

TITLE: Implementing Fencing Restrictions as Remedial Activities

**DATE
EFFECTIVE:** August 2005

HISTORY: Update to VA30011.09.004 - Revision was necessary to reflect changes in the rule citations that became effective in August 2014.

KEYWORDS: Access, applicable standards, direct contact, engineering control, institutional control, activity and use limitation, operation and maintenance plan, remedy

**RULE/
AUTHORITY:** ORC 3746.05 and 3746.12; OAC 3745-300-11

QUESTION: If fencing is used to restrict access to a property as a remedial activity, should it be incorporated into an institutional control or is fencing better treated as an engineering control?

ANSWER: If a Volunteer chooses to install and maintain a fence for use as part of its remedial activities, the Volunteer should treat the fence as an engineering control and not as an institutional control (now referred to as “activity and use limitations”). If a fence is implemented as part of an activity and use limitation and it at any point is damaged or compromised, then the covenant not to sue (CNS) is immediately declared void by law, pursuant to ORC 3746.05. However, if the fence is used as part of an engineering control and it is damaged or compromised, the Volunteer has the opportunity to repair or replace the fence as directed by the property’s operation and maintenance (O&M) plan. In addition, pursuant to ORC 3746.12(B), the Volunteer is afforded a final opportunity to correct issues related to a property’s noncompliance with an engineering control (known as the opportunity to cure) before the agency begins the CNS revocation process. This opportunity to cure is not available to correct a property’s noncompliance with activity and use limitations, when the CNS has been voided as a result of ORC 3746.05.

There are numerous possible scenarios that could cause a fence to be damaged or compromised. For example, heavy storms, intruders, and even normal wear and tear could lead to the compromising of the fence. In addition, unforeseen circumstances may require temporary removal of a fence (or portions of a fence), such as for the movement of large machinery or vehicles into or outside the fenced area. By using a fence as an activity and use limitation, the Volunteer loses its ability to modify the fencing or cure any defects that would void the

CNS for the property. Alternatively, a Volunteer who installs and maintains a fence as an engineering control has an opportunity to inspect and make any necessary repairs to the fence, thus avoiding the automatic voidance of the CNS.

The inspection and maintenance of a fence identified as an engineering control is provided by rule language in OAC 3745-300-11. See OAC 3745-300-11(A)(4), (C)(4), and (F). Specifically, OAC 3745-300-11(F)(1)(f) requires that an O&M plan, which is used to implement and maintain an engineering control, include a plan for addressing potential problems with the remedial activities (e.g., fence repair). The rule language anticipates and provides for addressing problems with remedial activities implemented under an O&M plan, such as the repair or replacement of a fence. Thus, an O&M plan allows the Volunteer the opportunity to timely repair any defects to the engineering control. The requirement of inspecting and maintaining the fence as an engineering control provides a simple and cost effective alternative to the automatic voidance of the CNS for the property, which could occur if the fence is implemented as an activity and use limitation.

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CONTACT:

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