



# **How To Use Institutional Controls for Contaminated Sites**

**Lawrence P. Schnapf**

***Institutional environmental controls are effective only if they are known and maintained.***

**FEDERAL AND STATE ENVIRONMENTAL** agencies are under increasing pressure to expedite the cleanup of contaminated sites so contaminated properties can be returned to productive use. A popular method of accelerating site cleanups is to place the site under institutional control.

Under a more traditional cleanup approach, health risks are dealt with by either treating contaminants on-site or removing them to a treatment or disposal facility. Institutional controls are an alternative to complete treatment or removal of contaminants. Institutional controls are legal controls that prevent the public

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from being exposed to unhealthy concentrations of contaminants. Institutional controls are often used in conjunction with engineering controls. Engineering controls are constructed barriers such as impermeable caps, dikes, trenches, leachate collection systems, treatment systems, and groundwater containment systems that physically separate people and environmental receptors from contact with contaminants. Because cleanups relying partially or wholly on institutional controls may not require groundwater treatment or may allow higher levels of residual contamination to remain in soils, cleanups using institutional controls may be initially more cost-effective and be completed much faster than the more comprehensive site cleanups.

However, unlike permanent remedies, land use controls need to be monitored to ensure their effectiveness. If an impermeable cap placed over a commercial site contaminated with heavy metals is allowed to deteriorate, workers and visitors to the site could become exposed to contaminated dust. Likewise, if utility lines have to be repaired and the excavation activities damage a vapor extraction system, occupants could be exposed to unhealthy levels of volatile organic compounds ("VOCs").

#### **TYPES OF INSTITUTIONAL CONTROLS •**

There are essentially two types of institutional controls: proprietary controls and government controls.

#### **Proprietary Controls**

Proprietary controls are private contractual mechanisms that are contained in a deed or other instruments used to transfer title to property. When required to be placed in a deed, a state may refer to the control as either a "deed notice" or "deed restrictions." When a separate instrument is used, it is often referred to as a "declaration of environmental restrictions" or a "declaration of environmental land use restriction." The following are examples of proprietary controls.

#### **Easements**

An affirmative easement grants the holder the right to use the land of another while a negative easement restricts lawful uses of land. If the property owner violates the easement, the holder of the easement may bring suit to restrain the owner.

#### **Covenants**

This is a promise to take or refrain from taking certain actions. For example, an affirmative covenant may be a promise by an owner to maintain a fence that surrounds a former hazardous waste disposal site. Alternatively, a negative covenant can be in the form of a promise not to use groundwater or conduct certain activities at a site. If the covenant "runs with the land," it can be enforced against subsequent landowners.

#### **Reversionary Interest**

This is a conditional right to future enjoyment of property that is presently owned or occupied by another person. If the condition is violated, the property is returned to the seller or its successors.

#### **Government Controls**

State and local governments can limit the use of property through planning and zoning maps, subdivision plats, building permits, siting restrictions and groundwater use restrictions in the form of well drilling prohibitions or well use permits. Additional government tools include statutory enforcement methods such as consent decrees, permits, and voluntary cleanup program ("VCP") agreements.

#### **Informational Controls**

Though not technically considered institutional controls, informational notices can be an effective mechanism for limiting exposure to contaminants. The purpose of these informational tools is to advise future owners and users of hazards existing at the property. These notices

do not impose affirmative obligations on owners of property but, instead, require that warnings of site hazards be conveyed to the public. Examples of such warnings may be deed notices, publishing legal notices in local newspapers and posting of warning signs at the property. However, because title searches may sometimes only search back to the most recently recorded warranty deed, a prospective purchaser may not be aware of an older deed notice. Moreover, tenants usually do not conduct title searches before taking possession of property.

To deal with this problem, some communities have also established registries of hazardous waste sites or geographic information systems ("GIS") that can inform the public about contaminated sites. Public health departments have long used advisories to try to warn the public about certain kinds of risks. However, the problem with these advisories is that they are not completely effective because some will not receive or understand the warnings, or choose to ignore them. Therefore, these informational tools are generally not effective as institutional controls. In addition, some states have enacted transfer laws that require sellers to notify prospective purchasers of the existence of contamination at property to be conveyed.

### **Enforcement**

Traditional enforcement actions may also be used to create institutional controls. Use restrictions or restrictive covenants may be embodied in enforcement documents such as administrative orders, consent decrees, no further action ("NFA") letters and covenants not to sue ("CNTS").

**STATE REQUIREMENTS FOR INSTITUTIONAL CONTROLS** • Although local governments are usually the appropriate entities to deal with land use issues, many states have enacted statutes that impose notice requirements on owners of contaminated property. These may be in the form of simple deed notice requirements similar to those imposed under the

Federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq. ("RCRA") for the closure of treatment, storage, and disposal facilities ("TSDFs"), may be part of state transfer statutes that require sellers to disclose environmental conditions of the property being conveyed to the prospective purchasers or may be an obligation imposed on landowners to advise occupiers and prospective purchasers of environmental conditions. Some states have also established hazardous waste site registry acts in which use restrictions are placed on properties that are placed on the registry.

However, institutional controls are used most frequently in the voluntary cleanup programs and brownfield programs to achieve risk-based cleanups. Most of the states have enacted VCP or brownfield programs that authorize the use of institutional controls but the circumstances under which they may be used vary from state-to-state. Some states allow them to be used to achieve cleanup standards while others limit them to circumstances where they may be used to maintain a desired cleanup standard.

### **SELECTING INSTITUTIONAL CONTROLS**

- The first important issue with which you will have to deal is the selection of the particular institutional control. Here, you need to examine the relevant statute—the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq. ("CERCLA"). Section 121 of CERCLA, 42 U.S.C. §9621 et seq., contains cleanup criteria that the EPA must consider when selecting a remedial action. The criteria do not explicitly refer to institutional controls. In addition, the section also expresses a preference for permanent on-site treatment of contaminants. Thus, it would appear at first glance that CERCLA would preclude remedial strategies employing institutional controls. However, section 121 also provides that cleanups should be cost-effective and that the cleanup criteria should be achieved to the "maximum extent practicable."

This language suggests that institutional controls may be appropriate when permanent treatment is not feasible. Indeed, in the preamble to the 1990 amendments to the NCP, the EPA did allow for the use of institutional controls when more permanent or active treatment would be impractical. 55 Fed. Reg. 8,666, 8,706 (March 8, 1990). The preamble to the 1990 amendments stated that institutional controls were a necessary supplement when some waste is left in place, as it is in most response actions. *Id.*

Unfortunately, the type of institutional controls that are to be used at a site are not determined early in the remedy selection process. In the past, the EPA site managers assumed that contaminated properties would be used for residential purposes when they developed exposure assumptions and exposure pathways during the performance of the remedial investigation ("RI"). These hypothetical exposure scenarios were then used to select remedial alternatives and preliminary remediation goals. However, under the EPA's 1995 land use directive, site managers may now identify "reasonably anticipated land uses."

Although the need for land use restrictions may be referred to generally in the proposed remedial plan that is reviewed during the public comment period, the specific institutional controls that may be required at a site are usually not identified until after the public participation period has been completed and a record of decision ("ROD") has been issued. Unless the ROD identifies likely institutional controls, the selection of institutional controls will likely take place during the consent decree negotiations between the EPA and potentially responsible parties ("PRPs") in which the public or the affected community have little or no opportunity to participate.

The appropriateness of the institutional controls will often be predicated on the "reasonably anticipated land uses" that were identified early in the remedial investigation stage. However, it is often very difficult to anticipate future land use. The EPA site managers are supposed to re-

view zoning maps, comprehensive plans, and development patterns when developing the reasonably anticipated land use.

The purpose of zoning is to separate incompatible types of land use by regulating the activities that can be conducted on properties as well as the size and location of structures on the property. Zoning systems are designed to have some flexibility to compensate for economic changes in a community. As a result, relying on zoning and land use planning may not be a reliable predictor of the future use, nor serve as an appropriate enforcement mechanism when long-term institutional controls is required since zoning plans can change over time. Property owners can request to have sites rezoned, seek zoning variances or challenge local zoning restrictions.

There can also be discrepancies between zoning ordinances and zoning maps. Moreover, the broad zoning classifications usually contained in zoning ordinances are not designed to protect the public from the types of risks that might be posed by former industrial properties.

For example, some jurisdictions use cumulative zoning where industrial classifications can allow more restrictive uses. In such jurisdictions, a property could be used for residential purposes even though the area is zoned for commercial uses. In addition, in some areas industrial/commercial classifications allow uses such as day care centers where vulnerable populations may be present. Thus, in many areas, zoning may not be effective as an institutional control.

This problem of identifying reliable land use assumptions and late selection of institutional controls is not limited to the CERCLA program. The procedure that the EPA has adopted for conducting RCRA corrective actions is modeled after the CERCLA remedy selection process and suffers from the same flaws.

When transferring military bases, the Department of Defense ("DOD") will consider a range of reasonably likely land uses during the

remedial selection process taking into account current land use, current zoning classification, unique property attributes and surrounding land uses. The DOD has indicated in the past that it expects the community and the local land use agency to take the environmental conditions of the property, the planned remedial actions and any technological or resource limitations into account when developing reuse plans for the property. Under many of the state brownfield or voluntary cleanup programs, the public is given limited opportunity to participate in the identification of land use assumptions and land use controls. However, some states require that the proposed land use restrictions be published in local newspapers to provide the public with an opportunity to comment. Some states go even further and mandate that various local government agencies be given notice of the restrictions as well.

The type of institutional control that is appropriate may depend on the type of contaminants, the nature of the contamination, and the expected longevity of the contamination. The type of control that may be appropriate for a site with petroleum-contaminated soil that may degrade in a few years may not be appropriate for a site with uranium tailings that will remain hazardous for thousands of years. Likewise, a site contaminated with relatively immobile metals may require different controls than a site with a groundwater plume of solvents or methyl tertiary butyl ether ("MTBE") which is rapidly migrating away from the site. Institutional controls that may effectively prevent on-site exposure may not work well for off-site contamination. For example, at some CERCLA sites, radioactive or metallic dust from tailings may have been carried by the wind far beyond the boundaries of the site or may have been used as fill for streets and buildings in the community.

**DRAFTING AND NEGOTIATING CONSIDERATIONS** • The EPA cannot create institutional controls under Federal law. As a result, although the obligation to create land use con-

trols may be contained in a Federal consent decree, the EPA must rely on actions under state property law or the general police power of local governments to create the controls. As discussed earlier, proprietary-type institutional controls require a conveyance of property.

When a property owner has entered into a settlement with the EPA, the agency will try to deal with this problem by requiring the landowner to convey an easement for the purpose of allowing the agency to enforce the terms of the settlement. State environmental agencies usually face the same constraints, although some state voluntary cleanup programs or brownfield programs have statutorily created easements in favor of the state environmental agency that run with the land.

States vary on how to establish institutional controls. Many states do not require the restriction to be recorded but simply provide that the restriction be contained in a NFA letter, certificate of completion or a remediation agreement. Some states will not require the filing of use restrictions in the chain of title if it can be shown that there are adequate local government controls that reliably can be used to minimize exposure to hazardous substances. For example, when a groundwater treatment system is to be installed, many states require permits before a drinking water well may be installed.

Although the language and process of recording restrictions on property will vary from state to state, the following are some general suggestions that you should consider when drafting an institutional control instrument.

### **When Are Institutional Controls Required?**

The presence of use restrictions can impair the value of property. Moreover, many lenders are uncomfortable securing loans with institutional controls. Thus, ask the state environmental agency to state the rationale for requiring institutional controls. States generally require institutional controls to prevent the risk of exposure to residual soil contamination.

### ***Groundwater Contamination Exceptions***

If the only concern at a site is groundwater contamination and the site is connected to public drinking water supplies, there may be no need for the imposition of institutional controls. Some states have established groundwater classification exception areas ("CEAs"). In issuing a CEA, the agency recognizes that groundwater is contaminated but will not be used for drinking purposes. Obtaining a CEA may eliminate the need of having a land use control placed on the property although in some states it will provide the owner with the opportunity to avoid performing remediation in exchange for a land use restriction.

### ***Review Use Assumptions***

Also, it is important to review the use assumptions that the agency relied upon for selecting the remedial action. For example, the agency might request a land use restriction because the site might be capable of a wide range of uses but, in reality, the site might only be developable as a commercial property.

### ***Adequate Local Governmental Controls***

Some states will not require the filing of use restrictions in the chain of title if it can be shown that there are adequate local government controls that can reliably be used to minimize exposure to hazardous substances. This will probably be most useful when dealing with contaminated groundwater although local zoning prohibiting residential development could also eliminate the need to file an instrument.

If the primary concern of the state is that subsequent landowners or users of the property be aware of the contamination or that local residents be aware of groundwater contamination, it may be possible to use a deed notice and general information disclosure in lieu of filing an institutional control.

### ***What Instrument To Use***

Some states have developed forms with statutory-specific language that cannot be modi-

fied. Although some states require that a notice be placed in the deed to the property, others simply require that the owner of the property record a restrictive easement or covenant acceptable to the environmental agency. Lawyers should draft the document so it can stand alone should it become separated from the deed and other relevant documents.

Inquire if the filing of use restrictions under a brownfield or VCP cleanup obviates the need to file deed notices under other state statutes. Some statutes expressly state that volunteers or prospective purchasers of brownfields that comply with the recording obligations do not have to comply with other notice requirements.

### ***Drafting the Use Restrictions***

The instrument should contain a specific recitation of the work that has been performed at the site, describe the engineering controls that will remain at the site, and their specific location, the specific uses that are to be prohibited as well as permitted, the specific remediation goals that need to be achieved for the restrictions to be lifted (e.g., groundwater contaminant concentrations), and the instrument that will be used to terminate the restrictions.

Even in states where specific forms have been prepared or the instrument to be recorded is a decisional document like a no further action letter, there will be opportunity to review and revise the language creating the use restrictions. The language should track that contained in the ROD or other state decisional document. If only portions of the property are subject to use restrictions, the instrument should clearly limit the restrictions to those affected portions of site. Although specific language requirements vary with state law, it would be advisable to insert language that the use restrictions shall "run with the land" so the use restrictions can be enforced against future owners and occupiers of the property.

Common use restrictions that may be used and enforced by institutional controls include:

- *Use*—Property may not be used for residential purposes or for child daycare, hospitals, or schools;
- *Groundwater*—Ground water at the property shall not be used for drinking purposes; no use of Groundwater for any purpose from Existing wells; prohibit installation of new wells or removal of seals on closed wells; prohibit use of groundwater for irrigation, watering livestock;
- *Surface water*—Limiting surface water intakes or recreational uses;
- *Disturbances*—Soil at the property shall not be disturbed in any manner including without limitation drilling or excavation; restrictions on depth of excavations, prohibiting or requiring for disturbance of vegetation, or prohibit disturbance of a cap;
- *Construction*—No building shall be constructed on the property, no structures with basements;
- *Remedial Actions*—Integrity of monitoring or treatment wells must be maintained; no action shall be taken, allowed, suffered, or omitted if that action or omission is reasonably likely create a risk of migration of pollutants or a potential hazard to human health or the environment or result in a disturbance of the structural integrity of any engineering controls designed or use at the property to contain pollutants or limit human exposure to pollutants.

### Drafting the Restrictive Covenants or Easements

Since there must usually be a conveyance to establish an enforceable property right, many states require that the property owner grant a right of access and an environmental easement to the state environmental agency. Carefully review the purposes for which the easement or covenants have been granted to make sure that they are not too broad. The right of access and the covenant or easement should allow the state to have access to the site upon reasonable notice and at reasonable times to ensure that the use restrictions are being complied with and to en-

sure integrity of the engineering controls. These controls should be specifically stated and may include inspections to ensure the integrity of the landfill cap, inspection of the leachate treatment system or groundwater treatment system, and other operation and maintenance systems.

Some states require that the grantor have a subordination agreement executed by lenders, lien holders, lessees, and other owners of previously perfected property or possessory interests. Borrowers should consider contacting their lenders even if the state does not require a subordination agreement to confirm that the granting of such interests will not violate the terms of their loan agreement.

### Who Maintains the Institutional Controls?

The instrument should indicate which party will be responsible for assuring that the controls and other systems are working properly. The parties also need to determine who will fund this work. If the purchaser of the property will be responsible, the seller may want to require establishment of some financial assurance mechanism or insurance to make sure that the purchaser will have sufficient funding to do the long-term operations and maintenance (“O&M”).

Another related issue is responsibility for additional remediation on account of a change in use. Usually this obligation would fall on the party that is redeveloping the site. Whatever arrangement is negotiated, it should be expressed in the instrument.

### Enforcement

Perhaps the most important factor for ensuring effectiveness of institutional controls is the existence of a reliable enforcer. Environmental agencies will perform detailed risk assessments for developing remedial actions but, except for groundwater monitoring programs, they rarely perform post-construction analyses to determine if institutional or engineering controls are effectively protecting their communities from exposure. Thus, the instrument creating the institutional control should identify the party that

will have the right to enforce the restrictions and be responsible for maintaining and repairing the controls. Responsibilities of the enforcer may include making periodic site inspections to ensure that prohibited activities are not taking place, checking the integrity of caps, fencing and other barriers, ensuring that site use has not extended into prohibited areas, and inspecting drinking water wells to make sure that they are not being used.

When relying on governmental controls, the EPA and state environmental agencies often look to the local government to ensure that the institutional controls are properly enforced. However, local governments often lack the experience, resources and inclination to verify compliance to enforce land use controls arising out of agreements between private parties.

Likewise, applications for building permits or subdivision plats generally only require evidence of ownership. Local agencies may not review the underlying deeds to determine if the proposed uses violate any existing deed restrictions. In fact, according to a 1998 report issued by the International City/County Management Association, " 72 percent of the local government bodies survey did not search titles before making zoning changes. Christine Gaspar and Denise Van Burik, *Local Government Use of Institutional Controls at Contamination Sites* 15 (Washington, D.C.: International City/County Management Association 1998).

This report illustrated additional problems with using zoning to enforce institutional controls. It found that while local governments primarily rely on zoning to enforce institutional controls, the principal enforcement mechanism used by the majority of respondents was simply making sure that the land use was consistent with zoning maps. Most of the respondents indicated that they did not conduct any formal inspections to confirm compliance with the controls. In fact, the report revealed that citizen complaints were the most common means for discovering violations of institutional controls. Approximately two-thirds of the local entities

surveyed felt that it was likely that current owners could breach institutional controls without the local government learning of the violation for several years.

Further complicating the effectiveness of government controls is the fact that it is usually county governments and not local officials that are responsible for recording deeds and other land use restrictions. Thus, local government authorities may not even be aware of the existence of institutional controls. Accordingly, it is advisable for town attorneys and managers to establish an information exchange with the county governments and perhaps even establish procedures for enforcing institutional controls in their building or zoning codes.

### ***The Mists of Time***

The passage of time can also affect the effectiveness of zoning as an institutional control. A property may have been used as a manufacturing facility in the earlier part of the century and then may have been converted into a shopping store. After the store goes out of business, a developer may want to build residential units on the property, or the town may want to build a school or allow a day care center to be operated. With the passage of time, there may be insufficient institutional memory or records to alert the zoning board that the site might be contaminated. As a result, the board may grant a petition to reclassify the property for residential or commercial use without taking measures to ensure that occupants are not exposed to contaminants at the site.

### ***Proprietary Controls***

Enforcement of proprietary controls can be more problematic. The enforcement of these forms of institutional controls can be undermined by traditional doctrines of real property law that favor the free alienability of land and disfavor the enforcement of restrictions against owners who take title long after the restriction was imposed. Under real property law, the grantee is usually the only party who has the

right to enforce a property interest. If the grantee fails to enforce the provisions of the instrument, it might be difficult to compel compliance unless another party is granted enforcement authority.

It may be difficult to implement and enforce a proprietary form of institutional control that requires the consent of multiple landowners. For example, an owner of property that is contaminating groundwater may agree to an institutional control prohibiting the use of drinking water wells on its property and the adjoining properties but it may be difficult to enforce that restriction on the surrounding property owners.

Likewise, proprietary controls may also not be effective when a deep-pocket PRP must obtain the consent of an adjacent property owner and the adjacent owner seeks a significant sum of money in exchange for agreeing to the deed restriction. Similarly, a tenant that has agreed to implement an institutional control may not be able to obtain the consent of its landlord to impose a use restriction on the property or the landlord may ask for compensation that the tenant may not be able to afford. If the institutional control requires a future land use that is different from the currently zoned use, a different remedy may be more appropriate.

### *Rights of Access and Easements*

Since real property law generally requires a conveyance to establish an enforceable property right, environmental agencies may not be able to enforce proprietary controls. As a result, many states have required that the property owner grant a right of access and an environmental easement to the state environmental agency or have enacted legislation creating statutory land use restrictions or easements. Some of these statutes even provide that the restrictions will be enforceable even if they do not comply with some of the common law technicalities. To be enforceable against new owners, though, restrictive covenants must "run with the land." Instruments creating the control containing phrases like "run with the land," in perpetuity," or "successors and assigns" may be

sufficient, but it is important to review the requirements of the local real property law to determine what language is required.

Even if an easement or use restriction can be enforced between an environmental agency and a current owner, it is unclear if community groups or local governments could enforce a restriction that the owner fails to implement or maintain. Likewise, if the easement holder fails to bring suit in a timely manner to enforce the violation of an institutional control, the restriction may be deemed to have been terminated and third parties may not be able to enforce the use limitation.

Similarly, a use restriction may not be enforceable against a lender who is holding a mortgage that was perfected before adoption of the use restriction. Technically, if such a lender forecloses on the property and then sells the property, the use restriction may not be enforceable against the transferee although this may have little practical effect since the transferee may not be able to obtain title insurance.

For this reason, some states require that the grantor have a subordination agreement executed by lenders, lien holders, lessees, and other owners of previously perfected property or possessory interests. Some states require the purchaser, lessee or transferee to acknowledge that institutional controls may be required. It is important to make sure that executing a subordination certification does not waive rights to object to implementation of that remedy.

### *Enforceability of Orders and Decrees*

There can also be problems enforcing institutional controls that may be created through an enforcement tool, such as administrative orders or consent decrees. Although these orders can be enforced against the named parties or signatories, they generally do not create or convey a property interest. Therefore, the provisions of the orders usually may not be enforceable against subsequent owners or occupiers of the property even when the buyer or tenant has actual notice of the restriction.

Environmental authorities try to navigate around this problem by requiring that notice of transfers of the title or possessory interests in the property be given to the agencies and that transferees agree to be bound by the terms of the orders. In addition, most NFA letters and CNTS generally provide that the releases from liability will be revoked if mandated institutional controls are not maintained. However, in states where innocent landowners may not be liable for pre-existing contamination, the state environmental authority may only bring an enforcement action against the recipient of the NFA or CNTS. To address this problem, some state environmental statutes now require enforcement orders imposing use restrictions be recorded and provide that such recorded orders "run with land."

A few state environmental agencies are also required to maintain registries of properties where hazardous waste have been disposed or where use restrictions have been imposed. Often the state environmental agency must approve transfers or changes in use of listed sites. However, given limited resources, enforcement can be difficult if the owner does not provide the required notice to the state prior to conveying the property.

Maintenance of long-term institutional controls can be costly and in some cases may exceed the initial construction costs of the remedy. Consequently, creation of some form of financial assurance mechanism or insurance should be considered. If the facility is regulated as RCRA treatment, storage or disposal facility, it is possible that the RCRA financial assurance requirements may be used to ensure that adequate funding is available to maintain the institutional controls. Financial assurance is also a common feature of CERCLA remedies.

### **Modification or Termination**

Another important issue is the mechanism for modifying or terminating land use controls. Modification may be necessary to excavate soil for an expansion of a building or to repair utili-

ty lines. If the new land use will require additional remediation, the parties need to agree on who will pay for the additional work. Usually the party who desires the change will bear the costs of the additional cleanup.

When controls are no longer needed to protect human health or the environment, the instrument should also provide a process for removing the controls. Only a handful of states have forms of releases that must be executed by the state environmental agencies to terminate the institutional controls. In the rest of the states, it may be unclear what document has to be presented to the local records clerk to prove that the remedy has been completed and the institutional controls can be released. Although the parties could provide that the institutional controls will automatically terminate upon the achievement of certain standards such as levels of contamination, a better practice would be to require the recording of a separate instrument terminating the controls. This could be a release similar to the satisfaction of mortgage that is filed when a mortgage is paid off or the issuance of an NFA letter.

### **Notice**

It is important to know if the state mandates that notice of institutional controls be made either before they are approved by the state environmental agency or after the instrument of conveyance has been recorded. Some states require that the proposed land use restrictions be published in local newspapers to provide the public with an opportunity to comment. Other states require that various local government agencies be given notice of the restrictions as well.

Sometimes the seller fails to inform the buyer that the seller plans on using institutional controls to achieve state cleanup standards. This creates an interesting problem. Many real estate contracts simply require the seller to comply with law without specifying if institutional controls are an appropriate means of complying. Since these restrictions can interfere with a buyer's plans for the site, it is important that coun-

sel for purchaser to deal with this issue during the contract negotiations.

**INNOVATIVE USE OF INSTITUTIONAL CONTROLS** • In an effort to cut off future claims for personal injury and property damages claims, some Fortune 500 companies have been filing extensive deed disclosures far beyond state requirements when selling surplus industrial properties. This is especially so when the property is destined for residential development. The disclosures may be several pages long and describe in detail the kinds of activities that were conducted at the site, the nature of the contamination, and the remedial efforts that were performed.

Often, the disclosures also state that under the no further action issued by the state, the seller has no further responsibility for any contamination that may exist at the site. Whether this can be an effective tool to cut off future claims is debatable. The deed notice and release of liability did not prevent Hooker Chemical from being held liable for the contamination at Love Canal.

**INSTITUTIONAL CONTROLS AND DUE DILIGENCE** • The databases that environmental consultants customarily search may not contain any information on institutional controls. Thus, you should conduct a thorough search of the real estate records to determine if any environmental land use restrictions are in effect. Some title companies have failed to uncover such controls because the instruments were attached to the back of the deeds or were misfiled.

**CAVEAT ON INSTITUTIONAL CONTROLS AND DEFENSES TO LIABILITY** • Even if an instrument creating land use restrictions imposed obligations on the seller for maintaining institutional controls, an innocent purchaser may find itself liable under Federal or state law if the seller failed to adequately maintain the controls. A number of state brownfield or VCP

statutes expressly provide that innocent purchasers may lose the immunity from liability if the controls are not properly maintained.

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (the "Brownfield Amendments"). This legislation specifically requires a property owner or tenant qualifying for the innocent landowner defense or one of the newly created defenses to comply with land use controls.

For example, section 223 of the Brownfield Amendments requires a person qualifying as an innocent purchaser to comply with any land use restrictions established or relied on in connection with the response action at a facility. 42 U.S.C. §9601(35)(B). The owner must also not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action. In addition, the innocent purchaser must provide access to the persons that are authorized to conduct response actions at the facility, including providing access necessary for the installation, integrity, operation, and maintenance of land use controls that may be a part of a response action.

Section 222 of the Brownfield Amendments creates a new bona fide purchaser defense. 42 U.S.C. §9601(40). To qualify for the bona fide purchaser defense, a landowner or tenant, inter alia, must comply with any land use restrictions established or relied on in connection with the response action at a site and must not impede the effectiveness or integrity of any institutional control that is part of a remedy at the site. 42 U.S.C. §9601(40)(F). In addition, the innocent purchaser must provide access to the persons that are authorized to conduct response actions at the facility, including providing access necessary for the installation, integrity, operation, and maintenance of land use controls that may be a part of a response action. 42 U.S.C. §9601(40)(E).

Finally, section 221 of the Brownfield Amendments added the contiguous property owner defense. 42 U.S.C. §9607(q). This new exclusion

provides that the owner of property that may be affected by contamination that has migrated from a contiguous parcel may not be considered a CERCLA owner or operator if the landowner satisfies certain conditions. One of these obligations is that the owner of the contiguous property must comply with any land use restrictions established or relied on in connection with the response action at a vessel or facility and must not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action. 42 U.S.C. §9607(q)(1)(A)(v).

Each of these defenses also requires the owner or tenant to exercise "appropriate care"

regarding contamination at the site. Presumably, this would involve ensuring the integrity of institutional controls at a site if another party is not responsible for maintaining those controls.

In addition, under the CERCLA third-party defense, the party asserting the defense has to demonstrate, *inter alia*, that it exercised due care with respect to hazardous substances located on the property and took actions against foreseeable acts of third parties. Allowing institutional or engineering controls to fall into disrepair might constitute failure to exercise due care and therefore, expose the purchaser to liability.

### PRACTICE CHECKLIST

#### How To Use Engineering and Institutional Controls for Contaminated Sites

The EPA cannot create institutional controls under Federal law. As a result, although the obligation to create land use controls may be contained in a Federal consent decree, the EPA must rely on actions under state property law or the general police power of local governments to create the controls. Institutional controls may be either proprietary or governmental. Proprietary controls are private contractual mechanisms that are contained in a deed or other instruments used to transfer title to property. State and local governments can limit the use of property through planning and zoning maps, subdivision plats, building permits, siting restrictions and groundwater use restrictions in the form of well-drilling prohibitions or well-use permits.

- Since real property law generally requires a conveyance to establish an enforceable property right, environmental agencies may not be able to enforce proprietary controls.
  
- Make sure the controls are enforceable. To be enforceable against new owners restrictive covenants must "run with the land." Instruments creating the control containing phrases like "run with the land," in perpetuity," or "successors and assigns" may be sufficient, but review the requirements of the local real property law to determine what language is required.
  
- Ask the state environmental agency to state the rationale for requiring institutional controls. The presence of use restrictions can impair the value of property. Moreover, many lenders are uncomfortable securing loans with institutional controls. There may be less onerous alternatives to institutional controls.
  
- Make sure that the instrument creating the institutional control identifies the party that will have the right to enforce the restrictions and be responsible for maintaining and repairing the controls.

- Find out whether the state mandates that notice of institutional controls be made either before they are approved by the state environmental agency or after the instrument of conveyance has been recorded.
- Make sure the applicable instrument contains a specific recitation of the work that has been performed at the site, describe the engineering controls that will remain at the site, and their specific location, the specific uses that are to be prohibited as well as permitted, the specific remediation goals that need to be achieved for the restrictions to be lifted (e.g., groundwater contaminant concentrations) and the instrument that will be used to terminate the restrictions.
- Make sure the instrument indicates which party will be responsible for assuring that the controls and other systems are working properly. The parties also need to determine who will fund this work. If the purchaser of the property will be responsible, the seller may want to require establishment of some financial assurance mechanism or insurance to make sure that the purchaser will have sufficient funding to do the long-term operations and maintenance.
- Since the databases that environmental consultants customarily search may not contain any information on institutional controls, you should conduct a thorough search of the real estate records to determine if any environmental land use restrictions are in effect.

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