
Ohio's Voluntary Action Program

July 2001

Introduction

Ohio's Voluntary Action Program was created in September 1994 with the passage of Senate Bill 221, the implementing legislation for the program. Final administrative rules, governing all the administrative and technical aspects of the program, were adopted in December 1996. The VAP was fully implemented in early 1997. The program was created to give companies a way to investigate possible environmental contamination, clean it up if necessary and receive a promise from the State of Ohio that no more cleanup is needed.

Prior to the creation of the VAP, cleanup standards were unclear. As a result, valuable land sat idle because fears of immense liability and cleanup costs scared off potential developers, businesses and banks. Some developers abandoned plans to clean up their contaminated properties because Ohio EPA, which must focus its efforts on the worst sites, did not have resources to provide guidance or oversight for their projects. By creating this program, Ohio recognized the need to remove the environmental and legal barriers that stalled redevelopment and reuse of contaminated properties.

Now, anyone can undertake a cleanup project and be assured it meets environmental standards without direct oversight from Ohio EPA. The VAP minimizes governmental red-tape and maximizes resources and expertise in the private sector. If someone wants to clean up a piece of property, it may be done following specific standards developed by Ohio EPA. If done according to these standards, the company can ask Ohio EPA to release the owner from the responsibility to do further investigation and cleanup.

Certified Professionals and Laboratories

The VAP maximizes resources and expertise in the private sector by utilizing qualified, experienced professionals such as engineers and scientists, who are certified by Ohio EPA. These certified professionals are responsible for verifying properties are cleaned up to the levels required by the program rules. The detailed program rules allow these qualified professionals and the volunteer which he or she represents, to do the work without ongoing Agency involvement. Ohio EPA operates a professional certification program to ensure that only environmen-

tal professionals with the appropriate qualifications and experience are licensed as certified professionals. In addition, to help ensure high-quality work, certified professionals must meet annual continuing education requirements and be recertified by Ohio EPA each year.

To ensure high-quality laboratory data, Ohio EPA also certifies private sector laboratories that test environmental samples which support voluntary cleanups. Before they are certified, laboratories must demonstrate they can adequately conduct specific laboratory analyses and pass an on-site laboratory inspection by Ohio EPA personnel. Laboratories must analyze "test" samples for Ohio EPA twice a year to demonstrate that they are continuing to conduct high-quality laboratory analyses. If a certified lab fails to adequately analyze these "test" samples, Ohio EPA can suspend its ability to conduct lab work for the VAP until any testing issues are corrected.

NFA Review

When a certified professional believes that a site has been investigated and, if necessary, cleaned up to the standards contained in the program rules (OAC Chapter 3745-300), he or she can prepare what is called a No Further Action Letter (NFA).

VAP

This document, which must be submitted in a prescribed format developed by the VAP, describes the environmental problems found at the site, how those environmental problems were investigated and how the site was cleaned up.

Somewhat a misnomer, the NFA "letter" is actually a thick document full of very detailed information about the site. The NFA includes a Phase I property assessment report that contains information concerning the certified professional's investigation of the historical and current uses of the property. This information allows the certified professional to determine whether or not there is reason to believe that a release of hazardous substances or petroleum has or may have occurred at the property.

If there is reason to believe a release has occurred and the site may be contaminated, a Phase II property assessment is then conducted. The Phase II assessment includes collecting soil, ground water, surface water and sediment samples from the site as necessary. The Phase II

assessment ensures that all potential contaminants identified in the Phase I assessment are adequately evaluated and compared to the appropriate VAP cleanup standards. If the Phase II assessment indicates that cleanup standards are met, and the site is protective of human health and the environment, a certified professional will make the determination that the voluntary cleanup at the site is completed and prepare the NFA.

If the Phase II assessment indicates that any of the cleanup standards have been exceeded, remedial activities will occur to make the site protective of human health and the environment. Remedial activities may include things such as soil removal, ground water treatment or barriers to contamination such as a clay or asphalt cap. At that point, an NFA can be prepared.

If the volunteer wants the legal release from Ohio, the certified professional submits the NFA to Ohio EPA for review. When an NFA is received by Ohio EPA, technical staff reviews the document to determine if all of the standards (i.e. investigation and cleanup rules contained in OAC Chapter 3745-300) have been met and accordingly issues or denies the covenant not to sue.

Many volunteers may reach this point and decide not to pursue a legal release. That choice is largely driven by business decisions concerning financing and

ability to sell the property. Some lenders are comfortable enough to proceed knowing the state's cleanup standards have been met, and a legal release is not needed.

Cleanup Standards

As mentioned above, contaminated soils, ground water, surface water and sediment must be compared to cleanup standards to determine whether the site is protective of human health and the environment or if remediation must be conducted. These cleanup standards were developed utilizing the most current, accepted scientific methodologies for minimizing the health risk posed by exposure to contaminants. Exposure can occur by drinking ground water; contacting soils on the ground through work and play; swimming in lakes, ponds, rivers or streams; inhaling airborne dirt; or other such modes of contact.

The soil standards take into account that different types of land use (residential, commercial and industrial) result in contact with contamination for different lengths of time and by different individuals. As a result, cleanup standards for three different types of land use were developed. Because other types of land use exist, a methodology for determining the health risk for any and all land uses was developed as well.

Likewise, aquifers (underground water) can have very different characteristics. Some are very valuable drinking water resources and others, because of low ground water yield or quality, are unusable for drinking, cooking or bathing. As a result, the VAP developed a ground water classification system that takes into account how the aquifer will be used (e.g. drinking water vs. industrial cooling water) when determining what cleanup standards need to be met. Similar cleanup standards or methods for determining risk were used when determining cleanup levels for surface waters and sediments.

Technical Assistance

Currently, Ohio EPA assists volunteers with any questions they have regarding their participation in the VAP. Since the VAP relies on user fees to help support the program, volunteers must pay for the Agency's assistance. Sometimes Agency staff consults with certified professionals to resolve technical questions about a specific rule requirement. They also conduct comprehensive document reviews of all aspects of the investigation and cleanup. Although some volunteers receiving technical assistance submit NFA letters, many volunteers conduct work in accordance with Ohio EPA's advice but do not submit an NFA.

Although these sites do not get counted as an output of the VAP, the VAP statute, rules and technical assistance can be credited with their cleanup and redevelopment.

Covenant Not to Sue

VAP technical staff review NFA letters submitted to the Agency to determine if program standards are met and that the site is protective of public health, safety and the environment. When cleanup requirements are met, the director of Ohio EPA issues a covenant not to sue. This covenant protects the property owner or operator and future owners from being legally responsible to the State of Ohio for further investigation and cleanup. This protection applies only when the property is used and maintained in the same manner as when the covenant was issued.

A covenant is recorded in the County Recorder's office, and transfers with the title of the property to a new owner. Restrictions on how a property may be used are filed along with the property's deed in the County Recorder's office before a covenant is issued by Ohio EPA. When a covenant is issued or denied by the director, a notice is published in the local newspaper to inform nearby residents and other interested parties. Federal authorities and third parties still have the right to

sue property owners or operators. Covenant issuances and denials are appealable to the Environmental Review Appeals Commission.

Public Participation

All information provided to Ohio EPA about sites in the VAP is available to the public. This includes all the information provided by companies asking for technical assistance before submitting an NFA, and all the documentation included in an NFA, as well as all Agency comments. At any time during the NFA review process, the public has the right to request and receive any cleanup document from Ohio EPA. In addition, each NFA must include a list of all the data, information and documentation relied on to conduct the voluntary action, even if the data is not included as part of the NFA submittal. Ohio EPA is obligated to procure this information from certified professionals whenever it is requested by the public. Certified professionals must comply with all such documentation requests made by the director of Ohio EPA.

The enabling legislation for the VAP, specifically Section 3746.28 of the Ohio Revised Code, states that entering into and participating in a voluntary action does not constitute an admission of criminal liability under Ohio law. This statutory provision is intended to protect volunteers while they are attempt-

ing to investigate and clean up their properties and additionally protects the information, data, documents and samples collected while participating in the VAP by deeming such information inadmissible in any civil or administrative proceeding against the volunteer. This provision does not allow the volunteer to claim any of the information produced in connection with a voluntary action is confidential or alter any of the public's rights to receive access to documents mentioned above.

Audits

The enabling statute for the VAP recognized the need to ensure that a privatized cleanup program would operate properly and assure the public that sites taken through the VAP were protective of human health and the environment. As a result, Ohio EPA audits at least 25 percent of the properties taken through the VAP to ensure that sites have been properly addressed and that certified professionals and laboratories performed work properly. Any and all documents related to the voluntary action may be examined by Ohio EPA during an audit. During the audit, Ohio EPA may also conduct on-site sampling to verify compliance with cleanup standards. Volunteers may lose their covenants if problems identified in an audit are not

corrected. Certified professionals and laboratories who have conducted work under the VAP may be civilly or criminally penalized for violating agreements and falsifying or withholding information.

Memorandum of Agreement (MOA) Track

In 2000, Ohio EPA and U.S. EPA began negotiating an agreement to allow sites cleaned under Ohio's VAP to also receive comfort that U.S. EPA would not ask for additional cleanup. This assurance is documented in a Memorandum of Agreement, or MOA. In order to receive U.S. EPA's approval, Ohio EPA proposed a new "MOA Track" of the VAP. The primary differences between the classic version of VAP and the MOA Track are that investigation and cleanup activities of MOA Track projects will be overseen directly by Ohio EPA personnel and include opportunities for public review and comment of site documents as they are produced by the cleanup volunteer. U.S. EPA did not ask Ohio EPA to change the VAP cleanup standards for the MOA Track.

Ohio EPA implemented these additional steps administratively without amending rules or statutes. Volunteers decide if they want to follow the classic VAP or the MOA Track. If they choose the MOA Track,

they will be required to follow all the existing regulatory and statutory procedures for VAP sites and conduct all the additional MOA Track steps. Volunteers are still required to utilize a certified professional to prepare the NFA and certified laboratories to analyze environmental samples.

Participants completing the MOA Track effectively, as determined by Ohio EPA, may receive a VAP covenant not to sue, and have the comfort of knowing the cleanup was conducted under a program that U.S. EPA reviewed and has determined to be adequate. NFAs issued under the MOA track are also subject to VAP audits.

Financial Incentives

Ohio offers a variety of financial incentives to individuals conducting voluntary cleanups. Some of these financial incentives require participation in the VAP to qualify; others are available to both VAP volunteers and those conducting any type of voluntary assessment and/or cleanup of their site. Financial incentives for voluntary cleanup in Ohio are administered by several different agencies and departments including Ohio EPA's Division of Environmental and Financial Assistance, Ohio Department of Development, Ohio Department of Taxation

and Ohio Water Quality Development Authority.

Voluntary Action Program Tax Abatements

Upon issuance of a covenant not to sue from the director of Ohio EPA for a remedy under the Voluntary Action Program, the Department of Taxation will grant a tax abatement to the property (ORC 5709.87). The abatement, which is issued as an order by the tax commissioner, covers the increase in the assessed value of land and the increase in the assessed value of improvements, buildings, fixtures and structures that exist at the time the tax abatement order is granted. The abatement lasts for 10 years.

Water Pollution Control Loan Fund (WPCLF)

The WPCLF is administered by Ohio EPA's Division of Environmental and Financial Assistance. Any environmental investigation or remediation that will result in water quality benefits to surface and/or ground water is eligible for WPCLF financing. The WPCLF will provide up to \$3 million to a project for these eligible activities.

Ohio Water Development Authority (OWDA) Loan Program

Financial assistance is available from OWDA for the remediation of property owned either publicly or privately. For loans to local governments that are

undertaking brownfield remediation projects for land which ultimately will be used for a public purpose, the OWDA offers planning and construction loans. Interest on these loans is at a market rate rather than a discount rate. Private entities (i.e., individual proprietors or private partnerships or corporations) seeking financial assistance for brownfield remediation projects also may be eligible for loans from the OWDA.

Urban Redevelopment Loan Program

The Urban Redevelopment Loan Program is administered by the Ohio Department of Development. This program provides direct loans to municipalities or designated nonprofit eco-

nomic development organizations to acquire real estate for assembly into developable parcels and remediate any site contamination in 24 designated distressed urban locations across the state. The total loan fund allocation is \$30 million and the maximum loan amount is \$5 million.

Previous Incentives

Previously, financial incentives were available through the *Brownfield Site Cleanup Tax Credit Program (H.B. 441)* and the *Urban & Rural Initiative Grant Program (H.B. 442)*. Funds for H.B. 441 grants were subject to sunset provisions on June 30, 1999, and the funds for H.B. 442 grants were depleted as of April 1998.