

EPA's New "Institutional Controls" Guidance May Raise Issues in Cleanups and Transactions

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The U.S. Environmental Protection Agency recently issued two guidelines with far-reaching implications for real estate transactions involving contaminated sites, including sites owned by the Department of Defense. The guidelines focus on so-called "institutional controls" governing the cleanup of such sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601, et seq., the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, et seq., and other federal statutes and programs (e.g., the Brownfields Program). State, local and tribal authorities are likely to follow the guidelines.

Institutional controls sometimes are used to limit permissible activities at contaminated properties in order to prevent harmful exposure to residual contamination. Last year, the U.S. Environmental Protection Agency ("EPA") issued guidance on institutional controls to change the means by which institutional controls are implemented and enforced. Specifically, the guidance contains important recommendations that institutional controls be implemented through administrative orders, consent agreements, permits, and regulations, in addition to traditional real estate instruments, such as deed notices and restrictive covenants and/or easements. Matthew Stanislaus, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response ("OSWER"), has stated that this guidance is one of OSWER's chief priorities.¹ The details and implications of this guidance are discussed below.

What are Institutional Controls?

Institutional controls are legal instruments aimed at minimizing the potential for exposure to environmental contamination or protecting the integrity of the cleanup process. They are used typically at sites where contaminated media cannot be removed or remediated to unrestricted-use levels, as well as before response actions are complete. Depending on their nature, these controls may be enforced through



¹ See <http://www.bna.com/epa-institutional-controls-n17179871698>.

incorporation into decision documents and administrative orders and/or by statute. Institutional controls fall into four broad categories:

- **Proprietary Controls:** Land use limitations that run with the land and result from an agreement between property owners and a second party (usually a governmental entity with enforcement authority). Examples include deed restrictions, restrictive covenants, and negative easements.²
- **Governmental Controls:** Limitations on the use of land or resources located on the land imposed by a governmental entity. These include zoning restrictions, groundwater use regulations, and bans on agricultural development or fishing.
- **Enforcement and Permitting Tools:** Legally enforceable documents such as administrative orders, permits, federal facilities agreements, and consent decrees, which limit or require the performance of certain site activities (for example, long-term groundwater monitoring).
- **Informational Devices:** Methods of providing notice to third parties (including future property owners, governmental entities, and the community at large) about the presence of residual contamination. Informational devices include recorded notices, public advisories, and listing on state registries.

New EPA Guidelines

The more comprehensive guideline, entitled *Institutional Controls: A Guide to Planning, Implementing, Maintaining and Enforcing Institutional Controls at Contaminated Sites* (“IC Guidance”),³ highlights common problems at cleanup sites and contains EPA’s policies regarding institutional controls at such sites. The other guideline, entitled *Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites* (“ICIAP Guidance”),⁴ elaborates on the content of such plans (“ICIAPs”), which are generally described in the IC Guidance.

Together, the IC Guidance and ICIAP Guidance give comprehensive recommendations on the planning and selection of institutional controls, as well as their implementation and enforcement. The basic themes are that site managers, attorneys, and stakeholders should consider the use of institutional controls as early as possible in the response selection and design process, and that key legal documents should be drafted or amended to allow regulatory agencies to enforce the requirement to implement such controls.

A. Planning and Selecting Institutional Controls

Early Planning –The IC Guidance recommends formal evaluations of institutional control strategies during the initial phases of site investigation. For a typical CERCLA site, this means no later than the Remedial Investigation/Feasibility Study stage. For sites subject to RCRA corrective action, this means during the Facility Investigation phase.

Public Participation – The IC Guidance also stresses the importance of community involvement and urges site managers to make “extra efforts” to reach out to local residents in cases where the public feels disenfranchised from the local land use planning and development process.

B. Implementing and Enforcing Institutional Controls

² Many states have enacted statutes that require proprietary controls to be imposed upon contaminated properties, where residual contamination above action levels is expected to remain even after remediation has been conducted. Most such statutes are modeled after the Uniform Environmental Covenants Act (“UECA”).

³ OSWER 9355.0-89/EPA-540-R-09-001 (December 2012).

⁴ OSWER 9200.0-77/EPA-540-R-09-002 (December 2012).

Drafting and Amending Decision Documents – The IC Guidance recommends incorporating into site decision documents (e.g., a record of decision under CERCLA) detailed information relating to institutional controls and the rationale for their use. This recommendation arises from past problems due to vague or missing language about restrictions in such documents. The IC Guidance suggests that decision documents either be supplemented with clarifying memoranda or formally amended (with public notice and comment) to include detailed descriptions of selected institutional controls.

Regulatory Review of Institutional Control Implementation – The IC Guidance urges federal site managers and attorneys periodically to review the effectiveness of institutional controls. Such reviews may occur as part of the natural review cycle for a site (e.g., the CERCLA Five-Year-Review), or in response to changes in land use or long-term remediation technology.

Institutional Control Implementation and Assurance Plans – EPA recommends the development of ICIAPs to provide information on how and by whom institutional controls will be implemented, maintained, enforced, modified and terminated in a greater detail than is included in decision documents. ICIAPs also serve an important function by delineating the roles of all responsible parties with respect to a given institutional control. Through incorporation into consent decrees and/or other administrative orders, this enables the government to bring enforcement actions against entities that may not have been parties to the original cleanup order at a site.

C. Enforcing Institutional Controls

Implications of the IC Guidance

EPA's IC Guidance may heighten the attention given to institutional controls in environmental cleanups, as well as in corporate and real estate transactions involving contaminated sites. The identification and memorialization of institutional controls early in the cleanup process stands to limit the flexibility that parties might have in implementing such controls and/or developing the property. This could be a significant issue at many sites, given that institutional controls usually are intended to be maintained over the long term, during which property uses and/or ownership may change.

In the context of real estate and corporate transactions, certain recommendations will alleviate the uncertainty involved in negotiating contract provisions dealing with institutional controls. For example, a common issue in site transfers involving proprietary controls concerns the selection of the entity with primary responsibility for maintaining and enforcing an environmental covenant, deed restriction, or negative easement. Although both state statutes and common law usually allow for a wide range of parties to assume the role,⁵ the IC Guidance recommends that, unless U.S. EPA or a state agency explicitly receives enforcement rights in the instrument, the grantee should be the entity that is accountable for the site cleanup through a consent decree, administrative order, or other enforceable legal document.⁶

On the other hand, some recommendations in the IC Guidance will introduce uncertainties and greater risk in transactional contexts. This is particularly true with respect to the recommendation regarding the solicitation of public comment for the implementation of institutional controls. This additional public participation step could lead to delays and uncertainty in the site remediation process, which, in turn, could

⁵ See, e.g., Del. Code Ann. Tit. 7, § 7916; Ga. Code Ann. § 44-16-11; Haw. Rev. Stat. § 508C-11; Idaho Code Ann. § 55-3011; 765 Ill. Comp. Stat. 122/11; Me. Rev. Stat. Ann. Tit. 38, § 3011; 27 Pa. Cons. Stat. § 6511; Wash. Rev. Code § 64.70.110.

⁶ The recommendation that the key provisions of environmental covenants, deed restrictions or negative easements be incorporated into enforceable legal documents further eliminates the uncertainty arising from the question, mostly at issue in non-UECA states (Arizona, Arkansas, California, Colorado, Florida, Louisiana, Massachusetts, Michigan, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Puerto Rico, Tennessee, Virginia, Wisconsin, Wyoming), as to whether proprietary controls "run with the land" or should be treated as contracts that must be renewed any time the property is transferred. See IC Guidance at p. 18.

affect the abilities of parties to secure financing and/or proceed with property development plans. Furthermore, by recommending the incorporation of detailed descriptions of institutional controls into legally binding instruments, in a scenario where the responsible party for a cleanup conveys contaminated property to a third-party who plans to (re)develop it, the IC Guidance heightens the need for the parties to work together during the transaction process to identify, in greater detail, mutually agreeable institutional control strategies that will conform with both property development plans and the responsible party's desire to conduct the cleanup in a cost effective manner.

At minimum, the IC Guidance heightens the need for careful work on the part of environmental, real estate, and transactional attorneys. Although the types of issues encountered will differ on a site-specific basis, the following are some general considerations:

- Property development and transactional agreements should be crafted to reflect the terms of ICIAPs, as well as the descriptions of institutional controls written into environmental decision documents.
- Contract provisions should be drafted to account for the possibility that regulators may review and propose modifications to the existing institutional controls, as both the IC Guidance and ICIAP Guidance recommend reassessing the efficacy of institutional controls after implementation.
- Earlier consideration should be given to potential funding mechanisms that may reduce the financial burden of maintaining institutional controls at contaminated sites. Such mechanisms include federal and state grants for Brownfields sites, cooperative agreements under CERCLA Section 104(d), and intergovernmental agreements between state and local authorities with an interest in remediating contaminated properties.
- Where the responsibility for maintaining institutional controls will be assigned in connection with a transaction, the parties should expect regulatory agencies to push to amend ICIAPs, consent orders, and/or permits to name the new owners of the property. This will necessitate closer coordination between the principals to a transaction on the one hand and governmental entities on the other.

If you have any questions, please contact the authors, who practice in our Washington, DC office, or any partner in our [Environment, Land Use & Natural Resources](#) practice.

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