ARCHIVE: **Archived due to the 2009 rule revision. Refer to VA30000.09.004 for the updated document.**

TITLE: **Real Property Tax Exemptions under the Voluntary Action Program**

DATE EFFECTIVE: January 2007

HISTORY: Update of VA30000.06.001 - Revision was necessary to reflect statutory amendment to the tax exemption process under Ohio Revised Code (ORC) Section 5709.87.

KEYWORDS: Real property tax exemption, tax lien day, tax list, tax duplicate, valuation, assessed value, tax exemption order, tax parcel number, tax exemption revocation, request to rescind tax exemption

RULE/ AUTHORITY: ORC 5709.87 and OAC 3745-300-13(E)(16)

QUESTION 1: In general, how does the tax exemption process work for obtaining a real property tax exemption pursuant to ORC 5709.87 for properties for which a covenant not to sue has been issued?

ANSWER: If a remedy or remedial activities are conducted at a property under the Voluntary Action Program and the Director of Ohio EPA issues a covenant not to sue for the property, the Director shall also provide notice of the issuance of the covenant to the Ohio Department of Taxation and the Director of the Department of Development. Based on the language in ORC 5709.87(B) the statute imposes a mandatory directive on Ohio EPA. Specifically, the statute says in relevant part, "**[t]he director** [of EPA], **after issuing a covenant not to sue** for property under section 3746.12 of the Revised Code ***, **shall certify to the tax commissioner and to the director of development** that such a covenant has been issued and such remedies or remedial activities have occurred at that property. "

Upon receipt of the certification from the director as provided for in ORC 5709.87(B), the Tax Commissioner issues an order exempting the identified property from real property taxation for the increase in the assessed value of the property as reflected on the current tax lists on tax lien day of the year that the exemption order is issued. ORC 5709.87(C)(1)(a) states in relevant part as follows, "(u)pon receipt by the tax commissioner of a certification for property under division (B) of [5709.87], **the commissioner shall issue an order granting an exemption from real property taxation** ***."

The Ohio Department of Taxation has interpreted this exemption to apply to the increase in value of the land and the existing structures at the NFA property as a result of the remedial activities. The Ohio Department of Taxation may not extend the property tax exemption under ORC 5709.87 to new construction on the NFA property with the possible exception of new construction built as an engineering control in conjunction with the remedial activity.

The Ohio Department of Taxation will send copies of the exemption order to the owner of the NFA property and the applicable county auditor's office. The county auditor's office maintains a list of properties for the county that are subject to real property taxes or that are exempt from real property taxes. The county auditor is initially responsible for determining the actual increase in value of the land and buildings of the NFA property as a result of the remedial activities, and applying the real property tax exemption granted under ORC 5709.87 to that increased value. Typically, the value of real property in any county is determined by periodic appraisal by the auditor's office, or as the result of an arm's length transfer of property. However, the property owner may be able to present additional information to the county auditor related to the determination of the value of a contaminated property, or the new value as a result of the remedial activities.

QUESTION 2: What is Ohio EPA's role in the tax exemption process?

ANSWER: Ohio Revised Code ("ORC") 5709.87(B) provides that the Director of Ohio EPA, after issuing a covenant not to sue for a property under ORC 3746.12 and determining that remedies or remedial activities have commenced or been completed at that property to the satisfaction of the Director of Ohio EPA, shall certify to the Tax Commissioner for the Department of Taxation and to the Director of the Department of Development that such a covenant has been issued and such remedies or remedial activities have occurred at that property. The certification is provided in the form of an interoffice memorandum ("tax certification memorandum") from Ohio EPA to the Department of Taxation, Division of Tax Equalization and the Department of Development. Ohio EPA sends the tax certification memorandum by certified mail to facilitate timely review by the Department of Taxation. A courtesy copy of the Director's tax certification memorandum is also mailed to the appropriate county auditor.

Ohio EPA's role in the tax exemption process is primarily ministerial. However, ORC 5709.87(B) requires Ohio EPA to include in the tax certification memorandum a description of the property in sufficient detail for the Department of Taxation and the Department of Development to determine the boundaries of the property entitled to the tax exemption. Ohio EPA includes in the tax certification memorandum the property name, property address, parcel number(s), the county and taxing district, and the date the covenant not to sue was issued. Ohio EPA also includes the property owner's name, mailing address, and contact person. A copy of the legal description of the property and a site map are also attached to the tax certification memorandum to further identify the property covered by the covenant. Ohio EPA obtains the information presented in the tax certification memorandum from the No Further Action ("NFA") Letter issued by the certified professional. The property to which the tax exemption will apply depends on the accuracy of the property information provided. The identification of the correct parcel numbers in the NFA Letter is very important.

Upon delivery of the tax certification memorandum to the Department of Taxation and the Department of Development, Ohio EPA has completed its responsibilities under ORC Section 5709.87. Ohio EPA does not track the tax exemption process to completion to ensure that a tax exemption was granted and applied to the property. However, to assist volunteers, Ohio EPA will include a copy of the tax certification memorandum with the certified copy of the covenant not to sue that is sent to the volunteer after the covenant is journalized. Because the tax exemption under ORC 5709.87 is transferrable, the volunteer or property owner, or appropriate transferee is responsible for tracking the tax abatement process and for updating the tax records of the county auditor and county treasurer as to the current ownership of the NFA property.

QUESTION 3: What are the Volunteer's obligations to ensure an accurate tax exemption for the property?

ANSWER: In order to issue an accurate covenant not to sue and tax certification memorandum, Ohio EPA and the Department of Taxation must have the correct and most current information about the property. It is the volunteer's responsibility to notify Ohio EPA of any change in the ownership, the parcel numbers, or corrections to the legal description for the NFA property after the issuance of the NFA Letter and before the issuance of the covenant not to sue. Changes in the legal description and associated parcel numbers (if the new parcel numbers

are known) should be submitted as an Addendum to the NFA Letter under affidavit by the Certified Professional. The most current information regarding the NFA property will be included in the tax certification memorandum to the Department of Taxation and Department of Development.

As previously stated, Ohio EPA does not track the tax exemption process to completion to ensure that a tax exemption was granted and applied to the NFA property. However, to assist volunteers, Ohio EPA will include a copy of the tax certification memorandum with the certified copy of the covenant not to sue that is sent to the volunteer after the covenant is journalized. The property owner or volunteer is responsible for tracking the issuance of the property tax exemption by the Tax Commissioner and ensuring that the NFA property receives its authorized tax exemption.

QUESTION 4: What special considerations are there if the property that is the subject of the NFA Letter consists of portions of a parcel?

ANSWER: The NFA Letter must include, as an attachment, a legal description of the NFA property. A map illustrating the NFA property boundaries must also be attached in accordance with OAC 3745-300-13(E)(2) and 06(I)(3). When the NFA property described in the NFA Letter consists of only a portion of an existing tax parcel, or all or part of multiple tax parcels, the attached map should reflect what portions of the existing tax parcel(s) constitutes the NFA property to facilitate the application of an authorized tax exemption by the county auditor. OAC 3745-300-13(E)(16) (revised effective 4/19/06) specifies the required tax parcel information. Including a copy of the county auditor's plat map as part of Section D.1. of the NFA Letter Form is helpful. The Tax Commissioner makes the determination on the request for tax exemption. Once granted, the Tax Commissioner sends a tax exemption determination order to the property owner and appropriate county auditor. Thereafter, the county auditor will exempt the NFA property. It is important that the county auditor be able to determine what tax parcels or portions thereof have been granted the real property tax exemption by the Tax Commissioner.

QUESTION 5: How is the tax exemption applied to the NFA property?

ANSWER: On February 11, 2004, the Ohio Supreme Court issued its decision in Columbus Bd. of Edn. v. Wilkins, 101 Ohio St.3d 112. In that case, the Ohio Supreme Court addressed several issues raised by the City of Columbus Board of Education concerning the application and

potential challenges to the tax exemption provided in ORC 5709.87. Specifically, the Supreme Court ruled that "the [tax] exemption in 5709.87(C) applies to 'the increase in the assessed value of land constituting property that is described in the [Ohio EPA's tax] certification, and of the increase in assessed value of improvements, buildings, fixtures and structures situated on that land at the time the order is issued as indicated on the current tax lists.'" Id. at 114. The Supreme Court held that the tax exemption is to commence on the first day of the tax year that includes the day on which the exemption order is issued by the Department of Taxation.

For example, if the covenant not to sue is issued by Ohio EPA in September, 2007, and the Tax Commissioner issues the tax exemption order in October, 2007, the property tax exemption granted will be for the increase in value of the land and buildings on the property from the value of the property as of January 1, 2006, the tax lien date for tax year 2006. Since real property taxes are collected a year in arrears (i.e., the 2006 taxes are based on a value as of January 1, 2006, but collected in 2007), the 2006 tax list would be the most current list available for the Tax Commissioner's October 2007 exemption order. The tax exemption would begin for tax year 2007 which would affect taxes collected in 2008.

The Supreme Court further stated that the tax exemption applied to the increase in the assessed value of the land constituting the property described in the certification, as well as the improvements, the buildings, the fixtures, and the structures on that land at the time the order is issued. The Supreme Court concluded that there was nothing in ORC 5709.87 that would limit the exemption to the increase in value of the specific item of property that was subject to environmental remediation (as argued by the City of Columbus Board of Education). However, the Supreme Court expressly added that the real property tax exemption provided in ORC 5709.87 would not exempt the assessed value of improvements, buildings, fixtures, or structures added to the tax list after the exemption order was issued. The Department of Taxation interprets the exemption granted under ORC 5709.87 as limited to the increase in value of the land and the existing buildings on the NFA property, and not of new structures constructed at the NFA property. However, an opportunity exists for additional real and tangible personal property tax exemptions pursuant to agreements authorized by ORC 5709.88 through 5709.883.

QUESTION 6: What is the duration of the tax exemption and can it be transferred?

ANSWER: The tax exemption granted under ORC 5709.87 applies for ten (10) tax years, beginning with the tax year the exemption order is issued. The Department of Taxation sends copies of the exemption order to the owner of the property and the appropriate County Auditor's Office. The County Auditor's Office implements the tax exemption order. If the volunteer or owner of the property wants to know the actual date of the abatement, the volunteer or owner should contact the County Auditor's Office.

Pursuant to ORC 5709.87(D), the sale or transfer of the NFA property or portion of the NFA property that is eligible for the tax exemption pursuant to ORC 5709.87(C) does not affect the tax exemption granted. The tax exemption will continue after the sale for the full period stated in the exemption order.

QUESTION 7: How would revocation of a covenant not to sue impact the property tax exemption?

ANSWER: Pursuant to ORC 5709.87(E), if the Director of Ohio EPA revokes a covenant not to sue for a property for which the Tax Commissioner has granted a tax exemption under 5709.87(C), the Director must notify the Tax Commissioner and the appropriate county and municipal authorities. The Tax Commissioner will immediately rescind the real property tax exemption and notify the property owner and the appropriate county auditor. All appropriate taxes that would have been charged on the exempt property from the date the exemption first applied until the date of the revocation of the covenant not to sue will be due and owing in accordance with the specific requirements of ORC 5709.87(E). If the property taxes are not paid timely, the property will be subject to additional real property tax penalties.

QUESTION 8: What if the property owner does not want to receive the tax exemption available under ORC 5709.87?

ANSWER: Amended Substitute House Bill (HB) 699, known as the 2006 capital budget bill of the 126th General Assembly, was signed by the Governor on December 28, 2006. Unless otherwise specified, the effective date of HB 699 is the 91st day after it was signed, or March 29, 2007. HB 699 included the following amendment to ORC 5709.87(C):

"(C)(1)(b) Within sixty days after receiving the commissioner's order, the owner of record of the property may notify the commissioner in

writing that the owner does not want the exemption from real property taxation provided under division (C)(1) of this section to apply. Upon receiving such a notification from the property owner of record, the commissioner shall issue a subsequent order rescinding the previously granted exemption."

The foregoing change in ORC Section 5709.87 allows the owner of the NFA Property at the time the property tax exemption order is issued by the Tax Commissioner to determine if they want to receive the property tax exemption or give notice to rescind the property tax exemption in accordance with the new language of ORC 5709.87(C)(1)(b). The current owner of the exempted property is responsible for determining the impact of the property tax exemption and the potential benefits or detriments of maintaining the automatic property tax exemption versus electing to request that the property tax exemption be rescinded. Ohio EPA is not involved in this notice process, or in verifying that the property owner's request for rescission of the VAP property tax exemption is timely made or granted.

Effective March 29, 2007, under ORC 5709.87(C)(1)(b), the current property owner will have 60 days from the date of receiving the Tax Commissioner's order granting the tax exemption to send written notice to the Tax Commissioner that the property owner does not want the tax exemption to apply to the eligible property. The written notice should clearly identify the exempted property. A copy of the Tax Commissioner's order granting the exemption from real property tax under ORC 5709.87(C)(1)(a) could be attached to the property owner's written notice to facilitate identification of the exact property and the property tax exemption being rescinded. It is suggested that the written notice to the Tax Commissioner be sent by certified mail. The property owner should maintain a copy of the written notice. A courtesy copy of the property owner's written notice to the Tax Commissioner could also be sent to the County Auditor of the county where the property is located.

The ability to rescind the property tax exemption belongs to the current owner of the property at the time the tax exemption order is issued by the Tax Commissioner. As stated above, Ohio EPA is not involved in this notice process, and therefore, does not need to be copied on the notices.

OHIO EPA

CONTACT: For further information regarding this issue, please contact the VAP Staff at (614) 644-2924, or the Legal Office at 614-644-3037.