

# Division of Environmental Response and Revitalization

## VAP Cleanup Standards as ARARs in the Remedial Response Program

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### Key Words

ARARs, applicable, relevant and appropriate, cleanup standards

### Rules

OAC 3745-300-08, OAC 3745-300-09, CERCLA Section 121(d)(2)(A), 40 CFR Section 300.400(g)(2) (National Contingency Plan)

### Question

Can the VAP cleanup standards be ARARs for a remedial action?

### Background

The concept of applicable and relevant and appropriate requirements (ARARs) is set forth in Section 121(d)(2)(A) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended, which states in relevant part:

With respect to any hazardous substance or contaminant that will remain onsite, if ... any **promulgated** standard, requirement, criteria, or limitation under a State environmental or facility siting law that is **more stringent** than any Federal standard, requirement, criteria or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner, is legally **applicable** to the hazardous substance or pollutant or contaminant concerned or is **relevant** and **appropriate** under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected ... shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally **applicable or relevant and appropriate** standard, requirement, criteria, or limitation.

According to the National Contingency Plan (NCP), a requirement is found to be applicable if "the requirement specifically addresses a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at the CERCLA site." This is interpreted to mean that an applicable requirement is a substantive requirement that a party would be subject to if it were undertaking the action independently from any CERCLA authority. For a requirement to be applicable, all jurisdictional prerequisites must be met. The determination of applicability is a legal one. The sites in the enforcement program usually fall into one or more of the following categories of sites that are not eligible for the Voluntary Action Program (VAP) as specified in OAC rule 3745-300-02: National Priorities List (NPL) sites; properties subject to federal enforcement; and properties subject to state enforcement.

A site which is the subject of enforcement pursuant to Chapter 3704, 3734 or 6111 of the Ohio Revised Code (ORC) is not eligible for participation in the VAP unless the requirements for demonstration of sufficient evidence described in OAC 3745-300-02 (D) are met. Therefore, any site which is the subject of an enforcement letter for which a demonstration of sufficient evidence has not been made cannot participate in the VAP. VAP standards are only an applicable requirement for sites in the VAP.

However, the VAP cleanup standards, found in OAC rules 3745-300-08 and 3745-300-09 may be relevant and appropriate for sites under enforcement. The determination of when a requirement is relevant and appropriate is based on best professional judgment rather than legal analysis. The NCP provides for the use of some discretion and flexibility in making this determination. According to the NCP, an evaluation for relevance and appropriateness requires an examination of “whether a requirement addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site.” 40 CFR Section 300.400(g)(2)

#### Answer

Yes, as promulgated standards under state environmental law, the VAP cleanup standards may be a relevant and appropriate requirement for a remedial action in an enforcement case. However, this is a site-specific determination based on the particular circumstances at a given site.

In order to determine whether a requirement is relevant and appropriate, Section 300.400(g)(2) of the NCP lays out a comparative analysis to be performed between the requirement in question and the proposed action.

The first factor to be considered is the **purpose** of the requirement as compared to the purpose of the proposed undertaking in the enforcement program. Under the VAP, a volunteer undertakes a series of measures to identify and address releases of hazardous substances or petroleum at a particular property, and to establish that the property complies with applicable standards. The Volunteer must demonstrate that the risk at the property does not exceed an excess lifetime cancer risk of  $1 \times 10^{-5}$  or a non-carcinogenic hazard index of 1 for all land uses. Property-specific industrial cleanup standards may alternately meet an excess lifetime cancer risk of  $1 \times 10^{-4}$  with a demonstration that the risks to off-property receptors from releases of hazardous substances and petroleum at the property do not exceed a  $1 \times 10^{-5}$  excess lifetime cancer risk and a non-carcinogenic hazard index of 1 for on-property and off-property receptors. Both the state enforcement program and CERCLA actions use an excess lifetime cancer risk range of  $10^{-4}$  to  $10^{-6}$ , and both the state and federal programs accept a non-carcinogenic hazard index of 1.

The next factor to be considered when evaluating relevant and appropriate requirements is the type of environmental **media** regulated or affected by the requirement. The VAP regulations provide for the evaluation of soil, sediments, ground water and surface water. All of these environmental media may be evaluated in enforcement cases. On a site-specific basis, the media to be addressed by the remedial action should be compared to the media for which VAP cleanup standards have been developed.

The **substances** regulated by the requirement are the next factor to be considered. The VAP regulates hazardous substances as defined in ORC 3746.01(F) and petroleum as

defined in ORC 3746.01(I). In the enforcement program, it is usually hazardous wastes, as defined by ORC 3734.01(J), which are regulated. Again, the particular substances to be addressed by the remedial action designed for the site should be compared to the substances for which the VAP cleanup standards have been developed.

The **actions or activities** regulated by the requirement and the **remedial action contemplated** under the enforcement action also have to be taken into consideration. A comparison would have to be undertaken to determine if the remedial action chosen for the particular site is a remedial action that is contemplated under the VAP cleanup standards

The NCP suggests that any **variances, waivers or exemptions** of the requirement and their availability for the circumstances of the enforcement action should be taken into consideration. There is a variance process in the VAP, but it does not appear that it would apply when considering the VAP cleanup standards as an ARAR for an enforcement action.

Three additional factors to be considered include: **type of place** regulated; **type and size of structure or facility** regulated; and **use or potential use** of affected resources. The VAP cleanup standards can be applied to any type of site with real or perceived contamination. This includes soils, sediments and waterways. All types and sizes of structures and facilities can be dealt with under the VAP standards, including but not limited to industrial, commercial, residential, recreational and agricultural structures or facilities. All land uses, including industrial, commercial, recreational, agricultural and residential, have been contemplated under the VAP cleanup standards. Each of these factors must be given site-specific consideration.

Lastly, assuming site-specific circumstances for the contemplated remedial action are such that the above criteria are met, the VAP cleanup standards under consideration as ARARs must be compared to existing applicable federal environmental standards. Where the VAP cleanup standards are more stringent than their federal counterparts (or where no similar federal standards exist), the VAP cleanup standards may be ARARs for a given remedial action. The final determination regarding the relevance and appropriateness of the VAP cleanup standards to a remedial action is made by Ohio EPA during final remedy selection and is documented in the Proposed Plan and the final Decision Document. For NPL sites for which U.S. EPA is the lead agency, the final determination regarding the relevance and appropriateness of the VAP cleanup standards to a remedial action is made by U.S. EPA during the remedy selection phase and is documented in the Preferred Plan and the final Record of Decision (ROD).

### **Summary**

Like any other promulgated state environmental standards, the VAP cleanup standards may be a relevant and appropriate requirement for a remedial action in an enforcement case, but it is necessary to make an evaluation using the criteria identified above as to whether the cleanup standards address circumstances similar to the circumstances of the remedial action and whether the standards are well-suited to the enforcement site on a case by case basis.

### **Ohio EPA Contact**

For any questions concerning this issue, please contact ARARs Coordinator, Remedial Response Section, Central Office at (614) 644-2297.