

**OPERATION AND MAINTENANCE AGREEMENT**  
**Between Ohio EPA and the City of Newark**  
**Regarding the former Newark Processing Company Property,**  
**Licking County, Ohio**

---

This Operation and Maintenance Agreement (“Agreement”) is entered into by the Director of the Ohio Environmental Protection Agency (“Director”) and the City of Newark (“Newark”), pursuant to Ohio Revised Code (“ORC”) Chapter 3746 and Ohio Administrative Code (“OAC”) Chapter 3745-300. In consideration of the mutual covenants and subject to the terms and conditions of this Agreement, the parties agree as follows:

1. **The NFA Letter Property.** A no further action letter (NFA Letter No. 12NFA481; the “NFA Letter”) under the Voluntary Action Program (“VAP”) was submitted to the Director on behalf of Newark on September 21, 2012, by Jeffrey P. Hullinger, a certified professional (Certified Professional No. 214). The NFA Letter addresses approximately 66 acres of real property owned by the City of Newark and located at 1367 East Main Street, Newark, Licking County, Ohio (the “Property”). The legal description of the Property is contained in the NFA Letter and is incorporated into this Agreement by reference.
2. **O&M Plan.** The NFA Letter includes an Operation and Maintenance Plan (“O&M Plan”). The term “O&M Plan” refers to the O&M Plan dated February 27, 2013. The O&M Plan is attached hereto as Attachment 1 and is incorporated into this Agreement by reference.<sup>+</sup> The O&M Plan is available for review as a public record with the NFA Letter for the Property, and a copy obtained by contacting the Records Management Officer at Ohio EPA’s Central District Office, at P.O. Box 1049, Columbus, Ohio 43216-1049, Telephone: (614) 728-3778.
3. **Requirement for an O&M Agreement.** This Agreement is required for the Property pursuant to ORC 3746.10(C)(2) or 3746.12(A)(2) and OAC 3745-300-11(A)(4) and 3745-300-11(E)(4).
4. **Remedy for the Property.** The remedy for the Property includes, overall, the following:
  - a. **Remedies Performed.** Remedies performed at the Property included capping with a geocomposite layer and soil cover, which are documented by the NFA Letter.

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

---

<sup>+</sup> [Please note when drafting: The O&M Plan does not have to be filed in county records pursuant to ORC 3746.14. The O&M Agreement must be filed as an exhibit to the Covenant Not to Sue, however, under that law. To reduce the volunteer’s recording costs, the volunteer may choose to remove the O&M Plan from the O&M Agreement at the time of recording of the Covenant Not to Sue and its exhibits.]

b. **Risk Mitigation Plan.** A Risk Mitigation Plan was prepared to detail the risk mitigation measures to be implemented during future construction/excavation activities, which are detailed in the plan.

c. **Activity and Use Limitations.** Several activity and use limitations are included in a proposed Environmental Covenant developed pursuant to ORC 5301.80 to 5301.92 and OAC 3745-300-11. Following the issuance of a covenant not to sue for the Property, the Environmental Covenant will be recorded pursuant to ORC 3746.14 as a deed record for the Property.

- ~~i. Limitation for Commercial or Industrial Land Uses~~
- ~~ii. Protection of Main Cap Area~~
- ~~iii. Groundwater Use Limitation~~

d. **Engineering Controls.** The engineering control~~s~~ installed at the Property include:

- i. Geocomposite Layer Covering Wastes; and
- ii. Two-foot-thick Vegetated Soil Cover

5. **Engineering Controls are Subject to the O&M Plan.** The engineering controls, as set forth in the Remedy for the Property Section of this Agreement, are part of the voluntary action remedy and must be established and maintained by Newark in accordance with this Agreement and the O&M Plan to demonstrate that the Property will maintain and comply with the applicable standards set forth in ORC Chapter 3746 and OAC Chapter 3745-300 and in the covenant not to sue issued pursuant to ORC 3746.12 for the Property (the "Covenant Not to Sue").

6. **Implementation of O&M Plan.** Newark shall maintain the engineering controls in accordance with the O&M Plan, and perform all inspections, repairs, reporting, record keeping, demonstrations and all other requirements in accordance with the O&M Plan.

7. **Property Access.** Newark certifies that it has access to the Property sufficient to fully implement the O&M Plan and this Agreement. Further, upon transfer of the Property or portion thereof, Newark shall use best efforts to maintain such access.

8. **Recording of Agreement.** Newark shall record this Agreement as required by the Covenant Not to Sue and as required by ORC 3746.14.

- 9. Effect of Violation of this Agreement.** Failure to comply with this Agreement or the O&M Plan may constitute the failure to maintain an applicable standard in accordance with ORC 3746.12(B) and OAC Chapter 3745-300, and may be subject to the process outlined in the Compliance Schedule Agreement Section of this Agreement. However, noncompliance with an activity and use limitation for the Property voids the Covenant Not to Sue, as provided in ORC 3746.05.
- 10. Financial Assurance.** Newark shall ensure that reasonable and adequate funds in the amount of at least ~~Three thousand Eight Hundred Twenty~~ Dollars (\$3,820.00) are available to comply with this Agreement and the O&M Plan by providing financial assurance. For its financial assurance, Newark has executed an affidavit for an annual appropriation of \$3,820.00, copy attached hereto as Attachment 2. Newark agrees to annually renew the appropriation or execute and fund another comparable, acceptable financial assurance, and submit to Ohio EPA a copy of each renewed appropriation or other financial assurance. Examples of acceptable financial assurance include a trust fund, a surety bond guaranteeing payment into a trust fund, a surety bond guaranteeing performance of this Agreement and the O&M Plan, a letter of credit, an insurance policy, the obligated party's financial assurance demonstration under VAP affidavit, an escrow account, or such other financial assurance as approved by Ohio EPA. In the event the amount or form of financial assurance provided herein is inadequate to comply with the terms of this Agreement, the Director may propose a modification of this paragraph pursuant to the Modification Section of this Agreement.
- 11. Notice to Prospective Property Transferees of Remedy Obligations.** At least thirty (30) days prior to the execution of any sales contract or other document transferring ownership of the Property, or any portion of the Property that is subject to this Agreement, Newark shall provide written notice to the prospective Property transferee that the Property, or such portion of the Property, is subject to the Covenant Not to Sue and this Agreement and the O&M Plan.
- 12. Notice to the Director of Transfer of Property.** Within fourteen (14) days after a sale or other transfer of the Property, or any portion of the Property that is subject to this Agreement, Newark shall provide written notice to the Director that the Property, or such portion of the Property, has been sold or otherwise transferred. This notice submitted to the Director shall include:
- a. The name, address, and telephone number of the new Property owner and the name, title, address, email address and telephone number of the contact person for the new Property owner;

**Comment [af1]:** Please provide a copy of the financial assurance document in an addendum so Ohio EPA can determine if it is acceptable.

- b. A legal description of the Property or such portion of the Property being transferred; and
- c. The closing date of the transfer of ownership of the Property or such portion of the Property.

13. **Option to Transfer this Agreement / Notice to Director.** Pursuant to ORC 3746.14(C), Newark may transfer this Agreement to any other person (the "Transferee") by assignment or in conjunction with the acquisition of title to the Property. Within fourteen (14) days after such transfer, Newark shall provide written notice to the Director of the terms and conditions of the transfer of obligations of this Agreement and the O&M Plan ("~~the~~ Transfer Terms and Conditions"), by submitting:

- a. The name, address, and telephone number of the Transferee and the name, title, address, e-mail address and telephone number of the contact person for the Transferee;
- b. A statement of the extent to which the Transferee has assumed the obligations of this Agreement and the O&M Plan;
- c. A copy of the legal instrument(s) that provide the Transfer Terms and Conditions; and
- d. A copy of the Transferee's proposed financial assurance that complies with the Financial Assurance Section of this Agreement. The Transferor's financial assurance shall remain effective until Ohio EPA approves in writing the Transferee's financial assurance and the Transferee's financial assurance is fully executed and funded.

Upon the Director's receipt of such notice of the Transfer Terms and Conditions in accordance with this section of the Agreement, and Ohio EPA's approval of the Transferee's financial assurance, the Transferee shall be considered a party to this Agreement, in accordance with the Transfer Terms and Conditions.

14. **Subparceling.** Upon written notice submitted by Newark to the Director, that one or more parcels of the Property have been divided or subparceled, this Agreement shall apply separately to each subdivided parcel subject to this Agreement upon the date of subdivision or the date of the submission of written notice, whichever occurs later. Newark shall provide such written notice by submitting:

- a. The legal description of the subdivided parcels;
- b. A survey map or maps of the subdivided parcels;
- c. The date of the subdivision;
- d. A copy of the legal instrument(s) providing for the subdivision; and
- e. The name(s) of the new owner, if any, of the subdivided parcels.

Upon the written notice submitted pursuant to this Section, this Agreement shall be deemed to be amended, without modification of this Agreement, to identify the subdivided parcels of the Property. The Covenant Not to Sue shall remain in effect for any subdivided portion of the Property that continues to comply with the requirements of this Agreement and the applicable standards that form the basis of the Covenant Not to Sue. Any revocation of the Covenant Not to Sue for any parcel shall not be based solely on a finding that any other subdivided parcel of the Property no longer complies with the applicable standards or the requirements of this Agreement.

15. **Document Submittals / Notifications to Parties.** All documents, including but not limited to notices and reports, required to be submitted by Newark pursuant to this Agreement shall be identified by NFA Letter #Number 12NFA481 and addressed to the following persons:

For Ohio EPA:

Ohio EPA – Central Office  
Division of Environmental Response and Revitalization  
50 West Town Street  
P.O. Box 1049  
Columbus, OH 43216-1049  
Attn: DERR Compliance Officer, the former Newark Processing Company Property (NFA No. 12NFA481)  
Electronic filings: [records@epa.state.oh.us](mailto:records@epa.state.oh.us)

and

Ohio EPA-Central District Office  
Division of Environmental Response and Revitalization  
50 West Town Street

Formatted: Font: Not Italic

[P.O. Box 1049](#)  
Columbus, OH [43207-43216-1049](#)  
Attn: Project Coordinator for the former Newark Processing Company  
Property (NFA No. 12NFA481)

Formatted: Font: Not Italic

For City of Newark:

City of Newark  
40 West Main Street  
Newark, OH 43055  
Attn: Jeff Hall  
Mayor

and

City of Newark  
40 West Main Street  
Newark, OH 43055  
Attn: David Rhodes  
Director of Public Service

Either party may designate an alternative contact name or mailing address upon written notification to the other party.

- 16. Modification of this Agreement or the O&M Plan.** This Agreement or the O&M Plan may be modified by agreement of the appropriate parties. Modifications to this Agreement shall be in writing, signed by the authorized representative of ~~the~~ Newark and by the Director, and shall be effective on the date signed by the Director. Modifications to the O&M Plan shall be submitted in writing to Ohio EPA, subject to approval by Ohio EPA, and effective upon approval by Ohio EPA. Ohio EPA reserves the right to require the submittal of a new NFA letter for a proposed modification that will result in the application of an applicable standard, land use, or a remedy different than that contained in the NFA letter approved by the Covenant Not to Sue.
- 17. Compliance Schedule Agreement.** Within thirty (30) days after the mailing of notice from the Director of finding that the Property or a portion of the Property no longer complies with an applicable standard upon which the issuance of the Covenant was based, Newark shall notify the Director of its intention to return the Property or such portion of the Property to compliance with the applicable standards upon which the Covenant was based ("cure") and enter into a

compliance schedule agreement with the Director for such cure, in accordance with ORC 3746.12(B).

- 18. Compliance with Other Laws.** Newark shall conduct all activities pursuant to this Agreement and the O&M Plan in compliance with all applicable local, state, and federal laws and regulations, including but not limited to requirements to obtain permits or authorizations. Newark acknowledges that Ohio EPA's review and approval of any health and safety measures contained in the O&M Plan is limited to ensuring compliance with the requirements of ORC Chapter 3746 and OAC Chapter 3745-300 and does not extend to determining compliance with the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, the regulations adopted under that act, or any obligation imposed by the Occupational Safety and Health Administration.
- 19. Inspections by Ohio EPA.** Newark shall allow the Director or his authorized representatives to perform inspections to determine compliance with this Agreement. Such inspections shall be consistent with ORC Chapter 3746 and OAC Chapter 3745-300, including but not limited to the reasonableness of inspection timing and frequency in accordance with ORC 3746.21.
- 20. Program Costs for Monitoring Compliance with this Agreement.** Newark shall reimburse Ohio EPA for the actual direct and indirect costs incurred by Ohio EPA in monitoring compliance with this Agreement pursuant to ORC 3746.04(B)(8) and OAC 3745-300-03.

  - a.** Ohio EPA will periodically submit to Newark an itemized statement of its monitoring costs for the previous year(s). Monitoring costs include, but are not limited to, costs for reviewing submissions or reports required by this Agreement, conducting Property inspections, and corresponding with the Volunteer or its representative.
  - b.** Within thirty (30) days of receipt of such itemized statement, Newark shall remit payment for all of Ohio EPA's monitoring costs for the previous year(s). If Newark disputes the accuracy of items on the itemized statement, a request for review of the statement may be made within thirty (30) days of receipt of the statement. After review, Ohio EPA will resubmit to Newark an itemized statement with appropriate revisions. Newark shall remit payment within fourteen (14) days of receipt of the resubmitted statement.
  - c.** Newark shall remit payments to Ohio EPA pursuant to this Section of the Agreement as follows:

- i. Payment shall be made by an official (or certified) check made payable to "Treasurer, State of Ohio." The check shall be submitted to Ohio EPA, Office of Fiscal Administration, P.O. Box 1049, 50 West Town Street, Columbus, Ohio 43216-1049.
  - ii. A copy of the transmittal letter and check shall be sent to the Fiscal Officer, DERR, Ohio EPA, P.O. Box 1049, 50 West Town Street, Columbus, Ohio 43216-1049.
  - iii. A copy of the transmittal letter and check shall be sent to the Records Management Officer, DERR, Ohio EPA, P.O. Box 1049, 50 West Town Street, Columbus, Ohio 43216-1049.
21. **Termination.** This Agreement shall terminate upon (a) revocation or voidance of the Covenant Not to Sue, or (b) otherwise upon the written approval of the Director of the Ohio EPA.
22. **Waiver.** Newark agrees that the terms and conditions of this Agreement are lawful and reasonable, and agrees to comply with this Agreement. Newark hereby waives its right to appeal the issuance of this Agreement and the terms and conditions of this Agreement, and hereby waives any and all rights it might have to seek judicial or administrative review of this Agreement either in law or equity. Newark reserves its right to participate in any appeal by a third party to the Environmental Review Appeals Commission or to any court.
23. **Entire Agreement.** The terms and conditions of this Agreement, including the O&M Plan, constitute the entire agreement of the parties. No oral or written representation shall be binding unless approved as a modification of this Agreement pursuant to the Modification Section of this Agreement. The terms and conditions of this Agreement shall be interpreted consistent with ORC Chapter 3746 and OAC Chapter 3745-300.
24. **Authorized Signatories.** Each undersigned representative of a signatory to this Agreement represents that he or she is fully authorized to execute this Agreement and to legally bind such signatory to this Agreement.
25. **Effective Date.** Upon execution of this Agreement by both parties, this Agreement shall be a valid and binding obligation enforceable in accordance with its terms and conditions and effective upon the date of the Director's signature.

In witness whereof, the parties hereto have executed this Agreement.

CITY OF NEWARK:

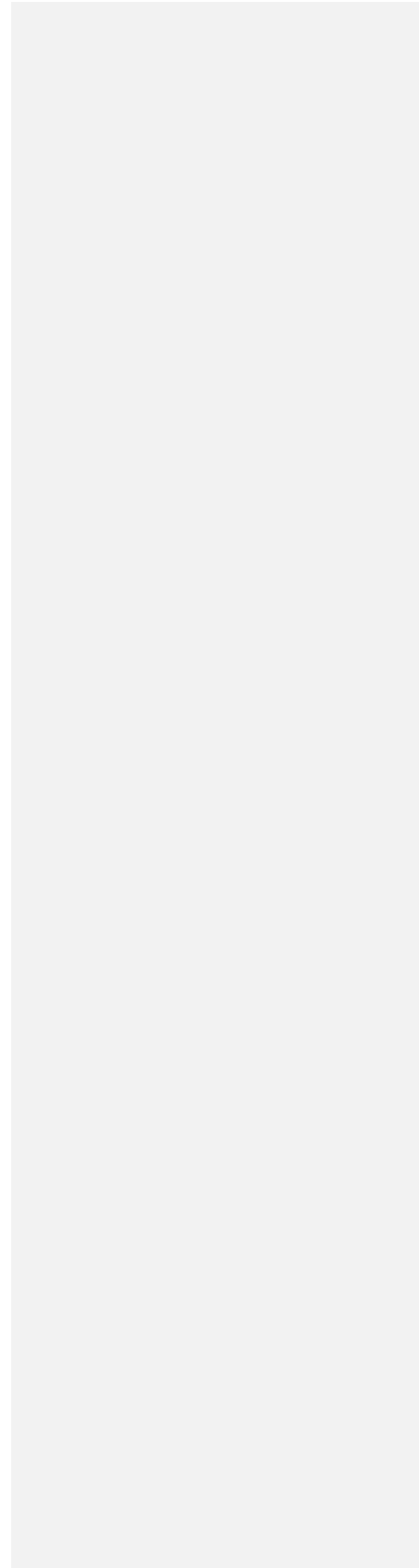
By: \_\_\_\_\_ Date: \_\_\_\_\_  
Jeff Hall, Mayor

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

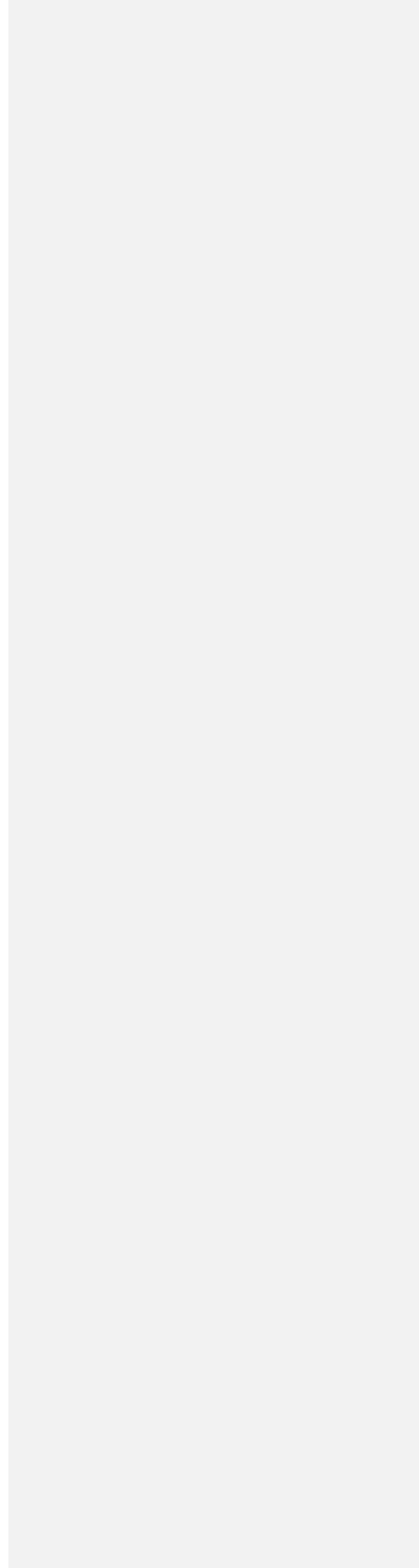
OHIO ENVIRONMENTAL PROTECTION AGENCY:

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Scott J. Nally  
Director of Ohio EPA

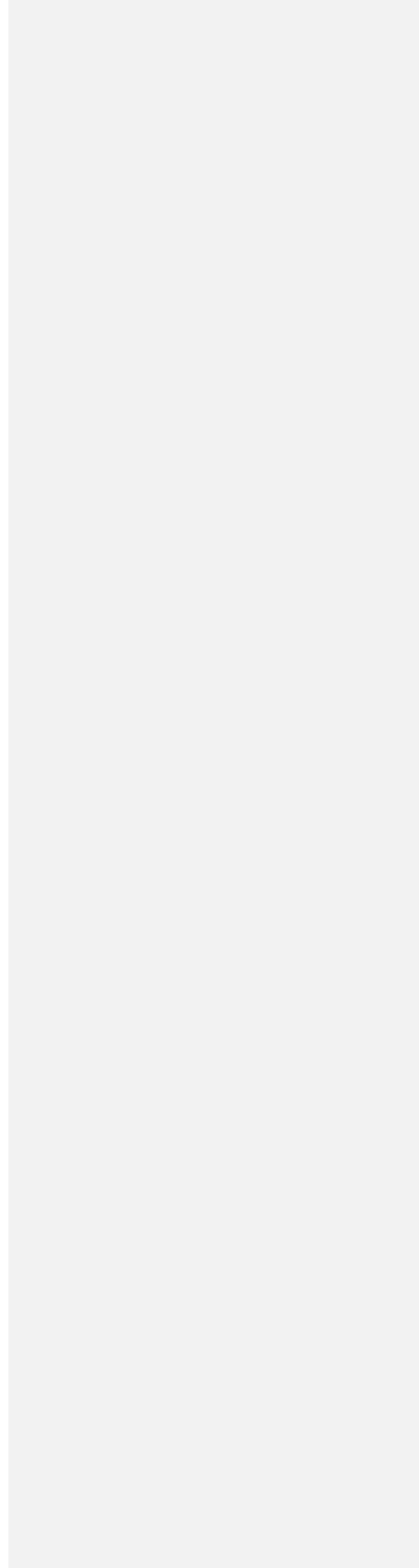


|

**[ATTACHMENT 1]**  
O&M Plan



| **ATTACHMENT 2**  
Financial Assurance





John R. Kasich, Governor  
Mary Taylor, Lt. Governor  
Scott J. Nally, Director

April 22, 2013

Mr. Jeffery P. Hullinger, PE  
Carnouste Consulting Ltd.  
6012 Kentigern Court South  
Dublin, OH 43017

**CERTIFIED MAIL**

91 7199 9991 7031 7488 1900

AND

Mr. Stuart Moynihan  
Economic Development Coordinator  
Department of Development  
City of Newark  
40 West Main Street, Suite 407  
Newark, Ohio 43055

**CERTIFIED MAIL**

91 7199 9991 7031 7488 1894

RE: Ohio EPA's Review of the Voluntary Action Program No Further Action Letter  
Former Newark Processing Facility, 12NFA481  
Project ID #145-001724-014  
Final Notice of Deficiency and Reviewer Comments

Dear Mr. Hullinger and Mr. Moynihan:

On September 21, 2012, Ohio EPA-Central District Office received the no further action (NFA) letter for the property located at 1367 East Main Street, Newark, Licking County, Ohio. The NFA letter was submitted on behalf of the volunteer, the city of Newark, Ohio with an accompanying request for a covenant not to sue (CNS) under the Voluntary Action Program (VAP), Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 3745-300. In a letter dated December 20, 2012, Ohio EPA provided you with comments developed during the collective review of the NFA letter.

On February 27, 2013, Ohio EPA received an addendum from you addressing the issues noted in the comment letter. After reviewing the addendum, Ohio EPA has determined the following issues remain unresolved:

## **Issue 1: Compliance with OAC 3745-300-13(B)(4)**

### **Comment 1, Environmental Covenant**

Pursuant to OAC 3745-300-13(B)(4), “[i]f the volunteer seeks to obtain a covenant not to sue and if the remedy relies on activity and use limitations to achieve applicable standards” the NFA letter is required to include “a demonstration that the activity and use limitations have been developed in accordance with this chapter [OAC Chapter 3745-300], and are contained in a proposed environmental covenant that meets the requirements established in section 5301.82 of the Revised Code.” Revise the environmental covenant in accordance with the attached redline/strikeout version, and submit a copy of the revised environmental covenant, and all exhibits, to Ohio EPA in an addendum.

## **Issue 2: Compliance with OAC 3745-300-11(E)(4)**

### **Comment 1, Operation and Maintenance Agreement**

Pursuant to OAC 3745-300-11(E)(4)(a), if a VAP property is subject to a remedial activity that requires an operation and maintenance (O&M) plan, the volunteer must enter into an O&M agreement with the Director. Revise the O&M agreement in accordance with the attached redline/strikeout version, and submit a copy of the revised O&M agreement, and all exhibits, to Ohio EPA in an addendum. One of the required exhibits is a financial assurance instrument that satisfies the requirements of OAC 3745-300-11(E)(4).

If you wish to discuss these revisions, please contact Ann Fischbein, Legal, at 614-728-1833.

### **Response Required**

The identified issues stated above must be addressed to the satisfaction of Ohio EPA no later than end of business on May 26, 2013 in order for the Director to issue a CNS for the property. The NFA letter addendum will need to be prepared so that the NFA letter, as amended, meets the criteria of OAC 3745-300-13. Further, the addendum needs to be submitted under the certified professional affidavit provision of OAC 3745-300-13(O), and include any other affidavits (such as volunteer or certified laboratory affidavits). Please submit two copies of the addendum (one hard copy and one indexed electronic copy on a compact disc) to Fred Myers at the following address no later than end of business on May 26, 2013.

Ohio EPA – Central District Office  
Division of Environmental Response and Revitalization  
50 W. Town St., Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

Please also send the original addendum and an indexed electronic copy of the addendum on a compact disc to the attention of DERR Records Management Officer, Ohio EPA Central Office no later than end of business on May 26, 2013 at the following address:

Ohio EPA – Division of Environmental Response and Revitalization  
Assessment Cleanup and Reuse Section – Voluntary Action Program  
50 W. Town St., Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

If the outstanding issues are not addressed and the NFA letter, as amended, does not meet the requirements of OAC Chapter 3745-300, or if a response is not received no later than end of business on May 26, 2013, Ohio EPA will issue a notice of impending denial of the CNS request.

As an alternative to denial, the volunteer may choose to submit a request to withdraw the pending NFA letter and request for a CNS at any time prior to CNS issuance or denial. If, after the withdrawal, the volunteer wishes to continue under the VAP to seek a CNS, a new NFA letter and request for a CNS can be submitted either under the traditional NFA Letter review track (along with the appropriate fee) or the pay-as-you-go (PAYGO) process, which is billed directly as technical assistance.

This letter does not constitute an action of the Director and is not subject to appeal.

If you have any questions related to this review or would like to schedule a meeting or conference call, please feel free to contact Fred Myers at 614-728-3830.

Sincerely,



Tiffani Kavalec, Manager  
Assessment, Cleanup and Reuse Section  
Division of Environmental Response and Revitalization

cc: DERR-CDO File Copy

ec: Eric Sainey, ACRE, DERR-CO  
Dan Tjoelker, SABR, DERR-CO  
Deborah Strayton, DERR-CDO  
Fred Myers, DERR-CDO  
Jason Reed, DDAGW-CDO  
Lisa Shook, DERR-CO  
Ann Fischbein, Legal  
[records@epa.state.oh.us](mailto:records@epa.state.oh.us)



John R. Kasich, Governor  
Mary Taylor, Lt. Governor  
Scott J. Nally, Director

**Certified Mail #91 7108 2133 3932 1838 6893**  
**#91 7108 2133 3932 1838 6909**

December 20, 2012

Mr. Jeffery P. Hullinger, PE  
Carnouste Consulting Ltd.  
6012 Kentigern Court South  
Dublin, OH 43017

Mr. Stuart Moynihan  
Economic Development Coordinator  
Department of Development  
City of Newark  
40 West Main Street, Suite 407  
Newark, Ohio 43055

**Re: Ohio EPA's Review of the Voluntary Action Program**  
**No Further Action Letter**  
**Former Newark Processing Facility, 12NFA481**  
**Project ID #145-001724-014**  
**Initial Notice of Deficiency and Reviewer Comments**

Dear Mr. Hullinger and Mr. Moynihan:

Ohio Environmental Protection Agency (EPA) received the no further action (NFA) letter for the property located at 1367 East Main Street, Newark, Licking County, Ohio on September 21, 2012. The NFA letter was submitted on behalf of the volunteer, city of Newark, Ohio with an accompanying request for a covenant not to sue (CNS) under the Voluntary Action Program (VAP), Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 3745-300 [2012]. Comments developed by Ohio EPA personnel in a collective review of the NFA letter are presented below.

## **Issue A: OAC 3745-300-06, Phase I Property Assessment**

**Comment 1: Compliance with OAC 3745-300-06(C)(1)(b), OAC 3745-300-06(I)(3) and OAC 3745-300-07(E)(1)(b).** These rules require an updated chain of title in the amended Phase I report. Section 1.2, Chain of Title, states that the city of Newark acquired the property in December 2010; however, an updated chain of title was not submitted. Submit the updated chain of title as an addenda to the Phase I report.

## **Issue B: OAC 3745-300-07, Phase II Property Assessment**

**Comment 1: Compliance with OAC 3745-300-07(E)(1)(b) and OAC 3745-300-07(J)(2).** Requirement to amend the Phase I property assessment. These rules require that a summary of the Phase I update be included in the Phase II report. A summary of the Phase I update was not in the submitted Phase II report.

**Comment 2: Compliance with OAC 3745-300-07(J).** This rule specifies the minimum requirements for a Phase II written report. The Phase II report submitted with the NFA letter does not comply with the 2012 reporting requirements in OAC 3745-300-07(J). The Phase II report must be amended to include all requirements listed in OAC 3745-300-07(J)(1)-(16). A complete amended Phase II report must be submitted; not a revision of the Phase II report submitted with the NFA letter. Specific requirements that need to be addressed are described in the following comments.

**Comment 2.1: Compliance with OAC 3745-300-07(J)(1).** This rule requires an introduction that includes the legal description of the property, the dates the Phase I and Phase II investigations were conducted, the date the written reports were finalized, and the name and job title of the person(s) responsible for the Phase I and Phase II. The introduction of Phase II report submitted with the NFA letter does not include the information specified in OAC 3745-300-07(J)(1). Include this information in the Phase II report introduction.

**Comment 2.2: Compliance with OAC 3745-300-07(J)(2).** This rule requires the summary of any amendments to the Phase I required by OAC 3745-300-07(E)(1)(b). Include this summary in the Phase II report.

**Comment 2.3: Compliance with OAC 3745-300-07(J)(4).** This rule requires documentation of compliance with OAC 3745-300-07(C), Data quality objectives (DQOs) for Phase II property assessments and OAC 3745-300-07(D), Sampling and sample analysis (e.g., a summary of the sampling and quality assurance and quality control procedures). The Phase II report submitted with the NFA letter does not provide the information required in this rule. The 2004 Field Sampling and Analysis Plan (FSAP) that was developed prior to the Phase II field work contains this information and may be referenced and attached to the Phase II report to comply with these rules. Note that the DQOs and sampling/sample analysis for the ground water sampling conducted in 2011 must also be documented.

**Comment 2.4: Compliance with OAC 3745-300-07(J)(5).** This rule requires documentation of compliance with OAC 3745-300-07(E), Phase II assessment data activities. Section 3.0, Description of Sampling Program, of the submitted Phase II report describes the data collection activities for each identified area in 2004-2005. In addition to the information provided in Section 3.0, the amended Phase II report must also include a description of the 2011 ground water investigation and any other Phase II activities that were conducted after the 2004-2005 Phase II investigation.

**Comment 2.5: Compliance with OAC 3745-300-07(J)(6).** This rule requires documentation of compliance with OAC 3745-300-07(F), Determinations under the voluntary action program. The determinations made as a result of the Phase II must be documented in the amended Phase II report. The determinations were summarized in Sections 4.0, 5.0, and 6.0 of the submitted Phase II report. The information in these sections may be summarized in the amended Phase II report; however, the information must be updated and include current VAP rule citations; the 2011 ground water monitoring; and any other Phase II activities that are used to demonstrate compliance with applicable standards. Issues that need to be corrected are listed below:

- The rule citations in Section 5.0 are inaccurate and must be revised. Section 5.2 incorrectly lists OAC 3745-300-10(C) as the ground water classification system requirements and OAC 3745-300-10(F)(4) as the appropriate ground water classification. However, under the current VAP rules, OAC 3745-300-10(B) identifies the ground water classification system and OAC 3745-300-10(E)(4) is the correct rule citation for Class A ground water without an urban setting designation.
- The analytical results for the ground water samples collected in 2011 must be included in the summary tables in the amended Phase II report. The tables must be updated to include the results of all analyses conducted during the Phase II property assessment per OAC 3745-300-07(J)(6).
- A summary of the exceeded applicable standards must be included in the Phase II report; for example, arsenic and lead exceeded applicable standards in dross and fluoride and selenium exceeded unrestricted potable use standards in ground water.
- Section 5.2, Groundwater Response Requirements, states that an interceptor trench is required. However, an interceptor trench was not necessary and was not installed. The references to this unnecessary remedy should be removed from the amended Phase II report to accurately summarize remedial activities completed prior to the issuance of the NFA letter per OAC 3745-300-07(J)(11).

**Comment 2.6: Compliance with OAC 3745-300-07(J)(11).** This rule requires documentation of compliance with OAC 3745-300-07(I)(4), Implementation of remedial activities and OAC 3745-300-11, Remediation. The amended Phase II report must include a summary of the remedial activities that were implemented to comply with applicable standards. Also, include a statement that the remedial activities were completed with an authorization from the Director of the Ohio EPA per OAC 3745-27-13. Note: in accordance with ORC 3746.10(D), you must comply with all applicable state laws, which includes the requirements listed in OAC 3745-27-13(H)(10).

**Comment 2.7: Compliance with OAC 3745-300-07(J)(12).** This rule requires a summary of compliance with applicable standards. Provide a summary of information in the amended Phase II report that documents compliance with OAC 3745-300-07(I)(3) and OAC 3745-300-07(I)(4). These rules require the volunteer to verify compliance with applicable standards and describe how the implemented remedial activities render the potential exposure pathways incomplete to all potential receptors and all points of compliance as specified in OAC 3745-300-07(I)(1). Include a statement verifying that the cap material meets applicable standards; for example, soil sample analytical results and/or Phase I assessment of the source area. See Ohio EPA's technical guidance compendium *Characterization of Soil for Placement onto a VAP Property* at <http://www.epa.ohio.gov/portals/30/vap/tgc/va30007-11-002.pdf>

**Comment 2.8: Compliance with OAC 3745-300-07(J)(13).** This rule requires applicable maps and cross-sections that support the Phase II assessment. The maps and cross-sections in the submitted Phase II report are not adequate. Include the following maps and cross-sections in the amended Phase II report:

- A map that depicts the current or existing topography as required in OAC 3745-300-07(J)(13)(b).
- A geologic cross-section that depicts the ground water zones that were classified and require protection. The cross-section needs to depict all saturated zones evaluated during the Phase II property assessment as required by OAC 3745-300-07(J)(13)(c). The geologic cross-section submitted with NFA letter does not depict the ground water zones.
- A map(s) that depicts the portion(s) of the property where remedial activities have been, or will be, implemented per OAC 3745-300-11 as required by OAC 2745-300-07(e). The map needs to include the institutional controls, risk mitigation measures, and engineering controls subject to an operation and maintenance plan.

## Issue C: OAC 3745-300-11, Remediation

**Comment 1: Compliance with OAC 3745-300-11(C)(7).** This rule requires a risk mitigation plan to eliminate or reduce the risk to persons working in areas where concentrations of chemicals of concern exceed applicable standards NFA Form Table 10, *Applicable Standards and Remedial Activities for Each Pathway*, indicates that lead exceeds the construction worker standard in Identified Areas 1, 3, and 4. However there is no risk mitigation plan as required by OAC 3745-300-11(C)(7). Submit a risk mitigation plan. A risk mitigation plan template is available at <http://www.epa.state.oh.us/derr/volunt/volunt.aspx>.

**Comment 2: Compliance with OAC 3745-300-11(D)(1)(d) and OAC 3745-300-11(E)(1)(c)(iii).** These rules require the volunteer to submit a final elevation map for a property that relies on institutional controls to meet applicable standards. The elevation survey must cover those areas where a point of compliance has been established to meet applicable standards [see OAC 3745-300-11(D)(1)(d)(ii)]. Submit a final elevation survey map for both areas of the property that were graded and capped.

**Comment 3: Compliance with OAC 3745-300-11(E).** This rule specifies requirements for the operation and maintenance (O&M) plan and agreement. The O&M plan submitted did not contain provisions for the maintenance and monitoring of all engineering controls implemented at the property as specified in this rule and must be revised. Please use the VAP O&M plan template that is available at <http://www.epa.state.oh.us/derr/volunt/volunt.aspx>. At a minimum the revised O&M plan must include the following:

- Provisions to inspect and maintain the cap for general integrity, including breaches, burrowing, slumping and erosion. Erosion control features constructed at the Licking River and in Shawnee Run protect the cap remedy from stream erosion. Therefore, provisions to inspect and maintain the erosion control features at the Licking River and in Shawnee Run should be included.
- O&M reports will be submitted annually to the Ohio EPA pursuant to the O&M agreement.
- Appropriate figures that depict the locations of the remedial activities implemented at the property and engineering controls subject to the O&M plan.
- Do not include references to ground water monitoring. The O&M plan submitted with the NFA letter incorrectly lists ground water monitoring in the table of contents and indicates that ground water monitoring is an O&M activity in Section 7.0, titled "Potential Problems with Remedial Activities." Ground water monitoring is not necessary as a remedy in the O&M plan per OAC 3745-300-11

**Comment 4: Compliance with OAC 3745-300-11(E)(4).** OAC 3745-300-11(E)(4)(a) requires that if a VAP property is subject to a remedial activity that requires an O&M plan, the volunteer must enter into an operation and maintenance agreement with the Director. Submit an addendum that includes an O&M agreement in accordance with the template, available at <http://www.epa.state.oh.us/derr/volunt/volunt.aspx>. Also include a financial assurance instrument that satisfies the requirements of OAC 3745-300-11(E)(4).

#### **Issue D: OAC 3745-300-13, Content and Scope of No Further Action Letters**

**Comment 1: Compliance with OAC 3745-300-13(B).** OAC 3745-300-13(B)(4) requires that, “[i]f the volunteer seeks to obtain a covenant not to sue and if the remedy relies on activity and use limitations to achieve applicable standards” the NFA Letter is required to include “a demonstration that the activity and use limitations have been developed in accordance with this chapter [see OAC Chapter 3745-300], and are contained in a proposed environmental covenant that meets the requirements established in section 5301.82 of the Revised Code” Revise the environmental covenant in accordance with the attached redline/strikeout version and submit the revised environmental covenant, and all exhibits, as an addendum to the NFA letter.

**Comment 2: Compliance with OAC 3745-300-13(B)(6) and OAC 3745-300-13(E)(18).** These rules specify required affidavits to be submitted with an NFA letter. Ohio EPA sent three Kemron laboratory affidavits to the certified professional, Mr. Jeffrey P. Hullinger, after the NFA letter was issued. Mr. Hullinger must submit these affidavits with the NFA letter addendum under his affidavit. In addition, include the Severn-Trent laboratory affidavits that were not submitted with the NFA letter.

**Comment 3: Compliance with OAC 3745-300-13(E)(1) and OAC Rule 3745-300-06(I).** OAC Rule 3745-300-13(E)(1) requires that a legal description be provided for the property subject to the NFA letter. OAC Rule 3745-300-06(I) further requires information required by OAC Rule 3745-300-06 to be complete and reliable to the extent relied upon by the certified professional for the purpose of issuing a NFA letter. The property acreage in the legal description does not appear to equal the property acreage as described in the NFA letter narrative. Moreover, the acreage in the environmental covenant does not match the acreage stated in the legal description. Submit an addendum to the NFA letter that explains how the legal description acreages match or provide corrected documents that match the legal description acreage

**Comment 4: Compliance with OAC 3745-300-13(J).** This rule specifies requirements for the executive summary of the NFA letter. The executive summary must be completed in the format prescribed by Ohio EPA and submitted under the certified professional's affidavit. Revise the executive summary as necessary and submit it

under the certified professional's affidavit with the amended NFA letter. Comments on the executive summary submitted with the NFA letter are listed below. Please correct these.

- Correct the first paragraph. The Division of Emergency and Remedial Response has been renamed the Division of Environmental Response and Revitalization.
- Section 2.0, Timeline. List the date of the completion of the amended Phase II report.
- Section 3.6, PSRA. Add a statement clarifying that a PSRA was completed for the property and was submitted with the NFA letter, but it was not used in the determination of compliance with applicable standards.
- Section 5.0, Remedial Activities. Add a statement that the remedial activities were governed by the OAC 3745-27-13 authorization and ORC 3734.02(G) exemption issued on November 18, 2009. State that the grading of the dross and construction of the cap complies with the authorization. Also, state that the conditions in the authorization requires post-remedy operation and maintenance plan and agreement and environmental covenant, and that these these conditions will be met when those documents are finalized and submitted as addenda to the NFA letter.
- Section 6.0, Operations and Maintenance/Engineering Controls/Risk Mitigation Plans. Add a statement that the O&M plan includes the required procedures for monitoring and maintaining the 2-foot point of compliance at the property and provisions to inspect and maintain engineering controls, including the fence and erosion control features. In addition, state that a risk mitigation plan will be implemented to manage potential exposures of construction/excavation workers to the underlying dross and ground water exceeding direct contact standards.
- Section 7.0, Institutional Controls. The section states that an environmental covenant will limit the property to restricted residential and commercial or industrial land uses. However, the draft environmental covenant included with the NFA letter does not include restricted residential provisions. Neither was a demonstration made in the NFA letter to show that any residential land uses would be appropriate. Revise this section to remove the reference to restricted residential land uses.

**Comment 5: Compliance with OAC 3745-300-13(E)(8), OAC 3745-300-07(I)(3), and OAC 3745-300-09(D).** NFA Form Table 10, Applicable Standards and Remedial Activities for Each Pathway, indicates that several chemicals of concern (COCs) were eliminated based on the concentration of those COCs being less than 1% of the single chemical generic direct contact standard. Per OAC 3745-300-09(D)(3)(a)(ii), this evaluation should be based on the concentration in comparison to the estimated risk

and/or hazard index attributed to the pathway-receptor combination. Revise this demonstration and include the cumulative risk calculations.

**Comment 6: Compliance with OAC 3745-300-13(E)(17).** This rule requires identification of the taxing district for the property. Section A, General Information, of the NFA letter lists "Licking" as the taxing district, which is not correct. According to the Licking County Auditor's Office, the taxing district is Newark City-Licking Valley Local School District. Revise this information.

### **Response Required**

The identified issues stated above must be addressed to the satisfaction of Ohio EPA no later than end of business on February 27, 2013 in order for the Director to issue a CNS for the property. The NFA letter addendum will need to be prepared so that the NFA letter, as amended, meets the criteria of OAC 3745-300-13. Further, the addendum needs to be submitted under the certified professional affidavit provision of OAC 3745-300-13(O), and include any other affidavits (such as volunteer or certified laboratory affidavits). Please submit two copies of the addendum (one hard copy and one indexed electronic copy on a compact disc) to Fred Myers at the following address no later than end of business on February 27, 2013.

Ohio EPA –Central District Office  
Division of Environmental Response and Revitalization  
50 West Town Street, Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

Also, please send the original addendum and an indexed electronic copy of the addendum on a compact disc to the attention of Records Management Officer, DERR, Ohio EPA Central Office no later than end of business on February 27, 2013 at the following address:

Ohio EPA – Division of Environmental Response and Revitalization  
Assessment Cleanup and Reuse Section – Voluntary Action Program  
50 West Town St., Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

If the outstanding issues are not addressed and the NFA letter, as amended, does not meet the requirements of OAC Chapter 3745-300, or if a response is not received by end of business on February 27, 2013, Ohio EPA will issue a final notice of deficiency.

The volunteers also have the option to submit a request to withdraw the pending NFA letter and request for a CNS at any time prior to CNS issuance or denial. If, after the withdrawal, the volunteers wish to continue under the VAP to seek a CNS, a new NFA letter and request for a CNS can be submitted either under the traditional NFA letter review track (along with the appropriate fee) or under the pay-as-you-go (PAYGO) process, which is billed directly as technical assistance.

This letter does not constitute an action of the Director and is not subject to appeal.

If you have any questions related to this review or would like to schedule a meeting or conference call, please feel free to contact me at 614-728-3830.

Sincerely,



Fred Myers  
Site Coordinator  
Division of Environmental Response and Revitalization  
Central District Office

cc: CDO File Copy

ec: Frank Robertson, Supervisor, ACRE, DERR-CO  
Eric Sainey, ACRE, DERR-CO  
Lisa Shook, DERR-CO  
Vlad Cica, SABR, DERR-CO  
Dan Tjoelker, SABR DERR-CO  
Deborah Strayton, DERR-CDO  
Jason Reed, DDAGW-CDO  
Ann Fischbein, Legal  
[records@epa.state.oh.us](mailto:records@epa.state.oh.us)