.43(B)(5).
- 130 *State ex rel. Consumer News Services, Inc. v. Worthington Bd. of Education* (2002), 97 Ohio St. 3d 58.
- 131 *State ex rel. Taxpayers Coalition v. City of Lakewood* (1999), 86 Ohio St. 3d 385.
- 132 *State ex rel. Consumer News Services, Inc. v. Worthington Bd. of Education* (2002), 97 Ohio St. 3d 58; *State ex rel. Taxpayers Coalition v. City of Lakewood* (1999), 86 Ohio St. 3d 385.
- 133 *State ex rel. Lemke v. Columbiana County Prosecutor's Office*, Columbiana App. No. 93-C-56, 1996 Ohio App. LEXIS 521.
- 134 R.C. 149.43(B)(1), (B)(7).

- ¹³⁵ *E.g.*, R.C. 5502.12 (Dept. of Public Safety may charge for copies of accident reports).
- ¹³⁶ *State ex rel. Gibbs v. Concord Twp. Trustees*, 152 Ohio App. 3d 387, 2003-Ohio-1586.
- ¹³⁷ *State ex rel. Bertolini v. Smith*, Franklin App. No. 89AP-836, 1988 Ohio App. LEXIS 2994.
- ¹³⁸ *State ex rel. Mayrides v. City of Whitehall* (1990), 62 Ohio App. 3d 225; *State ex rel. Edwards v. Cleveland Police Dep't* (1996), 116 Ohio App. 3d 168.
- ¹³⁹ R.C. 149.43(B)(7).
- ¹⁴⁰ R.C. 149.43(B)(7).
- ¹⁴¹ OAC 3745-47-20.
- ¹⁴² OAC 3745-47-20(B).
- ¹⁴³ OAC 3745-47-20(B).
- ¹⁴⁴ R.C. 2317.02(A).
- ¹⁴⁵ R.C. 2317.021.
- ¹⁴⁶ Civ. R. 26(B)(1); *In re Election of November 6, 1990 for Office of Attorney Gen* (1991), 57 Ohio St. 3d 614, 615 (holding that party seeking production of material within attorney-client privilege must show good cause—even if the privilege was waived).
- ¹⁴⁷ *Schaefer v. Garfield Mitchell Agency* (1992), 82 Ohio App. 3d 322, 329.
- ¹⁴⁸ Civ. R. 26(B)(3).
- ¹⁴⁹ *Jackson v. Greger*, 160 Ohio App. 3d 258 (holding that attorney mental impressions are afforded near absolute protection).
- ¹⁵⁰ Civ. R. 26(B)(3); *Jackson v. Greger* (2005), 160 Ohio App. 3d 258 (holding good cause requires “a showing of substantial need, that the information is important in the preparation of the party’s case, and that there is an inability or difficulty in obtaining the information without undue hardship.”).
- ¹⁵¹ Civ. R. 26(C)(7).
- ¹⁵² *State v. McDermott* (1995), 72 Ohio St. 3d 570.
- ¹⁵³ *State v. McDermott* (1995), 72 Ohio St. 3d 570.
- ¹⁵⁴ *Travelers Indemnity Co. v. Cochrane* (1951), 155 Ohio St. 305 (plaintiff waived privileged nature of his statement to insurance counsel where he divulged contents of statement to others).
- ¹⁵⁵ *Ward v. Graydon, Head & Ritchey* (2001), 147 Ohio App. 3d 325 (plaintiff waived attorney-client communication by filing malpractice lawsuit against its attorney).

¹⁵⁶ *Allen County Bar Ass'n v. Williams* (2002), 95 Ohio St. 3d 160 (acknowledging “required by law” exception to attorney-client privilege).

¹⁵⁷ *In re Guardianship of Simmons*, 6th Dist. No. WD-02-039, 2003 Ohio App. LEXIS 4872, at *15 (citing *Mid-American Nat'l Bank & Trust Co. v. Cincinnati Ins. Co.* (1991), 74 Ohio App. 3d 481, 489). See also *Walsh v. Barcelona Associates, Inc.* (1984), 16 Ohio App. 3d 470, 471–472 (waiver is not limited to the actual communication, but to the entire subject matter of the communication).

¹⁵⁸ Civ. R. 26(B)(3).

¹⁵⁹ Civ. R. 26(B)(5)(a).

¹⁶⁰ Civ. R. 26(B)(5)(b).

¹⁶¹ Civ. R. 26(B)(5)(b).

¹⁶² Civ. R. 26(B)(5)(c)–(d).

¹⁶³ *Spirit Master Funding, LLC v. Pike Nurseries Acquisition, LLC*, 287 F.R.D. 680, 684 (N.D. Ga. 2012).

¹⁶⁴ *Meds. Co. v. Mylan Inc.*, 2013 U.S. Dist. LEXIS 82964 (N.D. Ill. June 13, 2013).

¹⁶⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

¹⁶⁶ Evid.R. 702.

¹⁶⁷ *Miller v. Bike Athletic Co.* (1998), 80 Ohio St. 3d 607.

¹⁶⁸ See *Terry v. Caputo*, 115 Ohio St. 3d 351 (2007) (requires evidence of specific causation expert testimony in mold case). Cf. *Adams v. Pitorak & Coenen Invs., Ltd., Geauga Cty. Nos. 2009-G-2931 and 2009-G-2940*, 2010 Ohio App. LEXIS 2848, at *60–61 (noting that scientific testing is not required for expert testimony under Ohio Evid. R. 702 when an expert is testifying regarding the cause of water runoff as an engineer in a mold case).

¹⁶⁹ See *Valentine v. Conrad*, 110 Ohio St. 3d 42 (2006) (Qualification and reliability are distinct requirements. Trial court must review principles and methodology underlying expert’s opinion and determine whether opinion will be helpful to the trier of fact.).

§ 15.07. Common Law Claims, Damages and Statute of Limitations

[1] Common Law Claims

[a] Negligence

To make out a prima facie claim for negligence in Ohio, one must prove: (1) duty; (2) breach of duty; (3) proximate cause; and (4) injury.¹⁷⁰ The

applicable standard of care, or duty, is that “which an ordinarily careful and prudent person would exercise or observe under the same or similar circumstances.”¹⁷¹ A party’s duty is defined generally by the common law.¹⁷² Alternatively, the duty also may be established by statute under the doctrine of negligence per se.¹⁷³

A negligence action for damage to a property accrues and the four-year statute of limitations of [Revised Code § 2305.09\(D\)](#) commences to run when the damage is first discovered by the plaintiff, or through the exercise of reasonable diligence should have been discovered.¹⁷⁴

Practice Point: Permit conditions may establish the appropriate standard of care in a negligence action. Activities undertaken in compliance with the permit are likely to be deemed reasonable, and permit exceedances may be found to be unreasonable, when analyzing the first two elements applicable to a negligence action.¹⁷⁵

[b] Nuisance

[i] Elements of a Nuisance Claim

Under Ohio law, to succeed on a claim for nuisance, one must demonstrate an unreasonable interference with the use and enjoyment of their property, which caused real, material and substantial injury.¹⁷⁶ Courts in Ohio recognize several different concepts within the law of nuisance.

Practice Point: Nuisance has become a claim utilized by various plaintiffs in the context of climate change litigation. For the latest judicial developments concerning climate change litigation, see [§ 23.14\[4\]\[e\]](#).


[ii] Public v. Private

First, a nuisance is characterized as either a public nuisance or a private nuisance, depending on the type of interest with which it interferes. A public nuisance is defined as an unreasonable interference with a right common to the public; yet, conduct does not amount to a public nuisance merely because it interferes or bothers a large number of people.¹⁷⁷ However, for example, a public nuisance is present when defendant’s conduct renders the plaintiff’s

groundwater unusable and disrupted its business, which provides public water to approximately 12,000 people.¹⁷⁸ Whereas, a private nuisance is a *nontrespasory* invasion of another's interest in the private use and enjoyment of their land.¹⁷⁹ Ohio has adopted Section 822 of the Restatement, which further provides that in order for a party to recover for private nuisance, the party must show that the invasion of the party's interest is either: (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.¹⁸⁰

[iii] Absolute v. Qualified

Additionally, a nuisance also can be either an absolute nuisance or a qualified nuisance, depending on the level of the actor's culpability. The law distinguishes an absolute nuisance or (nuisance per se), for which strict liability is imposed, from a qualified nuisance, which is a nuisance based on the negligence of the claimed wrongdoer.¹⁸¹ Absolute nuisance or strict liability involves three categories of conduct: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; or (3) a nonculpable act resulting in accidental harm, for which, because of the hazards involved absolute liability attaches notwithstanding the absence of fault.¹⁸² Conversely, a qualified nuisance is based on negligence.¹⁸³ If the action is based on a qualified nuisance theory, the standard of care owed to one injured is that care a prudent man or woman would exercise in preventing potentially or unreasonably dangerous conditions to exist.¹⁸⁴

 **Strategic Point:** The existence of a qualifying permit or other legal authorization is a defense to an absolute nuisance.

Practice Tip: Ohio law does not recognize strict liability except as an absolute nuisance.

[iv] Permanent v. Continuing

The nuisance needs to be further characterized as either permanent or continuing in order to determine the applicable statute of limitations. If the nuisance is permanent, the statute of limitations begins to run at the time that the nuisance begins or is first noticed, as long as the permanent nature of the

nuisance can be ascertained at that time.¹⁸⁵ In contrast, a continuing nuisance can be asserted when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights.¹⁸⁶ Thus, when the alleged nuisance is continuing, no statute is triggered since the theory is new violations are created continuously, but a plaintiff is limited to seeking recovery of damages incurred the four years prior to filing the complaint.¹⁸⁷

Practice Tip: Nuisance law in Ohio is a fact-specific analysis with contradictory precedent making it susceptible to innumerable arguments.

[c] Trespass

To prevail upon a claim for trespass in Ohio, one must prove: (1) an intrusion onto his or her property; (2) such intrusion interferes with the right to the exclusive possession of the property; and (3) substantial damage to the property.¹⁸⁸

Thus, to satisfy the elements of a trespass claim, a plaintiff must prove actual intrusion onto the property. There does not appear to be any case law in Ohio suggesting that a mere reduction in property value alone would satisfy the requirement for an actual injury. Instead, as explained in § 15.05[2][a] below, Ohio law looks at the reduction in property value as a measure of damages for an injury to property.¹⁸⁹ The Ohio Supreme Court has held that a plaintiff cannot rely on the mere presence of a chemical pollutant on the property; instead, a plaintiff needs to point to evidence in the record that establishes "some type of physical damage or interference with use."¹⁹⁰ When the alleged trespass involves subsurface contamination, it is considered an indirect trespass. Yet, even with an indirect trespass, the owner of the property must show that the invasion of the property actually interferes with the property owner's reasonable and foreseeable use of the subsurface.¹⁹¹

Additionally, a plaintiff also must prove actual or constructive possession of the land at the time the trespass occurred.¹⁹² A plaintiff, however, may sue for a trespass that began prior to the plaintiff's taking possession, if the defendant's trespass continues after the plaintiff takes possession.¹⁹³ A continuing trespass occurs when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights.¹⁹⁴ Conversely, a permanent trespass occurs when the defendant's tortious act

has been fully accomplished, but injury to the plaintiff's land from that act persists in the absence of further conduct by the defendant.¹⁹⁵ If an action is deemed a permanent trespass, then the four-year statute of limitations found in [Ohio Rev. Code Ann. § 2305.09\(D\)](#) for damage to real property applies, and begins to run once the wrongdoer is discovered.¹⁹⁶ If, however, the alleged trespass is continuing, the theory is new violations are continuously created, but a plaintiff is limited to seeking recovery of damages incurred during the four years prior to filing the complaint.¹⁹⁷ Yet, there must be actual evidence of damages presented, for a trespass claim to be successful.¹⁹⁸

[d] Intentional and Negligent Infliction of Emotional Distress

To maintain a claim for intentional infliction of emotional distress, a plaintiff must prove: (1) the defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community; (3) the defendant's actions proximately caused psychic injury to the plaintiff; and (4) the plaintiff suffered serious mental anguish of a nature no reasonable man could be expected to endure.¹⁹⁹ In order to constitute "serious emotional distress," the injury must surpass upset or hurt feelings, and must be such that "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."²⁰⁰

A claim for negligent infliction of emotional distress requires proof that: (1) the plaintiff was a bystander to an accident, witnessed or experienced a dangerous accident, or was in fear of physical consequences to his or her own person as the result of a negligent act; (2) reasonably appreciated the peril of the accident; and (3) suffered serious and foreseeable emotional distress as a result.²⁰¹ Nonetheless, a plaintiff may recover for emotional distress caused by another's negligence even without a contemporaneous physical injury.²⁰² Yet, emotional distress, unaccompanied by physical injury, must be "severe and debilitating," and therefore, to recover without a contemporaneous injury, an individual must demonstrate that he or she was in fear of physical consequences to his or her own person.²⁰³ Basically, negligent infliction of emotional distress is limited to situations where one has either witnessed a dangerous accident or appreciated the actual physical peril.²⁰⁴

A claim for intentional infliction of emotional distress is governed by [R.C. § 2305.09\(D\)](#), which provides a four-year statute of limitations.²⁰⁵ Such a claim, however, does not accrue until the tort is complete, which is at the time the injury is incurred and the emotional impact is felt.”²⁰⁶ The statute of limitations for negligent infliction of emotional distress claim is two years from the date of the sudden and traumatic event.²⁰⁷

Practice Tip: Claims for intentional infliction of emotional distress and negligent infliction of emotional distress in this context ordinarily do not survive. For intentional infliction of emotional distress, it is very difficult to sufficiently prove that a defendant acted with the necessary intent or extreme recklessness. Additionally, the gradual release of chemicals is not a single sudden traumatic experience that a negligent infliction of emotional distress cause of action contemplates, and recovery is not permitted where the person alleges suffering of the emotional distress after witnessing the negligent damaging of property over a period of time.²⁰⁸

[e] Medical Monitoring

If a plaintiff does not have an alleged personal injury at the time of filing suit, another option is to request medical monitoring to proactively identify future diseases. The Ohio Supreme Court has not ruled directly on the availability of medical monitoring damages.²⁰⁹ Federal case law in Ohio, however, clarifies, that in order for medical monitoring damages to be recoverable, monitoring must be directed at the disease for which a tort victim is at risk, and procedures for which damages are sought must be medically prudent in light of that risk as opposed to measures aimed at general health.²¹⁰ Additionally, at least one Ohio common pleas court has acknowledged indirectly the presence of such a claim.²¹¹ Yet, recently, the Northern District of Ohio found that although Ohio law does not recognize medical monitoring as an independent cause of action, it is a form of damages for an underlying tort claim. For a medical monitoring damage claim, the plaintiff does not have to show physical injuries, but the plaintiff must show by expert medical testimony that plaintiffs have an increased risk of disease that warrants a reasonable physician to order monitoring.²¹²

[f] Fear of Future Injury

Ohio also recognizes claims for fear of future health effects.²¹³ To be compensable, the plaintiff must prove that he or she possesses “an increased statistical likelihood of developing disease, and that from this knowledge springs a reasonable apprehension which manifests itself in mental distress.”²¹⁴ Yet, no court in Ohio has allowed recovery for apprehension of a risk of harm in a case when the plaintiff has not suffered any injury.²¹⁵

[g] Contribution

Under Ohio law, contribution is a statutory right to recover damages from another tortfeasor. [Revised Code § 2307.25](#) states:

if one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability ...²¹⁶

The proportionate shares of tortfeasors in a common liability are based on their relative degrees of legal responsibility.²¹⁷ Thus, there is no right to contribution unless one of the tortfeasors pays more than his fair share.²¹⁸

A release provided to a settling tortfeasor does not discharge any of the other tortfeasors from liability for contribution unless its terms so provide, but the release does reduce the claim against the other tortfeasors to the extent of the settlement amount.²¹⁹ However, the reduction of the claim against the other tortfeasors does not apply where the reduction results in the plaintiff recovering less than the total amount of the plaintiff's compensatory damages.²²⁰ The release or covenant, however, does discharge the settling tortfeasor from all liability for contribution to any other tortfeasor.²²¹

Practice Point: A tortfeasor who enters into a settlement with an injured party is not entitled to contribution from another tortfeasor if the other tortfeasor's liability was not extinguished by the settlement, or if the settling tortfeasor paid in excess of what would be considered reasonable.²²²

A party that has expended environmental cleanup costs also can attempt

to assert claims for contribution pursuant to federal law under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²²³ Parties that are determined to be “responsible parties” for the contamination may bring a contribution or cost recovery claim pursuant to Sections 107 or 113 of CERCLA.²²⁴ The U.S. Supreme Court has held that a party must be subject to a “prior civil action” under CERCLA Section 106 or 107 before bringing a contribution action.²²⁵ A Supreme Court decision in 2007 confirmed that potentially responsible parties do in fact have a cause of action to recover costs from other PRPs under Section 107 of CERCLA where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.²²⁶ In 2014, the U.S. Court of Appeals for the Sixth Circuit held that a party can only bring a § 107 cost recovery action if the settlement agreement at issue does not qualify as an “administrative settlement” under the CERCLA contribution provision of § 113(f).²²⁷ As explained in *Hobart*, a defining characteristic of a § 113(f) administrative settlement is that it resolves some or all of a party’s liability to the government.²²⁸ Whether a party may bring a claim under § 107 or § 113 has many implications, including, which statute of limitations may be applicable to a claim. *Hobart* has been followed in several jurisdictions.

Practice Point: The U.S. Supreme Court also provides support for parties to argue for divisibility of liability under CERCLA Section 107 pursuant to *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009). The party seeking to avoid joint and several liability bears the burden of proving a reasonable basis for divisibility of harm.²²⁹ CERCLA defendants seeking to avoid joint and several liability “bear the burden of proving that a reasonable basis for apportionment exists.” The Seventh Circuit tried to revive this argument in *United States v. P.H. Glatfelter Co.*,²³⁰ which remanded a district court decision with instructions for the court to look more closely at divisibility defenses. After the remand, the Eastern District of Wisconsin held that NCR established its divisibility defense.²³¹ Months later though, the court granted the government’s motion for reconsideration and concluded that NCR failed to meet its burden to show the harm was theoretically capable of divisibility and that there was a reasonable basis for apportionment.²³² Thus, the *NCR* decision

has wavered with the court's decision on divisibility, but overall it is still very difficult to win a divisibility argument.

Practice Point: Although Ohio federal or state courts have not decided a divisibility case following the 2009 Supreme Court's *Burlington Northern* case, there have been dozens of opinions in other jurisdictions, and every court has ruled against parties presenting divisibility arguments.

 **Warning:** CERCLA may preempt the state contribution claims for remediation expenses.

[h] Indemnification

An indemnification claim arises from contracts that are either express or implied.²³³ They involve the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.²³⁴ Contracts of indemnity are construed in accordance with the general rules for the construction of contracts. Thus, the language and terms of the contract are given their plain meaning.²³⁵ If the terms of the contract are ambiguous, a court generally will construe the language against the party that drafted the document.²³⁶ When the indemnitor and indemnitee are sophisticated commercial parties, however, the indemnity provision need not be construed against the drafter.²³⁷

Indemnity claims also may arise by implied contract only when one party is liable for the wrongful act of another and pays damages to the injured party as a result.²³⁸ An implied contract of indemnity exists in situations where there is a relationship between tortfeasors such that one tortfeasor may be held liable for another's actions.²³⁹ Implied indemnity, however, is not available when two parties are joint tortfeasors that are both responsible for negligence.²⁴⁰

R.C. 2307.25 does not affect any right to indemnity under existing Ohio law. It states that "if one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution ..."²⁴¹

Practice Tip: Parties often utilize indemnity agreements to shift environmental liabilities by contract. In general, courts will enforce

such agreements, vis-à-vis the contracting parties, but this will not prevent a government plaintiff from suing the indemnified party.

[i] Unreasonable Use of Water

A claim for “unreasonable use of water” has become an increasing feature in water-related contamination cases. The common law actions are shaped by [R.C. 1521.17](#). Common law defenses apply to this cause of action as they do for negligence, nuisance, trespass and other common law actions. For a full analysis of riparian rights and common law associated with water, see [Chapter 5](#).

[2] Damages

[a] Property Damages: Loss of Use and Diminution in Property

When a claimant seeks recovery for permanent damage to property (i.e. damage is irreparable), Ohio law mandates proof of the difference in the market value of the property, including improvements to the property, before and after the injury.²⁴² If, in contrast, the damage alleged is temporary in nature (i.e. repairable), an Ohio Court may award damages for the cost of repair plus “loss of use” between the time of the injury and the restoration.²⁴³ If, however, such cost of restoration exceeds the difference in the market value of the property before and after the injury, then the difference in market value is the correct measure of damages.²⁴⁴

A lessee also is entitled to recover his or her losses.²⁴⁵ In evaluating a leasehold interest, courts consider the amount of rent the lessee is required to pay, the reasonable value of the use of the realty for the unexpired term of the lease, any premium paid by the lessee for the lease in addition to the subsequent rental, and any increase or decrease in the market value of the realty during the term of the lease.²⁴⁶

Finally, a plaintiff asserting such property damage claims in Ohio can seek additional recovery for discomfort and annoyance to him as an occupant.²⁴⁷ The discomfort does not need to be constant, the value of the property depreciated, the health of the occupants compromised or the rental value of the property impaired.²⁴⁸

Practice Tip: Damage awards are fact-specific inquiries, and the

final dollar value determinations usually are based on expert testimony.

[b] Stigma Damages

Allegations of environmental stigma focus on the argument that the value of real property decreases due solely to public perception or fear of contamination from a neighboring property. Ohio law does not permit a party to maintain a claim based on stigma damages. Instead, the Ohio Supreme has explained that a plaintiff must show actual damage to the property.²⁴⁹

[c] Personal Injuries

Claims for property damages are often accompanied by claims for personal injuries, especially cancer. In Ohio, actions for personal injuries are governed by a two-year statute of limitations.²⁵⁰ The Ohio Supreme Court has recognized, however, that in certain situations, an injured person may not be aware of the injury he or she has suffered until after the expiration of this two-year period, especially when the case involves allegations of exposure to toxic chemicals. Where such an injury does not manifest itself immediately, a cause of action for that injury arises when the plaintiff is informed by competent medical authority that he or she has been injured by exposure to the toxin, or when, by the exercise of reasonable diligence, he or she should have become aware of such injury.²⁵¹

[d] Injunctive Relief

In litigation that does not involve the government, the ability to obtain injunctive relief generally relies upon guidelines that require findings regarding the likelihood of the plaintiff's success on the merits of the alleged claim; whether there is an adequate remedy at law; whether an irreparable harm will result in the absence of an injunction; the balance of interests between the potential injury to the defendant and the general public; and whether the desired injunctive relief will simply maintain the status quo.²⁵²

The considerations used to determine whether a private party is entitled to injunctive relief differ from those used when a government agency such as Ohio EPA seeks injunctive relief in several important respects. Initially, the courts are not required to balance the potential injury to a defendant where an

agency such as the Ohio EPA seeks an injunction that is authorized by a statute designed to provide the government with the means to enforce what is a public policy.²⁵³ Further, to obtain injunctive relief, Ohio EPA does not have to show any degree of irreparable harm. To the contrary, Ohio EPA is only required to show that the statutory requirements of a violation or threatened violation of any statutory or regulatory provision, a permit condition or order exist to empower a court to issue a requested injunction.²⁵⁴

[e] Punitive Damages

In Ohio, courts may award punitive damages in tort actions if there is proof of fraud, malice, or insult.²⁵⁵ Such damages are appropriate only after the trier of fact determines that a party is entitled to compensatory damages.²⁵⁶ Ohio courts characterize “fraud, malice or insult” as “actual malice.”²⁵⁷ Actual malice is (1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge; or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.²⁵⁸ Before a jury can determine if a party is entitled to punitive damages, the court must determine: (1) whether reasonable minds could differ as to whether the wrongdoer was aware that his or her act had a great probability of causing substantial harm; and (2) whether the party consciously disregarded the injured party’s rights or safety.²⁵⁹

Footnotes — § 15.07:

¹⁷⁰ *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285 (“In order to establish actionable negligence, one seeking recovery must also show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom.”).

¹⁷¹ *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285 (citing *Di Gildo v. Caponi* (1969), 18 Ohio St. 2d 125, 127).

¹⁷² *Sidle v. Humphrey* (1968), 13 Ohio St. 2d 45, 49 (citing to case law establishing duty owed by landlord to business invitee of tenant).

¹⁷³ *State ex rel. Schoener v. Board of County Comm’rs* (1992), 84 Ohio App. 3d 794, 801 (setting forth elements to prove negligence per se).

¹⁷⁴ *Harris v. Liston* (1999), 86 Ohio St. 3d 203, 207.

¹⁷⁵ *N. Coast Premier Soccer, LLC v. Ohio DOT*, 2012 Ohio 5296, 2012 Ohio Misc. LEXIS 170 (Ohio Ct. Cl. Mar. 30, 2012), *aff’d*, 2013 Ohio App. LEXIS 1540 (Ohio Ct. App. Apr. 25, 2013).

¹⁷⁶ *Taylor v. City of Cincinnati* (1944), 143 Ohio St. 426, 440; *Soukoup v. Republic Steel Corp.*

(1946), 78 Ohio App. 87, 103.

¹⁷⁷ *Brown v. County Comm'rs* (1993), 87 Ohio App. 3d 704, 712 (citing Restatement of the Law 2d, Torts Section 821B (1979)).

¹⁷⁸ *Little Hocking Water Ass'n v. E.I. du Pont de Nemours*, 91 F. Supp. 3d 940, 971–73, 978–82 (S.D. Ohio 2015).

¹⁷⁹ Restatement of the Law 2d, Torts (1979) 100, Section 821D (*emphasis added*).

¹⁸⁰ See *Brown v. County Comm'rs* (1993), 87 Ohio App. 3d 704, 712–13 (adopting the Restatement Sections 821 and 822 in the context of a public and private nuisance).

¹⁸¹ *Uland v. S.E. Johnson Companies, Inc.*, Williams App. No. 95-CI-000095, 1997 Ohio App. LEXIS 6112, at *9–10.

¹⁸² *Uland v. S.E. Johnson Companies, Inc.*, Williams App. No. 95-CI-000095, 1997 Ohio App. LEXIS 6112, at *11.

¹⁸³ *Uland v. S.E. Johnson Companies, Inc.*, Williams App. No. 95-CI-000095, 1997 Ohio App. LEXIS 6112, at *12.

¹⁸⁴ *Rothfuss v. Hamilton Masonic Temple* (1973), 34 Ohio St. 2d 176, 180.

¹⁸⁵ *Brown v. County Comm'rs* (1993), 87 Ohio App. 3d 704, 718.

¹⁸⁶ *Weir v. East Ohio Gas Company*, Mahoning App. No. O1-CA-207, 2003 Ohio App. LEXIS 1165, at *16.

¹⁸⁷ *Wood v. American Aggregates Corp.* (1990), 67 Ohio App. 3d 41, 45.

¹⁸⁸ *Brown v. County Comm'rs* (1993), 87 Ohio App. 3d 704, 717; *Chance v. BP Chems.* (1996), 77 Ohio St. 3d 17 (discussing actual damages requirement); *Williams v. Oeder* (1995), 103 Ohio App. 3d 333, 338.

¹⁸⁹ *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 248; *Brown v. County Comm'rs* (1993), 87 Ohio App. 3d 704, 717 (“We are persuaded that ... since appellant has failed to adduce summary judgment evidence of physical damage to her real property, appellees were entitled to summary judgment on appellant’s trespass claim.”). See also *Readance v. American Asphalt Sealcoating, Inc.*, Lake App. No. 2009-L-002, 2009 Ohio App. LEXIS 4452, at *9 (noting that “this court has, especially in cases involving residential properties, moved away from the ‘rigid’ rule of *Ohio Collieries*, and [has] evolved toward a rule of reasonableness”).

¹⁹⁰ *Chance v. BP Chems.* (1996), 77 Ohio St. 3d 17.

¹⁹¹ *Lueke v. Union Oil Co.* (2000), Ottawa App. No. 07-00-008, 2000 Ohio App. LEXIS 4845, at *17.

¹⁹² *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App. 3d 471, 475, 2002-Ohio-4392.

¹⁹³ *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App. 3d 471, 476, 2002 Ohio 4392.

¹⁹⁴ *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 627. See also *Elmer v. S.H. Bell*, 2015 U.S. Dist. LEXIS 115501, at *13, 22–24 (N.D. Ohio Aug. 31, 2015) (since the defendant continued to operate at the time of the suit and the plaintiff’s claims for trespass were for continuing emissions, the plaintiff’s claim was not time-barred).

¹⁹⁵ *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623, 627.

¹⁹⁶ *Weir v. East Ohio Gas Co.*, Mahoning App. No. 01-CA-207, 2003 Ohio App. LEXIS 1165, at *11 (statute of limitations began running upon discovery of harm); *Tarry v. Fechko Excavating, Inc.*, Lorain App. No. 98-CA-007180, 1999 Ohio App. LEXIS 5130, at *5.

¹⁹⁷ *Davis v. Allen*, 1st District No. C-010165, C-010202, C-010260, 2002 Ohio App. LEXIS 158, at *8–9.

¹⁹⁸ *Rubber City Arches Graham v. Joe Sharma Props.*, 2015-Ohio-1630, ¶¶ 7–9, 15, 2015 Ohio App. LEXIS 1571 (Ohio Ct. App. Summit County Apr. 29, 2015).

¹⁹⁹ *Burkes v. Stidham* (1995), 107 Ohio App. 3d 363, 375 (citing *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App. 3d 359, 366).

²⁰⁰ *Davis v. Billow Co. Falls Chapel* (1991), 81 Ohio App. 3d 203, 207.

²⁰¹ *Tackas-Davis v. Concorde Casting, Inc.*, Lake App. No. 99-L-035, 2000 Ohio App. LEXIS 5920, at *18 (citing *Heiner v. Moretuzzo* (1995), 73 Ohio St. 3d 80, 86). “Ohio case law recognizes negligent infliction of emotional distress only where there is cognizance of a real danger, not mere fear of nonexistent peril.” *Heiner v. Moretuzzo* (1995), 73 Ohio St. 3d 80, 86 (citing *Criswell v. Brentwood Hospital* (1989), 49 Ohio App. 3d 163, 165–166).

²⁰² *Williams v. Warren Gen. Hosp.* (1996), 115 Ohio App. 3d 87, 89.

²⁰³ *Amentrout v. Bolden*, Portage App. No. 2001-P-0025, 2002 Ohio App. LEXIS 3427, at *65.

²⁰⁴ *Amentrout v. Bolden*, Portage App. No. 2001-P-0025, 2002 Ohio App. LEXIS 3427, at *65.

²⁰⁵ *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 375, *overruled in part, followed in part*, 2015 U.S. Dist. LEXIS 133947 (N.D. Ohio Oct. 1, 2015).

²⁰⁶ *Biro v. Hartman Funeral Home* (1995), 107 Ohio App. 3d 508, 514.

²⁰⁷ *Lawyer’s Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St. 3d 273, 280–81; see also R.C. 2305.10.

²⁰⁸ *Reeser v. Weaver Bros., Inc.* (1989), 54 Ohio App. 3d 46, 49; *Stechler v. Homyk* (1998), 127 Ohio App. 3d 396, 399 (“Ohio simply does not permit recovery for negligent infliction of emotional distress caused by witnessing the destruction of one’s property.”).

²⁰⁹ *Riston v. Butler*, 149 Ohio App. 3d 390, 401, 2002-Ohio-2308.

²¹⁰ *Day v. NLO* (N.D. Ohio 1994), 851 F. Supp. 869, 881.

²¹¹ *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 541–542, 2004-Ohio-5847.

- ²¹² *Elmer v. S.H. Bell*, 2015 U.S. Dist. LEXIS 115501, *24–25 (N.D. Ohio Aug. 31, 2015).
- ²¹³ See *Lavelle v. Owens-Corning Fiberglas Corp.* (1987), 30 Ohio Misc. 2d 11, 14–15 (noting that the injured plaintiff would be permitted to introduce evidence of his increased fear of cancer and holding that cancerphobia was a type of serious emotional distress which modern tort law recognized as a separate cause of action).
- ²¹⁴ See *Lavelle v. Owens-Corning Fiberglas Corp.* (1987), 30 Ohio Misc. 2d 11, 15.
- ²¹⁵ *Williams v. Warren Gen. Hosp.* (1996), 115 Ohio App. 3d 87, 91.
- ²¹⁶ R.C. 2307.25(A).
- ²¹⁷ R.C. 2307.25(F).
- ²¹⁸ R.C. 2307.25(A).
- ²¹⁹ R.C. 2307.28(A).
- ²²⁰ R.C. 2307.28(A).
- ²²¹ R.C. 2307.28(B).
- ²²² R.C. 2307.25(B).
- ²²³ See 42 U.S.C. § 9613.
- ²²⁴ See 42 U.S.C. § 9613(f)(1) (allowing parties subject to prior civil actions to bring contribution claims); 42 U.S.C. § 9613(f)(3)(B) (providing a contribution right to a party that has resolved its liability to the government in an administratively or judicially approved settlement); 42 U.S.C. § 9607(a) (permitting a cost recovery claim against certain “covered persons”).
- ²²⁵ See *Cooper Industries v. Aviall Services, Inc.* (2004), 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548.
- ²²⁶ *United States v. Atlantic Research Corp.* (2007), 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28.
- ²²⁷ *Hobart Corp. v. Waste Management of Ohio*, 758 F.3d 757 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1161, 190 L. Ed. 2d 913 (2015).
- ²²⁸ *Hobart Corp. v. Waste Management of Ohio*, 758 F.3d 757, 768 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1161, 190 L. Ed. 2d 913 (2015).
- ²²⁹ *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009).
- ²³⁰ 768 F.3d 662 (7th Cir. 2014).
- ²³¹ *United States v. NCR*, 107 F. Supp. 3d 950, 951 (E.D. Wis. 2015).

- ²³² *United States v. NCR*, 2015 U.S. Dist. LEXIS 142301 (E.D. Wis. Oct. 19, 2015).
- ²³³ *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St. 3d 238, 240.
- ²³⁴ *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St. 3d 238, 240.
- ²³⁵ See *McCloyey v. Hamilton Cty. Bd. of Elections* (1998), 130 Ohio App. 3d 621, 625.
- ²³⁶ See *McCloyey v. Hamilton Cty. Bd. of Elections* (1998), 130 Ohio App. 3d 621, 625.
- ²³⁷ *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St. 3d 44, 46–47.
- ²³⁸ *Reynolds v. Physicians Ins. Co.* (1993), 68 Ohio St. 3d 14, 16.
- ²³⁹ *Reynolds v. Physicians Ins. Co.* (1993), 68 Ohio St. 3d 14, 16 (noting that implied indemnity arises only where related tortfeasors share a special relationship such that the one committing the wrong is so related to the second party as to make the secondary party liable for the wrongs committed solely by another, i.e. wholesaler/retailer, abutting property owners/municipality, independent contractors/employer and master/servant).
- ²⁴⁰ *McCloyey v. Hamilton County Board of Elections* (1998), 130 Ohio App. 3d 621, 627. See also *Rannals v. Diamond Jo Casino* (N.D. Ohio 2003), 250 F. Supp. 2d 829, 836–837 (explaining that “indemnity may lie in favor of a party who was not actively negligent but is nonetheless made liable under the law”).
- ²⁴¹ R.C. 2307.25.
- ²⁴² *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 247–48.
- ²⁴³ *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 249, 140 N.E. 356; *B&B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects*, 2012 Ohio 5981, 2012 Ohio App. LEXIS 5150.
- ²⁴⁴ *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 248–249. Cf. *Francis Corp. v. Sun Co.* (1999), Cuyahoga App. No. 74966, 1999 Ohio App. LEXIS 6306, at *8 (“Where ... the owner is required by law to remediate contaminated real property, restoration costs are an appropriate measure of damages, regardless of the effect of the contamination on market value.”).
- ²⁴⁵ *Carroll Weir Funeral Home v. Miller* (1965), 2 Ohio St. 2d 189, 191 (“A lessee has a property right in a leasehold and, in the absence of an agreement to the contrary, is entitled to compensation if it is appropriated by eminent domain.”).
- ²⁴⁶ *Cleveland v. Zimmerman* (1965), 22 Ohio Misc. 19, 23.
- ²⁴⁷ See *Francis Corp v. Sun Co.*, Cuyahoga App. No. 74966, 1999 Ohio App. LEXIS 6306, at *6–7; *Kogler v. Daniel Bros. Fuel Co.*, Lake App. No. 2002-L-122, 2003 Ohio App. LEXIS 5994, at *10.
- ²⁴⁸ *Bullock v. Oles*, Mahoning App. No. 99-CA-223, 2001 Ohio App. LEXIS 4529, at *6–7.
- ²⁴⁹ *Chance v. BP Chems.* (1996), 77 Ohio St. 3d 17, 27.

²⁵⁰ R.C. 2305.10.

²⁵¹ *Liddell v. SCA Services* (1994), 70 Ohio St. 3d 6, 12.

²⁵² *Rien Construction Co. v. Board of Trumbull County Commissioners, et al.* (2000), 138 Ohio App. 3d 622.

²⁵³ See *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St. 2d 51, 56.

²⁵⁴ See *State ex rel., Montgomery v. Tri-State Group, Inc.*, Belmont App. No. 03-BE-61, 2004 Ohio App. LEXIS 4036.

²⁵⁵ *Roberts v. Mason* (1859), 10 Ohio St. 277, 280; *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App. 3d 7, 15; R.C. 2315.21.

²⁵⁶ R.C. 2315.21(B)(1)(a); *Havel v. Villa St. Joseph*, 131 Ohio St. 3d 235, 237, 2012 Ohio 552, 963 N.E.2d 1270 (2012) (confirming that the mandatory bifurcation language in R.C. 2315.21(B) is constitutional because it is a substantive law that supersedes and prevails over Civ. R. 42(B), a procedural rule).

²⁵⁷ *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 558.

²⁵⁸ *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 336.

²⁵⁹ *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 336.

§ 15.08. Insurance for Environmental Claims

[1] Case Law

The Ohio Supreme Court has considered whether a claim for environmental coverage under a comprehensive general liability (CGL) policy could be maintained.²⁶⁰ The court ruled that the insurance company was not required to defend the insureds (owners and operators of a licensed hazardous landfill) because the government cost recovery actions and toxic tort cases for which coverage was sought were embraced within the “sudden and accidental pollution exclusion” clauses of the CGL policies. In addition, the court ruled that the “sudden and accidental” exception to the pollution exclusion laws has a temporal meaning, and thus does not apply to a release that occurred over an extended period of time.²⁶¹ Since the complaints in the underlying environmental cost recovery and toxic tort cases failed to allege that the release or discharge of the waste happened abruptly or instantaneously, the “sudden or accidental” exception to the pollution

exclusion clause in standard GCL policies is not invoked. In those cases, the insureds are not entitled to defense or indemnity coverage if their CGL policies contain a “sudden and accidental “pollution exclusion” clause.

[2] Environmental Claims

Several fundamental issues arise when an entity seeks insurance coverage from multiple companies in order to protect itself against the potentially high costs associated with an environmental cleanup. The first such issue concerns the allocation or apportionment of a loss across multiple triggered policies. Allocation often arises in an environmental cleanup claim since it involves a long-term injury or damage where it is difficult to determine which insurer(s) must bear the loss.²⁶²

There are two main methods for resolving the issue of allocation. First, a *pro rata* allocation scheme that divides a loss horizontally among all the triggered policy periods with each insurance company paying only a percentage share of the policyholder’s total damages. The second approach, currently favored in Ohio, is the “all sums” approach that permits a policyholder to seek full coverage, up to that policy’s coverage limits, from any policy in effect during the time period of injury or damage when a continuous occurrence of environmental pollution triggers claims under multiple insurance policies. In this situation, the insurer may still seek contribution from other applicable primary insurance policies.²⁶³

⚠ Warning: The language set forth in the policy is the key to which allocation approach is utilized by the court in determining the scope of coverage and the intent of the parties. An insurance policy is viewed as a contract and courts cannot enlarge the contract by implication to embrace an object distinct from that originally contemplated by the parties.²⁶⁴

Notice becomes a primary concern when dealing with an insurance contract since it is considered a condition precedent to coverage. An insured’s failure to give its insurer notice in a timely fashion bars coverage.²⁶⁵ A provision in an insurance policy that requires notice to the insurer “as soon as practical” requires notice within a reasonable time in light of all the surrounding facts and circumstances.²⁶⁶ While the question of timeliness

concerns matters that are discerned by the finder of fact, an unexcused significant delay may be unreasonable as a matter of law.²⁶⁷ However, while the question of whether a significant delay is unreasonable may be decided as a matter of law, the insured bears the additional burden of showing an absence of prejudice to the insurer in light of a presumption of prejudice to the insurer by an untimely notice.²⁶⁸

[3] Mold Claims

[a] The Genesis of Mold Claims

The vast majority of mold claims arise under property as opposed to liability endorsements. Of the property claims, the vast majority are under homeowner as opposed to commercial property policies.

Property insurers have long paid mold claims when presented. Two factors are credited with increasing the pressure on carriers. The first is the increased publicity in the popular press given to the alleged threat for mold. The second factor is the increase in filing of bad faith claims against insurers for denial or alleged slow processing or misprocessing of claims. The watershed case in this respect (from Texas) is *Ballard v. Farmers Insurance* (2001), Tex. Dist. No. 99-05252. In that case, the jury awarded homeowners \$32 million in compensatory and punitive damages on claims that the insurer committed fraud and unfair deceptive acts for allegedly failing to have internal leaks repaired leading to the growth of toxic mold. The family members occupying the insured house allegedly suffered brain damage and asthma as a result of the failure to properly remediate the damage. On December 19, 2002, the Texas Third Circuit Court of Appeals reduced the punitive damage award to \$4 million, still an expensive extra-contractual event for the insurer.²⁶⁹ The plaintiffs later settled the case for an undisclosed amount. The majority of litigation in this context since *Ballard* likewise focuses on plaintiffs attempting to obtain recovery from their insurers.

[b] Insurers' Response

The general response of most property insurers, particularly in high risk jurisdictions, has been to exit the market completely or to attempt to exclude or limit coverage for mold related claims. Several insurers have placed exclusions on coverage for mold claims resulting from lack of maintenance

by the property owner. Beginning with January 2002 renewals, insurers began to exclude certain mold claims but offer “enhanced water coverage,” which pays for removal of mold and replacement of rotted wall ceilings, floors and furniture, but which excludes expenses for testing or relocation of the insured.

[c] Legislative Initiatives

The rise in concern and claims regarding mold has brought a number of state legislative initiatives across the country, but most of those have not yet been enacted. These initiatives in other states would, for example, regulate procedures that insurers could use for handling water damage claims or would allow for the allocation of funds from the state school construction program to pay the cost of fixing mold and other air quality problems in public schools. As of the date of this manual, no such legislation has been introduced in Ohio.

The most sweeping mold-related legislation was first introduced several years ago in Congress. HR 5040, introduced as the United States Toxic Mold Safety and Protection Act of 2002, would, among its many provisions, create a national toxic mold hazard insurance program under the Federal Emergency Management Agency. Although the bill has been resubmitted several times since 2002, it has never made it out of the subcommittees and remains dead at this time.

[d] Insurability of Mold Claims in Property Insurance Policies

Standard property insurance forms cover “all perils” subject to a laundry list of exclusions. The 1991 ISO homeowners form, HO-3, excludes coverage for loss caused by, among other things, “smog, rust or other corrosion, mold, wet or dry rot” or “discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a [peril insured against under this policy].” “Pollutants” means any solid, liquid, gaseous or thermal irritant or containment, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

Most policies with such exclusions, however, will cover mold damage if such damage resulted from a covered loss such as a burst pipe or water

infiltration from fire or storm loss. Only mold damage resulting from general wear and tear or other excluded event would be excluded.²⁷⁰

The 2000 version of HO-3 reads slightly differently, excluding coverage for loss caused by, among other things, “mold, fungus or wet rot However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within: ... A plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the ‘residence premises’; or ... A storm drain, or water, steam or sewer pipes, off the ‘residence premises.’ ” Again, the policy excludes only damage “caused by” mold but not damage which results from a covered loss.

The current version of ISO’s most frequently used commercial property form, CP 1030, restricts coverage further by excluding coverage for loss or damage “caused by or resulting from,” among other perils, “fungus.” The exclusions grouped together in this part of the form are, as with the homeowners’ policies, largely long-term wear and tear items. Although interpretation of this endorsement is scarce, it is reasonable to assume that coverage may only apply if the mold infestation results from a covered cause of loss.

[e] Coverage for Mold Claims Under Commercial General Liability Policies

Commercial general liability (CGL) policies provide coverage for claims asserted against the insured arising out of an “occurrence” which essentially means an accident or fortuitous event not intended by the insured. A standard grant of coverage under a CGL policy will state that the policy applies to “All sums which the insured shall become legally liable to pay because of bodily injury or property damage”

As with property insurance, the coverage provided by a CGL policy is subject to numerous exclusions, some of which come into play in mold litigation. For example, the so-called “absolute pollution” exclusion applies to claims arising out of the actual, alleged or threatened discharge, disbursement, release or escape of pollutants ... at or from premises you own, rent or occupy.”²⁷¹

On its face, this exclusion would seem to act as a bar to coverage for claims arising out of mold exposure. A split of authority exists however as to whether or not indoor air contaminants are covered by the absolute pollution exclusion. While Ohio has not reached a conclusion in a mold-specific case, the Supreme Court held in *Anderson v. Highland House Co.*,²⁷² that the exclusion does not apply to a wrongful death claim asserted against the owner of an apartment complex whose tenants died as a result of carbon monoxide inhalation. The Court concluded that the policy did not clearly and unambiguously exclude indoor air contaminants. In acknowledgement of the likelihood that the Courts will not apply the absolute pollution exclusion to mold claims, some insurers are beginning to insert exclusions that specifically bar coverage for mold-related claims. These exclusions are too recent in genesis to have generated any interpretative precedent.

A few insurers are now adding “absolute” mold exclusions to their CGL and umbrella policies which would apply to all damage “caused directly or indirectly, in whole or in part,” by fungi, including mold, “regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that injury or damage.” This exclusion is too new to have generated any case law.

[f] Checklist of Risk Management Strategies

The following is a checklist for the prevention, management and defense of mold-related claims. Remember that risk management is a “before, during and after” process. In other words, anticipation of a potential claim (“before”) is as important as the immediate response to a water event or mold outbreak (“during”) and the defense of a potential claim (“after”). Keep in mind that once the outbreak manifests itself, the time between the immediate response and inception of a defense strategy may become compressed. To avoid the risk of late notice, be sure to put any insurer that may provide coverage on notice as soon as the existence of a potential claim (property or casualty) becomes apparent. If immediate remediation which will result in destruction of evidence is necessary, photograph and/or videotape the damage to preserve a record for the insurer.

BEFORE (planning for the event):

- contractual risk transfer (lease, construction, sale agreements).

- insure the risk (property, CGL and Business Interruption coverage).
- develop list of remediation contractors before you need one.
- be aware of regulatory “safe harbors” as they develop.
- Establish/review document retention policy, including audit of existing documents and policy regarding creation of new documents.

DURING (when a water or mold event occurs):

- respond promptly to water damage complaints.
- involve consultants and counsel early in the process.
 - gather facts under attorney-client privilege.
 - gain control over process.
- call in the right experts as needed.
 - forensic engineers.
 - certified industrial hygienist.
 - architects.
 - lawyers.
- comply with government standards and best practices.
- create the “right” documentation of the investigation and abatement activities.
- create a media plan and find a knowledgeable spokesperson.

AFTER (as soon as you are on notice of a potential claim).

- notify insurer at once (in any event notify before remediation begins or destruction of any potential evidence).
- remember everyone is a potential defendant and put potentially responsible parties on notice.

[4] Hidden Traps for the Insured: Notice and Trigger of Coverage

Insurance coverage may be lost if the insured does not give timely notice

of a claim to its insurer. Most policies require that notice of a claim be “as soon as practicable” or “as soon as possible after the loss.” Ohio does not place an express time limit on the amount of time an insured has to provide notice to its insurer. However, if the insured delays long enough that the insurer is prejudiced in its ability to investigate and/or defend the claim, the insured forfeits coverage.²⁷³ Under any circumstances destruction of evidence by the insured, acknowledgement of liability or entry into a settlement all constitute strong evidence of prejudice to the insurer.

Knowing which insurer to put on notice is likewise important. Environmental contamination and mold claims may be latent for some period of time before it becomes obvious that a problem exists. In these cases, more than one year’s coverage could be at issue. This possibility, combined with the fact that different policies may contain different exclusions, makes it important that the insured give prompt notice to every insurer that may provide coverage for a potential claim. However, the Supreme Court of Ohio has made the issue of tender of claim considerably easier for the insured, essentially allowing the insured to pick which insurer or insurers it wished to collect from and placing the burden on the insurers to divide up responsibility for the loss.²⁷⁴

Footnotes — § 15.08:

²⁶⁰ *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St. 3d 657.

²⁶¹ *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St. 3d 657.

²⁶² *Goodyear Tire & Rubber Co., et al.* (2002), 95 Ohio St. 3d 512.

²⁶³ *Goodyear Tire & Rubber Co., et al.* (2002), 95 Ohio St. 3d 512.

²⁶⁴ *Goodyear Tire & Rubber Co., et al.* (2002), 95 Ohio St. 3d 512; *Rhoades v. Equitable Life Assur. Soc. of the U.S.* (1978), 54 Ohio St. 2d 45, 47.

²⁶⁵ *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.* (C.P. 1995), 74 Ohio Misc. 2d 183, 203.

²⁶⁶ *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St. 3d 292, 303.

²⁶⁷ *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St. 3d 292, 300.

²⁶⁸ *Champion Spark Plug Co. v. Fidelity & Casualty Co. of New York* (1996), 116 Ohio App. 3d

258.

²⁶⁹ *Ronald Allison/Fire Insurance Exchange v. FIE/Mary Melinda Ballard and Ronald Allison*, No. 03-01-00717-CV, 2002 Tex. App. LEXIS 8957.

²⁷⁰ See, e.g., *Home Ins. Co. v. McClain*, No. 05-01479-CV, 2000 Tex. App. LEXIS 969.

²⁷¹ Other potentially relevant exclusions included the “Owned or Alienated Property,” “Own Work,” and “Expected or Intended” exclusions.

²⁷² *Andersen v. Highland House Co.* (2001), 93 Ohio St. 3d 547.

²⁷³ *Ormet Primary Aluminum Corp. v. Employers of Wausau* (2000), 88 Ohio St. 3d 292.

²⁷⁴ *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St. 3d 512.

Footnotes — CHAPTER 15:

¹ The author of this chapter thanks Christopher Bechhold, Thompson Hine LLP, for his contributions to the discussion on Ohio insurance law in this chapter.

CHAPTER 16

CRIMINAL ENVIRONMENTAL ENFORCEMENT

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I.

PROCEDURAL CONTEXT

§ 16.01. Scope

This chapter covers:

- The structure of the state criminal environmental enforcement agencies [see §§ 16.03–16.04 *below*].
- Identification of general enforcement authority, statutory environmental crimes, degree and penalties [see §§ 16.05–16.07 *below*].
- Identification of statutory search warrant authority [see § 16.08 *below*].
- Factors commonly considered for evaluating parallel enforcement issues [see §§ 16.09–16.10 *below*].
- General factors considered in charging decisions involving environmental and traditional crimes and venue [see §§ 16.11–16.12 *below*].
- Considerations for conducting internal investigations and factors in maintaining confidentiality [see §§ 16.13–16.17 *below*].

§ 16.02. Procedural Context—Environmental Criminal Enforcement

The statutory and regulatory structure of the state’s environmental laws creates a system where non-compliance with virtually any regulatory requirement is a potential criminal violation. While not providing for strict liability crimes, a substantial number of the environmental statutory provisions create criminal felony liability for reckless offenses for which there are no lesser included crimes. Attorneys must be alert to the provisions, factors and conditions under which a client may be exposed to criminal prosecution for what would under most circumstances be considered a regulatory violation resulting in potential civil or administrative enforcement.

The highly regulated nature of environmental activities will necessarily involve enforcement and remediation issues in most situations. This unique regulatory structure creates a risk of simultaneous or sequential civil and criminal enforcement against the same regulated entity and a concurrent necessity to thoroughly understand the factors considered in charging decisions and internal investigations.

II.

ORGANIZATION

§ 16.03. Checklist for Identifying Participants in Criminal Enforcement Proceedings

- Identify agency or agencies involved
- Identify lead investigative agency
- Identify roles of government personnel
- Identify government point of contact

§ 16.04. State Enforcement Structure

[1] Ohio’s Three-Pronged Approach in Conducting Environmental Prosecutions

Ohio uses a three-pronged approach to conduct environmental investigations and prosecutions. Ohio EPA investigators (from the Special Investigations Unit (SIU)),¹ and Special Agents from the Ohio Attorney General's Office, Bureau of Criminal Investigation (BCI) form the first two prongs, providing the manpower and expertise to jointly conduct all criminal environmental investigations. In general, the SIU investigators provide the environmental expertise necessary for sampling and any scientific or technical aspects of the investigation while BCI Special Agents interview parties involved, conduct crime scene analysis and surveillance, collect evidence and perform other traditional law enforcement type functions.


The third enforcement prong is made up of the Assistant Attorneys General ("AAGs") from the Ohio Attorney General's Office who handle the courtroom work and provide the legal guidance necessary for investigations in all areas from search and seizure to corporate and multiple representation issues. In most situations, the AAG will be cross-designated as a Special Assistant Prosecutor in the county the case is filed and will handle the prosecution on behalf of the Attorney General's Office and the local county prosecutor's office.

[2] Ohio Environmental Protection Agency (Ohio EPA)—Special Investigations Unit (SIU)

The SIU, under its former name of the Office of Special Investigations, was established in 1984 with a primary mission to investigate activities or incidents of potential criminal violations of the environmental laws and regulations. While the SIU is the only unit within the Ohio EPA that was expressly formed to handle complex criminal investigations, individual investigators from various media programs have the flexibility and expertise to perform criminal investigations because they are usually trained in criminal investigative techniques.

Initially, SIU focused its primary investigative efforts on improper waste disposal (dumping) because it formed the basis of many solid and hazardous waste violations. However, as the SIU investigators gained investigative expertise and obtained advanced training, the scope of the investigations expanded to encompass other program areas such as waste water, drinking water and air pollution investigations. Now, investigations involve allegations such as, *inter alia*, recklessly or knowingly violating permits or

orders; partially complying with environmental laws and regulations (managing a portion of generated wastes properly while improperly managing and/or disposing of the remainder); failing to report/sample/test; falsifying information contained in permit applications, reports, monitoring and testing data; tampering with pollution control equipment; improperly bypassing of waste treatment systems; open burning; and abandoning facilities subject to the Cessation of Regulated Operations program.

 **Strategic Point:** The investigative efforts of the SIU, working in tandem with the Special Agents of the Ohio Attorney General's Office, encompass standard criminal activities that fall under the general criminal code, Title 29 of the Ohio Revised Code. Criminal environmental investigations have commonly involved allegations of forgery, falsification, obstruction, tampering with evidence, possession of criminal tools and criminal endangering in connection with disposal and failure to test allegations. However, these offenses must be related in some manner to a potential violation under an environmental statute.

While the principal SIU office is located in Columbus, Ohio, the unit has investigators assigned throughout the state in each of five District Offices, greatly increasing their ability to quickly respond to a potential crime scene. The statewide reach of the SIU investigators is further expanded by participating in four regional multi-agency environmental task forces. These task forces draw from the expertise of multiple agencies including the Ohio BCI, Ohio Attorney General's Office, US Attorney's Office, U.S. EPA, FBI, local prosecutors, Sheriff's Departments, Coast Guard, and other federal agencies. The organization and existence of these task forces increase the investigative capabilities of the SIU by combining resources to effectively and efficiently investigate and prosecute environmental crimes.

The key to the effectiveness of the SIU has been a steady working relationship with the Ohio Attorney General's Office in two (2) respects. First, the Ohio Attorney General's Office provides the prosecutorial function for enforcement. Second, the OSI investigators work hand-in-hand on every investigation with dedicated criminal investigators from the Attorney General's Office BCI who are statutorily recognized law enforcement officers. Because of the working combination of criminal investigative

expertise and technical environmental investigative expertise, the Ohio environmental criminal enforcement program was recognized as one of the top programs in the nation.²

[3] Ohio Attorney General's Office (OAG)—BCI&I, Environmental Enforcement Unit (EEU)

The Environmental Enforcement Unit (EEU) is a specialized criminal investigative unit within the Ohio Attorney General's Office BCI that was created in 1979. This investigative unit is made up of seven Special Agents and a Special Agent Supervisor (SAS). The unit is assigned to the Environmental Enforcement Section (EES) of the Ohio Attorney General's Office and is one of the few units within the BCI itself that works under the direct control of a head of a particular section within the Attorney General's Office. This direct line of control and organization combines with the fact that five of the seven Special Agents, along with the SAS, are centrally located with the EES and the AAG, who serves as the environmental prosecutor, means the investigators are extremely responsive to investigative requests and can quickly obtain legal guidance at all stages of an investigation and subsequent prosecution.³

As BCI Special Agents, the EEU Agents have the statutory authority to carry firearms. However, arrest authority is statutorily limited to specific situations where they are providing assistance to a law enforcement officer in connection with the activities or investigation for which the Agent's assistance was requested or where the Agent is rendering emergency assistance to a peace officer.⁴ With that understanding, it should be noted that the EEU Agents receive all the standard training involving interview techniques, crime scene and document analysis, surveillance, and other standard law enforcement type functions. In addition to standard law enforcement training, EEU Special Agents receive specialized training in the hazardous materials incident response operations, basic and advanced courses on identifying and evaluating potential environmental crimes, personal protection, and advanced analytical investigative methods. Similar to their OSI counterparts, each EEU Special Agent must satisfactorily complete a 40 hour OSHA safety course and annual 8 hour refresher training for individuals working in potentially toxic environments.

While the main role of the Environmental Enforcement Section (EES)

involves the civil and administrative enforcement of the state's environmental statutes and regulations, the EES is one of only two sections in Ohio Attorney General's Office that has the statutory authority to independently commence criminal prosecutions. (The Medicaid Fraud Unit also has statutory authority to independently prosecute criminal cases.) The EES dedicates at least one AAG to the full time litigation of criminal matters at all levels, including advising and assisting investigators during the criminal investigations with matters such as, *inter alia*, search warrants and multiple representation issues, grand jury, trial and appellate work. Other attorneys within the EES are assigned to assist in the prosecution of criminal cases under the direction of the dedicated AAG as the case load dictates.

Footnotes — § 16.04:

¹ Environmental Response, Investigation and Enforcement, Ohio EPA, *available at* <http://epa.ohio.gov/derie/Home.aspx#176409991-resources> (noting the SIU is the criminal investigative branch of Ohio EPA).

² A 1991 report by USEPA involving a comprehensive review of Ohio's pollution control programs noted that Ohio EPA and the Ohio Attorney General's Office initiate, prosecute and conclude a significant number of environmental cases. In particular, Ohio's criminal environmental enforcement program is considered among the best in the nation.

³ The remaining two Special Agents operate out of the BCI&I Richfield office and principally cover northeast Ohio. However, even these two agents are available statewide as investigative needs dictate.

⁴ See R.C. 109.541(B), (C)(2).

III.

CRIMINAL ENFORCEMENT AUTHORITY

§ 16.05. Checklist for Determining Enforcement Authority

- Identify environmental statutory and regulatory structure involved.
- List all possible environmental charges.
- Identify maximum potential penalties.
- Determine whether factual circumstances create possibility of R.C. Title 29 criminal offenses.

- ❑ Identify all potential R.C. Title 29 criminal offenses and determine degree of potential offenses.
- ❑ Identify proper prosecutorial agency.
- ❑ Determine whether appropriate request to initiate prosecution has been received by prosecutorial agency from appropriate referring agency.
- ❑ Determine whether appropriate prosecutorial cross-designation authority has been initiated where appropriate.

§ 16.06. Specific Statutory Enforcement Authority

The Ohio Attorney General is designated as the Chief Law Officer for the state and all its departments. The Attorney General can only use its criminal enforcement authority to appear in criminal cases where the state is directly or indirectly interested.⁵ In the area of environmental enforcement, the Attorney General has the authority and the duty to prosecute environmental crimes upon request by the Director of the Ohio EPA. In most situations, the Attorney General will coordinate an environmental prosecution with the local County Prosecutor's Office and engage in a joint prosecution after being cross-designated as a Special Prosecuting Attorney.

Footnotes — § 16.06:

⁵ R.C. 109.02.

§ 16.07. Legal Authority and Penalties

⚠ Warning: The environmental criminal statutory scheme establishes the degree of the violation involved. However, unlike many traditional R.C. Title 29 crimes, the environmental statutes do not create a system of lesser included offenses.

[1] Air Pollution Control (R.C. Chapter 3704)

The authority to prosecute criminal air pollution violations is found in [R.C. 3704.06\(A\)](#). Under that provision, upon receiving a request from the Director of Ohio EPA, the Attorney General will prosecute, *inter alia*,

violations of rules, orders, permits, the falsification of plans, reports, records and physical acts such as tampering with vehicle air pollution control equipment.

In general, crimes and penalties associated with the environmental statutory scheme are considered to be unclassified felonies or unclassified misdemeanors, since, with few exceptions, they do not track the classification scheme established within R.C. Title 29. Thus, pursuant to [R.C. 3704.99](#), the following penalties are associated with various violations under the air pollution control laws:

Violation	Level of violation	Maximum jail	Maximum fine	Subsequent conviction
Recklessly:				
-cause, permit or allow emission or air contaminant in violation of rule;				
-by variance holder who causes, permits or allows emission of air contaminant violating conditions of variance or fails to obey director's order;				
-violate terms/conditions of permit;				
-fail to install/maintain monitoring equipment or submit required reports;	unclassified misdemeanor	1 year	\$25,000.00 each violation	no enhancement
-permit holder who refuses entry to authorized representative of the EPA or hinders or thwarts a person making an investigation;				
-fail to submit plans and specifications;				
-the violation of order, rule, or determination by the director of the EPA;				
-falsification of a submitted inspection certificate.				
Knowingly:				

-falsify plans, specifications, reports, records, other information required to be kept or submitted to the director;				
-make false statement, representation, or certification in form, notice, or report required by Title V permit program;	unclassified misdemeanor	none	\$10,000.00 each day of each violation	no enhancement
-render monitoring device required by Title V inaccurate;				
-fail to pay administrative penalty or assessed fee;				
-violate requirement or permit condition of Title V permit;				
-operate a source without required Title V permit.				
Recklessly: ⁶				
-sell aerosol spray containing fluorocarbon compound that does not contain hydrogen or violates other rules.	1st degree misdemeanor	6 mos.	\$1,000.00	no enhancement
Recklessly:				
-introduce leaded fuel into vehicle designed to use only unleaded fuel.				
Knowingly:	minor misdemeanor	none	\$150.00	no enhancement
-operate a motor vehicle that has been tampered with.				
Recklessly:				
-offer for sale, sale of, possession for sale of device to bypass, defeat, or render inoperative the emission control system of motor vehicle;				
-tamper with vehicle emission control system prior to sale.	unclassified misdemeanor	none	\$500.00 to \$2,500.00 each day of each	no enhancement

			violation	
Knowingly:				
-sell, lease, or rent, or offer right of possession to vehicle that has been tampered with;				
-tamper with vehicle emission control system after sale, lease or rental.				
Recklessly:				
-violate any rule or order pertaining to the inspection of motor vehicles.	unclassified misdemeanor	1 year	\$25,000.00 each violation	no enhancement

[2] Construction and Demolition Debris (R.C. Chapter 3714)

The authority to prosecute criminal violations of the construction and demolition debris statute and regulations is found in [R.C. 3714.11\(A\)](#). Pursuant to that provision, upon receiving a request from the Director of Ohio EPA, the board of health of the respective health district, or the legislative authority of the respective political subdivision, the Attorney General will prosecute any person who has violated or is violating any section of [R.C. Chapter 3714](#), the applicable rules, or the terms or conditions of a license or order issued under the Chapter.

Pursuant to [R.C. 3714.99](#) and [R.C. 3714.13](#), the following penalties are associated with violations under the construction and demolition debris laws:

Violation	Level of violation	Maximum jail	Maximum fine	Subsequent conviction
Recklessly:				
-violate any statutory section;				
-violate any regulation adopted under the statute;				
-violate order issued under the statute;				
-violate term or condition of license issued under statute by license holder;				
-dispose of asbestos at construction, demolition and debris	2nd degree misdemeanor	90 days	\$750.00	no enhancement

facility without authorization by board of health or the director of environmental protection;				
Knowingly:				
-place concrete, asphalt, clay tile, building or paving brick resulting from any manmade physical structure as fill material on any land other than the site where the materials were generated without seven days prior written notice to board of health or the director of environmental protection.				

[3] Solid and Hazardous Waste (R.C. Chapter 3734)

The authority to prosecute criminal violations of the solid and hazardous waste statute and regulations is found within the provisions of [R.C. 3734.10](#). Pursuant to that provision, upon receiving a request from the Director of EPA, the board of health of the respective health district, or the legislative authority of the respective political subdivision, the Attorney General will criminally prosecute any person who has violated or is violating any section of [R.C. Chapter 3734](#), the applicable rules, or the terms or conditions of a permit, license, variance, or order issued under the Chapter.

Pursuant to [R.C. 3734.99](#), [R.C. 3734.11](#) and [R.C. 3734.13](#), the following penalties are associated with violations under the solid and hazardous waste laws:

Violation	Level of violation	Maximum jail	Maximum fine	Subsequent conviction
Recklessly:				
-violate any statutory section, rule, or order;				
-violate term or condition of license issued under statute by license holder;				
-unauthorized operation of solid				

waste facility within state park;				
-make a false material statement / representation in any affidavit, disclosure form, or other document required to be submitted to the attorney general;	unclassified felony	at least 2 yrs not more than 4 yrs	at least \$10,000.00 not more than \$25,000.00	at least \$20,000.00 not more than \$50,000.00
-open dumping of scrap tires;				
-violate an emergency order issued by the director of environmental protection concerning scrap tires;				at least 2 yrs not more than 4 yrs
-falsify explosive gas monitoring reports;				
-fail to collect and/or submit solid waste disposal fees and tonnage report;	unclassified felony	none	not more than \$10,000.00	no enhancement
-violate rules governing storage and disposal of PCBs;	unclassified misdemeanor	1 year	not more than \$25,000.00	no enhancement
-sell or offer for sale any non-complying compost product;				
-violate statutory sections relating to scrap tires;	1st degree misdemeanor	6 mos.	\$1,000.00	no enhancement
Knowingly:				
-violate an abatement order concerning scrap tires by holder of permit, license, or registration certificate;				
-sell or offer for sale any non-complying compost product;				
-fail to comply with an order to cease operation of a scrap tire facility, monocell, or monofill facility;				
-fail to submit registration application for new scrap tire collection facility or modify existing facility before establishing or modifying;	unclassified felony	at least 2 yrs not more than 4 yrs	at least \$10,000.00 not more than \$25,000.00	at least \$20,000.00 not more than \$50,000.00

-operate an unlicensed scrap tire collection, storage, monocell, monofill, or recovery facility;				at least 2 yrs not more than 4 yrs
-transport scrap tires without transporter registration;				
-violate the terms / conditions of permit to operate scrap tire storage facility, monocell, monofill facility, recovery facility, collection facility.				

[4] Voluntary Action Program (R.C. Chapter 3746)

The authority to prosecute criminal violations of Ohio EPA’s voluntary action site cleanup program is found in [R.C. 3746.22](#). Under this provision, upon receiving a request from the Director of EPA, the Attorney General will criminally prosecute any person who has violated or is violating specified sections of [R.C. Chapter 3746](#).

Pursuant to [R.C. 3746.99](#), the following penalties are associated with violations under the voluntary action program:

Violation	Level of violation	Maximum jail	Maximum fine	Subsequent conviction
Recklessly:				
-violate terms or conditions related to hazardous waste contained in a consolidated standards permit.	unclassified felony	at least 2 yrs not more than 4 yrs	at least \$10,000.00 not more than \$25,000.00	fined at least \$25,000.00 not more than \$50,000.00 or imprisoned at least 2 yrs not more than 4 yrs
Knowingly:				
-violate terms or conditions related to air pollution contained in a consolidated standards permit;				
-violate terms or conditions related to	unclassified felony	at least 2 yrs not	at least \$10,000.00	at least \$25,000.00

water pollution contained in a consolidated standards permit;		more than 4 yrs	not more than \$25,000.00	not more than \$50,000.00
-violate terms or conditions related to construction & demolition debris contained in a consolidated standards permit;				at least 2 yrs not more than 4 yrs
-with purpose to deceive, withhold, conceal, or destroy any data, information, records, or documents relating to a voluntary action.				

[5] Water Pollution Control (R.C. Chapter 6111)

The authority to prosecute criminal violations of the water pollution control statute is found in [R.C. 6111.07\(B\)](#). Pursuant to that provision, upon receiving a written request from the Director of Ohio EPA the Attorney General will criminally prosecute any person who violates or fails to perform any duty imposed by specified sections of [R.C. Chapter 6111](#), or violates any order, rule, or condition of a permit issued or adopted by the Director of Ohio EPA.

Pursuant to [R.C. 6111.99](#), the following penalties are associated with violations of the water pollution control statute:

Violation	Level of violation	Maximum jail	Maximum fine	Subsequent conviction
Recklessly:				
-cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state;				
-place sludge on land or release to air during administration of sludge management plan;				
-place or discharge sewage, sludge,				

industrial waste, or other wastes into waters of the state without permit or in excess of permit limits;				
-violate rules establishing effluent limitations, new source performance standards, toxic and pretreatment effluent standards without a permit;	unclassified misdemeanor	1 year	not more than \$25,000.00	no enhancement
-hold a permit and refuse entry to an authorized representative of the director of environmental protection;				
-violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection.				
Willfully:				
-hinder or thwart the representative of the director of environmental protection in the exercise of any authority granted by this section.	unclassified misdemeanor	1 year	not more than \$25,000.00	no enhancement
Recklessly:				
-fail to submit waste minimization plan for class I injection well facility;				
-fail to retain waste minimization plan at facility and have said plan available for inspection;				
-fail to submit revised executive summary of waste minimization plan every 3 years;	unclassified misdemeanor	none	not more than \$25,000.00	no enhancement
-failure of owner to collect disposal fee and/or failure to remit collected fees to director of environmental protection.				
Knowingly:				

-submit false information or records or fail to submit information or records pertaining to discharges of sewage, industrial wastes, or other wastes or to sludge management required as a condition of a permit;	unclassified misdemeanor	none	not more than \$25,000.00	no enhancement
-render inaccurate any monitoring device or other method required to be maintained by the director.				

Footnotes — § 16.07:

⁶ If no *mens rea* is specified, recklessness will be an element of an offense, unless the legislature’s purpose to impose strict liability appears expressly or by plain implication. R.C. 2901.21(B).

§ 16.08. Government Searches

[1] Responding to Government Searches

A business owner should prepare to respond to a search warrant, whether criminal or administrative, before the government agent or law enforcement officer arrives at the front door. The business owner should identify individuals in its contact team for government agents whether the government activity is a routine administrative inspection, a search warrant or complaint inspection.

Generally, when an inspection is conducted as part of a criminal investigation, the regulated entity should not consent to the inspection in the absence of a warrant. Where the government seeks to execute a search warrant, a member of the contact team should request a copy of the warrant. Another member of the contact team should immediately notify legal counsel of the search and transmit a copy of the warrant to the attorney. Team members should carefully read the warrant to determine the permissible scope of the search, including the places on the facility that are subject to the search, the records subject to the search, and the types of sampling or testing, if any, authorized. The contact team members should ensure that the search boundaries are clearly delineated and that the government agents remain

within those boundaries. While team members cannot forcibly prevent government agents from exceeding the warrant boundaries, team members should clearly identify where a government agent is exceeding the permissible scope in case the business owner wants to later challenge the search results.

Even when a government agent produces a warrant, the regulated entity should still not expressly consent to the search. Contact team members should lodge a protest and state that any search is conducted over the company's objections. Similarly, the company should not simply agree to a request to interview employees until legal counsel is present. Should the government agent demand to speak with employees, a team member should inform all employees that:

- They may speak with the government agent and, if they choose to do so, they should respond truthfully to any questions they agree to answer;
- They are under no obligation to speak with any government agent, however, if they do not wish to answer questions, they must expressly invoke their right to remain silent and should expressly state: "I wish to remain silent. I am invoking my **Fifth Amendment** right to remain silent."⁷ and
- They have a right to have legal counsel advise them as to whether it is in their personal interest to be interviewed by government agents and to have counsel present during any interviews to which they may consent.

The company should consider if it is necessary to make separate counsel available to its employees. Factors to consider when making separate counsel available include (1) whether the procedure may be a sign of non-cooperation; (2) if it will involve additional expense and duplication of efforts; (3) whether there will be an increased risk of information leaks and privilege waivers (as any privilege belongs to the individual employee at that point); and (4) the risk that an employee may be advised to cooperate with the government to the detriment of the company in exchange for individual leniency.

If possible, videotape the government agents as they execute the search warrant. Videotaping may prove useful to evaluate the government agents' interview techniques or analyze sampling techniques that may be challenged

later. When sampling happens, request split samples and fully document all sampling procedures used. Company team members should take detailed notes while the search warrant is executed to create an accurate record of the all activities for future reference.

The primary difference between a civil/administrative search warrant and a criminal search warrant is that the two warrants have different probable cause requirements. To obtain a civil or administrative search or inspection warrant, probable cause in the criminal sense is not required. In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 320 (1978), , the United States Supreme Court held that for purposes of an administrative search warrant, probable cause may be based on either specific evidence of an existing statutory violation or a showing that the inspection is sought as part of a general administrative plan for the enforcement of a statute.

Further, while criminal search warrants under the various environmental statutes may be issued by a court of competent jurisdiction under [Rule 41 of the Ohio Rules of Criminal Procedure](#), statutory authority for obtaining administrative search warrants arise in the various environmental statutes themselves.

[2] Government Searches Under the Air Pollution Control Laws (R.C. Chapter 3704)

[R.C. Chapter 3704](#) establishes a general administrative plan for the enforcement of Ohio's air pollution control laws. The Director of Ohio EPA, or his agent, has the authority to, at reasonable times, make inspections, take samples, conduct tests, and examine records or reports pertaining to emissions and monitoring equipment to ascertain compliance.⁸ If entry or inspection is refused, hindered, or thwarted the Director may apply for, and any judge of the appropriate court of jurisdiction shall issue, an appropriate search warrant necessary to achieve the purposes of [R.C. Chapter 3704](#).

Where a local air pollution control authority acts on behalf of the Director of Ohio EPA, the authority to conduct inspections and gain entry to public and private property rests in [R.C. 3704.112](#). Again, should entry or inspection be refused, hindered, or thwarted the authorized representative of the local air pollution control authority may apply for, and any judge of the appropriate court of jurisdiction shall issue, an appropriate search warrant necessary to

achieve the purposes of [R.C. Chapter 3704](#) pursuant to [R.C. 3704.112\(B\)](#) and [R.C. 2933.21\(F\)](#).

[R.C. 2933.21\(F\)](#) allows for entry to determine the existence of physical conditions which are or may become hazardous to the public health, safety, or welfare when government inspections are authorized or required by law.

[3] Government Searches Under the Construction and Demolition Debris Laws (R.C. Chapter 3714)

The Board of Health or its authorized representatives and the Director of Ohio EPA, or his authorized representatives, upon proper identification and upon stating the purpose and necessity of an inspection may, at reasonable times, enter to inspect or investigate, take samples, and examine or copy records to determine compliance at any licensed facility.⁹ The Director of Ohio EPA or the Board of Health may also apply for, and any judge of the appropriate court of record may issue, an appropriate search warrant necessary to achieve the purposes of [R.C. Chapter 3714](#). If entry is refused or the inspection or investigation is refused, hindered, or thwarted the Board of Health or the Director may suspend or revoke the facility's license.

If entry is refused or the inspection or investigation is refused, hindered, or thwarted and the Director or the Board of Health applies for and obtains a search warrant, the owner or operator of the facility is liable for the reasonable costs incurred for the regular salaries and fringe benefits of the personnel assigned to conduct the inspection or investigation from the time the inspections or investigation was refused, hindered, or thwarted until the search warrant is executed.¹⁰ The owner or operator is also liable for the salary, fringe benefits, and travel expenses of the Attorney General, prosecuting attorney, or city law director that were incurred in obtaining the warrant as well as the expenses necessarily incurred for the assistance of local law enforcement to execute the warrant.

[4] Government Searches Under the Solid and Hazardous Waste Laws (R.C. Chapter 3734)

The State of Ohio's solid and hazardous waste laws provide that the Director of Ohio EPA or the Board of Health, or their authorized representatives, upon proper identification and upon stating the purpose and

necessity of an inspection may, at reasonable times, enter private or public property, real or personal, to inspect or investigate, obtain samples, and examine or copy records to determine compliance with the provisions of the statute and regulations.¹¹ The Director of Ohio EPA or the Board of Health also may apply for, and any judge of the appropriate court of record may issue, an appropriate search warrant necessary to achieve the purposes of [R.C. Chapter 3734](#). If entry is refused or the inspection or investigation is refused, hindered, or thwarted, the Board of Health may suspend the operating license of the solid waste facility or infectious waste treatment facility that refused entry, or the Director may suspend or revoke the license or permit held by a solid waste, hazardous waste, or infectious waste treatment facility that refused entry.

If entry is refused or the inspection or investigation is refused, hindered, or thwarted and the Director or the Board of Health applies for and obtains a search warrant, the owner or operator of the premises where entry was refused or inspection or investigation was refused, hindered, or thwarted is liable for the reasonable costs incurred for the regular salaries and fringe benefits of the personnel assigned to conduct the inspection or investigation from the time the inspections or investigation was refused, hindered, or thwarted until the search warrant is executed.¹² The owner or operator is also liable for the salary, fringe benefits, and travel expenses of the Attorney General, prosecuting attorney, or city law director that were incurred in obtaining the warrant as well as the expenses necessarily incurred for the assistance of local law enforcement to execute the warrant.

[\[5\] Government Searches Under the Voluntary Action Program \(R.C. Chapter 3746\)](#)

The Director of Ohio EPA or his authorized representative, upon proper identification and upon stating the necessity and purpose of an inspection, may enter at reasonable time upon:

- any public or private property at which a voluntary action has been or is being conducted under Chapter 3746 and the rules adopted under it;
- any public or private property, real or personal, that is owned or operated by a person who is participating or has participated in the voluntary action program where data, information, records, or

documents relating to the person's participation in the voluntary action program are kept;

- any public or private property, real or personal, upon which is located a certified laboratory or the offices of a certified professional, to inspect the credentials of the certified professional or the credentials and facilities of the certified laboratory;

to examine or copy data, information, records, or documents relating to the evaluation, investigation, or remediation of properties; or to obtain samples of soil, water, or other environmental media at properties where voluntary actions have been or are being conducted.¹³

The Director of Ohio EPA or his authorized representative may apply for and any judge of a court of record may issue an administrative inspection warrant under the provisions of [R.C. 2933.21\(F\)](#), which allows for entry for the existence of physical conditions which are or may become hazardous to the public health, safety, or welfare when government inspections are authorized or required by law. [R.C. 3746.21](#) also provides that the Director may obtain other appropriate search warrants necessary to achieve the purposes of [R.C. Chapter 3746](#).

[6] Government Searches Under the Water Pollution Control Laws (R.C. Chapter 6111)

The Director of Ohio EPA, or his agent, may enter at reasonable times upon any private or public property to inspect and investigate conditions relating to pollution of any air of the state or land located in the state related to the use, storage, treatment or disposal of sludge or sludge materials or pollution of waters of the state.¹⁴ The Director may inspect monitoring equipment, injection wells, or take samples of any discharges. The Director may also apply to an appropriate court of common pleas for a warrant permitting entry and inspection. The Director can inspect records maintained by industrial users who discharge into publicly owned treatment works ("POTW"). In addition, authorized representatives of the POTW can enter at reasonable times upon the premises of industrial users that discharge into the POTW to inspect monitoring equipment, sampling methods, discharges or records pertaining to discharges to ascertain compliance with pretreatment standards.

While the statute contains a prohibition against a permit holder refusing entry or willfully hindering or thwarting inspections or investigations, the subsequent provision that allows the Director or representative of the POTW to obtain a search warrant from the courts of common pleas is not dependent upon such refusal, hindering or thwarting.

Footnotes — § 16.08:

⁷ See *Salinas v. Texas*, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).

⁸ R.C. 3704.03(L).

⁹ R.C. 3714.08.

¹⁰ R.C. 3714.08(D).

¹¹ R.C. 3734.07(C).

¹² R.C. 3734.07(D).

¹³ R.C. 3746.21.

¹⁴ R.C. 6111.05.

IV.

ISSUES IN MAINTAINING PARALLEL CRIMINAL AND CIVIL ENFORCEMENT PROCEEDINGS

§ 16.09. Checklist for Parallel Enforcement Issues

- Identify whether alleged violations are on-going and/or create a risk or threat of harm to human health or the environment.
- Determine whether there is an existing need for immediate injunctive relief and nature of relief.
- Determine whether the potential defendant may become effectively judgment-proof.
- Identify existence of applicable civil and/or criminal statute of limitations to time frame when alleged violation occurred.
- Determine whether potential violations are stand alone or inter-

related.

- Evaluate the effect of resolving a criminal proceeding through a plea of guilty or no contest upon a subsequent civil action.
- Evaluate effect of resolving civil action prior to resolution of subsequent criminal action.
- Evaluate potential for global resolution of all issues presented by criminal and civil actions.
- Identify specific attorney[s] and investigator[s] involved in the civil and criminal action.
- Determine applicability or necessity for **Fifth Amendment** claims when responding to applicable discovery demands.
- Where the documentary materials used in both the criminal and civil action are the same determine whether any such materials were the subject of a grand jury proceeding and, if so, whether a **Crim.R. 6(E)** release has been issued by the court where appropriate.

§ 16.10. Parallel Proceedings

[1] The Evolving Concept

“Parallel proceedings” refers to circumstances where a statutory scheme renders an individual or company subject to criminal and civil or administrative sanctions for conduct arising out of the same set of facts. While the concept of dual track enforcement or parallel proceedings has been around for many years, the increase in reduced budgets and manpower shortages faced by all government agencies have had the attendant result of agencies attempting to do more with less. In general, this can take the form of simultaneous, sequential or overlapping civil, administrative and/or criminal proceedings directed at the same individual or company. The issues associated with the concept may evolve at any stage of a case whether investigative, discovery, or pre- or post-litigation referral.

It is important to note that the only written guidance concerning the procedures for parallel proceedings in the state system came into existence in the form of an internal policy promulgated in 2000 under the administration

of then-Ohio Attorney General Betty Montgomery. While the framework identified within the 2000 policy was not expressly adopted by the subsequent administration, the considerations remained valid and it has not been replaced by any other guidance since. Thus, a discussion of the issues identified in the framework of that policy provides valuable insight into how such matters will be considered and handled on the state level.

[2] Parallel Proceedings Considerations

Since the concept of parallel proceedings involves the same set of facts giving rise to multiple types of action, the government is not forced to choose between proceeding with a civil action or a criminal action as they both serve separate and important governmental functions.¹⁵ With that understanding, the first issue is the early identification of matters that lend themselves to the possibility of simultaneous proactive investigations by both civil and criminal investigators.

From the point of view of the regulated community, it is important to determine with which responsibilities the regulated parties must comply and what rights they may be able to exercise. The wrong response could adversely affect the regulated party's ability to defend itself in a subsequent criminal action or result in unnecessary friction with the regulatory agency. Moreover, the wrong response could result in added financial expense, disruption to business operations, and the increased public scrutiny of day-to-day operations.¹⁶

While not all inclusive, a logical starting point in identifying factors that indicate the possibility of parallel proceedings is an examination of the potential violations that have drawn the attention of the regulatory agency in the first instance. Do the potential or actual violations represent a situation of "on-going" violations that could constitute a direct concern for public health, safety or the environment? On-going violations may require the government to initiate immediate injunctive proceedings to eliminate or remediate the threat[s] presented by those conditions in addition and prior to the initiation of a criminal proceeding. Another factor involves the apparent financial condition of a company. A weakened financial condition or activities that could be construed as a deliberate attempt to dissipate assets to make the target company effectively judgment-proof, may result in an immediate civil action by the government designed to stay or prevent the dissipation of assets.

The state recently enacted a statute of limitations in the civil arena for environmental violations. The governmental authority charged with enforcing the environmental law has five years from the time the violation comes to its attention to bring an action for civil or administrative penalties.¹⁷ Interestingly, while the criminal statute of limitations for a misdemeanor (other than a minor misdemeanor) is two years, the statute of limitations for a felony violation is a year longer than that allowed for bringing a civil action—six years.¹⁸ This provides a clear indication that an agency charged with the enforcement of a statutory scheme providing for both criminal and civil enforcement may be forced into an early pursuit of both types of actions or risk losing the right to bring one or the other.

The nature of the potential violations that are the subject of an agency's scrutiny may also provide an indication of whether the government will pursue dual track enforcement. If the potential criminal violations are completely separate from the violations that would be subject to a civil or administrative action, the agency may want to pursue both civil and criminal actions. As will be discussed, this is because the potential would be drastically reduced that the target of the enforcement actions could use the civil discovery process to uncover factual details related to the criminal investigation. However, the converse militates in favor of a single course of action since the broad nature of civil discovery would allow disclosure of information that is normally not subject to pretrial disclosure in a criminal case, if subject to disclosure at all.¹⁹

The question of whether the government may pursue multiple actions necessarily involves a consideration of the possible effects of the contemplated types of actions upon each other. For instance, what would be the effect of a plea bargain in a criminal case on an on-going or contemplated civil or administrative action? The effect of a guilty plea, which is a complete admission of guilt and could subsequently be used in a civil action as an admission, is quite different from a no contest plea in any subsequent civil or administrative forum that may still involve costly matters of remediation and/or restitution. Thus, an evaluation of the government's intention to pursue dual track enforcement will necessarily consider the potential effect of and/or need for collateral estoppel or admissions resulting from the resolution of a criminal case upon the potential for a subsequent civil or administrative action.

While the early resolution of a criminal matter may have an effect on the outcome of a subsequent civil or administrative case, due to the different standards of proof between a criminal and civil or administrative action, the resolution of a criminal matter via a not guilty verdict does not necessarily create a bar to the pursuit of a subsequent civil or administrative action.

A final consideration related to the potential effect of a resolution of the respective types of actions concerns whether a subsequent action, be it a civil action following a criminal action or vice versa, will address any outstanding concerns of deterrence, punishment, or remediation. Should these general concerns be addressed by the initial action, the utility of and potential for the companion action is greatly reduced.

[3] Discovery Considerations

The discovery procedures that are prescribed in the civil/administrative and criminal litigation tracks provide a valuable tool to evaluate an appropriate response to a government inquiry or request for information. Each discovery system possesses unique characteristics and requirements specific to those particular litigation tracks. It follows that the exercise of those unique rights and responsibilities provides an indication as to which track the state governmental authorities have decided to pursue.


The provisions for obtaining information in civil discovery are much broader than exist in the criminal arena. However, what may not be as obvious is that the target of an investigation involving both civil and criminal claims may be able to use the civil discovery process to obtain information, such as witness statements or take the deposition of the criminal investigator(s), that would normally not be available in the criminal discovery process.²⁰ Moreover, a critical aspect of the established information-gathering process is that the target of any government inquiry or investigation with a criminal component may legitimately assert a **Fifth Amendment** privilege in any companion civil/administrative matter arising from the same set of facts. Thus, while the entity that is the subject of the investigation may freely gather information from the government, the ability of the government to move forward in any effective manner on that civil/administrative matter is plainly impeded. The importance of the remedy sought in the civil/administrative action may therefore dictate whether the government will continue to pursue a potential criminal investigation and litigation track.

[4] The Appearance of Impropriety

The factors discussed above can be considered structural considerations since they concern non-discretionary factors such as statutory provisions, statute of limitations, standards of proof, as well as limitations and requirements imposed by civil or criminal procedural rules. A further set of considerations arise related to the information-gathering process and the role played by the government attorneys, inspectors and investigators, and the investigations themselves.

As a practical matter, there is no formal prohibition against the same government attorney handling the criminal and civil or administrative aspects of a particular matter. However, the situation creates the potential that the government attorney may have misused the particular discovery system in one action to obtain information in the other that is not otherwise available.

The starkest example of the potential for impropriety in this arena stems from the requirement for the secrecy of grand jury proceedings created by **Criminal Rule 6** of the Ohio Rules of Criminal Procedure. Pursuant to **Crim. R. 6(E)**, the disclosure of matters occurring before a grand jury is only permitted by the court upon proper motion by the party seeking disclosure.²¹ The requirement for court authorization under **Crim. R. 6(E)** for the release of grand jury materials is absolute and cannot be circumvented by the use of a criminal, civil or administrative subpoena by any party. Where the government attorney that handled a criminal matter involving grand jury proceedings is the same attorney now handling the civil or administrative matter, the spectre of impropriety exists unless and until the government attorney can demonstrate that information used in the civil or administrative matter, which is the same as the information obtained through a grand jury proceeding, was obtained independent of the grand jury.

 **Strategic Point:** While there is no suppression mechanism that is similar to that in a criminal case, to eliminate evidence that was improperly seized, a civil court maintains the inherent authority to exclude any evidence that it perceives was obtained in a manner that was manifestly unfair to the opposing party.

Similar concerns arise from the failure to ensure that the same investigator is not handling both the criminal investigation and a companion

civil or administrative inquiry. This lack of separation may have serious consequences in both the civil or administrative and criminal field of play. Similar to where the same attorney handles both the criminal matter and a subsequent civil or administrative component, there is no strict prohibition against the same investigator performing the same function in both arenas. However, the failure to use separate investigators raises a potential claim in criminal court under the **Fourth Amendment** that evidence was improperly obtained by a civil inspector pursuing a criminal investigation through the civil or administrative process to avoid the probable cause requirement necessary for a search warrant.

In the civil arena, there are two issues that arise when the government fails to adequately separate the role of the civil or administrative inspector from that of the criminal investigator. The first lies in the risk that the court may view evidence that was obtained through some criminal process as unnecessarily coercive and/or obtained in a manner that was unfair to the targeted individual or corporation. Thus, while there is no formal suppression mechanism, the court may still choose to exclude the use of the materials as evidence.²² The reverse side of this issue is the possibility that any privilege associated with information was inadvertently waived by disclosure to criminal investigators through a system that is inherently coercive in nature.

The second issue is more in the nature of a practical result that will adversely affect the ability to properly and adequately respond to future information requests by an agency. That issue is a loss of credibility for the civil or administrative inspector with the regulated community. The deterioration of that credibility results in unnecessary expense to all parties and the need to resort to normally unnecessary procedures such as administrative search warrants to enable the government agency to perform routine functions that would, in most circumstances, be executed with the cooperation of the entity.

The impact of these issues can be minimized or eliminated to a great extent by pursuing two inter-related policies. First, that there should be separation between the investigators and attorneys conducting criminal and civil or administrative actions. While separation is desired, it must be accompanied by the recognition that manpower questions, training and expertise factors may create situations where the cross-participation of

investigators and/or attorneys is unavoidable. Second, the delineation of responsibility between criminal and civil must be clear and not blurred.

The mere fact that information was collected in the course of a criminal investigation does not preclude its use in a civil or administrative action based upon the same conduct by the same individual or company, so long as court approval is obtained. Additionally, while there is no strict prohibition against sharing materials seized pursuant to a duly authorized criminal search warrant with civil enforcement authorities, the absence of court authorization for such a release raises questions of privilege and impermissible coercion. In a similar fashion, the fact that information was gathered during a legitimate civil or administrative inspection does not preclude its use in a subsequent criminal case as long as the information was of the type or nature that would be obtained in the normal course of the inspector's regular duties and not at the request or suggestion of the criminal investigators.

In all situations involving the exchange of information between criminal and civil investigative units, internal control procedures establishing the flow of information requests between civil and criminal investigative units, the ability to track the source of documents and information obtained and provided by the individual units to each other to ensure they are from a source independent of a grand jury proceeding, as well as the supervision of and normal contacts between those units become issues that are subject to scrutiny to ensure the propriety of any exchange or whether any exchange even occurred in the first instance.

[5] Resolution and Settlement

The desired end state of any enforcement action involving parallel proceedings is one that is appropriate and justified under the individual circumstances of each case. With that in mind it is often desirable to resolve civil or administrative and criminal issues in a global settlement representing an efficient utilization of resources by all parties. The difficulty in initiating such a resolution is the potential effect of Disciplinary Rule (DR) 7-105, which specifically prohibits presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter.

 **Strategic Point:** The import of DR 7-105 is practical in nature in that the state is effectively precluded from raising the possibility of a

global settlement. The basis for this preclusion is the fear of an accusation relating to a violation of DR 7-105. Thus, the desire for a global settlement must be raised by the regulated entity in order to initiate the process.

Footnotes — § 16.10:

¹⁵ *U.S. v. Kordel*, 397 U.S. 1 (1970).

¹⁶ An example of this can be found in R.C. 3734.07(D) which directs that the owner or operator of the premises where entry was refused or inspection or investigation was refused, hindered, or thwarted is liable for the reasonable costs incurred for the regular salaries and fringe benefits of personnel assigned to conduct the inspection or investigation from the time the entry, inspection, or investigation was refused, hindered, or thwarted until the search warrant is executed. The owner or operator is also liable for the salary, fringe benefits, and travel expenses of the prosecuting attorney incurred in obtaining the warrant as well as the expenses incurred for the assistance of local law enforcement officers in executing the warrant.

¹⁷ R.C. 3745.31(B)(1).

¹⁸ R.C. 2901.13.

¹⁹ An example of such materials would be prior written statements of potential witnesses, which under Ohio Criminal Rules would not be subject to disclosure until *after* the witness has testified and then only to determine the extent of inconsistent material statements that can be used for cross-examination. See *Crim. R. 16(B)(1)(g)*.

²⁰ *Ohio Crim.R. 15* allows for a deposition of a prospective witness if it appears probable that the witness is unable to attend or will be prevented from attending the trial *and* the testimony is material *and* it is necessary to take his deposition to prevent a failure of justice. Moreover, while *Ohio Crim.R. 16* only provides for a limited review of witnesses statements for inconsistencies *after* a witness testifies on direct, to the extent that such statements, as well as the reports/statements of investigators, are maintained in the civil/administrative files, they are subject to the disclosure provisions of civil discovery rules.

²¹ *Cf. In Re: Special Grand Jury Investigation Concerning Organic Technologies* (1999), 84 Ohio St. 3d 304.

²² An example of such a problem may exist in the seizure of documents subject to a claim of privilege. A second example may be where a civil inspector uses a civil statutory subpoena or a statutory right of entry to conduct an inspection to obtain documentary materials that could only have been obtained in the criminal process through a search warrant or grand jury subpoena. A question may also arise related to the ability of an individual to challenge the use of any statements given in the course of a civil inquiry if the target of an interview was arguably not timely apprised of any *Fifth Amendment* rights in a situation where the target could reasonably believe that they are in custody at the time of the statement.

CHARGING DECISIONS

§ 16.11. Checklist for Charging Decisions

- Identify applicable general factors.
- Identify whether potential violations are felony or misdemeanor violations under applicable state and federal statutes.
- Determine applicability of federal and state statute of limitations.
- Identify potential venue as federal or state.
- Determine all traditional criminal statutory provisions related to the environmental violations involved in specific fact pattern.

§ 16.12. Case Selection

[1] Exercising Discretion in Whether to Initiate a Criminal Prosecution

Unlike the federal system, there is no formal policy directive providing guidance on the factors that must be considered in case selection and charging decisions in the State of Ohio. While the Attorney General must receive a referral from an appropriate authority to initiate a prosecution, as the prosecutor, the Attorney General has the discretion to proceed with a criminal case or decline prosecution. The exercise of that discretion dictates the review of multiple factors where no one factor is determinative of whether a criminal case will be pursued or what the specific charges will be. While the following review presents some of the basic factors considered in any evaluation of a potential criminal matter, it is by no means an exhaustive list as each incident may present unique facts that bear upon any particular determination.

[2] Evaluating a Potential Criminal Matter

[a] Harm to Human Health or Environment

A fundamental reason for the existence of criminal enforcement of environmental laws is protection of the public. Evidence of harm to human health or the environment is a factor to be considered in evaluating the

feasibility of a criminal prosecution in many instances. However, the key to understanding the consideration of this factor in a charging decision is that it does not require the existence of actual harm. Indeed, the mere threat of such harm may be substantial enough to become a significant consideration in the evaluation of an incident. Rarely will the complete absence of any demonstrated harm be the determinative factor in not pursuing a criminal prosecution.

[b] Deception and Voluntary Disclosure

Many regulatory programs rely on self-monitoring. For the program areas to function and the public's confidence in them to be maintained, the temptation to cheat within the system must be effectively deterred. Accordingly, actions that are representative of a lack of ethics and honesty such as, *inter alia*, the falsification or the destruction of records, tampering with monitoring, sampling or emission equipment, and the burial of waste materials are viewed as affirmative efforts to conceal a crime or deceive the government and are significant negative factors in any charging decision.

On the other hand, the voluntary disclosure of an incident is a positive factor that is considered in weighing an entity's culpability. However, the timing and source of the voluntary disclosure are important elements in determining the weight attributed to it. For instance, disclosure resulting from a report by a disgruntled employee would not weigh in favor of the entity. Nor would disclosure of an incident immediately prior to an event such as a scheduled inspection that would have inevitably led to the discovery of the violation by the government.

[c] Cooperation and Mitigation

Voluntary efforts to mitigate environmental damage will be a positive factor in the evaluation of an entity's culpability for subsequent criminal prosecution. Hand-in-hand with efforts to mitigate environmental damage is an evaluation of an entity's cooperation and openness during the investigative process. The voluntary initiation of an internal investigation to determine the circumstances surrounding an alleged violation is often necessary for any entity to take corrective action or be in an adequate position to respond to requests or demands from an agency. However, the internal investigation may be a two-edged sword in that the government may take the position that

full disclosure of all aspects of the investigation is necessary to demonstrate cooperation. Full disclosure would necessarily include the complete waiver of any associated privileges. The failure or refusal to fully disclose the results of the investigation and all background documentation may be viewed as obstructionist.

Another aspect of cooperation that will be considered is an entity's past compliance attitude and record. Chronic violations of the same nature and a consistently combative demeanor would be considered adverse factors. Positive factors would include an established and meaningful environmental management system, ethics and compliance/audit policy and employee training.

[d] Deterrence Value

The deterrence value of a contemplated action will be considered in two regards. First, whether the factual scenario presents a situation that is unique and only requires a degree of specific deterrence or is reoccurring with a need for general deterrence. Additionally, the specific remedies uniquely available to each system will be evaluated to determine their necessity and whether they present any advantage in terms of efficiency and effect in responding to the violation. It is important to recognize that the only statutory remedies available in a criminal action are fines and imprisonment. Thus, a criminal action will not be an effective forum to obtain the remediation of an environmental problem.

[3] Evaluation of Forum

The environmental criminal statutory scheme provides that crimes under the solid and hazardous waste laws are unclassified felonies while those falling under the air and water statutes are unclassified misdemeanors. Under the federal statutory scheme, air and water violations may be classified as knowing felonies or negligent misdemeanors. Thus, where an incident implicates air or water provisions a necessary consideration will be whether the prosecutorial and investigative resources would be more efficiently utilized and present a greater deterrent effect in a federal versus state enforcement forum.

 **Warning:** In some instances a state violation may be a

misdemeanor while the corresponding federal violation is a felony. The initiation of a state action within the applicable statute of limitations must be considered during the pending federal investigation or the applicable state charge may be lost in the absence of an appropriate waiver by the target of the investigation.

[4] Combining Environmental and Traditional Crimes

In many instances the charging decision will include the consideration of related traditional crimes such as, *inter alia*, conspiracy, obstruction, tampering with evidence, forgery, criminal tools, and criminal endangering. In general, environmental crimes involve complex evidentiary issues and present the court with legal concepts that are not handled by the court on a daily basis. Thus, the regulatory agency may seek to link more traditional crimes into the charging process to simplify the environmental case for both the judge and the jury.

VI.

INTERNAL INVESTIGATIONS

§ 16.13. Checklist for Internal Investigations

- Retain investigating counsel.
- Ensure documentation initiating investigation identifies that purpose is to provide legal advice to corporate management.
- Ensure that decision to retain counsel to conduct investigation was made by disinterested corporate manager.
- Determine necessity to retain individual counsel for employees during course of investigation.
- Notify relevant employees concerning investigation.
- Immediately terminate all records retention destruction procedures and ensure no documentary materials are destroyed.
- Isolate and retain all electronic records.
- Identify storage location of all relevant documentary materials.

- Obtain and examine all relevant physical evidence.
- Determine whether expert is required for examination of physical evidence.
- Ensure information contained within investigative report is segregated into information necessary to demonstrate adequate remedial measures and information considered privileged.
- Ensure all reports contain appropriate legend designating materials “Privileged and Confidential.”
- Limit distribution of reports and associated materials to individuals on a “need-to-know” basis.

§ 16.14. Initiating an Internal Investigation

The need for an internal investigation may come to light as the result of one or a combination of several different signals. The activities that can signal a heightened level of government interest run the gambit of relatively innocuous actions such as an unscheduled inspection or information request to a more problematic form such as a search warrant or grand jury subpoena.

§ 16.15. Be Alert to Indications of a Need For an Investigation

The regulated entity must be alert to signals from sources other than from the government agency itself. The potential for heightened government scrutiny may be increased as the result of a civil lawsuit filed by a citizen alleging some form of wrongdoing or a physical incident such as a major spill, discharge, accident or employee injury. An internal audit system may reveal potential problems through a document review that discloses repeated violations of a similar nature, direct observation of conditions creating a potential violation or a “hot-line” system to identify citizen or employee complaints (whether current or former employees) of conditions that would necessarily garner increased agency attention during normal inspections.

§ 16.16. Set the Objectives of the Investigation


Regardless of the source, once conditions creating a potential for heightened government scrutiny come to the attention of the regulated entity,

an appropriate inquiry must be initiated. The investigation must determine what actions, if any, are necessary to immediately correct questionable conditions to ensure that the alleged violations will not happen again and remediate and/or prevent any environmental damage. The investigation also should determine whether the imposition of any disciplinary measures or additional training is appropriate for any individuals involved in the activities that lead to the potential violations. Finally, the results of the inquiry will place management in the position to determine whether it is appropriate and/or required to self-disclose the incident to the appropriate agency.


§ 16.17. Structuring the Investigation

The structure of an internal inquiry will depend upon the severity and scope of the potential wrong-doing. The structure of an inquiry involving a company-wide activity that happened over a substantial period of time involving multiple personnel will be much more detailed and expansive than an inquiry directed at an isolated incident that is limited in time and personnel.

There are three basic components of a proper internal inquiry. The first component involves the identification and analysis of all relevant documentary materials.

 **Warning:** The investigating attorney must identify all on and off-site storage locations for all possible documentary materials. Care must be taken to include e-mails, voicemail and all electronic materials within the definition of documentary materials. The failure to immediately suspend routine document destruction procedures may lead to a subsequent allegation of obstruction by prosecutorial authorities or spoliation of evidence.

The second component consists of the identification and interview of any current or former employees that potentially have knowledge of the alleged incident giving rise to the inquiry.

 **Strategic Point:** A paralegal or investigator should be present during the interview process to establish the propriety of the interview and all preparatory remarks should be memorialized. The

investigator or paralegal should be identified as an individual necessary for the investigating attorney to effectively conduct the inquiry in order to avoid inadvertently waiving any privilege associated with the interview.

The preparatory remarks for employee interviews should clearly explain that the purpose of the investigation interview is to gather factual information so that the investigating attorney can provide legal advice to the company in the event of litigation.

Trap: Preparatory remarks by the investigating attorney to the employee must be carefully structured to ensure that they do not raise the possibility of a later claim of obstruction by government authorities.


The remarks should explain that the attorney represents the company and that any privilege associated with the interview belongs to the company. The attorney should make sure the employee understands that, while the company will endeavor to keep employee comments confidential, the company may choose to waive the privilege.

⚠ Warning: Care must be taken during interviews when responding to seemingly innocuous employee inquiries concerning whether they are in trouble, have done anything wrong, or whether they need a lawyer. Providing answers to questions such as these may be interpreted as providing legal advice to the employee and raises the potential for a violation of Ethical Consideration (EC) 9-12.

A determination must be made at an early stage as to whether individual counsel should be made available to the employees as a group or individually.

⚠ Warning: Representation of two or more clients involved in the same incident such as the company and an individual employee, or more than one of the employees that may be involved, may result in the attorney being required to withdraw from all representation at a later date in the event a conflict of interest is later determined to exist.

A further decision must also be made as to whether the company will bear the cost of providing such counsel. While not ultimately controlling, factors to consider in making these determinations may include whether the employee will ultimately be in a better position to aid in the investigation if the employee is well prepared for the interview; the status and value of the employee to the company; whether there is any pending litigation or governmental investigation; and whether the employee is entitled to counsel at company expense as the result of state law, corporate by-laws, or any employee contract.

 **Strategic Point:** Absent a contractual provision that requires the advance payment of legal fees, the company should obtain a commitment from the employee to repay the fees should the employee later be found to have engaged in wrongdoing. Additionally, where the employee is an officer of the company, in the absence of a contractual provision requiring advance payment of legal fees, consideration must be given to whether the alleged wrongdoing involves a breach of a fiduciary duty which would argue against advance payment.

The final component involves the examination and assessment of any relevant tangible evidence associated with the allegations. Where necessary, outside experts should be retained to perform the examination and evaluation of such evidence. The retention of experts should be identified with the specific purpose of assisting the investigating attorney in determining appropriate legal advice. In light of that purpose, reports prepared by any assisting expert must be handled in a confidential manner with limited distribution. Ideally, the distribution of the expert's report should be limited to the investigating attorney and information within the report related to the implementation of corrective measures should be segregated from materials that are arguably confidential as attorney work product in anticipation of a potential need for disclosure at a later date.


§ 16.18. Maintaining Confidentiality

The risk of losing any confidentiality associated with the investigative report can arise in several instances. The administrative component of the government agency may require disclosure to establish sufficient remedial

measures have been taken and that the facility has returned to compliance. On the other hand, the enforcement arm of the agency may demand disclosure of parts of the investigation, such as employee interviews and supporting documentation as a demonstration of cooperation. A perceived failure to cooperate would increase the chance of a criminal prosecution and/or reduce the opportunity to negotiate a reduced penalty in the event of a prosecution.

Two concepts used to assert and protect the confidentiality of investigative reports are the attorney work product and attorney-client privilege.²³ The attorney work product privilege is an almost absolute protection from the forced disclosure of an attorney's mental impressions, conclusions, opinions and legal theories.²⁴ However, the disclosure of materials that are essentially factual in nature do not fall within that absolute protection. Disclosure of factual information may be required where the party seeking disclosure can demonstrate a substantial need and undue hardship if disclosure is prohibited.²⁵

To protect the privileges associated with the investigation, it must be clear that the mandate of the investigation is to place the investigating attorney in a position to provide legal advice on the specific matter under investigation and not in the nature of general business advice.²⁶

 **Strategic Point:** Although there should be no difference between the use of in-house counsel and outside counsel as the investigating attorney in relation to questions of privilege, consideration should be given to the inherent difficulties in-house counsel may experience when conducting an investigation that necessarily requires the interview of corporate managers perceived as being on the same management level as the in-house attorney. Moreover, courts often scrutinize claims of privilege more closely when in-house counsel leads the investigation.


To support a position that advice is provided in anticipation of litigation, indications that litigation may be forthcoming such as government investigatory actions in the form of document requests, employee interviews and site or facility visits should be documented. Similarly, activities that indicate the possibility of litigation from private sources such as threatening letters, unusual inquiries or behavior from current or former employees or

citizens should be documented and retained to support a claim of potential litigation.

The voluntary disclosure of all or part of an investigation to a third party could be considered a waiver of the privilege.²⁷ Consequently, where a third party in the form of an expert or legal assistant helps the investigating attorney, it should be clearly documented that the third party is necessary for the attorney to provide effective legal advice on the subject matter of the investigation.

The entity conducting the internal investigation must recognize that a government agency demanding the disclosure of the investigatory report as a sign of cooperation is still a third party. Thus, the potential for reducing the possibility of a subsequent criminal action or obtaining a reduced penalty through “cooperation” must be weighed against the fact that the voluntary disclosure to that government agency may result in a confidentiality waiver. While the waiver effect may be mitigated by executing a confidentiality agreement with the government investigatory agency prior to disclosure, the ultimate disclosure substantially increases the likelihood that an adversary other than the government may gain access to otherwise protected information.²⁸

The ultimate goal of the internal investigation is to analyze the facts against the applicable legal principles in order to provide legal advice. Similar to the work product privilege, the attorney-client privilege does not protect the underlying facts disclosed during the investigation.²⁹ The privilege only protects the attorney-client communication. The claim of privilege is determined on a case-by-case basis using four general guidelines. First, that the communications claimed to be privileged were made by employees to the investigating attorney in order for the corporation to secure legal advice. Second, employees were cooperating with the investigating attorney at the direction of corporate management. Third, the communications concerned matters within the employees’ scope of employment. Fourth, that the information was not available from upper management and is treated as confidential.³⁰

 **Strategic Point:** Treatment of the report as confidential dictates that the results of the investigation should be clearly marked as confidential. Information within the report should be segregated

between information necessary to immediately remediate any potential damage and distribution of the report should be limited to executives that are essential to conducting the investigation or act on findings.

Footnotes — § 16.18:

²³ See *American Motors Corp. v. Huffstutler* (1991), 61 Ohio St. 3d 343, 348 (the common-law attorney-client privilege protects against any dissemination of information obtained in the confidential relationship).

²⁴ *State v. Hoop* (1999), 134 Ohio App. 3d 627, 642, *habeas corpus proceeding, motion granted, objection sustained*, 2008 U.S. Dist. LEXIS 73363 (S.D. Ohio June 30, 2008).

²⁵ *State v. Hoop* (1999), 134 Ohio App. 3d 627, 642, *habeas corpus proceeding, motion granted, objection sustained*, 2008 U.S. Dist. LEXIS 73363 (S.D. Ohio June 30, 2008).

²⁶ See *Shaffer v. OhioHealth Corp.*, Franklin App. No. 03AP-102, 2004 Ohio 63 (R.C. 2317.021 extends attorney-client privilege to firms, partnerships, or corporations as clients); *State, ex rel., Leslie v. Ohio Housing Finance Agency, et al.* (2005), 105 Ohio St. 3d 261, citing, 1 Rice, *Attorney-Client Privilege in the United States*, at 53, Section 3:14 (confidential communications between in-house counsel and the client are privileged to the same extent as communications between outside retained counsel and clients who have consulted them for legal advice or assistance); cf. *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996) (as a negotiator on behalf of management, in-house lawyer was acting “in a business capacity” and accordingly “was not exercising a lawyer’s traditional function”); *Ames v. Black Entertainment Television*, 1998 U.S. Dist. LEXIS 18053 (S.D.N.Y. Nov. 18, 1998) (company bears burden of “clearly showing” that in-house attorney gave advice in her legal capacity, not in her capacity as business advisor).

²⁷ *State v. McDermott* (1995), 72 Ohio St. 3d 570.

²⁸ Cf. *Information Resources v. Dunn & Bradstreet Corp.* (S.D.N.Y. 1998), 999 F. Supp. 591, 593 (waiver found as result of “voluntary submission of material to a government agency to incite it to attack the informant’s adversary.”); *In re Steinhardt Partners, L.P.* (2d Cir. 1993), 9 F.3d 230 (privilege may be preserved where explicit confidentiality agreement is executed with government).

²⁹ *Upjohn Co. v. U.S.* (1981), 449 U.S. 383, 395.

³⁰ See *Upjohn Co. v. U.S.* (1981), 449 U.S. 383, 394–396.

CHAPTER 17

AGRICULTURE

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INTRODUCTION

§ 17.01. Scope

This chapter covers:

- Animal Feedlots [*see § 17.02 below*].
- Pesticide Application [*see § 17.03 below*].
- Fertilizer Storage and Handling [*see § 17.04 below*].
- Agricultural Drainage [*see § 17.05 below*].
- Dangerous Wild Animals [*see § 17.06 below*].

II.

REGULATION OF AGRICULTURAL OPERATIONS

§ 17.02. Animal Feedlots

[1] Regulatory Jurisdiction

[a] Overview

Animal feedlots, known in Ohio regulatory parlance as “animal feeding facilities”¹ or AFFs are subject to a number of regimes of environmental regulation by several regulatory agencies, depending on the subject matter of regulation and, in some cases, the size of the AFF. The Ohio Department of Agriculture (ODA), the Ohio EPA, the Ohio Department of Natural Resources (ODNR) and U.S. EPA each play roles in the regulation of Ohio AFFs.

[b] Ohio Department of Agriculture

ODA generally is responsible for regulating the operations of larger AFFs.² Ohio legislation effective in 2003 and amended in 2009, also conferred upon ODA authority to seek federal approval to administer the federal Clean Water Act’s wastewater discharge permitting program (known as the National Pollutant Discharge Elimination System or NPDES program)

to the extent the NPDES program applies to Ohio AFFs.³ ODA also administers regulation of pesticides in Ohio. See [Section 17.03](#) below and [Chapter 20](#) below for a more complete discussion of ODA's pesticide regulatory authorities.

[c] Ohio EPA

Ohio EPA currently remains responsible for issuance of NPDES permits for large and medium AFFs that discharge process wastewaters from their operations. Ohio EPA also issues stormwater discharge NPDES permits to AFFs and other dischargers. In addition, Ohio EPA has primary responsibility for air permitting, although these authorities are generally implemented through several intra-state regional air regulatory district agencies. Ohio EPA also is responsible for solid and hazardous waste regulation. To the extent some AFFs may utilize wells or other sources to supply drinking water to their work forces and/or other human populations, authorities administered by the Ohio EPA Division of Drinking and Ground Waters regulating drinking water systems may apply.⁴ Finally, Ohio EPA administers the program for permitting impacts to certain upland wetlands known as isolated wetlands.⁵

Alert: On April 2, 2015, Ohio Governor Kasich signed S.B. 1, which imposes certain restrictions on manure and fertilizer application on farm fields in the western Lake Erie basin to combat toxic algae blooms that have been plaguing the lake for last several years.⁶ The law's requirements were effective July 3, 2015.

[d] Federal

While not generally involved in day-to-day permitting and compliance activities relating to AFFs in Ohio, U.S. EPA has oversight responsibilities for the federally-delegated environmental programs, such as the federal Clean Water Act NPDES permitting program and the federal Clean Air Act Title V major source air permitting program. U.S. EPA may, and does on occasion, become involved in high profile permitting and, more commonly, enforcement matters. The U.S. Army Corps of Engineers has principal authority for the permitting of impacts to waters of the United States, including wetlands under federal jurisdiction.⁷

[2] Animal Feedlot Permitting

[a] Permits to Install and Operate

ODA requires certain AFFs to obtain Permits to Install (PTIs), Permits to Operate (PTOs) and/or specified compliance certificates. Generally, as described more fully below, only certain smaller and less environmentally impactful AFFs are absolved of these permitting requirements. The regulatory thresholds that determine the level of permitting required for a particular AFF generally depend upon the number of animals kept at the AFF. The two categories of larger AFFs that are generally subject to permitting requirements are “Large Concentrated Animal Feeding Facilities” (LCAFFs)⁸ and “Major Concentrated Animal Feeding Facilities” (MCAFFs).⁹ New or modified¹⁰ LCAFFs and MCAFFs are required to obtain Permits to Install (PTI) from ODA before commencing construction or facility modifications. Design specifications, construction plans, siting information, proposed water usage information, certificates that local government notification mandates were met and applicant’s past compliance history with environmental laws in the U.S. and other countries are among the types of information required by ODA to process a PTI application.¹¹ A PTO is required for any existing farm that reaches a design capacity category of LCAFF or MCAFF, or a new farm where a PTI has been submitted. Also, persons supervising the handling and management of manure at MCAFFs must first obtain a livestock manager certification from ODA.¹² Unless permissible under the terms of a valid PTI, CAFFs may only be operated under a valid PTO.¹³ PTOs will generally have permit terms of five years.¹⁴

A facility smaller than a LCAFF may be required to obtain a PTO under certain circumstances. Ordinarily, such small facilities adopt some form of best management practices (BMPs) to manage manure and control pollution. ODNR, Division of Water Resources has promulgated standards describing minimum practices that prevent water pollution from manure and related activities, over which ODNR has enforcement authority against AFFs smaller than LCAFFs.¹⁵ In addition, ODNR may seek to require that a smaller AFF with a track record of problems complying with the ODNR BMP standards be required to obtain a PTO.¹⁶ In such a case, ODA may require an AFF smaller than a LCAFF to obtain a PTO if (1) ODA has specified a corrective action to be taken under [R.C. 939.07](#); (2) ODA has inspected the facility; and

(3) ODA finds that “the facility is not being operated in a manner that protects the waters of the state.”¹⁷ If a smaller AFF required to obtain a PTO through such ODNR initiated action cannot achieve compliance with mandated BMPs without a physical modification to the existing facility, a PTI must also be obtained.¹⁸

PTIs and PTOs are transferable via relatively simple administrative procedures, although additional information demands are required from applicant transferees that have not operated a LCAFF in Ohio for at least two of the five years immediately preceding the permit transfer application.¹⁹ Transferees, for example, must identify other farms they have operated and list their violations of environmental laws in the U.S. or other countries.²⁰

Permittees who plan to end permit coverage must submit a closure plan to ODA at least 90 days before closure.²¹ Of most concern to ODA with respect to closure is the disposition of a facility’s manure. Consequently, closure plans focus primarily on the removal of a CAFO’s manure and related storage and treatment facilities.²² Closure is not complete until after ODA inspects the facility and verifies the permittee has satisfied all closure requirements.²³


[b] NPDES Permits

It is unlawful for Animal Feeding Facilities (AFF) to discharge wastewater to waters of the state unless its operator has secured an appropriate NPDES permit. Historically, Ohio EPA has administered NPDES permitting of all varieties within the state, including such permits issued to AFFs under [R.C. Chapter 6111](#). However, in 2001 through the enactment of Senate Bill 141, significant AFF regulatory authority was transferred to ODA. Among the authorities Senate Bill 141 sought to transfer from Ohio EPA to ODA was authority over issuance of NPDES permits to AFFs.²⁴ The legislation directed ODA to prepare and submit an application for delegation of such NPDES authority to U.S. EPA before the end of 2001.²⁵ U.S. EPA received the ODA delegation application package in January 2007. As of this writing, U.S. EPA approval of the application has not been granted. For the time being, Ohio EPA remains the state agency administering this program for AFFs.

As with ODA’s requirements for PTIs and PTOs, not all AFFs are subject

to NPDES permitting. However, the criteria and terminology distinguishing facilities that must secure NPDES permits from those not so regulated differs from the ODA regime for PTIs and PTOs. An AFF is subject to NPDES permitting if (1) it meets the definition of a “concentrated animal feeding operation” (CAFO) under [40 C.F.R. § 122.23\(b\)\(2\)](#), and (2) it discharges to waters of the United States.²⁶ Under the referenced federal rules, CAFOs subject to NPDES permitting are defined to include three categories of feeding operations. The first regulated category, described in the federal rules as “Large CAFOs,” has a definition premised solely on the numbers and types of livestock.²⁷ The Large CAFO under the federal rules has precisely the same livestock population thresholds as the LCAFF under ODA rules.²⁸ The second category of operations included as a CAFO subject to NPDES permitting is the “Medium CAFO” as defined under federal rules, which includes operations with animal population ranges falling just below those defined as Large CAFOs or Concentrated Animal Feeding Facilities, where the facility also either (a) discharges pollutants through a man-made conveyance or directly to waters of the United States, or (b) confines animals in an area at the facility where any of them come into contact with any surface waterbody running through the property.²⁹ The third category of operations included as a CAFO subject to NPDES permitting is the “Designated CAFO.” Designated CAFOs are typically smaller operations that are not required to apply for NPDES permits as Large CAFOs or Medium CAFOs, but nevertheless have been evaluated by Ohio EPA and found to satisfy the federal criteria for designation, including a determination that the facility is a significant contributor of pollutants to waters of the United States.³⁰

In addition to production areas, which include animal confinement, manure storage, raw materials storage and waste contaminant areas at a facility, land application areas and discharges are also subject to the requirements of the NPDES permit at a regulated facility.³¹ In addition to these requirements for NPDES permitting of process wastewater discharges, AFFs may separately be subject to NPDES permitting obligations arising from stormwater discharges.³²

 **Warning:** In 2015, U.S. EPA finalized its NPDES Electronic Reporting Rule, which requires CAFOs to electronically submit CAFO annual reports to permitting authorities in lieu of submitting

written reports. The electronic submittal of annual reports is expected to reduce paperwork and costs, and increase transparency. However, the electronic availability of detailed CAFO discharge information is anticipated to serve as a potential gateway for additional regulation of CAFOs under the Clean Water Act.³³

[c] ODA Agriculture Pollution Abatement Program

ODA's Division of Soil and Water Conservation (DSWC) was established beginning January 2016 through a transfer of programs from the Ohio Department of Natural Resources to the ODA. DSWC implements agricultural and non-point source water pollution control programs and administers various regulatory authorities applicable to livestock operations, including land application and utilization standards for animal manure and also standards for design and construction of manure storage and treatment facilities.³⁴

The Agricultural Pollution Abatement Rules that are administered by DSWC were revised in 2010. The rules apply to the control of pollutants from areas within the state used for agricultural production or silvicultural operations including land used for: (1) production or keeping of animals; (2) production of agricultural crops; and (3) private, commercial and public woodlands.³⁵

Included with the revisions to the Agricultural Pollution Abatement Rules was the adoption of rules for watersheds in distress. A "watershed in distress" is a watershed that has aquatic life and health that is impaired by nutrients or sediment from agricultural land uses and where there is a threat to public health, drinking water supplies, recreation, or public safety and welfare.³⁶ DSWC may designate an Ohio watershed as a "watershed in distress" based on the following factors:

- the watershed is listed as impaired by nutrients and/or sediments from agricultural sources;
- the watershed or a portion thereof exhibits conditions that are a threat to public health;
- streams, lakes, or other waterbodies within the watershed exhibit periodic evidence of algal and/or cyanobacterial blooms capable of

producing toxins that are harmful to humans, domestic animals, or wildlife;

- there is a threat to, or presence of contaminants in public or private water supplies;
- there is a threat to, or presence of contaminants in a primary contact recreational water or a bathing water;
- other unacceptable nuisance conditions exist, including the depletion of dissolved oxygen in water that results in impacts to aquatic life; and
- other situations as determined by DSWC in consultation with other federal, state, and local agencies.³⁷

When a watershed is designated as distressed by DSWC, the following changes are triggered, beginning two years after designation:

- (1) land application of manure must be in accordance with USDA standards and is generally prohibited between December 15th and March 1st, when ground is frozen outside these dates, and when the local weather forecast for the land application area contains a greater than 50 percent chance of exceeding 0.5” precipitation;
- (2) recordkeeping requirements for manure storage volumes to ensure 120 days of storage is available on December 1st of each year; and
- (3) requirements for farms generating or utilizing in excess of 350 tons and/or 100,000 gallons of manure annually to have an approved nutrient management plan.³⁸

To date, the only Ohio watershed that has been designated as a “watershed in distress” is the Grand Lake St. Mary’s watershed in Midwestern Ohio.

[3] Waste Disposal

[a] Regulatory Requirements

AFF owners and operators must address various waste handling and disposal regulatory obligations because of the volume and variety of wastes generated by their operations. AFFs are subject to ODA waste disposal requirements for “agricultural wastes,” namely manure and dead livestock. In

the case of LCAFFs, these waste management obligations are generally incorporated into the ODA permits under which LCAFFs generally operate. See [Sections 17.02\[2\]\[a\]](#) and [\[b\]](#) above. AFFs also must comply with the solid and hazardous waste requirements of Ohio EPA to the extent that other types of waste are generated by a facility.

[b] Manure Disposal

A single LCAFF is often capable of generating thousands of tons of manure every year. Typical manure management practices at LCAFFs involve manure consolidation in a waste pit or transport to manure treatment lagoons where solids are separated from liquids. The resulting wastes are often either applied to crop fields, sold as fertilizer, and/or partially treated and discharged to waters of the state, if the owner or operator has obtained an NPDES permit. The various regulatory requirements for manure application, and all other components of manure management at a LCAFF, including handling and storage requirements and land application,³⁹ are specified in a facility's Manure Management Plan. Development and implementation of Manure Management Plans are required under and incorporated by reference into the LCAFF permits administered by ODA. For further discussion of manure management plans, see [Section 17.02\[2\]](#).

[c] Animal Mortality

Both the ODA and ODNR, Division of Water Resources regulate the disposal of dead livestock. In Ohio, the placement of a dead animal carcass or offal upon land or water is a nuisance prohibited by statute, unless undertaken in accordance with the disposal procedures established by ODA and ODNR.⁴⁰ Owners must employ one of the following disposal methods:

- burial;
- incineration;
- dissolving by alkaline hydrolysis;
- rendering; or
- composting.⁴¹

When livestock has died or been destroyed due to a dangerously infectious

disease, its owner must dispose of it within twenty-four hours after learning of the animal's death or receiving written notice from ODA regarding disposal.⁴² ODA has authority to specify the method of disposal to be employed by the owner when ODA deems a specific method of disposal is necessary for the purpose of animal disease control.⁴³

Proper disposal of dead livestock is particularly important in the case of LCAFFs, at which thousands, and sometimes millions, of animals are present. The improper disposal of dead livestock could lead to conditions in and around a LCAFF that threaten human health and the environment, such as infestations of rodents and insects. ODA-permitted LCAFFs are required to develop and implement Animal Mortality Plans, which are generally plans for the disposal of dead livestock that utilize best management practices to burn, bury, render, or compost dead animals in accordance with the disposal procedures established by ODA and ODNR.⁴⁴ For further discussion of animal mortality plan requirements incorporated into LCAFF permits, see [Section 17.02\[2\]](#) of this Chapter.

[d] Ohio Livestock Care Standards Board

In November of 2009, the Ohio Livestock Care Standards Board was established. The Ohio Livestock Care Standards Board is charged with establishing statewide standards governing the care and well-being of livestock while promoting food safety, preventing animal and human diseases, and encouraging local food production. The Board's livestock care rules at Ohio Administrative Code Section 901:12 *et seq.* became effective in September 2011. The rules establish animal care requirements for responsible parties concerning euthanasia,⁴⁵ general care considerations,⁴⁶ and distressed and disabled livestock.⁴⁷ Responsible parties include a person of legal age who is the owner of the livestock and/or a person who has current responsibility or custody of livestock.⁴⁸ Minor violations of the rules, which are generally due to neglect or unintentional acts of substandard practice, are finable up to \$500 for the first offense and up to \$1,000 for each subsequent offense committed within 60 months of the previous violation.⁴⁹ Major violations are reckless or intentional acts that result in the unjustified infliction of pain, such as placing an animal's life in imminent peril, causing protracted disfigurement, causing protracted impairment of health, or causing protracted loss or impairment of the function of a limb or bodily organ. Fines

for major violations range between \$1,000 and \$5,000 for the first violations and \$5,000 and \$10,000 for each subsequent offense committed within 60 months of the previous violation.⁵⁰

[e] Solid and Hazardous Waste Disposal

For wastes not otherwise regulated under an ODA permit or other authority as an agricultural waste (such as manure and dead livestock), handling and disposal obligations must be assessed under Ohio's general solid and hazardous waste authorities. For discussion of the requirements for solid and hazardous waste disposal, see [Chapter 8](#).

[4] Air Emissions

The regulation of air contaminant sources is covered comprehensively in [Chapter 2 above](#). Whether a particular operation of an agricultural producer qualifies as an air contaminant source subject to state air permitting requires careful analysis in light of a specific agricultural exemption⁵¹ codified in Ohio air law. This exemption excludes from the statutory definition of "air contaminant" emissions from "agricultural production" activities,⁵² so long as such agricultural production activities are "consistent with generally accepted agricultural practices, were established prior to adjacent nonagricultural activities, have no substantial, adverse effect on the public health, safety, or welfare, do not result from the negligent or other improper operations of any such agricultural activities, and would not be required to obtain a Title V permit."⁵³

Trap: Note that certain activities related to agriculture are specifically excluded from the agricultural exemption. Such activities include off-farm facilities for storage and processing of agricultural products (e.g., certain dehydrating facilities, rendering plants, feed and grain mills, elevators and terminals). These operations should analyze their potential air permitting obligations without regard to the agricultural exemption. See [Chapter 2 above](#).

No state regulation or formal guidance document has been promulgated or issued to elaborate upon how regulators are to make the several subjective determinations requisite for applying this agricultural exemption to a particular agricultural emission source, although an Ohio court addressing the

propriety of an Ohio EPA determination of the applicability of the agricultural exemption has suggested the need for such rulemaking activity.⁵⁴ Despite the various subjective determinations that must be made in order to invoke the agricultural exemption, as a practical matter, very few state air permits have been required in Ohio for “agricultural production” operations such as AFFs for which the agricultural exemption was designed. In recent years, however, U.S. EPA has been gathering air emission data from AFFs. It is anticipated that requirements for the permitting of air emissions from AFFs are, as a result, likely in the near future.

Trap: Note that despite the agricultural exemption, LCAFFs and perhaps other agricultural operations may nevertheless be subject to air permitting if those facilities are deemed “major sources” under the federal Clean Air Act and thus require a “Title V” operating permit. While each operation should be evaluated on a case-by-case basis to determine whether it may be a “major source,” it is likely few agricultural operations other than perhaps some LCAFFs will have “potentials to emit” pollutants that are elevated enough to surpass the pollutant thresholds (10 to 100 tons per year, depending on pollutant) associated with the federal “major source” definition. See [Chapter 2](#) above for a discussion of the criteria for federal “major source” status.

While there has been little state air permitting activity in Ohio directed at LCAFFs in particular, the applicability of the air “agricultural exemption” does play a role in issuance of PTIs, PTOs, and NPDES permits in Ohio since regulators are required to assess a proposed facility’s compliance with other laws prior to issuance of the permit at hand. An Ohio court has held that where a state decision to issue a LCAFF PTO relies in part on a determination that a proposed facility qualifies for the air “agricultural exemption,” a site-specific evaluation of the exemption’s various criteria must be completed prior to permit issuance.⁵⁵

[5] Releases

On December 18, 2008, U.S. EPA published a final rule whereunder all but the largest farms are exempt from reporting their air releases of hazardous substances that are generated from animal wastes.⁵⁶ As directed by EPCRA §

304, non-exempt farms must report to their state and local agencies air emissions of ammonia and hydrogen sulfide of 100 pounds or more in a 24-hour period that are generated from animal wastes.⁵⁷ The effective date of the new rule was January 20, 2009.

[6] Neighbor Concerns and Disputes

[a] Background

LCAFFs and other large livestock operations are increasingly operating in closer proximity to and also coming into conflict with non-farmers due to the urbanization of traditionally rural areas. In response to odors, dust, noise, insects, rodents, water contamination, and manure spills emanating from livestock operations, non-farmers are taking legal action in the form of nuisance and trespass suits against LCAFFs in order to reduce or eliminate the adverse impacts of their operations. In response to the increased conflict between LCAFFs and non-farmers, Ohio has adopted legislation that establishes procedures for the creation of agricultural districts and agricultural security areas designed to protect farmland from development, defer certain tax assessments, and shield existing agricultural operations from some nuisance suits.

[b] Agricultural Districts and “Right to Farm” Protections

An owner of farmland can request that his property be placed in an agricultural district for a period of five years if, during the three preceding years, the farmland was devoted exclusively to agricultural production.⁵⁸ In the alternative, farmland is eligible for placement in an agricultural district if, at the time of the request and the during the three preceding years, it was enrolled in a federal land retirement or conservation program. Farmland also must be composed of tracts, lots, or parcels of at least ten acres in size or have a gross income, or anticipated gross income, from agricultural activities of at least twenty-five hundred dollars during each of the preceding three years to be eligible for placement in an agricultural district.⁵⁹

Applications for placement of farmland in an agricultural district are made to the county auditor if the farmland is located in an unincorporated area.⁶⁰ The auditor shall grant the application if the eligibility criteria are met.⁶¹ Applications regarding farmland located in a municipal corporation

shall be submitted to the county auditor and the legislative body of the municipal corporation.⁶² Should the municipal corporation's legislative body modify or reject the application, it must demonstrate that the modification or rejection was necessary to prevent a substantial, adverse effect within the municipal corporation on:

- the provision of municipal services;
- efficient use of land;
- orderly growth and development; or
- public health, safety, or welfare.⁶³

The denial or modification of an application may be appealed to the county court of common pleas.⁶⁴

The benefits of having one's farmland placed within an agricultural district are significant. First, assessments made on farmland by public entities for purposes of sewer, water, or electrical service are deferred while farmland remains in an agricultural district.⁶⁵ The assessments may, however, be recovered when the farmland is withdrawn from an agricultural district or there is a change in its use.⁶⁶ Second, agricultural districts also shield owners of farmland from nuisance liability under Ohio's "right to farm" law.⁶⁷ Under the "right to farm" law, an owner of farmland will not be found liable in a civil action for nuisance so long as the agricultural activities complained of were:

- conducted in an agricultural district;
- established within the district prior to the plaintiff's activities or interest on which the action is based;
- not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or were conducted in accordance with generally accepted agricultural practices; and
- the plaintiff is not involved in agricultural production.⁶⁸

The above benefits and protections associated with agricultural districts are intended to create incentives to maintain the viability of farming as an industry in Ohio.

[c] Agricultural Security Areas

Agricultural security areas are designed to maintain the viability of farming as an industry in Ohio by protecting farmland from development and providing real property tax abatements. The agricultural security area legislation went into effect in 2005.⁶⁹ The legislation permits owners of farmland in unincorporated areas to request from their county commissioners and township trustees the enrollment of at least five hundred acres of contiguous farmland into an agricultural security area for ten years.⁷⁰ The eligibility criteria for owners include:

- enrollment in the Current Agricultural Use Valuation tax program;
- enrollment in an agricultural district;
- utilization of “best management practices”;
- no civil or criminal violations of Ohio or federal environmental law in the ten years preceding the date of application.⁷¹

If approved, the farmland will be enrolled in the agricultural security area for ten years, during which time the farmland will be protected from incompatible development and may receive a real property tax exemption on investments of at least twenty-five thousand dollars in new or expanded farm buildings.⁷² Owners who violate or withdrawal from the agricultural security area during the period of enrollment shall repay any tax benefit received, plus interest, and may be liable for a fine of five hundred dollars.⁷³

[7] Enforcement

[a] Overview

Both Ohio EPA and ODA have enforcement authority with respect to the permitting and operation of Concentrated Animal Feeding Facilities.

[b] Ohio EPA Enforcement

AFFs are subject to regulation by Ohio EPA in several areas, including solid and hazardous waste disposal and NPDES permitting, until the ODA NPDES permitting program receives final approval from U.S. EPA. Any person who violates a law or regulation governed by Ohio EPA is subject to

possible civil or criminal penalties, injunctive action, and jail time in some cases. For further discussion of the enforcement powers of Ohio EPA, see [Section 17.02\[1\]](#) of this chapter and also Chapters 15 and 16 above.

[c] ODA Enforcement

An ODA enforcement action against the owner or operator of a LCAFF may be initiated by a citizen complaint to ODA or it may follow agency action, such as an inspection of a LCAFF.⁷⁴ In either case, ODA is authorized to require corrective actions and assess a civil penalty against an owner or operator who is in violation of the ODA permitting requirements for LCAFFs, the terms and conditions of a PTI or PTO, or the terms and conditions of an NPDES permit.⁷⁵ A civil penalty may be imposed after the following conditions are met:

- ODA provides the owner or operator with written notice that identifies the violation, the actions that may be taken to correct the violation, and the time period within which compliance must be achieved;
- ODA issues notice of an adjudication hearing after the period of time within which to achieve compliance has passed and a subsequent ODA inspection determines that the LCAFF remains in violation; and
- ODA affords the owner or operator an opportunity for an adjudication hearing to challenge the alleged violation, the civil penalty, or both.⁷⁶

ODA may issue an order that requires abatement of the violation and payment of a civil penalty following the adjudication hearing or waiver of the hearing by the owner or operator. The order and penalty may be appealed in accordance with [R.C. 119.12](#). For further discussion of Ohio's administrative appeal procedures, see [Chapters 1](#) and [15](#). ODA may issue an emergency order without holding an adjudication hearing when it determines that immediate action is necessary to protect public health or safety or the environment.⁷⁷ An adjudication hearing will be held, however, upon request by the person subject to the emergency order.

A person who violates the terms and conditions of a PTI, PTO, or NPDES permit may be liable for a civil penalty of up to but not more than twenty-five thousand dollars.⁷⁸ Each day of a violation constitutes a separate offense.⁷⁹ ODA will evaluate the following factors when determining the

amount of a civil penalty: (1) economic benefit from the violation; (2) economic impact on the violator; (3) acts of nature or third parties that resulted in or contributed to the violation; (4) any history of such violations; (5) any good-faith efforts to comply with applicable regulations; (6) any supplemental environmental projects undertaken by the owner or operator; (7) seriousness or magnitude of the violation; (8) gravity of effect of the violation; (9) such other matters as justice requires.⁸⁰ ODA may further modify the amount of a civil penalty using the penalty matrix provided in [OAC 901:10-5-04\(E\)](#), which accounts for the magnitude or seriousness of a violation, its gravity of effect, and the history of violations.⁸¹

A person who fails to obtain a PTI and/or PTO may be subject to a fine of up to twenty-five thousand dollars for each violation and imprisonment.⁸² The size of the fine and length of imprisonment depend on whether the violator acted negligently, recklessly, or knowingly.⁸³ In addition, the Attorney General, at the request of ODA, may obtain injunctive relief and impose a civil penalty of not more than ten thousand dollars from any person violating or threatening to violate the LCAFFs permitting requirements or the terms and conditions of an NPDES permit.⁸⁴

Footnotes — § 17.02:

¹ “Animal feeding facility” means a lot, building, or structure where both of the following conditions are met: (1) agricultural animals have been, are or will be stabled or confined and fed or maintained there for a total of forty-five days or more in any twelve-month period; and (2) crops, vegetable forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot, building, or structure. “Animal feeding facility” also includes land that is owned or leased by or otherwise is under the control of the owner or operator of the lot, building, or structure and on which manure originating from agricultural animals in the lot, building, or structure or a production area is or may be applied. Two or more animal feeding facilities under common ownership shall be considered to be a single animal feeding facility for the purposes of this Chapter if they adjoin each other or if they use a common area or system for the disposal of manure. [R.C. 903.01\(B\)](#).

² [R.C. 903.02](#) and [903.03](#).

³ [R.C. 903.08](#). ODA has been pursuing NPDES authority since approximately 2002, but has not yet received program delegation from U.S. EPA. Since federal authorization for transfer of this portion of the state NPDES program to ODA has not yet occurred, Ohio EPA remains the NPDES permitting authority for large and medium AFFs.

⁴ [R.C. Chapter 6109](#); [OAC 3745-81 through 3745-99](#).

⁵ See [R.C. 6111.021](#); see also [Chapter 4](#) above.

⁶ Ohio S.B. 1, available at <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-1>.

⁷ See Chapter 4 above.

⁸ A Large CAFF is defined at R.C. 903.01(M) to be any AFF that stables or confines at least the number of animals specified in any of the following categories: (1) mature dairy cattle—700; (2) veal calves—1,000; (3) cattle other than mature dairy cattle or veal calves—1,000; (4) swine weighing fifty-five pounds or more—2,500; (5) swine weighing less than fifty-five pounds—10,000; (6) horses—500; (7) sheep or lambs—10,000; (8) turkeys—55,000; (9) laying hens or broilers (if AFF uses liquid manure system)—30,000; (10) chickens other than laying hens (if AFF uses manure system other than liquid manure system)—125,000; (11) laying hens (if AFF uses manure system other than liquid manure system)—82,000; (12) ducks (if AFF uses manure system that is not liquid manure system)—30,000; (13) ducks (if AFF uses manure system that is liquid manure system)—5,000.

⁹ A Major CAFF is defined at R.C. 903.01(N) to be an CAFF with a total design capacity of more than ten times the number animals specified in any of the categories in R.C. 903.01(M).

¹⁰ “Modification” is defined to include increases in animal population exceeding permitted design capacity by ten percent or more, certain changes to an insect and rodent control plan, certain changes in treatment technology and usage of a manure storage or treatment facility, and certain other facility changes. See OAC 901:10-1-01(FFF).

¹¹ R.C. 903.02.

¹² R.C. 903.07.

¹³ R.C. 903.03(A)(2).

¹⁴ R.C. 903.03(F).

¹⁵ R.C. 1511 and 1515; OAC 1501:15-5-01 through -20.

¹⁶ R.C. 903.082(A).

¹⁷ R.C. 903.082(A).

¹⁸ R.C. 903.082(B).

¹⁹ OAC 901:10-1-08.

²⁰ OAC 901:10-1-08.

²¹ OAC 901:10-2-18.

²² OAC 901:10-2-18(B).

²³ OAC 901:10-2-18(A).

²⁴ R.C. 903.08.

²⁵ R.C. 903.08.

²⁶ 40 C.F.R. § 122.23(d).

²⁷ 40 C.F.R. § 122.23(b)(4).

²⁸ A LCAFF is defined at R.C. 903.01(M) to be any CAFF that stables or confines at least the number of animals specified in any of the following categories: (1) mature dairy cattle—700; (2) veal calves—1,000; (3) cattle other than mature dairy cattle or veal calves—1,000; (4) swine weighing fifty-five pounds or more—2,500; (5) swine weighing less than fifty-five pounds—10,000; (6) horses—500; (7) sheep or lambs—10,000; (8) turkeys—55,000; (9) laying hens or broilers (if AFF uses liquid manure system)—30,000; (10) chickens other than laying hens (if AFF uses manure system other than liquid manure system)—125,000; (11) laying hens (if AFF uses manure system other than liquid manure system)—82,000; (12) ducks (if AFF uses manure system that is not liquid manure system)—30,000; (13) ducks (if AFF uses manure system that is liquid manure system)—5,000. Also compare R.C. 903.01(F) and 40 C.F.R. § 122.23(b)(4).

²⁹ 40 C.F.R. § 122.23(b)(4). The definition of “Medium CAFO” specifies that these facilities have animal populations in the following ranges: (A) 200 to 699 mature dairy cows, whether milked or dry; (B) 300 to 999 veal calves; (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs; (D) 750 to 2,499 swine each weighing 55 pounds or more; (E) 3,000 to 9,999 swine each weighing less than 55 pounds; (F) 150 to 499 horses; (G) 3,000 to 9,999 sheep or lambs; (H) 16,500 to 54,999 turkeys; (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system; (J) 39,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system; (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system; (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system; or (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system).

³⁰ 40 C.F.R. § 122.23(c).

³¹ 40 C.F.R. § 122.23(b)(8) and (e).

³² R.C. 6111.03; *see also* 40 C.F.R. § 122.26(a)(9)(i)(B). Ohio EPA has promulgated a general permit addressing stormwater associated with construction activity under which dischargers may seek coverage. *See* Ohio EPA Permit No. OHC000003; OAC 901:10-3-11.

³³ U.S. EPA, NPDES Electronic Reporting Rule, 80 Fed. Reg. 64064 (Oct. 22, 2015).

³⁴ OAC 901:13-1-01 through -20.

³⁵ OAC 901:13-1-14.

³⁶ OAC 901:13-1-01(45).

³⁷ OAC 901:13-1-20.

³⁸ OAC 901:13-1-11; 901:13-1-19.

³⁹ OAC 901:10-2-14.

⁴⁰ R.C. 3767.16 (making it illegal to deposit the carcass of a dead animal or offal upon or into a lake, river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market place, or common).

⁴¹ R.C. 941.14 (burial, incineration, dissolving); R.C. 953.26 (rendering); R.C. 939.04 (composting).

⁴² R.C. 941.14(A).

⁴³ R.C. 941.14(C).

⁴⁴ OAC 901:10-2-15.

⁴⁵ OAC 901:12-1.

⁴⁶ OAC 901:12-3.

⁴⁷ OAC 901:12-4.

⁴⁸ OAC 901:12-3-01(J).

⁴⁹ OAC 901:12-2-01(F).

⁵⁰ OAC 901:12-2-01(G).

⁵¹ R.C. 3704.01(B).

⁵² R.C. 929.01. The definition of “agricultural production” includes animal and poultry husbandry as well as field crop, fruit and vegetable and various other agricultural activities.

⁵³ R.C. 3704.01(B).

⁵⁴ *Concerned Citizens of Cent. Ohio v. Schregardus*, 148 Ohio App. 3d 31, 2002-Ohio-1074, 771 N.E.2d 898 (2002).

⁵⁵ *Concerned Citizens of Cent. Ohio v. Schregardus*, 148 Ohio App. 3d 31, 2002-Ohio-1074, 771 N.E.2d 898 (2002).

⁵⁶ 73 Fed. Reg. 76948 (Dec. 18, 2008).

⁵⁷ “Large farms” with a reporting duty under EPCRA § 304 are those at or above the following thresholds of animals: (1) mature dairy cattle—700; (2) veal calves—1,000; (3) cattle other than mature dairy cattle or veal calves—1,000; (4) swine weighing fifty-five pounds or more—2,500; (5) swine weighing less than fifty-five pounds—10,000; (6) horses—500; (7) sheep or lambs—10,000; (8) turkeys—55,000; (9) laying hens or broilers (if AFF uses liquid manure system)—30,000; (10) chickens other than laying hens (if AFF uses manure system other than liquid manure system)—125,000; (11) laying hens (if AFF uses manure system other than liquid manure system)—82,000; (12) ducks (if AFF uses manure system that is not liquid manure system)—30,000; (13) ducks (if AFF uses manure system that is liquid manure system)—5,000.

⁵⁸ R.C. 929.02(A); see also R.C. 929.01(A), which broadly defines “agricultural production” as

commercial aquaculture, apiculture, animal husbandry, timber production, field crops, tobacco, fruits, vegetables, nursery stock, flowers, sod, and the processing, drying, storage, and marketing of agricultural products when such activities are conducted in conjunction with husbandry, production, or growth.

[59](#) R.C. 929.02(A); *see also* R.C. 929.01(A).

[60](#) R.C. 929.02(A); *see also* R.C. 929.01(A).

[61](#) R.C. 929.02(A)(2).

[62](#) R.C. 929.02(B).

[63](#) R.C. 929.02(B).

[64](#) R.C. 929.02(B); *see also* R.C. 929.02(A)(2).

[65](#) R.C. 929.03(A)(1).

[66](#) R.C. 929.03(C).

[67](#) R.C. 929.04.

[68](#) R.C. 929.04; *see also e.g., Eulrich v. Weaver Bros.*, 165 Ohio App. 3d 313, 2005-Ohio-5891, 846 N.E.2d 542 (3d Dist.); *Winklemann v. Cekada*, 137 Ohio App. 3d 176, 738 N.E.2d 397 (1999).

[69](#) R.C. 931.01 *et seq.*

[70](#) R.C. 931.02.

[71](#) R.C. 931.02.

[72](#) R.C. 931.02.

[73](#) R.C. 931.07; R.C. 931.99.

[74](#) R.C. 903.15; R.C. 903.16.

[75](#) R.C. 903.16(A); R.C. 903.17(A).

[76](#) R.C. 903.16(A)(1)–(3).

[77](#) R.C. 903.18(A).

[78](#) R.C. 903.99.

[79](#) R.C. 903.99.

[80](#) OAC 901:10-5-04(D).

[81](#) OAC 901:10-5-04(E).

⁸² R.C. 903.99.

⁸³ R.C. 903.99.

⁸⁴ R.C. 903.16(C), (D); R.C. 903.17(D)(1), (2).

§ 17.03. Pesticide Application

ODA regulates the application of pesticides in Ohio. A full discussion of pesticide regulation can be found in Chapter 20.

§ 17.04. Storage and Handling of Fertilizers

Certain aspects of the storage and handling of fertilizers are regulated by ODA. Storage of liquid fertilizers in particular is subject to stringent regulation.⁸⁵ “Liquid fertilizer” is defined to mean any fluid containing plant nutrients used to improve the quantity or quality of plant growth, excluding anhydrous ammonia.⁸⁶ New permanent storage vessels for liquid fertilizers must be approved prior to construction by ODA, which reviews such plans in light of applicable zoning, building and fire code mandates.⁸⁷ New construction of in-ground pits for storage of liquid fertilizers is prohibited.⁸⁸ In-ground storage pits for liquid fertilizer remaining in service that were constructed prior to 1991 may continue to be operated, but must meet specific lining and leachate collection requirements and also must be taken out of service at the end of the useful life of the pit’s primary liner.⁸⁹ Operators of such vessels are subject to various spill control, containment, inspection and recordkeeping requirements.⁹⁰ Storage of anhydrous ammonia also requires securing a license from ODA.⁹¹ Storage of dry fertilizer materials and non-liquid fertilizers are also subject to some ODA regulatory mandates, including a requirement that long-term (greater than thirty (30) days per year) storage must occur inside a structure or impermeable device.⁹²

In 2007, the U.S. Department of Homeland Security (DHS) adopted regulations, which are called the “chemical facility” rules, that require any chemical facility that possesses any chemical of interest at or above the screening threshold quantity set forth in Appendix A of the rules to complete and submit information—called a “Top Screen” analysis—to the DHS by January 22, 2008.⁹³ “Chemical facility” is broadly defined in the rules as any establishment that possesses or plans to possess, at any relevant point in time,

a quantity of a chemical substance determined by the DHS to be potentially dangerous or that meets other risk-related criteria identified by the DHS.

Appendix A contains quantity limits for a number of chemicals of interest, such as fertilizer ingredients and fuels, that are used in conjunction with agricultural operations.⁹⁴ However, DHS intends to limit coverage of the rules, with respect to agricultural users of chemicals of interest, by revising the screening thresholds for certain chemicals.

In the meantime, DHS has indefinitely delayed the requirement that regulated agricultural users provide DHS with a Top Screen analysis. Until further notice, or unless otherwise specifically notified in writing by DHS, the Top Screens will not be required for any facility that is required to submit a Top Screen solely because it possesses any chemical of interest, at or above the applicable screening threshold quantity, for use in preparation for the treatment of crops, feed, land, livestock, or other areas of an agricultural production facility, or during application to or treatment of crops, feed, land livestock, or other areas of an agricultural production facility.⁹⁵

The extension *does not*, however, apply to agricultural production facilities that possess a chemical of interest at or above a screening threshold quantity that the facility uses as a fuel.⁹⁶ Consequently, a farmer who possesses propane, for example, at one farm in an amount above the Appendix A screening threshold quantity, should have completed a Top Screen analysis for the propane by January 22, 2008.

In July 2010, DHS sent out 1,000 surveys to facilities requesting information on the sale or transfer of Chemicals of Interest (COIs) or products containing COIs to farmers and agricultural facilities. An example of these products would be pesticides and fertilizers. According to DHS they will also be asking for information, where available, on these agricultural customers' use and handling of COI-containing products. DHS defines agricultural facility and farmer as follows: (1) agricultural activities means (a) preparation for the treatment of crops, feed, land, livestock (including poultry) or other areas of an agricultural facility; or (b) application to or treatment of crops, feed, land, livestock (including poultry) or other areas of an agricultural facility; and (2) agricultural facility includes farms (e.g., crop, fruit, nut, and vegetable); ranches and rangeland; poultry, dairy, and equine facilities; turfgrass growers; golf courses; nurseries; floricultural operations;

and public and private parks. The deadline for completing the surveys was Monday, August 20, 2010. It is anticipated that DHS will use the information obtained from the survey to develop a different Top Screen process for farmers and agricultural facilities.

Alert: In May 2014, Governor Kasich signed Ohio S.B. 150 into law, creating the Agricultural Fertilizer Applicator Program. The first of its kind, the program requires anyone who applies commercial fertilizer to 50 or more acres to become certified by ODA (or operate under the direct supervision of a person who is certified) no later than September 30, 2017. Certification requires three steps: filling out an application form, paying an application fee, and attending a training session. Certifications are valid for three years. Persons holding a valid certification will obtain an affirmative defense to civil actions for claims involving or resulting from the application of fertilizer, if certain other requirements are met.

Footnotes — § 17.04:

⁸⁵ See OAC Chapter 901:5-2.

⁸⁶ OAC 901:5-2-01(T).

⁸⁷ OAC 901:5-2-02(A).

⁸⁸ OAC 901:5-2-02(F).

⁸⁹ OAC 901:5-2-02(E).

⁹⁰ OAC 901:5-2-04, -05 and -07.

⁹¹ See OAC Chapter 901:5-3.

⁹² OAC 901:5-2-08.

⁹³ 6 C.F.R. Part 27; 72 Fed. Reg. 65,396 (Nov. 20, 2007).

⁹⁴ 72 Fed. Reg. 65,396 (Nov. 20, 2007).

⁹⁵ 73 Fed. Reg. 1640 (Jan. 9, 2008).

⁹⁶ 73 Fed. Reg. 1640 (Jan. 9, 2008).

§ 17.05. Agricultural Drainage

Proper drainage of agricultural lands is a necessity in Ohio. Approximately fifty-five percent of Ohio’s arable soils require the removal of excess water in order to prevent soil erosion, increase agricultural productivity, and reduce conditions that would prevent farm equipment from accessing fields during the spring and fall. Drainage improvements take a variety of forms; however, ditches and subsurface drains are most commonly used to remove excess water from the surface and subsurface of agricultural lands.

Landowners are responsible for the construction and maintenance of drainage improvements on their property. In the course of constructing or maintaining such improvements, landowners are legally permitted to make a “reasonable use” of their land, even if the improvements alter or interfere with the natural flow of water causing harm to others and their land. For further discussion of the reasonable use doctrine, see [Chapter 5](#) above. A landowner may petition the county government to construct and assume responsibility for the maintenance of drainage improvements in those circumstances where a drainage problem impacts more than one landowner and the proposed improvement would benefit the general public.⁹⁷ However, the county’s costs to construct and maintain the drainage improvement are paid via assessment by the landowners who receive the benefit of the improvement.⁹⁸

⚠ Warning: Where agricultural activities may be adding pollutants to drainage water flows, the potential applicability of stormwater NPDES permitting obligations should be considered. See [Section 17.02\[2\]\[b\]](#) and [Chapter 3](#) above.

Footnotes — § 17.05:

⁹⁷ R.C. 6131 *et seq.*

⁹⁸ R.C. 6131 *et seq.*

§ 17.06. Dangerous Wild Animals

Senate Bill 310, which was signed into law in June 2012, regulates the possession of dangerous wild animals and certain snakes.⁹⁹ Dangerous wild animals generally include large cats, bears, elephants, certain monkeys,

rhinos, alligators, crocodiles, anacondas and pythons that are 12 feet or longer, vipers, and certain other venomous snakes.¹⁰⁰ Executive Order 2012-18K, dated November 27, 2012, authorized ODA to immediately adopt the administrative rules written by the Dangerous and Restricted Animals Advisory Board that govern the care and housing of registered dangerous wild animals in Ohio.¹⁰¹ Persons in possession of dangerous wild animals on the effective date of the law were required to register them with ODA¹⁰² and come into compliance with the temporary rules no later than February 25, 2013.

The law generally prohibits any person from:

- trading, selling or offering for sale a dangerous wild animal;
- knowingly removing the required locator microchip that is implanted in a dangerous animal;
- allowing a dangerous wild animal to roam off the property where it is confined;
- removing the teeth or claws of a dangerous wild animal;
- failing to comply with signage requirements; and
- knowingly releasing a dangerous wild animal into the wild.¹⁰³

With respect to venomous snakes, owners are required to have access to anti-venom for each of their species of venomous snake at the location the snakes are confined.¹⁰⁴ Owners are also required to provide ODA with proof the required anti-venom is maintained.¹⁰⁵ Under the law, all costs associated with the treatment of a venomous snake bite are the responsibility of the owner.¹⁰⁶

The law provides for five types of dangerous wild animal permits:

- Wildlife Shelter Permit;
- Wildlife Propagation Permit;
- Restricted Snake Possession Permit;
- Restricted Snake Propagation Permit; and
- Rescue Facility Permit.¹⁰⁷

Each permit type requires the permittee to maintain certain levels of liability insurance. With respect to Rescue Facility Permits, permittees are prohibited from (1) purchasing animals; (2) selling or trading animals; (3) using animals in any manner for profit; (4) breeding animals; and (5) allowing the public to come into contact with the animals.¹⁰⁸

After January 1, 2014, no person shall possess a dangerous wild animal unless registered and permitted.¹⁰⁹ Exceptions to the ODA permitting requirements include:

- accredited zoos and aquariums;
- certain research facilities;
- accredited circuses;
- veterinarians providing temporary care;
- wildlife shelters accredited by the Global Federation of Animal Sanctuaries;
- individuals traveling through Ohio who are not in the state for more than 48 hours and do not exhibit the animals or allow them contact with the public;
- educational institutes that display a single dangerous wild animal as a mascot;
- persons or facilities possessing certain Ohio DNR permits;
- service spider monkeys trained by non-profit organizations.¹¹⁰

In December 2012, the constitutionality of the law was upheld by the U.S. District Court for the Southern District of Ohio, Eastern Division following a three-day trial. The challenge was brought by seven owners of dangerous wild animals who claimed the law imposed unreasonable financial hardships on them and its requirements endangered their animals. For example, the plaintiffs argued that animals anesthetized during the required microchipping procedure, particularly older animals, were less likely to recover. Ultimately, the court concluded protecting the public outweighed the possible infringement of the rights of individuals to own dangerous wild animals without regulation.¹¹¹ In March 2014, the constitutionality of the law

was upheld by the Sixth U.S. Circuit Court of Appeals.¹¹²

Footnotes — § 17.06:

⁹⁹ R.C. 935.01 to 935.29.

¹⁰⁰ R.C. 935.01(C).

¹⁰¹ See OAC 901:1-2-01 to 901:1-2-09.

¹⁰² R.C. 935.03(A)

¹⁰³ R.C. 935.18.

¹⁰⁴ R.C. 935.23(A)(1).

¹⁰⁵ R.C. 935.23(A)(2).

¹⁰⁶ R.C. 935.23(B).

¹⁰⁷ R.C. 935.05 to 935.11.

¹⁰⁸ R.C. 935.01(K).

¹⁰⁹ R.C. 935.02.

¹¹⁰ R.C. 935.03.

¹¹¹ *Wilkins v. Daniels*, 2012 U.S. Dist. LEXIS 180321 (S.D. Ohio Dec. 20, 2012).

¹¹² *Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014).

CHAPTER 18

MINING AND OIL AND GAS REGULATION

Contents

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I.

PROCEDURAL CONTEXT

§ 18.01. Scope

This chapter covers:

- Ohio’s oil and gas well program [see §§ 18.01–18.03 *below*].
- Ohio’s coal mining program [see § 18.04 *below*].
- Ohio’s mining program relating to industrial mineral surface mining and in-stream mining [see § 18.05 *below*].
- Ohio’s abandoned mines programs [see § 18.06 *below*].
- Appeals from decisions, findings and orders issued by DMRM relating to mining [see § 18.07 *below*].

§ 18.02. Procedural Context—Ohio Mining and Minerals Programs

The Ohio Department of Natural Resources (ODNR) has authority over mining and mineral resource development activities in Ohio.¹ ODNR’s Division of Oil and Gas Resources Management, oversees Ohio’s regulatory program governing oil and gas wells.² ODNR’s Division of Mineral Resources Management (DMRM) oversees the regulation of coal mining,³ mine safety,⁴ and abandoned mine lands.⁵

Footnotes — § 18.02:

¹ R.C. 1509.02; R.C. 1561.02.

² R.C. 1509.03; see <http://www.ohiodnr.com/tabid/10371/default.aspx>.

³ R.C. 1513.02.

⁴ R.C. 1561.03.

⁵ R.C. 1513.37; R.C. 1509.02; R.C. 1561.02.

II.

OHIO MINERAL RESOURCE REGULATORY PROGRAMS

§ 18.03. Ohio and Gas Laws

[1] Introduction

As previously noted, the Division of Oil and Gas Resources Management in ODNR regulates the permitting, locating, spacing, drilling, and operating of oil and gas wells within the state, including site restoration and disposal of wastes from those wells, in accordance with [1509 of the Ohio Revised Code](#) (R.C. 1509) and rules adopted under it.⁶ The Chief of the Division of Oil and Gas Resources Management heads the Division.⁷

As is discussed below, although Ohio's oil and gas laws date back several decades, in recent years the Ohio General Assembly enacted several major revisions in response to the explosion of interest in the development of the Marcellus and Utica shale plays that underlie much of eastern Ohio.

Over the last several years, domestic natural gas production in the United States has expanded dramatically because of "hydraulic fracturing" (sometimes called hydrofracking or fracking), which makes extracting natural gas from shale formations more cost effective, at least when demand grows. (As of the date of this writing in April 2017 there has been a sharp decline in oil and gas drilling nation-wide, attributed by some to a decline in demand.)

Shale gas has been produced for more than 100 years in the Appalachian and central basins of the United States. Until recently, fracking operations were only marginally profitable, primarily because the shale formations where the oil and gas are trapped have a relatively low effective porosity, and the formations themselves, while horizontally expansive, vertically are not. This resulted in high costs and low production in oil or gas wells placed in

shale formations.

In the last five years, higher natural gas prices and advances in shale gas production methods have improved profitability. The two most critical advances have been the injection of high pressure drilling fluids to fracture the shale (thus improving effective porosity), and the development of horizontal drilling techniques (which addressed the limited vertical extent of the shale formations). Since the turn of the millennium, shale gas basins in Wyoming, Texas, New York, Pennsylvania, West Virginia and Ohio have witnessed a boom in production.

In the eastern United States, most shale gas wells are drilled vertically, straight down as far as two miles below surface, to reach shale formations. Then, the drill bit is turned horizontally and the well is extended laterally into the rock. After the well is drilled, hydraulic fracturing begins.

During the “fracking” process, millions of gallons of water, sand, and chemicals (fracking fluid) are pumped under high pressure into the well. The fracking fluid at such high pressure breaks apart the shale, releases the oil and gas, forces it out of the shale into the well, and is captured at the surface. Hydrofracking is the predominant process used to extract gas from shale formations in the United States.

Geologists have discovered more than two dozen producing and potential shale gas formations across the country in Rocky Mountain and Appalachian Mountain states (including Ohio, Pennsylvania and New York).

The most explored and produced plays are the Barnett Shale (Texas), the Haynesville/Bossier Shale (Louisiana, Texas), the Antrim Shale (Michigan), the Fayetteville Shale (Arkansas), the Marcellus Shale (New York, Ohio, Pennsylvania, West Virginia),⁸ and the Utica Shale (Ohio). Analysts have estimated that most growth in natural gas reserves in the United States will come from these shale plays.

The total estimated recoverable gas resources from just five of these plays—the Haynesville, Fayetteville, Marcellus, Woodford and Utica—may be over 550 trillion cubic feet (TCF), which alone amounts to about a 20-year supply of natural gas.

In 2015, the United States used about 27.5 TCF of natural gas, making up

approximately 29 percent of energy used in the United States in 2015.⁹ Through 2010, about 30 percent of the total natural gas production in the United States was from the shale plays, which has expanded rapidly from less than 2 percent of total U.S. production of natural gas in 2001, according to a report published August 18, 2011, by the Shale Gas Production Subcommittee of the Secretary of Energy Advisory Board.

Expansion of shale gas production was widely acknowledged in 2008. Since then, production has increased substantially, with output growing in new regions such as the Haynesville shale, mostly in Louisiana, and the Marcellus, mostly in Pennsylvania and West Virginia. Development of the Utica Shale, mostly in Ohio, is not far behind.

At least until the current decline set in, the U.S. Energy Information Administration (EIA) was predicting further rapid expansion of shale gas production, projecting shale gas to be 46 percent of domestic production by 2035. With the growth in U.S. production of shale gas, interest has spread to potential gas shale basins in Canada, Europe, Asian and Australia.

Shale oil and gas production has been called a “game changer.” It may lead to, if not energy independence, at least energy security for the United States. Development of the Utica Shale play in Ohio will likely play a significant role.

[2] Authority of the Division

R.C. 1509 vests in the Division Oil and Gas Resources Management and its Chief sole and exclusive authority to regulate the permitting, locating, and spacing of oil and gas wells within the state. Under R.C. 1509, the Division has sole and exclusive authority to regulate production operations (*see* § 18.03[1] *above*) within the state.¹⁰

Litigation has mostly upheld this grant of exclusive authority. In *State ex rel. Morrison v. Beck Energy Corp.*,¹¹ Beck Energy Corporation (“Beck”) challenged the lawfulness of ordinances by the city of Munroe Falls, which would have had the effect of barring oil and gas well drilling on private property located within the City limits without building and zoning permits issued by the City. A Summit County Common Pleas Court decision supported the City, but the Ninth District Court of Appeals partially reversed, ruling that the legislative grant of “sole and exclusive authority” over oil and

gas drilling and production in Ohio to the Chief of the Ohio Division of Oil and Gas Resources Management set forth in [R.C. 1509.02](#) preempts all but the land use and building code ordinances that apply to drilling and non-drilling operations alike.

Both the City and Beck filed appeals with the Ohio Supreme Court, which, in a four-three decision, affirmed the Court of Appeals.¹² Writing for three of the four Justices who joined in the decision of the Court to affirm the Court of Appeals decision, Justice French opined that because the city ordinances at issue attempted to restrict what state statute expressly allowed, the city ordinances conflicted with a statute of general application, and were therefore invalid.

The three dissenting Justices' opinions and Justice O'Donnell's concurrence in judgment cast doubt on whether the high court would overturn a legal ordinance if written differently. Justice O'Donnell's concurring opinion warrants particular attention. Although he did not articulate a clear test that could be adopted as the standard in future cases (as, for example, Justice Kennedy's opinion did in the plurality U.S. Supreme Court *Rapanos* jurisdictional waters decision), Justice O'Donnell's legal and policy rationale could form the basis for a future majority if the court takes up the traditional zoning question.

First, according to Justice O'Donnell, where [R.C. 1509.02](#) grants "sole and exclusive authority" to regulate the "location" of wells, the word location has a specialized, technical meaning in oil and gas law. Citing to oil and gas treatises, Justice O'Donnell believed location in this context related mainly to protecting correlative rights and maximizing the efficient production of oil as between adjacent properties.

He also noted that the legislature's recent revisions to [R.C. 1509.02](#) were intended to preempt a patchwork of local laws related to the technical and safety aspects of oil and gas. In this view, the revisions were not meant to divest local government of its traditional authority to promulgate land use planning regulations to ensure that uses were compatible with local neighborhoods, preserved property values, and were consistent with long term community development plans.

Although Justice O'Donnell does not make the point directly, it could be

argued that ODNR’s oil and gas drilling expertise and authority is limited to technical and safety concerns, and that [R.C. 1509.02](#)’s “sole and exclusive” language must be read in the context of ODNR’s mission to protect natural resources, human health, and the environment. Taken to the extreme, “sole and exclusive” could give ODNR authority to regulate any matter related to drilling activities, such as wage and hour requirements, no matter how remotely connected to ODNR’s expertise.

Finally, in a nod to statutory interpretation and legislative intent, Justice O’Donnell noted that the legislature knows how to expressly supersede local zoning ordinances when it intends to, having done so in statutes related to hazardous waste facilities, public utilities, casinos, and licensed residential facilities, which language is noticeably missing from [R.C. 1509.02](#). Justice Lazinger’s dissent (joined by Justices Pfeifer and O’Neill) also emphasizes the legislature’s silence on zoning in [R.C. 1509](#).

[R.C. 1509.02](#) excludes from the Division’s sole and exclusive authority the authority of the Director of Transportation and local authorities to issue special permits regarding vehicle size, weight, or load. That same division also excludes from the Division’s sole and exclusive authority the authority of a municipal corporation to regulate the use of streets, provided that the authority of the municipal corporation, or of the Director of Transportation or local authorities to issue such special permits, is not exercised in a manner that discriminates against, unfairly impedes, or obstructs regulated oil and gas activities and operations.¹³

Recent litigation has also tested the authority of the Chief of the Division of Oil and Gas Resources Management. In *D&L Energy, Inc. v. Ohio Division of Oil and Gas Resources Management*,¹⁴ the Chief issued an order revoking D&L’s Class II injection well permits because of certain alleged violations of Ohio’s oil and gas laws and regulations relating to brine disposal purportedly committed by persons and business entities related to D&L. Although nowhere in [Ohio Revised Code Chapter 1509](#) did the Ohio General Assembly expressly grant the Chief the authority to revoke underground injection control (UIC) permits, the Commission found that the Chief’s general authority to enforce Ohio’s oil and gas regulatory scheme included, by implication, the power to revoke permits. D&L appealed the Commission’s ruling and Court of Common Pleas of Franklin County, Ohio

affirmed the Commission's decision in November 10, 2014.¹⁵

[3] Definitions

“Owner” means the person who has the right to drill on a tract or drilling unit, to drill into and produce from a pool, and to appropriate the oil or gas produced from the pool either for the person or for others, except that a person ceases to be an “owner” with respect to a well when the well has been plugged in accordance with applicable rules adopted and orders issued under R.C. 1509.¹⁶ “Owner” does not include a person who obtains a lease of the mineral rights for oil and gas on a parcel of land if the person does not attempt to produce oil or gas from a well or obtain a permit under R.C. 1509 for a well or if the entire interest of a well is transferred to the person in accordance with [R.C. 1509.31\(B\)](#).¹⁷

R.C. 1509 defines “brine” to mean all saline geological formation water resulting from, obtained from, or produced in connection with the exploration, drilling, well stimulation, production of oil or gas, or plugging of a well.¹⁸

Additionally, R.C. 1509 defines “urbanized area,” for the purpose of attaching terms and conditions to a permit, to mean an area where a well or production facilities of a well are located within a municipal corporation or within a township that has an unincorporated population of more than 5,000 in the most recent federal decennial census before the permit for the well or production facilities is issued.¹⁹ This definition of “urbanized area” is applicable to the entire Oil and Gas Law rather than only the provisions pertaining to the subjects that the Chief must address when attaching terms and conditions to a permit.²⁰

Also, R.C. 1509 defines “tract” to mean a single, individual parcel of land or a portion of a single, individual parcel of land.²¹

R.C. 1509 also defines all of the following:

- (1) “Well stimulation” or “stimulation of a well” means the process of enhancing well productivity, including hydraulic fracturing operations.²²
- (2) “Production operation”²³ means all operations and activities

associated with oil, gas, or other mineral exploration and production, including site preparation, access roads, drilling, well completion, well stimulation, well operation, site reclamation, and well plugging. “Production operation” also includes all of the following:

- (a) The piping and equipment used for the production and preparation of hydrocarbon gas or liquids for transportation or delivery;
 - (b) The processes of extraction and recovery, lifting, stabilization, treatment, separation, production processing, storage, and measurement of hydrocarbon gas and liquid; and
 - (c) The processes associated with production compression, gas lift, gas injection, and fuel gas supply.²⁴
- (3) “Annular overpressurization” means the accumulation of fluids within an annulus with sufficient pressure to allow migration of annular fluids into underground sources of drinking water.²⁵
- (4) “Idle and orphaned well” means a well for which a bond has been forfeited or an abandoned well for which no money is available to plug the well according to R.C. 1509 and rules adopted under it.²⁶
- (5) “Temporarily inactive well” means a well that has been granted temporary inactive status under R.C. 1509.²⁷
- (6) “Material and substantial violation” under R.C. 1509 means any of the following:
- (a) Failure to obtain a permit to drill, reopen, convert, plug back, or plug a well;
 - (b) Failure to obtain or maintain the required insurance coverage;
 - (c) Failure to obtain or maintain a surety bond that is required;
 - (d) Failure to plug an abandoned well or idle and orphaned well unless the well has been granted temporary inactive status or the Chief has approved another option concerning the abandoned well or idle and orphaned well;
 - (e) Failure to restore a disturbed land surface;

- (f) Failure to reimburse the Oil and Gas Well Fund pursuant to a final order;
 - (g) Failure to comply with a final nonappealable order of the Chief issued under R.C. 1509; or
 - (h) Failure to submit a required report, test result, fee, or document²⁸
- (7) “Severer” has the same meaning as in the Severance Tax Law, that is, any person who actually removes the natural resources from the soil or water in Ohio²⁹ by reference to [R.C. 5749.01\(H\)](#).
- (8) “Persons” subject to Ohio’s oil and gas law are all legal entities “recognized” under Ohio law.

[4] Oil and Gas Regulatory Cost Recovery Assessment

Beginning July 1, 2010, [R.C. 1509](#) imposed an oil and gas regulatory cost recovery assessment on an owner.³⁰ An owner must pay the assessment in the same manner as a severer who is required to file a return under Ohio’s Severance Tax Law.³¹ However, an owner may designate a severer who must pay the owner’s assessment on behalf of the owner on the return that the severer is required to file under the Severance Tax Law. If a severer pays an owner’s assessment, the severer may recoup from the owner the amount of the assessment. [R.C. 1509](#) provides that except for an exempt domestic well, the assessment imposed is in addition to the taxes levied on the severance of oil and gas under Ohio’s Severance Tax Law.³²

[R.C. 1509](#) requires the oil and gas regulatory cost recovery assessment to be calculated on a quarterly basis, except for an exempt domestic well, and requires the assessment to be one of the following:

- (a) If the sum of 10¢ per barrel of oil for all of the wells of the owner, ½¢ per 1,000 cubic feet of natural gas for all of the wells of the owner, and the amount of the severance tax levied on each severer for all of the wells of the owner is greater than the sum of \$15 for each well owned by the owner, the amount of the assessment is the sum of 10¢ per barrel of oil for all of the wells of the owner and ½¢ per 1,000 cubic feet of natural gas for all of the wells of the owner; or³³
- (b) If the sum of 10¢ per barrel of oil for all of the wells of the owner, ½¢

per 1,000 cubic feet of natural gas for all of the wells of the owner, and the amount of the severance tax levied on each severer for all of the wells of the owner is less than the sum of \$15 for each well owned by the owner, the amount of the assessment is the sum of \$15 for each well owned by the owner less the amount of the severance tax levied on each severer.³⁴

R.C. 1509 states that the oil and gas regulatory cost recovery assessment for a well that becomes an exempt domestic well on and after July 1, 2010, is \$60 to be paid to the Division of Oil and Gas Resources Management on July 1 each year.³⁵

R.C. 1509 requires all money collected from the assessment to be deposited in the state treasury to the credit of the Oil and Gas Well Fund (*see* “Oil and Gas Well Fund,” § 18.03[7] *below*).³⁶

[5] Injection Well Disposal Fee

R.C. 1509 levies the following fees on owners and permit holders for an injection well:

- (a) 5¢ per barrel of each substance that is delivered to a well to be injected in the well when the substance is produced within the Division of Mineral Resources Management regulatory district in which the well is located or within an adjoining regulatory district; or
- (b) 20¢ per barrel of each substance that is delivered to a well to be injected in the well when the substance is not produced within a Division’s regulatory district in which the well is located or within an adjoining regulatory district.³⁷

R.C. 1509 establishes a maximum of 500,000 barrels of substance per injection well in a calendar year on which the fee may be levied. In addition, if in a calendar year the owner of an injection well receives more than 500,000 barrels of substance to be injected in the owner’s well and if the owner receives at least one substance that is produced within the Division’s regulatory district in which the well is located or within an adjoining regulatory district and at least one substance that is not produced within the Division’s regulatory district in which the well is located or within an adjoining regulatory district, the fee must be calculated first on all of the

barrels of substance that are not produced within the Division's regulatory district in which the well is located or within an adjoining district at the rate established in item (b) above. The fee then must be calculated on the barrels of substance that are produced within the Division's regulatory district in which the well is located or within an adjoining district at the rate established in item (a) above until the maximum of 500,000 barrels has been attained.³⁸

An owner of an injection well who is issued a permit for an injection well under R.C. 1509 must collect the fee on behalf of the Division of Oil and Gas Resources Management and forward the fee to the Division. The Chief must transmit all money received from the fees to the Treasurer of State, who must deposit the money in the state treasury to the credit of the Oil and Gas Well Fund (see "Oil and Gas Well Fund," § 18.03[7] *below*). An owner of an injection well who collects the fee may retain, for administrative costs, up to 3% of the amount collected.³⁹

R.C. 1509 requires the Chief to adopt rules in accordance with the [R.C. Chapter 119](#) establishing requirements and procedures for collection of the fee.⁴⁰

[6] Gas Storage Well Regulatory Fee

Not later than March 31 each year, the owner of a well that is used for gas storage or to monitor a gas storage reservoir and that is located in a reservoir protective area must pay to the Chief a gas storage well regulatory fee of \$125 for each well that the owner owned as of December 31 of the previous year for the purposes of administering R.C. 1509. The Chief may prescribe and provide a form for the collection of the fee and may adopt rules in accordance with Ohio's Administrative Procedures Act⁴¹ that are necessary for the administration of the fee. All of the money collected from the fee must be deposited in the state treasury to the credit of the Oil and Gas Well Fund (see "Oil and Gas Well Fund," § 18.03[7] *below*).⁴²

[7] Oil and Gas Well Fund

[a] Sources of Money Credited to the Fund

R.C. 1509 created the Oil and Gas Well Fund in the state treasury. All money collected by the Chief from permit application fees, permit revision

fees, forfeiture of bonds, fees for permits to plug and abandon a well, injection well permit fees, brine transporter registration fees, 90% of the money received from severance taxes on oil and gas, civil penalties for violations of certain provisions of R.C. 1509, and criminal fines imposed for violations of certain provisions of R.C. 1509 must be credited to the Fund. Additionally, temporary inactive well status fees, injection well disposal fees, money from the collection of liens under R.C. 1509 (see “Priority Lien,” § 18.03[37] *below*), and oil and gas regulatory cost recovery assessments must be credited to the Fund.⁴³

[b] Expenditures From the Fund

R.C. 1509 requires the Chief to spend money in the Fund to plug wells and to restore land surface properly for which bonds have been forfeited, to plug abandoned wells in accordance with R.C. 1509 for which no funds are available, to inject oil or gas production wastes in abandoned wells, to correct conditions that the Chief reasonably has determined are causing imminent health or safety risks, for the expenses of the Division associated with the administration of the Natural Gas Policy Act of 1978, and for the Division’s other functions.⁴⁴

[8] Mandatory Pooling and Unitization

[a] Statutory Provisions

Mandatory pooling may be requested when an operator is unable to acquire the leases necessary to meet the acreage and/or distance requirements when applying for a drilling permit.⁴⁵ R.C. 1509 states that if a tract of land is of insufficient size or shape to meet the requirements for drilling a well, and the owner has been unable to form a drilling unit by agreement on a just and equitable basis, the owner may submit an application to the Division of Oil and Gas Resources Management for a mandatory pooling order. Current law requires the owner of the tract also to own the mineral interest.⁴⁶

R.C. 1509 also provides for unitization of mineral interests.⁴⁷ While “pooling” refers to the integration of several tracts of land to allow for proper spacing between oil and gas wells, “unitization” refers to the consolidation of mineral interests in a common oil and gas supply to most efficiently extract oil and gas while protecting correlating rights.

In 2013, the Chief of the Division of Oil and Gas Resources Management issued new rules governing unitization. Among other things, these rules provide for the following:

- Affidavit of attempts to lease. Most notably, the 2013 rules required applicants to describe their efforts to lease the remaining acres in a proposed unit. The operator must identify specific details of each attempt to lease the mineral rights, including the dates of the attempts and the names of people contacted.
- Visual depictions of the proposed unit. The 2013 rules described specific dimensions and content requirements for maps and aerial photographs of proposed units.
- Description of geological formations. The 2013 rules required a gamma-ray density log depicting the geological formations to be drilled in the proposed unit.
- Large exhibits at hearings. The 2013 rules required applicants to bring large visual exhibits depicting many parts of the application (including the maps and aerial photographs of the proposed unit, and depictions of the geological formation).

[b] Application

Under R.C. 1509, the application for a mandatory pooling order may be made by the owner of the right to drill⁴⁸ and must include such data and information as reasonably required by the Chief. In addition, upon receipt of an application for a mandatory pooling order, the Chief must notify all owners of tracts included within the area proposed to be pooled of the filing of the application and of their right to a hearing.

Changes in R.C. 1509 enacted in 2015 now allow an application for a mandatory pooling order to be submitted if one or more tracts of land, rather than a single tract of land, is (are) of insufficient size or shape to meet the statutory minimum acreage requirements.

R.C. 1509 states that the Chief must issue the drilling permit and a mandatory pooling order in the time periods established in continuing law if the Chief is satisfied that the application is proper in form and that mandatory pooling is necessary to protect correlative rights and to provide effective

development, use, and conservation of oil and gas.⁴⁹ The mandatory pooling application shall be accompanied by a nonrefundable fee of \$10,000.

[c] Contents of a Mandatory Pooling Order

Under R.C. 1509, a mandatory pooling order shall:

- (1) Designate the boundaries of the drilling unit within which the well shall be drilled;
- (2) Designate the proposed production site;
- (3) Describe each separately owned tract or part thereof pooled by the order;
- (4) Allocate on a surface acreage basis a pro rata portion of the production to the owner of each tract. The pro rata portion shall be in the same proportion that the percentage of the owner's acreage is to the state minimum acreage requirements established in rules adopted under R.C. 1509 for a drilling unit unless the applicant demonstrates to the Chief using geological evidence that the geologic structure containing the oil or gas is larger than the minimum acreage requirement, in which case the pro rata portion must be in the same proportion that the percentage of the owner's acreage is to the geologic structure;
- (5) Specify the basis on which each mineral rights owner of a tract pooled by the order must share all reasonable costs and expenses of drilling and producing if the mineral rights owner elects to participate in the drilling and operation of the well;
- (6) Designate the person to whom the permit must be issued.

A person shall not submit more than five applications for mandatory pooling orders per year unless the Chief approves additional applications. In addition, the act prohibits surface operations or disturbances to the surface of the land from occurring on a tract pooled by an order are prohibited without the written consent of or a written agreement with the surface rights owner of the tract that approves the operations or disturbances.⁵⁰

[d] Nonparticipating Owners

If an owner of a tract pooled by a mandatory pooling order does not elect to participate in the risk and cost of the drilling and operation of a well, the owner must be designated as a nonparticipating owner in the drilling and operation of the well on a limited or carried basis and is subject to terms and conditions determined by the Chief to be just and reasonable. Additionally, if an owner is designated as a nonparticipating owner, the owner is not liable for actions or conditions associated with the drilling or operation of the well. If the applicant bears the costs of drilling, equipping, and operating a well for the benefit of a nonparticipating owner, as provided for in the pooling order, then the applicant is entitled to the share of production from the drilling unit accruing to the interest of that nonparticipating owner. However, the share of production from the drilling unit does not include the nonparticipating owner's proportionate share of the royalty interest until there has been received the share of costs charged to that nonparticipating owner plus such additional percentage of the share of costs as the Chief determines. The total amount receivable cannot exceed 200% of the share of costs charged to that nonparticipating owner. In addition, the act states that after receipt of that share of costs by such an applicant, a nonparticipating owner must receive a proportionate share of the working interest in the well and a proportionate share of the royalty interest, if any.⁵¹

[e] Minimum Acreage Requirements

The Chief, with the approval of the Technical Advisory Council on Oil and Gas created under R.C. 1509, must adopt rules relative to minimum acreage requirements for drilling units and minimum distances from which a new well may be drilled or an existing well deepened, plugged back, or reopened to a source of supply different from the existing pool from boundaries of tracts, drilling units, and other wells for the purpose of conserving oil and gas reserves. Under the minimum acreage rules, drilling units must be compact and composed of contiguous land.⁵²

[9] Restrictions Governing Surface Location of a Well, a Tank Battery, and Other Surface Facilities

R.C. 1509 imposes various location restrictions on wells, tank batteries and other surface facilities associated with oil and gas production operations in Ohio, including, but not limited to, the following:

- the minimum distance between a well and an occupied dwelling in an urbanized area;
- the minimum distance between a well and the property line of land that is not located within a drilling unit in an urbanized area when using directional drilling;
- the minimum distance between a well and an occupied dwelling in an unurbanized area on land that is part of a drilling unit established pursuant to a mandatory pooling order;
- the minimum distance between a well and the property line of land in an urbanized area that is part of a drilling unit that is established pursuant to a mandatory pooling order;
- the minimum distance between a tank battery and an occupied dwelling in an urbanized area on land that is part of a drilling unit established pursuant to a mandatory pooling order;
- the minimum distance of a well from any other well; and
- the minimum distance between a well or tank battery and a railroad or public road.⁵³

[10] Application for a Permit to Drill a Well

[a] Contents

An application is required for a permit to drill a new well, drill an existing well deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a different source of supply to be filed with the Chief. Plug back of a well to a different source of supply includes associated production facilities.⁵⁴ A permit application to drill a new well within an urbanized area, must contain a sworn statement that the applicant has provided notice by regular mail to the owner of each parcel of real property that is located within 500 feet of the surface location of the well and to the executive authority of the municipal corporation or the board of township trustees of the township, as applicable, in which the well is to be located. The notice must contain a statement that informs an owner of real property who is required to receive the notice that within five days of receipt of the notice, the owner must provide notice to each residence in an occupied

dwelling that is located on the owner's parcel of real property (see "Notice of the Filing of a Permit Application to Residents in Occupied Dwellings," § 18.03[12] *below*).⁵⁵ An applicant must identify owners of parcels of real property using the tax records of the municipal corporation or county where the parcel is located.⁵⁶

[b] Time Period for Issuance of a Permit

Under R.C. 1509, the Chief shall not issue a permit for at least 10 days after the permit application filing date unless, upon a reasonable cause shown, the Chief waives that period or a request for expedited review is filed. However, the Chief shall issue a permit within 21 days of the filing of the application unless the Chief denies the application by order. There are different time constraints for wells within an urbanized area. If the well will be or is within an urbanized area, the Chief cannot issue a permit for at least 18 days after the permit application filing date unless the Chief waives that period for reasonable cause or the grants a request for expedited review, at the Chief's discretion. However, the Chief must issue a permit for a well or proposed well within an urbanized area within 30 days of the filing of the application unless the Chief denies the application by order.⁵⁷

[c] Fees

R.C. 1509 requires each application for a permit to be accompanied by a nonrefundable fee as follows:

- (1) \$500 for a permit to conduct activities in a township with a population of fewer than 10,000;
- (2) \$750 for a permit to conduct activities in a township with a population of 10,000 or more, but fewer than 15,000;
- (3) \$1,000 for a permit to conduct activities in a township with a population of 15,000 or more or in a municipal corporation regardless of population; and
- (4) an additional \$5,000 fee if the application is for a permit that requires mandatory pooling (see § 18.03[8] *above*).⁵⁸

[d] Site Review; Fencing, Screening, and Landscaping

Before issuing a permit to drill a proposed well that will be located within an urbanized area, the Division of Oil and Gas Resources Management must conduct a site review to identify and evaluate any site specific terms and conditions that may be attached to a permit. At the site review, a representative of the Division must consider fencing, screening, and landscaping requirements, if any, for similar structures in the community in which the well is proposed to be located. The terms and conditions that are attached to the permit must include the establishment of fencing, screening, and landscaping requirements for the surface facilities of the proposed well, including a tank battery of the well.⁵⁹

[e] Subjects for Terms and Conditions of a Permit

R.C. 1509 requires the Chief to adopt rules according to Ohio's Administrative Procedures Act for the administration, implementation, and enforcement of R.C. 1509.⁶⁰ The rules must include an identification of the subjects that the Chief must address when attaching terms and conditions to a permit with respect to a well and production facilities of a well that are located within an urbanized area. The subjects to be addressed include: (1) safety concerning the drilling or operation of a well; (2) protection of the public and private water supplies; (3) fencing and screening of surface facilities of a well; (4) containment and disposal of drilling and production wastes; (5) construction of access roads for purposes of the drilling and operation of a well; and (6) noise mitigation for purposes of the drilling and operation of a well excluding safety and maintenance operations.⁶¹

[f] Term of a Permit to Drill

A permit issued under R.C. 1509 for a well that is or is to be located in an urbanized area is valid for 12 months; all other permits are valid for 24 months.⁶²

[11] Public Meeting by a Political Subdivision Concerning a Proposed Lease Agreement

Under its legislative authority, a political subdivision must conduct a public meeting concerning a proposed lease agreement for the development of oil and gas resources on land that is located in an urbanized area and that is owned by the political subdivision before entering into the lease agreement.

The public meeting must be conducted in a public venue in the municipal corporation or township in which the proposed well is to be located. The public meeting must not occur at the same meeting at which the legislative authority of the political subdivision votes to enter into a proposed lease, if applicable.⁶³

The legislative authority of the political subdivision must send notice not later than 10 days before the date of the public meeting to the owner of each parcel of real property that is located within 500 feet of the surface location of the property that is the subject of the proposed lease agreement.⁶⁴ The legislative authority must provide the notice in accordance with requirements established by the legislative authority governing public meetings that are held by the legislative authority.⁶⁵ The notice must contain a statement that the legislative authority of the political subdivision is considering entering into an oil or gas lease agreement. Also, the notice must provide: (1) the location, date, and time of the public meeting and (2) a statement that informs the owner of affected real property that, within five days of receipt of the notice, the owner is required to provide notice to each residence in an occupied dwelling that is located on the owner's parcel of real property.⁶⁶

[12] Notice of the Filing of a Permit Application to Residents in Occupied Dwellings

The owner of a parcel of real property who receives a notice about the filing of a permit application to drill a new well within an urbanized area must provide to each residence in an occupied dwelling that is located on the owner's parcel of real property, if any, a copy of that notice within five days of receipt of the notice.⁶⁷

[13] Surety Bond

Before the Director issues a permit to drill a well or before operating or producing from a well, an owner of any well must execute and file with the Division a surety bond that is conditioned on compliance with restoration requirements, plugging requirements, permit requirements for plugging and abandoning a well, and all rules and orders of the Chief relating to those requirements in an amount set by rule of the Chief.⁶⁸ Ohio law prohibits an owner, operator, producer, or other person from operating a well or producing from a well at any time if the owner, operator, producer, or other

person has not executed and filed the surety bond or other acceptable form of required financial security.

Instead of a surety bond, the Chief may accept proof of financial responsibility consisting of a sworn financial statement showing a net financial worth within this state equal to twice the amount of the bond for which it substitutes and, as may be required by the Chief, a list of producing properties of the owner within this state or other evidence showing ability and intent to comply with the law and rules concerning restoration and plugging. The owner of an exempt Mississippian well is not required to file scheduled updates of the financial documents unless requested by the Chief. The owner of a nonexempt Mississippian well must file updates of the financial documents in accordance with a schedule established by rule of the Chief. ⁶⁹

[14] New Surety Bond in Event of Forfeiture of Surety Bond

R.C. 1509.07 provides that when the Chief finds that an owner has failed to comply with restoration requirements, plugging requirements, or certain permit provisions, or rules and orders relating to them, the Chief must make a finding of that fact and declare any surety bond filed to ensure compliance with those requirements, provisions, and rules forfeited in the amount set by rule of the Chief. An owner's failure to comply with a final nonappealable order issued by or compliance agreement entered into with the Chief is an additional ground for surety bond forfeiture. In addition, the act authorizes the Chief to require an owner, operator, producer, or other person who forfeited a surety bond to post a new surety bond in the amount of \$15,000 for a single well, \$30,000 for two wells, or \$50,000 for three or more wells.

In lieu of total forfeiture, the surety, at its option, may cause the well to be properly plugged and abandoned and the area properly restored or pay to the Treasurer of State the cost of plugging and abandonment.⁷⁰

[15] Liability Insurance

R.C. 1509 requires an owner of any well, except an exempt Mississippian well or an exempt domestic well, to obtain liability insurance coverage from a company authorized to do business in Ohio in an amount of not less than \$1 million bodily injury coverage and property damage coverage to pay

damages for injury to persons or damage to property caused by the drilling, operation, or plugging of all the owner's wells in this state. If any well is located within an urbanized area, the owner must obtain liability insurance coverage in an amount of not less than \$3 million for bodily injury coverage and property damage coverage to pay damages for injury to persons or damage to property caused by the drilling, operation, or plugging of all of the owner's wells in this state. The owner is required to maintain the coverage until all the owner's wells are plugged and abandoned or are transferred to an owner who has obtained the required insurance and who is not under a notice of material and substantial violation or under a suspension order. R.C. 1509 prohibits an owner, operator, producer, or other person from operating a well or producing from a well at any time if the owner, operator, producer, or other person has not obtained the required insurance coverage.⁷¹

[16] Notification Prior to Commencement of Drilling, Reopening, Converting, Well Stimulation, or Plug Back Operations

A permittee or a permittee's authorized representative to notify an inspector from the Division of Oil and Gas Resources Management at least 24 hours, or within another time period agreed to by the Chief's authorized representative, before it begins drilling, reopening, converting, well stimulation, or plug back operations.⁷²

[17] Fluid Drilling in Onondaga Limestone in Urbanized Areas

A person who is issued a permit under R.C. 1509 to drill a new well or drill an existing well deeper in an urbanized area shall establish fluid drilling conditions before penetrating the Onondaga limestone and continue to use fluid drilling until total depth of the well is achieved unless the Chief authorizes such drilling without using fluid.⁷³

[18] Well Construction Requirements

[a] Standards for Constructing a Well

R.C. 1509 requires a well to be constructed in a manner that is approved by the Chief as specified in the permit, using materials that comply with industry standards for the type and depth of the well and the anticipated fluid pressures that are associated with the well. In addition, a well must be

constructed using sufficient steel or conductor casing in a manner that supports unconsolidated sediments, that protects and isolates all underground sources of drinking water as defined by the Federal Safe Drinking Water Act, and that provides a base for a blowout preventer or other well control equipment that is necessary to control formation pressures and fluids during the drilling of the well and other operations to complete the well. An oil and gas reservoir must be isolated during well stimulation and during the productive life of the well using steel production casing with sufficient cement. In addition, sour gas zones and gas bearing zones that have sufficient pressure and volume to over pressurize the surface production casing annulus resulting in annular overpressurization must be isolated using approved cementing, casing, and well construction practices. However, isolating an oil and gas reservoir cannot exclude open hole completion. A well cannot be perforated for purposes of well stimulation in any zone that is located around casing that protects underground sources of drinking water without written authorization from the Chief as provided under the provisions discussed below. When the well penetrates the excavations of a mine, the casing must remain intact and be plugged and abandoned in accordance with the requirements of R.C. 1509.⁷⁴

[b] Rules

The Chief adopted rules according to the Administrative Procedures Act,⁷⁵ which are consistent with the standards for constructing a well, evaluating the quality of well construction materials⁷⁶ and completing remedial cementing. The rules consider local geology and various drilling conditions and require the use of reasonable methods that are based on sound engineering principles.⁷⁷

The rules are codified at [Ohio Administrative Code 1501:9-1-01](#); 1501:9-1-02; 1501:9-1-08; and 1501:9-12-01.

Generally, these rules govern the design and construction of all oil and gas wells (vertical and horizontal) in the State of Ohio.⁷⁸ In 2015, the Division enacted extensive rules governing the construction of horizontal well pads.⁷⁹ Some of the standards found in the rules are based on production standards adopted by professional organizations such as the American Petroleum Institute (e.g., 5CT specifications for Casing and Tubing, American Petroleum Institute, 9th Ed.).

For instance, the horizontal well site construction rules require that plans for a proposed horizontal well be developed, signed, and sealed by a professional engineer. In the permit application, the professional engineer should include detailed drawings, a sediment and erosion control plan, storm water pollution prevention plan, a dust control plan, and a geotechnical report.⁸⁰

Horizontal well pads are larger in size than traditional vertical well pads and often house multiple wells, allowing operators to access greater acreages of shale reserves with a smaller environment footprint. Likewise, abundant production quantities from horizontal wells create a need for large scale operations to occur on or near the well pad. Stable access roads, also addressed in the new rule, are necessary for transporting drilling materials, and in the event of an emergency, provide access for response vehicles, personnel and equipment.

[c] Cementing

An owner or an owner's authorized representative must notify an oil and gas inspector each time that the owner or the authorized representative notifies a person to perform the cementing of the conductor casing, the surface casing, or the production casing. Not later than 60 days after the completion of the cementing of the production casing, an owner must submit to the Chief a copy of the cement tickets for each cemented string of casing and a copy of all logs that were used to evaluate the quality of the cementing.⁸¹

[d] Exemption

The Chief must grant an exemption from the standards for constructing a well if the Chief determines that a cement bond log confirms zonal isolation and there is a minimum of 500 feet between the uppermost perforation of the casing and the lowest depth of an underground source of drinking water.⁸²

[19] Statement of Production

R.C. 1509 requires the owner of any well, except a horizontal well, that is producing or capable of producing oil or gas to file with the Chief of the Division of Oil and Gas Resources Management, on or before March 31, a

statement of production of oil, gas, and brine for the last preceding calendar year. An owner that has more than 100 wells in Ohio must submit the statement electronically in a format approved by the Chief.⁸³

Owners of horizontal wells must file a statement of production of oil, gas, and brine on the 45th day following the close of each calendar quarter. Owners of more than 100 horizontal wells in Ohio shall submit electronically.

[20] Wireline Electric Logs and Well Completion Records

Any person drilling within the state, within 60 days after drilling to the proposed total depth or after determining a well is a dry or lost hole, must file with the Division of Oil and Gas Resources Management all wireline electric logs and an accurate well completion record on an approved form that describes:

- (1) The purpose for which the well was drilled;
- (2) The character, depth, and thickness of geological units encountered, including coal seams, mineral beds, associated fluids such as fresh water, brine, and crude oil, natural gas, and sour gas if such seams, beds, fluids, or gases are known;
- (3) The dates when drilling began and ended;
- (4) The types of drilling tools used and the name of the person that drilled the well;
- (5) The length in feet of the various sizes of casing and tubing used in drilling the well, the amount removed after completion, the type and setting depth of each packer, and other data relating to cementing in the annular space behind such casing or tubing, and data indicating completion as a dry, gas, oil, combination oil and gas, brine injection, or artificial brine well or a stratigraphic test;
- (6) The number of perforations in the casing and the intervals of the perforations;
- (7) The elevation above mean sea level of the point from which the depth measurements were made, stating also the height of the point above ground level at the well, the total depth of the well, and the deepest

geological unit that was penetrated in the drilling of the well;

- (8) If applicable, the type, volume, and concentration of acid, and the date on which acid was used in acidizing the well;
- (9) If applicable, the trade name and the total amount of all products, fluids, and substances, and the supplier of each product, fluid, or substance, not including cement and its constituents, intentionally added to facilitate the drilling. The owner shall identify each additive and include a list of chemicals, not including any information that is designated as trade secret.
- (10) If applicable, the type and volume of fluid used to stimulate the reservoir of the well, the reservoir breakdown pressure, the method used for the containment of fluids recovered from the fracturing of the well, the methods used for the containment of fluids when pulled from the wellbore from swabbing the well, the average pumping rate of the well, and the name of the person that performed the well stimulation. In addition, the owner must include a copy of the log from the stimulation of the well, a copy of the invoice for each procedure and method that was used on the well, and a copy of the pumping pressure and rate graphs. However, the owner may redact from the copy of each invoice the costs of and charges for the procedures and methods that were used on the well.
- (11) The name of the company that performed the logging of the well and the types of wireline electric logs performed on the well.⁸⁴

The well completion record must be submitted in duplicate with one copy retained by the Chief as a permanent record and the second copy to the Division of Geological Survey. Not later than 60 days after the completion of drilling operations to the proposed total depth, the owner must file all wireline electric logs with the Division of Oil and Gas Resources Management, and the Chief must transmit such logs electronically, if available, to ODNR's Division of Geological Survey. If a well is not completed within 60 days after the completion of drilling operations, the owner must file with the Division of Oil and Gas Resources Management a supplemental well completion record that includes all of the required information within 60 days after the completion of the well.⁸⁵

Finally, if there is a material listed on the invoice that is required in item (9), above, for which the Division of Oil and Gas Resources Management does not have a Material Safety Data Sheet (MSDS), the well owner shall provide a copy of the MSDS to the Chief and the Chief must post a copy of it on the Division's web site.⁸⁶

[21] Well Stimulation

An owner who elects to stimulate a well must stimulate the well in a manner that will not endanger underground drinking water sources. Not later than 24 hours before stimulating a well, the owner or the owner's authorized representative must notify a mineral resources inspector. If during the stimulation of a well damage to the production casing or cement occurs and results in the circulation of fluids from the annulus of the surface production casing, the owner must immediately notify the Chief. If the Chief determines that the casing and the cement may be remediated in a manner that isolates the oil and gas bearing zones of the well, the Chief may authorize the completion of the stimulation of the well. If the Chief determines that the stimulation of a well resulted in irreparable damage to the well, the Chief must order that the well be plugged and abandoned within 30 days of issuing the order. For purposes of determining the integrity of the remediation of the casing or cement of a well that was damaged, the Chief may require the owner of the well to submit cement evaluation logs, temperature surveys, pressure tests, or a combination of those logs, surveys, and tests.⁸⁷

Protecting trade secrets surrounding the contents of fracking fluid is important to many companies, so protections have been incorporated in R.C. 1509. For instance, the owner of a well or a person that provides chemical information to the owner for purposes of the well completion record regarding well drilling or stimulation may designate, on a form prescribed by the Chief, a product, fluid, or substance or a chemical component in a product, fluid, or substance as a trade secret. Such an owner or person may pursue enforcement of any rights or remedies established under the Uniform Trade Secrets Act for misappropriation with respect to a product, fluid, or substance or a chemical component in a product, fluid, or substance that is so designated as a trade secret.⁸⁸ Furthermore, the rule prohibits the Division from disclosing any product, fluid, or substance or chemical component in a product, fluid, or substance that is so designated as a trade secret. A well

owner must maintain records of all chemicals placed in a well for a period of not less than two years after the date such chemicals were placed and the Chief may inspect such records, including records concerning any chemical designated as a trade secret, at any time. However, the Chief cannot disclose the identity of any chemical that is designated as a trade secret.⁸⁹

A person claiming trade secret protection for a product, fluid, or substance used in well operations, upon request of a medical professional, must provide the exact chemical composition of each product, fluid, or substance and of each chemical component in a product, fluid, or substance that is designated a trade secret to assist in the diagnosis or treatment of an individual who was affected by an incident associated with the production operations of the well. But a medical professional who receives trade secret information must keep the information confidential and not disclose the information for any purpose not related to diagnosis or treatment of an individual affected by an incident associated with the production operations of a well.⁹⁰

[22] Gas Flaring

R.C. 1509 authorizes the owner of any well producing both oil and gas to burn such gas in flares when the gas is lawfully produced and there is no economic market at the well for the escaping gas. An owner also may burn gas when it is necessary to protect the health and safety of the public.⁹¹

[23] Defective Wells or Casing

No owner of any well shall construct a well, or allow defective casing in a well to leak fluids or gases, that causes damage to other permeable strata, underground sources of drinking water, or the surface of the land or that threatens the public health and safety or the environment. Upon discovering that the casing in a well is defective or that a well was not adequately constructed, the owner of the well must notify the Chief within 24 hours of the discovery, and the owner must immediately repair the casing, correct the construction inadequacies, or plug and abandon the well.⁹²

Where the plugging method prescribed by rules adopted under R.C. 1509 cannot be applied or if applied would be ineffective in carrying out the protection that that Chapter is meant to give, the Chief may designate a

different method of plugging.⁹³

[24] Wells Not Completed or Not Producing

R.C. 1509 requires the owner of a: (1) well that has not been completed, (2) well that has not produced within one year after completion, (3) an existing well that is not a horizontal well and that has no reported production for two consecutive reporting periods, or (4) an existing horizontal well that has no reported production for eight consecutive reporting periods to plug the well in accordance with R.C. 1509, obtain a temporary inactive well status for the well (see “Temporary Inactive Well Status,” § 18.03[25] *below*), or perform another activity regarding the well that is approved by the Chief. If a well has a reported annual production that is less than 1,000 cubic feet of natural gas or 15 barrels of crude oil, or a combination of natural gas or crude oil, the Chief may require the owner of the well to submit an application for a temporary inactive well status for the well.⁹⁴

[25] Temporary Inactive Well Status

For the owner of a well to submit an application for temporary inactive well status, the owner and the well must be in compliance with R.C. 1509 and rules adopted under it, any terms and conditions of the permit for the well, and applicable orders issued by the Chief.⁹⁵

[26] Permit to Plug and Abandon a Well

R.C. 1509 prohibits a person from plugging and abandoning a well without having a permit by the Chief. A permit to plug is valid for 24 months from the date of issue.⁹⁶

R.C. 1509 requires an application for a permit to plug and abandon a well to be filed with the Chief and establishes application requirements. If oil or gas has been produced from the well, the application fee is \$250.⁹⁷

R.C. 1509 states that if a well has been drilled in accordance with law and the permit is still valid, the permit holder may receive approval to plug the well from an Oil and Gas resources inspector so that the well can be plugged and abandoned without undue delay. Unless waived by an inspector, the owner of a well or the owner’s authorized representative must notify an Oil and Gas resources inspector at least 24 hours before it starts to plug a well.⁹⁸

No well shall be plugged and abandoned without a mineral resources inspector present unless permission has been granted by the Chief. The owner of the well must give written notice at the same time to the owner of the land on which the well is located and to all lessors that receive gas from the well under a lease agreement. If the well penetrates or passes within 100 feet of the excavations and workings of a mine, the owner of the well shall give written notice to the owner or lessee of that mine, of the well owner's intention to abandon the well and of the time when the well owner will be prepared to commence plugging it.⁹⁹

A permit applicant may file a request for an expedited review of a permit application to plug and abandon a well. A nonrefundable filing fee of \$ \$500 must accompany the request unless the Chief has ordered the applicant to plug and abandon the well.¹⁰⁰

Regarding the nonrefundable fees that govern permits to plug back an existing oil or gas well, a permit applicant must submit:

- (1) \$500 for a permit to conduct activities in a township with a population of fewer than 10,000;
- (2) \$750 for a permit to conduct activities in a township with a population of 10,000 to 14,999; or
- (3) \$1,000 for a permit to conduct activities in either a township with a population of 15,000 or more or a municipal corporation regardless of population.

If the application is for a permit that requires mandatory pooling, the owner must submit an additional \$5,000.¹⁰¹

[27] Written Report of Abandonment and Plugging Without Inspector Present

Any person who abandons a well, when written permission has been granted by the Chief to abandon and plug the well without a present inspector to supervise the plugging, shall make a written report of the abandonment to the Chief. The report must include: (1) the date of abandonment; (2) name of the owner/operator of the well at the time of abandonment and post-office address of owner/operator; (3) location of the well as to township and county and the name and address of the owner of the surface upon which the well is

drilled; (4) date of the permit to drill; (5) date when drilled; (6) dept of the well; (7) depth of the top of the formation to which the well was drilled; (8) depth of each seam of coal drilled through, if known; and (9) a detailed report as to how the well was plugged.¹⁰²

[28] Payment for Plugging of Abandoned Wells

For oil or gas wells abandoned before September 1, 1978, the board of county commissioners of the county in which the wells are located may submit to the electors of the county the question of establishing a special fund, by special levy, by bond issue, or out of current funds, which must be approved by a majority of the electors voting on that question for the purpose of plugging the wells. The fund shall be administered by the board, and the plugging of oil and gas wells shall be under the supervision of the Chief. The board shall allow contracts for that purpose, provided that the fund shall not be used for the purpose of plugging oil and gas wells that were abandoned after September 1, 1978.¹⁰³

[29] Emergency Planning Reporting

A person regulated under R.C. 1509 and that is required to submit information under the federal Emergency Planning and Community Right-to-Know Act (EPCRA) must submit specified information regarding hazardous materials to the Chief on or before March 1 of each calendar year. The Chief of the Division, in consultation with the Emergency Response Commission, must adopt rules that specify the information that must be included in an electronic database that the Chief creates and hosts. The information must be information that the Chief considers to be appropriate for the purpose of responding to emergency situations that pose a threat to public health or safety or to the environment.

The Chief's rules shall do all of the following:

- (1) Specify whether and to what extent the database and the information that it contains will be made accessible to the public;
- (2) Ensure that the information submitted for the database will be made immediately available to the Emergency Response Commission, the local emergency planning committee of the emergency planning district in which a facility is located, and the fire department having

jurisdiction over a facility;

- (3) Ensure that the information submitted for the database be made immediately available, rather than available via the Internet or a system of computer disks as in current law, to the above entities; and
- (4) Ensure that the information includes the information required to be reported under EPCRA and rules adopted under it, including [R.C. §§ 3750.08, 3750.02](#), governing the submission of an emergency and hazardous chemical inventory form.¹⁰⁴

For purposes of the above provisions, the definition of “emergency planning district,” “facility,” and “fire department” have the same meaning as Ohio’s version of EPCRA. Under that statute, an emergency planning district is an emergency planning district or joint emergency planning district designated under [R.C. 3750.03](#). A facility is all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with that person. Finally, a fire department is a fire department of a municipal corporation or township, township fire district, joint township fire district, private fire company, or volunteer fire company that has entered into an agreement for the use and operation of fire-fighting equipment.¹⁰⁵

[30] Rules for Drilling and Treatment of Wells, Production of Oil and Gas, and Plugging

R.C. 1509 authorizes the adoption of rules by the Chief of the Division of Oil and Gas Resources Management, in accordance with Ohio’s Administrative Procedures Act,¹⁰⁶ specifying practices to be followed in the drilling of wells and in the production of oil and gas for protection of public health or safety, to prevent damage to natural resources, and to specify practices to be followed in the treatment of wells and plugging of wells.

The rules may specify all of the following:

- (1) Appropriate devices;
- (2) Minimum distances that wells and other excavations, structures, and equipment must be located from water wells and bodies of water, streets, roads, railroad tracks, and other similar structures, public or

private recreational areas, zoning districts, and buildings or other structures. The act prohibits the rules concerning minimum distances from conflicting with the act's setback provisions.

- (3) Other methods of operation;
- (4) Procedures, methods, and equipment and other requirements for equipment to prevent and contain discharges of oil from oil production facilities and oil drilling and workover facilities consistent with and equivalent in scope, content, and coverage to specified provisions of the Federal Water Pollution Control Act Amendments of 1972. The act adds that the procedures, methods, and equipment are to prevent and contain discharges of brine, in addition to oil as in continuing law, from the facilities. It also adds that the rules may specify procedures, methods, and equipment and other requirements for equipment to prevent and contain surface and subsurface discharges of fluids, condensates, and gases.
- (5) Notifications required by law.¹⁰⁷

[31] Restoration Requirements

[a] Duty to Restore Land Surface

R.C. 1509 prohibits an oil or gas well owner or agent of an oil or gas well owner from failing to restore the land surface within the area disturbed in siting, drilling, completing, and producing the well.¹⁰⁸

[b] Filling of Pits and Grading

R.C. 1509 requires within 14 days after the date on which the drilling of a well is completed to total depth in an urbanized area and within two months after the date on which the drilling of a well is completed in all other areas, the owner or the owner's agent, in accordance with the restoration plan that is filed with the Division of Oil and Gas Resources Management, must fill all pits for containing brine and other waste substances resulting, obtained, or produced in connection with exploration or drilling for oil or gas that are not required by other state or federal laws or regulations and remove all drilling supplies and drilling equipment. Unless the Chief approves a longer time period, within three months after the date on which the surface drilling of a

well is commenced in an urbanized area and within six months after the date on which the surface drilling of a well is commenced in all other areas, the owner or the owner's agent must grade or terrace and plant, seed, or sod the area disturbed that is not required in production of the well where necessary to bind the soil and prevent substantial erosion and sedimentation. If the Chief finds that a pit used for containing brine, other waste substances, or oil is in violation of specified provisions of R.C. 1509 and rules adopted or orders issued under it, the Chief may require the pit to be emptied and closed before expiration of the 14 day or three month restoration period.¹⁰⁹

[c] Removal of All Production and Storage Equipment

R.C. 1509 provides that within three months after a well that has produced oil or gas is plugged in an urbanized area and within six months after a well that has produced oil or gas is plugged in all other areas or after the plugging of a dry hole, unless the Chief approves a longer time period, the owner or the owner's agent must remove all production and storage structures, supplies, and equipment, and any oil, salt water, and debris, and fill any remaining excavations.¹¹⁰

[32] Secondary or Additional Recovery Operations

R.C. 1509 prohibits a person, without first having obtained a permit, from conducting secondary or additional recovery operations, including any underground injection of fluids for the secondary or tertiary recovery of oil or natural gas or for the storage of hydrocarbons that are liquid at standard temperature or pressure, unless a rule of the Chief expressly authorizes such operations without a permit. A permit also is required for the underground injection of carbon dioxide for the secondary or tertiary recovery of oil or natural gas.

R.C. 1509 also provides that secondary or additional recovery operations must be conducted in accordance with rules and orders of the Chief and any terms or conditions of the permit authorizing those operations, and that the Chief may authorize tests to evaluate whether fluids or carbon dioxide may be injected in a reservoir and to determine the maximum allowable injection pressure. The tests must be conducted in accordance with methods prescribed in rules of the Chief or conditions of the permit.¹¹¹

[33] Fluids Associated With Oil and Gas Development

R.C. 1509 prohibits a person, except when applying brine to roads according to R.C. 1509.226, from placing or causing to be placed in ground water, on land, or in surface water brine, crude oil, natural gas, or other fluids associated with exploration, development, well stimulation or causing brine to be placed in surface or ground water or in or on the land in such quantities or in such manner as actually causes or could reasonably be anticipated to cause water that is used for consumption by humans or domestic animals to exceed the standards of the Federal Safe Drinking Water Act or damage or injury to public health or safety or the environment. ¹¹²

O.R.C. Chapter 1509 prohibits the storage, recycling, treatment, processing, or disposal of brine or other oil field wastes without a permit issued by the Chief of the Division of Oil and Gas Resources Management. The Chief shall adopt rules governing the permitting of storage, recycling, treatment, processing, and disposal of brine and other waste substances. *Id.*¹¹³

The storage and disposal of brine and other waste substances and the Chief's rules relating to storage and disposal are subject to all of the following standards:

- (1) Brine from any well except an exempt Mississippian well must be disposed of only by methods or procedures authorized by R.C. 1509.¹¹⁴
- (2) Brine from exempt Mississippian wells shall not be discharged directly into the waters of the state.
- (3) Muds, cuttings, and other waste substances cannot be disposed of in violation of any rule.
- (4) Pits, or steel tanks as authorized by the act, must be used as authorized by the Chief for containing brine and other waste substances resulting from, obtained from, or produced in connection with drilling, well stimulation rather than fracturing, reworking, reconditioning, plugging back, or plugging operations. The pits and steel tanks must be constructed and maintained to prevent the escape of brine and other waste substances.
- (5) A dike or pit may be used for spill prevention and control. A dike or pit so used must be constructed and maintained to prevent the escape

of brine and crude oil, and the reservoir within such a dike or pit must be kept reasonably free of brine, crude oil, and other waste substances.

- (6) Impoundments constructed utilizing a synthetic liner under the Division's specifications may be used for the temporary storage of waste substances used in the construction, stimulation, or plugging of a well.
- (7) No pit or dike can be used for the temporary storage of brine or other waste substances except in accordance with items (4) to (5) above.
- (8) No pit or dike can be used for the ultimate disposal of brine or other liquid waste substances.¹¹⁵

When analyzing material that results from constructing, operating or plugging a horizontal well, the owner shall determine the concentration of radium-226 and of radium-228 in representative samples of the material if it is Technologically Enhanced Naturally Occurring Radioactive Material (TENORM). The owner shall collect and analyze the representative samples according to the requirements approved by the Chief and shall not remove the material from the location associated with the production operation of the horizontal well until the analysis is complete. However, the owner may: (1) temporarily store the material in an area adjacent to the location associated with the production operation while the results from the analysis are pending; or (2) before collecting samples, transport the material to a location for which a permit or order has been issued. The owner is not required to determine the concentration of radium-226 and radium-228 if:

- (1) the material is reused in the horizontal well from where it originated or is transferred to another site for reuse in a horizontal well
- (2) the owner disposes of the material at an injection well where a permit has been issued
- (3) the owner uses the material in association with a method of enhanced recovery for which a permit has been issued
- (4) the material is transported out of the state for lawful disposal.¹¹⁶

[34] Permit to Inject Brine or Other Waste Substances

R.C. 1509 prohibits a person, without first having obtained a permit from the Chief, from injecting brine or other waste substances resulting from, obtained from, or produced in connection with oil or gas drilling, exploration, or production into an underground formation unless a rule of the Chief expressly authorizes the injection without a permit. An application for such a permit must be accompanied by a fee of \$1,000.¹¹⁷

Under R.C. 1509's authority,¹¹⁸ the Chief issued final rules updating, permitting, and operating requirements for Class II underground injection wells. These rules authorized tests to evaluate whether fluids or carbon dioxide may be injected in a reservoir and determined the maximum allowable injection pressure and methods of injection allowed.¹¹⁹ Under R.C. 1509, an owner of an injection well must quarterly and electronically submit to the Chief information concerning each shipment of brine and other waste substances received.¹²⁰

R.C. 1509 establishes a two-tier injection well disposal fee, depending on where the brine was generated as follows: (a) 5 cents per barrel of each substance that is delivered to a well to be injected when the substance is produced in the division of oil and gas resources management regulatory district or in an adjoining oil and gas resources management regulatory district; or (b) 20 cents per barrel of each substance that is delivered to a well to be injected when the substance is not produced in the division of oil and gas resources management regulatory district or in an adjoining oil and gas resources management regulatory district. The maximum number of barrels of substance per injection well in a calendar year on which a fee may be levied is 500,000. If in a calendar year the owner of an injection well receives more than five hundred thousand barrels of substance to be injected in the owner's well and if the owner receives at least one substance that is produced within the division's regulatory district in which the well is located or within an adjoining regulatory district and at least one substance that is not produced within the division's regulatory district in which the well is located or within an adjoining regulatory district, the fee shall be calculated first on all of the barrels of substance that are not produced within the division's regulatory district in which the well is located or within an adjoining district at the rate established in division (H)(2) of this section. The fee then shall be calculated on the barrels of substance that are produced within the division's regulatory district in which the well is located or within an adjoining district at the rate

established in division (H)(1) of this section until the maximum number of barrels established in division (H)(2) of this section has been attained.¹²¹

Practice Note: Article I, Section 8, clause 3 of the United States Constitution grants Congress the exclusive power to “... regulate Commerce ... among the several States” The United States Supreme Court has held that the Commerce Clause has a “negative” or “dormant” aspect that limits the scope of state regulation of commerce, which denies the states the power to unjustifiably discriminate against or burden interstate flow of articles of commerce (*Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 98 (1994)). In *Oregon Waste Sys. v. Department of Env'tl. Quality*, the United States Supreme Court stated that the first step in analyzing a state law under the Dormant Commerce Clause is to determine whether the law regulates commerce evenhandedly with only incidental effects on interstate commerce or whether it discriminates against interstate commerce.¹²² As used by the Court, “discrimination” means differential treatment of in-state and out of state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid.¹²³ However, if a state law is nondiscriminatory and has only incidental effects on interstate commerce, the courts will uphold the law unless “the burden imposed on such commerce is clearly excessive in relation to the ... [reputed] local benefits.” (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).)

Because Ohio levied a lower fee on each barrel of substance that is produced within the Division of Oil and Gas Resources Management regulatory district and a higher fee on each barrel of substance produced outside of a district, a constitutional issue may be raised regarding the two-tier injection well disposal fee provision. If a court determines that the higher fee, which would be levied on waste generated out of state that is disposed of in this state, results in a differential treatment of in state and out of state economic interests, it is conceivable that the court would hold that the higher fee violates the Commerce Clause of the United States Constitution. Although less clear, there may also be a Commerce Clause challenge to the imposition of different fees on the intrastate disposal of oil and gas

wastes if a higher fee is imposed on the disposal of such wastes from a different district in Ohio.

[35] Brine Transporters

[a] Registration Certificate, Identification Number, and Surety Bond Requirements

A person is prohibited from transporting brine by vehicle in Ohio unless the entity that employs the person registers with and obtains a registration certificate and identification number from the Chief.¹²⁴ Before being issued a registration certificate, the applicant must execute and file with the Division a \$15,000 surety bond, cash, or negotiable certificates of deposit.¹²⁵ Additionally, the applicant must submit a certificate from an insurance company authorized to do business in Ohio certifying that the applicant has in force a liability insurance policy in an amount not less than \$300,000 bodily injury coverage and \$300,000 property damage coverage.¹²⁶ Each application for a registration certificate must include a nonrefundable fee of \$500.¹²⁷ If a business entity has been issued a registration certificate and the name changes because of a business reorganization or merger, the business entity must revise the bond or certificates of deposit and obtain a new certificate from an insurance company to reflect the new name.¹²⁸

[b] Release of Surety Bond

R.C. 1509 prohibits the Chief from releasing the surety bond or other securities discussed above except by court order or the registration is terminated.¹²⁹

[36] Local Governments Application of Brine to Roads

R.C. 1509 establishes requirements in accordance with which a board of county commissioners or township trustees or the legislative authority of a municipal corporation may adopt a resolution permitting the application of brine to roads and other similar land surfaces. In addition, R.C. 1509 establishes standards for the application of brine to roads. Only brine produced from a well that is not a horizontal well can be spread on a road; fluids from the drilling of a well, flowback from the stimulation of a well, and other fluids used to treat a well are prohibited cannot be spread on a

road.¹³⁰

[37] Priority Lien

When an owner fails to pay the fees imposed under R.C. 1509, or if the Chief incurs costs to correct conditions associated with an owner's well that the Chief reasonably has determined are causing imminent health or safety risks, the Division of Oil and Gas Resources Management has a priority lien against that owner's interest in front of all other creditors for the amount of any such unpaid fees and costs. The Chief must file a statement in the office of the county recorder of the county in which the applicable well is located of the amount of the unpaid fees and costs. The statement constitutes a lien on the owner's interest in the well as of the date of the filing. The lien remains in force so long as any portion of the lien remains unpaid or until the Chief issues a certificate of release of the lien. If the Chief issues a certificate of release, the Chief must file it in the office of the applicable county recorder.¹³¹

A lien imposed as discussed above is in addition to any lien imposed by the Ohio Attorney General for failure to pay the oil and gas regulatory cost recovery assessment imposed by the act (*see* § 18.03[4] *above*) or the tax levied on the severance of oil or gas under continuing law.¹³² If the Attorney General cannot collect from a severer or an owner for an outstanding balance of amounts due from the oil and gas regulatory cost recovery assessment or of unpaid severance taxes on oil or gas, as applicable, the Tax Commissioner may request the Chief to impose a priority lien against the owner's interest in the applicable well. Such a lien has priority over all other creditors.¹³³

The Chief must promptly issue a certificate of release of a lien:

- (1) Upon the repayment in full of the amount of unpaid fees imposed under R.C. 1509 or costs incurred by the Chief to correct conditions associated with the owner's well that the Chief reasonably has determined are causing imminent health or safety risks;¹³⁴ or
- (2) Any other circumstance that the Chief determines to be in the best interest of the state.¹³⁵

The Chief may modify the amount of a lien and must file a statement in the office of the county recorder of the applicable county of the new amount.¹³⁶ An owner with a lien cannot transfer a well, lease, or mineral rights

to another owner or person until the Chief issues a certificate of release for each lien against the owner's interest in the well.¹³⁷ All money from the collection of liens must be deposited in the state treasury to the credit of the Oil and Gas Well Fund.¹³⁸

[38] Enforcement Actions, Orders of the Chief, and Civil and Criminal Penalties

R.C. 1509 requires the Chief of the Division of Oil and Gas Resources Management, or the Chief's authorized representative, to enforce Ohio's Oil and Gas laws and the rules, the terms and conditions of permits and registration certificates, and orders adopted or issued under it. The enforcement authority of the Chief includes the authority to enter into compliance agreements.¹³⁹ R.C. 1509 also authorizes the Chief or the Chief's authorized representative to issue an administrative order to an owner for a violation of R.C. 1509 or rules adopted under it, the terms and conditions of a permit issued under it, a registration certificate that is required under that Law, or orders issued under it.¹⁴⁰ R.C. 1509 provides that the Chief may issue an order finding that an owner has committed a material and substantial violation.¹⁴¹

Under R.C. 1509, the Chief, by order, may immediately suspend drilling, operating, or plugging activities that are related to a material and substantial violation and suspend and revoke an unused permit after finding either of the following: (1) the owner has failed to comply with an order finding that the owner has committed a material and substantial violation and the order is final and nonappealable; or (2) an owner is causing, engaging in, or maintaining a condition or activity that the Chief determines presents an imminent danger to the health or safety of the public or that results in or is likely to result in immediate substantial damage to the natural resources of the state.¹⁴² The Chief may issue such an order without prior notification if reasonable attempts to notify the owner have failed or if the owner is currently in material breach of a prior order, but in that event notification must be given as soon thereafter as practical.¹⁴³

Not later than five days after the issuance of such an order, the Chief must provide the owner an opportunity to be heard and to present evidence that one of the following applies: (1) the condition or activity does not present an imminent danger to the public health or safety or is not likely to

result in immediate substantial damage to natural resources; or (2) required records, reports, or logs have been submitted. If the Chief, after considering such evidence presented by the owner, determines that the activities do not present such a threat or that the required records, reports, or logs have been submitted, the Chief must revoke the order. The owner may appeal an order to the court of common pleas of the county in which the activity that is the subject of the order is located.¹⁴⁴

R.C. 1509 also empowers the Chief to issue a bond forfeiture order for failure to comply with a final nonappealable order or a compliance agreement.¹⁴⁵ In addition, the Chief may notify drilling contractors, transporters, service companies, or other similar entities of the compliance status of an operator.¹⁴⁶

The Chief may issue a suspension order without prior notification if the owner fails to comply with a prior enforcement order, but in that event the Chief must give notice as soon thereafter as practical. Not later than five calendar days after the issuance of an order, the Chief must provide the owner an opportunity to be heard and to present evidence that required records, reports, or logs have been submitted. If the Chief, after considering the evidence presented by the owner, operator, producer, or other person, determines that the requirements have been satisfied, the Chief must revoke the suspension order. The owner may appeal a suspension order to the Court of Common Pleas of the county in which the activity that is the subject of the suspension order is located.¹⁴⁷

Civil sanctions available for violations of **R.C. Chapter 1509**, rules adopted thereunder, or orders of the Chief include:

Type of Violation	The Bill	Current Law
Violations of provisions of the Oil and Gas Law, including violations of any rules or orders and terms or conditions of a permit or registration certificate, for which no specific penalty is provided.	A civil penalty of not more than \$10,000 for each offense.	A civil penalty of not more than \$4,000 for each offense.
Violations of permitting requirements for the exploration for or extraction of minerals or energy other than oil	A civil penalty of not more than \$10,000 for each violation.	A civil penalty of not more than \$2,500 for each violation.

|or natural gas. |

Anyone who violates the general permit requirements of [R.C. Chapter 1509](#) or the provisions of that Chapter requiring a permit for additional and secondary recovery operations, or any term or condition of a permit or order issued by the Chief of the Division of Oil and Gas Resources Management or brine storage and brine transportation requirements, is liable for any damage or injury caused by the violation and for the actual cost of rectifying the violation and conditions caused by it.

A person may be subject to a civil penalty and a term of imprisonment for the same offense.

The available criminal sanctions are as follows:

(A) Whoever violates [sections 1509.01 to 1509.31 of the Revised Code](#) or any rules adopted or orders or terms or conditions of a permit issued pursuant to these sections for which no specific penalty is provided in this section shall be fined not less than one hundred nor more than one thousand dollars for a first offense; for each subsequent offense the person shall be fined not less than two hundred nor more than two thousand dollars.

(B) Whoever violates [section 1509.221 of the Revised Code](#) or any rules adopted or orders or terms or conditions of a permit issued thereunder shall be fined not more than five thousand dollars for each violation.

(C) Whoever knowingly violates section 1509.072, division (A), (B), or (D) of section 1509.22, division (A)(1) or (C) of section 1509.222, or division (A) or (D) of [section 1509.223 of the Revised Code](#) or any rules adopted or orders issued under division (C) of section 1509.22 or rules adopted or orders or terms or conditions of a registration certificate issued under division (E) of [section 1509.222 of the Revised Code](#) shall be fined ten thousand dollars or imprisoned for six months, or both for a first offense; for each subsequent offense the person shall be fined twenty thousand dollars or imprisoned for two years, or both. Whoever negligently violates those divisions, sections, rules, orders, or terms or conditions of a registration certificate shall be fined not more than five thousand dollars.

(D) Whoever violates division (C) of [section 1509.223 of the Revised Code](#) shall be fined not more than five hundred dollars for a first offense and not more than one thousand dollars for a subsequent offense.

(E) The prosecuting attorney of the county in which the offense was committed or the attorney general may prosecute an action under this section.

(F) For purposes of this section, each day of violation constitutes a separate offense.

[39] Database of Permittee Violations

R.C. 1509 requires the Chief to maintain a database on the Division of Oil and Gas Resources Management's web site that is accessible to the public. The database must list each final nonappealable order issued for a material and substantial violation under R.C. 1509. The list must identify the violator, the date on which the violation occurred, and the date on which the violation was corrected.¹⁴⁸

[40] Suspension Order Concerning a Well in a Coal Bearing Township

Under R.C. 1509, before issuing a suspension order, the Chief must notify the owner in any manner that the Chief determines would provide reasonable notification of the Chief's intent to issue such an order. However, the Chief may order the immediate suspension of the drilling or reopening of a well in a coal bearing township without prior notification if the Chief has made reasonable attempts to notify the owner and the attempts have failed. If the Chief orders the immediate suspension of such drilling or reopening, the Chief must provide the owner notice of the order as soon as practical.¹⁴⁹

Not later than five days after the issuance of an order to immediately suspend the drilling or reopening of a well in a coal bearing township, the Chief must provide the owner an opportunity to be heard and to present evidence that the drilling or reopening activities will not likely result in an imminent and substantial threat to public health or safety or to a miner's health or safety, as applicable. If the Chief, after considering all evidence presented by the owner, determines that the activities do not present such a threat, the Chief must revoke the suspension order.¹⁵⁰ Notwithstanding any other provision of R.C. 1509, an owner may appeal such a suspension order

to the Reclamation Commission in accordance with Ohio's Surface Mining Law, [R.C. Chapter 1513](#).¹⁵¹

[41] Appeals by Persons Affected by an Order of the Chief

Under Ohio law, any person adversely affected by an order of the Chief may appeal to the Ohio Oil and Gas Commission for an order vacating or modifying the order. The appeal shall be filed with the Commission within 30 days after the date on which the appellant received notice of the order by certified mail and, for all other persons adversely affected by the order, within 30 days after the date of the order complained of.¹⁵² Note that the issuance of a permit is not an order of the Chief. So when the Chief issues, denies or modifies an oil and gas well permit in Ohio, the Courts of Common Pleas must review the permitting actions.¹⁵³

[42] Transfer or Assignment of the Entire Interest in an Oil and Gas Lease

R.C. 1509 establishes certain requirements and procedures governing whenever the entire interest in an oil and gas lease is assigned or otherwise transferred. When notice of any such assignment or transfer is required to be provided to the Division of Oil and Gas Resources Management, it must be provided on a form prescribed and provided by the Division and verified by both the assignor or transferor and by the assignee or transferee, and accompanied by a nonrefundable fee of \$100 for each well.¹⁵⁴

[43] Transfer or Assignment of the Entire Interest in an Oil and Gas Well

R.C. 1509 now provides that when the entire interest of a well is proposed to be assigned or otherwise transferred to the landowner for use as an exempt domestic well, the owner who has been issued a permit under R.C. 1509 for the well must submit to the Chief an application for the assignment or transfer that contains all documents that the Chief requires and a nonrefundable fee of \$100. The application for such an assignment or transfer must be prescribed and provided by the Chief. The Chief may approve the application if the application is accompanied by a release of all of the oil and gas leases that are included in the applicable formation of the drilling unit, the release is in a form such that the well ownership merges with the fee simple

interest of the surface tract, and the release is in a form that may be recorded. However, if the owner of the well does not release the oil and gas leases associated with the well that is proposed to be assigned or otherwise transferred or if the fee simple tract that results from the merger of the well ownership with the fee simple interest of the surface tract is less than five acres, the proposed exempt domestic well owner must post a \$5,000 bond with the Division of Mineral Resources Management prior to the assignment or transfer of the well to ensure that the well will be properly plugged. The Chief, for good cause, may modify the requirements governing the assignment or transfer of the interests of a well to the landowner. Upon the assignment or transfer of the well, the owner of an exempt domestic well is not subject to the severance taxes on oil and gas, but is subject to all applicable fees established in R.C. 1509.¹⁵⁵

[44] Oil and Gas Commission

R.C. 1509 creates the Oil and Gas Commission. The Commission consists of five members appointed by the Governor. One of the appointees to the Commission must be a person who, by reason of the person's previous training and experience, can be classed as one learned and experienced in geology. The person can be classed as one learned and experienced in petroleum engineering as well.¹⁵⁶ As discussed above in § 18.03[41], the Commission does not have jurisdiction to review permitting actions of the Chief.

This limitation on the jurisdiction of the Ohio Oil and Gas Commission was recently affirmed in *Chesapeake Exploration, LLC v. Ohio Oil and Gas Commission*.¹⁵⁷ In that case, Chesapeake Exploration ("Chesapeake") filed a prohibition action in the Ohio Supreme Court seeking to bar the Ohio Oil and Gas Commission from hearing an appeal from the issuance of a drilling permit to Chesapeake by the Chief of the Division of Oil and Gas Resources Management filed by a third party. In a *per curiam* decision, the high court ruled that the Commission only has jurisdiction under R.C. 1509.36 to hear appeals from orders of the Chief of the Division of Oil and Gas Resources Management, and that, since the issuance of a permit was not an "order" of the Chief, the Commission lacked subject matter jurisdiction to hear the appeal.

[45] Oil and Gas Exploration of State Lands

To emphasize Ohio's commitment to being a state friendly to oil and gas development, Ohio law, specifically [R.C. 1509.70 through 1509.77](#) allow exploration and development of oil and gas reserves on state-owned land.

In [R.C. 1505.71](#), the Ohio General Assembly declared that it is the “policy of this state” to provide access to and support the exploration for, development of and production of oil and natural gas resources owned or controlled by the State of Ohio. In furtherance of that policy, in [R.C. 1509.72](#), the Ohio legislature directed all agencies of state and government to conduct an inventory of state-owned land to identify public land in Ohio where the oil and gas interest(s) belong to the State of Ohio, and to publish the results of the inventories. [R.C. 1509.73](#), in turn, establishes a process pursuant to which private parties can “nominate” public lands in Ohio appearing on the published inventories for oil and gas leasing. [R.C. 1509.71\(B\)](#) creates a special commission, called the Ohio Oil and Gas Leasing Commission, to review these nominations, decide whether leasing is appropriate, and, if so, oversee the leasing of the oil and gas interest(s).

Despite these laws, few if any permits have been issued authorizing drilling on state owned lands.

[46] Seismic Monitoring

In March 2014, a series of small earthquakes having a magnitude of 3.0 on the Richter Scale or less shook the residents of Poland Township, near Youngtown. ODNR seismologists ultimately concluded that the epicenter of the quakes was directly under wells being fracked in Poland Township. This was not the first time Ohio experienced quakes from oil and gas activity. In 2013, ODNR geologists concluded that a series of minor earthquakes not far from Poland Township were linked to a Class II injection well drilled near an unknown fracture line in the underlying bedrock.

In direct response to these quakes, the Division of Oil and Gas Resources Management announced new, stronger permit conditions for drilling near faults or areas of seismic activity. ODNR's announcement in 2014 expressly acknowledged a link between oil and gas drilling and small earthquakes for the first time.¹⁵⁸

Now, companies that want to horizontally drill within three miles of an area with known seismic activity greater than a 2.0 magnitude have to install seismic monitors. If the monitors detect a seismic action greater than a 1.0 magnitude, drilling must stop while the cause is investigated. If the investigation concludes a probable link to racking, drilling related operations must stop.

ODNR did not say how it will determine if seismic activity is related to fracking.

“While we can never be 100 percent sure that drilling activities are connected to a seismic event, caution dictates that we take these new steps to protect human health, safety and the environment,” ODNR Director James Zehringer said in a statement.

Geologists from the state agency have stated their belief that the sand and water injected into the ground during the fracking process increased pressure on an unknown microfault.

Footnotes — § 18.03:

⁶ R.C. 1509.02.

⁷ R.C. 1509.02.

⁸ Little of the Marcellus Shale formation extends from western Pennsylvania into eastern Ohio.

⁹ *Natural Gas Explained*, US. Energy Information Administration, available at https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_use (last accessed Apr. 10, 2017).

¹⁰ See *Patriot Water LLC v. Nally*, ERAC Case Nos. 156477 and 156588 (Ohio Environmental Review Appeals Commission July 3, 2012).

¹¹ 2013-Ohio-356, 989 N.E.2d 85 (9th Dist.).

¹² *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St. 3d 271, 2015-Ohio-485.

¹³ R.C. 1509.02.

¹⁴ Appeal No. 847 (Ohio Oil and Gas Commission).

¹⁵ Case No. 13 CV 007831. See also *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485, 2015 Ohio LEXIS 299 (5th Dist.) (trial court lacked jurisdiction to order inactive oil and gas well plugged because Ohio Division of Oil and Gas Resources Management had sole jurisdiction).

¹⁶ R.C. 1509.01(K).

17 R.C. 1509.01(K).

18 R.C. 1509.01(U).

19 R.C. 1509.01(Y).

20 R.C. 1509.03.

21 R.C. 1509.01(J).

22 R.C. 1509.01(Z).

23 R.C. 1509.01(AA). In 2013, the Ohio General Assembly expanded the definition of “production operations.”

24 R.C. 1509.01(AA).

25 R.C. 1509.01(BB).

26 R.C. 1509.01(CC).

27 R.C. 1509.01(DD).

28 R.C. 1509.01(EE).

29 R.C. 1509.01(FF).

30 R.C. 1509.50.

31 R.C. 1509.50(A).

32 R.C. 5749.

33 R.C. 1509.50(B)(1).

34 R.C. 1509.50(B)(1).

35 R.C. 1509.50(B)(2).

36 R.C. 1509.50(C).

37 R.C. 1509.221(B)(1).

38 R.C. 1509.221(B)(2).

39 R.C. 1509.221(B).

40 R.C. 1509.221(B)(4).

41 R.C. Chapter 119.

⁴² R.C. 1571.18.

⁴³ R.C. 1509.02.

⁴⁴ R.C. 1509.02 and 1509.071(B).

⁴⁵ *Mandatory Pooling*, ODNR Oil and Gas Resources, available at <http://oilandgas.ohiodnr.gov/regulatory-sections/legal/mandatory-pooling> (last accessed Apr. 10, 2017).

⁴⁶ R.C. 1509.27.

⁴⁷ R.C. 1509.28.

⁴⁸ Until enactment of Am. Sub. H.B. 64 in 2015, the owner of the tract of land who was also the owner of the mineral interest had to submit the application.

⁴⁹ R.C. 1509.27.

⁵⁰ R.C. 1509.27.

⁵¹ R.C. 1509.27.

⁵² R.C. 1509.24.

⁵³ R.C. § 1509.021.

⁵⁴ R.C. 1509.06(A).

⁵⁵ R.C. 1509.06(A)(9).

⁵⁶ R.C. 1509.06(A)(9).

⁵⁷ R.C. 1509.06(C).

⁵⁸ R.C. 1509.06(G).

⁵⁹ R.C. 1509.06(H).

⁶⁰ R.C. Chapter 119.

⁶¹ R.C. 1509.03(A).

⁶² R.C. 1509.06(I).

⁶³ R.C. 1509.61(A).

⁶⁴ R.C. 1509.61(A).

⁶⁵ R.C. 1509.61(B).

⁶⁶ R.C. 1509.61(A).

67 R.C. 1509.60.

68 R.C. 1509.07(B).

69 R.C. 1509.07(B)(3).

70 R.C. 1509.071(A).

71 R.C. 1509.07.

72 R.C. 1509.06(J).

73 R.C. 1509.073.

74 R.C. 1509.17(A).

75 R.C. Chapter 119.

76 In 2013, the Ohio General Assembly amended R.C. Chapter 1509 to require oil and gas drillers to identify the “country of origin” for certain steel products used at oil and gas production sites.

77 R.C. 1509.17(B).

78 OAC § 1501:9-1-08.

79 OAC §§ 1501: 9-2-01, 1501: 9-2-02.

80 OAC § 1501: 9-2-02(C).

81 R.C. 1509.17(C).

82 R.C. 1509.17(D).

83 R.C. 1509.11.

84 R.C. 1509.10(A).

85 R.C. 1509.10(A).

86 R.C. 1509.10(E).

87 R.C. 1509.19.

88 R.C. 1509.10(I).

89 R.C. 1509.10(J).

90 R.C. 1509.10(H).

91 R.C. 1509.20.

- 92 R.C. 1509.12(A).
- 93 R.C. 1509.12(B).
- 94 R.C. 1509.062(A).
- 95 R.C. 1509.062(B).
- 96 R.C. 1509.13(A).
- 97 R.C. 1509.13(C).
- 98 R.C. 1509.13(C).
- 99 R.C. 1509.13(C).
- 100 R.C. 1509.13(D).
- 101 R.C. 1509.06(G).
- 102 R.C. 1509.14.
- 103 R.C. 1509.12(C).
- 104 R.C. 1509.231.
- 105 R.C. 3750.01.
- 106 R.C. Chapter 119.
- 107 R.C. 1509.23(A).
- 108 R.C. 1509.072.
- 109 R.C. 1509.072(A).
- 110 R.C. 1509.072(B).
- 111 R.C. 1509.21.
- 112 R.C. 1509.22(A).
- 113 R.C. 1509.22(B).
- 114 R.C. 1509.22(C)(1) (specifying methods).
- 115 R.C. 1509.22(C).
- 116 R.C. 1509.074.
- 117 R.C. 1509.22(D).

- 118 R.C. Chapter 119.
- 119 OAC §§ 1501:9-3-06 and 1501-9-3-07.
- 120 R.C. 1509.22(D).
- 121 R.C. 1509.22(H).
- 122 *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994).
- 123 *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994).
- 124 R.C. 1509.222(A)(1).
- 125 R.C. 1509.225(A).
- 126 R.C. 1509.222(A)(2).
- 127 R.C. 1509.222(A)(3).
- 128 R.C. 1509.222(A)(4).
- 129 R.C. 1509.225(C).
- 130 R.C. 1509.226(B)(10).
- 131 R.C. 1509.34(A)(1).
- 132 R.C. 1509.34(A)(2).
- 133 R.C. 1509.34(A)(3).
- 134 R.C. 1509.34(B).
- 135 R.C. 1509.34(B).
- 136 R.C. 1509.34(C).
- 137 R.C. 1509.34(D).
- 138 R.C. 1509.34(E).
- 139 R.C. 1509.04(A).
- 140 R.C. 1509.04(B)(1).
- 141 R.C. 1509.04(B)(2).
- 142 R.C. 1509.04(C).
- 143 R.C. 1509.04(D)(1).

¹⁴⁴ R.C. 1509.04(D)(2).

¹⁴⁵ R.C. 1509.04(E).

¹⁴⁶ R.C. 1509.04(E).

¹⁴⁷ R.C. 1509.04(F).

¹⁴⁸ R.C. 1509.041; see *Violations, Investigations & Reports*, ODNR, available at <http://oilandgas.ohiodnr.gov/resources/investigations-reports-violations-reforms#FIN> (Apr. 11, 2017) (providing a current list of final nonappealable orders).

¹⁴⁹ R.C. 1509.181(B).

¹⁵⁰ R.C. 1509.181(C).

¹⁵¹ R.C. 1509.181(D).

¹⁵² R.C. 1509.36.

¹⁵³ R.C. 1509.06(F) (stating a permit is not considered an order); see *Chesapeake Exploration v. Oil & Gas Commission*, 135 Ohio St. 36 204, 2013-Ohio-224, available at <http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-Ohio-224.pdf> (Jan. 9, 2013) (issuing a writ of prohibition to prevent the Oil & Gas Commission from exercising jurisdiction over a permit appeal).

¹⁵⁴ R.C. 1509.31(A).

¹⁵⁵ R.C. 1509.31(B).

¹⁵⁶ R.C. 1509.35(A).

¹⁵⁷ 135 Ohio St. 3d 204, 2013-Ohio-224.

¹⁵⁸ *Ohio Announces Tougher Permit Conditions for Drilling Activities Near Faults and Areas of Seismic Activity*, ODNR, available at <http://ohiodnr.gov/news/post/ohio-announces-tougher-permit-conditions-for-drilling-activities-near-faults-and-areas-of-seismic-activity> (Apr. 11, 2014).

§ 18.04. Coal Mining

The requirements of Ohio's surface coal mining regulatory program are driven in large measure by the requirements of the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* Like the federal program, Ohio's program prohibits conducting surface coal mining operations without a permit.¹⁵⁹ In Ohio, coal surface mining permits are issued by DMRM under R.C. Chapter 1513.¹⁶⁰ The constitutionality of R.C. Chapter 1513 has been upheld by at least one Ohio Court of Appeals.¹⁶¹

To obtain a permit under the Ohio program, the applicant must publish a notice of intent to mine in a newspaper of general circulation in the area where the proposed mining activity will be located.¹⁶² Simultaneously therewith, the applicant must submit a detailed application to DMRM which describes or contains, among other things, the type of coal mining operation that is proposed,¹⁶³ the engineering techniques proposed to be used,¹⁶⁴ the equipment proposed to be used,¹⁶⁵ the hydrological consequences of both the proposed mining and reclamation operations,¹⁶⁶ detailed information about the geology and the hydrology of the site where mining operations are proposed,¹⁶⁷ a detailed plan for the reclamation of the proposed mine site that meets the requirements of applicable DMRM regulations,¹⁶⁸ financial guaranties that the reclamation plan will be carried out,¹⁶⁹ and proof that the applicant has the right to enter upon the proposed mine site to conduct the proposed surface coal mining operation.¹⁷⁰ Permits are issued for a term of five years and are renewable and transferable.¹⁷¹

The Ohio General Assembly has given the Chief of DMRM the authority to designate areas within Ohio unsuitable for surface coal mining. Upon receipt of a petition from interested parties,¹⁷² Ohio courts have upheld this grant of authority,¹⁷³ and have held that in deciding whether an area should be declared off limits to surface coal mining the Chief may, but is not required to consider, local land use planning ordinances.¹⁷⁴

Because the Chief has not, by regulation, designated wetlands or surface water courses areas unsuitable for the surface mining of coal, in 2015, the Ohio General Assembly enacted extensive statutory requirements pertaining to streams and wetlands impacted by surface coal mining operations. Specifically, Ohio Amended Substitute House Bill 64, the 2015 biennial budget bill, contains provisions requiring:

- Permitted coal mining and reclamation operators to restore on the permit area streams and wetlands affected by mining operations unless the Chief approves mitigation activities off the permit area (such as wetlands banking) without a permit, provided that the Chief first makes certain determinations;
- The Operator, if the Chief approves restoration off the permit area, to complete all mitigation construction or other activities required by the mitigation plan; and

- That performance security for reclamation activities on the permit area must be released pursuant to continuing law, except that any release of the remaining portion of performance security must not be approved prior to the construction of required mitigation activities off the permit area.

By administrative order, the Chief of DMRM may require persons who violate any requirement of Ohio's surface coal mining regulatory program to cease such violations.¹⁷⁵ The Chief may also require by order the immediate cessation of surface coal mining if: (a) the Chief determines that the continued conduct of the mining operation creates an imminent endangerment to the health and safety of the public,¹⁷⁶ or (b) the mining operation has been issued a notice of violation by a DMRM inspector for violating any requirement of Ohio's surface coal mining regulatory program, and the violation has not ceased after 30 days.¹⁷⁷ The Chief, by order, may also revoke the permit of any person who has engaged in a pattern of permit violations or other violations of the regulatory program.¹⁷⁸

In addition to cessation and revocation orders, the Chief of DMRM may assess, by administrative order, a civil penalty of not more than \$5,000 against any person who has violated a permit condition or other provision of the regulatory program.¹⁷⁹ Each day of continuing violation constitutes a separate violation.¹⁸⁰

Any person aggrieved or affected adversely¹⁸¹ by a DMRM order or notice of violation, including the issuance or denial of a permit or a civil penalty assessment order, may file a notice of appeal challenging the order or notice before the Ohio Reclamation Commission.¹⁸² The Commission's jurisdiction over matters falling within its statutory purview is exclusive.¹⁸³ Persons wishing to contest civil penalty assessment orders must tender the full amount of the assessed penalty to the Commission as a condition of appealing.¹⁸⁴ The Commission may overturn the appealed from order or notice of violation only after conducting an evidentiary hearing, and only if it finds that the order or notice is arbitrary, capricious, or otherwise inconsistent with law.¹⁸⁵ Awards of attorneys' fees and other litigation costs are available in appeals before the Commission.¹⁸⁶ Any person aggrieved or adversely affected by a decision of the Ohio Reclamation Commission may appeal to the court of appeals for the county in which the activity addressed by the decision

being appealed occurred, is occurring, or will occur.¹⁸⁷ Upon appeal, the Court of Appeals will overturn a decision of the commission only if it finds that the commission acted arbitrarily or capriciously.¹⁸⁸

In addition to issuing orders and notices of violations, DMRM may ask the Ohio Attorney General's office to file a civil action in one of Ohio's trial courts of general jurisdiction to obtain equitable relief against any person who violates or refuses to comply with a DMRM order.¹⁸⁹ Equitable relief will issue upon a showing that a violation has occurred or is occurring; the traditional prerequisites to equitable relief (irreparable injury, inadequate remedy at law, etc.) need not be established.¹⁹⁰ At the request of DMRM, the Ohio Attorney General's office may also file a civil action to recover a civil penalty assessed by an administrative order of the Chief.

Footnotes — § 18.04:

¹⁵⁹ *State ex rel. Brown v. Home Pro Enterprises*, 1 Ohio St. 3d 255, 438 N.E.2d 1175 (1982) (mining permit required even if minerals removed as part of site preparation for housing development).

¹⁶⁰ R.C. 1513.07(A)(1).

¹⁶¹ *Tiger Corporation v. Call*, 8 Ohio App. 3d 158, 456 N.E.2d 554 (1982).

¹⁶² R.C. 1513.071.

¹⁶³ R.C. 1513.07(B)(1)(g).

¹⁶⁴ R.C. 1513.07(B)(1)(g).

¹⁶⁵ R.C. 1513.07(B)(1)(g).

¹⁶⁶ R.C. 1513.09(B)(1)(k); and see *Buckeye Forest Council, Inc. v. Div. of Mineral Res. Mgmt.*, 172 Ohio App. 3d 440, 2007-Ohio-965, 875 N.E.2d 631 (2007) (hydrogeological information contained in application was sufficient to ensure that mining plan would prevent damage to ground water resources).

¹⁶⁷ R.C. 1513.07(B)(1)(m)-(P); *Citizens Organized Against Longwalling v. Division of Reclamation*, 41 Ohio App. 3d 290, 535 N.E.2d 687 (1987) (when a permit application contained sufficient information to assess the risk of acid formation, application met informational requirements of governing statute and regulation).

¹⁶⁸ R.C. 151307(B)(5).

¹⁶⁹ R.C. 1513.07(B)(1)(Q); R.C. 1513.08; *Ohio Department of Natural Resources v. O-Tra Industries, Inc.*, 9 Ohio St. 3d 187, 459 N.E.2d 564 (1984) (Custodian of Information not dischargeable in bankruptcy).

¹⁷⁰ See R.C. 1513.07(B). In 2015, the Ohio General Assembly enacted right-of-access requirements to require only that the applicant demonstrate right to access 67% of the area to be mined, and ODNR to deny a permit application that fails to make the required demonstration or stipulates in the surface mining permit that operations may not commence until the department is provided documents forming the basis for the permittee's legal right to enter and conduct mining operations on the permitted premises.

¹⁷¹ R.C. 1513.07(A)(2).

¹⁷² R.C. 1513.073. A petition may also be filed to set aside a previous unsuitably designation.

¹⁷³ *Pleasant City v. Ohio Department of Natural Resources*, 67 Ohio St. 3d 312, 1993-Ohio-220, 617 N.E.2d 1103 (1993); see *State ex rel. R.T.G., Inc. v. State*, 141 Ohio App. 3d 784, 2001-Ohio-4267, 753 N.E.2d 869 (2001) (land unsuitable designation constitutes taking of property requiring just compensation).

¹⁷⁴ *Greenbelt Advocates v. Division of Mineral Resources Management*, 176 Ohio App. 3d 638, 2008-Ohio-3238, 893 N.E.2d 230 (2008).

¹⁷⁵ *Greenbelt Advocates v. Division of Mineral Resources Management*, 176 Ohio App. 3d 638, 2008-Ohio-3238, 893 N.E.2d 230 (2008); *Oxford Mining Co. v. Sponsler*, 156 Ohio App. 3d 557, 2004-Ohio-1547, 807 N.E.2d 939 (2004) (coalition established when acidic water was in mine pit anywhere from four to 40 days).

¹⁷⁶ R.C. 1513.02(D).

¹⁷⁷ R.C. 1513.02(D).

¹⁷⁸ R.C. 1513.02(D)(3).

¹⁷⁹ R.C. 1513.02(E)(1).

¹⁸⁰ R.C. 1513.02(E)(1).

¹⁸¹ *Tri State Reclamation, LLC v. Division of Minerals Resource Management*, 2005 Ohio 6439, 2005 Ohio App. LEXIS 5801 (2005).

¹⁸² R.C. 1513.05; 1513.13. Failure to do so constitutes a waiver of the right to contest the assessed penalty. R.C. 1513.02(E).

¹⁸³ *Roadway Servs. v. Sponsler*, 2006 Ohio 3765, 138 Ohio Misc. 2d 17, 856 N.E.2d 326 (2006).

¹⁸⁴ R.C. 1513.02(E)(3); *Lyle Constr., Inc. v. Ohio Dep't of Natural Resources, Div. of Reclamation*, 34 Ohio St. 3d 22, 516 N.E.2d 209 (1987).

¹⁸⁵ R.C. 1513.13(B); *Citizens Organized Against Long Wall Mining v. Division of Reclamation*, 41 Ohio App. 3d 290, 535 N.E.2d 687 (1987).

¹⁸⁶ R.C. 1513.13(E); R.C. 1514.09; see *Beam v. State*, 142 Ohio App. 3d 793, 757 N.E.2d 25 (2001).

¹⁸⁷ R.C. 1513.14(A).

¹⁸⁸ R.C. 1413.14; *Buckeye Forest Council, Inc. v. Div. of Mineral Res. Mgmt.*, 172 Ohio App. 3d 440, 2007-Ohio-965, 875 N.E.2d 631 (2007).

¹⁸⁹ R.C. 1513.15.

¹⁹⁰ *State v. Alexander Brothers, Inc.*, 43 Ohio App. 2d 154, 72 Ohio Op. 2d 362, 334 N.E.2d 492 (1974).

§ 18.05. Industrial Minerals

[1] Definitions

In Ohio, surface mining and in-stream mining for industrial minerals are also regulated by DMRM.¹⁹¹ Industrial minerals include sand, gravel, clay, sandstone, and other materials excavated in a solid form from natural deposits that have commercial value—but do not include coal or peat.¹⁹² Surface mining refers generally to the extraction of minerals by excavation of the surface of the land—such as open pit mining and quarrying.¹⁹³ In-stream mining refers to the extraction of minerals from the bottom of watercourses meeting certain criteria.¹⁹⁴

[2] History

The first industrial minerals law in Ohio was enacted in 1974 and remained relatively unchanged until March of 2002 when the Ohio General Assembly passed Amended Substitute Senate Bill 83.

Key provisions of this amendment include the regulation of in stream and near stream mining activities. It prohibits any in stream mining without a permit. In stream permits may be issued for a limited two year period. In stream activities are restricted to periods of low flow and non critical fish and mussel spawning season and habitats. New streamside prohibitions also limit activities in or near state scenic rivers and within specific minimum distances of larger streams.

The law also established requirements and procedures for minimizing impacts to ground water that may result from surface mining operations, including requirements for the replacement of water supplies in specific circumstances. Additionally, where blasting is conducted, persons using

explosives were required to meet certification requirements and more stringent ground vibration and air blast limitations.

Other provisions substantially increased the amount of bond required by mine operators to insure that reclamation of surface mining sites is completed timely and effectively. There are provisions requiring public notice and comment when new surface mine applications are submitted, and the term of a surface mining permit is 15 years, with a right for renewal.

In 2012, the Ohio General Assembly made major changes to the provisions of R.C. 1514 pertaining to the in-stream mining of minerals other than coal when it enacted the Omnibus Regulatory Reform Act of 2012 (see § 18.05[8] *below*).

[3] Structure

The structure of Ohio's regulatory scheme governing mining for industrial minerals other than coal, codified in [Chapter 1514 of the Ohio Revised Code](#), is similar to the structure of Ohio's regulatory scheme governing coal surface mining operations. Just as in coal surface mining, a person may engage in mining for industrial minerals in Ohio only if issued a permit by the Chief of DMRM.¹⁹⁵ As in the surface coal mining regulatory scheme, to obtain a permit for the mining of industrial minerals other than coal in Ohio, a permit application must be submitted to DMRM that contains, among other things, detailed information pertaining to the geology of the area to be mined or excavated¹⁹⁶ and a detailed plan for the mining and reclamation of the area to be mined.¹⁹⁷ As in the coal surface mining regulatory scheme, issuance of a permit for the mining of minerals other than coal is contingent upon the submittal of financial guarantees that the reclamation plan will be carried out.¹⁹⁸ Constitutionally challenges to Ohio's industrial minerals program have been unsuccessful.¹⁹⁹

A certified mine foreperson may be employed to oversee conditions and practices at a mine site in addition to conducting examinations of the surface mining operation. Moreover, a person identified by a certified mine foreperson who meets certain competency requirements may conduct examinations of the surface mining operation.²⁰⁰ Mine safety audits are discretionary rather than mandatory. The Chief of the Division may conduct one safety audit at a surface mining operation annually if the permit holder

requests the audit.²⁰¹

[4] Permitting Preconditions

By statute, the Chief of DMRM may not issue a permit authorizing mining for minerals other than coal unless he affirmatively finds that certain statutory performance standards for mining and reclamation, including the following, will be met:²⁰²

- The site of proposed mining will be adequately prepared for its intended future uses upon completion of mining.
- Final slopes will be terraced, contoured, or graded sufficient to achieve soil stability and control landslides, erosion, and sedimentation.
- Where ponds, impoundments, or other bodies of water are created or installed as part of the plan of mining or reclamation, measures will be taken to ensure public safety (if the applicant's plan of mining and reclamation calls for future recreational use of such water bodies, banks and slopes must be established to ensure safe access).
- Areas of land affected by the mining or reclamation will be re-soiled and, where needed, fertilized in order to raise and maintain a diverse growth of vegetation sufficient to control soil erosion.
- Where required by the approved reclamation plan, the area affected by mining and reclamation activities will be re-vegetated in such a manner as to be capable of self generation and plant succession.
- All metal, lumber, equipment, and refuse resulting from mining will be removed or buried,²⁰³ and all unwanted or useless structures will be relocated or buried.
- Quality and quantity of underground water supplies will be protected, and any water course, lake, or pond within the boundaries of the mine site will be free from harmful concentrations of substances resulting from mining.
- During mining and reclamation, drainage will be controlled to prevent flooding, landslides, and flood hazards to adjoining lands, and topsoil will be stored in sufficient quantities to complete the back filling, grading, contouring, terracing, and resoiling that are required in the

approved reclamation plan.

- All reclamation activities are completed within three years following mining unless DMRM approves otherwise.

[5] Permit Term


Permits are issued for a term not to exceed 15 years unless otherwise approved by the Chief of DMRM,²⁰⁴ and are renewable and transferable.²⁰⁵

[6] Enforcement

If the Chief of DMRM finds that a permitted industrial minerals mining operation has violated or is violating any requirement of [R.C. Chapter 1514](#), failed to perform any measure set forth in the plan of mining and reclamation approved by DMRM that is necessary to prevent damage to adjoining property, or failed to achieve any of the performance standards described above, the Chief may issue an administrative complaint order requiring that the violation or the default be rectified by a date certain specified in the order.²⁰⁶ If the order is not complied with, the Chief may issue an order revoking the operator's permit.²⁰⁷ In addition, the Chief may, by administrative order, assess a civil penalty of not more than one thousand dollars for each occurrence of non-compliance with a compliance order.²⁰⁸

Compliance and civil penalty orders of the Chief of DMRM may be appealed to the Ohio Reclamation Commission. In an appeal from a civil penalty assessment order, the appellant must tender the entire amount of the assessed civil penalty to the Commission as a condition of appealing.²⁰⁹ The Ohio Attorney General may file a civil action in an Ohio trial court of competent jurisdiction to recover any civil penalty assessed by the Chief of DMRM and not set aside by the commission.²¹⁰

[7] Exemptions

 **Strategic Point:** A number of operations that could arguably be characterized as surface or in-stream mining are exempted from Ohio's surface and in-stream mining regulations where the activities relate to certain noncommercial mining activities, or the dredging of watercourses for navigation purposes. Consult the definitions codified at [R.C. 1514.01](#) to determine whether your contemplated activities

fall within the jurisdiction of the DMRM.

While the surface mining law applies to anyone excavating minerals from the earth by surface excavation methods including open pit mining, dredging, placering and quarrying, it does not apply to underground mining, peat or coal mining except when the tonnage of coal mined is less than one sixth of the total production from the operation.

Exemptions to the law include the extraction of minerals by a landowner for his/her own non commercial use on their property in an unprocessed form; the removal of minerals that occurs to a depth less than 5 feet over an area less than one acre in size within 12 months; the removal of minerals incidental to construction work where a valid building permit has been issued; borrow pits for highway construction with a Department of Transportation reclamation plan and bond; or borrow pits on Ohio EPA landfill facilities.

[8] Specifics Regarding Surface or In-Stream Mining

A permit holder who wishes to continue surface or in-stream mining operations after the expiration date of the existing or renewal permit must file with the Chief of the Division of Mineral Resources Management a notice of intent to renew. The notice of intent to renew must be on a form the Chief prescribes and provides and must be accompanied by the existing permit renewal fee, which is \$1,000 for surface mining and \$500 for in-stream mining.

Upon receipt of a notice of intent to renew form and the permit renewal fee, the Chief must notify the permit holder to submit a renewal application package. The permit holder must submit a complete renewal package to the Chief at least 30 days before the expiration of the existing surface or in-stream mining permit or renewal permit. The renewal application package must include all of the following:

- A map that is a composite of the information required to be contained in the most recent annual report map and all surface or in-stream mining and reclamation activities conducted under the existing permit or renewal permit;
- The annual report;

- In the case of an applicant proposing a significant change to the plan of mining and reclamation, as “significant” is defined by rule, a copy of the advertisement that the applicant must publish in accordance with current law; and
- Additional maps, plans, and revised or updated information that the Chief determines to be necessary for permit renewal.

For a renewal permit requiring minor or minimal updates to the existing permit, renewal permit, or accompanying information, the Chief may authorize a permit holder to file updated information through a surface mining permit modification form. However, the Chief may require such a permit holder to submit a complete renewal application package.

For the Chief can only deny a renewal application if:

- The permit holder's operation is not in substantial or material compliance with Ohio's industrial minerals law, or rules adopted and orders issued under it, and the plan of mining and reclamation under the existing permit or renewal permit.
- The permit holder has not provided evidence that a performance bond applicable to lands affected under the existing permit or renewal permit will remain effective until released.
- The permit holder, any partner if the permit holder is a partnership, any officer or director if the permit holder is a corporation, or any other person who has a right to control or in fact controls the management of the permit holder or the selection of officers, directors, or managers of the permit holder has failed substantially or materially to comply or continues to fail to comply with the Industrial Minerals Mining Law.

After the Chief receives a complete renewal application package and permit renewal fees, it must do one of the following:

- Approve the application for renewal and issue an order granting a renewal permit;
- Issue an order denying a renewal permit; or
- Notify the applicant that there are deficiencies in the renewal application package and that an extension of the time limit for issuing an order approving or disapproving the renewal permit has been granted.

In making a decision regarding a renewal application package, the Chief must review the package for compliance with R.C. 1514 and rules adopted under it. The Chief must notify a permit holder and, if applicable, the permit holder's consultant, surveyor, or engineer of deficiencies or errors in a renewal application package and must include in the notification a discussion of the deficiencies or errors.

A permit holder has up to 180 days after the expiration of the permit holder's permit or renewal permit to submit a revised renewal application package. A permit holder may request, in writing, an extension of the 180-day period for revisions to the renewal application package. The Chief may approve a 60-day extension. The Chief must notify the permit holder of the

Chief's decision to either grant or deny the extension.

Upon the submission of a revised renewal application package that is determined to be complete by the Chief, the Chief must proceed to approve or deny the application. If the revised renewal application package is not submitted within 180 days after the permit expiration date or, if an extension has been granted, within 240 days after the permit expiration date, the Chief must issue an order denying the renewal permit.

If an applicant for a renewal permit has complied with the requirements to submit a notice of intent to renew, the applicant may continue surface or in-stream mining operations under an existing permit or renewal permit after its expiration date until the 60-day time period for filing a complete renewal application package has expired or until the Chief issues an order denying the renewal permit. A permit holder who fails to submit a timely notice of intent to renew form, required permit renewal fees, and a renewal application package must cease surface or in-stream mining operations on the expiration date of the existing permit or renewal permit. If such a permit holder then submits a notice of intent to renew form and the permit renewal fees on or before the thirtieth day after the expiration date of the expired permit or renewal permit and provides the information required by the Chief (see above) within 60 days after the permit expiration date, the permit holder need not submit the final map and report required under current law until the later of 30 days after the Chief issues an order denying the application for renewal or 30 days after the Chief's order is affirmed upon appeal.

The approval of an application for renewal of a surface mining permit or renewal is valid for 15 years. The approval of an application for renewal for an in-stream mining permit or renewal permit is valid for five years.²¹¹

For an in-stream mining permit, an applicant must submit a hydraulic evaluation of the applicable watercourse prepared by a registered professional engineer only if required by the Division of Mineral Resources Management after review of the applicant's proposed in-stream mining plans. Ohio law authorizes the Chief of the Division of Mineral Resources Management to allow an applicant to deviate from the required elements of the hydraulic evaluation if the Chief determines that such a deviation is appropriate. If the hydraulic evaluation is required, it must include:

- (1) Soundings that depict the cross-sectional views of the channel bottom of the watercourse and water elevations for the watercourse;
- (2) A profile of the channel bottom;
- (3) An analysis of design flows and water surface profiles for the watercourse prior to in-stream mining and the proposed final mining condition;
- (4) An analysis of the expected changes in the roughness coefficient, resistance to water flow velocity, and hydraulic gradient in the channel bottom due to the proposed mining; and
- (5) Any additional information that the Chief requires to evaluate the potential impact of in-stream mining on the watercourse and to determine if any additional performance standards are required to protect the environment and property outside the limits of the operation as established in the permit.²¹²

Footnotes — § 18.05:

¹⁹¹ R.C. 1514.02.

¹⁹² R.C. 1514.01.

¹⁹³ R.C. 1514.01.

¹⁹⁴ R.C. 1514.01.

¹⁹⁵ R.C. 1514.02(A).

¹⁹⁶ R.C. 1514.02(A).

¹⁹⁷ R.C. 1514.02(A)(10).

¹⁹⁸ R.C. 1514.02(B); R.C. 1514.04.

¹⁹⁹ *Call v. G.M. Sader Excavating & Paving, Inc.*, 68 Ohio App. 2d 41, 426 N.E.2d 798 (1980).

²⁰⁰ R.C. 1514.47.

²⁰¹ R.C. 1514.42.

²⁰² R.C. 1514.02(A).

²⁰³ *But see* R.C. 3734.03 (“No person shall dispose of solid waste by open dumping ... ”); R.C. 3734.05(D)(1) (“no person shall operate or maintain a solid waste facility without a license issued by

the board of health”).

²⁰⁴ R.C. 1514.02(C).

²⁰⁵ R.C. 1514.021.

²⁰⁶ R.C. 1514.07.

²⁰⁷ R.C. 1514.07.

²⁰⁸ R.C. 1514.071(A) and (B).

²⁰⁹ R.C. 1514.071(C).

²¹⁰ R.C. 1514.071(D).

²¹¹ R.C. 1514.021.

²¹² R.C. 1514.02.

§ 18.06. Abandoned Mine Lands

DMRM manages two primary programs to address the environmental consequences of abandoned mines: the Abandoned Mine Reclamation Fund; and the Acid Mine Drainage Abatement and Treatment Fund. The Abandoned Mine Reclamation Fund is intended to support activities to restore qualified lands impacted by historic mining operations.²¹³ The Acid Mine Drainage Abatement and Treatment Fund is specifically dedicated to abating the impacts of acid mine drainage to water.²¹⁴

Footnotes — § 18.06:

²¹³ R.C. 1513.37; *Abandoned Mine Land Reclamation Programs*, DMRM, available at <http://minerals.ohiodnr.gov/abandoned-mine-land-reclamation/aml-reclamation-programs>.

²¹⁴ R.C. 1513.37(E); *Acid Mine Drainage Abatement Program*, DMRM, available at <http://minerals.ohiodnr.gov/abandoned-mine-land-reclamation/acid-mine-drainage#AMD>.

§ 18.07. Appellate Review of Orders Issued by DMRM

Appeals relating to decisions issued by DMRM concerning oil and gas wells are heard by the Oil and Gas Commission.²¹⁵ Appeals from decisions of the Oil and Gas Commission are heard by the Franklin County Court of Common Pleas.²¹⁶ R.C. 1509.37 mandates that the court entertain such appeals in advance of any other pending civil matters. The Court shall apply a

“lawful and reasonable” standard of review to the certified record.²¹⁷

Appeals from actions taken by the DMRM relating to coal and surface mining may be appealed to the Reclamation Commission.²¹⁸ Generally, appeals from a decision issued by the Reclamation Commission must be filed with the appellate court for the county in which the relevant mining activity is taking place, or will take place, to protect mine workers and the public.²¹⁹ The presiding court shall review the Reclamation Commission decision under an “arbitrary and capricious” standard of review.²²⁰ Parties seeking appeal from Reclamation Commission decisions pertaining to surface and in-stream mining activities may alternatively file their appeal with the court of common pleas in the county where the operation is located, or in the Franklin County Court of Common Pleas.²²¹

DMRM decisions relating to violations of state mine safety regulations may also be appealed, within 10 days, to the Reclamation Commission.²²²

Footnotes — § 18.07:

²¹⁵ R.C. 1509.35; R.C. 1509.36.

²¹⁶ R.C. 1509.37.

²¹⁷ R.C. 1509.37.

²¹⁸ R.C. 1514.09.

²¹⁹ R.C. 1513.14.

²²⁰ R.C. 1513.14(A).

²²¹ R.C. 1514.09.

²²² R.C. 1561.35.

CHAPTER 19

FISH AND WILDLIFE

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§ 19.01. Introduction

The Ohio Department of Natural Resources' (ODNR) Division of Wildlife regulates Ohio's plant and animal species through a number of regulations. The Division of Wildlife regulations address the conduct of hunting and fishing throughout Ohio, including the licensing of hunters and the maintenance of state-owned or administered lands designated as public hunting areas. Division of Wildlife also regulates the propagation of wild animals and is responsible for the protection of Ohio's endangered or threatened plant and animal species.

§ 19.02. Hunting and Fishing

[1] Open and Closed Seasons

Ohio law mandates that fishing in the inland of Ohio and its Lake Erie fishing districts, the hunting for game birds and game animals throughout the

state, and the taking of fur bearing animals in designated trapping areas may occur only during open season.¹ Division of Wildlife regulations also specify the length of each open season for each wild animal, as well as the number and size of the animals that may be taken during each open season.² The possession of the hide, skin, or pelt of a wild animal during closed season constitutes *prima facie* evidence that the person in possession took the wild animal illegally. Each hide, skin, or pelt taken or in a person's possession during closed season also constitutes a separate offense. Generally, any person may engage in the live trapping and releasing of nuisance wild animals at any time of year, although certain nuisance wild animals—such as white-tailed deer, black bear, and wild turkey—cannot be trapped without first obtaining a permit from the Division of Wildlife. Persons who engage in the trapping or taking of nuisance wild animals for profit must first obtain a commercial nuisance wild animal control operator license from the Division of Wildlife.³

[2] Permits and Licenses

The Division of Wildlife requires permits and licenses for hunting,⁴ fishing,⁵ commercial fishing of yellow perch in the Ohio Waters of Lake Erie,⁶ falconry,⁷ fur taking,⁸ and fur dealing⁹ in Ohio. In addition to a license, special permits are required to hunt or trap specific game animals, such as turkey, deer, and water fowl. A permit is also required where operation of an energy facility (i.e., a facility where energy is produced) results in an incidental taking of a wild animal.¹⁰

Licenses and permits may be issued by agents designated by the Chief of ODNR, Division of Wildlife, including village clerks, township fiscal officers, and the Clerk of the Court of Common Pleas.¹¹ Licenses are valid from March 1, to the last day of February of the ensuing year and are non-transferable. They must be exhibited by the hunter to any person in control of the land upon which the hunter is engaged in hunting or trapping.¹² All license and permit fees received by ODNR are to be used for hunter education programs, the management of wild animals, and the Department's acquisition of land.¹³ In March 2011, ODNR adopted a web-based licensing and game-check system that replaced its current point-of-sale system. The web-based system, called the Wild Ohio Customer Relationship Management System, enables hunters to purchase and print licenses and permits instantly via the

Internet from home or at a license sales outlet. The system also enables deer and turkey hunters to check game on the Internet, over the phone, or at any license sales outlet.

Certain individuals are not required to obtain licenses, permits, or stamps for hunting or trapping. Exempt individuals include:

- Ohio resident landowners, spouses, and their children are not required to have a hunting license, fur taker permit, either-sex deer permit, antlerless deer permit, spring or fall turkey permit, or Ohio Wetlands Habitat Stamp when hunting or trapping on land they own.
- A nonresident landowner, and the spouse and children living with the landowner, may hunt on that property without a license, either-sex deer permit, antlerless deer permit, spring or fall turkey permit, Ohio Wetlands Habitat Stamp, or fur taker permit if the nonresident's home state allows residents of Ohio owning property in the nonresident's home state, and the spouse and children living with the Ohio property owner, to hunt without a license, deer permit, spring or fall turkey permit, wetlands habitat stamp, or fur taker permit.
- A member of a limited liability company or partnership is a landowner provided the member is an Ohio resident and the limited liability company or limited liability partnership consists of three or fewer individual members or partners, or the beneficiary or trustee of a trust that has three or fewer trustees or beneficiaries.
- Tenants and their children on land on which they reside and from which they derive the majority (more than 50 percent) of their income from agricultural production on that land are not required to have a hunting license, fur taker permit, either-sex deer permit, antlerless deer permit, spring or fall turkey permit, or Ohio Wetlands Habitat Stamp when they are hunting or trapping on land where they reside.
- Ohio resident landowners' grandchildren who are under 18 years of age are not required to have a hunting license or an Ohio Wetlands Habitat Stamp while hunting on their grandparents' land. All other licenses and permits are required.
- Members of the U.S. Armed Forces on active duty while on leave or

furlough are not required to purchase a hunting license, Ohio Wetlands Habitat Stamp, or fur taker permit. All other licenses and permits are required.

The following Ohio residents are eligible for free licenses, permits and stamps:

- Ohio residents born on or before December 31, 1937 will receive a free fishing license, hunting license, either-sex deer permit, antlerless deer permit, spring and fall turkey permits, Ohio Wetlands Habitat Stamp, and fur taker permit. Ohio residents age 66 and older who were born on or after January 1, 1938 are eligible for reduced-cost licenses and permits.
- Ohio residents who are holders of a veteran's license plate displaying the international wheelchair symbol must apply in writing for a free hunting license, fur taker permit, either-sex deer permit, spring or fall turkey permit, and an Ohio Wetlands Habitat Stamp endorsement. Applications must be certified by the U.S. Department of Veterans Affairs.
- Permanently and total disabled veterans who receive pension or compensation due to their service-related injuries and who are Ohio residents must apply in writing for a free hunting license, fur taker permit, either-sex deer permit, turkey permit, and Ohio Wetlands Habitat Stamp. Applications must be certified by the U.S. Department of Veterans Affairs.
- Ohio residents who are former prisoners of war must apply in writing for a free hunting license, fur taker permit, and Ohio Wetlands Habitat Stamp. All other licenses and permits are required to be purchased. Applications must be certified by the U.S. Department of Veterans Affairs.

A resident of any other state who owns real property in Ohio, and the spouse and children living with the property owner, may hunt on that property without a license, provided that the state of residence of the real property owner allows residents of Ohio owning real property in that state, and the spouse and children living with the property owner, to hunt without a license.¹⁴

First time hunters cannot obtain a hunting license until after they pass a hunting education course. Youth hunters (ages 17 and under) are also restricted. They must obtain a youth license, and must be accompanied by an adult 18 or older at all times.¹⁵ Ohio also issues an apprentice hunting license to adults and youth as a means of sampling the experience of hunting under the mentorship of a licensed adult prior to completing a hunter education course. Apprentice hunters must be accompanied by an adult 21 or older at all times.¹⁶

[3] Interstate Wildlife Violator Compact

Ohio is a member of the Interstate Wildlife Violator Compact, an agreement that recognizes suspension of hunting, fishing, and trapping licenses in member states.¹⁷ Illegal activities in one state can affect a person's hunting or fishing privileges in all participating states. For example, any person whose license privileges or rights are suspended in a member state may also be suspended in Ohio. Ohio residents with suspended hunting, fishing, or trapping licenses who plan to hunt, fish, or trap in another state must contact the other state to see if they can legally hunt, fish, or trap there. A list of member states is available at <http://wildlife.ohiodnr.gov/licenses-and-permits/interstate-wildlife-violator-compact>.

The Interstate Wildlife Violator Compact also establishes a process whereby wildlife law violations by a non-resident from a member state are handled as if the person were a resident, meaning they can be served a ticket rather than being arrested, booked, and bonded. This process is a convenience for hunters, fisherman, and trappers of member states, and increases efficiency of Wildlife Officers by allowing more time for enforcement duties rather than violator processing procedures.

[4] Hunting Without Permission

The Division of Wildlife maintains approximately 165,000 acres of state-owned or administrated lands for use as public hunting areas;¹⁸ however, these lands make up only five percent of the land in Ohio. Much of the remainder of Ohio's land is privately owned. Hunting and trapping on private lands is not permitted unless the hunter or trapper has obtained written permission in advance from the landowner pursuant to Ohio's "recreational user" law.¹⁹ The Division of Wildlife provides printed "Permission for Hunting and Trapping

on Private Land” forms that a hunter or trapper can carry with him or her and present to a private landowner for signature as needed to access private lands. The hunter or trapper is required to carry his or her written permission at all times when he or she is upon private lands.²⁰ Private landowners and their authorized agents who grant written permission to use their land for hunting and trapping, without charging a fee, are not liable to the user or others for injuries in the event of an accident.²¹ Private landowners and their authorized agents are not, however, exempt under Ohio’s “recreational user” law for injuries that result from their willful or wanton misconduct or intentionally tortious conduct.²²

[5] Harassment of Hunters Prohibited

The Division of Wildlife prohibits a variety of activities intended to interfere with the lawful hunting, trapping, and fishing for wild animals.²³ Prohibited activities include:

- Creating noise to interfere with hunting;²⁴
- Placing oneself in a location where their presence will affect the behaviour of the wild animal or the feasibility of it being taken;
- Creating sights, smells, or other stimuli that will affect behavior of the wild animal; and
- Affecting the condition or location of personal property intended for use in hunting, trapping, or fishing.²⁵

The Court of Common Pleas may enjoin any such conduct deemed to be harassment of hunters, trappers, and fishermen.²⁶

[6] Hunting Preserves

The Division of Wildlife permits the operation of wild animal hunting preserves²⁷ and commercial bird shooting preserves.²⁸ Wild animal hunting preserves are areas of land no less than 80 acres where game, captive white-tailed deer, and nonnative wildlife other than game birds are released and hunted as authorized by a license obtained from the Division of Wildlife under [R.C. 1533.721](#).²⁹ Commercial bird shooting preserves are areas of land no less than 80 acres where game birds are released and hunted by shooting as authorized by a license obtained under [R.C. 1533.72](#).³⁰ Wild animal

hunting preserves must be surrounded by a fence of at least 8 feet in height that is clearly identified by posted signs at intervals of not more than 400 feet.³¹ No person may release for hunting, or hunt within a wild animal hunting preserve, any game or nonnative wildlife listed as an endangered species, bears native to North America, or large feline carnivores (e.g., lions, tigers, leopards, cougars).³² Similarly, the boundaries of each licensed commercial bird shooting preserve must be clearly marked at intervals of not more than 200 feet.³³ Recent legislation allows persons to hunt within licensed preserves without first obtaining a hunting license from the Division of Wildlife.³⁴

[7] Nuisance Wild Animals

In Ohio, any person may trap live, non-migratory animals, except white-tailed deer, black bear, or wild turkey when such animals become a nuisance.³⁵ A nuisance wild animal is a wild animal that interferes with the use or enjoyment of property, is causing a threat to public safety, or may cause damage or harm to a structure, person or property.³⁶ It is unlawful for a non-licensed person to live-trap on the lands of another without permission³⁷ or possess a live-trapped wild animal longer than 24 hours.³⁸ Individuals who possess a commercial nuisance wild animal control operator license³⁹ may trap and take wild animals, except white-tailed deer, black bears, wild turkey, and waterfowl.⁴⁰ Nuisance animals may be killed by a license holder with written permission of the Division of Wildlife if it is established the animals are causing damage and cannot be live-trapped,⁴¹ although no such written permission is required for the taking of certain nuisance animals, such as opossum, raccoon, coyote, or fox.⁴² All trapped animals must be released outside the limits of any incorporated village or city.⁴³

Nuisance white-tailed deer, black bear, and wild turkey that are causing damage may be killed by licensed individuals or other persons after receiving written permission from the Division of Wildlife.⁴⁴ Nuisance Canada Geese that are causing damage may be captured or taken by licensed individuals, landowners, or their agents only after receiving a goose damage permit from the Division of Wildlife.⁴⁵

Footnotes — § 19.02:

¹ R.C. 1533.02.

- ² OAC 1501:31-15-10, -11, -17, -01.
- ³ OAC 1501:31-15-03.
- ⁴ R.C. 1533.10.
- ⁵ R.C. 1533.32.
- ⁶ OAC 1501:31-3-12.
- ⁷ R.C. 1533.05.
- ⁸ R.C. 1533.111.
- ⁹ R.C. 1533.23.
- ¹⁰ R.C. 1533.081.
- ¹¹ R.C. 1533.13.
- ¹² R.C. 1533.14.
- ¹³ R.C. 1533.15.
- ¹⁴ R.C. 1533.10.
- ¹⁵ R.C. 1533.10; R.C. 1533.13.
- ¹⁶ R.C. 1533.102.
- ¹⁷ 127 HB 153; R.C. 1531.133; OAC 1501:31-1-03.
- ¹⁸ OAC 1501:31-15-04.
- ¹⁹ R.C. 1533.17.
- ²⁰ R.C. 1533.17(C).
- ²¹ R.C. 1533.18; R.C. 1533.181.
- ²² R.C. 1533.17(B).
- ²³ R.C. 1533.03.
- ²⁴ R.C. 1533.031.
- ²⁵ R.C. 1533.03(A)(1), (2), and (3).
- ²⁶ R.C. 1533.03(D).
- ²⁷ R.C. 1533.721; R.C. 1533.731.

- 28 R.C. 1533.73.
- 29 R.C. 1531.01(FFF).
- 30 R.C. 1531.01(EEE).
- 31 R.C. 1533.731(A).
- 32 R.C. 1533.731(B)(2).
- 33 R.C. 1533.73(B).
- 34 129 HB 420.
- 35 OAC 1501:31-15-03(A).
- 36 R.C. 1531.40(A)(1).
- 37 OAC 1501:31-15-03(A)(4).
- 38 OAC 1501:31-15-03(A)(3).
- 39 R.C. 1531.40(B).
- 40 OAC 1501:31-15-03(B).
- 41 OAC1501:31-15-03(B)(4).
- 42 OAC 1501:31-15-03(E),
- 43 OAC1501:31-15-03(A)(4), (B)(8).
- 44 OAC 1501:31-15-03(H).
- 45 OAC 1501:31-15-03(H).

§ 19.03. Wild Animal Propagation

[1] Licensing

Ownership of and title to wild animals in Ohio is held by the state.⁴⁶ Consequently, individuals may not own, raise, or keep wild animals without obtaining a license from the Division of Wildlife. Three licenses are available for the propagation of wild animals in Ohio. A commercial propagatory license permits the licensee to raise wild animals and sell them or kill them for food.⁴⁷ A non-commercial propagatory license permits the licensee to raise wild animals for personal use, but the person is not permitted to sell the

animals.⁴⁸ A third license, the “Raise and Release” license, permits clubs and similar organizations to raise wild animals for release only.⁴⁹ Each license issued for the propagation of wild animals expires on March 15 of the following year.

[2] Private Ownership of Wild Dangerous Animals

The private ownership of wild dangerous animals is regulated by the Ohio Department of Agriculture and is addressed in Chapter 17 of this Manual.

[3] Aquaculture

Aquaculture, which is the raising of aquatic animals for sale such as fish and fish food, is regulated by the Division of Wildlife. Permits to propagate fish and fish food, deal bait, and transport fish into the state are issued by ODNR on an annual basis.⁵⁰ ODNR maintains a list of fish and fish food propagators, which ODNR makes available to the public on its website.

Footnotes — § 19.03:

⁴⁶ R.C. 1531.02.

⁴⁷ R.C. 1533.71.

⁴⁸ R.C. 1533.71.

⁴⁹ R.C. 1533.71.

⁵⁰ OAC 1501:31-39-01.

§ 19.04. Endangered and Threatened Species

The Division of Wildlife has adopted regulations setting forth the criteria for identifying and designating endangered and threatened species of plants native to Ohio.⁵¹ A list of endangered and threatened species of plants is maintained at [OAC 1501:18-1-03](#). The taking of any such plants for commercial purposes by any person is prohibited.⁵² However, the taking of endangered or threatened plants for scientific, educational, or preservation purposes is allowed so long as the person obtains a permit from the Division of Wildlife before doing so.⁵³

The Division of Wildlife also protects endangered animal species that are native to Ohio. Lists of Ohio's endangered and threatened animal species are maintained at [OAC 1501:31-23-01](#) and [OAC 1501:31-23-02](#). An ODNR-issued permit is required to take, transport, sell, or possess an endangered animal species, or any part thereof.⁵⁴

Footnotes — § 19.04:

⁵¹ [OAC 1501:18-1-02](#); R.C. 1531.25.

⁵² [OAC 1501:18-2-01](#).

⁵³ [OAC 1501:18-2-02](#), -03.

⁵⁴ [OAC 1501:31-23-01\(C\)](#).

§ 19.05. Enforcement

The Division of Wildlife has a variety of enforcement mechanisms at its disposal to address violations of the Department's regulations. Wildlife officers and employees of the Division of Wildlife designated by the Division Chief are granted certain authority to act as law enforcement officers, including the serving and executing of warrants, enforcement of ODNR laws and regulations, making arrests, and seizing wild animals, and parts thereof, that have been taken or propagated illegally.⁵⁵ The Division of Wildlife also may suspend or revoke licenses and permits associated with hunting, trapping, and fishing,⁵⁶ prosecute violations of ODNR regulations, and impose monetary penalties against violators.⁵⁷ Each Ohio wild animal or plant species may be assigned a monetary value⁵⁸ and the Division of Wildlife may bring a civil action to recover possession of or restitution value of any wild animal held, taken, bought, sold or possessed in violation of [Revised Code Chapter 1531](#) or [Chapter 1533](#).⁵⁹ The presumed minimum values of certain Ohio wild animals are set forth at [OAC 1501:31-16-01\(B\)\(1\) to \(39\)](#).

Footnotes — § 19.05:

⁵⁵ R.C. 1533.67.

⁵⁶ R.C. 1533.68.

⁵⁷ R.C. 1533.69.

⁵⁸ [OAC 1501:31-16-01\(A\)](#).

59 OAC 1501:31-16-01(B).

CHAPTER 20

PESTICIDES

Contents

I. INTRODUCTION

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I.

INTRODUCTION

§ 20.01. Scope

This chapter covers:

- Pesticide definition and classifications [*see § 20.03 and § 20.05 below*].
- Pesticide registration [*see § 20.04 below*].
- Licensing of pesticide applicators [*see § 20.06 below*].
- Licensing of pesticide businesses and dealers [*see § 20.07 and § 20.08 below*].
- Pesticide storage, handling and disposal restrictions [*see § 20.09 below*].
- Enforcement [*see § 20.10 below*].

II.

REGULATION OF PESTICIDE DISTRIBUTION AND APPLICATION

§ 20.02. Regulatory Authority

Authority to regulate the sales, distribution, application and handling of pesticides in Ohio is vested in the Director of the Ohio Department of Agriculture (“Director” or “ODA”).¹ The Director has broad authority to promulgate regulations, issue licenses, registrations and administrative orders, as well as to investigate and enforce potential violations of regulatory or statutory mandates related to the sales, distribution, application and handling of pesticides.

Footnotes — § 20.02:

¹ R.C. 921.01–921.99.

§ 20.03. Pesticide Definition

A “pesticide” is defined to mean:

any substance or mixture of substance intended for either of the following: (1) preventing, destroying, repelling, or mitigating any pest;² (2) use as a plant regulator, defoliant, or desiccant.³

Trap: Consider carefully the intent component of the pesticide definition. Product labeling and other marketing materials are often used to demonstrate such intent in prosecuting enforcement matters against purveyors of products alleged to be unregistered pesticidal products. Particular enforcement attention has been focused on this issue at the federal level with regard to an array of consumer products touting anti-microbial qualities. As a result, businesses making and selling any products that could be deemed pesticides typically find close coordination between their marketing and regulatory compliance functions a necessity.

Footnotes — § 20.03:

² The term “pest” is defined to mean “a harmful, destructive, or nuisance insect, fungus, rodent, nematode, bacterium, bird, snail, weed or parasitic plant or animal life or virus, or any plant or animal

species that the director declares to be a pest, except viruses, bacteria, or other microorganisms on or in living animals, including human beings.” R.C. 921.01(II).

³ R.C. 921.01(JJ).


§ 20.04. Registration of Pesticides

All persons wishing to sell, offer for sale or distribute any pesticide in Ohio must first secure from ODA a registration for each such pesticide.⁴ Applications for registration of pesticides must include an inspection fee and must be submitted on forms provided by ODA. Pesticide registrations must be renewed annually by submittal of an application and fee by June 30 of each year.⁵ Pesticide registration applications require:

- names and addresses of both applicant and person’s name that will appear on label, if different from applicant
- brand name and product name of the pesticide
- complete copy of all labeling including all claims made, directions for use and use classification
- ODA registration number for the pesticide, if any
- other information ODA may require.⁶

ODA may require submission of the complete formula for a pesticide, including active and inert ingredients, as well as a full description of testing the applicant will utilize to support the product’s pesticidal claims.⁷

Applicants may designate any portion of the information submitted with a registration application as a trade secret or confidential business information.⁸

 **Strategic Point:** If a pesticide or pesticidal product already has a valid federal registration, as will nearly always be the case, the state registration process with ODA may be streamlined by use of ODA Form 4204-001, “Application for Registration of Pesticides,”⁹ which may be used to register multiple federally-registered pesticides in Ohio.

Trap: When a registrant chooses to discontinue marketing a pesticide in Ohio, be aware that ODA requires that registration

continue annually until the product is entirely removed from the channels of trade in Ohio.

ODA has broad authority to deny, cancel or suspend pesticide registrations where a pesticide does not warrant its proposed claims, does not comply with [R.C. Chapter 921](#) or the rules adopted hereunder, or presents an imminent hazard to the environment.¹⁰ Applicants or registrants subject to such denials, cancellations or suspensions are entitled to administrative due process rights.¹¹

Trap: The federal pesticide registration regime under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) exempts from registration requirements certain “minimum risk” pesticides and pesticidal products known as Section 25(b) pesticides and pesticide products.¹² While federally exempt from registration, these “low risk” pesticides and pesticidal products are not exempt from state registration with ODA.

Footnotes — § 20.04:

⁴ [R.C. 921.02](#).

⁵ [OAC 901:5-11-12\(B\)](#).

⁶ [R.C. 921.02\(B\)](#).

⁷ [R.C. 921.02\(C\)](#) and [\(D\)](#).

⁸ [R.C. 921.02\(E\)](#).

⁹ Available at http://www.agri.ohio.gov/public_docs/forms/Plant/Plnt_4204-001.pdf (last visited Mar. 30, 2017).

¹⁰ [R.C. 921.05](#).

¹¹ [R.C. 921.05](#) and [R.C. Chapter 119](#).

¹² [7 U.S.C. § 136w\(b\)](#) and [40 C.F.R. § 152.25\(g\)](#).

§ 20.05. Restricted and General Use Pesticides

Pesticides are classified either “restricted use” or “general use” by ODA according to their federal status as classified by the United States

Environmental Protection Agency (U.S. EPA).¹³ U.S. EPA and, correspondingly, ODA, classifies pesticides “restricted use” where it has been determined that ordinary use, even in accordance with directions and warnings, may lead to unreasonable risk of adverse effects on the environment or to the applicator.¹⁴ U.S. EPA utilizes specific toxicity criteria to classify pesticidal products or uses as restricted.¹⁵ In Ohio, restricted use pesticides may only be applied by licensed commercial applicators and licensed private applicators, or specified categories of persons working under the direct supervision of such authorized persons.¹⁶ All pesticides not designated as “restricted use pesticides” are deemed “general use pesticides.”

Footnotes — § 20.05:

¹³ R.C. 921.01(V) and (SS).

¹⁴ 7 U.S.C. § 136a(d)(1)(C).

¹⁵ 40 C.F.R. § 152.170.

¹⁶ R.C. 921.11(A).

§ 20.06. Licensing of Individuals Applying Pesticides

ODA issues licenses for various categories of pesticide applicators and businesses.¹⁷ Licenses are categorized not only by the type of applicator, but also by the type of pest control activities for which license is sought. ODA licenses three categories of applicators: (1) commercial;¹⁸ (2) private;¹⁹ and (3) non-resident.²⁰ An individual must secure a commercial applicator license in order to (1) apply any restricted use pesticide,²¹ (2) apply any pesticide for hire for any pesticide business, (3) apply any pesticide as part of one’s duties as a federal, state or local government employee, (4) apply any pesticide as owner or employee of any business other than a pesticide business where the site of application would be any one of several specified categories of publicly accessible sites,²² or (5) conduct diagnostic inspections.²³

Securing commercial or private applicator licenses generally requires submission of application materials, demonstration of competence through ODA-administered exams, payment of a fee, and periodic license renewal.²⁴ License applicants must declare the classification(s) of pesticide application activity for which they seek license. Applicants undergo examinations both

on core principles of pesticide application and also on subject matter specific to the license classification(s) desired. With regard to licenses for commercial applicators, license classifications²⁵ available include:

- aerial pest control
- agricultural pest control
- aquatic pest control
- forest pest control
- industrial vegetation control
- ornamental pest control
- vertebrate animal control
- turf pest control
- animal pest control
- domestic, institutional, structural and health-related pest control
- specialized pest control
- wood-destroying insect diagnostic inspection.

Whereas the commercial applicator license is generally suitable for individuals engaging in pesticide application for pesticide businesses, the private applicator license is generally utilized by agricultural interests seeking to self-apply restricted use pesticides on their crops. Private applicator licensure requirements are somewhat more relaxed than those for commercial applicators, particularly in terms of fees and license duration.²⁶ Classifications²⁷ for private applicator licenses include:

- grain and cereal crops
- forage crops
- field vegetables and specialty crops
- fruit crops
- ornamentals and turf crops

- greenhouse crops
- forest crops
- livestock and livestock buildings
- non-crop land
- stored grain
- aquatic
- seed treatment
- wood preservation
- livestock protection collar.

ODA has also established specific licensing criteria and procedures for non-resident commercial and private applicators.²⁸ Candidate applicators currently licensed by other states with whom Ohio has a reciprocal agreement generally will be exempt from the examination component of the licensing process.²⁹

Footnotes — § 20.06:

¹⁷ The licensing of pesticide application businesses and pesticide dealers is covered in §§ 20.07 and 20.08 below.

¹⁸ R.C. 921.06.

¹⁹ R.C. 921.11.

²⁰ R.C. 921.08.

²¹ Licensed private applicators and their immediate family members and employees are exempt from this restriction when under the direct supervision of the licensed private applicator. R.C. 921.06(A)(1)(c).

²² Sites considered “publicly accessible” such that pesticide application by business owners or employees necessitates a commercial applicator’s license include food service and retail food establishments, health care and child care facilities, golf courses and certain school and rental properties. R.C. 921.06(A)(1)(d). Note that pesticide application at schools is subject to additional restrictions. OAC Chapter 901:5-11-15.

²³ R.C. 921.06(A)(1)(a)–(A)(1)(e).

²⁴ R.C. 921.12.

²⁵ OAC 901:5-11-01(N).

²⁶ OAC 901:5-11-05.

²⁷ OAC 901:5-11-01(O).

²⁸ R.C. 921.08.

²⁹ OAC 901:5-11-04(D) and OAC 901:5-11-05(D).

§ 20.07. Licensing Pesticide Application Businesses and Financial Responsibility

A “pesticide business” is defined to mean a person who performs pesticide business activities.³⁰ “Pesticide business activities” are defined to mean “any of the following: (1) application of pesticides to the property of another for hire; (2) solicitation to apply pesticides; and (3) the conducting of authorized diagnostic inspections.”³¹ All pesticide businesses wishing to conduct pesticide business activities in Ohio must first secure a license from ODA.³² The owner or operator of a pesticide business is deemed responsible for the acts of each employee in the handling, application and use of pesticides in the conducting of diagnostic inspections.³³ Pesticide businesses are responsible for complying with specific ODA recordkeeping mandates.³⁴ Applicants for pesticide businesses must satisfy ODA requirements to demonstrate sufficient financial responsibility through liability insurance or other approved means.³⁵ ODA’s financial responsibility regulations specify the types and amounts of insurance coverage pesticide businesses must carry, varying with the category of pesticide activity.³⁶

Footnotes — § 20.07:

³⁰ R.C. 921.01(LL).

³¹ R.C. 921.01(MM).

³² R.C. 921.09.

³³ R.C. 921.09(E).

³⁴ R.C. 921.14 and OAC 901:5-11-10(C).

³⁵ R.C. 921.10.

³⁶ OAC 901:5-11-07.

§ 20.08. Pesticide Dealers

A “pesticide dealer” is defined to mean “any person who distributes restricted use pesticides or pesticides whose uses or distribution are further restricted by the director to the ultimate user or to a commercial applicator who is employed by that pesticide dealer.”³⁷ Persons acting or advertising or assuming to act as pesticide dealers must obtain a pesticide dealer license from ODA.³⁸ Pesticide dealers must comply with record retention and submission requirements relating to all restricted use pesticides distributed.³⁹ Entities must secure separate pesticide dealer licenses from ODA for each Ohio location or outlet from which the entity distributes pesticides.⁴⁰ Dealers located outside Ohio wishing to distribute restricted use pesticides in Ohio must secure a pesticide dealer license from ODA for its principal out-of-state location and also for each sales person operating in Ohio.⁴¹ Pesticide dealers are deemed responsible for the acts of employees in solicitation and sale of pesticides and all claims and recommendations for use of pesticides.⁴² The pesticide dealer licensing requirements do not apply to federal, state or local government entities providing pesticides for their own programs.⁴³

Footnotes — § 20.08:

³⁷ R.C. 921.01(KK).

³⁸ R.C. 921.13.

³⁹ R.C. 921.13(A); OAC 901:5-11-10(D).

⁴⁰ R.C. 921.13(A).

⁴¹ R.C. 921.13(A).

⁴² R.C. 921.13(C).

⁴³ R.C. 921.13(B).

§ 20.09. Storage, Handling and Disposal of Pesticides

Specific restrictions on the storage of pesticides have been promulgated by ODA relating to each of several categories of pesticide storage, including agricultural storage,⁴⁴ display storage,⁴⁵ and liquid bulk storage.⁴⁶ Handling, loading and transportation restrictions also have been established by ODA involving various specific housekeeping, containment and labeling

mandates.⁴⁷ Pesticide and pesticide container disposal restrictions include mandates that pesticide and container disposal be undertaken consistent with label instructions or, in the absence of labeling, consistent with state solid and hazardous waste laws.⁴⁸

Footnotes — § 20.09:

⁴⁴ OAC 901:5-11-11(A)(1).

⁴⁵ OAC 901:5-11-11(A)(2).

⁴⁶ OAC 901:5-11-11(A)(3).

⁴⁷ OAC 901:5-11-11(B) and (C).

⁴⁸ OAC 901:5-11-11(D).

§ 20.10. Enforcement

ODA has an array of enforcement tools at its disposal to respond to violations of statutory or regulatory requirements relating to pesticide use in Ohio. ODA may deny, suspend, cancel, revoke or otherwise limit licenses and registrations it has issued where the holder has violated applicable regulatory requirements or where a pesticide does not warrant its claims or is deemed an imminent hazard to the public or the environment.⁴⁹ ODA also has authority to seize pesticides where it has reasonable cause to believe such is being distributed, stored, transported or used in violation of pesticide regulatory requirements.⁵⁰ Statutory authority also has been granted to ODA to take certain investigative measures relative to potential violations or hazards, including authority to inspect records, equipment and pesticides as well as sampling of materials and entry to premises.⁵¹ Violations of the requirements of Chapter 921 or the implementing rules promulgated by ODA can also carry civil or criminal penalties.⁵² Civil penalty amounts can be assessed up to \$5,000 per violation for a first offense and up to \$10,000 per violation for subsequent offenses.⁵³ Each day a violation continues is deemed by statute to be a separate violation for purposes of calculating a penalty.⁵⁴ ODA may initiate administrative enforcement actions or refer matters for judicial enforcement to the Ohio Attorney General.⁵⁵ ODA also possesses injunctive⁵⁶ and lien⁵⁷ authority.

Footnotes — § 20.10:

49 R.C. 921.05 and R.C. 921.23.

50 R.C. 921.27.

51 R.C. 921.18.

52 R.C. 921.25 and R.C. 921.99.

53 R.C. 921.16(B) and R.C. 921.25(B).

54 R.C. 921.25.

55 R.C. 921.25.

56 R.C. 921.25.

57 R.C. 921.29.

CHAPTER 21

ASBESTOS AND LEAD

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III. LEAD ABATEMENT

§ 21.05. Lead Abatement Licensing

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I.

PROCEDURAL CONTEXT

§ 21.01. Scope

This chapter covers:

- Ohio's licensing and permitting for asbestos operations [see § 21.03 *below*].
- Ohio's asbestos requirements [see § 21.04 *below*].
- Ohio's licensing and permitting for lead abatement [see § 21.05 *below*].
- Ohio's lead abatement standards [see § 21.06 *below*].

§ 21.02. Asbestos and Lead Overview

Both the Ohio EPA and the Ohio Department of Health (“ODH”) regulate Asbestos.¹ Ohio EPA regulates demolition and renovations involving asbestos, as well as its manufacturing, disposal, and handling requirements.² ODH regulates demolition and renovations, and licensing for professionals in the asbestos abatement industry.³

This chapter focuses on the Ohio asbestos program and lead abatement in schools, daycares, and residential units. Lead abatement activities are regulated by ODH⁴ (lead contaminated soils, lead used in industrial or other commercial operations, and lead air emissions are typically governed by TSCA, RCRA, CERCLA, the federal Clean Air Act, or other regulatory programs and will not be examined herein).

Footnotes — § 21.02:

¹ R.C. Chapter 3710; OAC Chapter 3701-32.

² R.C. 3704.03; OAC Chapter 3745-20.

³ R.C. Chapter 3710; OAC Chapter 3701-32.

⁴ R.C. 3742.04.

II.

THE OHIO ASBESTOS PROGRAM

§ 21.03. Licensing and Permitting

[1] Licensing for Asbestos Abatement, Renovation, and Demolition

ODH regulates and issues licenses for contractors performing asbestos removal projects, project supervisors, project designers, workers removing asbestos, persons inspecting buildings for asbestos-containing materials and developing plans to manage asbestos found in a facility, persons conducting air sampling for asbestos and the companies that provide required asbestos training.⁵ Specific licenses are issued and required for a number of asbestos activities, including:

- Asbestos abatement contractors, which permits the license holder to

perform, directly or indirectly, an asbestos hazard abatement activity;⁶

- Asbestos hazard abatement specialists, which permits the license holder to coordinate or supervise abatement projects;⁷
- Asbestos hazard evaluation specialists, which permits the license holder to identify, detect, or assess asbestos containing materials, determine response actions, or prepare asbestos management plans;⁸
- Asbestos hazard abatement project designers, which permits the license holder to determine the work scope, work sequence, or performance standards;⁹
- Asbestos hazard abatement air-monitoring technicians, which permits the license holder to conduct air sampling;¹⁰
- Asbestos hazard abatement workers, which permits the license holder to conduct asbestos hazard abatement activities.¹¹

Persons without the licenses described above are not permitted to engage in asbestos abatement, including project planning, monitoring, coordination, on-site management, or any other asbestos abatement activities, unless the Director of ODH waived the certification requirement in an emergency.¹²

There is an application process for the licenses described above, which includes the payment of fees, completion of forms, including pertinent background information, and the completion of required training courses.¹³ ODH must process license applications within sixty days after the receipt of a completed application.¹⁴ Grounds for denial of the application include fraudulently or deceptively obtaining or attempting to obtain a license or certificate, prior violations of asbestos handling laws, or a prior conviction of a felony under state or federal law designed to protect the environment.¹⁵ The licenses are valid for one year, after which time a renewal application must be submitted with the appropriate fee.¹⁶

Certain licenses carry special requirements. For instance, the asbestos hazard abatement contractor's license application requires the contractor to list, among other things, the contractor's name and address, the name of the chief executive officer, the number of employees, the names of certified asbestos hazard abatement specialists employed, a list of any other state asbestos licenses or certificates held, a list of adverse government actions that

relate to asbestos abatement, a description of protective clothing and respirators that will be used, a description of site decontamination procedures that will be used, and a list of ownership interests in the subcontractor.¹⁷ Recently, ODH amended its regulations, including one that requires contractors to “maintain at the project site a copy of the building inspection report that was prepared by an asbestos hazard specialist to comply with the US EPA requirement for a thorough inspection found in [40 CFR Part 61, Subpart M](#).”¹⁸ ODH has also developed an electronic submittal for the inspection reports. Similarly, the asbestos hazard abatement specialist must provide background information, a list of certifications held, must pass an approved examination and satisfactorily complete a training course, and, for renewal applications, complete an annual refresher training course.¹⁹

Ohio EPA also requires that a qualified person, who meets certain requirements set forth by Ohio EPA and undergoes bi-annual refresher courses, be present onsite during asbestos abatement activities.²⁰

The Director of ODH may waive licensing requirements for emergencies.²¹ Such emergencies must be “sudden, unexpected event[s]” that are “not a planned asbestos abatement project,” and include “nonroutine failures of equipment or by actions of fire and emergency personnel pursuant to duties within their official capacities.”²² In the event of such an emergency, the asbestos abatement or handling activity can go forward, but notification must occur to ODH within three days of the event.²³

[2] Permitting for Certain Asbestos Operations

Certain activities involving asbestos require a permit to install and permit to operate from Ohio EPA.²⁴ These activities include the operation of an active asbestos waste disposal site,²⁵ operation of an asbestos mill and the manufacturing of certain products using commercial asbestos such as cement products or the manufacturing of fireproofing and insulating materials,²⁶ the fabrication of products using commercial asbestos such as friction products or the fabrication of cement or silicate board for ventilation hoods,²⁷ or operations that convert asbestos-containing waste material into non-asbestos material.²⁸

In addition to permitting requirements, asbestos waste handlers, operators of active and inactive asbestos waste disposal sites, asbestos mills,

manufacturers, and fabricators, and asbestos waste conversion facilities must provide notification to Ohio EPA, including a description of the emission control equipment that will be used, specific information on the type of filter and corresponding information for the device, and specific information for asbestos waste disposal sites.²⁹

Footnotes — § 21.03:

⁵ R.C. Chapter 3710; OAC Chapter 3701-32.

⁶ OAC 3701-34-02(A).

⁷ OAC 3701-34-02(B). Asbestos hazard abatement specialists can also supervise asbestos abatement activities.

⁸ OAC 3701-34-02(C).

⁹ OAC 3701-34-02(D). Asbestos hazard project designers can also supervise asbestos abatement activities.

¹⁰ OAC 3701-34-02(E). Air monitoring or sampling can also be conducted by asbestos evaluation specialists or certified industrial hygienists or industrial hygienists in training.

¹¹ OAC 3701-34-02(F).

¹² OAC 3701-34-02.

¹³ OAC 3701-34-03.

¹⁴ OAC 3701-34-03(B).

¹⁵ OAC 3701-34-03(C).

¹⁶ OAC 3701-34-03(F) and (G).

¹⁷ OAC 3701-34-04(A).

¹⁸ OAC 3701-34-04(C)(2).

¹⁹ OAC 3701-34-05.

²⁰ OAC 3745-20-04.

²¹ OAC 3701-34-03(H).

²² OAC 3701-34-03(H).

²³ OAC 3701-34-03(H).

²⁴ OAC 3745-20-08(E).

²⁵ OAC 3745-20-08(E); OAC 3745-20-06.

²⁶ OAC 3745-20-08(E); OAC 3745-20-10.

²⁷ OAC 3745-20-08(E); OAC 3745-20-11.

²⁸ OAC 3745-20-08(E); OAC 3745-20-13.

²⁹ OAC 3745-20-08.

§ 21.04. Asbestos Program

[1] General Requirements for Demolition and Renovation Activities

Demolitions and renovations of facilities trigger asbestos regulations and requirements potentially involving handling, notification, and safety procedures.³⁰ A demolition involves the removal of load bearing structures in a building or handling those structures once removed, as well as burning of a building.³¹ A renovation involves altering a building in any way, including the “stripping or removal of regulated asbestos containing material from a facility component” or the removal or handling of renovated materials.³² Ohio EPA, with regulations that track the federal NESHAP regulates demolitions and renovations occurring to almost all buildings, excepting residential homes or buildings with four or fewer dwelling units.³³ ODH makes no such distinction and instead focuses only on the amount of asbestos being removed.³⁴ From a practical perspective, Ohio EPA mandates when abatement must occur, and both Ohio EPA and ODH regulate how such abatement will occur.

An owner or operator of a building that contains asbestos containing material (“ACM”) must thoroughly inspect the building for the presence of asbestos.³⁵ If at least 260 linear feet of “regulated asbestos-containing material” is found on pipes, 160 square feet on other facility components, or thirty-five cubic feet if measurement cannot be obtained previously, other rules are triggered including specific notification and handling requirements.³⁶ Otherwise, only general notification must occur, consisting of notice of the intent to demolish, made to Ohio EPA, through the local Ohio EPA district office.³⁷ “Regulated asbestos-containing material” is friable ACM, and certain categories of non-friable ACM that becomes friable or undergoes activities such as grinding that allow the ACM to become airborne.³⁸ Notifications also

must be made by licensed asbestos hazard abatement contractors to ODH if removal of greater than fifty linear or square feet of friable ACM is to occur.³⁹

⚠ Warning: Since asbestos abatement is regulated by both Ohio EPA and ODH, both agencies require notification in similar circumstances prior to beginning asbestos abatement. Both agencies may bring enforcement for violations. The federal government may also bring an enforcement action, since Ohio EPA implements the federal asbestos NESHAP requirements. The payment of penalties to ODH does not relieve a party from enforcement of the same requirements by Ohio EPA and, conversely, the payment of penalties to Ohio EPA does not relieve a party from enforcement of the same requirements by ODH.⁴⁰

Furthermore, asbestos abatement contractors must enter into written contracts with building owners that contain specific requirements including:

- A requirement that all persons working on the project are licensed and certified by ODH;
- Clearance air-sampling be analyzed by specific methods and conducted by an asbestos abatement air-monitoring technician, asbestos hazard evaluation specialist, or a certified industrial hygienist or industrial hygienist in training as certified by the American Board of Industrial Hygiene;
- A detailed description of project activities, including the amount, indicated in linear or square feet, of ACM to be abated, the exact location and type of that material, and whether or not a contained work site will be established as required by OSHA regulations;
- A requirement that all asbestos hazard abatement activities be done in accordance with all applicable federal, state, and local asbestos regulations.⁴¹

Assuming that quantities of ACM are above the thresholds described above, the notification must also contain the waste transporter, the demolition and renovation schedule, and the schedules starting and completion dates.⁴²

[2] Emission Control Requirements in Demolitions and Renovations

All friable ACM must be removed from a facility prior to it being demolished or renovated.⁴³ This includes certain categories of non-friable ACM if it meets listed criteria that make it more likely that the non-friable ACM can become friable, making it regulated ACM.⁴⁴ Regulated ACM must be made adequately wet prior to cutting or disjointing operations, prior to their being stripped, or prior to their removal.⁴⁵ Furthermore, wetting must occur on pieces of the building, such as steel beams, that are being removed or could be disturbed and are surrounded by regulated ACM.⁴⁶ In the alternative to wetting the regulated ACM, the person conducting the asbestos abatement may obtain a waiver from the Director of Ohio EPA from wetting requirements where wetting could cause damage to equipment or provide a safety hazard.⁴⁷ This exception is only available in renovations, not demolitions.⁴⁸ If the Director of Ohio EPA grants such an exemption, alternative emission control measures must be adopted and the person must display a copy of the Director's determination at the work site.⁴⁹

Other requirements also exist, such as the requirement to carefully lower sections of the building to the floor and to ground level and not "dropping, throwing, sliding, or otherwise damaging or disturbing" the regulated ACM.⁵⁰ Furthermore, transportation of ACM to the ground must be made via leak-tight chutes, HEPA equipped vacuum cleaners, or in leak tight containers if the materials were removed or stripped more than fifty feet above ground level and were not removed in units or sections.⁵¹

Exceptions exist to the wetting requirement for large facility components such as reactor vessels, large tanks, and steam generators (but specifically do not include beams), so long as the component can be removed without disturbing or damaging the regulated ACM, the component is encased in leak-tight wrapping, and the wrapping is labeled as provided in [OAC 3745-20-05\(C\)](#).⁵²

Once a facility component that contains ACM has been removed, it must be adequately wetted during stripping, a local exhaust and ventilation system used during stripping to capture the ACM, or the component encased in a leak tight container and properly handled under asbestos waste handling regulations.⁵³

For cold temperatures (i.e., below thirty-two degrees Fahrenheit), only certain wetting requirements are applicable if local exhaust ventilation and

collection systems are used that meet criteria such as the presence of no visible emissions, components are removed as units or sections to the maximum extent possible, and temperatures are recorded at the beginning, middle, and end of each day.⁵⁴

[3] Asbestos Regulations in Circumstances Other than Demolitions and Renovations

Ohio EPA prohibits the construction of a roadway with asbestos tailings or asbestos containing waste material unless, for asbestos tailings, it meets certain requirements.⁵⁵ These include temporary roadways on areas of asbestos ore deposits (an asbestos mine), temporary roadways at active asbestos mill sites that are encapsulated with resinous or bituminous binders and are maintained annually, or the asbestos tailings are encapsulated in asphalt concrete meeting requirements for construction of roads and bridges on federal highway projects.⁵⁶

Asbestos mills and manufacturing operations that utilize commercial asbestos are also regulated by Ohio EPA.⁵⁷ Examples of regulated operations include facilities that manufacture textile materials, including rope, cord, wicks, tubing, and similar products, facilities that manufacture cement products, fireproofing and insulating materials, friction products, floor tile, paints, coatings, and adhesives, and other operations that are listed in [OAC 3745-20-10](#).⁵⁸ The requirements placed on these facilities include alternatives, such as having no visible emissions, the use of air cleaning,⁵⁹ monitoring of potential sources of asbestos emissions, or inspection of cleaning devices.⁶⁰ Records must be created and retained, and reports of emissions submitted on a semiannual basis.⁶¹ These same requirements are also applicable to certain asbestos fabrication operations, such as cement building products that use commercial asbestos and friction products that use commercial asbestos, excepting those that primarily install asbestos friction materials onto motor vehicles.⁶²

Prohibitions also exist on the installation of insulating materials that contain asbestos, except spray-applied ACM that have one percent or less asbestos, or spray applied ACM with greater than one percent asbestos where notification to Ohio EPA occurs and no visible emissions are discharged.⁶³ The prohibition and requirements on spray applied ACM does not apply to the application of materials that are encapsulated with a bituminous or

resinous binder and are not friable after drying.⁶⁴

[4] Asbestos Waste Handling Requirements

All asbestos-containing waste material must be deposited by the generator at a waste disposal site that is operated in Ohio in accordance with the requirements of [OAC 3745-20-06](#), operated in accordance with [40 C.F.R. § 61.154](#) for sites outside of Ohio, or at a site that converts asbestos containing waste materials into non-asbestos material.⁶⁵ No visible emissions are permitted when collecting, processing, packaging, transporting, or depositing asbestos-containing waste material.⁶⁶ Moreover, during those processes, asbestos containing waste materials must be adequately wetted and sealed in a durable leak-tight container or wrapping that meets certain requirements and contain adequate marking as defined in the regulations.⁶⁷ Ohio EPA may authorize alternative waste handling procedures if permission is obtained in advance.⁶⁸

Vehicles used to transport asbestos containing waste material must be marked as defined in the regulations and waste shipment records maintained for asbestos containing waste material shipped offsite.⁶⁹ In order to assist manufactures that ship asbestos waste containers under [OAC Chapter 3745-20-05\(c\)\(1\)](#), Ohio EPA issued a Standard Operating Guidance in May 2015.⁷⁰ Certifications must be completed prior to the transportation of the waste material for offsite disposal by the waste generator.⁷¹ Certifications must be completed by the waste disposal site operator as well and provided to the waste generator.⁷² The Ohio EPA must be notified if the waste generator does not receive notification from the waste disposal site operator within forty-five days after the waste was received by the transporter.⁷³

[5] Asbestos Disposal Requirements

Separate requirements exist for active and inactive asbestos disposal sites.⁷⁴ Under Ohio's solid and construction and demolition debris waste regulations, sanitary landfills regulated under [OAC Chapter 3745-27](#), industrial landfills regulated under [OAC Chapter 3745-29](#), and construction and demolition debris landfills regulated under [OAC Chapter 3745-400](#) may accept asbestos waste if a permit to install and a permit to operate has been issued by Ohio EPA⁷⁵ Other landfills, such as residual landfills or composting facilities may not accept asbestos wastes.⁷⁶

Active asbestos disposal sites are prohibited from discharging visible emissions.⁷⁷ Alternatively, active asbestos disposal sites may comply by: (1) preventing visible emissions from asbestos-containing waste materials; (2) conducting burial operations so as to not cause asbestos-containing waste materials to be broken up or disbursed prior to burial; (3) covering asbestos-containing waste materials with at least one foot of compacted nonasbestos-containing material by the end of each operating day; (4) controlling access to the site so as to prevent the general public or unauthorized personnel from gaining unauthorized entry to any location within 100 feet of the operations; and (5) posting signs that contain the language specified by the regulation.⁷⁸ Waste shipment records must be maintained and records kept showing the deposits of asbestos waste containing material.⁷⁹ These records must be submitted to Ohio EPA upon closure of the site.⁸⁰ Finally, notification to Ohio EPA must occur for any excavations or disturbance of asbestos-containing waste material that has been deposited and covered.⁸¹

Inactive sites also cannot have visible emissions.⁸² For inactive sites, as an alternative to having no visible emissions, the asbestos-containing waste must be: covered with at least six inches of compacted non-asbestos containing material and vegetation must be grown and maintained on the area; or the asbestos containing waste material must be covered by at least two feet of compacted non-asbestos-containing material.⁸³ Warning signs must be posted as required by [OAC 3745-20-07](#)⁸⁴ unless there is a natural barrier to the site to deter access by the general public.

Specific regulations also apply to facilities that convert asbestos-containing waste materials into non-asbestos materials.⁸⁵ Detailed permit to install requirements apply to such facilities.⁸⁶ Detailed monitoring and sampling must also occur during the first ninety days of operation of such facilities, including monitoring of operational parameters, input materials, and the analysis of samples of output materials for the presence of asbestos.⁸⁷ Other monitoring requirements apply after the first ninety days of operation, including monitoring during start up periods and performance testing and monitoring of output during periods that the facility was outside of operating conditions established to ensure the production of non-asbestos material and monthly composite samples collected and analyzed.⁸⁸ Any residual waste that is asbestos-containing must be disposed of at an active asbestos site or re-recycled.⁸⁹ Records for such facilities must also be maintained and reports

submitted to Ohio EPA.⁹⁰

[6] Enforcement

Enforcement of ODH requirements relating to asbestos, found in [R.C. Chapter 3710](#) and [OAC Chapter 3701-34](#) may be civil and/or criminal.⁹¹ Civil actions are brought by the Ohio Attorney General (OAG) after a referral by the Director of ODH to the OAG.⁹² In addition to mandatory injunctive relief, the court may award up to \$5,000 per day, per violation.⁹³ Criminal prosecutions are brought by the prosecuting attorney, city director of law, or similar chief legal officer upon referral by the Director of ODH.⁹⁴ Unlike typical state air pollution prosecutions, a violation of ODH requirements constitute a felony, punishable by at least one year and not more than two years of incarceration and a fine of at least \$10,000 and not more than \$25,000 for a first offense.⁹⁵ These criminal offenses are strict liability and require no showing of a criminal mental intent.⁹⁶

Enforcement of Ohio EPA requirements relating to asbestos, found in [OAC Chapter 3745-20](#) may be administrative, civil, or criminal.⁹⁷ Civil actions are brought by the OAG after a referral by the Director of Ohio EPA to the OAG.⁹⁸ In addition to injunctive relief, the court shall award a civil penalty, up to \$25,000 per day, per violation.⁹⁹ Criminal prosecutions may also be brought by the OAG, generally require that recklessness be proved, and constitute a misdemeanor conviction of up to one year imprisonment and a fine of up to \$25,000 per day of violation.¹⁰⁰

Footnotes — § 21.04:

³⁰ [OAC 3745-20-01](#); [OAC 3745-20-02](#).

³¹ [OAC 3745-20-01 \(B\)\(13\)](#).

³² [OAC 3745-20-01\(B\)\(43\)](#).

³³ [OAC 3745-20-01\(B\)\(18\)](#). See also [OAC Chapter 3745-20](#) and [40 C.F.R. Part 61](#), Subpart M (federal asbestos NESHAP). As with other federal Clean Air Act requirements, federal enforcement of the requirements is possible.

³⁴ [OAC 3701-34-01\(C\)](#).

³⁵ [OAC 3745-20-02](#).

³⁶ [OAC 3745-20-02](#).

- 37 OAC 3745-20-02(B)(2).
- 38 OAC 3045-20-01(B)(41).
- 39 OAC 3701-34-04(C); OAC 3701-34-01(C).
- 40 R.C. 3710.16.
- 41 OAC 3701-34-11.
- 42 OAC 3745-20-02; OAC 3745-20-03.
- 43 OAC 3745-20-04(A)(1).
- 44 OAC 3745-20-04(A)(1)(a) through (d).
- 45 OAC 3745-20-04(A)(2), (3), (4), and (6).
- 46 OAC 3745-20-04(A)(4) and (6).
- 47 OAC 3745-20-04(A)(3)(c), (d), and (e).
- 48 OAC 3745-20-04(A)(3).
- 49 OAC 3745-20-04(A)(3)(c), (d), and (e).
- 50 OAC 3745-20-04(A)(2).
- 51 OAC 3745-20-04(A)(6).
- 52 OAC 3745-20-04(A)(5).
- 53 OAC 3745-20-04(A)(4).
- 54 OAC 3745-20-04(A)(7).
- 55 OAC 3745-20-09.
- 56 OAC 3745-20-09(A) through (C).
- 57 OAC 3745-20-10(A).
- 58 OAC 3745-20-10(A)(1) through (11).
- 59 Air cleaning requirements are listed in OAC 3745-20-12.
- 60 OAC 3745-20-20(B)(1) through (4).
- 61 OAC 3745-20-20(B)(5) through (8).
- 62 OAC 3745-20-11.

⁶³ OAC 3745-20-14 and OAC 3745-20-15. Other spray applied ACM are similarly governed by OAC 3745-20-15.

⁶⁴ OAC 3745-20-15(C).

⁶⁵ OAC 3745-20-05(A).

⁶⁶ OAC 3745-20-05(B).

⁶⁷ OAC 3745-20-05(B)(1) and (C).

⁶⁸ OAC 3745-20-05(B)(4).

⁶⁹ OAC 3745-20-05(D).

⁷⁰ [http://wwwapp.epa.ohio.gov/dapc/asbestos/Asbestos%20Warning%20Label%20Requirements%](http://wwwapp.epa.ohio.gov/dapc/asbestos/Asbestos%20Warning%20Label%20Requirements%20.pdf)

⁷¹ OAC 3745-20-05(E).

⁷² OAC 3745-20-05(E)(2).

⁷³ OAC 3745-20-05(E)(4).

⁷⁴ OAC 3745-20-06 and OAC 3745-20-07.

⁷⁵ OAC 3745-27-06; OAC 3745-27-19; OAC 3745-29-06; OAC 3745-29-19; OAC 3745-400-11(F)(2)(c).

⁷⁶ OAC 3745-27-45; OAC 3745-30-14.

⁷⁷ OAC 3745-20-06(A)(1).

⁷⁸ OAC 3745-20-06(B)(1) through (5).

⁷⁹ OAC 3745-20-06(C) and (D).

⁸⁰ OAC 3745-20-06(E).

⁸¹ OAC 3745-20-06(F).

⁸² OAC 3745-20-07(A)(1).

⁸³ OAC 3745-20-07(A)(2) and (3).

⁸⁴ OAC 3745-20-07.

⁸⁵ OAC 3745-20-13.

⁸⁶ OAC 3745-20-13(A).

⁸⁷ OAC 3745-20-13(B).


- ⁸⁸ OAC 3745-20-13(C).
- ⁸⁹ OAC 3745-20-13(B)(3) and (C)(3).
- ⁹⁰ OAC 3745-20-13(E) and (F).
- ⁹¹ R.C. 3710.14 and R.C. 3710.99.
- ⁹² R.C. 3710.14.
- ⁹³ R.C. 3710.14.
- ⁹⁴ R.C. 3710.99.
- ⁹⁵ R.C. 3710.99.
- ⁹⁶ *State v. Acevedo* (May 24, 1989), 9th State No. 88CA004423.
- ⁹⁷ R.C. 3704.03(S); R.C. 3704.06; R.C. 3704.99.
- ⁹⁸ R.C. 3704.06.
- ⁹⁹ R.C. 3704.06(B) and (C).
- ¹⁰⁰ R.C. 3704.06(A) and R.C. 3704.99.

III.

LEAD ABATEMENT

§ 21.05. Lead Abatement Licensing

Lead abatement licensing is regulated by ODH.¹⁰¹ Only residential units, schools, daycare centers, and the land that surrounds them are regulated by ODH.¹⁰² Ohio EPA does not regulate residential lead based paint, as it falls under the household hazardous waste exemption.¹⁰³ However, schools and day care centers face regulation by both ODH under [R.C. Chapter 3742](#) and Ohio EPA under [R.C. Chapter 3734](#). Hazardous waste requirements are discussed in [Chapter 3](#).

 **Strategic Point:** Lead abatement generally is regulated only by ODH. However, for schools and day-care centers that do not also constitute a person's primary residence, lead can constitute a waste or even a hazardous waste under Ohio's waste management regulations.

Licenses are granted by ODH upon the payment of required fees, passing an examination, completing required training (if required for that particular license), and, for certain licenses such as lead risk assessors, a college degree and obtaining relevant work experience.¹⁰⁴

Licenses are required for clearance technicians, lead inspectors, lead risk assessors, lead abatement contractors, lead abatement workers, and lead abatement project designers.¹⁰⁵ As of August 2015, ODH implemented an electronic system for lead licensure. These licenses allow the licensees to perform specific activities with respect to the assessment, project design, pre-abatement planning, and the performance of lead abatement.¹⁰⁶ Specific requirements with respect to work practices or the performance of lead abatement activities are provided in the regulations for the applicable license, such as, for lead inspectors, a requirement to prepare an inspection report for every lead inspection they perform.¹⁰⁷

Footnotes — § 21.05:

¹⁰¹ R.C. Chapter 3742.

¹⁰² R.C. 3742.02.

¹⁰³ OAC 3745-51-04(B)(1).

¹⁰⁴ OAC 3701-32-04; OAC 3701-32-05.

¹⁰⁵ OAC 3701-32-04.

¹⁰⁶ OAC 3701-32-04 *et seq.*

¹⁰⁷ OAC 3701-32-06(F).

§ 21.06. Lead Abatement Standards

The law defines “lead abatement” to include measures designed and intended to eliminate lead hazards, including removal, encapsulation or enclosure of lead hazards; replacement of lead-contaminated surfaces or fixtures; removal or covering of lead-contaminated soil; and preparation, cleanup, disposal and post-abatement activities associated with the abatement.¹⁰⁸ Reports are required for all lead inspections and lead abatement professionals must complete abatement assessments and abatement operations in accordance with the federal Department of Housing and Urban

Development (“HUD”) standards, which have been adopted by reference in applicable regulations.¹⁰⁹ In order to comply with [OAC 3701-32-07\(G\)\(3\)](#), the Ohio Department of Health has a “Lead Visual Assessment Form” for Lead Risk Assessments to use when performing a risk assessment of a residential unit, child care facility or school. Samples must be tested at approved laboratories and proper quality control must be maintained.¹¹⁰

Prior to beginning a lead abatement project, a plan must be prepared by a qualified professional, and the ODH must be notified.¹¹¹ Lead abatement workers and other onsite professionals must have been examined by a physician within the year prior to conducting the abatement and be declared physically capable of working while wearing a respirator.¹¹² Approved encapsulants must be used and certain work practices are prohibited. There can be no open flame burning of lead-based paint, machine sanding lead based paint, and dry sanding lead based paint for example.¹¹³ OSHA standards must also be followed.¹¹⁴ Certain ethical requirements apply, such as the prohibitions on lead abatement contractors giving advice on the need for lead abatement and then participating in the abatement.¹¹⁵ Post-abatement cleaning must be completed pursuant to HUD standards.¹¹⁶ A lead risk assessor or lead inspector must perform a clearance examination following a lead abatement of schools, daycares, and residential units to ensure that the facility meets the clearance standards; and, prepare a report, written in the format prescribed under the regulatory requirements:¹¹⁷

- (a) Start and completion dates of the abatement;
- (b) Address, unit number, and date of construction of the residential unit, child day-care facility or school;
- (c) Name, address, and telephone number of the owner of the residential unit, child day-care facility or school;
- (d) Name and address of each firm conducting the abatement, the name of the designated lead abatement contractor or lead abatement project designer, and the name(s) of other lead abatement contractor(s) or lead abatement project designers present at the abatement project;
- (e) A detailed written description of the abatement, including the abatement methods used, location of rooms and/or components where abatement occurred, and the reason for selecting particular abatement

methods for each component abated, and any suggested monitoring of encapsulants or enclosures.

- (f) The occupant protection portion of the pre-abatement plan as required in paragraph (I)(4)(a) of this rule;
- (g) The written compliance plan portion of the pre-abatement plan as required in (I)(4)(b) of this rule;
- (h) A copy of all clearance examination reports as required by [rule 3701-32-12 of the Administrative Code](#);
- (i) If applicable, information on the storage, transport and disposal of any hazardous waste generated during the abatement;
- (j) Name, license number, and address of each lead abatement project designer who prepared the pre-abatement plan for the lead abatement project, if any; and
- (k) The statement prescribed in paragraph (E) of [rule 3701-32-15 of the Administrative Code](#) prominently displayed at the top of the report in bold letters.

Certain record keeping and reporting requirements apply. Real estate transactions require lead disclosure reports and notifications issued to the property owner or manager of a residential unit, day-care facility or school where a lead abatement occurred.¹¹⁸ Finally, ODH is empowered to grant variances from lead abatement requirements (including licensing requirements) upon a showing of no jeopardy to the health and safety of the public as well as a showing of “unusual and unnecessary” hardship.¹¹⁹

Footnotes — § 21.06:

¹⁰⁸ R.C. 3742.01(E).

¹⁰⁹ See, e.g., [OAC 3701-32-07\(H\)](#).

¹¹⁰ [OAC 3701-32-07\(H\)](#).

¹¹¹ [OAC 3701-32-08\(I\)](#).

¹¹² [OAC 3701-32-08\(I\)\(7\)](#).

¹¹³ [OAC 3701-32-08\(I\)\(9\)](#).

- ¹¹⁴ OAC 3701-32-08(I)(10).
- ¹¹⁵ OAC 3701-32-08(I)(8).
- ¹¹⁶ OAC 3701-32-08(I)(12).
- ¹¹⁷ OAC 3701-32-08(I)(13) and (14).
- ¹¹⁸ OAC 3701-32-15.
- ¹¹⁹ OAC 3701-32-18.

§ 21.07. Enforcement

Enforcement is handled both criminally and civilly.¹²⁰ The OAG, upon referral by the ODH, is required to bring an action for civil penalties and an injunction.¹²¹ Civil penalties may be assessed in the amount of up to \$1,000 per day, per violation.¹²² Criminal prosecutions may also be brought based on a referral by ODH to a county prosecuting attorney or city attorney.¹²³ A first violation is a misdemeanor, punishable with up to six months of jail and a fine of up to \$1,000.¹²⁴ Subsequent violations constitute a felony, which is punishable with up to three years imprisonment and a \$5,000 fine for each day of each violation.¹²⁵ In response to recent issues with drinking water containing lead in other states, the Ohio Governor's office is proposing more protective standards to protect the public against lead in drinking water.¹²⁶ By March 9, 2017, community and non-transient community public water systems were required to identify areas that are known or likely contain lead service lines. Almost all water systems provided maps to Ohio EPA in response to the new law.

Footnotes — § 21.07:

- ¹²⁰ R.C. 3742.18; R.C. 3742.99.
- ¹²¹ R.C. 3742.18.
- ¹²² R.C. 3742.18.
- ¹²³ R.C. 3742.99.
- ¹²⁴ R.C. 3742.99.
- ¹²⁵ R.C. 3742.99.

126 Ohio EPA News Release, 3/31/16, Protecting Ohioans from Lead in Drinking Water,
available *at*
<http://www.epa.ohio.gov/Portals/47/director/EPA%20Lead%20Fact%20Sheet%20FINAL.pdf>.

CHAPTER 22

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION POLICY, PROCEDURES, AND PRACTICE

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INTRODUCTION

§ 22.01. Scope

This chapter covers:

- The OSH Act of 1970 [see § 22.02 below].
- OSHA's joint audits and combined enforcement with U.S. EPA [see § 22.03 below].
- History of the regulations [see § 22.05 below].
- OSHA's recordkeeping and reporting requirements [see § 22.06 below].
- Safety and health complaint processing [see § 22.07 below].
- OSHA's targeting criteria for companies in selected hazard industries [see § 22.08 below].
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- Challenging OSHA citations through the contest procedure [see § 22.14 below].
- The self-audit: benefits and possible negative impacts [see § 22.15 below].
- Partnership strategies with OSHA [see § 22.16 below].

II.

OSHA'S INCEPTION AND JURISDICTION

§ 22.02. The OSH Act of 1970

[1] General Agency Organization

The Williams-Steiger Occupational Safety and Health Act of 1970 (OSH Act of 1970), created the Occupational Safety and Health Administration (OSHA).¹ The federal government administers the Ohio occupational safety and health program.² Approximately half the states fall directly under federal enforcement purview, while the remaining half enforce safety and health statutes in their state with federal oversight.³

[2] OSHA Jurisdiction Over Employers

In Ohio, OSHA has jurisdiction over private sector employers and federal employees. All other public sector employees fall under the jurisdiction of the State of Ohio for enforcement of safety and health regulations. This includes all municipal, county and state employees.

The definition of an employee is broadly construed by OSHA to include temporary employees and those who the employer controls. Generally the employer falls under OSHA's purview if compensation is provided to a person, the employer determines the physical location or work, and the hours of work and duties.

[3] OSHA Inspection Activity

In fulfillment of its mission, OSHA focuses on three basic strategies: (1) strong enforcement; (2) outreach, education and compliance assistance; and (3) partnerships and cooperative programs. In recent years, the emphasis has remained on strong enforcement with a consistently high level of inspection activity. OSHA inspections can be somewhat limited in scope or relatively comprehensive. Inspections may be conducted by OSHA in response to a number of triggering events, including an accident or injury, complaint, referral from other government or emergency response entities, OSHA emphasis program, or random selection.

[4] Ohio OSHA Activity

OSHA has a total of ten regions. Ohio is part of Region V which is comprised of three federal enforcement states: Ohio, Wisconsin and Illinois. Region V also has three state enforcement programs: Minnesota, Indiana and Michigan. OSHA Area Offices are staffed based on the number of workers in

their given geographic location. Positions at Area offices fluctuate based on shifts in worker population demographics.

Ohio has four Area Offices (Cincinnati, Cleveland, Columbus, and Toledo). Cincinnati's Area Office covers the 19 counties in the Southwestern portion of the state. The Cleveland Area Office covers 12 counties in Northeast Ohio. The Columbus Area Office, covers Central Ohio and Southeastern Ohio's 28 counties. The Toledo Area Office covers 29 Northwest Ohio counties from Lorain County to the Indiana border.

Footnotes — § 22.02:

¹ Codified at 29 U.S.C. § 651 *et seq.*; Pub. L. No. 91-596, 84 Stat. 1590; 91st Congress, S.2193; December 29, 1970, as amended through January 1, 2004.

² 29 U.S.C. § 651(b). OSHA's mission is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."

³ There are 25 states and 2 territories (Puerto Rico and the Virgin Islands) with state OSHA plans. Connecticut, New Jersey, New York, and the Virgin Islands plans cover public sector (state & local government) employment only. The "state plan" jurisdictions are required to provide safety and health regulations and enforcement as stringent as that of the federal program. Section 18 of the OSH Act of 1970 (29 U.S.C. § 667(c)) supports states that resolve to develop and operate their own job safety and health programs. OSHA approves, monitors, and regularly audits the performance of state plans.

§ 22.03. OSHA's Joint Audits and Combined Enforcement with U.S. EPA

[1] Coordination of Activities Between U.S. EPA and OSHA

A Memorandum of Understanding (MOU) between OSHA and U.S. EPA was developed to clarify and improve working relationships between U.S. EPA's Office of Enforcement and OSHA.

The stated goals of the agencies in the MOU are to improve their combined efforts to achieve protection of workers, the public, and the environment at facilities subject to U.S. EPA and OSHA jurisdiction; to delineate the general areas of responsibility of each agency; and to provide guidelines for coordination of interface activities between the two agencies with the overall goal of identifying and minimizing environmental or workplace hazards.⁴

U.S. EPA and OSHA may conduct joint inspections as necessary to carry

out their legislative purposes. The MOU provides for joint inspections or referrals when U.S. EPA or OSHA inspectors, in the course of conducting separate inspections, discover potential violations of the other agency's laws or regulations. OSHA and U.S. EPA make referrals to one another, conduct joint training and exchange data. Common areas of joint concern include: asbestos, plastic materials, organic chemicals, chemical releases or explosions, hazardous waste sites, chemical spills and petroleum refining. U.S. EPA personnel, in the course of their inspection, may identify safety concerns or receive complaints from employees. OSHA is expected to inform the appropriate U.S. EPA office of worker allegations of significant adverse reactions to a chemical which poses a potential hazard to public health or the environment; accidental, unpermitted, or deliberate releases of chemicals beyond the workplace; and unsafe handling, storage or use of chemicals or waste materials in apparent violation of U.S. EPA law. OSHA will also inform the U.S. EPA of readily detectible U.S. EPA violations such as: bypassing treatment systems, asbestos dispersal or contamination affecting the public or environment. OSHA directs U.S. EPA referrals for inspection in most instances, and follows up with a report to the U.S. EPA.⁵

Referrals are tracked and managed to assure that potential violations, allegations of violations, or situations requiring inspection, evaluation or follow-up by either agency are processed appropriately. OSHA has consistently performed more than 4,000 inspections per year in recent years as a result of referrals from other agencies.

[2] Increased Deterrence Through Combined Enforcement

In recent years, improved collaboration has occurred between OSHA, U.S. EPA and Justice Department prosecutors to identify and enhance prosecution of the most flagrant workplace safety violators. The Solicitor of the Department of Labor has required that OSHA will discuss all willful violations of OSHA rules that lead to a fatality with the Department of Justice. OSHA is expanding cooperation with U.S. EPA with regard to criminal enforcement. More OSHA Inspectors or Compliance Safety and Health Officers (Compliance Officers) now receive training to recognize violations of U.S. EPA rules. OSHA is also providing training on how to conduct inspections that could lead to a criminal case. The federal Sarbanes-Oxley legislation has strengthened federal penalties for lying to or misleading

government officials conducting safety investigations with a potential penalty of up to 20 years in prison.⁶ In contrast, OSHA's limited criminal enforcement authority under the OSH Act only subjects persons who make a "knowingly false statement" to a misdemeanor with a maximum \$10,000 fine and/or prison term not beyond six months.⁷ In Ohio, OSHA may pursue an additional avenue to seek criminal enforcement by referring a case to the State Attorney General.

[3] OSHA Coordination with Other Agencies

In the past, OSHA has not coordinated extensively with the Ohio Bureau of Worker's Compensation (BWC). If a BWC consultant is presently working with an employer on an issue, under limited circumstances OSHA may give deference to the BWC consultant and decline enforcement activities for that specific issue. OSHA has worked from time to time in the past with local building departments in Ohio to target certain types of worksites. Some municipalities have standard operating procedures that require a call to OSHA in the event of an industrial accident, fall or trench collapse. Fire inspectors have made referrals to OSHA on unsafe chemical storage, hazardous operations and substandard building egress situations. State and local police frequently preserve an accident scene by placing yellow "Do-Not-Cross" perimeter tape and/or remaining on site until an OSHA inspector arrives.

Footnotes — § 22.03:

⁴ MOU Between the U.S. Department of Labor Occupational Safety and Health Administration and the U.S. Environmental Protection Agency Office of Enforcement, Working Relationships between Occupational Safety and Health Administration and U.S. EPA, Information Date: 02/13/1991.

⁵ Ohio EPA may notify OSHA of an unlicensed asbestos remover's activities. In one case, a contractor was working at night and surreptitiously dumping the asbestos containing materials. OSHA participated in the inspection activity and cited OSHA's asbestos standard, hazard communication standard, and employee training standard.

⁶ Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, [Pub. L. No. 107-204](#), July 30, 2002, codified at [18 U.S.C. § 1514A](#).

⁷ [29 U.S.C. § 666](#).

§ 22.04. OSHA and EPA Overlapping Regulations

[1] OSHA Multiple Chemical Standards

[a] Chemical Hazard Communication

OSHA specifies requirements and training requirements that are to be in place prior to employees being exposed to chemicals. The hazard communication standard requires a written program and safety data sheets that shall be provided and used for training employees prior to exposure to chemical hazards. This training can be done by the employer.

Other standards may prescribe criteria for an acceptable source of the specified training which may be beyond the capabilities of most employers.⁸ Examples include the asbestos and process safety management standards, which will be discussed below, where EPA training courses or their equivalents are stipulated. Employees applying pesticides fall directly under the jurisdiction of the U.S. EPA and the Ohio Department of Agriculture rather than OSHA.⁹

[b] Process Safety Management for Highly Hazardous Chemicals

The OSHA process safety management standard targets highly hazardous chemicals with the potential to cause catastrophic incidents.¹⁰ The standard is required by the Clean Air Act's Amendments which also establish the Environmental Protection Agency's Risk Management Plan mandate. Section 304 of the Clean Air Act requires employers to train and educate their employees. Merging the two Agency's sets of requirements into the process safety management program is intended to assure full compliance with each of these mandates.

[c] Hazardous Waste and Emergency Spill Response

The OSHA Hazardous Waste Operations and Emergency Response (HAZWOPER) standard covers hazardous waste clean-up and remedial operations at sites covered by the Resource Conservation and Recovery Act of 1976 (RCRA).¹¹ Safety requirements mandated by the HAZWOPER standard, including employee training, will vary depending on the tasks and hazards.¹² A 40 hour off-site training requirement with three days field experience under the direct supervision of a trained experienced supervisor would be typically required for most workers involved in hazardous waste

operations.¹³ Competent trainers must complete a training program (or the equivalent field experience) or have academic credentials and instructional experience.

The second component of the HAZWOPER standard is emergency response to chemical spills. Those employers who intend for their employees to participate in emergency spill response (containing, stopping and cleaning) are required initially to train and then provide annual refresher training for all employees and supervisors involved.¹⁴

[2] OSHA's Specific Chemical Regulations

[a] Permissible Exposure Limits

Hazardous metals, mineral dusts, and volatile and carcinogenic chemical air contaminants are covered in OSHA's [29 C.F.R. § 1910.1000 Z-Tables](#). These tables contain permissible exposure limits for an eight-hour time weighted average and/or short term (measured in minutes) exposure limits. OSHA has issued standards which set permissible exposure limits for more than 400 substances. The OSH Act requires that, before a health standard can be promulgated, OSHA must demonstrate a significant risk to employees exists and that the standard in question will actually reduce that risk.¹⁵ The OSH Act also requires OSHA to gather data to demonstrate that a regulation is economically and technologically feasible for the industry as whole.¹⁶

EPA and OSHA have overlapping responsibilities and objectives in exercising their respective statutory powers. This overlap with other agencies' jurisdictions was recognized at the time the Toxic Substances Control Act (TSCA) was enacted and led to inclusion of TSCA section 9, "Relationship to Other Federal Laws," among others, which provides that the EPA Administrator "shall consult and coordinate" with other agencies in administering TSCA.¹⁷

[b] Asbestos

OSHA also has established expanded standards on several dozen specific chemical hazards.¹⁸ For instance, the OSHA Asbestos standard¹⁹ requires a competent person who is capable of identifying existing asbestos hazards in the workplace and selecting the appropriate control strategy for asbestos

exposure, who has the authority to take prompt corrective measures to eliminate them: in addition, for Class I and Class II work, one who is specially trained in a course which meets the criteria of EPA's Model Accreditation Plan (40 C.F.R. Part 763) for supervisor, or its equivalent and, for Class III and Class IV work, who is trained in a manner consistent with EPA requirements for training of local education agency maintenance and custodial staff as set forth at 40 C.F.R. § 763.92(a)(2). In Ohio, training may be furnished by Ohio EPA directly or a state-approved training provider, certified by Ohio EPA, or a course equivalent in stringency, content, and length to the Ohio EPA course.

[c] Lead

OSHA's construction lead standard has coverage and scope requirements similar to that of the asbestos construction standard. OSHA requires written programs, assessment, training and waste disposal requirements covered by various agencies.²⁰ For instance, the employer shall assure that the containers of contaminated protective clothing and equipment required by the standard have the following labels: "Caution: Clothing contaminated with lead. Do not remove dust by blowing or shaking. Dispose of lead contaminated wash water in accordance with applicable local, state, or federal regulations." Lead exposure in renovations to buildings and bridges triggers initial and annual re-training requirements. State EPA certification (after training and testing) or certification from the Steel Structures Painting Council could serve as evidence of satisfying the required training component of a company's comprehensive lead program.²¹

Footnotes — § 22.04:

⁸ An example is the bloodborne pathogen standard 29 C.F.R. § 1910.1030 that requires a medical professional be available for questions.

⁹ The U.S. Environmental Protection Agency regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The EPA sets forth extensive requirements concerning the labeling and application of pesticides, which, among other things, includes personal protective equipment, pesticide safety training, decontamination, and restricted entry intervals for workers in 40 C.F.R. Part 170.

¹⁰ 29 C.F.R. § 1910.119.

¹¹ RCRA as amended (42 U.S.C. § 6901 *et seq.*).

¹² Consider the relationship between 29 C.F.R. § 1910.120 with other authorities and standards including: The U.S. EPA’s Comprehensive Environmental Response Compensation and Recovery Act of 1980; Superfund Amendments and Reauthorization Act, title III; U.S. EPA’s Clean Air Act Amendments of 1990; The National Fire Protection Association NFPA Standards; Department of Transportation, Hazardous Material Transportation Uniform Safety Act of 1990; United States Coast Guard, Oil Pollution Act of 1990; National Response Team; Integrated Contingency Plan.

¹³ On-site management and supervisors who are either directly responsible for or who supervise employees engaged in hazardous waste operations generally must receive 40 hours initial training, and three days of supervised field experience. Training may require Department of Energy or Defense Department training where radioactivity and/or shock-sensitive wastes may be encountered.

¹⁴ 29 C.F.R. § 1910.120(q) specifies the training criteria required. A 24 hour Hazardous Materials Technician course is required prior to any employee approaching the source of the spill to patch or plug the container and stop the leak. The Incident Commander and Hazardous Materials Specialist who may coordinate with outside agencies would also require 24 hours of training. Trainers may obtain competency through the U.S. National Fire Academy, or have training and/or academic credentials and instructional experience.

¹⁵ As interpreted by the U.S. Supreme Court in *Industrial Union Dep’t v. American Petroleum Institute*, 448 U.S. 607, 8 OSH Cases 1586 (1980).

¹⁶ As interpreted by federal appeals courts in *American Fed’n of Labor v. OSHA*, 965 F.2d 962, 15 OSH Cases 1729 (11th Cir. 1992); *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

¹⁷ The Toxic Substances Control Act (15 U.S.C. §§ 2601 through 2629) was enacted in 1976.

¹⁸ There are several dozen toxic and hazardous substance standards in 29 C.F.R. Part 1910, Subpart Z that regulate specific chemicals with very detailed sets of requirements.

¹⁹ 29 C.F.R. § 1910.1001 covers general industry and 29 C.F.R. § 1926.1101 covers the construction industry.

²⁰ 29 C.F.R. § 1910.1025(a)(2).

29 C.F.R. § 1910.1025 does not apply to the construction industry or to agricultural operations covered by 29 C.F.R. Part 1928.

²¹ OSHA requires training and competency in numerous standards, but does not always stipulate where to go to obtain that training and competency. Experience may be substituted for academic credentials and/or certification in some circumstances. OSHA generally does consider Certified Safety Professionals, Board Certified Industrial Hygienists or Registered Professional Safety Engineers as good examples of sufficient professional stature for safety and health managers who will provide training and administer the employer’s safety and health programs.

III.

OSHA REGULATIONS

§ 22.05. History of the Regulations

In addition to regulating employee exposure to chemical hazards, OSHA has far-ranging safety, health and reporting standards. Section 6(a) of the OSH Act of 1970²² temporarily suspended the rule-making provisions of the Administrative Procedure Act and allowed the Secretary of Labor two years to adopt a set of safety and health regulations rapidly. The regulations were to be drawn from any (1) national consensus standard,²³ or (2) established federal standard that would result in improved safety or health for specific employees.²⁴ Generally accepted industry practices or national consensus standards are referenced when OSHA cites the Section 5(a)(1) of the OSH Act of 1970, better known as the “general duty clause.”²⁵ The OSHA standards are grouped into large headings called subparts.

Caution: Training and experience often enable most compliance officers to locate deficiencies in even the most exhaustive safety and health programs. Making a “good effort” or having a good faith belief that written programs and training are generally adequate is often not enough to avoid citations entirely.

Footnotes — § 22.05:

²² 29 U.S.C. § 655.

²³ Pursuant to the OSH Act, “national consensus standards” are defined as “any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.” 29 U.S.C. § 652(9).

²⁴ 29 U.S.C. § 655. A general industry employer must follow 29 C.F.R. Parts 1900 to § 1910.999 and Parts 1910 § 1910.1000 to End. In construction, employers follow 29 C.F.R. Part 1926. OSHA standards are cited directly.

²⁵ See § 22.12[4] below for additional explanation of the general duty clause violation (§ 5(a)(1) of the OSH Act).

§ 22.06. OSHA’s Recordkeeping and Reporting Requirements

[1] Required OSHA Recordkeeping Forms 300, 300A, and 301

[a] OSHA Form 300 Log of Work-Related Injuries and Illnesses


If an employer has eleven or more employees during the last calendar year, that entity must keep injury and illness records.²⁶ The log entry identifies the worker, describes the case and classifies the work-related injury or illness.²⁷ OSHA can request OSHA Form 300 reports for the past five years during any inspection. Failure to complete OSHA recordkeeping forms or to complete them accurately will result in the issuance of a citation.²⁸

[b] OSHA Form 300A Summary

The Work-Related Injuries and Illnesses summary form (OSHA Form 300A) summarizes annual injury and illness data from the OSHA 300. The employer is required to complete the summary for the previous year by January 31, verify its accuracy and certify it with a company executive's signature.²⁹ It must then be posted at the facility beginning February 1 and remain posted through April 30 in a conspicuous place.

[c] OSHA Form 301 Injury and Illness Incident Report

In Ohio, the OSHA Compliance Officer conducting an inspection will most likely request OSHA Form 301 or the equivalent BWC-1011 detailed incident report forms for any recorded injuries or illnesses of interest.³⁰ This form must be completed within seven calendar days after receiving information of an occurrence of a recordable work-related injury or illness.³¹ The information revealed on these forms can be used to expand the inspection. For example, based on a recorded amputation, a compliance officer may decide to evaluate a specific machine for possible guarding deficiencies.

 **Warning:** The 300 series forms should be completed carefully to ensure factual accuracy. When completing the 300 series forms, particularly the detailed OSHA 301 or Bureau of Worker's Compensation equivalent form, it is considered best practice to simply state the facts and avoid admissions or speculation as to causation. Accuracy and completeness of these records have become an enforcement focus in recent years.

[2] Fatality and Catastrophe Reporting Requirements

Within eight hours of the death of any employee from a work-related incident, the employer must make an oral report to OSHA.³² In addition, the in-patient hospitalization of one employee or any amputation or loss of an eye by an employee must also be reported to OSHA within 24 hours.³³ The employer may call the OSHA Area Office that is nearest to the incident, or use the OSHA toll-free central telephone number, 1-800-321-OSHA.³⁴ The eight-hour and 24-hour time clocks begin once any agent or employee of the employer learns of an employee death or hospitalization or amputation.

Caution: As emotions are still running high after a workplace death or significant accident, employees and/or managers sometimes inadvertently make admissions during the oral report that the Compliance Officer will carefully note. These statements may be used to later upgrade the citation classifications or increase the number of citations. Fatality inspections always garner additional scrutiny from an enforcement perspective. If at all possible, employers should consider consulting with counsel before making a timely report in these difficult circumstances.

Footnotes — § 22.06:

²⁶ 29 C.F.R. § 1904.1(a)(1). Specific “low hazard” industries are not required to keep the OSHA 300 log. 29 C.F.R. § 1904.2(a)(1). The Bureau of Labor Statistics randomly selects a relatively small number of employers each year that are required to keep records and submit them to the Bureau for statistical analysis purposes.

²⁷ Recordable injuries are those that require actual medical treatment (beyond simple first aid) and either days off or restricted duty beyond the date of the incident.

²⁸ Deficiencies that materially impair the understandability of the nature of the hazards, injuries and/or illnesses at the workplace can subject the employer to a penalty where: (1) OSHA can document that the employer was previously informed of the requirements to keep records; or (2) the employer’s deliberate decision to deviate from the requirements or plain indifference to the recordkeeping requirements can be documented. Scrutiny of employer compliance with these recordkeeping obligations has become one of OSHA’s enforcement areas of emphasis.

²⁹ 29 C.F.R. § 1904.32(b)(3). The owner, company officer or highest-ranking executive at the establishment certifies that the document has been examined and that entries are true, accurate and complete under penalty of fine for knowing falsifications.

³⁰ An equivalent form to the OSHA 301 is allowable where the same information is provided about the employee, physician or health care professional, and issues of the case. In Ohio, the Bureau of Workers’ Compensation BWC-1011 (Rev. 8/2005) First Report of an Injury, Occupational Disease or Death, is an acceptable equivalent form to the OSHA 301 for recordkeeping purposes.

³¹ 29 C.F.R. § 1904.29(b)(3) requires that the employer retain the OSHA 300 series forms for five (5) years. There is a duty to update the OSHA Form 300 during the five-year retention period per 29 C.F.R. § 1904.33. Updating is required when any newly-discovered recordable injuries or illnesses become known or the classification changes on a previous recording. There is no requirement to update the OSHA 300A or 301.

³² 29 C.F.R. § 1904.39.

³³ 29 C.F.R. § 1904.39.

³⁴ Accidents that occur on a public street that is not considered a construction work zone do not have to be reported under this provision. However, a seemingly natural death such as a heart attack at work is nevertheless required to be reported. OSHA will determine if the event was work-related and requires an inspection “depending on the circumstances.” This may involve a cursory survey of possible causal factors such as chemical hazards present, heat stress and/or physical exertion.

IV.

OSHA INSPECTIONS

§ 22.07. Safety and Health Complaint Processing

[1] OSHA Complaint Processing and Scheduling the Inspection

While employees are most likely to do so, anyone can make a complaint to OSHA. The Area Office reviews and processes all serious allegations of employee exposure to safety and health hazards. Not all complaints will result in an on-site inspection or telephone investigation. Where the Area Director, exercising professional judgment, determines there are no reasonable grounds to believe that a violation or danger exists, no inspection or investigation will be made.

Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to OSHA of such violation or danger.³⁵ Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees.³⁶ Where a current employee or employee representative signs a “formal complaint,” an on-site inspection is scheduled.³⁷

Reasons for OSHA to initiate an on-site inspection from a complaint include: (1) allegations of a permanent disabling injury; (2) allegations of

imminent danger situations; (3) allegations of hazards covered by a local or national emphasis program; (4) an inadequate response to an informal investigation; (5) the complainant provides evidence that the employer's response was false or inadequately addressed the hazards; (6) the establishment has a history of egregious, willful or failure-to-abate citations within the Area Office jurisdiction in the past three (3) years; or (7) a subsequent complaint after an on-site inspection has begun.³⁸

[2] Nonformal Investigations Using the Telephone and Telefax

OSHA sometimes allows impacted employers an opportunity to deal with some complaints informally via telephone and telefax. OSHA may process complaints from angry customers, former employees, competitors and others, as informal "complaint investigations." OSHA's Complaint Officer will call or write the employer and explain the hazard and request that the appropriate person at the facility investigate and address the concern as soon as possible.

The Complaint Officer may request some assurance that the situation is resolved very promptly. After the telephone call, the allegations are typically faxed in the form of a complaint. The complaint includes a posting requirement to share information with employees. An adequate written response from the employer is due within a prescribed, brief time period to avoid OSHA scheduling an on-site inspection. OSHA informs the employer that some cases are scheduled for inspection regardless to assure that employers take action. In Ohio and throughout the country, OSHA will convert investigations to on-site inspections where there remain inadequately addressed complaint items.³⁹

Caution: An employer is well-advised to have legal counsel familiar with OSHA processes and abatement methodologies review any response prior to submission. In order to maximize the chance that a complaint investigation will not lead to a physical inspection, answers to non-formal complaints should be timely, thorough and responsive to the underlying alleged safety issue even when the complaint may not sufficiently explain the underlying issue and even where the employer is convinced that the complaint is baseless.

³⁵ 29 U.S.C. § 657. The complainant’s name will be redacted from the copy of the complaint provided to the employer or any subsequent copies of materials published or provided in Freedom of Information Act requests.

³⁶ 29 U.S.C. § 657.

³⁷ OSH Act of 1970 § 8(f)(1) codified at 29 U.S.C. § 657.

³⁸ CPL 02-00-140—Complaint Policies and Procedures, Effective date 06/23/2006. Available on line at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3389.

³⁹ OSHA Directive CPL 02-00-140—Complaint Policies and Procedures, June 23, 2006 determines when an on-site inspection will be scheduled. Any one of several factors, if present, will still result in an inspection, including: “The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer’s response is false or does not adequately address the hazard(s).”

§ 22.08. OSHA’s Targeting Criteria for Companies in Selected Hazard Industries

[1] Site Specific Targeting (SST)

Ohio and other states with federal enforcement use the annual SST program to target inspections of high hazard industries. State enforcement plans may adopt this system or use other targeting schemes. To select targets for the SST program, establishments in various industries are surveyed, and OSHA determines injury and illness rates based on average DART⁴⁰ and DAFWII rates.⁴¹ Area Offices prepare primary and secondary lists of targeted establishments using this information. Deletion from the inspection list can occur if a targeted establishment participates in a Voluntary Protection Program (VPP), or OSHA’s Safety and Health Achievement Recognition Program (SHARP).

OSHA conducts random comprehensive safety inspections under this program based on prior experience or knowledge of a particular establishment or industry. The threshold DART rates and DAFWII case rates can change annually for both the Primary and Secondary Inspection Lists. The Primary List will generally include those establishments with a DART rate at or above 12.0, or a DAFWII case rate at or above 9.0. OSHA gives strong consideration to facilities that have failed to reduce elevated DART or DAFWII rates in compiling its Primary List. Area Offices will complete

inspections of Primary List facilities before beginning to visit Secondary List facilities for SST inspections. The Secondary List generally includes establishments with a DART rate of 7.0 or greater, but less than 12.0, or a DAFWII case rate of 5.0 or greater, but less than 9.0.

[2] Popular Emphasis Programs Applicable in Ohio

Ohio OSHA Area Offices periodically target specific industries for enhanced enforcement to address hazards to workers that fall within their jurisdiction through Local Emphasis Programs (LEPs). Regional Offices and/or Area Offices design and implement these enforcement strategies. LEP outreach activities include informational mailings, local training events at meetings of industry associations or labor organizations. With each emphasis program, there are mechanisms in addition to the routine means in place for a Compliance Officer to gain access to a site for an inspection. For example, Ohio implemented a Construction Fall LEP. A compliance officer who observes employees working at heights without proper fall protection while driving is required to stop and address the situation.⁴² The Compliance Officer typically documents “plain view” hazards from a public location with enhanced lens photography or a video camera with strong zooming capabilities prior to setting foot on site.

A single Area Office may implement emphasis programs. There are also Regional Emphasis Programs that apply to all of the Area Offices. For example, Region V targets include falls hazards in construction, amputations, and power industrial vehicles.

OSHA also develops and implements, from time to time, a number of National Emphasis Programs (NEPs) with enforcement and outreach implications. NEPs may target industries, equipment, or substances. Examples include: machinery capable of causing amputations, trenching and excavations, combustible dust, silica and lead or other hazardous substances. The Compliance Officer will review NEP items on each inspection to expand the scope of the inspection. Alleged NEP hazards on a complaint generally require an on-site enforcement inspection. OSHA uses emphasis programs to leverage its limited resources and have a greater impact on those targeted industries and activities where the greatest exposure to serious injuries and illnesses exists.

[3] The Revised NEP on Amputations

The revised NEP on amputations has enhanced enforcement provisions which includes additional targeting criteria for identifying companies that will be placed on a master list by the National Office and provided to the Area Offices.⁴³ Area and regional offices add to the master list of establishments using identified Standard Industrial Classification (“SIC”) codes. The selected SICs had high OSHA accident data numbers coupled with high Bureau of Labor Statistics (BLS) amputation numbers.⁴⁴ Area offices may add general industry establishments to their master list where amputation injuries or fatalities related to machinery and equipment have occurred in the five (5) years preceding the directive’s effective date of October 27, 2006.⁴⁵ The basis for an addition to the master list must be documented. Once on site, evidence of amputations from the OSHA 300 logs and evidence of certain types of equipment on site (from a list of approximately 30) will be evaluated by the Compliance Officer.⁴⁶

Footnotes — § 22.08:

⁴⁰ Days Away, Restricted, or Transferred (DART) Rate: The DART rate includes cases involving days away from work, restricted work activity and transfers to another job. It is calculated based on $(N \text{ EH}) \times (200,000)$ where N is the number of cases involving days away from work and/or restricted work activity, and/or job transfer; EH is the total number of hours worked by all employees during the calendar year; and 200,000 is the base number of hours worked for 100 full-time equivalent employees.

⁴¹ Days Away from Work Injury and Illness (DAFWII) Case Rate: The DAFWII case rate is the number of cases that involve days away from work per 100 full-time equivalent employees. Cases that involve only temporary transfers to another job or restricted work are not included. It is also calculated based on $(N \text{ EH}) \times (200,000)$. The DART and DAFWII rates are differentiated by the makeup of N in the calculation formula. For the DAFWII rate, N is equal to the total of Column H [days away from work] from the OSHA-300 Log. The DAFWII is the same as the Days Away Case Rate (DACR) that is referred to in OSHA’s Voluntary Protection Programs.

⁴² Per CPL 04-00 (LEP 006), the Compliance Officer is required to follow established procedures to gain entrance to the site. This requires a call to the Area Office Supervisor. If the worksite has not been inspected in the last 30 days, permission will be given by the Area Officer Supervisor to inspect the site. If an imminent danger situation appears to exist, recently inspected sites will also receive a limited inspection to address the imminent danger situation and any plain view hazards.

⁴³ The enhanced enforcement OSHA Directive CPL 03-00-003—National Emphasis on Amputations became effective October 27, 2006 and cancels the previous OSHA Instruction CPL 03-00-002, (CPL 2-1.35) that had been in effect since March 26, 2002.

⁴⁴ Per CPL 03-00-003, the National Office will provide additional companies to the master lists based on enforcement data from the following standards: 29 C.F.R. § 1910.147, The Control of

Hazardous Energy (Lockout/Tagout); 29 C.F.R. § 1910.212, General Requirements for all Machines; 29 C.F.R. § 1910.213, Woodworking Machinery; 29 C.F.R. § 1910.217, Mechanical Power Presses; and 29 C.F.R. § 1910.219, Mechanical Power-transmission Apparatus. These standards are combined with BLS Amputation Numbers and Rates.


⁴⁵ Per CPL 03-00-003: local evidence of amputations, available workers' compensation data, OSHA 200 and OSHA 300 data, NIOSH data, and other reliable sources of information (e.g., reports of amputations from hospital admissions, Emergency Medical Services, fire department, and police reports) may be used to add to the master list.

⁴⁶ Per CPL 03-00-003, in conducting an inspection of the machinery and equipment, particular attention will be paid to employee exposure to nip points, pinch points, shear points, cutting actions, and other point(s) of operation. "The [Compliance Officer] should consider and evaluate employee exposures during any of the following: regular operation of the machine; setup/threading/preparation for regular operation of the machine; clearing jams or upset conditions; making running adjustments while the machine is operating; cleaning of the machine; oiling or greasing of the machine or machine pans; scheduled/unscheduled maintenance; and locking out or tagging out."

§ 22.09. The On-site Enforcement Inspection


[1] The Opening Conference

The Compliance Officer will arrive on-site after being assigned an inspection for any of the reasons described above, including if he or she observes a plain view hazard while driving by the facility or activity. The Compliance Officer must initially present his or her credentials and state the purpose for the visit. Where a complaint or referral exists, the employer is provided a copy.⁴⁷ Where the workplace has a union, an employee representative has the right to participate in the OSHA inspection starting with the opening conference.⁴⁸ In addition, a complaining employee has the right to participate in an inspection of the subject of the complaint.⁴⁹

 **Strategic Point:** The employer should request the Compliance Officer to describe the scope of the inspection. Clarify the specific, written safety and/or health programs, equipment and processes that they wish to view. Stay focused on those items and any written complaint issues.

The Compliance Officer generally will hold an opening conference with the employer. The Compliance Officer may attempt to shorten the opening conference to arrive on the plant floor quickly to observe and photograph "plain view" hazards. The Compliance Officer should indicate the authority

to videotape, photograph, measure items, review safety programs and injury and illness logs, as well as conduct private employee interviews. OSHA procedures permit the Compliance Officer discretion to wait before commencing the inspection a reasonable amount of time (usually up to one hour or so) for an employer representative to arrive when requested by the employer. Where access is refused on a voluntary basis or delayed unreasonably, OSHA may seek to obtain a warrant. See [§ 22.10\[1\]](#) below.

 **Strategic Point:** After obtaining the written complaint or referral from the Compliance Officer, employers may wish to consider placing a call to counsel. The employer's objectives and Compliance Officer's objectives are typically in direct conflict. The Compliance Officer is there to discover and document deficiencies, then recommend the maximum number of citation items and penalties. Providing help to the employer in correcting problems and recommending abatement methodology may be only a secondary objective at best.

[2] General Industry Inspection Procedure

There are great variations in operations covered under the general industry standards ([29 C.F.R. Part 1910](#)) from factories, foundries and assembly plants to warehouses, repair shops and refineries. There are common issues typically reviewed on each inspection including: the OSHA poster, first aid supplies and training (where remote from medical facilities), personal protective equipment, fire safety and emergency egress, a chemical hazard communication program and training. The employer is usually asked to provide copies of the OSHA Form 300 for review. Emergency action plans and fire extinguisher training records will be reviewed.


A comprehensive written program and training is required if employees service and maintain machinery and equipment that might unexpectedly become energized. This lockout tagout procedure includes a specific set of written procedures for each different type of machinery or equipment on site. Where employees enter confined spaces, another comprehensive written program with permits and training requirements must exist. Each entry requires completion of a detailed permit to ensure elimination of all potential hazards. Employers that utilize powered industrial trucks (fork lifts), must

thoroughly train, test, certify, and regularly recertify each operator.⁵⁰ Overhead crane operations (including slings and hooks) require training and various inspections with records and written certifications. Numerous, stringent requirements and various targeting programs exist for operators who make use of mechanical power presses.

Specific requirements are in place for exit signs, written hazard assessments for personal protective equipment and welding and cutting operations (including permits). The Compliance Officer must evaluate any amputation hazards.⁵¹ There are also standards for: processing of highly hazardous chemicals, dip tanks, spray or powder coat finishing to prevent fires and explosions (including appropriate explosion-rated wiring and fixtures). Various industries from logging operations and sawmills to telecommunications and electric power generation, distribution, and transmission have specific, detailed standards to address the unique industry hazards. Generally, four (4) foot or greater potential falls require guardrails, covers, or some means of fall protection in general industry, although lower fall thresholds trigger requirements in certain special risk scenarios.⁵²

[3] The Closing Conference

After the walk-through inspection, employee interviews, written programs and records review, OSHA will conduct a closing conference with the employer. This may or may not occur the same day as the opening conference and walk-through inspection. Alternatively, the Compliance Officer may schedule the closing conference days, weeks or months later where the inspection is more complex and time-consuming.

 **Strategic Point:** Carefully note the proposed violations described at the closing conference, and request clarification on any issues that are not conveyed clearly. It is usually not fruitful at this stage to engage in argument with OSHA over the merit of proposed violations. OSHA will rarely agree during a closing conference to eliminate a proposed violation. However, using this opportunity to clear up any obvious and important factual mistakes may be beneficial. Also, be sure to record or copy each document submitted to OSHA during any inspection.

An explanation of the citation classifications and penalty structure is generally provided. The Compliance Officer generally will not discuss the specific classifications of the alleged violations. The Compliance Officer should explain the citation posting requirements, the employer's right to contest, and may solicit tentative reasonable time periods during which the employer could correct alleged violations. Of course, employers are not obligated to negotiate abatement with OSHA at this preliminary stage.

Footnotes — § 22.09:

⁴⁷ The OSHA 7 Notice of Alleged Safety or Health Hazards is the preferred form that is delivered to the employer, even when an OSHA 90 Referral Report may have generated the original "complaint." A Referral may be made by: (1) Compliance Officer referral—information based on the direct observation (within Area Office); (2) safety and health agency referral—from sources including, but not limited to: NIOSH, state programs, consultation, state or local health departments, local police and fire departments, medical doctors, as well as safety and/or health professionals in other federal agencies; (3) an 11(c) complaint referral—made by an 11(c) discrimination (whistleblower) investigator when an employee alleges that he or she was discriminated against for complaining about safety or health conditions in the workplace or for refusing to do an allegedly imminently dangerous job or task; (4) other government agency referral—made by other federal, state, or local government agencies or their employees; (5) media report—either news items reported in the media or information reported directly to OSHA by a media source; (6) employer report—of accidents other than fatalities and catastrophes.

⁴⁸ 29 U.S.C. § 657.

⁴⁹ 29 U.S.C. § 657.

⁵⁰ When OSHA uses the term "certified" it can be generally understood to require: dates, names and titles of employees trained or observed, names and titles of management persons signing-off and some descriptive information as to what is being "certified."

⁵¹ Per CPL 03-00-003, this NEP on Amputations applies to each general industry workplace inspection where, among others, saws, shears, slicers, press brakes and power presses of all types are present.

⁵² Fall protection at four (4) feet is required on platforms, runways and walking and working surfaces. Where employees would contact chemical hazards, heated materials, dangerous equipment or machinery, OSHA requires guarding at a height less than four (4) feet.

§ 22.10. Employer Rights

[1] Right to Require Warrant

Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or


exigent circumstances) an employer has a right to require that the Compliance Officer seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.⁵³ Employers generally are not reminded by OSHA that the employer can request that OSHA obtain a warrant. Most inspections are consented to by the employer voluntarily. Once the employer permits an inspection, there is typically little legal recourse to challenge the validity of the inspection later.

If asked to obtain a warrant, OSHA will prepare a warrant application that outlines the reason for requiring an inspection, and details the safety and health programs, machinery, equipment and processes that need to be inspected for compliance.⁵⁴ OSHA will then present the warrant application to a federal magistrate judge who will review and approve the warrant authorizing compulsory process. OSHA may also prepare and obtain a warrant in advance where prior history indicates it will be required.⁵⁵

[2] During an Inspection

OSHA compliance officers' credentials may be verified but not copied. A written complaint generally will be provided to management shortly after arrival on site. The employer maintains the right to suspend the inspection at any point during the process and require the Compliance Officer to obtain a warrant. The Compliance Officer will generally complete whatever portion of the inspection that is allowed, then seek compulsory process, if needed, to complete the inspection.⁵⁶

The Compliance Officer is required to address and document any "plain view" hazards. The Compliance Officer will document a hazard by photographing, measuring and obtaining information as to employee exposure. Photographs in OSHA's file can be marked "confidential" where any proprietary information exists to protect any trade secrets. An employer can request that the Compliance Officer limit the photographs to the actual area of concern.


 **Strategic Point:** Read the complaint narrowly. Do not attempt to fill-in the details that may broaden the scope of the inspection. Plan your movement through the facility so as to limit the inspector's exposure to the facility to only areas directly related to the scope of the inspection. Do not perform a demonstration of an entire process

where the scope only addresses a portion of a process. Explain the process later if requested. Once parameters have been agreed upon and the physical inspection begins, if the scope or intensity seems to unexpectedly increase in a manner that is unacceptable, consider temporarily suspending the inspection, returning to a neutral location such as a conference room and revisiting negotiation of terms on which the employer will allow the inspection to continue voluntarily.

A noise complaint or complaint lacking specificity may require a more extensive walk through the facility.⁵⁷ Management and counsel have the right to participate at each step of the walk-through.⁵⁸ If it is dangerous or difficult to interview employees on the plant floor, identify employees that the Compliance Officer may want to interview later. Although a Compliance Officer may insist on private employee interviews, it is the individual's right to have a friend, co-worker, union representative or any one else (including management if the employee so chooses) present during an interview.⁵⁹

[3] The Informal Conference

An employer that receives citations has fifteen (15) working days to: (1) arrange and attend an Informal Conference with the local OSHA Area Director; (2) sign a settlement agreement, pay the penalties and provide evidence of abatement; or (3) file written notice of contest. At the Informal Conference, the employer may present additional information, negotiate and reach a settlement. The Area Director has the authority to amend citation language, vacate, reclassify and/or group items to lessen penalties. Documented financial hardship may reduce penalties. Additional abatement time may be obtained at the Informal Conference.⁶⁰ Unless a union contests abatement dates, these extension requests will generally be granted.⁶¹

 **Strategic Point:** When contemplating an attractive offer to settle, recognize that a settlement agreement admits liability for committing any remaining violations. Exculpatory language may be obtained to eliminate admissions of guilt for any other purposes other than future dealings with OSHA.

Footnotes — § 22.10:

⁵³ If not voluntarily allowed, the U.S. Supreme Court has held that the [Fourth Amendment](#)

requires a warrant for a “nonconsensual” OSHA inspection. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

⁵⁴ Pursuant to 29 C.F.R. Part 1904, an *ex parte* warrant is preferred where compulsory process is relied upon to seek entry to a workplace.

⁵⁵ CSP 01-01-013 (former number STP 2.18) Inspections and Investigations: Obtaining Warrants on an Ex Parte Basis and Prior to Attempting Entry (February 26, 1981). The OSHA directive is available on line at:
http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1863.

⁵⁶ See OSHA Field Inspection Reference Manual CPL 2.103 Section 6, Chapter II, Inspection Procedures.

⁵⁷ A complaint item lacking specificity may read: “Unguarded electrical panel boxes throughout the plant are exposing employees to shocks from live parts.” If OSHA is requested to obtain a warrant because the complaint lacks specificity, they will need to demonstrate a reasonable basis that the alleged violation exists. This may require contacting the complainant for more information to document the warrant application. See OSHA Field Inspection Reference Manual CPL 2.103 Section 6, Chapter II, Inspection Procedures.

⁵⁸ Section 8(e) of the OSH Act of 1970 (codified at 29 U.S.C. § 657) provides: “[A] representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative [compliance officer] shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.”

⁵⁹ Case law indicates that the decision regarding a third party’s potential participation in a private employee interview ultimately resides with that individual employee. See *Reich v. Muth*, 34 F.3d 240, 244 (4th Cir. 1994). Therefore, by implication, the employer or their representative may be present during any management interviews. See *id.*

⁶⁰ Later, this becomes a much more formalized process requiring in writing a “petition for modification of abatement.” The OSHA Area Office reviews the petition and maintains the discretion to deny the petition.

⁶¹ The union has party status with rights to participate in an informal conference. The union has the right to contest the abatement dates and/or the abatement methodology. The penalty negotiation and other aspects of the settlement negotiations are strictly between OSHA and the employer.

§ 22.11. Employee Rights Under OSHA Whistleblower Statutes

[1] Whistleblower Basics

OSHA administers 14 statutes with whistleblower provisions.⁶² The

Whistleblower Investigators are required to follow-up on all timely allegations of employment discrimination made by whistleblowers to determine if the case has merit. Many whistleblower statutes require complainants to begin their complaint process with OSHA and/or exhaust an administrative remedy prior to bringing suit in another forum.

To establish an employee discrimination complaint, OSHA must show: (1) that the employee engaged in protected activity, (2) the employer knew about that activity, (3) the employer subjected him or her to an adverse employment action, and (4) the protected activity contributed to the adverse action. Adverse employment action generally requires a “material change in the terms or conditions of employment.” Discrimination may be found in the following actions: termination or layoff; blacklisting, failure to hire or rehire, demotion or failure to promote; reassignment diminishing prospects for promotion; movement to different or undesirable shift; removal from overtime; reductions in hours or pay; denial of benefits; selective disciplinary action; and/or intimidation.⁶³

[2] The Whistleblower Investigator

Whistleblower Investigators interview complainants, other employees, supervisors and upper management. Evidence of adverse action may include *animus*, disparate treatment, and timing of the alleged discrimination in relation to the protected activity. Typical information requests to employers include: records involved in the allegations, payroll and evidence of verbal or written disciplinary actions. The Whistleblower Investigator may share information or issues raised by the complainant with officials from other agencies.

🕒 **Timing:** Discrimination complaints under the OSH Act, must be made within 30 days of the adverse action. They may be phoned in to OSHA by a complainant. Untimely filed cases are dismissed by OSHA.

[3] Disposition of the Case

If OSHA finds merit in the complaint after conducting its investigation, the remedy pursued by the OSHA Area Director is one that makes the complainant whole. Typically, the negotiated settlement agreement may

include rehiring with back pay, or some monetary payment where the complainant and/or employer has no desire to continue the working relationship. The various statutes determine the particular venue for legal challenges. Under the OSHA statute, the Department of Labor Office of the Solicitor must file their complaint in Federal District Court.

Footnotes — § 22.11:

⁶² Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA); The Surface Transportation Assistance Act of 1982 (STAA); The Asbestos Hazard Emergency Response Act of 1986 (AHERA); The International Safety Container Act of 1977 (ISCA); The Safe Drinking Water Act of 1974 (SDWA); The Federal Water Pollution Control Act of 1972 (FWPCA); The Toxic Substances Control Act of 1976 (TSCA); The Solid Waste Disposal Act of 1976 (SWDA); The Clean Air Act of 1977 (CAA); The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA); The Energy Reorganization Act of 1978 (ERA); The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21); Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (CCFA) (Sarbanes-Oxley Act); Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA).

⁶³ Employee discrimination is prohibited per § 11(c) of the OSH Act of 1970 codified at [29 U.S.C. § 660](#). OSHA's Office of Investigative Assistance has published a web page on the Whistleblower Program that covers the basics regarding employee rights. It is available at <http://www.osha.gov/dep/oia/whistleblower/index.html>.

V.

ENFORCEMENT THROUGH CITATIONS AND PENALTIES

§ 22.12. An OSHA Violation

[1] Elements of an OSHA Violation

OSHA must prove each violation by a preponderance of the evidence. First, there must be a standard that applies to the activity.⁶⁴ There are general universal standards that apply to numerous conditions and industries. There are also various specific standards that narrowly apply to individual industries. If both types of standards appear to apply to a situation, OSHA is required to apply the specific industry standard. Second, OSHA must prove the employer's non-compliance with the standard. Third, OSHA must demonstrate that there has been an employee exposed to the hazard. First-hand observation and photographs can document exposure.⁶⁵ Past exposure may be established through witness statements and other available evidence.⁶⁶

Fourth, OSHA must establish that the employer had actual or constructive knowledge of the violation.⁶⁷

There may be difficulty defining an employee in some instances. OSHA considers a temporary employee under the employer's control an employee. Under the multi-employer citation policy, OSHA has authority to cite a host employer where a subcontractor may have created the violative condition.⁶⁸ Four multi-employer citation categories exist: (1) an employer with employees exposed to a hazard, (2) the hazard-creating employer, (3) the employer responsible for correcting the condition, and (4) the controlling employer.⁶⁹

For a serious violation, there must be a substantial probability that a death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or used.⁷⁰ For an other-than-serious violation: "the likely result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health."⁷¹ OSHA must be able to express a reasonable scenario that could injure an employee exposed to the condition.⁷²

[2] Citation Classification and Unadjusted Penalty Range

Citation classifications vary based on the most likely resultant injury. Penalties are then determined by the injury gravity or severity and probability. Some state programs have slightly different penalty structures. Ohio falls under the federal penalty scheme where penalties range up to \$12,675 for Serious, Other Than Serious, or Failure to Abate violations and up to \$126,749 for Willful or Repeat violations.⁷³

OSHA uses the following penalty classifications:

- ***de minimis***: There is a technical deviation from the regulation only with no harm to employees and no requirement to correct the violation.⁷⁴
- **Other-than-serious**: A non-serious injury or a regulatory/paperwork violation. The penalty for a lesser probability violation is zero; for higher probability violations the maximum penalty is \$12,675 but is typically issued at a much lower level.

- **Serious:** The most likely injury is serious; the maximum unadjusted initial penalty is \$12,675.
- **Repeat:** Serious or other-than-serious categories apply. For a small employer (250 or less employees), the first repeat will double and second repeat will triple the initial unadjusted penalty. For large employers (251 or more employees), the multiplication factors are five (5) and ten (10) times the initial penalty up to a maximum of \$126,749.⁷⁵
- **Willful:** Serious or other-than-serious categories apply. Penalty can range up to a maximum of \$126,749.⁷⁶
- **Failure-to-abate:** The employer may be assessed daily penalties for failing to correct a hazard by the given abatement date. The maximum total proposed penalty will normally not exceed thirty times the amount of the daily-proposed penalty.
- **Egregious:** Is not a true classification in itself, but a method of treating each instance as a violation in itself to enhance penalties significantly where the maximum deterrent effect is required.⁷⁷
- **Unclassified:** Citations are not issued initially as unclassified. This classification is used by the agency in order to settle difficult cases. In return for this concession, OSHA typically requires full payment of the proposed penalties.

[3] Penalty Reduction Factors

There are penalty adjustment (reduction) factors potentially available under OSHA guidance documents for size, history and good faith. Under the willful classification adjustment system, only size reductions are given. The following size reduction factors apply to all other classifications: (1) 1–25 employees (40%); (2) 26–100 employees (30%); (3) 101–250 (10%). A ten percent reduction for history applies where no violation occurred within the previous three (3) years. The final category of reduction is “good faith” and will only be applied to serious and other-than-serious classifications, and is primarily based on the written safety and health programs and training at the facility. A good faith reduction typically will not be given where no safety and health program exists. A fifteen percent reduction applies where an effective safety and health program exists with more than incidental

deficiencies. A twenty-five percent good faith reduction can be applied where such a compliance program is in place and where only incidental deficiencies exist.


[4] The General Duty Clause Violation

[a] Definition of a § 5(a)(1) Violation

Under § 5(a)(1) of the OSH Act of 1970,⁷⁸ “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” By definition, a general duty clause (or § 5(a)(1)) violations are assigned a serious classification.⁷⁹ When no regulation pertains to a specific hazard, OSHA can seek to apply the general duty clause.⁸⁰ A “recognized” hazard is one where there exists written safety and health materials available to the employer in the form of industry consensus standards. OSHA § 5(a)(1) violations will typically reference specific requirements from these industry consensus standards.

[b] Required Elements for a § 5(a)(1) Violation

The Occupational Safety and Health Review Commission and court precedent established that the Secretary must provide evidence of four (4) elements in order to prove a violation of the general duty clause: (1) that an activity or condition in the workplace presented a hazard, (2) that the employer or its industry recognized this hazard, (3) that the hazard was likely to cause death or “serious physical harm,” and (4) that a feasible and effective means of abatement existed by which the employer could eliminate or materially reduce the hazard.⁸¹

 **Strategic Point:** OSHA has the burden of proving a general duty violation including, reasonable foreseeability of the hazard, industry recognition of the hazard,⁸² and the feasibility of proffered corrective action.

Caution: Once an employer settles or a contested violation becomes a final order, an employer must precisely adhere to the § 5(a)(1) abatement requirements. A future § 5(a)(1) violation could potentially be cited as a repeat violation.⁸³ OSHA does not, however, typically

seek repeat violation status for § 5(a)(1) violations since the “substantial similarity” hurdle could rarely be satisfied due to the wide array of specific hazards a § 5(a)(1) violation might address.

Footnotes — § 22.12:

⁶⁴ A company may petition for a variance allowing them to remain out of conformance with a particular standard. OSHA has granted a very limited number of variances over the years. Where there is no standard, but a hazard exists, OSHA may allege a general duty clause violation.

⁶⁵ There may be a case made for potential or future exposure. This requires witness statements and other evidence that will place employees in a future danger zone.

⁶⁶ The observation and documentation of circumstantial evidence such as scrap materials adjacent to the saw can document employee exposure to a hazard. OSHA has six (6) months from the date citations are issued to look back for violations. [29 U.S.C. § 658](#).

⁶⁷ The standard requires that the employer either knew of the existence of the hazardous condition, or could have, with the exercise of reasonable diligence, known of the presence of the violation.

⁶⁸ OSHA Directive [CPL 2-0.124](#), Multi-Employer Citation Policy, effective December 10, 1999 details how OSHA may cite an employer even without directly exposing even one of their employees to a hazard.

⁶⁹ Although this policy is applied mostly to the construction industry, OSHA will apply this policy in a general industry setting. This policy has been in place for decades. While the policy has recently been legally challenged with some initial success, the decision of the OSH Review Commission vacating a lower decision supporting the policy was successfully appealed by OSHA to the Eighth Circuit Court of Appeals. [Solis v. Summit Contractors, Inc.](#), [558 F.3d 815 \(8th Cir. 2009\)](#).

⁷⁰ Section 17(k) of the OSH Act codified at [29 U.S.C. § 666](#). In determining if a violation is serious, the issue is not whether an accident is likely to occur, but whether the result of an accident would likely cause death or serious harm. See [Whiting-Turner Contracting Co.](#), [13 BNA OSHA 21550, 2157 \(No. 87-1238, 1989\)](#).

⁷¹ See [Hackney/Brighton Corp.](#), [15 BNA OSHC 1884, 1887 \(No. 88-610, 1992\)](#).

⁷² Additionally, the likely injury must correlate with the gravity of the violation discussed under the classification.

⁷³ See generally [29 U.S.C. § 666](#). In 2016, OSHA promulgated a rule increasing the maximum penalties for each classification by approximately 78% each. This enhanced penalty scheme became effective August 2016 and was the first such penalty adjustment since 1990.

⁷⁴ Many offices will provide this information in some form other than a violation. Perhaps a letter will be written or simply verbal conveyance. Some Regions have a policy against issuance of these violations as the use of *de minimis* violations may be perceived as an inefficient use of limited resources.

⁷⁵ OSHA will look at the previous five (5) calendar years for assessing repeat violations. However, there is no statutory prohibition to looking back beyond five (5) years. The agency uses the five year time-frame for consistency purposes throughout the country and territories. Penalty reduction factors of “history” and “good faith” are not applied to repeat violations.

⁷⁶ Willfulness is found where the employer “knowingly violated the standard or demonstrated plain indifference to employee safety in violating the standard.” See *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1123 (No. 88-572, 1993).

⁷⁷ Employee training is one example where an egregious citation may result. Flagrant recordkeeping cases have been made egregious where each instance of an unrecorded injury or illness was given a penalty in order to deter companies from underreporting injuries. See *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 1999 (No. 89-0265, 1997).

⁷⁸ 29 U.S.C. § 654.

⁷⁹ Occasionally, OSHA issues a § 5(a)(1) violation with a willful or repeat classification. A recent willful violation was issued for failure to lockout a gasoline pump prior to servicing the equipment. The resulting explosion resulted in multiple fatalities. The conduct was so flagrant that common sense recognition of the hazard was used in the presumption of the enhanced knowledge requirement under the circumstances. OSHA may issue repeat and willful § 5(a)(1) violations.

⁸⁰ The Review Commission has held that citation to section 5(a)(1) is inappropriate if the hazard is addressed by an existing OSHA standard. See *Daniel Int’l, Inc.*, 10 BNA OSHC 1556, 1558 (No. 78-4279, 1982).

⁸¹ *Secretary of Labor v. Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). The courts and Review Commission have continually upheld this language in a line of cases dating back to the landmark decision in *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1265–66, 1 OSH Cases 1422 (D.C. Cir. 1973) where three (3) elements were provided by that Court. The Review Commission inferred the fourth element from the D.C. Court’s reasoning in that decision.

⁸² The existence of a recognized hazard may be determined if the hazardous event could occur “under other than a freakish or utterly implausible concurrence of circumstances.” See *Waldon Healthcare Ctr.*, 16 BNA OSHA 1052, 1060 (No. 89-2804, 1993); *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1197 n.5 (5th Cir. 1997).

⁸³ The repeat violation of § 5(a)(1) under § 17 of the Act may be established per 29 U.S.C. § 666. A violation is repeated if, at the time of the alleged repeat violation, there is a Review Commission final order against the employer for a “substantially similar” violation. See *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Substantial similarity for a § 5(a)(1) is established by showing that violative conditions result in substantially similar hazards. See *Secretary of Labor v. Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

§ 22.13. Severe Violator Enforcement Program

OSHA devotes particular enforcement focus to specified types of more serious enforcement matters. Through OSHA guidance, an employer may be

placed by OSHA in the Severe Violator Enforcement Program (SVEP) where the employer meets one or more of the following criteria. First, a fatality inspection where OSHA finds one or more failure to abate or willful or repeat violations related to the death or a serious violation related to the death can trigger inclusion in the SVEP. Second, an inspection that results in two or more high gravity serious violations classified as willful or repeat (or any combination of three willful or repeat) related to a High Emphasis Hazard can also trigger inclusion in the SVEP. Third, an inspection resulting in three or more repeat, willful, or failure to abate violations based on high gravity serious violations related to potential release of a highly hazardous chemical can also result in inclusion in the SVEP. Finally, any enforcement action categorized “egregious” will result in an employer’s inclusion in the SVEP. Consequences of inclusion in the SVEP may consist of: follow-up inspections; inspections of other sites of the same employer; contact with the employer’s national headquarters requesting increased high level involvement; enhanced settlement requirements with comprehensive features; future commitments and/or additional reporting requirements; and federal court enforcement of a final order, under § 11(b) of the OSH Act of 1970,⁸⁴ to enhance sanctions for non-compliance with the terms of the final order by using the court’s contempt powers.


Footnotes — § 22.13:

⁸⁴ 29 U.S.C. § 660(b) (Pub. L. No. 98-620).

§ 22.14. Challenging OSHA Citations Through the Contest Procedure

[1] Timely Notice of Contest Required

OSHA allows fifteen working days from receipt of the citations to inform OSHA in writing of the intention to contest the citation. Once the notice of contest has been submitted to OSHA, an employer must post the notice of contest and give employee representatives the opportunity to participate in the proceeding. The Department of Labor attorneys will file a complaint against the company with the OSH Review Commission, which will subsequently assign an Administrative Law Judge.

 **Strategic Point:** Although the employer may limit the number of citations, penalties, or abatement dates that are to be contested, it is often advantageous to contest all citations, abatement dates, and penalties involved in order to maintain the greatest degree of flexibility for settlement negotiations.

[2] Assignment of an Administrative Law Judge

Once the case is assigned to an Administrative Law Judge, a prehearing conference will be set. The Judge may schedule the case for “Simplified Proceedings” at this same time.⁸⁵ If there is opposition to this format, the employer needs to timely file for discontinuance of simplified proceedings. When choosing or agreeing to this type of proceeding, the employer gives up many useful legal tools and protections.⁸⁶ One example is the suspension of the Federal Rules of Evidence. Thus, hearsay and documents of questionable authenticity may come in.

[3] The Hearing

After exhausting efforts to settle, including mediation in some cases, the employer argues the case before the Administrative Law Judge. No right to a jury exists. Although the OSH Review Commission Rules of Procedure allows an employer to represent himself or herself, it is generally advisable to have representation by experienced counsel.

Caution: OSHA attorneys are generally well-versed in the evidence needed to sustain the violations. OSHA will frequently obtain an expert within the Agency, and in doing so, add another element of complexity (and cost) to the legal challenge.⁸⁷

Typical procedure involves the Secretary beginning the trial of the case by calling as its initial witness(es) the Compliance Officer(s), then other witnesses including employees, public officials, and experts if needed. The employer then follows with its case including witnesses and experts. Both parties have opportunities to cross examine witnesses and submit exhibits for the record. The judge may have additional questions to ask of the witnesses and Compliance Officer. Where a third party exists, such as union, the judge may solicit testimony and comments from the employee representatives.

[4] The Occupational Safety and Health Review Commission and Appeals

Any party may appeal the decision rendered by the Judge. The Occupational Safety and Health Review Commission is the next step in the appeals process. Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his or her own motion or on the petition of a party. The Commission will ordinarily require additional briefs for those issues on review and may potentially request exhibits and/or oral argument. Once the Review Commission renders their decision, the employer may choose to appeal that decision to either the U.S. Circuit Court of Appeals for the District of Columbia or the applicable circuit court where the alleged violations occurred. In Ohio, the employer appeals to either the D.C. Circuit or the Sixth Circuit Court of Appeals. The U.S. Supreme Court has the final right to decide the case. The U.S. Supreme Court continues to address OSHA issues periodically where there is a significant impact to employee safety and health and/or the economy, or a conflict between the circuit courts.

Footnotes — § 22.14:

⁸⁵ Eligibility criteria includes one or more of the following: (1) relatively few citation items, (2) total aggregate proposed penalty no more than \$20,000, (3) no willful or repeat violation, (4) no fatality, (5) a hearing expected to last two days or less, or (6) a small employer.

⁸⁶ Complaints, answers and pleadings are generally not required, discovery is not permitted except as ordered by the Administrative Law Judge, interlocutory appeals are not permitted, the employer is given a limited number of OSHA's documents early on, the Federal Rules of Evidence do not apply, briefs are not required, most motions are eliminated, and the parties argue their case orally before the Judge who may, at the conclusion, render a decision from the bench.

⁸⁷ Additionally, the penalties may be potentially increased by an administrative law judge or the OSH Review Commission above those initially issued by OSHA. In [Secretary of Labor v. Hern Iron Works Inc.](#), 16 BNA OSHC 1619, 162425 (No. 88-1962, 1994), based on the employer's lack of good faith, the Commission increased the penalty above that assessed by the administrative law judge who heard and initially decided the case.

VI.

THE PROACTIVE APPROACH

§ 22.15. Safety Audits: Benefits and Possible Negative Impacts

[1] Safety Audits

Self-audits can be useful tools to reduce the risk of injuries and illnesses while enhancing compliance performance. Many proactive employers retain outside experts to conduct health and safety audits to identify current violations. In addition, many states provide some type of non-enforcement audit services. In Ohio, an employer may request a consultative visit from the Bureau of Workers' Compensation or the OSHA On-site Consultation program.⁸⁸

[2] Scope of the Audit

The initial request form determines the scope of the service requested. One may request a Comprehensive Safety Survey, Comprehensive Health Survey, Consultation on Specific Area of Concern (Safety), or Consultation on Specific Area of Concern (Health). In Ohio, the employer may also request consultative services from the Ohio Bureau of Workers Compensation's (BWC) consultative branch. Injury prevention services are provided by personnel specializing in safety, industrial hygiene and ergonomics.

[3] Reports and Follow-up

The state consultant provides a written report of deficiencies. Failure to correct a hazard identified by such a state consultant may eventually result in an enforcement action.⁸⁹ Ohio has a program in place under the BWC that places an additional penalty on a Workers' Compensation award when an injury is in "violation of specific safety requirement" (VSSR) of an Ohio Safety Code.⁹⁰ This system is administered separately and VSSR claims will arise from specific accidents, not from voluntary consultative visits.⁹¹

Footnotes — § 22.15:

⁸⁸ OSHA On-Site Consultation is located within the Ohio Department of Commerce, Division of Labor and Worker Safety, Bureau of Occupational Safety and Health. They have enforcement responsibility for public sector employers. A portion of BWC's budget is earmarked for consultative services and is available to employers with active coverage. Ohio BWC will not report violations they identify to OSHA enforcement staff if abatement measures are implemented. See the Consultative Services web page at: <http://www.ohiobwc.com/employer/programs/safety/SandHOSHAOnsiteDetails.asp>.

⁸⁹ State Consultation Offices in Ohio provide the employer generally provide ample time to

correct the known hazards. Although it is rare to have a case referred for OSHA enforcement, there are instances when it is required. The state consultation program does not readily share information with OSHA because of the desire to continue to be invited to employer's facilities.

⁹⁰ After the Industrial Commission in Ohio issues their order determining the VSSR percentage, the Bureau of Workers' Compensation calculates the VSSR settlement and lets the employer know the amount that the employer must pay the injured worker directly for the VSSR portion of the settlement. Thus, in Ohio, the employer may potentially face enforcement action from the state and federal government.

⁹¹ See the BWC web page at: <http://www.ohiobwc.com/employer/programs/safety/SandHOSHAOnsiteDetails.asp>.

§ 22.16. Partnership Strategies with OSHA

[1] Ohio Partnerships for Contractors and Industries

The OSHA Alliance Program consists of trade or professional organizations, employers, labor organizations and educational institutions that collaborate with OSHA to prevent injuries and illnesses in the workplace.⁹² A formal agreement with OSHA will be signed, specifying goals that address training and education, outreach and communication, and promoting the national dialogue on workplace safety and health.

Strategic partnerships with OSHA are also available to organizations to address specific safety and health issues. OSHA may partner with groups of employers, employees, and employee representatives, or just one employer. In order to encourage an employer that commits to highly-effective safety and health programs, enhanced self-audits and additional training for employees and supervisors, OSHA is willing to remove that contractor from construction inspection targeting lists.⁹³

[2] State Consultation and Limited Issue Partnering

The Safety and Health Achievement Recognition Program (SHARP)⁹⁴ recognizes small employers with an exemplary safety and health program. In order to be eligible for SHARP, an employer must have fewer than 250 onsite employees and fewer than 500 corporate-wide employees. Acceptance into SHARP requires a complete hazard identification survey; employee involvement; correction of all identified hazards; a safety and health management system; Lost-Workday Injury and Illness rate (LWDII) and Total Recordable Case Rate (TRCR) below the national average; and state

consultation project office notification prior to changing working conditions or introducing new hazards. A worksite is exempt from programmed inspections during the period that a SHARP certification is valid.⁹⁵

[3] VPP Process

The Voluntary Protection Program (VPP) enables OSHA to officially recognize exemplary workplaces that have implemented a comprehensive safety and health management system and made outstanding efforts in occupational safety and health. The OSH Act of 1970, declares Congress's intent:⁹⁶

to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions[.]

OSHA's verification process for employers seeking VPP status includes an application review and a rigorous on-site evaluation by a team of OSHA safety and health experts. OSHA approves qualified sites to one of three programs: (1) Star, (2) Merit, and (3) Star Demonstration (recognition for worksites that address unique safety and health issues). Once approved, a celebration ceremony will include an OSHA official who presents a VPP flag. Sites must submit to annual self-evaluations and undergo periodic on-site re-evaluations to continue to participate. Benefits of achieving and maintaining VPP status include exemptions from OSHA's targeted inspections. Some VPP organizations later participate as mentors to other potential VPP sites. OSHA VPP auditors may take a week on the non-enforcement inspection to evaluate comprehensive safety and health programs, corporate culture and level of employee commitment and knowledge of safety and health issues.⁹⁷

The federal OSHA Strategic Partnership Program (OSPP)⁹⁸ is a less comprehensive program. It moves away from traditional enforcement methods and embraces collaborative agreements. Under OSPP, OSHA and its partner(s), often groups of employees or workers such as trade groups or

unions, agree to work cooperatively to address critical safety and health issues. An OSPP agreement may be national, regional or local in scope, and there is agreement upon individual responsibilities, identified strategies, established goals and performance measures to verify results.

Footnotes — § 22.16:

⁹² For additional information, see the OSHA web address at: <http://www.osha.gov/dcsp/alliances/index.html>.

⁹³ There are numerous members throughout Ohio and Region V including: the Association of Builders and Contractors, Associated General Contractors, Builder's Exchange, Residential Contractors, Roofing Contractors, Cleveland Building and Construction Trades, and Construction Employers Council. Partnerships exist for organizations from nursing homes and foundry ergonomics partnerships to ongoing renovation projects of Toledo public schools and Cincinnati's Convention Center.

⁹⁴ For additional information, see the OSHA web address at: <https://www.osha.gov/dcsp/smallbusiness/sharp.html>.

⁹⁵ Those in the process of receiving SHARP certification also qualify for limited inspection exemptions.

⁹⁶ 29 U.S.C. § 651.

⁹⁷ For additional information, see the OSHA web address at: <http://www.osha.gov/dcsp/vpp/index.html>.

⁹⁸ For additional information, see the OSHA web address at: <http://www.osha.gov/dcsp/partnerships/index.html>.

CHAPTER 23

ENERGY INITIATIVES AND CLIMATE CHANGE

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I.

OVERVIEW OF STATE AND FEDERAL FUNDING OPPORTUNITIES

§ 23.01. Introduction to Renewable Energy Funding Opportunities

Numerous state and federal incentive programs are available to support initiatives designed to foster energy efficiency and the development of renewable energy resources. Electricity “re-regulation” coupled with rising public interest and an emphasis on the implementation of energy efficiency and renewable energy at the federal level translates into new incentives and standards being introduced at federal, state, and local levels on a frequent basis. Incentives can take the form of tax credits, low interest loans, grants, and research assistance. These initiatives vary in size and complexity. Ultimately, the goals of the programs are to offer a balanced and economically competitive energy policy for the nation and the state and to reduce historical reliance on traditional fossil fuel energy sources.

§ 23.02. Ohio Programs

[1] Advanced Energy Fund

The Ohio Advanced Energy Fund (AEF) is a public benefits revolving loan fund designed to support energy initiatives in Ohio.¹ The purpose of the fund is to provide assistance for implementing efficiency and renewable energy projects.² The Ohio Development Services Agency³ is charged with administering the AEF through the award of grants, contracts, loans, loan participation agreements, linked deposits, and energy production incentives to qualifying projects.⁴

In 2012, S.B. 315 transferred funds from the Advanced Energy Research and Development Taxable Fund and the Advanced Energy Research and Development Fund to the AEF to continue to provide grants and loans. These funds were necessary as the original funding mechanisms under the program expired in 2011.⁵ However, the AEF assets currently are being used to fill other actively lending funds like the Energy Loan Fund. The Energy Loan Fund helps small businesses, manufacturers, and nonprofits implement energy efficiency improvements to lower energy use and costs. Eligible applicants receive low-interest financing to install efficiency measures, such as LED lighting, insulation, and HVAC upgrades, that reduce energy by at least 15%.⁶

[2] Air Pollution Control Bonds

The Ohio Air Quality Development Authority (OAQDA) issues bonds for air pollution control projects.⁷ The OAQDA is not a loan fund as described above in [§ 23.02\[1\]](#); rather, it is a conduit through which a qualifying business can receive tax incentives for air pollution control projects. Examples of eligible air pollution control projects include, but are not limited to, ethanol and other biofuel facilities, coal research and development projects, and any other project defined in [R.C. 3706.01\(G\)](#). Through these bonds, the OAQDA has supported projects ranging from \$13,000 to \$350 million.⁸ The funds may be used to improve machinery and equipment that contributes to better air quality or for new projects that directly or indirectly, through energy efficiency methods, clean the air.⁹ Bond terms will vary, as the lender decides the life of the loan under its normal underwriting guidelines.¹⁰

[3] Tax Incentives and Credits

A solar, wind, or hydrothermal energy system on which construction or installation is completed during the statutory period prescribed in [R.C. 5709.53](#), and that otherwise meets the guidelines of [R.C. 1551.20\(B\)](#), is exempt from real property taxation.¹¹ Further, additional tax incentives and credits are offered for qualifying renewable energy and efficiency projects through the federal and state programs discussed in this Chapter.

[4] Ohio Renewable and Advanced Energy Portfolio Standards

In August 2007, former Ohio Governor Ted Strickland announced his plan to address energy rates and increase the use of renewable energy in the State.¹² The plan, which expired at the end of 2008, set new electric rates to ensure rate stabilization and promised Ohio residents a fully deregulated marketplace in 2009. The plan also required that 25 percent of Ohio's power be fueled by alternative energy resources by 2025, at least half of the 25 percent being generated from renewable energy sources including wind, hydro, geothermal, and at least 0.5 percent from solar energy. The plan permitted the remaining half of the 25 percent to be generated from advanced energy resources such as clean coal technology. To achieve the 25 percent alternative energy generation mandate by 2025, the plan required utilities to meet certain annual benchmarks for renewable and solar energy production. The plan also required utilities to develop energy efficiency programs that reduced demand by 22 percent by the end of 2025.¹³ In addition, the plan developed incentives to address carbon control technologies to guard against Ohio's vulnerability to future climate change policy.¹⁴ All of these requirements composed the Renewable and Advanced Energy Portfolio Standards established by the plan and were intended to gradually achieve the plan's energy objectives.

A revised version of Governor Strickland's energy plan passed the Senate as S.B. 221. The bill was signed into law by Governor Strickland on May 1, 2008 and became effective on July 31, 2008.¹⁵ In addition to the standards above, S.B. 221 incorporated a system where rates are set by the Public Utilities Commission of Ohio (PUCO) and outlined a path for electric utilities to implement market-based pricing.¹⁶ On November 5, 2008, PUCO adopted rules for Electric Service and Safety Standards to implement S.B. 221.¹⁷ Further, on June 17, 2009, PUCO adopted modified rules to implement the Renewable and Advanced Energy Portfolio Standards created by S.B. 221,

including energy efficiency, long-term forecast, and greenhouse gas reporting and carbon dioxide control planning.¹⁸ These rules became effective on December 10, 2009.¹⁹ PUCO has authority to impose penalties if a utility fails to comply with the renewable/alternative energy standards above, and to improve and modify each utility's electric security plan or market-rate offers, as necessary.

On June 13, 2014, Governor John Kasich signed into law S.B. 310, which placed a two-year “freeze” on Ohio's renewable energy and energy efficiency mandates. The freeze was intended to give lawmakers time to study the mandates, which critics said were unachievable, raise Ohioans' electric bills, and intrude on the free market. A spokesman for Governor Kasich, in explaining the governor's support for the bill, stated: “Ohio needs more renewable and alternative energy sources and it needs a strong system to support them as they get started. It's naïve, however, to think that government could create that system perfectly the first time and never have to check back to see if everything's OK.”²⁰

Alert: On December 27, 2016, Governor Kasich vetoed H.B. 554,²¹ legislation that would have effectively extended the freeze on the state's clean energy standards. H.B. 554 would have maintained the long-term goal of increasing renewable energy use, but there would have been no penalties imposed on utilities for failing to reach benchmarks. Kasich vetoed the bill because it risked undermining job creation and economic growth in Ohio. It could take away energy generation options that create many jobs in Ohio.²² So, the renewable energy and energy efficiency mandates put in place in 2008 will resume, although two years behind schedule.

[5] Ohio Job Stimulus Package—Advanced Energy Component

The Ohio Job Stimulus Package (H.B. 554) became effective on September 11, 2008. It was enacted to provide new and expanded incentives for economic development and job creation, and makes capital and operating appropriations for these purposes. The advanced energy component of the Ohio Job Stimulus Package included \$150 million in funding designed to increase the development, production, and use of advanced energy technologies in the state.²³ Of this amount, \$66 million was allocated for clean

coal technology projects administered by the Ohio Development Services Agency's Ohio Coal Development Office, and \$84 million was allocated for non-coal related projects in three annual appropriations administered by the OAQDA.²⁴

Qualifying non-coal technologies are identified in [R.C. 3706.25](#) and [R.C. 4928.621](#), and qualifying clean-coal technologies are identified in [R.C. 1551.01](#) and [R.C. 1555.01](#). The OAQDA began reviewing proposed projects in early 2009 and selected projects were funded by the OAQDA's issuance of bonds of the State of Ohio. Initial funding under H.B. 554 expired at the end of 2011, but the program continues as a bond-funded program administered by the state treasury.²⁵

Footnotes — § 23.02:

¹ [R.C. 4928.61 to 4928.63](#).

² [R.C. 4928.63](#).

³ The Ohio Development Services Agency was formerly known as the Ohio Department of Development.

⁴ [R.C. 4928.62](#).

⁵ Energy Gov't, *Advanced Energy Fund*, available at <http://energy.gov/savings/advanced-energy-fund> (last visited Apr. 3, 2017).

⁶ Energy Loan Fund, Ohio Development Services Agency, available at https://www.development.ohio.gov/bs/bs_energyloanfund.htm (last visited Apr. 3, 2017).

⁷ The Ohio Air Quality Development Authority, *About OAQDA*, available at <http://ohioairquality.ohio.gov/About-OAQDA/About-OAQDA> (last visited Apr. 3, 2017).

⁸ The Ohio Air Quality Development Authority, *Clean Air & Clean Energy are Good Business*, available at <http://www.morpc.org/Assets/MORPC/files/12-10-2015OAQDA.pdf> (last visited Apr. 3, 2017). The Ohio Air Quality Development Authority, available at <http://ohioairquality.ohio.gov/> (last visited Apr. 3, 2017).

⁹ The Ohio Air Quality Development Authority, *OAQDA Program Overview*, available at <http://ohioairquality.ohio.gov/Lenders/OAQDA-Program-Overview> (last visited Apr. 3, 2017).

¹⁰ The Ohio Air Quality Development Authority, *OAQDA Process Overview*, available at <http://ohioairquality.ohio.gov/Lenders/OAQDA-Process-Overview> (last visited Apr. 3, 2017).

¹¹ [R.C. 5709.53](#).

¹² U.S. EPA, *State and Local Climate and Energy Programs*, available at

<https://www.epa.gov/statelocalclimate> (last visited Apr. 3, 2017).

¹³ The Public Utilities Commission of Ohio, *Ohio's Renewable Energy Portfolio Standard*, available at <http://www.puco.ohio.gov/puco/index.cfm/industry-information/industry-topics/ohioe28099s-renewable-and-advanced-energy-portfolio-standard/#sthash.nkczPiZt.XXZGr1tH.dpbs> (last visited Apr. 3, 2017).

¹⁴ Green Energy Ohio, *Ohio Governor Ted Strickland Announces his Energy, Jobs and Progress Plan*, available at <http://www.greenenergyohio.org/page.cfm?pageId=1419> (last visited Apr. 3, 2017).

¹⁵ The Public Utilities Commission of Ohio, *Energy, Jobs, Progress: Ohio Senate Bill 221*, available at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/energy-jobs-progress-ohio-senate-bill-221/#sthash.eaqXzrg4.dpbs> (last visited Apr. 3, 2017).

¹⁶ The Public Utilities Commission of Ohio, *Energy, Jobs, Progress: Ohio Senate Bill 221*, available at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/energy-jobs-progress-ohio-senate-bill-221/#sthash.eaqXzrg4.dpbs> (last visited Apr. 3, 2017).

¹⁷ The Public Utilities Commission of Ohio, *Energy, Jobs, Progress: Ohio Senate Bill 221*, available at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/energy-jobs-progress-ohio-senate-bill-221/#sthash.tGDsfpQY.dpbs> (amending and adopting various Rules in OAC Chapters 4901:1) (last visited Apr. 3, 2017).

¹⁸ OAC Chapters 4901:1-40 and 4901:1-41.

¹⁹ OAC Chapters 4901:1-40 and 4901:1-41.

²⁰ Pelzer, Jeremy, *Gov. John Kasich Intends to Sign Two-Year Freeze on Renewable Energy, Energy Efficiency Standards* (May 29, 2014), available at http://www.cleveland.com/open/index.ssf/2014/05/governor_john_kasich_intends_t.html (last visited Apr. 3, 2017).

²¹ House Bill 554, The Ohio Legislature 132nd General Assembly, available at <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-HB-554>.

²² *Kasich vetoes bill delaying renewable energy mandates*, The Toledo Blade, available at <http://www.toledoblade.com/Energy/2016/12/27/Ohio-governor-vetoes-bill-making-renewable-mandates-optional.html> (Dec. 27, 2016).

²³ Energize Ohio, *Ohio Job Stimulus Plan-Advanced Energy Program*, available at <http://energizeohio.osu.edu/incentives/ohio-job-stimulus-lan-advanced-energy-program> (last visited Apr. 3, 2017).

²⁴ Energize Ohio, *Ohio Job Stimulus Plan-Advanced Energy Program*, available at <http://energizeohio.osu.edu/incentives/ohio-job-stimulus-plan-advanced-energy-program/> (last visited Apr. 3, 2017).

²⁵ R.C. 3706.26.

§ 23.03. Federal Programs

[1] Production Tax Credit and Investment Tax Credit

The Production Tax Credit (PTC) was originally enacted in 1992 to promote the development of renewable energy and was extended twice through December 31, 2008.²⁶ The PTC was then granted a third extension through 2009, as part of the Emergency Economic Stabilization Act of 2008 (Stabilization Act).²⁷ The Stabilization Act extended the in-service deadlines for all qualifying renewable technologies and expanded the list of qualifying resources to include marine and hydrokinetic resources.²⁸ In February 2009, the PTC was granted a fourth extension in the American Recovery and Reinvestment Act of 2009 (Reinvestment Act).²⁹ The Reinvestment Act revised the credit by extending the in-service deadline for eligible technologies by two to three years, and allowed qualifying facilities to opt to instead take the federal business energy investment tax credit (ITC) or an equivalent cash grant from the U.S. Department of Treasury.³⁰ In January 2013, the PTC was extended yet again in the American Taxpayer Relief Act of 2012.³¹ This legislation further revised the PTC by (1) removing placed-in-services deadlines; (2) extending the deadline for wind energy facilities by one year; (3) extending the PTC eligible facilities' ability to claim ITCs; and (4) revising the definition of "municipal solid waste" to exclude certain recycled paper.

As in previous years, the PTC was extended in December 2014 by the Tax Increase Prevention Act of 2014³² and again in December 2015 by the Consolidated Appropriations Act.³³ The Tax Increase Prevention Act of 2014 extended PTC availability through the end of 2014. This was important because the PTC expired December 31, 2013. Even though the Tax Increase Prevention Act was not enacted until December 2014, the effective date was January 1, 2014, meaning any qualifying project that commenced construction at any point in 2014 was eligible to claim the PTC.³⁴ Similarly, the Consolidated Appropriations Act extended the PTC through the end of 2016 for all facilities except wind facilities, which were extended through the end of 2019. This Act created a phase-down scheme for wind facilities commencing construction in 2017, when the PTC amount is reduced by 20 percent; in 2018, the PTC amount is reduced by 40 percent; and in 2019, the PTC amount is reduced by 60 percent. Before the Consolidated Appropriations Act, the PTC had expired at the end of 2014. The effective date is January 1, 2015, which means any qualifying project that commenced

construction at any point in 2015 is eligible to claim the PTC.³⁵

The tax credit amount is calculated at 2.3 cents per kilowatt hour on the sale of electricity produced from the qualified energy resources (e.g., wind, geothermal, and closed-loop biomass). For open-loop biomass facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities and qualified hydroelectric, marine and hydrokinetic facilities, a 1.2 cent tax credit is allowed.³⁶ The tax credit applies to all facilities placed into service at various times based upon the qualified energy resource being sold or utilized.

The ITC referenced above is a credit against federal income tax that is determined based on a percentage of the cost (*i.e.*, tax basis) of the investment in certain qualified energy property and was first authorized under the Energy Improvement and Extension Act of 2008.³⁷ Unlike the PTC, the amount of the ITC is not reduced by grants or tax-exempt bond financing.³⁸ The ITC was also expanded by the Reinvestment Act enacted in February 2009, which extended the ITC for eligible systems placed in service on or before December 31, 2016. ITC was most recently amended by the Consolidation Appropriations Act of 2015, which extended the expiration date, but also introduced a step-down in the value of the credit for solar technologies and PTC-eligible wind. The ITC is equal to approximately 10–30 percent of expenditures for an eligible system depending on the type of system.³⁹

[2] Energy Policy Act of 2005

[a] Background

The Energy Policy Act of 2005 (the Act) was signed into law on August 8, 2005. The Act sought to create incentives for both the supply and demand sides of the energy industry; reduce reliance on foreign oil supplies; encourage domestic oil and gas production, energy efficiency and renewable energy; and streamline the related approval processes of the Federal Energy Regulatory Commission's (FERC) authority to reduce regulatory uncertainty and increase reliability. The Act is comprised of 18 titles, each of which covers a substantive area of energy policy.

[b] Energy Efficiency

The Act created annual energy use reduction goals for all federal buildings and mandated the creation of a new federal building energy efficiency performance standards.⁴⁰ The revised standards required that new federal buildings be designed to achieve energy consumption levels at least 30 percent below those of current building codes and use sustainable design principles or green building techniques.⁴¹ Under the Act, the U.S. Department of Energy (DOE) can make grants for state energy conservation plans to assist local government in improving energy efficiency in public buildings. Initially, this provision authorized \$30 million per year in appropriations for 2006–2010 to assist local governments.⁴²

Funds provided to Ohio under the DOE’s State Energy Program (SEP) are directed to the Ohio Development Services Agency.⁴³ The DOE determines the allocation amount based on a specific formula. Since 2009, the Ohio Development Services Agency has issued competitive solicitations directing grant funding to education, outreach, technical assistance, and other services to increase jobs, lower energy use, and reduce greenhouse gas emissions and has increased the adoption of renewable energy and energy efficiency technologies across Ohio.

[c] Renewable Energy

The Act imposes minimum percentage requirements for the consumption of renewable electric energy as a portion of total government electricity consumption. Under the Act, “renewable energy” means any electric energy generated from solar, wind, biomass, landfill gas, geothermal, municipal solid waste, or hydroelectric generation.⁴⁴ Additionally, the Act established a hydroelectric power production incentive program. Under the program, DOE makes payments to the owner or operator of all qualified hydroelectric facilities after the owner or operator submits an application.⁴⁵ It also offers efficiency incentive payments to the owners and operators of hydroelectric facilities at existing dams for capital improvements designed to increase production efficiency.⁴⁶

[d] Tax Incentives

In addition to extending the PTC, the Act authorizes other tax incentives that include credits for the investment in clean coal facilities.⁴⁷ The Act also allowed for a deduction for the cost of creating certain energy efficient

commercial buildings, which was extended through 2013 by the federal Energy Improvement and Extension Act of 2008.⁴⁸ This included deductions for the costs of lighting, heating and cooling, ventilation, water heating and building insulation when installed as part of a design to increase energy efficiency by 50 percent for these items.⁴⁹ For residences, the Act added credits for energy efficient homes and for the installation of energy efficient appliances.⁵⁰ This residential energy efficiency credit was extended and expanded by the Energy Improvement and Extension Act of 2008 and again by the Reinvestment Act for eligible equipment purchased between January 1, 2009 and December 31, 2010.⁵¹ On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which extended the residential energy efficiency credit into 2011, but at lower levels. The credit was retroactively extended (as it expired in 2012) again in January 2013 with the passage of the American Taxpayer Relief Act of 2012, which extended the credit through December 31, 2013.⁵² And the Consolidated Appropriations Act, signed in December 2015, retroactively extended the expiration date to the end of 2016 for all technologies except for photovoltaic and solar thermal technologies, which have a gradual step down credit extending to 2022.⁵³

[3] Emergency Economic Stabilization Act of 2008

The Emergency Economic Stabilization Act of 2008 (the Stabilization Act), which was signed into law on October 3, 2008, includes a number of energy provisions, including new and extended tax incentives for advanced energy.⁵⁴ As discussed above (see § 23.03[1]), one of the most significant effects of this law was the extension of PTCs for qualifying renewable energy projects. Specifically, the Stabilization Act extended through 2009 PTCs for producing electricity from wind and refined coal facilities, which were subsequently further extended.⁵⁵ Additionally, it extended through 2010 tax credits for other facilities, including closed and open-looped biomass, solar energy, small irrigation power, landfill gas, trash combust and hydropower.⁵⁶ Beyond these extensions, the Stabilization Act provided additional production incentives for geothermal and biomass, credits for investments in residential and commercial solar projects, and provided additional tax credits and extends excise taxes relating to coal and carbon mitigation.⁵⁷

[4] USDA Grant for Renewable Energy

The United States Department of Agriculture (USDA) Rural Energy for America Program (REAP) makes available direct loans, loan guarantees, and grants to agricultural producers and rural small businesses.⁵⁸ These funds are used for purchasing renewable-energy systems or for making energy-efficiency improvements. Biomass, wind power and hydroelectric source technologies are among those accepted by this program. The maximum grant award for renewable energy projects is 25 percent of eligible project costs, the amount of the loan guaranteed under the program cannot exceed \$25 million and the combined amount of the grant and loan cannot exceed 85 percent of eligible projects costs. USDA has made up to \$12.3 million in grants and \$57.8 million in loan guarantees available for the REAP to help farmers, ranchers, and rural small businesses make energy efficiency improvements and/or install renewable energy systems.⁵⁹

[5] American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (Reinvestment Act) was enacted in response to the economic crisis of 2009 and was intended to stimulate the economy through job creation and investments in long-term economic growth. A prevailing focus of the Reinvestment Act was a significant investment in the domestic renewable energy industry through grants, loans, and tax incentives.⁶⁰ As noted throughout this section, some of these incentives extended and expanded many of the energy efficiency and renewable energy incentives (*i.e.*, PTCs, ITCs, residential efficiency credits, commercial building efficiency credits, etc.) that were previously authorized under the Energy Policy Act of 2005, the Energy Improvement and Extension Act of 2008, and the Stabilization Act of 2008. In addition to these incentives, the Reinvestment Act provides additional funding for various grants, loans and incentive programs for qualifying renewable energy and energy efficiency projects.

For example, the Energy Efficiency and Conservation Block Grant Program (EECBG), authorized in Title V, Subtitle E of the Energy Independence and Security Act of 2007 (EISA) and signed into Public Law ([Pub. L. No. 110-140](#)) on December 19, 2007, provided \$3.2 billion in grants to local and state governments, Indian tribes, and territories to develop and implement projects to improve energy efficiency and reduce fossil fuel emissions in their communities. A total of \$84,183,300 was made available to

Ohio for this program. Of this amount \$24,979,600 was made available to the Ohio Development Services Agency to award to state or local governments implementing energy efficiency, renewable energy or greenhouse gas reduction projects.

The Reinvestment Act also provided additional funding to each state for qualifying renewable energy projects under the DOE's State Energy Program (SEP) discussed above (*see* § 23.03[2][a]). Under the Reinvestment Act, \$96,083,000 was allocated to Ohio to stimulate the creation and retention of jobs, save energy, increase energy generation from renewable energy, and reduce greenhouse gas emissions.⁶¹ Under the program, each state submits to DOE a proposal for use of the funds, which must be approved before the funds are awarded for further disbursement by the Ohio Development Services Agency. Since 2010, the program has generated private investment of more than \$29 million in Ohio's manufacturing sector, spurred \$13 million in annual energy cost savings, and reduced greenhouse gas emissions by nearly 130,000 metric tons per year.⁶²

Footnotes — § 23.03:

²⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1301, 119 Stat. 594, 986 (2005).

²⁷ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

²⁸ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

²⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

³⁰ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

³¹ Pub. L. No. 112-240, 126 Stat. 2313 (Jan. 2, 2013).

³² Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010 (Dec. 19, 2014).

³³ Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015).

³⁴ Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010 (Dec. 19, 2014); Energy, *Renewable Electricity Production Tax Credit (PTC)*, available at <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> (last visited Apr. 3, 2017).

³⁵ Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015); Energy, *Renewable Electricity Production Tax Credit (PTC)*, available at <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> (last visited Apr. 3, 2017).

³⁶ Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015); Energy, *Renewable Electricity Production Tax Credit (PTC)*, available at <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> (last visited Apr. 3, 2017).

³⁷ 26 U.S.C. § 48(a)(1).

³⁸ 26 U.S.C. § 48(a)(4).

³⁹ Energy, *Business Energy Investment Tax Credit (ITC)*, available at <http://energy.gov/savings/business-energy-investment-tax-credit-itc> (last visited Apr. 3, 2017).

⁴⁰ Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 102 and 109, 119 Stat. 594, 986 (2005).

⁴¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 109, 119 Stat. 594, 986 (2005).

⁴² Energy Policy Act of 2005, Pub. L. No. 109-58, § 125, 119 Stat. 594, 986 (2005); *see also* Section 5, as additional amounts were apportioned to local governments in the American Recovery and Reinvestment Act of 2009.

⁴³ Ohio Development Services Agency, *Advanced Energy and Efficiency Programs*, available at https://development.ohio.gov/bs/bs_renewenergy.htm (last visited Apr. 4, 2017).

⁴⁴ Energy Policy Act of 2005, Pub. L. No. 109-58, § 203, 119 Stat. 594, 986 (2005). However, the definition of “renewable energy” was expanded with respect to PTCs in the Emergency Economic Stabilization Act of 2008 to include marine and hydrokinetic renewable energy.

⁴⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, § 241, 119 Stat. 594, 986 (2005).

⁴⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, § 242, 119 Stat. 594, 986 (2005).

⁴⁷ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1307, 119 Stat. 594, 986 (2005).

⁴⁸ Energy Improvement and Extension Act of 2008, H.B. 1424, Division B (2008).

⁴⁹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1331, 119 Stat. 594, 986 (2005).

⁵⁰ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1334, 119 Stat. 594, 986 (2005).

⁵¹ U.S. Department of Energy, *Residential Energy Efficiency Tax Credit*, available at <http://energy.gov/savings/residential-energy-efficiency-tax-credit> (last visited Apr. 4, 2017).

⁵² U.S. Department of Energy, *Residential Energy Efficiency Tax Credit*, available at <http://energy.gov/savings/residential-energy-efficiency-tax-credit> (last visited Apr. 4, 2017).

⁵³ Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015); Energy, *Residential Renewable Energy Tax Credit*, available at <http://energy.gov/savings/residential-renewable-energy-tax-credit> (last visited Apr. 4, 2017).

⁵⁴ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, Division B, Title I, Subtitle A, 122 Stat. 3765 (2008).

⁵⁵ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (2008).

⁵⁶ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765 (2008).

⁵⁷ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 112–118, 122 Stat. 3765 (2008), and Pub. L. No. 110-343, Division B, Title I, Subtitle B (Carbon Mitigation and Coal Provisions).

⁵⁸ U.S. Department of Agriculture, *Rural Energy for America Program, Renewable Energy Systems & Energy Efficiency Improvement Loans & Grants*, available at <http://www.rd.usda.gov/programs-services/rural-energy-america-program-renewable-energy-systems-efficiency> (last visited Feb. 16, 2016).

⁵⁹ USDA, *USDA Announces Effort to Cut Energy Costs for Farmers, Ranchers, Rural Small Businesses*, available at <https://www.usda.gov/media/press-releases/2014/05/05/usda-announces-effort-cut-energy-costs-farmers-ranchers-rural-small> (last visited Apr. 4, 2017).

⁶⁰ See generally American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

⁶¹ U.S. Department of Energy, *Examination Report: The Department of Energy's American Recovery and Reinvestment Act—Ohio State Energy Program*, available at <http://energy.gov/sites/prod/files/OAS-RA-L-12-07.pdf> (last visited Apr. 4, 2017).

⁶² Office of Energy Efficiency & Renewable Energy., *State Energy Program Projects in Ohio*, available at <https://energy.gov/eere/wipo/downloads/state-energy-program-projects-ohio> (last visited Apr. 4, 2017).

II.

HOT TOPICS IN ENERGY INITIATIVES

§ 23.04. Biofuels

[1] Introduction to Biofuel Technology

The two most common types of biofuels are ethanol and biodiesel. Ethanol is an alcohol-based fuel produced by fermenting and distilling starch crops that have been converted into simple sugars. Feedstocks for this fuel include corn, barley, and wheat. Ethanol also can be produced from cellulosic biomass such as trees and grasses and is called bioethanol. Ethanol is most commonly used to increase octane and improve the emissions quality of gasoline.⁶³ Biodiesel is made primarily from soybean oil. Biodiesel is typically blended at 20% with petroleum diesel.⁶⁴

[2] State Programs to Encourage Biofuel Technology

[a] Alternative Fuel Transportation Grant Program

The Alternative Fuel Transportation Grant Program, administered by the Ohio Development Services Commission, provides funding in the form of grants and loans to businesses, nonprofit organizations, public school systems, and local governments for the following: (1) to purchase and install alternative fuel refueling or distribution facilities and terminals; (2) to purchase and use alternative fuel; (3) to pay the cost of fleet conversion; and (4) to pay the costs of educational and promotional materials and activities intended for prospective alternative fuel consumers, fuel marketers, and others to increase the availability and use of alternative fuel.⁶⁵ The term “alternative fuel” includes any of the following fuels used in a motor vehicle: E85 blend fuel; blended biodiesel; natural gas; liquefied petroleum gas; hydrogen; compressed air; electricity; and any fuel that the U.S. Department of Energy determines, by final rule, to be substantially not petroleum and that would yield substantial energy security and environmental benefits.⁶⁶

[b] Emission Inspection and Control System Exemptions

Ohio allows alternative fuel vehicles, including alcohol-powered vehicles, to be exempt from certain motor vehicle inspection and maintenance programs.⁶⁷ Additionally, Ohio allows tampering with emission control systems on cars when the action is for the purpose of converting a motor vehicle to use an alternative fuel, and it is in compliance with the standards adopted under the Federal Clean Air Act Amendments.⁶⁸

Footnotes — § 23.04:

⁶³ U.S. Department of Energy, *Ethanol Fuel Basics*, available at http://www.afdc.energy.gov/fuels/ethanol_fuel_basics.html (last visited Apr. 4, 2017).

⁶⁴ U.S. Department of Energy, *Biodiesel Blends*, available at http://www.afdc.energy.gov/fuels/biodiesel_blends.html (last visited Apr. 4, 2017).

⁶⁵ R.C. 122.075; Ohio Development Services Agency, *Alternative Fueling Stations*, available at https://www.development.ohio.gov/bs/bs_altfueltrans.htm.

⁶⁶ R.C. 122.075(A)(1), 125.831(A).

⁶⁷ 2015 Am. Sub. H.B. No. 64, § 3704.14.

§ 23.05. Clean Coal Gasification

[1] Introduction to Clean Coal Gasification Technology

Coal gasification, also known as integrated gasification combined cycle (IGCC), is a process where energy from coal is converted into electricity, hydrogen and other energy forms. This process utilizes steam to extract energy from coal, rather than burning coal directly. In a gasifier, the coal is exposed to hot steam along with a precise amount of oxygen while under high temperatures and pressure. This causes the coal to separate, setting off chemical reactions and producing a synthetic gas compound consisting mainly of hydrogen and carbon monoxide.⁶⁹ The coal gasification process is considered “clean” because, unlike the traditional coal burning processes, it allows for the removal and containment of emissions. Gasification efficiently removes at least 95 percent of sulfur and nitrogen. Also, the emissions can be separated from this mixture and used for commercial products such as fertilizers and chemicals.⁷⁰

[2] State Programs to Encourage Clean Coal Gasification Technology

The Ohio Development Services Agency, through its Ohio Coal Development Office, approves grants for university-based clean coal research projects.⁷¹ These grants can be used to fund research into clean coal gasification. Ohio was one of seven states that competed to build a coal gasification, zero emissions power plant through the federal government’s FutureGen program, although neither of the proposed sites won the competition.⁷²

Footnotes — § 23.05:

⁶⁹ U.S. Department of Energy, *Gasification Technology R&D*, available at <http://energy.gov/fe/science-innovation/clean-coal-research/gasification> (last visited Apr. 4, 2017).

⁷⁰ U.S. Department of Energy, *Commercial Examples of Gasification-Based Chemicals Production*, available at <http://www.netl.doe.gov/research/coal/energy-systems/gasification/gasifipedia/commercial-production> (last visited Apr. 4, 2017).

⁷¹ The Ohio Coal Development Office, *Ohio Coal Research and Development Program*, available at http://development.ohio.gov/bs/bs_ohiocoaldev.htm (last visited Apr. 4, 2017).

⁷² Farm and Dairy, *FutureGen passes over Ohio sites*, available at <http://www.farmanddairy.com/news/futuregen-passes-over-ohio-sites/762.html> (last visited Apr. 4, 2017).

§ 23.06. Ohio Siting Requirements for Major Utility Facilities

Ohio is one of a handful of states that has a specific statutory procedure for major utility facilities to obtain an installation and operating permit. Specifically, **R.C. 4906.04** requires a “major utility facility” to obtain a “certificate” before starting construction on a new facility.⁷³ A “major utility facility” includes electric generating plants, electric transmission lines, gas or natural gas transmission lines with statutorily set design capacities,⁷⁴ and “economically significant wind farms.”⁷⁵ The Ohio Power Siting Board (OPSB) has exclusive jurisdiction over the siting of major utility facilities. Injunction and prohibition will block any attempt by any local or state authority, other than the OPSB, to regulate the siting of a major utility facility.⁷⁶

A “certificate” means a certificate of environmental compatibility and public need issued by the OPSB.⁷⁷ The members of the OPSB include the Chairman of the Public Utilities Commission of Ohio (who chairs the OPSB), the Director of Ohio EPA, the Director of the Ohio Department of Natural Resources, the Director of the Ohio Department of Agriculture, and an engineer to represent the general public.⁷⁸

The OPSB certification process is analogous to applying for an environmental assessment (EA) or environmental impact statement (EIS) under NEPA, except that public need is considered under the Ohio statute but not under NEPA. Further, the OPSB certification process is “substantive” (*i.e.*, if a certificate is not issued, the proposed facility may not be constructed) under the Ohio statute, while EAs and EIS are “procedural” under NEPA. If an EA or EIS is prepared under NEPA, construction may commence even if the EA or EIS concludes that the environmental impacts from the proposed project will be negative, whereas, if the OPSB declines to issue a certification upon a finding that the proposed site does not represent the site with the least environmental impact, given the nature and economics of the alternatives, the project may not proceed. This is an important distinction under Ohio law, as it adds a level of consideration that is absent from the federal standards, especially the public need component. Under **R.C.**

4906.12, OPSB decision appeals must be in writing “stating [the] reasons for the action taken”.⁷⁹

To obtain a certificate, a major utility facility must file a certificate application with the OPSB that meets the requirements of R.C. 4906.06. This is often a lengthy application, and the entire process commonly takes several years to complete.

Following receipt of a certificate application, the OPSB will conduct a public hearing and will subsequently issue a decision to either grant or deny the application.⁸⁰ If the application is granted, the certificate will expire two years after the date that the facility first generates electric power.⁸¹

Important for the oil and gas industry, in 2012 the Ohio General Assembly clarified that production lines and so-called “gathering lines” used to collect oil and gas produced by vertical or horizontal wells in Ohio, are not subject to OPSB jurisdiction. Local zoning authorities have siting jurisdiction.⁸²

Footnotes — § 23.06:

⁷³ R.C. 4906.04.

⁷⁴ R.C. 4906.1(B).

⁷⁵ R.C. 4906.13.

⁷⁶ See *State ex rel. State Edison Co. v. Parrott*, 73 Ohio St. 3d 705, 654 N.E.2d 106 (1995); *Ohio Telnet.com, Inc. v. Windstream Ohio*, 2012-Ohio-5969, 2012 Ohio App. LEXIS 5155 (2012).

⁷⁷ R.C. 4906.01(D).

⁷⁸ See R.C. 4906.02.

⁷⁹ See R.C. 4906.11; *State ex rel. State Edison Co. v. Parrott*, 73 Ohio St. 3d 705, 654 N.E.2d 106 (1995).

⁸⁰ R.C. 4906.7, 4906.10.

⁸¹ R.C. 4906.10(A).

⁸² See R.C. 4906.01(B); see also Ohio Power Siting Board, *Natural Gas Pipeline FAQ*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/information/natural-gas-pipeline-faq/> (last visited Apr. 4, 2017).

§ 23.07. Wind Power

[1] Introduction to Wind Power Technology

The DOE characterizes wind energy as “the fastest-growing energy source in the world.”⁸³ The technology is particularly appealing to the United States because this country has enough wind resources to generate electricity for every home and business in the nation.⁸⁴ Wind energy (or wind power) describes the process by which wind is used to generate mechanical power or electricity. Wind turbines convert the kinetic energy in the wind into mechanical power, which can then be used for specific tasks, or can be converted into electricity using a generator. This technology can be used to provide energy for a single home or building, or a number of wind turbines can be connected to an electricity grid for more widespread electricity distribution.⁸⁵

[2] State Program to Encourage Wind Power Technology

The Ohio Anemometer Loan Program (ALP) is designed to help promote the development of wind power in Ohio. Under the ALP, qualified applicants can borrow all the equipment necessary to conduct a wind study, including a temporary meteorological tower, data logger, and instrumentation.⁸⁶ In addition to the loaning of equipment, Green Energy Ohio will provide study services, such as site inspection, equipment installation, data validation, and program management at no cost.⁸⁷

In August 2007, former Ohio Governor Ted Strickland announced grant awards totaling \$5 million for the development of utility-scale wind energy projects. Two projects received funding: The Buckeye Wind project developed by EverPower Renewables in Champaign County, and the JW Great Lake’s Wood County Wind Farm in Wood County.⁸⁸

On April 24, 2009, Everpower applied for a commercial wind farm certification from the Ohio Power Siting Board and was granted certification (for portions of the facility) on March 22, 2010.⁸⁹ In 2012, Everpower submitted an application for a second phase of the project and on May 28, 2013, was granted permission to construct 42 additional wind turbines.⁹⁰ In 2014, the OPSB approved Everpower’s request for an extension until 2018 for constructing the first phase.⁹¹ Numerous concerns raised by local

governments and Union Neighbors delayed construction on both project phases. Some concerns have evolved into legal disputes.⁹² Union neighbors appealed OPSB's extension and approval of the second phase to the Ohio Supreme Court, which heard the oral arguments on December 16, 2015.⁹³ In April 2016, the Ohio Supreme Court affirmed the OPSB's decision that granted a certificate for construction for the project's second phase.⁹⁴

The JW Great Lake's Wind Farm project, which was initially proposed for Wood County, was approved by OPSB in March 2010 for Hardin County.⁹⁵ Eventually, JW Great Lakes sold the farm to Hog Creek Wind Farm, LLC. Hog Creek requested an extension of its certificate for recent changes in the energy market, which OPSB granted until 2018.⁹⁶

In Cuyahoga County, the Great Lakes Energy Development Task Force released its Final Feasibility Study of Offshore Wind Pilot Project on May 1, 2009.⁹⁷ The proposed pilot project contemplates the installation of five to seven wind turbines seven miles offshore of downtown Cleveland that are expected to generate 20–30 MW. If successful, the developer intends on expanding the project to generate up to 5,000 MW by 2030. In May 2014, the Lake Erie Energy Development Corporation (LEEDCo), the organization charged with building the offshore wind project, did not receive the \$47 million four year grant sought from the DOE for the project.⁹⁸ However, LEEDCo did receive at least \$3 million from DOE to complete engineering and design studies concerning its wind project.⁹⁹

Alert: Birds and bats often are killed by wind turbine propellers. Consider the effect on flying animals when determining the location of a wind farm.

Footnotes — § 23.07:

⁸³ U.S. Department of Energy, *Advantages and Challenges of Wind Energy*, available at <http://energy.gov/eere/wind/advantages-and-challenges-wind-energy> (last visited Apr. 4, 2017).

⁸⁴ U.S. Department of Energy, *Explore Careers in Wind Power*, available at <http://energy.gov/eere/education/explore-careers-wind-power> (last visited Apr. 4, 2017).

⁸⁵ U.S. Department of Energy, *Wind Program*, available at <http://energy.gov/eere/wind/about-doe-wind-program> (last visited Apr. 4, 2017).

⁸⁶ Green Energy Ohio, *Anemometer Loan Program Wraps up its 5th Year*, available at <http://www.greenenergyoh.org/anemometer-loan-program-wraps-up-its-5th-year/> (last visited Apr. 4,

2017).

⁸⁷ Green Energy Ohio, *Anemometer Loan Program Wraps up its 5th Year*, available at <http://www.greenenergyoh.org/anemometer-loan-program-wraps-up-its-5th-year/> (last visited Apr. 4, 2017).

⁸⁸ Green Energy Ohio, *Governor Strickland announces \$5 million for wind energy production projects*, available at <http://www.greenenergyohio.org/page.cfm?pageID=1427> (last visited Apr. 4, 2017).

⁸⁹ Ohio Power Siting Board, *08-0666-EL-BGN: Buckeye Wind Project Buckeye Wind, LLC*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/cases/08-0666-el-bgn-buckeye-wind-project-buckeye-wind-llc/> (last visited Apr. 4, 2017).

⁹⁰ Ohio Power Siting Board, *Buckeye Wind Project*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/cases/12-0160-el-bgn-buckeye-ii-wind-farm-champaign-county> (last visited Apr. 4, 2017).

⁹¹ Ohio Power Siting Board, *Monday, August 25, 2014 Meeting Minutes*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/calendar/ohio-power-siting-board-meeting19/> (last visited Apr. 4, 2017; see Dayton Daily News, *OPSB extends wind certification*, available at <http://www.daytondailynews.com/news/news/local/opsb-extends-wind-certificate/ng8hp/> (last visited Apr. 4, 2017).

⁹² Dayton Daily News, *Buckeye Wind Farm case appealed to state Supreme Court*, available at <http://www.daytondailynews.com/news/news/local/buckeye-wind-farm-case-appealed-to-state-supreme-c/npCqD/> (last visited Feb. 17, 2016).

⁹³ See Court News Ohio, *Oral Argument Wednesday, Dec. 16, 2015 archive*, available at <http://www.courtnewsOhio.gov/cases/previews/15/1216/1216.asp#OA131874> (last visited Feb. 17, 2016).

⁹⁴ *In Re Application of Champaign Wind, LLC for a Certificate to construct a wind-powered electric generating facility in Champaign County, Ohio*, Ohio Supreme Court, available at <https://supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-ohio-1513.pdf> (Apr. 13, 2016).

⁹⁵ Ohio Power Siting Board, *Ohio Power Siting Board approves JW Great Lakes Wind project in Hardin County*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/media-room/media-releases/ohio-power-siting-board-approves-jw-great-lakes-wind-project-in-hardin-county/> (last visited Apr. 4, 2017).

⁹⁶ Ohio Power Siting Board, *Monday March 9, 2015 Meeting Minutes*, available at <http://www.opsb.ohio.gov/opsb/index.cfm/calendar/ohio-power-siting-board-meeting22> (last visited Apr. 4, 2017); see National Wind Watch, *Wind farm gets extension*, available at <https://www.wind-watch.org/news/2015/03/13/wind-farm-gets-extension/> (last visited Apr. 4, 2017).

⁹⁷ Cuyahoga County Department of Development, *Great Lakes Wind Energy Center Feasibility Study*, available at <http://development.cuyahogacounty.us/en-US/GLWECF-Study.aspx> (last visited Apr. 4, 2017).

⁹⁸ Office of Energy Efficiency & Renewable Energy, *Offshore Wind Advanced Technology*

Demonstration Projects, available at <http://energy.gov/eere/wind/offshore-wind-advanced-technology-demonstration-projects> (last visited Apr. 4, 2017).

⁹⁹ Midwest Energy News, *Despite funding setback, Lake Erie wind project pushes ahead*, available at <http://midwestenergynews.com/2014/06/23/despite-funding-setback-lake-erie-wind-project-pushes-ahead/> (last visited Apr. 4, 2017).

§ 23.08. Fuel Cells

[1] Introduction to Fuel Cell Technology

A fuel cell is an electrochemical energy conversion device. A fuel cell consists of two electrodes (an “anode” and “cathode”) that are compacted around an electrolyte. Energy is generated by oxygen passing over one electrode and hydrogen over the other, generating electricity, water, and heat. Hydrogen fuel is fed into the anode of the fuel cell and oxygen enters the fuel cell through the cathode. A catalyst splits the hydrogen atom into a proton and an electron, which then take different paths to the cathode. The proton then passes through the electrolyte. As the electrons travel down a separate path, they create an electrical current. As long as there is a supply of hydrogen and oxygen the circuit remains charged with electricity.¹⁰⁰

[2] State Program to Encourage Fuel Cell Technology

In February 2002, former Ohio Governor Bob Taft unveiled The Third Frontier Initiative; a \$1.6 billion, 10-year plan to invest in research, project demonstration and job creation in Ohio’s high tech industry.¹⁰¹ Further, in 2010, Ohio voters approved a \$700 million extension of The Third Frontier Initiative, which would have otherwise ended in 2012. One of the programs funded by the Third Frontier Initiative was the Fuel Cell Program (FCP). The purpose of the FCP was to spur job creation in Ohio while positioning the state as a national leader in the growing fuel cell industry. From 2003–2011, the FCP provided over \$90 million in low interest loans and grants to qualifying organizations seeking to investigate, implement, commercialize, or adapt qualifying fuel cell technologies. In addition to the FCP, the Third Frontier Initiative funded an Advanced Energy Program and Advanced Materials Program that were focused on alternative fuel technologies. Now, the Third Frontier grants money to companies that embrace alternative fuel methods through its Technology Validation and Start-up Fund, which seeks to create greater economic growth by protecting, supporting, and developing

technologies created by Ohio institutions.¹⁰²

Footnotes — § 23.08:

¹⁰⁰ The Fuel Cell and Hydrogen Energy Association, *Fuel Cell Basics*, available at <http://fchea.org/fuelcells> (last visited Feb. 16, 2016).

¹⁰¹ Ohio Development Services Agency, *Ohio Third Frontier*, available at http://development.ohio.gov/bs_thirdfrontier/default.htm (last visited Apr. 4, 2017).

¹⁰² Ohio Development Services Agency, *Technology Validation and Start-up Fund*, available at https://development.ohio.gov/bs_thirdfrontier/tvsf.htm (last visited Apr. 4, 2017; see Think, Ohio Third Frontier Commission approves funding for four early-stage technology companies being developed at Case Western Reserve, available at http://blog.case.edu/think/2015/12/28/ohio_third_frontier_commission_approves_funding_for_four_ear (last visited Apr. 4, 2017) (Third Frontier granted money for self-powering wireless sensors that create energy efficient smart buildings).

§ 23.09. Regulation of Solid and Hazardous Waste-to-Energy Facilities in Ohio

The last several decades have seen the transformation of solid and hazardous waste as a problem to be dealt with (usually by disposal) to a potential energy resource to be exploited. Energy is recovered from solid and hazardous waste in Ohio in at least two ways: (1) combustion of solid or hazardous waste as a heat source to generate heat or electricity; and (2) the use of landfill gas to serve the same function.

In Ohio, at least two separate environmental regulatory schemes, both administered by the Ohio EPA, are implicated in the construction and operation of Waste-to-Energy (WTE) facilities: (1) Ohio's air pollution regulatory program¹⁰³ (because WTE facilities that combust waste and produce energy are usually "air contaminant sources" as that term is defined in Ohio's air pollution regulations¹⁰⁴ requiring installation and operation permits of various kinds under Ohio law); and (2) Ohio's solid and hazardous waste regulatory program contained in [Revised Code Chapter 3734](#) and [Ohio Administrative Code Chapters 3745-27 and 3745-50](#) through 3745-57 (because solid or hazardous wastes are disposed of via incineration at such facilities, and thus are either solid or hazardous waste disposal facilities subject to regulation under those regulatory programs).

It is unlawful in Ohio to construct or operate a source of air pollution,

such as a hazardous or solid waste incinerator, without a permit issued by Ohio EPA.

The principal provisions of Ohio's solid waste regulatory/scheme applicable to WTE facilities are contained in [OAC 3745-27-50 and 3745-27-51](#). Those rules generally require that solid waste-to-energy facilities meet the same design criteria and siting criteria that sanitary landfills are required to meet.¹⁰⁵

Finally, hazardous waste incinerators are regulated in [Sections 3745-57-40 through 3745-57-51 of the Ohio Administrative Code](#). Those sections generally prohibit the incineration of any hazardous waste other than those specified in the incinerator's permit,¹⁰⁶ require that the incinerator conduct test burns of the waste to be disposed in accordance with [OAC 3745-50-62](#),¹⁰⁷ and require that such incinerators be operated in accordance with operating conditions determined by Ohio EPA on a case-by-case basis.¹⁰⁸

Most WTE facilities, whether they burn solid waste or landfill gas, emit significant quantities of carbon and greenhouse gas emissions. However, with the change in Administration, U.S. EPA leadership appears intent on revisiting its efforts to regulate the emission of carbon and greenhouse gases.

Footnotes — § 23.09:

¹⁰³ [R.C. Chapter 3704](#) and rules adopted thereunder; 2015 Am. Sub. H.B. No. 64, Sections 3704.05 and 3704.14.

¹⁰⁴ [OAC 3745-31-01\(I\)](#).

¹⁰⁵ See [OAC 3745-27-02](#); [3745-27-06](#); [3745-27-07](#); [3745-27-08](#).

¹⁰⁶ [OAC 3745-57-44\(A\)](#).

¹⁰⁷ [OAC 3745-57-44\(A\)\(I\)](#).

¹⁰⁸ [OAC 3745-57-45](#).

III.

CLIMATE CHANGE

§ 23.10. Introduction to Climate Change Issues

Climate change continues to be one of the most important and complex policy areas in the United States and beyond. The climate change phenomenon arises from the growing scientific consensus that the earth is warming. While the debate over the cause or causes of that warming continues, this warming effect has largely been attributed to human activities, such as the burning of fossil fuels, land use change, and agriculture. While far from resolved, a majority of scientists believe that if these contributing activities are not curtailed or altered to reduce their warming effects on the environment, global warming will continue to occur potentially resulting in flooding, droughts, famines and substantial social disruption. Further, the concept of climate change also encompasses related effects to global warming, including changes in precipitation, wind and ocean circulation, and a general concern that such changes in regional climates could lead to disruption and changes in ecosystems around the world.

These concerns have led to a strong movement for the reduction of carbon emissions resulting from the burning of fossil fuels. Many countries have already implemented carbon emission regulations and international cooperation to address climate change is currently being implemented by the United Nations Framework Convention on Climate Change (UNFCCC). With the adoption of the Paris Agreement, which requires countries to monitor, verify, and report greenhouse gas emissions, curtail the global temperature, and submit updated plans for reducing greenhouse pollution, the UNFCCC is trying to affect global change.¹⁰⁹ It is still uncertain whether Congress will enact legislation to curtail and control carbon emissions. As discussed in § 23.14, federal regulations have been enacted requiring the control, monitoring and reporting of greenhouse gas (GHG) emissions, although the ultimate use of the reportable emissions in the promulgation of future laws and regulations is still unfolding. U.S. EPA also has issued permitting rules for large GHG emitters (see § 23.14[4][b] and [d] below), and New Source Performance Standards imposing GHG emissions limits on new and modified coal- and oil-fired electric utility generating units (see Chapter 2 at § 2.03[4]),¹¹⁰ and GHG emission limits on existing electric generating units (see § 23.14[4][d]) with further regulations in the works.

Footnotes — § 23.10:

¹⁰⁹ United Nations, *Adoption of the Paris Agreement*, available at <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf> (last visited Mar. 23, 2017).

¹¹⁰ 80 Fed. Reg. 64510 (Oct. 23, 2015).

§ 23.11. Climate Registry

In May 2007, Ohio joined with 30 other states to form the Climate Registry.¹¹¹ The Climate Registry is an organization that helps public and private entities in Ohio accurately track emissions of GHGs.¹¹² Specifically, the Climate Registry provides the reporting and measurement infrastructure to allow member states to measure GHG emissions in a consistent manner. Participation in the program is voluntary for both Ohio and Ohio GHG emitters, such as utilities and manufacturers, but will help to develop necessary baselines to credibly compare future reductions. As of February 2011, the Registry's member list included 41 U.S. states, the District of Columbia, 13 Canadian Provinces, 4 Indian tribes and 6 Mexican states. Potential benefits from participating in the Climate Registry include: (1) providing access to software and technical support for cost-effective measurement of GHG emissions; (2) documenting early reduction actions; (3) preparing for future mandatory federal reporting requirements; (4) and obtaining public recognition as a proactive company.

Participants in the Climate Registry use the General Reporting Protocol that contains reporting requirements, calculation methodologies, administrative instructions and reference materials for reporters. The General Reporting Protocol provides instructions for gathering data, verifying the data, and reporting the data publicly on the Climate Registry website. Participants must pay fees based on the revenues of the commercial or industrial organization and budgets of non-profit, government, and academic organizations. Information about the registry is available at www.theclimateregistry.org.

Footnotes — § 23.11:

¹¹¹ The Climate Registry, *About Us*, available at <http://www.theclimateregistry.org/who-we-are/about-us/> (last visited Mar. 23, 2017); <http://www.theclimateregistry.org> (last visited Mar. 23, 2017).

¹¹² The Climate Registry, *Jurisdiction*, available at <http://www.theclimateregistry.org/who-we-are-board-of-directors/jurisdiction/> (last visited Mar. 23, 2017); see Ohio Manufacturers' Ass'n, *Ohio Joins the Climate Registry to Track Emissions of Climate Change Gases*, available at <http://www.ohiomfg.com/communities/environment/ohio-joins-the-climate-registry/> (last visited Mar. 23, 2017); <http://www.theclimateregistry.org> (last visited Mar. 23, 2017).

§ 23.12. Midwest Greenhouse Gas Reduction Accord

On November 15, 2007, the Midwest Governors Association (MGA) signed the Midwestern Greenhouse Gas Reduction Accord, which was intended to serve as a regional strategy to achieve energy security and reduce GHG emissions that cause global warming.¹¹³ Iowa, Illinois, Kansas, Manitoba, Michigan, Minnesota, and Wisconsin signed the Accord as members, while Indiana, Ohio, Ontario, and South Dakota signed the accord as observers.¹¹⁴ As an observer, Ohio was to participate in the formation of the regional cap-and-trade system. The Accord was designed to (1) establish GHG reduction targets and timeframes consistent with MGA member states' targets; (2) develop a market-based and multi-sector cap-and-trade mechanism to help achieve those reduction targets; (3) establish a system to enable tracking, management, and crediting for entities that reduce GHG emissions; and (4) develop and implement additional steps as needed to achieve the reduction targets, such as low-carbon fuel standards and regional incentives and funding mechanisms.¹¹⁵

Under the Accord's timelines, members are required to: develop a work plan and work group to move forward with the program by January 2009; establish targets for GHG emission reductions and timelines for adopting such policies by summer 2009; and complete development of the proposed cap-and-trade agreement and model rule by November 2009.¹¹⁶ The Accord Advisory Group issued its GHG emission target recommendations in June 2009. A Final Model Rule was issued in April 2010. The program called for a cap-and-trade system with a target of reducing GHG emissions by 20 percent below 2005 levels by 2020 and 80 percent below 2005 levels by 2050. As part of the Accord, member states originally committed to launching new cooperative regional initiatives to address carbon dioxide management, a bioproduct procurement program, additional electricity transmission capabilities, renewable fuel corridors, advanced bioenergy permitting, and low-carbon energy transmission infrastructure. As is the case at the national level, this regional initiative has stalled. While the Accord has not been revoked, the signatory states no longer are proceeding thereunder.

Footnotes — § 23.12:

¹¹³ <http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra> (last visited Mar. 23, 2017); <http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra> (last visited Mar. 23,

2017).

¹¹⁴ <http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra> (last visited Mar. 23, 2017).

¹¹⁵ <http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra> (last visited Mar. 23, 2017).

¹¹⁶ <http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra> (last visited Mar. 23, 2017).

§ 23.13. Ohio Municipal Climate Change Initiatives

In addition to state and federal legislation and rules to combat climate change and promote renewable energy, many Ohio cities and municipalities are adopting policies and rules to address climate change issues on the local level. For example, both the Cities of Cleveland and Cincinnati have implemented, or are seeking to implement, policies or technologies to reduce the cities' production of GHGs. In 2008, the Cincinnati City Council adopted a Climate Protection Action Plan (now called The Green Cincinnati Plan).¹¹⁷ The plan, which started in 2008, requires Cincinnati to reduce its greenhouse gas emissions below the 2006 levels by 2% per year, totaling an 84% reduction in GHG emissions by 2050.¹¹⁸ This process includes the development of a Greenhouse Gas Emissions Inventory, which will be used as a baseline against which these reduction goals will be measured.¹¹⁹

The City of Cleveland also has taken steps to map its "carbon footprint" by joining the International Council for Local Environmental Initiatives (ICLEI).¹²⁰ Other Ohio cities that are members of the ICLEI, include Akron, Alliance, Athens, Cincinnati and Oberlin.¹²¹ The ICLEI developed the benchmarking methodology used in the Cincinnati Climate Protection Action Plan, which will likely be used to create uniformity in GHG emission reduction programs in Ohio cities. Similarly, Cleveland has adopted a citywide Advanced Energy Portfolio Standard (AEPS) to ensure that 15% of Cleveland Public Power's energy comes from advanced or renewable sources by 2015, 20% by 2020, and 25% by 2025.¹²² In addition to mapping its carbon footprint, Cleveland, as well as various groups and municipalities, is involved in wind monitoring on Lake Erie to determine the potential for future development of wind power on the lake.¹²³

Finally, many cities in Ohio are creating incentives or requirements to

promote “green” or sustainable building to lower energy consumption and promote green building principles. In Cleveland, developers and contractors that receive financial support from the City are now required to use green building principles in new construction projects.¹²⁴ Further, the City is replacing traffic and crosswalk signals with LED lights to reduce energy and maintenance costs. The traffic light replacement is part of a 5-year plan being managed by the Department of Public Service.¹²⁵ The City of Columbus has established a “Get Green” initiative. Its Office of Environmental Stewardship focuses on both internal City operations and external partnering with vendors and stakeholders throughout the community.¹²⁶

Footnotes — § 23.13:

¹¹⁷ Office of Environment & Sustainability, *Green Cincinnati Plan (2013)*, available at <http://www.cincinnati-oh.gov/oes/linkservid/6CE53223-9206-9F36-DB7FA3444F16A1A0/showMeta/0/>, at 8 (last visited Mar. 23, 2017); <http://www.cincinnati-oh.gov/oes/citywide-efforts/climate-protection-green-cincinnati-plan> (last visited Mar. 23, 2017).

¹¹⁸ Office of Environment & Sustainability, *Green Cincinnati Plan*, available at <http://www.cincinnati-oh.gov/oes/citywide-efforts/climate-protection-green-cincinnati-plan/> (last visited Mar. 23, 2017); <http://www.cincinnati-oh.gov/oes/citywide-efforts/climate-protection-green-cincinnati-plan> (last visited Mar. 23, 2017).

¹¹⁹ <http://www.cincinnati-oh.gov/oes/citywide-efforts/climate-protection-green-cincinnati-plan> (last visited Mar. 23, 2017).

¹²⁰ <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²¹ <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²² <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²³ <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²⁴ <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²⁵ <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeofSu> (last visited Mar. 23, 2017).

¹²⁶ www.columbus.gov/getgreen (last visited Mar. 23, 2017).

§ 23.14. Federal and International Climate Change Developments

[1] Greenhouse Gas (GHG) Reporting Rule

On September 22, 2009, U.S. EPA issued a final rule for mandatory GHG reporting by large GHG emissions sources in the United States.¹²⁷ The purpose of the reporting rule is to collect accurate and comprehensive national emissions data for future policy-making decisions, including the potential development of a cap-and-trade program. The rule was developed by the U.S. EPA in response to the 2008 Consolidated Appropriations Act ([Pub. L. No. 110-161](#)) and issued under authority granted to the U.S. EPA by the Clean Air Act.

Suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, facilities included in one of the specified source categories, and facilities that produce 25,000 metric tons or more per year of GHG emissions must submit an annual report to the EPA.¹²⁸ Facilities that do not contain one of the specified source categories and have direct emissions below the 25,000-metric-ton threshold are not required to report.¹²⁹

Even if a facility does not contain any direct emission sources listed in the first two source categories, the facility must determine if it emits 25,000 metric tons or more of GHGs from any stationary combustion sources. If so, the facility is subject to the reporting rule's requirements. The first annual report was due March 31, 2011 for 2010 emissions, except for vehicle and engine manufacturers, whose reporting year begins for model year 2011.¹³⁰ On March 17, 2011, U.S. EPA extended the deadline for reporting 2010 data to September 30, 2011.¹³¹ Twelve source categories were required to report for the first time in 2012 (for calendar year 2011). Among the sources were oil and gas systems, industrial landfills and wastewater treatment facilities, certain coal mines, and the use and manufacture of electric transmissions and distribution equipment.¹³²

On November 29, 2013, U.S. EPA adopted rules that assign higher global warming impacts to six classes of air pollutants. The action reflects the latest internationally accepted scientific consensus.¹³³

Emitters of the following compounds will need to calculate GHG

emissions using new equations: methane, nitrous oxide, sulfur hexafluoride, certain hydrofluorocarbons, perfluorocarbons, and other fluorinated greenhouse gases.

In 2014, U.S. EPA created an “inputs verification” tool that 23 industries must use to report their GHG emissions.¹³⁴ The verification tool will protect the confidentiality of process and production data that could disclose proprietary trade secrets. Among the 23 industries are aluminum manufacturing, iron and steel production, petrochemical production, petroleum refineries, pulp and paper manufacturing, and industrial waste landfills.

U.S. EPA added GHG reporting requirements in 2015 for gathering and boosting systems, completions and work overs of oil wells using hydraulic fracturing, and blowdowns of natural gas transmission pipelines. Moreover, the rule requires the reporting of well identification numbers for Onshore Petroleum and Natural Gas production facilities and allows for temporary, automatic use of best available monitoring methods for any newly added sources to provide flexibility to new reporters.¹³⁵

U.S. EPA’s GHG reporting data may be accessed at www.epa.gov.ghgreporting/.

[2] GHG Endangerment Finding

On December 7, 2009, the U.S. EPA announced its finding that GHGs threaten the public health and welfare of the American people, and that GHG emissions from on-road vehicles contribute to the threat (the “Endangerment Finding”).¹³⁶ The Endangerment Finding is significant because it opened the door to regulation of GHGs under the Clean Air Act (CAA), an issue that has been hotly debated in Congress since climate change was first recognized as a global issue. Specifically, the Endangerment Finding paves the way for U.S. EPA to regulate automobile emissions. While the Endangerment Finding itself does not impose any requirements on industry or entities, its significance to future regulation under the CAA has had far reaching impacts beyond the automotive industry.

The Endangerment Finding was issued in response to the Supreme Court’s decision in *Massachusetts v. EPA*,¹³⁷ where the Court found that GHGs were air pollutants under the CAA. The Court further held that U.S.

EPA must determine if GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, or if the science is too uncertain to make a reasoned decision. In announcing the Endangerment Finding, U.S. EPA has answered this question in the affirmative by determining that emissions of GHGs can reasonably be anticipated to endanger public health and welfare.

The Endangerment Finding enabled U.S. EPA to finalize the GHG standards for light duty vehicles that were proposed jointly by the U.S. Department of Transportation's National Highway Traffic Safety Administration and U.S. EPA on September 15, 2009.¹³⁸ Finalized in April 2010, the standards established a national program aimed at improving vehicle fuel economy and reduction of GHGs.¹³⁹ The rules cover model years 2012 through 2016 and include miles per gallon requirements and maximum carbon emission levels per mile.¹⁴⁰

Numerous parties challenged the validity of the Endangerment Finding. In June of 2012, the D.C. Circuit Court of Appeals upheld the agency's determination.¹⁴¹ The court held that the Endangerment Finding was supported by the record and that subsequent rules based on the Finding were compelled by the Clean Air Act and the U.S. Supreme Court's decision in *Massachusetts*. Six months later, the D.C. Circuit denied a request for rehearing en banc, cementing its original decision, stating that the Clean Air Act's definition of air pollutants "unambiguously includes greenhouse gases" and that U.S. EPA's scientific judgment must receive "an extreme degree" of deference.¹⁴²

Manufacturers, businesses, and trade organizations feared that the Endangerment Finding would lead to U.S. EPA's regulation of GHG emissions sources beyond the auto industry. As discussed below, those fears have proven well-founded (see § 23.14[4]).

[3] American Clean Energy and Security Act of 2009

On June 26, 2009, the House of Representatives passed H.R. 2454, otherwise known as the American Clean Energy and Security Act of 2009 (also referred to as the Waxman-Markey bill). However, Congressional efforts to enact climate change legislation stalled in 2010 and have not been revived.

The ambitious Waxman-Markey bill contemplated the creation of a cap-and-trade program for GHG emissions in the United States. Specifically, it included provisions (1) creating a combined energy efficiency and renewable electricity standard and requiring retail electricity suppliers to meet 20% of their demand through renewable electricity and electricity savings by 2020; (2) setting a goal of, and requiring a strategic plan for, improving overall U.S. energy productivity by at least 2.5% per year by 2012 and maintaining that improvement rate through 2030; and (3) establishing a cap-and-trade system for GHG emissions and setting goals for reducing such emissions from covered sources by 83% of 2005 levels by 2050.¹⁴³ It remains to be seen whether the political winds will shift back to support such an agenda. It does not seem likely under the Trump Administration and a Republican-controlled Congress.

[4] Federal Climate Change Regulatory and Judicial Developments

[a] Introduction

On June 25, 2013, then-President Obama outlined an ambitious second-term climate change strategy, reaffirming the goal of reducing total U.S. GHG emissions by 17 percent below 2005 levels by 2020. The President's "Climate Action Plan" would have imposed emission limits on new and existing power plants; further promoted renewable energy (with a goal of doubling renewable electricity generation by 2020); reduced GHG emissions from the transportation sector via fuel economy standards and biofuel development; and sought greater energy efficiency in buildings and appliances. DOE received an increase in funding for energy-related research and development in fiscal year 2014, 29.9 percent higher than 2013 figures.¹⁴⁴

The Climate Action Plan set specific targets with respect to the utility industry: President Obama directed U.S. EPA to issue proposed GHG emission standards for new, modified and existing power plants. (See discussion of the GHG emissions standards for power plants at § 2.03[4] and § 23.14[4][d].)

The Obama Administration also pursued an aggressive methane reduction strategy, targeting emissions from oil and gas activities, coal mining landfills, and agriculture. Methane is a priority greenhouse gas, as a ton of methane has 20 times the heat trapping capacity as a ton of carbon dioxide. One thing is

for sure: The Trump Administration will seek to scale back President Obama's climate change programs.

[b] Permitting of GHG Under EPA's "New Source Review" and "Title V" Programs—The "Tailoring Rule"

EPA's issuance of its "Endangerment Finding" and the subsequent April 2010 promulgation of emission standards, and fuel economy rules for cars and light-duty trucks, subjected GHGs to the Clean Air Act's pre-construction new source review "Prevention of Significant Deterioration (PSD) and "Title V" operating permit programs. While those permit programs apply only to "major sources" (see [Chapter 2](#)), because carbon dioxide is emitted in such large amounts by so many sources, application of the 250 tons per year and 100 tons per year thresholds of the PSD and Title V programs would subject tens of thousands of entities (such as commercial buildings, health care facilities, schools) to permitting requirements. Consequently, in May 2010, EPA issued a rule to "tailor" applicability of the PSD and Title V permit programs to the realities of GHG emissions, establishing much higher thresholds for GHGs. Ohio EPA adopted conforming rules on March 31, 2011.¹⁴⁵

During the Tailoring Rule's first phase (January 2 to June 30, 2011), new sources that were required to obtain a PSD permit for other regulated pollutants also had to incorporate GHGs into their permit if the facility had the potential to emit GHGs equal to or exceeding 75,000 tons per year on a carbon dioxide equivalent (CO₂e) basis. During the first phase, GHG emissions alone did not trigger PSD permitting requirements. During the second phase (permits issued on or after July 1, 2011), PSD applies to new GHG emissions sources if either: (1) PSD for GHGs would have been required under the first phase; or (2) if the facility's potential GHG emissions are equal to or greater than 100,000 tons CO₂e *and* exceed the traditional 100/250 ton PSD thresholds measured on a mass basis.

During the first six-month phase, modified major sources were required to incorporate GHGs into their permits if: (1) the modification would be considered major regardless of GHG emissions (i.e., emission increases of other regulated pollutants would trigger permitting requirements); *and* (2) the emission increase and net emission increase attributable to the modification

was equal to or greater than 75,000 tons CO₂e *and* greater than zero tons on a mass basis.

For permits issued on or after July 1, 2011, modifications to existing major sources are required to incorporate GHGs into their permits if: (1) the criteria for the first six-month period are met; or (2) the existing source has a PTE equal or greater to 100,000 tons on a CO₂e basis and 100/250 tons on a mass basis, *and* the modification has a net emission increase equal to or greater than 75,000 tons CO₂e and greater than zero tons on a mass basis. For minor sources, modifications trigger PSD permitting if the modification alone has actual or potential GHG emissions equal to or greater than 100,000 tons CO₂e and 100/250 tons on a mass basis.

The PSD program requires permittees to employ the “Best Available Control Technology” (BACT) to control regulated pollutants. This presented another challenge in this new age of carbon controls, as permit writers have little or no guidance as to what constitutes BACT for GHGs. According to initial guidance provided by EPA to state and local regulatory authorities, energy efficiency will be a critical factor in BACT determinations until add-on pollution control technologies, such as carbon sequestration and other control methodologies, become more accessible.¹⁴⁶ The EPA released five technical white papers detailing available GHG control options for significant emission sources in the oil and gas sector.¹⁴⁷

On January 12, 2011, U.S. EPA announced that it would defer for three years GHG permitting requirements for new and modified industrial facilities that burn wood, crop residues, grass, and other “biomass” as fuel.

The “tailoring rule” faced immediate legal and political challenges. However, the D.C. Circuit Court of Appeals’ decision in *Coalition for Responsible Regulation Inc. v. EPA*¹⁴⁸ (supporting U.S. EPA’s “Endangerment Finding”) also upheld the Tailoring Rule.

The Supreme Court solidified U.S. EPA’s authority to regulate GHGs under the Clean Air Act when it rejected challenges to the D.C. Circuit’s ratification of the Endangerment Finding and the Agency’s subsequent GHG emissions rules for motor vehicles. However, the Supreme Court granted six petitions for certiorari in a consolidated proceeding.¹⁴⁹ The Court heard arguments only on the question whether U.S. EPA’s GHG emissions

standards for vehicles necessarily triggered permitting requirements for stationary sources. Industry argued that the Prevention of Significant Deterioration pre-construction permit program applies only to facilities that emit major amounts of only criteria pollutants (those pollutants for which National Ambient Air Quality Standards have been established) in attainment areas. U.S. EPA argued that PSD applies to facilities that emit major amounts of any pollutant (including GHGs), even if a facility emits no criteria pollutants in major amounts, as long as the facility is located in an attainment area.

On June 23, 2014, the Supreme Court rendered its decision: the Clean Air Act did not compel U.S. EPA to require facilities to obtain PSD or Title V permits due solely to GHG emissions, and the Agency does not have authority to “tailor” those permit programs to the scope of GHG emissions by establishing emissions thresholds that differ from those expressly set forth in the Clean Air Act.¹⁵⁰ However, the Court ruled that U.S. EPA may subject sources that would otherwise be subject to PSD review, to emission limits for GHG based on Best Available Control Technology requirements (the standard for all sources subject to PSD).¹⁵¹ For such so-called “anyway” sources, U.S. EPA will continue to apply a 75,000 tpy CO₂e threshold (i.e., BACT will not apply to sources that emit less than 75,000 tpy).

In a December 19, 2014 policy statement, U.S. EPA announced that, consistent with the *UARG* decision:

- (1) U.S. EPA will propose a rule that would give permitting authority to rescind “GHG-only” permits;
- (2) Until such a rule is issued, U.S. EPA is providing “no action assurance” to sources with GHG-only permits, declining to enforce terms and conditions relating to GHG; and
- (3) U.S. EPA is encouraging states to take similar action.

U.S. EPA issued a final rule that gives U.S. EPA authority to rescind CAA Prevention of Significant Deterioration permits under Step 2 of the Greenhouse Gas tailoring rule on May 7, 2015.¹⁵²

U.S. EPA published a final rule implementing the Supreme Court’s *UARG* ruling in August 2015.¹⁵³ Facilities that received GHG emissions-

based PSD permits prior to the UARG decision were instructed to request rescission from the appropriate permitting agency. In early 2016, the Supreme Court declined to hear a lawsuit that sought to compel U.S. EPA to re-propose its GHG permitting requirements.

On October 3, 2016, U.S. EPA issued a proposed rule that would exclude facilities that emit less than 75,000 tons of GHG (carbon dioxide equivalent) from PSD and Title V permitting.¹⁵⁴ This “de minimis” determination would be the final component of U.S. EPA’s response to the UARG decision. The final rulemaking was pending as the 2017 Manual went to print.

[c] Carbon Capture and Sequestration

On December 10, 2010, U.S. EPA finalized its “Carbon Capture and Sequestration” (CCS) rules under the Safe Drinking Water Act’s “Underground Injection Control” program.¹⁵⁵ Sequestration involves capturing carbon emissions at stationary sources such as power plants, natural gas processing facilities and other large industrial operations, and injecting the carbon dioxide deep into the ground for long-term storage. Because of concerns regarding migration/escape of the gases and potential presence of impurities, U.S. EPA’s rules are designed to ensure that storage areas are geologically sound, and that wells are constructed, tested, monitored and ultimately closed properly. The rule also mandates regular groundwater monitoring, tracking of the location of injected gases, and collecting of data in 2011 and reporting beginning in March 2012. These rules will become more relevant to the extent U.S. EPA GHG emission standards rely on CCS as a control strategy.

[d] GHG Emission Standards

As discussed in [Chapter 2](#) at § 2.03[4], on April 13, 2012, U.S. EPA first issued proposed GHG emission standards under the “New Source Performance Standards” (NSPS) program for power plants.¹⁵⁶ Due to the significant concerns that the proposal created (interested parties submitted 2.5 million comments), the Agency withdrew the initial rulemaking and issued a revised proposal on January 8, 2014.¹⁵⁷ U.S. EPA issued the rules in final form in October 2015, and those rules are under attack.¹⁵⁸ U.S. EPA subsequently issued proposed Clean Air Act Section 111(d) emission guidelines for existing power plants in June 2014.¹⁵⁹ The proposed rule was less

straightforward than the rules for new electric generating units. It set target lbs CO₂/net MWhr carbon emissions rates for each state (interim and final targets), and allowed states to achieve those rates through the use of a combination of “building blocks.” Rather than requiring existing sources to employ CCS or convert from coal-fired power generation to natural gas systems, the following “building blocks” are deemed to constitute BSER:

- (1) 6% heat rate improvements (i.e., increased efficiency);
- (2) Displacing coal-fired power generation with existing natural gas-fired combined cycle plants, with a targeted 70% utilization rate;
- (3) Increasing use of renewables and nuclear power; and
- (4) Reducing electricity demand.

Lawsuits challenging the Agency’s proposed existing source regulations were filed almost immediately.¹⁶⁰ The challengers asserted that the Clean Air Act precludes Section 111(d) rules for existing electric generating units because they are already subject to Section 112 (hazardous air pollutant) regulation and that the “Best System of Emission Reduction” may not include measures “beyond the fence line” of electric generating units or plants (e.g., end-user efficiency and expansion of renewable power generation). Additionally, the industry asserted that the guidelines do not provide adequate time for electric grid reliability assessments, necessary electricity system changes, construction of new electric generating units, and the expansion of natural gas transmission and distribution facilities.

The State of Ohio filed comments on the proposed existing source CO₂ emissions guidelines rulemaking. In addition to challenging U.S. EPA’s authority to regulate existing electric generating units under Section 111(d) and questioning the agency’s assumptions underlying the four building blocks, the State also indicated that the rule would threaten electric grid reliability. Ohio already expects to lose 30% of its coal-fired generating capacity due to other U.S. EPA regulatory programs. Ohio also asserted that U.S. EPA failed to take into account, as it developed the BSER determination, the unique circumstances of Ohio as a de-regulated energy marketplace. Further, Ohio commented, U.S. EPA has underestimated the rule’s impact on the cost of electricity and has no authority to usurp the

Federal Power Act by mandating dispatch of energy based on CO₂ emissions rather than costs. Power plants could be required to spend billions of dollars to comply with other U.S. EPA requirements, such as the mercury NESHAPS and Cross State Air Pollution Rule (see §§ 2.05 and 2.04[1]), only to be forced to close facilities that cannot meet the GHG restrictions. Industry and state challenges to the proposed GHG regulations for existing power plants were dismissed as premature.

The centerpiece of the Obama administration's climate change strategy, U.S. EPA's final "Clean Power Plan" GHG emissions regulations for existing electric generating units ("CPP Rules"), were published in October 2015.¹⁶¹ U.S. EPA expects that the rules will reduce, by 2030, carbon dioxide emissions by 32% from 2005 levels. As discussed below, however, a February 2016 Supreme Court decision put the program's implementation on hold.

The CPP rules set state-specific CO₂ emission goals: interim goals to be met over the period 2022–2029, and final goals to be met by 2030. It is up to each state (or group of states) to develop rules to achieve their goals. The emissions goals are expressed as rate-based (pounds of CO₂ per megawatt hour of electricity) and mass-based (tons of CO₂ emitted by electric generating unit.) States may select which metric they wish to use.

Using 2012 as a baseline, U.S. EPA analyzed each state's mix of energy generation and used three "building block" assumptions (rather than the four originally proposed in 2012) to set the various state goals:

- (1) 2.1–4.3% improvement in heat rate (i.e., generation of more electricity per Btu);
- (2) Re-dispatch demand from coal-fired units to natural gas combined cycle units; and
- (3) Significant increases in use of renewable sources of energy (solar, wind, biomass, and hydroelectric).

Ohio would be required to cut carbon emissions by 36% to achieve its CPP goal.

States must submit final implementation plans by September 2018 unless

granted an extension. U.S. EPA would impose a “Federal Implementation Plan” upon those states that do not submit an approvable plan. U.S. EPA released its proposed FIP in August 2015.¹⁶²

Twenty-nine states (including Ohio) and numerous utility and other industrial groups immediately filed lawsuits in the U.S. Court of Appeals for the District of Columbia following issuance of the final CPP regulations.¹⁶³ The arguments presented to the Court of Appeals similar to those raised in the challenges to the proposed CPP rules:

- The Court should limit its deference to U.S. EPA’s interpretation of its authority under Section 111(d) to shift the power industry away from coal and toward cleaner energy sources;
- The rules subvert the clear statutory language of the Clean Air Act by regulating how utilities generate electricity, forcing a shift to renewable energy or less-impactful fuels and otherwise imposing “outside the fenceline” control systems;
- The CPP rules impose limits more stringent than those applicable to new electric generating units; and
- U.S. EPA is barred from regulating CO₂ under Section 111(d) because electric operating units already are subject to limits imposed under the Section 112 “Hazardous Air Pollutants” regulatory program.

The D.C. Circuit rejected state and industry requests for a stay of implementation of the CPP rules pending the Court of Appeals’ ultimate consideration of the challenges on their merits. However, on February 9, 2016, in a surprising 5–4 decision, the U.S. Supreme Court issued a stay order.¹⁶⁴ The stay prevents U.S. EPA from implementing the rule not only until the D.C. Circuit issues judgment on the legality of the CPP rules, but also until the Supreme Court subsequently weighs in. Ten judges on the D.C. Court of Appeals heard oral argument on the merits of the challenges on September 10, 2016.

The stay virtually guarantees that the deadlines for states’ submissions of implementation plans (2018) and initial demonstration of reduced GHG emissions (2022) will be pushed back.

It is unclear when the Court of Appeals will render its decision, let alone

how the appeal will play out at the Supreme Court. In the meantime, the Trump Administration (and the Scott Pruitt-led U.S. EPA) will pursue its vowed roll-back of the CPP. It has three primary options:

- (1) Allow the D.C. Circuit and ultimately the Supreme Court to kill the rules;
- (2) Initiate a rulemaking to revoke the CPP (or, if the Court of Appeals remands the CPP regulations, significantly revise the rules); and/or,
- (3) Work with the Republican-led Congress to amend the CAA to bar U.S. EPA from regulating GHG emissions.

States that are supportive of the CPP rules likely will follow the spirit of the regulations, strengthening regional GHG reduction efforts through, e.g., cap and trade programs such as the existing Regional Greenhouse Gas Initiative.

As mentioned in § 2.03[4], in 2016 U.S. EPA also issued NSPS emission standards to limit methane and volatile organic compounds generated by certain oil and gas operations.¹⁶⁵ Heretofore, such operations were subject to emission limits, but the rules did not include methane. The rules now cover, in addition to well sites and compression stations, hydraulically fractured wells and downstream processing operations. The sources also are required to monitor for fugitive emissions in order to discover methane and VOC leaks.

At last count, 15 states and 24 industry trade associations have challenged the rules in the federal court of appeals.¹⁶⁶ Petitioners assert that the Clean Air Act does not authorize U.S. EPA to regulate methane emissions nor certain of the targeted sources in the oil and gas sector. It is likely that the Trump Administration will revisit the rulemaking in light of concerns regarding the regulations' impact on oil and gas development and production.

Recent Development: On March 28, 2017, President Trump signed an Executive Order directing U.S. EPA to withdraw the Clean Power Plan rules for existing power plant units, as well as agency's rules capping GHG emissions from new and reconstructed power plants. The Order also calls for a roll back of the 2016 methane emissions standards for new oil and gas development sources. Withdrawal of final regulations is itself a rulemaking exercise that certainly will face

vociferous opposition from those states that support the GHG rules and a coalition of environmental organizations. In the meantime, everyone awaits the D.C. Circuit Court of Appeals' decision on the remanded Clean Power Plan rules.

[e] The Climate Change Battle Is Waged in the Courts

In a much-anticipated court proceeding, on June 20, 2011, the U.S. Supreme Court rejected the attempt by various states, New York City, and several environmental groups to have the judicial system regulate the limits on greenhouse gas emissions. In *American Electric Power Co. v. Connecticut*,¹⁶⁷ the Court ruled in an 8-0 decision that it would leave the standard setting and greenhouse gas emission controls to the experts. Since the Clean Air Act and the associated U.S. EPA regulations authorized by the Act provide the mechanism to address limits on emissions of carbon dioxide from domestic plants, “there is no room for a parallel track,” and federal common law is not available as a way to sidestep this process. The Court’s decision overturns the Second Circuit’s ruling that permitted the same plaintiffs to proceed with lawsuits against various electric utilities, which alleged that the defendants’ greenhouse gas emissions were considered a public nuisance that contributed to global warming. The Court declined to address the state law nuisance claim, finding that its decision on the federal common law question precluded the need to do so. Thus, for now, it appears that industry will need to keep its eyes on Congress and U.S. EPA to make the next move.

Three other climate change cases have reached the federal Courts of Appeal. In *Comer v. Murphy Oil USA*,¹⁶⁸ Mississippi residents sued dozens of oil and gas companies for Hurricane Katrina-related damages claiming that global warming, contributed to by the defendants’ GHG emissions, intensified the hurricane. The federal district court in Mississippi dismissed the lawsuit, and the Fifth Circuit Court of Appeals, after fits and starts, ultimately dismissed the plaintiffs’ appeal.¹⁶⁹

The Ninth Circuit heard an appeal from the dismissal of an Alaskan village’s claim against 24 energy companies alleged to have contributed to global warming, which was responsible for coastal erosion.¹⁷⁰ Following the U.S. Supreme Court’s lead in *American Electric Power Co. (AEP) v. Connecticut*,¹⁷¹ the Ninth Circuit held that federal common law public

nuisance claims are unavailable to parties seeking damages or injunctive relief based on global warming.¹⁷² Essentially, the court ruled that federal common law cannot apply when legislation directly speaks to an issue. The Supreme Court denied certiorari.¹⁷³

Finally, the Ninth Circuit followed up on its *Kivalina* decision by ruling that two environmental groups lacked standing to bring a GHG-based Clean Air Act citizen suit against oil refineries in the State of Washington.¹⁷⁴ The court held that the plaintiffs failed to satisfy the “causation” and “redressability” elements of the standing test because they failed to demonstrate that the refinery emissions make a “meaningful contribution” to global GHG concentrations.¹⁷⁵ Thus, “meaningful contribution” is now the threshold for standing for GHG-based citizen suits under the Clean Air Act in the Ninth Circuit.

The combination of *AEP*, *Comer*, *Kivalina*, and *Washington Environmental Council* impose significant hurdles to private party efforts to curb GHG emissions based on global warming. However, the Ninth Circuit did not address *Kivalina*’s state claims. State courts are likely to become the next battleground for public nuisance claims arising from assertions of climate change.

In a novel approach, a group of private citizens, including children, have brought an action against the federal government asserting that by facilitating climate change, the government denied the plaintiffs their right to life, liberty and property. The plaintiffs also claim that the government violated the “public trust doctrine” by supporting fossil fuel use despite being aware of its role in climate change.¹⁷⁶ The federal government and industry group intervenors sought dismissal of the lawsuit, arguing that the plaintiffs lacked standing, failed to raise any constitutional claims, and improperly asked the court to rule on political issues. In November 2016, the court rejected the motions to dismiss. The lawsuit continues.

In other climate change battlefront news, 17 state attorneys general (known as “AGs United for Clean Power”) have announced their intention to pursue fraud allegations against certain large fossil fuel companies. Certain of the AGs have subpoenaed climate change-related documents from ExxonMobil spanning decades. ExxonMobil is challenging the subpoenas. The SEC also is taking action, investigating whether ExxonMobil properly

accounts for costs to comply with future environmental regulatory requirements and other climate change impacts on its business.

[5] International Efforts to Control GHG

During the much ballyhooed United Nations Climate Change Conference held in Copenhagen, Denmark, December 7–18, 2009 (COP15), a number of countries entered an agreement recognizing the existence of global warming and the need for international measures to address the issue globally (the Accord). The Accord was predominantly negotiated between leaders of China, India, Brazil, South Africa, the United States, and approximately 20 other countries. The most significant aspect of the Accord is that participating nations recognized that the increase in global temperatures should be below 2 degrees Celsius, and that significant emission cuts were necessary to achieve that goal. To this end, participating developed nations committed to implement individually or jointly emission targets by 2020 with such targets being set by January 31, 2010.

Under the Accord, developing nations may undertake actions voluntarily and on the basis of financial support.¹⁷⁷ The availability of financial support was a significant issue discussed during COP15 with nations recognizing the disparity in financial sacrifice required to address global warming between developed and developing nations. Thus, the Accord contemplates developed nations providing financial support to developing nations in their efforts to meet the emission targets.

The Accord was met with mixed reviews from the international and domestic communities for failing to establish mandatory emission cuts and international enforcement mechanisms. It was further criticized when the Accord failed to garner enough support among U.N. member nations and the January 31, 2010 target deadline was amended to be “optional.”

In November 2014, the U.S. and China entered into a Joint Agreement to reduce GHG emissions. The U.S. targeted reductions of 26–28% below 2005 levels by 2025. The Obama Administration has stated that it hopes to see reductions up to 80% by 2050. For its part, China projects that its GHG emissions will peak in 2030, and non-fossil fuels will generate 20% of China’s energy. China reports that it will have an additional 800–1,000 gigawatts of nuclear, wind, and solar power on-line by 2030.

In late 2015, representatives from nearly 200 nations gathered in Paris in an attempt to build on the modest progress made in forging an international approach to combating climate change. While not legally enforceable, the participants at the “Paris Climate Change Conference” reached a number of agreements:

- (1) Parties are to prepare and submit their own “nationally determined contributions” to reduce carbon emissions. The NDCs are to be submitted every 5 years, becoming progressively stronger. (The U.S. entered the conference committing to a 26–28% reduction below 2005 levels by 2025.)
- (2) The increase in global temperature must be limited to 2 degrees celsius above pre-industrial levels, and the parties set an aspirational objective of 1.5 degree increase.
- (3) Recognition that developed countries will have the greatest responsibility to reduce GHG emissions and must assist developing nations financially and through technology transfers.
- (4) The world must conserve and enhance forests and other agricultural “sinks” capable of absorbing GHGs.

The Paris Agreement calls for countries to pool resources to develop renewable energy sources and to aid developing countries in upgrading their infrastructure. As part of its intended nationally determined contribution, President Obama vowed to reduce America’s GHG emissions by 26–28% compared with 2005 levels by 2025.

The Paris Agreement became effective November 4, 2016 when the adoptees reached 55 countries and met the threshold of accounting for 55% of global GHG emissions. However, President Trump has indicated his intent to rescind U.S. participation in the Agreement’s program, which he may do via a simple Executive Order because the Agreement is not a treaty.

Footnotes — § 23.14:

¹²⁷ 74 Fed. Reg. 56260 (Oct. 29, 2009).

¹²⁸ 74 Fed. Reg. 56260 (Oct. 29, 2009).

¹²⁹ 74 Fed. Reg. 56260 (Oct. 29, 2009).

- ¹³⁰ 74 Fed. Reg. 56260 (Oct. 29, 2009).
- ¹³¹ <http://Yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/ac9fa87ba25> (last visited Mar. 23, 2017).
- ¹³² 76 Fed. Reg. 73886 (Nov. 29, 2011).
- ¹³³ 78 Fed. Reg. 71904 (Nov. 29, 2013); 40 C.F.R. Part 98; 80 Fed. Reg. 12934, effective Mar. 12, 2015 (amending 40 C.F.R. Part 98); 80 Fed. Reg. 21650, effective Apr. 20, 2015 (amending 40 C.F.R. Part 98); 80 Fed. Reg. 33425, effective June 12, 2015 (amending 40 C.F.R. Part 98); 80 Fed. Reg. 64262, effective Oct. 22, 2015 (amending 40 C.F.R. Part 98); 80 Fed. Reg. 64510, effective Oct. 23, 2015 (amending 40 C.F.R. Part 98).
- ¹³⁴ 79 Fed. Reg. 63750 (Oct. 24, 2014).
- ¹³⁵ 80 Fed. Reg. 64262 (Oct. 22, 2015).
- ¹³⁶ 74 Fed. Reg. 66496 (Dec. 15, 2009).
- ¹³⁷ 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).
- ¹³⁸ <http://www.epa.gov/air-pollution-transportation> (last visited Mar. 23, 2017).
- ¹³⁹ 75 Fed. Reg. 25324 (May 15, 2010).
- ¹⁴⁰ <http://www.epa.gov/air-pollution-transportation> (last visited Mar. 23, 2017).
- ¹⁴¹ Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012).
- ¹⁴² Coalition for Responsible Regulation, Inc. v. EPA, 2012 U.S. App. LEXIS 26315 (D.C. Cir. Dec. 20, 2012).
- ¹⁴³ <https://www.govtrack.us/congress/bills/111/hr2454> (last visited Mar. 23, 2017).
- ¹⁴⁴ Renewable Energy World, *The US Department of Energy's 2014 Budget Request: Implications for Renewable Energy Funding*, available at <http://www.renewableenergyworld.com/articles/2014/03/the-us-department-of-energys-2014-budget-request-implications-for-renewable-energy-funding.html> (last visited Mar. 23, 2017).
- ¹⁴⁵ OAC 3745-31-34.
- ¹⁴⁶ PSD and Title V Permitting Guidance for Greenhouse Gases, available at <http://www.epa.gov/sites/production/files/2015-12/documents/ghgpermittingguidance.pdf> (last visited Mar. 23, 2017).
- ¹⁴⁷ U.S. EPA, *Methane addressing greenhouse gases and smog forming VOCs from the oil and gas industry*, available at <http://www.epa.gov/stationary-sources-air-pollution/epas-actions-reduce-methane-and-volatile-organic-compound-voc> (last visited Mar. 23, 2017).
- ¹⁴⁸ 684 F.3d 102 (D.C. Cir. 2012), *reh'g en banc denied*, 2012 U.S. App. LEXIS 26315 (D.C. Cir. Dec. 20, 2012).

- [149](#) [Utility Air Regulatory Group v. EPA](#), 134 S. Ct. 418, 187 L. Ed. 2d 278 (2013).
- [150](#) [Utility Air Regulatory Group v. EPA](#), 573 U.S. ___, 134 S. Ct. 2427, 2443–47, 189 L. Ed. 2d 372 (2014).
- [151](#) [Utility Air Regulatory Group v. EPA](#), 573 U.S. ___, 134 S. Ct. 2427, 2447–49, 189 L. Ed. 2d 372 (2014).
- [152](#) 80 Fed. Reg. 26183 (May 7, 2015).
- [153](#) 80 Fed. Reg. 50199 (Aug. 19, 2015).
- [154](#) 81 Fed. Reg. 68110.
- [155](#) 75 Fed. Reg. 77230 (Dec. 10, 2010).
- [156](#) 77 Fed. Reg. 22392 (Apr. 13, 2012).
- [157](#) 79 Fed. Reg. 1430 (Jan. 8, 2014).
- [158](#) 80 Fed. Reg. 64510 (Oct. 23, 2015); *see* Section 2[4].
- [159](#) 79 Fed. Reg. 34830 (June 18, 2014).
- [160](#) [Coalition for Responsible Regulation, et al. v. EPA](#), 09-1322 (D.C. Cir. 2014); [State of Texas, et al. v. EPA](#), 726 F.3d 180 (D.C. Cir. 2013); [Murray Energy Corp. v. EPA](#), 14-1112 and 14-1151 (D.C. Cir. 2014); [West Virginia, et al. v. EPA](#), 14-1146 (D.C. Cir. 2014).
- [161](#) 80 Fed. Reg. 64662 (Oct. 23, 2015).
- [162](#) 80 Fed. Reg. 64966 (Oct. 23, 2015).
- [163](#) [West Virginia, et al. v. EPA](#), D.C. Cir. No. 15-1363.
- [164](#) [West Virginia, et al. v. EPA](#), U.S. No. 15A773, 2/9/16.
- [165](#) 81 Fed. Reg. 35824 (June 3, 2016).
- [166](#) [North Dakota v. EPA](#), D.C. Cir. Case No. 16-1242, 2016.
- [167](#) [131 S. Ct. 2527](#), 180 L. Ed. 2d 435 (2011).
- [168](#) No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh'g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied sub nom. In re Comer*, 131 S. Ct. 902, 178 L. Ed. 2d 807 (2011).
- [169](#) [Comer v. Murphy Oil USA](#), 718 F.3d 460 (5th Cir. 2013) (affirming district court's dismissal).
- [170](#) [Native Village of Kivalina v. Exxon Mobil Corp.](#), 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. 2010).

- ¹⁷¹ 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011).
- ¹⁷² *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).
- ¹⁷³ *Native Village of Kivalina v. ExxonMobil Corp.*, 133 S. Ct. 2390, 185 L. Ed. 2d 1116 (2013).
- ¹⁷⁴ *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013).
- ¹⁷⁵ *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013).
- ¹⁷⁶ *Juliana et al. v. U.S. et al.*, 2016 U.S. Dist. LEXIS 156014 (D. Or. Nov. 10, 2016).
- ¹⁷⁷ United Nations, *Drasft Decision Copenhagen Accord*, available at <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> (last visited Mar. 23, 2017).

CHAPTER 24

HISTORIC PRESERVATION

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§ 24.01. Scope

This chapter covers:


- Federal laws governing historic preservation issues, including the National Historic Preservation Act and the Archaeological Resources Protection Act [*see §§ 24.02 & 24.03 below*].
- Common scenarios implicating historic preservation laws and regulations [*see § 24.04[1] below*].
- An overview of Ohio laws affecting the discovery of archaeological artifacts on privately-owned land [*see § 24.04[2]–[4] below*].

§ 24.02. National Historic Preservation Act

[1] Scope and Overview

The National Historic Preservation Act¹ authorizes the Secretary of the

Interior to maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture. It is the primary federal mechanism for the preservation of archaeological resources, and is the regulatory scheme that most affects Ohio private landowners. The National Register is designed to compile a list of historic properties, by nomination, that have sufficient historic, architectural, archaeological, engineering or cultural value to be protected.

 **Strategic Point:** Disregard for the presence of archaeological artifacts at a development site can quickly lead to public opposition for a development project. That opposition, in turn, can sour government and private backing for the project, leading to delays, and significantly increased completion costs. It also could lead to federal prosecution for violations of federal laws. These factors underline the importance of advising real estate developers, mining developers, public utilities, and similarly-situated clients to expend the cost upfront to conduct a survey for archaeological resources on proposed development sites, thereby saving those clients the headache that could otherwise result from a later discovery of historically-significant archaeological artifacts.

[2] Determining Eligibility for the National Registry

Eligible properties include any structure, building, object, site, district, or archaeological resource that is significant within a local, state, or national context. A determination of eligibility is a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register.²

[3] The Section 106 Process

The protections afforded by listing in the Register are largely prospective. Section 106 of the Act requires that before commencing development activity by the federal government, each federal agency chief must examine the effects of the agency's proposed undertakings on property that is either already listed, or is eligible to be listed, in the National Register of Historic


Properties.³ Before granting approval to a “federal undertaking,” the Advisory Council on Historical Preservation must have a chance to comment. This is commonly referred to as the “Section 106 process.”⁴ Properties listed on the Register are nominated, and then evaluated based on the following criteria:

- properties that are associated with events that have made a significant contribution to the broad patterns of our history;
- properties that are associated with the lives of persons significant in our past;
- properties that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- properties that have yielded, or may likely yield, information important in prehistory or history.⁵

The Section 106 process can affect development projects in innumerable ways. The definition of a “federal undertaking” includes any federal project, federally-assisted project, or federally-licensed project. Given the pervasiveness of federal funding in state-operated undertakings, Section 106’s ambit is actually quite extensive. For example, any development project that requires a dredge and fill permit to fill a wetland would be subject to the 106 process.⁶ Likewise, any private development project, such as many brownfield projects, that receive even minimal federal funding would also fall under the Section 106 restrictions. Therefore, the bottom line for an Ohio developer, is that even if the Ohio regulations do not restrict development activities, the National Historic Preservation Act requirements must be addressed.⁷

Once the Section 106 process is activated, a private landowner’s property is subject to a five-step analysis: (1) identifying and evaluating the historic property; (2) assessing the facts and assigning an appropriate evaluation of “no effect,” “no adverse effect,” or “adverse effect” from proposed development activities; (3) consulting with the appropriate State Historic Preservation Office; (4) submitting the proposed undertaking for comment by the Advisory Council; and finally (5) where potential adverse effect is

assessed, reaching a memorandum of agreement for the conduct of development activities or arrival at an alternative approach to avoid adverse effects.⁸

 **Strategic Point:** To avoid any potential sanctions by federal or state authorities for violations of historic preservation laws, real estate developers and other professionals who encounter historical or archaeological material should consider engaging a professional to conduct a survey of the subject property for the presence of protected material. In some cases, such as the presence of a historical building, the need for preservation will be obvious. In others, the discovery of historically-significant material will require greater effort. Numerous resources in Ohio are available to assist with the survey process, with detailed guidance available through the Ohio Historic Preservation Society’s website.⁹

Footnotes — § 24.02:

¹ 16 U.S.C. § 470 *et seq.*

² 36 C.F.R. § 60.3(c).

³ 36 C.F.R. §§ 800.2–800.13.

⁴ *See* 36 C.F.R. §§ 60.2(a), 800.3–800.13.

⁵ 36 C.F.R. § 60.4.

⁶ 33 C.F.R. Part 325.

⁷ 33 C.F.R. §§ 800.3–800.7.

⁸ 36 C.F.R. § 800 *et seq.*

⁹ <https://www.ohiohistory.org/preserve/state-historic-preservation-office>.

§ 24.03. Archaeological Resources Protection Act

In addition to the landowner-based federal regulations under the National Historic Preservation Act, federal law also targets archaeological resources in commerce.

The Archaeological Resources Protection Act (ARPA) prohibits

trafficking in interstate or foreign commerce any archaeological resources in violation of any state or local provisions, rule, regulation, ordinance, permit, or law.¹⁰ Just as the value of archaeological artifacts and resources varies depending on who the holder is, the meaning of “archaeological resource” differs based on the applicable regulatory scheme. ARPA defines “archaeological resource” as “any material remains of a past human life of archaeological interest...” that are at least 100 years old.¹¹ In addition to protecting archaeological artifacts against defacement or destruction, ARPA provides: “[n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any ... law.”¹²

Violations of ARPA are punishable by civil penalty in the form of a fine.¹³

ARPA also establishes a permit scheme for the excavation and removal of archaeological artifacts located on public or Indian lands. ARPA’s anti-trafficking provisions affect Ohio residents and apply to the buying or selling of archaeological artifacts found on state or federal land.¹⁴

Footnotes — § 24.03:

¹⁰ See generally 16 U.S.C. §§ 470aa–mm.

¹¹ 16 U.S.C. § 470bb(1).

¹² 16 U.S.C. § 470ee(c).

¹³ 16 U.S.C. § 470ff(a).

¹⁴ See *U.S. v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994) (applying ARPA’s prohibition against trafficking in archaeological resources obtained in violation of state or local law where defendant trespassed in violation of Kentucky law in order to excavate artifacts).

§ 24.04. Ohio Law and Regulation

[1] Introduction to Ohio Regulations

Under Ohio law, there are numerous instances in which historic preservation laws may be implicated. Practically speaking, some of the more common scenarios in which clients run into historic preservation regulations

include:

- Real estate developers who encounter Native American artifacts on the site of a development project;
- Developers who are required to comply with Ohio and federal regulations regarding historic preservation to obtain a dredge and fill permit under wetlands regulations;
- Public utilities that encounter archaeological resources when installing utility lines;
- Developers who encounter burial mounds and other archaeological sites as part of the permit process for coal mining.

[2] Overview of Ohio Law on Historic Preservation

[a] Voluntary Listing on Ohio Registry

Unlike many other jurisdictions across the country, Ohio imposes few obligations on owners of private property with respect to discovered archaeological artifacts.¹⁵ In fact, most restrictions under Ohio law are wholly voluntary. Despite the lack of regulation, however, Ohio has the third-highest number of National Register listings in the country with nearly 3,900¹⁶ buildings, sites, structures, objects, and districts on the Register.¹⁷ The Ohio Historical Society maintains a state registry of archaeological landmarks that the Society finds to be “archaeologically significant” only where the landowner first provides a written agreement subjecting his or her land to the provisions of the statute. The Ohio Historical Society also may accept articles dedicating real property as “archaeological preserves” analogous to nature preserves.¹⁸ Ohio’s scheme, therefore, relies largely on the landowner’s voluntary cooperation to achieve historic preservation of artifacts.

Once a landowner consents to listing his or her property on the state historic registry, no person may dig, excavate, remove, or destroy any evidence of Indian Settlement or Occupation or remove skeletal remains or artifacts from the earth without permission of the Ohio Historical Society. Such permission is granted in the form of a permit for survey and salvage work, and specifies the required procedures pursuant to [Revised Code 149.54](#).

[b] Department Cooperation Required

In the midst of a minimally-restrictive framework, there is one provision of Ohio law regarding archaeological artifacts and resources that has restrained development. “[A]ll departments, agencies, units, instrumentalities, and political subdivisions of the state” must work with the Ohio historic site preservation advisory board to provide for “archaeological and historic survey and salvage work during the planning phases, before work on a public improvement begins or at other appropriate times; and require that contractors performing work on public improvements cooperate with archaeological and historic survey and salvage efforts and notify the society or the board about archaeological discoveries.”¹⁹ This statute effectively confers authority on state instrumentalities to require archaeological surveys before starting development, but in practice this tool has proved largely ineffective.²⁰

A growing concern to Ohio historic preservation authorities is the practice of anticipatory demolition. This practice occurs when a person finds potential historical or archaeological material on its property and the person destroys the material before reporting its existence to the state or local government. This practice is explicitly prohibited under ARPA,²¹ and is not the approved method for development under Ohio law. Instead, Ohio law encourages creative solutions, such as prior remedial measures to protect or preserve the historical significance of the object before its destruction.²²

[3] Ohio State Historic Preservation Office

Pursuant to the National Historic Preservation Act, the Ohio Historical Society has formed a State Historic Preservation Office (SHPO) to coordinate information and efforts related to historic preservation.²³ Ohio’s SHPO also provides guidance on procedures for implementing historic preservation techniques, provides an overview of compliance with the Section 106 process, and links potentially-affected parties with other government offices and consultants to assist with compliance.²⁴

The SHPO also provides an electronic database listing of over 100,000 historic properties in the Ohio Historic Inventory. The Ohio Historic Inventory forms have detailed information on existing sites or projects, including the location, background, architectural data and photographic

documentation. Additionally, the SHPO has promulgated several guidance documents detailing the importance of historic preservation and providing information on efforts by local and state entities to advance historic preservation in Ohio communities. Finally, the SHPO provides information on utilization of the federal income tax credit, designed to increase private investment in preserving historic properties.²⁵

[4] Ohio's Certified Local Government Program

Currently, about 70 local government entities in Ohio are qualified as Certified Local Governments (CLGs) and participate in the state historic preservation program.²⁶ The CLG program is a federal-state-local partnership that involves the collaboration of various government entities, including the Department of the Interior, Ohio state and local government entities, and the Ohio Historic Preservation Society. CLG grants fund many of these local efforts, which enable CLGs to conduct surveys, nominate buildings, sites and historic districts to the National Register, and further educate communities about historic preservation.²⁷

To qualify as a CLG, a local government must have all of the following: (1) a qualified commission of at least five members who designate historic properties and review proposed changes to the historic environment; (2) an ordinance that protects historic resources and offers guidance to those wishing to make changes to historic buildings, sites, and districts; (3) a procedure for identifying, surveying, recording, designating locally, and nominating historic properties to the National Register of Historic Places; and (4) a public participation program that invites and encourages citizens to engage in the community's historic preservation program.²⁸

[5] Ohio Historic Preservation Tax Incentive Program

In 2007, the State of Ohio adopted a Historic Preservation Tax Credit Program, which provides a 25 percent tax credit for the rehabilitation expenses to owners and lessees of historically significant buildings. A building is eligible if it is individually listed on the National Register of Historic Places; contributes to a National Register Historic District, National Park Service Certified Historic District, or Certified Local Government historic district; or is listed as a local landmark by a Certified Local Government.²⁹ The Ohio program is much like the federal tax incentive

program, but differs in that credits in Ohio are limited, so the process for admission is competitive. Additionally, under the Ohio program, owner-occupied dwellings are eligible for the tax incentive, whereas under the federal program they are not.³⁰ Applications for participation in the program are available through the Ohio Historic Preservation Office, or online at http://www.development.ohio.gov/files/redev/Round_12_OHPTC_FormWeb.

Footnotes — § 24.04:

¹⁵ In contrast to the historic preservation framework in place in Ohio, Indiana has adopted the Indiana Historic Preservation Act (IHPA). Under the IHPA, no one may disturb the land for purposes of excavating or finding artifacts without first obtaining plan approval from the Indiana Department of Natural Resources. If an individual inadvertently discovers artifacts, he or she must immediately cease operations and notify the Department within two business days. Additionally, if a private landowner discovers artifacts on his or her property without a prior state-approved plan in place, and subsequently sells those artifacts in interstate commerce, he or she violates ARPA and is therefore subject to federal prosecution.

¹⁶ There are about 3,983 Ohio sites on the National Registry according to a contact at the State Historic Preservation Office.

¹⁷ See *Finding Common Ground: A Historic Preservation Plan for Ohioans 2016–2020*, at https://www.ohiohistory.org/OHC/media/OHC-Media/Documents/SHPO/SHPO_2016_StatePlan.pdf.

¹⁸ R.C. 149.52.

¹⁹ R.C. 149.53.

²⁰ See Bagus, “Cultural Resource Law in Ohio,” *Cleveland State Law Review*, 1980.

²¹ 16 U.S.C. § 470bb.

²² R.C. 149.53.

²³ 16 U.S.C. § 470(a).

²⁴ See, e.g., <https://www.ohiohistory.org/preserve/state-historic-preservation-office/hpreviews> (providing guidance on Section 106 process) (last visited Mar. 28, 2017).

²⁵ For further information on the services available through the SHPO, see <https://www.ohiohistory.org/preserve/state-historic-preservation-office>.

²⁶ For information on CLGs in existence as of Mar. 28, 2017, see <https://www.ohiohistory.org/preserve/state-historic-preservation-office/clg/clgsinohio>.

²⁷ For available CLG grants and application guidance, see <https://www.ohiohistory.org/preserve/state-historic-preservation-office/clg/about-certified-local-governments> (last visited Mar. 28, 2017).

²⁸ For more information on CLGs and the qualification process, <https://www.ohiohistory.org/preserve/state-historic-preservation-office/certified-local-government-program/certified-local-government-grants> (last visited Mar. 28, 2017).

²⁹ See http://www.development.ohio.gov/cs/cs_ohptc.htm (last visited Mar. 28, 2017).

³⁰ See <http://www.historicaltaxcredits.com/historic-preservation-resources/ohio-historic-tax-credit-rules.php> (last visited Mar. 28, 2017).

APPENDIX

Finding the Law

Ohio's statutes, environmental regulations, and many court decisions can be found at www.advance.lexis.com.

The best service available for finding Ohio's environmental laws in print is the multi-volume series published by Anderson Publishing Co., which includes regulations promulgated by Ohio EPA, the Department of Agriculture, the Ohio Power Siting Board, and other agencies. One of the volumes also includes the rules of the Environmental Review Appeals Commission. Many of Ohio EPA's regulations, policies, guidance manuals, fact sheets, and forms are accessible electronically through the agency's web page, which is available at <http://www.epa.state.oh.us/>.

The comprehensive annotated statutes of Ohio appear in *Page's Ohio Revised Code Annotated* (Anderson Publishing Co.) and *Baldwin's Ohio Revised Code Annotated* (Banks-Baldwin Law Publishing Co.). Ohio environmental statutes are also available at <http://codes.ohio.gov/orc/>. The codified regulations are found in the *Ohio Administrative Code* (Banks-Baldwin Law Publishing Co.), with monthly supplementation in the *Ohio Monthly Record* (Banks-Baldwin Law Publishing Co.), and are available at <http://codes.ohio.gov/oac/>.

Ohio EPA's proposed regulations are initially noticed in the *Ohio EPA Weekly Review*, which is published weekly and available online at <http://epa.ohio.gov/Actions.aspx>.

With respect to case law, the decisions of Ohio's trial courts, intermediate appellate courts, and the Supreme Court can be found in the *Ohio Official Reports* (Anderson Publishing Co.) and the *Ohio Bar Reports* (Law Abstract Publishing Co.).

Another important body of environmental law is found in the decisions issued by Ohio EPA after adjudicatory hearings. These decisions are not published but may be reviewed at Ohio EPA's offices. In addition, the decisions of the Environmental Review Appeals Commission (ERAC) are available online at www.advance.lexis.com. 2012 through 2017 ERAC

decisions can be found on the ERAC website at <http://erac.ohio.gov/Decisions.aspx>.

Finally, Ohio EPA's website provides additional resources, such as engineering guides, policies, and copies of enforcement orders and judgments. It also provides contact information for Ohio EPA staff and information on Ohio EPA programs.

Environmental Agency Directory

[1] Federal

[a] United States Environmental Protection Agency

USEPA, Region 5
Main Office:
77 W. Jackson Blvd.
Chicago, IL 60604-3590

Cleveland Office:
25063 Center Ridge Rd.
Westlake, OH 44145-4114
Website: <http://www2.epa.gov/aboutepa/epa-region-5>
Phone: (312) 353-2000

[b] United States Army Corps of Engineers

U.S. Army Corps of Engineers
Great Lakes & Ohio River Division
550 Main Street, Room 10524
Cincinnati, OH 45202-3222
Website: <http://www.lrd.usace.army.mil/>
Phone: (513) 684-3010

U.S. Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, NY 14207-3199
Website: <http://www.lrb.usace.army.mil/>
Phone: (800) 833-6390 (option 3)

U.S. Army Corps of Engineers,
Huntington District
502 8th Street
Huntington, WV 25701-2070
Website: <http://www.lrh.usace.army.mil/>
Phone: (866) 502-2570

[2] State

[a] Ohio Environmental Protection Agency

Ohio EPA
P.O. Box 1049
50 West Town Street,
Suite 700
Columbus, OH 43215-1049
Website: <http://www.epa.state.oh.us/>

Director's Office: (614) 644-2782
Legal Services: (614) 644-3037
Materials and Waste Management: (614) 644-2621
Public Interest Center: (614) 644-2160
Surface Water: (614) 644-2001
Drinking and Ground Waters: (614) 644-2752
Environmental Response and Revitalization: (614) 644-2924
Air Pollution Control: (614) 644-2270
Environmental Services: (614) 644-4247
Environmental and Financial Assistance: (614) 644-2798
Central District Office: (614) 728-3778
Northeast District Office: (330) 963-1200
Northwest District Office: (419) 352-8461
Southeast District Office: (740) 385-8501
Southwest District Office: (937) 285-6357

[b] Bureau of Underground Storage Tank Regulations

Ohio Department of Commerce, State Fire Marshall, Bureau of Underground
Storage Tank Regulations
8895 East Main Street

Reynoldsburg, Ohio 43068-3340
Website: <http://www.com.ohio.gov/fire/>
Phone: (614) 752-7938

[c] Ohio Department of Agriculture

Ohio Department of Agriculture, Livestock Environmental Permitting Program
8995 East Main Street
Reynoldsburg, OH 43068-3399
Website: <http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx>
Phone: (614) 387-0470

[d] Voluntary Action Program

Ohio Environmental Protection Agency, Division of Environmental Response and Revitalization
P.O. Box 1049
50 West Town Street,
Suite 700
Columbus, OH 43215-1049
Website: <http://www.epa.ohio.gov/derr/volunt/volunt.aspx>
Martin Smith, Manager:
E-mail: martin.smith@epa.ohio.gov
Phone: (614) 644-4829

[e] Financial Assistance Programs

Ohio Environmental Protection Agency
Division of Environmental and Financial Assistance
Website: <http://epa.ohio.gov/defa/EnvironmentalandFinancialAssistance.aspx>
Phone: (614) 644-2798
Fax: (614) 644-3687

Clean Ohio Fund
Ohio Development Services Agency
Office of Redevelopment
77 South High Street, 26th Floor
Columbus, Ohio 43215-6130

Website: <https://development.ohio.gov/cleanohio/>

Phone: (614) 995-2292

Fax: (614) 466-4172

Ohio Environmental Protection Agency
Division of Environmental Response and Revitalization
Voluntary Action Program

Phone: 614-644-2924

Fax: 614-644-3146

Website:

<http://www.epa.state.oh.us/derr/EnvironmentalResponseandRevitalization.asp>

[f] Other State Agencies

Call State Operator at (614) 466-2000

Telephone Hot Lines

Ohio Environmental Protection Agency
(614) 644-3020

Ohio EPA Division of Environmental Response and Revitalization
(614) 644-2924

Ohio EPA State Emergency Response Commission
(614) 644-2260

Ohio EPA Office of Public Interest Center
(614) 644-2160

Bureau of Underground Storage Tank Regulation
(614) 752-7938

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