

3745-300-02 Eligibility for participation in the voluntary action program.

[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules, and federal statutory provisions referenced in this rule, see paragraph (B) of rule 3745-300-01 of the Administrative Code titled "Incorporation by reference."]

- (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) Exceptions to eligibility. A property, that meets the description of one or more of paragraphs (B)(1) to (B)(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 (B)(1) to (B)(8) of this rule do not apply.
- (1) National priorities list sites. Any property identified on the national priorities list, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 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, 42 U.S.C. 300f - 300j and the regulations adopted thereunder, or Chapter 6111. of the Revised Code and 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.
- (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 the Resource Conservation and Recovery Act (RCRA), and the regulations adopted thereunder, and Chapter 3734. of the Revised Code and rules adopted thereunder.
- (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 rules adopted thereunder.

(a) "Solid waste facility," for purposes of this paragraph, includes any facility as defined in section 3734.01 of the Revised Code, and rules 3745-27-01 and 3745-500-02 of the Administrative Code, including but not limited to sanitary landfill facilities, municipal solid waste disposal facilities, residual waste landfill facilities, industrial solid waste facilities, solid waste transfer facilities, scrap tire facilities, solid waste incinerator or solid waste energy recovery facilities, or composting facilities.

"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 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, 3745-30, and 3745-560 of the Administrative Code.

(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 rules adopted thereunder.

(iii) Any hazardous waste management unit described in paragraph (B)(5)(b) 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: 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 rules adopted thereunder regarding underground storage tank systems, including any underground storage tank systems which contain or had previously contained petroleum. However, this paragraph shall not apply to property with either of the following:
 - (a) A class C release, provided that the volunteer is not a responsible person as defined in section 3737.87 of the Revised Code.
 - (b) A release other than a class C release, provided the following:
 - (i) The volunteer is not a responsible person, as determined by the fire marshal pursuant to Chapter 3737. of the Revised Code.
 - (ii) The voluntary action also addresses hazardous substances or petroleum that are not subject to the rules adopted under division (B) of section 3737.882 of the Revised Code pertaining to a corrective action.
 - (iii) The fire marshal has not issued an administrative order concerning the release or referred the release to the attorney general for enforcement.
 - (7) Oil and gas. Any property that is subject to site assessment, removal, or remediation, pursuant to Chapter 1509. of the Revised Code and rules adopted thereunder.
 - (8) Properties subject to an 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 (C) of this rule.
- (C) 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 (B)(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 has done the following:
 - (a) Has entered into the voluntary action program prior to receipt of the enforcement letter
 - (b) Is proceeding expeditiously to address the release or threatened release of hazardous substances or petroleum identified in the enforcement letter.

- (i) Entry into the voluntary action program means commencing a voluntary action by completing a phase I property assessment report, retaining a certified professional to conduct the voluntary action, and conducting other activities identified in paragraphs (C)(2) and (C)(3) of this rule.
- (ii) Proceeding expeditiously means conducting a voluntary action through the achievement of milestones which address the release or threatened release of hazardous substances or petroleum identified in the enforcement letter with a three year period, unless otherwise established by the director.
- (iii) Milestones include, but are not limited to the following:
 - (A) Assessment of identified areas and releases or threatened releases of hazardous substances or petroleum identified in the enforcement letter.
 - (B) Completion of a phase II property assessment work plan.
 - (C) Completion of phase II property assessment activities or a phase II property assessment report.
 - (D) Completion of a risk assessment.
 - (E) Completion of a remedial action bench scale, treatability, pilot or similar study.
 - (F) Completion of a remedial action plan.
 - (G) Completion of soil and/or ground water remedies.
 - (H) Submittal of a no further action letter to the director.
- (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:
 - (a) A phase I property assessment report, which meets the requirements contained in paragraph (G) of rule 3745-300-06 of the Administrative Code, was completed prior to receipt of the enforcement letter 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 milestone of the phase II property assessment activities and determinations described in paragraph (F) of rule 3745-300-07 of the Administrative Code and any other voluntary activities necessary to address the threat identified in the enforcement letter.
 - (c) Documentation of recent or ongoing activity at the property, which demonstrates that the proposed volunteer is proceeding expeditiously to achieve milestones which

address the threat identified in the enforcement letter. Such documentation shall have been prepared prior to receipt of the enforcement letter. Recent completion of the activities required in paragraphs (C)(2)(a) and (C)(2)(b) of this rule may satisfy the requirements of this paragraph.

- (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.
 - (c) A schedule for completing the voluntary action in accordance with this chapter that specifies target milestone dates for completing the voluntary action, through submission of a no further action letter to the director.
- (4) Upon the submission of all items contained in paragraphs (C)(2) and (C)(3) of this rule, the director will review those items for compliance with paragraph (C)(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 identified in the enforcement letter, 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 (B)(1) to (B)(7) of this rule. In order to remain eligible with respect to paragraph (B)(8) of this rule, the proposed volunteer must do the following:
 - (a) Substantially comply with any schedule established pursuant to paragraphs (C)(3)(b) and (C)(3)(c) of this rule, as appropriate.
 - (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 (C)(4) of this rule; thereafter progress reports must be submitted every three months, 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 and target milestone dates during the reporting period.
 - (ii) A description of any difficulties encountered or deviations from the schedule of work and target milestone dates during the reporting period and actions taken to address the difficulties or deviations.
 - (iii) A description of activities planned and target milestone dates for the next reporting period.
 - (iv) An identification of any replacement of or addition to the certified professional identified in the contract or scope of services affidavit submitted to the director pursuant to paragraph (C)(3)(a) of this rule.
 - (v) An indication of any anticipated change in the target or actual completion dates for each milestone of the voluntary action, including project completion, and an explanation for any deviation from any applicable schedules, which shall be subject to Ohio EPA approval.
- (6) The requirements of paragraphs (C)(1) to (C)(5) of this rule do not have to be met prior to conducting a voluntary action 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.
 - (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 submission 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 any of the following occur:

- (a) The volunteer does not expeditiously proceed with the voluntary action by adhering to the schedules submitted to Ohio EPA pursuant to paragraph (C)(5)(b) of this rule.
 - (b) The director determines that the volunteer is in violation of any of the requirements of paragraph (C) of this rule.
 - (c) The property is later determined to be ineligible for the voluntary action program under this chapter.
- (8) The director shall provide written notice to a volunteer if the agency intends to proceed with an enforcement action pursuant to paragraph (C)(7) of this rule.
- (D) A property which is ineligible for participation in the voluntary action program pursuant to paragraphs (B)(1) to (B)(8) of this rule may become eligible for participation upon a written demonstration to the agency's satisfaction that the property is no longer subject to the laws or regulations 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.

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