

3745-300-14 Audits of no further action letters

(A) As used in this rule:

- (1) "Audit findings" means written documentation provided by certified mail to a person who has performed a voluntary action, the current owner of a property that has been the subject of a voluntary action, or a certified professional or certified laboratory, as appropriate, which indicates the results of an audit conducted pursuant to this rule.
- (2) "Investigatory auditing activities" means activities conducted prior to the issuance of audit findings, including, but not limited to document review and analysis, field screening or sampling activities, and laboratory analysis.
- (3) "Mandatory audit pool" means those no further action letters submitted to the director in the preceding calendar year under section 3746.11 of the Revised Code and to which any of the following apply:
 - (a) The no further action letter was prepared by an individual who was certified under division (D) of section 3746.07 of the Revised Code, but not certified pursuant to rule 3745-300-05 of the Administrative Code;
 - (b) Laboratory analyses were performed in support of a no further action letter by a laboratory certified under division (E) of section 3746.07 of the Revised Code, but not certified under rule 3745-300-04 of the Administrative Code for the analyte(s) or method(s) used in support of the no further action letter.
 - (c) The director has reason to believe that the no further action letter was submitted fraudulently;
 - (d) The no further action letter was prepared by a certified professional whose certification was subsequently revoked in accordance with rule 3745-300-05 of the Administrative Code;
 - (e) Laboratory analyses were performed in support of the no further action letter by a certified laboratory whose certification was subsequently revoked in accordance with rule 3745-300-04 of the Administrative Code; or
 - (f) The no further action letter was the basis for a covenant not to sue which was subsequently revoked under this chapter and Chapter 3746. of the Revised Code.
- (4) "Priority audit pool" means those no further action letters submitted to the director in the preceding calendar year under section 3746.11 of the Revised Code and to which either of the following applies:

- (a) The no further action letter pertains to a voluntary action for which a risk assessment was conducted in accordance with division (B)(2) of section 3746.04 of the Revised Code and the rules adopted thereunder; or
 - (b) The no further action letter pertains to a voluntary action that included, as a remedial activity, either an engineering control(s) as described in this chapter and Chapter 3746. of the Revised Code or institutional controls which restrict the access to or use of the property pursuant to this chapter and Chapter 3746. of the Revised Code.
- (5) "Random audit pool" means all of the no further action letters submitted to the director in the preceding calendar year under section 3746.11 of the Revised Code which are not selected from the mandatory audit pool or the priority audit pool, including those properties which involved remedial activities and those properties which did not involve remedial activities.
 - (6) "Tier I audit" means a review and analysis of documents pertaining to a no further action letter held or produced by a certified professional, a volunteer, the current owner of the property, or a certified laboratory, as appropriate, and a site walkover the property, in order to determine compliance with applicable standards, this chapter or Chapter 3746. of the Revised Code.
 - (7) "Tier II audit" means a physical inspection and investigation of a property upon which a voluntary action was conducted in order to determine compliance with applicable standards, this chapter or Chapter 3746. of the Revised Code, including sampling and analysis of soils, surface water, air, sediments, or groundwater.
 - (8) "Split sample" means an equal portion of a material or media which has been obtained or removed from a property for the purposes of performing laboratory analyses to determine compliance with the applicable standards, this chapter or Chapter 3746. of the Revised Code.
- (B) The director shall conduct audits in connection with no further action letters issued under section 3746.11 of the Revised Code for all of the following purposes:
- (1) To determine whether, after completion of voluntary actions conducted pursuant to this chapter and Chapter 3746. of the Revised Code, the properties upon which the voluntary actions were conducted meet applicable standards;
 - (2) To review the qualifications of and work performed by certified professionals under this chapter and Chapter 3746. of the Revised Code to determine whether they possess the qualifications required for certification pursuant to rule 3745-300-05 of

the Administrative Code and whether their performance in the voluntary action program has resulted in the issuance of no further action letters that are not consistent with applicable standards; or

- (3) To review the qualifications of and work performed by certified laboratories to determine whether they possess the qualifications required for certification pursuant to rule 3745-300-04 of the Administrative Code and whether their performance under this chapter and Chapter 3746. of the Revised Code has resulted in the issuance of no further action letters that are not consistent with applicable standards.

An audit may be conducted for any of the purposes identified in paragraphs (B)(1) to (B)(3) of this rule or for any combination of those purposes.

- (C) The director shall audit all no further action letters in the mandatory audit pool.
- (D) The director shall randomly select for audit twenty-five per cent of the no further action letters contained in the priority audit pool. Any no further action letter in the priority audit pool which is not randomly selected for audit under this paragraph shall be included in the appropriate random audit pool.
- (E) At a minimum, the director shall conduct audits of no less than twenty five per cent of all no further action letters involving remedial activities, and no less than twenty five per cent of all no further action letters not involving remedial activities, submitted to the director during the preceding calendar year.
- (F) The director may conduct audits from the random audit pool as he deems necessary.
- (G) If the director has a reasonable belief that a no further action letter submitted to the director in any of the ten preceding calendar years meets one or more of the criteria for inclusion in the mandatory audit pool, the director shall audit such letter. Audits of no further action letters conducted pursuant to this paragraph shall not be included in determining the number of audits conducted by the director pursuant to paragraph (E) of this rule and division (B) of section 3746.17 of the Revised Code.
- (H) Audits may be conducted for any purpose or combination of purposes described in paragraph (B) of this rule in accordance with one or both of the following procedures:
 - (1) Tier I audit
 - (a) Prior to commencing a tier I audit of a no further action letter, the director shall provide reasonable advance notice of the audit to the volunteer for whom the no further action letter was prepared, the certified professional who prepared the no further action letter, the current owner of the property, if

different from the volunteer and, as appropriate, any certified laboratory which performed analyses which formed the basis for the no further action letter. The notice shall contain a request that the certified professional who prepared the no further action letter submit or make available all documents relied upon by the certified professional and required to be itemized on the document list contained in the no further action letter pursuant to rule 3745-300-13 of the Administrative Code, and any other documents which the director determines are necessary to perform an audit pursuant to this rule.

- (b) Following receipt of the notice provided pursuant to paragraph (H)(1)(a) of this rule, the certified professional shall deliver the requested documentation to the agency not more than thirty days following the request.
 - (c) When conducting a tier I audit, the director may do the following:
 - (i) Request that a certified professional, a certified laboratory, a volunteer or a person responsible for maintaining compliance with applicable standards at a property submit any or all documents pertaining to the no further action letter being audited;
 - (ii) VISIT a property or place of business, following reasonable advance notice and during the normal operating hours of the business, to perform a review of the documents stored at that property or place of business; and
 - (iii) Conduct a site walkover of the property upon which the voluntary action was conducted.
 - (d) All documents requested pursuant to paragraph (H)(1)(c)(i) of this rule shall be submitted to the director not later than thirty days following the request.
- (2) Tier II audit
- (a) If the documents produced and reviewed pursuant to paragraph (H)(1) of this rule are inadequate to substantiate the no further action letter, or if the director has a reasonable belief that the no further action letter has been based on fraudulent or inaccurate information or documentation, the director may:
 - (i) Inspect a property, following reasonable advance notice, investigate or inspect conditions, equipment or practices and conduct sampling to determine compliance with applicable standards, this chapter or Chapter 3746. of the Revised Code; or

- (ii) Take any other action the director deems necessary to determine whether the no further action letter was prepared in compliance with applicable standards, this chapter or Chapter 3746. of the Revised Code.
 - (b) In addition to tier II audits conducted pursuant to paragraph (H)(2)(a) of this rule, the director may, at his discretion, randomly perform tier II audits on any no further action letter(s) selected for audit.
 - (c) Nothing in this rule shall diminish the director's ability to conduct criminal or other investigations under Chapters 3704., 3714., 3734., 3746., 3750., 3753., 6109. or 6111. of the Revised Code.
- (I) The director shall complete all investigatory auditing activities by December thirty first of the year in which an audit is conducted pursuant to paragraphs (C) to (F) of this rule and division (B) of section 3746.17 of the Revised Code, and the director shall issue all audit findings by March first of the year following that in which an audit is conducted.
- (J) The person responsible for maintaining compliance with applicable standards at a property subject to an audit may request one informal meeting with the Ohio EPA to discuss the technical aspects of that audit. The Ohio EPA shall be available for such meeting following the conclusion of all investigatory auditing activities and prior to the issuance of audit findings.
- (K) The time limits required by this rule shall not prevent the director, at his discretion, from granting one thirty day extension to any person subject to this rule. The director may also extend any time limits imposed upon him under this rule for a period not to exceed thirty days.
- (L) An audit of a no further action letter shall be completed in accordance with paragraphs (H)(1) and (H)(2) of this rule if either of the following apply:
 - (1) If the certification of the certified professional who prepared the no further action letter has been revoked pursuant to rule 3745-300-05 of the Administrative Code as a result of his commission of fraud; or
 - (2) If the certification of the certified laboratory which performed the laboratory analyses in support of the no further action letter has been revoked pursuant to rule 3745-300-04 of the Administrative Code as a result of its commission of fraud.
- (M) If requested by the director, upon proper identification and stating the necessity and purpose of the inspection, the volunteer or current owner of a property shall allow the director access

to the property to conduct all audit activities pursuant to this rule. Nothing in this rule shall limit the authority of the director provided in section 3746.21 of the Revised Code.

- (N) The Ohio EPA shall provide the person responsible for maintaining compliance with applicable standards at a property with a split sample of any soil, water or sediment sample obtained or removed from a property, if prior to sampling, a written request is made by the person responsible for maintaining compliance with applicable standards at a property. With sufficient prior notice, the Ohio EPA shall provide, at cost, appropriate sampling containers to the person making such a request.
- (O) The director shall issue audit findings pursuant to this rule which include a determination of whether applicable standards, and all other requirements established under this chapter or Chapter 3746. of the Revised Code have been met and whether additional actions are required to attain compliance. After an audit is completed:
 - (1) If the director finds that a certified professional or certified laboratory either did not possess the required qualifications for certification or that work performed by the certified professional or certified laboratory in connection with a voluntary action has resulted in the issuance of a no further action letter that is not consistent with the applicable standards, the director may either suspend or revoke the certification of the certified professional or certified laboratory;
 - (2) If the director finds that the performance of a certified professional or certified laboratory has resulted in the issuance of no further action letters that are not consistent with applicable standards, he shall notify persons for whom the certified professional or certified laboratory has performed work in connection with a voluntary action of his findings;
 - (3) If the director finds that a property no longer complies with the applicable standards upon which issuance of a covenant was based, the director shall, by certified mail, return receipt requested, notify the person responsible for maintaining compliance with those standards of that finding and of the requirements of division (B)(3) of section 3746.12 of the Revised Code;
 - (4) Unless the recipient of a notice provided under paragraph (O)(3) of this rule and division (B)(2) of section 3746.12 of the Revised Code, within thirty days after the mailing of the notice, notifies the director of his intention to return the property to compliance with the applicable standards upon which the covenant was based and enters into a compliance schedule agreement with the director, the director, by issuance of an order as a final action under Chapter 3745. of the Revised Code, shall revoke the covenant not to sue issued for the property. The compliance schedule agreement shall establish a reasonable period of time for returning to compliance with those applicable standards; and

- (5) If the director finds that a person with whom he has entered into a compliance schedule agreement under this rule and division (B)(3) of section 3746.12 of the Revised Code has failed to return the property to which the agreement pertains to compliance with the applicable standards within the time established in the agreement, the director, by issuance of an order as a final action under Chapter 3745. of the Revised Code, shall revoke the covenant not to sue issued for the property.

Effective: _____

Certification: _____
Christopher Jones, Director
Ohio Environmental Protection Agency

Date: _____

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