

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, in the form of an invitation to negotiate which includes proposed director's final findings and orders;

(2) "Determination of eligibility letter" means a notification from the director, pursuant to section 3746.02 of the Revised Code and this rule, that a person or property 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, or portion thereof, described in one or more of paragraphs (C)(1) to (C)(10) 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)(10) of this rule do not apply.

(1) “National Priorities List” (NPL) sites. Any property or portion thereof identified on the “National Priorities List”, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. 9601 et. al, as amended, and regulations adopted thereunder.

(2) 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 (SWDA), 42 U.S.C.A. 300(f), 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 SDWA.]

- (3) Hazardous substance underground storage tank systems. Any property or portion thereof which is subject to requirements for site assessment, removal, or remediation, pursuant to the Resource Conservation and Recovery Act of 1980 (RCRA), 42 U.S.C.A. 6921, as amended, 40 CFR part 280, or Chapter 3737. of the Revised Code and the Administrative Code rules adopted thereunder, regarding underground storage tanks, or underground storage tank systems which contain or contained hazardous substances.
- (4) Properties subject to federal or state permit obligations. Any property or portion thereof which is subject to corrective action requirements, pursuant to a federal or a state permit issued under RCRA, 42 U.S.C.A. 6921, as amended and the regulations adopted thereunder, and Chapter 3734. of the Revised Code and the Administrative Code rules adopted thereunder.
- (5) Polychlorinated biphenyls (PCBs). Any property or portion thereof which is subject to requirements for site assessment, removal, or remediation, pursuant to the toxic Substances Control Act, 15 U.S.C.A. 2601, as amended, or 40 CFR part 761, regarding PCBs and PCB-contaminated materials or items.
- (6) Properties subject to federal enforcement. Any property or portion thereof which 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.
- (7) Closure required under chapter 3734. of the Revised Code. Those portions of a 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 licensed pursuant to Chapter 3734. of the Revised Code and the Administrative Code rules adopted thereunder;

(ii) Any solid waste facility for which a 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;

(iii) 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;

(iv) Any other solid waste facility for which closure is 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: properties 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", provided that all other eligibility requirements are met. For example, a property could be eligible for a voluntary action 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 tank or container 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 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 paragraphs (C)(7)(b)(i) and (C)(7)(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, will create a unit subject to hazardous waste closure obligations under Chapter 3734. of the Revised Code.]

[Comment: where no 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 indicates the occurrence at the property of either the accumulation of hazardous waste as a large quantity generator 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: "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.]

- (8) Petroleum underground storage tank systems. Any property or portion thereof which is subject to site assessment, removal, or remediation, pursuant to Chapter 3737. of the Revised Code and the Administrative Code rules adopted thereunder regarding underground storage tank systems, including any underground storage tanks which contain or had previously contained petroleum.
- (9) Oil and gas. Any property or portion thereof which is subject to any site assessment, removal, or remediation, pursuant to Chapter 1509. of the Revised Code and the Administrative Code rules adopted thereunder.
- (10) Properties subject to state enforcement. 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.
- (D) Sufficient evidence of entry into the "Voluntary Action Program." A property which is the subject of an enforcement letter pursuant to Chapter 3704., 3734., or 6111. of the Revised Code may be eligible 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," (hereinafter "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) Was proceeding and is continuing to proceed expeditiously to address the threat identified in the enforcement letter at the property upon which the voluntary action is being conducted.
- (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) An initial statement of work for completing a “Phase II Property Assessment”, in accordance with rule 3745-300-07 of the Administrative Code, was prepared for the property; 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 paragraphs (D)(2)(a) and (D)(2)(b) of this rule may satisfy 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, a schedule for completing the voluntary action through submission of the no further action letter to the director must be developed by a certified professional and be submitted to the director, and a contract between the proposed volunteer and a certified professional must be entered into to complete the voluntary action. By the end of the sixty day period, or other time period approved by the director, the proposed volunteer, through the certified professional, must demonstrate to the director completion of the following:
- (a) That all existing documentation and data pertaining to the voluntary action have been reviewed by the certified professional;
 - (b) That a schedule for completing a “Phase II Property Assessment” in accordance with rule 3745-300-07 of the Administrative Code has been reviewed and revised by the certified professional, if applicable; and
 - (c) That 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, has been established between the

certified professional and the proposed volunteer.

[Comment: The contract referenced in paragraph (D)(3) 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 paragraphs (D)(3)(a) to (D)(3)(c) 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 submittal 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, and send a determination of eligibility letter to the owner of record of the property, and the proposed volunteer, if different, indicating whether the Ohio EPA 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 eligibility letter described in paragraph (D)(4) of this rule, if the proposed volunteer is eligible for participation in the "Voluntary Action Program," in order to remain eligible, the 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 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 submittal 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 changes in the certified professional involved with the voluntary action; 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 an enforcement letter, which addresses requirements for site assessment, removal, or remediation has been issued by the director in accordance with this rule and Ohio EPA has not taken any of the following actions within any continuous two year period following the issuance of an enforcement letter:
- (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) Initiated discussions with any owners, operators, or other responsible parties concerning activities at or the condition of the property;
 - (e) Conducted correspondence, discussions, or other activities with or on behalf of the U.S.EPA concerning site assessment, removal, or remediation activities in connection with the property;
 - (f) Initiated negotiations by letter, telephone, or meeting with any owners, operators, or other responsible parties concerning activities at or the condition of the property;
or
 - (g) Conducted any other activities in connection with the property.
- (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 this paragraph, 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)(10) of this rule may become eligible for participation upon a written demonstration to the "Voluntary Action Program's" satisfaction that the property is in compliance with or no longer subject to the law(s) or regulation(s) which made it ineligible. The demonstration must include a written statement from the state or federal agency or department which regulated the property, which asserts that all requirements of the law(s) or regulation(s) have been satisfied and that the property is no longer subject to such requirements.

Effective: _____

Certification: _____

Date: _____

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Rule authorized by: RC Chapter 3746.

Prior effective dates: none