

**FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
Division of Waste Management**

**INSTITUTIONAL CONTROLS
PROCEDURES GUIDANCE**

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Preface

This document has been prepared as guidance for the Florida Department of Environmental Protection (FDEP or Department), Division of Waste Management (DWM) Tallahassee staff, FDEP District Offices, and those counties under contract with, or delegation from, the FDEP to oversee cleanup of contaminated property. **Nothing in this document should be construed as a uniform policy or rule** (except for those rules specifically enumerated as such). This document merely provides general information regarding types of Institutional Controls (ICs), outlines the requirements for the internal processing of ICs, and characterizes the DWM's and the FDEP Office of General Counsel's (OGC) experiences thus far in this area. This guidance is provided in one document so that all FDEP staff has the same information upon which to base a decision. Agency staff shall not cite this document as authority for taking or refusing to take any agency action. It is anticipated that this document will also be used by those parties considering pursuing site closures with conditions, including responsible parties and owners, and their consultants and lawyers, among others. Such use by those parties may facilitate an understanding of the FDEP internal processing of ICs and result in a quicker processing time.

This document was prepared by the DWM with input from the District Offices and the OGC. If you have any questions regarding the information contained in this document, please contact the appropriate attorney and/or the appropriate technical supervisor in your section. Likewise, if you have any insight or experience you believe should be included in a subsequent version of this document, please contact Peter Cornais, or Mary Stewart.

A. WHAT ARE INSTITUTIONAL CONTROLS?

Sections 376.301 and 376.79, Florida Statutes (F.S.), similarly define ICs as "the restriction on use of, 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 (RC) or conservation easements." Other forms of ICs that may be acceptable to FDEP include government controls such as local ordinances, permits, agency rules, delineated areas (under Chapter 62-524, F.A.C.), comprehensive land use planning and management, and FDEP consent orders.

ICs are non-engineering legal and legislative controls intended to affect human activities by preventing or reducing exposure to contamination. The IC contains restrictions or prohibitions such as land and resource use restrictions. Restrictive Covenants are the most common form of ICs used by DWM to close contaminated sites. This type of IC is created by the execution of documents that should then be properly recorded in the public records of the county in which the property is located to ensure proper notice and continued effectiveness of the control. This guidance document focuses mainly on Restrictive Covenants (RC), since those are the most common form of ICs. However, this guidance also contains provisions regarding other forms of ICs that do not require

recording, including a listing of commonly used ICs, along with examples. (See Section C below).

B. WHEN IS THE USE OF AN INSTITUTIONAL CONTROL APPROPRIATE?

The use of ICs to eliminate or control the potential exposure to contamination is specifically authorized by the Florida Statutes governing global Risk Based Corrective Action (RBCA), petroleum cleanup, drycleaning solvent cleanup, and brownfields.¹ Chapter 62-780, F.A.C., implements the statutory authorization by allowing use of ICs and “alternative cleanup target levels” instead of the default cleanup target levels contained in Chapter 62--777, F.A.C.² These rules authorize the use of ICs to achieve FDEP approval for a Site Rehabilitation Completion Order with Conditions (SRCO with Conditions, conditional SRCO, or SRCOC) if the controls are protective of human health, public safety, and the environment.³ In determining whether a conditional SRCO is appropriate, please look to these rules and any FDEP guidance document on site assessment and remediation regarding the contaminated site. Then determine the actual or potential exposure pathways and develop a list of restrictions that will be necessary to protect human health and the environment from the remaining contamination in light of those pathways.

Chapter 62-780, F.A.C., and the enabling statutory provisions describe the circumstances under which an IC is appropriate. Conceptually, the rule contemplates evaluation of the following:

- Which media are contaminated [e.g., a groundwater use restriction may be appropriate if, among other things, contaminant levels exceed groundwater cleanup target levels (GCTLs)];
- Current and projected use of the affected groundwater and surface water (e.g., a groundwater use restriction may be appropriate if, among other things, there is no current and projected use of the groundwater because the area is served by a municipal water supply);
- Current and projected use of the contaminated property (e.g., a land use restriction may be appropriate if soil contamination greater than the residential but below the commercial/industrial soil cleanup target levels (SCTLs) exists on a property that will not be capped, but exposure is limited to adults in a commercial/industrial setting);
- Development of alternative cleanup target levels (ACTLs) for contaminated property that are based upon maintaining site-specific conditions of exposure (for example, an age restricted community);

¹ Sections 376.30701(2)(d), 376.3071(5)(b)4, 376.3078(4)(d) and 376.81(1)(d), F.S.

² Also see Rule 62-780.650 and 62-780.680, F.A.C.

³ Risk Management Options Level II and III (RMO II and RMO III) are the options for a Site Rehabilitation Completion Order with institutional controls and are available when the controls are protective of human health, public safety, and the environment and are agreed to by the property owners of the affected properties. See Subsections 62-780.680(2) and .680(3), F.A.C.

- Probability of the contamination spreading, (e.g., a groundwater use restriction may be appropriate if, among other things, the technical documents show that the plume is stable or shrinking);
- Location of receptors (water supply wells, surface water bodies, etc.) and availability of public water supply systems (e.g., a groundwater use restriction may be appropriate if, among other things, there are no water supply wells near the groundwater plume that could provide a pathway for human exposure); and
- Necessity of an engineering control (e.g., the parking lot of a shopping mall may serve as an engineering control to prevent exposure to an area of soil contamination⁴).

Where an EC is necessary, an IC should be recorded.

Specifically, when selecting restrictions and requirements for an IC, the applicable rules should be followed. For example, if the selected IC is a restrictive covenant that will be recorded with title to and with the property deed, real property law requires such covenants be executed by the current real property owner. Work closely with the property owner, or his or her representative, to find a mutually satisfactory institutional control.

Under certain circumstances, the Department may agree to rely on non-recorded institutional controls to close a site. This is often considered in cases with off-source property contamination (under RMO III).

Engineering Controls (ECs).

ECs, such as physical barriers, caps, covers, slurry walls, fences, methane collection systems, and impermeable barriers, are designed to limit or prevent access and exposure to contamination or are designed to eliminate further migration of the contamination. Where an EC is necessary, an IC should be put in place to ensure that the EC is properly maintained and the FDEP has access to inspect the EC.⁵

Future owners of contaminated property might not be willing to continue to maintain and repair an EC if those requirements are not imposed through an IC that “runs with the land,” which is typically a restrictive covenant. That means that all future owners are required by law to comply with the terms of the IC, including maintenance and repair of ECs, and this mechanism is the assurance the FDEP needs to agree with the allowance of alternative cleanup target levels. The nature of the EC and the relationship between the IC and the EC should be very clear in the language in the IC, including any requirements on the future maintenance or repair of the EC, which FDEP expects will be the responsibility of subsequent owners of the property subject to the IC. The current use of the property and the property owner’s long-term plans for the property are of interest

⁴ A Professional Engineer would need to certify that the parking lot is competent for use as a cap, and an IC would need to require proper maintenance of the parking lot cap.

⁵ See Attachment 31: Engineering Controls Reporting and Monitoring.

to the FDEP in the formulation of the text of the IC to ensure sufficient protection of human health and the environment.⁶

Engineering Control Maintenance Plan (ECMP).

Pursuant to subsection 62-780.680(7), F.A.C., the inspection, monitoring and maintenance requirements for an EC shall be part of the Site Rehabilitation Completion Order (SRCO), shall be retained in the Department's site file and shall be referenced in the IC to ensure future owners of contaminated property maintain the EC. It is then incumbent upon the property owner (or Person Responsible for Site Rehabilitation) to adhere to these requirements as a condition of the SRCO.

As required by Chapter 62-780, F.A.C., the ECMP referred to as part of the IC shall include a description of the conditions that constitute a failure of the EC. For example, the groundwater contaminant levels, or trend in groundwater contaminant levels, outside a slurry wall that should lead to a repair effort or further investigation should be provided. For engineered caps, the size, depth and frequency (area or time) of breaches in the cap could be specified. See [Attachment 31](#): Engineering Control Reporting & Monitoring for more information.

Interim Institutional Controls.

Some sites may be required by private contract, cleanup agreement, or consent order to implement an IC prior to beginning or completing the cleanup work. In some circumstances, there are also sound environmental reasons for the agency to encourage the implementation of an IC prior to completing the remediation. For example, an Interim IC may be appropriate when restrictions related to areas of defined soil contamination are appropriate, the parties anticipate that remediation will take years to complete, and the FDEP agrees that active remediation will be conducted only on the groundwater contamination. Under such circumstances, for example, an Interim IC might require restrictions on use or the maintenance of an impervious surface (i.e., cap) to prevent exposure to contaminated soils and restrictions on use of groundwater while the groundwater continues to be remediated, either actively or passively, using natural attenuation. When an Interim IC is implemented, remediation of all affected media will not be complete; therefore, the FDEP will not issue a Site Rehabilitation Completion Order with Conditions after the recording of an Interim IC. The procedures for evaluating this Interim IC will be the same as for the permanent IC. However, additional language will need to be included in the document to address the contamination that is under remediation. Please be sure to advise the OGC attorney reviewing the IC if the control is intended to be an interim measure.

An interim IC may be appropriate when long term groundwater remediation is projected. The interim IC may make possible the redevelopment or reuse of the property during cleanup.

⁶ There may be certain instances when the FDEP, to ensure the durability of the Engineering Control, may request that the owners/responsible parties present evidence that they have sufficient financial resources to maintain the Engineering Control.

When the groundwater has achieved the appropriate cleanup target levels, the Interim IC should be re-evaluated. At that time, the FDEP must evaluate what restrictions, if any, need to be instituted on the property in order to issue a Site Rehabilitation Completion Order (SRCO), conditional or not. If an IC still is necessary, then the complete IC review procedure needs to be conducted (including new or updated title work), and the IC text needs to be amended to remove the interim restrictions that are no longer appropriate and impose the new restrictions that are appropriate. It is the real property owner's option to either record an amendment to the existing recorded IC or to simply record an entirely new IC to supersede the existing one. See Section F for more information on amending or replacing recorded ICs. Upon implementation of this new IC (or an amendment to an existing IC), the issuance of a SRCO with Conditions may be appropriate. If the Interim IC is no longer appropriate because the requirements for closure under Risk Management Option I (RMO I) have been met, then a termination of the Interim IC should be implemented (with any RC, the termination of the RC is not effective unless the termination document is recorded) and a SRCO without conditions can be issued.

Institutional Control on Non-Source Property.

If the remaining contamination extends off the source property and that contamination otherwise meets the technical and rule requirements for conditional closure, the FDEP site/project manager may be asked if an IC can be placed on the non-source property. There are a number of site-specific issues that should be evaluated prior to approving such a request as described for closure with conditions under RMO III [See subsection 62-780.680(3), F.A.C.]. Because of the complexities in RMO III, and in working with non-source properties, before attempting to answer this question, FDEP project/site managers should contact their supervisor, and coordinate with the appropriate attorney and/or Tallahassee Division staff to discuss the specifics of the contamination and properties in question. If such a request is approved, the governing statute and rule require that notice must be provided to the local government. [See subsection 62-780.220(7), F.A.C.] In these cases, the SRCO (and Restrictive Covenant, if applicable) should reflect the type of control used to effect closure, and may include different language than that typical for closure using a Restrictive Covenant. Additionally, the IC for the non-source property should be prepared (if applicable)⁷ and reviewed, along with the title work, and any other necessary documentation for that non-source property. The documentation that is required for such non-source properties will vary depending on site specific factors such as the type of IC being considered, the size of the contaminated area, and the type, location and affected media of the contamination. In some circumstances, notice of proposed controls on non-source properties may need to be given to interest holders in the non-source properties, such as easement holders who may be likely to encounter contamination.

⁷ As described on page 12, below, in certain circumstances the FDEP will agree to rely on existing governmental controls that may exist on non-source property, as an alternative to the requirement that a restrictive covenant be recorded on non-source property.

Restricting Future use of the Property Based on Actual Conditions of Exposure.

The Model Restrictive Covenant ([Attachment 3](#)) includes a suggested definition of what constitutes “residential uses” that are prohibited on properties where site soils do not meet the default direct exposure residential SCTLs. The Model uses North American Industry Classification System (NAICS) sector codes⁸ to define a broad range of activities that could result in use inconsistent with the exposure criteria upon which the Department permits unrestricted (i.e. “residential”) direct exposure to soil. However, the use of NAICS sector codes to define restricted uses is not mandatory and the property owner can propose alternative descriptions of the uses that are restricted or prohibited on the property that are consistent with the degree and nature of the cleanup conducted and actual conditions of exposure. For example, if ACTLs have been developed and approved by the Department for a property based upon a specific set of exposure conditions and assumptions, an alternative description of the prohibited activities, uses or exposure scenarios can be provided in lieu of the Model restriction, so long as the text captures in narrative form the essential exposure assumptions upon which the ACTLs were derived. If the proposed land use restriction differs from what the Model the Department will review the proposal as a request for RMO III with assistance from FDEP in Tallahassee. For example, where the use of the Model restriction on “residential uses” results in potential ambiguity regarding a specific use which is not intended to be prohibited, the Department will consider the addition of specific language to the Model restriction to clarify permitted activities, notwithstanding the broad language of the Model restriction.

Restricting a Portion of the Property.

Restricting only a portion of the property rather than the entirely-owned parcel is allowed, especially when the entire parcel is relatively large and the portion to be restricted is relatively small. However, when a parcel is small, groundwater use restrictions on only a portion of it 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 property is large enough that restricting groundwater use on only a portion of the property will be adequately protective. When soil contamination is the only issue, however, the IC may need a cap on only the contaminated portion of the property.

In special circumstances, it may be appropriate and permissible to restrict use of groundwater within a particular aquifer on the property or to a defined geographic area, so long as protection of human health and the environment is achieved. Factors to consider when evaluating whether a restriction on use of groundwater can be restricted to a particular aquifer on the property include the following:

- The nature and concentrations of contaminants;
- The specific aquifer being impacted, size and location of the contaminant plume;

⁸ The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

- The specific aquifer that will not be restricted for access and may be used for consumptive or other purposes;
- The ability to demonstrate isolation of the proposed restricted aquifer from the aquifer(s) that will remain available for use (for example by presence of confining unit(s), application of well construction requirements, limitations on locations of permitted wells, or other means); and
- Interconnections to surface water.

Whether an IC should encumber the entire property 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 in the context of the future land use and planned site development.⁹ [Attachment 3](#), Sample Declaration of Restrictive Covenant, consists of [Form A](#) and [Form B](#). Form A should be used when the entire property will be encumbered – either by the restrictions required in an IC (for example, a land use restriction or a restriction on the use of groundwater), or by an easement in favor of FDEP across the entire property for access to a restricted portion of the property. Form B should be used when only a portion of the property will be encumbered, provided the FDEP will have access to the restricted portion either because the restricted portion of the property abuts a public right-of-way or FDEP has been granted a separate recorded easement for access to that restricted portion of the property (see [Attachment 4](#): Access Easement Agreement).

When it is appropriate to restrict less than the entire parcel, the owner can define the area to be restricted by using a legal description of that smaller contaminated area. This can be accomplished in one of two ways. It can be incorporated as the Exhibit A legal description, in which case only the restricted portion is encumbered (i.e., the IC is a lien on the title of only the restricted portion). Alternatively, the legal description of the smaller contaminated area can be incorporated as the Exhibit B legal description (with the Exhibit A legal description describing the entirely-owned property), in which case the entirely-owned property is encumbered (i.e., the IC is a lien on the entirely-owned property), but the restriction applies to only the smaller defined area. For example, if the parcel is 20 acres, only a ¼ acre area of contaminated soil remains, and the only restriction is the maintenance of a cap (e.g., two feet of clean soil), then the legal description of the restricted area in the IC should describe only the contaminated ¼ acre. Along with a legal description of the restricted portion, the

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.

⁹ 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 property-wide IC restricting future land use to non-residential uses (as defined by the Department) 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. If the IC is to encumber only a portion of the property, then in order to avoid the possibility of creating title issues for the property owner, the recorded IC should show as an exhibit only the legal description and Survey (as defined below) of the restricted area. The IC should not attach a description of the entire parcel (unless included for the purpose of providing the FDEP with access to the restricted areas). Of course, the files maintained by the FDEP will include the description of the entire property as well as the restricted area, so in any event the legal description of the entirely-owned property must be submitted.

owner should include a Specific Purpose Survey, Boundary Survey or Sketch and Description as defined under Chapter 5J-17, F.A.C. (collectively referred to as a “Survey”), using minimum technical standards (MTS). In addition, the Survey should include four corners of the restricted portion labeled with the state plane coordinates (SPC) system or geographical coordinates. The Survey will be 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.

Note, however, that when the IC encumbers less than the entirely-owned property, unless the restricted area abuts a public right of way, the FDEP will still need ingress and egress access to that smaller encumbered area for inspection and audit purposes. If the encumbered area does not abut a public right of way, a non-exclusive site access easement in favor of the FDEP should be recorded that grants FDEP access to the encumbered (and restricted) area. This may be provided in the form of a non-exclusive blanket easement over the entire property using a legal description for the entire parcel (i.e., from the granting deed under which the property owner obtained title or as described in the Title Report) for an RC using Form A, or by using Form B for an RC together with a legally described easement area connecting the restricted (encumbered) area to the public right of way. See [Attachment 4](#) for an example of a site access easement. A legal description describing the ingress and egress corridor to the public right of way is necessary for this easement, and the corridor should be identified on the Survey exhibit described above. Finally, the Survey exhibit should be included as an exhibit to the access easement 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.¹⁰

“Low Yield/Poor Quality” Cleanup Target Levels.

If the responsible party wants to utilize the low yield/poor quality cleanup target levels (CTLs) for groundwater and corresponding leachability-based CTLs for soil, then the IC should identify the property as having poor quality and/or low yield groundwater, and it should prohibit the use of groundwater on the property because of the contaminants that are allowed to remain at higher levels than the default health-based CTLs based on a

¹⁰ If an IC has been recorded with FDEP approval, the IC will run with the land and with the title to the property, and if the property is later subdivided the IC will continue to bind each affected lot within the subdivision. If the FDEP learns of such a subdivision, the IC Registry information should be updated to reflect the new multiple addresses. See Section E, IC Registry, below.

If an IC has been approved by the FDEP and recorded for a property, and the criteria for direct exposure were met using a 95% Upper Confidence Limit (UCL) approach, then several things need to be evaluated. First, if the property is being divided into parcels smaller than the Exposure Unit (EU) used in the 95% UCL calculation, then there must be a showing to the FDEP that the contamination is no longer on the property (in which case those restrictions may be removed; see Section F, “Removing or Amending an IC,” below); or that subsequent sampling indicates that the contamination on the source property now meets conditional SRCO levels without the need for use of the 95% UCL (in which case the IC should be modified to remove the 95% UCL language and associated restrictions in the IC, see Section F below); or that subsequent sampling indicates that the contamination on each parcel derived from the source property now meets SRCO levels using the 95% UCL.

determination that the groundwater already is of poor quality or low yield. Sample language for a restriction based on poor quality/low yield is included in the Model Restrictive Covenant ([Attachment 3](#)).

C. CREATING AND USING INSTITUTIONAL CONTROLS

In almost all cases, an RC¹¹ will qualify as an acceptable Institutional Control under Section 376.301(22), F.S. (as renumbered pursuant to Ch. 2016-184, Laws of Florida), and Rules 62-780.680(2) and (3), F.A.C. See [Attachment 3](#) Sample Declaration of Restrictive Covenant, ([Form A](#) and [Form B](#)) and [Attachment 5](#): IC Checklist.¹² However, a restrictive covenant is not the only acceptable form of an IC. The FDEP will consider other forms of Institutional Controls so long as they meet the definition of “institutional control” in Section 376.301, F.S., and comply with Rules 62-780.680(2) and (3), F.A.C., which fundamentally require the control to be protective of human health, public safety, and the environment. [Attachment 38](#) includes examples of institutional controls other than RCs that could potentially be sufficient for closure under RMO II or III. In some instances, “layering” various ICs may be necessary to ensure the controls are protective of human health, public safety, and the environment.¹³

ICs Other than RCs¹⁴

It is important to note that, other than cases involving MOAs between the FDEP and other institutional or governmental entities, at the present time, these non-RC controls should only be used to address *groundwater* contamination at a site (which can include impacts off the source property). When addressing soil contamination using either land use restrictions or an engineering control (e.g., a concrete cap), an RC is the only type of control that effectively ensures that the type of land use remains in perpetuity, or that an engineering control remains in place and is properly maintained to permanently cover the area of soil contamination.

Factors to consider when evaluating whether institutional control other than an RC is adequately protective of human health, public safety, and the environment, include the following:

¹¹ Restrictive covenants and deed restrictions are similar. Some differences lie in when the restriction is imposed and who is permitted to enforce it. In either case, the owner of the property must impose the restriction. A deed restriction is a restriction included in the deed of conveyance created and recorded by the seller of real property to control the use of the property by the buyer and any subsequent owners and may be enforceable by the seller against the buyer and successive owners of the property, depending on the language in the deed restriction. A restrictive covenant is created and recorded by the owner of the property to limit his or her own actions as well as those of subsequent owners of the property and is enforceable by third party beneficiaries named in the covenant (for example, the FDEP).

¹² Attachment 3 consists of Sample Declaration of Restrictive Covenant Forms A and B. Form A should be used when the entirely owned parcel will be encumbered, and Form B should be used when only a portion of the parcel will be encumbered.

¹³ “Layered” ICs are used if a proposed control, alone, is insufficient to provide the necessary protections, but multiple controls, together may provide the desired level of protection. These controls may include notices that are warnings to the public that a hazard may exist at the property. Examples of such notices include: warning signs posted at a property; legal notices in a newspapers of general circulation; “Deed Notices” that contain information but impose no obligations; and government advisories.

¹⁴ In November 2013, the Division of Waste Management issued a memorandum regarding institutional controls, including the use of institutional controls that do not require RCs. Revisions to this Institutional Control Program Guidance in 2016 restate and clarify that November 2013 memorandum.

- 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 (i.e., possibility of dewatering, discharging of contaminated groundwater to surface soils, causing plume migration; etc.); and
- Potential for installation of new stormwater features or enlargement of existing stormwater features at or near the affected property.

When proposing an IC other than an RC, the Person Responsible for Site Rehabilitation (PRSR) should submit much of the same information as in a typical RC package including the Deed and Legal Description. Instead of a draft RC, the PRSR should submit electronic copies of the proposed institutional control and any documentation that is necessary to validate or provide context to the control. For example, in cases where a PRSR is relying on a local ordinance, the ordinance itself should be submitted. Along with the ordinance, a statement explaining whether the property(s) is currently in compliance with that ordinance, and, a statement of whether the ordinance relies upon delegation of authority from another governmental entity, should be submitted. 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.

An additional decision that will have to be made when using an IC of this nature, is whether title work is necessary to identify the holders of encumbrances on the property and provide them with notice of the proposed closure using the control. [See subsection 62-780.220(7), F.A.C.] This decision should be made on a site by site basis because it depends on both the nature of site as well as the nature of the control. For sites where contamination goes beyond property boundaries, this evaluation is necessary for each parcel. Factors to be considered in this evaluation include:

- Depth to groundwater contamination;
- Status of site development and existing or planned infrastructure on the site;
- Ownership of each property;
- Involvement and knowledge of off-site property owners as to the nature and extent of contamination;
- Nature of the property interests subject to the restriction in relation to the contamination causing the need for restriction;

Considerations for Evaluating Local Governmental Controls

An important factor to consider in evaluating the durability and protectiveness of institutional controls other than RCs is whether the control in question is one that the Department can appropriately rely upon as a long-term control.

As specified above, to be legally sufficient, institutional controls must all meet the definition of an institutional control in Section 376.301(22), F.S. (as renumbered in Ch. 2016-184, Laws of Florida) (i.e., “restriction on use or access to a site to eliminate or minimize exposure to petroleum products, chemicals of concern, drycleaning solvents, or other contaminants”). Local ordinances that prohibit installation or use of water wells (even in conjunction with a requirement to use of a municipal water supply) are insufficient because the exclusive authority to regulate the consumptive use of groundwater rests with the Department and water management districts (Districts).¹⁵ Courts have recognized and upheld this “exclusive authority.”¹⁶

In addition, statutory provisions prohibit the Department and Districts from requiring a permit “for domestic consumption of water by individual users.”¹⁷ Because regulation of water use is preempted to the state and the state specifically exempts domestic self-supply from regulation, it would be improper to rely on such prohibitions as institutional controls.

While local ordinances that prohibit the installation or use of potable water wells are not legally sufficient, other, legally sufficient ordinances could suffice as an institutional control after a site specific evaluation. For example, ordinances that require property owners to hook up to a community, county or municipal water system without also requiring the property owners to use the water system could suffice. Or, an ordinance that prohibits the location of wells on property owned by the local government passing the ordinance could likewise suffice.

Keep in mind that legally sufficient local governmental controls must also suffice as controls that are adequately protective of human health and the environment given the specifics of the site in question to be accepted by the Department. For example, these mandatory hook-up ordinances often allow private wells for irrigation or other non-potable

¹⁵ See § 373.217(2), Fla. Stat. (stating that Chapter 373 is “the exclusive authority for requiring permits for the consumptive use of water.”); § 373.217(3), Fla. Stat. (Specifically stating that if any provision of Part II of Chapter 373, as amended, “is in conflict with any other provision, limitation, or restriction which is now in effect under any law or ordinance of this state or any political subdivision or municipality, or any rule or regulation promulgated thereunder, Part II shall govern and control, and such other law or ordinance or rule or regulation promulgated thereunder shall be deemed superseded for the purpose of regulating the consumptive use of water.” An exception is made for the Florida Electrical Power Plant Siting Act.); & § 373.217(4), Fla. Stat. (expressly preempting “the regulation of the consumptive use of water.”).

¹⁶ See Marion County v. Greene, 5 So. 3d 775, 777 (Fla. 5th DCA 2009); Sw. Florida Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903, 918 (Fla. 2nd DCA 2001); Thomas v. Sw. Florida Water Mgmt. Dist., 864 So. 2d 455, 456 (Fla. 5th DCA 2003); and Heartland Environmental Council v. DCA and Highlands County, ¶ 169, DOAH Case No. 94-2095GM.

¹⁷ § 373.219(1), Fla. Stat. Domestic consumption includes “the use of water for the individual personal household purposes of drinking, bathing, cooking, or sanitation” and “[a]ll other uses shall not be considered domestic.” § 373.019(6), Fla. Stat.

purposes. Site/project managers must decide whether continued use of the groundwater for non-potable use is still protective of human health and the environment.

FDEP FDOT Memorandum of Understanding (MOU)

FDEP and FDOT have entered into a Memorandum of Understanding (MOU) (See [Attachment 32](#)) dated June 16, 2014, that allows petroleum contamination to remain in FDOT rights of way in certain circumstances as set forth therein without the recordation of a restrictive covenant on the affected FDOT property in the public records of the county. However, closure in reliance on this MOU requires additional actions by both the site/project manager and the owner of the source property that are set forth in the MOU. In the spring of 2016, the MOU was undergoing further review by the agencies to increase efficiencies and greater use of this type of IC which may result in an amendment to the MOU. Therefore, to ensure the most recent version is used, the responsible party, site/project manager, and FDEP attorney should be in communication prior to preparing a conditional SRCO proposal in reliance upon this MOU.

As specifically enumerated in [Attachment 33](#), the PRSR should submit a conditional SRCO proposal to FDEP including specified information for the adjacent contaminated FDOT Right of Way (ROW) property. FDEP will review the proposal and, if sufficient, will request that FDOT add a ROW Map Note regarding the existing petroleum contamination. FDOT will acknowledge the request by letter and will record a Map Note on the FDOT ROW Map with an Oculus link to FDEP's Request Letter along with summaries of soil and groundwater data, surveys and other documents detailing the contamination that remains. The Map Note will act as the IC to provide notice regarding the presence of contamination to all parties seeking a FDOT permit to do work in the ROW. FDEP will thereafter issue the conditional SRCO, and the PRSR will record the Map Note reference in the County Records Office.

Evaluation of Exposure Routes when Using ICs other than RCs

Note that when using an institutional control other than an RC, such as a local ordinance, governmental control, or MOU to prevent exposure to contaminated groundwater all potential exposure routes should be considered including the possibility of irrigation wells, possibility of construction worker exposure to groundwater, and possibility of new stormwater features that may affect groundwater flow. The potential that some other exposure routes may exist does not prevent the use of local ordinances or governmental controls, but may suggest a layering of multiple controls.

Site/Project Manager Review

The FDEP or local government site/project manager¹⁸ (including the contracted or delegated local government site/project manager) in conjunction with the designated

¹⁸ The sample RC and review process will be modified based on who is the site manager.

FDEP or local program professional engineer (PE) or professional geologist (PG) responsible for the technical review for the site, must make the technical determination as to whether a contaminated site has undergone sufficient assessment and, if necessary, remediation that a conditional closure is appropriate under Chapter 62-780, F.A.C.¹⁹ See [Attachment 7](#) for a sample letter from the site/project manager to the Person Responsible for Site Rehabilitation (PRSR) regarding ICs. The site/project manager should provide any FDEP technical guidance regarding the control to the property owner, and should request that the property owner or its agent prepare a draft of the IC package. The FDEP site/project manager should not prepare the IC, but should provide the internet location of the Institutional Controls Procedures Guidance document to the owner or owner's representative. If, however, FDEP is the PRSR (for example, for contaminated sites being assessed/remediated by the Petroleum Restoration Program), site/project managers should check with their supervisors or OGC on what can be done by the FDEP and by whom.²⁰

All questions should be directed initially to the site/project manager. If a question is legal in nature, and early resolution of the question could change how the proposed IC is approached or greatly expedite the review process, the site/project manager may ask OGC to address the issue prior to submission of the IC package. Once the IC package is prepared, the IC and supporting documents should go to the site/project manager, who must determine if the IC document includes the appropriate restrictions or requirements and if the necessary supporting documentation has been provided (See [Attachment 5](#), Checklist. This checklist was created to assist in review of RC packages; however, the checklist provisions relating to groundwater contamination can be considered for non-RC ICs too). The site/project manager is not required to review or comment on the title work assuming the title work was prepared within 6 months of submittal to the site/project manager. If the title work is older than 6 months at the time of submittal to the FDEP site/project manager for review, the site/project manager may request that the title work be updated, which may be provided either by submission of an affidavit of title from the owner confirming the current status of title (See [Attachment 8](#)) or by submission of an updated Title Report. The site/project manager should then route those documents to the

District-Lead Sites The District should modify any of the sample RCs attached to this guidance document to indicate that the District is the FDEP signing representative, that the technical documents referenced in the covenant are on file at the District office, and that the District's address is the location of stored documents. (Counties with delegated programs that are not required to obtain FDEP approval of technical decisions should follow the "District-Lead Sites" instructions).

FDEP-Contracted Local Government Lead Sites The FDEP-contracted local government site/project manager must submit the draft RC and accompanying documentation to the appropriate FDEP liaison. For petroleum sites, after reviewing, the FDEP liaison will send the documents to a FDEP technical reviewer in the Petroleum Restoration Program (PRP). The PRP reviewer is the Professional Engineer (PE) or Professional Geologist (PG) on the county team. If approved on its technical merits, all of the above documentation, including supporting legal documents, must be forwarded to FDEP OGC with a cover memo indicating who performed the FDEP technical review. See Sample Memo to OGC, Attachment 6. If the FDEP technical reviewer determines that the site is not yet ready for an IC, the documentation will be returned to the contracted local government. (Counties with delegated programs that do require FDEP-approval of technical decisions should follow the instructions for "FDEP-Contracted Local Government Lead Sites" throughout this document).

¹⁹ Any reference to "FDEP technical professional staff" includes not only staff in the six FDEP Districts and the Tallahassee headquarters office, but also FDEP contracted local governments and delegated programs and FDEP contracted private site/project managers (hereinafter referred to as site/project manager).

²⁰ See Chapter 2016-184, section 9, Laws of Florida

OGC for legal review, approval, and signature. The FDEP OGC should only receive the request for legal review of the IC directly from the site/project manager and not from the property owner or owner's representative.

For contracted local government-lead petroleum contaminated sites, the site manager's decision to allow the use of an IC will be reviewed by one of the Petroleum Restoration Program (PRP) Local Program Coordinators (who will involve the appropriate Tallahassee technical staff, as needed). The District Waste Program Administrator should approve the technical determination for District-lead sites, and the appropriate Tallahassee Program Administrator should approve Tallahassee-lead sites. District staff may always seek input from Tallahassee staff, if desired.

The site/project manager, in conjunction with the designated FDEP or local program PE or PG responsible for the technical review for the site, should review and approve the geological and engineering details prior to forwarding an IC package with supporting documentation to the FDEP OGC. The site/project manager must also review the draft IC to ensure that the IC includes the correct maintenance requirements for, and restrictions on use of, the property, if applicable. Generally, three (3) types of restrictions/requirements are used:

- groundwater restrictions; and/or
- requirement to maintain engineering control (e.g., soil or synthetic cap); and/or
- land use restrictions.²¹

Along with the draft RC document, if applicable, the site/project manager and the OGC need the following prior to reviewing any IC package (see also IC Checklist, [Attachment 5](#)):

Deed.

- A copy of the recorded deed should be provided that identifies the current real property owner. The owner of the property shown on the deed should match the name of the person agreeing to restrict the property (the Grantor). If the names do not match, additional information should be provided to clarify ownership.²² This piece of information is necessary for all types of ICs to be evaluated, whether they are RCs or any other form of an IC, and it is necessary for both source and non-source properties that a PRSR wishes to restrict. In some very limited situations (such as rights of way established by statute or plat map) ownership of a piece of property to be restricted may be established through an instrument other than a deed.

²¹ Generally, both land use restrictions and soil cap engineering controls do not need to be included at the same time, unless there are areas of contaminated soil not covered by the engineering control. Redundancy of restrictions is not typically necessary.

²² A copy of the recorded deed is necessary, but the copy does not need to be certified.

Legal Description.

- A written legal description of the entire parcel should be provided regardless of whether the entire parcel is being restricted or only a portion of the parcel will be restricted. If the entire parcel is being restricted, and the PRSR is using a RC as the IC, then Form A should be used and Exhibit A to the RC should be the legal description of the entire parcel. This legal description should be the same as the legal description found in the deed and in the Title Report.²³ If they are not the same in all three places, an explanation should be provided. FDEP staff may send Surveys to the FDEP Bureau of Survey and Mapping for confirmation of the legal description. Additionally, when only a portion of the parcel will be restricted, a legal description of that smaller portion should also be included. See the next bullet point and RC Form B for more information regarding partially-restricted parcels.

Survey.

- If only a portion of the parcel will be encumbered or restricted, then 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 attached to a RC as an exhibit. In addition, the Survey should include four corners of the designated restricted area labeled with the state plane coordinates (SPC) system or geographical coordinates. The Survey should be a clearly labeled attachment (e.g., Exhibit B) to the RC and the area to be restricted should also be clearly labeled with a label that corresponds to the terminology used to describe it in the text of the document (e.g., “Area of Engineering Control,” “Groundwater Restriction Area”, “Capped Area,” “Location of Slurry Wall,” “Restricted Area”)²⁴. 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 such on the Survey, so that if a building is removed a suitable cap can be constructed and maintained where the building stood. Additionally, when restricting stormwater swales, detention or retention facilities or ditches, any existing stormwater structures should be clearly identified on the Survey, which may require a multi-part composite exhibit, in which case it should be labeled by part (e.g., “Exhibit B-1,” “Exhibit B-2”). Site/project managers should ensure that this attachment correctly locates the area(s) to be restricted.²⁵ If only a part of the property will be encumbered by the RC and the restricted area does not abut a publicly-dedicated right of way, then an access easement as discussed above in “Restricting a Portion of the Property,” should be created. See [Attachment 2](#), Institutional Control Tips, for more information. In cases where there are no stormwater features on the property to be restricted and the only restriction

²³ The legal description in the RC and Title Report will not match the legal description of the deed if the RC is intended to encumber only a portion of the property (i.e., some area less than the entirely owned parcel as described in the deed).

²⁴ The terminology used to describe the area to be restricted should be used within statement two (2) of the RC, and it should be the same terminology used on the survey to identify the location of the restricted area.

²⁵ In the event there is a conflict between the drawing of a portion of the property, the SPC or geographical coordinates and a written legal description of the same portion, the written legal description will control.

contemplated is on groundwater use for the entire parcel, and a legal description of the parcel is already provided, there is no need for a survey in addition to the legal description of the property to be restricted.

Title Report.

- A Title Report (which may be in the form of an Ownership and Encumbrance Report, a title insurance commitment, or title insurance policy, so long as it provides all of the information described below) that reflects all parties having a recorded interest in the property, including owners, tenants under recorded leases, lienors, mortgage holders and easement holders, among others, should be submitted with the IC package to be reviewed.²⁶ The search commences with the instrument constituting the root of title under the Marketable Record Title Act (MRTA) (i.e., evidence of title, such as a deed, that is at least 30 years old) and includes a review of all subsequently recorded instruments, a review of prior recorded instruments (to the extent required by MRTA), and a review of prior recorded instruments that are not eliminated by MRTA. If the Title Report was issued more than six (6) months prior to delivery to FDEP, or if it will be more than six (6) months old by the time the IC is to be approved, then the Owner should provide either an updated Title Report or an Affidavit of Title confirming that the status of title is unchanged from the Title Report provided (see [Attachment 8](#), Sample Affidavit of Title) include complete copies of all existing encumbrances on the property as reported on the Title Report in the IC package sent to OGC. It is not unusual for only a “Memorandum of Lease” or “Notice of Lease”, rather than the entire lease, to be recorded in the public records. If there is such a recorded Memorandum or Notice, provide OGC with a complete copy of the lease along with the Memorandum or Notice. For properties with numerous easements or multiple partially restricted areas, in addition to the encumbrances, the assigned OGC attorney may also request a labeled map, diagram, or Survey showing the locations of all encumbrances in relation to the restricted area. See [Attachment 14](#), Sample Encumbrance Map and List of Encumbrances. If requested, the list of encumbrances should identify which encumbrance intersects with which restricted area. As discussed above, a title report (for the source and possibly for non-source properties) may or may not be required in evaluating an IC other than an RC.

Owner’s Notice to Existing Encumbrance Holders.

- The property owner should provide actual notice of FDEP's approval of the use of an IC to holders of existing encumbrances in the property. Such encumbrances include the following recorded documents as well as others: mortgages, liens, financial notes, leases, and easements. Notice should be provided when the

²⁶ When a title search is performed in the county property records, all recorded instruments with legal descriptions that overlap with the legal description of the property that is the subject of the title search will be identified. All such recorded instruments have an effect on the title to the property and will somehow affect or encumber the property rights of the property owner. Some previously recorded encumbrances will conflict with a prospective RC making it necessary for the owner to seek subordination or joinder and consent (as applicable) from the holders of those encumbrances. If those previously recorded instruments are not subordinated, or their holders do not join and consent, then those encumbrances take priority over a subsequently recorded RC and the RC could fail as to that encumbrance. However, if certain conditions exist, a notice to existing easement, mortgage or other lien holders is acceptable in lieu of a joinder and consent or subordination. For further guidance see next page.

proposed restrictions in the IC intersect with the encumbrance holder's property rights (also called a "material conflict"). In the case of mortgages, liens, leases, leaseholds, and some other types of encumbrances, the restriction will always intersect. But, it will not always intersect in the case of some encumbrances such as easements. For example, if the IC restriction forbids groundwater use and the encumbrance property right grants ingress and egress across the surface of the property, then notice to that encumbrance holder is not necessary because there is no intersection (no "material conflict") of the encumbrance right with the IC restriction even though the surface location is the same. However, if the IC restriction includes the requirement for a FDEP approved dewatering plan, and the encumbrance holder's right is for entry into the soil to lay and maintain utility lines, then notice is required for that encumbrance holder because the laying and maintaining of utility lines might require dewatering. The text of the encumbrance document must be examined carefully to determine whether the encumbrance holder right intersects with the IC restriction. See subsection 62-780.220(7), F.A.C. Such notice to encumbrance holders should include information regarding the owner's intention to utilize an IC and request a Conditional SRCO, the type and location of the restrictions on the property and FDEP contact information. A template is provided. See [Attachment 9](#), Actual Notice of Intent to Approve Use of IC for Easement Holders & Financial Institutions. In some cases when non-RC ICs are considered, notice to all encumbrance holders will not be required. In other cases, due to site specific conditions, such notice will be required. Therefore, it is important for PRSRs and case managers to work closely with OGC from the receipt of the request to use an IC that is not an RC. Additional discussion about how to evaluate site specific factors and make these decisions is in the "ICs Other Than RCs" section above.

To facilitate timely review of the notice, FDEP encourages that the notice be provided to encumbrance holders as early as possible; even as early as the time at which the IC package is submitted to FDEP for review. In addition to the template, FDEP also encourages the property owner to provide the encumbrance holder with a Specific Purpose Survey, Boundary Survey or Sketch and Description as defined under Chapter 5J-17, F.A.C., or other scaled map or diagram that accurately shows the location of the contamination and proposed restricted area in relation to the location of the encumbrance (e.g., easement) and a summary table of contaminant concentrations. See [Attachment 14](#) for an example of such a diagram. The site/project manager will review copies of all such notices to existing encumbrance holders, together with proof of delivery to each encumbrance holder. Notice should be provided in accordance with the terms for notice set forth in the recorded instrument (i.e., as described in the mortgage or easement), and if proof of delivery is not required by the recorded instrument, then by certified mail, return receipt requested, signed acknowledgement of receipt obtained by a courier or delivery service, or other commercially recognized method. Regardless of whether notice is specifically addressed by the terms of the recorded instrument, if the encumbrance holder is a business entity formed in or otherwise qualified to do business in the State of Florida, the property owner

should also send notice to the registered agent of the business entity which may be identified on the Florida Department of State's Division of Corporation Website [www.sunbiz.org]. This will ensure that the notice is properly received and subsequently routed for review within the business entity's organization.

- *Mortgage Holders (also known as Mortgagees)*. If there are mortgage holders (typically these are banks) or other holders of financial instruments (collectively referred to throughout this document as mortgage holders), then in addition to the above Notice, a "Subordination of Mortgage" (see [Attachment 10](#)) may be obtained by the owner and recorded along with an RC, if a RC is the chosen form of IC. However, FDEP will not need a subordination unless the mortgage materially conflicts with the RC. The FDEP does not expect that material conflicts between the RC and the mortgage will occur very often. Examples of when a material conflict may exist between the RC restrictions and a mortgage include, but are not limited to, the following:
 - the restriction requires an engineering control with an active control system, if the active control includes a substantial recurring expense or if the failure to maintain the active control could result in an imminent hazard (within a few days or weeks). Examples include:
 - active gas collection systems that remove ignitable, corrosive, reactive or toxic vapors (for example, landfill gas or hydrogen sulfide); or
 - maintenance of active containment structures such as holding tanks or ponds that may hold substantial volumes of fluid and any control mechanisms to maintain the appropriate level of material for those structures requiring daily or weekly attention
 - the language of the mortgage itself specifically prohibits limitations on the use of the property or, conversely, requires the property to be used in a manner directly in conflict with the land use restrictions in the RC.
- *Easements, Tenants (Lessees), and other Interests (collectively referred to as easement holder)*. The property owner should review the recorded encumbrances on the property to make a determination as to whether it is appropriate to seek subordination or joinder and consent from holders of recorded encumbrances. See [Attachment 12](#) and [Attachment 13](#).
- *Examples of situations wherein a property owner may wish to seek a Joinder and Consent* include, but are not limited to, the following:²⁷
 - the restriction requires an engineering control with an active control system *located in the easement*, if the active control includes a substantial recurring expense or if the failure to maintain the active control could result in an imminent hazard (within a few days or weeks). Examples include:
 - active gas collection systems that remove ignitable, corrosive, reactive or toxic vapors (for example, landfill gas or hydrogen

²⁷ The examples of a material conflict between the restrictions in a proposed RC and an existing encumbrance outlined in the guidance should not be construed as the only instances where a material conflict may exist. Whether or not a material conflict exists is a matter for the property owner and encumbrance holder to determine and resolve, if possible. For this reason, FDEP encourages the property owner to engage in dialogue with encumbrance holders early in the process to resolve any potential issues.

- sulfide); or
 - maintenance of active containment structures such as holding tanks or ponds that may hold substantial volumes of fluid and any control mechanisms to maintain the appropriate level of material for those structures requiring daily or weekly attention.
 - an engineering control *located in the easement* that requires a cap to prevent direct exposure to contaminated soil or to minimize the leaching of contaminants into the groundwater, and if an easement holder has the right to conduct activities that may interfere with the establishment or maintenance of this control.
 - an easement holder has the right to disturb the soil or ground water for construction and maintenance unless it is demonstrated that during the construction of the use allowed in the easement or its maintenance:
 - the likelihood of mobilizing contamination in groundwater is small, *or,*
 - *the risk posed by exposure is acceptable.*

For example, if a city has a stormwater easement on the property that goes through the area with remaining groundwater contamination and has not yet built the stormwater conveyance or retention facility, then the property owner should consider obtaining a Joinder and Consent from the city because in digging the stormwater facility it is likely that the groundwater contamination will be mobilized and move in to the stormwater facility²⁸. In cases where the stormwater easement allows continued maintenance of an existing system and such maintenance may mobilize contamination in ground water or there is a risk of direct exposure to contaminated soil, then Joinder and Consent from the encumbrance holder should also be pursued. A property owner may choose to seek Joinder and Consent from a utility or other easement holder for its underground or aboveground easement where the proposed restrictions in the RC encompass the easement. Such easements may provide for construction, maintenance, and repair (including replacement) of transmission, distribution or similar facilities which may result in excavation of contaminated soil or have the potential to mobilize ground water contamination. See [Attachment 12](#) and [Attachment 13](#), Sample Subordination of Encumbrance, Sample Joinder and Consent of Encumbrance. Even if a joinder and consent is determined by the property owner to be unnecessary, the owner should notify the easement holder of the existence of the contamination, restriction on use of the property, and the requirement to maintain an engineering control (if applicable) on the property which is subject to the easement. See [Attachment 9](#) for a template Notice letter.

²⁸ Remember, in evaluating whether to pursue a conditional SRCO and an RC, the assessment and other data is based upon the conditions of the property at the time the assessment and remediation work was conducted which is prior to, for example, the construction of a stormwater facility.

State Lands Encumbrances/State Lands Leases.

- For property owned by the State of Florida (excluding FDOT), if there are any encumbrances such as easements, as with all title work, copies must be provided to the OGC. These need not be certified copies, but should be copies of executed instruments. Those tenants with a State Lands lease must contact the FDEP Division of State Lands since that division, as the representative of the land owner, also must approve of the conditional closure and restrictions. See [Attachment 15](#), [Attachment 16](#), [Attachment 17](#), and [Attachment 18](#) if the property to be restricted is leased from the State of Florida (Board of Trustees of the Internal Improvement Fund).

Map of Encumbrances and Restricted Area, and List of Encumbrances.

- The property owner should provide a list of recorded encumbrances, in addition to the copies of the recorded encumbrances, for the reviewing FDEP lawyer. The list of encumbrances should identify the right(s) the encumbrance grants to the holder and whether each encumbrance intersects ("materially conflicts") with the restriction. If the restriction could affect, or be affected by, the encumbrance holder's rights in such a way as to constitute a "material conflict" (as described above under "Owner's Notice to Existing Encumbrance Holders") with a proposed RC, then the owner should acquire either a subordination of encumbrance (for mortgages and easements) or a joinder and consent (easements only), or the owner should provide actual notice as outlined above in "Owner's Notice to Existing Encumbrance Holders." See [Attachment 12](#) and [Attachment 13](#), Sample Subordination of Encumbrance, Sample Joinder and Consent of Encumbrance, and [Attachment 9](#), Actual Notice of Intent to Approve Use of Institutional Control For Easement Holders & Financial Institutions.

If only a portion of the property is restricted, a labeled map, diagram, or Survey showing the locations of all encumbrances in relation to the restricted area should be provided. See [Attachment 14](#), Sample Encumbrance Map and List of Encumbrances.

FDEP Permit Reviews.

- The FDEP's Division of Waste Management (DWM) will coordinate with the FDEP's Division of Water Resource Management such that when Environmental Resource Permit (ERP) applications are submitted to the FDEP or to a Water Management District, the permit reviewers will check the DWM Institutional Control Registry to evaluate whether or not there are existing DWM-imposed institutional controls. If an ERP application includes property that is impacted by a DWM institutional control, the permit reviewer should contact the DWM project manager to see whether there is a conflict between the existing restrictions and the proposed use contained in the application for an ERP.

Memo from the site/project manager to the OGC with the following (see sample in [Attachment 6](#)):

- Name and contact information for the following persons:
 - FDEP Site/Project manager;

- Consultant;
- Real property owner;
- Real property owner representative;
- Any other responsible parties; and
- Buyer (if applicable/available).
- Type(s) of IC; e.g., an RC, a local government ordinance, Rule, MOA or MOU; etc.
- Type of restriction, e.g., water use restriction, mandatory community system hook-up, cap requirement, land use restriction.
- Restrict entire property or partial property_restriction.
- Rationale for this recommendation.
- Affected media: e.g., soil, groundwater, surface water, and/or sediment.
- Type of contamination: e.g., petroleum, drycleaning solvents, arsenic, etc.
- Brief site history: e.g., past operation, date of discharge, etc.

Office of General Counsel (OGC) Review.

When the OGC receives an IC package, an OGC paralegal will verify that all required documents are present. If documents are missing, the paralegal will work with the site/project manager, to obtain the missing documents, and, when the IC package is complete, forwards it to the assigned attorney. Once all documents are received in the OGC, an attorney will review the IC package. If the PRSR is proposing an RC, the attorney will determine if the proposed RC is ready for signature or requires changes. After reviewing the RC and supporting documentation, the attorney will provide a list of questions and requested changes to the RC text, as well as questions about notice, if any are needed. The attorney will route the memorandum, consisting of questions and requested textual changes, to the owner or the owner's representative and to the site/project manager. If an alternative IC, such as local ordinance(s) or MOA, is proposed, then the attorney will review the IC package, including the local ordinance(s) or MOA, for sufficiency to address the type of contamination and restrictions needed and forward any questions as described above.

Important Note:

If an owner's response takes more than 60 days, the site/project manager should inquire in writing as to the delay. {See respective clean up rules Time Schedules section}

Typically, the owner should reply with a new draft of the RC, if applicable, additional supporting documents, if requested, and a letter answering questions. The OGC attorney will review the new information. This process may have several iterations before agreement is reached regarding additional documentation, answers to questions, and the text of the RC, if applicable. If the OGC attorney communicates directly with the owner's counsel, he or she should copy the site/project manager, so the site/project manager knows the status of the IC package at any given time. During this process the site/project manager should be aware of the amount of time the owner takes to reply to FDEP requests for more information or new drafts of an RC.

It should be noted that if an owner's response takes more than 60 days, the site/project manager should inquire in writing as to the delay. If a response is not forthcoming, the site/project manager can recommend enforcement of Chapter 62-780, F.A.C., at the site.

The IC process should not extend for long periods of time as site conditions may change, and other intervening events may make the conclusion of the process difficult.

IC Notice Procedures

After the FDEP has issued its letter confirming approval of the recommended conditional closure, and in any case prior to FDEP approval of the IC, notice and a 30-day opportunity to comment on the conditional closure proposal is provided in Rule 62-780.220 in the following manner:

- Notice by regular mail - to local governments with jurisdiction over the property where the contaminated site is located, and to real property owners and resident or business tenants of property subject to the IC. In lieu of mailing, where there are multiple residences, businesses or tenants on any property subject to the proposed IC, the PRSR may publish a Notice of Intent to Approve Use of Institutional Controls. See [Attachment 19](#), [Attachment 20](#), [Attachment 21](#), [Attachment 22](#), and [Attachment 23](#); and
- Encumbrance Notice - to existing mortgage holders, holders of recorded leases and easement or other encumbrance holders identified in the Title Report, by notice made by the owner to the interest holder if the IC limitations or restrictions could impact ("materially conflict with") the encumbrance holder's interest. See above discussion under the Title Section and [Attachment 9](#), and particularly under "Owner's Notice to Existing Encumbrance Holders".

Under Chapter 62-780, F.A.C., notice is to be given within 30 days of FDEP's approval of the recommendation for conditional closure. Site/project managers should bring this notice requirement to the owners' attention early in the process because owners are often anxious to obtain the conditional SRCO due to pending real estate transactions or bank financing, and they may be frustrated to learn they have to give this notice and wait another 30 days for comments if notice was not already given.

The site/project manager shall send a copy of the FDEP's conditional closure approval to any party who provides comments to the FDEP or requests a copy.

While not required by Chapter 62-780, F.A.C., owners cleaning up large-scale, high-interest sites may want to consider inviting the public to public forums to become involved while environmental conditions and risks are being assessed and while plans are being developed. For cleanups managed with EPA as the lead, such public forums may even be required (see the appropriate EPA rules for more information). If public involvement in the development of controls is requested, owners should focus on whether the restrictions, engineering controls, and land use controls have been drafted to adequately explain what the prohibited and permitted uses of the site will be, and whether there are any continuing obligations and conditions required of the property owner and tenants/lessees. Public comment should be accepted in this process and, if warranted, additional meetings and notices can be scheduled.

Additional Notice Requirements at RCRA Facilities per Chapter 62-730, F.A.C.

While the IC process for Resource Conservation and Recovery Act (RCRA) facilities is identical to the above description, please note that an additional public notice and 45-day

comment period are required when a site rehabilitation completion order is to be issued. And, like EPA-lead sites, a public forum may be required based on public interest at a RCRA facility. These timeframes should be recognized up front since they can have a significant effect on real estate transactions or other planned development of property.

Signature Process for a Restrictive Covenant

After the RC has been reviewed by the OGC and found to be acceptable under Chapter 376, F.S. and Chapter 62-780, F.A.C., the owner should sign the RC, and if applicable, the Access Easement Agreement, and return it to the site/project manager they are working with in the district, or to OGC for CERCLA, Petroleum based contaminants, or other Tallahassee lead sites. If the property owner is an entity (corporation, LLC, government) only the person with the authority to sign on behalf of that entity can sign the RC and, if applicable, the Access Easement Agreement. See [Attachment 27](#), Examples of Signature Blocks and Certifications. The site/project manager can provide OGC with a scanned copy of the document and the reviewing attorney will electronically sign the RC as being in correct form. The site/project manager will then route it to the appropriate director or delegated authority for signature. The Division Director for the DWM, or his or her designee, should sign all RCs for Tallahassee-lead sites. The District Director or the Director's designee should sign all RCs for District-lead sites. All RCs for contracted local government-lead sites should be signed by the Division Director for the DWM, or the Director's designee. Local governments with delegated authority should sign in accordance with the provisions of the delegation agreement.

Recording RCs in the Public Record

After the signing of the RC by the FDEP attorney and Division representative or District Director, the RC should be immediately returned to the property owner, or owner's representative, as soon as possible for recording in the public records of the county where the restricted property is located and the property deed recorded.²⁹ The property owner is responsible for all filing fees at petroleum-contaminated sites, unless the property is eligible for state-funded site rehabilitation, in which case recording costs may be paid for by the fund. Property owners of properties that have privately-funded cleanups are responsible for paying the filing fees. See [Attachment 24](#), Statutory Recording Requirements.

Post-recording Processing

The PRSR provides the FDEP site/project manager with a copy of the RC stamped with the county record book and page number on every page of the document, including attachments and exhibits, and showing where and when the RC was recorded. In the case of an RC that is recorded in a county that does not provide free online public access to review recorded documents, the FDEP site/project manager may request an official recorded copy of the RC from the PRSR. After reviewing the recorded RC, the FDEP site/project manager shall issue the SRCO with Conditions, copy OGC, and complete the ICR sheet (see below).

²⁹ When a title search is performed, all recorded documents that are related to the property described in the original property deed, and that affect the rights of the owner, are identified.

SRCO with Conditions using Alternative ICs (non-RC option)

If the PRSR has proposed an alternative IC, such as reliance upon a local ordinance requiring that a property connects to a municipal water supply or a MOA, then the IC is not recorded because the local ordinance is already a part of the public record or the MOA has been determined by FDEP to be adequately protective. However, the type of IC used should be memorialized in the SRCO with Conditions. The template SRCO normally used with RCs should be modified to reference the specific provisions of the alternative IC upon which the PRSR relies to restrict use or access to the contaminated site. Additionally, a statement will be added to the reopener language in the SRCO to state that if the provisions of the alternate IC relating to the restriction on use are amended, then the contaminated site may be “reopened” and the Conditional SRCO may be revoked.

D. INSTITUTIONAL CONTROLS REGISTRY

FDEP staff shall ensure that information regarding property encumbered with any IC (this includes low-scored site initiative (LSSI) NFAs issued pursuant to s. 376.3071(12)(b), F.S. - for information about LSSI NFA, please contact the Petroleum Restoration Program) is entered into the FDEP’s Institutional Controls Registry (ICR) so that the controls can be audited and enforced. Delegated brownfield county sites and contracted local program county sites with ICs must also be included in the ICR. The site/project manager shall submit a copy of the recorded RC, if applicable, to the FDEP DWM, Director’s Office, and shall complete the electronic “IC Registry Data Sheet” for all ICs, whether recorded or not. (See [Attachment 25](#) for a sample of the contents of the electronic IC Registry Data Sheet; and contact OGC’s IC paralegal for assistance in completing this form). The Conditional SRCO and the referenced IC, whether a recorded RC or an alternative IC, will be scanned into OCULUS and will be a public record. Unless scanned and inserted into OCULUS, all oversized reports and exhibits referenced in an IC should be kept on file with the FDEP for as long as the IC exists and not be destroyed pursuant to any other recordkeeping guidelines. Electronic copies of any recorded instruments will be linked through OCULUS to the FDEP’s Institutional Control Registry (ICR) so that anyone seeking information about a site in the ICR will be able to see the actual recorded IC for that site.

If FDEP is notified that a property with a control has been subdivided, then a new ICR sheet must be completed indicating that the controls apply to multiple parcels.

To allow easy access by the FDEP Districts as well as contracted and delegated local governments, this registry is maintained on the FDEP’s DWM home page. The Registry web address is

<https://floridadep.gov/waste/waste/content/institutional-controls-registry>. (This guidance document is located in the same place under “ICR Guidance.”) Please follow the FDEP locational data standards for GIS submittals (found at <https://floridadep.gov/otis/portfolio-management-services/documents/gis-location-data-standard>.)

Should any FDEP employee obtain information that a property with an IC has been subdivided (as is often the case with former military properties and larger tracts), a new ICR

Data Sheet should be completed indicating that the current controls now apply to multiple parcels and addresses. The new addresses/parcel numbers and other data should be provided to the DWM in the same manner as the original ICR forms. Also, when ownership of a property in the ICR changes, a new ICR data sheet should be completed reflecting that change.

Special Mapping Requirement for Brownfields Sites.

Along with the ICR requirements for all sites, there is an additional mapping requirement for brownfields sites. See s. 376.303(5), F.S. If an IC is implemented at any contaminated site in a brownfields area (designated per s. 376.80, F.S.), then the property owner must provide information regarding the IC to the local government for mapping purposes. The local government must then note the existence of the IC on any relevant local land use and zoning maps with a cross-reference to the FDEP's ICR. If the IC is recorded, then the map notation shall also provide a cross-reference to the book and page number where recorded. If the FDEP subsequently issues an unconditional SRCO for the site (e.g., following resumption of cleanup or due to natural attenuation achieving cleanup target levels for the site), then the local government shall remove the notation from the map. Because this statutory requirement is in a separate section of the statute, and is not included within the "Brownfields Redevelopment Act" in Chapter 376, it is often overlooked. Therefore, FDEP Brownfields Program staff in Tallahassee and the Districts must ensure that this provision is brought to the attention of the property owner and the local government.

E. ENFORCEMENT OF INSTITUTIONAL CONTROLS

ICs are monitored to ensure compliance so that the public health and the environment are adequately protected. If a control or a condition of the SRCO has been ignored or violated, then the FDEP will pursue enforcement, as it deems necessary and appropriate. Enforcement of these provisions should proceed in the same manner and under the same authorities as enforcement cases are handled for other violations.

If you believe that any of the following events has occurred, please immediately contact and coordinate with the appropriate FDEP enforcement attorney:

- A provision of the IC has been violated or ignored (e.g., if the IC prohibits the installation of wells on the property and there is a well on the property that was not approved by the FDEP); or
- An IC has been improperly amended or removed from the public records of the county in which the property is located.

If you believe that the restrictions at a site are not protecting human health or the environment, whether due to changed site conditions, a new release or some other situation, site/project managers should contact the OGC program attorney regarding whether conditions have been met for reopening the SRCO for the site, or to determine what other action may be appropriate under the circumstances.

F. AMENDING AND REMOVING AN INSTITUTIONAL CONTROL

To remove an IC, the current property owner may submit a written request to the appropriate program of the FDEP or District. The commonly acceptable reasons to remove a control include: the site's contamination no longer exceeds the Cleanup Target Levels or water quality standards (recent assessment data would need to be submitted); or the IC should be amended (one form of an IC is to be replaced with another). For other circumstances that may necessitate the temporary removal or modification of an IC such as asphalt, concrete, or soil cap and/or slab or foundation replacement or accessing groundwater from a non-contaminated aquifer, please contact the Site Manager.

An RC should only be removed by execution of a termination of the RC by the appropriate program of the FDEP or District, and the recordation of the signed termination in the public records of the county where the property is located. A sample Termination is included as [Attachment 26](#).

The Termination document should state that the FDEP agrees to remove the control and should also briefly state the reason(s) for removing the IC. Once an IC becomes unnecessary and is removed, all the supporting documents that have been kept on file may be disposed of in the same manner as other FDEP records. However, when an Interim IC is replaced with a final IC, supporting documents for the final IC should be maintained in the usual way (electronically). But, unless scanned into OCULUS, oversized documents should be kept on file with the FDEP and not be destroyed pursuant to any other record-keeping guidelines. An ICR data sheet should be submitted any time an IC is amended or removed so that the ICR can be updated. See [Attachment 26](#), Sample Termination and Release of Declaration of Restrictive Covenant.

It is not always necessary to amend an institutional control to accommodate construction on the property with the control. For example, an owner can replace a parking lot that is serving as an engineering control as long as the new parking lot meets the criteria contained in the SRCO and RC. Likewise, construction with dewatering activities can be conducted when there is contaminated groundwater as long as the owner complies with the RC which typically requires that a plan approved by FDEP's DWM must be in place to address and ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated. However, prior to a property owner fully developing plans for any construction that may interfere with an engineering control or conflict with restrictions in the IC, the owner should contact the District or Tallahassee office that originally approved the IC and provide information about the owner's plans. At that time the FDEP can provide assistance regarding what measures must be in place to protect human health and the environment. Once construction or development activities are complete, the owner and the FDEP can evaluate whether or not the IC needs to be changed or RC amended.

G. SPECIALIZED ATTACHMENTS

Attached to this guidance are documents provided to assist FDEP staff in processing a request for an IC. With the exception of those attachments that recite the Florida Statutes,

Florida Administrative Code, or documents adopted by rule, these attachments do not need to be followed exactly as provided. The FDEP is providing these samples and checklists to help facilitate the processing of IC requests. See [Attachment 1](#) for a flow chart of the RC approval process and [Attachment 2](#) for tips to reduce the review time of an IC. Not cited in the text above are the following:

[Attachment 28](#). Memorandum of Understanding Between the South Florida Water Management District and the Florida Department of Environmental Protection.

[Attachment 29](#). Superfund Restrictive Covenant Implementation Process.

[Attachment 30](#). Sample Declaration of Restrictive Covenant for Superfund Sites.

[Attachment 36](#). Sample Notice to The Department of Change in Ownership of Property Covered by an Institutional Control

[Attachment 37](#). Definitions and Acronym