
TITLE: VAP Environmental Covenants: Avoiding the Unauthorized Practice of Law

DATE EFFECTIVE: August 2014

HISTORY: New to the technical guidance compendium.

BACKGROUND: Environmental covenants often enable properties to meet applicable cleanup standards in support of a covenant not to sue under Ohio's Voluntary Action Program. Ohio's Environmental Covenants Act, ORC § 5301.80 *et seq.*, specifies the requirements of an environmental covenant. Ohio's recording statute, ORC § 317.111, requires that recorded documents such as environmental covenants include the name of the person who prepared the document. Below are Ohio EPA's answers to several frequently asked questions regarding the preparation of environmental covenants in the Voluntary Action Program (VAP).

RULE / AUTHORITY: ORC 317.111; 5301.80 *et seq.*

QUESTION 1: Does the preparation of an environmental covenant by a non-attorney, using Ohio EPA's template, constitute the unauthorized practice of law?

ANSWER: Yes, the preparation of an environmental covenant by a non-attorney, on behalf of others, using Ohio EPA's template, probably constitutes the unauthorized practice of law. The Supreme Court of Ohio has ruled that the preparation, on behalf of another person, of legal documents such as deeds, easements, and other property-related legal documents, constitutes the unauthorized practice of law if the person preparing the documents is not licensed to

practice law in Ohio.¹ Thus, when certified professionals, consultants, or other non-attorneys use Ohio EPA's template to prepare environmental covenants, they are probably engaging in the unauthorized practice of law.

QUESTION 2: What may a certified professional do re: the preparation of an environmental covenant, using Ohio EPA's template, to avoid the unauthorized practice of law?

ANSWER: A certified professional may assist a licensed attorney in the preparation of an environmental covenant. The activity and use limitations (§ 5 of Ohio EPA's template) are the "heart" of the environmental covenant. The activity and use limitations constitute a remedial activity; they are developed based on the condition of the property (soil and groundwater) the anticipated future land uses, and the complete exposure pathways to achieve VAP applicable standards. Thus, the certified professional should assist a licensed attorney in the development of the activity and use limitations for the proposed environmental covenant in support of a VAP no further action (NFA) letter. However, the responsibility for the preparation of the environmental covenant remains with the attorney representing the property owner, in collaboration with the attorney for Ohio EPA. Accordingly, the placeholder, "This instrument was prepared by," at the end of the document, should list the name and address of the attorney representing the property owner, if the property owner is represented by counsel, and include a placeholder for the name and address of the attorney for Ohio EPA. See ORC § 317.111.

¹ See *Disciplinary Counsel v. Doan*, 77 Ohio St. 3d 236, 237 (1997), *Toledo Bar Assn. v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St. 3d 356 (2003), *Ohio State Bar Assn. v. Newburn*, 119 Ohio St. 3d 96, 97 (2008), *Disciplinary Counsel v. Jones*, 138 Ohio St. 3d 330, 331 (2014).

QUESTION 3: What may a certified professional do re: the preparation of an environmental covenant, using Ohio EPA's template, if there is no attorney representing the property owner?

ANSWER: A template environmental covenant has been prepared by Ohio EPA attorneys to provide a format that complies with the requirements of ORC §§ 5301.80 – 5201.92. If a property owner decides to implement activity and use limitations as a remedy for a NFA letter property seeking a covenant not to sue, an Ohio EPA attorney will review the proposed environmental covenant. The Ohio EPA attorney may provide edits, comments or guidance regarding the proposed environmental covenant as part of Ohio EPA's NFA letter review. If the property owner does not have an attorney prepare the environmental covenant, the assigned Ohio EPA attorney will be listed as the preparer of the document for purposes of ORC § 317.111. However, the Ohio EPA attorney represents Ohio EPA, including the director as a signatory to the environmental covenant, and does not represent the property owner, the volunteer, or the certified professional.

Counsel for the Volunteer may also review the proposed environmental covenant prior to submission of the NFA letter and request for a covenant not to sue. But it is the property owner that must agree to the activity and use limitations, and thus sign and record the environmental covenant, not the Volunteer (unless the Volunteer is also the property owner). Therefore, separate legal counsel for the property owner is recommended.

OHIO EPA

CONTACT: For further information regarding this issue, please contact: Ohio EPA Legal Office, 50 West Town Street, Columbus, Ohio 43216, 614-644-3037