Attachment 2: Institutional Control Tips

**1. KEEP YOUR TERMS STRAIGHT**

The drafter of the IC documents will sometimes misuse terms such as “property,” “site,” “encumber,” etc. Just as specificity is necessary in Site Rehabilitation Completion Order (SRCO) language when referencing the “contaminated site,” the same is true for IC’s. Make sure the drafter specifically describes what is being encumbered. In some cases, it is the entire property, in other cases, only a portion of the property is being encumbered (e.g., a cap covering an area of contaminated soil).

**2. LIST THE GROUNDWATER RESTRICTION CONDITIONS IN AN RC**

Often the drafter will leave out of an RC one or more of the groundwater use restriction necessary conditions, i.e., that it does not extend beyond the Property, that the plume does not exceed 1/4 acre, and that it is not migrating. The language to be included depends on which Risk Management Option (RMO) level is being used. The above-listed conditions are required for an RMO II closure, which is the most common. If RMO III is being used, then there may be contamination beyond the property boundaries, and this language would have to be altered. In either case, the Person Responsible for Site Rehabilitation (PRSR) should have established that the groundwater plume is stable or shrinking (i.e., not migrating).

**3. MAKE SURE THE SURVEY IS COMPLETE**

When only a portion of the property will be subject to the restrictions (such as a cap over contaminated soil), the required Exhibit B Survey should adequately show the location of that portion of the property that is to be restricted. A Specific Purpose Survey, Boundary Survey or Sketch and Description as defined under Chapter 5J-17, F.A.C., and prepared using the minimum technical standards (MTS) as defined therein (collectively referred to as a “Survey”) should be provided showing the location of the restricted area in relationship to the balance of the Property. In addition, the Survey should include periodic labels of geographical coordinates or the State Plane Coordinates (SPC) system along the boundary of the restricted area. The Survey should be a clearly labeled attachment (e.g., “Exhibit B”) to the RC and the area to be encumbered should also be clearly labeled (for example, “Area of EC,” “Capped Area,” “Location of Slurry Wall,” “Restricted Area”). When identifying the restricted area on the Survey, especially if the restricted area includes engineering controls such as caps or areas of clean fill, be sure to consider any buildings located on the property. Building foundations sometimes act as caps and should be identified as “Capped Area,” or other applicable name, on the Survey, so that if a building is removed a suitable cap can be constructed and maintained where the building stood. The Survey should also include location information such as street names and identify existing structures such as buildings, parking lots, pools, and open space. The SPC and geographical coordinate references are necessary to confirm the cap location in the event of changes over time. Note that most county land recording offices have size limitations for documents to be recorded (typically 8.5 x 11-inch limit); therefore, full-size Surveys cannot be recorded. It may be necessary to create a composite exhibit that includes a reduced copy of the overall Survey, but then also include one or more inset maps with the relevant restricted areas identified and clearly labeled.

When groundwater contamination remains, the property is subject to water use restrictions, and the site/project manager approves the continued existence of stormwater swales, detention or retention facilities or ditches on the property. A Survey should identify these structures. Additionally, the wording of the RC should be modified to require that these existing stormwater structures cannot be modified without prior FDEP approval because modification of such facilities can affect groundwater gradients and cause plume migration.

**4. PROHIBIT GROUNDWATER USE**

Sometimes the drafter of the RC changes the model language for groundwater restrictions so that no new wells are allowed, but use is NOT prohibited. Please compare the proposed RC language with the model language in the Institutional Controls Procedures Guidance RC template document to ensure the drafter hasn’t removed these important restrictions prohibiting all groundwater use.

**5. LET THE PARTIES ENFORCE**

Often owners do not want to allow the enforcement of the restrictions by any person other than the FDEP and so delete the sentence in the template RC that allows for this. Be sure this sentence is included in the RC: “These restrictions may also be enforced in a court of competent jurisdiction by any other person, firm, corporation, or governmental agency that is substantially benefited by this restriction.” This provision expressly allowing all substantially benefited parties to enforce the RC helps to ensure that the RC will be effective. It is an essential component for the FDEP to agree to a conditional closure.

**6. PUT THE EC IN PLACE BEFORE STARTING THE PROCESS**

Sometimes, owners want to record the RC prior to having the EC in place; however, as explained in number 3 above, the attached exhibit to the RC must indicate exactly where the EC is located, so it should be in place prior to execution of the RC. Note: Chapter 62-780, F.A.C., requires that the control be in place and certified by a P.E., so this certification should be included in the PRSR’s No Further Action (NFA) Proposal requesting the SRCO with Conditions from the FDEP. FDEP cannot issue the SRCO until it has proof of RC recording; therefore, the EC should be in place before the RC package and request for the SRCO is submitted.

**7. GET A COMPLETE TITLE REPORT.**

Very frequently there is not a complete title report. This report should be included in any RC package for FDEP to verify the ownership and review any encumbrances on the property. Sometimes a title report is submitted, but it excludes a search for easements. A proposed RC package should include a complete title report, including a listing of all encumbrances, easements and mortgages on the subject property and copies of each encumbrance document. Also, the title report often does not extend backward in time far enough. The title report should reflect all parties having an interest in the Property, including owners, lienors and easement holders. The search should commence with the instrument constituting the root of title under the Marketable Record Title Act (MRTA) (evidence of title that is at least 30 years old) and should include a review of all subsequently recorded instruments, as well as a review of prior recorded instruments that are not eliminated by MRTA.

**8. SUBMIT ENCUMBRANCE SURVEY AND LIST AND PROVIDE MAILED NOTICE, PUBLISHED NOTICE (if applicable), OR OBTAIN SUBORDINATIONS AND JOINDERS AND CONSENTS (if applicable).**

Very frequently an encumbrance is listed in the title report, but there is no explanation offered as to whether the encumbrance conflicts with the restriction(s) in the IC. The PRSR should obtain a Survey showing the locations of all encumbrances in relation to the restricted area(s). The list of encumbrances should identify whether each encumbrance intersects with the restricted area and what right(s) the encumbrance holder has. The PRSR should review this information and determine if a conflict exists between the rights of mortgagors and other encumbrance holders and the proposed restrictions on the property. Where there is conflict mailed notice, published notice (in some cases), subordinations or joinder and consents should be pursued. Mailed and published notice requires a 30 day comment period to pass before FDEP will approve the IC. Subordinations and joinders and consents will infrequently be required (see page 13-16 for instructions on the analysis of their necessity or contact FDEP OGC). In the case of an RC as the IC, if the owner does subordinate or join, then the best practice is to include all subordinations and joinders in the same document as the RC (e.g., “Declaration of Restrictive Covenant and Subordination of Mortgage”). The documents can be submitted as separate documents and recorded separately; however, care should then be taken to record the subordinations/joinders after the RC is recorded. Drafts of the subordinations and joinder and consents should be included in the RC package submitted to OGC. Signed copies should be recorded with the final RC prior to issuance of the CSRCO.

**9. USE THE IC CHECKLIST**

The PRSR and the attorney preparing the RC should use the IC Checklist that is included in this ICPG as an attachment. This checklist helps the PRSR avoid errors of omission in assembling its RC package.

**10. FORMAT CORRECTLY**

There are often formatting errors with restrictive covenants, such as failure to leave the 3”x3” blank space in the upper-right-hand corner of the first page of the RC (required per the recording statutes). Page numbers should be in the X of Y format, including the signature pages and exhibits. Exhibits should be properly titled and labeled.

**12. EXPLAIN RC DRAFT/SAMPLE RC DIFFERENCES**

Where the draft RC uses language different from the template RC, the PRSR should explain the difference in the cover letter

**13. COMPARE LEGAL DESCRIPTIONS**

Compare the legal descriptions of the deed, the title report, and the RC (could be in the text or in an exhibit). If they are different, the PRSR should explain why.