**To be recorded with Deed**

**Records -** **ORC § 317.08**

 **ENVIRONMENTAL COVENANT [[1]](#footnote-1), [[2]](#footnote-2)**

This Environmental Covenant is entered into by [*name all Owners of the* *Property and Holders*] and the Ohio Environmental Protection Agency (“Ohio EPA”) pursuant to Ohio Revised Code (“ORC”) §§ 5301.80 to 5301.92 for the purpose of subjecting the Property described herein (“the Property”)**[[3]](#footnote-3)** to the activity and use limitations**[[4]](#footnote-4)** set forth in this document.

**Summary**

The following is a brief summary of the provision of this Environmental Covenant that is provided to assist in understanding of the Environmental Covenant. In the event of any discrepancy between this summary and the actual terms of the Environmental Covenant, the actual terms shall control.

This Environmental Covenant requires current and future Property owners to meet certain requirements, including, but not limited to:

* Comply with the activity and use limitations given by paragraph 5 that: [*Plain language summary of the activity and use limitations in paragraph 5, for example: (a) restrict Property use to commercial or industrial land uses, (b) prohibit extraction or use of ground water underlying the Property except as provided herein, (c) require operation and maintenance of engineering controls at the Property, and (d) in case of any building on that portion of the Property depicted on Attachment B of this Environmental Covenant, prohibit any human occupancy until the remedy or demonstration obligations are met*].
* Noncompliance with any activity and use limitation will result in the covenant not to sue issued for the Property by the Director of Ohio EPA to be voidable by order of the Director, as described in paragraphs 5 and 7.
* Provide an annual compliance report to Ohio EPA by [*enter Month from paragraph 9*] 1of each year, as required by paragraph 9, describing that the Property continues to be used in compliance with the activity and use limitations.
* Give notice to new property owners (also known as “Transferees”) upon conveyance, as required by paragraph 10, of the activity and use limitations and the recorded location of this Environmental Covenant.
* Notify Ohio EPA within 14 days of each conveyance, as required by paragraph 10, of the property that was conveyed and new owner’s contact information.

**Background**

A. [*Name of each Volunteer*] [has / have] undertaken a voluntary action with respect to the Property under Ohio’s Voluntary Action Program (“VAP”), pursuant to ORC Chapter 3746 and Ohio Administrative Code (“OAC”) Chapter 3745-300.

B. The Property is owned by [*name of Owner*]; [*name of Volunteer*] is not an owner of the Property.**[[5]](#footnote-5)**

C. The voluntary action remedy for the Property includes the activity and use limitations set forth in this Environmental Covenant. Certified Professional [*CP name,* CP###], issued a no further action letter (“NFA Letter”) for the Property on [*date of CP’s affidavit*] and submitted the NFA Letter to Ohio EPA (“No. [\_\_NFA­­­ \_\_\_]”) with a request for a covenant not to sue.

D. The activity and use limitations support the issuance of the NFA Letter and a covenant not to sue for the Property; the limitations protect against exposure to the [*hazardous substances / petroleum / hazardous substances and petroleum*] in [*soil / ground water / soil and ground water, or describe other affected media*] on or underlying the Property.

E. The Property uses or may in the future use an engineering control to comply with applicable standards, as the terms are defined in OAC Chapter 3745-300. Whenever an engineering control is used, an activity and use limitation in this Environmental Covenant requires the engineering control implementation, through an operation and maintenance (O&M) agreement, until it is no longer needed to meet applicable standards. An engineering control that is no longer needed may be modified or terminated in accordance with OAC 3745-300-11 and applicable O&M plan and agreement criteria. The documentation must be submitted to and accepted by Ohio EPA prior to any modification or termination.

F. [The Property is the subject of an O&M plan and agreement that provide for a central management entity (“CME”) to oversee engineering controls and soil management to maintain site protectiveness.**[[6]](#footnote-6)**]

 G. The NFA Letter executive summary contains an overview of the voluntary action. The executive summary may be reviewed as an exhibit to the covenant not to sue issued for the Property, recorded in the deed records for the Property in the [*name of County Recorder’s Office*]. Or request to review documents by contacting the Records Management Officer for the Division of Environmental Response and Revitalization, at Ohio EPA’s Central Office, 50 West Town Street, Columbus, OH 43216, 614-644-2924, or at Ohio EPA’s [*name*] District Office at [*address, phone*], or by contacting [*CP’s or Volunteer’s business name, business address, phone*].

**Covenant**

 Now therefore, [*name of each Owner, and Holder other than Owner, if any*] and Ohio EPA agree to the following:

1. Environmental Covenant. This instrument is an environmental covenant developed and executed pursuant to ORC §§ 5301.80 to 5301.92. The background given above is incorporated by reference into this section as if fully restated.

2. Property. This Environmental Covenant concerns an approximately [*##*]-acre tract of real propertylocated at [*Address of Property*], in [*County*], Ohio, and more particularly described in Attachment [*A*] attached hereto and incorporated by reference (“Property”).

3. Owner. This Property is owned by [*Owner Name*] (“Owner”), [*with a place of business located*] at [*Address of Owner*].

4. Holder. Pursuant to ORC § 5301.81, the holder of this Environmental Covenant (“Holder”) is the Owner listed above [*and if applicable [Name of other Holder not the Owner], [with place of business located]* at *[Address of other Holder]*]. [Effective on the date of transfer of all ownership interest in the Property, Owner consents to waive its Holder status in accordance with ORC 5301.90. After such transfer Owner’s signature is not required for any amendment or termination of this Environmental Covenant.]

5. Activity and Use Limitations. As part of the voluntary action remedy described in the NFA Letter, Owner hereby imposes and agrees to comply with the following activity and use limitations:

a. **[Specify limitation language developed for the property]** **[[7]](#footnote-7)**

\_\_. **Engineering control implementation.** **[[8]](#footnote-8)**

 For each engineering control used to meet applicable standards, the control shall be operated and maintained in compliance with an Ohio EPA-approved operation and maintenance plan and agreement applicable to the control. This limitation applies to any engineering control used to meet applicable standards, whether put in place before or after the execution of this Environmental Covenant.

 Any noncompliant engineering control implementation shall be corrected within the plan- specified timeframe or, in case of no specified timeframe, within a reasonable time as determined by Ohio EPA.

 For purposes of ORC 3746.05, the Property use shall not be considered in noncompliance with this limitation when the noncompliance is with an engineering control and is i.) corrected within a reasonable time under an operation and maintenance plan or agreement, ii.) returned to compliance by a timeline specified by an Ohio EPA notice of noncompliance, or iii.) cured under a compliance schedule agreement entered into pursuant to ORC 3746.12 with the Ohio EPA director.

 An engineering control or its use may be modified or terminated following Ohio EPA approval of a demonstration made, in accordance with OAC 3745-300-11 and applicable operation and maintenance plan and agreement criteria, that supports the control use is no longer needed to comply with applicable standards.

6. Running with the Land; Transferees. This Environmental Covenant shall be binding upon the Owner, during the time that the Owner owns the Property or any portion thereof, and upon all assigns and successors in interest, including any Transferee, and shall run with the land, pursuant to ORC § 5301.85, subject to amendment or termination as set forth herein. The term “Transferee,” as used in this Environmental Covenant, shall mean any future owner of any interest in the Property or any portion thereof, including, but not limited to, owners of an interest in fee simple.

7. Compliance Enforcement. Compliance with this Environmental Covenant may be enforced pursuant to ORC § 5301.91 and other applicable law. Failure to timely enforce compliance with this Environmental Covenant or the activity and use limitations contained herein by any party shall not bar subsequent enforcement by such party and shall not be deemed a waiver of the party’s right to take action to enforce against any non-compliance. Nothing in this Environmental Covenant shall restrict the Director of Ohio EPA from exercising any authority under applicable law. Pursuant to ORC § 3746.05, if the Property or any portion thereof is put to a use that does not comply with any activity and use limitation, the covenant not to sue issued for the Property by the Director of Ohio EPA under ORC § 3746.12 is voidable by order of the Director, as provided in paragraph 5.

8. Rights of Access. Owner hereby grants to Ohio EPA’s authorized representatives [*include, as applicable,* *name of local government and name of each Holder other than Owner, if any, etc.; see ORC §§ 5301.82(A)(6) and 5301.91(A)*] the right of access to the Property for implementation or enforcement of this Environmental Covenant and shall require such access as a condition of any transfer of the Property or any portion of the Property.

9. Compliance Reporting. Owner or the Transferee, if applicable, shall annually submit to Ohio EPA [*include, as applicable, name of* *local government, any “Holders” other than Owner*] written documentation verifying that the activity and use limitations set forth in this Environmental Covenant remain in place and are being complied with. Documentation shall be due to Ohio EPA on [*Pick a date that makes sense for your situation consistent with O&M / RMP reporting dates: May 1 / March 1 / September 1,*] of each year beginning the year after the effective date of this Environmental Covenant, unless otherwise directed by Ohio EPA.

10. Conveyance of Property - Language for Instruments and Notice upon Conveyance. Each instrument hereafter conveying any interest in the Property or any portion of the Property shall contain a notice of the activity and use limitations set forth in this Environmental Covenant and shall reference its recording date and location. Further, notice shall be given by Owner or Transferee, as described below:

a. Language for Instruments. The notice of the Environmental Covenant to include in instruments shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL COVENANT, RECORDED IN THE DEED OR OFFICIAL RECORDS OF [*name of County Recorder’s Office*] ON \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_, IN [DOCUMENT \_\_\_\_\_\_\_\_\_\_\_\_, or BOOK\_\_\_\_\_, PAGE \_\_\_\_\_\_]. THE ENVIRONMENTAL COVENANT CONTAINS THE FOLLOWING ACTIVITY AND USE LIMITATIONS: *[List or summarize the**activity and use limitations from Paragraph 5, i.e.,* a.) commercial or industrial land uses, b.) ground water extraction and use prohibition, c.) building occupancy limitation – prior remedy or demonstration obligations, d.) engineering control implementation requirement.*]*

b. Notice of Each Conveyance. Owner or Transferee, if applicable, shall notify Ohio EPA [and Holders other than the Owner, if any] within fourteen (14) days after each conveyance of an interest in the Property or any portion of the Property. The notice shall include the name, address, and telephone number of the Transferee, a copy of the deed or other documentation evidencing the conveyance, and a survey plat that shows the transferred property boundaries relative to the Property boundaries.

11. Representations and Warranties. Owner hereby represents and warrants to the other signatories to this Environmental Covenant that:

a. Owner is the sole owner of the Property;

b. Owner holds fee simple title to the Property and that the Owner conducted a current title search that shows that the Property [*choose one: is subject to [or] is not subject to any*]interests or encumbrances that conflict with the activity and use limitations set forth in this Environmental Covenant;**[[9]](#footnote-9)**

c. Owner has the power and authority to enter into this Environmental Covenant, to grant the rights and interests herein provided and to carry out all obligations hereunder;

d. This Environmental Covenant will not materially violate or contravene or constitute a material default under any other agreement, document or instrument to which Owner is a party or by which Owner may be bound or affected;

e. Owner has identified all other persons that own an interest in or hold an encumbrance on the Property, and, if applicable, has notified such persons of the Owner’s intention to enter into this Environmental Covenant.

12. Amendment or Termination. This Environmental Covenant may be amended or terminated by all requisite parties pursuant to ORC § 5301.90 and other applicable law. Within thirty (30) days of signature by all requisite parties on any amendment or termination of this Environmental Covenant, the Owner or Transferee, if applicable, shall file such document for recording with the [*name of County Recorder’s Office*] and shall provide a file- and date-stamped copy of the recorded document to Ohio EPA and the other signatories. As terms used in this Environmental Covenant:

a. “Requisite parties” means i) the Director of Ohio EPA, ii) each person who signed the Environmental Covenant (unless the person waived in a signed record the right to consent or unless a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence), iii) each person holding a recorded interest in the Property, and iv) any other party pursuant to ORC § 5301.90 or other applicable law.

b. “Amendment” means any changes to the Environmental Covenant, including the activity and use limitations set forth herein, or the elimination of one or more activity and use limitations so long as there is at least one activity and use limitation remaining.

c. “Termination” means the elimination of all activity and use limitations set forth herein and all other obligations under this Environmental Covenant.

13. Severability. If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

14. Governing Law. This Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Ohio.

15. Recordation. Within thirty (30) days after the date of the final required signature, Owner shall file this Environmental Covenant for recording, in the same manner as a deed to the Property, with the [*name of County Recorder’s Office*].

16. Effective Date. The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded as a deed record for the Property with the [*name of County Recorder’s Office*].

17. Distribution of Environmental Covenant. Pursuant to ORC § 5301.83, Owner shall distribute a file- and date-stamped copy of the recorded Environmental Covenant to: Ohio EPA [, *include* *names of any Holder to the Environmental Covenant, if any, other than Owner*] and [*include the* *appropriate governmental entity for the property: City / County / Township*].

18. Notice. Unless otherwise notified in writing by a party under this Environmental Covenant or Ohio EPA, any document or communication required by this Environmental Covenant shall be submitted to:

As to Ohio EPA:

Ohio EPA – Central Office

Division of Environmental Response and Revitalization

50 West Town Street

Columbus, Ohio 43215

Attn.: DERR Records Management Officer, regarding[\_\_NFA\_\_\_]

 Or, send electronically to: records@epa.ohio.gov

And

Ohio EPA - [applicable district office]

[District office address]

Attn.: DERR Site Coordinator for [\_\_NFA\_\_\_]

As to Owner:

[Name of Owner]

[Address]

Attn.: [Name, title, or position]

[email address]

[phone]

[As to Holder:]

[name of Holder]

[Address]

Attn.: [Name, title, or position]

[email address]

[phone]

*[Remainder of page left intentionally blank]*

The undersigned represents and certifies that the undersigned is authorized to execute this Environmental Covenant.

**IT IS SO AGREED:**

**[OWNER NAME]**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Owner

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Printed Name and Title

State of \_\_\_\_\_\_\_\_\_\_\_\_ )

 ) ss:

County of \_\_\_\_\_\_\_\_\_\_ )

Before me, a notary public, in and for said county and state, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a duly authorized representative of the Owner, who acknowledged to me the execution of the foregoing instrument on behalf of the Owner.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

**[NON-OWNER HOLDER NAME]**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Holder

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Printed Name and Title

State of \_\_\_\_\_\_\_\_\_\_\_\_ )

 ) ss:

County of \_\_\_\_\_\_\_\_\_\_ )

Before me, a notary public, in and for said county and state, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a duly authorized representative of the Holder, who acknowledged to me the execution of the foregoing instrument on behalf of the Holder.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

**OHIO ENVIRONMENTAL PROTECTION AGENCY**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Laurie A. Stevenson, Director

State of Ohio )

) ss:

County of Franklin )

Before me, a notary public, in and for Franklin County, Ohio, personally appeared Laurie A. Stevenson, the Director of Ohio EPA, who acknowledged to me that she did execute the foregoing instrument on behalf of Ohio EPA.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

This instrument was prepared by: **[[10]](#footnote-10)**

[name of Owner’s legal counsel]

[firm/entity name]

[address]

[name of Ohio EPA’s legal counsel]

Ohio EPA-Legal Office

50 West Town Street

Columbus, OH 43215

*[Placeholder for Attachment cover pages, i.e.,* **Attachment A – Property legal description and survey plat; Attachment B – Survey plat depicting engineering control area / building occupancy limitation area / ABC Tract of the Property, etc.***]*

1. Ohio EPA designed this **VAP EC Template** **(October 2019 update)** for use by an attorney representing the Owner to prepare a “proposed environmental covenant” for the property for which a certified professional will submit an NFA letter and request for a covenant not to sue under Ohio’s Voluntary Action Program (VAP). See ORC 3746.10(C)(3) and OAC 3745-300-13(B)(5).

Before submission of the proposed EC to Ohio EPA, the legal counsel representing the Owner and the counsel of other parties with interests in the NFA letter property, such as a non-owner Volunteer that will be a Holder, should first review the proposed environmental covenant. **Although the certified professional should assist Owner’s legal counsel in development of the activity and use limitations, responsibility for the EC remains with the Owner in collaboration with Ohio EPA.** See <http://www.epa.ohio.gov/portals/30/vap/tgc/VA30000-14-003.pdf>. Please leave a 2- to 3-inch top margin on the first page for county use. Remove italics and delete all template footnotes prior to submitting the proposed EC to Ohio EPA. [↑](#footnote-ref-1)
2. If proposing to amend an existing recorded EC, adapt this template language to account for that EC and its recorded date and location. Include narrative that gives basic background on the reasons for the amendment. See OAC 3745-300-11(H), which provides a process under which certified professionals may issue and submit to Ohio EPA a request for remedy revision approval of a proposed amended EC. [↑](#footnote-ref-2)
3. This template presumes one EC will be used to restrict the NFA letter property. The term “Property” refers to the entire NFA letter property. To avoid confusion with NFA letter and VAP rule references, the term “Property” should not be used to explain only a portion of the NFA letter property. Retain a reference and legal description for the entire NFA letter property, including when more than one EC will be used to establish activity and use limitations for the Property collectively. Incorporate a new name for the EC-specific area, such as ABC parcel or XYZ tract of the Property. [↑](#footnote-ref-3)
4. Ohio EPA offers guidance on drafting the VAP activity and use limitations for inclusion in the proposed environmental covenant. The **VAP EC Guidance (October 2019 update)** is listed under the VAP tab on the Division of Environmental Response and Revitalization webpage, at: <http://epa.ohio.gov/portals/30/vap/docs/VAP_EC_Guidance.pdf>. [↑](#footnote-ref-4)
5. This sentence may be omitted when Owner is the sole Volunteer. [↑](#footnote-ref-5)
6. Insert language that references the associated O&M obligations when the Property use involves a limitation based on the “restricted residential land use category” under OAC 3745-300-08(C)(2). This language may be supplemented as needed to coordinate with the CME roles given by the O&M plan or agreement. [↑](#footnote-ref-6)
7. Insert the limitations appropriate for the Property. Each type of limitation must be considered on a Property-specific basis to determine which limitation or combination of limitations is suitable given the circumstances -- based on the applicable standards, the affected media and the potential exposures. See the Ohio EPA’s current EC guidance for common forms of VAP activity and use limitations. The guidance is listed under the VAP tab on the Division of Environmental Response and Revitalization webpage, at: <http://epa.ohio.gov/portals/30/vap/docs/VAP_EC_Guidance.pdf>. The types of limitations include but are not limited to: (a) **Land use limitation** (e.g., to limit human exposure to contamination in soils or other media), (b) **Ground water extraction or use prohibition** (e.g., to prevent exposure to contaminated ground water by prohibiting extraction or use of ground water) and (c) **Limitation on** **building occupancy – demonstration obligations** (e.g., to prevent exposure to volatile emissions to indoor air from contaminated media without first receiving Ohio EPA approval of an engineering control remedy or demonstrating no control is needed), (d) **Engineering control implementation** (e.g., to enable long term use of engineering controls, as needed for applicable standards compliance). [↑](#footnote-ref-7)
8. This limitation may be excluded when property use is commercial or industrial land use only and relies on no other institutional control or engineering control to comply with applicable standards. [↑](#footnote-ref-8)
9. If other interests or encumbrances on the Property conflict with the activity and use limitations set forth in this Environmental Covenant, add the following provision as a separate subparagraph:

To the extent that any other interests in or encumbrances on the Property conflict with the activity and use limitations set forth in this Environmental Covenant, the persons who own such interests or hold such encumbrances have agreed to subordinate such interests or encumbrances to the Environmental Covenant, pursuant to ORC § 5301.86, and the subordination agreement(s) (attached as [*Attachment #*] to this Environmental Covenant; [*or*] recorded at [*name of County Recorder’s Office*].) [↑](#footnote-ref-9)
10. As required by ORC § 317.111, identify the name the person who prepared this Environmental Covenant, i.e., both the Owner’s counsel and the Ohio EPA assigned attorney. [↑](#footnote-ref-10)