

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|   |       |                         |
|---|-------|-------------------------|
| In the Matter of the Application of     | )     |                         |
| Duke Energy Ohio, Inc., for an          | )     | Case No. 12-1685-GA-AIR |
| Increase in Gas Rates.                  | )     |                         |
| In the Matter of the Application of     | )     |                         |
| Duke Energy Ohio, Inc., for Tariff      | )     |                         |
| Approval.                               | )     | Case No. 12-1686-GA-ATA |
| <br>In the Matter of the Application of | <br>) |                         |
| Duke Energy Ohio, Inc., for Approval    | )     |                         |
| of an Alternative Rate Plan for Gas     | )     | Case No. 12-1687-GA-ALT |
| Distribution Service.                   | )     |                         |
| <br>In the Matter of the Application of | <br>) |                         |
| Duke Energy Ohio, Inc., for Approval    | )     | Case No. 12-1688-GA-AAM |
| to Change Accounting Methods.           | )     |                         |

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**DIRECT TESTIMONY OF**

**KEVIN MARGOLIS**

**ON BEHALF OF**

**DUKE ENERGY OHIO, INC.**

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|              |  |
|--------------|--|
| _____        | Management policies, practices, and organization |
| _____        | Operating income                                 |
| _____        | Rate Base  |
| _____        | Allocations                                      |
| _____        | Rate of Return                                   |
| _____        | Rates and Tariffs                                |
| <u>  X  </u> | Other: Manufactured Gas Plant Site Remediation   |

February 25, 2013

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### Attachments

KDM-1 Curriculum Vitae

KDM-2 Ohio EPA February 2012 Fact Sheet

KDM-3 Ohio Voluntary Action Program Annual Report, Sept. 1994 –June 1997

**I. INTRODUCTION AND PURPOSE**

1   **Q.   PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2   A.   My name is Kevin David Margolis, and my business address is 200 Public  
3       Square, Suite 2300, Cleveland, Ohio 44114.

4   **Q.   BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

5   A.   I am a partner in the law firm of Benesch, Friedlander, Coplan & Aronoff LLP.

6   **Q.   PLEASE   BRIEFLY   SUMMARIZE   YOUR   EDUCATIONAL**  
7       **BACKGROUND AND PROFESSIONAL EXPERIENCE.**

8   A.   I received a Bachelor of Arts from Northwestern University in Political Science  
9       on June 14, 1986 and I received a degree of Juris Doctor (law degree) from Case  
10      Western Reserve University, The Franklin Thomas Backus School of Law on  
11      May 14, 1989. I am licensed to practice law in the State of Ohio. My professional  
12      experience is generally described in my Curriculum Vitae, provided as  
13      Attachment KDM-1. My experience as a lawyer generally involves the  
14      representation of public and private companies in environmental legal matters,  
15      including environmental regulatory compliance, environmental enforcement  
16      matters, environmental remediation activities (both voluntary and those required  
17      by governmental enforcement actions), environmental litigation, environmental  
18      insurance matters, and environmental risk allocation in business and lending  
19      transactions.

1   **Q.   HAVE YOU PUBLISHED PAPERS OR PRESENTED SEMINARS IN**  
2   **ENVIRONMENTAL LAW OR RELATED AREAS?**

3   A.   Yes. I have written and spoken multiple times on environmental law topics. See  
4   Attachment KDM-1 for more details.

5   **Q.   ARE YOU AFFILIATED WITH ANY PROFESSIONAL**  
6   **ORGANIZATIONS?**

7   A.   Yes. I am a member of the American Bar Association, Ohio State Bar  
8   Association, Cleveland Metropolitan Bar Association and a Fellow of the  
9   American College of Real Estate Lawyers (ACREL).

10  **Q.   PLEASE DESCRIBE SOME OF THE RECOGNITIONS THAT YOU**  
11  **HAVE RECEIVED IN RECENT YEARS.**

12  A.   In 2012 I was elected to be a Fellow of the ACREL. I am one of very few  
13  environmental lawyers that has been nominated for and elected to be a Fellow of  
14  this organization. I am an AV Preeminent Peer Review Rated lawyer and a Top  
15  Rated Lawyer in Energy, Environmental and Natural Resources law by  
16  Martindale Hubbell. Since 2009 I have been included by “Best Lawyers in  
17  America” in the Environmental and Real Estate law categories.

18  **Q.   WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

19  A.   The purpose of my Direct Testimony will describe and support one of the  
20  objections of Duke Energy Ohio, Inc (Duke Energy Ohio or the Company) to  
21  certain findings and recommendations contained in the Report by the Staff of the  
22  Public Utilities Commission of Ohio (Staff) issued in these proceedings on  
23  January 4, 2013 (Staff Report). Specifically I address the Company’s objection to

1 the Staff's recommendation regarding recovery of costs associated with the  
2 manufactured gas plant (MGP) sites. More specifically, my testimony discusses  
3 the legal liability of Duke Energy Ohio for these sites under both federal and Ohio  
4 law and the actions undertaken by the Company to address that liability.

## **II. OBJECTIONS SPONSORED BY WITNESS**

5 **Q. PLEASE DESCRIBE THE COMPANY'S OBJECTION NO. 6.**

6 A. As I understand, the Company is objecting to the Staff's recommendation  
7 regarding recovery of MGP remediation-related costs.

8 **Q. WHAT OTHER DOCUMENTS HAVE YOU REVIEWED OR EFFORTS**  
9 **HAVE YOU MADE TO LEARN ABOUT THE LEGAL EFFECTS OF**  
10 **REMEDATING RESIDUALS FROM MANUFACTURED GAS PLANTS**  
11 **(MGPS)?**

12 A. I have generally reviewed Federal and Ohio environmental law. Further, I have  
13 reviewed the testimony of Jessica L. Bednarcik and Andrew C. Middleton, Ph.D.

14 **Q. WHAT IS YOUR UNDERSTANDING OF THE STEPS TAKEN BY DUKE**  
15 **ENERGY OHIO, INC TO INVESTIGATE POTENTIAL**  
16 **CONTAMINATION OF THE WEST END AND EAST END MGP SITES?**

17 A. It is my understanding that both the West End and East End site are the locations  
18 of historic MGP operations conducted by Duke Energy Ohio, Inc. (Duke Energy  
19 Ohio or the Company) and its predecessors. MGP sites, in general, including  
20 these two sites, created numerous waste products and contaminants during their  
21 operations, many of which came to be located on or about these sites in the  
22 ordinary course of business operations and before modern environmental laws

1 regulated the management of these waste products and contaminants. At both of  
2 these locations current Duke Energy Ohio utility operations continue (*e.g.*, a  
3 natural gas pipeline and system to monitor and control the natural gas distribution  
4 system, electric transmission and distribution equipment, substations, transformer  
5 bays operate at the West End site and a gas storage, distribution and operations  
6 center is at the East End site). But as a result of activities of third parties that  
7 changed site conditions, expected future site conditions and adjacent site  
8 conditions and use, which in turn affected potential exposure pathways for the  
9 potential waste products and contaminants at these sites, Duke Energy Ohio has  
10 prioritized the environmental investigation and cleanup activities at these sites.

11 At the West End site, in 2009 the Ohio Department of Transportation  
12 (ODOT) and the Kentucky Department of Highways (KYDOH) finalized the  
13 preferred location of a new bridge corridor project. This bridge project is  
14 designed to directly cross the West End Site, which will require the relocation of  
15 Duke Energy Ohio electric equipment at this site. The bridge construction will  
16 cause the relocation of power delivery equipment and disturb surface caps  
17 beneath which are located contaminants and the bridge construction work at this  
18 site will cause construction workers to potentially come in contact with  
19 contaminated soil and groundwater. As a result Duke Energy Ohio began  
20 environmental investigation into the real property at the West End site.

21 With respect to the East End site, in 2006 a real estate developer  
22 purchased land adjacent to this site and announced plans to construct a large  
23 residential development on this adjacent real property. Furthermore, this

1 developer had easements for ingress and egress of utilities across the East End site  
2 and landscape easement for part of the western portion of the East End site.  
3 Because of the change in potential exposure pathways for potential historic  
4 contamination at the East End Site and as a result of the use of this adjacent site  
5 for residential purposes and the impact of the easements that could likely disturb  
6 the subsurface at the East End site, Duke Energy Ohio began soil and  
7 groundwater investigations of this site.

8 It is my understanding that all of the environmental investigations at both  
9 of these Duke Energy Ohio sites were conducted under the direction of an Ohio  
10 “Certified Professional” or CP. In Ohio, involvement of a CP is required for  
11 environmental investigation and cleanups performed pursuant to Ohio’s  
12 statutorily defined voluntary cleanup program as prescribed in Ohio Revised Code  
13 (ORC) Chapter 3746, commonly known as the Voluntary Action Program or  
14 VAP. To my knowledge, the highest standard for environmental cleanup  
15 professionals in Ohio is the standard required to become and remain a CP  
16 pursuant to ORC Chapter 3746 and the rules promulgated thereunder.

17 It is my further understanding that the environmental investigations at the  
18 West End site and East End site all have been conducted pursuant to the specific  
19 requirements of the VAP and ORC Chapter 3746 and the rules promulgated  
20 thereunder. The VAP has very precise and specific requirements for the phased  
21 environmental investigation and evaluation of differing environmental media  
22 (e.g., soil, air, water, groundwater etc.), environmental and ecological risk  
23 assessments and environmental cleanups.

1   **Q.   WHAT LEGAL OBLIGATION DOES DUKE ENERGY OHIO HAVE**  
2       **REGARDING CONTAMINATION LOCATED ON THE WEST END AND**  
3       **EAST END MGP SITES?**

4   A.   The waste products and contaminants that may have come to be located at the  
5       West End and East End MGP sites contain hazardous substances, as defined by  
6       the federal Comprehensive Environmental Response, Compensation, and Liability  
7       Act, as amended (42 U.S.C. §9601, *et seq.*) (CERCLA). Liability for the  
8       investigation and cleanup of the release of such hazardous substances under  
9       CERCLA is strict, regardless of fault, joint and several, retroactive and extends to  
10      a number of types of responsible parties, including current owners and operators  
11      of the real property where such contamination exists. In my opinion, Duke  
12      Energy Ohio, as the current owner and operator of the East End and West End  
13      MGP sites has a current statutory liability and legal obligation for the  
14      investigation and cleanup of all such contamination at these sites under CERCLA  
15      and is acting prudently and in a reasonable and responsible manner in conducting  
16      these activities.

17   **Q.   WHAT RULES AND GUIDELINES DOES OHIO HAVE TO**  
18      **INVESTIGATE REMEDIATE POTENTIALLY CONTAMINATED**  
19      **SITES?**

20   A.   There are different statutory schemes in Ohio to cleanup potentially contaminated  
21      sites. For instance, rules for underground storage tank contamination can be  
22      found at ORC Chapter 3737 and the rules promulgated thereunder, ORC Chapter  
23      3734 and the rules promulgated thereunder provide a framework for the cleanup



1 of certain solid and hazardous wastes, and ORC Chapter 3710 and the rules  
2 promulgated thereunder govern asbestos cleanups, but in my experience the  
3 statutory framework most commonly and reasonably utilized in Ohio for the  
4 remediation of sites with historic contamination is ORC Chapter 3746, the VAP,  
5 and the rules promulgated thereunder.

6 **Q. ARE YOU FAMILIAR WITH THE OHIO ENVIRONMENTAL**  
7 **PROTECTION AGENCY VOLUNTARY ACTION PROGRAM (VAP)?**

8 A. Yes, I am very familiar with the VAP and its rules and operation. I have utilized  
9 this cleanup program on behalf of my clients since its inception in 1994. In fact, I  
10 worked on some of the very first sites to utilize the VAP in the mid-1990s and  
11 since then I have worked on numerous client's sites that have been investigated  
12 and cleaned up pursuant to the VAP.

13 **Q. PLEASE EXPLAIN THE PURPOSE AND PROCESS OF THE OHIO**  
14 **ENVIRONMENTAL PROTECTION AGENCY VAP.**

15 A. The VAP was enacted into Ohio law in 1994 to provide an efficient and cost  
16 effective alternative for the cleanup of historically contaminated sites, sometimes  
17 referred to as "brownfields," in lieu of cleanup activities conducted through other  
18 unclear, inefficient and costly statutory cleanup programs available at that time  
19 (and still available now) or pursuant to orders issued by the Ohio Environmental  
20 Protection Agency (Ohio EPA). As the Ohio EPA stated in a February 2012 Fact  
21 Sheet: "Prior to the creation of the VAP, cleanup standards were unclear." "[A  
22 party] can undertake a cleanup and be assured it meets environmental

standards...” “The VAP minimizes governmental red tape and maximizes resources and expertise in the private sector.” See Attachment KDM-2.

**Q. WHAT ADVANTAGES DID THE OHIO VAP PROVIDE TO DUKE ENERGY OHIO FOR MANAGING THE INVESTIGATION AND REMEDIATION OF THE WEST END AND EAST END MGP SITES?**

A. The VAP provided Duke Energy Ohio with many advantages for managing the investigation and remediation of the West End and East End MGP sites. While the VAP has very specific statutorily defined rules and cleanups standards, it is a very flexible program to utilize. Under the direction of a CP a party can follow the VAP rules and regulations and conduct a thorough site investigation, characterization and risk-based remediation of a potentially contaminated site, like the West End and East End MGP sites. Through the VAP process, a party like Duke Energy Ohio can work at its own pace, efficiently utilizing resources without the excessive burdens of cost, timing, loss of control and efficiency that a similar process would require if performed through a cleanup program administered by a government agency through an enforcement mechanism or what is often called a “command and control” approach. These other programs are inefficient and often generate redundant activities, have both inflexible timelines and timelines that are often extended over many years because of the ponderous and extensive interplay between the private party and the government regulator(s) and often multiple agencies. With the VAP, you begin and conduct the cleanup without a requirement for government intervention or the direction of a government regulator or agency until the work is complete because such work is

1 being overseen by a VAP CP and follows specific regulations. As a result, by  
2 utilizing the VAP a party is able to have more control over the cleanup process  
3 (while observing the clear VAP cleanup rules and cleanup standards), save time,  
4 money and be able to expeditiously and efficiently conduct such a site  
5 investigation and remediation.

6 **Q. IN YOUR OPINION, WAS IT REASONABLE FOR DUKE ENERGY**  
7 **OHIO TO CONDUCT ITS INVESTIGATION AND REMEDIATION OF**  
8 **THE WEST END AND EAST END MGP SITES PURSUANT TO THE**  
9 **OHIO VAP?**

10 A. Yes, in my opinion it was reasonable and prudent for Duke Energy Ohio to  
11 conduct its investigation of the West End and East End MGP sites pursuant to the  
12 VAP. In my opinion, the VAP was the best choice for such an environmental  
13 investigation and remediation; it was the most efficient and effective method to  
14 address the Company's statutory obligation and environmental liabilities at these  
15 sites.

16 **Q. WHAT TRIGGERED DUKE ENERGY OHIO'S INVESTIGATION OF**  
17 **THE EAST END MGP SITE IN 2006?**

18 A. As I previously mentioned, in 2006 a real estate developer purchased land  
19 adjacent to the East End MGP site and announced plans to construct a large  
20 residential development on this adjacent real property. Furthermore, this  
21 developer had easements for ingress and egress of utilities across the East End site  
22 and a landscape easement for part of the western portion of the East End site.  
23 Because of the change in potential exposure pathways for potential historic

1 contamination at the East End Site and as a result of the use of this adjacent site  
2 for residential purposes and the impact of the easements that could likely disturb  
3 the subsurface at the East End site, it is my opinion that Duke had a duty under  
4 the law to conduct environmental investigation activities at this site in order to  
5 protect human health and safety and the environment.

6 **Q. WAS IT REASONABLE FOR DUKE ENERGY OHIO TO INITIATE AN**  
7 **INVESTIGATION FOR THE EAST END MGP SITE BASED ON THOSE**  
8 **CHANGES IN THE USE OF THE PROPERTIES BORDERING THE**  
9 **EAST END PROPERTY?**

10 A. Yes, it was reasonable and prudent for Duke Energy Ohio to initiate  
11 environmental investigations at the East End MGP site. The change in use of the  
12 real property bordering the East End site to a residential use along with the related  
13 easements, in my opinion, put Duke Energy Ohio at risk. Had Duke Energy Ohio  
14 not proceeded with this environmental investigation, it would have been at risk  
15 for third party law suits as a result of the potential for contamination to affect  
16 receptors that had previously not been at risk and for costly and inefficient  
17 governmental environmental enforcement activity that would have produced no  
18 different result than the cost effective and efficient VAP environmental  
19 investigation path it chose.

20 **Q. WHAT TRIGGERED DUKE ENERGY OHIO'S INVESTIGATION OF**  
21 **THE WEST END MGP SITE IN 2009?**

22 A. As I previously mentioned, in 2009 the ODOT and the KYDOH finalized the  
23 preferred location of a new bridge corridor project. This bridge project is

1 designed to directly cross the West End Site which will require the relocation of  
2 Duke Energy Ohio electric equipment at this site. The bridge construction will  
3 cause the relocation of power delivery equipment and disturb surface caps  
4 beneath which are located contaminants and the bridge construction work at this  
5 site will cause construction workers to potentially come in contact with  
6 contaminated soil and groundwater. It is my opinion that as a result of the  
7 impending bridge project work that Duke Energy Ohio had a duty under the law  
8 to conduct environmental investigation activities at this site in order to protect  
9 human health and safety and the environment.

10 **Q. WAS IT REASONABLE FOR DUKE ENERGY OHIO TO INITIATE AN**  
11 **INVESTIGATION FOR THE WEST END MGP SITE BASED ON THE**  
12 **PROPOSED BRENT SPENCE BRIDGE RELOCATION PROJECT?**

13 A. Yes, it was reasonable and prudent for Duke Energy Ohio to initiate  
14 environmental investigations at the West End MGP site when it did. The  
15 impending bridge construction project, which caused the relocation of power  
16 delivery equipment and disturb surface caps, in my opinion, put Duke Energy  
17 Ohio at risk. Had Duke Energy Ohio not proceeded with this environmental  
18 investigation, it would have been at risk for third party law suits as a result of the  
19 potential for contamination to affect receptors that had previously not been at risk  
20 (e.g., bridge construction workers) and for costly and inefficient governmental  
21 environmental enforcement activity that would have produced no different result  
22 than the cost effective and efficient VAP environmental investigation path it  
23 chose.

1   **Q.   WHO ARE LIABLE PARTIES UNDER CERCLA?**

2   A.   Parties liable under CERCLA include:

3           a. The current owner of property contaminated by hazardous  
4           substances.

5           b. Current operators of contaminated property and operators of such a  
6           facility at the time hazardous substance were released at the  
7           property.

8           c. Persons or entities that arranged for the treatment or disposal of  
9           hazardous substances at such a facility (often referred to as  
10          “generators”).

11          d. Persons or entities that transported hazardous substances to such a  
12          facility they selected.

13   **Q.   DO YOU HAVE AN OPINION REGARDING THE LEGAL**  
14   **OBLIGATIONS OF DUKE ENERGY OHIO REGARDING THE EAST**  
15   **END AND WEST END MGP SITES?**

16   A.   Yes, it is my opinion that Duke Energy Ohio had a duty and liability under  
17   CERCLA to investigate and remediate potential contamination at East End and  
18   West End PGP sites.

19   **Q.   ON WHAT DO YOU BASE THIS OPINION?**

20   A.   I base my opinion on my knowledge of environmental law, my experience with  
21   how environmental law is enforced by the government and how these laws,  
22   including CERCLA, are utilized by third parties to prosecute lawsuits for cleanup  
23   liability, costs and expenses.

1   **Q.    IN YOUR EXPERIENCE, DOES OHIO HAVE A PUBLIC POLICY IN**  
2       **FAVOR OF APPROPRIATE RESPONSE ACTIONS BEING TAKEN**  
3       **WITH REGARD TO HISTORICAL INDUSTRIAL CONTAMINATION?**

4    A.   Yes, the existence of the VAP, enacted into law by the State of Ohio as an  
5       alternative to environmental cleanups conducted as a part of governmental  
6       enforcement activity, is evidence of a clear expression of public policy in favor of  
7       private voluntary response action in connection with historic industrial  
8       contamination. As Ohio EPA stated in its *Ohio Voluntary Action Program*  
9       *Annual Report, Sept. 1994 –June 1997*, the VAP “removes environmental and  
10      legal barriers” to the cleanup and reuse of contaminated properties. See  
11      Attachment KDM-3.

12   **Q.    UNDER PRESENT-DAY ENVIRONMENTAL LAWS WHAT POSSIBLE**  
13       **RIGHTS OF ACTION ARE THERE FOR CONTRIBUTION FOR COSTS**  
14       **ASSOCIATED WITH REMEDIATION AT MGP SITES?**

15   A.   Under Section 107 of CERCLA (42 U.S.C. §9607), parties that cleanup MGP  
16       sites consistent with the requirements of CERCLA, may have the right to pursue  
17       other potentially responsible parties (PRPs) for cleanup costs. In my experience  
18       this process can be very litigious, very costly and very time consuming. Most  
19       importantly, there is significant uncertainty that pursuing other PRPs will  
20       ultimately result in the recovery of any meaningful amount of response costs.  
21       Establishing the liability of PRPs for response costs is difficult in general, and  
22       much more difficult in the case of MGP sites whose operations go back many

1 years. Evidence is hard or impossible to find and in many cases like these, PRPs  
2 often are no longer in existence or have any assets.

3 **Q. ARE YOU FAMILIAR WITH ACTIONS TO PURSUE INSURANCE**  
4 **RECOVERY FOR ENVIRONMENTAL REMEDIATION COSTS UNDER**  
5 **GENERAL COMMERCIAL LIABILITY COVERAGE INSURANCE**  
6 **POLICIES?**

7 A. Yes. I often advise clients on the legal process for pursuing insurance coverage  
8 for environmental remediation costs under their general commercial liability  
9 policies.

10 **Q. WHAT HURDLES EXIST TO COLLECTING ENVIRONMENTAL**  
11 **REMEDATION COST RECOVERY UNDER GENERAL COMMERCIAL**  
12 **LIABILITY COVERAGE INSURANCE POLICIES?**

13 A. The most significant hurdles that exist to collecting environmental remediation  
14 costs under general commercial liability insurance policies are: (i) modern general  
15 commercial liability policies (since 1985) include a “so-called” absolute pollution  
16 exclusion, meaning that the insurance policy specifically excludes coverage for  
17 the recovery of environmental remediation costs; (ii) for old, and particularly very  
18 old sites like MGP sites, identifying any insurance coverage for environmental  
19 remediation costs may take significant time and expense, and then even if any  
20 such policies are found they may have very small coverage limits because of the  
21 time period in which they were issued; and (iii) finally, the insurance companies  
22 that provided the policies may no longer be in existence and even if they are will  
23 deny and doggedly fight any claims for coverage – they have no particular



1 incentive to pay any such claims quickly. In my experience, making such claims  
2 on these old policies often is uncertain as to outcome and results in disputes that  
3 spend many years in complex litigation or settle for nominal amounts.

4 **Q. DO YOU HAVE AN OPINION REGARDING REASONABLENESS OF**  
5 **DUKE ENERGY OHIO'S STRATEGY TO PURSUE RATE RECOVERY,**  
6 **INSURANCE RECOVERY AND POTENTIALLY RESPONSIBLE PARTY**  
7 **CONTRIBUTIONS?**

8 A. Yes. It is my opinion that Duke Energy Ohio's strategy to pursue rate recovery,  
9 insurance recovery, and cost recovery from PRPs is prudent and reasonable. I  
10 believe that pursuing all of these actions is reasonable, useful and sensible.  
11 Nevertheless, as stated earlier in this written testimony, insurance recovery and  
12 cost recovery from PRPs are typically very costly, time consuming (and, as such,  
13 an inefficient use of resources), and may not be likely to result in the recovery of  
14 significant funds, if any.

### **III. CONCLUSION**

15 **Q. WAS ATTACHMENT KDM-1 PREPARED BY YOU AND UNDER YOUR**  
16 **DIRECTION AND CONTROL?**

17 A. Yes.

18 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

19 A. Yes.

## **Voluntary Action Program**

Ohio's Voluntary Action Program (VAP) was created in September 1994 with the passage of Senate Bill 221. 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.

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. The owner can also be released 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 environmental 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.

### **No Further Action Letter**

When a certified professional determines after site investigation and, if necessary, cleanup that the property meets the standards contained in the program rules (OAC Chapter 3745-300), he or she can prepare what is called a No Further Action (NFA) letter.

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.

The NFA "letter" is actually a series of documents containing detailed information about the site. The NFA letter 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.

## Voluntary Action Program

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 letter.

If the Phase II assessment indicates that more action is needed to meet the standards, additional cleanup activities will occur to make the site protective of human health and the environment. Cleanup activities may include things such as soil removal, ground water treatment or barriers to the contamination such as a clay or asphalt cap.

If the volunteer wants a legal release from Ohio, the certified professional submits the NFA letter to Ohio EPA for review. 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.

### Technical Assistance

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 clean up.

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.

Even if a volunteer does not submit an NFA letter, VAP rules and technical assistance can be used for cleanup and redevelopment of those properties.

### Covenant Not to Sue

VAP technical staff reviews 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 can be appealed to the Environmental Review Appeals Commission.

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.

# **Voluntary Action Program**

## **Memorandum of Agreements**

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 (MOA).

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.

## **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. This information is also available to the public upon request.

Though the law protects the volunteer from having any of this documentation used in any civil or administrative proceeding, it does not allow the volunteer to claim any of the information produced in connection with a voluntary action to be confidential or to alter any of the public's rights to receive access to these documents.

If you have questions regarding the VAP, please call (614) 644-2924.

## **Curriculum Vitae**

### **KEVIN D. MARGOLIS**

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200 Public Square  
Suite 2300  
Cleveland, Ohio 44114  
Phone: 216-363-4161  
Mobile Phone: 216-789-8738  
[KMargolis@beneschlaw.com](mailto:KMargolis@beneschlaw.com)

### **Description of Legal Practice**

Mr. Margolis has been Chair of the Benesch Real Estate and Environmental Practice Group since 2000. Benesch is a multi-practice, diverse law firm of approximately 175 lawyers with offices in Cleveland and Columbus, Ohio, Indianapolis, Indiana, Wilmington, Delaware, Philadelphia, Pennsylvania, and Shanghai, China. Mr. Margolis originally joined Benesch as a summer associate in 1988 and began work there full-time in the Fall of 1989. He is in his second term as a member of the firm's Executive Committee and Co-Chair of its Energy Practice Group. Approximately 75% of Mr. Margolis's practice focuses on environmental issues in real estate transactions including acquisitions and dispositions, leasing, development, real estate finance, construction, distressed property, environmental insurance and wetland issues. A significant portion of his work involves the re-development and environmental remediation of brownfield sites. The remaining portion of his practice is devoted to "traditional" areas of environmental law including regulatory compliance, defense of environmental enforcement actions, cost recovery litigation including Superfund matters, underground storage tank, mold and dry cleaner cleanups, and landfills and hazardous waste issues. Significant recent engagements:

- Mr. Margolis was the principal lawyer representing a major national REIT in a several hundred million dollar transaction involving more than 60 sites in connection with multiple environmental issues including the negotiation of manuscripted environmental insurance coverage, management of numerous historic environmental issues at many of these properties and crafting unique environmental indemnity and risk transfer documentation. Representation of this client also involves day-to-day counseling on environmental issues encountered in this client's real estate portfolio, nationwide (with local counsel, as appropriate).
- Representation of a major public company for more than fifteen years in the disposition of numerous "legacy" properties across the country with significant environmental and real estate issues, often involving local, state and Federal agencies and voluntary and mandated cleanups.
- Representation of a public company in connection with successor liability issues relating to a newly listed "Superfund" site.

- Defense of the ownership of a dry cleaner chain in a large class action and government enforcement case in connection with alleged thirty-year old release of perchloroethylene.
- In order to facilitate a disposition, Mr. Margolis represented the owner of multiple apartment buildings in connection with a complicated asbestos abatement program, liability analysis and development of standardized documents for communications with residents and public authorities.
- Representation of a major public international automobile company in the disposition of multiple, 1.0 million plus square foot manufacturing facilities involving the retention and management of certain environmental risks and the transfer and assumption by a third party of other environmental risks.
- Acquisition of a large New England paper mill for a strategic buyer. This asset was comprised of multiple riverside buildings dating to the beginning of the 20<sup>th</sup> century that had intricate and complex real estate and environmental issues requiring resolution before the deal could close.
- Representation of multiple clients in connection with wetland and stream fill permitting issues, including enforcement. Mr. Margolis also has been retained as an expert witness in these matters.
- Mr. Margolis has been primary legal counsel and provided strategic real estate and environmental advice in hundreds of real estate transactions, including numerous sophisticated brownfield developments. These transactions typically involve participating in relevant state voluntary cleanup programs, obtaining binding closure documents (*e.g.*, covenants not to sue) from state and federal authorities, coordinating and negotiating public incentives and evaluation and negotiation of environmental insurance and risk transfer options.

**Educational Background:**

Case Western Reserve University School of Law (J.D. 1989)  
Northwestern University (B.A. Political Science, with Honors, 1986)

**Bar Memberships:**

State of Ohio (1989-Present)  
United States Court of Appeals, Sixth Circuit (1990-Present)  
United States District Court, Northern District (1990-Present)  
United States District Court, Southern District (2004-Present)

**Bar Activities:**

**American Bar Association** (Member since 1989)

Member, Real Property, Probate and Trust Law Section  
Member, Environment, Energy and Resources; Brownfield Task Force Member  
Member, Forum on the Construction Industry  
Committee Member, Transaction, Audits & Brownfield Committee, Model Language Project (2000)

**Cleveland Bar Association** (n/k/a, Cleveland Metropolitan Bar Association) (Member since 1989)

Member, Real Estate Section  
Member, Environmental Law Section; Executive Council Member 2002-2006  
Member, Committee on Regionalism (2007)

**Ohio State Bar Association** (Member since 1989)

Member, Environmental Law Committee

**Other Memberships:**

Fellow, American College of Real Estate Lawyers (ACREL)  
Member, International Council of Shopping Centers (ICSC)  
Member, NAIOP, Commercial Real Estate Development Association  
Member, Urban Land Institute (ULI)  
Former Member, Ohio Brownfield Finance Partnership

**Professional Ratings:**

AV Preeminent Peer Review Rated – Martindale Hubbell (Top Rated Lawyer for Energy, Environmental and Natural Resources Law)  
Named to ***Best Lawyers in America***, (2009-Present), in Real Estate Law and Environmental Law categories (Woodward/White, Inc.)  
Ohio “Super Lawyer”

**Employment History:**

Benesch Friedlander Coplan & Aronoff LLP (1989-1994, 1996-Present)  
Executive Committee (2008-Present)  
Hiring Partner (2003-2011)  
Real Estate & Environmental Practice Group Chair (2000-Present)  
Partner (1996-Present)  
Associate (1989-1994)

Hemisphere Corporation (1994-2001) (Hemisphere is a brownfield redevelopment company).  
Vice President and Principal

National Safety Apparel Corp.  
Board of Advisors (1999-Present)

**Legal Publications:**

Chapter Co-Author for the American Bar Association's book, A State-By-State Guide to Construction and Design Law, (2<sup>nd</sup> Ed.) *Ohio Construction and Design Law*, (2009)

NAIOP, Northern Ohio Chapter, Newsletter, *To Qualify or Not to Qualify: That is the Question Facing Foreign Insurance Companies Attempting to Loan Money in Ohio*, (2007)

Cleveland Bar Journal, *Ohio Voluntary Clean Up Program – 10 Years Later*, (2004)

Benesch Polymer Advisory, *What Every Polymer Manufacturer Should Know About Shipping Hazardous Materials*, (2004)

The National Law Journal, *Mold, Unlike Industrial Waste, Is Here To Stay*, (2003)

Chapter Co-Author for the American Bar Association's book, Environmental Aspects of Real Estate Transactions, *Brownfield's Redevelopment: Creative Solutions to Historical Environmental Liabilities*, (1999)

Community Reinvestment Forum Journal, published by the Federal Reserve Bank of Cleveland, *Doing the Brownfield's Deal*, p. 6-7, (1998)

Contributing Author to the Urban Land Institute's book, *Turning Brownfields Into Greenbacks*, (1998)

Book Editor and Multiple Chapter Author for the American Bar Association's book, Brownfields, A Comprehensive Guide to Redeveloping Contaminated Property, (1997). This more than 700 page book, with a preface by Vice President Al Gore, was the first major treatise on brownfield redevelopment and was a 1998 National Law Journal "Worth Reading" book. As a result of the publication of this extremely successful ABA book, for years Mr. Margolis was invited to speak and make numerous formal and informal presentations across the country on brownfield redevelopment topics. This brownfield redevelopment book has been cited repeatedly in other publications, articles and law journals and was named a "Worth Reading" book by The National Law Journal. Mr. Margolis also contributed to the two subsequent editions of this book.

The Maxine Goodman Levin College of Urban Affairs at Cleveland State University, Technical Advisor and Contributor to *Report: Redevelopment Strategies for the Harborpark Site in Kenosha, Wisconsin*, (1997)



Environmental Regulation and Permitting, Wiley Publishers, Vol. 6, Number 3, *Perfecting the Model: Analysis of Ohio's Largest Private Brownfield Redevelopment*, (1997)

Paint & Coatings Industry Magazine, Business News Publishing Company, p. 64-80, *Proactive Brownfield Strategies*, (1997)

Affinity Magazine, *Banking Bogs – One Solution to Redeveloping Wetlands*, (1994)

Co-Author, *The Underground Storage Tank Manual*, published by Hemisphere Corporation, (1994)

**Speaking Engagements and Presentations\***

Crain's Shale Summit 2013, "Manufacturing for the Utica Shale/API Certification," 2013

Private Seminar (Co-Sponsored by Oswald Insurance), "Overcoming Obstacles to Close Deals with Innovative Insurance Solutions," (2012)

Northeast Ohio Risk & Insurance Management Society, "Environmental Enforcement Trends and Hot Topics," (2012)

TerraLex Global Meeting, "Recent Legal Developments and the Utica and Marcellus Shale Plays," (2012)

The Ohio Society of CPA's Oil & Gas Conference, "The Utica Shale Play in Ohio, Challenges and Opportunities," (2012)

Environmental Bankers Association Semi-Annual Meeting, "How Due Diligence is Changing for Corporate and Real Estate Transactions," (2012)

Environmental Bankers Association Annual Meeting, "Distressed Real Estate and Risk Management for Lenders," (2012)

Cleveland Bar Association, "Lenders and Environmental Issues," (2011)\*

Law Seminars International, "Environmental Issues in Loan Transactions," (2011)\*

TerraLex Annual General Meetings, "Commercial Real Estate Transactions – Environmental Representations, Warranties and Indemnities," (2010 and 2004)

National Business Institute, "Commercial Leases: Negotiating Key Provisions," (2010 and 2011)\*

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\* *All speaking engagements and presentations marked with an asterisk were accredited continuing legal education (CLE) events.*

Cleveland Bar Association, Real Estate Law Institute, “Wading Through Wetlands,” (2007)\*

Ohio Wetlands Conference, “Current Status of Jurisdictional Determinations,” (2007)\*

Presentation to CB Richard Ellis, “Legal Due Diligence Issues (or How to Get Your Deal Done on Time Without the Lawyers’ Screwing it Up),” (2006)

Cleveland Bar Association, Environmental Law Symposium, “Ethics,” (2004)\*

Cleveland-Marshall College of Law, “Urban Influences in Environmental Policy,” (2004)

Ohio Wetlands & Stream Conference, “Legal Issues in Regulation and Enforcement,” (2004)\*

Cleveland Bar Association, Real Estate Law Institute, “Uniform Relocation Act,” (2003)\*

Ohio Wetland & Stream Conference, “Federal Regulations – Permit Review,” (2003)\*

SES Commercial Lease Seminar, “Premises Liability and Environmental Risk Issues,” (2003)\*

Benesch Transportation and Logistics Seminar, “Environmental Risks and How to Manage Them,” (2003)

Ohio Wetlands Conference, “Case Law Update,” (2002)\*

Private Seminar (Co-Sponsored by AIG), “The Dangers of Mold,” (2002)

Cleveland Bar Association, “The Basics: What Corporate Counsel Needs to Know About Environmental Law,” (2001)\*

Cleveland State University, Breakfast Seminar, “Doing the Real Estate Deal,” (2001)

Lorman Commercial Real Estate Seminar “Commercial Real Estate Loans – Environmental Issues,” (2001)\*

American Corporate Counsel Association, “Current Issues Relating to Real Estate Assets with Environmental Liabilities,” (1999)\*

Brownfields 1999 (National Brownfield Conference), Moderator of Panel on “The Value of Mothballed Properties”

Cleveland Urban Setting Designation Speaker Series, “Anatomy of a Brownfield Development,” (1999)

ICSC Columbus Regional Seminar “The Development of Brownfields,” (1999)

Industrial Site Recycling Conference, Brownfield Development Presentation, (1999)

Ohio Government Finance Officers Association Annual Conference (1999)  
Brownfields Panel

ABA Annual Conference on Environmental Law, “Overview of State and Federal  
Brownfield Programs,” (1998)\*

Brownfields 1998 (National Brownfields Conference), Panelist on “Understanding  
Private Brownfield Transactions”

Cincinnati, Ohio Community Brownfield Strategy Workshop, “Elements of a  
Work Plan,” (1998)

Cleveland Title Association, “Brownfields Legislation,” (1998)\*

NAIOP, Greater Cincinnati/Northern Kentucky Chapter, “Brownfields: Buying, Selling  
Incentives,” (1998)

Northern Ohio Chapter of NACORE, “Large Brownfield Developments,” (1998)

Southwestern Paint Convention, Brownfield Development Presentation, (1998)

University of Findlay Brownfields Conference, “Brownfield Development Basics,” (1998)

North Carolina Brownfields Conference, “Redeveloping Contaminated Property,” (1997)\*

AISE Annual Convention and Iron and Steel Exposition, Brownfield Development Presentation,  
(1997)

Precision Metalforming Association, “Practical Compliance with EPA and OSHA  
Requirements,” (1997)

Turnaround Management Association (Cleveland, Ohio), Workshop, “Ohio  
Voluntary Action Program,” (1997)

Program Coordinator and Panelist for ABA Brownfields Teleconferences, “Brownfield  
Transactions: Making the Deals Work,” (1996 & 1997)

**Teaching Activities:**

See, Speaking and Presentation Section.

Mr. Margolis has been a guest speaker in environmental law classes at Case Western Reserve  
University School of Law.

**Community Service and Pro Bono Activities:**

**Leadership Cleveland** – Class of 2008

**Parkinson's Pals** - Board Member (2011 - Present)

**Most Valuable Kids of Greater Cleveland** – Board Member (2008-2012)

**United Way of Greater Cleveland** – Southern Regional Cabinet (2010)

**Case Western Reserve University LLM Advisory Board** – (2009-Present)

**Cleveland Institute of Art** – Advisory Board Member (2006-2012); Finance Committee (2010-2012); Building & Grounds Committee (2006-2012)

**Business Volunteers Unlimited**, Volunteer Trustee Institute (2005-2006)

**Ohio Environmental Protection Agency** – Voluntary Action Program Rulemaking Committees (1994-2002) and Five-Year Rule Review Committee

**Pepper Pike Civic League** – Officer (1998-2001)

**Ohio Department of Development** – Member, Brownfield Finance Partnership (1996-2004)

**City of Cleveland Urban Setting Designation Work Group** (1998-1999)

**Temple Tifereth Israel** – Board Member (2006-Present); Officer (Vice President, Secretary and Member of Executive Committee) (2008-Present); University Circle Task Force (2007-2010); Vice Chair, Strategic Planning Committee (2009-2011); Annual Meeting Chair (2012); Nominating Committee (2013); Strategic Vision Implementation Committee (2012-Present)

**Jewish Education Center of Cleveland (JECC)** – Board of Trustees (2008-Present); Early Childhood Planning Committee (2006-Present); Budget and Finance Committee (2010-Present); Evaluation Committee (2012-Present)

**Jewish Community Federation of Cleveland** – Community Planning Executive Committee (2007-Present); Chair-Outreach and Engagement Task Force (2011-2012); Graduate-2005-2006 Mandel Course for Advanced Leadership

**The Agnon School** – Board Member and Executive Committee Member (2001-2007); Chair – Strategic Planning Committee (2006-2007)

**Park Synagogue** – Young & Emerging Leaders Development Program (1999-2000); Strategic Planning Committee (2001-2002)

**Jewish Children's Foster Homes (JCFH)** – Board Member, Officer; Coordinated the Reorganization of this group, including the merger of two auxiliary groups into one (1994-2002)

**Maltz Museum of Jewish Heritage**, Advisory Committee for Zap! Pow! Bam! The Superhero: The Golden Age of Comic Books, 1938-1950 (2008)

# **Ohio Voluntary Action Program Annual Report**

**Sept. 1994 - June 1997**

# **Ohio Voluntary Action Program Annual Report**

**Sept. 1994 - June 1997**

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## **Introduction**

One of the unfortunate by-products of Ohio's industrial heritage is the number of contaminated sites scattered throughout the state. Valuable land has sat idle because fears of immense liability and cleanup costs scared off potential developers, businesses and banks.

Governor George V. Voinovich and the Ohio General Assembly recognized the need to remove the environmental and legal barriers that have stalled redevelopment and reuse of contaminated properties.

In June 1994, Governor Voinovich signed S.B. 221 into law, creating a program for voluntary real estate reuse and cleanup. This program is now called the Voluntary Action Program or VAP. Rules allowing property owners, lenders, and developers to investigate and clean up contaminated properties became effective in December 1996.

Prior to the Voluntary Action Program, no one could undertake a cleanup project and be assured it would meet environmental standards without direct oversight from Ohio EPA. Because Ohio EPA had to focus on the worst sites first, others had to wait.

This new program minimizes government 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 voluntarily.

## **How VAP Works**

A person undertaking a voluntary action contracts with consultants certified by Ohio EPA to perform investigation and cleanup activities in this program. Once the cleanup is done, the Agency-certified consultant, called a certified professional, and a laboratory also certified by Ohio EPA, prepare documentation called a no further action letter (NFA) to demonstrate that proper investigation and cleanup activities were performed and that no further action is needed.

If the data shows that the work was properly conducted, Ohio EPA can issue a covenant not to sue, which promises the volunteer that the State of Ohio will not require further investigation or cleanup of the property. To monitor this program, Ohio EPA will audit at least one out of every four sites that are cleaned up under the program.

## **Financial Assistance**

Ohio is concerned about continued urban sprawl at the expense of urban revitalization. To level the playing field between development of our greenfields and brownfields, the cleanup of contaminated urban land needs to be cost effective. The Voluntary Action Program offers financial relief to people undertaking voluntary cleanups in the form of loans, grants and tax relief.

## **Ohio's Voluntary Action Program is working**

Sites are being cleaned up and jobs are being created and saved. Given the nature of the program, precise estimates are impossible. Based on what we do know, more than 80 projects are active or planned and 10 covenants not to sue have been issued.

## Success Story

### **HBE Corporation** Columbus, Ohio

Ohio EPA issued a covenant not to sue to HBE Corporation and all future owners of the former downtown Sheraton Hotel, 50 North Third Street, Columbus. HBE refurbished the property and reopened it as an Adam's Mark Hotel this spring. The newly renovated hotel includes guest rooms, a parking garage, ballrooms, a restaurant, and kitchen and laundry areas.

From 1911 to 1957, the property was occupied by the Virginia Hotel and the Columbus Citizen, which published the Citizen Journal. The Central Christian Church, residential dwellings, and a carriage house also were located at the site. The current 22-story hotel and parking garage were constructed in 1964. The Sheraton Columbus Plaza Hotel opened in 1967 and operated until 1987. Except for the parking garage, the property has been vacant since 1987.

HBE Corporation removed and properly disposed of asbestos along with hazardous and non-hazardous chemicals from the property. The chemicals removed included paints, concentrated laundry detergents and swimming pool chemicals.

Based on a review of the site history, a ground water investigation, and soil samples taken from the site, the certified environmental professional employed by Lawhon & Associates determined there are no significant environmental problems associated with the site.

The cleanup and redevelopment of this Columbus brownfield site can be attributed in large part to the tax abatement provisions in Senate Bill 221, the enabling legislation for the Voluntary Action Program. When a property which has conducted cleanup activities under the VAP receives a covenant not to sue, the property owner is eligible for a ten-year tax abatement on the increased value of the remediated property. The difference in value of the abandoned hotel prior to cleanup and after the voluntary action was complete was estimated to be significant enough for HBE Corporation to seriously consider the tax abatement advantages and choose to develop the former Sheraton Hotel as opposed to other properties in the area. As a result, downtown Columbus now boasts a newly renovated luxury hotel with needed conference space on property where an urban eyesore once stood.





## Public Involvement During the VAP Rule-Making Process

As required by Senate Bill 221, a multidisciplinary committee representing a wide variety of stakeholders was formed to advise Ohio EPA on the development of the Voluntary Action Program rules. Members of this group represented scientists, businesses, lawyers, cities and townships, environmental groups, health professionals, and environmental consultants. Some of the members are highly regarded as national experts in their field. A steering committee, which was formed to direct the rule development, met 26 times from December 1, 1994, through July 7, 1996. All of these meetings were open to the public.

Under the direction of the steering committee, seven subcommittees with more than 60 representatives of the various stakeholder groups worked on specific technical issues. These subcommittees conducted research and developed state-of-the-art cleanup standards that are uniquely designed to match Ohio's environmental conditions. In addition to the steering committee and subcommittee meetings, which also were open to the public, Ohio EPA held additional outreach meetings for the general public for both the first and second set of rules.

In August 1995, Ohio EPA sponsored five information sessions around the state to explain the first set of draft rules and answer questions. These meetings were held in Columbus, Athens, Middletown, Toledo and Akron. The first set of rules, which cover the more administrative aspects of the program, were filed with the Ohio Legislative Service Commission on September 28, 1995, and became effective on December 29, 1995. This first set included rules for certified professionals, certified laboratories, program fees, variances, audits, and cleanup documentation requirements.

In June 1996, the Agency sponsored five information sessions around the state regarding the second set of rules, which cover the more technical aspects of the program. These meetings were held in Toledo, Columbus, Dayton, Athens and Twinsburg. After the second set of program rules were filed with the Joint Committee on Agency Rule Review (JCARR) on July 31, 1996, Ohio EPA held three public hearings. The hearings were in Columbus, Dayton, and Lorain during the first week of September. Approximately 65 people attended the hearings; 22 presented oral testimony. The official public comment period originally ended on September 9, 1996; however, due to requests from the business and environmental communities, Ohio EPA extended the comment period to October 15, 1996. More than 70 individuals and organizations submitted approximately 700 pages of written materials covering 870 separate comments. Prior to the end of the comment period, Ohio EPA voluntarily offered two additional informational sessions to explain changes that been made to the proposed rules in response to public comments received. These sessions were held in Columbus on October 7, 1996. Approximately 25 people attended these sessions.

The second set of rules was filed on December 6, 1996, and became effective on December 16, 1996. The second set included rules for applicability and eligibility of property, Phase I property assessments, Phase II property assessments, generic cleanup standards, site specific risk assessments, ground water classification, and remediation of properties. With the finalization of these technical rules that describe what level of investigation and cleanup must be done, the private sector now has the tools it needs to clean up and redevelop contaminated property.

## Success Stories

### **Fairview Fuel Corporation**

Ohio EPA issued a covenant not to sue to Fairview Fuel Corporation in January 1996.

The Fairview Fuel property, which operated as the Strongsville Airpark from the 1950s until 1987, used foundry sands during a runway expansion project. In addition, underground storage tanks were used at the airport to store petroleum products for aircraft refueling.

After the airport closed, the underground tanks were removed and the surrounding soils, contaminated from tank leaks or spills, were removed. Sampling in an area near the foundry sand and aircraft parking, including ground water sampling, was conducted during the voluntary action. After compiling the site history review, sampling and risk assessment, the certified professional determined that no significant environmental problems existed.

The issuance of the covenant not to sue for this property re-opened the door for continued residential housing development at the former airport. The first phase of housing construction had been completed on the property; however, perceived environmental liability had hampered further development. The covenant provided the comfort residential housing developers needed in order to conduct the second phase of residential housing and finalize plans for phases three and four of the development. When all four phases are complete, which is scheduled for the year 2000, approximately 240 homes will be located on the former airport grounds. This development has pleased planners and others interested in preserving greenspace in the rapidly growing suburb of Cleveland, where the push to build suburban housing on farmland and woodland has been felt strongly in recent years. Utilizing the VAP to eliminate environmental liability for the former Strongsville Airpark allowed a suburban brownfield to become the solution to preventing suburban sprawl in Strongsville.

### **Williams Properties, Inc.**

Ohio EPA issued a covenant not to sue to Williams Properties in June 1996. The site operated as the Canton City Gas Works from the 1880s until around 1914. The plant burned coal in brick and concrete chambers to collect synthetic gases for use in street lighting.

As a result of this process, petroleum and residual materials were deposited on the site. Other industrial activities did not contribute to the property contamination. Based on a review of the site history, soil sampling, and risk assessment, the certified professional determined there are no significant environmental problems associated with the property if it continues to be used for industrial and nonretail commercial purposes. A deed restriction to that effect was placed on the property prior to the issuance of the covenant.

## SUMMARY OF NFA'S SUBMITTED AND COVENANTS ISSUED

| NAME OF<br>PROPERTY                | ADDRESS   | VOLUNTEER'S NAME<br>TO AGENCY     | DATE NFA<br>SUBMITTED<br>ISSUED | DATE<br>COVENANT<br>ISSUED |
|------------------------------------|---|-----------------------------------|---------------------------------|----------------------------|
| Kessler                            | 302 McClurg Road<br>Boardman, OH<br>Mahoning County                     | Kessler Products                  | 01/23/95                        | 05/01/95                   |
| Fairview Fuel                      | 12430 Prospect<br>Road<br>Strongsville, OH<br>Cuyahoga<br>County        | Fairview Fuel Corp.               | 12/08/95                        | 01/12/96                   |
| Southern Ohio<br>Port Authority    | 202 Vine Street<br>New Boston, OH<br>Scioto County                      | Southern Ohio Port<br>Authority   | 02/09/96                        | 03/05/96                   |
| Williams<br>Properties             | 7th Street, S.E. &<br>Walnut Avenue<br>Canton Twp, OH<br>Stark County   | Williams Properties,<br>Inc.      | 03/01/96                        | 06/19/96                   |
| City of Toledo-<br>Goose Hill Site | I-280 & S. Ketcham<br>Toledo, OH<br>Lucas County                        | City of Toledo                    | 04/17/96                        | Pending                    |
| TURUCO                             | Morse Road<br>Gallipolis, Ohio<br>Gallia County                         | Merc, Marine, Fond<br>Du Lac Wis. | 08/14/96                        | 06/24/97                   |
| Northcliff<br>Shopping Ctr.        | I-480 & Ridge Road<br>Brooklyn, OH<br>Cuyahoga County                   | Northcliff<br>Shopping Ctr. Ltd.  | 08/26/96                        | 12/26/96                   |
| Goldberg East                      | 777 Swan Street<br>Grandview Heights,<br>OH<br>Franklin County          | Ward Engineering                  | 09/03/96                        | 12/06/96                   |
| Adam's Mark                        | 50 N. 3rd Street<br>Columbus, OH<br>Franklin County                     | HBE Corporation                   | 12/03/96                        | 12/20/96                   |
| Kilgore Farms                      | 800 Tussic Road<br>Westerville, OH<br>Delaware County                   | The Keethler<br>Company           | 12/10/96                        | Pending                    |
| Former<br>Chemserve                | 5055 Nike Drive<br>Hilliard, OH<br>Franklin County                      | Nakki Partners,<br>Mr. S. Blatt   | 12/12/96                        | 08/14/97                   |
| Conrail                            | Rear of (W) 4100<br>W. 150th Street<br>Cleveland, OH<br>Cuyahoga County | National City<br>Bank             | 12/13/96                        | Pending                    |

| NAME OF PROPERTY            | ADDRESS   | VOLUNTEER'S NAME TO AGENCY                    | DATE NFA SUBMITTED ISSUED | DATE COVENANT ISSUED |
|-----------------------------|---|---|---------------------------|----------------------|
| Kilgore Farms II            | 800 Tussic Road<br>Westerville, OH<br>Delaware County                         | The Keethler Company                          | 02/13/96                  | Pending              |
| Former Bostick Property     | 4805 Lexington Ave.<br>Cleveland, OH<br>Cuyahoga County                       | Bostick, Inc.                                 | 12/13/96                  | Pending              |
| Northcliff II               | I-480 & Ridge Road<br>Brooklyn, OH<br>Cuyahoga County                         | Northcliff Shopping Ctr., Ltd.                | 02/01/97                  | Pending              |
| Mercury Marine              | 2150 Eastern Ave.<br>Gallipolis, OH<br>Gallia County                          | Merc, Marine, Fond Du Lac Wis                 | 02/14/97                  | Pending              |
| Former Swan Dry Cleaners    | 150 Wilson Bridge Rd.<br>Worthington, OH<br>Franklin County                   | Allegis Realty Investors                      | 03/03/97                  | Pending              |
| Highland Ridge Plaza        | Highland & Ridge Ave.<br>Northwest Quad.<br>Cincinnati, OH<br>Hamilton County | Bay Street Number Limited                     | 03/03/97                  | Pending              |
| Simcox Grinding & Steel Co. | 304 Tacoma Avenue<br>Tallmadge, OH<br>Summit County                           | National City Bank Northeast                  | 05/15/97                  | Pending              |
| Former Federal-Mogul Corp.  | Route 7<br>Gallipolis, OH<br>Gallia County                                    | Federal Mogul Corporation                     | 05/29/97                  | Pending              |
| Former Central High School  | 75 Washington Blvd.<br>Columbus, OH<br>Franklin County                        | City of Columbus, Dept. Of Parks & Recreation | 06/11/97                  | Pending              |
| Tower Place Garage          | 28 W. Fourth Street<br>Cincinnati, OH<br>Hamilton County                      | Shell Pension Trust                           | 07/16/97                  | Pending              |
| Kilgore Farms III           | 800 Tussic St. Rd.<br>Westerville, OH<br>Delaware County                      | Keethler Companies                            | 07/18/97                  | Pending              |
| Certified Alloys Company    | 5463 Dunham Road<br>Maple Heights, OH<br>Cuyahoga County                      | Aluminum Smelting & Refining Co., Inc.        | 07/21/97                  | Pending              |
| Former Aerovent Property    | 8515 Industrial Pk.<br>Piqua, OH<br>Miami County                              | AV Acquisition, Inc.                          | 08/12/97                  | Pending              |

## Urban Setting Designations

Ohio EPA's ground water protection requirements for voluntary cleanups are designed to address risks contaminated ground water pose to residents and the environment. Some sites in highly urbanized areas rely on community water systems to supply residents with safe drinking water, so ground water that contains chemicals from prior industrial activities poses no appreciable risk to the community. This is because the ground water is not being used and will not be used in the foreseeable future for drinking water purposes. In these locations, a ground water classification known as Urban Setting Designation or USD recognizes that cleanup to drinking water standards is not necessary, since no one will be drinking the ground water. Other possible exposures to contaminated ground water still must be addressed even with an USD. For example, if contaminated ground water makes its way to a stream, the resulting discharge cannot adversely impact aquatic life in the stream, nor can it harm people who might swim in the water.

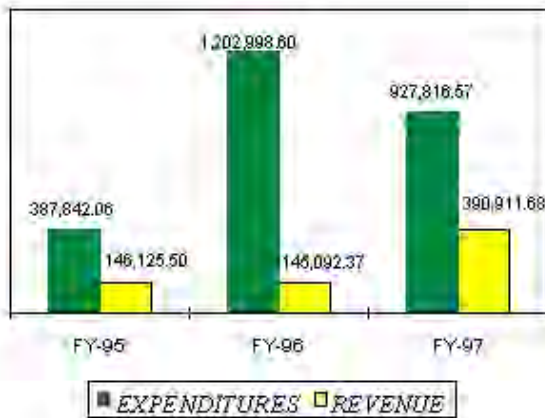
A request for an Urban Setting Designation must be approved by the director of Ohio EPA. Public participation is an important part of this process, because people who live in the area may have information not known to the Ohio EPA.

Two examples of encouraging brownfield redevelopment using the USD tool are summarized on these pages. Cleveland's first USD, which was granted in 1997, will allow the Catholic Charities Facilities Corporation to build a new community center in a disadvantaged area of the city. The USD for Akron, which currently is under review, was submitted to encourage continued cleanup and commercial redevelopment in the Opportunity Park area of the city.

## Summary of Program's Financial Status:

The goal of the VAP is to function entirely from program fees. However, to start the program, seed money was borrowed from the Hazardous Waste Facility Management Account. The Ohio Environmental Protection Agency received two such loans totaling \$2,803,274 that have allowed the program to continue operations until revenues become sufficient to independently fund the program. During the first two years of program implementation, program efforts were focused on rule development. Therefore, revenue from program customers (certified professionals, certified laboratories and volunteers) was low. With the finalization of the program rules in the middle of FY97, revenues have been steadily increasing as more customers use the program.

**FIGURE 1 - Revenue & Expenditure Chart**



**FIGURE 2 - % of Revenue from Different Sources**

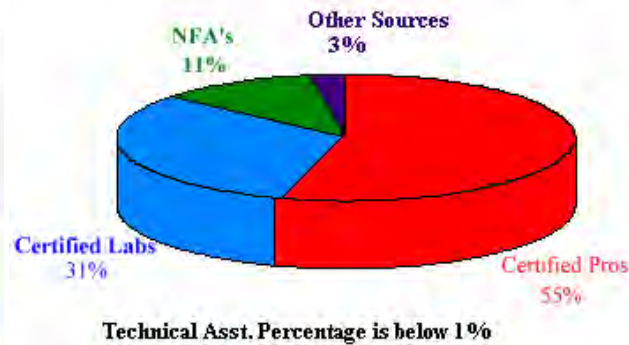


Figure 1 - bar chart showing the breakdown of expenses & revenue for FY95, FY96 and FY97.

Figure 2 - pie chart with breakdown of percentages on revenue sources.

Figure 3 - table with description of expenses for activities performed under the program.

|                                     | REVENUE TABLE     |                   |                   |                   |
|-------------------------------------|-------------------|-------------------|-------------------|-------------------|
|                                     | FY95              | FY96              | FY97              | TOTAL             |
| <b>Certified Pros</b>               | 94,000.00         | 118,500           | 162,300.00        | 374,800.00        |
| <b>Certified Labs</b>               | 42,000.00         | 17,000            | 152,570.57        | 211,570.57        |
| <b>NFA's</b>                        | 4,000.00          | 8,950             | 62,200.00         | 78,150.00         |
| <sup>1</sup> <b>Technical Asst.</b> | -0-               | -0-               | 429.39            | 429.39            |
| <sup>2</sup> <b>USD's</b>           | -0-               | -0-               | -0-               | -0-               |
| <b>Other Sources</b>                | <u>6,125.50</u>   | <u>642.37</u>     | <u>10,411.72</u>  | <u>17,179.59</u>  |
| <b>TOTAL</b>                        | <b>146,125.50</b> | <b>145,092.37</b> | <b>390,911.68</b> | <b>682,129.55</b> |

<sup>2</sup>USD's are in the review process and have not been billed yet.

**Figure 3 - VAP EXPENSES BY ACTIVITY DESCRIPTION**

100 COST/PERSONNEL & PERSONAL SERVICES

| ACTIVITY                                    | FY95<br>EXPENSES  | FY96<br>EXPENSES    | FY97<br>EXPENSES  |
|---|-------------------|---------------------|-------------------|
| Program Development                         | 6,738.11          | 5,918.30            | 19,014.99         |
| Develop Internal<br>Operating Procedures    | 1,709.62          | 1,186.04            | 17,839.50         |
| Technical Assistance                        | 3,244.91          | 6,266.44            | 17,176.88         |
| Professional Certification                  | 14,033.93         | 12,001.22           | 19,973.96         |
| Lab Certifications                          | 1,729.34          | 7,651.25            | 9,021.80          |
| Review NFA                                  | 2,274.48          | 10,610.22           | 24,518.75         |
| Report to Legislators                       | 758.95            | 493.90              | 385.23            |
| Rule Writing                                | 100,446.52        | 246,875.35          | 84,921.78         |
| Request for Information                     | 22,255.15         | 52,016.12           | 69,550.13         |
| Other Personnel &<br>Personal Services Cost | 134,410.57        | 712,932.31          | 513,146.68        |
| <b>Total 100 Cost</b>                       | <b>296,605.58</b> | <b>1,055,951.15</b> | <b>778,725.57</b> |

200 COST/SUPPLIES, TRAVEL AND MAINTENANCE

| ACTIVITY                        | FY95<br>EXPENSES | FY96<br>EXPENSES | FY97<br>EXPENSES  |
|---------------------------------|------------------|------------------|-------------------|
| Edible Products & Food Handling | 76.05            | 76.05            | 0                 |
| Office Supplies                 | 8,293.30         | 2,793.61         | 1,498.72          |
| Vehicle Maintenance             | 0                | 375.65           | 798.77            |
| Travel & Registration Fees      | 3,413.89         | 6,311.05         | 6,641.69          |
| Communications & Shipping       | 1,302.68         | 7,419.48         | 6,647.41          |
| Maintenance & Repairs           | 0                | 733.38           | 891.00            |
| Rental-Leases                   | 5,101.36         | 46,603.39        | 48,665.87         |
| Printing, Binding & Advertising | 3,191.14         | 11,013.89        | 65,342.19         |
| General & Other Expenses        | 3,486.27         | 9,550.77         | 12,183.28         |
| <b>Total 200 Cost</b>           | <b>25,015.71</b> | <b>84,877.27</b> | <b>142,668.93</b> |

300 COST/EQUIPMENT

| ACTIVITY                | FY95<br>EXPENSES | FY96<br>EXPENSES | FY97<br>EXPENSES |
|-------------------------|------------------|------------------|------------------|
| Office Equipment        | 3,205.00         | 0                | 0                |
| Purchase Vehicle        | 21,343.00        | 0                | 0                |
| Communication Equipment | 3,829.08         | 0                | 0                |

| ACTIVITY                           | FY95<br>EXPENSES | FY96<br>EXPENSES | FY97<br>EXPENSES |
|------------------------------------|------------------|------------------|------------------|
| Lab Equipment                      | 9,694.65         | 0                | 0                |
| Data Processing Equipment/Software | 23,299.21        | 51,858.18        | 6,422.07         |
| Other General Equipment            | 849.83           | 312.00           | 0                |
| <b>Total 300 Cost</b>              | <b>62,220.77</b> | <b>52,170.18</b> | <b>6,422.07</b>  |

| ACTIVITY              | FY95<br>EXPENSES | FY96<br>EXPENSES | FY97<br>EXPENSES |
|-----------------------|------------------|------------------|------------------|
| Certification Refunds | 4,000.00         | 10,000.00        | 0                |

| ACTIVITY                                       | FY95<br>EXPENSES  | FY96<br>EXPENSES    | FY97<br>EXPENSES  |
|--|-------------------|---------------------|-------------------|
| <b>Total Voluntary Action<br/>Program Cost</b> | <b>387,842.06</b> | <b>1,202,998.60</b> | <b>927,816.57</b> |



## **Certified Professionals and Laboratories**

Due to the privatized nature of the Voluntary Action Program (VAP), the volunteers and Ohio EPA rely heavily on environmental consultants and laboratories certified to perform work in support of a voluntary action. There are currently more than 70 environmental professionals and more than a dozen laboratories certified to conduct work under the VAP. The program maintains up-to-date lists of both professionals and laboratories. These lists are available to interested parties by contacting the VAP or accessing the VAP World Wide Web home page at <http://www.epa.ohio/derr/volunt.htm>.

The requirements for being certified as a professional are quite stringent and require, among other things, at least eight years of professional experience related to the cleanup of contaminated properties and a bachelor's degree in a related science or engineering field. Laboratories must provide extensive documentation regarding their sample analysis procedures and quality assurance plans. Labs are subject to a rigorous laboratory audit conducted by Ohio EPA personnel, prior to being considered for certification. These requirements and procedures help ensure that voluntary cleanups are being conducted in adherence to the technically stringent requirements of the program.

The availability of certified professionals and laboratories to perform work on voluntary properties saves time and money, which is extremely important to developers and property owners who are often faced with tight time lines that can make or break a deal. "The difference in the time it takes to clean up a property voluntarily versus the traditional CERCLA (Superfund) route can be significant," states Bob Wilkenfeld, of Chevron USA. "I have compared the difference in time between conducting the Phase I and Phase II investigations for the voluntary cleanup at the Toledo Chevron property and negotiating the analogous investigatory phases of the CERCLA cleanup at the Cincinnati Chevron property. Where it took Chevron Toledo a year and a half to complete the Phase I and Phase II voluntary investigations, it took 3 years just to finalize the negotiations for the investigation at the Chevron Cincinnati facility." Wilkenfeld believes that a privatized, performance-based program allows for quicker implementation of investigatory and remedial projects and can reduce property cleanup costs by at least 20 percent and up to 100 percent in some cases.

Success Story

**Northcliff Limited Liability  
Benefits from Issuance of Covenant**

Ohio EPA issued a covenant-not-to-sue to Northcliff Shopping Center Limited Liability Company, releasing it from state civil liability associated with the environmental cleanup of the property at I-480 and Ridge Road, Brooklyn. Northcliff plans to purchase the four contiguous properties that comprise the site to develop a commercial retail shopping center.

Since 1914, the approximately 19-acre site has been used for a variety of industries, including machine shops, metal fabrication companies, a putty and compound factory, a plastic novelty factory, a corrosion-proofing company, a metal refurbishing company, a service and sales company for material handling equipment, and warehouses. The site is zoned as commercial property but is located in an area comprising mixed commercial and residential zoning.

Currently, most of the site is vacant; however, there are five one-story masonry buildings, one metal building, parking lots, and abandoned foundations on the site. The topography of the site has been modified during the past 50 or more years with backfilling of foundry sand, construction debris and soils.

Based on a review of the site history, soil samples taken from the site and a site-specific risk assessment, the certified environmental professional at Gemini Geotechnical Associates, Inc., identified exposure pathways and determined exposure scenarios. The following limitation and conditions have been placed on uses for the property: the site cannot be used for residential purposes; although some contaminated soil will be removed, the entire site must be capped with either pavement or soil cover to protect tenants, building occupants, and the general public from exposure to remaining contaminated soil; and, during initial site development and any reconstruction activities within the capped areas, special measures must be implemented to protect construction workers and the general population from significant lead exposure from the remaining contaminated soil.

## VAP Financial Incentives

There are several financial programs available to assist volunteers who are interested in cleaning up their properties but may need some assistance to get the project off the ground or to keep the project going. One of these programs was created when the Governor Voinovich/Lt. Governor Hollister Jobs Bill III package became effective in October 1996. Jobs Bill III is comprised of House Bills 440, 441 and 442. Two of these bills, House Bills 441 and 442, provide grants and tax credits to individuals performing voluntary actions. The impetus behind Jobs Bill III was Lt. Governor Nancy P. Hollister who, during extensive travels throughout the state, met with local government and business officials and discussed their economic development needs. These officials identified a need for economic incentives to revitalize and attract businesses to their communities.

The grant program (H.B. 442), which is administered by the Ohio Department of Development (DOD), provides grants to eligible participants in economically disadvantaged areas. H.B. 442 grants are available to non-profit and governmental entities such as port authorities; community improvement corporations; community-based organizations that provide social services and have experience in economic development; other non-profit economic development entities; and county, township, or municipal corporations. Four VAP-related grants were issued during Fiscal Year 1997 (see table below).

The House Bill 441 tax incentives, which provide corporate franchise and personal income tax credits to individuals or corporations conducting voluntary actions, also are administered by the DOD. All voluntary actions conducted in the state are potentially eligible for the tax credit; however, a larger credit is available to volunteers who clean up properties in economically disadvantaged areas. No tax credits were issued during Fiscal Year 1997.

In addition to the tax credits and grants offered by House Bill 441, low-interest loans are available to volunteers through the Ohio Water Development Authority (OWDA) and Ohio EPA's Water Pollution Control Loan Fund (WPCLF). Low-interest loans have been granted under these programs for both voluntary investigation activities and voluntary remediation. During Fiscal Year 1997, six VAP-related low-interest loans were granted (see table below).

A good example of how these financial incentives can work to revitalize an abandoned brownfield property is the Lockland Development site in the Village of Lockland, near Cincinnati. This property previously had been home to the Jefferson Smurfit Paper Mill and had been unused since the mill shut down in 19XX because of fears of environmental liability. The Village of Lockland saw the H.B. 442 grant program as an excellent opportunity to obtain funds to acquire the site and lease it to Lockland Development Corporation, who was interested in developing the site for light manufacturing use. Lockland Development, in turn, needed capital to voluntarily remediate the site and looked to the OWDA for low-interest loan monies. The result was a \$1 million grant to the Village of Lockland for property acquisition and a \$1.5 million low-interest loan to Lockland Development for demolition of existing structures and remediation. This win-win situation will result in a protective environmental cleanup and allow the Village of Lockland to redevelop an unsightly brownfield property.

### VAP- Related Grants and Loans Approved During State Fiscal Year 1997

| APPLICANT                        | COUNTY   | PROJECT NAME               | PROJECT DESCRIPTION               | FINANCIAL INCENTIVE TYPE | AMOUNT OF GRANT OR LOAN |
|----------------------------------|----------|----------------------------|-----------------------------------|--------------------------|-------------------------|
| 3-D Warehousing and Distributing | Hamilton | Former Mosler Safe Company | Phase II investigation activities | WPCLF Loan               | \$79,930                |
| City of Cleveland                | Cuyahoga | Collinwood Yards           | VAP remediation activities        | H.B. 442 Grant           | \$1,000,000             |
| Grant Realty                     | Cuyahoga | Sunar-Hauserman Co.        | VAP remediation activities        | WPCLF Loan               | \$1,637,000             |
| Grant Realty                     | Cuyahoga | Sunar-Hauserman Co.        | VAP remediation activities        | OWDA Loan                | \$1,025,534             |
| Liniform Services                | Summit   | Barberton                  | Phase II investigation            | WPCLF                    | \$63,940                |

| APPLICANT                    | COUNTY   | PROJECT NAME                        | PROJECT DESCRIPTION  | FINANCIAL INCENTIVE TYPE | AMOUNT OF GRANT OR LOAN |
|------------------------------|----------|-------------------------------------|--|--------------------------|-------------------------|
|                              |          | Laundry & Cleaning, Inc.            | activities   | Loan                     |                         |
| Lockland Development Company | Hamilton | Former Jefferson Smurfit Paper Mill | Demolition and VAP remediation activities                              | OWDA Loan                | \$1,500,000             |
| Scranton Development Company | Cuyahoga | Scranton Peninsula                  | Phase II investigation activities                                      | WPCLF Loan               | \$650,000               |
| Southern Ohio Port Authority | Scioto   | Ohio River Industrial Park          | VAP remediation activities   | H.B. 442 Grant           | \$500,000               |
| Village of Lockland          | Hamilton | Lockland Commerce                   | Land acquisition for an industrial park undergoing a voluntary action. | H.B. 442 Grant           | \$1,000,000             |
| WIRE-Net                     | Cuyahoga | Walworth Run Industrial Park        | VAP Remediation Activities   | H.B. 442 Grant           | \$250,000               |

## Auditing Program

Ohio EPA audits 25 percent of all NFAs submitted to the VAP. These audits are conducted by the VAP Field Auditing Unit (FAU). The selected NFAs are chosen from three audit pools; the Mandatory Audit Pool, Priority Audit Pool, and Random Audit Pool. The audits may be limited only to a review and analysis of the documents pertaining to a NFA letter in order to determine compliance with VAP rules, or the audit may also include sampling and analysis of soils, surface water, air, sediments, or ground water. Audits are conducted to determine whether, after completion of voluntary actions, the properties meet applicable standards. Audits are also conducted to review the qualifications of and work performed by certified professionals and certified laboratories in order to determine if they possess the qualifications to perform work under the VAP which results in the issuance of NFAs that are consistent with applicable standards.

The Voluntary Action Program audited the Kessler Products property located at 302 McClurg Road in Youngstown. This audit included a review of all documents used by the certified professional to prepare the no further action letter and an inspection of the property. Some documents the certified professional had used as a basis for issuing the NFA letter had not been submitted with the Kessler NFA letter and were requested and received by the VAP.

The file review raised some questions about whether the Phase I Property Assessment was performed to the standards of the ASTM Standard Practice E 1527, as required by ORC 3746.07. It also raised a question about whether the residual concentrations of the primary contaminant of concern at the property could result in ground water contamination. The site inspection didn't reveal additional concerns, although the ground water monitoring wells were found to be no longer available for collecting additional samples. Efforts to resolve the audit findings are still underway.

Success Story

**Southern Ohio Port Authority**

New Boston, Ohio

Ohio EPA issued a covenant not to sue to the Southern Ohio Port Authority (SOPA) for a portion of the former Empire Detroit Steel Company on Vine Street in New Boston. The covenant was vital to the sale of the property to OSCO Industries, which will construct a new plant on the remediated site to produce castings for the appliance and automotive industry.

SOPA's participation in the state brownfields program is a major step forward for New Boston and Southern Ohio, Lieutenant Governor Nancy P. Hollister said. The restoration of this site will help renew the area's economic base and provide more than 100 new jobs. This is exactly what the brownfields program is designed to accomplish.

The 16.8-acre parcel that SOPA cleaned up previously was owned by Cyclops Corporation and operated as a steel mill for about 100 years. It later became the Empire Detroit Steel Mill, and operated until 1980. As part of the cleanup, SOPA removed approximately 26,000 cubic yards of soil and waste materials contaminated with PCBs, asbestos and petroleum. Sampling of soil and ground water confirmed that cleanup standards were met at the site, and SOPA's certified environmental professional determined there are no significant environmental problems associated with the site.

## No Further Action Letters Issued Under The Voluntary Action Program

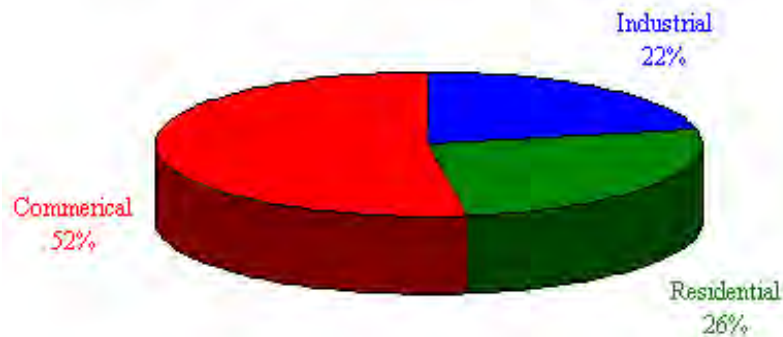
The no further action letter (NFA) issued by a certified professional at the completion of a voluntary action is the culmination of thorough investigatory and remedial efforts conducted to ensure the property is protective of public health, safety and the environment.

To date, 25 NFAs have been issued under the VAP. Fourteen of these NFAs were issued under the interim program, meeting the interim standards for investigation and cleanup. Eleven NFAs have been issued under the final program rules, thus complying with cleanup requirements based on residential,

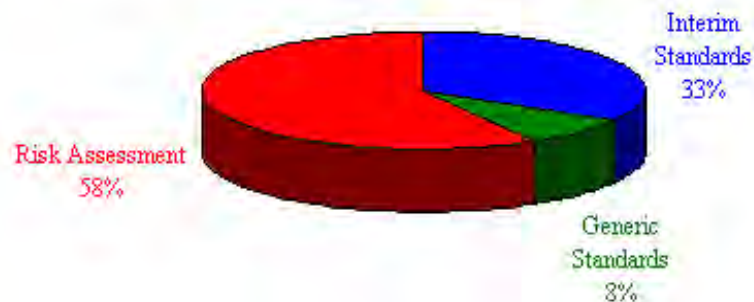
commercial or industrial generic standards or standards derived through a property-specific risk assessment.

Ohio EPA has issued 10 covenants, releasing the volunteer and all current and subsequent property owners from state civil liability associated with cleanup.

**Land Use Categories of the No Further Action Letters Submitted to Ohio EPA**



**Numerical Standards of the No Further Action Letters Submitted to the Ohio EPA**



## GLOSSARY OF TERMS

**Audit** - A thorough examination conducted by Ohio EPA to ensure the NFA letter for a property was issued in accordance with Ohio's Voluntary Action Program rules and that the property complies with applicable standards for the property. An audit may involve only an examination of all available documentation reviewed by the Certified Professional in issuing the NFA letter or it may involve collection and analysis of samples from the property.

**Certified Laboratory (CL)** - A laboratory facility certified by the director of Ohio EPA pursuant to Rule 3745-300-04 of the Administrative 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.

**Certified Professional (CP)** - An individual certified by the director of Ohio EPA pursuant to Rule 3745-300-05 of the Administrative 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.

**Covenant Not To Sue (CNS)** - Issued by the director of Ohio EPA upon satisfactory completion of environmental cleanup activities at a property in the Voluntary Action Program. The covenant promises the volunteer that the State of Ohio will not require further investigation or cleanup of a property.

**No Further Action Letter (NFA Letter)** - Issued by a Certified Professional for a property after it has been found to meet protective standards. Properties that have concentrations of chemicals of concern exceeding protective standards must have remedial actions performed to meet those standards before an NFA Letter can be issued.

**Remedial Actions** - Actions taken at a property to treat, remove, transport for treatment or disposal, dispose of, contain, control, or control hazardous substances or petroleum, which 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 measures, 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.

**Urban Setting Designation (USD)** - Ground water classified as a critical resource or Class A ground water requires a lower level of cleanup when the property above the ground water is designated as an urban setting. Property can be classified as an urban setting when ALL of the following criteria are met: 1)The property is within the corporate boundaries of a city, or within an urban township having at least 20,000 residents in the unincorporated area of the township; 2)Not less than 90 percent of the parcels within the city or township is connected to a community public water system, OR less than 90 percent but at least 75 percent of the parcels within the city or township is connected to a community water system and the area not connected is unaffected by conditions at the property; 3)The property is not within a wellhead protection area endorsed or submitted for endorsement by Ohio EPA, except when the wellhead protection plan has received endorsement and the owner of the public water system consents in writing to the urban setting designation; 4)Ground water is not being used for potable within 0.5 miles of the property unless specific conditions apply. When the property is over a critical resource ground water, the certified professional must demonstrate that the water under the property and within 0.5 miles is not reasonable expected to be used as potable water.

**Voluntary Action** - A series of measures taken to identify and address contamination of properties by hazardous substances or petroleum and the potential sources of the contamination to establish that the property complies with applicable standards. To demonstrate that applicable standards have been met, the person undertaking the voluntary action must establish EITHER that there is no information indicating there has been 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.

**Voluntary Action Program (VAP)** - Ohio's Voluntary Action Program was created by Senate Bill 221 and signed into law by Governor George V. Voinovich in June of 1994. The program encourages people to redevelop and reuse land that is contaminated by hazardous substances or petroleum. The amount of cleanup required for a particular piece of property depends on how that property will be used in the future. Land that



will be reused for industrial purposes, such as a factory, is not required to be cleaned up as much as land that will be reused for residences.

**Volunteer** - Person conducting a voluntary action and unless indicated otherwise, includes the owner of the property, if different from the person conducting the voluntary action, and any authorized representative of the person conducting the voluntary action.

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**Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM**

Summary: Testimony Supplemental Direct Testimony of Kevin D. Margolis on Behalf of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy