UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: "Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups" (OSWER 9255.0-98)

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The purpose of this memo is to transmit the final guidance entitled "Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups."

The Institutional Controls (IC) Citizen's Guide is one of a collection of OSWER/OECA efforts to address IC-related topics and is intended to complement more detailed IC practitioner guidance. Specifically, the IC Citizen's Guide: 1) defines ICs and other related terms; 2) discusses the different types of ICs; 3) discusses when, why, and how ICs are used; 4) identifies entities that may be involved in the implementation, monitoring and enforcement of ICs; and 5) discusses the role of the community throughout the IC life-cycle.

The IC Citizen's Guide has been reviewed by OSWER offices, OSRE, the Office of General Counsel, both program staff and ORC attorneys at the Regional level, and several outside organizations. These comments were very helpful, and we believe they greatly enhanced the final guidance.

Questions about this guidance or the general topic of ICs should be referred to Michael Bellot or Marisa Guarinello of the Office of Superfund Remediation and Technology Innovation (OSRTI), Allison Abernathy of the Federal Facilities Restoration and Reuse Office (FFRRO), Carlos Lago of the Office of Solid Waste (OSW), Joe Vescio of the Office of Underground Storage Tanks (OUST), Nancy M. Porter of the Office of Brownfields Cleanup and Redevelopment, and Kenneth C. Schefski of the Office of Site Remediation Enforcement. Copies of this document will be available at http://www.epa.gov/superfund/action/ic/index.htm.

Attachment

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Institutional Controls:

A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups

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Terms that appear in **bold** can be found in a glossary at the end of the document. Many of these terms describe some types of ICs.

PURPOSE

The purpose of this guide is to provide community members with general information about the role of ***institutional controls*** (ICs) in Superfund, Brownfields, Federal Facilities, Underground Storage Tanks (UST) and Resource Conservation and Recovery Act (RCRA) cleanups occurring in their neighborhoods. This guide will also discuss the community's role in providing input for the selection of ICs and helping to monitor them to ensure that human health and the environment remain protected in the future.

Key Points

- ICs are legal and administrative tools used to maintain protection of human health and the environment at sites.
- ICs are often an important part of the overall cleanup at a site.
- ICs can be used for many reasons and come in different types. These include restricting site use, modifying behavior, and providing information to people.
- There are 4 general types of ICs: ***governmental, proprietary, enforcement, and informational.***

- ICs are designed to lower the potential for people and the environment to be exposed to contamination.

- ICs are usually most effective when layered and used in series to improve protectiveness.

- ICs should fit the needs of the specific site and community.

- The community can play an important role in identifying potential future uses of the site.

- A cooperative relationship should be established early between government, the entity doing the cleanup and the community.

- Seeking community input and involvement can maximize the effectiveness of ICs.

- Communities can play a vital role as "eyes and ears" for monitoring ICs.

- Federal, state, tribal, and local governments and parties responsible for the cleanup should keep the public informed of cleanup decisions that may affect them.

What Are Institutional Controls?

ICs are generally administrative and legal tools that do not involve construction or physically changing the site. ICs are generally divided into four categories:

1) **Government Controls**- include local laws or permits (e.g., county zoning, building permits, and Base Master Plans at military facilities);

2) **Proprietary Controls**- include property use restrictions based on private property law (e.g., ***easements*** and covenants);

3) **Enforcement Tools**- include documents that require individuals or companies to conduct or prohibit specific actions (e.g., environmental cleanup ***consent decrees, unilateral orders,*** or permits); and,

4) **Informational Devices**- include ***deed notices*** or public advisories that alert and educate people about a site.

In many site cleanups, ICs help reduce the possibility that people will come in contact with contamination and may also protect expensive cleanup equipment from damage. The use of ICs is not a way "around" treatment, but rather part of a balanced, practical approach to site cleanup that relies on both engineered and non-engineered remedies.

When Are ICs Used?

ICs are normally used when waste is left onsite and when there is a limit to the activities that can safely take place at the site (i.e,. the site cannot support unlimited use and unrestricted exposure) and/or when cleanup equipment remains onsite. ICs are often used throughout a site cleanup, including when:

- contamination is first discovered (i.e., to protect people from coming in contact with potentially harmful materials while the contamination is being investigated)
- cleanup work is ongoing (in some cases it may take many years to complete cleanup)
- some amount of contamination remains on-site as part of a cleanup remedy.

ICs can play an important role when a cleanup is conducted and when it is too difficult or too costly to remove all contamination from a site. ICs are rarely used alone to deal with contamination at a site. Typically, ICs are part

of a larger cleanup solution and serve as a non-engineered layer of protection. ICs are designed to keep people from using the site in a way that is not safe and/or from doing things that could damage the cleanup equipment, thus, potentially jeopardizing protection of people and the environment. For example, an IC may be necessary at a former landfill to notify the community and guard against excavators digging through a clay barrier that is meant to stop rain water from entering the landfill.

It is also important to remember that ICs are frequently used to protect cleanup equipment while the cleanup is being conducted. For example, sites may require complex technologies that remove, treat, and discharge groundwater. Operation of these systems may be needed for a long time in order to reach the cleanup goals.

Most cleanups will need to use a combination of engineered remedies and ICs. ICs provide an additional level of safety and help to make sure the remedy remains securely in place. Also, it is important to understand that a cleanup is not finished until all necessary action has been taken to protect people and the environment from contamination at the site.

Why Can't All The Contamination Be Removed?

Removing all traces of contamination from a site is often not possible or practicable because of the types and location of contamination. However, the presence of some residual contamination does not mean that a site can't be used safely.

Use of a site with residual contamination is considered safe if exposure to contamination is prevented. ICs can help a site be reused. A common example of a site reuse is when a surface barrier layer is installed over contaminated soil and the area is used for athletic fields, a golf course, or a park because ICs are in place to prevent disturbance of the barrier layer.

Are ICs Reliable?

All ICs have strengths and weaknesses. With this understanding, it is important to choose the best combination of ICs that will be protective of human health and the environment. One key challenge is that ICs are often implemented, monitored, and enforced by various levels of federal, state, tribal, or local governments. Therefore, it is critical to make sure there are enough IC safeguards and overlaps so no significant risk to human health or the environment or damage to the remedy occur.

EPA guidance encourages the use of ICs in "layers" and/or in "series" to enhance overall protectiveness. Layering ICs means using more than one IC at the same time, all with the same goal (e.g., a consent decree, deed notice, and covenant stopping the use of drinking water wells). Using ICs in series uses different ICs over time when site circumstances or IC processes change. For example, restrictions can gradually be reduced as progress is made toward cleanup goals. Used in such overlapping ways ICs can be more securely relied upon to provide an important measure of safety. Thus, usually more than one kind of IC is put in place at a single site.

How Many ICs Are Required?

The decisions about how many and what types of ICs are needed are usually very site-specific. There are many important factors to consider when deciding how many ICs are required at a site. A few common considerations include:

- the level of experience and resource capacities of the party doing the cleanup
- who the intended ICs will affect and how
- the type of enforcement mechanism used (consent decree, order, permit, ordinance)
- who will enforce the mechanism (i.e., EPA, another federal agency at sites it owns, the State, a local agency)
- the likelihood of future redevelopment and/or reuse of the site
- the degree of cooperation exhibited by the different levels of government and community involved in the cleanup.

Who Is Responsible For Making Sure ICs Work As Intended?

The responsibility for making sure that ICs work depends largely on the type of IC and who is conducting the cleanup. Overlapping responsibilities sometimes make it difficult to identify the person or entity responsible for the IC. For example, zoning is often the responsibility of a local zoning board, easements are based on state law, and permits or orders can occur at the federal, state, tribal and local level. It is also common for several entities to have some overlapping responsibility for an IC. For example, an agency that approves a cleanup frequently has some responsibility for making sure that the ICs work. However, the actual implementation steps may be completed by the cleanup party and/or another agency (i.e., local zoning board). Exceptions are active military facilities; the authority for regulating and enforcing ICs typically lies with the commanding officer.

Regardless of who is responsible, ICs should be regularly monitored to make sure all the requirements are still in place and the ICs continue to work effectively. Because federal, state, and tribal government officials are not always located in the neighborhood of the site, local governments and community members can contribute to ensure that ICs work properly. One way to improve the use of ICs is to make sure that roles and responsibilities are clearly stated early in the process of choosing the ICs.

Will ICs Hinder The Reuse of the Site?

In many ways, ICs can help return a site to a safe and productive reuse. ICs can identify possible uses for a site and communicate use limitations to present and future users. For example, a site may be fit for industrial reuse, but not for residential development. To determine the appropriate types of ICs, it is important to make sure that the preferred future use of the land is taken into account. It is important to recognize that ICs can affect future development at a site. For this reason, the appropriate mix of ICs is key. The objective is not to have as many ICs as possible, but to strike a balance that gives reasonable assurance that the site remedy will remain protective over time while being consistent with the site's future use. In most cases, the ICs can help shape the reuse of the site to one that is suitable, safe, and positive for the community.

Communities should be proactive in communicating with appropriate decision-makers about the types of land use they think will be best for their community. Because each community has a different history and different development needs, it is critical that these needs are effectively communicated to elected officials and the cleanup agency so they can be taken into consideration during selection of the cleanup method and reuse plan for the site. Opportunities for involvement include attending public meetings, commenting on

documents which state potential cleanup methods, and participating in local groups.

How And When Can The Community Get Involved?

Community input can be essential to selecting, using, and monitoring ICs that are the best fit for the community and the protectiveness of the remedy. The cleanup agency or private party and other stakeholders should develop a working relationship with the community early in the cleanup process. Mutual respect, trust, and open and timely communication can greatly enhance the ability of all involved to ensure that the most effective ICs are used at the site.

The first time the community can get involved is during master planning meetings, zoning hearings, land use planning meetings to name a few. The community can also be involved in the site investigation and remedy selection process. Federal, state, tribal, and local authorities should make information available to the public so community members can provide informed input into the remedy selection process. EPA, States, Tribes, local governments and cleanup parties should evaluate ICs as thoroughly and rigorously as all remedy components. This analysis will help to identify potential strengths and weaknesses and to develop the appropriate balance of ICs and ultimately increase the long-term viability of the remedy. Because ICs are remedy components, they should be presented to the community in documents and at meetings. This is especially important for ICs that may impose land use restrictions on property(ies) next to the site. The potential impacts of the ICs should be presented in a manner that can be understood by the local community.

The second way in which the community can be of great benefit is in assisting with monitoring ICs. Individual residents and business owners are the eyes and ears of a community. They are often the first to notice uses or excavation that appear inconsistent with the site's future use or remedy restrictions. By contacting the appropriate party, an important series of checks and balances can be developed. Cleanup parties should work with the community to establish an effective and user-friendly system for reporting and monitoring information about the site and ICs.

CONCLUSION

The institutional controls discussed in this guide can be essential components of environmental cleanups. It is important for citizens to understand ICs and have the opportunity to take an active role in their selection, use, and monitoring. Because institutional controls are often in place long after physical cleanup is finished, community knowledge and input can be important in assuring that the ICs remain protective of human health and the environment. Working relationships between governments, stakeholders and communities are vital ingredients in the successful application of cleanups, especially the IC components.

For additional information about ICs, refer to the EPA web page at: www.epa.gov/superfund/action/ic/index.htm. For site specific information contact the Office of Superfund Remediation and Technology Innovation (OSRTI), the Federal Facilities Restoration and Reuse Office (FFRRO), the Office of Solid Waste (OSW or RCRA), the Office of Brownfields Cleanup and Redevelopment (OBCR), or the Office of Underground Storage Tanks (OUST) and/or the respective state or local agency. Information about EPA program offices can be found online at http://www.epa.gov/oswer/.

This document provides guidance to EPA Regions and States involved in Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and RCRA corrective action cleanups. It also provides guidance to the public and the regulated community on how EPA intends to evaluate and implement ICs as part of a cleanup decision. The guidance is designed to implement national policy on these issues. The document does not, however, substitute for CERCLA, RCRA or EPA's regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. Any decisions regarding a particular facility will be made based on the applicable statutes and regulations. Therefore, interested parties are free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA will consider whether or not the recommendations or interpretations in the guidance are appropriate in that situation. EPA may change this guidance in the future.

GLOSSARY

Consent Decree: Legal document approved by a judge that formalizes an agreement reached between EPA and companies, governments, or individuals associated with contamination at the sites (potentially responsible parties (PRPs)) through which PRPs will take certain actions to resolve the contamination at a Superfund site.

Deed Notice: Non-enforceable, informational document filed in land records to alert the public to important information pertaining to a land parcel**.**

Easement: Property right conveyed by the land owner to another party, giving the second party certain rights to the land.

Enforcement Tools: Types of institutional controls that include orders compelling a party to limit certain site activities as well as ensure the performance of affirmative obligations (e.g, consent decree, RCRA permit, unilateral administrative order).

Governmental Controls: Types of institutional controls that impose land or resource restrictions using the authority of an existing unit of government (e.g., state legislation, local ordinance, well drilling permit, etc.).

Informational Devices: Type of institutional controls that provide information or notification to the public of contamination remaining in place.

Institutional Controls: Non-engineered instruments, such as administrative and/or legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use (e.g., easement, fish advisory, local permit).

Proprietary Control: Type of legal instrument that has its basis in real property law and is unique in that it generally creates legal property interests placed in the chain of title of a site property (e.g., easement, restrictive covenant).

Unilateral Administrative Order: Legal document signed by EPA directing a responsible party to take corrective action or refrain from an activity; it may describe the violations and actions to be taken, and can be enforced in court.

Office of Solid Waste and Emergency Response

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