

CHAPTER 3746
VOLUNTARY ACTION PROGRAM

Section

3746.01. Definitions.

3746.02. Exemptions from provisions.

3746.03. Multidisciplinary council to advise director as to rules.

3746.04. Adoption of rules; fees; public meetings on proposed rules.

3746.05. Institutional controls or activity and use limitations.

3746.06. Attaining background level of contaminant sufficient; compliance with ground water standards.

3746.07. Standards and requirements governing until rules take effect.

[3746.07.1] 3746.071. Obligations of certified professionals; suspension or revocation for noncompliance.

3746.08. [Repealed]

3746.09. Application for variance from standards.

3746.10. Voluntary action to identify and address sources of contamination; seeking of no further action letter.

3746.11. Duties of certified professional in connection with no further action letter; submission to director.

3746.12. Issuance or denial of covenant not to sue; revocation.

[3746.12.1] 3746.121. Verification of eligible costs for tax credit purposes.

3746.13. Methods of issuance of covenant not to sue; fee.

3746.14. Filing and recording of letters and covenants; transferability.

3746.15. Consolidated standards permit.

3746.16. Voluntary action program administration fund.

3746.17. Audits in connection with issuance of letters.

[3746.17.1] 3746.171. Record of properties with institutional controls or activity and use limitations; inspections.

3746.18. Director may request supporting documents and data.

3746.19. Notice of noncompliance by professional or laboratory; audits of property where certification suspended or revoked.

3746.20. Information and documents to be submitted by affidavit; falsification or deception.

3746.21. Right of entry for inspection or investigation.

3746.22. Prosecution of violators; injunctions; civil penalties.

3746.23. Actions for recovery of costs of conducting voluntary action; allocation of costs by contract.

3746.24. Immunity from tort actions for harm caused.

3746.25. Immunity of state and officers and employees.

3746.26. Exemption of persons holding indicia of ownership in a property primarily to protect a security interest.

3746.27. Exemption of fiduciary or trustee.

3746.28. Admissibility of entry into or participation in program and of information or documents.

3746.29. Other authority of director; costs incurred as to release or threatened release.

3746.30. Obligations, rights and liabilities arising under other state and federal laws not affected.

3746.31. Director to provide copies of materials upon request.

3746.35. Annual reports by directors of environmental protection and development and county auditors.

3746.99. Felony violations; penalties.

§ 3746.01. Definitions.

As used in this chapter:

(A) "Activity and use limitations" has the same meaning as in section 5301.80 of the Revised Code.

(B) "Affiliated" means under common ownership or control.

(C) "Applicable standards," unless the context indicates otherwise, means standards established in or pursuant to sections 3746.05, 3746.06, and 3746.07 of the Revised Code, in or pursuant to rules adopted under division (B)(1) or (2) of section 3746.04 of the Revised Code, pursuant to rules adopted under division (B) (12)(b) of section 3746.04 of the Revised Code, or alternative standards and terms and conditions set forth in a variance issued under section 3746.09 of the Revised Code, as applicable.

(D) "Background level" means the conditions at a property and areas surrounding a property that are unaffected by any current or past activities involving treatment, storage, or disposal of hazardous substances or petroleum. "Background level" includes naturally occurring substances.

(E) "Certified laboratory" means a laboratory certified by the director of environmental protection pursuant to rules adopted under division (B)(6) of section 3746.04 of the Revised Code, or deemed to be certified under division (E) of section 3746.07 of the Revised Code, to perform analyses in connection with voluntary actions.

(F) "Certified professional" means a person certified by the director pursuant to rules adopted under division (B) (5) of section 3746.04 of the Revised Code, or deemed to be certified under division (D) of section 3746.07 of the Revised Code, to issue no further action letters under section 3746.11 of the Revised Code.

(G) "Covenant not to sue" means a release from liability that is issued by the director under section 3746.12 of the Revised Code.

(H) "Environmental covenant" has the same meaning as in section 5301.80 of the Revised Code.

(I) "Hazardous substance" includes all of the following:

(1) Any substance identified or listed in rules adopted under division (B)(1)(c) of section 3750.02 of the Revised Code;

(2) Any product registered as a pesticide under section 921.02 of the Revised Code when the product is used in a manner inconsistent with its required labeling;

(3) Any product formerly registered as a pesticide under that section for which the registration was suspended or canceled under section 921.05 of the Revised Code;

(4) Any mixture of a substance described in divisions (I)(1) to (3) of this section with a radioactive material.

(J) "Owner or operator" includes both of the following:

(1) Any person owning or holding a legal, equitable, or possessory interest in or having responsibility for the daily activities on a property;

(2) In the case of property title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to this state or a political subdivision of this state, any person who owned, operated, or otherwise controlled activities occurring on the property before the conveyance.

(K) "Person" means any person as defined in section 1.59 of the Revised Code and also includes this state, any political subdivision of this state, any other body of this state or of a political subdivision of this state, the board of directors of a nonprofit corporation governing a special improvement district created under Chapter 1710 of the Revised Code, and the United States and any agency or instrumentality thereof.

(L) "Petroleum" means oil or petroleum of any kind and in any form, including, without limitation, crude oil or any fraction thereof, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil refuse, used oil, substances or additives utilized in the refining or blending of crude petroleum or petroleum stock, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel, and mixtures of natural gas and synthetic gas.

(M) "Property," except for the purposes of sections 3746.02, 3746.26, and 3746.27 of the Revised Code, means any parcel of real property, or portion thereof, and any improvements thereto, the limits of which have been described in writing by the owner of record or a legally appointed representative of the owner and that is or has been the subject of a voluntary action under this chapter and rules adopted under it.

(N) "Radioactive material" means a substance that spontaneously emits ionizing radiation.

(O) "Related" means the persons are related by consanguinity or marriage.

(P) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating, dumping, or disposing of any hazardous substance or petroleum into the environment, including, without limitation, the abandonment or discarding of barrels, containers, or any other closed receptacle containing any hazardous substance, petroleum, or pollutant or contaminant. "Release" does not include any of the following:

(1) Any release that results solely in the exposure of individuals to hazardous substances or petroleum in the workplace with respect to which those individuals may assert a claim against their employer and that is regulated under the "Occupational Health and Safety Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651, as amended, and regulations adopted under that act, or under Chapter 4167 of the Revised Code and rules adopted under it;

(2) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

(3) Any release of a source, byproduct, or special nuclear material from a nuclear incident, as "source material," "byproduct material," "special nuclear material," and "nuclear incident" are defined in the "Atomic Energy Act of 1954," 68 Stat. 919, 42 U.S.C.A. 2011, as amended, if the release is subject to financial protection requirements under section 170 of that act unless any such material is mixed with a hazardous substance or petroleum;

(4) Any federally permitted release as defined in section 101(10) of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 3300, 42 U.S.C.A. 9601, as amended;

(5) The normal application of a fertilizer material that is intended to improve the quality or quantity of plant growth.

(Q) "Remedy" or "remedial activities" means actions that are taken at a property to treat, remove, transport for treatment or disposal, dispose of, contain, or control hazardous substances or petroleum, are protective of public

health and safety and the environment, and are consistent with a permanent remedy, including, without limitation, excavation, treatment, off-site disposal, the use of engineering or institutional controls or activity and use limitations, the issuance and implementation of a consolidated standards permit under section 3746.15 of the Revised Code, and the entering into and implementation of an operation and maintenance agreement pursuant to section 3746.12 of the Revised Code.

(R) "Voluntary action" means a series of measures that may be undertaken to identify and address potential sources of contamination of property by hazardous substances or petroleum and to establish that the property complies with applicable standards. "Voluntary action" may include, without limitation, a phase I property assessment conducted in accordance with rules adopted under division (B)(3) of section 3746.04 of the Revised Code or division (B) of section 3746.07 of the Revised Code, as appropriate, a phase II property assessment conducted in accordance with rules adopted under division (B)(4) of section 3746.04 of the Revised Code or division (C) of section 3746.07 of the Revised Code, as appropriate, a sampling plan, a remedial plan, or remedial activities followed by the issuance of a no further action letter under section 3746.11 of the Revised Code indicating that the property meets applicable standards upon demonstration by the person undertaking the measures either that there is no information indicating that there has been a release of hazardous substances or petroleum at or upon the property or that there has been a release of hazardous substances or petroleum at or upon the property and that applicable standards were not exceeded or have been or will be achieved in accordance with this chapter and rules adopted under it.

HISTORY: 145 v S 221 (Eff 9-28-94); 146 v H 441. Eff 8-22-96; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.02. Exemptions from provisions.

(A) Nothing in this chapter applies to any of the following:

(1) Property 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:

(a) The "Federal Water Pollution Control Act Amendments of 1972," 86 Stat. 886, 33 U.S.C.A. 1251, as amended;

(b) The "Resource Conservation and Recovery Act of 1976," 90 Stat. 2806, 42 U.S.C.A. 6921, as amended;

(c) The "Toxic Substances Control Act," 90 Stat. 2003 (1976), 15 U.S.C.A. 2601, as amended;

(d) The "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2779, 42 U.S.C.A. 9601, as amended;

(e) The "Safe Drinking Water Act," 88 Stat. 1661 (1974), 42 U.S.C.A. 300(F), as amended.

(2) Those portions of property where closure of a hazardous waste facility or solid waste facility is required under Chapter 3734. of the Revised Code or rules adopted under it;

(3) Property or properties regardless of ownership that are subject to remediation rules adopted under the authority of the division of fire marshal in the department of commerce, including remediation rules adopted under sections 3737.88, 3737.882 [3737.882.], and 3737.889 [3737.88.9] of the Revised Code;

(4) Property that is subject to Chapter 1509. of the Revised Code;

(5) Any other property if the director of environmental protection has issued a letter notifying the owner or operator of the property that he will issue an enforcement order under Chapter 3704., 3734., or 6111. of the

Revised Code, 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. For the purposes of this division, the evidence constituting sufficient evidence of entry into the voluntary action program under this chapter shall be defined by the director by rules adopted under section 3746.04 of the Revised Code. Until such time as the director has adopted those rules, the director, at a minimum, shall consider the existence of a contract with a certified professional to appropriately respond to the threat named in the director's letter informing the person of his intent to issue an enforcement order and the availability of financial resources to complete the contract to be sufficient evidence of entry into the program.

(B) The application of any provision of division (A) of this section to a portion of property does not preclude participation in the voluntary action program under this chapter in connection with other portions of the property where those provisions do not apply.

(C) As used in this section, "property" means any parcel of real property, or portion thereof, and any improvements thereto.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.03. Multidisciplinary council to advise director as to rules.

The director of environmental protection, in accordance with section 121.13 of the Revised Code, shall appoint and convene a multidisciplinary council to advise the director with respect to the rules the director is required to adopt under section 3746.04 of the Revised Code. The council shall include, without limitation, one representative each from the departments of commerce, development, and health; representatives of the banking, manufacturing, utility, and real estate development industries, the regulated community, certified professionals, professions whose members have practical experience in the investigation or remediation of releases of hazardous substances or petroleum into the environment, municipal corporations, counties, townships, environmental advocacy organizations, and citizens organizations whose members are knowledgeable about the cleanup of sites identified pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2779, 42 U.S.C.A. 9601, as amended, and regulations adopted under it; and toxicologists employed by state universities as defined in section 3345.011 [3345.01.1] of the Revised Code and medical professionals.

HISTORY: 145 v S 221 (Eff 9-28-94); 146 v H 670. Eff 12-2-96.

§ 3746.04. Adoption of rules; fees; public meetings on proposed rules.

Within one year after September 28, 1994, the director of environmental protection, in accordance with Chapter 119. of the Revised Code and with the advice of the multidisciplinary council appointed under section 3746.03 of the Revised Code, shall adopt, and subsequently may amend, suspend, or rescind, rules that do both of the following:

(A) Revise the rules adopted under Chapters 3704., 3714., 3734., 6109., and 6111. of the Revised Code to incorporate the provisions necessary to conform those rules to the requirements of this chapter. The amended rules adopted under this division also shall establish response times for all submittals to the environmental protection agency required under this chapter or rules adopted under it.

(B) Establish requirements and procedures that are reasonably necessary for the implementation and administration of this chapter, including, without limitation, all of the following:

(1) Appropriate generic numerical clean-up standards for the treatment or removal of soils, sediments, and water media for hazardous substances and petroleum. The rules shall establish separate generic numerical clean-up standards based upon the intended use of properties after the completion of voluntary actions, including industrial, commercial, and residential uses and such other categories of land use as the director considers to be appropriate. The generic numerical clean-up standards established for each category of land use shall be the concentration of each contaminant that may be present on a property that shall ensure protection of public health and safety and the environment for the reasonable exposure for that category of land use. When developing the standards, the director shall consider such factors as all of the following:

(a) Scientific information, including, without limitation, toxicological information and realistic assumptions regarding human and environmental exposure to hazardous substances or petroleum;

(b) Climatic factors;

(c) Human activity patterns;

(d) Current statistical techniques;

(e) For petroleum at industrial property, alternatives to the use of total petroleum hydrocarbons.

The generic numerical clean-up standards established in the rules adopted under division (B)(1) of this section shall be consistent with and equivalent in scope, content, and coverage to any applicable standard established by federal environmental laws and regulations adopted under them, including, without limitation, the "Federal Water Pollution Control Act Amendments of 1972," 86 Stat. 886, 33 U.S.C.A. 1251, as amended; the "Resource Conservation and Recovery Act of 1976," 90 Stat. 2806, 42 U.S.C.A. 6921, as amended; the "Toxic Substances Control Act," 90 Stat. 2003 (1976), 15 U.S.C.A. 2601, as amended; the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2779, 42 U.S.C.A. 9601, as amended; and the "Safe Drinking Water Act," 88 Stat. 1660 (1974), 42 U.S.C.A. 300f, as amended.

In order for the rules adopted under division (B)(1) of this section to require that any such federal environmental standard apply to a property, the property shall meet the requirements of the particular federal statute or regulation involved in the manner specified by the statute or regulation.

The generic numerical clean-up standards for petroleum at commercial or residential property shall be the standards established in rules adopted under division (B) of section 3737.882 [3737.88.2] of the Revised Code.

(2) (a) Procedures for performing property-specific risk assessments that would be performed at a property to demonstrate that the remedy evaluated in a risk assessment results in protection of public health and safety and the environment instead of complying with the generic numerical clean-up standards established in the rules adopted under division (B)(1) of this section. The risk assessment procedures shall describe a methodology to establish, on a property-specific basis, allowable levels of contamination to remain at a property to ensure protection of public health and safety and the environment on the property and off the property when the contamination is emanating off the property, taking into account all of the following:

(i) The implementation of treatment, storage, or disposal, or a combination thereof, of hazardous substances or petroleum;

(ii) The existence of institutional controls or activity and use limitations that eliminate or mitigate exposure to hazardous substances or petroleum through the restriction of access to hazardous substances or petroleum;

(iii) The existence of engineering controls that eliminate or mitigate exposure to hazardous substances or

petroleum through containment of, control of, or restrictions of access to hazardous substances or petroleum, including, without limitation, fences, cap systems, cover systems, and landscaping.

(b) The risk assessment procedures and levels of acceptable risk set forth in the rules adopted under division (B)(2) of this section shall be based upon all of the following:

(i) Scientific information, including, without limitation, toxicological information and actual or proposed human and environmental exposure;

(ii) Locational and climatic factors;

(iii) Surrounding land use and human activities;

(iv) Differing levels of remediation that may be required when an existing land use is continued compared to when a different land use follows the remediation.

(c) Any standards established pursuant to rules adopted under division (B)(2) of this section shall be no more stringent than standards established under the environmental statutes of this state and rules adopted under them for the same contaminant in the same environmental medium that are in effect at the time the risk assessment is conducted.

(3) Minimum standards for phase I property assessments. The standards shall specify the information needed to demonstrate that there is no reason to believe that contamination exists on a property. The rules adopted under division (B)(3) of this section, at a minimum, shall require that a phase I property assessment include all of the following:

(a) A review and analysis of deeds, mortgages, easements of record, and similar documents relating to the chain of title to the property that are publicly available or that are known to and reasonably available to the owner or operator;

(b) A review and analysis of any previous environmental assessments, property assessments, environmental studies, or geologic studies of the property and any land within two thousand feet of the boundaries of the property that are publicly available or that are known to and reasonably available to the owner or operator;

(c) A review of current and past environmental compliance histories of persons who owned or operated the property;

(d) A review of aerial photographs of the property that indicate prior uses of the property;

(e) Interviews with managers of activities conducted at the property who have knowledge of environmental conditions at the property;

(f) Conducting an inspection of the property consisting of a walkover;

(g) Identifying the current and past uses of the property, adjoining tracts of land, and the area surrounding the property, including, without limitation, interviews with persons who reside or have resided, or who are or were employed, within the area surrounding the property regarding the current and past uses of the property and adjacent tracts of land.

The rules adopted under division (B)(3) of this section shall establish criteria to determine when a phase II property assessment shall be conducted when a phase I property assessment reveals facts that establish a reason to believe that hazardous substances or petroleum have been treated, stored, managed, or disposed of on the property if the person undertaking the phase I property assessment wishes to obtain a covenant not to sue under section 3746.12 of the Revised Code.

(4) Minimum standards for phase II property assessments. The standards shall specify the information needed to

demonstrate that any contamination present at the property does not exceed applicable standards or that the remedial activities conducted at the property have achieved compliance with applicable standards. The rules adopted under division (B)(4) of this section, at a minimum, shall require that a phase II property assessment include all of the following:

(a) A review and analysis of all documentation prepared in connection with a phase I property assessment conducted within the one hundred eighty days before the phase II property assessment begins. The rules adopted under division (B)(4)(a) of this section shall require that if a period of more than one hundred eighty days has passed between the time that the phase I assessment of the property was completed and the phase II assessment begins, the phase II assessment shall include a reasonable inquiry into the change in the environmental condition of the property during the intervening period.

(b) Quality assurance objectives for measurements taken in connection with a phase II assessment;

(c) Sampling procedures to ensure the representative sampling of potentially contaminated environmental media;

(d) Quality assurance and quality control requirements for samples collected in connection with phase II assessments;

(e) Analytical and data assessment procedures;

(f) Data objectives to ensure that samples collected in connection with phase II assessments are biased toward areas where information indicates that contamination by hazardous substances or petroleum is likely to exist.

(5) Standards governing the conduct of certified professionals, criteria and procedures for the certification of professionals to issue no further action letters under section 3746.11 of the Revised Code, and criteria for the suspension and revocation of those certifications. The director shall take an action regarding a certification as a final action. The issuance, denial, renewal, suspension, and revocation of those certifications are subject to Chapter 3745 of the Revised Code, except that, in lieu of publishing an action regarding a certification in a newspaper of general circulation as required in section 3745.07 of the Revised Code, such an action shall be published on the environmental protection agency's web site and in the agency's weekly review not later than fifteen days after the date of the issuance, denial, renewal, suspension, or revocation of the certification and not later than thirty days before a hearing or public meeting concerning the action.

The rules adopted under division (B)(5) of this section shall do all of the following:

(a) Provide for the certification of environmental professionals to issue no further action letters pertaining to investigations and remedies in accordance with the criteria and procedures set forth in the rules. The rules adopted under division (B)(5)(a) of this section shall do at least all of the following:

(i) Authorize the director to consider such factors as an environmental professional's previous performance record regarding such investigations and remedies and the environmental professional's environmental compliance history when determining whether to certify the environmental professional;

(ii) Ensure that an application for certification is reviewed in a timely manner;

(iii) Require the director to certify any environmental professional who the director determines complies with those criteria;

(iv) Require the director to deny certification for any environmental professional who does not comply with those criteria.

(b) Establish an annual fee to be paid by environmental professionals certified pursuant to the rules adopted under division (B)(5)(a) of this section. The fee shall be established at an amount calculated to defray the costs to the agency for the required reviews of the qualifications of environmental professionals for certification and

for the issuance of the certifications.

(c) Develop a schedule for and establish requirements governing the review by the director of the credentials of environmental professionals who were deemed to be certified professionals under division (D) of section 3746.07 of the Revised Code in order to determine if they comply with the criteria established in rules adopted under division (B)(5) of this section. The rules adopted under division (B)(5)(c) of this section shall do at least all of the following:

(i) Ensure that the review is conducted in a timely fashion;

(ii) Require the director to certify any such environmental professional who the director determines complies with those criteria;

(iii) Require any such environmental professional initially to pay the fee established in the rules adopted under division (B)(5)(b) of this section at the time that the environmental professional is so certified by the director;

(iv) Establish a time period within which any such environmental professional who does not comply with those criteria may obtain the credentials that are necessary for certification;

(v) Require the director to deny certification for any such environmental professional who does not comply with those criteria and who fails to obtain the necessary credentials within the established time period.

(d) Require that any information submitted to the director for the purposes of the rules adopted under division (B)(5)(a) or (c) of this section comply with division (A) of section 3746.20 of the Revised Code;

(e) Authorize the director to suspend or revoke the certification of an environmental professional if the director finds that the environmental professional's performance has resulted in the issuance of no further action letters under section 3746.11 of the Revised Code that are not consistent with applicable standards or finds that the certified environmental professional has not substantially complied with section 3746.31 of the Revised Code;

(f) Authorize the director to suspend for a period of not more than five years or to permanently revoke a certified environmental professional's certification for any violation of or failure to comply with an ethical standard established in rules adopted under division (B)(5) of this section.

(g) Require the director to revoke the certification of an environmental professional if the director finds that the environmental professional falsified any information on the environmental professional's application for certification regarding the environmental professional's credentials or qualifications or any other information generated for the purposes of or use under this chapter or rules adopted under it;

(h) Require the director permanently to revoke the certification of an environmental professional who has violated or is violating division (A) of section 3746.18 of the Revised Code;

(i) Preclude the director from revoking the certification of an environmental professional who only conducts investigations and remedies at property contaminated solely with petroleum unless the director first consults with the director of commerce.

(6) Criteria and procedures for the certification of laboratories to perform analyses under this chapter and rules adopted under it. The issuance, denial, suspension, and revocation of those certifications are subject to Chapter 3745, of the Revised Code, and the director of environmental protection shall take any such action regarding a certification as a final action.

The rules adopted under division (B)(6) of this section shall do all of the following:

(a) Provide for the certification to perform analyses of laboratories in accordance with the criteria and procedures established in the rules adopted under division (B)(6)(a) of this section and establish an annual fee to

be paid by those laboratories. The fee shall be established at an amount calculated to defray the costs to the agency for the review of the qualifications of those laboratories for certification and for the issuance of the certifications. The rules adopted under division (B)(6)(a) of this section may provide for the certification of those laboratories to perform only particular types or categories of analyses, specific test parameters or group of test parameters, or a specific matrix or matrices under this chapter.

(b) Develop a schedule for and establish requirements governing the review by the director of the operations of laboratories that were deemed to be certified laboratories under division (E) of section 3746.07 of the Revised Code in order to determine if they comply with the criteria established in rules adopted under division (B)(6) of this section. The rules adopted under division (B)(6)(b) of this section shall do at least all of the following:

(i) Ensure that the review is conducted in a timely fashion;

(ii) Require the director to certify any such laboratory that the director determines complies with those criteria;

(iii) Require any such laboratory initially to pay the fee established in the rules adopted under division (B)(6)(a) of this section at the time that the laboratory is so certified by the director;

(iv) Establish a time period within which any such laboratory that does not comply with those criteria may make changes in its operations necessary for the performance of analyses under this chapter and rules adopted under it in order to be certified by the director;

(v) Require the director to deny certification for any such laboratory that does not comply with those criteria and that fails to make the necessary changes in its operations within the established time period.

(c) Require that any information submitted to the director for the purposes of the rules adopted under division (B)(6)(a) or (b) of this section comply with division (A) of section 3746.20 of the Revised Code;

(d) Authorize the director to suspend or revoke the certification of a laboratory if the director finds that the laboratory's performance has resulted in the issuance of no further action letters under section 3746.11 of the Revised Code that are not consistent with applicable standards;

(e) Authorize the director to suspend or revoke the certification of a laboratory if the director finds that the laboratory falsified any information on its application for certification regarding its credentials or qualifications;

(f) Require the director permanently to revoke the certification of a laboratory that has violated or is violating division (A) of section 3746.18 of the Revised Code.

(7) Information to be included in a no further action letter prepared under section 3746.11 of the Revised Code, including, without limitation, all of the following:

(a) A summary of the information required to be submitted to the certified environmental professional preparing the no further action letter under division (C) of section 3746.10 of the Revised Code;

(b) Notification that a risk assessment was performed in accordance with rules adopted under division (B)(2) of this section if such an assessment was used in lieu of generic numerical clean-up standards established in rules adopted under division (B)(1) of this section;

(c) The contaminants addressed at the property, if any, their source, if known, and their levels prior to remediation;

(d) The identity of any other person who performed work to support the request for the no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code and the nature and scope of the work performed by that person;

(e) A list of the data, information, records, and documents relied upon by the certified environmental professional in preparing the no further action letter.

(8) Methods for determining fees to be paid for the following services provided by the agency under this chapter and rules adopted under it:

(a) Site- or property-specific technical assistance in developing or implementing plans in connection with a voluntary action;

(b) Reviewing applications for and issuing consolidated standards permits under section 3746.15 of the Revised Code and monitoring compliance with those permits;

(c) Negotiating, preparing, and entering into agreements necessary for the implementation and administration of this chapter and rules adopted under it;

(d) Reviewing no further action letters, issuing covenants not to sue, and monitoring compliance with any terms and conditions of those covenants and with operation and maintenance agreements entered into pursuant to those covenants, including, without limitation, conducting audits of properties where voluntary actions are being or were conducted under this chapter and rules adopted under it.

The fees established pursuant to the rules adopted under division (B)(8) of this section shall be at a level sufficient to defray the direct and indirect costs incurred by the agency for the administration and enforcement of this chapter and rules adopted under it other than the provisions regarding the certification of professionals and laboratories.

(9) Criteria for selecting the no further action letters issued under section 3746.11 of the Revised Code that will be audited under section 3746.17 of the Revised Code, and the scope and procedures for conducting those audits. The rules adopted under division (B)(9) of this section, at a minimum, shall require the director to establish priorities for auditing no further action letters to which any of the following applies:

(a) The letter was prepared by an environmental professional who was deemed to be a certified professional under division (D) of section 3746.07 of the Revised Code, but who does not comply with the criteria established in rules adopted under division (B)(5) of this section as determined pursuant to rules adopted under division (B)(5)(d) of this section;

(b) The letter was submitted fraudulently;

(c) The letter was prepared by a certified environmental professional whose certification subsequently was revoked in accordance with rules adopted under division (B)(5) of this section, or analyses were performed for the purposes of the no further action letter by a certified laboratory whose certification subsequently was revoked in accordance with rules adopted under division (B)(6) of this section;

(d) A covenant not to sue that was issued pursuant to the letter was revoked under this chapter;

(e) The letter was for a voluntary action that was conducted pursuant to a risk assessment in accordance with rules adopted under division (B)(2) of this section;

(f) The letter was for a voluntary action that included as remedial activities engineering controls or institutional controls or activity and use limitations authorized under section 3746.05 of the Revised Code.

The rules adopted under division (B)(9) of this section shall provide for random audits of no further action letters to which the rules adopted under divisions (B)(9)(a) to (f) of this section do not apply.

(10) A classification system to characterize ground water according to its capability to be used for human use and its impact on the environment and a methodology that shall be used to determine when ground water that has become contaminated from sources on a property for which a covenant not to sue is requested under

section 3746.11 of the Revised Code shall be remediated to the standards established in the rules adopted under division (B)(1) or (2) of this section.

(a) In adopting rules under division (B)(10) of this section to characterize ground water according to its capability for human use, the director shall consider all of the following:

(i) The presence of legally enforceable, reliable restrictions on the use of ground water, including, without limitation, local rules or ordinances;

(ii) The presence of regional commingled contamination from multiple sources that diminishes the quality of ground water;

(iii) The natural quality of ground water;

(iv) Regional availability of ground water and reasonable alternative sources of drinking water;

(v) The productivity of the aquifer;

(vi) The presence of restrictions on the use of ground water implemented under this chapter and rules adopted under it;

(vii) The existing use of ground water.

(b) In adopting rules under division (B)(10) of this section to characterize ground water according to its impacts on the environment, the director shall consider both of the following:

(i) The risks posed to humans, fauna, surface water, sediments, soil, air, and other resources by the continuing presence of contaminated ground water;

(ii) The availability and feasibility of technology to remedy ground water contamination.

(11) Governing the application for and issuance of variances under section 3746.09 of the Revised Code;

(12) (a) In the case of voluntary actions involving contaminated ground water, specifying the circumstances under which the generic numerical clean-up standards established in rules adopted under division (B)(1) of this section and standards established through a risk assessment conducted pursuant to rules adopted under division (B)(2) of this section shall be inapplicable to the remediation of contaminated ground water and under which the standards for remediating contaminated ground water shall be established on a case-by-case basis prior to the commencement of the voluntary action pursuant to rules adopted under division (B)(12)(b) of this section;

(b) Criteria and procedures for the case-by-case establishment of standards for the remediation of contaminated ground water under circumstances in which the use of the generic numerical clean-up standards and standards established through a risk assessment are precluded by the rules adopted under division (B)(12)(a) of this section. The rules governing the procedures for the case-by-case development of standards for the remediation of contaminated ground water shall establish application, public participation, adjudication, and appeals requirements and procedures that are equivalent to the requirements and procedures established in section 3746.09 of the Revised Code and rules adopted under division (B)(11) of this section, except that the procedural rules shall not require an applicant to make the demonstrations set forth in divisions (A)(1) to (3) of section 3746.09 of the Revised Code.

(13) A definition of the evidence that constitutes sufficient evidence for the purpose of division (A)(5) of section 3746.02 of the Revised Code.

At least thirty days before filing the proposed rules required to be adopted under this section with the secretary of state, director of the legislative service commission, and joint committee on agency rule review in accordance with divisions (B) and (H) of section 119.03 of the Revised Code, the director of environmental protection

shall hold at least one public meeting on the proposed rules in each of the five districts into which the agency has divided the state for administrative purposes.

HISTORY: 145 v S 221 (Eff 9-28-94); 146 v H 670. Eff 12-2-96; 150 v H 516, § 1, eff. 12-30-04; 151 v H 66, § 101.01, eff. 9-29-05.

§ 3746.05. Institutional controls or activity and use limitations.

A remedy or remedial activity conducted under this chapter may attain applicable standards otherwise established in this chapter and rules adopted under it through the use of institutional controls or activity and use limitations that restrict the use of a property or through the removal of, treatment of, transportation for treatment or disposal of, disposal of, or use of engineering controls that contain or control the release of hazardous substances or petroleum at or from a property. Any such institutional controls or activity and use limitations that restrict the use of a property shall ensure that the property is used only for purposes that comply with the applicable standards established in this chapter and rules adopted under it pertaining to the intended use of the property after the completion of the voluntary action, as the intended use is specified in the documents establishing the institutional controls or activity and use limitations. If a property is subject to institutional controls or activity and use limitations and is put to a use that does not comply with the institutional controls or activity and use limitations specified in the documents establishing the institutional controls or activity and use limitations, the covenant not to sue issued under section 3746.12 of the Revised Code for the property in connection with the voluntary action for which the institutional controls or activity and use limitations were established is hereby declared to be void on and after the date of the commencement of the noncomplying use.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.06. Attaining background level of contaminant sufficient; compliance with ground water standards.

(A) If applicable standards otherwise established in this chapter and rules adopted under it establish a contamination level for a hazardous substance or petroleum that is below the background level of the hazardous substance or petroleum, the voluntary action conducted at a property is required to achieve only the background level of the hazardous substance or petroleum, notwithstanding the contamination level established in the applicable standard.

(B) If the ground water underlying a property complies with standards for residential use established in or pursuant to rules adopted under division (B)(1) or (2) of section 3746.04 of the Revised Code, the remedy or remedial activities undertaken in connection with a voluntary action to address sources of potential ground water contamination at or upon the property shall ensure the continued compliance of the ground water underlying the property with those standards for residential use.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.07. Standards and requirements governing until rules take effect.

(A) Until such time as the director of environmental protection adopts rules under divisions (B)(1), (2), and

(10) of section 3746.04 of the Revised Code, the following standards and requirements shall govern voluntary actions taken under this chapter:

(1) All point source discharges of pollutants into the waters of the state, as defined in section 6111.01 of the Revised Code, that occur from or on the property shall comply with the applicable effluent limitations established pursuant to Chapter 6111. of the Revised Code.

(2) For hazardous substances having carcinogenic effects that are present in media other than ground water, the carcinogenic risk shall be reduced to within the range of one excess cancer in a population of ten thousand to one excess cancer in a population of one million. For hazardous substances having noncarcinogenic effects that are present in media other than ground water, the noncarcinogenic risk shall be reduced to a level not exceeding a hazard index of one. In either case, the determination of the appropriate risk level shall take into account all of the following:

(a) Actual human exposures to the hazardous substance contaminating the property of persons on and off the property due to the presence of the hazardous substance at the property and its migration off the property;

(b) The current and proposed uses of the property;

(c) The uses of the surrounding land.

For the purposes of division (A)(2) of this section, "carcinogenic effects," "carcinogenic risk," "noncarcinogenic effects," "noncarcinogenic risk," and "hazard index of one" have the same meanings as in the "risk assessment guidance for superfund, volume I health evaluation manual (part A), interim final," (EPA/540/1-89/002, December, 1989).

(3) A covenant not to sue shall not be issued under section 3746.12 of the Revised Code for property if ground water underlying the property, emanating from the property, or both is contaminated.

(4) For releases of petroleum that are not subject to the corrective action requirements established in rules adopted under division (B) of section 3737.882 [3737.88.2] of the Revised Code, the voluntary action shall reduce the level of petroleum hydrocarbons and petroleum product constituents to levels at or below the action levels for which a corrective action is required by those rules.

(B) Until such time as the director adopts rules establishing standards governing phase I property assessments under division (B)(3) of section 3746.04 of the Revised Code, standard E 1527 practice for environmental site assessments: phase I environmental site assessment process by the American society for testing and materials shall govern phase I property assessments conducted for the purposes of this chapter. If a phase I property assessment conducted under this division reveals facts that establish a reason to believe that hazardous substances or petroleum have been treated, stored, managed, or disposed of on the property, and if the person undertaking the phase I property assessment wishes to obtain a covenant not to sue under section 3746.12 of the Revised Code, a phase II property assessment shall be conducted in accordance with division (C) of this section or with rules adopted under division (B)(4) of section 3746.04 of the Revised Code, as appropriate.

(C) Until such time as the director adopts rules establishing standards governing phase II property assessments under division (B)(4) of section 3746.04 of the Revised Code, a phase II property assessment shall demonstrate that any contamination present at the property does not exceed applicable standards or that the remedial activities conducted at the property have achieved compliance with applicable standards. A phase II property assessment conducted pursuant to this division shall consist of an evaluation of the current environmental conditions of the property, including, at a minimum, all of the components identified in divisions (B)(4)(a) to (f) of section 3746.04 of the Revised Code and the identification through sampling of all sources of contamination on or at the property.

(D) Until such time as the rules adopted by the director under division (B)(5) of section 3746.04 of the Revised Code require the certification of professionals to issue no further action letters under section 3746.11

of the Revised Code, a person who, on the effective date of this section, meets any of the following is hereby deemed to be a certified professional for the purpose of issuing no further action letters under that section pertaining to all investigations and remedies:

(1) A person who is a professional engineer registered under Chapter 4733 of the Revised Code, who has at least five years' practical experience in the investigation or remediation of releases of hazardous substances or petroleum into the environment, and who has at least three years' experience in directly supervising projects that remediated releases of hazardous substances or petroleum into the environment;

(2) A person who has been duly certified as a professional geologist by the American institute of professional geologists, who has at least five years' practical experience in the investigation or remediation of releases of hazardous substances or petroleum into the environment, and who has at least three years' experience in directly supervising projects that remediated releases of hazardous substances or petroleum into the environment;

(3) A person who has been duly certified as an industrial hygienist by the American board of industrial hygiene, who has at least five years' practical experience in the investigation or remediation of releases of hazardous substances or petroleum, and who has at least three years' experience in directly supervising projects that remediated releases of hazardous substances or petroleum into the environment;

(4) A person holding at least a master's degree in toxicology or a related field from an accredited university, who has at least five years' practical experience in evaluating the human health risk and environmental risk associated with releases of hazardous substances or petroleum into the environment, and who has at least three years' experience in directly supervising projects that remediated releases of hazardous substances or petroleum into the environment.

Prior to his first submission of a no further action letter to the director under section 3746.11 of the Revised Code, any such person shall submit to the director a copy of his credentials, a certified statement of his relevant practical experience, a statement indicating that he has not been disqualified by an agency in this state or another state from performing environmental work, and a fee of two thousand dollars. Upon payment of that fee, the person need not pay another fee to the director for the purposes of this chapter until he is certified by the director pursuant to the rules adopted under division (B)(5)(c) of section 3746.04 of the Revised Code.

(E) Until the rules adopted by the director under division (B)(6) of section 3746.04 of the Revised Code require the certification of laboratories to conduct analyses for the purposes of the voluntary action program under this chapter, laboratories that, on the effective date of this section, meet either of the following are hereby deemed to be certified laboratories for the purposes of this chapter:

(1) Any laboratory that is participating in the contract laboratory program of the United States environmental protection agency and that meets the requirements set forth in the "user's guide to the contract laboratory program" (1991) of the office of emergency and remedial response of that agency and the "statement of works for organic and/or inorganic analyses" of that agency;

(2) Any laboratory approved by the director under division (C)(6) of section 6109.04 of the Revised Code to perform analyses of drinking water parameters.

Prior to first performing work for the purpose of a voluntary action under this chapter, any such laboratory shall pay a fee of two thousand dollars to the director. Upon payment of that fee, the laboratory need not pay another fee to the director for the purposes of this chapter until it is certified by the director pursuant to the rules adopted under division (B)(6)(b) of section 3746.04 of the Revised Code.

(F) Until such time as the director adopts rules under division (B)(7) of section 3746.04 of the Revised Code, a no further action letter prepared under section 3746.11 of the Revised Code shall include the information specified in divisions (B)(7)(a) to (e) of section 3746.04 of the Revised Code.

(G) Until such time as the director adopts rules under divisions (B)(5), (6), and (8) of section 3746.04 of the

Revised Code, he shall not accept any no further action letters under section 3746.11 of the Revised Code on and after the date one year after the effective date of this section and shall issue not more than two hundred covenants not to sue under section 3746.12 of the Revised Code.

(H) Until such time as the director adopts rules under division (B)(8) of section 3746.04 of the Revised Code establishing methods for determining fees to be paid for services provided by the environmental protection agency, the director may do both of the following:

(1) Establish the fee to be paid for reviewing an application for and issuing a consolidated standards permit under section 3746.15 of the Revised Code. Any such fee shall be established on a case-by-case basis in an amount sufficient to defray the direct and indirect costs incurred by the agency for reviewing the application and issuing the permit.

(2) Require any person with whom the director has entered into an operation and maintenance agreement under division (A)(3) of section 3746.12 of the Revised Code to pay the agency for the direct and indirect costs incurred by the agency in monitoring compliance with the agreement. The director shall negotiate a schedule with any such person for the payment of those costs.

Any fee or payment required under division (H) of this section is in addition to the fee established under division (C) of section 3746.13 of the Revised Code for the issuance of a covenant not to sue.

HISTORY: 145 v S 221. Eff 9-28-94.

[§ 3746.07.1] § 3746.071. Obligations of certified professionals; suspension or revocation for noncompliance.

(A) As used in this section, "certified professional" means a certified professional deemed to be certified under division (D) of section 3746.07 of the Revised Code.

(B) A certified professional shall do all of the following:

(1) Protect the safety, health, and welfare of the public in the performance of professional duties. If a circumstance arises where the certified professional faces a situation where the safety, health, or welfare of the public would not be protected, the certified professional shall do all of the following:

(a) Sever the relationship with the certified professional's employer or client;

(b) Refuse to accept responsibility for the design, report, or statement involved;

(c) Notify the director of environmental protection if, in the opinion of the certified professional, the situation is sufficiently important.

(2) Undertake to perform assignments only when the certified professional or the certified professional's consulting support is qualified by training and experience in the specific technical fields involved;

(3) Be completely objective in any professional report, statement, or testimony. The certified professional shall include all relevant and pertinent information in the report, statement, or testimony when the result of an omission would or reasonably could lead to a fallacious conclusion.

(4) Express an opinion as a technical or expert witness before any court, commission, or other tribunal only when it is founded upon adequate knowledge of the facts in issue, upon a background of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of the testimony.

(C) A certified professional shall not issue statements, criticisms, or arguments on matters connected with public policy that are inspired or paid for by an interested party, unless the certified professional has prefaced the remarks by explicitly identifying the certified professional, by disclosing the identity of the parties on whose behalf the certified professional is speaking, and by revealing the existence of any pecuniary interest the certified professional may have in the instant matters.

(D) (1) A certified professional shall conscientiously avoid any conflict of interest with the certified professional's employer or client.

(2) A certified professional promptly shall inform the certified professional's employer or client of any business association, interests, or circumstances that could influence the certified professional's judgment or the quality of the certified professional's service to the employer or client.

(3) A certified professional shall not accept compensation, financial or otherwise, from more than one party for services on or pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties or their duly authorized agents.

(4) A certified professional shall not solicit or accept financial or other valuable considerations from material or equipment suppliers for specifying their products.

(5) A certified professional shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing directly with the certified professional's employer or client in connection with the work for which the certified professional is responsible.

(E) (1) A certified professional shall not pay, solicit, or offer, directly or indirectly, any bribe or commission for professional employment with the exception of payment of the usual commission for securing salaried positions through licensed employment agencies.

(2) A certified professional shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. A certified professional may submit proposed fee information prior to selection to serve as a certified professional under this chapter and rules adopted under it.

(3) A certified professional shall not falsify or permit misrepresentation of the certified professional's or the certified professional's associates' academic or professional qualifications. The certified professional shall not misrepresent or exaggerate the certified professional's degree of responsibility in or for the subject matter of prior assignments.

(4) Brochures or other presentations incident to the solicitation of employment by a certified professional shall not misrepresent pertinent facts concerning the certified professional's employers, employees, associates, or joint ventures, or the past accomplishments of any of them, with the intent and purpose of enhancing the certified professional's qualifications for the certified professional's work.

(F) (1) A certified professional shall not sign or seal professional work for which the certified professional does not have personal professional knowledge and direct supervisory control and responsibility.

(2) A certified professional shall not knowingly associate with, or permit the use of the certified professional's own name or the name of the certified professional's firm in, a business venture by any person or firm that the certified professional knows, or has reason to believe, is engaging in business or professional practices of a fraudulent or dishonest nature.

(3) If a certified professional has knowledge or reason to believe that another person or firm has violated any of the provisions of this chapter or any requirement of this section, the certified professional shall present the information to the director in writing.

(G) The director, in accordance with rules adopted under section 3746.04 of the Revised Code, may suspend

for a period of not more than five years or permanently revoke a certified professional's certification for a violation of or failure to comply with any requirement or obligation set forth in this section.

HISTORY: 145 v S 221. Eff 9-28-94; 151 v H 66, § 101.01, eff. 9-29-05.

§ 3746.08. Repealed.

Repealed, 150 v H 516, § 2 [145 v S 221 (Eff 9-28-94); 146 v S 162. Eff 10-29-95]. Eff 12-30-04.

§ 3746.09. Application for variance from standards.

(A) A person who proposes to enter into or who is participating in the voluntary action program under this chapter and rules adopted under it, in accordance with this section and rules adopted under division (B)(11) of section 3746.04 of the Revised Code, may apply to the director of environmental protection for a variance from applicable standards otherwise established in this chapter and rules adopted under it. The application for a variance shall be prepared by a certified professional. The director shall issue a variance from those applicable standards only if the application makes all of the following demonstrations to the director's satisfaction:

(1) Either or both of the following:

(a) It is technically infeasible to comply with the applicable standards otherwise established at the property named in the application;

(b) The costs of complying with the applicable standards otherwise established at the property substantially exceed the economic benefits.

(2) The proposed alternative standard or set of standards and terms and conditions set forth in the application will result in an improvement of environmental conditions at the property and ensure that public health and safety will be protected.

(3) The establishment of and compliance with the alternative standard or set of standards and terms and conditions are necessary to promote, protect, preserve, or enhance employment opportunities or the reuse of the property named in the application.

A variance issued under this section shall state the specific standard or standards whose terms are being varied and shall set forth the specific alternative standard or set of standards and the terms and conditions imposed on the applicant in their place. A variance issued under this section shall include only standards and terms and conditions proposed by the applicant in the application, except that the director may impose any additional or alternative terms and conditions that the director determines to be necessary to ensure that public health and safety will be protected. If the director finds that compliance with any standard or term or condition proposed by the applicant will not protect public health and safety and that the imposition of additional or alternative terms and conditions will not ensure that public health or safety will be protected, the director shall disapprove the application and shall include in the order of denial the specific findings on which the denial was based.

(B) Variances shall be issued or denied in accordance with this section, rules adopted under division (B)(11) of section 3746.04 of the Revised Code, and Chapter 3745. of the Revised Code. Upon determining that an application for a variance is complete, the director shall schedule a public meeting on the application to be held within ninety days after the director determines that the application is complete in the county in which is located the property to which the application pertains.

(C) Not less than thirty days before the date scheduled for the public meeting on an application for a variance,

the director shall publish notice of the public meeting and that the director will receive written comments on the application for a period of forty-five days commencing on the date of the publication of the notice. The notice shall contain all of the following information, at a minimum:

- (1) The address of the property to which the application pertains;
- (2) A brief summary of the alternative standards and terms and conditions proposed by the applicant;
- (3) The date, time, and location of the public meeting.

The notice shall be published in a newspaper of general circulation in the county in which the property is located and, if the property is located in close proximity to the boundary of the county with an adjacent county, as determined by the director, shall be published in a newspaper of general circulation in the adjacent county. Concurrently with the publication of the notice of the public meeting, the director shall mail notice of the application, comment period, and public meeting to the owner of each parcel of land that is adjacent to the affected property and to the legislative authority of the municipal corporation or township, and county, in which the affected property is located. The notices mailed to the adjacent land owners and legislative authorities shall contain the same information as the published notice.

(D) At the public meeting on an application for a variance, the applicant, or a representative of the applicant who is knowledgeable about the affected property and the application, shall present information regarding the application and the basis of the request for the variance and shall respond to questions from the public regarding the affected property and the application. A representative of the environmental protection agency who is familiar with the affected property and the application shall attend the public meeting to hear the public's comments and to respond to questions from the public regarding the affected property and the application. A stenographic record of the proceedings at the public meeting shall be kept and shall be made a part of the administrative record regarding the application.

(E) Within ninety days after conducting the public meeting on an application for a variance under division (D) of this section, the director shall issue a proposed action to the applicant in accordance with section 3745.07 of the Revised Code that indicates the director's intent with regard to the issuance or denial of the application. When considering whether to issue or deny the application or whether to impose terms and conditions of the variance that are in addition or alternative to those proposed by the applicant, the director shall consider comments on the application made by the public at the public meeting and written comments on the application received from the public.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04; 151 v S 124, § 1, eff. 6-27-05.

§ 3746.10. Voluntary action to identify and address sources of contamination; seeking of no further action letter.

(A) Except as otherwise provided in section 3746.02 of the Revised Code, any person may undertake a voluntary action under this chapter and rules adopted under it to identify and address potential sources of contamination by hazardous substances or petroleum of soil, sediments, surface water, or ground water on or underlying property and to establish that the property meets applicable standards. The voluntary action may include any one or more of the following elements:

- (1) A phase I property assessment conducted in accordance with rules adopted under division (B)(3) of section 3746.04 of the Revised Code or division (B) of section 3746.07 of the Revised Code, as appropriate;
- (2) A phase II property assessment conducted in accordance with rules adopted under division (B)(4) of section 3746.04 of the Revised Code or division (C) of section 3746.07 of the Revised Code, as appropriate;

- (3) A sampling plan;
- (4) A remediation plan;
- (5) Remedial activities;
- (6) Such other activities as the person undertaking the voluntary action considers to be necessary or appropriate to address the contamination.

When the person undertaking a voluntary action determines that the property meets applicable standards, the person may seek a no further action letter from a certified professional. A no further action letter may be issued for the property at any stage of the identification of potential hazardous substance or petroleum contamination or remedial activities after a phase I or II property assessment has demonstrated that there is no reason to believe that there has been a release of hazardous substances or petroleum at or upon the property, that information indicates that there has been a release of hazardous substances or petroleum at or upon the property, but that the release is not in excess of applicable standards, or that if there has been such a release in excess of applicable standards, those standards have been achieved through remedial activities or will be achieved in accordance with the timeframes established in an operation and maintenance agreement entered into under division (A)(3) of section 3746.12 of the Revised Code or in such an agreement and a consolidated standards permit issued under section 3746.15 of the Revised Code.

(B) (1) A person who is participating in the voluntary action program under this chapter and rules adopted under it shall do both of the following:

(a) Utilize the services of a certified laboratory to perform any analyses that form the basis for the issuance of a no further action letter for a property and ensure that a laboratory performs in connection with a voluntary action only those analyses for which it is certified under rules adopted under division (B)(6) of section 3746.04 of the Revised Code or for which it is qualified prior to the adoption of those rules;

(b) Utilize the services of a certified professional to verify that the property and any remedial activities undertaken at the property in connection with a voluntary action comply with applicable standards and, if those standards are met, to issue to the person a no further action letter for the property. For the purposes of such a verification, the certified professional shall perform and review all work that was conducted to support the request for the no further action letter or shall ensure that the work has been performed and reviewed by other persons with expertise and competence in areas other than those of the certified professional's expertise and competence as necessary for the issuance of the no further action letter.

(2) No person who is participating in the voluntary action program shall do any of the following:

(a) If the person also is a certified professional, prepare a no further action letter in connection with a voluntary action conducted at a property that the certified professional owns or operates;

(b) Utilize the services of a certified professional who is employed by, affiliated with, or related to the participant or who was employed by or affiliated with the participant during the year preceding the date that the participant entered into the contract to utilize the services of the certified professional in connection with the voluntary action;

(c) Utilize the services of a certified laboratory that is owned by or affiliated with the participant, that is owned by a person related to the participant, or that was owned by or affiliated with the participant during the year preceding the date that the participant entered into the contract to utilize the services of the certified laboratory in connection with the voluntary action, to perform any analyses that form the basis for the issuance of a no further action letter in connection with a voluntary action.

A covenant not to sue issued under section 3746.12 of the Revised Code to a person who violated division (B) (2)(a), (b), or (c) of this section with respect to the no further action letter upon which issuance of the covenant

was based is void.

Except as otherwise provided in division (B)(2) of this section, a person who is participating in the voluntary action program may utilize an independent contractor to serve as a certified professional or certified laboratory.

(C) In order to obtain a no further action letter, a person undertaking a voluntary action shall submit to a certified professional all of the following, as applicable:

(1) Information demonstrating that there is no contamination by hazardous substances or petroleum of soil, sediments, surface water, or ground water on or underlying the property in concentrations exceeding applicable standards. The demonstrations shall be based upon the findings of a phase I or phase II property assessment.

(2) If remedial activities were conducted in connection with the voluntary action, data demonstrating that the remedy meets applicable standards or will achieve applicable standards in accordance with the timeframes established in an operation and maintenance agreement entered into under division (A)(3) of section 3746.12 of the Revised Code or in such an agreement and a consolidated standards permit issued under section 3746.15 of the Revised Code;

(3) (a) If the remedy relies on institutional controls or restrictions on the use of the property to achieve applicable standards, a demonstration that the institutional controls or the use restrictions have been recorded in the office of the county recorder of the county in which the property is located, or have been entered in the appropriate register for registered land as defined in section 5309.01 of the Revised Code, in compliance with section 3746.14 of the Revised Code;

(b) If the person undertaking a voluntary action seeks to obtain a covenant not to sue and if the remedy relies on activity and use limitations to achieve applicable standards, a demonstration that the activity and use limitations have been developed in accordance with this chapter and rules adopted under it and are contained in a proposed environmental covenant that meets the requirements established in section 5301.82 of the Revised Code.

(4) If the remedy relies on engineering controls that contain or control the release of hazardous substances or petroleum at or from the property, a plan for the proper operation and maintenance of the engineering controls.

(D) Except as otherwise specifically provided in this chapter and rules adopted under it, voluntary actions under this chapter and rules adopted under it 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.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.11. Duties of certified professional in connection with no further action letter; submission to director.

(A) After receiving the demonstrations and operation and maintenance plan, if any, required to be submitted to a certified professional under division (C) of section 3746.10 of the Revised Code, the certified professional shall review them to verify whether the property where the voluntary action was undertaken complies with applicable standards or shall ensure that they have been reviewed by another person or persons who performed work to support the request for the no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code. If, on the basis of the best knowledge, information, and belief of the certified professional, the certified professional concludes that the property meets applicable standards, the certified professional shall prepare a no further action letter for the property. The no further action letter shall contain all the information specified in rules adopted under division (B)(7) of section 3746.04 of the Revised Code or in division (E) of section 3746.07 of the Revised Code, as applicable.

Upon completion of a no further action letter, the certified professional shall send a copy of the letter to the person who undertook the voluntary action. The letter shall be accompanied by a written request that the person notify the certified professional as to whether the person wishes to submit the no further action letter to the director of environmental protection and by a written notice informing the person that the original letter may be submitted to the director only by a certified professional and that the person may receive a covenant not to sue from the director in connection with the voluntary action only if the no further action letter for the voluntary action is submitted to the director on the person's behalf by the certified professional.

Promptly after receipt of the letter and request, the person who undertook the voluntary action shall send written notice to the certified professional informing the certified professional as to whether the person wishes to submit the letter to the director and shall send a copy of the notice to the director. If the person's notice indicates that the person wishes to have the no further action letter submitted to the director, promptly after receipt of the notice, the certified professional shall submit the original no further action letter, together with a proposed environmental covenant, if applicable, and a proposed operation and maintenance agreement, if applicable, to the director by certified mail on behalf of the person who undertook the voluntary action. If the person who undertook the voluntary action notifies the certified professional that the person does not wish to submit the no further action letter to the director, the certified professional shall send the original letter to the person promptly after receiving the notice.

(B) If after reviewing the demonstrations required to be submitted to the certified professional under division (C) of section 3746.10 of the Revised Code, the certified professional finds that the property where the voluntary action was undertaken does not comply with applicable standards, the certified professional shall send to the person who undertook the voluntary action written notice of that fact and of the certified professional's inability to issue a no further action letter for the property.

(C) A certified professional shall prepare a summary report detailing the certified professional's findings and conclusions about the environmental conditions at the property concerning which the professional was requested to prepare a no further action letter and the remedial activities undertaken to mitigate or abate any threat to public health and safety and the environment, including, without limitation, all of the following:

- (1) A description of the nature and extent of contamination emanating from sources on the property;
- (2) A risk assessment performed in accordance with rules adopted under division (B)(2) of section 3746.04 of the Revised Code if such an assessment was used in lieu of generic numerical clean-up standards established in rules adopted under division (B)(1) of that section;
- (3) A description of any remedy conducted at the property and how the remedy complies with applicable standards;
- (4) A description of any plan for the proper operation and maintenance of engineering controls identified under division (C)(4) of section 3746.10 of the Revised Code;
- (5) Any documents prepared by any other person who performed work to support the request for the no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code.

(D) A certified professional shall maintain all documents and data prepared or acquired by the certified professional in connection with a no further action letter for not less than ten years after the date of issuance of the letter or after the notice required under division (B) of this section has been sent, as applicable, or for a longer period as determined in rules adopted under section 3746.04 of the Revised Code. The director shall have access to those documents and data in accordance with section 3746.18 or 3746.31 of the Revised Code.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.12. Issuance or denial of covenant not to sue; revocation.

(A) Except as provided in division (C) of this section, the director of environmental protection shall issue to a person on behalf of whom a certified professional has submitted to the director an original no further action letter and accompanying verification under division (A) of section 3746.11 of the Revised Code a covenant not to sue for the property that is named in the letter. The director shall not issue a covenant not to sue if an original no further action letter is submitted to him by any person other than the certified professional who prepared the letter or if a copy of the letter is submitted to him.

A covenant not to sue shall contain both of the following, as applicable:

(1) 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 when the property has undergone a phase I or a phase II property assessment in compliance with this chapter and rules adopted under it or has been the subject of remedial activities conducted under this chapter and rules adopted under it to address a release of hazardous substances or petroleum and such an assessment or those activities demonstrate or result in compliance with applicable standards, except:

(a) As otherwise specifically provided in this chapter or as may be conditioned by the director under this chapter;

(b) For claims for natural resource damages the state may have pursuant to section 107 or 113 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781 and 2792, 42 U.S.C.A. 9607 and 9613, as amended;

(c) For claims the state may have pursuant to section 107 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781, 42 U.S.C.A. 9607, as amended, for costs other than those for damages to natural resources, provided that the state incurs those other costs as a result of an action by the president of the United States under section 104, 106, 107, or 122 of that act or pursuant to section 3746.29 of the Revised Code.

(2) If the voluntary action involves the use of engineering controls that contain and control the release of hazardous substances or petroleum at or from the property in order to comply with applicable standards, all of the following:

(a) A provision requiring that the person enter into an operation and maintenance agreement with the director that ensures that all engineering controls are maintained so that the remedy is protective of public health and safety and the environment; that includes provisions requiring the person to conduct monitoring for compliance with the engineering controls and the applicable standards upon which issuance of the covenant was based, and periodically to report the findings of the monitoring to the director, as specified in the agreement; and that includes financial assurances that the remedy will remain operational and functional;

(b) A provision requiring the transferor of a covenant that contains an operation and maintenance agreement for engineering controls to notify the director whenever a transfer or assignment of the covenant or property to which it applies occurs;

(c) A provision revoking the covenant if the engineering controls are violated or are no longer in place and the person has not reinstated the controls within a reasonable period of time as determined in accordance with the covenant.

(B) (1) The release provided under division (A)(1) of this section remains effective only for as long as the property or portion thereof to which the covenant pertains continues to comply with the applicable standards upon which the issuance of the covenant was based.

(2) Upon finding that a property or portion thereof to which a covenant not to sue pertains no longer complies with the applicable standards upon which issuance of the covenant was based, the director, by certified mail, receipt requested, shall mail notice of that fact and the requirements of division (B)(3) of this section to the person responsible for maintaining compliance with those standards.

(3) Unless the recipient of a notice provided under division (B)(2) of this section, within thirty days after the mailing of the notice, notifies the director of his intention to return the property or portion thereof to compliance with the applicable standards upon which issuance of the covenant was based and enters into a compliance schedule agreement with the director, the director, by issuance of an order as a final action under Chapter 3745 of the Revised Code, shall revoke the covenant. The compliance schedule agreement shall establish a reasonable period of time for returning to compliance with those applicable standards.

(4) Upon finding that a person with whom he has entered into a compliance schedule agreement under division (B)(3) of this section has failed to return the property or portion thereof to which the agreement pertains to compliance with the applicable standards within the time established in the agreement, the director, by issuance of an order as a final action under Chapter 3745 of the Revised Code, shall revoke the covenant applicable to the property or portion thereof.

(C) The director shall deny a covenant not to sue as a final action for any of the following reasons:

(1) The no further action letter submitted on behalf of the person seeking the covenant not to sue does not comply with section 3746.11 of the Revised Code and any rules adopted under this chapter regarding no further action letters;

(2) The director determines from information available to him that a remedy identified in the no further action letter does not protect public health and safety and the environment;

(3) The no further action letter was submitted fraudulently.

(D) The director shall not revoke a covenant not to sue issued for property for which a voluntary action was conducted in accordance with standards and procedures established in section 3746.07 of the Revised Code solely on the basis that the voluntary action was conducted in accordance with those standards and procedures.

(E) Unless a covenant not to sue issued under this section is revoked through the operation of a provision of the covenant described in division (A)(2)(c) of this section, or under division (B) of this section, division (B)(2) of section 3746.18 of the Revised Code, or division (B) of section 3746.19 of the Revised Code, the covenant shall remain effective as long as the property complies with the applicable standards that were in effect when the person who undertook the voluntary action submitted the information and demonstrations required under division (C) of section 3746.10 of the Revised Code to the certified professional who prepared the no further action letter regardless of whether amendments to the rules adopted under division (B)(1) or (2) of section 3746.04 of the Revised Code that became effective after that time altered the generic numerical clean-up standards for a contaminant addressed by the voluntary action or the procedures or levels of acceptable risk that govern the property-specific risk assessments conducted in lieu of compliance with generic numerical standards.

HISTORY: 145 v S 221. Eff 9-28-94.

[§ 3746.12.1] § 3746.121. Verification of eligible costs for tax credit purposes.

Upon receiving a request submitted under section 122.16 of the Revised Code for verification of eligible costs associated with a voluntary action incurred by the applicant for the agreement under that section, a certified professional shall submit to the director of development verification of the eligible costs associated with the voluntary action as defined in section 122.16 of the Revised Code. The verification shall be submitted in the form of an affidavit subject to section 3746.20 of the Revised Code, shall state that the information contained in the verification is true to the best of the knowledge, information, and belief of the certified professional, and shall be accompanied by any receipts, invoices, canceled checks, or other documents evidencing eligible costs associated with the voluntary action that are provided by the applicant. Verification submitted under this section does not constitute a finding or representation by the certified professional that eligible costs associated with the voluntary action are reasonable.

HISTORY: 146 v H 441 (Eff 8-22-96); 147 v H 215. Eff 9-29-97.

§ 3746.13. Methods of issuance of covenant not to sue; fee.

(A) For property that does not involve the issuance of a consolidated standards permit under section 3746.15 of the Revised Code and where no remedial activities for which there is a required operation and maintenance agreement or an environmental covenant under this chapter or sections 5301.80 to 5301.92 of the Revised Code, as applicable, are used to comply with applicable standards, the director of environmental protection shall issue a covenant not to sue pursuant to section 3746.12 of the Revised Code by issuance of an order and as a final action under Chapter 3745. of the Revised Code within thirty days after the director receives the no further action letter for the property from the certified professional who prepared the letter under section 3746.11 of the Revised Code.

(B) For property that involves the issuance of a consolidated standards permit under section 3746.15 of the Revised Code or where remedial activities for which there is a required operation and maintenance agreement or an environmental covenant under this chapter or sections 5301.80 to 5301.92 of the Revised Code, as applicable, are used to comply with applicable standards, the director shall issue a covenant not to sue pursuant to section 3746.12 of the Revised Code by issuance of an order and as a final action under Chapter 3745. of the Revised Code within ninety days after the director receives the no further action letter for the property from the certified professional who prepared the letter and enters into an environmental covenant regarding the property, if applicable.

(C) Except as provided in division (D) of this section, each person who is issued a covenant not to sue under this section shall pay the fee established pursuant to rules adopted under division (B)(8) of section 3746.04 of the Revised Code. Until those rules become effective, each person who is issued a covenant not to sue shall pay a fee of two thousand dollars. The fee shall be paid to the director at the time that the no further action letter and accompanying verification are submitted to the director.

(D) An applicant, as defined in section 122.65 of the Revised Code, who has entered into an agreement under section 122.653 [122.65.3] of the Revised Code and who is issued a covenant not to sue under this section shall not be required to pay the fee for the issuance of a covenant not to sue established in rules adopted under division (B)(8) of section 3746.04 of the Revised Code.

HISTORY: 145 v S 221 (Eff 9-28-94); 149 v H 3. Eff 7-26-2001; 150 v H 95, § 1, eff. 9-26-03; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.14. Filing and recording of letters and covenants; transferability.

(A) Except as otherwise provided in division (B) of this section, the person to whom a covenant not to sue for a property has been issued under section 3746.12 of the Revised Code shall file for recording in the office of the county recorder of the county in which the property is located a true and accurate copy of all of the following:

- (1) The no further action letter issued under section 3746.11 of the Revised Code or an executive summary of it;
- (2) The covenant not to sue issued for the property under section 3746.12 of the Revised Code;
- (3) The environmental covenant for the property, if any, proposed pursuant to division (C)(3)(b) of section 3746.10 of the Revised Code and executed under section 5301.82 of the Revised Code.

The documents specified in divisions (A)(1) to (3) of this section shall be recorded in the same manner as a deed to the property. The no further action letter, covenant not to sue, and environmental covenant, if any, shall run with the property.

No person shall fail to comply with this division.

(B) Pursuant to Chapter 5309. of the Revised Code, a no further action letter, a covenant not to sue, and, if applicable, any environmental covenant prepared, issued, entered into, or identified under this chapter and rules adopted under it or under sections 5301.80 to 5301.92 of the Revised Code, as applicable, in connection with registered land, as defined in section 5309.01 of the Revised Code, shall be entered as a memorial on the page of the register where the title of the owner is registered.

(C) A no further action letter, a covenant not to sue, and any agreement authorized to be entered into and entered into under this chapter and rules adopted under it may be transferred by the recipient to any other person by assignment or in conjunction with the acquisition of title to the property to which the document applies.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.15. Consolidated standards permit.

(A) A person participating in the voluntary action program under this chapter and rules adopted under it who otherwise would be required to obtain any permits, licenses, plan approvals, or other approvals from the environmental protection agency in connection with the voluntary action under Chapter 3704., 3714., 3734., or 6111. of the Revised Code or rules adopted under any of those chapters, or under the "Federal Water Pollution Control Act Amendments of 1972," 86 Stat. 886, 33 U.S.C.A. 1251, as amended, the "Resource Conservation and Recovery Act of 1976," 90 Stat. 2806, 42 U.S.C.A. 6921, as amended, or the "Air Quality Act of 1967," 81 Stat. 485, 42 U.S.C.A. 1857, as amended, or regulations adopted under any of those acts, may obtain a consolidated standards permit for the activities in connection with the voluntary action for which those permits, licenses, plan approvals, or other approvals are required that contains all of the substantive requirements applicable to those activities under any of those chapters, rules, acts, or regulations and that complies with any agreements the director of environmental protection has entered into with the United States environmental protection agency under those acts or regulations.

(B) Prior to issuing a permit under this section, the director shall hold a public meeting on it in the county in which the affected property is located or in an adjacent county. At least thirty days prior to holding the public meeting, the director shall publish notice of the meeting in a newspaper of general circulation in the county in which the property is located and, if the affected property is located in close proximity to the boundary of the

county with an adjacent county, as determined by the director, shall publish notice of the meeting in a newspaper of general circulation in the adjacent county. The notice shall contain the date, time, and location of the public meeting and a general description of the activities to be conducted at the property under the permit.

At the public meeting, any person may submit written or oral comments on or objections to the permit. The person, or a representative of the person, who requested the permit shall be present at the public meeting to respond to comments or questions concerning the voluntary action conducted or to be conducted at the property directed to him by the officer or employee of the agency presiding at the meeting. After considering the comments and objections, the director shall approve or deny an application for a consolidated standards permit by issuance of an order as a final action under Chapter 3745. of the Revised Code.

(C) A person who is issued a consolidated standards permit under this section in connection with a particular activity is not required to obtain a permit, license, plan approval, or other approval in connection with the activity under the applicable provisions of Chapter 3704., 3714., 3734., or 6111. of the Revised Code and rules adopted under any of those chapters. A person who obtains a consolidated standards permit for a particular activity is hereby deemed to be in compliance with the requirement to obtain a permit, license, plan approval, or other approval in connection with the activity under the applicable provisions of those chapters and rules.

(D) No person shall violate or fail to comply with a term or condition of a consolidated standards permit issued under this section.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.16. Voluntary action program administration fund.

Moneys collected by the director of environmental protection under this chapter and rules adopted under it shall be forwarded to the treasurer of state who shall deposit them to the credit of the voluntary action program administration fund, which is hereby created in the state treasury. The director shall expend moneys in the fund exclusively for the implementation, administration, and enforcement of this chapter and rules adopted under it.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.17. Audits in connection with issuance of letters.

(A) The director of environmental protection shall conduct audits in connection with no further action letters issued under section 3746.11 of the Revised Code for all of the following purposes:

(1) Determining whether after completion of the voluntary actions under this chapter and rules adopted under it, the properties where the voluntary actions were conducted meet applicable standards;

(2) Reviewing the qualifications of and work performed by certified professionals under the voluntary action program to ascertain whether they possess the qualifications for certification pursuant to rules adopted under division (B)(5) of section 3746.04 of the Revised Code and whether their performance under the program has resulted in the issuance of no further action letters that are not consistent with applicable standards;

(3) Reviewing the qualifications of and work performed by certified laboratories in connection with the

voluntary action program, and inspecting the facilities of certified laboratories to ascertain whether they possess the qualifications for certification pursuant to rules adopted under division (B)(6) of section 3746.04 of the Revised Code and whether their performance in connection with the program has resulted in the issuance of no further action letters that are not consistent with applicable standards.

An audit may be conducted for any of the purposes identified in divisions (A)(1) to (3) of this section or for any combination of those purposes.

(B) Commencing one year after the effective date of this section, the director annually shall conduct in connection with the no further action letters submitted to him during the preceding calendar year under section 3746.11 of the Revised Code audits of not less than twenty-five per cent of the letters pertaining [to] the voluntary actions that involved remedial activities and not less than twenty-five per cent of the letters pertaining to voluntary actions that did not involve remedial activities. Audits conducted pursuant to contracts entered into under division (E) of this section or division (B) of section 3745.01 of the Revised Code shall be included in determining the number of audits conducted by the director during the year in which the audits were conducted.

(C) Except as provided in division (D) of this section, the director shall select the no further action letters to be audited under this section in accordance with the selection criteria established in rules adopted under division (B)(9) of section 3746.04 of the Revised Code. Any such audit shall be conducted in accordance with the rules adopted under that division.

(D) Prior to the adoption of rules under section 3746.04 of the Revised Code, the director may conduct audits in connection with no further action letters issued under section 3746.11 of the Revised Code in order to determine if the relevant properties, certified professionals, certified laboratories, or any combination of them comply with the standards established in section 3746.07 of the Revised Code.

(E) The director may enter into contracts to have audits conducted under this section in accordance with rules adopted under division (B)(9) of section 3746.04 of the Revised Code. The director shall not select as a contractor to conduct audits under this section a person who meets any of the following:

(a) Undertook the voluntary action in connection with which the audit is to be performed;

(b) Is employed by, affiliated with, or related to the person who undertook the voluntary action in connection with which the audit is to be performed or was employed by or affiliated with that person during the year preceding the date that the audit is to be conducted;

(c) Served as the certified professional who issued the no further action letter for the voluntary action in connection with which the audit is to be performed or is employed by, affiliated with, or related to the person who served as the certified professional or was employed by or affiliated with that person during the year preceding the date that the audit is to be conducted;

(d) Performed or reviewed, or his employer performed or reviewed, any work that was conducted to support the request for the no further action letter in connection with which the audit is to be performed;

(e) Served as a certified laboratory that performed any analyses that formed the basis for the issuance of the no further action letter in connection with which the audit is to be performed, is employed by, affiliated with, or related to the person who served as such a certified laboratory, or was employed by or affiliated with that person during the year preceding the date that the audit is to be conducted.

HISTORY: 145 v S 221. Eff 9-28-94.

[§ 3746.17.1] § 3746.171. Record of properties with institutional controls or activity and use limitations;

inspections.

The director of environmental protection shall maintain a record of the properties for which covenants not to sue were issued under section 3746.12 of the Revised Code that involve institutional controls or activity and use limitations that restrict the use of the properties in order to comply with applicable standards. The records pertaining to those properties shall indicate the use restrictions or activity and use limitations applicable to each of them. At least once every five years, the director or an authorized representative of the director shall visually inspect each such property to determine whether the property is being used in compliance with the applicable institutional controls or activity and use limitations.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04.

§ 3746.18. Director may request supporting documents and data.

(A) The director of environmental protection may request a certified professional or certified laboratory to provide to him documents and data for the purposes of verifying the qualifications of the professional or laboratory or auditing the performance of the professional or laboratory in connection with voluntary actions conducted under this chapter and rules adopted under it or may request any other person who performed work that was conducted to support a request for a no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code to submit documents and data relating to the no further action letter.

No person shall fail to comply with a request made under this division.

(B) In addition to any other remedy provided by law, the director may do either or both of the following in connection with a violation of division (A) of this section:

(1) Permanently revoke the certification of the certified professional or certified laboratory in accordance with rules adopted under division (B)(5)(g) or (B)(6)(f) of section 3746.04 of the Revised Code, as applicable;

(2) Revoke any covenant not to sue issued under section 3746.12 of the Revised Code pertaining to the director's request for information under division (A) of this section.

Nothing in division (B)(2) of this section precludes a person whose covenant not to sue was revoked under that division from having a new no further action letter prepared regarding the relevant property and issued under section 3746.11 of the Revised Code by another certified professional, or using another certified laboratory, for the purpose of obtaining a new covenant not to sue for the property.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.19. Notice of noncompliance by professional or laboratory; audits of property where certification suspended or revoked.

(A) If the director of environmental protection finds that the performance of a certified professional or certified laboratory has resulted in the issuance of no further action letters under section 3746.11 of the Revised Code that are not consistent with applicable standards, he shall notify persons for whom the certified professional or certified laboratory has performed work in connection with a voluntary action of his findings.

(B) The director, in accordance with the criteria and procedures established in rules adopted under division (B) (9) of section 3746.04 of the Revised Code, may conduct an audit of any property for which a covenant not to sue was issued under section 3746.12 of the Revised Code based upon a no further action letter issued under section 3746.11 of the Revised Code that was prepared by a certified professional whose certification was subsequently suspended or revoked under this chapter and rules adopted under it or based upon a no further action letter for a voluntary action for which analyses were performed by a certified laboratory for which the certification was subsequently suspended or revoked under this chapter and rules adopted under it.

If, after such an audit, the director finds that the property does not comply with applicable standards, he shall proceed in accordance with divisions (B)(2) through (4) of section 3746.12 of the Revised Code.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.20. Information and documents to be submitted by affidavit; falsification or deception.

(A) All of the following shall be submitted by affidavit:

(1) Any information, data, documents, or reports submitted by any of the following to another person for the purposes of a voluntary action conducted under this chapter and rules adopted under it:

(a) The person undertaking the voluntary action;

(b) A certified professional;

(c) Any other person who performed work that was conducted to support a request for a no further action letter as provided in division (B)(2) of section 3746.10 of the Revised Code;

(d) A certified laboratory.

(2) Any information submitted by an environmental professional to the director of environmental protection for the purposes of complying with rules adopted under division (B)(5)(a) or (c) of section 3746.04 of the Revised Code or with division (D) of section 3746.07 of the Revised Code;

(3) Any information submitted by a laboratory for the purposes of complying with rules adopted under division (B)(6)(a) or (b) of section 3746.04 of the Revised Code;

(4) The verification of eligible costs associated with a voluntary action submitted by a certified professional to the director of development pursuant to section 3746.121 [3746.12.1] of the Revised Code.

(B) No person shall materially falsify, tamper with, or render inaccurate any information, data, documents, or reports generated for the purposes of or used in documenting or preparing a no further action letter under this chapter or rules adopted under it or verification of eligible costs under section 3746.121 [3746.12.1] of the Revised Code.

Violation of this division is not falsification under section 2921.13 of the Revised Code.

(C) In accordance with rules adopted under division (B)(5)(f) of section 3746.04 of the Revised Code, the director permanently shall revoke the certification of a certified professional who violates division (B) of this section.

(D) No person, with purpose to deceive a certified professional, certified laboratory, or a contractor thereof, or the environmental protection agency or a contractor thereof, shall withhold, conceal, or destroy any data, information, records, or documents relating to a voluntary action.

HISTORY: 145 v S 221 (Eff 9-28-94); 146 v H 441. Eff 8-22-96.

§ 3746.21. Right of entry for inspection or investigation.

In addition to the authority established in sections 3746.18, 3746.19, and 3746.20 of the Revised Code, the director of environmental protection or his authorized representative, upon proper identification and upon stating the necessity and purpose of an inspection, may enter at reasonable times upon any public or private property at which a voluntary action has been or is being conducted under this chapter and rules adopted under it; upon any public or private property, real or personal, that is owned or operated by a person who is participating or has participated in the voluntary action program under this chapter and rules adopted under it where data, information, records, or documents relating to the person's participation in the voluntary action program are kept; or upon any public or private property, real or personal, upon which is located a certified laboratory or the offices of a certified professional, to inspect the credentials of the certified professional or the credentials and facilities of the certified laboratory; to examine or copy data, information, records, or documents relating to the evaluation, investigation, or remediation of properties under this chapter and rules adopted under it or to compliance with a consolidated standards permit issued under section 3746.15 of the Revised Code; or to obtain samples of soil, water, or other environmental media at properties where voluntary actions have been or are being conducted under this chapter and rules adopted under it. The director or his authorized representative may apply for and any judge of a court of record may issue an administrative inspection warrant under division (F) of section 2933.21 of the Revised Code, or other appropriate search warrant, necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.22. Prosecution of violators; injunctions; civil penalties.

(A) The attorney general, the prosecuting attorney of the county, or the city director of law of the city where a violation of section 3746.14, 3746.15, 3746.18, or 3746.20 of the Revised Code has occurred or is occurring, upon the written request of the director of environmental protection, shall criminally prosecute to termination or bring an action for injunction in any court of competent jurisdiction against any person who has violated or is violating any of those sections. The court in which an action for injunction is filed has the jurisdiction to and shall grant preliminary and permanent injunctive relief upon a showing that the person against whom the action is brought has violated or is violating any of those sections. The court shall give precedence to such an action over all other cases.

(B) Whoever violates section 3746.14, 3746.18, or 3746.20 of the Revised Code, or violates section 3746.15 of the Revised Code in a manner that otherwise would constitute a violation of Chapter 3714., 3734., or 6111. of the Revised Code or rules adopted under any of those chapters, shall pay a civil penalty of not more than ten thousand dollars for each day of each violation. Whoever violates section 3746.15 of the Revised Code in a manner that otherwise would constitute a violation of Chapter 3704. of the Revised Code or rules adopted under it shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation. The attorney general, the prosecuting attorney of the county, or the city director of law of the city

where a violation of any of those sections has occurred or is occurring, upon the written request of the director, shall bring an action under this division for the imposition of a civil penalty in any court of competent jurisdiction against any person who has committed or is committing any such violation. Moneys arising from civil penalties imposed under this division shall be paid into the voluntary action program administration fund created in section 3746.16 of the Revised Code.

(C) An action for injunction or civil penalties under division (A) or (B) of this section is a civil action governed by the Rules of Civil Procedure.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.23. Actions for recovery of costs of conducting voluntary action; allocation of costs by contract.

(A) As used in this section, "costs of conducting the voluntary action" means the costs incurred for performing a voluntary action that are cost effective and reasonably necessary to protect public health and safety and the environment, including, without limitation, the costs for all of the following:

- (1) Identifying potential sources of contamination of the property by hazardous substances where a voluntary action is being or was undertaken under this chapter and rules adopted under it;
- (2) Investigating the nature and extent of contamination of the property by hazardous substances in order to screen and select remedial alternatives;
- (3) Preparing a remedial plan for the property;
- (4) Conducting the remedial activities, including, without limitation, the future operation and maintenance costs of any engineering controls installed to contain or control the release of hazardous substances at or from the property;
- (5) The preparation and submission of a no further action letter by a certified professional in connection with the voluntary action;
- (6) Any oversight costs paid to the environmental protection agency;
- (7) Reasonable attorney's fees, court costs, and other expenses in connection with the action brought under this section.

"Costs of conducting the voluntary action" does not include the costs of any work performed at the property to render it suitable for a higher use than its current use or its most recent demonstrable use that is in addition to the work that is cost effective and reasonably necessary to protect public health and safety and the environment.

(B) Any person who, at the time when any of the hazardous substances identified and addressed by a voluntary action conducted under this chapter and rules adopted under it were released at or upon the property that is the subject of the voluntary action, was the owner or operator of the property, and any other person who caused or contributed to a release of hazardous substances at or upon the property, is liable to the person who conducted the voluntary action for the costs of conducting the voluntary action. If the person who conducted the voluntary action did not cause or contribute to any release of hazardous substances at or upon the property that were identified and addressed by the voluntary action, he may recover in a civil action the costs of conducting the voluntary action from the owners or operators of the property at the time when those releases occurred and the other persons who caused or contributed to the releases. If the person who conducted the voluntary action caused or contributed to any release of hazardous substances at or upon the property that were identified and

addressed by the voluntary action, he may recover in a civil action from the owners and operators of the property when those releases occurred and the other persons who caused or contributed to the releases the costs of conducting the voluntary action that are attributable to the releases that those owners, operators, and others caused or contributed to.

If two or more persons are found to have caused or contributed to a release of hazardous substances at or upon the property, the costs of conducting the voluntary action shall be apportioned among each such person on the basis of his respective degree of responsibility for the costs.

(C) A civil action authorized by this section shall be commenced in the court of common pleas of the county in which is located the property at which the voluntary action is conducted. The person conducting the voluntary action may commence the civil action at any time after the person has commenced the conduct of the voluntary action. Notwithstanding section 2305.09 of the Revised Code, a civil action shall be commenced under this section within three years after the applicable no further action letter was submitted to the director of environmental protection under section 3746.11 of the Revised Code in connection with the voluntary action.

(D) All of the owners and operators of the property when the releases of hazardous substances identified and addressed by the voluntary action occurred, and the other persons who caused or contributed to those releases, shall be joined as defendants in a civil action commenced under this section. The liability of those owners, operators, and others for the costs of conducting the voluntary action shall be based upon their respective degrees of responsibility for the costs. When determining the respective degrees of responsibility for the costs of those owners, operators, and others, the jury or, in a nonjury action, the court may consider the nature and amount of hazardous substances stored, treated, disposed of, used, and released by each person; the length of time that each person owned or operated the property; each person's history of compliance with applicable federal and state environmental laws and rules in the use and operation of the property; and any other factors that the jury or court considers to be appropriate.

(E) This section shall allow the filing of claims for recovery of the costs of conducting a voluntary action that identifies and addresses releases of hazardous substances that occurred prior to, on, or after the effective date of this section.

(F) The existence of a claim for relief under this section does not preclude persons from allocating the costs of conducting a voluntary action among themselves by contract. Contractual allocations of those costs do not affect the rights, liabilities, or obligations to this state of the parties to the contractual allocation.

(G) This section does not create a claim for relief to recover the costs of conducting a voluntary action against any of the following:

(1) A person who neither caused nor contributed to in any material respect a release of hazardous substances on, in, or under the property that was identified and addressed by the voluntary action nor who expressly undertook contractual liability for conducting the voluntary action;

(2) Notwithstanding a landlord's rights against a tenant, a landlord if the landlord did not know, and could not reasonably have known, of the acts or omissions of a tenant that caused or contributed to, or were likely to have caused or contributed to, a release of a hazardous substance that resulted in the conduct of the voluntary action at the property;

(3) This state or a political subdivision of this state if it involuntarily acquires ownership or control of property by virtue of its function as a sovereign through such means as escheat, bankruptcy, tax delinquency, or abandonment;

(4) This state or a political subdivision of this state if it voluntarily acquires ownership or control of property through purchase, appropriation in accordance with Chapter 163. of the Revised Code, or other means;

(5) An owner or operator or any other person who caused or contributed to a release of petroleum at or upon property that was identified and addressed by a voluntary action for that portion of the costs of conducting a voluntary action arising from the petroleum release. If a petroleum release became mixed with a release of a hazardous substance on or upon the property, the owner or operator or other person who caused or contributed to the release of petroleum is not liable for that increment of the costs of conducting a voluntary action that is attributable to the presence of the petroleum release;

(6) A holder who is in compliance with the requirements of section 3746.26 of the Revised Code;

(7) A fiduciary or trustee who is in compliance with the requirements of section 3734.27 of the Revised Code.

(H) Division (G)(5) of this section does not affect any other liability to which any person described in that division otherwise is subject under state or federal law.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.24. Immunity from tort actions for harm caused.

(A) As used in this section:

(1) "Harm" means injury, death, or loss to person or property caused by exposure to a hazardous substance or petroleum.

(2) "Public utility" includes, without limitation, a person engaged in the storage and transportation of natural gas.

(3) "Tort action" means a civil action for damages for harm and includes a civil action under section 3746.23 of the Revised Code for recovery of the costs of conducting a voluntary action, but does not include a civil action for damages for a breach of contract or another agreement between persons or for a breach of a warranty that exists pursuant to the Revised Code or common law of this state.

(B) Any of the following, and any officer or employee thereof, is not liable in a tort action resulting from the presence of hazardous substances or petroleum at, or the release of hazardous substances or petroleum from, a property where a voluntary action is being or has been conducted under this chapter and rules adopted under it unless an action or omission of the person, state agency, political subdivision, or public utility, or an officer or employee thereof, constitutes willful or wanton misconduct or intentionally tortious conduct:

(1) A person who is working as a contractor for another in conducting any activity in connection with a voluntary action under this chapter and rules adopted under it;

(2) A state agency or political subdivision that is conducting a voluntary action or maintenance activities on lands, easements, or rights-of-way owned, leased, or otherwise held by the state agency or political subdivision;

(3) A state agency when an officer or employee of the state agency, as defined in section 109.36 of the Revised Code, provides technical assistance to a person undertaking a voluntary action under this chapter and rules adopted under it, or to a contractor, officer, employee, or agency thereof, in connection with the voluntary action;

(4) A public utility that is doing either of the following:

(a) Performing work in an easement or right-of-way of the public utility across property where a voluntary action is being or has been conducted and where the public utility is constructing or has main or distribution lines above or below the surface of the ground for purposes of maintaining the easement or right-of-way or for construction, repair, or replacement of its lines; of poles, towers, foundations, or other structures supporting or sustaining any such lines; or of appurtenances to those structures;

(b) Performing work on property where a voluntary action is being conducted that is necessary to establish or maintain utility service to the property, including, without limitation, the construction, repair, or replacement of main or distribution lines above or below the surface of the ground; of poles, towers, foundations, or other structures supporting or sustaining any such lines; or of appurtenances to those structures.

(5) The Ohio water development authority created in section 6121.02 of the Revised Code and the director of environmental protection as the providers of assistance under section 6111.036 [6111.03.6] or Chapter 6123 of the Revised Code to any person undertaking a voluntary action.

(C) (1) This section does not create, and shall not be construed as creating, a new cause of action against or substantive legal right against this state or a person, political subdivision of this state, or public utility, or an officer or employee thereof.

(2) This section does not affect, and shall not be construed as affecting, any immunities from civil liability or defenses established by another section of the Revised Code or available at common law, to which this state or a person, political subdivision, or public utility, or officer or employee thereof, may be entitled under circumstances not covered by this section.

(3) Section 9.86 of the Revised Code does not apply to an officer or employee of the state, as defined in section 109.36 of the Revised Code, if the officer or employee is performing work in connection with an activity described in division (B)(2) or (3) of this section at the time he allegedly caused the harm, or caused or contributed to the release of hazardous substances or petroleum, for which damages, or the recovery of the costs of conducting a voluntary action, are sought in a tort action. Instead, the immunities conferred by division (B) (2) or (3) of this section, whichever is applicable, apply to that individual.

(4) Divisions (B)(2), (3), and (4) of section 2744.02 of the Revised Code do not apply to a political subdivision of this state with respect to the conduct of an activity described in division (B)(2) or (4) of this section. Instead, the immunities conferred by division (B)(2) or (4) of this section, whichever is applicable, apply to the political subdivision.

(5) Division (A)(6) of section 2744.03 of the Revised Code does not apply to an employee, as defined in section 2744.01 of the Revised Code, if the employee is performing work in connection with an activity described in division (B)(2) or (4) of this section at the time that he allegedly caused the harm, or caused or contributed to the release of hazardous substances or petroleum, for which damages, or the recovery of the costs of conducting the voluntary action, are sought in a tort action. Instead, the immunities conferred by division (B) (2) or (4) of this section, whichever is applicable, apply to that individual.

(D) This section does not affect, and shall not be construed as affecting, any liability of an owner or operator of a property on which a voluntary action is being or has been undertaken. No person shall be deemed to be an owner or operator solely as the result of conducting a voluntary action at the property.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.25. Immunity of state and officers and employees.

(A) As used in this section:

(1) "Harm" means injury, death, or loss to person or property.

(2) "Tort action" means a civil action for damages for harm and includes a civil action under section 3746.23 of the Revised Code for recovery of the costs of conducting a voluntary action, but does not include a civil action for damages for a breach of contract or another agreement between persons or for a breach of a warranty that exists pursuant to the Revised Code or common law of this state.

(B) The state, and any officer or employee thereof as defined in section 109.36 of the Revised Code, is not liable in a tort action when the state inspects, investigates, removes, or remediates hazardous substances or petroleum unless an action or omission of the state, or an officer or employee thereof, constitutes willful or wanton misconduct or intentionally tortious conduct.

(C) (1) This section does not create, and shall not be construed as creating, a new cause of action against or substantive legal right against the state or an officer or employee thereof.

(2) This section does not affect, and shall not be construed as affecting, any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which this state, or an officer or employee thereof, may be entitled under circumstances not covered by this section.

(3) Section 9.86 of the Revised Code does not apply to an officer or employee of the state if the officer or employee is performing work in connection with inspecting, investigating, removing, or remediating hazardous substances or petroleum at the time that he allegedly caused the harm, or caused or contributed to the presence or release of hazardous substances or petroleum, for which damages, or the recovery of the costs of conducting a voluntary action, are sought in a tort action. Instead, the immunities conferred by division (B) of this section apply to that individual.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.26. Exemption of persons holding indicia of ownership in a property primarily to protect a security interest.

(A) (1) Any person who, without participating in the management of a property, holds indicia of ownership in a property primarily to protect a security interest in the property is not liable for:

(a) The costs of conducting a voluntary action in a civil action brought under section 3746.23 of the Revised Code or otherwise brought under the Revised Code or common law of this state in connection with a voluntary action undertaken at a property in which the person holds indicia of ownership for that purpose;

(b) For for the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at or upon any property that may be the subject of investigation or remediation of hazardous substances or petroleum, irrespective of whether or not any such costs are incurred in connection with a voluntary action undertaken pursuant to any provision of this chapter of the Revised Code in a civil action brought under section 3746.23 of the Revised Code or otherwise brought under the Revised Code or common law of this state, provided that, after taking title to the property, the person conducts or causes to be conducted all activities occurring at the property not related to the identification or remediation of releases or threatened releases of hazardous substances or petroleum in compliance with the applicable requirements of Chapters 3704., 3714., 3734., 3737., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under them.

(2) Such a person who, after taking title to property, conducts or causes to be conducted all such nonremedial activities at the property in compliance with the applicable requirements under those chapters and rules is not

required to comply with any provisions of those chapters and rules pertaining to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property and shall not be subject to the issuance of an enforcement order, or a civil action for injunctive relief, under any of those chapters requiring the identification or remediation of any release or threatened release of hazardous substances or petroleum at or upon the property.

(B) For the purposes of this section, "indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real property acquired incident to foreclosure or its equivalents. Evidence of those interests includes, without limitation, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not initially select the leased property, which shall hereafter be referred to as a lease financing transaction, legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of those interests also includes assignments, pledges, or other rights or other forms of encumbrance against property that are held primarily to protect a security interest.

(1) For the purposes of this section, a "holder" is a person who maintains indicia of ownership primarily to protect a security interest. A "holder" includes the initial holder, such as the loan originator; any subsequent holder, such as a successor in interest or subsequent purchaser of the security interest in the secondary market; a guarantor of an obligation; a surety; any other person who holds indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of the holder.

(2) For the purposes of this section, a "borrower," "debtor," or "obligor" is a person whose property is encumbered by a security interest. These terms are used interchangeably in this section.

(C) As used in this section, "primarily to protect a security interest" means the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation. "Primarily to protect a security interest" does not include indicia of ownership held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why ownership indicia are held shall be protection for a security interest.

(D) As used in this section, "security interest" means an interest in property created or established for the purpose of securing a loan or other obligation. "Security interest" includes, without limitation, a mortgage, deed of trust, lien, or title pursuant to a lease financing transaction. A security interest also may arise from a transaction such as a sale and leaseback, a conditional sale, an installment sale, a trust receipt transaction, certain types of assignments, a factoring agreement, an accounts receivable financing, and a consignment if the transaction created or established an interest in a property for the purpose of securing a loan or other obligation.

(E) (1) As used in this section, "participation in the management of a property" means actual participation in the management or operational affairs by the holder and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control the operations of the property. A holder is participating in management while the borrower is still in possession of the property encumbered by the security interest only if the holder does either of the following:

(a) Exercises decision-making control over the borrower's environmental compliance such that the holder has undertaken responsibility for the borrower's hazardous substance or petroleum handling or disposal practices;

(b) Exercises control at a level comparable to that of a manager of the borrower's enterprise such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision-making of the enterprise with respect to either of the following:

(i) Environmental compliance;

(ii) All or substantially all of the operational, as opposed to financial or administrative, aspects of the enterprise other than environmental compliance.

For the purposes of division (E)(1) of this section, "operational aspects of the enterprise" includes functions such as that of a property, facility, or plant manager; operations manager; chief operating officer; or chief executive officer; and "financial or administrative aspects" includes functions such as that of credit manager, accounts payable or receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(2) "Participation in the management of a property" does not include either of the following:

(a) Actions at the inception of the loan or other transaction.

No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the property in which indicia of ownership are to be held, or, whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest, requires a prospective borrower to clean up a property or comply or come into compliance with any applicable law or rule, is not participating in the property's management. This section does not require a holder to conduct or require an inspection of the property to qualify for the exemption provided by this section, and the liability of a holder cannot be based on or affected by the holder's not conducting or requiring an inspection.

(b) Policing and work-out, as described in divisions (E)(2)(b)(i) and (ii) of this section.

Actions that are consistent with holding indicia primarily to protect a security interest do not constitute participation in management. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and work-out activities cover and include all activities up to foreclosure and its equivalents.

(i) A holder who engages in policing activities prior to foreclosure remains within the exemption provided by this section, provided that the holder does not participate in the management of the property. These activities include, without limitation, requiring the borrower to clean up the property during the term of the security interest; requiring the borrower to comply or come into compliance with applicable environmental laws, other applicable laws, and applicable rules or regulations of the United States, this state, or political subdivisions of this state during the term of the security interest; securing or exercising authority to monitor or inspect the property in which the indicia of ownership are maintained during the term of the security interest, including, without limitation, on-site inspections; securing or exercising authority to inspect or monitor the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest such as requiring a borrower to comply with any warranties, covenants, conditions, or representations or promises from the borrower.

(ii) A holder who engages in work-out activities prior to foreclosure and its equivalents remains within the exemption provided by this section if the holder does not participate by that action in the management of the property.

As used in this section, "work-out" means those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor or to preserve or prevent the diminution of the value of the security interest. These actions include, without limitation, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, or guidance; and exercising any right or remedy that the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(iii) A holder does not participate in the management of a property by taking a voluntary action under this chapter and rules adopted under it.

(iv) A holder who, after taking title to a property, conducts or causes to be conducted all activities occurring at the property not related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property in compliance with the applicable requirements of Chapters 3704., 3714., 3734., 3737., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under them does not participate in the management of the property.

(F) (1) Indicia of ownership that are held primarily to protect a security interest include, without limitation, legal or equitable title acquired through or incident to foreclosure and its equivalents.

As used in this section, "foreclosure and its equivalents" includes purchase at a foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal manner by which the borrower acquires title to or possession of the secured property regardless of whether title to or possession of the property is acquired pursuant to law or under warranties, covenants, conditions, representations, or promises of the borrower. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest, provided that the holder undertakes to sell property, re-lease property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, or otherwise divest itself of property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the property taking into consideration all facts and circumstances, and provided that the holder did not participate in management of the property prior to foreclosure or its equivalents. For purposes of establishing that a holder is seeking to sell property, re-lease property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, or divest a property in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the property or may employ the means specified in this section. A holder that outbids, rejects, or fails to act upon a bona fide, written offer of fair consideration for the property as provided in this section is not considered to hold indicia of ownership primarily to protect a security interest.

(2) A holder who did not participate in management prior to foreclosure and its equivalents may sell property, re-lease property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, liquidate, maintain business activities, wind up operations, undertake any voluntary action under this chapter and rules adopted under it, or take measures to preserve, protect, or prepare the secured asset prior to sale or other disposition. The holder may conduct any of these activities without voiding the exemption provided by this section, subject to the requirements of this section.

(a) A holder establishes that the ownership indicia maintained following foreclosure and its equivalents continue to be held primarily to protect a security interest by, within twelve months following foreclosure, listing the property with a broker, dealer, or agent who deals with the type of property in question, or by advertising the property as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the property in question, or a newspaper of general circulation in the area where the property is located. For the purposes of division (F)(2)(a) of this section, the twelve-month period begins to run from the time that the holder acquires a marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, the twelve-month period begins to run on the date of foreclosure and its equivalents.

(b) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the property establishes that the ownership indicia in the secured property are not held primarily to protect the security interest unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

For the purposes of division (F)(2)(b) of this section:

(i) "Fair consideration," in the case of a holder maintaining indicia of ownership primarily to protect a senior

security interest in the property, is the value of the security interest as described in division (F)(2)(b)(i) of this section. The value of the security interest is calculated as an amount equal to or in excess of the sum of the outstanding principal, or the comparable amount in the case of a lease that constitutes a security interest, owed to the holder immediately preceding the acquisition of full title, or possession in the case of property subject to a lease financing transaction, pursuant to foreclosure and its equivalents; plus any unpaid interest, rent, or penalties whether arising before or after foreclosure and its equivalents; plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining business activities of the enterprise, preserving, protecting, and preparing the property prior to sale, re-lease of property held pursuant to a lease financing transaction whether by a new lease financing transaction or substitution of the lessee, or other disposition; plus voluntary action costs incurred under this chapter and rules adopted under it; plus any costs of conducting or causing to be conducted all activities occurring at the property not related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property that are required under Chapters 3704., 3714., 3734., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under those chapters; less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title, or possession in the case of property subject to a lease financing transaction, pursuant to foreclosure and its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as described in the provisions of division (F)(2)(b)(i) of this section applicable to senior security interests.

(ii) "Outbids, rejects, or fails to act on an offer of fair consideration" means the holder outbids, rejects, or fails to act upon within ninety days after receipt of a bona fide, firm, written offer of fair consideration for the property received at any time after six months following foreclosure and its equivalents. That six-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, that six-month period begins to run on the date of foreclosure and its equivalents.

For the purposes of division (F)(2)(b)(ii) of this section, a "bona fide, firm, written offer" means a legally enforceable, commercially reasonable cash offer solely for the foreclosed property, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform.

(3) (a) Provided that the holder did not participate in management prior to foreclosure and its equivalents, and that the holder complies with the requirements of this section during the period following foreclosure and its equivalents, a holder in possession of a property may incur civil liability in connection with its activities related to the investigation or remediation of releases or threatened releases of hazardous substances or petroleum at or upon such a foreclosed property only by arranging for disposal or treatment of a hazardous substance or petroleum or by accepting for transportation or disposing of hazardous substances or petroleum at a facility selected by the holder.

(b) Following foreclosure and its equivalents, a foreclosing holder that directs or undertakes activities at the foreclosed property under this chapter and rules adopted under it is not liable in a civil action for the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at or upon the property, except as otherwise specifically provided in section 3746.29 of the Revised Code.

(G) (1) This section does not create, and shall not be construed as creating, a new cause of action against or substantive legal right against a holder.

(2) This section does not affect, and shall not be construed as affecting, any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which a holder may be entitled under circumstances not covered by this section.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.27. Exemption of fiduciary or trustee.

(A) A fiduciary or trustee who acquires ownership or control of property without having owned, operated, or participated in the management of the property prior to acquiring ownership or control of it is not liable for the costs of conducting a voluntary action in a civil action brought under section 3746.23 of the Revised Code in connection with a voluntary action undertaken at the property or for the costs of identifying or remediating a release or threatened release of hazardous substances or petroleum at or upon the property in a civil action otherwise brought under the Revised Code or common law of this state, provided that both of the following conditions apply:

(1) No action or omission of the fiduciary or trustee constituting willful or wanton misconduct or intentionally tortious conduct caused, contributed to, or exacerbated a release or threatened release of hazardous substances or petroleum at or upon the property;

(2) After so acquiring ownership or control of the property, the fiduciary or trustee conducts or causes to be conducted all activities occurring at the property not related to the identification or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property in compliance with the applicable requirements under Chapters 3704., 3714., 3734., 3737., 3750., 3751., 6109., and 6111. of the Revised Code and rules adopted under those chapters.

(B) Such a fiduciary or trustee who, after so acquiring ownership or control of property, conducts or causes to be conducted all such nonremedial activities at the property in compliance with the applicable requirements under those chapters and rules is not required to comply with any provisions of those chapters and rules pertaining to the identification or remediation of releases or threatened releases of hazardous substances or petroleum at or upon the property and shall not be subject to the issuance of an enforcement order, or a civil action for injunctive relief, under any of those chapters requiring the identification or remediation of any release or threatened release of hazardous substances or petroleum at or upon the property.

(C) Nothing in this section precludes the filing of claims against the assets that constitute the estate or corpus of the trust held by the fiduciary or the filing of claims under section 3746.23 of the Revised Code for the costs of conducting a voluntary action at the property or the filing of claims for the costs of remediation under other provisions of the Revised Code or common law of this state against the fiduciary or trustee in its representative capacity.

(D) (1) This section does not create, and shall not be construed as creating, a new cause of action against or substantive legal right against a fiduciary or trustee.

(2) This section does not affect, and shall not be construed as affecting, any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which a fiduciary or trustee may be entitled under circumstances not covered by this section.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.28. Admissibility of entry into or participation in program and of information or documents.

(A) Entering into and participating in the voluntary action program under this chapter and rules adopted under it does not constitute an admission of criminal liability under the laws of this state or rules adopted under them or the ordinances, resolutions, and rules of a political subdivision of this state or an admission of civil liability under the Revised Code or common law of this state.

(B) The fact that a person has entered into or is participating in the voluntary action program under this chapter and rules adopted under it is not admissible in any civil, criminal, or administrative proceeding initiated or brought under Chapter 3704., 3714., 3734., 3750., 3751., 6109., or 6111. of the Revised Code.

(C) Any information, documents, reports, or data produced, or any samples collected as a result of entering into and participating in the voluntary action program under this chapter and rules adopted under it are not admissible against the person undertaking the voluntary action, and are not discoverable, in any civil or administrative proceeding against the person undertaking the voluntary action, except a judicial or administrative proceeding initiated under section 3746.22 of the Revised Code or rules adopted under section 3746.04 of the Revised Code in connection with an alleged violation of section 3746.20 of the Revised Code.

This division does not apply to any person whose covenant not to sue has been revoked under this chapter.

(D) Entering into and participating in the voluntary action program under this chapter and rules adopted under it shall not be construed to be an acknowledgment that the conditions at the property identified and addressed by the voluntary action constitute a threat or danger to public health or safety or the environment.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.29. Other authority of director; costs incurred as to release or threatened release.

(A) Nothing in this chapter limits the authority of the director of environmental protection to act under sections 3734.13 and 3734.20 to 3734.23 of the Revised Code.

(B) Nothing in this chapter limits the authority of the director to request that a civil action be brought pursuant to the Revised Code or common law of this state to recover the costs to the environmental protection agency for investigating or remediating a release or threatened release of hazardous substances or petroleum at or from a property where a voluntary action is being or has been conducted under this chapter and rules adopted under it when the director determines that the release or threatened release poses an imminent and substantial threat to public health or safety or the environment.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.30. Obligations, rights and liabilities arising under other state and federal laws not affected.

(A) Nothing in this chapter shall be construed as abrogating any obligation or right established in federal law.

(B) Nothing in this chapter shall be construed as releasing a person to whom the director of environmental protection has issued any final findings and orders under Chapter 3704., 3734., or 6111. of the Revised Code on or before September 28, 1994, from the obligation to comply with any requirements established in the findings and orders.

(C) Nothing in this chapter shall be construed as relieving a person from any requirement established under the "Atomic Energy Act of 1954," 68 Stat. 919, 42 U.S.C.A. 2011, as amended, and regulations adopted under it or under Chapter 3747, or 3748. of the Revised Code and rules adopted under them, including, without limitation, any applicable requirement existing when a voluntary action is undertaken to notify or coordinate remedial activities with the United States nuclear regulatory commission or the department of health in connection with radioactive materials regulated under that act or those chapters.

(D) Nothing in this chapter alters, abridges, abrogates, diminishes, or otherwise limits the rights or protections afforded any shareholder, director, officer, or employee, or, in the case of a partnership, any general or limited partner, under the Revised Code and common law of this state.

HISTORY: 145 v S 221 (Eff 9-28-94); 146 v S 19. Eff 9-8-95.

§ 3746.31. Director to provide copies of materials upon request.

Upon the written request of any person for information, documents, reports, or data described on a list submitted to the director of environmental protection pursuant to division (F) of section 3746.07 of the Revised Code or rules adopted under division (B)(7)(e) of section 3746.04 of the Revised Code, as applicable, the director, within a reasonable period of time after receipt of the request, shall provide copies of the requested materials to the person. If the requested materials are not on file in the offices of the environmental protection agency, the director, promptly after receipt of the request, shall send a written request to the certified professional who submitted the list pursuant to that division or those rules to submit the requested materials to the director within a specified reasonable period of time. The certified professional shall submit the requested materials to the director within the time specified in the director's request. Within a reasonable period of time after the director receives the requested materials from the certified professional, the director shall provide copies of them, at cost, to the person who requested them and shall retain the originals in the agency's files.

HISTORY: 145 v S 221. Eff 9-28-94.

§ 3746.35. Annual reports by directors of environmental protection and development and county auditors.

(A) Not later than September 1, 1996, and not later than the first day of September of each subsequent year, the director of environmental protection shall prepare and submit to the chairpersons of the respective standing committees of the senate and house of representatives primarily responsible for considering environmental and taxation matters a report regarding the voluntary action program established under this chapter and rules adopted under it and the tax abatements granted pursuant to sections 5709.87 and 5709.88 of the Revised Code for properties where voluntary actions were conducted. Each annual report shall include, without limitation, all of the following:

(1) Both of the following for each property for which a covenant not to sue was issued under section 3746.12 of the Revised Code during the preceding calendar year:

(a) The address of the property and name of the person who undertook the voluntary action at the property;

(b) Whether the applicable standards governing the voluntary action were the interim standards established in section 3746.07 of the Revised Code or the generic numerical clean-up standards established in rules adopted

under division (B)(1) of section 3746.04 of the Revised Code, were established through the performance of a risk assessment pursuant to rules adopted under division (B)(2) of section 3746.04 of the Revised Code, or were set forth in a variance issued under section 3746.09 of the Revised Code.

(2) All of the following for each property for which a variance was issued under section 3746.09 of the Revised Code during the preceding calendar year:

(a) The address of the property and the name of the person to whom the variance was issued;

(b) A summary of the alternative standards and terms and conditions of the variance and brief description of the improvement in environmental conditions at the property that is anticipated to result from compliance with the alternative standards and terms and conditions set forth in the variance;

(c) A brief description of the economic benefits to the person to whom the variance was issued and the community in which the property is located that are anticipated to result from the undertaking of the voluntary action in compliance with the alternative standards and terms and conditions set forth in the variance.

(3) The number of audits performed under section 3746.17 of the Revised Code during the preceding calendar year and, in connection with each of them, at least the following information:

(a) The address of the property in connection with which the audit was performed and the name of the person who undertook the voluntary action at the property;

(b) An indication as to whether the audit was a random audit or was conducted in accordance with the priorities established in rules adopted under divisions (A)(9)(a) to (f) of section 3746.04 of the Revised Code and, if the audit was conducted in accordance with those priorities, an indication as to which of them resulted in the selection of the voluntary action for an audit;

(c) A brief summary of the findings of the audit and any action taken by the environmental protection agency as a result of those findings.

(4) The number of covenants not to sue revoked during the preceding calendar year through the operation of divisions (A)(2)(c) and (B) of section 3746.12, division (B)(2) of section 3746.18, and division (B) of section 3746.19 of the Revised Code and for each property for which a covenant was revoked, at least both of the following:

(a) The address of the property affected by the revocation and name of the person who undertook the voluntary action at the property;

(b) The reason for the revocation.

(5) The amount of money credited to the voluntary action administration fund created in section 3746.16 of the Revised Code during the preceding fiscal year from the fees established in divisions (D) and (H) of section 3746.07 and division (C) of section 3746.13 of the Revised Code and from civil penalties imposed under section 3746.22 of the Revised Code. The report shall indicate the amount of money that arose from each of the fees and from the civil penalties. The report also shall include the amount of money expended from the fund during the preceding fiscal year by program category, including, without limitation, the amount expended for conducting audits under section 3746.17 of the Revised Code during the preceding fiscal year.

(6) For each property that is receiving a tax abatement under section 5709.87 of the Revised Code for the preceding tax year, the amount of the valuation exempted from real property taxation for that tax year under that section. In order to comply with division (A)(6) of this section, the director shall include in the annual report the report required to be provided to the director by the director of development under division (B)(2) of this section. The sole responsibility of the director of environmental protection regarding the report provided to the director under that division is to include it in the annual report prepared under division (A) of this section.

(7) For each property that is receiving a tax abatement pursuant to an agreement with a municipal corporation or county entered into under section 5709.88 of the Revised Code, the amount of the valuation exempted from real or personal property taxation. In order to comply with division (A)(7) of this section, the director shall include in the annual report the report required to be provided to the director by the director of development under division (C) of this section. The sole responsibility of the director of environmental protection regarding the report provided to the director under that division is to include it in the annual report prepared under division (A) of this section.

(B) (1) Not later than March 31, 1996, the county auditor of each county in which is located any property that is receiving a tax abatement under section 5709.87 of the Revised Code shall report to the director of development for each such property both of the following as applicable to tax year 1995:

(a) The address of the property and the name of the owner as stated in the records of the county auditor of the county in which the property is located;

(b) The amount of the valuation of the property that was exempted from real property taxation under that section.

Not later than the thirty-first day of March of each subsequent year, each such county auditor shall report the information described in those divisions to the director of development for each property within the county that is receiving a tax abatement under that section for the preceding tax year.

(2) Not later than July 1, 1996, and not later than the first day of July of each subsequent year, the director of development shall compile the information provided to the director under division (B)(1) of this section applicable to the preceding tax year into a report covering all of the counties in the state in which are located properties receiving a tax abatement under section 5709.87 of the Revised Code for the preceding tax year and shall forward the report to the director of environmental protection. The sole responsibility of the director of development in preparing the report is to compile the information submitted to the director by the county auditors under division (B)(1) of this section.

(C) Not later than July 1, 1996, and not later than the first day of July of each subsequent year, the director of development shall compile the information provided to the director by municipal corporations and counties under division (A) of section 5709.882 [5709.88.2] of the Revised Code applicable to the preceding calendar year into a report covering, by county, all of the municipal corporations and counties in this state in which are located properties receiving a tax abatement pursuant to an agreement entered into under section 5709.88 of the Revised Code and shall forward the report to the director of environmental protection. The sole responsibility of the director of development in preparing the report is to compile the information submitted to him by municipal corporations and counties under division (A) of section 5709.882 [5709.88.2] of the Revised Code.

HISTORY: 145 v S 221. Eff 9-28-94; 150 v H 516, § 1, eff. 12-30-04; 151 v S 124, § 1, eff. 6-27-05.

§ 3746.99. Felony violations; penalties.

(A) Whoever recklessly violates section 3746.15 of the Revised Code in a manner that otherwise would constitute a violation of Chapter 3734. of the Revised Code or rules adopted under it, or knowingly violates that section in a manner that otherwise would constitute a violation of Chapter 3704., 3714., or 6111. of the Revised Code or rules adopted under any of those chapters, is guilty of a felony and shall be fined at least ten thousand dollars, but not more than twenty-five thousand dollars, or imprisoned for at least two years, but not more than four years, or both. Each day of violation is a separate offense. Upon a second or subsequent conviction for such an offense, the offender shall be fined at least twenty-five thousand dollars, but not more

than fifty thousand dollars, or imprisoned for at least two years, but not more than four years, or both.

(B) Whoever knowingly violates section 3746.20 of the Revised Code is guilty of a felony and shall be fined at least ten thousand dollars, but not more than twenty-five thousand dollars, or imprisoned for at least two years, but not more than four years, or both. Each violation is a separate offense. Upon a second or subsequent conviction for such an offense, the offender shall be fined at least twenty-five thousand dollars, but not more than fifty thousand dollars, or imprisoned for at least two years, but not more than four years, or both.

HISTORY: 145 v S 221. Eff 9-28-94.
