

Content and scope of no further action letters.

- (A) For the purposes of this chapter and Chapter 3746. of the Revised Code, a no further action letter may be issued pursuant to this rule by a certified professional for a property under one or a combination of the following circumstances:
- (1) After completion of a "Phase I Property Assessment" conducted in accordance with rule 3745-300-06 of the Administrative Code, a certified professional determines that there is no information establishing any reason to believe a release of hazardous substances or petroleum has or may have occurred at or upon a property;
 - (2) After completion of a "Phase I Property Assessment" conducted in accordance with rule 3745-300-06 of the Administrative Code, a certified professional determines a release of hazardous substances or petroleum occurred on the property, with the release(s) being demonstrated in writing to be de minimis in accordance with paragraph (G) of rule 3745-300-06 of the Administrative Code;
 - (3) After completion of a "Phase II Property Assessment" conducted in accordance with rule 3745-300-07 of the Administrative Code, a certified professional determines the concentrations of chemical(s) of concern at the property do not exceed the applicable standards; or
 - (4) After completion of a "Phase II Property Assessment" conducted in accordance with rule 3745-300-07 of the Administrative Code, a certified professional determines the concentrations of chemical(s) of concern at the property exceed the applicable standards but those applicable standards have been achieved through remedial activities or will be achieved in accordance with an operation and maintenance plan if required under rule 3745-300-15 of the Administrative Code, or a consolidated standards permit issued under section 3746.15 of the Revised Code and any rules adopted thereunder.
- (B) In order to support a request for a no further action letter, a volunteer, and other persons performing work to support the request as described in paragraph (M) of this rule, must submit to a certified professional, by affidavit, all relevant investigatory and remedial information pertaining to the property including, but not limited to:
- (1) Information demonstrating there is no contamination by hazardous substances or petroleum of soil, sediments, surface water, or ground water on, underlying or emanating from the property in concentrations exceeding the applicable standards. The demonstrations must be based upon the findings of a "Phase I - Property Assessment" in accordance with rule 3745-300-06 of the Administrative Code or a "Phase II Property Assessment" in accordance with rule 3745-300-07 of the Administrative Code, as applicable;

- (2) If remedial activities were conducted in connection with a voluntary action, data demonstrating that any or all remedies meet or will meet applicable standards in accordance with paragraph (E) of rule 3745-300-15 of the Administrative Code;
 - (3) If a remedy relies on institutional controls restricting the use of the property to achieve applicable standards, a demonstration that all institutional controls on the property have been recorded in the office of the county recorder of the county in which the property is located, or have been entered as a memorial in the appropriate register for registered land as defined in section 5309.01 of the Revised Code, in compliance with section 3746.14 of the Revised Code, except as provided by paragraphs (B)(4) and (E)(13) of this rule;
 - (4) If the volunteer seeks to obtain a covenant not to sue and if the remedy relies on activity and use limitations to achieve applicable standards, a demonstration that the activity and use limitations have been developed in accordance with this chapter, and are contained in a proposed environmental covenant that meets the requirements established in section 5301.82 of the Revised Code;
 - (5) An operation and maintenance plan and a proposed operation and maintenance agreement, for the remedies that require an operation and maintenance plan and operation and maintenance agreement, in accordance with rule 3745-300-15 of the Administrative Code; and
 - (6) The affidavits required by paragraphs (M), (N) and (O) of this rule.
- (C) No person, with the purpose to deceive a certified professional, certified laboratory or a contractor thereof, or the agency or a contractor thereof, may withhold, conceal, or destroy any data, information, records, or documents relating to a voluntary action.
- (D) After receiving the information which is required to be submitted by a volunteer under paragraph (B) of this rule, a certified professional must review the information to determine whether the property complies with the applicable standards, or must ensure that the information has been reviewed by persons with experience and competence in areas other than the certified professional's expertise and competence, as necessary for the issuance of the no further action letter.
- [Comment: Paragraph (D) of this rule requires the certified professional to receive all the information required to be submitted under paragraph (B) of this rule, including the affidavits specified by paragraphs (M) and (N) of this rule. Without the required information, the certified professional may be unable to complete the review necessary to comply with paragraph (D) and issue a no further action letter in accordance with this rule.]
- (E) After performing a review in accordance with paragraph (D) of this rule, if the certified professional concludes on the basis of best available knowledge, information and belief that a property meets or will meet applicable standards, a

certified professional may prepare a no further action letter for the property. The certified professional must prepare the no further action letter in the format prescribed by paragraph (I) of this rule. The no further action letter must contain, at a minimum, the following information:

- (1) A legal description of the property subject to the no further action letter;
- (2) Property maps. For each of the maps described in paragraphs (a) through (c) of this rule the no further action letter must include, in addition to a hard copy, an electronic file as available containing the map data formatted in a manner recommended by the agency. The property maps must include, but are not limited to the following:

[Comment: The agency recommends electronic formats for map data on its web site. The electronic data will facilitate the entry of property information in an agency geographic information system.]

- (a) Property map(s) provided on 8.5 by 11 inch-size paper showing:
 - (i) The property's location, and the surrounding significant features such as roads and other right of ways, surface water bodies, and adjacent properties;
 - (ii) The property's boundaries, as determined by a professional surveyor licensed under Ohio law to practice surveying; and
 - (iii) The property's latitude and longitude to the nearest second;
- (b) Map(s) showing the portion(s) of the property where remedial activities have been implemented or will be implemented pursuant to rule 3745-300-15 of the Administrative Code, including the institutional controls, risk mitigation measures, and engineering controls subject to an operation and maintenance plan prepared under that rule. If a remedial activity does not apply to the entire property, include a survey map showing the portion of the property to which the remedial activity applies; and
- (c) Property map(s) showing:
 - (i) The property improvements, including all roads, railroads and above and below ground structures and appurtenances;
 - (ii) The locations of all borings, monitoring wells, and other sampling locations;

- (iii) The existing topography delineating the streams, swamps, lakes, springs, and other surface waters, with a contour interval of no greater than five feet; and
 - (iv) The property's latitude and longitude to the nearest second.
- (3) The "Phase I Property Assessment" report completed in accordance with rule 3745-300-06 of the Administrative Code, as supplemented by the certified professional in accordance with paragraph (L) of that rule.
 - (4) The "Phase II Property Assessment" report completed in accordance with rule 3745-300-07 of the Administrative Code.

[Comment: If more than one hundred eighty days has elapsed since completion of the Phase I Property Assessment activities, amendments to the Phase I Property Assessment must be performed and included, pursuant to paragraph (J) of rule 3745-300-06 and paragraphs (D) and (I) of rule 3745-300-07 of the Administrative Code.]

- (5) A property-specific risk assessment report completed in accordance with rule 3745-300-09 of the Administrative Code, if such a property-specific assessment was used in lieu of or in addition to using generic numerical standards established in rule 3745-300-08 of the Administrative Code;
- (6) Information demonstrating that the property conforms with each of the exposure assumptions used to calculate the applicable standards for the property, including all exposure assumptions used to calculate the generic numerical standard(s) established in rule 3745-300-08 of the Administrative Code and all exposure assumptions used to determine the applicable standards under rule 3745-300-09 of the Administrative Code, as applicable to the property;
- (7) A description of all chemicals of concern identified in environmental media at the property, their source, if known, and their locations and concentration levels prior to and after any remediation. The no further action letter must also provide this information in a summary table format;
- (8) Identification of the applicable standards for the property that reflects the certified professional's conclusion that the property complies with the applicable standards for each complete exposure pathway identified in accordance with paragraph (D)(2) of rule 3745-300-07 of the Administrative Code. The no further action letter must also provide this information in a summary table format;
- (9) Verification that the determination of the property's compliance with the applicable standards is based on certified analytical data generated by a certified

laboratory pursuant to rule 3745-300-04 of the Administrative Code, if such data is required by rule 3745-300-07 of the Administrative Code;

- (10) A summary of the information required to be submitted by the volunteer to the certified professional preparing the no further action letter, as described in paragraph (B) of this rule;
- (11) The name and qualifications of each person who performed work, other than the certified professional, to support the no further action letter and the nature and scope of the work performed by that person;
- (12) A list of all documents, and the date such documents were prepared, which were reviewed by the certified professional in preparing the no further action letter;
- (13) A copy of the proposed environmental covenant for the property that meets the requirements established in section 5301.82 of the Revised Code, if the remedy relies upon activity and use limitations (also known as institutional controls) to achieve applicable standards. The proposed environmental covenant must contain activity and use limitations that are developed in accordance with rule 3745-300-15 of the Administrative Code (the criteria for institutional controls) and other applicable laws. If the entire property is not subject to the activity and use limitations, the environmental covenant must include the additional legal description and survey map of the portion of the property that is subject to the limitations. The recordation of the environmental covenant in accordance with sections 3746.14 and 5301.88 of the Revised Code will be required as a condition of a covenant not to sue issued for the property in order for the covenant to become effective;

[Comment: Ohio EPA may be contacted under the voluntary action program's technical assistance program to provide volunteers, certified professionals or other persons assistance regarding the development of activity and use limitations or environmental covenants. Ohio EPA may recover its costs related to the review, comment or oversight of activity and use limitations, environmental covenants, or other activities not associated with a submitted no further action letter otherwise covered by a fee pursuant to rule 3745-300-03 of the Administrative Code.]

- (14) A copy of the operation and maintenance plan and proposed operation and maintenance agreement prepared in accordance with rule 3745-300-15 of the Administrative Code, if the plan and agreement is required pursuant to that rule;
- (15) A copy of the risk mitigation plan prepared in accordance with rule 3745-300-15 of the Administrative Code, if the plan is required pursuant to that rule;
- (16) Identification of the tax parcel number(s) and the taxing district(s) for the property. If any portion of the property includes less than an entire tax parcel,

the no further action letter must include a map indicating the affected tax parcel number(s), and the included and excluded portions;

- (17) All affidavits prepared in connection with the voluntary action in accordance with paragraph (M) through (O) of this rule and as required by rules 3745-300-04 and 3745-300-05 of the Administrative Code;

[Comment: Paragraph (I) of rule 3745-300-04 of the Administrative Code provides that certified laboratories must submit all information, data, documents and reports in support of a no further action letter by affidavit. Paragraph (F)(4) of rule 3745-300-05 of the Administrative Code requires certified professionals to provide, with each submission of a voluntary action opinion, an affidavit regarding the standards of conduct.]

- (18) An executive summary of the no further action letter, prepared in accordance with paragraph (J) of this rule;
- (19) A copy of the consolidated standards permit and supporting documents issued pursuant to section 3746.15 of the Revised Code, if any; and
- (20) Any other information the certified professional considers relevant.

- (F) Upon completion of a no further action letter, the certified professional must send a copy of the no further action letter to the volunteer. The no further action letter must be accompanied by:

- (1) A written request that the volunteer notify the certified professional as to whether the volunteer wishes to submit the no further action letter to the director;
- (2) A written notice informing the volunteer that the original no further action letter may be submitted to the director only by a certified professional and that the volunteer may receive a covenant not to sue from the director in connection with the voluntary action only if the original no further action letter for the voluntary action is submitted to the director on behalf of the volunteer by the certified professional; and
- (3) The certified professional's affidavit, prepared in accordance with paragraph (O) of this rule.

- (G) Promptly after receipt of the no further action letter and the request described in paragraph (F)(1) of this rule, the volunteer must:

- (1) Send written notice to the certified professional which indicates whether or not the volunteer wishes the certified professional to submit the no further action letter to the director; and

(2) Send a copy of the written notice to the director.

[Comment: To prepare the written notice pursuant to paragraph (G) of this rule the volunteer may use the template letter attached to the "NFA Letter Form", which is available on the agency's web site.]

(H) Promptly after receipt of the written notice pursuant to paragraph (G) of this rule, the certified professional must either:

(1) Submit the original no further action letter to the director by certified mail on behalf of the volunteer, if the volunteer's notice indicates that the volunteer wishes to have the no further action letter submitted to the director. The original no further action letter must include the certified professional's original affidavit prepared in accordance with paragraph (O) of this rule; or

(2) Send the original no further action letter to the volunteer promptly after receiving the notice, if the notice indicates that the volunteer does not wish the certified professional to submit the no further action letter to the director.

(I) The certified professional must prepare the no further action letter in a format prescribed and provided by the agency.

[Comment: The prescribed format is available by contacting the voluntary action program at Ohio EPA or by accessing the agency's web site. This prescribes the format of how the no further action letter and supporting documentation should be assembled for submitting to the agency and also specifies, for example, the preparation of a summary table showing analytical data results relied upon to support an applicable standards demonstration.]

(J) The certified professional must prepare an executive summary of the no further action letter in the format prescribed and provided by the agency for purposes of meeting the recording requirement of paragraph (K) of this rule. The executive summary must include the legal description of the property and the certified professional's affidavit for the executive summary, in the format prescribed by the agency pursuant to paragraph (I) of this rule.

[Comment: The formats for the executive summary and the certified professional's executive summary affidavit are included with the prescribed format for the no further action letter, and is accessible by contacting the voluntary action program at Ohio EPA or by accessing the agency's web site.]

(K) If a covenant not to sue is issued by the director as a result of the submission of a no further action letter prepared pursuant to this rule, the volunteer who is issued the covenant not to sue must ensure that the certified professional's executive summary of the no further action letter, in the format described in paragraph (J) of this rule, the covenant not to sue and the institutional controls for the property, if any, are

recorded, in the same manner as a deed to the property, in the office of the county recorder of the county in which the property is located. No further action letters submitted to the agency will be made available by the agency as public records.

- (L) A no further action letter, a covenant not to sue and any agreement authorized to be entered into under Chapter 3746. of the Revised Code and this chapter may be transferred by the recipient to any other person by assignment or in conjunction with the acquisition of title to the property to which such document applies.

[Comment: Rule 3745-300-15 of the Administrative Code addresses agreements for the implementation of operation and maintenance plans.]

- (M) Affidavit requirement - volunteers and persons who performed work to support a request for a no further action letter. When a volunteer or a person who performed work to support a request for a no further action letter submits information, data, documents, or reports to a certified professional, a certified laboratory or the agency, the volunteer or person must provide the submission under affidavit. The affidavit must be based on the knowledge, information and belief of that volunteer or person, and include the following:

- (1) The name of the affiant;
- (2) A statement that the affiant is authorized to submit the affidavit on behalf of the volunteer, with the name of the entity with whom the affiant is employed or retained if not employed or retained by the volunteer;
- (3) The name and address of the property subject to the voluntary action;
- (4) The purpose for which the information, data, documents, or reports are being submitted;

[Comment: For example, when a person performs work to support a request for a no further action letter, such as a consultant who completes a "Phase I Property Assessment" or a property-specific risk assessment report, the consultant's affidavit would identify the submission purpose and the report name.]

- (5) An identification of all information, data, documents, or reports submitted with the affidavit;
- (6) When information, data, documents, or reports are submitted to a certified professional to support a request for a no further action letter, a statement that the work indicated by the submission was conducted in compliance with all applicable local, state and federal laws and regulations; and

- (7) A statement attesting all information, data, documents, or reports submitted by the affiant are true, accurate and complete.

[Comment: A "person who performed work to support a request for a no further action letter" may include the volunteer's contractor or consultant. "Work" performed to support a request for a no further action letter may include (1) the collection of environmental samples by the contractor for submission to a certified laboratory, and (2) the preparation of a "Phase I Property Assessment" report, a "Phase II Property Assessment" report, a property-specific risk assessment report, or documentation of completed remedial activities.

However, if the individual who performed the work is an employee of the volunteer, this rule provision does not require an affidavit from that individual. Further, if the individual who performed the work is employed by the entity employing the certified professional and working under the direction of the certified professional, this rule provision does not require an affidavit from that individual. In such scenarios, the affidavits provided under this rule by the volunteer and certified professional suffice.]

[Comment: Paragraph (M) of this rule does not apply to information, data, documents, or reports provided by any federal, state, or local governmental entity in response to a public records request.]

[Comment: If a person interviewed by a volunteer or certified professional for purposes of a "Phase I Property Assessment" does not submit an affidavit attesting, in accordance with paragraph (M) of this rule, to the information the person provided during the interview, the interviewer may submit an affidavit attesting to the information received during the interview and that the interviewed person did not submit an affidavit.]

- (N) Affidavit requirement - certified laboratories. The information, data, documents, or reports submitted by a certified laboratory to a volunteer, a certified professional, the director, or any other person to support a request for a no further action letter must be submitted by affidavit. Each time that information, data, documents or reports are submitted by a certified laboratory for the purposes of conducting or completing a voluntary action, an authorized representative of the certified laboratory must submit an affidavit based upon the certified laboratory's knowledge, information and belief, which includes the following:

- (1) The name of the affiant;
- (2) A statement attesting the affiant is authorized to submit the affidavit on behalf of the certified laboratory;
- (3) Name and address of the property that is the subject of the voluntary action;

- (4) A statement attesting the purpose for which the information, data, documents, or reports are being submitted is to support a request for a no further action letter;
 - (5) An identification of all information, data, documents, or reports submitted with the affidavit;
 - (6) A statement attesting the certified laboratory performed the analyses documented in the submission in accordance with the laboratory's current certificate issued under the voluntary action program and the laboratory was certified for each analyte, parameter group and method used at the time it performed the analyses;
 - (7) A statement attesting that, at the time of analysis, the analyses were performed pursuant to the certified laboratory's standard operating procedures and quality assurance program plan for which the laboratory has received prior approval from the agency; and
 - (8) A statement attesting all information, data, documents, or reports submitted by the certified laboratory in support of the request for a no further action letter are true, accurate and complete.
- (O) Affidavit requirement - no further action letter issuance or submission. For each no further action letter issued to a volunteer or submitted to the director for a covenant not to sue, the certified professional must submit an affidavit based upon the certified professional's knowledge, information and belief, which includes the following:
- (1) The name of the certified professional;
 - (2) The name and address of the property that is the subject of the no further action letter, and the name and address of each volunteer and property owner;
 - (3) A statement attesting the certified professional has read all standards of conduct contained in paragraph (F) of rule 3745-300-05 of the Administrative Code and met the standards of conduct while the certified professional rendered professional services regarding the voluntary action at the property;
 - (4) A statement attesting the property is eligible for the "Voluntary Action Program" pursuant to rule 3745-300-02 of the Administrative Code and section 3746.02 of the Revised Code;
 - (5) A statement attesting the voluntary action has been conducted and the no further action letter issued in accordance with Chapter 3745-300 of the Administrative Code and Chapter 3746. of the Revised Code;
 - (6) A statement attesting the voluntary action was conducted in compliance with all applicable local, state, and federal laws and regulations; and

- (7) A statement attesting the no further action letter, and any information, data, documents, or reports submitted with the no further action letter, are true, accurate and complete.

[Comment: The certified professional may use the same affidavit prepared in accordance with paragraph (O) of this rule for both the issuance of a no further action letter to the volunteer and the submission of the no further action letter to the director. An original affidavit must be provided with the original no further action letter submitted to the director pursuant to this rule or with any subsequent submittal to the Director in support of the original no further action letter.]

[Comment: The agency provides example affidavit language for use in complying with paragraphs (M) to (O) of this rule. The examples are attachments to the "NFA Letter Form", available on the agency's web site.]

[Comment: Any subsequent submittals to the Director in support of the no further action letter must comply with the affidavit requirements specified in paragraphs (M) to (O) of this rule. The issuance date of a no further action letter is not affected by any subsequent submittals to the Director in support of the no further action letter.]

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Certification

Date

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