

INTRODUCTION

§ 9.01. Scope

Ohio EPA's Division of Environmental Response and Revitalization [9.04] ▲ Ohio EPA's authority under the solid and hazardous waste law [9.04] ▲ Ohio EPA's authority under the water pollution law [9.05] ▲ Spill reporting requirements [9.07] ▲ Ohio's Cessation of Regulated Operations law [9.08]

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

- The **Division of Environmental Response and Revitalization (DERR)** handles the investigation and cleanup of contaminated sites, including RCRA corrective action and closure, VAP, federal facilities, Superfund and remedial response.
 - DERR also provides assistance and guidance to communities and private entities interested in assessment, clean up and reuse of brownfield sites.
- Key Concepts:
 - The main difference between the Resource Conservation and Recovery Act of 1976 (**RCRA**) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (**CERCLA**):
 - RCRA regulates solid and hazardous waste at facilities that are currently in use, while CERCLA is focused on the management and remediation of abandoned, non-operating sites with media contaminated with hazardous substance.
 - Unlike CERCLA, RCRA facilities' owners and operators are known and are currently using, managing, or disposing of hazardous wastes. RCRA also regulates the transport of hazardous waste.
 - CERCLA includes all hazardous substances on the site. RCRA includes only hazardous waste.
 - Treatment, Storage & Disposal Facilities - (**TDSF**) final link in the cradle-to-grave concept.

- The regulations pertaining to TSDFs are more stringent than those that apply to generators or transporters.
- **Brownfields** - an abandoned industrial property where the land may still contain hazardous contaminants. Pollution at brownfield sites, however, is considered low-grade and able to be cleaned up, thereby making these properties a prime target for redevelopment. Contaminants most commonly discovered at brownfield sites include solvents, pesticides, asbestos, and lead.

[2] Contaminated Sites

[a] Contaminated Sites Databases

- The DERR database is an index of sites maintained in DOs.
 - The database is NOT a record of contaminated sites in Ohio. Not all sites in the database are contaminated, and a site's absence from the database does not imply that it is uncontaminated.
 - The 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 which would qualify as brownfields are not in the database.
- The DERR database contains basic site information only.
 - Name address, etc . . . whether the property is, to Ohio EPA's knowledge, being cleaned up in accordance with the Voluntary Action Program (VAP) or is receiving technical assistance through the VAP; and whether Clean Ohio Fund money has been issued to remediate the site.

[d] Site-Specific Cleanup Standards

- DERR follows a site-specific approach to establish cleanup levels at contaminated sites.
 - Uses several combinations of cleanup options: voluntary action, emergency response, time critical and non-time critical removal actions, as well as closely supervised fully detailed remedial cleanup actions.
 - Multi-media approach, meaning DERR will work with other Ohio EPA divisions
- DERR generally follows the National Contingency Plan (NCP) provisions when conducting cleanups at hazardous waste sites.
 - Thus, site-specific cleanup standards developed by Ohio EPA comply with the Risk Assessment Guidelines for CERCLA sites. VAP may not be enough.
 - Vapor Intrusion evaluated for all cleanups when soil is contaminated.
- Variances - If the applicant can show 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.

[3] Ohio's Hazardous Waste Cleanup Program Covers RCRA Hazardous Waste But Not Petroleum

- Ohio's definition of hazardous waste includes any substance identified by regulation as hazardous waste and does not include any substance that is subject to the Atomic Energy Act of 1954.
 - Petroleum and natural gas products are in, but petroleum is out. No state cleanup money can be used for petroleum release cleanup.

[4] Ohio Defines Potentially Responsible Parties as Site Owners and Facility Owners

- a potentially responsible person for hazardous waste site cleanup - owner of the land on which a facility is located or the owner of the facility.

§ 9.04. Ohio EPA Authority Under the Solid & HW 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.
 - Can conduct investigations, issue cleanup orders, perform cleanup, and pursuing judicial enforcement actions—is expressly provided by statute.

[2] RCRA Authority

- Ohio EPA has authority from U.S. EPA to administer the RCRA program in the state. Ohio regs are similar to fed regs.
 - Ohio's regulations include specific closure and postclosure requirements and associated financial responsibility requirements for hazardous waste treatment, storage, and disposal (TSD) facilities.
 - 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.
 - Also regulates corrective actions at operating facilities.

[3] State Regulation of Underground Storage Tank Sites (USTs)

- The Ohio State Fire Marshal administers the state's UST regulations.
 - siting, installation, monitoring, and closure

[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 EPA, local board of health, or local governing body, the AG shall criminally prosecute or bring an action for injunction (civil) 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.

[b] State Investigations to Ensure Compliance with R.C. Chapter 3734 (you already know this)

[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.
- 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 of, and arguably could include areas of historic contamination predating RCRA

or Ohio's solid and hazardous waste regulations. Ohio EPA can get a search warrant through the court of common pleas.

- 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.
- If Ohio EPA's orders to abate the pollution are not complied with, then Ohio EPA may perform the necessary remedy to abate or prevent the pollution or the threats to public health and safety. Then can seek reimbursement for cleanup costs.
- Unreimbursed cleanup costs are recorded by Ohio EPA and constitute a lien against the property.
- Ohio has established an Environmental Protection Remediation Fund to pay for cleanup costs and enforcement expenses incurred by the state.
- Ohio EPA also requires a "Rule 13" permit before any excavating, drilling, or other activity upon or into any solid or hazardous waste facility. The requirements apply to sites having landfills even if they ceased operating before regulatory requirements were adopted.

[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.

[e] 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.
 - DFFOs are issued in accordance with the agency's procedural rules and include an opportunity for a hearing.

[f] 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."
 - 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.

[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.

[h] Penalties

- Bigger penalties for reckless or knowing violations of the solid and hazardous waste statutes and regulations, or violations of an order issued under the chapter, including criminal. Up to \$25,000 per day of violation and possible imprisonment.

§ 9.05. Ohio EPA Authority Under the Water Pollution Law, R.C. Chapter 6111

[1] Ohio EPA Asserts Broad Authority Under Chapter 6111

- RC Ch 6111 gives Ohio EPA broad authority to prohibit parties from causing “pollution,” which is defined as placing sewage, sludge, industrial, and other wastes in the waters of the state. “Waters of the state” include virtually all groundwater and surface water in the state.
- 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.”
 - Such action is declared a public nuisance. 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.

[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.
 - 1. An investigation by Ohio EPA is required if someone files a Verified Complaint.
 - 2. Ohio EPA also may issue orders to “prevent, control or abate” water pollution.
- 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.
- Sludge: 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. 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.
- Emergency Orders: Ohio EPA may issue emergency orders, without notice or hearing, which are effective immediately and must be immediately followed. 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. Emergency orders may be issued where “the director officially determines that an emergency exists

requiring immediate action to protect the public health or welfare.” The orders are effective for up to sixty days.

§ 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, Ohio EPA must follow administrative procedures before taking enforcement actions and issuing orders. Although certain actions, such as emergency orders, are exempt.

[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.
 - Not surprisingly, parties often say yes.
 - 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.

[3] Proposed Actions

- Ordinarily, Ohio EPA’s actions regarding the clean up of sites are issued as final and are appealable to ERAC.
 - Process of Cleanup DFFOs
 - Ohio EPA uses information from the RI/FS to develop a “Preferred Plan” that outlines Ohio EPA’s evaluation of possible remediation alternatives & preferred option.
 - Then, 30-day public comment period and a public meeting.
 - Ohio EPA issues a “Decision Document” as a final action of the Director, appealable to ERAC.
 - 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

- 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 (waste 3734) or twenty days (water 6111) after issuance.

[5] Statute of Limitations for Civil or Administrative Penalties

- 5 year Statute of Limitations. Knowledge of the facts of the action.

§ 9.07. Spill Reporting

[1] Ohio Requirements

- Both federal and state requirements for reporting certain spills. Ohio EPA or State Fire Marshal.

[2] Underground Storage Tank Leaks (3 Reporting Events)

- Release or Suspected Release - owners or operators of UST containing hazardous substances, including petroleum, must report a release or suspected release to the State Fire Marshall and local fire department within twenty-four hours of discovery.
 - EXCEPT: 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.
- Flammable or Combustible: The owner and operator of an UST containing flammable or combustible liquids must report within 24 hours to the local fire official & 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 trigger an investigation to confirm that a release has occurred.
- Closure: 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.

[3] Air and Water

- Air - 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.
- Water - NPDES permits typically 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.
 - Pre-treatment - Industrial discharges have to give notice to POTW of sludge loading & other violations

[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;
 - CERCLA hazardous substances.
 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.

[5] Toxic Chemical Releases

- Ohio EPA administers a toxic chemical release reporting program.

§ 9.08. Cessation of Regulated Operations (CRO)

[1] General Requirements

- Goal: to prevent abandoned or terminated industrial operations from becoming a source of exposure to asbestos or hazardous substances.
 - End of Operation process where extremely hazardous substances, flammable substances, hazardous chemicals, petroleum and hazardous wastes have been produced, used, stored, or otherwise handled.
- Process:
 - owner or operator of regulated operations must give notice of its plans to cease those operations;
 - Once stopped, must 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.

[2] Regulated Operations

- “Regulated operations” means the “production, use, storage or handling” of “regulated substances,” such as extremely hazardous substances, hazardous substances, flammable substances and petroleum.
 - 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.
 - do not apply to equipment operated by a public utility, oil or gas production operations, or underground storage tanks regulated by other code provisions.
 - first mortgages holders have special regulations but still must report
- Change of ownership does not trigger CRO review.

[3] Required Actions

- Within 30 days after the cessation of all regulated operations at the facility, owner or operator must:
 - Notice of Cessation to Ohio EPA, the local emergency planning committee, and the fire department;
 - designate a contact person at the facility as part of the written notification.
 - establish site security.
- 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;
 - take inventory of regulated substances;
 - drain or remove all regulated substances from tanks and equipment and legally transfer it from the facility;
 - properly dispose of all debris and non-stationary equipment that are contained or are contaminated with a regulated substances; and
 - certify compliance.
- After Ohio EPA received compliance cert, it will inspect the facility to confirm that all requirements have been met. Ohio EPA will coordinate with the designated contact

person to schedule the inspection and the contact person must accompany the inspector during the inspection.

- 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.
- If property is abandoned, the 1st mtg holder must post abandonment signage and provide security until title transfer or release of mtg filed.
- Ohio EPA may Violators of this law are subject to civil penalties of not more than \$10,000 for each day of violation. 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.

Chapter 10

This chapter covers:

Voluntary Action Program [10.03]▲ Uniform Land Use Covenants [10.04]▲ Brownfield Cleanup Financing [10.05]▲ Changes to ACRE and SABR [10.06]▲

§ 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. And another revision is underway as of this Spring!

II. OHIO VAP

§ 10.03. Voluntary Action Program (VAP)

[1] Background

How clean is clean?

- To address this concern, the Ohio General Assembly enacted Ohio's VAP in July of 1994. The final set of rules became effective in December 1996, with subsequent updates in 2009 and 2014. New VAP rules are in progress this year.
- 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 no one could undertake voluntarily a cleanup project with the assurance it would satisfy the state.
- Through statutes, they state began to answer, How Clean is Clean?
 - VAP minimizes governmental red tape, maximizes resources and expertise in the private sector, and provides tax relief as an incentive.
 - Urban revitalization & suburban sprawl.
- Ohio's VAP allows persons deemed responsible for the contamination to participate in the program 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).
 - An unusual feature - 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.

[2] A Two Track Program

- In 2001 (modified several times after), USEPA & Ohio EPA entered a Memorandum of Agreement (MOA) establishing two different VAP tracks, both utilizing the same codified regulations as the basic prescription for successfully completing a VAP cleanup.
- “Classic VAP Track” - can get a covenant not to sue from the State of Ohio, but need additional steps to bind the federal government.

[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: (LOTS of exceptions, so look them up before you VAP! But here are some)
 - Cleanup precluded under CWA, RCRA, CERCLA, TSCA;
 - 3734 (certain solid & HW);
 - Certain BUSTR; (But BUSTR has HUGE backlog. 3k)
 - Already under enforcement;
 - National Priorities List (Superfund);
 - Safe Drinking Water;
 - PCB-contaminated; or
 - Otherwise under fed or state enforcement.

[b] Eligible Persons Include Those Deemed Responsible for the Contamination

- Program is property focused, not person specific.

[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.

- Phase I Purpose - assessment 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. Mostly a paperwork investigation!
 - Standard: - If after Phase I there’s “any reason to believe that a release has or may have occurred,” a Phase II assessment must be conducted.

[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

Generally, VAP cleanups must reach established generic soil numerical cleanup levels based on the future use of the property. Three future uses - residential, commercial, and industrial.

- Variance Standard - volunteer must show it’s 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 the generic numeric or risk derived ground water standard inapplicable to a property - water only.

- A good example - property and groundwater are contaminated with a VOC migrating off the property at levels in excess of applicable standards.
 - Variance Example: 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.
 - “Case-by-case” Determination Example: 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.
- Vapor Intrusion to indoor air - Ohio EPA has a guidance document - “Sample Collection and Evaluation of Vapor Intrusion to Indoor Air For Remedial Response and Voluntary Action Programs” (May 2010).
 - 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.
 - If Phase I site assessment suggests that volatile or toxic substances may have been released, then
 - Determine which compounds need further consideration (look to Superfund guidance docs for list)
 - Identify source of contamination, the primary release mechanism, the affected media, the transport mechanism, the exposure media and routes, and current/potential receptors.
 - Conduct soil sampling, ground water and gas subslab sampling (something more than just indoor readings)
 - Use Johnson & Ettinger VI model to evaluate the data collected
 - Calc potential exposure & risk
 - If risk goals are exceeded, get more sampling and remedy plan
 - Remedies might include soil removal, soil vapor extraction, or engineered solutions, like depressurizing a slab, vapor barriers, etc.
 - If sampling reveals imminent threat, notify epa.
- 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.
 - Urban Setting Designation or “USD.” This classification recognizes that cleanup to drinking water standards is not necessary because no one will be drinking the groundwater. Other analysis still on the table, like Vapor Intrusion.

[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.

- 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. In making this determination, the CP must use the services of a certified laboratory.

- CPs are well-trained: 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, 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 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.
 - number of NFAs by CP; number of NFA deficiency letters issued to the CP in the last five years; 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.
 - Deficiencies will be compared to the CP standards of conduct. If the deficiencies were significant in number or substantial in type, Ohio EPA can file a disciplinary case to suspend applicable licenses.
- Ohio EPA’s requirements 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.

[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.

- 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. 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.
 - 25 percent of all NFA letters audited
 - Three audit pools; the mandatory, priority, and random audit pools
 - Two Tiers - paper (Tier I) and Sampling of surface water, soil, air, groundwater (Tier II).
 - 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.

- 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.
- 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 meets 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.

[e] A Participant May Request a Covenant Not to Sue (CNS)

- 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 using a template.
- Ohio EPA VAP officials will then determine whether a CNS sue will be issued or denied.
 - CNS runs with the land (must be filed w county recorder's office).
 - The NFA and CNS will need to focus on all conditions on the property. Both are property-specific not contaminant-specific.
- A CNS 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 under CERCLA. 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.
- A CNS is transferable.
- Since 1995, Ohio EPA has issued over 500 CNSs.

[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."

[g] Post Covenant Not to Sue Remedy Changes

- Remedy Revision Notice - a volunteer need not secure agency approval for remedy changes, but good if you do.

[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

In 2001, Ohio EPA and U.S. EPA Region V entered into a MOA regarding federal interest at contaminated sites cleaned up in Ohio creating the MOA track

- the MOA Track imposes additional requirements,
 - formal notification of the entry into the system, public involvement through public review and comment periods, & more Ohio EPA oversight during the actual site work.
 - More work but more comfort.

- The MOA expressly provides 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.
- Steps:
 1. Investigate to determine if the property is eligible for VAP;
 2. Set up a document repository at a public location near the property;
 3. Notify Ohio EPA of intent to participate - submit Notice of Entry;
 4. Public Notice intent n a local newspaper (OEPA does Weekly Review);
 5. 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. OEPA review & approve 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 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).

[6] Cost Recovery Actions

The volunteer who conducted a VAP cleanup may recover certain costs against responsible parties.

- Responsible parties - 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
 - 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. The volunteer may also recover reasonable attorney’s fees, court costs.

[7] VAP Fees (skip)

[8] Laboratories and Environmental Professionals Involved in the VAP Must Be Certified (Included above)

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.

- If the property's remedy relies on "activity and use limitations" to restrict property use, the volunteer must provide to the CP a "proposed environmental covenant" The proposed environmental covenant, with its activity and use limitations, counts as a remedy to support the NFA letter.

[2] The UECA and How it Can Benefit Redevelopment

The UECA provides a uniform statutory mechanism to create and enforce future land use restrictions (called "environmental covenants") binding present and future owners of affected property.

[3] Creation of an Environmental Covenant

An environmental covenant imposes restrictions on the property, such as limitations on permissible land or groundwater use. These environmental covenants "run with the land," meaning it binds current and future landowners to the land use or activity restrictions.

- Because they are interests in real property, environmental covenants must be filed in the county recorder office 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).

[4], [5], [6] skip

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. Now shift to jobs.

[2] Jobs Ohio Revitalization Program and Incentives

Jobs Ohio Revitalization Fund replacing the Clean Ohio Fund. Clean Ohio funding requests are now processed by the private, non-profit agency known as JobsOhio and the JobsOhio Network.

- Monies have been allocated to the JobsOhio Fund for use in
 - (1) Phase II assessment 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, nonprofits, or local governments where a potential end user has expressed a clear interest in reuse of the site and a plan for job retention or creation of new jobs.
 - (2) asbestos and lead-based paint abatement grants, and
 - up to \$500,000 for demolition, asbestos abatement, lead-based paint abatement if coupled with asbestos abatement, disposal of universal waste, and site preparation.

(3) site improvement loans and gap grants starting in March 2014.