

Avoid the Void

or other unfortunate consequences under the VAP

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CP Coffee – January 2014



Benign beginning

- Draft the **use restriction** - specify **intended site uses**
- Establish under “environmental covenant”
- Apply in support of VAP “covenant not to sue”

Use restriction aka “institutional control”
“activity and use limitation”



Conducted as remedy

Ohio Revised Code 3746.05 says:

a remedy or remedial activity conducted under the VAP **may attain applicable standards through the use of use restrictions** (among other remedies)



Documented

3746.05 says use restrictions shall ensure the property is **used only for purposes that comply with applicable standards pertaining to the intended property use**, as the use is specified in the documents establishing the restrictions

Q: Say volunteers plan a new commerce park, what land uses might they want to include?



Expect void...

If property is put to a use that does not comply with its use restriction, the **covenant not to sue** is “hereby **declared to be void** on and after the date of the commencement of the noncomplying use.” (ORC 3746.05)

Q: Based on 3746.05’s wording, what circumstances would void a CNS?



Found in Franklin County

- Central Point Shopping Center (Columbus)



Central Point Shopping Center

- 2007 NFA Letter
- April 2008 CNS
- EC
 - Restricted to commercial/industrial land use (standard language)
 - Limited groundwater extraction and use
- June 2013 visual periodic inspection
- Retail space, and...
- Two educational facilities
 - Day Care
 - High School



Central Point: What Happened Next

- **Reviewed anticipated land uses in NFA Letter**
 - Addendum 4 anticipated proposed charter school, but carved that parcel out of the NFA Letter Property.
 - Commercial/industrial anticipated use.
- **Reviewed risk assessment** to see if modeled for school use
 - Not for remaining NFA Letter Property.
- **Confirmed parcels** to ensure the educational facilities observed in strip mall were, in fact, part of CNS Property.



Paper Trail: Notification of Voidance

- Notification of Voidance (August 2013):
 - CNS Voided
 - Suggested Meeting
- Attached Periodic Inspection Report



Stay Tuned....

- Meeting was held
- September 2013 TA requested
- Owner indicated will submit new NFA Letter



“Globe Lot” example

- 2000 NFA letter, GM site
- May 2002 CNS
- Various engineering controls + use restrictions
- Later in 2002 site sold...
- Buyer accepted GM’s O&M obligations
- COF funding; new site plan
- 2006 to 2008 active remedies, regrading
- In meantime, SWDO staff review annual O&M reports, etc.

But, back to
year 2000 →



High hopes?

Restriction requested:

No person shall in any way... disturb, impair, or interfere with

- (1) engineering control sewer system and **ground water extraction system**, or
- (2) continued and unimpeded **access to ... extraction system** by the party or parties, including their representatives, performing O&M activities

Q: What could go wrong with such an approach?



Inquired (cautioned)

- Ohio EPA reviewer questioned volunteer about its remedy approach:
“Given ORC 3746.05, consider whether GM needs to include sewer and ground water extraction systems as institutional controls to meet applicable standards under the VAP. Would they [would be] better handled as only engineering controls? ... The notes below identify some potential matters that may arise...”
- In the end, **deferred to volunteer’s approach**



Justified...known

- From O&M reports, SWDO staff learned of **extraction system problems**
- Reports indicated that during 2006 - 2008:
 - Extraction well inaccessible
 - Pump non-operational
 - MWs buried
- **DERR notice of CNS voidance**, timed for 2009



Lessons learned

- **Volunteers get to choose** remedies, yet...
 - **Better to not entangle** VAP use restrictions with engineering controls
 - **Continue to caution** volunteers about 3746.05 risks
- Protectiveness *plus* sustainability

Key roles of CPs, environmental consultants



Matters of compliance

What's the subject matter of the noncompliance?

- Is it the use restriction itself?
- Or, some other environmental covenant obligation?

* CNS voidance per **ORC 3746.05** applies to use restriction noncompliance



Not recorded (*yet...*)

Bonus topic #1:

Volunteer has not recorded the EC, nor the CNS... What's the problem?

- CNS not effective
- Use restrictions not established to comply with VAP applicable standards
- ORC 3746.12(B) prompts Director to send notice of noncompliance (with cure opportunity)



Oh O&M...

Bonus topic #2:

What about when noncompliance with an O&M obligation occurs?

- Does the situation amount to **noncompliance with a VAP applicable standard**?
- If yes, Ohio EPA applies ORC 3746.12(B) process

Questions?

