



Activity and Use Limitations Under the Voluntary Action Program

Properties that receive Covenants Not to Sue (CNS) from Ohio EPA under the Voluntary Action Program (VAP) often depend on activity and use limitations (AULs) to meet applicable standards.

It is important for property owners to know and communicate to those using a property which AULs apply. AULs are identified in the Environmental Covenant (EC) associated with the CNS property. These AULs could affect building occupancy and approvals may be needed from Ohio EPA to meet development needs.

This fact sheet addresses the AUL that requires owners to demonstrate to Ohio EPA that the Vapor Intrusion to Indoor Air (VI) pathway to any new building — construction or expansion — meets the applicable standards prior to occupying the building. If a building were to be occupied without first fulfilling the AUL criteria, the property may not comply with the CNS and with the EC. Ohio Revised Code 3746.05 provides that when a property is put to a use that does not comply with an AUL, the CNS for the property is declared void on the date of the noncomplying use.

Ohio EPA created this fact sheet as a guide to help property owners, Certified Professionals (CPs), municipalities, developers and lessees of properties become aware of this potential compliance issue for a VI pathway AUL. We hope to prevent any property uses that may conflict with a VI pathway AUL. Keep in mind that the VI pathway AUL applies on a building-by-building basis.

Basic AUL language on the vapor intrusion to indoor air pathway¹, or “VI pathway AUL”

Limitation on Building Occupancy – Remedy or Demonstration Obligation. Prior to human occupancy of any building constructed on the Property, either: (i) a remedy that eliminates indoor air vapor intrusion exposure to hazardous substances in soil or ground water in excess of applicable standards shall be installed, operated and maintained as an engineering control under an operation and maintenance agreement in accordance with a covenant not to sue issued by the director of environmental protection pursuant to ORC 3746.12; or (ii) a demonstration attested by a certified professional shall be made to Ohio EPA, that the Property complies with applicable standards for the vapor intrusion to indoor air exposure pathway without further implementation or remedial activity and documented in accordance with ORC chapter 3746 and the rules adopted under the chapter. [Emphasis added.]

When does “occupancy” first occur, for purposes of planning?

For VAP purposes, occupancy occurs when the building is first opened to its intended users. Below are some examples.

- Office building – employees begin to use the building for business functions
- Residence – people begin to move into the building
- Retail establishment (for example, store, restaurant, entertainment venue, etc.) – first made accessible to or open for public use (for example, grand opening date)
- Industrial facility – employees begin to use the building for business functions

What steps must be taken before occupying a building at a property with a VI pathway AUL?

- 1) Be familiar with each AUL associated with the property, and the locations where each AUL applies. Does a VI pathway AUL apply to the building to be constructed?

¹ This AUL language first became prevalent in the VAP in 2011. Prior to this time, AUL language may have included restrictions on the building of builds (for instance, “no-build” restrictions) or other types of building restrictions (for example, limitation to first floor open air structures, or no buildings with basements). The same can be said for declaration of use restriction language used prior to 2005 when the EC statute became effective. Modifying these types of restrictions is beyond the scope of this fact sheet, but any changes to these restrictions would need to proceed in compliance with OAC 3745-300-11(H), post-CNS remedy changes. Upfront coordination with Ohio EPA through VAP technical assistance is recommended. Further, allowance for adequate time is also recommended to consider the technical and legal issues to change any restrictions for the property. Early upfront communication benefits both the volunteer and the agency to facilitate project success.

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- 2) For locations where a VI pathway AUL applies, determine whether an engineering control is required. An assessment of the VI pathway can be completed to determine this or the default remedy of an engineering control can be implemented. If the assessment concludes an engineering control must be installed, the engineering control will need to be installed and approved by Ohio EPA prior to occupancy. Approval means, the engineering control will need to be operated and maintained under an Operation and Maintenance (O&M) Plan and Agreement between the owner or other volunteer (for instance, long-term tenant) and Ohio EPA.
- 3) If, following an assessment of the VI pathway, a CP can demonstrate the property meets the applicable standards without any further remediation or engineering control, the building may be occupied once the demonstration is attested to by a CP in an affidavit submitted to Ohio EPA. Supporting documentation justifying the assertion that the property meets applicable standards without any further remediation or engineering control must be submitted to Ohio EPA along with the CP affidavit.

What track applies for developing an O&M plan for an Engineering Control for a VI pathway AUL?

Ohio EPA recognizes some development plans change and flexibility is needed, but when schedules are on track it is also important to be ready to have necessary agreements (for example, O&M Agreements) in place for opening day. Below are two options to help owners and other volunteers better anticipate the length of time it may take to get Ohio EPA approval to occupy a building subject to a VI pathway AUL. The CNS and the existing remedy documents will stipulate which track applies to the building.

Track A

For Property under an O&M Agreement that sanctions plan modification². [Time to finalize with Ohio EPA is approximately 2-3 months.] Below are the steps that must be completed by the owner/volunteer to replace or modify its existing O&M Plan commitments.

- Design engineering control
- Build engineering control
- Conduct engineering control effectiveness evaluation (for instance, what is needed?)
- Write newly modified O&M plan or replacement O&M Plan
- Submit to Ohio EPA for review (open TA account, if not already open)
- Address Ohio EPA comments and finalize documents
- Submit final O&M Plan to Ohio EPA for approval (approval by VAP manager)
- Receive agency approval – VAP manager letter
- Occupy the building

Track B

When an O&M Agreement is not in place (or it needs to be modified) and CNS must be amended. [Time to finalize with Ohio EPA is approximately 3-4 months.] Below are the steps that must be completed by the owner/volunteer to develop (or modify) its O&M Plan and Agreement with Ohio EPA.

- Design engineering control
- Build engineering control
- Conduct engineering control effectiveness evaluation (for instance, what is needed?)
- Write (or revise) O&M plan and proposed (new or modified) agreement
- Submit to Ohio EPA for review (open TA account, if not already open)
- Address Ohio EPA comments and finalize documents, including Volunteer's signature to O&M agreement; financial assurance documentation
- Submit final documents to Ohio EPA for final review and signoff, to recommend that the director amend the CNS
- Receive agency approval through director-issued Amended CNS with (new or modified) O&M Agreement; then may occupy the building
- Record Amended CNS
- Provide Ohio EPA with a copy of the recorded Amended CNS

Contact

For more information or questions, please contact the voluntary action program at (614) 644-2924.

² Generally, O&M Agreements established after 2012 allow for plan modification "effective upon written approval by Ohio EPA" and without agreement modification. Refer to the Modification section of the Agreement for the property.