



Ohio Revised Code

Section 3746.12 Issuing or denying covenant not to sue.

Effective: September 30, 2021

Legislation: House Bill 110

Except as provided in division (C) of this section, the director of environmental protection shall issue to a person on behalf of whom a certified professional has submitted to the director an original no further action letter and accompanying verification under division (A) of section 3746.11 of the Revised Code a covenant not to sue for the property that is named in the letter. The director shall not issue a covenant not to sue if an original no further action letter is submitted to the director by any person other than the certified professional who prepared the letter or if a copy of the letter is submitted to the director.

A covenant not to sue shall contain both of the following, as applicable:

(1) A provision releasing the person who undertook the voluntary action from all civil liability to this state to perform additional investigational and remedial activities to address a release of hazardous substances or petroleum when the property has undergone a phase I or a phase II property assessment in compliance with this chapter and rules adopted under it or has been the subject of remedial activities conducted under this chapter and rules adopted under it to address a release of hazardous substances or petroleum and such an assessment or those activities demonstrate or result in compliance with applicable standards, except:

(a) As otherwise specifically provided in this chapter or as may be conditioned by the director under this chapter;

(b) For claims for natural resource damages the state may have pursuant to section 107 or 113 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781 and 2792, 42 U.S.C.A. 9607 and 9613, as amended;

(c) For claims the state may have pursuant to section 107 of the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2781, 42 U.S.C.A. 9607, as amended, for costs other than those for damages to natural resources, provided that the state incurs those other



costs as a result of an action by the president of the United States under section 104, 106, 107, or 122 of that act or pursuant to section 3746.29 of the Revised Code.

(2) If the voluntary action involves the use of engineering controls that contain and control the release of hazardous substances or petroleum at or from the property in order to comply with applicable standards, all of the following:

(a) A provision requiring that the person enter into an operation and maintenance agreement with the director that ensures that all engineering controls are maintained so that the remedy is protective of public health and safety and the environment; that includes provisions requiring the person to conduct monitoring for compliance with the engineering controls and the applicable standards upon which issuance of the covenant was based, and periodically to report the findings of the monitoring to the director, as specified in the agreement; and that includes financial assurances that the remedy will remain operational and functional;

(b) A provision requiring the transferor of a covenant that contains an operation and maintenance agreement for engineering controls to notify the director whenever a transfer or assignment of the covenant or property to which it applies occurs;

(c) A provision revoking the covenant if the engineering controls are violated or are no longer in place and the person has not reinstated the controls within a reasonable period of time as determined in accordance with the covenant.

(B)(1) The release provided under division (A)(1) of this section remains effective only for as long as the property or portion thereof to which the covenant pertains continues to comply with the applicable standards upon which the issuance of the covenant was based.

(2) Upon finding that a property or portion thereof to which a covenant not to sue pertains no longer complies with the applicable standards upon which issuance of the covenant was based, the director, by certified mail, receipt requested, shall mail notice of that fact and the requirements of division (B)(3) of this section to the person responsible for maintaining compliance with those standards.

(3) Unless the recipient of a notice provided under division (B)(2) of this section, within thirty days



after the mailing of the notice, notifies the director of the recipient's intention to return the property or portion thereof to compliance with the applicable standards upon which issuance of the covenant was based and enters into a compliance schedule agreement with the director, the director, by issuance of an order as a final action under Chapter 3745. of the Revised Code, shall revoke the covenant. The compliance schedule agreement shall establish a reasonable period of time for returning to compliance with those applicable standards.

(4) Upon finding that a person with whom the director has entered into a compliance schedule agreement under division (B)(3) of this section has failed to return the property or portion thereof to which the agreement pertains to compliance with the applicable standards within the time established in the agreement, the director, by issuance of an order as a final action under Chapter 3745. of the Revised Code, shall revoke the covenant applicable to the property or portion thereof.

(C) The director shall deny a covenant not to sue as a final action for any of the following reasons:

(1) The no further action letter submitted on behalf of the person seeking the covenant not to sue does not comply with section 3746.11 of the Revised Code and any rules adopted under this chapter regarding no further action letters;

(2) The director determines from information available to to the director that a remedy identified in the no further action letter does not protect public health and safety and the environment;

(3) The no further action letter was submitted fraudulently.

(D) The director shall not revoke a covenant not to sue issued for property for which a voluntary action was conducted in accordance with standards and procedures that applied prior to the adoption of rules under section 3746.04 of the Revised Code solely on the basis that the voluntary action was conducted in accordance with those standards and procedures.

(E) Unless a covenant not to sue issued under this section is revoked through the operation of a provision of the covenant described in division (A)(2)(c) of this section, or under division (B) of this section, division (B)(2) of section 3746.18 of the Revised Code, or division (B) of section 3746.19 of the Revised Code, the covenant shall remain effective as long as the property complies with the



applicable standards that were in effect when the person who undertook the voluntary action submitted the information and demonstrations required under division (C) of section 3746.10 of the Revised Code to the certified professional who prepared the no further action letter regardless of whether amendments to the rules adopted under division (B)(1) or (2) of section 3746.04 of the Revised Code that became effective after that time altered the generic numerical clean-up standards for a contaminant addressed by the voluntary action or the procedures or levels of acceptable risk that govern the property-specific risk assessments conducted in lieu of compliance with generic numerical standards.