Ohio EPA

Voluntary Action Program

Division of Environmental Response & Revitalization

OhioEPA

VAP Rules Responsiveness Summary

- Several formatting and editorial comments were much appreciated and fixed…..

VAP Rules Responsiveness Summary

- **Rule 1 - Definitions** (Source Area)
- Change the definition of "source area" to be more inclusive of various site conditions. "Source Area" is an area which COCs are present above applicable standards and may be the point of origin of migrating COCs.

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** The intent of the source area definition is to identify those containers, receptacles in environmental media, or any affected media impacted by a release that may have served as a release point of origin for the migration of chemicals of concern into the environment.

- The presence of a source area is not contingent on whether or not an applicable standard is exceeded. Therefore, the definition is proposed to remain as is.

OhioEPA

VAP Rules Responsiveness Summary

- **Rule 1 - Definitions** (Soil)
- The definition of "soil" should be changed to include the upper layer of earth that may be dug or plowed and in which plants grow. Also suggests including the term "inorganic".
- I am not sure a definition of soil was needed.
- The definition of soil in the revised version of OAC 3745-300-01 is, at best, vague.
- Etc……

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** The proposed definition of soil has been removed from consideration. Based on multiple comments regarding the proposed definition, a definition for soil was not universally viewed as a positive concept.

- Further, the voluntary action program has effectively operated since the program's inception without a soil definition, thus the proposed definition is being removed from rule language.

OhioEPA

VAP Rules Responsiveness Summary

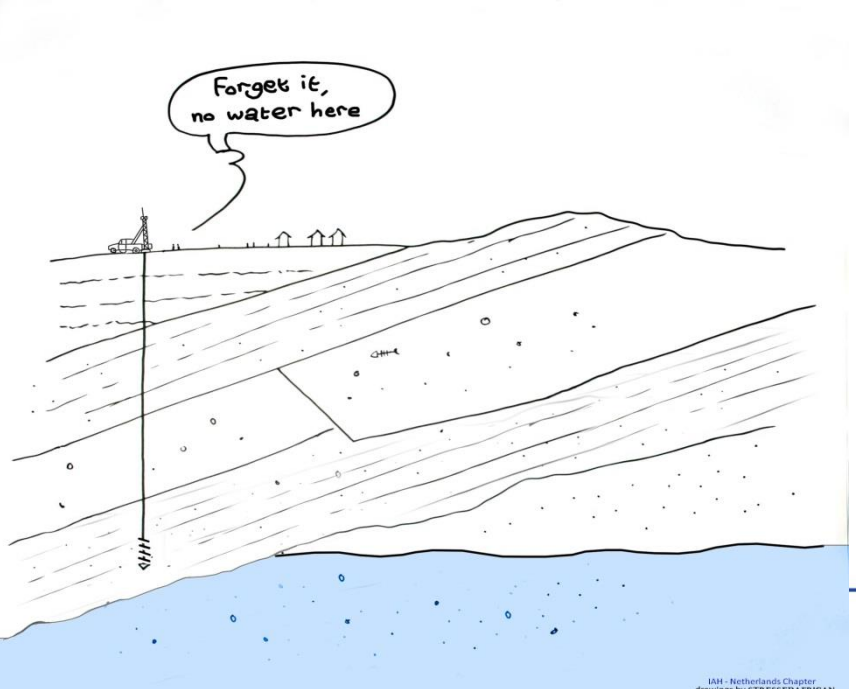
- **Rule 1 - Definitions** (Groundwater)
- Suggest adding the phrase "one or both" to the definition, as shown below:

"Ground water" is, for purposes of conducting a voluntary action, is water underlying a property in a saturated zone that meets "one or both of" the following criteria…."

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** The addition of the phrase *"one or both"* to the definition of ground water is unnecessary because the definition states that ground water is: "…water underlying a property in a saturated zone that meets the following criteria:".



VAP Rules Responsiveness Summary

- Thereafter, two criteria are listed as: “(a)”, related to the minimum required yield; and “(b)”, related to the minimum required in situ hydraulic conductivity.
- Since it is separated into two required criteria, both must be met for the saturated zone to be considered ground water for the purposes of voluntary actions conducted under Chapter 3746 of the Revised Code. Demonstrating that either one of the two criteria is not met results in disqualification as ground water. Failing to meet both criteria is not necessary to eliminate the saturated zone as ground water.
- It has been determined that the phrase “one or both” is unnecessary, and the rule is proposed to remain as is.

OhioEPA

VAP Rules Responsiveness Summary

- Rule 5 – Certified Professionals
- Concern if a CP leaves the firm for retaining documents.
- *05(H)(1)(a) A certified professional must retain all documents … for a period of at least ten years.*
- **Response:** The rule language reflects the statutory requirement, and therefore, it is proposed that the rule language remain as is.

OhioEPA

VAP Rules Responsiveness Summary

- Rule 6 – Phase I:
- The reference in Rule 01 is ASTM E1527-13 but the text in Rule 06 says ASTM-E1527.
- The ASTM reference and the rule are consistent with the VAP statute as it comes directly from the statute references ASTM E1527. See ORC 3746.07(B).

OhioEPA

VAP Rules Responsiveness Summary

- Consider making the following de minimis definition language per ASTM E1527-13 definition: *"a condition that generally does not present a threat to human health and the environment and that generally would not be the subject of an enforcement action if brought to the attention of the appropriate governmental agencies".*

- **Response:** Adding the language is too subjective and provides unclear instruction for use as rule criteria. If a release meets the first set of criteria, the subjective phrase is not needed. The rule language remain as is.

OhioEPA

VAP Rules Responsiveness Summary

- Identifying the on-site impacts associated with vapor intrusion. This pathway may represent the biggest source of contaminates to receptors at a property.

- **Response:** This recommendation was accepted and incorporated into rule. Ohio EPA has added rule language based on the comment with modification for consistency with ASTM protocol.

VAP Rules Responsiveness Summary

- How do CPs document "the reliability and completeness of [the information obtained through] interviews?" Documenting the reliability and completeness of the information provided during the interview process is an inexact process and impossible.
- **Response:** Ohio EPA agrees that the interviewer is not in the position to document the reliability or completeness of information obtained during the interview. Therefore, the rule language has been revised to clarify the objective of the interview process is allow interviewees with property knowledge the opportunity to provide as much meaningful and relevant information about the property or surrounding properties as is reasonably possible.

OhioEPA

VAP Rules Responsiveness Summary

- Not in favor of language indicating that an entire property may be designated an identified area if there is no information on the specific location of a release.
- **Response:** The option to designate the entire property as an identified area has been in the rule since the beginning of the VAP rules and is an important option for our volunteers to ensure that VAP properties are adequately investigated for compliance with applicable standards.

OhioEPA

VAP Rules Responsiveness Summary

- (G)(4) Language would imply that, even if a Volunteer is not seeking a liability release for asbestos, that an asbestos survey should be performed of any buildings that will remain on a VAP property.
- **Response:** This recommendation was accepted and incorporated into rule with revisions. It is agreed that the rule language needed to be clarified. The (G)(4) concept will be retained, but the language has been modified to clarify that an asbestos survey is not a requirement of a VAP Phase I assessment.

OhioEPA

VAP Rules Responsiveness Summary

- Concerned with the suggested deletion of "(J) A certified professional may not issue a no further action letter without performing a walk-over of the property and making a determination that the requirements of paragraph (I) of this rule have been met."
- **Response:** The requirement for a CP site walk-over is not a requirement of the Phase I rule. The requirement for a CP to do a site walk-over is prior to issuing an NFA letter and still exists in the VAP rules. The requirement is now located in the NFA letter rule, OAC 3745-300-13 paragraph (D)(2).

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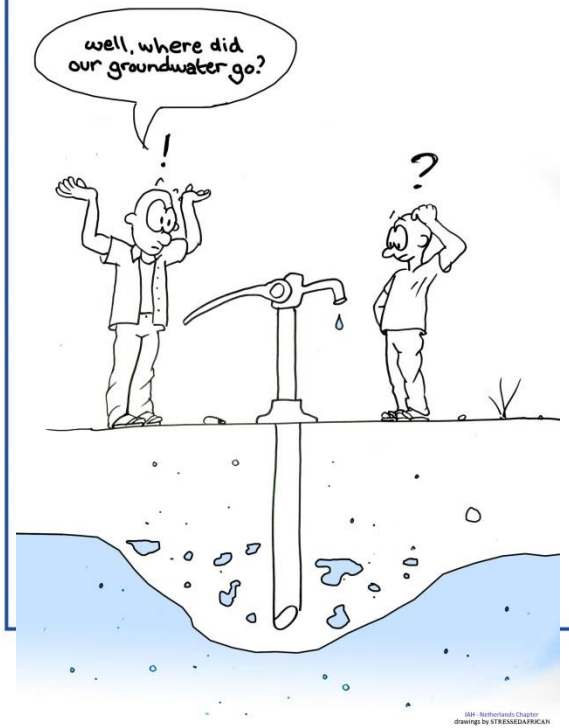
VAP Rules Responsiveness Summary

- **Rule 7** – Phase II
- Why are the generic soil leaching to ground water values or guidance document not referenced in 07(F)(4)(a)?



VAP Rules Responsiveness Summary

- **Response:** Soil leaching values cannot be referenced in either rule 3745-300-07 or -08 because they are not considered applicable standards. The leach-based soil values (LBSVs) are numbers calculated or generated through use of a model.

- Unrestricted potable use standards, not the LBSVs, are the appropriate standards which must be met in a leaching demo.

- Ohio LBSV Support Document is limited to an OEPA recommended calculation methodology in which to generate leach-based soil values. There are multiple peer-reviewed and generally accepted methodologies in which to calculate LBSVs. Ohio EPA proposes maintaining the LBSV guidance as a separate support document, and does not propose referencing it in rule.

OhioEPA

VAP Rules Responsiveness Summary

- **Rule 8** – Generic Numeric Standards
- Generic Standards tables in Appendix A; the proposed format of every chemical being listed in alphabetical order is very user un-friendly.
- **Response:** The chemicals in OAC 3745-300-08 Appendix A are organized in alphabetical order allowing users to easily find a chemical. The tables in Appendix A cannot be provided in electronic (Microsoft Excel) format in the rules themselves due to the limitations of our rule software. However, the final versions of the tables in Appendix A and in the VAP Support Document will be available on the VAP website in Microsoft Excel format. This will allow users to readily view the generic numerical standards, physical and chemical properties, and toxicity information for each chemical.

OhioEPA

VAP Rules Responsiveness Summary

- Proposed Table VI: Generic unrestricted potable use standards based on MCLs ~ cis-1,2-dichloroethene (cis-1,2,-DCE) with CAS #156-59-2 is not listed.

- **Response:** Not all MCLs promulgated by the USEPA are listed in Table VI. Cis-1,2-dichloroethylene is not a hazardous or petroleum -related substance according to the VAP statute.

- The MCLs listed in Table VI are only for those chemicals that are hazardous or petroleum-related substances and also included in the generic soil direct-contact numerical standards. We believe that previous inclusion of cis-1,2-dichloroethene (cis-1,2,-DCE) with CAS #156-59-2 is in <u>error</u>.

OhioEPA

VAP Rules Responsiveness Summary

- Using the RSL 'constructs' for the GNS: The purpose of screening levels and clean-up standards are similar, but distinctly different. Screening levels are representative of concentrations that are assumed to pose a negligible non-cancer hazard or excess lifetime cancer risk, without further evaluation. Clean-up standards are the levels of a chemical of concern that, once achieved by remedial actions, demonstrate that conditions at the property are protective of human health. The Regional Screening Levels (RSLs) are aptly named, because they represent a conservative estimate of a concentration that poses negligible hazard and risk.

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** The Ohio EPA agrees with the comment, and argues that the VAP Generic Numerical Standards are clean-up standards as opposed to screening levels. The RSL format and construct has been modified to Ohio VAP specific parameters and they should not be used as screening levels.

VAP Rules Responsiveness Summary

- **Rule 9** – Property Specific Risk Assessment
- The addition of a paragraph to proposed rule 3745-300-08 to describe indoor air modeling would be useful, similar in scope and intent to Paragraph (J) of Proposed Rule 3745-300-08, which describes the development of leach-based soil standards based on fate and transport modeling.
- **Response:** Ohio EPA is revising the indoor air guidance document for the remedial, voluntary and RCRA programs. Modeling for demonstrations in a voluntary action may be used as long as the model comports with OAC 3745-300-07(G).

OhioEPA

VAP Rules Responsiveness Summary

- Direct Contact Groundwater Standards for Construction /Excavation Workers: The exposure of construction/excavation workers to shallow groundwater during excavation and grading activities is evaluated in many VAP risk assessments. Therefore, a set of GNS to evaluate these exposures would be a useful complement to the direct contact soil standards for construction/excavation activities.

- **Response:** The direct contact groundwater exposures for construction/excavation workers are highly property-specific in nature. Therefore, the VAP does not plan to generate generic numerical standards for this exposure pathway.

OhioEPA

VAP Rules Responsiveness Summary

- Procedures for assessment and remediation of sediments. The proposed revisions have been described by OEPA as clarifications. However, these changes can be interpreted as fundamental change in the rule that will require assessment of off-Property sediment where no on-Property sediment exists. Potentially complete pathways from on-Property non-sediment sources to off-Property sediment should be specified in the proposed rule changes.

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** Ohio EPA believes that the commenter's concern is addressed without the further revision recommended by the commenter. The revisions to rule 3745-300-09(F) as proposed encompass a compete exposure pathway (determined based on the rule 3745-300-07 process) from a source area at the voluntary action property (source area is defined by rule 3745-300-01), to the affected sediments.

VAP Rules Responsiveness Summary

- The revisions clarify that the volunteer is to respond to any sediment contamination originating from any on-property source area. The sediments containing releases from the source area would undergo assessment and remediation, as needed, to comply with applicable standards at locations where the release is emanating or has emanated. The contamination may have emanated from any type of source area, i.e., from soil, surface water or sediment at the property, to another sediment location. See also OAC 3745-300-07(I) for applying the derived standards to the affected media.

OhioEPA

VAP Rules Responsiveness Summary

- Rule 10 – Groundwater
- Letter sent in regard to pocket communities and USDs.
  - Mayor Trevor Elkins, Village of Newburgh Heights
- Letter sent in regard to modifications of the rule in regard to USDs.
  - Mayor Jack Bacci, Village of Cuyahoga Heights

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** Proposed rule language allows USDs in the commenter's jurisdictions.

- All townships in Cuyahoga County are fully incorporated, the Village of Cuyahoga Heights and Village of Newburgh Heights would be eligible for a USD. Under these circumstances, individual properties within Cuyahoga Heights would also be eligible for a USD.

OhioEPA

VAP Rules Responsiveness Summary

- I have a situation that I believe warrants a USD, but does not meet the criteria provided in the proposal. I suggest consideration be given to adding a section 3745-300-10(C)(1)(a)(vi) that allows a certified professional to petition the Director to consider a USD for a property that does not meet the location criteria of 3745-300-10(C)(1)(a)(i) – (v).

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** Ohio EPA believes this change is not necessary because under OAC 3745-300-12 (variances and case-by-case determinations), a volunteer may petition to change a ground water standard at the property boundary. Therefore, it has been determined that it is not necessary to add a provision OAC 3745-300-10(C)(1)(a) allowing a CP to request an urban setting designation (USD) for a property that does not meet the USD eligibility requirements set forth in OAC 3745-300-10(C)(1)(a)(i)-(v).

VAP Rules Responsiveness Summary

- Rule 11 – Remediation
- Include language to apply a remedy revision notice for monitoring as well as remedial activities.
- **Response:** Changes to monitoring of remedies is expected to be covered by the operation and maintenance plan associated with the remedy element, and thus a remedy revision notice is not expected to be needed in such cases.

OhioEPA

VAP Rules Responsiveness Summary

- The term "diligent effort" should be defined so the volunteer clearly understands the requirements of the rule.

- **Response**: The plain, common dictionary meaning of the term is expected to be sufficient and should provide more leeway. Whereas a new definition could be limiting and restrict a volunteers ability to make use of that provision.

VAP Rules Responsiveness Summary

- The pathway omission process is not contemplated in the Ohio Revised Code sections for the Voluntary Action Program, specifically 3746.04 and 3746.10. If this measure is to be implemented the agency should first request revision to the statutory language and then develop rules under the Ohio Administrative Code.
- It would be a detriment if the current standard of a business and property owner friendly cleanup program would in any way be diminished through this revision.

OhioEPA

VAP Rules Responsiveness Summary

Response: The statute does allow the director to condition the covenant not to sue; see ORC 3746.12(A)(1)(a).

- The statute specifies that the covenant not to sue covers the voluntary action program property and all releases of hazardous substances and petroleum therefrom – including releases that have left the property.
- **The statute has been written this way since inception, and has not been changed**.
- The pathway omission process actually provides compliance flexibility and is designed to provide more options for a volunteer's success in the program by allowing participation when previously unworkable situations arise.

OhioEPA

VAP Rules Responsiveness Summary

- (D) - Item (1)(b)(ii) suggests the certified professional inform the landowner of any risk associated with the complete pathway. How will the certified professional be able to clearly articulate the risks without first performing phase II sampling activities on the landowner's property?

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** Ohio EPA agrees with this comment and has further evaluated and revised rule language to ask the CP to communicate "potential" risks associated with the release. We do believe the phase II rule adequately covers this situation, and 3745-300-07(E)(5)(a) has been modified to clarify this.

VAP Rules Responsiveness Summary

- If a volunteer demonstrates the off-property pathway meets applicable standards post remedial activities does the liability relief of the covenant not to sue extend to the off-property landowner? If so, does that also extend the value of the tax abatement? The agency should consider these options as incentives for landowners.

OhioEPA

VAP Rules Responsiveness Summary

- **Response:** No, liability relief goes to the voluntary action program property and releases of hazardous substances and petroleum therefrom.
- No, the scope of the tax abatement is limited to the voluntary action program subject property, see ORC 5709.87.

VAP Rules Responsiveness Summary

- Can a volunteer utilize an institutional or engineering control to meet applicable standards for an off-property pathway?
- How does the operation and maintenance of these controls work if the landowner is not party to the CNS?
- What happens if the landowner sells the property and the new owner does not want to provide access for the purposes of performing O&M?

OhioEPA

VAP Rules Responsiveness Summary

- Yes, institutional and engineering controls may be relied upon to meet an off-property pathway. Implementation of O&M off property would require that arrangements be made with that property owner, such that O&M could be properly supported.
- A change in ownership of the affected off property parcel may necessitate new arrangements with that owner. If the new property owner is uncooperative, a different approach may be needed to ensure compliance with applicable standards.

OhioEPA

VAP Rules Responsiveness Summary

- What is the difference between remedy revision approval and remedy revision acknowledgement, and when are these items applicable? Additional clarification is needed.

VAP Rules Responsiveness Summary

- **Response:** The remedy revision approval would go through a process similar to the current voluntary action program technical assistance. Ohio EPA would review all relevant materials for the change of remedy to approve its protectiveness.
- Under the remedy revision acknowledgement, the volunteer would simply be alerting the agency that the remedy is being modified, and would not necessarily require additional interaction with the agency.
- A technical guidance document will be developed to explain and clarify this.

OhioEPA

VAP Rules Responsiveness Summary

- Potentially being required to cleanup up a neighboring property that you don't own introduces too much additional risk for the Volunteer.

VAP Rules Responsiveness Summary

- **Response:** The statute indicates that the CNS covers the VAP property and all releases of hazardous substances and petroleum therefrom – including releases that have left the property – that are in compliance with applicable standards.
- The need to investigate off property contamination is also already present in the existing VAP rules.
- In light of this, those releases that originated on the property, but impact receptors off the property, have always needed to be addressed in order to receive a covenant not to sue. The proposed language simply makes this statutory requirement clearer.

OhioEPA

VAP Rules Responsiveness Summary

- How far off property will the Volunteer be required to assess? Will the volunteer be required to “chase” floor drains and other preferential pathways to their final destination?

VAP Rules Responsiveness Summary

- **Response:** Unpermitted discharges of hazardous substances or petroleum from a property should be evaluated as far as they can reasonably be linked to releases from the voluntary action program property.

VAP Rules Responsiveness Summary

- Because the pathway omission process requires Agency approval before submitting an NFA Letter, the process should require public notification similar to applying for a variance. Public notification is an essential check and balance to decisions made by the Agency.

VAP Rules Responsiveness Summary

- **Response:** The impacted parties here are the affected property owners. They are afforded the opportunity to participate in the decision making process as the rule is currently constructed. Public notification on a site specific decision for a voluntary action program no further letter is inconsistent with the general application of the voluntary action program.

VAP Rules Q&A

OhioEPA