

Environmental Covenants:

Back by Popular Demand: Several Legal Updates and Minor Changes to the EC Template

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Environmental
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Overview

- This presentation will review:
 - Drafting activity and use limitations (“AULs”) language for voluntary actions
 - Related Legal Issues
 - What can still go wrong

Statutory Requirement

- Ohio Revised Code (“ORC”) 3746.10(C)(3)(b) requires that any institutional controls or use restrictions be developed in accordance with ORC Chapter 3746, the VAP Rules and are contained in a proposed Environmental Covenant (“EC”) that meets the requirements established in ORC 5301.82.

Environmental Covenant Defined

- ORC 3746.01(H), 5301.80(D): An “environmental covenant” means “a servitude [or **legal device** that creates an obligation that runs with the land] arising under an environmental response project [including VAP projects] that imposes [AULs] and that meets the requirements established in section 5301.82 ...”
- Ohio EPA’s EC Template for VAP satisfies the requirements of ORC Section 5301.82.

EC Statute & The Template

- There are limits to practical clean ups for brownfields
- EC is enforceable by Ohio EPA as a signatory
- Uses statutory language to make valid environmental AULs rather than relying on the courts interpreting common law

Other Format Requirements

- ORC 317.11 - Printed Signatory Names
- ORC 317.111 – Name of Preparer at end - including representative of governmental agency
- ORC 317.112 – Capable of legible reproduction including photo or micro-reproduction
- ORC 317.114 – Font size, margins, ink color

Why Use an EC?

- The EC is used in lieu of an unrestricted use clean up.
- May also be used in combination with Engineering Controls but not to impose engineering controls
- An EC is a legal document creating an enforceable obligation to current and future owners with respect to the use of the Property.
- Recorded as a Deed and adheres to the Property – runs with the land - unless properly modified.

ORC 5301.80 *et seq.* and ORC 317.111

- ORC 317.111 requires that recorded documents such as an EC include the name of the person who prepared the document.
- Because an EC is a legal document, the preparation of the EC by a non-attorney probably constitutes the unauthorized practice of law. Ohio EPA has added new guidance about the unauthorized practice of law issue.
- Please see Ohio EPA TGC VA3000.14.003 – Aug. 2014

Environmental Covenant is a Remedy for the VAP Property

- **The CP should not prepare the EC document.**
- **But...** Given that the recording of an EC is a remedy that the Property may need to demonstrate compliance with VAP applicable standards, the CP has an important role in helping the attorney to prepare the appropriate AULs as a remedy established by the EC document.

VAP EC Template Updating Again

- The Property Owner's attorney should prepare and review the EC for the VAP Property. List the Attorney's name at the end of the document and use our Template.
- Revised template also adds the name of the Ohio EPA Attorney assigned to the NFA review team as a "preparer" of the EC on behalf of the Ohio EPA Director – See ORC 317.111.

Why Care about ECs?

- *If the EC is determined to be invalid, the Property will probably not have a “valid remedy” that meets VAP applicable standards.*
- Updated template still refers to the prior EC guidance document for drafting AULs, but that guidance will be updated by Ohio EPA in the near future.

Work with the Attorney for the Property Owner & Ohio EPA

- There are several recent Supreme Court decisions on point that indicate the preparation property records similar to the EC is the practice of law.
- Ohio EPA's EC Template provides the property owner's attorney a proposed draft EC that will meet statutory requirements. Ohio EPA attorney will also review the EC text so that we can recommend that the Director sign.



Lawyers need the CP

- Need to craft the EC to be site-specific. The CP and counsel for the Owner and for Ohio EPA should work together to craft EC given the specific conditions at the Property and using the template and OEPA guidance.
- Volunteer and CP need to do the background homework (e.g., review the chain of title, Property ownership history, potential conflicting uses, holders, prior encumbrances) See OAC 3745-300-06(C)(1)

What Ohio EPA will Review:

- During the NFA Review, Ohio EPA's Legal Staff will typically review EC to verify:
- Property Address or location
- Adequate Legal Description – Issues with splits
- Boundary Map and/or Plat Map
- Auditor's Records – Parcel Numbers to locate
- Other ownership Interests
- Information regarding potential "Holders" not identified, such as tenants

EC is a legal document that is a Remedy

- CNS is conditioned on the recording of the EC. See ORC 3746.14(A)(3) and 5301.88(A).
- EC needs to be recorded for all ownership interests, either directly or by cross reference
- This may be handled differently by each County

Frequent Problems with the legal description

- The metes and bounds legal description in the deed gives one acreage number but other sources (Auditor's records) indicate another number for the same property.
- Consider if there was a road right of way transaction that was not accounted for.
- May need to resurvey the property.



Whose Property Is It?

- Important to accurately identify the Owner(s) of the NFA Property in the EC
- Multiple Owners and Parcels – Need to clearly identify each ownership interest and provide a map to reflect who owns what parcels
- Also need to accurately identify the contact person for the Owner in the Notice Provision

“Signatory Authority”

- If the Owner is an Limited Liability Partnership (LLP) or a Limited Liability Corporation (LLC), may need to state the source of the signatory’s authority – validity of imposing the AULs
- May be appropriate to add a paragraph before signature block to clarify authority

Example Signature Blocks

Cartoon Land Development, LLC

By: Looney Tunes Management Inc., Managing
Member

By _____
Wiley Coyote, President, pursuant
To Members Resolution of Owner



Another Example

18. Authority of Signatory. Owner certifies that Looney Tunes Management, Inc. is its Managing Member, and that Wiley Coyote is the President of said Managing Member and has been duly authorized to sign this Environmental Covenant on behalf of Owner, and said Managing Member.

More Examples

18. Authority of Signatory. Owner certifies that _____ is the President of Looney Tunes, LLC and has been duly authorized to sign this Environmental Covenant on behalf of the Owner.

EC Template says: “The undersigned represents and certifies that the undersigned is authorized to execute this Environmental Covenant.”

More Examples

- **LOONEY TUNES PARTNERSHIP**, an Ohio general partnership

By: BUNNY FAMILY LIMITED PARTNERSHIP, an Ohio limited partnership, a general partner

By: _____
Bugs Bunny, General Partner



Owner is a City or County

- The City may need the approval of city council, by resolution, to have the authorized representative sign the EC.
- The City Attorney may also need to approve the EC as to form, which is in addition to being a “preparer” and appears on the City’s signature page, not the Director’s signature page.
- County Owner may need resolution of the County Commissioners to authorize signature to the EC.

Multiple Owners

- Large plats of land may have multiple owners with separate ownership interests
- Need the legal descriptions for each ownership interest and for the entire VAP property
- May string parcels as long as clear and accurate
- Need a boundary map

Example for Multiple Owners

- Whereas, the NFA Property is described in Attachment A.
- Whereas, the NFA Property is owned by Porky Pig, Inc., Daffy Duck, LLC, and Foghorn Leghorn, Inc. Porky Pig, Inc. owns the portion of the NFA Property identified in Attachment B attached hereto and incorporated herein as if fully rewritten. Daffy Duck, LLC owns the portion of the NFA Property identified in Attachment C attached hereto and incorporated herein as if fully rewritten. Foghorn Leghorn, Inc. owns the portion of NFA Property identified in Attachment D attached hereto and incorporated herein as if fully rewritten.

Devil is in the Details

- A copy “of the Boundary Map showing the Property boundary and respective ownership interests”... or a copy of “the record plat map dated August 2007 as recorded with the County Recorder for the entire NFA Property” is Attachment E attached hereto and incorporated herein.
- Creating a legal obligation, and receiving a release of liability to be maintained in perpetuity, so we have to get this part right.

Do I hear a train coming?



Railroad property has previously been identified as problematic for VAP properties when needed within the NFA Property Boundary.

OAC 3745-300-10(E)(3)(a)(iii) has been added in the August 1, 2014 rules to allow the down gradient POC for ground water to include an established transportation corridor without including it in the defined NFA Property.

Transportation Corridor

- The Transportation Corridor rule is a down gradient point of compliance rule for demonstrating that ground water meets VAP applicable standards.
- Transportation Corridor is not part of the identified “NFA Property” so not adding its legal description to the NFA property, but will need a narrative and a map to support the use of this alternative point of compliance.

Clarity for future use limitations

- The Property Owner needs to carefully consider the AULs being established to preserve the CNS in the future. Template is changing the notice restatement section.
- This is a big concern for the restricted residential land use that is using an alternative POC and is also relying on the maintenance of an engineering control to meet the POC.



Potential Traps in the EC Restriction Text

- Does the current Owner/Volunteer/Public Entity understand the limitations on future use. Does the subsequent owner/developer. Consider restating the use limitations in detail in the O&M Plan, if engineering control is needed for POC.
- Commercial and Industrial Land use is no longer defined in the rule with examples, but may recommend putting examples in EC for clarity.
- See OAC 3745-300-08(C)(2)(b) and (c)

VOIDANCE?

- Consider that a non-conforming use of the Property after CNS issued will **Void** the CNS - ORC 3746.05 – we interpret this strictly.
- Errors in the EC may be fixable post CNS, but corrections could be hindered by complex sales agreements and entanglements of ownership.
- Corrections or Modifications to a recorded EC need to be recorded in the chain(s) of title.

Notary Issues

- Ohio Society of Notaries Elements & Guidance for Notarization –
- <http://ww.ohionotaries.org/1/notarization>
- Guideline 6 says the Notary is to check that the signer's physical description and the document signature to be sure it is consistent with their identification.

Notarized Signatures & Affidavits

- Affidavits need to specify the name of the person who is attesting (the Affiant), and what the person is specifically attesting to - that is attached are “true and accurate copies of *what??*”
- If there are blank spaces on the document being notarized, the signor must fill in or line through the blanks
- Notary is notarizing the signature, not the content

Questions?

Ohio EPA Attorneys are to work with you and the property owners and their counsel.

For more information:

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