

STATE ENVIRONMENTAL REGULATION

Expert Analysis

Rules on Institutional Controls Move Forward

Environmental remediation seeks to decrease the amount of contamination located at a property. Residual contamination, however, can remain at the property after the cleanup is completed. If the residual contamination concentrations are low enough, they may pose no risk to humans and the environment regardless of the use of the property. On the other hand, residual contamination concentrations might be high enough to pose an unacceptable risk of exposure for some, but not all, uses of property. In other situations, residual contamination may be isolated by physical means, engineering techniques, or land use restrictions as a way to control the risk of exposure. Perhaps the simplest example of a control method is a fence that cordons off an area, making it inaccessible.

Control methods that utilize non-physical means to restrict the use of property so as to limit the exposure of humans and the environment to contamination are referred to as “institutional controls” (ICs).¹ The most common ICs currently employed are environmental easements, deed restrictions, and environmental notices. ICs can minimize the potential for exposure to contamination, protect engineered remedies to restrict exposure, and provide appropriate notice of the residual contamination to those individuals who may be impacted by the contamination.

ICs have been used for many years to enforce restrictions on the use of real property as a means to limit human or environmental exposure to contamination. For example, ICs have been employed to restrict the use of groundwater at a site, thereby preventing exposure to contamination in that groundwater. A notice recorded in the land records is another example of an IC, and is often

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used to provide notice to potential purchasers, tenants, or the general public about the existence of consent orders or ongoing environmental cleanups. These notices also are used to prevent actions that interfere with the effectiveness of a remedial project. ICs often work in conjunction with engineering controls (also referred to as ECs) to ensure that ECs are properly monitored and maintained.²

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The kinds of ICs have changed over the years. For example, in 2004, the New York State Legislature passed an environmental easement statute. Pursuant to that law, environmental easements can be granted that restrict the use of land to conform to constraints placed on sites by any remedial program of the State Department of Environmental Conservation (DEC).³

In December 2010, the DEC adopted a guidance policy on ICs,⁴ which took effect earlier this month and which provides direction on developing, drafting, and properly recording ICs as part of a cleanup decision for remedial programs managed by the DEC’s Division of Environmental Remediation (DER).⁵ As noted in the guidance policy document, DER-33, ICs “must be properly drafted and recorded with the appropriate county’s

land records to ensure proper notice” to the public and other interested parties, and to ensure the “effectiveness of the control.”⁶ Moreover, if an engineering control is part of a remedial plan, an IC must be recorded, as provided in the new DEC guidance, before a final engineering report can be approved and a certificate of completion (COC)⁷ or other form of closure letter can be issued. Thus, as more and more sites, including brownfields and New York Superfund sites, are remediated throughout the state, or are part of any other DEC remedial program, the guidance provided in DER-33 will become one of the more important documents to which lawyers and environmental consultants will frequently refer.

Environmental Easements

DER-33 explains that, to ensure that an environmental easement (EE) is properly executed, the “remedial party” must “conduct a sufficient search of the real estate records to identify all legal and equitable interest in the property and to ensure the EE and any supporting documents are properly prepared and executed.”⁸ DER-33 also provides that “[w]ithout 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.”⁹ The guidance points out that “[i]t is in the remedial party’s best interests 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.”¹⁰

As the DEC guidance notes, the remedial party begins the process for execution of an EE by providing the DER project manager with, among other things, a proposed EE;¹¹ an updated title report along with copies of any encumbrances such as mortgages, judgments, easements, leases, and liens; a \$35,000 title insurance policy; organizational documents

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and partnership agreements; and completed and signed attorney and site owner checklists and certifications.¹²

After the EE package is reviewed by the DEC and executed, it has to be recorded at the office of the appropriate county clerk (or the registrar in New York City). The remedial party must provide a receipt indicating where and when the EE was recorded to the DEC, and then must serve notices of the EE on parties identified in the title report.

Deed Restrictions

A deed restriction (DR) is an encumbrance that controls the use of property. DRs include limits on the current and future uses of the property, limits on the use of groundwater, and restrictions on how soils are managed.

A DR issued in connection with a remedial project runs with the land in favor of N.Y. State and contains the restrictions or prohibitions on the use of land. DER-33 notes that a DR "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, or monitoring requirements of the approved site management plan."¹³

As the guidance makes clear, "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 the DEC's written consent."¹⁴

To ensure that a deed restriction is properly executed, the remedial party must "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."¹⁵

As with environmental easements, the DEC makes it clear in the guidance that it is in a remedial party's best interests to make sure that a deed restriction is valid and enforceable, because any subsequent challenge to the validity, enforceability, or effectiveness of a DR "would be a basis for voiding any certificate of completion and/or releases and reopening the remedy for the site."¹⁶

The appropriate DR template can be downloaded from the DEC's website.¹⁷ The project manager and remedial party complete the template, and the remedial party provides the deed, a tax map of the site, and a survey to the DEC. The DEC contracts with a title company to handle the deed restriction (with costs recoverable from the remedial party). After the signed, notarized deed restriction is received by the title company, it records it at the office of the appropriate county clerk (or the New

York City Registrar). The guidance provides that the title company will send a receipt to the DEC and the remedial party.

Environmental Notice

An environmental notice (EN) is an informational document filed in the public land records that informs prospective purchasers of an interest in property that contamination exists on the property; a cleanup is required or has occurred at the property to a level that restricts certain uses of all or part of that property; and a DEC-approved site management plan is or will be in place setting forth requirements relative to the use of such property.

Generally, an environmental notice "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 land.¹⁸ The property owner does not have to approve or sign an environmental notice. Rather, the DER Division Director is permitted to sign ENs on behalf of the DEC.¹⁹

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"After an EN has been prepared and signed by the DEC, the remedial party or the DEC's contractor must have the EN recorded at the office of the appropriate county clerk (or the Registrar in New York City)."²⁰ As with other kinds of institutional controls discussed here, a receipt indicating where and when the environmental notice was recorded must be provided to the DEC.

Post-Recording Actions

The DEC guidance imposes some post-recording requirements on remedial parties. "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 the DEC within 30 days of providing the local government with a copy."²¹ For environmental notices, the guidance indicates that the DEC will submit a copy of an environmental notice to the local government where the contaminated property is located.

Moreover, all reports referenced in an IC must be maintained and not destroyed regardless of any other recordkeeping guidelines so long as the IC is in place. Environmental easements are listed on an EE registry on DEC's website.²²

Additionally, DER-33 recognizes that "[i]t may be necessary to replace, modify, or extinguish ICs due to changes in conditions existing at a site over time, or to changes in the ICs themselves."²³ Thus, a Site Management Plan should include procedures to modify or terminate ICs, as warranted, and must delineate criteria to do so.

Conclusion

Not all real estate can or should be remediated to the extent that all uses would be permitted on that land. Institutional controls have long been recognized as a way to impose and enforce use limits while still permitting development and productive use of the site. DER-33 will act as a concise road map for parties and their counsel and other advisors when contemplating use of an IC.



1. 6 NYCRR 375-1.2(aa).

2. An EC is a physical barrier or method that actively or passively contains, stabilizes, or monitors contamination, restricts the movement of contamination to ensure the long term effectiveness of a remedial program, or eliminates potential exposure pathways to contamination. Examples of ECs are caps, covers, subsurface barriers, vapor barriers, slurry walls, building ventilation systems, and fences. 6 NYCRR 375-1.2(o).

3. See Environmental Conservation Law (ECL) Article 71, Title 36.

4. DER-33 / Institutional Controls: A Guide to Drafting and Recording Institutional Controls, available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der33.pdf.

5. Interestingly, the U.S. Environmental Protection Agency recently published notice of an interim final guidance of its own on ICs. Entitled, "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites," this guidance applies to ICs for environmental cleanups of sites under the federal environmental laws, including the Superfund law, formally known as CERCLA or the Comprehensive Environmental Response, Compensation, and Liability Act. The EPA guidance is available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ba9030>.

6. DER-33 at page 2.

7. DER-33 at page 3. COCs are issued upon approval of a final engineering report or the issuance of the no further action decision document, and provide liability protections for site owners, developers, and lessees. 6 NYCRR 375-1.9.

8. DER-33 at page 4.

9. Id.

10. Id.

11. A model EE document is available at <http://www.dec.ny.gov/chemical/48236.html>.

12. See <http://www.dec.ny.gov/chemical/65118.html>.

13. DER-33 at page 6.

14. Id.

15. DER-33 at page 7.

16. Id.

17. See <http://www.dec.ny.gov/chemical/48236.html>.

18. DER-33 at page 8.

19. Id.

20. Id.

21. DER-33 at page 9.

22. Id.

23. Id.