

Ohio EPA Guidance - VAP Environmental Covenants

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Drafting Proposed Environmental Covenants with “Activity and Use Limitations” for Properties Seeking Covenants Not to Sue

Overview

This guidance relates to property cleanups under Ohio’s Voluntary Action Program (VAP), when the volunteer requests 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 that includes activity and use limitations (AULs) pursuant to Ohio’s uniform environmental covenant act (UECA). See Ohio Revised Code (ORC) 5301.80 to 5301.92 (enacted December 30, 2004).

An NFA letter submitted with a covenant not to sue request is an “environmental response project” as defined in Ohio’s uniform environmental covenants law. The environmental covenant is the legal mechanism 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)(4).

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 institutional control remedies, which include AULs.

When an AUL is needed, the volunteer should provide to the CP a “proposed environmental covenant” that complies with ORC 5301.82. Specifically for VAP sites, Ohio EPA developed a *VAP Environmental Covenant Template* to aid in the uniform implementation of the statutory requirements. The *VAP Environmental Covenant Template* may be found by searching the Ohio EPA website, at <http://www.epa.ohio.gov/portals/30/vap/docs/EC%20docs/Environmental%20Covenant%20Template.doc>.

This guidance serves to assist the volunteer in the preparation of a proposed environmental covenant – and the CP in the drafting of the AULs - for a voluntary action property for which the volunteer seeks a covenant not to sue. Keep in mind that the environmental covenant must be signed and recorded by the Owner or Owners of the property being restricted, including those voluntary actions where the Owner is different than the Volunteer for the NFA property.

Developing a Proposed Environmental Covenant

1. Addition of property information and project background

Using the “whereas clause” in the *VAP Environmental Covenant Template* for the background section, 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 of the information blanks must remain blank necessarily until the agency’s review of the proposed environmental covenant, for example, Ohio EPA’s assigned tracking number for the NFA letter.

If the NFA letter’s applicable standards demonstration relies on AULs that are applied to a smaller property area than the (entire) voluntary action property, be sure to explain the property differences in the background section. Otherwise, the property legal description used for the proposed environmental covenant typically should match the NFA letter property’s legal description and acreage.

Additional explanation will be necessary in the background section and property definition to specify which owner owns which portion of the property when different land owners own different parts of the NFA letter property. Sometimes separate legal descriptions of the property portions will be necessary to attach, which will later support the recording of the environmental covenant.

2. Drafting the AULs - based on the Property use

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 commercial / industrial properties applicable to that property. Several examples are provided below.

The first example *Limitation for Commercial or Industrial Land Uses*, below, addresses the category of commercial and industrial land uses as defined in OAC 3745-300-08(C)(2)(c). The generic 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.¹

3. Drafting the AULs - based on the Phase II assessment

Each AUL must be considered on a property-specific basis to determine which AUL or combination of AULs is suitable for the particular circumstances of the property. The AULs can be drafted to address the applicable standards exceedences noted in the Phase II assessment.

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 should be designed to address complete exposure pathways where contaminants of concern exceed applicable standards.

The second example *Limitation Prohibiting Ground Water Extraction and Use*, below, may be used for most property scenarios to restrict against any extraction or use of ground water for potable and non-potable exposures. This would eliminate the groundwater ingestion pathway.

The third example *Limitation on Building Occupancy*, below, may be 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 on a VAP property but it is reasonably anticipated that a building will be added on the VAP property in the future. This language would also be used when a new building or an existing building expansion may be constructed beyond an existing installed remedy, such as a vapor mitigation system, that is subject to operation and maintenance (O&M) activities under an O&M plan. When the affected media (e.g., indoor air) is determined to potentially exceed applicable standards based on the existence of COCs in soil or ground water on the VAP property, the AUL language provides a way for the Property to demonstrate compliance with VAP applicable standards. The AUL requires that the indoor air pathway be addressed with an engineering control or eliminated entirely prior

¹ The generic exposure assumptions for commercial and industrial land use are set forth in OAC 3745-300-08(C)(3). The actual exposure factor point values and distributions are set forth in the *Support Document for the Development of Generic Numerical Standards and Risk Assessment Procedures* (February 2002 and as amended through August 2008), which can be downloaded from Ohio EPA’s web page or a copy can be requested by calling 614-644-2924.

to the occupancy of any future building. In the event that an engineering control is implemented as part of the new building, an engineering control through a VAP-approved O&M plan and O&M Agreement is contemplated prior to building occupancy.

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 development of acceptable AULs.

Example Language for “Generic” AULs

Limitation for Commercial or Industrial Land Uses. The Property is limited to commercial or industrial land use, as those terms are defined in OAC 3745-300-08(C)(2)(c)(ii) and (C)(2)(c)(iii) (effective March 1, 2009), or any combination of those uses.

OAC 3745-300-08(C)(2)(c)(ii) 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 and ingestion of soil. Examples of commercial land uses include, but are not limited to, warehouses; retail gasoline stations; retail establishments; professional offices; office buildings; hospitals and clinics; religious institutions; hotels; motels; and parking facilities.”

OAC 3745-300-08(C)(2)(c)(iii) 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. Examples of industrial land uses include, but are not limited to: lumberyards; power plants; manufacturing facilities such as metalworking shops, plating shops, blast furnaces, coke plants, oil refineries, brick factories, chemical plants and plastics plants; assembly plants; non-public airport areas; limited access highways; railroad switching yards; and marine port facilities.”

Limitation Prohibiting Ground Water Extraction and Use. 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].*

Limitation on Building Occupancy - Remedy or Demonstration Obligation.

Prior to human occupancy of any building constructed on the [Property / portion of Property that is defined by the EC as subject to this limitation] after the recording date of this Environmental Covenant, either: (i) a remedy that eliminates indoor air vapor intrusion exposure to hazardous substances in soil or groundwater in excess of applicable standards shall be installed, operated and maintained as an engineering control under an operation and maintenance agreement in accordance with a covenant not to sue issued by the Director of Environmental Protection pursuant to ORC § 3746.12; or (ii) a demonstration attested by a certified professional shall be made to Ohio EPA, that the Property complies with applicable standards for the vapor intrusion to indoor air exposure pathway without further implementation of remedial activity and documented in accordance with ORC Chapter 3746 and the rules adopted thereunder.

4. Review of the Proposed Environmental Covenant – by the volunteer and the property owner – before its submission to Ohio EPA

Often the volunteer will request the environmental consultant or CP to prepare the initial draft of the proposed environmental covenant. The environmental consultant or CP may then use their detailed knowledge of the VAP project to apply the VAP Environmental Covenant Template and create 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 environmental covenant for the property at this point. The draft environmental covenant should undergo further review by the volunteer, the property owner (in cases where the volunteer does not own the property) or 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 and the required notices and warranties. As a result, the proposed environmental covenant may better comply with the criteria of OAC 3745-300-13(E)(13) and support the NFA letter site for which a covenant not to sue is requested.

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.