The Florida Bar Journal
Advertising Rates • Submission Guidelines • Archives • Subscribe • *News*

February, 2011 Volume 85, No. 2

Journal HOME

Restrictive Covenants as Institutional Controls for Remediated Sites: Worth the Effort?

by Ralph A. DeMeo and Sarah Meyer Doar

Restrictive covenants, long used in the real estate context — particularly by homeowner and condominium associations — to prohibit certain land uses, could be more accurately thought of as "permissive covenants" in the environmental and land use law context. Restrictive covenants are one of the extremely valuable tools that allow remediators and redevelopers to bring contaminated property back to productive use. Without such "permissive covenants," the use of most contaminated property would be highly restricted until such contamination was nearly 100 percent remediated. This article discusses the value of restrictive covenants to the environmental and land use lawyer and highlights some practical considerations.

In order to understand restrictive covenants in the context of environmental and land use law, it is important to know the background and history of the use of "risk-based corrective action" (RBCA). RBCA has been used for several years in Florida at contaminated sites pursuant to a limited number of Florida Department of Environmental Protection programs, particularly the Petroleum Program,[1] the Brownfield Program,[2] and the Drycleaning Facility Restoration Program.[3] RBCA utilizes site-specific data, modeling results, risk assessment studies, institutional controls, engineering controls, or any combination thereof to develop a unique remediation strategy for the site that considers the intended use of the property and which is protective of human health and safety and the environment.

Broadly, engineering controls are remedies designed to physically limit access and exposure to contamination or to contain further migration of contamination. Engineering controls can be anything from a security fence to underground impermeable barriers. Institutional controls are administrative and legal controls that help minimize the potential for human exposure to contamination and/or protect the integrity of the physical remedy. They can include recorded restrictive covenants, but land use laws and regulations, deed restrictions, department consent orders, and conservation easements are all institutional controls.[4] Restrictive covenants are typically favored to the extent they tend to be binding on property regardless of changes in the law, do not require change in ownership, provide for enforcement by third parties, allow for productive uses that would not be allowed in conservation areas, and tend to appear during typical title searches. Of the different institutional controls available, the restrictive covenant is the most common form used by the department.[5]

Based upon data collected during the RBCA evaluation process, an applicant may incorporate engineering controls, institutional controls, or even alternative cleanup target levels in some situations, to achieve a "no further action" determination or a site rehabilitation completion order from the department.[6] In other words, the amount of site remediation required to bring a contaminated site into compliance is based on the interplay of the risks of exposure and the likelihood of exposure once controls are in place.

On June 20, 2003, Gov. Jeb Bush signed into a law a global RBCA program that extended the use of RBCA to all contaminated sites, including nonprogram sites, resulting from a discharge of pollutants or hazardous substances where legal responsibility for site rehabilitation exists pursuant to other provisions of F.S. Ch. 376 and 403.[7] Prior to the introduction of RBCA at nonprogram sites, contamination at a site was typically remediated to the default Cleanup Target Levels (CTLs) now contained in Table II of F.A.C. Rule 62-777.170[8] — with little flexibility to provide for site-specific remediation strategies. For example, the only flexibility in the soil CTLs are found in the two sets of default cleanup target levels: one set for property that will be used for residential purposes following remediation[9] and one set for property that will be used for industrial purposes following remediation.[10] Furthermore, the soil CTLs are highly conservative and were developed based on the assumption that an individual would be at their residence 350 days per year and live there for 30 years, or in the case of industrial property, that a worker would spend 250 days per year at the workplace and 25 years working at the same location.[11]

Prior to the passage of global RBCA, to return any nonprogram contaminated property to productive use it was often remediated to the conservative residential or industrial cleanup target levels, even though actual exposure would be far less than the exposure assumed by the CTLs. Consequently, remediation was often inefficient and overly expensive. This, in turn, decreased the probability of a redeveloper recouping the cost of remediation and earning a return on investment. This resulted in contaminated properties remaining unused, unproductive, and, at

times, unremediated. By contrast, RBCA provides for a flexible site-specific cleanup on some properties that reflects the intended use of the property following cleanup, while maintaining adequate protection of human health and safety and the environment through the evaluation of the toxicity of the contamination and the exposure pathways by which human and environmental receptors may be exposed. Consequently, RBCA may result in significant cost savings during remediation, leading to more efficient cleanups and more properties being remediated.

To balance the flexibility of RBCA with the environmental assurances of CTLs, the department uses both institutional controls and engineering controls when employing RBCA. If the department relies on any institutional or engineering controls as a basis for issuing a "no further action" determination or a site rehabilitation completion order, such controls must be perpetuated in the form of a restrictive covenant which is filed and recorded in the county where the property is located. As with typical restrictive covenants employed in the real estate context, restrictive covenants that relate to environmental conditions on property run with the land and provide notice to interested persons of such conditions. This ensures that the controls are employed by current and future land owners and that the controls protect the public from engaging in activities which may be harmful as a result of environmental conditions on the property.

The use of institutional controls to eliminate or control the potential exposure to contamination is specifically authorized in the Florida Statutes.[12] The department rules implement the statutory authorization by allowing use of institutional controls and "alternative cleanup target levels" in some cases instead of the default cleanup target levels contained in F.A.C. Ch. 62-777.[13] These rules also authorize use of institutional controls to gain the department's approval for a site rehabilitation completion order with conditions (SRCO).[14]

To implement institutional and engineering controls, the department issued Institutional Controls Procedures Guidance in November 2004 and updated in November 2010.[15] The guidance reiterates the statutory definition of institutional controls as "the restriction on use or access to a site to eliminate or minimize exposure to petroleum products' chemicals of concern, drycleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants or conservation easements."[16] The legal mechanism contains restrictions or prohibitions, such as land and resource use restrictions and well-drilling prohibitions.

To determine which institutional controls are appropriate, the department considers the medium contaminated, current and projected use of the affected groundwater and surface water, current and projected use of the contaminated property, current and projected use of the land surrounding the contaminated property, probability of the contamination spreading, the nature of the contamination (*i.e.*, whether it is likely to naturally attenuate or is easily mobilized), location of receptors (water supply wells, surface water bodies, etc.), and necessity of an engineering control on property. Any institutional control that involves the recording of a document with the title of the property (such as a restrictive covenant) must be authorized by the owner of the contaminated property.[17]

The department also permits the use of engineering controls, such as impermeable barriers, caps, covers, slurry walls, fences, or other controls designed to limit access and exposure to contamination or designed to eliminate further migration of the contamination. When an engineering control is necessary, a restrictive covenant must always be imposed to ensure that the engineering control is properly monitored and maintained, and that the department has access to inspect the engineering control.[18]

The department provides model covenant language for allowing or restricting certain activities when there is groundwater contamination. For example, the guidance provides that in these situations, there shall be no use of the groundwater on the property, no drilling for water conducted on the property, nor shall any wells be installed on the property other than monitoring wells preapproved by the department. Additionally, the guidance provides that there shall be no new or modification of existing stormwater swales, stormwater detention or retention facilities, or ditches on the property, unless approved by the department. For any dewatering activities, a plan must be in place to address and ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated.[19]

The department also provides model covenant language for property where there is soil contamination. Remediators that wish to employ engineering controls, for example, should have these in place prior to the recording of the restrictive covenant. Engineering controls must be identified on a survey that would be an exhibit to the restrictive covenant.[20]

In addition, the department provides in the model covenant language land use restrictions that apply to contaminated sites where engineering controls will not be employed, but the site is only cleaned to commercial/industrial target levels. The guidance provides that at such sites, there shall be no agricultural use of the land including forestry, fishing, and mining; no hotels or lodging; no recreational uses, including amusement parks, parks, camps, museums, zoos, or gardens; no residential uses; and no educational uses, such as elementary and secondary schools or day care services. These prohibited uses are specifically defined in the guidance.[21]

The department has identified the most common problems with restrictive covenants that arise in the processing of requests for the use of institutional and engineering controls. These include the submittal of a "draft"

restrictive covenant instead of a final; an insufficient title search[22]; a conflict between identified encumbrances and the area to which the restrictive covenant applies; inconsistent use of the terms "encumbered site, property, parcel"; the improper identification or control over stormwater swales, detention, or retention facilities; the omission of one or more restrictive covenant requirements; inadequate survey when only a portion of the property will be encumbered — a professional survey which includes references to the state plane coordinates system or GPS coordinates must be provided; alteration of the department's model restrictive covenant language for land use without explanation; premature recording of restrictive covenants; lack of compliance with the department notification requirements; late submission of restrictive covenants due to impending real estate closing deadlines; and/or restrictive covenant formatting errors.[23] The environmental and land use lawyer would do well to avoid these potential pitfalls, and the resultant project delays, by a thorough understanding of the guidance and close communications with the department.

In formulating and implementing institutional and engineering controls, a number of important questions should be answered by the environmental and land use lawyer prior to submitting the proposed restrictive covenant.[24] These questions include: How long will the institutional control have to be in effect? What is the current and proposed use of the property? Can or should an institutional control be recorded prior to the end of the cleanup? Can or should the department authorize an institutional control that extends off the source property onto adjacent properties not owned by the source property owner or other responsible party? What if the property owner only wants to restrict a portion of the property? Can he subdivide it before recording an institutional control? What if the property owner wants to subdivide property that has an institutional control? Are there mortgage, easement, or lease holders who must consent or subrogate their interests? Do such interests in fact conflict with the proposed control? The environmental and land use lawyer should conduct a presubmission meeting with the department to answer these and other questions.

To conclude, the state provides the environmental and land use lawyer with valuable tools to remediate, develop, and transfer certain contaminated properties in a cost-effective manner, in light of modern principles of RBCA. A thorough understanding of the institutional and engineering controls that are available in Florida will permit the use of properties which, because of their contamination, previously were unusable. The department and property owners should continue to work together to ensure that the Institutional Control Procedures Guidance and other guidances facilitate the use of property in the most effective and cost effective manner, while ensuring that the environment and public health are fully and properly protected. Facilitating the productive reuse of contaminated property is well worth the effort.

[1] Fla. Stat. §§376.3071-.3072 (2010).

[2] Fla. Stat. §§376.78-.875 (2010).

[3] Fla. Stat. §§376.3078-.3079 (2010).

[4] *See* Florida Department of Environmental Protection, Division of Waste Management, *Institutional Controls Procedures Guidance* (Nov. 2010), *available at* www.dep.state.fl.us/waste/quick_topics/publications/wc/csf/icpg.pdf.

[5] *See id.*

[6] *See* Fla. Stat. §376.30701(2) (2010).

[7] *Id.*

[8] F.A.C. Rule 62-777, Table II (2010); *see also* F.A.C. Rule 62-770.200(7) (2010).

[9] *Id.*

[10] *Id.*

[11] Final Technical Report: Development of Cleanup Target Levels (CTLs) for Ch. 62-777, F.A.C., at 73, *available at* http://www.dep.state.fl.us/waste/quick_topics/publications/wc/FinalGuidanceDocumentsFlowCharts_April2005/TechnicalReport2FinalFeb2005(Final3-28-05).pdf.

[12] Fla. Stat. §§376.30701(2)(d), 376.3071(5)(b)4, 376.3078(4)(d), and 376.81(1)(d) (2010).

[13] F.A.C. Ch. 62-770, 62-780, 62-782, and 62-785; *see* F.A.C. Rule 62-770.650, 62-782.650, 62-785.650, and 62-780.650, and 62-770.680, 62-782.680, 62-785.680, and 62-780.680.

[14] *See* F.A.C. Rule 62-770.700, 62-782.700, 62-785.700, and 62-780.700.

[15] FDEP, Division of Waste Management, *Institutional Controls Procedures Guidance* (Nov. 2010), *available at* www.dep.state.fl.us/waste/quick_topics/publications/wc/csf/icpg.pdf.

[16] Fla. Stat. §§376.301(22) and 376.79(10) (2010).

[17] FDEP, Division of Waste Management, *Institutional Controls Procedures Guidance* (Nov. 2010), *available at* www.dep.state.fl.us/waste/quick_topics/publications/wc/csf/icpg.pdf.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] These prohibitions are defined by using the *North American Industry Classification System, United States, 2007 (NAICS),* Executive Office of the President, Office of Management and Budget. The prohibited uses by code are Sector 11 Agriculture, Forestry, Fishing and Hunting; Subsector 212 Mining (except Oil and Gas); Code 512132 Drive-in Motion Picture Theaters; Code 51912 Libraries and Archives; Code 53111 Lessors of Residential Buildings and Dwellings; Subsector 6111 Elementary and Secondary Schools; Subsector 623 Nursing and Residential Care Facilities; Subsector 624 Social Assistance; Subsector 711 Performing Arts, Spectator Sports, and Related Industries; Subsector 712 Museums, Historical Sites, and Similar Institutions; Subsector 713 Amusement, Gambling, and Recreation Industries; Subsector 721 Accommodation (hotels, motels, RV parks, etc.); Subsector 813 Religious, Grantmaking, Civic, Professional, and Similar Organizations; and Subsector 814 Private Households.

[22] The department requires a complete report including a listing of all encumbrances, easements, mortgages, etc. The report should commence with a document that constitutes the root of title under the Marketable Record Title Act and is at least 30 years old, but also includes a search for prior recorded instruments that were not eliminated by the MRTA. FDEP, Division of Waste Management, *Institutional Controls Procedures Guidance* at 55 (Nov. 2010), *available at* www.dep.state.fl.us/waste/quick_topics/publications/wc/csf/icpg.pdf.

[23] FDEP, Division of Waste Management, *Institutional Controls Procedures Guidance* at 22 (Nov. 2010), *available at* www.dep.state.fl.us/waste/quick_topics/publications/wc/csf/icpg.pdf.

[24] *See generally id.* at 53.

Ralph A. DeMeo *is a shareholder in the Tallahassee law firm of Hopping Green & Sams. He received his B.A. and M.A. from Stetson University and his J.D. from Florida State University. He is a past chair of ELULS.*

Sarah Meyer Doar *is an associate at Hopping Green & Sams. She received her B.A. from Case Western Reserve University in Cleveland, Ohio, and her J.D. from Florida State University.*

This column is submitted on behalf of the Environmental and Land Use Law Section, Paul H. Chipok, chair, and Gary K. Oldehoff and Kelly Samek, editors.

[Revised: 02-10-2012]