

**TITLE:** VAP Eligibility of Hazardous Waste Facilities Subject to Closure, Corrective Action, or Federal or State Enforcement

**DATE EFFECTIVE:** January 2003

**HISTORY:** Update of VA30002.03.001 - Revision was necessary to reflect changes in rule citations that became effective in March 2009. However, the archived TDC document remains accurate under the 1996 VAP rules.

**KEYWORDS:** Hazardous waste facility, closure, corrective action

**RULE/ AUTHORITY:** OAC 3745-300-02(B)(3); ORC § 3746.02(A)(1)(b); OAC 3745-300-02(B)(4); OAC 3745-300-02(B)(5)(b); ORC § 3746.02(A)(2); OAC 3745-300-02(B)(8); and ORC § 3746.02(A)(5)

**QUESTION:** Are hazardous waste facilities necessarily ineligible for the VAP?

**ANSWER:** No. Properties where closure of a hazardous waste facility is required are ineligible for the VAP. See OAC 3745-300-02(B)(5); ORC § 3746.02(A)(2). Properties subject to corrective action requirements, pursuant to a federal or state hazardous waste permit, are ineligible for the VAP. See OAC 3745-300-02(B)(3); ORC § 3746.02(A)(1)(b). Properties which are the subject of a federal enforcement action requiring site assessment, removal or remedial activities, or a state enforcement letter relating to a release or threatened release of hazardous substances or petroleum, are ineligible for the VAP. See OAC 3745-300-02(B)(4) and (B)(8); ORC § 3746.02 (A)(1) and (A)(5).

However, other hazardous waste entities, such as hazardous waste transporters, generators not subject to closure requirements, and facilities subject to RCRA corrective action, that are not the recipient of a federal or state hazardous waste facility permit or order requiring commencement of corrective action, may be eligible for the VAP. Ohio EPA retains the discretion to enforce hazardous waste violations, and seek civil penalties where appropriate.

**BACKGROUND:** Ohio Revised Code ("ORC") § 3746.02 and Ohio Administrative Code ("OAC") 3745-300-02 govern the eligibility of properties for the Voluntary Action Program ("VAP"). ORC § 3746.02(A)(1)(b)

states that nothing in Chapter 3746 applies to “[p]roperty for which a voluntary action under this chapter is precluded by federal law or regulations adopted under federal law, including, without limitation, any of the following federal laws or regulations adopted thereunder: ... (b) The “Resource Conservation and Recovery Act of 1976,” 90 Stat. 2806, 42 U.S.C.A. 1251, as amended; ...” (“RCRA”).

It is not precisely clear what is meant in ORC § 3746.02 (A)(1), by the exclusion of certain properties from the VAP if a voluntary action is precluded by federal law or federal regulations. Neither RCRA nor the hazardous waste regulations, see 40 CFR Part 260, expressly preclude a voluntary action under ORC Chapter 3746. However, RCRA Subtitle C and the hazardous waste regulations mandate specific, non-voluntary cleanup processes and requirements for the following cleanup scenarios: (i) hazardous waste management units subject to closure (& post-closure, if applicable) requirements; (ii) hazardous waste facilities subject to corrective action requirements identified in hazardous waste facility permits; and (iii) properties subject to cleanup requirements identified in federal enforcement actions (e.g., RCRA § 3008(h) orders).

With respect to other RCRA Subtitle C activities (e.g., hazardous waste transporters, generators not subject to closure requirements, OAC 3745-52-34, and facilities subject to RCRA corrective action, that are not the recipient of a permit or an order requiring the commencement of corrective action<sup>1</sup>), nothing in RCRA Subtitle C nor the hazardous waste regulations prohibits voluntary action under Chapter 3746.

## I. CLOSURE REQUIREMENTS

Like RCRA, ORC Chapter 3734 is a comprehensive framework for regulation of solid and hazardous waste facilities. The General Assembly left many of the specifics to the administrative rule writing process, but the result is a statutory and regulatory framework that imposes specific legal requirements based on the “status” of a

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<sup>1</sup> Those portions of the facility’s property subject to closure (i.e., hazardous waste management units) would not be eligible for the VAP, per ORC § 3746.02(A)(2), until all closure (and post-closure, if applicable) requirements have been fulfilled for that unit(s).

particular entity or site. In the hazardous waste universe, one important legal “status” is that of “facility,” which status ultimately necessitates “closure.” See ORC § 3734.12(D)(8)<sup>2</sup> and OAC 3745-55-10 et seq. and 3745-66-10 et seq.

ORC Chapter 3734 and OAC Chapters 3745-50 et seq. establish a framework of hazardous waste regulation built upon the premise that hazardous waste is to be disposed only by certain methods and in certain locations. This is evidenced by OAC Chapters 3745-54 through 3745-57, 3745-65 through 3745-69, 3745-218 and 3745-248, which prescribe the standards for proper treatment, storage and disposal of hazardous waste.<sup>3</sup> These provisions provide that hazardous waste is to be disposed only at regulated “facilities.”<sup>4</sup>

**Hazardous Waste Facilities Subject to Closure:  
ORC § 3746.02(A)(2) & OAC 3745-300-02(B)(5)(b)**

Hazardous waste facilities that are subject to closure (and post-closure, if applicable) requirements are not eligible for the VAP. Nothing in Chapter 3746 applies to:

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<sup>2</sup> “The director ... shall adopt ... rules ... , which shall be consistent with and equivalent to the regulations adopted under [RCRA] ... (D) Establishing performance standards for owners and operators of hazardous waste facilities ... necessary to protect human health or safety or the environment ... including ... (8) Closure and post-closure care of a hazardous waste facility where hazardous waste will no longer be treated, stored, or disposed of ...” ORC § 3734.12(D)(8).

<sup>3</sup> See e.g., OAC 3745-54-01(A) (“The purpose of [OAC] Chapters 3745-54 to 3745-57 and 3745-218 ... is to establish minimum standards which define the acceptable management of hazardous waste.”) and (B) (“The standards in Chapters 3745-54 to 3745-57 and 3745-218 ... apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste, except as specifically provided otherwise ... ”)

<sup>4</sup> An examination of the OAC closure requirements leads to the conclusion that closure is required at sites within the regulated facility universe. The hazardous waste rules define the various types of “units” that are regulated under Chapters 3745-50 through 3745-69 and 3745-218 and 3745-248.

Those portions of property where closure<sup>5</sup> of a hazardous waste facility<sup>6</sup> . . . is required under [ORC] Chapter 3734 . . . or rules adopted under it.

ORC § 3746.02(A)(2). This aspect of the VAP eligibility provision depends upon whether and when closure of a facility is required under Chapter 3734. A facility that has a hazardous waste management unit is not eligible to address that portion of the site (i.e., the unit) through the VAP until all closure (and post-closure, if applicable) requirements, OAC Chapters 3745-55 and 3745-66, have been fulfilled for that unit. Similarly, a facility with a hazardous waste accumulation area is not eligible to address that area through the VAP until the generator closure requirements, OAC 3745-52-34, have been fulfilled for that area. Note: generator closure requirements do not apply until the area is no longer used for accumulation, as provided below.

OAC 3745-300-02(B)(5), which clarifies the ineligibility of property where closure is required under ORC Chapter 3734 or rules adopted thereunder, sets forth, by way of illustration, several examples of facilities that have hazardous waste closure obligations:

(i) Those portions of a property on which hazardous waste generator closure of any tank or container accumulation area is required pursuant to [OAC] Chapter 3745-52;

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<sup>5</sup> *Closure* is defined, in pertinent part, to mean: “the time at which a hazardous waste facility will no longer accept hazardous waste for treatment, storage, or disposal ... or the effective date of an order revoking the permit for a hazardous waste facility ... ‘Closure’ includes measures performed to protect public health or safety, to prevent air or water pollution, or to make the facility suitable for other uses, if any, including ... establishment and maintenance of a suitable cover of soil and vegetation over cells in which hazardous waste ... are buried; minimization of erosion, the infiltration of surface water into such cells, the production of leachate, and the accumulation and runoff of contaminated surface water; ... or the removal and proper disposal of ... hazardous waste ... from a facility when necessary to protect public health or safety or to abate or prevent air or water pollution. ...” ORC § 3734.01(O).

<sup>6</sup> *Facility* is defined, in pertinent part, as “any site, location, tract of land, installation, or building used ... for the storage, treatment, or disposal of hazardous waste.” ORC § 3734.01(N).

(ii) Those portions of a property on which 'closure' of a 'hazardous waste management unit' is required under [ORC] Chapter 3734 . . . , and [OAC] rule 3745-50-10 . . . , regardless of whether a hazardous waste . . . permit has been issued. Properties on which 'hazardous wastes,' . . . were treated, stored, or disposed of, are required to be closed in accordance with [ORC] Chapter 3734 . . . and [OAC] rules adopted thereunder; and

(iii) Any hazardous waste management unit described [above] . . . , for which closure activities have been completed in accordance with [ORC] Chapter 3734 . . . , during the term of any applicable post-closure care period required by [OAC] Chapters 3745-55 and 3745-66 . . .

OAC 3745-300-02(B)(5)(b) (emphasis added). The rule is followed by several comments, including one that pre-November 19, 1980 releases not associated with a hazardous waste treatment, storage or disposal unit are not subject to the hazardous waste closure requirements,<sup>7</sup> and another that "small quantity" generators who accumulate hazardous waste in compliance with applicable hazardous waste requirements, are not subject to the hazardous waste generator closure requirements.<sup>8</sup> However, generators are required to complete closure of an accumulation area when the area is no longer used for hazardous waste

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<sup>7</sup> [Comment: Areas of contamination resulting from releases of hazardous substances or petroleum that occurred prior to November 19, 1980 and that are not associated with a hazardous waste treatment, storage or disposal unit, are not subject to the hazardous waste closure requirements of Chapter 3734. ... However, if management activities such as excavation or relocation are conducted at such areas of contamination, the contaminated media from such areas of contamination must be managed in accordance with the applicable hazardous waste requirements of Chapter 3734. ... Failure to properly manage hazardous waste, such as creating waste piles, will create a unit subject to hazardous waste closure obligations under Chapter 3734. ...]

<sup>8</sup> [Comment: "Small quantity generators" of hazardous waste, as defined in rule 3745-50-10 of the Administrative Code, and "conditionally exempt small quantity generators," as defined in rule 3745-51-05 of the Administrative Code, who accumulate hazardous waste in compliance with the applicable provisions of the Administrative Code, are not subject to hazardous waste generator closure requirements.]

accumulation.<sup>9</sup> Hazardous waste facilities that are subject to closure (and post-closure, if applicable) requirements are not eligible for the VAP until the closure obligations are completed.

## II. CORRECTIVE ACTION REQUIREMENTS

As noted above, RCRA Subtitle C mandates specific, non-voluntary cleanup processes and requirements for hazardous waste facilities subject to corrective action requirements identified in hazardous waste facility permits:

Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

42 U.S.C. § 6924(u). See also OAC 3745-55-011(A) (“The owner or operator of a facility seeking a permit for the treatment, storage, or disposal of hazardous waste shall institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any waste management unit at the facility, regardless of the time at which waste was placed in such unit.”)

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<sup>9</sup> Since closure of a generator accumulation area is not “required” until the area is no longer used for the accumulation of hazardous waste, a property with an operating generator accumulation area may be eligible for the VAP; however, a VAP covenant not to sue would be qualified by the future obligation to conduct generator closure. See ORC §3746.12(A)(1)(a). Note: accumulation of hazardous waste in violation of certain generator accumulation restrictions would subject a generator to the storage/treatment facility requirements. See OAC 3745-52-34 (B), (F).

**Properties Subject to Federal or State Permit Obligations: ORC § 3746.02(A)(1)(b) & OAC 3745-300-02(B)(3)**

Hazardous waste facilities that are required to undergo corrective action through federal or state hazardous waste facility permits are not eligible for the VAP. As stated above, properties for which a voluntary action under ORC Chapter 3746 is precluded by federal law or regulations, including RCRA, are ineligible for the VAP. See ORC § 3746.02(A)(1)(b). OAC 3745-300-02(B)(3) clarifies the ineligibility of certain properties regulated by RCRA, known as “corrective action” sites, which are described as follows:

(4) Properties subject to federal or state permit obligations. Any property or portion thereof which is subject to corrective action requirements, pursuant to a federal or a state permit issued under RCRA, . . . , as amended and the regulations adopted thereunder, and Chapter 3734 of the Revised Code and the Administrative Code rules adopted thereunder.

OAC 3745-300-02(B)(3) (emphasis added). Thus, any portion of a property with a hazardous waste facility that is subject to corrective action requirements, identified in a federal or state hazardous waste facility permit, is not eligible for the VAP. Such property would remain ineligible until completion of the corrective action obligations required by the permit.

**III. FEDERAL or STATE ENFORCEMENT**

Properties which are the subject of a federal enforcement action requiring site assessment, removal or remedial activities, or a state enforcement letter relating to a release or threatened release of hazardous substances or petroleum, are ineligible for the VAP. See OAC 3745-300-02(B)(4) and (B)(8); ORC § 3746.02 (A)(1) and (A)(5).

**A. Properties Subject to Federal Enforcement  
OAC 3745-300-02(B)(4)**

Properties subject to cleanup requirements identified in federal enforcement actions (e.g., RCRA § 3008(h) orders) are not eligible for the VAP. OAC 3745-300-02(B)(4) clarifies the ineligibility of properties subject to federal enforcement:

Any property or portion thereof which is the subject of a federal enforcement action which requires site assessment, removal, or remedial activities, pursuant to any federal laws and regulations, including, without limitation, the federal laws set forth in division (A) of section 3746.02 of the Revised Code. For purposes of this paragraph, “federal enforcement action” includes but is not limited to the issuance of administrative or judicial orders, injunctions, and consent decrees.

As noted above, RCRA Subtitle C mandates specific, non-voluntary cleanup processes and requirements for hazardous waste facilities subject to corrective action requirements. See 42 U.S.C. § 6928(h)(1), RCRA § 3008(h)(1) (“Whenever . . . the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.”) See also 42 U.S.C. § 6928(a)(1) (which authorizes the Administrator to issue an order requiring compliance with RCRA). Thus, any property subject to cleanup requirements identified in a federal enforcement action (e.g., a RCRA § 3008(h) order) is not eligible for the VAP until such cleanup is completed.

**B. Properties Subject to State Enforcement  
ORC § 3746.02(A)(5) & OAC 3745-300-02(B)(8)**

Properties which are the subject of a state enforcement letter relating to a release or threatened release of hazardous substances or petroleum, which poses a substantial threat to public health or safety or the environment, are ineligible for the VAP. ORC § 3746.02(A)(5) states that nothing in Chapter 3746 applies to:

Any other property if the director . . . has issued a letter notifying the owner or operator of the property that he will issue an enforcement order under [ORC] Chapter 3704., 3734., or 6111. . . . , a release or threatened release of a hazardous substance or petroleum from or at the property poses a substantial threat to public health or safety or the environment, and the person subject to the order does not present sufficient evidence to the director that he has entered into the voluntary action program under this chapter and is proceeding expeditiously to address that threat.

OAC 3745-300-02(B)(8), which reiterates the ineligibility of properties subject to state enforcement, describes these properties as follows:

Any property that is the subject of an enforcement letter from the director relating to a release or threatened release of hazardous substances or petroleum on, underlying or emanating from the property which poses a substantial threat to public health or safety or the environment, except when sufficient evidence of entry and participation in the “Voluntary Action Program” is demonstrated, as provided in paragraph (C) of this rule.

Therefore, pursuant to ORC § 3746.02(A)(5), any property subject to a state enforcement action (e.g., proposed corrective action order) would not be eligible for the VAP, unless sufficient evidence of entry and participation in the VAP is demonstrated, as provided in OAC 3745-300-02(C).

#### **IV. CONCLUSION: RCRA Subtitle C Properties - VAP Eligible/ Not Eligible**

As set forth above, the following properties (or portions thereof) are not eligible for the VAP, pursuant to ORC § 3746.02 and OAC 3745-300-02:

(1) a property where hazardous waste closure (or post-closure care, if applicable) is required;

(2) a hazardous waste facility where corrective action is required pursuant to a hazardous waste permit issued to the owner and operator of the facility;

(3) a hazardous waste facility where cleanup is required pursuant to a federal enforcement action (e.g., RCRA § 3008(h) order); and

(4) a hazardous waste facility where cleanup is required pursuant to a state enforcement action (e.g., regarding corrective action).

These properties may become eligible for the VAP upon a written demonstration that applicable hazardous waste cleanup obligations have been fulfilled.<sup>10</sup>

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<sup>10</sup> See OAC 3745-300-02(D) (“A property which is ineligible for participation in the “Voluntary Action Program” pursuant to paragraphs (B)(1) through (B)(8) of this rule may become eligible for participation upon a written demonstration to the “voluntary action program’s” satisfaction that the property is in compliance with or no longer subject to the law(s) or regulation(s) which made it ineligible. The demonstration must include a written statement from the state or federal agency or department which regulated the property, which asserts that all requirements of the law(s) or regulation(s) have been satisfied and that the property is no longer subject to such requirements.”)

However, other properties associated with certain hazardous waste activities may be eligible for the VAP:

- (1) properties owned or operated by hazardous waste transporters;
- (2) properties owned or operated by generators who are not subject to any closure requirements pursuant to OAC 3745-52-34; and
- (3) portions of a hazardous waste facility that are subject to corrective action, but no permit, order or enforcement action requiring commencement of corrective action or other cleanup has been issued.

Nothing in RCRA Subtitle C nor its regulations prohibit voluntary action under ORC Chapter 3746 at these sites. Moreover, OAC 3745-300-02, the VAP Eligibility Rule, does not exclude these sites from participation in the VAP. An example of such a property is one where the owner or operator: (i) created unpermitted hazardous waste management units and thus became subject to the closure requirements; (ii) closed or is in the process of closing the units under the hazardous waste closure requirements; and (iii) although now subject to corrective action requirements for the units at the property, has not received a permit or an order requiring commencement of corrective action. Such a property may be eligible for the VAP if all other eligibility criteria are satisfied.

## **V. ENFORCEMENT DISCRETION**

Disposal of hazardous waste at an unpermitted facility constitutes a violation of ORC § 3734.02 (E) and (F), i.e., the establishment or operation of a hazardous waste facility without a hazardous waste facility permit. The eligibility of an unpermitted hazardous waste facility<sup>11</sup> to participate in

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<sup>11</sup> An unpermitted hazardous waste facility that is the subject of an enforcement letter from the Director relating to a release or threatened release of hazardous substances or petroleum on, underlying or emanating from the property which poses a substantial threat to public health or safety or the environment would not be eligible for the VAP, pursuant to ORC § 3746.02(A)(5) and OAC Rule 3745-

the VAP, even if accompanied by the issuance of a No Further Action letter<sup>12</sup> by a Certified Professional and the issuance of a covenant not to sue<sup>13</sup> by the Director, does not preclude Ohio EPA from pursuing enforcement, including civil penalties, for violations of ORC Chapter 3734 and the hazardous waste rules adopted thereunder which may have occurred at the facility. Such enforcement may include pursuit of injunctive relief to obtain removal of any hazardous waste that may have been unlawfully disposed. Ohio EPA retains the discretion to pursue enforcement of any such violations and seek civil penalties where appropriate.

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300-02(B)(8), unless sufficient evidence of entry and participation in the VAP is demonstrated pursuant to OAC Rule 3745-300-02(C).

<sup>12</sup> Voluntary actions under ORC Chapter 3746 and OAC Chapter 3745-300 “shall be undertaken in compliance with all applicable laws of this state and rules adopted under them and with applicable ordinances, resolutions and rules of political subdivisions of this state.” ORC §3746.10(D). Such applicable laws and rules may include ORC § 3734.02(H) and OAC 3745-27-13, which prohibit the filling, grading, excavating, building, drilling, or mining on land where a hazardous waste facility was operated without prior authorization of the Director.

<sup>13</sup> A covenant not to sue shall contain “[a] provision releasing the person who undertook the voluntary action from all civil liability to this state to perform additional investigational and remedial activities to address a release of hazardous substances or petroleum ...” ORC § 3746.12(A)(1) (emphasis added). Thus, a VAP covenant would not constitute a release of civil penalty liability for violations of the hazardous waste requirements of ORC Chapter 3734 and applicable rules.

**SUMMARY:**

Properties where closure of a hazardous waste facility is required are ineligible for the VAP. See OAC 3745-300-02(B)(5) & ORC § 3746.02(A)(2). Properties subject to corrective action requirements, pursuant to a federal or state hazardous waste permit, are ineligible for the VAP. See OAC 3745-300-02(B)(3) & ORC § 3746.02(A)(1)(b). Properties which are the subject of a federal enforcement action requiring site assessment, removal or remedial activities, or a state enforcement letter relating to a release or threatened release of hazardous substances or petroleum, are ineligible for the VAP. See OAC 3745-300-02(B)(4) and (B)(8); ORC § 3746.02 (A)(1) and (A)(5).

However, other hazardous waste entities, such as hazardous waste transporters, generators not subject to closure requirements, and facilities subject to RCRA corrective action, but not the recipient of a federal or state hazardous waste facility permit or order requiring commencement of corrective action, may be eligible for the VAP. Ohio EPA retains the discretion to enforce hazardous waste violations, and seek civil penalties where appropriate.

**OHIO EPA  
CONTACT:**

For further information regarding this issue, please contact the Ohio EPA Central Office, Voluntary Action Program, at (614) 644-2924.