

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: OAC Chapter 3745-300, Voluntary Action Program

Rule Number(s): OAC Rules: 3745-300-15

Date: July 2020

**Rule Type:**

New

5-Year Review

Amended

Rescinded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 Voluntary Action Program (VAP) is governed by rules in Ohio Administrative Code (OAC) Chapter 3745-300. The VAP was created to give individuals a way to investigate possible environmental contamination, clean it up if necessary, and receive a promise from the State of Ohio that no more cleanup is needed, known as a covenant not to sue (CNS).

The rule that is being amended, OAC rule 3745-300-15, is incorporated by reference (IBR) rule for the VAP. This rule is being amended to reflect an update to a guidance document now titled "Sample Collection and Evaluation of Vapor Intrusion to Indoor Air for Remedial Response, Resource Conservation and Recovery Act and Voluntary Action Program" that is referenced in this rule.

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

Section 3746.04 of the Revised Code authorizes the director to adopt the VAP rules.

**3. 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?**

No, this rule does not implement any federal requirement. It is not being amended to administer or maintain any federal program.

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

This rule does not exceed federal requirements, as it does not implement any federal requirements.

**5. 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 allow property owners and developers to voluntarily evaluate and clean up environmentally contaminated property and get a release of liability from the state. Without regulation in these areas, parties would be reluctant to assess, clean up and redevelop properties due to liability uncertainty, hence, sites that enter the VAP would not be remediated or cleaned up to standards at safe levels for both human health and the environment.

This particular VAP rule is required because it is the Incorporation By Reference rule for the VAP. It contains no compliance components; it is a list of references. It is amended because one of the guidance documents it references has been updated.

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

The proposed change in OAC rule 3745-300-15 updates the rule to reference improved guidance available to be used to assess sites for contamination within the Voluntary Action Program. The guidance itself was updated to reflect the current understanding of vapor intrusion, as well as to maintain consistency with guidance from U.S. EPA on the subject. Ultimately, success of the VAP program is gauged by both the level of participation by property owners who wish to mitigate their properties, and external satisfaction with the program, including the value of the CNS to property owners who have used the program.

## **Development of the Regulation**

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

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

Ohio EPA's Division of Environmental Response and Revitalization (DERR) established a 14-day early stakeholder comment period and requested comments from interested and potentially affected parties. The comment period ended on June 8, 2020. DERR sent an electronic notice of our request for comments to 1,833 people, including VAP Certified Professionals, VAP Certified Laboratories, and other members of Ohio EPA's Interested Parties list for DERR rulemaking. Interested parties included developers, municipalities, environmental professionals and lawyers, as well as citizens and environmental groups. The notice was also posted on the DERR webpage. In addition, VAP Certified Professionals and other external stakeholders were invited to provide comments and suggestions on the guidance document during 2019 and 2020.

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

Ohio EPA accepted comments for two weeks ending June 8, 2020. Stakeholders had an opportunity to provide comments and suggestions on the guidance document during drafting. Those comments were incorporated into the final version of the guidance document. It is the reference to that guidance document that is updated in this rule amendment.

**9. 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 rule 3745-300-15 cites updated guidance developed by the State, U.S. EPA, and similar peer reviewed guidance to incorporate best practices through which blighted properties can be remediated and cleaned up voluntarily.

OAC rule 3745-300-15 itself did not use scientific data to develop the rule or the measurable outcomes of the rule, since this rule is the IBR rule for the VAP, and it has no compliance component.

**10. 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?**

The original version of this guidance document, and its subsequent update that is referenced in this rule amendment, considered available guidance from U.S. EPA, other states, and other commonly utilized guidance on the subject such as the ASTM standard, in order to develop an Ohio-specific guidance.

Since the IBR rule is required for the VAP, and it has no compliance component, no alternative regulations (or specific provisions within the regulation) were considered by did the Agency,

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**11. 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. Overall, the VAP is a performance-based program, as properties that enter it must achieve applicable standards. The process each volunteer chooses to clean up the property is not necessarily dictated in rule. However, the outcome is always the same for each VAP property; they are required to maintain and meet applicable standards before a CNS will be issued by the director. The steps that are taken under the rule procedures to remediate a property to reach and meet those applicable standards, however, are left up to the certified professional in cooperation with the entities who want to clean up the property.

Since the IBR rule is required for the VAP and it has no compliance component, by nature this rule is not a performance-based concept nor can it be.

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

Ohio EPA is the only agency in Ohio to have a program such as the VAP. OAC Chapter 3745-300, the VAP program rules, are unique within Ohio EPA and do not duplicate the rules of this or any other agency in the state of Ohio.

**13. 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 voluntary action program was originally implemented in September 1994. The proposed amendments to this rule will be implemented when the amended rule is adopted and becomes effective. The updated guidance document referenced in the amended rule has been available on the agency webpage since its finalization. Ohio EPA will inform the stakeholders of both the proposal and the adoption of this amended rule through announcements on our listserv. The amendment will also be posted on the DERR web page. DERR also plans to conduct multiple training events for both Ohio EPA staff and external stakeholders.

**Adverse Impact to Business**

**14. 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*

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***“representative business.” Please include the source for your information/estimated impact.***

Participation in the VAP is completely voluntary. 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.

The cost of compliance with the VAP 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. Adverse impact, the impact of this guidance change is minimal as it does not require any additional activities nor additional time be taken to conduct this evaluation over the prior version.

This particular VAP rule is the IBR rule for the VAP and contains no compliance components; it is a list of references. It is amended because one of the guidance documents it references has been updated. Since the updated document referenced is a guidance document and not a regulation, and the amendment to this rule is to a reference, this rule has no cost of compliance associated with this particular rule.

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

Once a property has gone through the VAP and received a CNS, the value of the property increases and can be placed back into productive service within the community. This ultimately benefits the community through the remediation of a property that was once blighted. Cleanup often leads to property redevelopment, allowing the property to return to productive use within the community.

Since this amended rule is limited to a list of references and it has no compliance component, this particular rule does not have an adverse impact to the regulated business community.

**Regulatory Flexibility**

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

The entire VAP program is an alternative means of cleanup. Any volunteer, including a small business, has the same compliance points to meet standards in order to receive a CNS.

Since this amended rule is limited to a list of references and it has no compliance component, it does not have an exemption to or an alternative means of compliance for small businesses.

**17. 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?**

This rule does not subject entities who choose to participate in the VAP program to any violation; it is the IBR rule for the VAP program and does not contain any compliance components.

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## **18. 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](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 eBusiness Center.
- Ohio EPA maintains the Compliance Assistance Hotline 1-800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
- 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](http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx).

Ohio EPA's DERR-VAP Manager, Lisa Shook, is the primary contact for any rules relating to VAP and is available to answer any questions. She can be reached by calling (614) 644-2295 or by email at [Lisa.Shook@epa.ohio.gov](mailto:Lisa.Shook@epa.ohio.gov).