

3745-300-02 Eligibility for participation in the "Voluntary Action Program."

- (A) Applicability. Chapter 3746. of the Revised Code and this chapter apply only to the investigation, identification and remediation of hazardous substances or petroleum for property which is eligible for the "Voluntary Action Program." All property is eligible for the "Voluntary Action Program" except as provided in this rule and Chapter 3746. of the Revised Code.
- (B) Definitions. For the purposes of this rule:
- (1) "Enforcement letter" means a notification that the director intends to pursue enforcement under Chapter 3704., 3734., or 6111. of the Revised Code relating to a release or threatened release of hazardous substances or petroleum, in the form of an invitation to negotiate from the director which includes proposed director's final findings and orders;
 - (2) "Determination of sufficient evidence letter" means a notification from the director, pursuant to section 3746.02 of the Revised Code and this rule, that a person or property that is subject of an enforcement letter may or may not participate in the "Voluntary Action Program";
 - (3) "Property" means any parcel of real property, or portion thereof, and any improvements thereto.
- (C) Exceptions to eligibility. A property described in one or more of paragraphs (C)(1) to (C)(8) of this rule is ineligible for participation in the "Voluntary Action Program." The application of this paragraph to a portion of a property does not preclude the participation under this chapter and Chapter 3746. of the Revised Code, of other portions of a property to which paragraphs (C)(1) to (C)(8) of this rule do not apply.
- (1) "National Priorities List" (NPL) sites. Any property identified on the "National Priorities List", pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq., as amended, and regulations adopted thereunder.

Properties subject to the underground injection control program. Any property or portion thereof which is subject to requirements for site assessment, removal, or remediation, pursuant to the Safe Drinking Water Act (SDWA), 42 U.S.C. 300(F), et seq., as amended, and the regulations adopted thereunder, or Chapter 6111. of the Revised Code and the Administrative Code rules adopted thereunder, regarding Class I, II, III, and IV underground injection control wells.

Any property or portion thereof on which a Class V underground injection control well is located is eligible for the "Voluntary Action Program" if it is not the subject of an order or permit requiring site assessment, removal, or remediation of hazardous substances or petroleum.

[Comment: Class I, IV, and V underground injection control wells are regulated by sections 6111.043 to 6111.049 of the Revised Code, and the Administrative Code rules adopted thereunder, regarding the operation, maintenance, closure and remediation of those wells. Class II and III underground injection control wells are regulated under Chapter 1509. of the Revised Code. Class IV underground injection control wells are required to be closed in accordance with Chapter 3734. of the Revised Code and rules 3745-34-08 and 3745-34-09 of the Administrative Code. Class V underground injection control wells which are eligible for the "Voluntary Action Program" must meet applicable standards consistent with the Safe Drinking Water Act.]

- (3) Properties subject to federal or state corrective action permit obligations. Any property or portion thereof which is required to perform corrective action, pursuant to a federal or a state permit issued under RCRA, 42 U.S.C. 6921, et seq., as amended and the regulations adopted thereunder, and Chapter 3734. of the Revised Code and the Administrative Code rules adopted thereunder.

[Comment: Under section 3746.02(A)(1)(b) of the Revised Code, a property for which a voluntary action is precluded by federal law, including RCRA, is ineligible for the VAP. Under RCRA Subtitle C and the Federal hazardous waste regulations, the only cleanup scenarios meeting the above standard are: (a) corrective action cleanup responsibilities identified in, and required by, hazardous waste permits; (b) cleanup responsibilities identified in, and required by, federal enforcement actions (e.g., RCRA section 3008(h) orders); and (c) hazardous waste management units subject to closure (and post-closure, if applicable) requirements. These three scenarios are covered by paragraphs (C)(3), (C)(4) and (C)(5) of Rule 3745-300-02 of the Administrative Code. With respect to those facilities that are subject to RCRA corrective action but have not been issued a permit or an order requiring corrective action, nothing in RCRA Subtitle C or the Federal hazardous waste regulations prohibits voluntary action under chapter 3746 of the Revised Code].

- (4) Properties subject to federal enforcement. Any property that is the subject of a federal enforcement action which requires site assessment, removal, or remedial activities, pursuant to any federal laws and regulations, including, without limitation, the federal laws set forth in division (A) of section 3746.02 of the Revised Code. For the

purposes of this paragraph, "federal enforcement action" includes but is not limited to the issuance of administrative or judicial orders, injunctions, and consent decrees.

- (5) Closure required under Chapter 3734. of the Revised Code. Any property where closure of a hazardous waste facility or a solid waste facility is required under Chapter 3734. of the Revised Code or the Administrative Code rules adopted thereunder.
 - (a) For the purposes of this paragraph, "property where closure of a solid waste facility is required" includes the following:
 - (i) Any solid waste facility for which a license, plan approval, permit-to-install, registration, or other authorization has been issued pursuant to Chapter 3734. of the Revised Code and the Administrative Code rules adopted thereunder;
 - (ii) Any solid waste facility, for which closure activities have been completed in accordance with Chapter 3734. of the Revised Code, during the term of any applicable post-closure care period required by Chapters 3745-27, 3745-29, and 3745-30 of the Administrative Code;

"Solid waste facility" includes but is not limited to a sanitary landfill facility, municipal solid waste disposal facility, residual waste landfill facility, industrial solid waste landfill facility, solid waste transfer facility, scrap tire facility, solid waste incineration or energy recovery facility, or solid waste composting facility.

[Comment: Property on which "open dumping" or "open burning" have occurred, as those terms are defined in section 3734.01 of the Revised Code and rule 3745-27-01 of the Administrative Code, would be eligible for participation in the "Voluntary Action Program," if the property is not otherwise ineligible pursuant to any other provision of paragraph (C) of this rule. For example, a property could be eligible for the Voluntary Action Program if it is not currently subject to an enforcement order issued by the director, or if the director has issued an enforcement letter for the property, but the requirements of paragraph (D) of this rule have been satisfied. This chapter and Chapter 3746. of the Revised Code do not apply to, and do not authorize, the open dumping or open burning of solid waste.]

- (b) For the purposes of this rule, "property where closure of a hazardous waste facility is required" includes the following:

- (i) Those portions of a property on which hazardous waste generator closure of any accumulation area is required pursuant to Chapter 3745-52 of the Administrative Code;
- (ii) Those portions of a property on which "closure" of a "hazardous waste management unit" is required under Chapter 3734. of the Revised Code, as those terms are defined in section 3734.01 of the Revised Code, and rule 3745-50-10 of the Administrative Code, respectively, regardless of whether a hazardous waste facility installation and operation permit has been issued. Properties on which "hazardous wastes," as defined in section 3734.01 of the Revised Code, were treated, stored, or disposed of, are required to be closed in accordance with Chapter 3734. of the Revised Code and the Administrative Code rules adopted thereunder; and

[Comment: Areas of contamination created by a spill or release of a product (not hazardous waste) that contains hazardous waste constituents are not subject to hazardous waste closure requirements of Chapter 3734. of the Revised Code or the Administrative Code rules adopted thereunder.]

- (iii) Any hazardous waste management unit described in paragraph (C)(5)(b)(ii) of this rule, for which closure activities have been completed in accordance with Chapter 3734. of the Revised Code, during the term of any applicable post-closure care period required by Chapters 3745-55 and 3745-66 of the Administrative Code.

[Comment: Areas of contamination resulting from releases of hazardous substances or petroleum that occurred prior to November 19, 1980 and that are not associated with a hazardous waste treatment, storage or disposal unit are not subject to the hazardous waste closure requirements of Chapter 3734. of the Revised Code, or the Administrative Code rules adopted thereunder. However, if management activities such as excavation or relocation are conducted at such areas of contamination, the contaminated media from such areas of contamination must be managed in accordance with the applicable hazardous waste requirements of Chapter 3734. of the Revised Code or the Administrative Code rules adopted thereunder. Failure to properly manage hazardous waste, such as creating waste piles, may create a unit subject to hazardous waste closure obligations under Chapter 3734. of the Revised Code.]

[Comment: Where the information obtained pursuant to a "Phase I Property Assessment" or a "Phase II Property Assessment" conducted in accordance with rules 3745-300-06 and 3745-300-07 of the Administrative Code does not indicate the occurrence at the property of either the accumulation of hazardous waste requiring

generator closure or the treatment, storage or disposal of hazardous waste, the property is not subject to the hazardous waste closure requirements of Chapter 3734. of the Revised Code or the Administrative Code rules adopted thereunder.]

[Comment: With the exception of generators who are subject to unit-specific closure requirements, e.g., rules 3745-57-85 and 3745-69-45 (closure of drip pads) or rules 3745-218-02 and 3745-248-02 (closure of containment buildings), "small quantity generators" of hazardous waste, as defined in rule 3745-50-10 of the Administrative Code, and "conditionally exempt small quantity generators," as defined in rule 3745-51-05 of the Administrative Code, who accumulate hazardous waste in compliance with the applicable provisions of the Administrative Code, are not subject to hazardous waste generator closure requirements.]

[Comment: Division (H) of section 3734.02 of the Revised Code and rule 3745-27-13 of the Administrative Code require that authorization be received from the director prior to engaging in the filling, grading, excavating, building, drilling, or mining on land where a hazardous waste facility or a solid waste facility was operated.]

- (6) Petroleum underground storage tank systems. Any property that is subject to site assessment, removal, or remediation, pursuant to sections 3737.88, 3737.882, and 3737.89 of the Revised Code and the Administrative Code rules adopted thereunder regarding underground storage tank systems, including any underground storage tank systems which contain or had previously contained petroleum.
- (7) Oil and gas. Any property that is subject to site assessment, removal, or remediation, pursuant to Chapter 1509. of the Revised Code and the Administrative Code rules adopted thereunder.
- (8) Properties subject to state enforcement letter. Any property that is the subject of an enforcement letter from the director relating to a release or threatened release of hazardous substances or petroleum on, underlying or emanating from the property which poses a substantial threat to public health or safety or the environment, except when sufficient evidence of entry and participation in the "Voluntary Action Program" is demonstrated, as provided in paragraph (D) of this rule.

[Comment: Under section 3746.02(A)(1) of the Revised Code, a property for which a voluntary action is precluded by federal law, including the Resource Conservation and Recovery Act, 42 U.S.C. 6921 et seq. ("RCRA") and the Toxic Substances Control Act, 15 U.S.C. 2601 et seq. ("TSCA"), is ineligible for the VAP. Under RCRA Subtitle C and the Federal hazardous waste regulations, the only cleanup scenarios meeting the above standard are: (a) corrective action cleanup

responsibilities identified in, and required by, hazardous waste permits; (b) cleanup responsibilities identified in, and required by, federal enforcement actions (e.g., RCRA section 3008(h) orders); and (c) hazardous waste management units subject to closure (and post-closure, if applicable) requirements. In addition, Revised Code section 3746.02(A)(2) specifically precludes property where closure of a hazardous waste facility or solid waste facility is required under Revised Code chapter 3734 or rules adopted thereunder, and Revised Code section 3746.02(A)(3) specifically precludes property subject to (petroleum underground storage tank) remediation rules adopted by the State Fire Marshal. Accordingly, properties that are subject to Federal hazardous substance underground storage tank regulations or Federal PCB regulations are not necessarily ineligible for the VAP, provided they are not the subject of a Federal enforcement action as described in this rule. Such properties remain subject to the site assessment, removal and remediation requirements under RCRA or TSCA, notwithstanding eligibility for the VAP, and any covenant not to sue that may be issued to a volunteer for such property would not release the volunteer from those obligations. See Revised Code section 3746.30(A)].

- (D) Sufficient evidence of entry into the “Voluntary Action Program.” A property which is the subject of an enforcement letter may be eligible with respect to paragraph (C)(8) of this rule for participation in the “Voluntary Action Program” upon satisfaction of the requirements of this paragraph.
- (1) Following receipt of the enforcement letter, the person seeking to enter the “Voluntary Action Program,” (“proposed volunteer”), must present sufficient evidence to the director that the proposed volunteer:
 - (a) Had entered into the "Voluntary Action Program" prior to receipt of the enforcement letter; and
 - (b) Is proceeding expeditiously to address the release or threatened release of hazardous substances or petroleum at the property identified in the enforcement letter.
 - (2) Not later than thirty days from the receipt of an enforcement letter, the proposed volunteer must submit to the director, and the director will consider, at a minimum, evidence showing completion of the following requirements prior to receipt of the enforcement letter:
 - (a) A "Phase I Property Assessment", which meets the requirements contained in rule 3745-300-06 of the Administrative Code, was completed for the property for which a no further action letter will be sought;

- (b) A detailed summary of planned data collection activities, a schedule for conducting planned data collection activities, a detailed description of how such data will be evaluated, and a general description of and estimation of the time frame for completing each of the “Phase II Property Assessment” activities and determinations described in rule 3745-300-07 of the Administrative Code and any other voluntary activities necessary to address the threat identified in the enforcement letter; and
 - (c) Documentation of recent or ongoing activity at the property, which demonstrates that the proposed volunteer is proceeding expeditiously to address the threat. Recent completion of the activities required in paragraphs (D)(2)(a) and (D)(2)(b) of this rule may satisfy the requirements of paragraph (D)(2)(c) of this rule.
- (3) Not later than sixty days from receipt of the enforcement letter, or such other time period as approved by the director the proposed volunteer, through the certified professional, must demonstrate to the director that all existing documentation and data pertaining to the voluntary action have been reviewed by the certified professional and must submit to the director the following documentation:
- (a) A copy of the contract between the proposed volunteer and the certified professional to complete the voluntary action, or an affidavit by a certified professional that verifies that the certified professional has been retained to complete the voluntary action and describes the scope of services the certified professional has been retained to provide with respect to the voluntary action;
 - (b) A schedule for completing a "Phase II Property Assessment" in accordance with rule 3745-300-07 of the Administrative Code, if applicable; and
 - (c) A schedule for completing the voluntary action which specifies target milestone dates for completing the voluntary action, through submission of a no further action letter to the director.

[Comment: The contract or affidavit referenced in paragraph (D)(3)(a) of this rule need not require that the certified professional personally conduct all activities necessary to complete the voluntary action, but must, at a minimum, require the certified professional to complete the activities outlined in paragraph (D)(3) of this rule, and that the certified professional review any work performed by any other person in furtherance of a no further action letter for the property.]

- (4) Upon the submission of all items contained in paragraphs (D)(2) and (D)(3) of this rule, the director will review those items for compliance with paragraph (D)(1) of this rule, determine whether the proposed volunteer has demonstrated sufficient evidence of entry into the "Voluntary Action Program" and is proceeding expeditiously to address the release or threatened release of hazardous substances or petroleum at the property, and send a determination of sufficient evidence letter to the proposed volunteer—indicating whether the agency intends, at that time, to proceed with enforcement or to consider the proposed volunteer a participant in the "Voluntary Action Program."

- (5) Upon receipt of the determination of sufficient evidence letter determining that the proposed volunteer has demonstrated sufficient evidence, the proposed volunteer may participate in the "Voluntary Action Program", unless otherwise ineligible pursuant to paragraphs (C)(1) through (C)(7) of this rule. ~~It~~ In order to remain eligible with respect to paragraph (C)(8) of this rule, the proposed volunteer must:
 - (a) Substantially comply with any schedule established pursuant to paragraphs (D)(3)(b) and (D)(3)(c) of this rule, as appropriate; and

 - (b) Submit progress reports to the director. The initial report must be submitted within three months after receipt of the director's determination of sufficient evidence letter referenced in paragraph (D)(4) of this rule; thereafter progress reports must be submitted upon the completion of milestones associated with the voluntary action, or at least every six months, whichever occurs first, and must continue until submission to the director of a complete no further action letter for the property. Progress reports must include the following:
 - (i) A description of the status of the work and actions taken toward achieving compliance with the schedule of work during the reporting period;

 - (ii) A description of any difficulties encountered or deviations from the schedule of work during the reporting period and actions taken to address the difficulties or deviations;

 - (iii) A description of activities planned for the next reporting period;

 - (iv) An identification of any replacement of or addition to the certified professional identified in the scope of services affidavit submitted to the director pursuant to paragraph (D)(3)(a) of this rule; and

- (v) An indication of any anticipated change in the target or actual completion dates for each element of the voluntary action, including project completion, and an explanation for any deviation from any applicable schedules;
- (6) The requirements of paragraphs (D)(1) to (D)(5) of this rule do not have to be met prior to conducting a voluntary action when if Ohio EPA has not taken any of the following actions within any continuous one year period following the issuance of an enforcement letter or a determination of sufficient evidence letter, whichever is later:
 - (a) Conducted inspections of or other investigation activities concerning the property;
 - (b) Taken samples at the property;
 - (c) Sent correspondence to any owners, operators, or other responsible parties concerning activities at or the condition of the property;
 - (d) Conducted discussions or negotiations with any owners, operators, or other responsible parties concerning activities at or the condition of the property; or
 - (e) Exchanged correspondence, conducted discussions, or engaged in other activities with or on behalf of the U.S. EPA concerning site assessment, removal, or remediation activities in connection with the property.

Upon a written submittal to the director of a statement that Ohio EPA has not taken any of the foregoing actions contained in this paragraph within a continuous one year period following the issuance of an enforcement letter or a determination of sufficient evidence letter, whichever is later, the director will determine whether the statement of inactivity is true and, in a timely manner, respond in writing to the proposed volunteer as to whether the agency intends to proceed with enforcement or to consider the proposed volunteer a participant in the "Voluntary Action Program."
- (7) Nothing in this rule precludes the agency from proceeding with an enforcement action at any time if the volunteer does not expeditiously proceed with the voluntary action, or if the director determines that the volunteer is in violation of any of the requirements of paragraph (D) of this rule, or if the property is later determined to be ineligible for the "Voluntary Action Program" under this chapter.
- (E) A property which is ineligible for participation in the "Voluntary Action Program" pursuant to paragraphs (C)(1) to (C)(8) of this rule may become eligible for participation upon a

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written demonstration to the agency's satisfaction that the property is no longer subject to the law(s) or regulation(s) which made it ineligible. The demonstration must include a written statement from the applicable state or federal agency or department, which confirms that the property is no longer subject to such requirements.

Effective:

Certification: _____

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