**Environmental Restrictive Covenant**

THIS ENVIRONMENTAL RESTRICTIVE COVENANT (“Covenant”) is made this \_\_\_\_\_\_ day of [*month*], 20\_\_\_, by [*insert name and address of property**owner*] (together with all successors and assignees, collectively (“Owner”).

WHEREAS: Owner is the fee owner of certain real estate in the County of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Indiana, which is located at [*insert address of site*] andmore particularly described in the attached Exhibit “A” (“Real Estate”), which is hereby incorporated and made a part hereof. ThisReal 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 andhas 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 this Covenant applies, is depicted on a map attached hereto as Exhibit \_\_\_\_.]

WHEREAS: [*insert name of owner or name and address of VRP applicant, if different*] entered into Indiana’s Voluntary Remediation Program (“VRP”) to address releases of hazardous substances and/or petroleum (“contaminants of concern”) relating to the Real Estate. The Indiana Department of Environmental Management (“IDEM” or the “Department”) assigned the project number \_\_\_\_\_\_\_\_\_. A remediation work plan was prepared in accordance with IC 13-25-5, which was approved by the Department on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

WHEREAS: IDEM approved the remediation work plan, which allows certain contaminants of concern to remain in the [*select appropriate media:* soil, groundwater, or groundwater and soil], provided that certain land use restrictions are implemented [*if applicable, insert* and engineering controls maintained] to protect human health. The remaining contaminants of concern are listed in Exhibit *\_\_\_\_*, which is attached hereto and incorporated herein.

WHEREAS: The remediation work plan and completion report 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/](http://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.*]

1. 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).
2. 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.
3. 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*]

1. 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 current risk based guidance.Upon the Department’s request, the Owner shall provide the Departmentwritten 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.*]

1. 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 the attached Exhibit \_\_\_\_\_ (which is incorporated herein), unless the 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 14 below [*edit as necessary* at least \_\_\_\_ days [before *or* after] the start of soil disturbance activities]. The owner, upon the Department’srequest, 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.*]

1. 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 (e.g., vapor mitigation system, etc.) has been implemented at the site*]

1. 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, theOwner 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 and modify as appropriate*]

1. Shallmaintain the integrity of the existing [*insert* asphalt pavement or building*, as appropriate*], 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*]

1. Shallprohibit any activity at the Real Estate that may interfere with the groundwater monitoring or well network.
2. [*Insert other site specific restriction(s) here.*]

II. GENERAL PROVISIONS

1. 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 andtheir 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.
2. 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.
3. 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 rightincludes the right to take samples and inspect records.
4. 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.**

6. Notice to Department of the Conveyance of Property. Owner agrees to provide notice to the Department ofany 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 theDepartment 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; (b)if it has been recorded, its recording reference; and (c)the name and business address of the transferee.

7. 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

8. Enforcement. Pursuant to IC 13-14-2-6and 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

9. 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.

10. 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 recordsuch amendment, modification, or termination with the Office of the Recorder of \_\_\_\_\_\_\_\_\_\_\_\_\_\_ County and within thirty (30) days after recording, providea true copy of the recorded amendment, modification, or termination to the Department.

V. MISCELLANEOUS

11. 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.

12. 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 complywith any other applicable laws.

13. Change in Law, Policy or Regulation. In no event shall this Covenant be rendered unenforceable if Indiana’s laws, regulations, guidance, 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.

14. 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*]

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

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

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

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

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

To Department:

IDEM, Office of Land Quality

100 N. Senate Avenue

IGCN 1101

Indianapolis, IN 46204-2251

Attn: Institutional Controls Group

An Owner may change its address or the individual to whose attention a notice is to be sent by giving written notice via certified mail.

15. Severability. If any portion of this Covenant or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portionsor termsof this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

16. Authority to Execute and Record. The undersigned personexecuting this Covenant represents that he or she is the current fee Owner of the Real Estate or is the authorized representative of the Owner, and further represents and certifiesthat he or she isduly authorized and fully empowered to execute and record, or have recorded,this Covenant.

Owner hereby attests to the accuracy of the statements in this document and all attachments.

IN WITNESS WHEREOF, ***[****Insert Owner’s Name****]*,** the said Owner of the Real Estate described above has caused this Environmental Restrictive Covenant to be executed on this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_.

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

***[****Insert Owner’s Name****]***

STATE OF )

) SS:

COUNTY OF )

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ of the Owner, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, who acknowledged the execution of the foregoing instrument for and on behalf of said entity.

Witness my hand and Notarial Seal this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

, 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]**

EXECUTED AND DELIVERED in my presence: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [*Witness’s Signature*] Witness: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [*Witness’s Printed Name*] STATE OF INDIANA )  ) SS: COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  ) Before me, a Notary Public in and for said County and State, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [*Witness’s Name*], being known to me to be the person whose name is subscribed as a witness to the foregoing instrument, who, being duly sworn by me, deposes and says that the foregoing instrument was executed and delivered by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  [*Grantor’s  or other Signer’s Name*] in the above-named subscribing witness’s presence, and that the above-named subscribing witness is not a party to the transaction described in the foregoing instrument and will not receive any interest in or proceeds from the property that is the subject of the transaction. Witness my hand and Notarial Seal this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [*Notary Public’s Signature*] \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [*Notary Public’s’ Printed Name*] [*Include Notary Public’s commission number, seal, commission county of residence or employment, and commission expiration date.*]

**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 sites and non-hazardous waste facilities).*
3. *Scaled map(s) with GPS coordinates[[1]](#footnote-1) showing the location of engineered barriers or other engineering controls.*
4. *Scaled map(s) with GPS coordinates showing the location of contamination above construction worker levels, identifying the relevant area as the “Construction Worker Restriction Area” (requested if contaminant concentrations remain above that level).*
5. *Scaled map(s) showing the legal boundary (by 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 sites and current and former hazardous waste facilities (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. (Note: CERCLIS sites and hazardous waste facilities enrolled in the VRP are not exempt from the above requirements.) Two methods of relaying this information include the following exhibit types:*
   1. *Scaled map(s) identifying the location of contamination exceeding residential land use criteria for each contaminant of concern. For clarity purposes, it is recommended that analytical information (identification and quantity of hazardous substances) be shown separately in a table.*
   2. *A narrative summary of the identity, quantity, and location of hazardous substances remaining on the property.*

1. The presence of any of the following will likely necessitate the collection of GPS data: engineered barriers or controls; a restriction that applies to only a portion of the site; and areas labeled ‘construction worker restriction area.’ GPS data should be collected with a mapping or survey-grade GPS receiver, and data deliverable information should be submitted in accordance with the document *IDEM Office of Land Quality Spatial Data Collection Standards*, which is available on IDEM’s Website. [↑](#footnote-ref-1)