

**CP Affidavits and NFA Letter Addenda:
Environmental Covenants; Operation and Maintenance Agreements**

Ohio EPA Voluntary Action Program
May 5, 2011

A proposed Environmental Covenant (EC) and/or Operation and Maintenance Agreement (OMA) must be accompanied by the affidavit of a Certified Professional (CP) as part of a No Further Action (NFA) letter and, if applicable, as an addendum to an NFA letter.

However, non-substantive changes to the proposed EC and/or proposed OMA need not be accompanied by a CP's affidavit.

The NFA rule includes a provision entitled, "Affidavit requirement – no further action letter issuance or submission," which states, in pertinent part:

For each no further action letter issued to a volunteer or submitted to the director for a covenant not to sue, the certified professional must submit an affidavit based upon the certified professional's knowledge, information and belief, . . .

OAC rule 3745-300-13(O).¹ The term, "no further action letter" is defined as "a document issued by a certified professional under affidavit upon determination by the person undertaking a voluntary action that either there is no information indicating there has been a release of hazardous substances or petroleum at or upon the property, or there has been a release of hazardous substances or petroleum at or upon the property and applicable standards were not exceeded or have been or will be achieved in accordance with Chapter 3746. of the Revised Code and rules adopted under it." OAC rule 3745-300-01(A)(83). The definition does not expressly reference ECs or OMAs.

However, the NFA rule states, in pertinent part, that "[t]he no further action letter must contain, at a minimum, the following information: . . .

(13) If the remedy relies on institutional controls (use restrictions or activity and use limitations) to achieve applicable standards, a demonstration that the institutional controls have been implemented in accordance with division (C)(3)(a) or (C)(3)(b) of section 3746.10 of the Revised Code, as applicable. This demonstration must include one of the following:

¹ The CP rule states that "[c]ertified professionals must submit each voluntary action opinion . . . by affidavit pursuant to this paragraph except for no further action letters that are subject to the affidavit provisions of . . . rule 3745-300-13 of the Administrative Code." OAC rule 3745-300-05(E)(4) (emphasis added).

...

(b) If the volunteer intends to request a covenant not to sue from Ohio EPA . . . , a copy of the proposed environmental covenant for the property that meets the requirements established in section 5301.82 of the Revised Code. The proposed environmental covenant must contain activity and use limitations that are developed in accordance with rule 3745-300-11 of the Administrative Code and other applicable laws. . . .

...

(15) A copy of the operation and maintenance plan and proposed operation and maintenance agreement prepared in accordance with rule 3745-300-11 of the Administrative Code, if the plan and agreement is required pursuant to that rule;

...

(18) All affidavits prepared in connection with the voluntary action in accordance with paragraphs (M) to (O) of this rule and as required by rules 3745-300-04 and 3745-300-05 of the Administrative Code;

OAC rule 3745-300-13(E) (emphasis added). Thus, where applicable, proposed ECs and proposed OMAs constitute requisite components of an NFA letter; therefore, the CP is required to submit an affidavit with a proposed EC and/or a proposed OMA in support of an NFA letter.

Upon receipt of an NFA letter by the Agency, the VAP staff and/or Legal Office review frequently includes comments (i.e., redline/strikeout revisions) on proposed ECs and OMAs. Unless the revisions relate to only non-substantive corrections, or additions requested by the program, the revised EC and OMA should be submitted as an NFA letter addendum with a CP affidavit. Examples of Ohio EPA requested information include the assigned NFA letter number, the submission date of the NFA letter, and updates to Ohio EPA contact information.

As noted above, the proposed EC must meet “the requirements established in” ORC § 5301.82 and “must contain activity and use limitations that are developed in accordance with” the remediation rule (3745-300-11) and other applicable laws; and the proposed OMA must be “prepared in accordance with” the remediation rule (3745-300-11).

Therefore, Ohio EPA’s substantive comments on proposed ECs and OMAs must be addressed by the CP in an NFA addendum accompanied by the CP’s affidavit. However, if Ohio EPA’s comments on a proposed EC or OMA (or a revision thereof) are only non-substantive corrections (e.g., typographical errors) or programmatic additions (e.g., NFA letter number), that do not address the requirements of ORC § 5301.82 or OAC rule 3745-300-11, then non-substantive revisions of the proposed EC or OMA need not be accompanied by a CP’s affidavit.