

DER-33 / INSTITUTIONAL CONTROLS: A GUIDE TO DRAFTING AND RECORDING INSTITUTIONAL CONTROLS

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Val Washington

Title: Deputy Commissioner,
Office of Remediation and Materials Management

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I. Summary

"Institutional controls" (ICs) are any non-physical means of enforcing a restriction on the use of real property that limits human or environmental exposure, restricts the use of groundwater, provides notice to potential owners, operators, or members of the public, or prevents actions that would interfere with the effectiveness of a remedial program or with the effectiveness and/or integrity of site management activities at or pertaining to a remedial site. [*also see 6 NYCRR 375-1.2(aa)*]

ICs accomplish their goal by limiting land or resource use and/or by providing information that helps modify or guide human behavior at the site. This guidance provides an overview of the drafting and recording of ICs for remedial programs managed by the New York State Department of Environmental Conservation (DEC) Division of Environmental Remediation (DER). Specifically, this policy applies to the Inactive Hazardous Waste Disposal Site Remedial Program, known as the State Superfund Program (SSF); Brownfield Cleanup Program (BCP); Voluntary Cleanup Program (VCP); Environmental Restoration Program (ERP); Spill Response Program (SRP - Navigation Law (NL) section 178); and the Resource Conservation and Recovery Act (RCRA) Program.

II. Policy

Contaminated site remedial programs are an important and necessary component of the state's policy of restoring and revitalizing real property located throughout the state. When an environmental remediation leaves contaminants at levels that have been determined to be safe for a specific use, but not all uses, or includes engineered structures or controls that must be maintained or protected against damage to be effective, it is necessary to provide an effective and enforceable means of ensuring the performance of maintenance, monitoring and operation requirements, and the restriction on future uses of the land, including restrictions on excavating soils or using groundwater.

DEC has used deed restrictions and, where appropriate, environmental notices to address these sites for nearly three decades. In 2004 the legislature provided for the granting of environmental easements restricting the use of land to conform to constraints placed on sites in any of DEC's remedial programs (Environmental Conservation Law [ECL] Article 71, Title 36). Collectively, these ICs are necessary for the protection of public health and the environment and to achieve the requirements for remediation established at certain contaminated sites.

It is DEC's policy, consistent with applicable statutes and regulations, that all remedies will be protective of public health and the environment. DEC's preference is that remedial programs be designed such that the performance standard results in the implementation of a permanent remedy resulting in no future land use restrictions. However, some of DEC's remedial program objectives are predicated on future site use when return to a condition where no restrictions are required is not feasible, or when a remedial party agrees to restrict future use of a site resulting in reduced opportunity for human exposure. Where a remedy will limit future use, ICs play an important role in minimizing the potential for exposure, protecting engineered remedies and providing appropriate notice to potentially impacted individuals.

The use of ICs is not an alternative to an active remedy, but rather part of a balanced, practical approach to site cleanup that relies on both engineered and non-engineered remedies. Remedies in New York State are not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The NCP emphasizes that ICs are meant to supplement engineering controls during all phases of cleanup and may be a necessary component of the completed remedy. The NCP cautions against the use of ICs as the sole remedy unless active response measures are determined to be impractical. These same principles apply to remedies in New York State.

Procedures set forth in this policy document are intended for the use by and guidance of both DEC personnel and remedial parties. The policy is not intended to create any substantive or procedural rights enforceable by any party in administrative or judicial litigation. DEC reserves the right to vary these procedures to address site-specific circumstances, and to revise them as it deems appropriate based on changes in law or its experience in implementing the policy.

III. Purpose and Background

ICs have been employed for nearly three decades in DEC's various environmental remediation programs. ICs are used to ensure the protectiveness of the remedy where unrestricted conditions are not achieved by the site remedial program (except as provided in DER-10 1.12(b)(1)(iii) for residential properties under certain conditions). Further, to the extent that an engineering control is necessary, ICs must always be imposed to ensure that the engineering controls are properly monitored and maintained, and that DEC has access to inspect the engineering control.

The types of the ICs, and the specificity provided in the decision documents identifying the site remedy, have changed over the years. Most recently, the legislature passed the environmental easement statute to provide for a new form of IC. With the addition of the environmental easement, the most common ICs employed by DEC are:

- Environmental Easements
- Deed Restrictions
- Environmental Notices

Each of these documents must be properly drafted and recorded with the appropriate county's land records to ensure proper notice and effectiveness of the control. The purpose of this guidance is to provide direction on how to develop and properly record ICs as part of a cleanup decision.

IV. Responsibility

The responsibility for maintaining and updating this policy lies with Remedial Bureau C in DER. DER and Office of General Counsel (OGC) staffs are responsible for interpreting and implementing this policy.

V. Procedure

1. Overview

The common forms of ICs employed in DER remedial programs are Environmental Easements in accordance with ECL Article 71, Title 36 (see subdivision 2(a) below), Deed Restrictions (see subdivision 2(b) below), and Environmental Notices (see subdivision 2(c) below). The various documents referenced by and attached to the IC, such as the Site Management Plan, survey and title commitment, should be prepared concurrently to the extent possible. Therefore, once a Decision Document is issued, work should commence to develop the IC/ECs specified, as well as the Site Management Plan. Assuming all remedial requirements have been met, once the IC is recorded and distributed in accordance with this guidance, the Final Engineering Report may be approved and a Certificate of Completion (COC) or other form of closure letter can be issued.

2. Types of Institutional Controls

(a) Environmental Easement.

1. Where EEs are employed, unless specifically precluded by statute, such as on Forest Preserve Lands, an environmental easement (EE) is the required instrument for memorializing land use restrictions on:

- (i) all BCP remedial projects;
- (ii) SSF or a non-registry sites subject to an Article 27 Title 13 remediation, where:
 - (1) the consent order, or applicable oversight document, was signed after October 7, 2003: or
 - (2) regardless of the date of the order, where a Record of Decision, or other applicable decision document, was issued for the site or an operable unit of the site after October 7, 2003;
- (iii) ERP sites where:
 - (1) the state assistance contract (SAC) was signed after October 7, 2003: or
 - (2) regardless of the date of the SAC, where an ERP Record of Decision was issued for the site or an operable unit of the site after October 7, 2003; and
- (iv) VCP sites when the decision document calls for an EE.

2. The EE runs with the land in favor of the State, subject to the provisions of ECL Article 71, Title 36, and contains the use restriction(s) and/or any prohibition(s) on the use of land in a manner inconsistent with engineering controls. The emplacement of an EE provides an effective and enforceable means of encouraging the reuse and redevelopment of a controlled property in a manner that is consistent with the remedial program and ensuring the performance of operation, maintenance, and/or monitoring requirements.

3. Other interests in the property subject to the EE. To ensure an EE is properly executed, it is the obligation of the remedial party to conduct a sufficient search of the real estate records to identify all legal and equitable interest in the property and ensure the EE and any supporting documents are properly prepared and executed. Without clearance of title issues and the willingness of the title company to insure the title under an owner's policy, DEC will not accept an EE on behalf of the State. It is in the remedial party's best interest to make sure the EE is valid and enforceable since any subsequent challenge to the validity, enforceability or effectiveness of such control to ensure the protectiveness of the remedy would be a basis for voiding any COC and/or releases issued for the site and lead to reopening the remedy for the site. DEC has prepared two checklists detailing the requirements and attachments that must be submitted with the EE to address these issues, one completed by the site owner and the other by the attorney preparing the easement. Parties are encouraged, but not required, to use the services of an attorney licensed in New York State and with experience in real property law to prepare and execute the required documentation. This documentation must be submitted to OGC with a copy to the DER Project Manager (PM) as described in subdivision (d) below.

4. EE package. The remedial party starts the process for execution of an EE by providing the PM with the following elements of a complete EE package:

(i) a proposed EE, using the latest version of the model EE document provided by DEC, which can be downloaded from DEC's website at <http://www.dec.ny.gov/chemical/48236.html>;

(1) a modified form of the EE may be proposed, but any revisions to the model form must be explained and specifically identified in a cover letter. Any proposed modifications to the model will require additional time for DEC to review, process and approve. Accordingly, parties should evaluate the importance of such changes in conjunction with any timing concerns;

(ii) an updated title report (current within 6 months) along with copies of any encumbrances (e.g., mortgages, judgments, easements, leases, liens, etc.), and the following other Title information:

(1) A "Certification Page, Schedule A and Schedule B" for each title report;

(A) An indication on the Certification Page as to who has the right to convey or mortgage the property that is subject to the EE;

(B) Schedule A, providing the legal description of the property; and

(C) Schedule B, listing the exceptions to the title or issues which require clearance or amplification before the title company is willing to issue its policy. The remedial party's attorney must ensure that the title report includes a copy of every encumbrance that affects title (i.e., mortgages, judgments, easements, leases, subleases, assigned leases);

(2) a copy of the tax map attached to each report;

(3) a proposed title insurance policy to be underwritten by a New York State licensed title insurance company. The policy should be in the amount of \$35,000 with the State (The People of the State of New York acting through their Commissioner of the Department of Environmental Conservation) listed as the insured; and

(4) a certification from the title company that:

(A) sufficient title and lien research has been conducted to identify all necessary legal and equitable interests. This would include at a minimum all fee title owners by deed, contract sellers, buyers and assignees, mortgagees, lessees and other consensual lien-holders; and

(B) the signatures of the identified grantors on the EE satisfy legal requirements necessary to provide the State with an interest in the property superior to all other interests or to provide notice to those other parties. The title company should insure the boundaries of the encumbered property as it appears on the final survey;

(iii) if an exception to Schedule “B” is necessary, any exception supporting documents (prior easements, rights of way, liens, encumbrances etc., affecting the property);

(iv) in lieu of subordinations, a notice form may be sent to all interested parties identified in Schedule B, as well as any existing tenants on the property. Where such notice is required it shall include a list of those parties with the names and address. The notice and list will be returned to the remedial party’s attorney along with the fully executed EE for mailing;

(v) the current deed(s);

(vi) a survey, to include a graphic scale; legend; section, block and lot; and physical address, that:

(1) clearly identifies the property as described in the current deed, or area(s) of the site to be addressed by the EE, with corresponding metes and bounds description; and

(2) includes other information, as addressed by the survey requirements identified in Section 3 and included as Attachment “A”;

(vii) a commitment letter and a proposed final policy from the title company stating that it will issue the proposed title insurance policy upon recording of the EE;

(viii) organizational documents and partnership agreements with evidence of successors in interest such as LLC Documents/Certificate of Incorporation papers/Limited Partnership papers, etc. of the owners of the property, where applicable; and

(ix) completed and signed EE attorney and site owner checklists and certifications. The remedial party can download the latest versions of these checklists from DEC’s website.

Please note: The foregoing list is not exhaustive and is subject to change. Additional information may be required on a case by case basis.

5. Execution of the EE. After review of the EE package by the OGC attorney and any necessary revisions to the documentation, the site owner signs the easement form and provides all documents in a final form for execution by DEC. The DER Division Director has been delegated the authority by the Commissioner to execute Environmental Easements.

6. Recording the EE. After the EE has been executed, the remedial party must:

(i) have the EE recorded at the office of the appropriate county clerk (or Registrar in New York City). A receipt (typically, this is a copy of the EE that is stamped with the book and page number in the upper right hand corner of every page of the document including attachments/exhibits), indicating where and when the EE was recorded, must be provided to DEC; and

(ii) serve the notices of the easement on the required parties (see subparagraph 2(a)4(iv) above). These notices must be served on all parties identified in the title report within 60 days of filing, and the proof of service and notices must be provided to DEC within 90 days of filing. In addition, a copy of the notice and certification of service on the parties will be filed in the County Clerk's office, or Registrar in New York City.

(b) Deed Restrictions.

1. A deed restriction (DR) may be the required institutional control for:

(i) VCP sites;

(ii) those SSF class 2, 3 4 or 5 sites, or a non-registry sites subject to an Article 27 Title 13 order, provided the consent order was executed, and the record of decision (ROD) was issued, prior to October 7, 2003;

(iii) ERP sites, provided the SAC was signed and the ERP ROD was issued prior to October 7, 2003; and

(iv) sites for which an EE is statutorily precluded, such as Forest Preserve Lands.

2. For any of the above, the remedial party may request DER approval to utilize an environmental easement in place a deed restriction.

3. DRs are encumbrances on the property that control the use of the property. The restriction runs with the land in favor of the State and contains the use restriction(s) and/or any prohibition(s) on the use of land in a manner inconsistent with engineering controls. The restriction provides an effective and enforceable means of encouraging the reuse and redevelopment of a controlled property in a manner that is consistent with the remedial program, ensuring the performance of operation, maintenance and/or monitoring requirements of the approved site management plan.

4. DRs must be approved by the property owner and must be recorded in the land records of the county where the property is located. The DRs travel with the deed, and cannot be removed by new

owners without DEC's written consent. DRs have been used by DEC as a form of institutional control in enforcement cases for several decades. DRs require that the background information and documentation described below be provided to DEC's PM.

5. To ensure the DR is properly executed, it is the obligation of the remedial party to conduct a sufficient review of the real estate records to identify all legal and equitable interest in the property and ensure that the DR and any supporting documents are properly prepared and executed.

6. It is in the remedial party's best interest to make sure the DR is valid and enforceable, since any subsequent challenge to the validity, enforceability or effectiveness of such control in ensuring the protectiveness of the remedy would be a basis for voiding any certificate of completion and/or releases and reopening the remedy for the site. Parties are encouraged, but not required, to use the services of an attorney licensed in New York State and with experience in real property law to prepare and execute required documentation.

7. DEC, at its sole discretion, may elect to use the approach set forth above for Environmental Easements or the following DR process:

(i) the PM commences the process by selecting the appropriate DR template (groundwater use restriction, no groundwater use restriction or no engineering controls), the latest version of which can be downloaded from DEC's website at <http://www.dec.ny.gov/chemical/48236.html>;

(ii) the PM will fill in the blanks in the fourth paragraph of the "Whereas" section of the template, selecting the appropriate use from the restricted uses identified in 6 NYCRR 375-1.8(g)(2). The PM should verify that the use specified in the IC is consistent with local zoning and the Record of Decision or Decision Document for the site, and compliant with 6 NYCRR 375-1.8(g)(5). Note that approved zoning variances and historic uses, such as closed landfills, may be considered as reasonably anticipated future uses;

(iii) the PM transmits the partially completed DR to the remedial party and requests that the remedial party complete the remaining fields (site owner name, address, etc.) in the template, along with the following:

(1) a copy of the current deed;

(2) a tax map of the site to which the restrictions apply; and

(3) a survey that meets DEC's requirements of the area(s) to be addressed by the DR, with corresponding metes and bounds description. The survey should include a graphic scale; legend; section, block and lot; and physical address. The survey should also include other information, as addressed by the Survey Requirements (Section 3. and Attachment "A");

(iv) DEC contracts with a title company to handle the deed restriction. The costs associated with the deed restriction are recoverable from the remedial party. DEC's PM will notify the remedial party of the name of title company retained by DEC ("title company") to finalize the DR. This title company will contact the remedial party concerning the deed restriction;

(v) the remedial party completes the DR and provides it electronically unsigned to DEC's title company. A modified form of the DR may be proposed, but any proposed revision to the DR must be explained and specifically identified in a cover letter. Any proposed modifications to the DR will require additional time to review, process and approve. Accordingly, the remedial party should evaluate the importance of such changes in conjunction with any timing concerns. The unsigned, completed DR must include the metes and bounds description and a map of the site;

(vi) the title company works directly with the remedial party to correct any errors or omissions to produce the final DR to be filed;

(vii) once the title company has a final DR, it is provided electronically to the PM with a letter recommending that this document be finalized by the remedial party. Upon receipt of the letter from the title company, DEC's PM transmits a copy of the approved DR to the remedial party and requests that the DR be signed by the property owner, notarized and returned to the title company for filing; and

(viii) after the signed, notarized DR has been received by the title company, the title company will have the DR recorded at the office of the appropriate county clerk (or Registrar in New York City). A receipt (typically, this is a copy of the DR that is stamped with the book and page number in the upper right hand corner of every page of the document including attachments/exhibits) indicating where and when the DR was recorded must be provided to DEC and the remedial party. The PM may elect to have the remedial party file the deed restriction and provide the required receipt.

(c) Environmental Notice.

1. Environmental notices (EN) are informational documents filed in the public land records that inform prospective purchasers of an interest in the property that:

(i) contamination exists on the property;

(ii) a cleanup is required to occur or has occurred at the property to a level that restricts certain uses of all or part of that property; and

(iii) A DEC-approved Site Management Plan is or will be in place setting forth requirements relative to the use of such property.

2. Generally, the EN is used where a property owner cannot be located or refuses or is unable to grant an easement or place a deed restriction on the subject property. The latest version of the EN is available on [DEC's web site](#).

3. The property owner does not need to approve or sign the EN. The DER Division Director signs the ENs on behalf of DEC.

4. After the EN has been prepared and signed by DEC, the remedial party or DEC's contractor must have the EN recorded at the office of the appropriate county clerk (or Registrar in New York City). A receipt (typically, this is a copy of the EN that is stamped with the book and page number

in the upper right hand corner of every page of the document including attachments/exhibits) indicating where and when the EN was recorded must be provided to DEC.

3. Post-recording Actions for all ICs

(a) For EEs and DRs, the remedial party must submit a copy of any recorded EE or DR restricting land use to the highest official in the local government (e.g., mayor or town supervisor) and the Code Enforcement Officer where the contaminated property is located. Proof must be provided to DEC within 30 days of providing the local government with a copy.

(b) For ENs, DEC will submit a copy of an EN to the local government where the contaminated property is located.

(c) All reports referenced in the institutional control must be maintained and NOT destroyed pursuant to any other recordkeeping guidelines so long as the control is in place. EEs are listed on an EE registry on DEC's website.

4. Surveys

All survey work must be performed under the supervision of an individual who is licensed to practice land surveying in the State of New York. An ALTA survey is preferred; however, it is not required. The minimum requirements that must be shown on the survey are included on Attachment "A". However, when preparing a survey, the latest listing of minimum requirements should be downloaded from DEC's website. Additional information may be required on a case-by-case basis.

5. Modification or Termination of ICs

(a) It may be necessary to replace, modify, or extinguish ICs due to changes in conditions existing at a site over time, or changes in the ICs themselves. The Site Management Plan (SMP) for each site should establish procedures to modify or terminate ICs when warranted. These procedures should clearly delineate criteria to assist in determining whether it is appropriate to modify or terminate ICs, and should be documented.

(b) To remove or modify an IC, the current property owner must submit a written request to DER that the control be removed or modified.

1. Acceptable reasons to remove or modify a control include: the site's contamination no longer exceeds the unrestricted SCOs or groundwater standards, a municipal prohibition on groundwater extraction is enacted, or one form of an IC is replaced with another.

2. When DEC approves the removal or modification of an IC, a document in the same form as the original document and filed in the same manner with the county land records office must be recorded, which states that DEC and the property owner agree to remove the control and briefly states the reason for removing the institutional control.

3. Once recorded, a copy of the document must be provided to the same governments that were notified of the filing of the original.

VI. Related References

- Environmental Conservation Law, Article 27, Titles 13 and 14
- Environmental Conservation Law, Article 56, Title 5
- Environmental Conservation Law, Article 71, Title 36
- [6 NYCRR Part 375, Environmental Remediation Programs. December 14, 2006](#)
- [Model Environmental Easement](#)
- [Model Deed Restriction](#)
- [Model Environmental Notice](#)
- Minimum Survey Requirements (Attachment “A”)

ATTACHMENT "A"

MINIMUM SURVEY REQUIREMENTS

The survey must:

1. bear the name, address, telephone number, signature and certification of the professional land surveyor who performed the survey, his or her official seal and registration number, the date the survey was completed, and the dates of all the surveyor's revisions;
2. be certified to the New York State Department of Environmental Conservation;
3. show boundaries drawn to a convenient scale, with that scale clearly indicated. A graphic scale, shown in feet and meters, must be included;
4. identify the symbols and abbreviations that are used on the survey by the use of a legend;
5. accurately present diagrams;
6. show the point of beginning of the legal description;
7. include a correct legal description;
8. include a statement of the acreage in the legal description;
9. indicate both the measured bearings/angles/distances and the deed(s) description, if they differ;
10. provide the identifying titles of all recorded/filed maps and deeds with their appropriate recording data, filing dates and map numbers;
11. provide the section, block and lot/ tax map/ section numbers/letters of the surveyed premises;
12. show the location of all buildings/monuments/overlaps/encroachments upon the surveyed property with their locations defined by measurement perpendicular to the nearest perimeter boundaries;
13. show all observable evidence of easements and or servitudes and underground easements and or servitudes with their recording information (such as those created by roads, right-of-way, water courses, drains, telephone, telegraph, or electric lines, water sewer, gas cable lines or oil or gas pipelines) on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property, or any easements of record which may, based upon their location or use, impair or otherwise limit proposed development;
14. show any "blanket floating" easements;
15. depict the location of visible improvements within five feet of each side of boundary lines.
16. show a path of legal access for ingress and egress to and from the site for the Grantee, its agents, employees or other representative of the State to use to access the Site;
17. show ponds, lakes, springs, rivers or a natural water boundary bordering on or running through the surveyed property; the survey must measure the location of the natural water boundary and note on the survey the date of the measurement;
18. depict the area(s) of wetlands; restricted use zones;
19. depict the environmental easement area with corresponding metes & bounds description and acreage;
20. depict the area affected by engineering controls with corresponding metes and bounds with acreage, measurements with description of the engineering control (for example OU 1, OU 2 or Soil Management Plan Area and Sub-Slab Depressurization Systems);
21. show Methane/VOC system, Site Cap, Clean fill, Concrete, Demarcation Layer, area not under environmental control, Asphalt or building structures, footprint of future buildings (where known), and other site features, remedial equipment or structures;
22. clearly state "Environmental Easement Description" or Deed Restriction", with the DEC Site Number next to it;

23. include the following statement: “*The engineering and institutional controls for this Easement are set forth in the Site Management Plan (SMP). A copy of the SMP must be obtained by any party with an interest in the property. The SMP can be obtained from NYS Department of Environmental Conservation, Division of Environmental Remediation, Site Control Section, 625 Broadway, Albany, NY 12233 or at derweb@gw.dec.state.ny.us*”. This reference must be located in a prominent place on the face of the survey and be in at least 15-point type;
24. show the sheet number and total number of sheets on each sheet if the survey consists of more than one sheet; and
25. show the record title description of the surveyed tract and any new description prepared by the surveyor on the face of the survey.

Additional information may be required on a case by case basis.