

Instructions and Template for a BUSTR Environmental Covenant

Attached is the current template for an Environmental Covenant (EC), as used by the Division of the State Fire Marshal, Bureau of Underground Storage Tank Regulations (BUSTR). An Environmental Covenant is a complex legal document created and governed by Ohio Statutes; therefore, BUSTR recommends the use of an Attorney to aid in drafting and implementing an Environmental Covenant under BUSTR corrective action rules.

APPLICABLE STATUTES

If the preparer of the Environmental Covenant is not familiar with the legal requirements of an Environmental Covenant, please review Ohio Revised Code ("ORC") § 5301.80 through § 5301.92. The State Fire Marshal is authorized to enter into an Environmental Covenant by ORC §3737.88 and §3737.882. The Environmental Covenant is to be filed with the appropriate County Recorder's office (county in which the UST property is located in) and is to be filed in a similar manner as a deed (in accordance with ORC § 317.08). In order for the document to be accepted for filing in a County Recorder's office, the document should conform to the requirements specified in ORC § 317.114 (eff. 7-1-09). These requirements specify size of paper, measurement of margins, and other elements the document must have in order to be accepted for filing. It is the responsibility of the preparer or submitter to draft the document with these specifications prior to review, approval and signature of the State Fire Marshal.

PROCEDURES

Before an Environmental Covenant is reviewed by legal counsel and subsequently signed by the Fire Marshal, you must first obtain PRIOR APPROVAL from the BUSTR Site Coordinator. You may want to discuss with the BUSTR Coordinator which activity and use limitations (land use, groundwater use) are needed for the specific site. Additionally, the Environmental Covenant option is expressed in rule during the Tier 2 Evaluation process. If you have questions as to when you should submit the Environmental Covenant, please contact the BUSTR Coordinator. **Per rule, the recorded Environmental Covenant should be submitted as part of a Tier 2 Evaluation Report. See OAC 1301:7-9-13(L)(7).**

After the BUSTR site coordinator reviews the Environmental Covenant, he or she will submit the document to Legal Counsel for review. If there are revisions needed to the Environmental Covenant draft, BUSTR will advise the

preparer. If revisions are required, the preparer may submit the revised Environmental Covenant to Legal Counsel or the BUSTR Site Coordinator.

Once approved, the State Fire Marshal or his designee will sign the Environmental Covenant. BUSTR will then return the document to the submitter/preparer for additional signatures, if needed, and for proper recording with the County Recorder's Office. **Submitter must return a TIME-STAMPED COPY of the Environmental Covenant from the RECORDER'S OFFICE to the BUSTR site coordinator.** A No Further Action (NFA) letter will NOT be issued before a time-stamped, recorded Environmental Covenant copy is received by BUSTR. For more questions regarding the approval process, please contact BUSTR.

TEMPLATE USAGE

The template contains the basic requirements that the Division of the State Fire Marshal and BUSTR requests be in an Environmental Covenant in order for it to be approved. It is strongly encouraged to discuss any substantive changes made to the template language with Legal Counsel or technical revisions with the BUSTR Coordinator *prior* to submission. Substantive changes made to the Environmental Covenant template may result in denial.

Please note the *blue italicized segments* in the attached template. These italicized sentences or phrases are either instructions for the preparer to follow OR sections that need modified to reflect site specific data. **Please alter or remove, if appropriate, ALL of the italicized portions before submitting the final draft.** To further demonstrate this, an example of a finished Environmental Covenant is also available.

Note: Use of the language in the template does not guarantee that the Fire Marshal will approve the use of an Environmental Covenant or that the property relating to the BUSTR release complies with BUSTR's rules or applicable standards.

(PLEASE REMOVE ALL INSTRUCTION PAGES BEFORE
SUBMITTING FINAL ENVIRONMENTAL COVENANT DRAFT)

(Note: Per ORC § 317.114, the first page is required to have a 3 inch top margin and subsequent pages to have a 1½ inch top margin)

**To be recorded with Deed Records in accordance with ORC § 317.08
Format of document to conform to requirements of ORC § 317.114**

Environmental Covenant

This Environmental Covenant is entered into by _____ (“**Owner**”) *[list all Owners of the Property]*, the State Fire Marshal of Ohio, *[add other “Holders”**, if any]* pursuant to Ohio Revised Code (“ORC”) § 5301.80 to 5301.92 for the purpose of subjecting the Property to the activity and use limitations set forth herein.

*(**Note: Additional parties, without an interest in the property, may be added to the covenant and will be considered an additional “Holder” to the covenant. This is useful especially in cases where the Responsible Party is not the property owner OR parties wish to include a lessee of the property and/or the operator of the Underground Storage Tanks.)*

Preparer, TYPE in the following site-appropriate background information here:

- 1. Site Description:** *Identify the “site” or “facility.” (Type in the Name and Facility Number)*
- 2. Environmental Project Description:** *Describe the “environmental response project,” which is “the work performed for environmental assessment and/or remediation of the property (corrective actions) conducted pursuant to Ohio Revised Code 3737.88 and 3737.882. (Questions on this requirement, See ORC § 5301.80(E)(1)(e))*
- 3. Nature of Contamination:** *Describe the nature of the contamination on or underlying the property and its remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination. (Questions on this requirement, See ORC § 5301.82(B)(2)) **The description should not be simply a recitation as to the various reports received.***
- 4. Administrative Records:** *Identify the agency and location of the administrative record for the project. (Questions on this requirement, See ORC § 5301.82(A)(8))*

Please insert the following language:

All administrative records regarding the petroleum release and corrective action process, pursuant to Chapter 3737 of the Ohio Revised Code, that occurred at the Property that is the subject of this Environmental Covenant may be obtained through a public records request by requesting information on [Type in Name of Facility and BUSTR Release Number]:

Bureau of Underground Storage Tank Regulations
Division of State Fire Marshal
Attention: Public Information Clerk
8895 East Main Street
Reynoldsburg, OH 43068

NOW THEREFORE, the Owner(s) *(List all the Owners of the Property and add other "Holders," if any)* **and the State Fire Marshal of Ohio agree to the following:**

1. Environmental Covenant. This instrument is an environmental covenant developed and executed pursuant to ORC §§ 5301.80 to 5301.92.
2. Description of Property. This Environmental Covenant concerns *[choose either: an approximately _____ acre tract of real property OR real property, Parcel Number(s)_____]* owned by _____, located at _____, _____, _____, in _____ County, Ohio, and more particularly described in **Exhibit "A"** attached hereto and hereby incorporated by reference herein ("**Property**").

*(Note: For purposes of this Environmental Covenant, the Subject Property shall be further defined in Exhibit "A", which shall contain a sufficient Legal Description of Subject Property i.e. in metes and bounds. Exhibit "A" must be attached with the Environmental Covenant draft in order for it to be approved. **BUSTR recommends attaching the most recent deed for the property as Exhibit "A" in order to expedite review by BUSTR of ownership, legal description, etc.)***

3. Owner(s). _____ ("**Owner**") *(Choose either... "who resides" OR "which is located")* at _____ (Address) _____, _____ (City) _____, _____ (State) _____ is the owner of the Property.
4. Holder(s). The Owner(s), whose address(es) *[is/are]* listed above and *[if there are additional holders such as different responsible parties, then list Holders' names and addresses]* are the ("**Holders**") of this Environmental Covenant.

5. Activity and Use Restrictions. As part of the corrective action at the Subject Property and in consideration for the State Fire Marshal's forbearance to require unrestricted land use for the Subject Property and to issue a no further action status, Owner hereby imposes and agrees to comply with the following activity and use limitations:

*[Preparer, insert the limitations appropriate for the Property. Several limitations may be appropriate. Each type of limitation must be **considered on a site-specific basis and with the pre-approval of the BUSTR Coordinator** to determine which limitation or combination of limitations is suitable for the particular circumstances of the site or facility, based on the nature of contamination, the affected media and the potential exposures. Limitations generally must include the ENTIRE facility/property. The types of limitations include:]*

Prohibition Against Extraction of Groundwater. As a portion of the remedy under the State Fire Marshal's Bureau of Underground Storage Tank Regulations ("BUSTR") program to protect against exposure to petroleum in groundwater located at or underlying the Property described herein, no person shall extract the groundwater located at or underlying the Property or any portion thereof for any purpose, potable or otherwise, except for groundwater investigation or remediation.

Land Use Restriction. As a portion of the remedy under the State Fire Marshal's Bureau of Underground Storage Tank Regulations ("BUSTR") program to protect against exposure to petroleum on and underlying the Property described herein, the Property and any portion thereof is hereby restricted to Non-Residential Use only, as that term is defined in Ohio Administrative Code ("OAC") 1301:7-9-13(C)(18). (effective September 1, 2017). See Ohio Administrative Code ("OAC") 1301:7-9-13(C)(27) for the definition of Residential Use (effective September 1, 2017).

Prohibition against Basements. As a portion of the remedy under the State Fire Marshal's Bureau of Underground Storage Tank Regulations ("BUSTR") program to protect against exposure to petroleum on and underlying the Property described herein, no basement or other permanent subsurface or underground structure designed for routine human occupancy shall be constructed at the property.

6. Running with the Land. This Environmental Covenant shall be binding upon the Owner and 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, mortgagees, easement holders, and/or lessees.

7. Compliance Enforcement. Compliance with this Environmental Covenant may be enforced pursuant to ORC § 5301.91. Failure to timely enforce compliance with

this Environmental Covenant or the 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 any non-compliance. Nothing in this Environmental Covenant shall restrict the Ohio State Fire Marshal from exercising any authority under applicable law.

8. Rights of Access. Owner(s) hereby grants to State Fire Marshal, its agents, contractors, and employees as well as the *[LIST applicable local units of government including County and City, Township, or Village], and [add additional "Holders", if any]*, the right of access to the Property for implementation or enforcement of this Environmental Covenant. *(Questions on this requirement, See ORC §§ 5301.82(A)(6) and 5301.91(A))*

9. 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 provide the recorded location of this Environmental Covenant. The notice shall be substantially in the following form:

"THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL COVENANT, DATED , 20___, RECORDED IN THE DEED OR OFFICIAL RECORDS OF THE _____ COUNTY RECORDER ON _____, 20___, IN [DOCUMENT _____, or BOOK____, PAGE ____]. THE ENVIRONMENTAL COVENANT CONTAINS THE FOLLOWING ACTIVITY AND USE LIMITATIONS:
... [insert language]"

(NOTE: Preparer, unless you elect to, you do not need to reiterate all of the specific activity or use restrictions to this portion. FUTURE document preparers; however, must reinsert the activity and use limitations exactly as they appear in paragraph 5 of this Environmental Covenant to any subsequent conveyances)

Owner, or its assigns or successors in interest (including any Transferee who conveys the Property) shall notify the State Fire Marshal *[and any "Holders" other than the Owner]* within thirty (30) days after each conveyance of an interest in any portion of the Property. The notice shall include the name, address, and telephone number of the Transferee who acquires the Property, a copy of the deed or other documentation evidencing the conveyance, and a survey map that shows the boundaries of the property being transferred.

10. Compliance Reporting. Owner(s) or any Transferee shall submit to the State Fire Marshal, every five (5) years, written documentation verifying that the activity and use limitations remain in place and are being complied with. The first five (5) year period shall commence from the Effective Date as defined in this Environmental Covenant. (See Paragraph 17)

11. Non-complying Use. If the Property or any portion of the Property is put to a use that does not comply with this Environmental Covenant, then the No Further

Action (NFA) status issued for the Property by the State Fire Marshal, pursuant to Chapter 3737 of the Ohio Revised Code and the regulations promulgated thereunder, is void on and after the date of the commencement of such non-complying use.

12. Representations and Warranties. Owner(s) hereby represents and warrants to the other signatories hereto that 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; that the Owner holds fee simple title which is free, clear and unencumbered; that the Owner has identified all other parties that hold any interest (e.g., encumbrance) in the Property and notified such parties of the Owner's intention to enter into this Environmental Covenant; that 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 which Owner may be bound or affected.

13. Amendment or Termination. This Environmental Covenant may be amended or terminated by consent of all of the following: the Owner or a Transferee; *[other "Holders," if any;]* and the State Fire Marshal,¹ pursuant to ORC § 5301.90 and other applicable law. The term, "Amendment," as used in this Environmental Covenant, shall mean 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 when there is at least one limitation remaining. The term, "Termination," as used in this Environmental Covenant, shall mean the elimination of all activity and use limitations set forth herein and all other obligations under this Environmental Covenant.

This Environmental Covenant may be amended or terminated only by a written instrument duly executed by the Ohio State Fire Marshal and the Owner or Transferee *[and other "Holders," if any]* of the Property or portion thereof, as applicable. Within thirty (30) days of signature by all requisite parties on any amendment or termination of this Environmental Covenant, the Owner or Transferee shall file such instrument for recording with the *(Insert Name of County)* County Recorder's Office, and shall provide a file- and date-stamped copy of the recorded instrument to State Fire Marshal.

14. 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.

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

¹ See ORC § 5301.82 (B) (3), which allow for "limitations on amendment or termination."

16. Recordation. Within **thirty (30) days** after the date of the final required signature upon this Environmental Covenant, Owner shall file this Environmental Covenant for recording, in the same manner as a deed to the Property, with the (Insert Name of County) County Recorder's Office.

17. 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 (Insert Name of County) County Recorder.

18. Distribution of Environmental Covenant. The Owner shall distribute a file- and date stamped copy of the recorded Environmental Covenant to: State Fire Marshal; the _____, *[must send a copy to the local units of government including **County and City, Township, Village**];* _____ *[must insert each person who signed the Environmental Covenant such as other holders]* and _____ *[must insert all parties **holding a recorded interest in the Property such as a lessee, etc.**].* *(Per ORC § 5301.83, State Fire Marshal or BUSTR may request other person(s) or parties to be sent a copy)*

19. Notice. Any document or communication required by this Environmental Covenant shall be submitted to:

Bureau of Underground Storage Tank Regulations ("BUSTR")
Division of State Fire Marshal
8895 East Main Street
Reynoldsburg, OH 43068

The Undersigned Owner (or) Representative of the Owner *(if the owner is a corporation) [and other "Holders," if any]* represent[s] and certif[y/ies] that *[he/she/they] [is/are]* authorized to execute this Environmental Covenant.

IT IS SO AGREED:

[INSERT NAME OF OWNER(S)]

Signature of *(Type in Name of Owner or Owner Representative)*

Print Name and Title

Date

For Notary to complete the following portion:

1. FOR SIGNATURE(S) OF A CORPORATION REPRESENTATIVE, USE...

State of Ohio :
County of _____ : SS

Before me, a notary public, in and for said county and state, personally appeared _____, a duly authorized representative of _____, who acknowledged to me that [he/she] did execute the foregoing instrument on behalf of _____.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this day of _____, 20__ .

Affix Seal Here

Signature of Notary Public

Commission Expires

or

2. FOR SIGNATURES OF INDIVIDUALS, USE...

State of Ohio :
County of _____ :

Before me, a notary public, in and for said county and state, personally appeared _____, the Property Owner, who acknowledged to me that [he/she] did execute the foregoing instrument on [his/her] behalf.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this day of _____, 20__ .

Affix Seal Here

Signature of Notary Public

Commission Expires

STATE FIRE MARSHAL OF OHIO

(Signature) xxxxxx, State Fire Marshal of Ohio

Date

[Preparer, please make sure you have inserted the name of the CURRENT State Fire Marshal or his designee. To obtain the name of the current State Fire Marshal, you may visit our website at <http://www.com.ohio.gov/fire/> or call us at 614-752-7938. Remove this paragraph from the final submitted copy.]

SFM Notary to complete the following portion:

State of Ohio :

:

County of Licking :

Before me, being a notary public, in and for said county and state, did personally observe the appearance of xxxxxxxx, State Fire Marshal of Ohio, who acknowledged to me that he did execute the foregoing instrument on behalf of the State of Ohio, Department of the State Fire Marshal, Bureau of Underground Storage Tank Regulations (BUSTR).

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ day of _____, 20_____.

Affix Seal Here

Signature of Notary Public

Commission Expires

(ONLY IF APPLICABLE, ADD THE FOLLOWING)

[Insert Name of Additional Holder(s), if Required]

Signature of ***[Insert Name of Holder]***

Print Name and Title

Date

State of _____ :

County of _____ :

Before me, a notary public, in and for said county and state, personally appeared a duly authorized representative of _____, who acknowledged to me that *[he/she]* did execute the foregoing instrument on behalf of _____.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ day of _____, 20 _____ .

Affix Seal Here

Signature of Notary Public

Commission Expires

Document prepared by:

Insert Preparer's Information

PLEASE INCLUDE EXHIBIT "A" WITH YOUR ENVIRONMENTAL COVENANT DRAFT SUBMISSION. (The Covenant will NOT be approved if Exhibit " A" is missing or inadequate.

ATTACH EXHIBIT(S) AFTER THE SIGNATURE PAGES.