



## **Ohio EPA Guidance - VAP Environmental Covenants**

*Updated July 2015*

### **Drafting Proposed Environmental Covenants with “Activity and Use Limitations” for Properties Seeking Covenants Not to Sue**

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#### ***OVERVIEW***

This guidance relates to property cleanups under Ohio’s Voluntary Action Program (VAP), when the volunteer asks that a VAP certified professional (CP) submit to Ohio EPA a no further action (NFA) letter, with a request for a covenant not to sue (CNS).

An NFA letter submitted with a CNS request is an “environmental response project” as defined in Ohio’s environmental covenants law, enacted at Ohio Revised Code (ORC) 5301.80 to 5301.92 (effective December 30, 2004). The environmental covenant is the legal mechanism to establish one or more activity and use limitations (AULs), which constitute a remedy in support of a CP’s issuance of a NFA letter. See ORC 3746.10(C)(3)(b) and 3746.11(A) and Ohio Administrative Code (OAC) 3745-300-13(B)(5).

The property may rely on AULs to impose land use and activity restrictions in accordance with OAC 3745-300-07(I)(1), or as a remedy to achieve the property’s compliance with applicable standards in accordance with OAC 3745-300-07(I)(3). OAC 3745-300-11(C)(3) provides criteria for the overall development of institutional control remedies, which include AULs.

#### ***PURPOSE OF GUIDANCE***

This guidance serves to assist the volunteer in the preparation of a proposed environmental covenant – and the CP in the drafting of the AULs - for a voluntary action property dependent on an AUL as a remedy.

When an AUL is needed, the volunteer’s legal counsel should provide to the CP a “proposed environmental covenant” that complies with ORC 5301.82. Specifically for VAP sites, Ohio EPA developed a VAP Environmental Covenant Template to aid in the uniform implementation of the statutory requirements. The VAP Environmental Covenant Template is routinely updated and posted on the Ohio EPA website. The current version is found at [VAP EC template Dec 2014.docx](#).

The NFA letter issued by the CP should include the volunteer’s proposed environmental covenant. Following Ohio EPA’s review and revision, the owner of the property to be restricted executes (signs before a notary public) the final environmental covenant.

Ohio EPA includes the owner-executed environmental covenant as an exhibit to the CNS recommended for the director's signature. Following CNS issuance, the volunteer or owner arranges for filing of the documents with the county recorder, for recording in the same manner as a deed to the property; see ORC 317.08, 3746.14, and 5301.88. The CNS becomes effective on the date when the environmental covenant is recorded.

## ***DEVELOPING A PROPOSED ENVIRONMENTAL COVENANT***

### **1. Addition of property information and project background**

Using the “whereas clause” in the *VAP Environmental Covenant Template* for the background section, identify the volunteer and the property owner, identify the CP and NFA letter, identify the property that is the subject of the voluntary action, describe the purpose of the AULs, and explain that the reader can find more information about the voluntary action in the NFA letter's executive summary, and where it can be found.

*Note:* Some of the information blanks must remain blank necessarily until the agency's review of the proposed environmental covenant, for example, Ohio EPA's assigned tracking number for the NFA letter.

If the NFA letter's applicable standards demonstration relies on AULs that are applied to a smaller property area than the (entire) voluntary action property, be sure to explain the property differences in the background language and property definition, section 2. Otherwise, the property legal description used for the proposed environmental covenant must match the NFA letter property's legal description and acreage.

When different land owners own different parts of the NFA letter property, additional explanation will be necessary in the background section and property definition to specify which owner owns which portion of the property. Sometimes separate legal descriptions and survey maps of the property portions will be necessary. Attach to the environmental covenant the necessary legal descriptions and maps, which will later support its recording.

### **2. Drafting the AULs - based on current and anticipated property use, Phase II assessment determinations, and the applicable standards**

AULs are drafted with consideration of the current and anticipated property use, Phase II assessment determinations, and the applicable standards.

AULs may be drafted to restrict the property to a certain land use category (e.g., commercial and industrial land use). This would then make standards that apply only to the defined land use applicable to that property. Several AUL examples are provided in this guidance including generic language for commercial and industrial land use. The AUL language limits the property's use so that remedies and applicable standards relying on the exposure assumptions used to calculate the VAP generic numerical standards for commercial and industrial land use (“generic exposure assumptions”)

apply.<sup>1</sup> When a property specific risk assessment is used to derive applicable standards for commercial or industrial land use, appropriate adjustments need to be made to reflect the assessed exposure factors and risk scenarios.

The example AUL language for “restricted residential” land use considers property specific variables, such as the depth to which applicable standards are met (i.e., modified point of compliance). AULs can be drafted to address specific exposure scenarios not contemplated in the development of applicable standards for the specific land use categories identified in OAC 3745-300-08(C)(2) (i.e., recreational land use.)

The AULs can also be drafted to address the specific limitations for properties that exceed applicable standards for complete exposure pathways for reasonable anticipated uses determined under the Phase II assessment. In this regard, generic language for a limitation on building occupancy – remedy or demonstration obligation, is provided below.

Each AUL must be considered on a property-specific basis to determine which AUL or combination of AULs is suitable for the particular circumstances of the property. Such AULs will be based on:

- complete exposure pathways (existing and reasonably-anticipated pathways determined pursuant to OAC 3745-300-07(F)(1)),
- affected media,
- receptors, and
- VAP standards applicable to the property.

AULs are considered remedies under the VAP and must be proposed for all NFA letter properties that exceed applicable standards for unrestricted use. (In contrast, compliance with generic numerical standards for the unrestricted residential land use category to the minimum 10 feet point of compliance would not require a land use limitation.) Engineering controls may also be needed to support the AULs or to mitigate or eliminate exposure. Other remedies may apply as described in OAC 3745-300-11.

*Note:* Engineering controls are operated and maintained under an operation and maintenance plan - not under an environmental covenant. ORC 3746.10(C)(4).

The example AUL language for “restricted residential” land use, given below, presumes that residential land use category standards are met at a point of compliance greater than 2 feet but less than 10 feet below ground surface. The companion engineering controls must be addressed through an operation and maintenance plan.

For land uses not contemplated by rule language, such as recreational use, or if

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<sup>1</sup> The generic exposure assumptions for commercial and industrial land use are set forth in OAC 3745-300-08(B)(3). Exposure factor point values are set forth in the *Support Document for the Development of Generic Numerical Standards and Risk Assessment Procedures* (August 2014), which can be downloaded from Ohio EPA's web page.

seeking to mitigate other exposures using an AUL not contemplated in this guidance, coordination with Ohio EPA for technical assistance is recommended well before issuance of the NFA letter.

### 3. Drafting the AULs – example language

The first set of AULs that are given below relate to land use. Several scenarios are provided, based on the point of compliance and whether the property is subject to engineering controls or other remedial activities under an operation and maintenance (O&M) plan. The range of land use options include commercial or industrial; and restricted residential. Choose the type of land use that fits with what the Phase II assessment and cleanup support, and the current and anticipated property uses.

The next set of AULs relate to ground water. They may be used for most property scenarios to prohibit extraction or use of ground water for potable and/or non-potable exposures. Three options are given, depending on whether all uses of ground water (potable and non-potable) are to be excluded, or whether non-potable uses will be allowed. An example is also provided to specify separate ground water zone restrictions.

The last AUL example, below, is the *Limitation on Building Occupancy – Remedy and Demonstration Obligation*. This limitation may be an appropriate AUL when vapor intrusion is determined to be a reasonably-anticipated complete future pathway. This AUL language would be used when no building currently exists on a VAP property but it is reasonably anticipated that a building will be added on the VAP property in the future. This language would also be used when a new building or a building expansion may be constructed beyond an existing installed remedy, such as a vapor mitigation system subject to operation and maintenance under an O&M plan. The AUL language provides a remedy to demonstrate compliance with VAP applicable standards when subsurface contamination has a potential to create an exceedance of applicable indoor air standards.

The AUL requires that the indoor air pathway be addressed with an engineering control or be shown to not require a remedy through the CP's demonstration. An Ohio EPA approval must be received prior to the occupancy of any future building. In the event that an engineering control is implemented as part of the new building, the engineering control must be addressed through a VAP-approved O&M plan and agreement established between the volunteer and Ohio EPA prior to building occupancy.

*Note:* Use of example AUL language does not guarantee a property complies with VAP rules or applicable standards. The example language is intended only as guidance for the volunteer's and CP's development of acceptable AULs.

a. Example AUL language for "commercial and industrial" land use. For use scenarios based on the VAP commercial and industrial land use categories for the applicable direct contact soil standards.

\_\_\_\_. **Limitation for Commercial or Industrial Land Uses.** The Property is limited to commercial or industrial land use, as those terms are defined in OAC 3745-300-08(C)(2)(b) and (C)(2)(c) (effective August 1, 2014), or any combination of those uses.

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as “land use with potential exposure of adult workers during a business day and potential exposure of adults and children who are customers, patrons, or visitors to commercial facilities during the business day. Commercial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil, ingestion of soil and inhalation of volatile compounds due to vapor intrusion to indoor air. Generic direct contact standards for commercial land use may not be appropriate for properties where a high frequency of potential exposure to children may occur, such as at schools and day care facilities.” Commercial land use includes, without limitation, [*Edit as appropriate to reflect current and reasonably anticipated uses: warehouses, retail establishments, office buildings, hospitals and clinics, religious institutions, hotels, motels and public areas incidental to such use.*]

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as “land use with potential exposure of adult workers during a business day and potential exposures of adults and children who are visitors to industrial facilities during the business day. Industrial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil and inhalation of volatile compounds due to vapor intrusion to indoor air.” Industrial land use includes, without limitation, [*Edit as appropriate to reflect current and reasonably anticipated uses: lumberyards, power plants; manufacturing facilities, assembly plants, non-public airport areas, railroad switching yards, marine port facilities, and public or employee areas incidental to such land use.*]

b. Example AUL language for “restricted residential” category land use. Based on OAC 3745-300-08(C)(2)(a)(ii), restricted residential land use is considered protective for, and may be applied to, residential land uses appropriate for a modified point of compliance supported by institutional or engineering controls. A modified point of compliance consists of any depth less than the minimum depth of 10 feet below ground surface required by OAC 3745-300-07(l)(1)(a). The example language applies to scenarios when direct contact soil residential standards are met to 2 or more feet below ground surface.

Also, the 2-foot point of compliance is maintained as an engineering control under an operation and maintenance plan or agreement, which designates a central management entity (“CME”) to oversee site maintenance and construction activities. The CME’s oversight is to prevent human exposure to the soil at depth that may exceed VAP applicable standards at depths of 2 or more feet below ground surface (i.e., by

ensuring that the shallow point of compliance is retained following site construction.) Refer to the designated CME for a property in an environmental covenant introductory clause.<sup>2</sup>

*Option 1 - For “restricted residential” category land use*

\_\_\_\_. **a. Restriction on Residential Land Use.** The Property shall not be used for fee simple single-family homes and duplexes. This restriction does not prohibit any permissible residential land use defined herein.

\_\_\_\_. **b. Limitation Defining Permissible Land Uses.** Subject to the Restriction on Residential Land Use set forth herein, the Property may be otherwise used for (i) residential land use, (ii) commercial land use, or (iii) industrial land use, or any combination of these land uses, each as defined in OAC 3745-300-08(C)(2) (effective August 1, 2014).

OAC 3745-300-08(C)(2)(a) defines “residential land use” as “land use with a high frequency of potential exposure of adults and children to dermal contact with soil, inhalation of vapors and particles from soil, incidental ingestion of soil, and inhalation of volatile compounds due to vapor intrusion from ground water to indoor air.” **Permissible residential land use** includes, without limitation, *[Edit as appropriate to reflect current and reasonably anticipated uses: apartments, condominiums, and elder care facilities. The residential land use exposure scenarios are also protective of urban parks, picnic areas, outdoor performance spaces, playfields, open lawns, walkways, pet play areas, and activities incidental to such land use.]*

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as...*[Insert remainder of language – see prior section.]*

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as ...*[Insert remainder of language – see prior section.]*

*Option 2 – For “restricted residential” category land use*

\_\_\_\_. **Limitation for Restricted Residential, Commercial or Industrial Land Uses.** The Property shall not be used for fee simple single-family homes and duplexes. The Property is limited to the allowable residential land use as described herein, or to commercial or industrial land uses as defined in OAC 3745-300-08(C)(2)(b) and (C)(2)(c) (effective August 1, 2014), or any combination of these land uses.

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<sup>2</sup> *Example language:* WHEREAS, the Property is the subject of an operation and maintenance agreement that provides for a central management entity (“CME”) to oversee maintenance of engineering controls or implementation of other site activities. CME oversight will prevent human exposure to the ground water or soil at depth, which may exceed VAP applicable standards at depths of two (2) or more feet below the ground surface.

OAC 3745-300-08(C)(2)(a) defines “residential land use” as “land use with a high frequency of potential exposure of adults and children to dermal contact with soil, inhalation of vapors and particles from soil, incidental ingestion of soil, and inhalation of volatile compounds due to vapor intrusion from ground water to indoor air.” **Allowable residential land use** excludes fee simple single-family homes and duplexes, but includes, without limitation, *[Edit as appropriate to reflect current and reasonably anticipated uses: apartments, condominiums, day care centers, and schools. Residential land use exposure scenarios are also protective of nursing homes, elder care and other long-term care facilities; colleges and other educational institutions; and activities and uses incidental to such land use.]*

OAC 3745-300-08(C)(2)(b) defines “**commercial land use**” as...*[Insert remainder of language – see prior section.]*

OAC 3745-300-08(C)(2)(c) defines “**industrial land use**” as ...*[Insert remainder of language – see prior section.]*

c. Example language for AULs on ground water extraction and use. Several options are given below.

*Option 1—For scenarios where all use of ground water, potable and non-potable, are to be restricted:*

\_\_\_\_. **Prohibition on Ground Water Extraction and Use.** Ground water underlying the Property shall not be extracted or used for any purpose, potable or otherwise, except for investigation, monitoring or remediation of the ground water *[Additional language for certain property-specific complete exposure pathways, which - if addressed in the NFA letter demonstrations - may also be excluded: or for extraction in conjunction with construction or excavation activities or maintenance of subsurface utilities, such as to dewater a trench].*

*Option 2—For scenarios where potable ground water use is to be restricted, but non-potable uses are allowed:*<sup>3</sup>

\_\_\_\_. **Prohibition on Ground Water Extraction and Potable Use.** No person shall extract or use ground water at or underlying the Property for any potable purpose.

*Option 3—For scenarios where potable ground water use only is to be restricted from one ground water zone (but non-potable uses allowed), and all ground water use is restricted from a second ground water zone:*<sup>3</sup>

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<sup>3</sup> Use of this option requires compliance with the requirements in OAC 3745-300-11(C)(8) ensuring protection of clean ground water zones and evaluation of non-potable pathways.

\_\_\_\_. **Prohibition on Extraction or Use of Ground Water from [Contaminated Shallow Zone].** No person shall extract or use ground water at or underlying the Property from the *[contaminated ground water zone or other identifying description of the zone; may include geologic or common description or depth ranges based on what makes sense for a particular property]* for any potable purpose. Ground water underlying the Property from the *[deeper, uncontaminated, unconsolidated ground water zones or other identifying description]* shall not be extracted or used for any purpose, potable or otherwise, except for investigation or remediation of the ground water.

d. Example AUL language for vapor intrusion to indoor air pathway. For scenarios where the property does not meet applicable standards for the vapor intrusion to indoor air pathway for an anticipated building expected to be constructed on the property or a portion of the property. The language below, if included as an AUL in an EC, would remedy this complete exposure pathway and still leave the Volunteer in a position to develop the property and construct a building. In order to occupy a new building and remain in compliance, one of the “options” in the AUL would have to be exercised. For more information on this AUL see the VAP guidance entitled, *Conducting Remedies in the VAP for Complete and Reasonably Anticipated to be Complete Pathways*, at <http://www.epa.ohio.gov/portals/30/vap/tgc/va30011-14-003.pdf>.

\_\_\_\_. **Limitation on Building Occupancy – Remedy or Demonstration Obligation.** Prior to human occupancy of any building constructed on the *[Edit as appropriate: Property / portion of Property that is defined in Attachment 2 of the Environmental Covenant as subject to this limitation]*, either: (i) a remedy that eliminates indoor air vapor intrusion exposure to hazardous substances in soil or groundwater 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 of remedial activity and documented in accordance with ORC chapter 3746 and the rules adopted under the chapter.

#### **4. Review of the proposed environmental covenant – by the volunteer and the property owner – before its submission to Ohio EPA**

Often the volunteer will request the environmental consultant or CP prepare the initial draft of the proposed environmental covenant. The environmental consultant or CP may then use their detailed knowledge of the VAP project to apply the VAP Environmental Covenant Template and develop AULs in support of the applicable standards demonstration for the property. This guidance in effect supports this practice.

However, the environmental consultant or CP should not consider the draft ready for submission as the proposed environmental covenant for the property at this point. The environmental covenant draft should undergo further review by the volunteer, the property owner (in cases where the volunteer does not own the property) and their legal counsel before the CP uses it to support the CP's issuance of an NFA letter.

Such a review by the volunteer, the property owner or their legal counsel will allow for an evaluation of the ownership interests, the property legal description, the AUL areas if a subset of the property is to be restricted (with legal description and survey map), the required notices and warranties and contact information for future notices. As a result, the proposed environmental covenant may better comply with the OAC 3745-300-13(B)(5) criteria and support the NFA letter site for which a CNS is requested. Ohio EPA cautions against a non-attorney preparing an environmental covenant without the involvement of legal counsel for the volunteer and owner. See [VAP Environmental Covenants: Avoiding the Unauthorized Practice of Law](#).

Note that ORC 3746.05's "voidance by law" provision applies to any property in the VAP for which a covenant not to sue has been issued in reliance on an AUL. ORC 3746.05 provides that if a property is put to a use that does not comply with an AUL, the CNS is declared void on and after the date of the commencement of the noncomplying use. In this regard, the volunteer may want to consider use of safeguards for compliance with an AUL (i.e., the Limitation on Building Occupancy – Remedy or Demonstration Obligation) to prevent triggering the ORC 3746.05 voidance by law provision.

### **For Questions or More Information**

Should questions arise regarding this guidance or the *VAP Environmental Covenant Template* feel free to contact Ohio EPA's Legal Office at 614-644-3037 and ask for a VAP attorney.