

May 2009

Audits of No Further Action Letters

Introduction

Ohio EPA is required by law to annually conduct an audit of at least 25 percent of the No Further Action (NFA) letters that have received a covenant not to sue during the previous calendar year under the Voluntary Action Program (VAP). In general, the audit serves to evaluate whether the NFA letter demonstrates the property's compliance with VAP applicable standards, established under Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 3745-300. The audit also evaluates whether the Certified Professional (CP) who issued the NFA letter and each Certified Laboratory (CL) that provided data supporting the NFA letter performed in compliance with the criteria of ORC Chapter 3746 and OAC Chapter 3745-300.

Establishment of Audit Pools

OAC 3745-300-14 (Audits of NFA letters) establishes three separate audit pools. The first audit pool includes NFA letters submitted to Ohio EPA that involved a property-specific risk assessment or remedial activities that included engineering or institutional controls. These audits are considered priority audits. The second audit pool includes all remaining NFA letters submitted to Ohio EPA, including those NFA letters that were part of the priority audit pool but were not selected for a priority audit. These audits are considered random audits. The third audit pool consists of mandatory audits and includes any NFA letter submitted to Ohio EPA within the last ten years for which Ohio EPA has reason to believe the NFA letter was issued fraudulently or



when the certification of the CP who issued the NFA letter or the CL which performed analyses in support of the NFA letter has been revoked. NFA letters included in the mandatory audit pool are not included in the priority or random audit pools.

Audit Selection

Ohio EPA selects NFA letters for audit in accordance with the following requirements:

- all NFA letters included in the mandatory audit pool must be audited;
- for NFA letters included in the priority audit pool, 25 percent are to be selected randomly;
- at least 25 percent of all NFA letters involving remedial activities are to be selected for audit; and
- at least 25 percent of all NFA letters not involving remedial activities are to be selected for audit.

The VAP selects the NFA letters for priority audits and random audits using a random number generator. NFA letters from the priority audit pool are selected first. Additional NFA letters from the random audit pool are selected to ensure that at least 25 percent of all NFA letters involving remedial activities are selected for audit and at least 25 percent of all

NFA letters not involving remedial activities are selected for audit.

The Audit Process

After the NFA letters are selected for audit, the project coordinator for VAP's audit team sends a notification letter to each Volunteer, CP and CL involved with the NFA letter as well as the current property owner and any other persons responsible for the property's compliance with applicable standards. The letters provide notice that the property's NFA letter was selected for audit, describe how the selection was made and provide a brief description of what will be expected of the recipient during the audit process.

The notification letter sent to a volunteer and property owner also requests permission for Ohio EPA to access the property, to allow the VAP audit team to conduct a site visit or walkover as required by regulation. The letter to the CP requests that the CP provide any additional information available that was used to support the NFA letter but was not submitted with the NFA letter. The letter to each CL typically notes that Ohio EPA may, at a later time, request additional laboratory documents as necessary for the completion of the audit.

When conducting an audit, Ohio EPA has three main objectives:

- to determine if the property complies with VAP applicable standards, as set forth in the NFA letter;
- to evaluate the CP's performance with respect to the issuance of the NFA letter; and
- to evaluate each CL's performance with respect to generation of the supporting analytical data of the NFA letter.



Audits of No Further Action Letters

The VAP audit team reviews the NFA letter, including the Phase I and II property assessments, property-specific risk assessment and other documentation related to the remedial activities conducted at the property. The NFA letter review evaluates whether the NFA letter demonstrates the property's compliance with applicable standards, and whether the voluntary action was conducted in accordance with the applicable VAP rules.

The audit team also reviews the supporting documentation to determine if it is consistent with information contained in the NFA letter. The audit team may consider the issues brought up in prior Ohio EPA comment letters to determine if the NFA letter and any addenda appears inconsistent with the assessed property conditions and VAP rules. Ohio EPA may likewise review the information provided by the CP and CL to determine, for example, if any issues exist concerning the property's eligibility or compliance with applicable standards.

The VAP audit team also conducts a walkover of the property to determine if there are any conditions not addressed in the voluntary action or if property conditions appear inconsistent with NFA letter information.

These processes make up the Tier I audit.

After the Audit

The audit team reports its audit findings to the director of Ohio EPA. Typically, the audit team summarizes audit findings and provides a recommendation for any further action regarding the performance of the CP and CL, the property's compliance with applicable standards set forth in the NFA letter and the covenant not to sue, if issued. The audit findings include a background summary of the property and the voluntary action, how the NFA letter was selected for audit, an overview of the audit process, the audit findings and the recommendations for any further action. The report is provided to the volunteer, the CP, the CL and the current property owner (or other person responsible for compliance with applicable standards, as known by Ohio EPA).

When the NFA letter demonstrates the property's compliance with applicable standards, the audit concludes at the Tier I audit stage. Ohio EPA may proceed to a Tier II audit if the documents produced and reviewed under the Tier I audit are inadequate to support whether the property meets applicable standards or Ohio EPA has reason to believe the NFA letter was based on fraudulent or inaccurate information. A Tier II audit

may include sampling and other field work at the NFA letter property. In cases where the actions of a CP or CL come into question, a Tier II audit would likely investigate the conduct of the CP or CL. Ohio EPA's audit findings are reported for a Tier II audit in the same manner as a Tier I audit.

Further action based on the performance of the CP or CL may be recommended under a Tier I or Tier II audit. The further action may include a written notice to the CP or CL of the performance deficiencies identified by the audit as well as any noncompliance with the standards of conduct that applied to the CP or CL. If warranted, further action may include an action to suspend or revoke the CP or CL's VAP certification.

Questions regarding the audit process may be directed to VAP Central Office staff at (614) 644-2924.