UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
SOLID WASTE AND EMERGE
RESPONSE

MEMORANDUM

SUBJECT: Request for Comments on Draft "Institutional Controls: A Reference Manual"

FROM: Stephen Hess, Office of General Counsel
Sharon Frey, Office of Emergency and Remedial Response

TO: Interested Parties

Thank you for your interest in the "Institutional Controls: A Reference Manual." Attached for your review is a copy of the draft document. We would appreciate any comments you may have regarding this draft document by close of business **July 3, 1998** (see below for address information)

Background

This document was prepared by EPA's Institutional Controls Workgroup, which consists of attorneys from the Office of General Counsel, the Office of Enforcement and Compliance Assurance, and EPA Regional offices, as well as representatives of a number of headquarters program offices including the Office of Emergency and Remedial Response, and the Office of Solid Waste. It was drafted by the Institutional Controls Workgroup as a general reference tool.

The Reference Manual has been prepared for use by EPA staff involved in evaluating and implementing institutional controls in cleanup programs -- primarily under the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), although the information contained in it may be relevant in other cleanup contexts as well. The Reference Manual is not intended to be Agency guidance. The drafters hope that it will be useful as a general introduction to institutional controls, the purposes they can serve, and issues that arise in their implementation. While it provides information that may be used by both program and legal staff, it is expected to be of particular value for regional counsel.

Implementation

Controls on the use of land and other resources are often a key element of environmental cleanups. Such controls can play an important role in limiting risk, and are often needed to ensure that engineered remedies are not affected by later activities.

The Reference Manual identifies the kinds of legal and other vehicles that can serve as institutional controls, and discusses in detail the legal and practical considerations that may arise in putting such controls in place. It also provides a general introduction to the role of such controls in applicable regulations and program guidance. The Workgroup believes that this information can be valuable both in the assessment of institutional controls during the remedy selection process and in the implementation of institutional controls. In addition, the reference manual contains recommendations that the Workgroup believes can improve future efforts to evaluate and implement institutional controls.

As noted above, the information contained in the reference manual is relevant to the use of institutional controls under both CERCLA and RCRA, except where a focus on one program is specifically noted. In addition, some of the information in the manual is not applicable at federal facilities; therefore, a discussion focused on federal facilities can be found in Section XI.

How to Comment

We welcome your input. Our plan is to consider all comments we receive, and then prepare a final document. Please submit your comments by close of business **July 3, 1998** via mail, fax, or E-mail to either of the following:

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Institutional Controls: A Reference Manual

Prepared by the U.S. EPA Workgroup on Institutional Controls

[WORKGROUP DRAFT -- MARCH 1998]

Institutional Controls: A Reference Manual

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I. An introduction to institutional controls

A. What are institutional controls?

The term "institutional controls" ("ICs") refers to non-engineering measures -- usually, but not always, legal controls -- intended to affect human activities in such a way as to prevent or reduce exposure to hazardous substances. Examples of institutional controls cited in the preamble to the 1990 CERCLA National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") include "land and resource (e.g., water) use and deed restrictions, well-drilling prohibitions, building permits and well use advisories and deed notices.".[2] Under this definition, institutional controls include but are not necessarily limited to legally enforceable measures (e.g., providing risk information to potential site users could be considered a form of institutional control). However, they are distinct from physical engineering measures such as treatment and containment systems.[3]

Institutional controls are only one category of the many kinds of tools that can be used to reduce exposure to acceptable levels in environmental cleanups. They are generally used in conjunction with, or as a supplement to, other measures such as waste treatment or containment, rather than as the sole remedy. The role of institutional controls relative to other remedial methods is discussed in Section III below.

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[2] See 55 Fed. Reg. at 8706 (March 8, 1990).

[3] The term is sometimes used in the Agency to include very limited, passive engineering measures such as fences. However, the definition above seems most consistent with the way the term is used in the NCP. The NCP does not define institutional controls, but its preamble, in discussing their use, says that they "limit human activities at or near facilities", distinguishes them from "engineering controls" and "active" response measures, and elsewhere draws a distinction between "treatment and permanent remedies" on one hand, and "legal controls" on the other. See 55 Fed. Reg. at 8706 (March 8, 1990).

Institutional controls can be created in a variety of ways. Property law devices, or "proprietary" controls, are perhaps the most common type of control. Controls established through some governmental entity's regulatory authority, such as zoning restrictions or controls on well drilling, are a second category. Enforcement tools, such as unilateral or consent orders issued under CERCLA s. 106 or RCRA s. 3008(h), can also be used to limit land use. Each of these types of controls is discussed in detail below.

It is important to keep in mind that these types of controls are not mutually exclusive. One or more types of controls may be appropriate for a particular site depending on site-specific conditions. In fact, "layering" -- the use of redundant controls -- can be a way of enhancing the overall level of reliability of the controls.

It is also important to remember that these controls are established as part of a program for protecting human health and the environment. Therefore, while legal tools based on private property law may be used to create controls, EPA is not acting simply as a buyer of property when it uses those tools. These tools should instead be viewed as part of the measures the agency uses to enforce restrictions that are within its authority to create under its cleanup programs.

B. Typical uses of institutional controls

ICs are extremely flexible, and can be used to serve a variety of purposes. Some of the situations in which institutional controls may be necessary to ensure that the remedy is protective include the following.

* Where the cleanup is protective for industrial or commercial, but not residential exposures, institutional controls may be needed to prevent residential use from taking place at the site.

* Where groundwater will remain contaminated for some period of time (either during remediation, or because remediation has been found impracticable), restrictions may have to be placed on well drilling , to prevent use of the groundwater for drinking purposes.

* Similarly, where surface water will remain contaminated above safe levels during the remediation process, it may be necessary to issue fishing advisories or restrictions.

* Where soils are decontaminated near the surface, but contamination is left at higher levels in subsurface soils (e.g., because of the difficulty of excavating under structures or over a very wide area), restrictions may have to be placed on excavation to prevent exposure.

* In some cases, soil may be decontaminated enough to allow for continued residential use, but certain activities such as gardening may result in unacceptable exposures. Restrictions on such activities may therefore be appropriate.

* Where contamination is capped to prevent direct exposure and/or reduce leaching of contaminants to groundwater, it is generally necessary to prohibit activities that could degrade the cap.

As these examples show, institutional controls may be needed in a wide variety of situations. The challenge for the Agency is to identify the kinds of legal and other tools available to try to serve these needs, and to ensure that they are implemented effectively. This reference manual is intended to assist in meeting that challenge.

II. Workgroup Recommendations

1. Institutional controls should be evaluated carefully before the remedy is chosen.

The workgroup recommends careful analysis of ICs in the studies that precede remedy selection (e.g., the feasibility study, under CERCLA, or corrective measures study under RCRA). Such analysis should be as detailed and complete as that conducted on any other part of the remedy.

Close attention should be paid to (1) the potential for use of institutional controls, (2) the specific types of controls that may be available and (3) potential impediments to their successful implementation and long-term enforcement. As later portions of the manual will explain, a variety of barriers can exist to the establishment and enforcement of reliable institutional controls, which need to be anticipated before the remedy is selected.

The workgroup believes that early and careful consideration of institutional controls may affect the design of the remedial alternatives. For example, whether a containment remedy will be considered adequately protective, or whether removal and treatment of contaminated soil is necessary, may depend in part on whether controls to prevent access or interference with the containment system will be reliable and enforceable. Therefore, institutional controls should not be considered an automatic "add-on" or afterthought; they should be seriously evaluated in comparing the remedial alternatives before remedy selection.

2. Goals of institutional controls should be described clearly in the remedial decision document.

The workgroup believes that the remedial decision document (ROD under CERCLA, or permit or order under RCRA) should clearly state the purposes that the institutional controls are intended to achieve, setting objective performance standards wherever possible. In CERCLA RODs, these should be among the remediation goals. The workgroup believes it is generally desirable to retain flexibility in decision documents as to the precise type of institutional controls to be implemented (leaving

some flexibility, for example, to change from proprietary to governmental controls if the preferred approach proves to be unworkable). However, wherever a particular type of control is anticipated, the workgroup believes that should be indicated in the key decision document.

This recommendation reaffirms what is already stated in the Agency's guidance on considering land use in CERCLA remedy selection: "While the ROD need not always specify the precise type of control to be imposed, sufficient analysis should be shown in the FS and ROD to support a conclusion that effective implementation of institutional controls can be reasonably expected."[4]

It is also good practice to note in the remedial decision document that the remedy is intended to include any institutional controls needed to implement the engineered portion of the remedy or maintain its long-term effectiveness (e.g., access easements or easements prohibiting excavation into a cap), without necessarily specifying the nature of all such controls. Such controls may be specified to the extent they are known, but a more general statement is desirable including any institutional controls that may be needed to implement or protect the engineered remedy. Omitting this clarification can lead to disagreement later over whether the institutional controls are within the scope of the remedy (and thus potentially within the scope of enforcement actions or agreements). Specifically including such a discussion can avoid such disputes.

3. State and local agencies have a vital role in developing, establishing and maintaining effective and enforceable institutional controls.

Establishing effective institutional controls will in some cases depend on the authority of state or local governmental entities to impose such controls. Even where such authority is not being used, local governments have a strong interest in any actions that affect land use. Therefore, it is extremely important to identify as early as possible (such as during the

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[4] OSWER Directive No. 9355.7-04, "Land Use in the CERCLA Remedy Selection Process." (Hereinafter, "Land Use Guidance.")

RI/FS at a CERCLA cleanup) what state and local authorities may have jurisdiction over a particular property, and what state and local provisions may provide the basis for institutional controls. In addition, EPA should attempt to outline the expected basis and scope of institutional controls as early as possible and determine what is needed to ensure that there is sufficient local and state government "buy-in" to make such controls an effective part of the remedy. EPA should then consult with state or local governmental authorities to determine whether they would be willing to take the lead on enforcing institutional controls, and what concerns they may have should they be asked to play this role. Such consultation should occur during the analysis and evaluation process, not postponed until after the remedy is selected. Where a private party is performing the analysis of alternatives, it may be appropriate for that party to carry out such consultation; this will depend on the circumstances.

4. Misconceptions about the effect of simply specifying use restrictions in a deed should be corrected.

There appears to be a common misconception that enforceable controls may be established simply by having the landowner enter a notation in "the deed" to the property. There is no "deed", in most cases, that lists all ownership interests in and restrictions applying to a piece of property. A deed is simply the document executed when one party conveys an interest in the property to another party. In such a transaction, the selling party may place restrictions on the future use of the property. However, a landowner may not impose restrictions on its own property later by unilaterally altering that deed; property law requires a conveyance of a property interest (such as an easement) from the landowner to another party for a restriction to be enforceable.[5] Nor can restrictions be imposed simply by having the landowner record a notice in the land

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[5] Some states have recently adopted statutes allowing controls that run with the land to be established by the landowner through an agreement with a state agency, or by the agency itself, without a conveyance. See page 26 below. However, unless one of these laws clearly applies, the general principle above should be assumed to be true.

records, without a conveyance of rights to some other party. Even if a unilateral document were accepted for recording, the landowner who filed it could remove it at any time. At most, the filing of such a document might have some informational value similar to posting a sign on the premises that could be removed at any time by the owner.

The workgroup believes that avoiding confusion on this point is important because misunderstandings about what is required to establish effective controls could lead decision-makers to underestimate the complexities involved in remedies that involve institutional controls, or to inadequate implementation of such remedies. Therefore, the workgroup recommends that both agency staff and members of the public be fully informed about this aspect of institutional controls.

5. The term "deed restriction" should be used carefully.

The confusion described above sometimes seems to arise from use of the term "deed restriction". The term "deed restrictions" can be useful (and is used in this document) as a generic term that encompasses any instruments such as easements and covenants that are legally enforceable (as opposed to documents that are simply filed by the owner and therefore have no legal effect). However, it is not a traditional or clearly-defined property law term. The workgroup recommends that to avoid confusion, when the term "deed restriction" is used with a general audience an explanation of what it means should be provided. In addition, in a context where clarity of intent is particularly important, a more specific term, such as "easement", should generally be used.

6. The limitations of deed notices should be clearly understood.

Unenforceable "deed notices" are sometimes used to alert those searching land records to important information about the property. For example, they may note that the property is located within a Superfund site, identify the kinds of contaminants present and the risks they create, or describe activities that could result in unacceptable exposures to the contaminants left on site after a remedial action was taken.

However, recording a deed notice has little or no effect on a property owner's legal rights regarding the future use of the property. Neither the present owner nor any successors would be legally bound by any use restrictions referred to in a deed notice. Therefore, the workgroup recommends that deed notices be used with caution because they may create an impression that legally enforceable controls have been established when that is not the case. They should not be used where enforceable controls are necessary to ensure a protective remedy. Use of deed notices is, of course, appropriate where specifically required in applicable regulations (e.g., RCRA closure rules at 40 CFR 264.119).

7. Where it is important for the control to run with the land, it is generally not advisable to rely on a consent decree alone, without execution of a separate instrument such as an easement.

Under CERCLA, consent decrees ("CDs")are used to memorialize settlements with responsible parties who agree to implement the remedy. Consent decrees can limit land use by a settling party, and in some cases the terms of the consent decree might be construed as the conveyance of a property interest so as to be binding against subsequent purchasers as well. However, to make the intention of the parties clearer, the workgroup strongly recommends that separate documents explicitly conveying a real estate interest be drafted and filed. The consent decree should reference the intent to execute such documents, but should not itself be used as the instrument of conveyance. Similarly, filing of the consent decree, by itself, should not be relied on to establish effective controls. New model language for consent decrees consistent with this recommendation has recently been issued; see Appendix A.

III. The role of institutional controls in remedies

The role that institutional controls should play in the remedial program as a whole is a policy choice that is beyond the scope of this document. However, a general overview of principles that have been adopted by the Agency as policy to date may be worthwhile.

A. CERCLA

The NCP contains the following "expectation" regarding the use of institutional controls:

> EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.

40 CFR 300.430(a)(1)(iii)(D).[6]

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[6] A reference to institutional controls also appears in 40 CFR 300.430(e)(3)(ii), providing that for source control actions, the lead agency shall develop, as appropriate, "one or more alternatives that involve little or no treatment, but provide protection of human health and the environment primarily by preventing or controlling exposure...through engineering controls, for example, containment, and as necessary, institutional controls...."

This expectation reflects the remedy selection criteria in the NCP, under which alternatives that meet the threshold requirements of protectiveness and ARAR compliance are evaluated and compared using five balancing criteria: long term effectiveness, use of treatment, implementability, short-term effectiveness, and cost. In some cases, this balancing process may favor use of engineering controls; in others it may lead to greater reliance on institutional controls. The appropriate balance among these considerations is made on a site-specific basis.

The NCP does not forbid the use of institutional controls as the sole remedy; rather, as noted above, it states as an expectation that this will occur only where other measures "are determined not to be practicable, based on the balancing of trade-offs among alternatives." Practicability, as used here, is determined through the evaluation of alternatives under the nine CERCLA remedy selection criteria "including cost and other factors." See 55 FR at 8706 (March 8, 1990). However, "[w]here institutional controls are used as the sole remedy, special precautions must be made to ensure that the controls are reliable." 55 FR at 8706.

More commonly, institutional controls are used because treatment and containment measures do not address risks entirely so that the remedy must include activity restrictions to ensure that it is fully protective. For example, over the time that is required to pump and treat contaminated groundwater, other measures may be needed to ensure that residents are not inadvertently exposed by drilling new wells. Containment remedies may have to be supplemented with institutional controls to ensure that future land users are aware of the wastes left on site and that they do not take actions that might interfere with the containment system.

Further guidance on the use of institutional controls under CERCLA can be found in the NCP preamble, 55 FR at 8706-07.

B. RCRA

Cleanups may be conducted under RCRA in a variety of contexts -- most commonly in connection with closure of regulated

units and facility-wide corrective action under a permit or order. Cleanups may also be ordered under s. 7003 of RCRA.

In a Notice published May 1, 1996, EPA stated that it is "committed to consistency of results between the RCRA corrective action and Superfund remedial programs" and stated expectations for corrective action that were based on those published in the CERCLA NCP. Accordingly, the expectations for the use of institutional controls in corrective action are the same as under the CERCLA NCP. Specifically, the Notice stated that:

> EPA expects to use institutional controls such as water and land use restrictions primarily to supplement engineering controls as appropriate for short and long term management to prevent or limit exposure to hazardous waste and constituents. EPA does not expect that institutional controls will often be the sole remedial action.

61 FR at 19448 (May 1, 1996).

In addition, RCRA closure rules specifically require, for units where waste is left in place, that the owner or operator must "record, in accordance with State law, a notation on the deed to the facility property" that will in perpetuity notify any potential purchaser that the land had been used to manage hazardous wastes and that its use is restricted under the closure regulations. See 40 CFR 264.119(b)(1).

IV. Integrating institutional controls into the remedy selection process

Issues relating to institutional controls can arise at a number of points in the process of selecting a remedy. Under CERCLA, remedy selection begins with a remedial investigation and feasibility study ("RI/FS"), with the final decision documented in a record of decision ("ROD"). Under RCRA, the process is similar although different terms are used: it generally begins with a RCRA facility investigation ("RFI"), followed by a corrective measures study ("CMS"), with final documentation in a permit or order (or modification thereof). For simplicity, the following discussion uses the CERCLA terminology, but the conclusions apply under both programs.

A. Consideration of ICs in the RI/FS

The feasibility study identifies remedial alternatives and assesses them against the remedy selection criteria. ICs may be one of the alternatives considered, or may be one element of an alternative (e.g., supplementing a particular cap design).

The workgroup believes that the standard of care and degree of analysis in the FS should be as high for ICs as for other elements of the remedy. Carefully studying ICs in the FS can serve two purposes. First, it can identify factors affecting the overall choice of the remedy under the nine criteria (e.g., legal or practical impediments to implementation, estimated cost of long-term monitoring and oversight, etc.). Second, creative evaluation of institutional controls may identify innovative ways of using these legal devices to accomplish remedial objectives. Thus, the FS can help identify both opportunities and risks in the use of institutional controls.

The OSWER Land Use Guidance states that: "In developing remedial alternatives that include institutional controls, EPA should determine: the type of institutional control to be used, the existence of the authority to implement the institutional control, and the appropriate entity's resolve and ability to implement the institutional control."[7] This guidance

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[7] Land Use Guidance at 10.

reflects the importance of long term effectiveness and implementability as criteria bearing on the evaluation of institutional controls. Depending on the circumstances, other remedy selection criteria, such as cost and community acceptance may be significant as well (although, of course, all nine criteria must be considered in each case). In evaluating cost, the estimated cost of implementing, monitoring and enforcing the control, particularly against non-liable parties, should not be overlooked.

The Land Use Guidance also points out that "an alternative may anticipate two or more options for establishing institutional controls, but should fully evaluate all such options."[8]

A proper analysis of implementability can be complex, considering such diverse factors as patterns of land ownership, the extent to which land being restricted is owned by liable parties, and the degree of cooperation anticipated from the local government with authority to establish land use controls. Therefore, to evaluate IC options intelligently, it may be necessary to expand the scope of the remedial investigation to include gathering information such as the identity of property owners, current zoning or land use plans, etc. (Much of this information is already identified in the general guidance on information needed to consider land use in remedies; see OSWER Land Use Guidance at 5.) Therefore, the workgroup believes that improving evaluation of ICs needs to begin as far back as the process of scoping the RI. The workgroup believes that regional counsel can provide valuable assistance in this aspect of the RI/FS.

B. Discussion of ICs in the ROD

The workgroup believes that the proposed plan and ROD should clearly and fully describe the goals to be attained by institutional controls. If the ROD is vague about the goals to be attained by institutional controls to be implemented, and gives little consideration to whether they can realistically be implemented, both the opportunities for, and the complexities of

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[8] Land Use Guidance at 10.

using institutional controls may be underestimated. In addition, if the role of the institutional controls is not adequately described, public acceptance of the remedy may be difficult to obtain because the full protections provided by the remedy are not clear.

The workgroup believes that the ROD should focus on the goals to be achieved by institutional controls, rather than specifying the precise form of ICs to be implemented, in order to provide adequate flexibility after the ROD is signed. This is consistent with OSWER's Land Use Guidance, which states that "While the ROD need not always specify the precise type of control to be imposed, sufficient analysis should be shown in the FS and ROD to support a conclusion that effective implementation of institutional controls can reasonably be expected."[9]

However, the workgroup believes that the ROD should discuss in some detail the kinds of controls envisioned and, as noted above, contain enough information to show that effective implementation can reasonably be expected. In particular, "Performance standards" should be clearly specified, setting forth the aims that the ICs are intended to achieve (e.g., prevent exposure to contaminated groundwater by prohibiting well drilling).

Another important consideration is long-term monitoring of compliance with institutional controls. The ROD should include, and discuss, plans for monitoring land use and other aspects of the remedy that depend on institutional controls. The required 5-year review may serve this function, but in some cases more frequent monitoring may be considered important.

Finally, a mechanism for enforcement of the controls is critical to their long term reliability. The ROD or other decision document should generally contain enough discussion to indicate that this need has been considered and what enforcement mechanisms are anticipated.

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[9] Land Use Guidance (see note 4) at 10.

C. Post-ROD oversight, funding and compliance assurance

The legal steps involved in establishing ICs are discussed in Section VII. However, other post-ROD work will also be appropriate in many cases. Effective oversight is important, especially where the ICs are critical to protectiveness and failure is a significant possibility. Under CERCLA, five-year review is one method of providing such oversight; other steps may be provided for in individual RODs. Another means of assuring compliance may be to use the O&M inspections as an opportunity to evaluate the effectiveness of the IC's. Under RCRA, special provision may have to be made in the permit or order for a periodic review of implementation and compliance.

As noted earlier, enforcement is critical to the long-term reliability of institutional controls. Therefore, it is important, as controls are established, to ensure that satisfactory enforcement mechanisms are created.

Funding, both for long-term oversight and for any necessary future remedial action, is another important consideration. Especially at enforcement-lead sites, the need to provide financial assurance for future contingencies should not be overlooked.

D. IC's in removals

Institutional controls may be used in connection with removals as well as remedial actions. While the NCP discussion above focuses on response actions taken under remedial authority, nothing in the NCP precludes using institutional controls in connection with a removal. In such cases they would usually be considered part of the "post-removal site control". See OSWER Directive 9360.2-02, "Policy on Management of Post-Removal Site Control", December 3, 1990.

V. Tools for Creating Institutional Controls

Since neither CERCLA nor RCRA contains provisions specifically addressing the establishment of institutional controls, EPA must turn to a variety of legal and other devices -- either under those statutes or under other authorities -- to accomplish the goal of controlling land use. This Section introduces the tools that can be used to create institutional controls.

In general, these tools fall into four categories: (1) "proprietary" controls, which rely on property law, (2) governmental controls, which rely on regulatory authorities (usually of a state or local government), (3) enforcement tools, and (4) non-enforceable informational devices. Since informational devices often rely on property recordation systems, they will be discussed in connection with proprietary controls.

A. Proprietary controls

1. What is a proprietary control?

Private property law provides a variety of tools that can be used to restrict or affect the use of property. Common examples include covenants or easements restricting future land use or prohibiting activities that may compromise specific engineering remedies. The term "proprietary controls" is used here to refer to these kinds of controls.[10] A distinctive feature of proprietary controls is that, because they are based on generally applicable property law, they can be implemented without the intervention of any federal, state or local regulatory authority.

2. A real property primer

Effective selection, implementation and enforcement of proprietary ICs requires a basic understanding of real property

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[10] The term "deed restriction" is commonly used to refer to this type of control. However, as was pointed out in Section II, that term has no clear legal meaning in property law; see page 30.

law. Principles of real property law will dictate whether a proprietary control can be used in a particular circumstance and what limitations may apply to it.

The following is a very general introduction to the relevant principles of property law. If a proprietary interest is being seriously considered, counsel should do further research to familiarize themselves more fully with this area of the law.[11] The Office of General Counsel can provide support in this regard as well.

It is also important to bear in mind that the development, implementation and enforceability of proprietary ICs is almost always a function of state law. Consequently, regional counsel, and to a lesser extent project managers, should become familiar with the property laws of the state in which a site is located before proceeding on the assumption that such controls can be easily or reliably established.

a. **Real Property Interests**. Ownership of property is often analogized to holding a bundle of sticks, any one of which can be either retained or conveyed to another party. Thus, more than one party can own some interest in a particular parcel of land. The ways in which any given bundle of sticks may be divided up is almost infinite. For example, the principal or "fee" owner may sell to another party the mineral rights while retaining all other rights in the property. Signing a mortgage is another transfer of limited rights (i.e., the right to seize the property as collateral if payment is not made).

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[11] A general introduction to the relevant property law principles can be found in Arthur Gaudio, ed., American Law of Real Property (1994). Articles specifically applying these principles to institutional controls include Susan Borinsky, The Use of Institutional Controls in Superfund and Similar State Laws, 7 Fordham Env. L. J. 1 (1995), and John Pendergrass, "Use of Institutional Controls as Part of a Superfund Remedy: Lessons from Other Programs", 26 Environmental Law Reporter 10109, 10111-12 (March 1996).

Interests in land can be either possessory or non-possessory. The most common possessory interests are fee simple and leaseholds (landlord-tenant). Non-possessory interests may, among other things, give one party the right to enter onto another person's land, or the right to restrict the other's use of his or her own land. In most cases, institutional controls will be non-possessory, although in some cases full ownership (i.e., ownership in fee simple) of property might be acquired in order to restrict its use.

Under traditional real property law, a number of different non-possessory devices evolved under which one party could control another's use of its own land. The most notable of these devices include easements, covenants and equitable servitudes. Historically, because they evolved in different contexts, each of these devices had its own distinctive requirements and limitations resulting in a very complex and confusing set of legal rules and terms. More recently, however, courts have begun moving toward a more unified, pragmatic approach that allows the parties to fashion their own agreements as they wish, and override common law doctrines, so long as their intentions are clearly specified and notice is properly given to other parties against whom the agreements are being enforced (e.g., subsequent purchasers).

Therefore, for a general understanding of institutional controls it is not essential to become immersed in the complexities of traditional real estate law and terminology governing these devices. Rather, at least initial steps can be taken in most cases with the general expectation that a document clearly stating the parties' intentions with regard to key issues will likely be enforced according to its terms. However, counsel should become familiar with the kinds of problems that common law doctrines can present, and should plan to research the law of the state to determine whether, in that state, those doctrines are still likely to be recognized. If the risk of an adverse result appears too great, this should be taken into account in deciding whether to rely on a particular form of control.

The primary issues that are likely to arise, and should be addressed in the instrument that evidences the conveyance are (1) the nature and extent of the control to be imposed, (2) whether the control will be binding on subsequent

owners of the property (i.e., whether it "runs with the land"), and (3) whether the right to enforce the control (i.e., the "benefit") can be transferred to other parties. Historically, the answers to these questions depended on which form the property interest took. Again, issues of form appear to be less critical in modern practice, and clarity of intent is probably more important. However, a general understanding of the traditional distinctions is important to pitfalls potentially lurking in jurisdictions where more traditional doctrine is still enforced.[12]

i. Traditional real estate interests

The most flexible traditional property interest is the **easement.** An easement is a property right conveyed by a landowner to another party, which gives the second party rights with regard to the first party's land.[13] Easements may be "affirmative" or "negative". An affirmative easement allows the holder of the easement to enter upon or use another's property for a particular purpose (e.g., an access easement). A negative easement imposes limits on how the landowner can use his or her own property. For institutional controls, negative easements are most relevant. A negative easement might, for example, prohibit a particular parcel from being used for residential purposes, or prohibit well-drilling on that parcel.

At one time, the common law discouraged negative easements. Today, however, negative easements are fully enforceable as long as the intent of the parties as to the nature and scope of the easement is clear.

Traditional property law also distinguishes between easements that are "appurtenant" and those that are "in gross."

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[12] If EPA is the recipient of the proprietary easement, the need for a state assurance under CERCLA s. 104(j)(2) should be evaluated. See Section IX.

[13] It is important to remember that for an easement to be created there must be a conveyance from one party to another. An easement cannot be established unless there is some party willing to hold the easement. See discussion below on "deed restrictions."

This terminology is still commonly used, although the legal implications are becoming less crucial. An easement is "appurtenant" if it is created to benefit an adjacent parcel of land (and it is held by the owner of that land). For example, an easement allowing the owner of one parcel the right to cross an adjoining parcel in order to gain access would be an "appurtenant" easement.[14] An easement is "in gross" if the benefit is not related to any property owned by the holder of the easement. Easements used in applying institutional controls will generally be "in gross" because the restrictions are generally not for the benefit of any particular neighboring parcel owned by the holder of the easement.[15]

Traditional common law doctrines limited the usefulness of easements in gross as long-term controls on land use. Most importantly, the benefit of an easement in gross (i.e., the right to enforce it) was not considered transferable because it was considered purely personal. If this doctrine were applied to an easement acquired by EPA, it would prevent EPA from transferring the easement to a third party (e.g., to a state).

Modern doctrine generally does allow the benefit to be transferred where the easement is "commercial" -- that is, produces an economic benefit. Institutional controls might be analogized to commercial easements, in that they serve a long-term social purpose rather than simply a personal one (such as a right to hunt or fish on another's property). Furthermore, many

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[14] In such cases, the benefited parcel is referred to as the "dominant" and the burdened parcel as the "servient" estate.

[15] There are circumstances in which an appurtenant easement might be created in the cleanup context: for example, if the purpose of the control were to prevent a particular adjoining parcel from being threatened by migration of contaminants (e.g., to protect a cap that prevents leaching). Even here, however, the easement would be considered appurtenant only if it was held by the owner of that parcel; if it were held by a regulatory agency, it would be "in gross".

states now allow non-commercial easements to be transferable if this intent is clearly stated in the easement.[16]

A second critical issue is whether the "burden" of the easement -- that is, the restrictions it imposes -- runs with the land. Again, easements in gross did not historically run with the land (but easements appurtenant did). Modern doctrine tends to allow an easement in gross to run with the land so long as the intent to do so is clear, and subsequent purchasers receive notice (e.g., by recording the easement in land records).[17] However, in some jurisdictions the traditional rule may still prevail.

Finally, at common law easements are generally not enforceable by third parties. This is a significant consideration at cleanup sites; for example, a common practice is for EPA to require a settling PRP to acquire easements from adjoining landowners. Unless the regulatory agency can enforce the easement, its only recourse is to compel the PRP to enforce; this is a cumbersome arrangement that may fail if, e.g., the PRP becomes insolvent or the PRP refuses to enforce the easement. In some states, enforcement by a third party may be allowed where the party is specifically identified in the easement. Attorneys should review the law of the relevant state to see if this option is available.

A second type of traditional non-possessory real estate interest is the **covenant**. Covenants are similar in many respects to easements, but covenants have traditionally been subject to a somewhat different set of formal requirements, and some of these requirements have survived to a greater extent than in the case of easements. These constraints, in conjunction with the fact that covenants are used in connection with a transfer of a possessory interest from one party to another, make it generally preferable to frame the documents establishing institutional controls as easements.

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[16] See American Law of Real Property at 6-49 and 6-50.

[17] See American Law of Real Property at 6-55 and 6-56.

A covenant is a promise by one landowner to another, made in connection with a conveyance of property. Generally, a covenant is a promise by the holder of a possessory interest in property to use or refrain from using the property in a certain manner. A covenant could be used to establish an institutional control where the remediated property is being transferred from the current owner to another party.

Closely related to covenants are **equitable servitudes**. The notion of an equitable servitude arose when courts of equity enforced agreements that did not meet all the requirements for a covenant. In effect, therefore, whether an instrument needs to meet the criteria for a covenant depends upon whether the plaintiff is seeking equitable relief (i.e., enforcement of the terms of the agreement) or money damages. If enforcement of the agreement is being sought (which would typically be the case with institutional controls) the rules governing equitable servitudes are relevant, and it is not necessarily critical to meet all the preconditions for establishing a real covenant.

Moreover, an equitable servitude does not need to satisfy all the requirements that have traditionally been imposed. An agreement can run with the land as an equitable servitude so long as (1) notice is given to the subsequent landowner (provided by recording the document), (2) there is a clear statement of intent to bind future owners, and (3) the agreement "touches and concerns" the land. The third requirement should be met by any agreement that restricts what the owner can do with the land. Covenants run with the land only if they meet the three requirements above and, in addition, there is both "vertical privity" and "horizontal privity" between the parties.[18]

Historically, covenants (like easements) would not run with the land unless they benefited other, adjoining property; in other words, courts did not recognize a covenant "in gross". However, this doctrine now appears to be the minority rule.[19]

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[18] For an explanation of these requirements, see American Law of Real Property at 6-80 to 6-84.

[19] See American Law of Real Property at 6-99.

Somewhat surprisingly, however, for equitable servitudes the traditional approach appears to survive to a greater extent. That is, the ability to enforce an equitable servitude "in gross" against subsequent landowners is less likely to be recognized, although this depends greatly on the jurisdiction.[20] This limitation unfortunately limits the usefulness of an equitable servitude in the cleanup context.

An equitable servitude is most likely to have value as an institutional control where a party responsible for cleanup expects to own neighboring property for a long period of time (as might be the case in partial military base closures).[21] Even here, however, it important to review the law of the jurisdiction to determine whether the traditional formalities applied to covenants must still be met, and if so to ensure that they are met.

Still another traditional real property device that may be used to create an institutional control in some cases is the **reversionary interest**. A reversionary interest is created when a landowner deeds property to another, but the deed specifies that the property will revert to the original owner under specified conditions. The reverter clause is binding upon any subsequent purchasers. In the cleanup context, failure to abide by specified restrictions on property use could be made a ground for having the property revert to the original owner. This would be most useful where it can be assumed that the original owner will be available over a long time period to conduct any further response that is necessary (e.g., where a federal agency is selling the contaminated property), although the risk of reversion by itself would create a substantial incentive for future landowners to comply with the restrictions.

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[20] See American Law of Real Property at 6-111.

[21] If a decision is made to use a covenant, the attorneys drafting such instruments should familiarize themselves with the common law of the jurisdiction involved. As noted above, a variety of detailed drafting considerations have evolved under the common law, which need to be met for the covenant to be effective.

In summary, although the law may appear to be complex, many of these complexities are more of historic than current concern, and emerged in cases where courts were required to construe documents whose intent was not clear. Under modern real estate doctrine and practice, the focus should be on drafting an agreement that clearly states the intent of the parties. How that document is labeled is secondary; it is probably safest to identify it as an easement, but the same document could also be identified as a restrictive covenant (which renders it an equitable servitude if the aim is to seek performance later). If it becomes necessary to enforce the agreement, the doctrines applying to any and all of these instruments can be invoked.

This does not mean that the complexities can be simply ignored. As recommended above, counsel should review the law of the state to determine whether the state still applies older doctrines limiting the extent to which such agreements run with the land or are transferable to other parties. However, where state law does not create such obstacles, a clearly drafted agreement can be considered at least reasonably reliable.[22]

Aside from favorable developments in state law, an argument can be made that the effect of any state law doctrines is limited under the holding in North Dakota v. United States,[23] which involved easements purchased by the federal government to protect wetlands that serve as habitat for migratory birds. The State of North Dakota adopted legislation significantly impairing the value of such easements, setting a maximum term of 99 years on nonappurtenant easements, and allowing the draining of certain wetlands notwithstanding the terms of the easement. The court ruled that where an acquisition "is one arising from and bearing

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[22] Proposed revisions to the Restatement of Property would reverse entirely the presumption against long-lived easements and covenants, and remove most or all of the restrictions described above. A draft reporter's note specifically identifies allowing governmental bodies to enforce restrictions in gross as a reason for abandoning the traditional doctrine. If followed by courts, this approach would significantly improve the reliability of institutional controls.

[23] 460 U.S. 300, 103 S. Ct. 1095, 75 L.Ed.2d 77 (1983).

heavily upon a federal regulatory program...the choice-of-law task is a federal task for federal courts," and that "Although state law may be borrowed if appropriate, 'specific aberrant or hostile state rules do not provide appropriate standards for federal law.'" It found the North Dakota laws to be "hostile to federal interests", and held that they could not be applied to federal easements.[24] While the state laws there were specifically adopted with the intention of defeating the federal program, the case is not expressly limited to that situation. Furthermore, an earlier Supreme Court case held that "In a setting in which the rights of the United States are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly consistent with that program."[25] These cases may provide a basis for arguing that, even in states that still apply the traditional doctrines limiting the value of easements in a cleanup context, such doctrines are similarly inapplicable to easements acquired by the federal government as part of a federal program.

ii. state use restriction statutes

A number of states have enacted statutes providing authority to establish use restrictions specifically for contaminated property, which override the common law impediments to the long term enforceability of real property interests.[26]

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[24] 103 S. Ct. at 1105-06.

[25] United States v. Little Lake Misere Land Co. 412 U.S. 580, 602, 93 S. Ct. 2389, 2402, 37 L.Ed. 2d 187 (1973).

[26] See, e.g., Cal. Health and Safety Code s. 25396.1; Conn. Gen. Stat. s. 22a-133k; Mass. Gen. Laws Ann. c. 21E s. 6; Mich. Comp. Laws Ann. s. 324.20120b; Ohio. Rev. Code Ann. s. 3746.14. A valuable review of state statutes is contained in Susan Borinsky, The Use of Institutional Controls in Superfund and Similar State Laws, note 9. An article focusing more closely on the Massachusetts law is Paul Nightingale, "Land Use Restrictions and Waste Site Cleanups: Lessons from the States", BNA Toxics Law Reporter (April 5, 1995).

Attorneys should investigate whether the state in which their site is located has such a statute and if so whether the authority can be used to implement the EPA remedy. In some cases, the authority to acquire or enforce such restrictions is conferred only on the state, so they are not available to EPA without assistance from the state. It is also important to determine whether the restriction can be federally enforced. If not, it may nevertheless be worth investigating whether the state agency is willing to take on the role of enforcement.[27]

iii. conservation easements

Many states have adopted statutes providing for **conservation easements.** These statutes override common law barriers to the long term enforcement of easements by parties who do not own adjacent property. Easements created under such laws may be possible vehicles for institutional controls. Generally, conservation easements may only be used for a narrow range of possible purposes, which limits their usefulness as institutional controls, but in some cases a control might fit within the conservation easement framework.[28]

While these laws vary to some extent from state to state, they are all patterned on a model statute, the Uniform Conservation Easement Act ("UCEA").[29] The model statute provides for the establishment of Conservation Easements for the purposes of:

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[27] State willingness to enforce a control of this type raises issues similar to those discussed below with regard to whether local governments can enter into binding agreements with EPA to establish and enforce land use controls.

[28] See Pendergrass, note 9 at 10111-12.

[29] Model statutes are developed by the National Conference of Commissioners on Uniform State Laws, and can be found in the Uniform Laws Annotated. However, in connection with remedies at any particular site, the statutes of the relevant state should be consulted.

"retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."

Some types of institutional controls may fit within this framework. For example, where open space, or recreational space, is maintained to prevent exposure or prevent uses that might degrade a landfill cap, a conservation easement might be useful. Controls that can be characterized as "protecting natural resources" or "maintaining or enhancing air or water quality" could also be implemented through this device. (For example, a control intended to maintain the integrity of a cap, so as to minimize leaching to groundwater, might be viewed as protecting natural resources.) On the other hand, controls designed solely to prevent human contact with contamination (e.g., well drilling restrictions) would not seem to fit the conservation easement framework.

In general, conservation easements function similarly to other easements: they effect a conveyance of a property right from one party to another, allowing the latter to control the former's use of property in some respect. The primary advantage of using such easements is that they are not subject to some of the traditional requirements under the common law of easements and covenants. Thus, according to Section 4 of the UCEA, a conservation easement is valid even though: "(1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract." Thus, the UCEA would allow the EPA to create an institutional control restricting land use that resembled either an easement or a covenant without the risks about validity or future enforcement that would arise under common law.

In general the holder of the easement must be a governmental body or a charitable corporation, association or trust; this may limit the value of conservation easements where there is a desire to have some other kind of entity (e.g., a responsible party) hold the easement. In some states, the governmental body must be a state or local agency, apparently precluding EPA from being the holder of the easement. Some states allow any entity entitled to be a holder of the easement to be given third-party enforcement rights even if it is not the holder of the easement.

b. **Informational devices.** Efforts to provide better public information about risks from contamination can serve as a form of institutional control, even if they do not involve legally enforceable requirements. While these might not, strictly speaking, be considered proprietary controls, they often rely on the land recordation system and are commonly discussed together with enforceable property interests.

The most commonly cited example of such a device is the **deed notice.** The concept of a "deed notice" was not recognized under traditional real property law, and its legal meaning is therefore not clearly established. (For example, in some contexts, the term "deed notice" is used where it appears that the intention is to establish a legally enforceable restriction.) Most commonly, however, the term "deed notice" is used to refer to a non-enforceable, purely informational document filed in public land records that alerts anyone searching the records to important information about the property. (For example, it may state that the property is located within a Superfund site, identify the kinds of contaminants present and the risks they create, or describe activities that could result in undesirable exposures to the contaminants left on site after a remedial action was taken.)

Because deed notices are not a traditional real estate interest, proper practice in using them is not well established. However, they appear to have been used at some Superfund sites and have been accepted for recording. In addition, some state statutes specifically allow deed notices to be filed in

connection with cleanups.[30] Therefore, such notices should be considered one of the available tools, but state law and local practice should be investigated in advance to determine whether such a notice will be recorded (even though it does not evidence any transaction), how it should be drafted, and who would be entitled to revoke it.[31]

The critical difference between deed notices and deed restrictions (such as easements and covenants) is that a deed notice is not an interest in real property, so that recording a notice has little or no effect on a property owner's legal rights regarding the future use of the property. Neither the present owner, nor any successors would be legally bound by any use restrictions referred to in a deed notice. The notice would merely serve to place them (and others such as lenders) on notice that the property either is, or was, contaminated. Accordingly, the 1995 OSWER Land Use Guidance[32] states that "Where exposure must be limited to assure protectiveness, a deed notice alone generally will not provide a sufficiently protective remedy."[33]

Deed notices can have value; for example, they may effectively discourage inappropriate land users from acquiring the property, if filed in a way that provides adequate notice. In addition, notices may be easier to implement than easements because they do not require a conveyance to be negotiated (although the owner's consent may be required and in any case is generally desirable in order to avoid the risk of claims for slander of title.) However, the workgroup believes that deed notices should be used with caution because they may create an

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[30] See, e.g., Mich. Comp. Laws Ann. s. 324.20120b(2).

[31] The NCP preamble and the discussion on RI/FSs at § 300.430 mention deed notices without providing further explanation. RCRA closure requirements also refer to recordation of "a notation on the deed to the facility property" to alert any potential purchaser to the property's historic use for hazardous waste management. See 40 CFR 264.119(b)(1).

[32] See note 4.

[33] Land Use Guidance at 10.

impression that legally enforceable controls have been established when that is not the case.

Other means of alerting the public to the presence of contamination can be developed that focus less on giving notice to purchasers and more on informing the general public. In some cases, systems already exist for this purpose (see, e.g., the discussion of state registries below). In other cases, site-specific measures could be set up; for example, records on contaminated property, easily identifiable by locality, could be kept at the regional office (or a local government might be persuaded to maintain the files), and their existence generally publicized so that community members, or potential purchasers, will know how to find them.

It is important to keep in mind that poorly-drafted deed notices and other informational measures, which do not clearly explain the types of risks presented at a site, can discourage even appropriate development, The workgroup therefore recommends that consideration be given to legitimate redevelopment concerns in drafting such documents. EPA has developed strategies for addressing redevelopment, a full discussion of which is beyond the scope of this document. Well designed measures that specify the types of activities that present risk, the degree of risk involved, and the kinds of uses that can be carried out without undue risk, may further the goal of informing the public without preventing land uses that are appropriate to the site.

c. **"Deed restrictions."** The term "deed restrictions" commonly appears in Records of Decision, consent decrees, and other agency materials (including the NCP). However, it is not a traditional real property term and does not have a precise legal meaning.

The term "deed restrictions" should be understood as simply a catchall term for proprietary controls such as easements and covenants that are legally enforceable against subsequent owners (and that is how it is used in this document). However, its use seems to have led in some cases to the misconception that enforceable controls on the use of land may be established simply by having the landowner record them on a deed, or file a document called a "deed restriction" in the land records. As should be

clear from the earlier discussion, that is not the case; absent some special authority under state law, only the conveyance of some property interest, such as an easement, creates an enforceable control.[34] Even if a one-party document were accepted for filing (many systems accept only documents reflecting a transaction between two parties), it would have no legal effect on subsequent landowners, probably would not be enforceable even against the current landowner, and could probably be revoked by the landowner at any time. At most, the filing of such a document might have some informational value similar to that of a deed notice.[35]

Because of this confusion, the workgroup has concluded that it is important to make sure that all those involved in evaluating remedies using proprietary controls understand that to establish legally enforceable restrictions, rather than merely informational notices, a conveyance or contract of some kind will likely be required.[36] If the term "deed restrictions" is used with a general audience, the workgroup believes that it is important to explain what it means. In addition, where clarity

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[34] A "conveyance" can take many forms: the term simply refers to any agreement under which a property interest is transferred from one party to another. Thus, an enforcement agreement (e.g., consent decree) could conceivably effect a conveyance if it clearly states the intention to create rights that will run with the land (but see discussion below on use of CDs as institutional controls). The critical point above is that a document simply executed and filed by one party cannot create an enforceable control because it is not a conveyance.

[35] Similar issues arise in connection with the common practice of filing consent decrees. Recommended practice with regard to filing consent decrees is discussed in Section V.C.2.

[36] As noted earlier, some states have by statute created procedures for establishing use restrictions that run with the land but that do not involve a conveyance (usually by agreement with or order from the state environmental agency). Where such statutes apply, they would be an exception to the general concern noted above.

of intent is important, and especially where EPA wishes to ensure that the IC is enforceable, a more precise term, such as easement, should generally be used.

d. **General advice on easements and covenants**

Easements and similar property interests are probably most useful in situations where a single parcel of land is involved, and the current owner of the land is subject to regulation under CERCLA RCRA. On the other hand, easements are generally less useful where a large number of parcels are involved and the owners are not responsible parties. (For example, easements may not be a practical way of preventing exposure to contaminated groundwater where a plume has spread over a wide area.)

Traditional common law doctrines can limit the enforceability of easements against successors in title, although the trend in the law is toward greater enforceability, particularly for easements created by government entities for the public benefit. Therefore, the law of the relevant state should be carefully examined to determine whether the common law principles discussed above have been modified in a way that makes these instruments potentially more useful. In general there is no harm in drafting instruments to provide that they will run with the land, or are enforceable by third parties, even if the law in the state is unclear on that topic. However, where that is done those relying on the easement (e.g., program staff designing a remedy) should be made fully aware of any uncertainties involved.

An important consideration is who will hold the easement. It is common in CERCLA cleanups for settling PRPs to agree to acquire easements from other landowners, as part of their implementation of the remedy as a whole. This has the advantage of placing the burden of negotiating and paying for such controls on a responsible party. At the same time, such an arrangement can make enforcement by EPA more difficult. As a third party, EPA may not have the right to enforce the easement; its only remedy may be to try to compel the PRP to enforce (the effectiveness of which may depend upon the PRP's willingness and financial capability to do so). This should be taken into account in deciding whether the grantee of the easement should be

the PRP or EPA. (Note that it would be possible to require the PRP to negotiate and pay for the IC, but to have EPA, or a state or local government, named as the grantee.)

Conveyance to EPA raises other issues, however. First, federal procedures for acquiring real property must be followed where an easement is conveyed to EPA. Such procedures should not be a barrier to using this approach, but staff should familiarize themselves with those requirements to avoid unnecessary delays (a brief introduction to that process is attached as Appendix C). Second, in CERCLA cleanups it is EPA's practice to require an assurance from the state that it will accept the interest following completion of the remedial action (making the state's consent necessary before the transaction can proceed). This assurance is discussed more fully in Section IX.

An option that may be worth considering in some cases is to arrange for the easement to be conveyed to a third party, such as a community or environmental organization, rather than to the government. This may provide a locally based party with an interest in enforcing the control. It also avoids any need in Superfund cleanups to obtain the state assurance referred to above. If the group owns property in the vicinity, to which the easement is arguably "appurtenant", such an arrangement may also avoid the common law restrictions on easements in gross. Of course, some affected parties, including local governments, may be reluctant to put such authority in the hands of a non-governmental organization. Furthermore, such organizations may be reluctant to take on such a role because of concerns about liability or resource demands. Whether this is a useful approach will depend entirely on the circumstances.

Finally, it is important to keep in mind that the current "owner" may not be the only party with whom it is necessary to negotiate. For example, where a property is subject to a mortgage, the current owner's agreement to convey an easement does not automatically bind the mortgage-holder, and should the mortgage be foreclosed the easement would have little further effect. Others who might not be bound could include holders of prior easements with a right of access, lienholders, and holders of other such rights. Therefore, a title search is important in order to ensure that agreements have been obtained from all necessary parties. In some cases, it may be appropriate

to conduct the title search as early as the feasibility study, in order to adequately assess the implementability of proprietary controls.

B. Governmental controls

A second category of controls uses the regulatory authority of a governmental unit to impose restrictions on citizens or sites under its jurisdiction.[37] Since CERCLA and RCRA do not specifically authorize EPA to regulate land use in a comprehensive manner, EPA must generally turn to state or local governments to establish .controls of this type.

There are a variety of mechanisms available to state and local governments to utilize as institutional controls. They include restrictions on the use of land and groundwater, issuance of advisories warning of potential risks and state registries of hazardous waste sites. The most important consideration in their use is that they are implemented by third parties (state or local governments) and rely on those parties for monitoring, maintenance and enforcement. They may also be subject to variances or exceptions available from those implementing governments.

1. Types of governmental controls

a. Land Use Restrictions

The most familiar form of governmental control consists of using a local government's authority over land uses to control exposures that are not otherwise protected by a remedy or to place prohibitions on activities that could be disruptive to engineered controls at a site. Such authority is potentially extremely flexible, and can be tailored to the specific needs of the site.

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[37] The agency's general rulemaking authority might possibly be used for this purpose (although the rule would have to be focused on a particular site). However, such an approach has never been used, and because land use determinations are generally viewed as local in nature would probably be controversial. Therefore, the discussion here focuses on the use of state or local regulatory authorities.

i. Zoning

One of the most common land use restrictions is the exercise of zoning authority by local governments specifying allowed land uses for certain areas. Zoning can be utilized to prohibit activities that could disturb certain aspects of a remedy or to control certain exposures not otherwise protected under a remedy. For example, a local government could prohibit residential development in an area of contamination or limit gardening in certain areas.

Although zoning laws can be useful tools, they have limitations as well. They are not necessarily permanent in nature (i.e., they can be repealed or exceptions granted by the local government). They may also not be fully effective unless they are monitored and enforced over the long term, and local governments may not commit the resources necessary to such oversight.

It is also important to recognize that under typical zoning ordinances, an "industrial" or "commercial" classification usually does not prohibit residential use. Zoning laws were written primarily to keep intensive uses, such as factories, out of less intensively developed areas (e.g., residential neighborhoods). In the remedial context, the policy goal is usually the reverse. Therefore, even where the area is zoned industrial an amendment may be needed to make clear that residential development is not a permitted use.

ii. specialized zoning tools

Many municipalities retain within their zoning ordinances the flexibility to accommodate or to limit certain, specified land uses through such zoning tools as the **overlay district**, the **planned unit development ("PUD")**, and **transferable development rights ("TDRs")**.

The overlay zoning district is used by a municipal zoning authority to "overlay" an existing zoning classification and to impose a new set of regulations on a designated area within said zone. For example, there may be an "Historic Preservation" overlay district super-imposed over business or

commercial zoning in an older section of a central business district. This district may be shown on the community's zoning map as lightly shaded area encompassing several zoned properties and having the specific designation of "HP" (Historic Preservation).

This overlay district may or may not restrict or even eliminate certain of the underlying zone's permitted uses; but it will most commonly require the submittal and approval of a development plan, in order for the developer to obtain building and/or occupancy permits. In the instance of environmental protection, the municipality could implement an environmentally sensitive area (ESA) overlay district, restricting certain uses on the land or limiting certain uses to only certain locales on the land. This designation would also serve to place developers on notice to investigate the underlying reasons for the zone's imposition.

The planned unit development was the logical offshoot of zoning enabling legislation allowing governmental entities to impose land use controls. This device allowed a developer to rezone a great number of acres at a time, usually for mixed uses. These mixed use developments typically contained residential uses and complementary commercial and office uses. From the PUD concept has emerged the planned development concept, whereby the developer of a smaller commercial, business or even industrial parcel would be required to submit a development plan in order to obtain a building and/or occupancy permit. Such plans are usually requested when a parcel of an unusual shape or one with some other physical peculiarity that will be expected to host some specific use.

Like the greater PUD, these smaller development plans must also designate the type and exact location of each use to be placed on the parcel. After acceptance by the governing bodies, any variance would subject the developer/owner to default and a forfeiting of his building or occupancy permits. Because these plans are typically the highest land management tool available to the municipality, they are usually required to be filed and are usually subject to a high degree of routine, official scrutiny for compliance (just the thing for "living" or "dead" caps).

In the case of environmental issues, where this zoning exists or the municipality is enabled to implement such zoning, developers should be required to submit development plans for approval, prior to the issuance of building permits and/or occupancy permits, for those parcels designated by ordinance or official declaration to be environmentally sensitive areas. Development plans are an integral part of overlay zoning. Any sort of development plan zoning has a type of built-in permanence. Moreover, these plans, once adopted, become legally integrated with the land, much as the underlying zoning. These plans would "run with the land" and survive sale, transfer and assignment.

The transferable development right allows a developer to transfer the right to develop a plot where over-building is a problem to an under-developed plot, thus benefiting both sites. Under the typical TDR scenario, a would-be developer who finds that a proposed development would not be allowed due to concerns about its effect on neighboring properties, could transfer his development rights to another contiguous lot or parcel. There, the developer could build to the limit permitted by the TDR that he/she possessed (or the TDR could be sold to another "needy" developer).

TDRs may be especially valuable in situations where the environmental hazard requires that the use of a subject site be severely restricted. TDRs have been used to limit development in those communities where the citizens sought to limit growth because of limited services, resources or space. TDRs have been used to relocate uses from condemned properties to more worthwhile locations. TDRs can also reduce the risk of takings claims in situations where a restriction severely narrows the range of permitted uses.

iii. local permits

Building permits can also be utilized as a land use restriction. For example, an ordinance could be adopted requiring anyone seeking a building permit for construction activities in a particular area to be notified of contamination in the area and informed of any relevant management standards. Such an ordinance could also be used to prohibit types of construction that would result in unacceptable exposures (e.g.,

excavation in areas where subsurface contamination has not been fully removed). It should be noted, however, that not all excavation requires permitting (e.g., utility repair).

iv. "Miss-Utility" systems

In many states, one must contact a designated office before excavating to ensure that buried utilities will not be damaged. A state or local government could adopt a similar system for excavation or new construction in areas where there is contamination left on site after the remedy. Such an arrangement could be tied in with the local permitting systems discussed above.

v. Tailored ordinances

Many local governments have broad land use authority, which they could use to adopt a tailored ordinance placing controls on access or use of certain areas. For example, local governments have required fences or buffers around areas of contamination and placed bans on fishing and swimming in specified areas. The effectiveness of such controls again depends on the willingness and ability of some entity to monitor compliance and take enforcement action. Postings alone, of course, may not be effective in preventing incidental contact or consumption.

b. Groundwater Use Restrictions

Groundwater use restrictions are directed at limiting or prohibiting certain uses of groundwater. Implementation of such restrictions are dependent on a state's groundwater ownership and use laws. A number of states have adopted laws that could be used to restrict groundwater use at cleanup sites.[38]

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[38] See Pendergrass, note 11, at 10113-14. For example, under Connecticut's groundwater law (Conn. Gen. Stat. s. 22a-3546, the state maintains a published map of existing quality and classified uses of groundwater, and groundwater underlying contaminated sites has been placed in a class barring human consumption. Vermont has similarly reclassified groundwater at

Groundwater use restrictions commonly involve water and well use restrictions. This is a broad category and such restrictions can take a variety of forms. They can include the establishment of groundwater management zones or protection areas; prohibitions or limitations on certain uses of groundwater in particular areas; capping or closing of wells; and limitations on the drilling of new wells.

Well construction permits can also be utilized as a groundwater use restriction. A number of state and local governments have adopted statutes controlling new well installations or requiring permits for existing wells. These permitting programs can be utilized as institutional controls. There are a number of approaches that can be utilized. They include requiring water quality testing; licensing of well drillers; prohibitions on the drilling of new wells in areas of contamination; and requirements and controls on the operation of wells (withdrawal rates and pumping rates).

Some states, particularly in the west, have an entire body of law governing groundwater rights. The workgroup has not attempted to evaluate the implications such laws may have on efforts to restrict groundwater use, but regional staff should do so on a site specific basis.

c. Advisories

Advisories are publicly-issued warnings that provide notice to potential users of land, surface water or groundwater of some existing or impending risk associated with their use. For example, an advisory may be issued to owners of private wells in a particular area that contamination has been detected in groundwater at levels that pose a threat to human health. Advisories are generally issued by public health agencies, either at the federal, state or local level (e.g., the health advisories issued by the U.S. Agency for Toxic Substances and Disease Registry under s. 104(i) of CERCLA).

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two Superfund sites, under Vt. Stat. Ann. tit. 10, s. 6001.

Like a deed notice, an advisory does not have any legal effect or create any enforceable restrictions. This does not mean that advisories may not be useful parts of a remedy; however, it is important that their limitations be clearly understood.

d. State Registries of Hazardous Waste Sites

In certain states, legislatures have established registries of hazardous waste sites.[39] Such registries typically contain a number of common elements that can act as institutional controls. They include the compilation of a list of hazardous waste sites in the state; annual reports submitted to the legislature summarizing the status of each site on the registry; notice with the deed for sites on the registry that the site is contaminated; and requirements that any person conveying title to property on the registry disclose to all potential purchasers the fact that the property is on the registry. Some laws provide that the use of property on the registry cannot be substantially changed without the approval of the state.

A potential limitation of the use of state registries by EPA as institutional controls is the fact that the procedure for listing and removing them from registries is solely at the state's discretion. Nevertheless, with the cooperation of the state they can prove useful with other measures as part of an overall remedy for a site, especially in providing information to the public.

e. Condemnation of property

Local governments may exercise eminent domain authority to acquire property for a public purpose. One way of controlling land use may simply be for a local government to exercise this authority to take title to the property in question. For example, it might be decided that the best use of a site was as a park or a public parking lot. Imposing use restrictions of this degree might require outright condemnation.

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[39] See, e.g., Iowa Code s. 455B.426; Conn. Gen. Stat. s. 22a-133o.

2. Advantages and disadvantages of governmental controls

Governmental controls have certain advantages and disadvantages relative to proprietary controls. Perhaps their chief advantage is that they do not require the negotiation, drafting and recording of parcel-by-parcel restrictions. This is important where the restriction is intended to affect a large number of distinct parcels, particularly where some of the landowners are not liable parties with whom the agency is already dealing in the enforcement context. Finally, the legal impediments to long-run enforcement of proprietary controls can be avoided; governmental controls remain effective so long as they are not repealed.

The chief disadvantage of governmental controls (at least from the perspective of the agency that selects the remedy) is that they will almost always have to be adopted and enforced by a unit of government other than EPA or the state, who are the lead remedial agencies. At least for controls adopted on a site-specific basis, local governments are almost always relied upon to implement and enforce such controls. Zoning ordinances sometimes allow enforcement by citizen suit, but this is not always true, and in any case there may be no third party with the interest or resources to do the necessary monitoring and enforcement.

The effectiveness of governmental controls thus depends in most cases upon the willingness of local governments to adopt them (unless they already exist), keep them in force, and enforce them over the long term. One way to address this concern may be to establish a direct contractual relationship (e.g., a cooperative agreement) between EPA and the local governmental unit responsible for implementing and enforcing the institutional control. However, there may be constitutional limits on the extent to which state and local governments can effectively be bound by contracts that limit their ability to reject or repeal legislation.

Other approaches might be used to reduce the risk that governmental controls once adopted will be repealed or will not be enforced. One is to make clear that, if institutional controls turn out to be ineffective, it may be necessary to

reconsider the remedy. This may create an incentive to ensure that they are fully implemented. In addition, monitoring of land use can help to track the extent to which controls are being enforced. While this does not ensure that the controls will be enforced, or add to EPA's ability to compel them to be enforced, it will make the local government aware that failure of the controls will be detected and become public knowledge. Such monitoring might be done as part of the regular 5-year review, or it might be conducted by the state as part of its long-term operation and maintenance obligations at a fund-lead site.

C. Enforcement authorities

The enforcement tools available to EPA under CERCLA and RCRA may also be used to restrict the use of land. This Section discusses the potential use of enforcement authorities as a form of institutional control.

Enforcement authority might be used in two ways in establishing institutional controls. First, an enforcement instrument such as an administrative order or consent decree may prohibit the party named in the order or decree from using land in certain ways, or from carrying out certain activities at specified property. Second, a consent decree may be used to require settling parties to put in place some other form of control, such as a proprietary control (for example, by conveying an easement to the government, or obtaining one from a third party).

This Section focuses on the use of orders under s. 106 of CERCLA, orders under ss. 3008(h) and 7003 of RCRA, and consent decrees to restrict land use <u>without</u> the creation of some proprietary control. The use of enforcement measures to ensure that proprietary controls are established is discussed separately, in Section VII.

1. Administrative orders as land use controls

The scope of EPA's authority under section 106 of CERCLA is very broad, as it authorizes the agency to issue such administrative orders "as may be necessary to protect public health and welfare and the environment" where there "may be an imminent and substantial endangerment...because of an actual or threatened release of a hazardous substance from a facility." RCRA contains similarly broad authority under sections 3008(h) and 7003. Accordingly, orders may be used for a very wide range of purposes including the establishment of institutional controls.

An administrative order can directly restrict the use of property by a named party (who need not be a named PRP in the CERCLA context). Used in this way, the order can establish the restriction without the execution of any further property instrument. This approach has the advantage of relative

simplicity. It also creates the threat of potential penalties for violations, as an incentive to properly maintain the control. The chief disadvantage of such an approach is that the order does not bind subsequent owners, or users not named in the order (e.g., lessees).

To enhance the long-term effect of an order, the order could be drafted to require the property owner to notify EPA of any anticipated change in ownership, the identities of any potential purchasers or lessees, and other information that would allow EPA to assess whether a new order should be issued to the new purchaser or lessee. The original order might also require the landowner to disclose the order's existence to any potential purchaser or lessee.

While orders generally do not "run with the land" in the same way as property interests do, they may have more value as institutional controls than is generally recognized. Their chief advantage is that they may be easier to establish. An order does not require an agreement with the landowner; while consent orders are generally considered desirable, unilateral orders can be issued if agreement cannot be reached. Negotiating consent orders may be somewhat easier than negotiating the transfer of a property interest. Furthermore, unilateral orders can be modified more easily than negotiated property interest transfers in the event that the control needs to be modified or withdrawn due to new information or changed conditions at the site.[40]

While orders may have disadvantages in terms of enforceability against transferees, proprietary controls can run into similar problems as well. Furthermore, the importance of these disadvantages depends on how likely it is that the property will be transferred during the period that the restriction is necessary. If ownership seems unlikely to change for a long time, an order may be a relatively effective means of control. Finally, steps can be taken in the drafting of the order, as noted above, to ensure that a regulator is aware of any

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[40] If a consensual agreement constitutes a settlement within the meaning of s. 122(d)(1)(A) of CERCLA, it must be in the form of a consent decree.

subsequent transfer and can re-issue the order to the transferee.[41]

Finally, a CERCLA s. 106 order can potentially be used to restrict the use of land owned by a non-liable party.[42] This approach would primarily be useful if no other method (e.g., negotiating the transfer of a proprietary control, or obtaining a local government's agreement to impose regulatory controls) is successful. A number of complexities can arise in enforcing orders against non-liable parties (including, but not limited to, the potential for a claim for compensation under s. 106(b)). However, the need to pay such claims is not, by itself, necessarily a bar to imposing the controls as the cost of the reimbursement may still be less than the added cost of the kind

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[41] Questions sometimes arise as to whether an order may be issued "in rem" -- that is, either naming a parcel of property rather than a person as the recipient of the order, or naming the current owner "and all subsequent owners". Although it does not appear that such an order has ever been issued, it is not clear that such authority does not exist. (Possible precedent exists in caselaw on in rem injunctions; see, e.g., United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96, 98 (W.D. Mo. 1946); United States v. Hall, 472 F.2d 261, 265-66 (5th Cir. 1972); United States v. Crookshanks, 441 F. Supp. 268, 270 (D. Or. 1977).) Since such an approach is untested, its long run reliability should be considered uncertain but in unusual circumstances it might be considered. Notice could be given to subsequent owners by filing the order in the land records, if the local land record custodian permits it.

[42] It may be noted that nothing precludes use of a CERCLA order in connection with a RCRA cleanup, if the conditions for issuance of such an order are met.

of cleanup required if institutional controls could not be imposed.[43]

In short, while the estimated cost of establishing institutional controls is clearly a consideration in determining whether to use an order under CERCLA or RCRA as a form of control, it should be evaluated against the estimated cost of other options, within the general framework of remedy selection. Moreover, any costs incurred by the Agency, or by a private party carrying out the remedy, would constitute response costs for which a claim could be made against any party liable under section 107.

2. Are consent decrees effective ICs?

CERCLA consent decrees commonly specify restrictions on use of land by the settling party. Such restrictions can serve as an institutional control at least with respect to the particular settling party.

The workgroup believes, however, that where the intent is for the restrictions to bind subsequent owners or users of the land, it is not good practice to rely simply on the terms of a consent decree (even if the consent decree is filed in the land records). A settlement between the United States and a particular PRP does not generally affect the rights of others, especially others with no current connection to the case such as future purchasers or lessees. To have this effect, the CD would have to be construed to be a conveyance of a property interest, or possibly to be an injunction in rem. However, as the CD is

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[43] Should a party establish a right to compensation under s. 106(b), it would be important to distinguish between any loss in property value experienced as a result of the order and other losses not attributable to the order itself, such as the diminution in value caused by the original contamination. Especially where the restrictions are not severe in nature, as where they allow commercial but not residential use, or simply prohibit well drilling, the costs that could have to be reimbursed may thus be limited (although the ability of claimants to make sizable claims, and the burdens of litigating such claims, should not be overlooked).

primarily a document memorializing the settlement of an enforcement case, and does not clearly take the form of a typical easement or covenant, a subsequent party might challenge its effectiveness as a real estate conveyance.[44] Therefore, if the intent of the settlement is to establish restrictions on land use that are binding on subsequent owners and occupants (as would normally be the case), the workgroup does not recommend reliance on the CD alone, regardless of whether the CD is filed for recording. Rather, to minimize enforcement risks the CD should require the settling parties to execute and file a separate instrument conveying a proprietary control. Failure to file such a document would then constitute noncompliance with the decree, triggering penalties . Recommended practice is discussed further in Section VII; recently-approved model CD language is attached as Appendix A.

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[44] Even if the CD were found to be in effect an easement or covenant, its enforceability against subsequent purchasers would be subject to the same common law limitations discussed earlier for those kinds of property interests.

VI. Choosing among types of institutional controls

Deciding whether to use a proprietary control, a governmental control, or other measures at a particular site will inevitably depend on local circumstances. However, the workgroup believes that certain generalizations can be useful, and has highlighted below some of the considerations that, in the workgroup's experience, most frequently affect the selection of controls.

It is important to note that these factors do not substitute for the regulatory criteria used in selecting remedies (for CERCLA cleanups, see 40 CFR 300.430(f); under RCRA, see the criteria discussed at 55 FR 30823-24 (July 27, 1990)). Rather, they go into the analysis of such criteria as long-term effectiveness, implementability and cost. The factors cited below may not only affect the decision on which control to use , but may bear on the more fundamental question of whether institutional controls should be used at all.

1. How long will the control have to be in effect?

The expected duration of the control is an important consideration, relating directly to the criterion of long-term effectiveness and permanence. Some ICs may only be needed while more active measures are being carried out; for example, well drilling restrictions may only have to be effective until the aquifer has been treated to acceptable levels. Others may have to stay in place indefinitely, as part of the permanent remedy, such as broad land use restrictions, or controls to prevent disturbing a cap or other waste left permanently in place.

If the control is expected to be relatively short lived, or if the likelihood of the property being sold during the life of the control seems small, an order issued to the current landowner directing him or her not to engage in certain activities, along with some system for getting notice of any change in ownership, may be adequate. Putting such an order in place will generally be simpler than establishing either proprietary or governmental controls, particularly if it is done on consent (and such an order would not trigger any need to use

federal acquisition procedures or to obtain a state assurance under section 104(j) of CERCLA).[45]

In addition, where the control may need to be modified from time to time to reflect changing conditions or information, use of an order may be appropriate because it is easier to modify and may allow some parcels to be returned to unrestricted use with a minimum of delay.

Where a longer time frame is anticipated, either proprietary or governmental controls should generally be considered. However, both proprietary and governmental controls have weaknesses in terms of long term reliability as well, which should be taken into account in selecting between them. Where turnover in ownership is likely, common law doctrines restricting enforcement by parties who do not own adjoining land can render proprietary controls ineffective; governmental controls may be preferable in such cases. At the same time, over the long term governmental controls may not be effectively enforced because political and fiscal constraints may influence a State or local government's exercise of its police power. The likelihood that governmental controls will be kept in place and enforced over the long term therefore needs to be evaluated.

2. How many different parcels of land will be affected?

The number of parcels that need to be restricted will affect the relative implementability of different kinds of controls. Where restrictions are to be imposed over a very wide area, affecting many parcels, governmental controls avoid the need for parcel-by-parcel negotiation. (For example, controlling well drilling into a large contaminated aquifer would affect many parcels.) In general, proprietary controls are most useful where a relatively small number of properties must be controlled. Of course, the ability of the State or local government responsible for a control to monitor and enforce over a wide area should also

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[45] Section 104(j) is triggered by the acquisition of an interest in real estate; issuance of an order to the current landowner directing the owner to restrict its use of the land in certain ways would not, by itself, constitute an acquisition.

be assessed before selecting a governmental control on this ground.

3. Are the affected landowners predominantly parties who are potentially liable under CERCLA or subject to regulation under RCRA? If not, are they generally supportive of the controls ?

Proprietary controls are easiest to establish where most or all of the property owners are potentially responsible parties under CERCLA, or subject to regulation under RCRA. Obtaining agreement from property owners who are not subject to these authorities can be more difficult, even where the aim of the control is to protect those owners or their successors. Therefore, governmental controls have some advantages in these situations. Moreover, landowners sometimes are more reluctant to convey a property interest than they are to being subject to equivalent regulatory restrictions. Proprietary interests can be condemned where the property owner is unwilling to convey them (i.e., the government may compel the landowner to convey such an interest with payment of compensation as appropriate), but this process can be time consuming and resource intensive, and may be opposed by some landowners.

It may be easier to obtain agreement on non-enforceable, informational devices such as deed notices, or registries. However, as has been emphasized, the goals of the remedy and its long term efficacy should be carefully considered before deciding to use non-enforceable measures.

4. Where governmental controls are being considered, are local governments generally in agreement with the goal of restricting use? Can and will they commit the resources necessary to effectively enforce such controls? How likely is it that development pressure or other political and economic considerations may tempt them to rescind such controls in the future?

The uncertainties created by relying on other governmental units to implement controls has already been discussed; another consideration is the uncertainties of the process by which such controls would have to be adopted. This process is not controlled by the agency leading the remediation,

and can be time consuming and resource intensive. Moreover, if the restriction is controversial, the controls as adopted may differ from what the remedy anticipated.

5. Will some entity be willing and able to take responsibility for enforcing the control?

The availability of an enforcer is critical to the long-term effectiveness of institutional controls. In the absence of a reliable enforcement entity, remedies that rely heavily on institutional controls may not be reliable.

The process of identifying an entity responsible for long term enforcement can begin as early as the process of evaluating remedial alternatives. Where governmental controls are involved, the enforcer would normally be the government entity that adopts the controls, although the possibility of drafting the controls to allow enforcement by third parties could be explored. Proprietary controls can be assigned to a variety of parties; in some jurisdictions, it may be possible to draft them to allow enforcement by parties other than the holder.

In this regard, it should be noted that for fund-financed CERCLA remedies, the State must provide an assurance that "any institutional controls implemented as part of the remedial action at a site are in place, reliable, and will remain in place after the initiation of O&M." 40 CFR 300.510(c)(1). This assurance is discussed further in Section IX.

6. Is the State prepared to take title to any property interest involved?

Under CERCLA s. 104(j)(2), EPA may not acquire an interest in real property in connection with a CERCLA remedial action unless it the state agrees to take title to the property upon completion of the remedial action. Application of this requirement to institutional controls is discussed in Section IX.

In some cases, states have been reluctant to agree to take title to easements or similar interests. If a state assurance is required, this can obviously affect the choice of control to be used, or at least the structuring of the transaction. One possibility is to have the property interest

conveyed to a party other than EPA, such as a PRP. The interest could also be held by a local government, community group, or trust where one has been created for implementation of the remedy. Of course, the party holding the interest should be one whose ability and willingness to enforce the interest is considered reasonably reliable.

If a willing, reliable holder cannot be found, other options, such as governmental controls (e.g., a local ordinance) should be evaluated. An administrative order could also be used without triggering the requirement of a state assurance. Although an order does not run with the land, it can be drafted to require notice to the relevant agencies of any change in ownership.

7. Can Multiple Institutional Controls be selected?

The discussion above is not meant to preclude considering multiple IC's as part of a remedy. Remedial alternatives may anticipate two or more options for establishing IC's, but should fully evaluate all such options. Furthermore, any given option may "layer" different controls to ensure long term reliability. A variety of IC's may be used such as deed restrictions and deed notices, and adoption of land use controls by a local government.[46] For example, controls that do not run with the land, such as enforcement orders, may be adopted for short term control pending establishment of more long-term controls such as local regulations or deed restrictions.

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[46] Land Use Guidance (see note 4) at 10.

VII. Establishing Institutional Controls

Where ICs have been identified as part of a CERCLA or RCRA remedy, a variety of legal steps will have to be taken to implement them. The steps will vary from site to site, and to some extent will vary depending on whether CERCLA or RCRA applies, but in any case the workgroup believes that as much care should go into the selection and implementation of ICs as into other aspects of the remedy.

This Section will discuss the steps needed to establish institutional controls. The discussion here focuses primarily on proprietary controls, but considerations regarding establishment of governmental controls (and enforcement of existing governmental controls) will also be discussed.

A. Establishing Proprietary Controls under CERCLA

In general, for a proprietary control to be put in place a transaction will have to occur in which a property interest (e.g., an easement) is conveyed from the owner of the land being restricted to some other party, who will be the holder (and enforcer) of the interest. Such a transaction may be part of a larger transaction (e.g., sale of the entire property), or may be a freestanding conveyance.

The specific steps required to effectuate transfer of an interest in real property will depend on (1) whether the PRPs are expected to perform the remedy, or whether it is fund-lead; (2) whether the grantor is a PRP implementing the remedy, or some other party; (3) whether the grantor agrees to the transfer; and (4) who the grantee will be.

1. PRP-lead remedies

At PRP-lead sites, responsibility for securing deed restrictions rests with the PRPs since they will be obligated, pursuant to a consent decree or administrative order issued unilaterally, to implement the controls as part of the remedial action. The PRP's obligations will depend on whether it, or some other party, owns the affected property.

Generally, where the PRP owns the land that is being restricted, it will commit in the consent decree to effect the conveyance that will establish an enforceable control. On the other hand, if the remedy requires restricting the use of land not owned by the settling PRP, the PRP must commit to use best efforts to obtain conveyances from the relevant landowners. In either case, the PRP must commit to carrying out long term oversight, monitoring and enforcement to ensure that the controls remain effective.

a. Restricting use of land owned by the settling PRP

Where the land being restricted is owned by a settling PRP, the PRP can agree to restrict its own use of the land as part of the consent decree. However, for the commitment to be binding against successors in title, the PRP should commit in the CD to convey an easement or other deed restriction to EPA or a third party (and ensure that it is suitably recorded). The PRP would not be entitled to compensation for such a conveyance; the conveyance is simply one of the steps the PRP is agreeing to undertake in order to settle the government's potential CERCLA claims. Issues that can arise where an interest is conveyed to EPA are discussed below under "EPA as Grantee".

As discussed above, the workgroup does not believe that using the consent decree itself as the instrument of conveyance is generally good practice (see Section V.C.2). Filing the consent decree in the land records can serve the function of providing notice, but where there the control is meant to run with the land, the workgroup believes that the better approach is for the PRP to agree in the CD to convey an appropriate interest to some other party, with the conveyance itself memorialized in some other document that is separately recorded. Model language for this type of consent decree provision is attached as Appendix A.

b. Restricting land not owned by the settling PRP

Where the owner of the restricted land is not a party to the CD (i.e., is a non-settling PRP, or a non-PRP), the settling PRP must commit to negotiating with the landowner to obtain a conveyance. The conveyance may be to the PRP, or to EPA, or to some other party (see discussion below of "grantees").

Although the settling PRPs do not have authority to compel other landowners to convey deed restrictions, they can be required in the CD to use their best efforts to obtain restrictions (see definition of "best efforts" in the model CD language attached as Appendix A). If the best efforts of the PRPs are unavailing, EPA may, in its discretion, acquire the necessary property interest (either by negotiation or, if necessary, through condemnation). If EPA must acquire the necessary interest, the settling PRPs should be obligated under the settlement agreement to reimburse EPA. If EPA must acquire the interests itself the cost may be significantly higher (especially if they are acquired through condemnation), and EPA would seek to recover those costs from the PRPs. Therefore, it will generally be in the PRP's own interest to acquire the interest wherever feasible. If the PRP feels that by doing so, it is bearing a disproportionate share of the cost of establishing the ICs it can seek cost recovery (or contribution) from other PRPs.

Where acquisition is negotiated by a PRP, the PRP does not necessarily have to be the grantee. The PRP could obtain an agreement to convey an easement to EPA or a third party. Factors to consider in deciding who the grantee of the interest should be are discussed in Section VII.A.4.

2. Fund-lead remedies

If the cleanup will be Fund-financed, EPA or the state will have to take the lead in ensuring conveyance of any property interests. The process is similar to that taken to obtain access, in that a voluntary conveyance is to be preferred and sought as an initial matter; involuntary condemnation is a last resort. Whether the acquisition is voluntary or involuntary, the cost of acquiring the controls is recoverable under s. 107 of CERCLA.

If EPA attempts to acquire the property interest by agreement, EPA will necessarily have to consider the possibility that a non-PRP property owner might be entitled to compensation. If a property owner refuses to agree to the conveyance, and EPA institutes condemnation proceedings, compensation would also be addressed in those proceedings.

At a fund-lead site, the lead agency will most likely be the grantee, although that would not necessarily be the case (for example, EPA could arrange for conveyance of an interest to a third party, such as a conservancy group). Factors to consider in deciding who the grantee should be are discussed below; however, it is important to note that if EPA wishes to be the grantee of the interest, the applicability of section 104(j) (regarding the state's assurance to take title to real estate interests) must be evaluated (see Section VII.A.4 below).

3. Prospective purchaser settlements

Sometimes ICs may be established as part of a prospective purchaser agreement; that is, the purchaser would agree to convey an interest restricting use as one of the conditions for obtaining a release from liability. To further strengthen the effectiveness of the control, the agreement may make the release contingent on compliance with the control. In that case, if the purchaser later changed the land use to one that was not protective it might become liable for further remediation.

4. Choosing the grantee

As has been emphasized, for an institutional control to run with the land there must be a conveyance to a party other than the landowner -- the grantee. Examples of possible grantees include EPA, states, non-landowner PRPs, local government organizations, civic or other associations (if legally cognizable under state law), conservation organizations, and land trusts. The selection of the grantee can have significant implications. A preliminary evaluation of the likely grantees of the interest should be performed during remedy selection and can be completed at the commencement of RD/RA.

In evaluating appropriate grantees, consideration should be given to (i) whether the potential grantee is likely to be in existence for the duration of the remedy, (ii) whether the grantee would be able to compensate the landowner (if applicable), and (iii) whether the grantee (if other than EPA) is willing and able to enforce the proprietary control independently of EPA's enforcement rights.

a. EPA as Grantee

EPA may be the grantee. This is likely to occur in a fund-lead remedy because in such cases EPA will have primary responsibility for removal or remedial activities at the site. EPA also may be the grantee where the land subject to restrictions belongs to the settling PRP because, as discussed in Section A.1 above, the owner of the property cannot make an enforceable conveyance to him or herself. To create a restriction that will run with the land, the landowner must convey the enforceable property interest to a third party. Other factors affecting whether EPA is an appropriate grantee include: (1) whether EPA has a significant interest in controlling the enforcement of the deed restriction; (2) the likelihood that another grantee will have sufficient resources or incentives to carry out future actions to enforce the deed restriction; and (3) whether the state will accept transfer of the title from EPA following the completion of the remedial action. Other site-specific factors also might tip the balance as well.

Naming EPA as grantee has enforcement advantages, since EPA can enforce the control directly, rather than having to rely on others to do so.[47] However, under section 104(j) of CERCLA EPA may not acquire a property interest for purposes of a remedial action unless the state agrees to accept transfer of the title from EPA following completion of the remedial action. EPA's practice is to apply this requirement to proprietary controls such as easements and covenants. Such transfer helps ensure that EPA does not have an open-ended obligation to perform oversight and enforcement of the IC (and at fund-lead sites is consistent with the state's responsibility for institutional controls as part of operation and maintenance). However, it also gives the state an effective veto over the decision to acquire the IC. If the state does not wish to be the ultimate holder of the interest, either some other grantee must be found or a proprietary IC cannot be used. Section IX contains a more

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[47] EPA may be able to enforce the restriction without being the holder of the interest, especially if it is specifically granted this right in the instrument. However, the law on third-party enforceability of deed restrictions is unclear and probably varies from state to state. See Section V.A.2.

detailed discussion of s. 104(j) and the state's assurance regarding institutional controls at fund-lead sites.

If EPA will be the grantee, the laws and regulations governing federal property acquisitions will apply. As part of the acquisition process, EPA will need to conduct an evaluation of the property including obtaining an appraisal and a title search. EPA will also obtain a title opinion from DOJ or the Army Corps of Engineers. Headquarters' Offices of Administration and Resource Management and the Office of General Counsel may also conduct reviews as appropriate.[48]

b. State as grantee

The state can also be the grantee in the first instance. This obviates the need to provide for transfer to the state at a later date. In fund-lead remedies, where the state is obligated to ensure that institutional controls are maintained and enforced as part of its general duty to perform operations and maintenance, ownership of the deed restriction would be consistent with that obligation. An agreement by the state to acquire the interest can be memorialized in an MOU, a Superfund State Contract, or a cooperative agreement.

c. PRP as grantee

A settling PRP may acquire deed restrictions from other landowners, as part of its obligation to ensure that the remedy is properly implemented. By taking title to an easement or similar property interest, the PRP ensures that it will be in a position to enforce the institutional controls. Furthermore, it will often have an incentive to enforce the controls because a failure of the controls could make further remedial action necessary.

The chief disadvantage of this approach is that the lead agency may be unable to enforce the control directly, unless

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[48] The acquisition process should not be viewed simply as a procedural necessity; it may bring issues to light that could affect the reliability of the controls (e.g., a title search could turn up otherwise unknown owners or lienholders).

state law allows for third party enforcement.[49] In that case, EPA's only course of action may be to attempt to compel the PRP to carry out its obligations under the CD. If the PRP is unresponsive, or bankrupt, this approach may be ineffective and at a minimum the enforcement of the control may be substantially delayed.[50]

d. Other Grantees

It is possible to identify other organizations, such as local community or conservancy groups, as grantees. In deciding whether to use this approach, one should consider such factors as whether the group has the resources or the incentive to effectively enforce the control, whether the group is likely to remain viable for the necessary life of the control, and whether other stakeholders will be comfortable with turning over this important role to an entity that is not accountable either through a consent decree or through governmental processes. Clearly, this option raises a number of concerns; however, private groups have been used in this way in connection with traditional conservation easements.

5. Drafting Effective Deed Restrictions

In order to be legally sufficient, a deed restriction must be in a form that satisfies the real property laws of the state in which it will be filed. The workgroup has developed a generic deed restriction that it believes can be used as an initial draft in most states (see Appendix B). However, the appropriate form of deed restriction in a given state should be verified.

Deed restrictions must contain language of conveyance to effectuate a transfer of an interest in real estate. As a

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[49] This document does not address whether EPA acquires a real estate interest (thus triggering s. 104(j)) when it is named as a third party beneficiary in a deed restriction.

[50] One option for the agency in this case might be to issue an order to the party violating the control, pending enforcement of the control itself.

general rule, such language is drafted in terms of a grantor (seller) conveying a property interest to a grantee (purchaser). Since deed restrictions are often used to ensure that restrictions run with the land, it is important that this be clearly stated in the document. The following drafting considerations apply to deed restrictions:

- express intent clearly (to run with land or otherwise)
- require waiver of claims against EPA, including takings
- require indemnification of EPA for costs to enforce IC
- specify that injunctive relief is available
- provide for stipulated penalties
- provide mechanism for review and/or expiration
- require long-term monitoring to ensure compliance
- require notification of EPA or state upon sale or lease

The document should also identify the area to be restricted as clearly as possible, where less than an entire parcel is affected. Failure to be clear about the affected area may complicate efforts to enforce the restriction.[51]

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[51] On the dangers of establishing geographically undefined easements, see U.S. v. Johansen, 93 F.3d 459 (8th Cir. 1996), reversing and remanding criminal conviction of private landowners who violated a U.S. Fish and Wildlife Service Wildlife Refuge Act wetlands easement whose geographic boundary fluctuated as wetlands emerged and dried up. Because U.S. F&WS neither defined the easements, nor subsequently attempted to assist the property owner in understanding the boundaries of the easement, the Court found that U.S. F&WS had not proven that defendants had violated the easement conditions.

6. Establishing governmental controls

As discussed in Section V.B, a governmental control is a land use restriction that is imposed under some agency's regulatory authority. Since EPA has little authority to impose restrictions of that nature, this generally means looking to a state, or more likely a local government, to establish the controls. This requires working with the local government to obtain the adoption of appropriate controls through that government's normal administrative processes. What kinds of controls are available, what the procedures are for adopting them, and whether the local government will be amenable to adopting them, will depend entirely on the local government involved. In addition, as discussed in Section V.B, questions will remain regarding the long term reliability of such controls and whether they will be effectively enforced.

It is important to recognize that any controls established in this way would operate outside the usual CERCLA enforcement regime. That is, they would be enforced through local processes, not through the statutory enforcement provisions in CERCLA. Nevertheless, the controls thus established could be considered in concluding that the CERCLA remedy plan would be protective.

If a governmental control approach appears promising, a PRP could be required to take steps to see that such controls are adopted by the local jurisdiction. EPA may, of course, assist in encouraging adoption of such controls, or in a fund-lead site would have to take the lead role in seeking to have them adopted. However, EPA would have no way to compel the local government to adopt them (unless the local government were a PRP, and thus subject to CERCLA enforcement).

B. Establishing institutional controls under RCRA

Many of the considerations discussed above apply to the establishment of institutional controls under RCRA as well. However, RCRA requirements are imposed through legal mechanisms that are different from those used under CERCLA. Other program differences will affect the establishment of controls as well; for example, there are no "fund-lead" remedies under RCRA.

EPA's experience with institutional controls under RCRA is less extensive than under CERCLA, and the discussion below is limited accordingly. What can be offered at this time are some general guidelines on possible approaches. Better knowledge as to which of these approaches work best, and what issues may arise that are not identified here, will have to be gained over time.

1. Mechanisms for establishing controls

a. Permits and orders

In RCRA cleanups, enforceable requirements will generally be established through a permit (e.g., the corrective action portion of an operating permit, or a post-closure permit), or an order under s. 3008(h) or s. 7003. As discussed in Section V.C, permits and orders can serve by themselves as institutional controls, by imposing enforceable restrictions on the use of property by the facility owner/operator.

b. Proprietary controls

In some cases, it may also be desirable to establish restrictions that run with the land and bind future landowners as well as the current owner/operator. This would be most likely where there is a desire to create restrictions that will outlive the permit or order. To accomplish this, it will generally be necessary to establish a proprietary or governmental control. To establish a proprietary control, there must generally be a transaction conveying a property interest (e.g., an easement) from the landowner to another party who is then the holder (and enforcer) of that interest. A permit or order may direct the owner/operator to convey such an interest to someone who will then be the enforcer. Model permit and order language does not yet exist under RCRA for this purpose; however, the model language for a CERCLA consent decree (attached as Appendix A) may be adapted for RCRA purposes.

In general, such an approach will work best where it is agreed to by the owner/operator (e.g., in the absence of consent, takings concerns could conceivably arise). Where the alternative would be to require a more extensive cleanup, the option of conducting a limited-use cleanup and creating

enforceable restrictions should be relatively attractive to the owner/operator.

Identifying a party to be the holder of the easement or other interest is an important first step. In contrast to CERCLA, RCRA does not expressly grant EPA authority to acquire property interests in order to conduct cleanups. Therefore, EPA probably cannot be the grantee in a RCRA cleanup (unless the cleanup can be characterized as a response action under CERCLA). Where the cleanup is being done under an authorized state hazardous waste program, the state may be able to use authority that EPA does not have, if it wants to be the grantee.

If neither EPA nor the state can be the grantee, some other party must be found to be the holder of the proprietary control. If the property in question is being sold, the seller can accomplish the same result by retaining a limited interest while conveying the title to the buyer. If this is being relied on as part of a remedial plan, however, thought must be given to whether the seller will be able and willing to enforce the control after the sale occurs. If the cleanup is being done under an order, the order can require the selling owner/operator to effectively enforce the control; if it is being done under a permit, steps should be taken to ensure that long-run enforcement is not lost through expiration of the permit.[52]

If the property being restricted is not being sold, it will be necessary to find some other party that will be responsible for holding and enforcing the control. If no such party exists, an alternative may be to rely on the permit or order to restrict land use as long as it remains in its current ownership, and require the owner/operator to create a deed restriction if and when the property is ultimately sold.

As discussed in Section V.A, some states have statutory tools, similar to proprietary controls but more closely

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[52]A further concern arising where the seller retains an interest is that the interest must not be drafted in such a way that it violates the "rule against perpetuities". Therefore, it may be necessary to place a limit of some kind on the life of the control -- potentially limiting its long term reliability.

linked to cleanup programs, that can be used to create reliable long term restrictions on land use in a cleanup context. Where the corrective action is being conducted under a state program, and such tools are available, such tools may avoid the complications described above.

c. Governmental controls

As discussed in Section V.B, a governmental control is a land use restriction that is imposed under some agency's regulatory authority. Since EPA has little authority to impose restrictions of that nature, this generally means looking to a state, or more likely a local government, to establish the controls. This requires working with the local government to obtain the adoption of appropriate controls through that government's normal administrative processes. What kinds of controls are available, what the procedures are for adopting them, and whether the local government will be amenable to adopting them, will depend entirely on the local government involved. In addition, as discussed in Section V.B, questions will remain regarding the long term reliability of such controls and whether they will be effectively enforced.

It is important to recognize that any controls established in this way would operate outside the usual RCRA regulatory system. Accordingly, they would be enforced through local processes. Nevertheless, the controls thus established could be considered in concluding that the remedial plan would be protective.

If a governmental control approach appears promising, the permit or order would likely require the owner/operator to take steps to see that such controls are adopted by the local jurisdiction. EPA may, of course, assist in encouraging adoption of such controls, but would have no way to compel the local government to adopt them (unless the local government were the regulated party, and thus bound by the permit or order).

d. Further direction anticipated

Because experience with institutional controls under RCRA is limited, a better understanding of them will no doubt develop as the program matures. In its May 1, 1996 Notice

soliciting comment on various aspects of the corrective action program, EPA invited input regarding the mechanisms that may be used to ensure that remedies remain protective over the long term, especially where land use or ownership patterns change. (See 61 FR at 19460 and 19463 (May 1, 1996)). Further guidance can be anticipated as these issues are explored over time.

VIII. Enforcing institutional controls

Enforcement action may be needed to ensure that controls are implemented properly. In some cases, a party may fail to perform its agreement to establish a control. In others controls may be established but not adhered to.

A. Enforcing agreements and orders to establish controls

Where a party is required to establish a control (either by agreement, as in a consent decree, or unilaterally as through an order) but fails to do so, enforcement steps must be taken.

1. Action on CERCLA Consent Decree or Consent Order

In a CERCLA remedy where a CD has been entered, and the settling parties fail to carry out their obligations, the Agency may simply petition the court to enforce the consent decree. The remedies available may include specific performance of the control and/or damages which may include stipulated penalties or statutory penalties.

Where a requirement to establish institutional controls has been imposed in a CERCLA administrative consent order ("AOC"), EPA can seek judicial enforcement of the order under section 106 of CERCLA, and seek injunctive relief and/or statutory penalties.

It should be noted that in any case where a remedy being performed by PRPs includes establishment of institutional controls, final approval of the remedy should not be given until it is clear that the required controls have been implemented.

An action on the CD or AOC will be effective only against the settling landowner, and not against successors in title. For example, a requirement in a CD or AOC requiring that the settling landowner PRP record a covenant or restriction preventing a particular land use could not be enforced by the grantee against any successor in title because the successor was not a signatory to the CD/AOC.

If institutional controls are needed on property that is not owned by a settling PRP, the consent decree will generally require that the settling PRPs use "best efforts" to obtain from the landowner an agreement to restrict its use of the property and/or an agreement to file an easement restricting use of the property. The term "best efforts" is defined in the model consent decree to include the payment of reasonable sums of money in consideration for the restrictions. If the settling PRPs are unable to obtain the restrictions and the settling PRPs will be required to reimburse EPA for all costs incurred in obtaining the restrictions, including any compensation that EPA may have to pay for the restriction.

2. Action on Unilateral Administrative Order

Where EPA has issued a unilateral administrative order ("UAO") which includes a requirement to establish institutional controls, EPA can seek judicial enforcement of the UAO under section 106 of CERCLA, and seek injunctive relief and/or statutory penalties. As discussed in Section A.1 above, however, an action to enforce the requirements of the UAO will be effective only against the respondent(s) to the UAO, and not as against any successor in title.

3. Commence New Enforcement Action

In some cases, it may be necessary to commence an enforcement action against the settling PRPs by filing a new action under CERCLA s. 106 or issuing a unilateral administrative order. For example, if the initial IC program relied exclusively on governmental controls such as zoning to control land use, a subsequent revision of the local zoning ordinances may compromise the protection afforded by the initial zoning. A UAO could be used to require that a PRP acquire or record an agreement limiting future land use consistent with the initial zoning restrictions. However, it must be determined whether the new enforcement action is barred by the covenant not to sue given to the settling PRP in the prior settlement.[53]

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[53] As discussed below, it may be necessary to change the remedy because unanticipated barriers prevent the implementation of controls originally required. In such cases, a PRP that has

Enforcement action may also be brought against a non-settling PRP that owns property within the site or is otherwise liable and has not settled with EPA under section 107. While a non-settling PRP is not bound by a Consent Decree or Administrative Order, and thus not contractually obligated to implement an IC, it would clearly be subject to enforcement actions. As discussed above, EPA likely would be barred from taking further enforcement action against a settling PRP if the covenant not to sue was in effect.

4. Reopening or modifying the ROD

Where failure to establish controls calls the long-term protectiveness of a remedy into question, another option is to reconsider elements of the remedy. For example, if the remedy included property restrictions preventing residential development, a property owner's subsequent refusal to impose enforceable restrictions would compromise the plan to limit future land use to industrial purposes. In that case, it might be necessary to reconsider the cleanup levels in the ROD to make them consistent with a residential land use scenario. Procedurally, this might require a ROD amendment, or an explanation of significant differences ("ESD"), depending on the significance of the change in the remedy.

Reconsidering the remedy would in most cases be an alternative of last resort. However, it can be useful to keep the responsible parties aware that this may be the only option if institutional controls are not properly implemented. It should be made clear to those implementing the remedy that failure to establish or enforce ICs may trigger reconsideration and

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received a covenant not to sue may try to argue that it cannot be compelled to do anything more than was required under the original consent decree. That is, it might argue that EPA could at most bring an action to require enforcement of the original controls, and could not force it to implement a substitute remedy. On the other hand, the discovery that the controls originally selected are not reliable may constitute new information that justifies imposing additional cleanup requirements. The relative weight of these arguments will depend on the circumstances.

imposition of additional requirements so that the remedy remains protective. Since the responsible parties will face added costs if failure of controls leads to a more stringent remedy, this will create a strong incentive to see that controls are put in place and fully complied with.[54]

As noted above, however, if settling PRPs have implemented a remedial action pursuant to a consent decree, it must be determined whether the covenant not to sue would bar efforts to require the settling PRPs to implement the ROD amendment.

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[54] In some cases, a contingent ROD might be appropriate (making clear that a higher degree of cleanup would be required if ICs are not established).

B. Enforcing established controls

A second enforcement problem arises where controls are established, but not complied with. The mechanism for enforcing established controls will depend on the type of control used and the way in which it is structured. For example, if EPA is made the grantee of a deed restriction, it may simply enforce the deed restriction as a matter of real property law. If a PRP is the grantee, EPA (or the state, where oversight of controls is the state's responsibility) may have to bring an action on the consent decree to enforce the PRP's obligation to enforce the control.[55] As noted earlier, deed restrictions can be drafted to state that EPA or the state is entitled to enforce them directly, even where they are not grantees, but traditional doctrines did not allow third-party enforcement of such interests, and whether such terms will be enforced will depend on the law of the state. The threat of penalties for noncompliance with the CD may be a stronger tool to obtain effective enforcement of a control held by a PRP (although it will have little effect if the PRP is no longer in business). Where governmental controls are used, the government that imposed them will generally have to be the enforcer, with little direct EPA influence on enforcement decisions.

Attempting to compel other parties (e.g., PRPs or local governments) to vigorously enforce controls may be difficult. If nothing else, the controls may go unenforced while the obligation to enforce them is litigated. Therefore, an alternative approach, at least as an interim measure, may be to use statutory enforcement measures to prohibit inappropriate uses of land or other resources. As discussed in Section V.C, enforcement authorities can be effective institutional controls in themselves, at least for the short run.

In addition, just as in the case of failure to establish controls, if controls are established but cannot be

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[55] It should be noted that the model consent decree language (Appendix A) is designed for the case where EPA will be the grantee. Therefore, it does not require enforcement by the settling PRP. In cases where the PRP is expected to be the grantee such a requirement should generally be added.

enforced effectively it may be necessary to reconsider the remedy. This possibility may provide an incentive for parties to exercise their authority to enforce the controls. As noted above, it must be determined whether the covenant not to sue would bar such claims against the prior settlors.

Because of the potential importance of institutional controls in accomplishing the overall objectives of a remedy, it would be appropriate for EPA or the state to periodically review the effectiveness of the control. At CERCLA remedial sites, for example, the five-year review process would be an appropriate mechanism through which to review whether the control is performing effectively and as expected. However, five-year review alone may not be sufficient in all cases. Therefore, an important aspect of designing a system of institutional controls is to evaluate how frequently compliance should be monitored, and establish mechanisms to carry out that oversight. Under RCRA, periodic review may be imposed as a specific requirement of a permit or order.

IX. State roles and state assurances

States will very often have to be involved, and supportive, for institutional controls to be established and to be effective. Political support from the state is obviously important; in addition, requirements for state assurances can make the state's agreement legally necessary in some cases.

A. Institutional controls as part of operations & maintenance

For fund-financed remedies, the state is required to provide an assurance that it will "assume responsibility for operations and maintenance". This includes the obligation, where appropriate, to ensure that "any institutional controls implemented as part of the remedial action at a site are in place, reliable, and will remain in place after the initiation of O&M." 40 CFR 300.510(c)(1).

In some cases, states feel that they cannot override land use decisions of local governments, because authority to make such decisions has been delegated either by statute or in the state constitution. They may then be cautious about providing the O&M assurance where governmental controls were adopted as part of the remedy. In other cases, states may be reluctant to assume ownership of a proprietary control, or may simply feel uncomfortable becoming involved in land use issues because they feel these are traditionally local matters.

From EPA's perspective, however, it is essential to emphasize that the state assurance is statutorily required and cannot be waived. Instead, efforts should be made to look for ways in which the state could carry out its obligations without interfering too greatly in local government activities (e.g., by monitoring land use and consulting with the local government if controls do not appear to be working). A cooperative agreement among EPA, the state and the local government might also be considered as a vehicle for providing the necessary assurance. However, if the state simply refuses to provide this assurance, the statute does not provide the option of implementing the remedy without adequate O&M.

B. Section 104(j) assurance

Section 104(j)(2) of CERCLA prohibits EPA from acquiring interests in real property necessary for conducting a remedial action unless the state agrees to take title to the property following completion of the remedy.[56] EPA's practice is to require such an assurance in connection with proprietary controls granted to EPA. Ideally, the state's general indication that it will provide the necessary assurances should be obtained at the time it concurs on the ROD, since the assurances are a precondition to full implementation of the remedy.

The state assurance requirement is not a concern, of course, where the state is willing to take title to the interest involved. However, states appear to be cautious about taking title in a significant number of cases. The reasons for such caution should be explored with the state. For example, it may be pointed out that to the extent liability is a concern, section 104(j)(3) provides that no agency shall be liable under section 107 solely as a result of acquiring an interest under this section. Furthermore, the owner of a nonpossessory easement is not necessarily an "owner and operator" for purposes of CERCLA.

If the state remains unwilling to accept title, a number of other options can be considered. One is to use non-proprietary controls. Governmental controls, and orders under s. 106, do not trigger s. 104(j)(2). Another is to have the interest conveyed to some party other than the United States. For example, if a settling liable party acquires proprietary interests from third parties, and holds them in its own name, the 104(j) assurance is not triggered.

Where the interest will not have to be held after the remedial action is completed, it is EPA's view that the s. 104(j) assurance is not required. This may be the case, for example, with controls that prevent contact with hazardous substances pending removal of the contaminated soil.

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[56] Note that this assurance is not on its face limited to fund-lead remedies (in contrast to the O&M assurance discussed earlier). It has been EPA's practice to request an assurance in connection with enforcement-lead remedies as well.

In exploring the possibilities of a state assurance, it is important that the implications of refusal to accept title to the property be fully understood by the state. Under s. 104(j), EPA does not have the option of acquiring the property and waiving the state's assurance. Therefore, failing to provide the assurance blocks implementation of one aspect of the remedy. In such cases, EPA could jeopardize the statutory requirement to establish protective remedies if it simply proceeded with the rest of the remedy, ignoring the need to acquire property. If no satisfactory alternative can be found, the necessary consequence, in order to ensure that a protective remedy is carried out, may be to adopt a different remedy. Again, to minimize disruption the best practice is to raise the issue of the assurance early, such as during the development of the proposed plan, or before the state concurs on the ROD.

It is important to note that acquisitions of proprietary controls also must follow the usual process through which the federal government acquires property. The earlier recommendation that consent decrees be drafted to provide for a separate, subsequent conveyance reflects a desire to avoid delays in the consent decree negotiation resulting from the federal acquisition process. An overview of that process is attached as Appendix C.

X. Institutional Controls and RCRA

Cleanups are conducted under RCRA as well as under CERCLA. It is EPA's policy that RCRA and CERCLA cleanups should generally be equivalent in substance, even though they take place in different regulatory settings.[57]

Accordingly, institutional controls can play a role in RCRA cleanups similar to their role under CERCLA. Much of the earlier discussion of the types of institutional controls is applicable in RCRA as well as CERCLA. There are, however, certain differences.

Some of these differences are more a matter of form than of substance. For example, most RCRA cleanups do not involve consent decrees, but most of the discussion of using consent decrees to implement institutional controls can apply to permits or RCRA consent orders as well. Similarly, the discussion of imposing restrictions through orders under CERCLA s. 106 can generally be extended to orders under RCRA ss. 3008(h) or 7003.

A more substantive difference is that under RCRA, the permitting authority can itself be used as an institutional control. That is, prohibitions on certain land uses or activities can be made a condition of the permit. The more difficult problem is how to restrict property use after a permit expires, especially when property changes hands. At this point, some kind of control of the kind discussed earlier may have to be used.[58]

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[57] See September 24, 1996 Memorandum from Assistant Administrators Steven A. Herman and Elliott P. Laws to RCRA/CERCLA National Policy Managers, "Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities".

[58] EPA recently solicited comment on means for long-term restriction of land use at RCRA facilities (or former RCRA facilities). See Advance Notice of Proposed Rulemaking, 61 Fed. Reg. 19432, 19463 (May 1, 1996).

Because RCRA does not contain any provision comparable to s. 104(j) of CERCLA, the Agency's authority to acquire proprietary controls is not as clear under RCRA.[59] However, nothing would prevent conveyance of a proprietary interest to a third party. Moreover, many RCRA cleanups are conducted by states, which may have authority to acquire property under state law. In addition. governmental controls may be established by a state or local government.

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[59] However, to the extent such authority does exist there is no requirement to obtain the state's assurance that it will ultimately accept title.

XI. Institutional Controls and Federal Facilities

The general rules and policies governing CERCLA and RCRA cleanups apply with equal force at Federal Facilities. Section 120(a)(2) of CERCLA, 42 U.S.C. § 9620(a)(2), provides that all guidelines, rules, regulations, and criteria applicable to remedial actions under CERCLA are applicable to facilities that are owned or operated by Federal departments, agencies, or instrumentalities. Similarly, Federal Facilities are subject to the corrective action requirements under §§ 3004(u) and (v) of RCRA, or may be subject to cleanup orders under §§ 3008(h) or 7003 of RCRA. Under CERCLA, the NCP designates the Federal department, agency or instrumentality that has jurisdiction, custody or control of a facility where the release is on, or the sole source of the release is from the facility (hereinafter referred to as "Federal Facilities") as the lead agent for purposes of investigating releases or potential releases of hazardous substances and conducting removal or remedial actions. At NPL sites, CERCLA remedial actions are conducted in accordance with a Record of Decision (ROD), concurred in by EPA. At non-NPL sites, the Federal owner will select the CERCLA remedial action through a ROD or other similar type of decision document. [60] In either case, NCP requirements apply, including rules and policies regarding institutional controls. Federal agencies, accordingly, may consider institutional controls as a component of a cleanup action at Federal Facilities, in the same way that they would be considered in other CERCLA or RCRA cleanups.

Much of the earlier discussion of the types of institutional controls that exist and their enforcement may be

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[60]The U.S. Army Environmental Center's Installation Restoration Program Management Plan, for example, provides that CERCLA remedial action decisions at non-NPL sites may be embodied in "decision documents" which can be less elaborate than RODs. EPA involvement at non-NPL sites and its opportunity to comment on the contents of decision documents generally stems from EPA's CERCLA section 120(h) role at Base Realignment and Closure facilities or facilities where property is slated to be transferred by Federal agencies. For purposes of this discussion "ROD" means the appropriate decision document.

applicable to Federal Facilities. However, certain proprietary or governmental controls discussed above cannot be applied on Federal property that is not included in local land registries[61] or subject to local zoning or land use ordinances[62]. There are, however, additional controls that may be applied on Federal Facilities. That said, not all Federal Facilities are similarly situated, thus, a case by case review of the circumstances applicable to the Federal Facility will determine what proprietary, governmental, or enforcement tools are appropriate. The kinds of institutional controls potentially available will also depend on whether the Federal property will remain in Federal operation and control, will be transferred to private parties (e.g., at a closing military base) or will remain Federally owned but privately operated (e.g., by contractors at Department of Defense facilities or miners on Bureau of Land Management property).[63]

This section focuses on Federal Facilities that will remain in Federal operation and control and Federal Facilities that will be transferred to private entities through the Base Realignment and Closure Act (BRAC) or other transfer processes. Although not an exhaustive discussion of the institutional, legal, or statutory differences with Federal Facilities as they relate to implementing institutional controls, this section will attempt to identify major legal or regulatory differences at Federal Facilities to guide Regional Attorneys and Remedial Project Managers working with other Federal agencies in developing protective and effective remedial actions. This

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[61]Some Federal Facility lands were acquired before states and counties established recording systems. Reportedly, no deed yet exists for the property.

[62]Some Federal Facility lands are zoned "Military Reservation", which does not readily lend itself to classifying permitted uses or restricting certain categories of activities of subsequent private transferees of the land.

[63]It is hoped that this handbook in its entirety will help to identify issues to consider at Federal Facilities of any variety.

section will also make specific recommendations related to Federal Facilities.

A. General Issues for Non-Closing Federal Facilities

1. Discussion of Institutional Controls in Federal Facility RODs

Federal Facility RODs should clearly describe the goals and Performance Standards of the institutional controls. Federal Facility RODs should contain plans for monitoring the performance of the ICs as well. Unlike RODs related to privately-owned sites, however, Federal Facility RODs also should specify the particular type of IC that will be used to implement the control. It is appropriate to be specific in the ROD about ICs that will be used at Federal Facilities for the following reasons:

a. At privately-owned sites, the landowner of the property to be affected usually must be involved in effectuating the IC. Thus, because there is no opportunity to get a commitment from the landowner prior to issuance of the ROD, there needs to be flexibility in the ROD for deciding what type of control can be implemented through negotiations. This is not the case at Federal Facilities, where the Federal agency is the owner or manager of the property. As the landowner and as either the lead or co-lead for issuing the ROD, the Federal agency is in a better position to select the Performance Standards and the type of control that will be used to implement them.[64]

b At Federal Facilities the ROD is the primary enforceable document for implementing the remedial action to be taken, which is a significant difference between Federal

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[64] Federal Facility RODs can be drafted to be flexible. Federal agencies may want to write contingent IC provisions in their RODs to address possible future transfer of the facility to nongovernmental entities. Nonetheless, if contingencies are included, it should be clear in the ROD what events or circumstances would trigger a change in the institutional control.

Facilities and privately-owned Superfund sites. At private sites, EPA will seek to negotiate a RD/RA Consent Decree which will contain the obligations and duties of the parties agreeing to perform the remedial action in the ROD, including implementing the ICs at the site. During negotiations agreements are reached with PRPs about the type of control to be used.

At Federal Facilities the lead Federal agency will be responsible for performing the work and there will not be RD/RA Consent Decree negotiations. At NPL Federal Facilities, CERCLA section 120 Federal Facility Agreements (FFA) are negotiated that acknowledge that the ROD will be enforceable and incorporated into the FFA upon issuance. Therefore, there is no implementing step after the ROD in which details such as the type of control to be used may be specified. Because the ROD, in essence, is the enforceable document for ensuring that the remedial action is implemented, it should specify the type of IC that will be used to implement the Performance Standards. At non-NPL Federal Facilities, since neither FFAs nor RD/RA Consent Decrees are negotiated, the decision document may be the only document generated which details the remedial action selected for implementation.

2. Deed Restrictions

Deed restrictions may not be a practical means for implementing land use restrictions on operating Federal Facilities because Federal property is not typically a part of local land registries. Even if the Federal property were included in the county registry, a deed notice or restriction may not be an effective means to notify Federal personnel of land use restrictions because title searches are not conducted before making land use decisions or issuing permits, licenses, or leases allowing parties to conduct activities on Federal land. Thus, for Federal land that will stay in Federal ownership and control, alternative ways to institutionalize the restricted uses are required. Such alternatives primarily consist of ways the Federal agencies can do business differently both in managing the Federal property and developing it, as well as in permitting private parties to conduct activities on Federal property. RPMs and Regional Attorneys should coordinate closely with their Federal agency counterparts to explore effective, long-term means for implementing land use restrictions on the Federal property.

A short list of possible, alternative mechanisms are discussed below. This list is not exhaustive and there may be other methods to record, document, or otherwise institutionalize the ROD's restrictions and other requirements through management changes and standard operating procedures. The following list provides a few examples of the types of mechanisms that may be used. These mechanisms may be implemented differently by each facility (e.g., base, Forest Service District or Region or BLM Management District). Therefore, the effectiveness and long-term reliability of these mechanisms must be researched on a site-specific basis.

a. FFA The FFA itself is an enforceable document, binding on the Federal agency, so that any use restrictions specified in RODs, which become incorporated into the FFA, also will be enforceable. Thus, while not a deed restriction, the FFA can serve to establish legally binding controls on land use at the facility. The chief limitation of the FFA as an institutional control is that its effectiveness comes into question when the agency that signed it proposes to transfer the facility. At that point, EPA must evaluate property transfer issues (see subsection B, below). In addition, the FFA by itself does not necessarily give effective notice of the restrictions to those who make subsequent land use decisions at the facility. The following mechanisms can be used in addition to the FFA to provide such notice.

b. Base Master Plans Military bases typically develop Base Master Plans to designate land uses or purposes for different areas of the base. Such Plans could serve as the equivalent of a governmental control that could restrict particular uses as determined by the ROD on military installations. Base Master Plans may be a mechanism for documenting land use restrictions and notifying military personnel of the ROD and who to contact if there is an inconsistent use proposed.

Base Master Plans, however, have many limitations and do not provide the level of assurance that governmental controls (e.g., local zoning ordinances) provide. Base Master Plans, including any restrictions and controls contained therein, may be

enforced only by the commanding officer[65]; may be changed by commanding officers at their discretion; usually do not impose sanctions for violations of the Plans; and usually are consulted only in relation to construction planning rather than activities involving vehicular or foot traffic (e.g., tanks and troops during military exercises).

As a result, EPA and states very carefully should evaluate against the NCP's "Long-term effectiveness and permanence" criterion the specific aspects of institutional controls proposed to be implemented at specific facilities. This criterion requires, for example, that the proposed reliance on a Base Master Plan be assessed for "the degree of certainty that the alternative will prove successful." 40 C.F.R. § 300.430(e)(9)(iii)(C). The issue of the adequacy and reliability of institutional controls, in general, and Base Master Plans, in particular, has led to the development of facility-specific protocols and procedures involving compliance monitoring and

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[65]Restrictions in Base Master Plans are not independently enforceable by EPA and the states. ROD requirements at facilities on the NPL, where a CERCLA section 120 FFA exists, however, are enforceable by any person pursuant to CERCLA section 310(c). In the alternative, EPA and the state may elect to reopen the ROD and change the remedy on the grounds that the institutional controls have failed to be protective.

periodic reporting to EPA and states in the base master planning process[66] as well as sanctions for violating the Plan.[67]

c. Facility, Forest, or Resource Maps The Base Master Plan may include base-wide maps, or at some military bases a central file of maps are known to be a central part of the planning process for future uses or development. Some Federal Facilities even have developed a computerized data base, a Geographic Information System (GIS), to track uses or restrictions for property. Similar types of resource maps may be kept up to date by other Federal land management agencies. If such a master set of maps are used at the Federal Facility, RODs could specify that such maps be stamped or otherwise marked to designate where remedial action has left hazardous substances on site and specify the restrictions on land uses.

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[66]For example, EPA, some states and military services have established either general action plans for facilities or ROD-specific assurance plans. Generally, use restrictions and other institutional controls have been incorporated and retained in the base master planning process throughout the applicable remediation period; adherence to such use restrictions shall be routinely reviewed; annual reports of such compliance reviews shall be provided to EPA and the state; any proposals to engage in restricted use shall be coordinated with EPA and the state; and any violations of the use restrictions shall be reported immediately to EPA and the state for collaborative determination of an appropriate remedy.

[67]For example, the commanders at three Florida Navy bases have been issued "Instructions", orders for all personnel on the bases, to abide by the base master planning process and the use restrictions contained in the Base Master Plans. Violations of any recorded institutional control presumably will be punishable offenses under military law.

In the alternative, having the ROD specify (by job title) the base personnel who shall be responsible for maintaining institutional controls as a part of their jobs may create the incentives to assure maintenance of restrictions.

As discussed in relation to Base Master Plans, reliance on these types of maps and plans must be evaluated with regard to the adequacy and reliability of institutional controls. Separate protocols may need to be established either independently of or as a part of the specific ROD remedy to provide an adequate level of reliability and enforceability for the particular use or risk involved.

d. Forest Plans Forest Plans are the primary planning and resource management tool used by the U.S. Forest Service on the National Forest level.[68] All outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are required to be consistent with the Forest Plan. 36 C.F.R. §219.10(e). The Forest Service may be subject to challenge through the NEPA process or the APA if it conducts or permits an activity that is inconsistent with the Forest Plan. Likewise, permits or licenses given to private parties to conduct activities on national forest lands would have to be consistent with the Forest Plan. There are planning documents on a larger geographic scale used by the Forest Service, however, if contamination occurs on a parcel within a particular National Forest, the more practical and effective level to effectuate institutional controls probably will be the forest level.[69]

e. Land Status Records System Another place where use restrictions on Forest Service lands may be recorded is in the Land Status Records System. This Records System is the permanent repository for all agency realty records and land title documents for the National Forest Service System lands. A Land Status Atlas is maintained at each National Forest administrative unit

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[68] See 36 C.F.R. Parts 200 through 297 for U.S. Forest Service regulations. In particular, 36 C.F.R. Part 219, Subpart A, "National Forest System Land and Resource Management Planning" regulations.

[69] RPMs and Forest Service personnel should consult with their Regional Counsel concerning necessary administrative procedures to appropriately amend the Forest Plans to make institutional controls legally enforceable through the Forest Plan.

and Regional Office. The ROD could require that the restricted land uses be designated on this system.

f. Resource Management Plans Resource Management Plans are the Bureau of Land Management's planning tool on a resource area level.[70] Resource Management Plans may be considered as one mechanism for institutionalizing selected institutional controls for remedies constructed on BLM lands.[71]

g. Restricted Use Notices or IC Notices. Actual notice of the ROD and restricted uses could be one tool for notifying different departments or offices within the owning Federal agency and notifying other Federal agencies that may have a role in future uses at the Federal Facility of the ROD and the IC requirements contained in it. Notices should be sent to key offices at the local, regional, and national level of the owning Federal agency which may have a role in future use decisions. Likewise, notices should be sent to appropriate offices of the Government Services Administration, which is the agency that disposes or leases most Federal property.[72] Such notices do not, of course, create legally enforceable obligations; they are purely informational. However, if legal duties are created in other mechanisms the notice can call attention to that fact.

h. Permits and Licenses The Federal government issues permits, licenses, and leases under numerous statutory authorities, allowing various activities to occur on Federal land. If property to be remediated is or may be in the future subject to a permit, license, or lease, ways to incorporate

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[70] See 43 C.F.R. Part 1601.0-5(k) for a definition of Resource Management Plan.

[71] Appropriate procedures for amending Resource Management Plans also must be researched prior to selecting this mechanism as an institutional control.

[72] Where and to whom to send such notices should be explored by the lead Federal agency. At this time, it is not known whether GSA has a central database for such notices or where the most appropriate office at GSA would be.

appropriate use restrictions as enforceable terms of such documents should be considered. For example, there exist Forest Service regulations relating to the issuance of permits which allow private entities to conduct certain activities on Federal lands. As a part of the permit conditions, the Federal government may be able to specify use restrictions.

3. Enforcement Authorities

Although some or all of the enforcement tools discussed previously may apply to a particular Federal Facility, CERCLA provides additional means for EPA and Federal agencies to enforce Federal Facility ROD requirements.

As previously discussed, the ROD is the primary enforceable document for ensuring the remedy is implemented on Federal Facilities. The FFAs that are entered into prior to or during commencement of the RI/FS contemplate that the ROD will be incorporated into the FFA upon issuance and the enforcement provisions, including stipulated penalties, of the FFA will be applicable to performance of the ROD. In other words, ROD requirements become enforceable requirements of FFAs. Failure to create controls which are selected as ROD remedy components would constitute a failure to perform an enforceable condition of the FFA.[73] Moreover, as discussed earlier, as long as the lead agency continues to hold the property the ROD and FFA can be an effective control by themselves.

Section 310 of CERCLA authorizes states and citizens to sue the Federal government where there is alleged a failure of the Federal government to comply with the terms of a FFA, or a failure to comply with the statutory requirements of section 120,

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[73]CERCLA section 120 FFAs contain, as part of the Enforceability provisions, the following model language: "All terms and conditions of this Agreement which relate to interim and final remedial actions, including corresponding timetables, deadlines or schedules, and all work associated with the remedial actions, shall be enforceable by any person pursuant to CERCLA section 310(c), and any violation of such terms or conditions will be subject to civil penalties under CERCLA sections 310(c) and 109 . . . ."

generally. This section allows states and citizens to monitor compliance with state and Federal environmental cleanup requirements at Federal facilities and sue the Federal agencies to comply with substantive provisions of section 120 and to impose civil penalties for any violation of a FFA. Failure to implement institutional controls or to enforce such controls contained in the ROD would be a violation of section 120.

For circumstances where third parties may be violating land use restrictions, Federal agencies have CERCLA section 106 authority at sites where EPA is not the lead agent, i.e., non-NPL cleanup sites. Orders under section 106 can be used to enjoin inconsistent uses or violations of institutional control restrictions. At NPL Federal Facilities, the Federal agency could request that EPA issue any necessary orders.

4. States' Roles and Responsibilities

At Federal Facilities there is no requirement that states take over long-term O&M. Likewise, there is no legal requirement that the state perform monitoring or other duties related to the enforcement of ICs on Federal Facilities where no transfer is proposed. However, states may agree to take such responsibility and the possibility may be explored with the them.

Where a Federal Facility is subject to RCRA corrective action, the state will be the regulatory authority if it is authorized for corrective action. In that case, the state's usual RCRA authorities can be used to establish controls, as well as other mechanisms discussed in this section.

B. Property Transfers and CERCLA Section 120(h)

Section 120(h) of CERCLA provides what Federal agencies must do when contaminated property is transferred to a non-Federal entity. 42 U.S.C. § 9620(h). Although these property transfer provisions are applicable to any Federal agency in any transfer situation to private parties, it has been applied most frequently in the BRAC context. Many DoD installations targeted to close or be realigned under the Base Closure and Realignment Act of 1988 or the Defense Base Closure and Realignment Act of

1990[74] will be transferred to private entities. Under agreements with DoD, on both NPL and non-NPL BRAC sites, EPA has responsibilities to participate on the BRAC Cleanup Team, Restoration Advisory Board (RAB) and review and comment on the Finding of Suitability to Transfer (FOST) and all supporting documentation. A significant part of this review and comment process involves the DoD component's CERCLA section 120(h)(3) determination that "all remedial action necessary to protect human health and the environment with respect to any such [hazardous] substance remaining on the property has been taken"; this implicitly requires EPA's evaluation of the RODs[75].

Before the CERCLA 120(h)(3) determination can be made, the FOST should contain information about what institutional controls were required, how they were or will be implemented, and how and who will maintain them and enforce them after transfer.[76] FOSTs reflect DoD policy that its "environmental restoration efforts for property to be transferred out of Federal control will attempt, to the extent reasonably practicable, to facilitate the land use and redevelopment needs stated by the community in plans approved prior to the remedy selection decision."[77] By the same token, consistent with EPA's "Land Use in the CERCLA Remedy Selection Process" Directive, a site proposed for industrial reuse need not be remediated to

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[74]Pub. L. No. 100-526, 102 Stat. 2623 and Pub. L. No. 101-510, 104 Stat. 1808, respectively.

[75]Section 300.430(f)(4)(iii) provides that, at NPL sites, EPA shall select the remedial action jointly with the responsible Federal agency, unless mutual agreement on the remedy is not reached, in which case the selection of the remedy is made by EPA. No such formal role in the remedy selection process is provided to EPA at non-NPL sites.

[76]See subsection C, below, for discussions regarding maintaining and enforcing institutional controls at property proposed for transfer.

[77]DoD's July 25, 1997 policy memorandum entitled "Responsibility for Additional Environmental Cleanup after Transfer of Real Property." (Hereinafter referred to as "DoD's Future Land Use Policy".)

residential cleanup levels, provided that future residential use of the property is restricted.

Since ICs are a part of the remedial actions in such cases, it is necessary that all controls required by RODs are in place and effective before the section 120(h)(3) covenants could be granted. Thus, even at non-NPL BRAC sites, EPA will be involved in the decision-making regarding the selection of appropriate institutional controls.

C. Special Issues at Closing Federal Facilities

1. Mechanisms for restricting land use

At closing facilities, matters are more complex because the anticipated land users will not be parties to, and legally bound by, the FFA (assuming the facility is on the NPL and an FFA has been negotiated). Therefore, in such cases the FFA by itself does not establish a reliable long term control and it will be necessary for the agency to create other mechanisms that will be enforceable against subsequent landowners.

The transfer of Federal property to private owners opens the door to a wider range of traditional governmental and proprietary controls than is available for operating Federal facilities. With regard to governmental controls, if the property is not already included in the local land registry, it will be included as a result of the deed transfer to the private transferee. Furthermore, the land likely will become subject to the various zoning, permitting, licensing and other authorities of state, county and local governments.

With regard to proprietary controls, since the Federal government is the transferor of the property, it may retain the property interests necessary to establish the institutional controls selected in a ROD. Its direct involvement in the chain of title overcomes many of the hurdles posed in the context of private sites. Restrictive covenants or equitable servitudes could be placed in the conveyance documents. Because the United States would be in privity of estate with the transferee/grantee and its successors, the United States could enforce violations of the restrictive covenants.

2. Discussion of Institutional Controls in Federal Facility RODs and FOSTs

As at non-closing Federal Facilities, RODs should clearly describe the goals and Performance Standards of the institutional controls. Federal Facility RODs should contain plans for monitoring the performance of the ICs as well. These details regarding the ICs then should be included in the FOSTs and subsequent transfer documents as a part of a focused discussion on how the ICs were or will be implemented; how and who will maintain or monitor them; and who will enforce them after transfer.[78] The degree of specificity that is appropriate for a particular ROD or FOST will depend on several factors:

a. Under BRAC law, the local redevelopment authorities have principal responsibility for reuse planning. While redevelopment plans may identify the proposed land use in terms of local zoning categories (e.g., light industrial or commercial), identification of specific construction "footprints" or associated uses (e.g., day care for a office park) may not occur until after the issuance of a ROD. At the ROD stage, then, the transferring Federal agency only may select the Performance Standards and specify the type of control that will be used to implement them. The transferring agency, however, may decide to defer detailing the specific monitoring and post-transfer enforcement mechanisms until very specific reuse plans can be developed at the FOST stage.

b. Although private transferees of Federal property need not necessarily be involved in effectuating the IC[79], the

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[78]DoD's Future Land Use Policy states that the "DoD Component disposal agent will ensure that [the] transfer documents reflect the use restrictions and enforcement mechanisms specified in the remedy decision document."

[79]Transferees of Federal property are acquiring land with pre-existing environmental limitations and must abide by certain restrictions in the transfer documents in order to maintain the benefit of the CERCLA section 120(h)(3) covenants and the indemnification provisions of section 330 of Public Law 102-484, as amended. Responsibility for monitoring, maintaining and

private parties can choose to make certain commitments with respect to monitoring, maintaining or enforcing ICs. In other situations, the prospective transferees may seek to negotiate modifications to the original plans for monitoring or maintaining ICs.[80]

c. At BRAC facilities the ROD is still the primary enforceable document for implementing the remedial action to be taken. The lead Federal agency will be responsible for performing the work and there will not be RD/RA Consent Decree negotiations. Although the Federal agency may negotiate with the proposed transferee post-transfer IC details, EPA and the states are not a party to those transfer documents and they must still look to the Federal agency for compliance with ROD- required ICs.

d. Federal agencies transferring facilities in remote locations may seek to transfer the responsibility for monitoring, maintaining and enforcing ICs to states, local governments, transferees, or other third parties in transfer or other agreements. EPA needs to evaluate the specifics of the ICs which are contained in enforceable documents in terms of adequacy and reliability.

3. Enforcement Authorities

In addition to the enforcement tools previously discussed, Federal agencies will have the property law right to

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enforcing the use restrictions, unless modified at the time of the property transfer, remain with the Federal transferor.

[80]As noted in the subsection concerning operating facilities, Federal agencies may want to write contingent IC provisions in their RODs to address possible future transfer needs. For example, where residual lead levels in soil pose a potential direct contact risk to children, an IC prohibiting any land use involving children in an area designated "commercial" may provide a contingency for regulator approval of a plan to construct a barrier layer (e.g., asphalt) on the affected parcel in order to allow for a day-care facility as part of an office park.

enforce the controls where third parties may be violating land use restrictions and as well as possible contract rights in the event a transferee violates terms of the transfer agreement.[81] This would be in addition to the section 106 authority that they may have. It should be noted that EPA would not have authority to enforce such controls directly; it would have to rely on the Federal agency to do so.

4. Roles and Responsibilities of States, Local Governments and Third Parties

For closing Federal facilities, there is no requirement that states take over long-term O&M, perform monitoring or other duties related to the enforcement of ICs on Federal Facilities. Furthermore, if proprietary controls are contemplated for property being transferred, the Federal government will be reserving rights, not acquiring them, therefore, eliminating the need for the states to agree to take such property interests in the future. The transferring Federal agency is responsible for those activities. However, states may agree to take such responsibility and the possibility may be explored with the them. By the same token, local governments and third parties my express a desire to assume some responsibility for monitoring and enforcing institutional controls.

As part of a conveyance, the Federal agency may transfer an easement to a state in order to give the state the right to enforce the deed or use restrictions. The ability to transfer this right, however, may depend both on the property law of the relevant state as well as the legal authority of the state to accept voluntarily a property right. Such considerations also apply in the case of local governments and third parties.

Where a Federal Facility is subject to RCRA corrective action, the state will be the regulatory authority if it is authorized for corrective action. In that case, a state's usual

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[81]DoD's Future Land Use Policy states that "[i]f it becomes evident to the DoD Component that a deed restriction or other institutional control is not being followed, the DoD Component will attempt to ensure that appropriate actions are taken to enforce the deed restriction."

RCRA authorities can be used to establish controls, as well as other mechanisms discussed in this section.

D. Early Evaluation and Planning

As the foregoing discussion makes clear, early identification and planning and thorough evaluation of ICs is critical to the timely completion of remediation at Federal Facilities slated for transfer. The evaluation of CERCLA section 120(h)(3) determinations benefit greatly from Feasibility Study reports (FSs) that contain detailed evaluation of site-specific ICs, including implementation and monitoring considerations. Even at Federal Facilities which are not slated for transfer, such early evaluation of ICs affords a more thorough examination of remedial alternatives using the NCP's nine evaluation criteria. Furthermore, since no RD/RA Consent Decree will be negotiated, EPA's involvement in the preparation of the ROD is the last opportunity to detail enforceable remedy implementation provisions.

The experiences at BRAC sites provide valuable lessons which may be adapted to the remedial process at non-transfer Federal Facilities. The BRAC process incorporates enhanced public participation by the local community by the establishment of Land Reuse Authorities which comment and coordinate on cleanup issues, particularly future land uses. The BRAC process then provides additional opportunities and coordination tools for establishing appropriate institutional controls at BRAC sites. Early coordination with the Land Reuse Authority at BRAC facilities and the states on institutional control issues, i.e., implementation and enforcement, will help the lead Federal agency develop realistic and implementable remedial action alternatives.

For BRAC facilities or other Federal property that will be transferred to non-Federal governmental entities, coordination with the local government that will take jurisdiction of the transferred property should occur to explore how the transferred property is or may be zoned. The local authority may need to amend its zoning ordinance or conduct other legislative action to implement zoning regulations, so such coordination should begin as soon as the Federal property is slated for transfer and the projected future use is determined.

REFERENCES:

OSWER Directive No. 9355.7-04, "Land Use in the CERCLA Remedy Selection Process." (Hereinafter, "Land Use Guidance.")

Memorandum, "Use of Institutional Controls at Superfund Sites", from David F. Coursen to Howard Corcoran, dated July 27, 1992.

Coursen, "Institutional Controls at Superfund Sites", 23 ELR 10279 (1993).

Susan Borinsky, The Use of Institutional Controls in Superfund and Similar State Laws, 7 Fordham Env. L. J. 1 (1995).

Arthur L. Gaudio, ed., The American Law of Real Property (1994).

Paul Nightingale, "Land Use Restrictions and Waste Site Cleanups: Lessons from the States", BNA Toxics Law Reporter (April 5, 1995).

John Pendergrass, "Use of Institutional Controls as Part of a Superfund Remedy: Lessons from Other Programs", 26 Environmental Law Reporter 10109, 10111-12 (March 1996).

APPENDIX A

Access & Institutional Controls Language for RD/RA CDs

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 85 of Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from **[insert the date identified in the Past Response Costs definition]** to the date of entry of this Consent Decree.

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[NOTE: For Consent Decrees in which there is an Owner Settling Defendant, add Paragraph 9, below. Paragraph 9(a) may be deleted if an easement will be recorded pursuant to Paragraph 26(c)]

9. <u>Notice to Successors-in-Title</u>

a. With respect to any property owned or controlled by the Owner Settling Defendant(s) that is located within the Site,

within 15 days after the entry of this Consent Decree, the Owner Settling Defendant(s) shall submit to EPA for review and approval a notice to be filed with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA selected a remedy for the Site on _____, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Owner Settling Defendant(s) shall record the notice(s) within 10 days of EPA's approval of the notice(s). The Owner Settling Defendant(s) shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

b. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Owner Settling Defendant(s) conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been

conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as restrictive easements) pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Owner Settling Defendant(s) conveying the interest shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

c. In the event of any such conveyance, the Owner Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Owner Settling Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the Owner Settling Defendant(s) to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

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IX. ACCESS AND INSTITUTIONAL CONTROLS

[NOTE: Subparagraphs 26(a) and 27(a) should routinely be included in consent decrees. Subparagraphs 26(b) and 27(b) should be included where EPA determines that land/water use restrictions

are needed on property owned by settling or non-settling landowners to ensure the integrity or protectiveness of the remedial action. Subparagraphs 26(c) and 27(c) should be included where EPA determines that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired by EPA or another grantee from settling or non-settling landowners.]

26. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by any of the Settling Defendants, such Settling Defendants shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States[, the State,] and its [their] representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

i. Monitoring the Work;

ii. Verifying any data or information submitted to the United States [or the State];

iii. Conducting investigations relating to contamination at or near the Site;

iv. Obtaining samples;

v. Assessing the need for, planning, or implementing additional response actions at or near the

Site;

vi. Implementing the Work pursuant to the conditions set forth in Paragraph 85 of this Consent Decree;

vii. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);

viii. Assessing Settling Defendants' compliance with this Consent Decree; and

ix. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree. Such restrictions include, but are not limited to, [LIST SPECIFIC RESTRICTIONS]; and

c. execute and record in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of _____ County, State of _____, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent

Decree including, but not limited to, those activities listed in Paragraph 26(a) of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26(b) of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling defendants and their representatives, and/or (iv) other appropriate grantees].[1] Such Settling Defendants shall, within 45 days of entry of this Consent Decree,[2] submit to EPA for review and approval with respect to such property:

> i. A draft easement, in substantially the form attached hereto as Appendix , that is enforceable under the laws of the State of _____, free and

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[1] If, at the time that a consent decree is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, Paragraph 26(c) should be redrafted to insert the phrase ※one or more of the following persons, as determined by EPA,※ prior to the bracketed list of potential grantees.

[2] If, at the time that a consent decree is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, Paragraph 26(c) should be redrafted to insert the phrase "if EPA so requests," at the beginning of the subparagraph, and the Settling Defendants should be required to submit the draft easement a certain number of days from the date of EPA's request.

clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

ii. a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's approval and acceptance of the easement, such Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of ____ County. Within 30 days of recording the easement, such Settling Defendants shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

27. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not

limited to, those activities listed in Paragraph 26(a) of this Consent Decree;

b. an agreement, enforceable by the Settling Defendants and the United States, to abide by the obligations and restrictions established by Paragraph 26(b) of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree; and

c. the execution and recordation in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of _____ County, State of _____, of an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26(a) of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26(b) of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land/water use restrictions shall be granted to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling defendants and

their representatives, and/or (iv) other appropriate grantees].[3] Within 45 days of entry of this Consent Decree,[4] Settling Defendants shall submit to EPA for review and approval with respect to such property:

> i. A draft easement, in substantially the form attached hereto as Appendix , that is enforceable under the laws of the State of _____, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and
>
> ii. a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's approval and acceptance of the easement, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, the easement shall be recorded with the Recorder's Office [or Registry of Deeds or other appropriate office] of ____ County. Within 30 days of the recording of

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[3] If, at the time that a consent decree is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, Paragraph 27(c) should be redrafted to insert the phrase ※one or more of the following persons, as determined by EPA,※ prior to the bracketed list of potential grantees.

[4] If, at the time that a consent decree is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, Paragraph 27(c) should be redrafted to begin with the phrase "if EPA so requests," and the Settling Defendants should be required to submit the draft easement within a certain number of days from the date of EPA's request.

the easement, Settling Deferdants shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

28. For purposes of Paragraph 27 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, and/or restrictive easements. **[NOTE: It may be appropriate to delete the preceding sentence if the property where access or land/water use restrictions are needed is owned by a non-settling party who EPA determines is a PRP. (See guidance entitled "Model RD/RA Consent Decree: Acceptable Modifications to Model Language (Directive No. 2)," March 25, 1992)]** If any access or land/water use restriction agreements required by Paragraphs 27(a) or 27(b) of this Consent Decree are not obtained within 45 days of the date of entry of this Consent Decree, or any access easements or restrictive easements required by Paragraph 27(c) of this Consent Decree are not submitted to EPA in draft form within 45 days of the date of entry of this Consent Decree,[5] Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 27 of this Consent Decree. The

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[5] If the obligation to obtain an easement pursuant to Paragraph 27(c) runs from the date of EPA's request for such an easement, as opposed to from the date of entry of the consent decree, this language should be revised accordingly.

FAVOR OF, AND ENFORCEABLE BY, THE UNITED STATES OF AMERICA.

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

17. Administrative jurisdiction: The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the EPA.

18. Enforcement: The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of the Grantee, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

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

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

21. Covenants: Grantor hereby covenants to and with the United States and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on **Exhibit D** attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

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

To Grantor:	To Grantee:
_____	_____
_____	_____
_____	_____

23. General provisions:

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

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

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

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

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

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

g) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are freely assignable, subject to the notice provisions hereof.

h) Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

United States may, as it deems appropriate, assist Settling Defendants in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access and/or land/water use restrictions including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

29. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's [and the State's] efforts to secure such governmental controls.

30. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its access authorities and rights, as well as all of its [their] rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

APPENDIX B

ENVIRONMENTAL PROTECTION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS

1. This Environmental Protection Easement and Declaration of Restrictive Covenants is made this ____ day of _____, 19___, by and between _____, ("Grantor"), having an address of _____, and, _____ _____("Grantee"), having an address of _____ _____.

WITNESSETH:

2. WHEREAS, Grantor is the owner of a parcel of land located in the county of _____, State of _____, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property"); and

3. WHEREAS, the Property is part of the _____ Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 19__; and

4. WHEREAS, in a Record of Decision dated _____, 19__ (the "ROD"), the EPA Region __ Regional Administrator selected a "remedial action" for the Site, which provides, in part, for the following actions:

and

5. WHEREAS, with the exception of_____

_____, the remedial action has been implemented at the Site; and

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

7. WHEREAS, Grantor wishes to cooperate fully with the Grantee in the implementation of all response actions at the Site;

NOW, THEREFORE:

8. Grant: Grantor, on behalf of itself, its successors and assigns, in consideration of [the terms of the Consent Decree in the case of ____ v. ____, etc.], does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantee, and its assigns, with general warranties of title, 1) the perpetual right to enforce said use restrictions, and 2) an environmental protection easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

9. Purpose: It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants.

10. Restrictions on use: The following covenants, conditions, and restrictions apply to the use of the Property, run with the land and are binding on the Grantor:

11. Modification of restrictions: The above restrictions may be modified, or terminated in whole or in part, in writing, by the Grantee. If requested by the Grantor, such writing will be executed by Grantee in recordable form.

12. Environmental Protection Easement: Grantor hereby grants to the Grantee an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of:

a) Implementing the response actions in the ROD, including but not limited to_____ _____ ;

b) Verifying any data or information submitted to EPA.

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

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

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

f) Implementing additional or new response actions if the Grantee, in its sole discretion, determines i) that such actions are necessary to protect the environment because either the original remedial action has proven to be ineffective or because new technology has been developed which will accomplish the purposes of the remedial action in a significantly more efficient or cost effective manner; and, ii) that the additional or new response actions will not impose any significantly greater burden on the Property or unduly interfere with the then existing uses of the Property.

13. Reserved rights of Grantor: Grantor hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.

14. Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under CERCLA, the NCP, or other federal law.

15. No Public Access and Use: No right of access or use by the general public to any portion of the Property is conveyed by this instrument.

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

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL PROTECTION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS, DATED _____, 19__, RECORDED IN THE PUBLIC LAND RECORDS ON _____, 19___, IN BOOK _____, PAGE _____, IN

APPENDIX C

Procedures for the Acquisition by EPA of Interests in Real Property for Implementation of Institutional Controls

An acquisition by any Federal agency of an interest in real property must comply with the following:

1. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601)("URA") and the implementing regulations at 49 CFR part 24;

2. 41 U.S.C. 14, Restriction on Purchases of Land;

3. 40 U.S.C. 255, Approval of Title Prior to Federal Land Purchases;

4. "Standards for Preparation of Title Evidence in Land Acquisitions by the United States," U.S. Department of Justice (DOJ), 1970;

5. "Uniform Appraisal Standards for Federal Land Acquisitions," Interagency Land Acquisition Conference, 1992; and

6. If applicable - 40 U.S.C. §§257, 258a, 258b "Condemnation of realty for sites and other uses". Also, FRCP 71A.

Additionally, acquisition by EPA of an interest in real property in connection with a NPL site must be authorized in accordance with the following:

1. CERCLA §104(j), Acquisition of Property, "property or any interest in real property ... needed to conduct a remedial action."

2. EPA Delegation 14-30, CERCLA Acquisition of Property (Office of Solid Waste and Emergency Response (OSWER) and Office of General Counsel (OGC) review and concurrence); and

3. EPA Delegation 1-4-B, Real Property and Space (Facilities Management and Services Division ("FMSD") approval and authorization).

The implementation of the acquisition procedures will vary depending on factors such as, the interest to be acquired, the duration of the interest to be acquired, the parties involved in the transaction, the amount of compensation to be paid (if any), and the party paying the compensation. The portions of the acquisition procedures that require the most lead time are, obtaining the appraisal required under the URA and completing the title review required under 40 U.S.C. 255. Both the appraisal and the title review are valuable tools to assure the validity

and enforceability of the interest to be acquired and that any compensation/takings issues are adequately addressed.

The general process for property acquisitions by EPA is as follows:

1. Under Delegation 14-30, the Region makes a determination that the interest in real property is required for the remedial action, and obtains a "state assurance" under §104j(2).

2. Under Delegation 14-30, OGC must concur in the acquisition and the Assistant Administrator for OSWER must authorize FMSD to make the acquisition. The Director of FMSD acquires the interest in real property under the authority delegated in Delegation 1-4-B, or authorizes the Region or the Corps of Engineers ("COE") to carry out the acquisition.

3. The approvals set forth above are accomplished by the Region submitting a memo jointly to OGC and OSWER. The memo serves a dual purpose; (i) to help the Region address all relevant issues and plan the steps necessary to complete the acquisition, and (ii) to set forth the facts and legal issues for efficient OSWER and OGC review.

4. Issues to be addressed in planning the acquisition include:

a. Determining the parties involved in the transaction, including the owner of the property to be controlled (PRPs, non-PRPs, state or local governments, bankruptcy court);

b. Determining that EPA will be the party that will hold and enforce the property interest used for the institutional controls, i.e., EPA will be the "Grantee" of the property interest.

c. Type of property interest to be acquired (easement, fee, restrictive covenant);

d. Compensation issues (donation v. payment of market value) (contaminated property v. clean property), (negotiated settlement v. condemnation);

e. Decisions as to the party or parties that will hire and monitor the appraiser, title insurance company, and surveyor, as needed, (ORC, COE, DOJ or PRP); and

f. Timing concerns, including contracting for additional support (COE, appraiser, title work, survey).

5. 40 U.S.C. 255, "Approval of Title Prior to Federal Land Purchases" requires that DOJ or COE legal staff prepare a title opinion. This legal opinion is usually based on a commitment for title insurance. After the closing, the title insurance company will issue an insurance policy in accordance with "Standards for Preparation of Title Evidence in Land Acquisitions by the United States," U.S. Department of Justice (DOJ), 1970. Note: The title opinion from DOJ or COE, and title insurance, are **separate** requirements.

6. Appraisal review and approval by DOJ or COE, may be required under the URA. The appraisal must meet the "Uniform Appraisal Standards for Federal Land Acquisitions," Interagency Land Acquisition Conference, 1992.

7. Closing (delivery and recordation of documents) is handled by the Region or COE and the title insurance company.

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

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

TO HAVE AND TO HOLD unto the United States and its assigns forever.

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

Executed this _____ day of _____, 19__.

_____

By: _____

Its: _____

STATE OF _____)
) ss
COUNTY OF _____)

On this __ day of _____, 19__, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn, personally appeared _____, known to be the _____ of _____, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

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

_____
Notary Public in and for the
State of _____

My Commission Expires: _____.

This easement is accepted this ____ day of _____ , 19__.

UNITED STATES OF AMERICA

the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns.

U.S. ENVIRONMENTAL PROTECTION AGENCY

By: _____

_____

Attachments:	Exhibit A	-	legal description of the Property
	Exhibit B	-	identification of proposed uses and construction plans, for the Property
	Exhibit C	-	identification of existing uses of the Property
	Exhibit D	-	list of permitted title encumbrances