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The Environmental Protection Agency May Reopen Institutional Controls at Completed Sites

**Gregory A. Bibler, Elizabeth F. Mason, and
Charlotte L. Bednar**

Gregory A. Bibler is chair of the Environmental Practice of Goodwin Procter LLP in Boston, MA, and can be reached at gbibler@goodwinprocter.com. Elizabeth F. Mason and Charlotte L. Bednar are associates in the firm's Boston office and can be reached at emason@goodwinprocter.com and cbednar@goodwinprocter.com, respectively.

The United States Environmental Protection Agency (EPA) is currently undertaking an ambitious national effort to evaluate the effectiveness of institutional controls at federal Superfund sites where remedies already have been implemented. In its "Strategy to Ensure Institutional Control Implementation at Superfund Sites" (IC Strategy), the EPA states that it is focusing on these 899 "construction complete" sites because many of them were addressed early in the Superfund program, when EPA's understanding of the implementation, maintenance, and enforcement of institutional controls was less evolved. The EPA's review may spur demands to responsible parties for different or additional actions at sites they have long considered closed, including sites that have been deleted from the National Priorities List (NPL).

Institutional controls are legal or other "paper" mechanisms used to minimize potential human exposure to residual contamination by managing land uses, construction work, and other activities at a site. Institutional controls are typi-

cally implemented through deed restrictions, covenants, or notices recorded at the registry of deeds or other office of land records. Institutional controls have become sufficiently commonplace to prompt development of model legislation, the Uniform Environmental Covenant Act, concerning the proper form and rules for enforcement of long-term property restrictions imposed as part of an environmental remedy. To date, the model legislation has been adopted in Kentucky, Maryland, Ohio, Nebraska, and South Dakota.

Given the number of federal sites at which institutional controls already have been approved, as part of either interim or final remedies, the EPA's announced intention to reevaluate those controls constitutes a very real threat of new requirements at older sites. Responsible parties may be required (1) to adjust or alter institutional controls that are already in place; (2) to implement institutional controls that should have been but were not previously included as remedy components; or (3) to undertake additional cleanup where necessary institutional con-

trols were not implemented or are determined to be inadequate to protect human health.

This article examines the EPA's new IC Strategy and its potential implications for those parties that until now had assumed that they had acquitted their responsibilities for implementing institutional controls at older Superfund sites.

INSTITUTIONAL CONTROLS: AN OVERVIEW

The National Contingency Plan (NCP) specifically provides for the use of institutional controls to prevent or limit exposure to hazardous substances that will remain on site during or after completion of treatment, partial removal, or engineered containment of contamination. The NCP also permits the use of institutional controls as the sole remedy when such measures are technically impracticable.

There are four basic categories of institutional controls:

1. *Proprietary Controls*: Restrictions, based on state property law, usually in the form of restrictive covenants or easements, that prohibit or limit activities or uses at a site in order to prevent exposure to residual contamination. When correctly implemented, these proprietary controls are legal property interests that "run with the land," meaning that they bind not only the current owner of the property but also all future owners.
2. *Governmental Controls*: Land or groundwater use restrictions that are implemented and enforced by state or local governments, for example, through zoning codes, water supply rules, groundwater use restrictions, or well-drilling regulations.
3. *Enforcement and Permit Controls*: Legally enforceable consent decrees or agreements, orders, or permits, either negotiated with or unilaterally issued by a federal or state governmental agency, that contain provisions to limit site activities and ensure performance by requiring monitoring and reporting. Unlike proprietary controls, these controls only bind the parties named in the enforcement document or permit.
4. *Informational Devices*: Mechanisms for providing notice to the public and potentially affected parties of the presence of residual contamination at a site. They may come in the form of state registries of contaminated sites, notices incorporated into deeds, or public advisories. They are generally considered to be the least protective form of institutional control, because they are not legally binding on any party and do not "run with the land."

CURRENT CONCERNS ABOUT INSTITUTIONAL CONTROLS

Until now, the EPA has relied on periodic site-specific reviews to evaluate the effectiveness of institutional controls at individual sites. The NCP provides that any remedial action resulting in hazardous substances, pollutants, or contaminants remaining at a site above levels allowing for unlimited use and unrestricted exposure must be reviewed every five years after initiation of the selected remedy. Over time, EPA has raised concerns about the implementation, maintenance, and enforcement of institutional controls at such sites.

First, as the EPA notes in its IC Strategy, there are older sites with residual soil or groundwater contamination—including sites deleted from the NPL when the required cleanup has long since been completed—that do not have institutional controls in place.

Second, there are sites where institutional controls were incorrectly implemented. In particular, the EPA has become concerned that documents purporting to implement proprietary controls may not have been correctly drafted and therefore may not bind future owners or be enforceable under state property laws. For instance, if proprietary-control instruments are not titled "easement" or "covenant" or do not use other terms recognizable and enforceable under a state's property laws, they may not be enforceable against future owners.

Third, there are numerous sites where institutional controls simply have not been maintained over time. Because institutional controls impose long-term requirements, through time they often will become the legacy of future site owners and developers. The controls will remain effective only to the extent that these parties are aware of, understand, and comply with the obligations and limitations to which they are subject. Unless the documents establishing the controls are carefully drafted and the affected areas graphically delineated, it will be difficult for future owners and operators to understand what activities are prohibited and where and to prevent what risks.

The US General Accounting Office (GAO) echoed the EPA's concerns about existing institutional controls at Superfund sites in a January 2005 report, "Hazardous Waste Sites: Improved Effectiveness of Controls at Sites Could Better Protect the Public." The GAO evaluated the use, implementation, monitoring, and enforcement of institutional controls at 268 sites across the United States. It found that

- Documentation of institutional controls often failed to specify the controls' objectives, the means and schedule for their implementation, their duration, or the party or parties responsible for monitoring and enforcing them.
- Institutional controls often were not implemented before site deletion from the NPL (as required) and in some cases were implemented after site deletion or not at all.
- Post-cleanup monitoring did not always include a review of the site's compliance with institutional controls or verification that the controls were still in place.
- Institutional controls at some sites were not enforceable either because they were informational in nature and did not legally restrict use of the property or because state or local law limited the options available for enforcing them.

REVISITING INSTITUTIONAL CONTROLS AT INDIVIDUAL SITES

The IC Strategy lays out a four-step plan, set forth below, for evaluating the existence, effectiveness, reliability, and long-term durability of institutional controls. The EPA's goal is to identify and review the institutional control status of all 899 construction complete sites over the next five years.

1. *Data Collection.* The EPA first collected baseline data about institutional controls, including (1) whether residual contamination is present above levels allowing unlimited use and unrestricted exposure, (2) what types of controls, if any, were required in the site decision document, and (3) what their objectives were (*e.g.*, to minimize human exposure to residual contamination or to protect the integrity of an engineered remedy), and (4) what time frame was established for their implementation.
2. *Prioritizing for Further Evaluation.* The EPA then used these data to identify four types of sites for further evaluation:
 - Sites where the data indicate residual contamination but no institutional control associated with that contamination
 - Sites where the data indicate that an institutional control was required to be implemented but do not indicate any implementation date

- Sites where there is at least one proprietary control
- Sites where the only institutional control is an informational device.

In prioritizing these sites for in-depth evaluation, the EPA considered whether the site had any known institutional control failures, when it reached construction complete status, and whether it had been deleted from the NPL. In total, the EPA identified about 130 "priority" sites as targets for further evaluation.

3. *Conducting In-Depth Evaluations.* For each such "priority" site, the EPA now plans an evaluation of institutional controls either during the site's next five-year review (if that review is scheduled to occur in the next 12 months) or through a separate evaluation. These evaluations may include further review of the EPA site file (including enforcement documents), interviews of state and local officials, site visits, and, for sites with proprietary controls, title survey reviews.

First, the EPA will assess whether an institutional control is necessary when a site has residual contamination that poses an unacceptable human health risk but does not have such a control in place. Although the EPA presumes that an institutional control is required when contamination prevents the unlimited use of a site or does not allow for unrestricted exposure, a responsible party may rebut this presumption with sampling data demonstrating that the site is now available for unlimited use or unrestricted exposure.

Second, when the EPA determines that a site without institutional controls requires them, it will evaluate what corrective actions should be taken to ensure that the necessary control or layering of controls is properly implemented.

The EPA plans to pay special attention to sites where proprietary controls, such as a restrictive covenant or easement, were required to be implemented. It will focus on (a) whether the control is in the form of a legally enforceable easement, covenant, or restriction reserved in the deed for the site property, (b) whether it identifies a specific grantor and grantee or otherwise clearly identifies who has the right to enforce its terms, and (c) whether the party responsible for monitoring, maintaining and enforcing the control still exists and can meet these obligations.

4. *Planning and Undertaking Corrective Measures.* In its IC

Strategy, the EPA proposes a range of corrective measures for sites that require institutional controls but have either improperly implemented controls or have none at all. According to the IC Strategy, whether a particular measure is appropriate for use at a site depends on the circumstances of that specific site.

- When the EPA determines that the level of potential human health risk posed by the improper implementation of institutional controls at a site is uncertain, it may require that the five-year review for the site take place earlier than otherwise required.
- When institutional controls required as part of a selected remedy were not implemented, the EPA may require the responsible parties at the site to develop an implementation plan and identify planned implementation date, select and impose institutional controls different from those already required for the site, or even determine that the responsible parties must undertake additional site cleanup.
- The EPA may initiate a response action under Section 104 or Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act when it determines that a necessary institutional control was not properly implemented and that based on activities at the site, site occupants or users may be at risk or an engineered remedy may be jeopardized.

The IC Strategy envisions that the EPA will effect the necessary changes to originally selected remedies through one of several means. A note to the site file is all that will be needed to make a minor change, such as the imposition of a new proprietary control at a site where the proprietary controls initially required were not properly implemented. The EPA must issue an “Explanation of Significant Differences” when it proposes a significant change to the scope, performance, or cost of the originally selected remedy (including a determination that institutional controls are required at a site with residual contamination when the record of decision (ROD) for the site did not require them) or a change in the kind of institutional control required for the site. When the EPA proposes a fundamental change to

the selected remedy, it may need to amend the ROD. If it determines, for example, that additional cleanup rather than implementation of an institutional control is necessary or that a site presents a greater risk than assumed in the ROD and therefore requires the imposition of institutional controls, a ROD amendment may be necessary.

CONCLUSION

Responsible parties can take the initiative now to stay ahead of the EPA as it reviews the almost 900 construction-complete sites across the United States, and begin formulating their own remedies to fix any problems they may identify concerning the adequacy of existing institutional controls. Specific steps that parties can take now to manage their exposure at construction-complete sites include:

1. Reviewing the remedial decision documents for the site to identify what institutional controls the EPA required, if any.
2. Verifying that these controls were implemented and are being monitored and maintained at appropriately protective intervals and that compliance is being documented.
3. Engaging an environmental consultant to conduct a “paper review” of any recent sampling or monitoring data, relevant agency files, and public land records and, if possible, to visit the site in order to confirm that required institutional controls are being properly monitored, maintained, and enforced.
4. Requesting the parties’ attorneys to review the court-approved consent decree or EPA-issued consent order requiring implementation and maintenance of the selected remedy in order to evaluate the potential for enforcement consequences, such as the assessment of civil penalties, for any failure to implement required controls or properly maintain and enforce them over time.

By spending a limited amount of money now, these parties may be able to avoid sizable expenditures in the future by limiting the EPA’s opportunities to impose corrective measures of its own design, including potentially costly new cleanup actions at sites previously considered cleaned up and closed out.

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