

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DIRECT TESTIMONY OF

SHAWN S. FIORE

ON BEHALF OF

DUKE ENERGY OHIO, INC.

| | |
|--------------|--------------------------------------------------|
| _____ | 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 |

April 22, 2013

TABLE OF CONTENTS

| | <u>PAGE</u> |
|-------------------------------------------------------|-------------|
| I. INTRODUCTION AND PURPOSE | 1 |
| II. ENVIRONMENTAL REMEDIATION ACTIVITIES | 3 |
| III. THE OHIO VOLUNTARY ACTION PROGRAM | 5 |
| IV. CONCLUSION..... | 24 |

ATTACHMENTS

SSF-1 Curriculum Vitae

SSF-2 VAP 101

SSF-3 Presentation to CPs by Ohio EPA Attorneys

I. INTRODUCTION AND PURPOSE

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

2 A. My name is Shawn S. Fiore. My business address is 5755 Granger Road, Suite 320,
3 in Independence, Ohio. My position is Vice President of Haley & Aldrich, Inc.

4 **Q. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL AND**
5 **PROFESSIONAL EXPERIENCE.**

6 A. I earned a Bachelor of Science Degree in Geochemistry from Bowling Green State
7 University, in Bowling Green, Ohio; in May 1986. I earned a Master of Science
8 Degree in Geology from Bowling Green State University in August 1993. I am a
9 licensed Professional Geologist in Indiana and Pennsylvania, and a Voluntary
10 Action Program (VAP) Certified Professional (CP), in Ohio. I have been a CP since
11 1996. I have almost 25 years of experience working in the environmental consulting
12 industry. I began my career as an environmental geologist for Engineering-Science
13 Inc. (later Parsons Corporation), in 1988, in Chicago, Illinois, and continued to
14 work with this company until 2002, when I joined Haley & Aldrich. I have worked
15 predominantly on environmental investigation and remediation projects during my
16 career, focusing on Manufactured Gas Plant (MGP) projects for the past eight years.
17 I have completed professional assignments, including investigation and remediation
18 projects, throughout the United States and in Canada, Mexico and, Turkey,
19 Thailand, South Korea, UK, and other countries. I have presented at several
20 professional conferences, seminars and meetings, including those at the invitation of
21 the Ohio Environmental Protection Agency (Ohio EPA), Fortune 50 Companies and
22 non-profit groups, as listed in my Curriculum Vitae, provided as Attachment SSF-1.

1 **Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY OR TESTIFIED**
2 **BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO?**

3 A. No.

4 **Q. WHAT DOCUMENTS HAVE YOU REVIEWED IN THE PREPARATION**
5 **OF YOUR TESTIMONY?**

6 A. I generally reviewed the Voluntary Action Program (VAP) rules in the Ohio
7 Administrative Code Rule (O.A.C.) 3745-300 and related VAP guidance prepared
8 by the Ohio EPA, as well as the testimony of Ms. Jessica Bednarcik, Mr. Kevin
9 Margolis, and Dr. Andrew Middleton. I have also reviewed documents prepared
10 for Duke Energy Ohio on the East End and West End site investigations, as listed
11 in the supplemental testimony of Ms. Jessica Bednarcik. As the CP now
12 responsible for the East End site, I am familiar with the details of the work that
13 has been performed by the Company at that site.

14 **Q. WHAT IS THE PURPOSE OF YOUR PREFILED TESTIMONY?**

15 A. The purpose of my testimony is to describe Ohio's VAP, Duke Energy Ohio's
16 compliance with VAP requirements to date and the prudence of the plans developed
17 and actions taken as related to Ohio requirements and practical considerations.

18 **Q. PLEASE SUMMARIZE YOUR PREFILED TESTIMONY.**

19 A. My testimony focuses on a description of the Ohio VAP and regulation of VAP
20 CPs, and to provide a discussion of VAP applicable standards associated with the
21 environmental investigation and remediation activities, as relevant to Duke
22 Energy Ohio's former MGP sites.

23

II. ENVIRONMENTAL REMEDIATION ACTIVITIES

1 **Q. PLEASE DESCRIBE YOUR EXPERIENCE IN INVESTIGATING AND**
2 **REMEDATING CONTAMINATED PROPERTIES.**

3 A. During my approximately 25-year professional career, as discussed previously, I
4 have predominantly focused on investigation and remediation of contaminated
5 sites. I have completed hundreds of professional assignments on contaminated
6 properties in Ohio and beyond, including more than 20 Comprehensive
7 Environmental Response, Compensation and Liability Act (CERCLA) and
8 Superfund Sites (which are some of the most contaminated sites in the country)
9 more than 50 former industrial properties or “brownfield sites,” more than 200
10 active industrial facilities, more than 20 former Department of Defense (DOD)
11 facilities, more than 100 commercial facilities, and on MGP sites in Ohio,
12 Pennsylvania, Indiana, and Michigan. Specifically in Ohio, I have conducted
13 investigations and remediations on contaminated sites regulated by the US EPA,
14 including CERCLA and Superfund Sites, Resource Conservation and Recovery
15 Act (RCRA) Sites, formerly used defense sites, hazardous waste landfills, and
16 other sites. I have conducted investigations and remediations on sites regulated
17 by the Ohio EPA, including Division of Environmental Response and
18 Remediation (DERR) Sites, active and inactive industrial facilities, landfills,
19 commercial properties, brownfield sites, residential properties, abandoned /
20 undeveloped properties, and MGP sites. I have completed investigation and
21 remediation projects in all five Ohio EPA districts. I have also conducted
22 investigations and remediations on other contaminated sites in Ohio regulated by

1 the Bureau of Underground Storage Tank Regulations (BUSTR).

2 **Q. PLEASE DESCRIBE YOUR INVOLVEMENT WITH THE OHIO**
3 **VOLUNTARY ACTION PROGRAM (VAP).**

4 A. I was certified by the Ohio EPA as a Certified Professional in 1996. I have been
5 re-certified, by the Ohio EPA, every year since. I have participated in the VAP in
6 a number of ways including practicing as a VAP CP for more than 16 years on
7 more than 50 properties, obtaining recertification annually through participation
8 in ongoing professional development training as required by the VAP, providing
9 comments and input to Ohio EPA on proposed rule changes regarding the VAP,
10 participating in Ohio EPA led training sessions to enhance my knowledge of the
11 VAP rules and requirements, working with the Ohio EPA through Technical
12 Assistance to identify and solve complex project-related issues not directly
13 included in the rules, participating on multi-disciplinary tasks groups (including
14 Total Petroleum Hydrocarbons and NAPL (e.g., Free Product) issues and Metals),
15 participating in and providing feedback as part of a multidisciplinary stakeholder
16 review process implemented by the Ohio EPA, and presenting at CP training
17 sessions or other Ohio EPA-led meetings designed to provide additional and
18 ongoing training for VAP CPs. I have also been contacted by other VAP CPs,
19 working on MGP sites in Ohio, to provide information on mitigation of MGP-
20 related wastes under the VAP.

21 **Q. HAVE YOU BEEN INVOLVED IN INVESTIGATING AND**
22 **REMEDATING ANY MGP SITES IN OHIO?**

23 A. Yes. I have been involved in investigating and remediating MGP sites in Ohio

1 since 2005. I have investigated more than 20 MGP sites in Ohio and have been
2 involved in the remediation of three, to date, which, I believe, makes me the CP
3 with the most experience in investigating and remediating MGPs in Ohio, under
4 the VAP.

5 **Q. HAVE YOU BEEN INVOLVED IN INVESTIGATING AND**
6 **REMEDATING ANY MGP SITES IN OHIO UNDER THE VAP?**

7 A. Yes, all of the sites indicated in my response to the previous question have been
8 or are being investigated or remediated following VAP rules.

9 **III. THE OHIO VOLUNTARY ACTION PROGRAM**

10 **Q. WHAT IS THE VAP?**

11 A. In general, Ohio's VAP is a set of rules, regulations, guidance, and other
12 directives from the Ohio EPA, that establish a process by which contaminated
13 sites may be investigated and remediated to Ohio EPA standards. The VAP is a
14 program created in 1994 to provide remediating parties with a process to
15 investigate possible environmental contamination, remediate the contamination, if
16 necessary, and receive a No Further Action (NFA) determination from a CP and
17 Covenant Not to Sue (CNS) from the State of Ohio that no more remediation
18 activities were required.

19 The VAP provides investigation requirements, non-prescriptive
20 remediation procedures, and well-defined cleanup standards. The goal of the
21 VAP is to allow the remediation and beneficial re-use of important properties and
22 real estate assets, which have been dormant due to concerns regarding ongoing
23 environmental liability and unknown cleanup costs. These concerns formerly

1 dissuaded investors, financial institutions, developers, businesses and private
2 individuals from purchasing, financing, redeveloping and returning to beneficial
3 use former industrial or commercial properties. The VAP is Ohio's solution to
4 remove, control or manage the environmental and legal barriers that inhibit this
5 redevelopment as a more cost-effective alternative to performing such work under
6 Ohio EPA orders.

7 The VAP limits and minimizes Ohio EPA direct involvement and
8 maximizes the environmental remediation expertise in the private sector, through
9 certification of Certified Professionals, who act on the State of Ohio's behalf in
10 monitoring and cleaning up contaminated properties. The VAP allows a property
11 owner or remediating party, working closely with a Certified Professional, to
12 investigate and remediate a property and, if appropriate, obtain an NFA letter.
13 This letter indicates that the property meets all VAP standards and allows the
14 remediating party to request a CNS from the State of Ohio, limiting future
15 liability for the site. Because CPs act as agents of the State, within the VAP
16 program, the VAP also contains a comprehensive program regulating CPs, which
17 includes verification of educational and work experience, certification criteria,
18 initial and ongoing training requirements, a determination of professional
19 competence (initially and annually), regulation of conduct, and other items.

20 **Q. PLEASE EXPLAIN THE ROLES OF OHIO EPA AND CERTIFIED**
21 **PROFESSIONALS UNDER THE VAP.**

22 **A.** Simply put, CPs are agents of the State, responsible for verifying that properties
23 are investigated and cleaned up to the levels required by the VAP rules. CPs,

1 because they act as agents of the State, are held to a standard of conduct that
2 uncertified practitioners are not. CPs are held, by regulation, to the following
3 standards of conduct which do not apply to uncertified practitioners. A CP must
4 act with care and diligence and fully apply the CP's knowledge and skills at the
5 time professional services are performed (as indicated in O.A.C. 3745-300-
6 05(E)(1)(a)). A CP must hold paramount public health, safety, welfare and the
7 environment in the performance of professional services (as indicated in O.A.C.
8 3745-300-05(E)(2)(a)). A CP must follow the requirements and procedures set
9 forth in the applicable provisions of O.A.C. Rule 3745-300 and Revised Code
10 Chapter 3746 (as indicated in O.A.C. 3745-300-05(E)(2)(e)(ii)). A CP must make
11 a good faith and diligent effort to review relevant data and reports and identify
12 and obtain such additional data and other information as deemed necessary to
13 provide professional services (as indicated in O.A.C. 3745-300-05(E)(2)(e)(iii)).
14 A CP must exercise independent professional judgment and be objective in any
15 professional report, statement or testimony (as indicated in O.A.C. 3745-300-
16 05(E)(2)(e)(i)). Finally, if a CP does not maintain adherence to these standards,
17 the CP is subject to disciplinary action including a written warning, suspension of
18 certification, revocation of certification, and potentially more severe actions.

19 When a CP determines that, after appropriate investigation and, if needed,
20 remediation, a property meets all applicable VAP standards, the CP may prepare
21 an NFA letter. This document must be prepared under affidavit attesting to the
22 truth, accuracy and completeness of the information, follow a prescribed format,
23 and is quite extensive, often in excess of several thousand pages. If the

1 remediating party desires a CNS from the State of Ohio, the remediating party
2 must direct the CP to submit the NFA to the Ohio EPA for review, under
3 affidavit. The Ohio EPA will review the NFA and either provide comments on
4 the NFA or issue a CNS, from the Director of the Ohio EPA. This is the
5 methodology set forth by the State of Ohio. If the remediating party opts to
6 proceed with remedial activities without a CP, they may not obtain an NFA letter
7 or CNS from the State.

8 In addition to involvement in reviewing NFA letters and issuing CNSs, as
9 discussed above, the Ohio EPA also administers the VAP. The Ohio EPA
10 operates initial and ongoing certification programs, including certain training
11 programs, for CPs, Certified Biocriteria Evaluators, and Certified Laboratories.
12 The Ohio EPA also provides user-paid technical assistance to assist remediating
13 parties undertaking work under the VAP with questions regarding the program,
14 specific rule requirements, or other aspects of the VAP, although such assistance
15 is not required by the Ohio EPA. In addition, the Ohio EPA administers the
16 issuance of Urban Setting Designations (USD). Further, the Ohio EPA is required
17 by law to conduct audits on 25% of the properties taken through the VAP, to
18 ensure that these sites have been properly addressed and that CPs and
19 Laboratories have performed the work properly. As I mentioned previously, the
20 Ohio EPA is also responsible for monitoring the performance of CPs and
21 disciplining those deemed to have performed poorly, failing to meet the standards
22 of conduct mentioned previously. Based on internal guidance documents,
23 portions of which were shared verbally with CPs at certain training sessions, CPs

1 who perform poorly may be warned, have their certification suspended, have their
2 certification revoked, or, in more egregious instances, face more severe actions.
3 This information is further discussed in Attachments SSF-2 and SSF-3.

4 **Q. WHAT DOES IT MEAN TO BE A CERTIFIED PROFESSIONAL?**

5 A. A CP, is a person certified by the director of the Ohio EPA to issue NFA letters,
6 under the VAP. That is, a CP serves as an agent of the State in making a
7 determination that properties meet all applicable standards and issue NFA letters.
8 No person, other than a Certified Professional, not even an Ohio EPA employee,
9 is permitted to issue NFA letters. That is, under VAP rules, the Certified
10 Professional is responsible for making a determination that a property meets all
11 applicable standards, under VAP, such that an NFA letter can be issued.
12 Notwithstanding the standards of conduct discussed previously and the
13 preparation of NFA letters (where warranted), the Certified Professional has
14 specific responsibilities, as listed in O.A.C. 3745-300-05 and including
15 preparation of NFA letters, submittal of NFA letters to the Ohio EPA for issuance
16 of a CNS, submittal of USD applications to the Ohio EPA, and other
17 responsibilities. CPs are regulated by the Ohio EPA pursuant O.A.C. 3745-300-
18 05 and are subject to discipline, including suspension or revocation of their
19 certification for failing to comply with standards of conduct imposed by the VAP.

20 **Q. WHAT ARE THE REQUIREMENTS TO BECOME A VAP CERTIFIED**
21 **PROFESSIONAL AND TO MAINTAIN THE CERTIFICATION?**

22 A. A person who wishes to become a VAP Certified Professional must meet several
23 criteria, including 1) hold a bachelor's degree from an accredited school in an

1 appropriate engineering or science discipline, 2) have 8 years of professional
2 experience related to cleanup work, including three years as a supervisor or
3 project manager, 3) possess good moral character, 4) possess the professional
4 competence and knowledge to perform the tasks required of a Certified
5 Professional and 5) take the initial training class offered by the Ohio EPA. It is
6 important to note that this last requirement, initial training class, was added well
7 after the VAP had been implemented. The requirement to participate in this class,
8 which provides a great deal of detailed information and nuances about the VAP
9 not readily available elsewhere, was added by the Ohio EPA based on their
10 experience that many CPs did not have a working knowledge of the intricacies of
11 the VAP, which has many differences from most other states' cleanup programs.
12 That is, the Ohio EPA understands that the VAP is complex, non-intuitive and
13 nuanced, and requires otherwise qualified individuals to obtain a detailed
14 education on the VAP rules, prior to certifying them as Certified Professionals.

15 If an applicant meets these criteria, then the applicant must submit a
16 completed application, provide original transcripts, provide six references,
17 document participation in the initial training class, and pay the required fee. The
18 Ohio EPA then requests public comments on applicants, through a public notice
19 program. Once the public notice requirements are met and the Ohio EPA deems
20 the applicant as suitable, the Ohio EPA provides the certification. The
21 certification is valid for one year and must be renewed annually. To maintain
22 certification, the Certified Professional must record 12 Professional Development
23 Hour Units (PDHUs) of relevant and Ohio EPA-approved training annually,

1 submit a recertification application annually, and pay the required annual fee.

2 **Q. WHAT IS A NO FURTHER ACTION (NFA) LETTER?**

3 A. An NFA letter is comprehensive report detailing all activities completed in
4 support of the determination, by the Certified Professional, that all applicable
5 VAP standards have been met at a property. The NFA letter includes a template
6 NFA form, provided by the Ohio EPA, and all supporting documentation. The
7 supporting documentation includes items such as a complete Phase I Property
8 Assessment Report, (including copies of Ohio EPA and US EPA files, previous
9 site investigation and remediation reports, and other documentation), any updates
10 to the Phase I Property Assessment Report, a Phase II Property Assessment
11 Report (including copies of analytical reports provided by the Certified
12 Laboratory, boring logs, affidavits, risk assessment documents, operation and
13 maintenance plans, risk mitigation plans, Protection of Ground Water Meeting
14 Potable Use (POGWMPUS) demonstrations, background studies, modeling,
15 leaching testing, remediation completion reports, etc.). NFA documents can
16 range in size from a few hundred pages, if an NFA is warranted after only a Phase
17 I Property Assessment is completed, to thousands of pages (which is more
18 typical) if a Phase II Property Assessment and remediation are required. Once
19 the NFA is complete, the original copy is provided to the remediating party, by
20 the Certified Professional. The remediating party must then inform the Certified
21 Professional whether the NFA is to be submitted to the Ohio EPA for the purpose
22 of obtaining a CNS. The CP must then submit the original NFA letter, and
23 specified copies, to the Ohio EPA for CNS review. The CP must also respond to

1 any comments made by the Ohio EPA during this review and must submit any
2 additional information requested. Once the Ohio EPA's requests are satisfied, the
3 Ohio EPA will issue a CNS.

4 It should be noted that a CNS may be revoked and an NFA invalidated if
5 certain conditions occur. For instance, the CNS may be revoked if land usage
6 changes, if additional contamination not encountered during the Phase II
7 Investigation is found, if improprieties in preparation of the NFA are later
8 identified, and if remedial measures (land use restrictions, engineering controls,
9 operation & maintenance plans, etc.) are not followed. In many of these cases,
10 the Ohio EPA would review the conduct and work completed by the Certified
11 Professional. Based on these reviews, disciplinary actions could take place.

12 **Q. WHAT REQUIREMENTS MUST A VAP CERTIFIED PROFESSIONAL**
13 **FOLLOW TO DETERMINE WHETHER A VAP NO FUTHER ACTION**
14 **(NFA) LETTER MAY BE ISSUED FOR A PROPERTY?**

15 A. In order to determine whether an NFA letter may be issued for property, the
16 Certified Professional must follow the VAP rules to confirm that property is
17 eligible for participation in the VAP, ensure that the property is investigated in
18 accordance with the VAP rules, identify all applicable VAP standards, determine
19 whether all applicable VAP standards have been met, and, if not, ensure that
20 remediation required to meet applicable standards has been completed. All
21 information obtained under the VAP must be certified to truth, accuracy and
22 completeness by way of an affidavit. Once applicable standards have been met,
23 an NFA Letter may be issued for the property by the Certified Professional under

1 affidavit. It is also important to note that the NFA letter applies to the work
2 conducted and conditions known to exist at that time it is issued. In the event
3 that, subsequent to the date that a Certified Professional issues an NFA letter, the
4 Certified Professional learns that relevant facts, data or other information existed
5 at the time the NFA was issued which indicates that applicable standards were not
6 met, the Certified Professional must: (i) promptly notify the remediating party or
7 the owner or operator of the property, if different, that the applicable standards
8 were not met and of the need to notify the Director of Ohio EPA; and (ii) notify
9 the Director of Ohio EPA that applicable standards were not met if the
10 remediating party, or the owner or operator of the property, if different, does not
11 submit written confirmation to the Certified Professional within thirty days of
12 learning of the relevant facts, data, or other information, that the Director has been
13 notified.

14 **Q. PLEASE IDENTIFY THE STANDARDS THAT MUST BE EVALUATED**
15 **TO DETERMINE WHETHER A PROPERTY COMPLIES WITH ALL**
16 **APPLICABLE VAP STANDARDS SUCH THAT A NO FURTHER**
17 **ACTION (NFA) LETTER MAY BE ISSUED UNDER THE VAP.**

18 A. In order to prepare an NFA letter for a property, CPs are required to identify all
19 applicable standards for that property. Applicable standards must be determined
20 for all chemicals of concern with respect to all current and reasonably anticipated
21 exposure pathways determined to be complete for which the remediating party
22 intends to demonstrate compliance.

23 Applicable standards may include, but are not limited to, standards derived

1 from generic numerical standards, background levels determined following VAP
2 rules, standards derived through a property-specific risk assessment, or a
3 combination of these standards. Standards to be considered must include dermal
4 contact standards and non-dermal contact standards, including potable
5 groundwater use and vapor intrusion pathways. Standards that must be
6 considered also include leaching of chemicals to groundwater, POGWMPUS, and
7 standards related to migration or leaching of chemicals to surface water and
8 sediment. As indicated previously, once all applicable standards are identified
9 and once it is determined that a property meets all applicable standards, an NFA
10 letter may be issued by the Certified Professional under affidavit.

11 **Q. WHAT IS AN URBAN SETTING DESIGNATION (USD) UNDER THE**
12 **VAP?**

13 A. An Urban Setting Designation (or USD) is a recognition, by the Ohio EPA, that
14 groundwater in certain urbanized areas (serviced by community water systems) is
15 not used for potable purposes and that chemicals from past industrial activities
16 that may be present in such groundwater pose no perceptible risk of consumption
17 by the community because the groundwater is not being used and will not be used
18 for drinking water purposes in the foreseeable future. In essence, a USD allows a
19 remediating party to exclude potable groundwater use as an exposure pathway
20 from further consideration. Note that a USD only addresses potable groundwater
21 use and not the other potentially applicable exposure pathways under the VAP.
22 Risks from all potentially complete pathways must still be considered by the
23 Certified Professional when making a decision on whether all applicable VAP

1 standards have been met.

2 **Q. WHAT IS REQUIRED TO OBTAIN A USD FOR A PROPERTY IN**
3 **OHIO?**

4 A. In order for a property to be considered for a USD, it must meet a number of
5 criteria, as described in O.A.C. 3745-300-10. These criteria include, at a
6 minimum, the property must be located within the boundaries of a city or
7 township with a population of at least 20,000; at least 90% of the parcels within
8 the city or township (or within a minimum of 1-mile from the property) must be
9 connected to a community water system; the property (or USD area) cannot be
10 located within certain well-head protection or drinking water source protection
11 areas; there can be no potable wells within ½ mile of the site; for properties above
12 a sand and gravel aquifer producing more than 100 gpm or sites above sole source
13 aquifers, a Certified Professional must demonstrate that there is no reasonable
14 expectation that any potable water wells will be installed within one-half mile;
15 and the city or township in which the property is located must have a community
16 water system that it considers capable of meeting its future water supply needs.
17 It should be noted that the USD rule provides other mechanisms for achieving a
18 USD if certain of the above standards cannot be met. It should also be noted that
19 the Ohio EPA makes the final determination on whether a USD is granted and
20 that determination is made based on whether all criteria have been met, whether
21 the USD is likely to have an adverse impact on surrounding communities,
22 whether the USD is likely to adversely impact regional water resource needs, and
23 whether the USD is likely to expose people to contaminated groundwater now and

1 in the future. Further, the Ohio EPA also considers comments received through
2 required public participation (meetings and notifications) and whether the local
3 governments favor the designation.

4 **Q. IN ADDITION TO THE STRINGENT REGULATORY CRITERIA**
5 **IDENTIFIED IN THE QUESTION ABOVE, WHAT COMPLICATIONS**
6 **EXIST TO OBTAINING A USD IN THE AREA OF THE TWO DUKE**
7 **ENERGY OHIO MGP SITES AND WHAT ARE THE**
8 **BENEFITS/LIMITATIONS TO A USD AT THESE SITES EVEN IF A USD**
9 **COULD BE OBTAINED?**

10 A. There would be several complications to obtaining or fully utilizing USDs at these
11 two sites. First, as discussed above, to achieve a USD there can be no potable
12 wells within ½ mile of the site and at least 90% of the parcels within the city or
13 township (or within a minimum of 1-mile from the property) must be connected
14 to a community water system. With respect to these two sites, the
15 Commonwealth of Kentucky is located less than ½ mile from each site and
16 private properties, within the Commonwealth of Kentucky, are located within this
17 ½ mile radius. The rules are unclear whether and how the Ohio EPA can
18 authorize out-of-state USD boundaries and how wells present, if any, within these
19 out-of-state areas would impact the approvability of the USD.

20 With respect to the potential benefits and limitations of USDs at these two
21 sites, there would be significant expense involved in obtaining the information to
22 attempt to make the demonstration that a USD is suitable and inclusion of
23 information from Kentucky, would be a significant complication. The most

1 significant benefit of the USD is that it would allow the remediating party to
2 exclude risks related to potable use of groundwater at a property at an extended
3 point of compliance. Importantly, however, that benefit is limited at these sites as
4 groundwater would still need to meet criteria associated with other non-potable
5 uses, as well as criteria associated with surface water discharges (O.A.C. 3745-
6 300-10(E)(2)(a)(ii)). Because the groundwater at these sites may discharge to a
7 surface water body, water that discharges to the surface water body would need to
8 meet the surface water criteria and not the UPUS. In addition, as indicated in
9 O.A.C. 3745-300-10(D), POGWMPUS requirements must still be met, as one of
10 the applicable standards that must be achieved to obtain an NFA letter.
11 Therefore, a groundwater use restriction, implemented through an environmental
12 covenant, at these sites, rather than a USD, would be less costly and provide the
13 same benefits of addressing the on-site potable use exposures.

14 **Q. WHAT ARE THE VAP REQUIREMENTS FOR ADDRESSING FREE**
15 **PRODUCT AT A PROPERTY?**

16 A. The Ohio EPA defines “free product” as “a separate liquid hydrocarbon phase
17 that has a measurable thickness of greater than one one-hundredth of a foot.” In
18 general, the VAP assumes that properties with free product exceed applicable
19 standards for unrestricted potable use of ground water (O.A.C. 3745-300-
20 08(B)(2)(c)). It should be noted that this VAP assumption is, within the rules,
21 referred to in a section detailing petroleum releases, but the Ohio EPA generally
22 requires that free product, regardless of source, be removed, or mitigated to the
23 extent practicable, prior to issuance of an NFA under the VAP.

1 **Q. WAS THERE FREE PRODUCT AT THE EAST END AND WEST END**
2 **MGP SITES?**

3 A. Yes. There is significant free product present at both sites. Free product at the
4 Duke Energy Ohio sites was present in the form of liquid mobile coal tar. At the
5 East End site, this tar was present in and beyond former tar lagoons located in the
6 West Parcel and within the East Parcel. At the West End site, this tar was present
7 in and between former gas holders and in former MGP production areas, on both
8 the north and south sides of Mehring Way.

9 **Q. HAVE ANY NO FURTHER ACTION LETTERS BEEN ISSUED ON MGP**
10 **SITES IN OHIO WHERE FREE PRODUCT WAS REMAINING ON THE**
11 **SITE?**

12 A. Not to the best of my knowledge.

13 **Q. HAVE ANY NO FURTHER ACTION LETTERS BEEN ISSUED ON ANY**
14 **SITES IN OHIO WHERE FREE PRODUCT WAS REMAINING ON THE**
15 **SITE?**

16 A. Yes. A remediating party may apply to the Director of the Ohio EPA for a
17 variance from standards otherwise applicable to a property on which a voluntary
18 action is being conducted, If granted, this variance could allow sites with free
19 product to achieve NFA status. There are limited instances and conditions in
20 which NFA letters have been prepared for properties with free product remaining
21 in place, but those instances are not consistent with conditions at the Duke Energy
22 Ohio sites, as discussed below. Although I am not privy to investigation and
23 remediation details, my understanding from discussions with the Certified

1 Professionals involved is that the instances in which NFA letters were issued for
2 sites with free product, involved sites where the free product did not adversely
3 impact groundwater quality above applicable standards, did not adversely impact
4 POGWMPUS requirements, and was stable and immobile. At the two Duke
5 Energy Ohio MGP sites, free product must be remediated to meet applicable VAP
6 standards for several reasons. The free product at the Duke Energy Ohio MGP
7 sites has and will impact groundwater in excess of applicable standards. That is,
8 the free product is MGP-coal tar, a substance which contains a number of
9 chemicals including benzene and polyaromatic hydrocarbons, which can dissolve
10 into the groundwater at concentrations above applicable standards. In addition,
11 the free product at the Duke Energy Ohio MGP sites is not stable, but rather is
12 mobile and will likely continue to migrate through time. This migration would
13 likely cause failures of other applicable standards, thus making issuance of an
14 NFA letter impossible. Further, there are potential receptors that could be
15 impacted by the free product. At both Duke Energy Ohio MGP sites, a receiving
16 surface water body (Ohio River) is located adjacent to the site and the mobile free
17 product could migrate into the surface water body, thus making issuance of an
18 NFA letter not possible. Finally, at least some of free product located at the
19 Duke Energy Ohio MGP sites has migrated upward onto the ground surface,
20 causing potential exposures to land users. For these reasons, VAP requirements
21 for mitigation of free product at the Duke Energy Ohio MGP sites included
22 removal of the free product.

1 **Q. HAS THE WEST END SITE BEEN PROPERLY EVALUATED AND**
2 **REMEDIED BASED UPON THE OHIO VAP REGULATIONS?**

3 A. The VAP is an iterative process in which several rounds of investigation are often
4 needed, to fully evaluate a property. If applicable standards are not met,
5 remediation activities are then planned such that when these activities are
6 complete, all applicable standards may be achieved.

7 The iterative investigation and remediation work at this site is still
8 ongoing. That is, all applicable standards have not yet been achieved. However,
9 based on the documents that I have reviewed, the investigation and remediation
10 work conducted at the West End MGP appears to have been prudent and
11 reasonable, and in conformance with VAP regulations.

12 **Q. HAS THE EAST END SITE BEEN PROPERTY EVALUATED AND**
13 **REMEDIED BASED UPON THE OHIO VAP REGULATIONS?**

14 A. As is the case with the West End MGP Site, the work at this site is still ongoing.
15 Based on the documents that I have reviewed, the investigation and remediation
16 work conducted at the East End MGP appears to have been prudent and
17 reasonable, and in conformance with VAP regulations.

18 **Q. WOULD A CERTIFIED PROFESSIONAL BE ABLE TO ISSUE A NO**
19 **FURTHER ACTION (NFA) LETTER FOR THE TWO DUKE ENERGY**
20 **OHIO MGP SITES BASED SOLELY ON IMPLEMENTATION OF**
21 **ENGINEERING CONTROLS SUCH AS ASPHALT OR CONCRETE**
22 **CAPPING?**

23 A. No, not as the only remedy implemented. This type of remedy would not meet all

1 applicable standards and, in fact, could potentially exacerbate site risks.
2 Engineering controls, such as asphalt or concrete capping, may enable a property
3 to achieve certain standards, such as direct contact standards; however the VAP
4 requires that all applicable standards be met for a property to be eligible for an
5 NFA letter. Additional standards that would not be achieved would include
6 surface water standards, POGWMPUS, leaching to groundwater, vapor intrusion
7 to indoor air and other standards. Further, because of the presence of liquid and
8 mobile free product (tar), near surface, in some portions of both sites, placement
9 of an engineering control, such as pavement or a soil cover, could alter subsurface
10 conditions and further mobilize the tar.

11 **Q. WOULD A CERTIFIED PROFESSIONAL BE ABLE TO ISSUE A NO**
12 **FURTHER ACTION LETTER FOR THE TWO DUKE ENERGY MGP**
13 **SITES BASED SOLELY ON INSTITUTIONAL CONSTROLS SUCH AS**
14 **LAND USE RESTRICTIONS?**

15 A. No, not as the only remedy implemented. Institutional controls, such as land use
16 restrictions, would not achieve all applicable standards. Institutional controls,
17 such as land use restrictions, may enable a site to meet certain direct contact
18 standards or groundwater potable use standards; however VAP requires that all
19 applicable standards be achieved prior to issuance of an NFA letter. Land use
20 restrictions would not allow the property to achieve surface water standards,
21 POGWMPUS, leaching to groundwater, vapor intrusion to indoor air and other
22 standards. Institutional controls would not meet these standards.

1 **Q. WHY IS IT DESIRABLE TO FOCUS REMEDIATION EFFORTS ON**
2 **OBTAINING A NO FURTHER ACTION (NFA) LETTER?**

3 A. Under VAP rules, an NFA letter is a very desirable end point. An NFA letter is
4 written confirmation that a site has been appropriately investigated and
5 remediated following the VAP rules and that there are no unacceptable risks to
6 current and reasonably anticipated future land users. The entire VAP process is
7 focused on meeting applicable standards and the NFA letter serves as
8 documentation that such standards have been achieved. In addition, an NFA
9 letter is required to obtain liability relief, in the form of a CNS from the State of
10 Ohio. Further, the Ohio EPA offers some enforcement relief for remediating
11 parties working under VAP rules and working toward meeting all applicable
12 standards and ultimately achieving an NFA letter. The Ohio EPA generally will
13 not issue an enforcement order on properties on which work is being undertaken
14 in conformance with the VAP.

15 **Q. ONCE A SITE IS EVALUATED, HOW ARE OPTIONS FOR**
16 **REMEDiation SELECTED?**

17 A. The VAP does not specify or prescribe remedial options. The VAP specifies all
18 applicable standards that must be achieved. Typically, a number of remedial
19 options are evaluated in order to select a remedy. These remedial options are
20 often evaluated with respect to protectiveness of human health and the
21 environment, the long and short term effectiveness and permanence,
22 implementability, suitability, compliance (with rules), and costs in meeting these
23 standards. Often, several remediation techniques are combined to provide a

1 remedial approach that allows a site to achieve all applicable standards.

2 **Q. HOW IS COST CONSIDERED IN DETERMINING COMPLIANCE WITH**
3 **THE VAP?**

4 A. The VAP establishes applicable standards. It is up to the remediating party to
5 determine how best to achieve those standards following the VAP regulations.
6 The VAP provides different approaches to addressing different conditions and
7 exposure pathways. These different approaches carry with them different costs,
8 but the objective is to achieve all applicable VAP standards. For the two Duke
9 Energy Ohio MGP sites, the remedial work included the mitigation of significant
10 volumes of free product in order to achieve applicable VAP standards. To meet
11 VAP criteria, including leaching to groundwater, surface water protection and
12 POGWMPUS, for example, removal or stabilization of the coal tar was necessary.
13 Utilization of other less expensive activities, such as environmental covenants or
14 surface capping, would allow the site to meet some standards, but not all
15 applicable standards and would also not be as protective of human health and the
16 environment.

17 **Q. DO YOU BELIEVE THAT THE INVESTIGATION AND REMEDIATION**
18 **ACTIVITIES THAT DUKE ENERGY OHIO HAS ELECTED TO**
19 **COMPLETE ARE REASONABLE AND PRUDENT IN WORKING**
20 **TOWARD MEETING APPLICABLE STANDARDS AT THE TWO DUKE**
21 **MGP SITES?**

22 A. The activities completed by Duke Energy Ohio, to date, have focused on
23 remediation of MGP-related wastes, including mobile free product. These

1 activities were reasonable and prudent to mitigate site risks and to meet all
2 applicable standards under the VAP. These activities are also consistent with
3 approaches taken at other similarly contaminated properties. Not all VAP
4 standards have been achieved yet and additional activities will be needed before
5 an NFA letter can be issued.

IV. CONCLUSION

6 **Q. WERE THE ATTACHMENTS TO YOUR TESTIMONY PREPARED BY**
7 **YOU OR UNDER YOUR DIRECTION AND SUPERVISION?**

8 A. SSF-1 is my Curriculum Vitae and I prepared this attachment. SSF-2 and SSF-3
9 are documents obtained from the Ohio EPA. I did not prepare these documents.

10 **Q. IS THE INFORMATION CONTAINED IN THESE ATTACHMENTS**
11 **ACCURATE TO THE BEST OF YOUR KNOWLEDGE AND BELIEF?**

12 A. Yes.

13 **Q. DOES THIS CONCLUDE YOUR FILED TESTIMONY?**

14 A. Yes.

**CURRICULUM VITAE
SHAWN S. FIORE., PG., CP**

**Haley & Aldrich, Inc.
5755 Granger Road, Suite 320
Independence, Ohio 44131
Phone: 216-706-1325
sfiore@haleyaldrich.com**

Summary of Professional Expertise

Mr. Fiore is a Voluntary Action Program (VAP) Certified Professional (CP) in Ohio, as well as a Professional Geologist (PG), in Indiana and Pennsylvania. He is experienced in the management, investigation and remediation phases of legacy environmental projects, including former manufactured gas plant (MGP) sites. Mr. Fiore has completed hundreds of professional assignments on contaminated properties in Ohio and beyond, including more than 20 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Superfund Sites, more than 50 former industrial properties or “brownfield sites,” more than 200 active industrial facilities, more than 20 former Department of Defense (DOD) facilities, more than 100 commercial facilities, and on MGP sites in Ohio, Pennsylvania, Indiana, and Michigan.

Mr. Fiore has conducted investigations and remediations on contaminated sites regulated by the US EPA, including CERCLA and Superfund Sites, Resource Conservation and Recovery Act (RCRA) Sites, formerly used defense sites, hazardous waste landfills, and other sites. He has also conducted investigations and remediations on sites regulated by the Ohio EPA, including Division of Environmental Response and Remediation (DERR) Sites, active and inactive industrial facilities, landfills, commercial properties, brownfield sites, residential properties, abandoned / undeveloped properties, and MGP sites. He has completed investigation and remediation projects in all five Ohio EPA districts. He has also conducted investigations and remediations on other contaminated sites in Ohio regulated by the Bureau of Underground Storage Tank Regulations (BUSTR).

Mr. Fiore has lead and conducted hydrogeological investigations, aquifer and contamination assessments in a variety of technically challenging and complex geological regimes. Mr. Fiore’s expertise includes the evaluation of contaminant migration pathways and characteristics, interaction of contaminant plumes and natural systems and assessment and implementation of low-cost remedial actions.

Mr. Fiore’s work experience includes:

- Manufactured Gas Plant projects in Ohio, Indiana, Michigan and Pennsylvania
- Industrial Environmental, Geotechnical, Plant Engineering, and Compliance Services.

- Brownfields Remediation for Redevelopment Experience
 - More than 20 projects in Cleveland's poorest neighborhood (Fairfax)
 - Langston Hughes Center for Senior Outreach, Cleveland Clinic Global Center for Cardiovascular Innovation, Cuyahoga County Juvenile Justice Facility, Quincy Place, Church Square, planned Quincy Industrial Park, others.
- In-Country Experience
 - Completed professional assignments in all 50 states, under numerous state regulatory programs and/or federal programs, including RCRA, CERCLA, and others.
- International Experience
 - Completed professional International Assignments in countries including Canada, Mexico, Central America, South America, Caribbean, Europe, Middle East, India, and East Asia.

Professional Experience Summary

Haley & Aldrich (2002 to Date)

- Vice President and Geologist, (2004 – Date)
- Great Lakes Unit Leadership Team (2004 – 2006)
- Senior Environmental Geologist (2002- Date)

Parsons Corporation (1988 to 2002)

- Manager, Environmental Studies Department (2000 – 2002)
- Project Manager (1993 – 2002)
- Geologist / Senior Geologist (1988- 1993)

Bowling Green State University, Department of Geology

- Research and Teaching Assistant (1986-1988)

Bowser-Morner, Inc. (1987)

- Geotechnical Engineering Technician

Education Summary

Bowling Green State University, B.S., Geochemistry, 1988

- Outstanding Senior Geology Major
- President, Bowling Green State University (BGSU) Geology Club
- Founding President AAPG, BGSU Chapter
- Sigma Gamma Epsilon Geology Honors Fraternity
- Sigma Omicron Gamma Honors Fraternity

Bowling Green State University, M.S., Geology, 1993

- Thesis: Origin of the Cave Branch Bed of the Slade Formation
- Additional Research – Geobotany of Albion Scipio Field

Professional Registrations

- Professional Geologist: Pennsylvania (License PG-001770-G)
- Professional Geologist (by ASBOG Examination): Indiana (License 2382)
- Certified Professional: Ohio EPA Voluntary Action Program (CP #154)

Special Studies and Courses (abridged)

- Haley & Aldrich, Leadership Development Program
- Project Management Training Program
- Financial Management for Engineers and Scientists
- Probability, Statistics and Geostatistics
- OSHA Supervisor Training

- OSHA 40-Hour HAZWOPER Training
- OSHA HAZWOPER Annual Refresher Training
- Asbestos Awareness Training
- VAP Annual Certified Professional Training
- VAP Initial Certified Professional Training

Publications/Presentations (abridged)

- “Natural Gas Before Fracking,” presented to the Northern Ohio Geological Society, at the University of Akron, Akron, Ohio 2013.
- “How an Effective Communication Strategy Streamlined an MGP Cleanup,” presented at the 2012 Ohio Brownfields Conference, Newark, Ohio 2012.
- “Leveraging Partnerships to Create Adaptive Reuses of Brownfield Properties” presented at the 2011 Ohio Brownfields Conference, Newark, Ohio 2011.
- “Implementation of a Corporate Due Diligence Program,” presented at the 2008 Global EH&S Conference, San Minneapolis, Minnesota, 2008.
- “Manufactured Gas Plants,” presented at the Annual Voluntary Action Program Certified Professional Training Course, Newark, Ohio, 2007.
- “Case Study: Delaware, Ohio MGP,” presented at the Manufactured Gas Plant Training Course, Columbus, Ohio 2007.
- “Emergency and Contingency Planning,” presented at the 2006 Global EH&S Conference, San Luis Potosi, Mexico, 2006.
- “Due Diligence in Property Transfers,” presented at the 2004 Global EH&S Conference, Columbus, Indiana 2004.
- “Due Diligence and Liability Management,” presented at the 25th Annual Inland Spills Conference, Kings Island, Ohio, 2002.
- “Geochemical Evaluation of Groundwater in Support of a Monitored Natural Attenuation Remedy,” Colloquium presentation at Bowling Green State University, 2001.
- “Recovery of Highly Viscous NAPL, using Steam Injection and Vacuum Enhanced Vapor Extraction,” Proceedings at 2nd Conference on the Remediation of Chlorinated and Recalcitrant Compounds, Monterey, CA, 1998.

Professional and Community Involvement Summary (abridged)

- Cuyahoga National Park Conservancy – Member
 - Cuyahoga National Park Conservancy, Wetlands Monitor Volunteer
- Dean's Science Advocate Advisors, Bowling Green State University
- Parents Resource Team – Dennison University
- Northern Ohio Geological Society
- City Club of Cleveland
- Crowne Point Community Sponsored Agriculture – Member & Shareholder
- Cleveland Industrial Land Bank, Brownfield Criteria Evaluation Committee
- Ohio Environmental Protection Agency Voluntary Action Program
 - Multidisciplinary Task Group - Stakeholder Program Review and Feedback Group
 - Multidisciplinary Task Group - Total Petroleum Hydrocarbons and NAPL Committee
 - Multidisciplinary Task Group - Background Committee
- Development Committee Chair, Census Committee Member, Fundraising Committee Member, St. Thomas More Church
- Cuyahoga Valley Princesses and Guides, Chief Information Officer
- Cleveland Foodbank –Presidents Circle
- Head Coach – Brecksville City Baseball League
 - Girls Softball (2003),
 - Boys Baseball (2004 through 2010)



VAP 101 - Introduction to the Voluntary Action Program

Division of Emergency and Remedial Response

Ohio EPA Voluntary Action Program



- Created in 1994 – Ohio Revised Code (ORC) 3746
- Final Rules went into effect 1996 – Ohio Administrative Code (OAC) 3745-300. Two revisions – 2002 and 2009.
- Allows a volunteer to clean up hazardous substances and petroleum on a property and receive a covenant-not-to-sue (CNS) from the State of Ohio.

What is a Voluntary Action?

- Series of measures undertaken to identify/address contamination and potential sources of contamination
- VAP encourages people to redevelop and reuse land contaminated with hazardous substances or petroleum
- Designed for timely clean-up and to make more properties usable.



VAP PROPERTY:



VAP applies to legally defined property. Contiguous parcels or portions of parcels.

Property maps and legal description

Covenant Not to Sue (CNS)

- Protects the property owner or operator and future owners from being legally responsible to the State of Ohio for further investigation and cleanup.
- Protection applies only when the property is used and maintained in the same manner as when the covenant was issued.
- A CNS and property restrictions are recorded in the County Recorder's office, and transfers with the title of the property.

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

OHIO E.P.A.
NOV 29 2010
ENTERED DIRECTOR'S JOURNAL

By Donna Lasside Date 11-29-10

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the matter of:

City of Cleveland
City Hall
Department of Economic Development
601 Lakeside Avenue, Room 210
Cleveland, Ohio 44114

Covenant Not to Sue
Director's Final Findings and Orders

Regarding property known as:

East 57th and Chester
East 57th Street and Chester Avenue
Cleveland, Ohio

Pursuant to Ohio Revised Code ("ORC") Chapter 3746 and Ohio Administrative Code ("OAC") Chapter 3745-300, the Director of the Ohio Environmental Protection Agency (the "Director") hereby makes the following Findings and issues the following Orders ("Findings and Orders").

FINDINGS

1. A No Further Action Letter, No. 10NFA398 (the "NFA Letter"), was submitted on October 21, 2010 to the Director under the Voluntary Action Program on behalf of the City of Cleveland (the "Volunteer"), by John Zampino, HzW Environmental Consultants, LLC, a certified professional, No. CP 280, as defined in ORC 3746.01(F) and OAC 3745-300-01(A) (the "Certified Professional").
2. The Certified Professional issued the NFA Letter by his CP affidavit on September 21, 2010.
3. The NFA Letter describes the investigational activities undertaken at the approximately 0.078-acre property, known as East 57th and Chester (PPN 118-02-049; 118-02-050), located at East 57th Street and Chester Avenue, Cleveland, Cuyahoga County, Ohio (the "Property"). An exact legal description of the



How is the VAP different from other clean up programs?

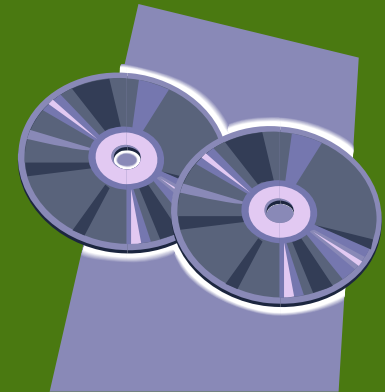
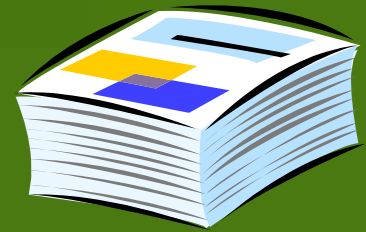
The VAP:

- is voluntary
- relies upon private parties to investigate and clean up properties
- allows cleanups tailored to current and future use
- limits the property owner's future liability
- audits a portion of the clean-ups conducted instead of direct oversight

Other Programs:

- are mandatory
- require direct oversight by the regulatory authority
- Usually conducted under an Administrative Order with the Ohio EPA

NFA Components



- Executive Summary
- Eligibility Determination
- Phase I Assessment
- Phase II Assessment -(includes Standards Determination)
- Risk Assessment - (may also include Standards Determination)
- Remedial Activities – including Activity and Use Limitations
- O&M Plan (engineering and institutional controls)

Volunteer



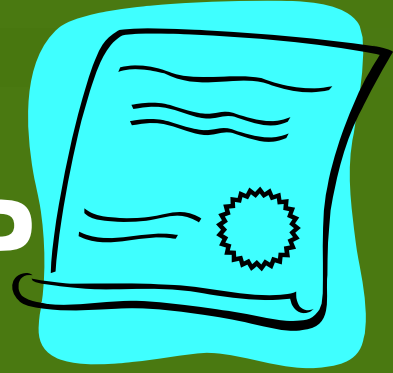
- The entity conducting a voluntary action.
 - Owner of the Property
 - Interested purchaser (developer)
 - Public entity (city, township)



Volunteer (cont.)

- A volunteer may conduct investigations and cleanup on their own
- Volunteer may also contract with a VAP CP to do the work.
- Regardless, a VAP CP must review all work performed in support of a voluntary action to issue a No Further Action Letter (NFA).

Certified Professional (CP)



- Private sector environmental professionals certified by the State of Ohio
- Must demonstrate specific qualifications before being certified
 - Relevant degree from accredited institution
 - Environmental Science, Geology, Biology, Chemistry, Hydrogeology, Toxicology, etc...
 - Eight years of relevant professional experience
 - Three of which must be in a supervisory or management role



CP Performance

- Performance of the CP during Voluntary Actions is tracked by Ohio EPA
 - Poor performance by a CP could result in disciplinary action in the form of a warning, suspension or revocation

Certified Laboratories (CL)



- A laboratory certified by the Ohio EPA to conduct analyses to support voluntary actions.
 - Certified to conduct specific analytical methods.
 - Detailed Certification process

Eligibility for VAP (OAC 3745-300-02)



- Properties that are not eligible (until closed per the specific regulatory program):
 - NPL sites
 - Solid Waste/RCRA sites requiring closure
 - Underground injection well sites
 - BUSTR Regulated USTs
 - ODNR Regulated oil wells
 - Federal or State Enforcement
- PCB and Hazardous Substance Tanks are eligible, but must still meet federal regulations.
- Asbestos is eligible



Phase I – (OAC 3745-300-06)

- Past uses of the Property
- Environmental history
- Known spills or releases
- Releases from neighboring properties onto the Property
- Property Inspection



Phase I

- Purpose:


- To determine whether there is any reason to believe that any releases of hazardous substances or petroleum have or may have occurred on, underlying, or are emanating from a property.



Phase I - Identified Areas

- Defined locations on the Property where releases of hazardous substances or petroleum have (or are likely to have) occurred.
 - Includes identification of potential contaminants of concern to be analyzed in the Phase II.
- ALL IDENTIFIED AREAS must be evaluated in a Phase II investigation.





Phase II

(OAC 3745-300-07)

- Investigation of property
- Pathway completeness determination
- Protection of clean ground water
- Determining “exposure point concentration” in environmental media
- Determining applicable standards
- Demonstrate compliance with applicable standards

A word about pathways...

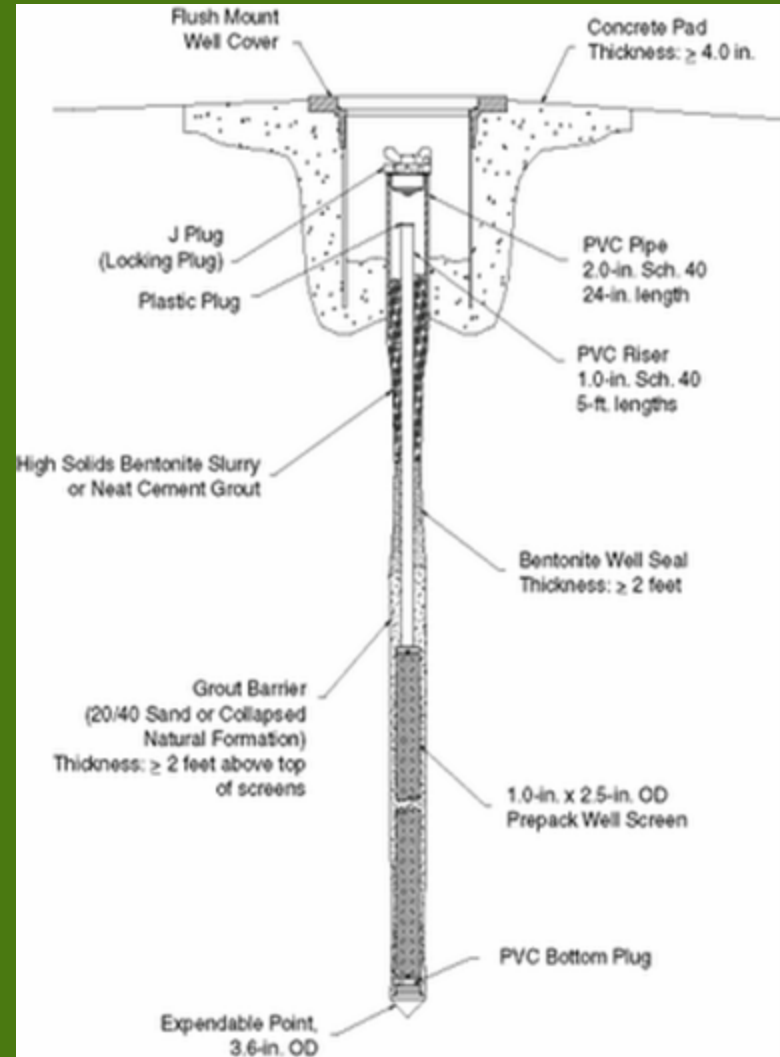
- Three components:
 - Affected media
 - Receptors and applicable points of compliance
 - Transport mechanism
- If anyone of these three components is not present or blocked through a remedy, then the pathway is not complete and an applicable standard need not be developed.



Soil Sample Collection



Ground Water Sampling



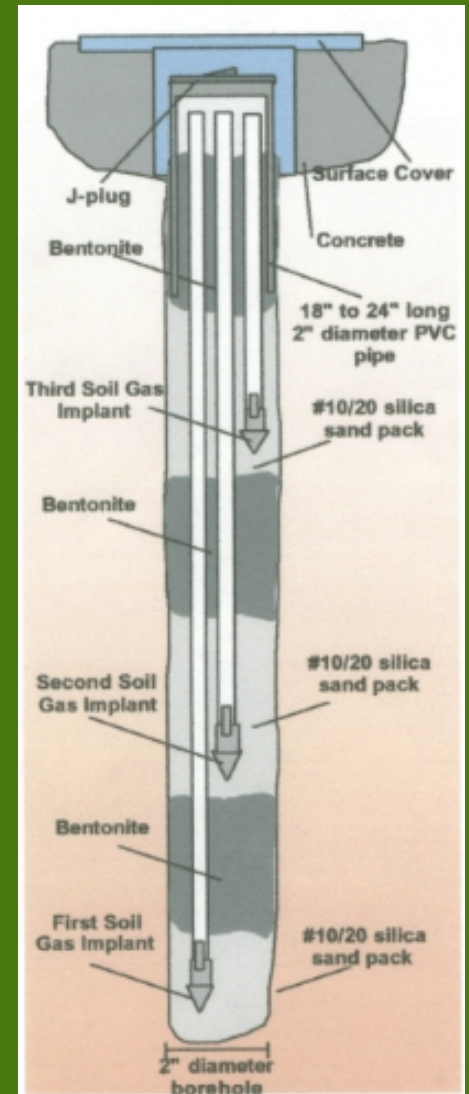
Soil Gas Collection



Stainless steel implant



Lung box sampling of nested implants



Mobile Lab

used for on-site screening of a large number of samples at a fraction of the cost of fix-based labs





Generic Numerical Standards (OAC 3745-300-08)

- Generic Standards for:
 - “direct contact” with soil
 - Considers ingestion, inhalation and skin contact
 - potable use of ground water
 - Considers ingestion; inhalation and dermal contact while showering
 - surface water
 - sediments



Generic Numerical Standards (OAC 3745-300-08)

- Soil standards (for human health):
- Listed for residential and commercial/industrial receptors and construction/excavation activities

Look-up values

| CAS # | COC | Single Chemical Noncarcinogen | Single Chemical Carcinogen | Soil Saturation | Soil Standard for a Single Chemical (mg/kg) |
|----------------------------|-------------------------|----------------------------------|-------------------------------|-----------------|------------------------------------------------------|
| Volatile Organic Chemicals | | | | | |
| 67-64-1 | Acetone | 64,000 | NA | 100,000 | 64,000 |
| 71-43-2 | Benzene | 94 | 64 | 920 | 64 |
| 56-23-5 | Carbon Tetrachloride | 5.5 | 6.6 | 1,400 | 5.5 |
| 108-90-7 | Chlorobenzene | 410 | NA | 740 | 410 |
| 75-00-3 | Chloroethane | 10,000 | 3,700 | 2,200 | 2,200 |
| 67-66-3 | Chloroform | 300 | 6.6 | 3,400 | 6.6 |

- Lowest of cancer, non cancer or soil saturation levels
- Are generated based on the presence of a single chemical
- The values must be adjusted to account for multiple chemicals



Point of Compliance

- For soils, the depth at which the applicable standard must be met.
 - Residential or unrestricted: 10 feet
 - Commercial/industrial: 2 feet
 - Construction/excavation: variable

Important Ecological Resources:

- Terrestrial habitats

- Surface water Ohio


- water quality standards

- Sediments

- Sediment reference values

- Toxicity screening levels

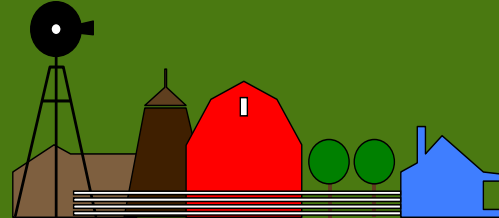




Ground Water Classification and Response Requirements (OAC 3745-300-10)

- Potential potable use depends on yield or whether it is currently used
- If GW is contaminated and capable of being used as a potable source, must meet the potable use standards at the property boundary (point of compliance for groundwater)

Protection of Ground Water Meeting Unrestricted Potable Use Standards



Clay

Contaminated Zone

Dolomite Bedrock

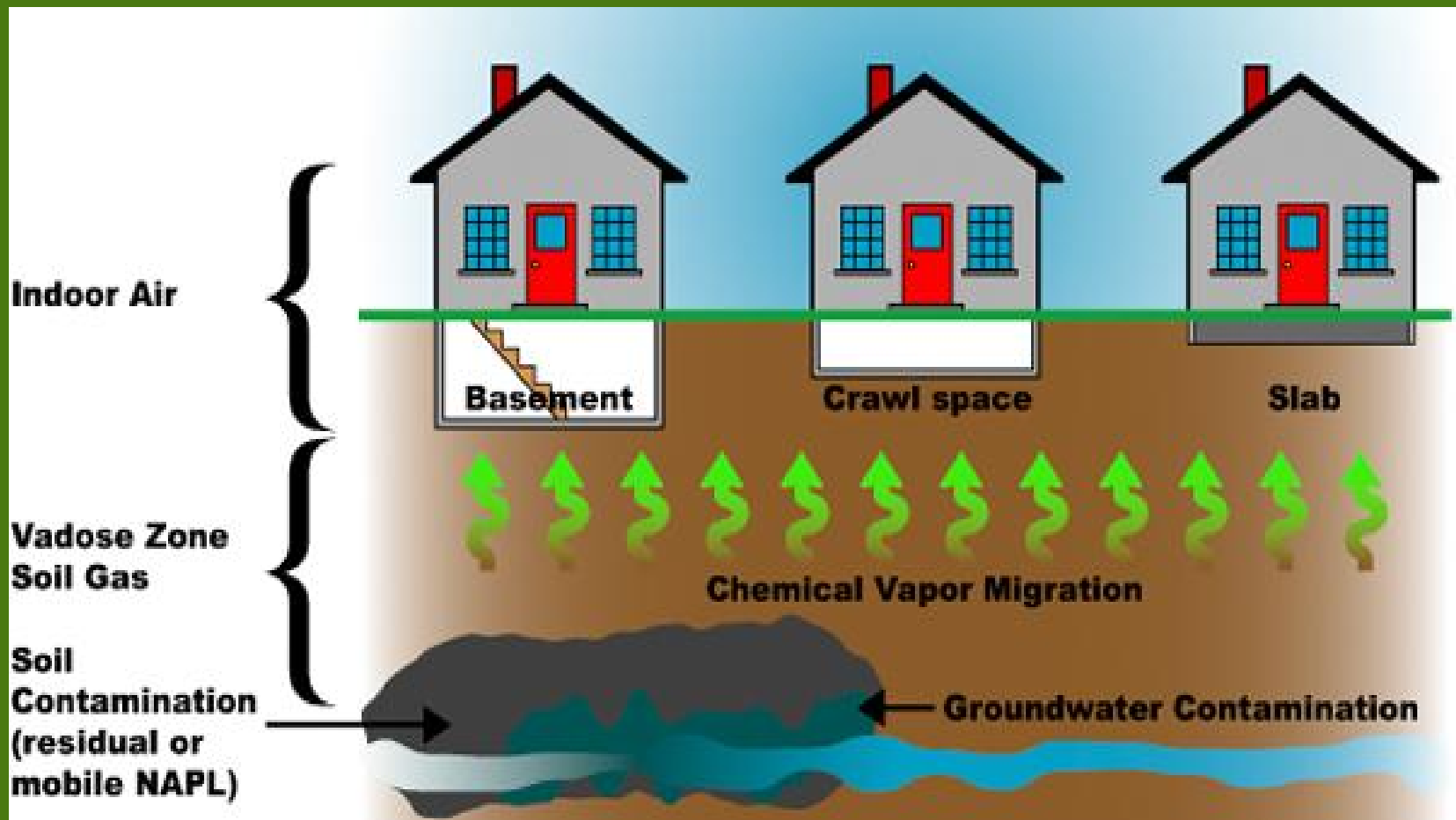
Clean zone requiring protection



Property-Specific Risk Assessment (OAC 3745-300-09)

- In lieu of generic standards
- When pathways exist that the generic standards did not consider (example: vapor intrusion)
- When terrestrial eco receptors are present or surface water/sediment contaminants exceed generic standards
- Prescribed format

Vapor Intrusion





Remedy (OAC 3745-300-11)

- Activity and use limitations
 - Recorded with deed
- Active remedy (dig and haul, ground water pump and treat)
- Passive remedy (natural attenuation)
- Risk Mitigation – specifically for construction/excavation workers
- O&M required – for remedies not complete at the time of the NFA Letter or for barrier engineered controls

Active Remediation



Vapor Intrusion



Review of NFA Letter



- CP issues NFA Letter that documents that the Property meets or will meet applicable standards.
 - Phase I NFA - No releases
 - Phase I/II NFA (with/without remedy) all standards met.
 - Phase I/II NFA + O&M Plan, an ongoing remedy or permanent barrier.

Review of NFA Letter



- Review Guidelines (these are total times for Ohio EPA review, clock stops when more information is required from CPs/Volunteers)
 - 30 day: no consolidated permits or no engineering/institutional controls.
 - 90 day: permits or controls present.
 - Issue a Covenant not to Sue (CNS); or
 - Denial of a CNS



Voluntary Action Program Fee Schedule *effective July 1, 2010*



In accordance with Ohio Administrative Code (OAC) 3745-300-03(G), Voluntary Action Program fees described in OAC 3745-300-03(B)(6) to (B)(10) and (C)(3)(b) will increase annually on July 1 by the percentage of increase (if any) from the previous year of the Consumer Price Index [as defined in OAC 3745-300-01(A)(20)]. The average annual CPI from 2008 to 2009 increased by 3%. Therefore, the VAP fees will increase on July 1, 2010.

| | Fee as of July 1, 2009 | | Fee as of July 1, 2010 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|---------|---------------------------|
| <u>No Further Action Letters submitted for a covenant not to sue</u> | | | |
| NFA includes only a Phase I investigation with no releases identified | \$2,980.00 | plus 3% | \$3,070.00 |
| NFA includes only a Phase I investigation with asbestos as the only contaminant identified | \$8,270.00 | plus 3% | \$6,460.00 |
| NFA includes both a Phase I and Phase II assessment | \$12,760.00 | plus 3% | \$13,140.00 |
| NFA includes both a Phase I and Phase II assessment and an operation and maintenance plan and agreement | \$17,650.00 | plus 3% | \$18,180.00 |
| <u>Variance</u> | | | |
| Variance from Applicable Standards | \$23,810.00 | plus 3% | \$24,520.00 |
| <u>PAYGO Administrative Processing Fee</u> | | | |
| Processing fee charged to volunteers submitting a No Further Action Letter in request of a covenant not to sue under the Pay-As-You-Go (PAYGO) process | \$1,060.00 | plus 3% | \$1,090.00 |



CNS

- The CNS is issued to the Volunteer, protects them from future Ohio EPA enforcement for the described releases.
- The CNS is recorded in the same manner as a deed to property.



Audits of NFA Letters

- At a minimum, 25% of NFA Letters received by Ohio EPA will be audited to ensure that the applicable standards have been met and appropriate protocols were followed.
- Tier I Audit = Paper Review
- Tier II Audit = Sampling



The VAP Memorandum of Agreement Process (MOA)

- A Partnership with USEPA –
- Public notification
- Protection under the MOA (upon issuance of CNS) gives the volunteer “comfort” that US EPA will not over file at VAP sites (except under limited circumstances)



PAYGO Process

- Alternative to paying NFA Fee
- Pay As You Go Process (PAYGO)
 - Must be entered BEFORE the NFA is issued by the CP.
 - \$1,000 “retainer” is paid to Ohio EPA upon entry
 - All review (pre- and post- NFA issuance) billed as Technical Assistance (hourly rate plus fringe and overhead of the agency personnel performing the review)
 - Administrative Fee (currently \$1,090) is also paid when NFA is submitted for review



Summary

- Program is VOLUNTARY
- Program is privatized in that it relies on certified individuals in the private sector
- Fee and direct-billing based
- Certified Professionals and Certified Laboratories
- Technical Assistance
- NFA Letter – issued by CP
- CNS – liability protection from state (not 3rd party suit)
- MOA Track – provides federal “comfort”
- PAYGO Process – alternative to NFA fees – billed as TA



Contact Information

- VAP Web page

- <http://www.epa.ohio.gov/derr/volunt/volunt.aspx>

- Audrey Rush

- audrey.rush@epa.ohio.gov

Questions???



Certified Professional Standards of Conduct

a review

Sue Kroeger and Mark Navarre
Ohio EPA's Office of Legal Services

For Ohio Brownfield Conference - January 2011



Environmental
Protection Agency

Scope of this presentation

- Agency's internal guidance on disciplinary actions under the Voluntary Action Program
- CP obligations to notify (summary table)
- Other CP standards (presentation outline)
- Opportunity for questions

Disciplinary action guidance

- Follow up to the November 2010 CP Training
- Guidance revised to:
 - Respond to CP comments
 - Clarify intent, an internal guidance

Revision highlights

CP standards of conduct

- Most are found in VAP's "CP rule" - OAC 3745-300-05, based on ORC 3746.04(B)(5), 3746.11



What
should a
CP focus
on?

CP Standards: *The Big Picture*

| Category | Source |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| Professional competency | OAC 3745-300-05(E)(1) |
| Professional responsibility <i>Includes:</i> document production, audits, executive summaries, use of CP seal, <u>notifications</u> | OAC 3745-300-05(E)(2) OAC 3745-300-05(H) to (K); ORC 3746.11, .18 to .20, .31 |
| Conflicts of interest | OAC 3745-300-05(E)(2)(g) and (3) ORC 3746.10(B)(2) |
| Affidavits | OAC 3745-300-05(E)(4); 3745-300-05(B) and (C); 3745-300-10(C), 3745-300-13(O); ORC 3746.20 |

CP obligations to notify?



- Yes - in limited scenarios...
- Most obligations in ORC 3746.11, OAC 3745-300-05, -06, and -13
- See “Certified Professional Obligations to Notify under Ohio’s Voluntary Action Program” table (handout)

CP obligations to notify: example 1

- Someone's action in the voluntary action work “*significantly deviates*” from:
 - Any scope of work, plan or report developed to meet VAP rules, or
 - A director's order in a compliance schedule agreement.

Potential scenario?

When to notify – example 1

- When a CP knows...has reason to know... of a “*significant deviation*” from a VAP rule or an order:
 - Promptly notify *the volunteer* of the deviation
 - In writing

OAC 3745-300-05(E)(2)(d)

When to notify – example 2

- A CP learns, after issuance of [that CP's] NFA letter, that relevant facts, data or other *information existed* at time of the NFA letter issuance *that indicates applicable standards were not met*.

Potential scenario?

When to notify – example 2

- Upon learning the information the CP should:
 - *Promptly notify the volunteer* that standards were not met – and of the volunteer's *need to notify Ohio EPA* of the situation.
 - Notify Ohio EPA if the volunteer did not.

OAC 3745-300-05(E)(2)(f)



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When to notify – example 3

- Before a CP relies on a phase I property assessment to issue an NFA letter, the CP must ensure that the phase I information is “complete and reliable” ...
- Overall, does the Phase I comply with OAC 3745-300-06(C)?

In the case of the volunteer's
information...

When to notify – example 3

- If CP finds phase I information *submitted by the volunteer* is not complete or reliable, the CP must:
 - Advise the volunteer that additional information is needed to comply with the Phase I rule. OAC 3745-300-06(I)(1).
 - In the NFA letter, CP describes the additional info. OAC 3745-300-06(K).

CP Standards: *The Big Picture*

| Category | Source |
|------------------------------------|--------------------------------------------------------------------------------------------------|
| Professional <u>competency</u> | OAC 3745-300-05(E)(1) |
| Professional <u>responsibility</u> | OAC 3745-300-05(E)(2) OAC 3745-300-05(H) to (K); ORC 3746.11, .18 to .20, .31 |
| Conflicts of interest | OAC 3745-300-05(E)(2)(g) and (3) ORC 3746.10(B)(2) |
| Affidavits | OAC 3745-300-05(E)(4); 3745-300-05(B) and (C); 3745-300-10(C), 3745-300-13(O); ORC 3746.20 |

Examples

Professional competency

- A CP acts *with care and diligence* and *fully applies* the CP's *knowledge and skill* at the time professional services are performed.
 - OAC 3745-300-05(E)(1)(a)



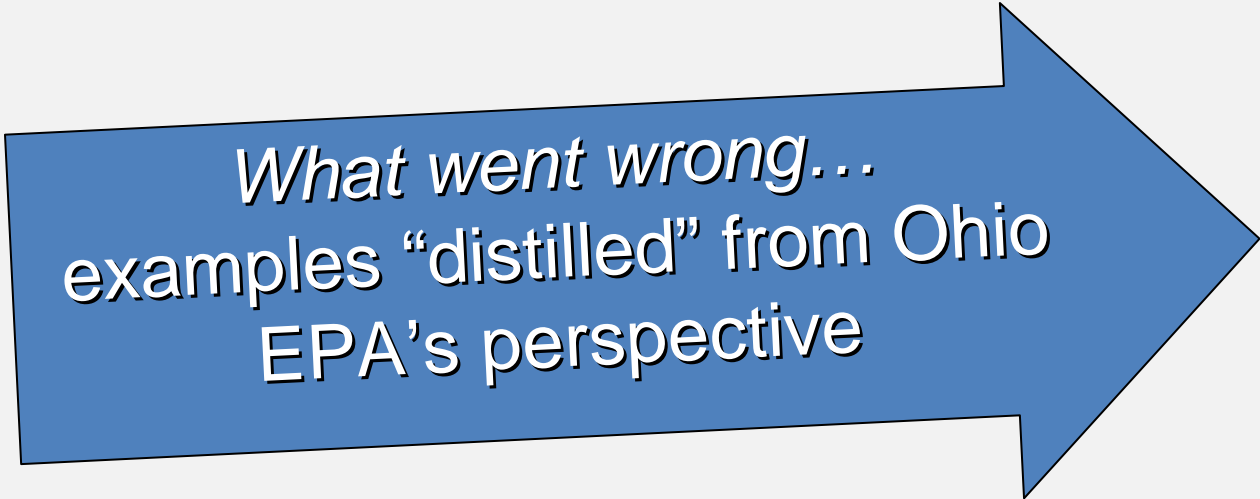
Review of key definitions

- *Professional services* means:
 - any conduct in connection with a *voluntary action*,
 - or
 - any conduct in rendering a *voluntary action opinion*.

Defined at OAC 3745-300-01.

Professional competency

- Competence is *presumed* with initial certification.
- Supplemented by continuing education.



What went wrong...
examples “distilled” from Ohio
EPA’s perspective

Viewed as incompetence

- Concluded property meets standards
 - without required remedy support
 - with conflicting data
- Showed pattern of poor performance.
- Repeated deficiencies... despite prior notice.

Professional responsibility

- A CP *holds paramount* public health, safety, welfare and the environment in the performance of professional services.
 - OAC 3745-300-05(E)(2)(a).

Holds paramount...

- Invokes *trustworthiness* – Director has granted authority to the CP, in a privatized voluntary program.
- *A stewardship* – responsibility for public health and the environment with projects.



What went wrong...

Viewed to *not* hold paramount

- In NFA letter, CP missed existence of nearby village well field & gave no yield support for argued “Class A” ground water.
- During O&M plan oversight (representing the volunteer,) CP delayed in report of data revealing COCs in boundary wells & failed to proceed with plan’s contingencies.

Professional responsibility

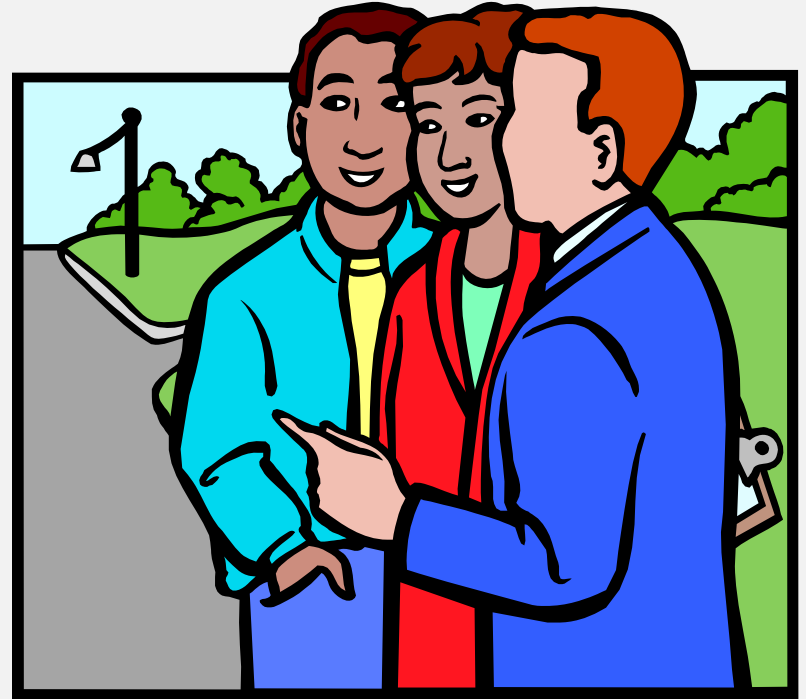
- A CP follows the requirements and procedures set forth in the applicable provisions of OAC Chapter 3745-300 and ORC Chapter 3746.
 - OAC 3745-300-05(E)(2)(e)(ii).

So... what
are these?



Responsibility for...

- NFA letter content -
OAC 3745-300-13(E).
- Checking the Phase I-
OAC 3745-300-06(I)-(K).
- Verifying the USD -
OAC 3745-300-10(C).



Confused?

- Ask before you issue
- Act with a steward's view

What went wrong...

Rule violations found when

- Missed identification of (notable) releases.
- No evaluation made for breakdown of PCE in ground water.
- Relied on an engineering control, but not in an O&M plan.
- Issued NFA letter without “leaching pathway” evaluated.
- Model inputs were unsupported or inconsistent with site conditions.

Professional responsibility

- A CP makes a good faith & diligent effort:
 - To obtain all relevant data, reports and other *available information regarding conditions* at a property.
 - To identify and obtain *such additional data* and other information *as the CP deems necessary* to provide professional services.
 - OAC 3745-300-05(E)(2)(e)(iii).



What went wrong...

Good faith & diligent effort?

- Not when CP understood need for accurate water level elevations, yet used faulty survey equipment & relied upon that data.
- Nor when CP should have known records search was incomplete for Phase I – or, to verify the USD - yet issued the NFA letter.

Professional responsibility

- CP exercises *independent professional judgment* and is *objective* in any professional report, statement or testimony.
 - OAC 3745-300-05(E)(2)(e)(i).



Independent, objective BPJ?

- Not when CP issued NFA letter based on another's Phase II report, but it showed:
 - Incorrect standards.
 - Lack of support that property met VAP's standards.
- Or, when client interests “caused” CP's reliance on limited data.



Project concerns



- Seek input from volunteer's or owner's legal counsel in “gray” project areas.
- Check Ohio EPA's website or consult with staff for rule guidance.

Questions about standards?

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