## Section B.6: Restricting a Portion of the Property

Whether an IC should encumber the entire parcel or only contaminated portions depends on the nature of the contamination and how that contamination will be addressed by the owner in accordance with the rules, and in the context of future land use and planned site development.[[1]](#footnote-2) [Attachment 3](https://floridadep.gov/waste/waste/documents/attachment-3-sample-declaration-restrictive-covenant), Sample Declaration of Restrictive Covenant, consists of [Form A](https://floridadep.gov/waste/waste/documents/attachment-3a-form-%E2%80%93-any-section-rc-encumbers-entire-property) and [Form B](https://floridadep.gov/waste/waste/documents/attachment-3b-form-b-%E2%80%93-only-portions-property-grantor-are-be-encumbered). Form A should be used when the entire parcel will be restricted (for example, a land use restriction or a restriction on the use of groundwater). Form B should be used when only a portion of the parcel will be restricted.

Restricting only a portion of the property rather than the entirely owned parcel, when technically supported, is allowed with approval from FDEP, especially when the entire parcel is relatively large and the portion to be restricted is relatively small. For example, when soil contamination is the only issue, the IC may consist of a cap on only the contaminated portion of the parcel or the IC may consist of engineering controls (ECs) that include only a portion of a site’s impervious surface (foundation, parking, or other). Technical information (e.g., soil borings) should be provided to support restricting only a portion of an existing site and include geographical coordinates on a survey to identify where the restriction is located. The shape of the EC should be defined, as much as possible, as a regular shape as opposed to an irregular shape (triangles or multi-sided ECs). A regular shape is much easier to identify and maintain in the future.

Groundwater use restrictions on only a portion of the parcel might not be appropriate if exposure to contamination cannot be sufficiently reduced or eliminated due to the small parcel size. The site/project manager must determine whether a parcel is large enough to provide adequate protection when implementing the smaller restricted area. In special circumstances, it may be appropriate and permissible to restrict use of groundwater within a particular aquifer on the parcel or to a defined geographic area, so long as protection of human health and the environmental is achieved. Note that a restricted area that coincides with the plume contour would not be considered protective. The restricted area should provide sufficient distance from the plume such that groundwater use outside of the restricted area would not be reasonably expected to affect the plume. Factors to consider when evaluating whether a restriction on a particular aquifer is adequate and acceptable include:

* The nature and concentrations of contaminants;
* The size and location of the contaminant plume in the specific aquifer being impacted;
* The specific aquifer that will not be restricted for access and may be used for consumptive or other purposes;
* Whether the restricted aquifer can be isolated from adjacent non-restricted aquifers (demonstrated by the presence of confining unit(s), application of well construction requirements, limitations on locations of permitted wells, or other means); and
* Interconnections to surface water.

*If an IC is requested on a non-source property, the DEP project manager should contact his or her supervisor and the appropriate DEP attorney.*

When it is appropriate to restrict less than the entire parcel, the owner can define the area to be restricted by using Attachment 3B Form and attaching a legal description and Survey of that smaller contaminated area as exhibits to the RC. This can be accomplished by including the legal description of both the parent parcel and the Restricted Property in Exhibit A. A Survey of the Restricted Property should be included as an exhibit to the IC, referenced in the body of the RC by the appropriate exhibit reference (e.g. Exhibit B), and incorporated by reference. The Survey should include periodic points identified along the boundary of the restricted portion labeled with the state plane coordinates (SPC) system or geographical coordinates.

Note, however, that when the IC encumbers less than the entirely owned property, unless the restricted area abuts a public right of way, FDEP will still need ingress and egress access to that smaller restricted portion for inspection and audit purposes. If the encumbered area does not abut a public right of way the Grantor must provide FDEP with adequate access to the restricted portion. This may be accomplished by providing a non-exclusive blanket easement over the entire property using a legal description for the entire parcel (i.e., the legal description from the granting deed under which the property owner obtained title or as described in the Title Report), or by providing an easement corridor.

If access is granted through an easement corridor, a legal description of the ingress and egress corridor to the restricted portion from a public right of way is necessary for this easement, and the corridor should be identified on the Survey exhibit as characterized above. Finally, the Survey exhibit should be included as an exhibit to the RC and cited in the access easement section of the document.

If a property owner proposes to subdivide the property to limit the area to be restricted and requests your input, please be certain that the “contaminated parcel” is of sufficient size to ensure that the potential for groundwater movement and plume migration are adequately addressed if groundwater contamination is an issue.[[2]](#footnote-3)

1. The owner of a property with isolated areas of soil contamination exceeding residential direct exposure SCTLs, but not exceeding commercial/industrial or leachability SCTLs, could elect to address the contamination in a variety of ways: (1) by implementing a parcel-wide IC restricting future land use to non-residential uses (as defined by FDEP) or (2) by capping those areas where soil exceeds the residential SCTLs and describing in the IC the smaller contaminated area where the cap must be maintained. [↑](#footnote-ref-2)
2. A recorded IC will run with the land and with the title to the property. If the parcel is later subdivided the IC will continue to bind each affected lot within the subdivision. If FDEP learns of such a subdivision, the IC Registry will be updated to reflect the new multiple addresses. See IC Registry section of this document. If the FDEP approved IC was based on criteria for direct exposure using a 95% Upper Confidence Limit (UCL), and if the property is divided into parcels smaller than the Exposure Unit (EU) used in the 95% UCL calculation, then there must be a showing to FDEP that the contamination is no longer on the property. If that is the case, then the restrictions may be removed. If subsequent sampling shows that contamination on the property now meets cleanup target levels approved in the CSRCO without the need for use of the 95% UCL, then the IC can be modified to remove the 95% UCL language and associated restrictions. [↑](#footnote-ref-3)