



## Ohio EPA Guidance - VAP Environmental Covenants

*Updated October 2019*

### Drafting Proposed Environmental Covenants with “Activity and Use Limitations” for Properties Seeking Covenants Not to Sue <sup>1</sup>

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#### **OVERVIEW**

This updated Ohio Voluntary Action Program (VAP) guidance provides new “Building Occupancy Limitation – Demonstration Obligations” language, which clarifies the criteria and process supporting occupancy. See pages 4 and 8, below. This guidance also clarifies instructions and the activity and use limitation (AUL) on commercial land use.

This guidance relates to property cleanups under the VAP, when the volunteer asks that a VAP certified professional (CP) submit to Ohio EPA a no further action (NFA) letter with a request for a covenant not to sue (CNS). An NFA letter submitted with a CNS request is an “environmental response project” as defined in Ohio’s environmental covenants (EC) law, at Ohio Revised Code (ORC) 5301.80 to 5301.92 (effective December 30, 2004). The EC is the legal mechanism used to establish one or more AULs, which constitute a remedy in support of a CP’s issuance of an NFA letter. See ORC 3746.10(C)(3)(b) and 3746.11(A) and Ohio Administrative Code (OAC) 3745-300-13(B)(5).

The property may rely on AULs to impose land use and activity restrictions in accordance with OAC 3745-300-07(I)(1), or as a remedy to achieve the property’s compliance with applicable standards in accordance with OAC 3745-300-07(I)(3). OAC 3745-300-11(C)(3) provides criteria for the overall development of VAP institutional control remedies, which are AULs for any project submitted to Ohio EPA.

#### **PURPOSE OF GUIDANCE**

This guidance serves to assist the volunteer in the preparation of a proposed EC – and the CP in the drafting of the AULs, for a voluntary action property dependent on an AUL as a remedy.

When an AUL is needed, the volunteer’s legal counsel should provide to the CP a “proposed environmental covenant” that complies with ORC 5301.82. For VAP sites, Ohio

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<sup>1</sup> This guidance is developed for voluntary action projects submitted to Ohio EPA at the NFA letter stage. The guidance also assists when seeking to add AULs as a remedy to achieve applicable standards. Include the appropriate new AUL language (plus survey plats and legal descriptions) in the proposed amended EC for the CP to attach to a remedy revision request submitted to Ohio EPA under OAC 3645-300-11(H). ***This guidance is based on rules effective May 26, 2016. Documents drafted under rules effective October 17, 2019 will require updates, including the land use definitions.***

EPA developed a VAP Environmental Covenant Template to aid in the uniform implementation of the statutory requirements. The VAP Environmental Covenant Template is routinely updated and posted on the Ohio EPA website. The current 2019 version is found at [http://epa.ohio.gov/portals/30/vap/docs/VAP\\_EC\\_Template.docx](http://epa.ohio.gov/portals/30/vap/docs/VAP_EC_Template.docx).

The NFA letter issued by the CP should include the volunteer's proposed EC. Following Ohio EPA's review and revision, the owner of the property to be restricted executes (signs before a notary public) the final EC. Ohio EPA includes the owner-executed EC as an exhibit to the CNS recommended for the director's signature. Following CNS issuance, the volunteer or owner arranges for filing of the documents with the county recorder, for recording in the same manner as a deed to the property; see ORC 317.08, 3746.14, and 5301.88. The CNS becomes effective on the date when the executed EC is recorded.

## ***DEVELOPING A PROPOSED EC***

### **1. Addition of property information and project background**

Within the recitals / background section, formerly "whereas" clauses in the *VAP Environmental Covenant Template*, identify the volunteer and the property owner, identify the CP and NFA letter, identify the property that is the subject of the voluntary action, describe the purpose of the AULs, and explain that the reader can find more information about the voluntary action in the NFA letter's executive summary, and where it can be found.

*Note:* Some information blanks must remain blank necessarily until the agency's review of the proposed EC. For example, the "\_\_NFA\_\_" tracking number is assigned after Ohio EPA receives the NFA letter.

If the NFA letter's applicable standards demonstration relies on AULs that are applied to a smaller tract area than the (entire) NFA letter property, be sure to explain the property differences in the background language and the property definition, paragraph 2. Provide a survey plat and legal description of the smaller tract to attach. Otherwise, the property legal description used for the proposed EC must match the NFA letter property's legal description and plat acreage.

When different entities own different parts of the NFA letter property, additional explanation will be necessary in the background section and property definition to specify which owner owns which property portion. Separate legal descriptions and survey plats of the portions will likely be necessary. Attach to the EC the necessary legal descriptions and plats, which will support its recording.

### **2. Drafting the AULs - based on current and anticipated property use, Phase II assessment determinations, and the applicable standards**

AULs are drafted with consideration of the current and anticipated property use, Phase II assessment determinations, and the applicable standards.

AULs may be drafted to restrict the property to a certain land use category (e.g., commercial and industrial land use). This would then make standards that apply only to the defined land use applicable to that property. Several AUL examples are provided in this guidance including generic language for commercial and industrial land use. The AUL language limits the property's use so that remedies and applicable standards relying on the exposure assumptions used to calculate the VAP generic numerical standards for commercial and industrial land use ("generic exposure assumptions") apply.<sup>2</sup> When a property specific risk assessment is used to derive applicable standards for commercial or industrial land use, appropriate adjustments need to be made to reflect the assessed exposure factors and risk scenarios.

The example AUL language for "restricted residential" land use considers property specific variables, such as the depth to which applicable standards are met (i.e., modified point of compliance). AULs can be drafted to address specific exposure scenarios not contemplated in the development of applicable standards for the specific land use categories identified in OAC 3745-300-08(C)(2) (i.e., recreational land use.)

The AULs can also be drafted to address the specific limitations for properties that exceed applicable standards for complete exposure pathways for reasonable anticipated uses determined under the Phase II assessment. In this regard, generic language for a building occupancy limitation –demonstration obligations, is provided below.

Each AUL must be considered on a property-specific basis to determine which AUL or combination of AULs is suitable for the circumstances of the property. Such AULs will be based on:

- complete exposure pathways (existing and reasonably anticipated pathways determined pursuant to OAC 3745-300-07(F)(1),)
- affected media,
- receptors, and
- VAP standards applicable to the property.

AULs are considered remedies under the VAP and must be proposed for all NFA letter properties that exceed applicable standards for unrestricted use. (In contrast, compliance with generic numerical standards for the unrestricted residential land use category to the minimum 10 feet point of compliance would not require a land use limitation.) Engineering controls may also be needed to support the AULs or to mitigate or eliminate exposure. Other remedies may apply as described in OAC 3745-300-11.

**Note on engineering control implementation:** Engineering controls are operated and maintained under an operation and maintenance plan. ORC 3746.10(C)(4). An activity and use limitation on engineering control

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<sup>2</sup> The generic exposure assumptions for commercial and industrial land use are set forth in OAC 3745-300-08(B)(3). Exposure factor point values are set forth in the *Support Document for the Development of Generic Numerical Standards and Risk Assessment Procedures* (May 2016) as updated, which can be downloaded from Ohio EPA's web page.

implementation is included in the EC, to notify Property owners of operation and maintenance requirements. In general, this limitation refers to engineering controls and Ohio EPA-approved operation and maintenance plan, as these become applicable to the site. Please refer to the current *VAP EC Template* for template language.

The example AUL language for “restricted residential” land use, given below, presumes that residential land use category standards are met at a point of compliance greater than 2 feet but less than 10 feet below ground surface. The companion engineering controls must be addressed through an operation and maintenance plan.

For land uses not contemplated by rule language, such as recreational use, or if seeking to mitigate other exposures using an AUL not contemplated in this guidance, coordination with Ohio EPA for technical assistance is recommended well before NFA letter issuance.

### **3. Drafting the AULs – example language**

The first set of AULs that are given below relate to land use. Several scenarios are provided, based on the point of compliance and whether the property is subject to engineering controls or other remedial activities under an operation and maintenance (O&M) plan. The range of land use options include commercial or industrial; and restricted residential. Choose the type of land use that fits with what the Phase II assessment and cleanup support, and the current and anticipated property uses.

The next set of AULs relate to ground water. They may be used for most property scenarios to prohibit extraction or use of ground water for potable and/or non-potable exposures. Three options are given, depending on whether all uses of ground water (potable and non-potable) are to be excluded, or whether non-potable uses will be allowed. An example is also provided to specify separate ground water zone restrictions.

The last AUL example is on *Building Occupancy Limitation – Demonstration Obligations*. This limitation is an appropriate AUL when vapor intrusion is determined to be a reasonably-anticipated complete future pathway. This AUL language would be used when no building currently exists but it is reasonably anticipated that a building will be added in the future. Also this language would be used when a new building or an existing building expansion or reconfiguration may occur to require further remedy beyond an existing engineering control, such as a vapor mitigation system. The AUL provides a remedy to demonstrate compliance with VAP applicable standards when subsurface contamination has a potential to create an exceedance of applicable indoor air standards. The AUL requires either addressing the indoor air pathway with an engineering control or showing no such remedy is required through a CP determination. See OAC 3745-300-05 on CP affidavits for voluntary action opinions and OAC 3745-300-11(E) for terms on verifying remedy effectiveness. An Ohio EPA approval must be received prior to the occupancy of any future building. If an engineering control is implemented for the building, the control must be addressed under a VAP-approved O&M plan and agreement established between the volunteer and Ohio EPA prior to building occupancy.

*Note:* Use of example AUL language does not guarantee a property complies with VAP rules or applicable standards. The example language is intended only as guidance for the volunteer’s and CP’s development of acceptable AULs.

a. Example AUL language for “commercial and industrial” land use. For use scenarios based on the VAP commercial and industrial land use categories for the applicable direct contact soil standards.

\_\_\_\_. **Commercial or Industrial Land Use Limitation.** The Property is limited to commercial land use or industrial land use, as those terms are defined in OAC 3745-300-08(C)(2)(b) and (C)(2)(c) (effective May 26, 2016), or any combination of those uses. The Property shall not be used for schools or day care facilities, or any other such use with a high frequency of potential exposure to children.<sup>3</sup>

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as “land use with potential exposure of adult workers during a business day and potential exposure of adults and children who are customers, patrons, or visitors to commercial facilities during the business day. Commercial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil, ingestion of soil and inhalation of volatile compounds due to vapor intrusion to indoor air. Generic direct contact standards for commercial land use may not be appropriate for properties where a high frequency of potential exposure to children may occur, such as at schools and day care facilities.” Commercial land use includes, without limitation, [*Edit as appropriate to reflect current and reasonably anticipated uses:* warehouses, retail establishments, office buildings, hospitals and clinics, religious institutions, hotels, motels and public areas incidental to such use.]

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as “land use with potential exposure of adult workers during a business day and potential exposures of adults and children who are visitors to industrial facilities during the business day. Industrial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil and inhalation of volatile compounds due to vapor intrusion to indoor air.” Industrial land use includes, without limitation, [*Edit as appropriate to reflect current and reasonably anticipated uses:* lumberyards, power plants; manufacturing facilities, assembly plants, non-public airport areas, railroad switching yards, marine port facilities, and public or employee areas incidental to such land use.]

b. Example AUL language for “restricted residential” category land use. Based on OAC 3745-300-08(C)(2)(a)(ii), restricted residential land use is considered protective for, and

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<sup>3</sup> This language presumes that the applicable standards determination does not support child exposure within commercial land use at the property. If the determination should support exposure, adjust the language accordingly

may be applied to, residential land uses appropriate for a modified point of compliance supported by institutional or engineering controls. A modified point of compliance consists of any depth less than the minimum depth of 10 feet below ground surface required by OAC 3745-300-07(I)(1)(a). The example language applies to scenarios when direct contact soil residential standards are met to 2 or more feet below ground surface.

Also, the 2-foot point of compliance is maintained as an engineering control under an operation and maintenance plan or agreement, which designates a central management entity (“CME”) to oversee site maintenance and construction activities. The CME’s oversight is to prevent human exposure to the soil at depth that may exceed VAP applicable standards at depths of 2 or more feet below ground surface (i.e., by ensuring that the shallow point of compliance is retained following site construction.) Refer to the designated CME for a property in an EC introductory clause. <sup>4</sup>

*Option 1 - For “restricted residential” category land use*

**\_\_\_a. Restriction on Residential Land Use.** The Property shall not be used for fee simple single-family homes and duplexes. This restriction does not prohibit any permissible residential land use defined herein.

**\_\_\_b. Permissible Land Uses.** Subject to the Restriction on Residential Land Use set forth herein, the Property may be otherwise used for (i) residential land use, (ii) commercial land use, or (iii) industrial land use, or any combination of these land uses, each as defined in OAC 3745-300-08(C)(2) (effective May 26, 2016).

OAC 3745-300-08(C)(2)(a) defines “residential land use” as “land use with a high frequency of potential exposure of adults and children to dermal contact with soil, inhalation of vapors and particles from soil, incidental ingestion of soil, and inhalation of volatile compounds due to vapor intrusion from ground water to indoor air.” **Permissible residential land use** includes, without limitation, *[Edit as appropriate to reflect current and reasonably anticipated uses: apartments, condominiums, and elder care facilities. The residential land use exposure scenarios are also protective of urban parks, picnic areas, outdoor performance spaces, playfields, open lawns, walkways, pet play areas, and activities incidental to such land use.]*

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as...*[Insert remainder of language – see prior section.]*

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as ...*[Insert remainder*

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<sup>4</sup> *Example language:* WHEREAS, the Property is the subject of an operation and maintenance agreement that provides for a central management entity (“CME”) to oversee maintenance of engineering controls or implementation of other site activities. CME oversight will prevent human exposure to the ground water or soil at depth, which may exceed VAP applicable standards at depths of two (2) or more feet below the ground surface.

*of language – see prior section.]*

*Option 2 – For “restricted residential” category land use*

\_\_\_\_. **Land Use Limitation - Restricted Residential, Commercial or Industrial Land Uses.** The Property shall not be used for fee simple single-family homes and duplexes. The Property is limited to the allowable residential land use as described herein, or to commercial or industrial land uses as defined in OAC 3745-300-08(C)(2)(b) and (C)(2)(c) (effective May 26, 2016), or any combination of these land uses.

OAC 3745-300-08(C)(2)(a) defines “residential land use” as “land use with a high frequency of potential exposure of adults and children to dermal contact with soil, inhalation of vapors and particles from soil, incidental ingestion of soil, and inhalation of volatile compounds due to vapor intrusion from ground water to indoor air.” **Allowable residential land use** excludes fee simple single-family homes and duplexes, but includes, without limitation, *[Edit as appropriate to reflect current and reasonably anticipated uses: apartments, condominiums, day care centers, and schools. Residential land use exposure scenarios are also protective of nursing homes, elder care and other long-term care facilities; colleges and other educational institutions; and activities and uses incidental to such land use.]*

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as...*[Insert remainder of language – see prior section.]*

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as ...*[Insert remainder of language – see prior section.]*

c. Example language for AULs on ground water extraction and use. Several options are given below.

*Option 1—For scenarios where all use of ground water, potable and non-potable, are to be restricted:*

\_\_\_\_. **Ground Water Extraction and Use Prohibition.** Ground water underlying the Property shall not be extracted or used for any purpose, potable or otherwise, except for investigation, monitoring or remediation of the ground water *[Additional language for certain property-specific complete exposure pathways, which - if addressed in the NFA letter demonstrations - may also be excluded: or for extraction in conjunction with construction or excavation activities or maintenance of subsurface utilities, such as to dewater a trench].*

*Option 2—For scenarios where potable ground water use is to be restricted, but non-potable uses are allowed:* <sup>5</sup>

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<sup>5</sup> Use of either option requires compliance with the requirements in OAC 3745-300-11(C)(8) ensuring

**\_\_\_\_. Ground Water Potable Use Prohibition.** No person shall extract or use ground water at or underlying the Property for any potable purpose.

*Option 3—For scenarios where all ground water use is to be restricted from one ground water zone, and potable ground water use is restricted (but non-potable uses allowed) from a second ground water zone:* <sup>3</sup>

**\_\_\_\_. Prohibition on Extraction or Use of Ground Water from [Contaminated Shallow Zone].** Ground water underlying the Property from the *[contaminated ground water zone or other identifying description of the zone; may include geologic or common description or depth ranges based on what makes sense for a particular property]* shall not be extracted or used for any purpose, potable or otherwise, except for investigation or remediation of the ground water. This prohibition does not apply to ground water in the *[deeper, uncontaminated, unconsolidated ground water zones or other identifying description]* underlying the Property.

d. Example AUL language for vapor intrusion to indoor air pathway. The language broadly applies to scenarios where the property - or portion of the property, does not meet applicable standards for the vapor intrusion to indoor air pathway for any building expected to be constructed, expanded, or altered, as applicable for the property. The language below, if included as an AUL in an EC, would remedy this complete exposure pathway and still leave the volunteer able to develop the property and construct a building. To occupy any new, expanded or altered building and remain in compliance, one of the AUL's demonstration options would have to be exercised.

**\_\_\_\_. Building Occupancy Limitation – Demonstration Obligations.**

Requirement for occupancy. No human occupancy shall occur in any building constructed on [the Property / the \_\_\_\_-acre portion of Property defined in Attachment B of this Environmental Covenant as subject to this limitation], prior to written approval from Ohio EPA. A certified professional may seek Ohio EPA's written approval by issuing a demonstration of applicable standards compliance and submitting it to Ohio EPA in accordance with OAC chapter 3745-300. That demonstration must support building occupancy for one of the following reasons:

- i. A remedy, operated and maintained as an engineering control and documented under an Ohio EPA agreed-to operation and maintenance plan, has achieved compliance with the applicable standard for indoor air vapor intrusion exposure to hazardous substances in soil, soil gas or ground water. The engineering control is a remedy evaluated to be effective in accordance with OAC 3745-300-11. The plan is governed by an operation and maintenance agreement entered into with Ohio EPA in

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protection of clean ground water zones and evaluation of non-potable pathways.



accordance with a covenant not to sue issued pursuant to ORC § 3746.12.

- ii. No remedy or engineering control implementation is needed to comply with applicable standards for the vapor intrusion to indoor air exposure pathway to the building.

Scope of this limitation: This limitation applies to any current or future buildings constructed on [the Property / the \_\_\_-acre portion of Property defined in Attachment B of this Environmental Covenant as subject to this limitation]. This limitation [applies / does not apply] to the existing building depicted on Attachment \_\_\_ of this Environmental Covenant that is occupied after the effective date of this Environmental Covenant for which Ohio EPA gave written approval. In this limitation, “building” shall mean any enclosed structure designed for human occupancy, and “constructed” includes any expansions or alterations that would result in a smaller enclosed space for human occupancy.

#### **4. Review of the proposed EC – by the volunteer and the property owner – before its submission to Ohio EPA**

Often the volunteer will request the environmental consultant or CP prepare the initial draft of the proposed EC. The environmental consultant or CP may then use their detailed knowledge of the VAP project property to apply the VAP Environmental Covenant Template and develop AULs in support of the applicable standards demonstration for the property. This guidance in effect supports this practice.

However, the environmental consultant or CP should not consider the draft ready for submission as the proposed EC for the property at this point. The EC draft should undergo further review by the volunteer, the property owner (in cases where the volunteer does not own the property) and their legal counsel before the CP uses it to support the CP’s issuance of an NFA letter.

Such a review by the volunteer, the property owner or their legal counsel will allow for an evaluation of the ownership interests, the property legal description, the AUL areas if a subset of the property is to be restricted (with legal description and survey plat), the required notices and warranties and contact information for future notices. As a result, the proposed EC may better comply with the OAC 3745-300-13(B)(5) criteria and support the NFA letter site for which a CNS is requested. Ohio EPA cautions against a non-attorney preparing an EC without the involvement of legal counsel for the volunteer and owner. See [VAP Environmental Covenants: Avoiding the Unauthorized Practice of Law](#).

Note that ORC 3746.05’s “voidance by law” provision applies to any property in the VAP for which a CNS has been issued in reliance on an AUL. As enacted in 1994, ORC 3746.05 provides that if a property is put to a use that does not comply with an AUL, the CNS is declared void on and after the date of the commencement of the noncomplying use. In this regard, the volunteer may want to consider use of safeguards for compliance

with an AUL (i.e., the Building Occupancy Limitation – Demonstration Obligations) to prevent triggering the ORC 3746.05 voidance by law provision.

### **For Questions or More Information**

Should questions arise regarding this guidance or the *VAP Environmental Covenant Template* feel free to contact Ohio EPA's Legal Office at 614-644-3037 and ask for a VAP attorney.