## Attachment 30: Sample Declaration of Restrictive Covenant tor Superfund Sites

This instrument prepared by:

COMPANY NAME

ADDRESS

**DECLARATION OF RESTRICTIVE COVENANTS**

This Declaration of Restrictive Covenants (hereinafter “Declaration”) is given by XXXX, a Florida corporation, (“Grantor”), having an address of XXX, XX County, Florida to the State of Florida Department of Environmental Protection (hereinafter “FDEP” or “Grantee”).

 **RECITALS**

A. **WHEREAS**, Grantor is the fee simple owner of a parcel of land situated in the county of XX County, State of Florida, more particularly described in Exhibit “A”attached hereto and made a part hereof (hereinafter the "Property");

B. **WHEREAS**, The Property subject to this restrictive covenant is a portion of the property known as the XXX Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, proposed for the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on May 11, 2000, at 65 Fed. Reg. 30482.

C. **WHEREAS**, in a Record of Decision dated XXX (the "ROD"), the EPA Region 4 Regional Administrator selected a "remedial action" for the Site.

D. **WHEREAS**, a remedial action selected pursuant to the EPA ROD will be performed on the Site.

E. **WHEREAS**, contaminants in excess of allowable concentrations for unrestricted use will remain at the Property after completion of the remedial action.

F. **WHEREAS**, it is the intent of the restrictions in this declaration to reduce or eliminate the risk of exposure of the contaminants to the environment and to users or occupants of the property and to reduce or eliminate the threat of migration of the contaminants.

G. **WHEREAS**, it is the intention of all parties that EPA is a third party beneficiary of said restrictions and said restrictions shall be enforceable by the EPA, FDEP, and their successor agencies.

H. **WHEREAS**, the parties hereto have agreed 1) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and 2) to grant an irrevocable right of access over the Property to the Grantee and its agents or representatives for purposes of implementing, facilitating and monitoring the remedial action; and

I. **WHEREAS**, Grantor deems its desirable and in the best interest of all present and future owners of the Property that the Property be held subject to certain restrictions and changes, that will run with the land, for the purpose of protecting human health and the environment, all of which are more particularly hereinafter set forth.

**NOW THEREFORE**, Grantor, on behalf of itself, its successors, its heirs, and assigns, in consideration of the recitals above, the terms of the Record of Decision, and other good and valuable consideration, the adequacy and receipt of which is hereby acknowledged, does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, which shall touch and concern and run with the title of the property, and does give, grant and convey to the Grantee, and its assigns, 1) an irrevocable use restriction and site access covenant of the nature and character, and for the purposes hereinafter set forth and 2), the perpetual right to enforce said covenants and use restrictions, with respect to the Property. Grantor further agrees as follows:

a. The foregoing recitals are true and correct and are incorporated herein by reference.

b. Grantor hereby imposes on the Property the following restrictions:

1. **Restrictions on use:** The following covenants, conditions, and restrictions apply to the use of the Property:

1. Contaminated groundwater shall not be used until State groundwater standards and the groundwater cleanup standards identified in the ROD are met.
2. There shall be no drilling for water conducted on the Property nor shall any wells, including monitoring wells, be installed on the Property unless pre-approved by FDEP and EPA. **[FDEP & EPA can add or delete well construction criteria on a site-specific basis at the Scoping Meeting]**
3. Attached as Exhibit B, and incorporated by reference herein, is a survey map identifying the size and location of existing stormwater swales, stormwater detention or retention facilities, and ditches on the Property. Such existing stormwater features shall not be altered, modified or expanded without prior approval from the FDEP. Additionally, there shall be no construction of new stormwater swales, stormwater detention or retention facilities or ditches on the Property without prior written approval from the FDEP.

[If there are no existing stormwater features on the Property, use the following language] There shall be no stormwater swales, stormwater detention or retention facilities, or ditches constructed on the Property unless previously approved by FDEP*.*

1. For any dewatering activities, a plan must be submitted and approved by FDEP to address and ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated.
2. The Property shall only be used for industrial purposes. There shall be no agricultural use of the land including forestry, fishing and mining; no hotels or lodging; no recreational uses including amusement parks, parks, camps, museums, zoos, or gardens; no residential uses, and no educational uses such as elementary and secondary schools, or day care services.  **[FDEP & EPA can add or delete restrictions on a site-specific basis at the Scoping Meeting**] These restrictions may only be modified pursuant to Paragraph 3 of this Declaration. If the Property is to be used other than for industrial purposes, FDEP may require additional response actions.
3. On-site engineering controls, including buildings, concrete slabs, and pavement on the Property, as identified in Exhibit B, shall be maintained. This restriction may only be modified pursuant to Paragraph 3 of this Declaration. Should future development require the disturbance of on-site engineering controls, additional response actions may be necessary. For any construction activities, a plan must be submitted and approved by FDEP and EPA to address and ensure the appropriate management of any contaminated soil that may be encountered.

2. **Irrevocable Covenant for Site Access**: Grantor hereby grants to the Grantee, its agents and representatives, an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of:

a) Implementing the response actions in the ROD;

b) Verifying any data or information submitted to EPA and Grantee;

c) Verifying that no action is being taken on the Property in violation of the terms of this instrument or of any federal or state environmental laws or regulations;

d) Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;

e) Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and

3. **Modification:** This Declaration shall not be modified, amended, or terminated without the written consent of FDEP or its successor agency. FDEP shall not consent to any such modification, amendment or termination without the written consent of EPA.

4. **(a) Reserved rights of Grantor:** Grantor hereby reserves unto itself, its successors, its heirs, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and covenants granted herein.

**(b) Reserved Rights of EPA:** Nothing in this document shall limit or otherwise affect EPA’s rights of entry and access or EPA’s or authority to take response actions under CERCLA, the NCP, or other federal law.

**(c) Reserved Rights of Grantee:** Nothing in this document shall limit or otherwise affect Grantee’s rights of entry and access or authority to act under state or federal law.

5. **Notice requirement:** Grantor agrees to include in any instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

**NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO A DECLARATION OF RESTRICTIVE AND AFFIRMATIVE COVENANTS, DATED\_\_\_\_\_\_\_\_\_\_\_\_\_, 200\_, RECORDED IN THE PUBLIC LAND RECORDS ON \_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_, IN BOOK \_\_\_\_\_\_\_, PAGE \_\_\_\_\_, IN FAVOR OF, AND ENFORCEABLE BY, THE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION.**

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantor must provide Grantee and EPA with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

6. **Administrative Jurisdiction:** FDEP or any successor state agency having administrative jurisdiction over the interests acquired by the State of Florida by this instrument is the Grantee. EPA is a third party beneficiary to the interests acquired by XXX.

7. **Enforcement:** The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. These restrictions may also be enforced in a court of competent jurisdiction by any other person, firm, corporation or governmental agency that is substantially benefited by this Declaration. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. It is expressly agreed that EPA is not the recipient of a real property interest but is a third party beneficiary of the Declaration of Restrictive Covenants, and as such, has the right of enforcement. Enforcement of the terms of this instrument shall be at the discretion of the entities listed above, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

8. **Damages:** Grantee shall be entitled to recover damages for violations of the terms of this instrument, or for any injury to the remedial action, to the public or to the environment protected by this instrument.

9. **Waiver of certain defenses:** Grantor hereby waives any defense of laches, estoppel, or prescription.

10. **Covenants:** Grantor hereby covenants to and with the Grantee, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on **Exhibit C** attached hereto.

11. **Notices:** Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, referencing the Site name and Site ID number and addressed as follows:

To Grantor: To Grantee:

 Program Administrator,

 Waste Cleanup Program

 FDEP M.S. 4505

 2600 Blair Stone Road

 Tallahassee, FL 32399

To EPA:

U.S. EPA, Region 4

Waste Management Division

Superfund Remedial and Technical Services Branch

Section Chief, Section D

61 Forsyth Street, SW

Atlanta, GA 30303

12. **Recording in Land Records:** Grantor shall record this Declaration of Restrictive and Affirmative Covenants in timely fashion in the Official Records of XX County, Florida, with no encumbrances other than those noted in Exhibit C, and shall rerecord it at any time Grantee may require to preserve its rights. Grantor shall pay all recording costs and taxes necessary to record this document in the public records.

13. **General provisions:**

a) Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are no applicable federal laws, by the law of the state where the Property is located.

b) Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

c) Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

d) Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

e) No Forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

f) Joint Obligation: If there are two or more parties identified as Grantor herein, the obligations imposed by this instrument upon them shall be joint and several.

g) Successors: The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are freely assignable, subject to the notice provisions hereof.

h) Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

i) Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

**TO HAVE AND TO HOLD** unto the State of Florida Department of Environmental Protection and its successors and assigns forever.

**IN WITNESS WHEREOF**, Grantor has caused this Agreement to be signed in its name.

Executed this \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

GRANTOR: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

President

XXX COMPANY.

Signed, sealed and delivered in the presence of:

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

Witness: Print Name Date

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

Witness: Print Name Date

**STATE OF FLORIDA**

**COUNTY OF \_\_\_\_\_\_\_\_\_\_\_**

On this \_\_\_ day of \_\_\_\_\_\_, 20\_\_, before me, the undersigned, a Notary Public in and for the State of Florida, duly commissioned and sworn, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, known to be the President of XXX Company, Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

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

Notary Public in and for the

State of Florida

My Commission Expires: \_\_\_\_\_\_\_\_\_\_

Approved as to form by the Florida Department of Environmental Protection, Office of General Counsel.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**STATE OF FLORIDA DEPARTMENT**

**OF ENVIRONMENTAL PROTECTION**

By: ­­­­­­­­­­­­­­­­­­­­­­­­­­­­­­­­­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signed, sealed and delivered in the presence of:

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

Witness: Print Name Date

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

Witness: Print Name Date

**STATE OF FLORIDA**

**COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_**

On this \_\_\_ day of \_\_\_\_\_\_, 20\_\_, before me, the undersigned, a Notary Public in and for the State of Florida, duly commissioned and sworn, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, known to be the Secretary of the Florida Department of Environmental Protection, the State Agency that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said Agency, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

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

Notary Public in and for the

State of Florida

My Commission Expires: \_\_\_\_\_\_\_\_\_\_.

Attachments: Exhibit A - Legal Description of the Property

 Exhibit B - Survey Map

Exhibit C - Existing Liens and Encumbrances on the Property

 (to be determined through/by title examination successor agencies)