## Section C.1: Non-DRC ICs (NDICs)

Although the standard control is a DRC, there are circumstances where other controls, collectively referred to as Non-DRC ICs (NDICs), may be appropriate. Examples of non-DRC ICs include local government controls such as ordinances coupled with well construction permitting rules, MOAs and MOUs (see Attachments 32 - 35 and 39 - 40 of the ICPG), recorded homeowners’ association (HOA) or recorded property owners’ association (POA) rules and regulations; and recorded covenants, conditions, and restrictions (CCR) and Board of Trustees Division of State Lands controls (see Attachments 15 - 18 of the ICPG). While all ICs must be evaluated for their durability and protectiveness, durability is built into recorded DRCs, unlike non-DRC ICs. Non-DRC ICs should be evaluated for durability over time and for protectiveness of human health and the environment. To be legally sufficient, ICs must meet the definitional requirements of Section 376.301(22), F.S. (2019), (i.e., “restriction on use or access to a site to eliminate or minimize exposure to petroleum products’ chemicals of concern, dry cleaning solvents, or other contaminants”).  This requirement goes to the protectiveness of human health and the environment.

Many non-DRC ICs only address groundwater contamination at a site (a contaminated site includes the contaminated source property and any neighboring contaminated non-source property).[[1]](#footnote-3) When addressing soil contamination (e.g., through a land use restriction[[2]](#footnote-4) or engineering control[[3]](#footnote-5)) a DRC is usually the only type of IC that effectively ensures that the IC remains in perpetuity.

Factors to consider when evaluating whether a non-DRC IC is adequately protective of human health, public safety, and the environment include the following:

* The nature and concentrations of contaminants;
* The size and location of the contaminant plume relative to existing and projected improvements on the property;
* The scope and coverage of any applicable local ordinance (requirement for connection to county/municipal/community water delivery system for both potable and irrigation water);
* Status of site development and existing infrastructure for provision of potable and irrigation water;
* Current and projected use of the property and likelihood of need for additional water use in the future;

* Potential for additional construction in the area and the possibility of dewatering, discharging contaminated groundwater to surface soils, or causing plume migration;
* Potential for installation of new stormwater features or enlargement of existing stormwater features at or near the affected property;
* Whether the property(ies) affected by the remaining groundwater contamination related to the site proposed to be closed utilizing an non-DRC IC is subject to the jurisdiction of a water management district’s (WMD’s) water well permitting rules and authority or is within the jurisdiction of a county, county health department, or other local government which has received delegated water well permitting authority from a WMD pursuant to Fla. Stat. §§ 373.308–309 (Delegated Local Government);
* Whether the jurisdictional WMD or Delegated Local Government has codified rules controlling well construction requirements and/or prohibiting the issuance of water well permits for wells that would increase the potential for harm to public health, safety and welfare or would degrade the water quality of the aquifer by causing pollutants to spread;[[4]](#footnote-6) and
* Whether the jurisdictional WMD or Delegated Local Government has procedures in place by which it may reflect and/or record the location of areas of groundwater contamination within a geographic information system (GIS) computer database (or similar system) to ensure that permits for potable wells, irrigation wells, or any other water wells subject to permitting requirements under Part III of Chapter 373, F.S. will not be issued in such areas of groundwater contamination without implementation of appropriate well construction requirements if such wells would adversely affect public health or degrade the water quality of an aquifer.

When proposing a non-DRC IC, the Person Responsible for Site Rehabilitation (PRSR) should submit much of the same information as when proposing a DRC IC package including the deed, legal description, and title search report. The PRSR should submit electronic copies of the proposed non-DRC IC and any documentation necessary to validate or provide context to the control. For example, in cases where a PRSR is relying on a local ordinance, the ordinance citation and text should be submitted along with a statement and map showing that the property is located within the local municipality governed by the ordinance, a statement explaining whether the property is in compliance with that ordinance, and a statement of whether the ordinance relies upon delegation of authority from another governmental entity. Documentation of that delegation should also be provided. Since some local ordinances are quite lengthy, the PRSR should direct the FDEP to the specific provisions that are relevant. In cases where a PRSR is relying on the water well permitting rules and authority of a WMD or of a Delegated Local Government, the PRSR should submit the applicable well permitting rules of the WMD or Delegated Local Government, the documentation of delegation, a depiction of the area to be restricted, and, as with all closures, a GIS-compatible computer shapefile setting forth the area of contaminated groundwater in which groundwater use will be restricted (See [Section D.2](https://floridadep.gov/waste/waste/documents/icpg-section-d2)).

Notice of proposed agency action must be provided to parties listed in subsection 62-780.220(7), F.A.C., when FDEP intends to issue a CSRCO after the establishment of an IC, including a non-DRC IC. The title search report will identify potential parties to be notified. Subsequent sections of this ICPG document provide information on proper noticing.

1. MOAs between FDEP and other institutional or governmental entities may address both soil and groundwater contamination, i.e., the FDOT FDEP MOU, CSX MOA, and most MOAs with seaports and airports. [↑](#footnote-ref-3)
2. Land use controls include a listing of prohibited uses such as residential, educational and agricultural, among others. [↑](#footnote-ref-4)
3. Engineering controls include impervious or pervious caps. [↑](#footnote-ref-5)
4. *See*, e.g., applicable within the Southwest Florida Water Management District (SWFWMD), Fla. Admin. Code r. 40D-3.505(3) (“[t]he District will deny a permit application to construct a water well if use of the well would increase the potential for harm to public health, safety and welfare, or if the proposed well would degrade the water quality of the aquifer by causing pollutants to spread.”) [↑](#footnote-ref-6)