## Section C.11: Owner’s Notice Requirements to Local Governments, Real Property Owners, Resident or Business Tenants, and Existing Encumbrance Holders

The property owner must provide mailednotice (does not have to be by certified mail) of FDEP's approval of the use of an IC to local governments with jurisdiction over the property subject to the IC (i.e., city, county and applicable water management district [WMD]), real property owners of any property subject to the IC, any resident or business tenant, and holders of existing encumbrances in the property materially affected by the IC (collectively called ”parties to receive notice”). Where there are multiple residences (e.g., a condominium), businesses or tenants on any property subject to the IC, the property owner may publish notice in lieu of mailing to such residences, businesses or tenants.

To facilitate notice recipients’ timely review of the notice information, FDEP encourages the notice be sent as early as possible, even as early as when the IC package is submitted for FDEP review. The property owner must provide FDEP with a copy of the mailed notice and a list of names and addresses to whom the notice was sent and the date it was sent. Alternatively, the property owner may provide FDEP with a dated copy of each notice letter mailed. For published notice, proof of such notice that meets the requirements of subsections 62-110.106(5), (8) and (9), F.A.C., must be provided. A template for published notice can be found in [Attachment 19](https://floridadep.gov/waste/waste/documents/icpg-attachment-19). Please see [Attachment 23](https://floridadep.gov/waste/waste/documents/icpg-attachment-23) for a template affidavit for proof of publication. The mailed notice should include information regarding the owner’s intention to utilize an IC and request a CSRCO from FDEP, the types and locations of restrictions to be placed on the property, and FDEP site manager contact information. In addition to the notice letter, FDEP encourages the property owner to provide parties to receive notice 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 restriction and a summary table of contaminant concentrations. See [Attachment 14](https://floridadep.gov/waste/waste/documents/icpg-attachment-14) for an example of such a diagram. If a recorded encumbrance instrument includes instructions and terms for how notice is to be provided, then those terms should be followed (i.e., as described in the mortgage, easement, or other encumbrance). 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](http://www.sunbiz.org/)]. This will ensure that notice is properly received and subsequently routed for review within the business entity’s organization. All notice, regardless of whether the encumbrance document lists a method to receive such notice, must provide receiving parties the opportunity to comment to FDEP within 30 days after receipt of the notice. Notice letter templates are provided in [Attachments 9A through 9F](https://floridadep.gov/waste/waste/content/institutional-controls-procedures-guidance).

Existing encumbrances include mortgages, liens, financial notes, leases, easements, and other recorded documents listed as encumbrances on a title search report. Notice should be provided to the holders of encumbrances when the proposed IC restrictions will materially affect the encumbrance holder's property rights (e.g., contaminated soils underneath an engineering control of two feet of clean fill exists in the same location that a utility owns a maintenance easement). In the case of mortgages, liens, leases, leaseholds, and some other types of encumbrances, the restriction will always materially affect (i.e., notice should be provided to all mortgage holders). But, some encumbrances, such as easements, will not always be materially affected. For example, if the IC forbids groundwater use, but the easement only grants access across the property surface, then notice to that easement holder is not necessary because the groundwater use restriction does not materially affect the access right though the location of each is the same. However, if the IC restricts groundwater use because of the presence of contamination, and a utility owns an easement to lay lines and maintain them in the same location, there is a possibility that the utility will make contact with the contaminated water. Therefore, the restriction materially affects the easement holders rights and requires notice to the utility easement holder.[[1]](#footnote-2) The text of each encumbrance document must be examined carefully to determine whether the encumbrance holder’s rights are materially affected by the IC restriction to the extent that notice is required. If so, then the encumbrance holder must be given notice. See subsection 62-780.220(7), F.A.C.

When non-DRC ICs are used (e.g., local ordinances, Rule 62-524, F.A.C., requirements), whether notice to all encumbrance holders is required will depend on site specific conditions. Therefore, it is important for property owners and site managers to work closely with OGC beginning early in the review process of a non-DRC IC. Additional discussion about how to evaluate site specific factors and determine notification requirements is in the “Non-DRC ICs” section (See [Section C.1](https://floridadep.gov/waste/waste/documents/icpg-section-c1)).

Subordination and Joinder and Consent Analysis

In addition to the providing notice as described above, there are some instances when a subordination of interest or a joinder and consent of a party will be required. This may be the case when some mortgages and easements encumber the property.

* + - *Mortgages.* When mortgages encumber property that will become subject to an IC, in addition to the above notice requirement, a “Subordination of Mortgage” (see [Attachment 10](https://floridadep.gov/waste/waste/documents/icpg-attachment-10)) may be obtained by the owner and recorded along with a RC, if a RC is the chosen form of IC. However, a subordination is not necessary unless the mortgage conflicts with the RC. FDEP does not expect conflicts between the RC and the mortgage to occur very often. Examples of when a 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,[[2]](#footnote-3) 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*. Property owners should review recorded encumbrances on the property to determine whether it is appropriate to seek subordination or joinder and consent from holders of recorded encumbrances. See [Attachment 12](https://floridadep.gov/waste/waste/documents/icpg-attachment-12) and [Attachment 13](https://floridadep.gov/waste/waste/documents/icpg-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:[[3]](#footnote-4)
  + - * + 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 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. However, if the easement is expected to be used only infrequently, and thereby interference with the engineering control occurs only infrequently, such as is the case with many types of utility easements, and the use of the easement does not prevent the property owner from maintaining the engineering control, then a joinder and consent may not be necessary.
        + an easement holder has the right to disturb the soil or groundwater 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 facility[[4]](#footnote-5). In cases where the stormwater easement allows continued maintenance of an existing system and such maintenance may mobilize contamination in groundwater 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 groundwater contamination. See [Attachment 12](https://floridadep.gov/waste/waste/documents/icpg-attachment-12) and [Attachment 13](https://floridadep.gov/waste/waste/documents/icpg-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](https://floridadep.gov/waste/waste/documents/attachment-9-actual-notice-intent-approve-use-institutional-control-easement)A for a template notice letter.

1. It is important to note that the providing of notice to an encumbrance holder is only for informational purposes to allow for the encumbrance holder’s internal documentation of the location of existing contamination. The creation of an IC at the same location as an encumbrance does not alter the property rights or existing responsibilities of that encumbrance holder. [↑](#footnote-ref-2)
2. Engineering controls that rely on continuing or intermittent operation of a mechanical system (e.g., hydraulic control by actively pumping) may be suitable interim controls but are not suitable as permanent engineering controls. [↑](#footnote-ref-3)
3. The examples of a 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 conflict may exist. Whether or not a 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. [↑](#footnote-ref-4)
4. Remember, in evaluating whether to pursue a CSRCO through use of 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. [↑](#footnote-ref-5)