

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Voluntary Action Program Minor Rule Revisions

Rule Number(s): OAC 3745-300-01, 3745-300-02, 3745-300-03, 3745-300-05, 3745-300-07, 3745-300-08, Appendix to OAC 3745-300-08, 3745-300-09, 3745-300-10, 3745-300-11, 3745-300-13, 3745-300-14

Date: November 9, 2015

Rule Type:

- | | |
|---|--|
| <input type="checkbox"/> New | <input type="checkbox"/> 5-Year Review |
| <input checked="" type="checkbox"/> Amended | <input type="checkbox"/> Rescinded |

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The rules in OAC chapter 3745-300 govern the Voluntary Action Program (VAP) and outline in detail the process for taking a property through the program. These rules specify eligibility for the VAP, fees associated with the program, qualifications for certified

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

professionals, criteria for property assessment and remedies, risk assessment procedures, ground water response requirements, urban setting designations, the content and scope of a no further action letter, the VAP audit process, and clarify sufficient evidence requirements.

The Division of Environmental Response and Revitalization has proposed amendments to the regulations in order to clarify the definition of various terms within the VAP, correct typos and include language that was inadvertently omitted in the last rulemaking, clarify survey map requirements for risk mitigation plans and environmental covenant property areas, correct risk numerical values, correct discrepancies between rule language and referenced support documents, and correct cross referencing discrepancies.

Please list the Ohio statute authorizing the Agency to adopt this regulation.

Rule Number	Authorizing Statute	Proposed Action
OAC 3745-300-01	3746.04	Amended
OAC 3745-300-02	3746.04	Amended
OAC 3745-300-03	3746.04	Amended
OAC 3745-300-05	3746.04	Amended
OAC 3745-300-07	3746.04	Amended
OAC 3745-300-08	3746.04	Amended
Appendix to -08	3746.04	Amended
OAC 3745-300-09	3746.04	Amended
OAC 3745-300-10	3746.04	Amended
OAC 3745-300-11	3746.04	Amended
OAC 3745-300-13	3746.04	Amended
OAC 3745-300-14	3746.04	Amended

- 2. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

If yes, please briefly explain the source and substance of the federal requirement.

No, the proposed regulations do not implement a federal requirement, nor are the proposed regulations being amended to enable the state to obtain approval to administer and enforce federal law, or participate in a federal program.

- 3. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The rules in this chapter do not exceed federal requirements, as they do not implement any federal requirements. The proposed rule amendments are intended to clarify and address oversights that were inadvertently not addressed within the last five year rule review which concluded in August 2014. This program and participation in it is voluntary and depends on the need for civil liability relief for hazardous substance and petroleum cleanup that a person voluntarily performs on a former industrial, commercial, or blighted property.

- 4. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The rules in OAC chapter 3745-300 establish criteria for certification and standards of conduct within the VAP for certified professionals and certified laboratories, and outline specific standards and procedures used for participation in the VAP. The rules govern the voluntary remediation process, which allow property owners and developers to voluntarily evaluate and cleanup environmentally contaminated property and get a release of liability from the state. Without regulation in these areas, parties would be reluctant to assess, cleanup, and redevelop properties due to liability uncertainty. Hence, sites that enter into the VAP would not be remediated or cleaned-up to standards at safe levels for both human health and the environment.

- 5. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

The proposed rule changes in OAC chapter 3745-300 will allow for a clearer understanding of the concepts intended by the program. Ultimately, success will be gauged by the level of participation and external satisfaction with the program.

Development of the Regulation

- 6. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Ohio EPA, DERR, established a 30 day early stakeholder comment period and requested comments from both interested and potentially affected parties. The comment period ended on July 17, 2015. Ohio EPA, DERR, sent notice of our request for comments electronically to the various VAP Certified Professionals, VAP Certified Laboratories, and other members of Ohio EPA's Interested Parties list for this DERR rulemaking. Interested parties include developers, municipalities, environmental professionals and lawyers, as well as citizens and environmental groups. The notice was also posted on the Ohio EPA, DERR webpage.

7. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Ohio EPA, DERR, did not receive any comments during the Early Stakeholder Outreach period regarding the proposed rule changes.

8. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

OAC 3745-300-09 and the appendix to OAC 3745-300-08 were revised based on the scientific toxicity data used to develop the generic numerical standards under the VAP. This data supports the regulation being proposed, as it allows for a predetermined set of standards to be followed when bringing a property through the program. These standards were updated during our last five year rule review; however, there were errors discovered within the tables. This rulemaking proposes to correct those errors.

OAC 3745-300-07 and OAC 3745-300-10 incorporate administrative procedures, lessons learned, and current environmental assessment practices as reflected by USEPA and similar peer reviewed guidance.

The rest of the rules in OAC chapter 3745-300 establish an administrative program and process through which blighted properties can be assessed and cleaned up voluntarily.

9. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

A spreadsheet was created to capture all of the ideas and suggestions that were brought up in regard to rule changes that should be considered. DERR reviewed potential rule changes and regulatory suggestions for this rulemaking that were developed within the division, as we didn't receive any input from the stakeholders, and opted to either include the suggested

changes, or to reject them. Once the spreadsheet was narrowed down, each of the rule changes were discussed and language was then modified within the rules.

10. Did the Agency specifically consider a performance-based regulation? Please explain.
Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The rules in OAC chapter 3745-300 establish an administrative program through which blighted properties can be remediated and cleaned up voluntarily. The process each volunteer chooses to use to clean up the property is not necessarily dictated in rule; however, the outcome is always the same for each VAP property: a property must be shown to comply with applicable standards before a covenant not to sue may be issued by the director. Essentially, the VAP is a performance based program, as properties that enter into it must achieve applicable standards. The steps that are taken under the rule procedures to remediate a property in order to reach and meet those applicable standards, however, are left up to the certified professional in cooperation with the volunteer performing the work on the property.

11. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

Ohio EPA is the only agency within Ohio to have a program such as the VAP. The rules in this chapter are unique within Ohio EPA and do not duplicate the rules of this or any other agency within the state of Ohio.

12. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Ohio EPA's VAP program was originally implemented in September 1994, and rules in OAC chapter 3745-300 have existed since December 1995. The proposed amendments to the rules will be implemented once the amended rules are adopted and become effective. All of the proposed changes to the rules will not affect the implementation of the rules, as they are minor and simply provide clarification and corrections in regard to a previous rulemaking. All of the rules are currently implemented through policy and guidance written within the division in compliment to the rules, which are adhered to by the division in its entirety, allowing for consistency and predictability within the program. The amendments to these rules will be implemented in the same manner.

Adverse Impact to Business

13. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

The impacted business community for the rules in this chapter is any party that wishes to voluntarily clean-up a property through the VAP. This can range from property owners, volunteers, townships, cities, etc.

Participation in the VAP is completely voluntary. However there are fees associated with the program which are necessary to keep the program afloat. The fees are based on a ‘cost incurred’ model for the agency and are not intended to create a profit for the agency. The cost of compliance with the rules can vary with the scope of remediation required for a particular property, as more time, money and effort will be required to clean-up a larger property vs. a smaller one. The proposed changes within this rules package will likely have no effect on the cost of compliance, as the changes being made are simply clarifying and cleaning up rule amendments that were adopted during the last rule review. However, the changes being proposed to the remedy rule, OAC 3745-300-11, further clarify the approval and acknowledgement paths for a volunteer or property owner who might opt to revise the remedy on a property that has already received a covenant not to sue from Ohio EPA. In which case, if a volunteer or property owner were to follow the clarified route for acknowledgement, the cost of compliance would likely decrease. The proposed changes to the remedy rule will provide a clear option for the volunteer or property owner when considering a remedy revision, to either ask the agency for approval or acknowledgement of that revision. The proposed clarifications to the acknowledgement route will provide for a somewhat less costly path forward when revising a remedy on a VAP property.

14. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The agency does not feel that there is an adverse impact to the regulated business community, as the VAP is, as the name implies, entered into completely voluntarily. We

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

believe the proposed changes will help to clarify the intent behind the rules, and help in our goal of making the program more business friendly. Once a property has gone through the VAP and received a covenant not to sue from the state, the value of the property increases and it can be placed back into productive service within the community. This ultimately benefits the community through the remediation of property that was once an eyesore.

Regulatory Flexibility

15. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

Any volunteer, including a small business, has the same compliance criteria to meet standards in order to receive a covenant not to sue from the state of Ohio.

16. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

These rules are not subject to fines or penalties.

17. What resources are available to assist small businesses with compliance of the regulation?

The following resources are available:

- Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at: <http://www.epa.ohio.gov/ocapp>.
- Ohio EPA also has a permit assistance web page (http://www.epa.ohio.gov/dir/permit_assistance.aspx) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Answer Place, Ohio EPA's Guide to Environmental Permitting, and the eBusiness Center.
- Ohio EPA maintains the Compliance Assistance Hotline 1-800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

- U.S. EPA Small Business Gateway also has information on environmental regulations for small businesses available at <http://www.epa.gov/smallbusiness/> and a Small Business Ombudsman Hotline 1-800-368-5883.
- Ohio EPA's Division of Environmental Response and Revitalization (DERR) offers grant funded technical assistance to eligible local public entities including counties, cities, villages, townships, port authorities, etc. More information is available at: http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx.

Ohio EPA's DERR Rules Coordinator, Emily Patchen, is the primary contact for any rules relating to the division, and is available to answer any questions. She can be reached by calling (614) 728-5441, or by email at Emily.Patchen@epa.ohio.gov.