

Environmental Restrictive Covenant

THIS ENVIRONMENTAL RESTRICTIVE COVENANT (“Covenant”) is made this _____ day of [*month*], 20____, by [*insert name and address of property owner*].

WHEREAS: Owner is the fee owner of certain real estate in the County of _____, Indiana, which is located at [*insert address of site*] and more particularly described in the attached Exhibit “A” (“Real Estate”), which is hereby incorporated and made a part hereof. This Real Estate was acquired by deed on _____, and recorded on _____, as Deed Record _____, in the Office of the Recorder of _____ County, Indiana. The Real Estate consists of approximately _____ acres and has also been identified by the county as parcel identification number[s] [*insert 18-digit parcel identification number(s) as described in 50 IAC 23-8-1*]. [*Optional: The Real Estate, to which the restrictions in this Covenant apply, is depicted on a map attached hereto as Exhibit ____.*]

WHEREAS: Corrective action was implemented in accordance with IC 13-23 and other applicable Indiana law as a result of a release of petroleum [*if applicable, insert* and hazardous waste *or* and hazardous substances] relating to the [*insert common name of cleanup site*]. The incident number assigned by the Indiana Department of Environmental Management (“Department” or “IDEM”) for the release is _____, and the relevant facility identification number is _____.

WHEREAS: Certain contaminants of concern (“COCs”) remain in the [*select appropriate media: soil, groundwater, or groundwater and soil*] of the Real Estate following completion of corrective action. The Department has determined that the COCs will not pose an unacceptable risk to human health at the remaining concentrations, provided that the land use restrictions contained herein are implemented [*if applicable, insert* and engineering controls maintained] to protect human health and the environment. These COCs are [*insert a list of the COCs remaining above residential land use criteria; if there are a large amount of COCs, consider the following language instead: The known COCs remaining are listed in Exhibit ____, which is attached hereto and incorporated herein.*]

WHEREAS: Environmental investigation reports and other related documents are hereby incorporated by reference and may be examined at the offices of the Department, which is located in the Indiana Government Center North building at 100 N. Senate Avenue, Indianapolis, Indiana. The documents may also be viewed electronically in the Department’s Virtual File Cabinet by accessing the Department’s Web Site (currently www.in.gov/idem/).

NOW THEREFORE, [*insert name of Owner*] subjects the Real Estate to the following restrictions and provisions, which shall be binding on the current Owner and all future Owners:

I. RESTRICTIONS

1. Restrictions. The Owner: [*Select from the list below those restrictions that are applicable to the site. Delete those that are not applicable and renumber list. Additional site specific restrictions may be appropriate based on site conditions, and are to be negotiated between the property owner and the Department.*]

- (a) Shall not use or allow the use of the Real Estate for residential purposes, including, but not limited to, daily child care facilities or educational facilities for children (e.g., daycare centers or K-12 schools).
- (b) Shall not use or allow the use or extraction of groundwater at the Real Estate for any purpose, including, but not limited to: human or animal consumption, gardening, industrial processes, or agriculture, except that groundwater may be extracted in conjunction with environmental investigation and/or remediation activities.
- (c) Shall not use the Real Estate for any agricultural use.

[Include the following soil disturbance restriction if COCs remain in soil at levels above residential land use criteria]

- (d) Shall restore soil disturbed as a result of excavation and construction activities in such a manner that the remaining contaminant concentrations do not present a threat to human health or the environment. This determination shall be made using the Department's Risk Integrated System of Closure ("RISC") Technical Guidance Document. Upon the Department's request, the Owner shall provide the Department written evidence (including sampling data) showing the excavated and restored area, and any other area affected by the excavation, does not represent such a threat. Contaminated soils that are excavated must be managed in accordance with all applicable federal and state laws; and disposal of such soils must also be done in accordance with all applicable federal and state laws.

[In addition to the preceding general soil disturbance restriction, additional soil disturbance restrictions may be appropriate for high levels of contamination and should be tailored accordingly. The following is an example restriction illustrating the case where COCs remain in soil at levels above construction worker criteria.]

- (e) Shall neither engage in nor allow excavation of soil [at depths greater than ____ feet] in the area identified via [*choose* GPS coordinates *or* legal survey, *as applicable*] as the "Construction Worker Restriction Area" on Exhibit _____, unless soil disturbance obligations listed in the preceding paragraph are followed. In addition, the Owner shall provide written notice to the Department in accordance with paragraph 13 below [*edit as necessary* at least ____ days [before *or* after] the start of soil disturbance activities]. The owner, upon the Department's request, shall provide the Department evidence showing the excavated and restored area does not represent a threat to human health or the environment.

[Include the following if there is a potential future vapor intrusion threat at undeveloped or unoccupied sites; sites that are already occupied and have vapor intrusion issues should instead include the restriction below requiring operation and maintenance of an engineered control.]

- (f) Shall not construct or allow occupancy of a dwelling or work space on the Real Estate unless a vapor mitigation system is installed, operated, and maintained within the dwelling or work space. IDEM may waive this restriction in writing if the Owner has provided data and analysis demonstrating to IDEM's satisfaction that there is no unacceptable risk to human health via the vapor intrusion exposure pathway.

[Include if an active engineered control (vapor mitigation system, etc.) has been implemented at the site]

- (g) Shall operate and maintain the *[list engineered control, depicted in Exhibit ____]* so as to protect its functional integrity *[in accordance with insert title and date of the document containing operations and maintenance requirements]*. Owner shall notify the Department in writing at least fifteen (15) days in advance of conducting any construction or excavation work that may impact an engineered control, unless an emergency exists. Owner shall ensure that the integrity of the *[list the engineered control]* is restored immediately after disturbance by any construction or excavation work. Upon IDEM's request, the Owner shall provide written evidence showing the engineered control has been restored to its complete integrity.

[Include if pavement or a building serves as a passive engineered control or barrier]

- (h) Shall maintain the integrity of the existing asphalt pavement, which is depicted on Exhibit ____ via *[choose GPS coordinates or legal survey, as applicable]*; this asphalt area serves as an engineered barrier to prevent direct contact with the underlying soils and must not be excavated, removed, disturbed, demolished, or allowed to fall into disrepair.

[Include the following if groundwater monitoring is being conducted]

- (i) Shall prohibit any activity at the Real Estate that may interfere with the groundwater monitoring or well network.
- (j) *[Insert other site specific restriction(s) here.]*

II. GENERAL PROVISIONS

2. Restrictions to Run with the Land. The restrictions and other requirements described in this Covenant shall run with the land and be binding upon, and inure to the benefit of the Owner of the Real Estate and the Owner's successors, assignees, heirs and lessees and their authorized agents, employees, contractors, representatives, agents, lessees, licensees, invitees, guests, or persons acting under their direction or control (hereinafter "Related Parties") and shall continue as a servitude running in perpetuity with the Real Estate. No transfer, mortgage, lease, license, easement, or other conveyance of any interest in or right to occupancy in all or any part of the Real Estate by any person shall

affect the restrictions set forth herein. This Covenant is imposed upon the entire Real Estate unless expressly stated as applicable only to a specific portion thereof.

3. Binding upon Future Owners. By taking title to an interest in or occupancy of the Real Estate, any subsequent Owner or Related Party agrees to comply with all of the restrictions set forth in paragraph 1 above and with all other terms of this Covenant.
4. Access for Department. The Owner shall grant to the Department and its designated representatives the right to enter upon the Real Estate at reasonable times for the purpose of monitoring compliance with this Covenant and ensuring its protectiveness; this right includes the right to take samples and inspect records
5. Written Notice of the Presence of Contamination. Owner agrees to include in any instrument conveying any interest in any portion of the Real Estate, including but not limited to deeds, leases and subleases (excluding mortgages, liens, similar financing interests, and other non-possessory encumbrances), the following notice provision (with blanks to be filled in):

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTIVE COVENANT, DATED _____ 20__, RECORDED IN THE OFFICE OF THE RECORDER OF _____ COUNTY ON _____, 20__, INSTRUMENT NUMBER (or other identifying reference) _____ IN FAVOR OF AND ENFORCEABLE BY THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT.

5. Notice to Department of the Conveyance of Property. Owner agrees to provide notice to the Department of any conveyance (voluntary or involuntary) of any ownership interest in the Real Estate (excluding mortgages, liens, similar financing interests, and other non-possessory encumbrances). Owner must provide the Department with the notice within thirty (30) days of the conveyance and: (a) include a certified copy of the instrument conveying any interest in any portion of the Real Estate, and (b) if it has been recorded, its recording reference, and (c) the name and business address of the transferee.
6. Indiana Law. This Covenant shall be governed by, and shall be construed and enforced according to, the laws of the State of Indiana.

III. ENFORCEMENT

7. Enforcement. Pursuant to IC 13-14-2-6 and other applicable law, the Department may proceed in court by appropriate action to enforce this Covenant. Damages alone are insufficient to compensate IDEM if any owner of the Real Estate or its Related Parties breach this Covenant or otherwise default hereunder. As a result, if any owner of the Real Estate, or any owner's Related Parties, breach this Covenant or otherwise default hereunder, IDEM shall have the right to request specific performance and/or immediate injunctive relief to enforce this Covenant in addition to any other remedies it may have at law or at equity. Owner agrees that the provisions of this Covenant are enforceable and

agrees not to challenge the provisions or the appropriate court's jurisdiction.

IV. TERM, MODIFICATION AND TERMINATION

- 8. Term. The restrictions shall apply until the Department determines that the contaminants of concern no longer present an unacceptable risk to the public health, safety, or welfare, or to the environment.
- 9. Modification and Termination. This Covenant shall not be amended, modified, or terminated without the Department's prior written approval. Within thirty (30) days of executing an amendment, modification, or termination of the Covenant, Owner shall record such amendment, modification, or termination with the Office of the Recorder of _____ County and within thirty (30) days after recording, provide a true copy of the recorded amendment, modification, or termination to the Department.

V. MISCELLANEOUS

- 10. Waiver. No failure on the part of the Department at any time to require performance by any person of any term of this Covenant shall be taken or held to be a waiver of such term or in any way affect the Department's right to enforce such term, and no waiver on the part of the Department of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof.
- 11. Conflict of and Compliance with Laws. If any provision of this Covenant is also the subject of any law or regulation established by any federal, state, or local government, the strictest standard or requirement shall apply. Compliance with this Covenant does not relieve the Owner of its obligation to comply with any other applicable laws.
- 12. Change in Law, Policy or Regulation. In no event shall this Covenant be rendered unenforceable if Indiana's laws, regulations, RISC guidelines, or remediation policies (including those concerning environmental restrictive covenants, or institutional or engineering controls) change as to form or content. All statutory references include any successor provisions.
- 13. Notices. Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other pursuant to this Covenant shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Owner: [*insert owner's name and address*]

_____, Notary Public

Residing in _____ County, _____

My Commission Expires:

This instrument prepared by:
[insert name and address]

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law:
[insert name and address]

EXHIBIT A

LEGAL DESCRIPTION OF REAL ESTATE

EXHIBIT ____

Instructions: *Attach separate sheets as necessary, labeled as ‘Exhibit B’, ‘Exhibit C’, etc. The following are some examples of additional Exhibits.*

- 1. A scaled map of the site (optional).*
- 2. List, description, or table of COCs (optional for non-CERCLIS and non-hazardous waste facilities).*
- 3. Scaled map(s) showing the location of engineered barriers or other engineering controls subject to operation and maintenance provisions (required if there are engineered barriers / controls on the site).*
- 4. Scaled map(s) showing the location of contamination above construction worker levels, identifying the area as the “Construction Worker Restriction Area” (required if concentrations remain above that level).*
- 5. Scaled map(s) showing the legal boundary (survey, GPS coordinates, etc.) of areas within a property (i.e. “carve outs”) subject to specific restrictions or obligations (required if such areas exist).*
- 6. CERCLIS and former hazardous waste facilities (a hazardous waste facility is defined in IC 13-11-2-100 to mean a plant or site where haz. waste is subjected to treatment, storage or disposal) are required by IC 13-25-4-24(c) to describe the identity, quantity, and location of hazardous substances remaining on the property. Two methods of relaying this information include the following exhibit types:*
 - a. Scaled map(s) identifying the location of contamination exceeding land use criteria for each contaminant of concern. For clarity purposes, it is recommended that analytical information (identification and quantity of hazardous substances) be showed separately in a table. GPS coordinates??*
 - b. A narrative summary of the identity, quantity, and location of hazardous substances remaining on the property.*