

# Memo

**To:** Interested Parties  
**From:** Ohio Voluntary Action Program  
**Date:** May 3, 2010  
**Re:** Revised Covenant Not to Sue (CNS) template

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The Ohio Environmental Protection Agency's Voluntary Action Program (VAP) Covenant Not to Sue (CNS) template was revised on December 1, 2009 to streamline the summary of applicable standards in the CNS and clarify the scope of liability release provided in the CNS.

## Applicable Standards

The applicable standards section in the CNS has been restructured. Applicable standards are no longer individually listed on an exposure pathway basis. Four broad categories of applicable standards are now listed. One or more categories may apply depending on the standards applicable to the voluntary action (based on the rules in effect when the no further action (NFA) letter was issued.) These categories are as follows:

1. Generic numeric standards.
2. Property-specific risk assessment standards.
3. Background standards.
4. Standards for residential (potable) use of ground water in the designated clean zone underlying the property.

## Scope of Liability Release

The CNS releases the volunteer from liability to the State of Ohio to perform additional investigational and remedial activities for past releases of hazardous substance or petroleum at the property. The CNS is conditioned on the performance of a Phase I or Phase II property assessment or remedial activities in compliance with Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 300. Overall, the CNS liability release applies to NFA letter property that has undergone VAP rule-compliant assessments or remedial activities, or both, and these show or result in the property's compliance with applicable standards. The CNS condition, which stated that the liability release is limited to hazardous substances and petroleum as identified in the NFA letter, has been removed. The CNS provides liability protection for all pre-NFA letter releases of hazardous substances and petroleum at the property, except for the following:

1. Releases post-NFA letter.
2. Natural resource damage claims.
3. Costs pursuant to U.S. EPA action.
4. Costs for responding to imminent and substantial threat.

In any instance where the property is found to not comply with applicable standards, a “cure” implemented by the volunteer will maintain the CNS (except for post-NFA letter releases). If the “cure” process is implemented, volunteers will develop and enter into a compliance schedule agreement while working with the Agency through VAP technical assistance to bring the property back into compliance with applicable standards. Failing to do so could result in the revocation of the CNS pursuant to ORC 3746.12(B).

Please refer to the table below, which summarizes how discovered releases will be handled under this new approach versus how they were previously handled. Also attached please find the new CNS template.

Please contact Tiffani Kavalec at (614) 644-3538 or [tiffani.kavalec@epa.state.oh.us](mailto:tiffani.kavalec@epa.state.oh.us) if you have any questions.

### CNS Template Revision – Old Style vs. New Style

Scenario	Resolution		VAP Payment	
	Old CNS	New CNS	Old CNS	New CNS
Release prior to NFA letter issuance, not described in NFA letter	Not addressed by CNS if not addressed through NFA letter. Could choose to not address (potential enforcement); option to address through new NFA letter	Opportunity to cure by bringing property back into compliance with applicable standards (or revocation of CNS)	CNS fee or PAYGO	VAP Technical Assistance (TA)
Release prior to NFA letter issuance, described in NFA letter but exceeds an applicable standard	Opportunity to cure by bringing property back into compliance with applicable standards (or revocation of CNS)	Opportunity to cure by bringing property back into compliance with applicable standards (or revocation of CNS)	VAP TA	VAP TA
Release post NFA letter issuance	Not addressed by CNS (potential enforcement). Option to address through a new NFA letter	Not addressed by CNS (potential enforcement). Option to address through a new NFA letter	CNS fee or PAYGO	CNS fee or PAYGO