**FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**Division of Waste Management**

**INSTITUTIONAL CONTROLS**

**PROCEDURES GUIDANCE**

DRAFT – \_\_\_\_\_\_\_\_\_\_\_2014

Please note this is a working copy of the ICPG and the notes, comments and suggestions herein are for discussion purposes.

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# Preface

This document has been prepared as guidance for the Florida Department of Environmental Protection (FDEP), 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, the District Office Waste Cleanup Programs, and the OGC. If you have any questions regarding the information contained in this document, please contact the appropriate program or enforcement 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 an attorney with the OGC, a Program Administrator for the Petroleum Restoration Program or the Waste Cleanup Program in Tallahassee, or a District Waste Program Administrator.

# A. WHAT ARE INSTITUTIONAL CONTROLS?

Sections 376.301(22) and 376.79(10), 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 include government controls such as zoning, local ordinances, permits, comprehensive land use planning and management, and FDEP consent orders.

ICs are non-engineering legal and legislative controls intended to affect human activities in such a way as to prevent or reduce exposure to contamination. The IC contains restrictions or prohibitions such as land and resource use restrictions, and well-drilling prohibitions. Two common forms of ICs are Restrictive Covenants and Conservation Easements. Each of these ICs 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 on Restrictive Covenants, since those are the most common form of ICs used within the DWM. However, additional provisions have been added in light of new DWM guidance on options for alternative ICs that do not require recording (see Section C below).

*The most common form of IC used by the Division is the Restrictive Covenant (RC).*

# 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]](#footnote-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]](#footnote-2) These rules also authorize the use of ICs to achieve FDEP approval for a Site Rehabilitation Completion Order with Conditions (SRCO with Conditions, conditional SRCO, or SRCOC).[[3]](#footnote-3) In determining whether a conditional SRCO is appropriate, please look to these rules and any FDEP guidance document in conjunction with the technical assessment and, if applicable, remediation information supplied regarding the contaminated site. Then determine the 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);
* Alternative soil cleanup target levels (ASCTLs) have been derived for contaminated property based upon site-specific conditions of exposure (for example, an age restricted community);
* 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 contamination[[4]](#footnote-4)).

Specifically, when selecting restrictions and requirements for an IC, the applicable rules should be followed. Work closely with the property owner, or his or her representative, to find a mutually satisfactory control. Any IC that involves the recording of a document affecting the title to, and use of, a property (such as a Restrictive Covenant) must be executed by the owner of the contaminated property. Under certain circumstances, the Department may agree to rely on non-recorded institutional controls to close a site with contamination beyond the source property boundary (under RMO III). However, pursuant to Subsection 62-780.680(3), F.A.C., even when a non-recorded IC is proposed to be relied on, so that a recorded Restrictive Covenant is not required on the down-gradient impacted property, any closure involving a proposed IC beyond the property boundary of the source property must be consented to by the current real property owner(s) of all affected properties subject to the IC. This requirement applies to all ICs, even those that are not recorded. In these cases, an actual notice letter should be sent to current real property owner(s) of all affected properties to provide an opportunity to those owners to comment, consent or object (Attachment 9). Restrictions on the use of the property cannot be imposed unilaterally by the FDEP.[[5]](#footnote-5)

## 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 recorded to ensure that the EC is properly maintained and the FDEP has access to inspect the EC.[[6]](#footnote-6)

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

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.” 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 to the FDEP in the formulation of the text of the IC to ensure sufficient protection of human health and the environment.[[7]](#footnote-7)

## 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 PRSR) to adhere to these requirements as a condition of the SRCO.

As required by Chapter 62-780, F.A.C., the ECMP in 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.

*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.*

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.

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 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 (RMO) I have been met, then a termination of the Interim IC should be implemented (with an RC, the termination of the RC must be 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. As noted above, this is permissible only if the affected non-source property owner consents to the imposition of the IC on its 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 the appropriate program or enforcement attorney 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, and the SRCO (and Restrictive Covenant, if applicable) should be modified to reflect the situation. Additionally, the IC for the non-source property should be prepared (if applicable)[[8]](#footnote-8) and reviewed, along with the title work, and any other necessary documentation for that 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 codes[[9]](#footnote-9) 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. The use of NAICS sector codes to define restricted uses is not mandatory, however, 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.

In addition, 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 environmental 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 aquifer, size and location of the contaminant plume;
* The proposed use of the aquifer to be allowed;
* 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.[[10]](#footnote-10) 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 G.4: Access Easement Agreement).

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

When it is appropriate to restrict less than the entire parcel, the owner can define the area to be restricted by using 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 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.[[11]](#footnote-11)

## “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 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, the FDEP will accept an RC[[12]](#footnote-12) as the Institutional Control.[[13]](#footnote-13) See Attachments 3 and 5, Sample Declaration of Restrictive Covenant (Forms A and B) and Restrictive Covenant Checklist.[[14]](#footnote-14) The FDEP is less willing to accept other forms of Institutional Controls.[[15]](#footnote-15) However, on a site-specific basis, the FDEP will consider alternative ICs that do not require the recordation of an RC, such as government controls, as described in the section below. In some instances, FDEP will request “layered” ICs.[[16]](#footnote-16)

## Governmental Controls as Alternative ICs (i.e., no RC required)

In November 2013, the DWM issued a memorandum on “Site Closure with Conditions” and included options for reliance on governmental controls that do not require an RC, provided the governmental control achieves the necessary degree of restriction on access to the contamination to meet the criteria of Subsections 62-780.680(2) or (3), F.A.C. Examples given include county or municipal ordinances prohibiting the installation of water wells in urban areas and mandating that any new well be connected to the county/municipal water delivery system. Additional guidance is provided here to clarify these options.

It is important to note that under existing guidance, other than cases involving MOAs between the FDEP and other institutional or governmental entities, at the present time, these options can 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 should be recorded to ensure the type of land use remains in perpetuity, or to ensure 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 a local ordinance or other governmental control is adequate to prevent exposure to contaminated groundwater include the following:

* The nature and concentrations of contaminants;
* The size and location of the contaminant plume relative to existing improvements on the property;
* The scope and coverage of the local ordinance:
  + Requirement for connection to county/municipal water delivery system for both potable and irrigation water;
  + Prohibition on installation of new wells, both potable and irrigation;
* Status of site development and existing infrastructure for provision of potable and irrigation water;
* 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 this type of alternative IC, the Person Responsible for Site Rehabilitation (PRSR) should submit the same information as in a typical RC package including the Deed, Legal Description, Title Work, Notice to Encumbrance Holders, etc., as described below. The only difference is that instead of a draft RC, the PRSR should submit electronic copies of all relevant local ordinances and governmental controls upon which they are relying as the IC for the contaminated site. Since some local ordinances are quite lengthy, the PRSR should direct the FDEP to the specific provisions that are relevant to restricted use of groundwater.

FDOT Memorandum of Agreement

FDEP and FDOT have entered into a MOA 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 in the public records of the county on the affected FDOT property. However, closure in reliance on this MOA requires additional actions by both the site/project manager and the owner of the source property, as described below.

The PRSR submits a conditional SRCO proposal to FDEP including for the adjacent contaminated FDOT Right of Way (ROW) property. FDEP reviews the proposal and then requests that FDOT add a ROW Map Note regarding the existing petroleum contamination. FDOT acknowledges the request by letter and then records a Map Note on the ROW Map consisting of FDEP's Request Letter along with summaries of soil and groundwater data, surveys and other documents detailing the contamination that remains. FDEP then issues the conditional SRCO, and the PRSR records the Map Note reference in the County Records Office.

## Site/Project Manager Review

The FDEP or local government site/project manager[[17]](#footnote-17) (including the contracted or delegated local government site/project manager) in conjunction with the designated 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/or remediation that a conditional closure is appropriate under Chapter 62-780, F.A.C.[[18]](#footnote-18) 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 prepare a draft of the IC. 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.

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 by the owner or the owner’s representative, 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 by the owner (See Attachment 5, Declaration of Restrictive Covenant 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 thanmust 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. However, if the title work is older than one year, a title affidavit is not sufficient and updated title work should be submitted. The site/project manager should then route those documents to the 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/project 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:

* water use restriction; and/or
* requirement to maintain engineering control (e.g., soil or synthetic cap); and/or
* land use restrictions.[[19]](#footnote-19)

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. If the names do not match, additional information should be provided to clarify ownership.[[20]](#footnote-20)

### Legal Description.

* A written legal description of the entire parcel should be provided regardless of whether the entire parcel is being encumbered or only a portion of the parcel will be encumbered. If the entire parcel is being encumbered, and the PRSR is using an 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.[[21]](#footnote-21) If they are not the same in all three places, an explanation should be provided. FDEPstaff may send Surveysto the FDEP Bureau of Survey & Mapping for confirmation of the legal description. Additionally, when only a portion of the parcel will be encumbered, 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 an 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,” “Capped Area,” “Location of Slurry Wall,” “Restricted Area”)[[22]](#footnote-22). 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*.*[[23]](#footnote-23) If only a part of the property will be encumbered by the RC and the restricted area does not abut a publically-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.

### 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.[[24]](#footnote-24) 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.

### Owner’s Notice to Existing Encumbrance Holders.

* + The property owner should provide notice to holders of existing encumbrances, which include recorded mortgages, liens, (or other financial notes), recorded leases, leaseholds or easements in the property to be encumbered by an IC (collectively referred to as encumbrance holders) where the proposed restrictions in the IC encompass the recorded encumbrance. 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. 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 send notice as well to the registered agent of the business entity which may be identified on the Florida Department of State Division of Corporation Sunbiz 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 an 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 13.
* Examples of situations wherein a property owner may wish to seek a Joinder and Consent include, but are not limited to, the following:[[25]](#footnote-25)
* + - * + 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.
        + 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 *or the risk of direct exposure of the soil contamination 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[[26]](#footnote-26). 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 Attachments 12 and 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.

### 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. Owners with a State Lands lease must contact the FDEP Division of State Lands since that division also must approve of the conditional closure and restrictions. See Attachments 15-18 if the property to be restricted is leased from the State of Florida.

## 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 whether each encumbrance intersects with the restricted area and what right(s) the encumbrance grants to the holder. 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) with a proposed RC, then the owner should acquire a subordination of encumbrance (for mortgages or easements) or a joinder and consent (easements only) to the RC. See Attachments 12 and 13, Sample Subordination of Encumbrance, Sample Joinder and Consent of Encumbrance

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 Permits.

* 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 of IC; e.g., an RC, a local government ordinance, MOA; etc.
  + Type of restriction, e.g., water use restriction, cap requirement, land use restriction
  + Restrict entire property or partial 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
  + Brief site history: e.g., past operations; date of discharge

## 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 contact the owner or the owner’s representative, with copy to the site/project manager, to obtain the missing documents and forward them to the OGC. 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, 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.

Typically, the owner will reply with a new draft of the RC, if applicable, additional supporting documents, if requested, and a letter answering questions. The OGC lawyer 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 lawyer 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.

***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}*

## Notice

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 the following manner:

* Constructive Notice -to local governments with jurisdiction over the property where the contaminated site is located, and to residents of any property subject to the proposed IC by publication of a Constructive Notice of Intent to Approve Use of Institutional Controls. See Attachments 19-23; and
* Encumbrance (Lien) Notice - to existing mortgage holders, holders of recorded leases and easement holders identified in the Title Report, by actual notice made by the owner to the interest holder. See above discussion under the Title Section and Attachment 9.

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 timely 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, the owner should sign the RC, and if applicable the Access Easement Agreement, and return it to the site manager. See Attachment 27, Examples of Signature Blocks and Certifications. The site manager will provide it to OGC and the reviewing attorney will sign the RC as being in correct form and 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

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.[[27]](#footnote-27) The property owner is responsible for all filing fees at all petroleum-contaminated sites, whether eligible for state-funded site rehabilitation or not; and additionally, the property owner is responsible for paying the filing fees for privately-funded cleanups of non-petroleum contaminated sites. See Attachment 24, Statutory Recording Requirements.

## Post-recording

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.

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

If the PRSR has proposed an alternative IC, such as reliance upon a local ordinance or MOA restricting groundwater use, 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 local ordinance upon which the PRSR relies as the IC for the contaminated site. Additionally, a statement will be added to the reopener language in the SRCO to state that if the local ordinance provisions relating to the restricted groundwater 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 property encumbered with an IC is entered into the FDEP’s Institutional Controls Registry (ICR) so that the controls can be audited and enforced. 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.

To allow easy access by the FDEP Districts as well as contracted local governments, this registry is maintained on the FDEP’s DWM home page. The Registry web address is http://www.dep.state.fl.us/waste/categories/brownfields/pages/ICR.htm. (This guidance document is located in the same place under “ICR Guidance.”) Please follow the FDEP locational data standards for GIS submittals found at http://depnet/gis/geodata/index.htm.

Should any FDEP employee obtain information that a property with an IC has been sub-divided (as is often the case with former military properties and larger tracts), a new ICR Data Sheet must be completed indicating that the current controls now apply to multiple parcels and addresses. The new addresses/parcel numbers and other data must 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 must be completed reflecting that change.

*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.*

## 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 over-looked. 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 should immediately pursue enforcement. Enforcement of these provisions should proceed in the same manner and under the same authorities as enforcement cases are handled for other violations.

Currently, the Waste Cleanup Program is implementing the IC/EC Audit Program (ICECAP). The Program staff and its contractors are conducting audits of all non-petroleum sites subject to IC/EC. These audit findings will be used to pursue enforcement for non-compliance, as appropriate.

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, you 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 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).

An RC should only be removed by execution of a termination of the RC by the owner and 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.

This 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.

# 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 32. Definitions and Acronyms

# ATTACHMENTS

## ATTACHMENT 1: FLOW CHART OF RESTRICTIVE COVENANT APPROVAL PROCESS

**Does the RC package comply with checklist (see Attachment 5)**

**FDEP PM submits RC packag*e to OGC with* cover memo (see sample in Attachment 6)**

**Issue Conditional SRCO**

**Yes**

**Does the OGC attorney have questions or comments?**

**ICPG**

**OGC review**

**FDEP PM submits information to IC registry, notifies OGC**

**No**

**Yes**

**RPO records RC, submits proof to FDEP PM**

**COMPLETE**

**Interim RC?**

**Director’s Signature**

**RPO submits draft RC package to FDEP PM**

**RPO publishes notice of FDEP’s intent to approve use of IC and/or EC**

**FDEP PM reviews package for completeness**

**Yes**

**No**

**RPO responds to FDEP comments and returns RC package to FDEP**

**No**

**RPO signs and submits final RC document to FDEP**

**OGC signs and transmits final RC with memo to PM for signature by Director**

**RESTRICTIVE COVENANT APPROVAL PROCESS**

**Key: FDEP** - Department of Environmental Protection **OGC** - Office of General Counsel **RC** - Restrictive Covenant **SRCO** - Site Rehabilitation

**IC** - Institutional Control **PM** - Project Manager/Site Manager **RPO** - Real Property Owner Completion Order

## ATTACHMENT 5: IC CHECKLIST

Does site meet statutory and rule requirements that allow an SRCO with conditions? Yes \_\_\_ No \_\_\_

What restrictions are necessary to reduce or eliminate the risk of exposure? Consider all affected media (i.e., groundwater, soil, surface water, and/or sediments), and determine which type of restrictions are required for each affected medium.

The following technical checklist applies to RMO II sites, which most commonly have contaminated groundwater and/or soil. For RMO III sites, please explain in the cover memo for the RC package how the rule criteria are met and what restrictions are being proposed for the source property and any other affected properties. Decisions for RMO III contaminated sites are very site-specific and may be based on risk assessment analysis or include properties other than the source property; therefore, these sites do not lend themselves to a simple checklist for the technical aspects of site closure. Additionally, the checklist below is a shortened summary of the details provided in Subsection 62-780.680(2), F.A.C. Please refer to the rule for the specific criteria that must be met.

If **groundwater** is contaminated:

\_\_\_\_\_Is an interim control proposed?;

**OR**

\_\_\_\_\_(a)Is the plume stable or shrinking?

\_\_\_\_\_(b) Is the plume contained within the property boundaries?

\_\_\_\_\_(c) Is the plume less than ¼ acre in size? If not, then which of the following alternative scenarios applies (check one or more, as applicable):

(\_\_\_) groundwater meets low yield or poor quality designation. Please refer to guidance available at http://www.dep.state.fl.us/waste/quick\_topics/publications/wc/Guidance\_for\_Evaluation\_of\_Low\_Yield\_Poor\_Quality\_Criteria.pdf;

(\_\_\_) an engineering control (EC) prevents plume migration. If an EC is used, e.g., a slurry wall, it should be in place and PE-certified, and it should be identified on an exhibit to the RC (usually Exhibit B) that is a Survey showing the size and location of the EC including State Plane Coordinates or geographical coordinates for four corners .

(\_\_\_) plume affects or may potentially affect *only* a marine surface water body.

\_\_\_\_\_(d) Does the Property currently include stormwater swales, stormwater detention or retention facilities or ditches? If so, the PRSR should include an exhibit to the RC (usually Exhibit B) that is a survey map identifying the size and location of the existing stormwater features. The RC should include language stating that these existing stormwater features should not be altered, modified or expanded without prior FDEP Division of Waste Management approval in writing, followed by a recorded amendment to the RC.

\_\_\_\_\_\_\_(e) If the PRSR proposes reliance on an alternative form of IC (such as local ordinance or MOA), has the PRSR provided documentation demonstrating reliance on the proposed IC is adequately protective of human health and the environment based upon site conditions.

If **soil** is contaminated:

\_\_\_\_\_(a) **Direct Exposure** criteria have been met. Check one or more of the following, as applicable:

(\_\_\_) The Chapter 62-777, F.A.C., commercial/industrial SCTLs are met;

(\_\_\_) An engineering control (EC) prevents direct exposure to contaminated soils (which may exceed the commercial/industrial SCTLs with an EC) [See \*Note below];

(\_\_\_) The soil meets alternative SCTLs using site-specific soil properties;

(\_\_\_) Soil concentrations of the site-specific fractions of TRPHs do not exceed the Chapter 62-777, F.A.C., commercial/industrial SCTLs for the TRPH fractions;

(\_\_\_) The 95% UCL approach is utilized to calculate average soil contaminant concentrations. If the 95% UCL approach is used, please describe this in the cover memo and include the exposure unit and parcel size.

\_\_\_\_\_(b) **Leachability** criteria have been met. Check one or more of the following, as applicable:

(\_\_\_) Soil contaminant concentrations do not exceed the alternative leachability-based SCTLs established pursuant to Ch. 62-777, F.A.C., Figure 8;

(\_\_\_) Direct leachability testing (e.g., SPLP or TCLP) or other acceptable approach was used to meet rule criteria; please refer to guidance at http://www.dep.state.fl.us/waste/quick\_topics/publications/wc/GuidanceforDeterminingLeachabilitybySPLPAnalysisDraftVersion1-8.pdf;

(\_\_\_) An EC that prevents water infiltration has been implemented (e.g., an *impervious* cap such as a concrete slab, parking lot, building foundation, etc.) [See \*Note below];

(\_\_\_) The soil meets alternative SCTLs using site-specific soil properties;

(\_\_\_) Soil concentrations of the site-specific fractions of TRPHs do not exceed the alternative leachability-based SCTLs for the TRPH fractions;

(\_\_\_) PRSR has demonstrated, based on site-specific conditions and at least a year of groundwater monitoring data that contaminants will not leach at concentrations that exceed the rule criteria.

\***Note**: If an EC is used to address either Direct Exposure or Leachability for soil contamination, it must be in place and PE-certified, and it should be identified on an exhibit to the RC (usually Exhibit B) that is a Survey showing the size and location of the EC and including State Plane Coordinates or geographical coordinates for four corners.

\_\_\_\_\_If soil contamination presents a Direct Exposure threat, and the PRSR is not utilizing an EC, then the Land Use Restriction language listing the prohibited uses is included in the RC.

\_\_\_\_\_If the PRSR has elected to use an EC to prevent exposure to contaminated soil, then the Land Use Restriction language has been deleted from the RC.

Restriction Location: Entire Property \_\_\_\_\_\_\_\_\_\_\_\_ Portion of Property \_\_\_\_\_\_\_\_\_\_\_

Why are these restrictions adequate? (Found in letter to owner preliminarily agreeing to use of conditional SRCO.) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SRCO will be issued after RC recorded or alternative IC has been approved (Final RC). \_\_\_, or

SRCO will *not* be issued after RC recorded or alternative IC has been approved (Interim RC). \_\_\_

If a restrictive covenant is appropriate, the following supporting documents should be provided to the FDEP OGC[[28]](#footnote-28):

\*Copy of the deed is included. Yes \_\_\_ No \_\_\_

\*Does the name of the owner/grantee on the deed match the name of the person who claims to be the property owner? Yes \_\_\_ No \_\_\_

\*Property ownership confirmed on county internet web site. Yes \_\_\_ No \_\_\_

Legal description of the entire property (Exhibit A to covenant) is included even if only a portion of the property will be encumbered/restricted. Yes \_\_\_ No \_\_\_

If only a portion of the parcel will be restricted, then:

A Specific Purpose Survey, Boundary Survey or Sketches to Accompany Descriptions (as defined under Chapter 5J-17, F.A.C.) prepared using the minimum technical standards (MTS)(collectively referred to as a “Survey”) should be provided, and it should include four corners labeled with the State Plane Coordinates (SPC) system or geographical coordinates, clearly labeling the attachment as Exhibit “B,” and labeling the encumbered area on the attachment as “restricted area” or another phrase that tracks the RC language] (Exhibit B to covenant).

Yes \_\_\_ No \_\_\_ N/A \_\_\_

\*Title Report is included [Title search commences with instrument constituting root of title under Marketable Record Title Act (MRTA) that is at least 30 years old and includes review of all subsequently recorded instruments, and prior recorded instruments that are not eliminated by MRTA.] Yes \_\_\_ No \_\_\_

\*Tax Lien information – either that lien has been removed or copy of lien—is included.

Yes \_\_\_ No \_\_\_ N/A \_\_\_

\*Easements are included (list of any easements & copies of recorded easements.)

Yes \_\_\_ No \_\_\_ N/A \_\_\_

\*A Diagram of the location of the easements in relation to the restricted area is included.

Yes \_\_\_ No \_\_\_ N/A \_\_\_

\*Leases – copies of all recorded leases, subleases and assigned leases are included.

Yes \_\_\_ No \_\_\_ N/A \_\_\_

\*UCC Liens – copies of and releases from any liens are included.

Yes \_\_\_ No \_\_\_ N/A \_\_\_

A completed and signed Subordination or Joinder and Consent is included only for any liens, leases, easements or other encumbrances that are in material conflict with the provisions of the RC. Yes\_\_\_No\_\_\_N/A\_\_\_

A completed and signed Subordination of Mortgage is included only for each financial institution or lender of existing mortgages for which a material conflict exists with the provisions of the RC. Yes \_\_\_ No \_\_\_ N/A \_\_\_

Is 95% UCL analysis used? Yes \_\_\_ No \_\_\_

If yes, what is the exposure unit and parcel size? \_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\*Has the PRSR provided actual notice of the proposed IC/EC to **all** mortgagors and holders of liens, leases or other encumbrances on the property?

Yes\_\_\_\_ No\_\_\_

\*Has the PRSR published constructive notice regarding use of IC/EC based upon preliminary approval of the Conditional No Further Action Proposal?

Yes \_\_\_ No \_\_\_

\*If yes, where \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and when \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_?

\*Has the 30-day comment period elapsed? ­­­­­­­Yes \_\_\_ No\_\_\_

\*Cover memo to Tallahassee is included. Yes \_\_\_ No \_\_\_

Site/Project Mgr. Name\_\_\_\_\_\_\_\_\_\_\_

Address \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Email\_\_\_\_\_\_\_\_\_

Phone\_\_\_\_\_

Prop. Owner Rep. Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Email\_\_\_\_\_\_\_\_\_

Phone\_\_\_\_\_\_

Prop. Owner Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Email\_\_\_\_\_\_\_\_\_

Phone\_\_\_\_\_\_

Contractor Name \_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_

Address\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Email\_\_\_\_\_\_\_\_\_

Phone\_\_\_\_\_\_

**MAIL:**

* District-lead sites – mail directly to FDEP OGC Tallahassee.
* Contracted-local-government-lead sites – mail directly to the FDEP Local Program Coordinator who will contact the appropriate Tallahassee technical support for review prior to OGC review.

## ATTACHMENT 7: SAMPLE SITE/PROJECT MANAGER LETTER TO PERSON RESPONSIBLE FOR SITE REHABILITATION

This document is to be used by the site/project manager to concur with a recommendation for conditional closure, to notify the property owner/person responsible for site rehabilitation about the needed restrictions, and to provide information about the location of the Institutional Controls Procedures Guidance document.

{Date}

[Mr. or Ms. or . . .] {Property Owner’s Name}

{Property Owner’s Company (if applicable)}

{Property Owner’s Address}

{City, State Zip Code}

Subject: Acknowledgment of Intent to Propose Conditional Closure

{Facility Name or Contaminated Site Name}

{Street Address}

{City, County}

FDEP Facility ID# or BSRA ID# or other FDEP Tracking Number {xxxxxxxxx}

Discharge Date[s]: {If known, list date(s) (only list the date(s) of the discharge(s) for which a conditional closure will be issued)}} [(petroleum only: select one for each discharge, as applicable) (ATRP) (EDI) (IVPSSRP) (PCPP) (PLRIP) (Non‑program)]

Dear [Mr. or Ms. or . . .] {Property Owner’s Last Name}:

The {reviewing entity, e.g., Petroleum Restoration Program (PRP), name of county program, District Office, etc.} has reviewed the {Type of Report}*,* dated {Date} (received {Date}), [prepared by {Consulting Company}, submitted or prepared and submitted by {Consulting Company}] for the {name of contaminant, e.g., petroleum products, chlorinated solvents, arsenic, etc.} discharge[s] referenced above. The {reviewing entity} is prepared to issue a Conditional Site Rehabilitation Completion Order (SRCO) for this discharge [or these discharges] provided that {Select appropriate option(s): a Declaration of Restrictive Covenant, with the following restrictions on the use of the property, is completed and recorded in the county land office where the property deed is recorded for the above-referenced property AND/OR based upon reliance on an approved alternative IC}:

1) {Restriction}.

2) {Restriction}.

{3) Alternative approved non-recorded Institutional Control}

{Include the following only when a Restrictive Covenant will be used:

Enclosed for your reference is a Sample Restrictive Covenant to be used as an example when preparing a draft covenant.} You may also access the Department’s *Institutional Controls Procedures Guidance* (ICPG) document in its entirety by going to www.dep.state.fl.us/waste/categories/pcp. The document title “Institutional Controls Procedures Guidance” appears in the right margin menu [Include the following if a Restrictive Covenant will be executed: and there are PDF as well as Word versions to expedite preparation of the Declaration of Restrictive Covenant. {Signor, e.g., XXXX, Program Administrator, or XXXX, District Director, etc.}, will sign the Declaration of Restrictive Covenant on behalf of the {reviewing entity}.}

The electronic file for this site is located in the FDEP’s Oculus electronic document system located at http://dwmedms.dep.state.fl.us/Oculus/servlet/login. In order to log in, type “netuser” as both the user name and password. On the left hand side of the screen, select the appropriate catalog based on the type of contaminated site (e.g., “Storage Tanks;” “Waste Cleanup;” or “Hazardous Waste”); search by “Property,” and select the “Facility-Site ID” under “Property.” To find the file, enter the facility identification number and click on “Search.” (Note: for petroleum sites, enter only the last seven (7) digits of the FAC ID#; for other sites enter the entire number.) If there are a large number of records you may want to sort them in chronological order by selecting “Document Date” and clicking on “Refresh.”

Please utilize the Restrictive Covenant Checklist found in Attachment 5 of the ICPG to help prepare your submittal for FDEP review. The following information should be provided:

1) A copy of the property’s deed.

2) A copy of the property’s legal description.

3) If proposing a partial encumbrance, then a copy of the legal description for the part of the property that will be restricted as Exhibit B to the restrictive covenant and a Specific Purpose Survey, Boundary Survey or Sketch and Description of the restricted area, as defined under Chapter 5J-17, F.A.C. and prepared using the minimum technical standards (MTS) that includes all corners of the restricted area labeled with the State Plane Coordinates (SPC) system or geographical coordinates.

3) An Ownership and Encumbrance Report, Title Insurance Commitment or Title Insurance Policy that reflects all parties having an interest in the Property, including owners, lienors or easement holders. The search should normally commence with the instrument constituting the root of title under the Marketable Record Title Act (MRTA) (evidence of title that is at least 30 years old) and should include a review of all subsequently recorded instruments that are not eliminated by MRTA.

4) Copies of all documents showing an interest in the property (e.g., mortgages, leases, liens, easements, etc.).

5) A Survey of the location of these interests in the property in relation to location of the proposed restricted area.

6) Copies of the notices required in Attachments 19-21, of the ICPG, as appropriate, or the draft notice and schedule to submit such notices.

7) Copies of the “Actual Notice of Intent to Approve Use of Institutional Controls” sent to each recorded mortgage holder, easement holder and leaseholder along with evidence of receipt of such notice. See Attachment 9 of the ICPG.

8) If a Restrictive Covenant will be used as the IC, then a copy of the draft RC. If the PRSR proposes reliance on an alternative IC, then copies of the relevant documents and information in support of the alternative IC.

Please provide the above documentation to the {reviewing entity}. Should you have any questions, please contact me at {(xxx) xxx‑xxxx} or at the letterhead address.

Sincerely,

{Site/Project Manager’s Name}

{Site/Project Manager’s Title (optional)}

{Reviewing Entity Section}

{Program Name of Reviewing Entity or District}

{email address}

{If applicable: Enclosure (Sample Restrictive Covenant)}

ec: {Consultant’s Name, Consultant’s Company, Company Address, City, State Zip Code} – {e-mail address}

File

## ATTACHMENT 9: Actual Notice of Intent to Approve Use of

## Institutional Control for Easement Holders & Financial Institutions

A copy of the following notice should be provided to all holders of existing mortgages, easements or recorded leaseholds within the area of any contaminated site for which conditional closure is proposed (whether using an RC or alternative approved ICs). The Department should be provided with complete copies of the notices that have been made, together with proof of delivery of the notice to each interest holder. Notice should be made in accordance with the terms for notice set forth in the recorded instrument, provided, however, if proof of delivery is not required therein, then also by certified mail, return receipt requested, signed acknowledgement of receipt obtained by a courier or delivery service, or other commercially recognized method.

<ON LETTERHEAD OF THE PRSR, if applicable>

*{Name of Interest Holder}*

*{Address of Interest Holder}*

Re: Notice of Intent to Conditionally Close a Contaminated Site Using an Institutional Control

Dear *{insert name or To whom it May Concern]:*

You are receiving this notice because you are holder of the following recorded instrument: {*Insert Name and date of Instrument, along with recording information taken from the Title Report}, (*a copy of which is attached hereto), on certain property owned by *{Owner’s name}* (“Owner”).

In connection with certain environmental site rehabilitation activities on the property, the person responsible for site rehabilitation (PRSR) has requested that the Florida Department of Environmental Protection (FDEP) approve a No Further Action Proposal with Institutional Controls or with Engineering and Institutional Controls and issue a Site Rehabilitation Completion Order with controls for a contaminated site relating to this property. {PRSR} is seeking this order in reference to FDEP Site ID # {site id #} {facility name, address} and intends to restrict exposure to contamination in the following manner: {describe the type of controls such as land use restrictions, water use restrictions, caps over contaminated soil, etc.} that {will be set forth in a Declaration of Restrictive Covenant between the Owner and the FDEP that will further encumber the property; ***or***… by reliance on existing {{insert citation to city/county local ordinance, MOA, etc.}} that require connection to municipal water, prohibit groundwater use in the area, etc., as applicable}.

Attached to this letter is a summary of the history of the contamination addressed by the Institutional Control, including the type of contamination, the affected media and the location of the contamination. Please contact the undersigned if you have any questions regarding this notice. In addition, you may contact {site/project manager’s name & phone number} to discuss the status of the work. Complete copies of the No Further Action Proposal, the {draft restrictive covenant *or* the alternative IC (such as ordinance or MOA) that is proposed to be relied upon}, and the FDEP’s preliminary evaluation are available for public inspection during normal business hours 8:00 a.m. to 5:00 p.m. Monday through Friday, except legal holidays at FDEP {address of location of documents} or online at http//dwmedms.dep.state.fl.us/Oculus/servlet/login. Please use the FDEP \_Com, Facility or Project number listed on the FDEP’s preliminary evaluation to communicate with the FDEP or the online document management system (Oculus).

**Holders of recorded interests have 30 days from receipt of this notice to provide comments to the FDEP. Within the 30-day comment period, holders of recorded interests may request additional time for review. Such comments should be sent to FDEP {name and address of person who should receive comments and person’s email address}.**

Yours sincerely

cc: {FDEP name and address of person who should receive comments}

## ATTACHMENT 19: TEMPLATE for CONSTRUCTIVE NOTICE OF INTENT TO APPROVE USE OF INSTITUTIONAL CONTROL

Pursuant to subsections 62-780.220(7) and .680(8), F.A.C., the Person Responsible for Site Rehabilitation (PRSR) is required to provide constructive notice of the Department’s intent to approve the PRSR’s No Further Action Proposal with Controls (either an institutional control or both engineering and institutional controls). The PRSR must provide the notice prior to the Department’s approval of such proposal (but within 30 days after the Department’s conditional approval of the proposal). Pursuant to subsection 62-110.106(5), F.A.C., the PRSR must publish the notice at its expense in the legal advertisements section of a newspaper of general circulation (i.e., meeting the requirements of ss. 50.011 and 50.031, F.S.) in the county in which the effects of the Department’s proposed action will occur. The PRSR must provide proof of publication within seven days of the publication by furnishing the Department with a uniform affidavit in substantially the form prescribed in s. 50.051, F.S. The following template meets this constructive notice requirement. Replace the information inside the brackets with information specific to the site.

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL PROTECTION

NOTICE OF PROPOSED AGENCY ACTION

The Florida Department of Environmental Protection (FDEP) gives notice that it proposes to approve a No Further Action Proposal with Institutional Controls or with Engineering and Institutional Controls and issue a Site Rehabilitation Completion Order with controls for a contaminated site. {PRSR} is seeking this order in reference to FDEP Site ID # {site id #} {facility name, address} and intends to restrict exposure to contamination in the following manner: {describe the type of controls such as land use restrictions, water use restrictions, caps over contaminated soil, etc.}.

Complete copies of the No Further Action Proposal, the proposed Institutional Control {i.e., a draft restrictive covenant, a local ordinance restricting water use, etc.}, and the FDEP’s preliminary evaluation are available for public inspection during normal business hours 8:00 a.m. to 5:00 p.m. Monday through Friday, except legal holidays at FDEP {address of location of documents}.

Local governments with jurisdiction over the property subject to the Institutional Control, real property owner(s) of any property subject to the Institutional Control, and residents of any property subject to the Institutional Control have 30 days from publication of this notice to provide comments to the FDEP. Such comments must be sent to FDEP {name and address of person who should receive comments and person’s email address}.

## ATTACHMENT 20: Template for Constructive NotICe OF INTENT TO APPROVE USE OF iNTERIM INSTITUTIONAL CONTROL

**The following template meets the constructive notice requirement for the use of an interim IC. Replace the information inside the brackets with information specific to the site.**

**STATE OF FLORIDA**

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**NOTICE OF PROPOSED AGENCY ACTION**

The Florida Department of Environmental Protection (FDEP) gives notice that it proposes to approve use of an interim institutional control in the form of a Declaration of Restrictive Covenant at a contaminated site while site rehabilitation is ongoing. {PRSR} is seeking this Declaration in reference to FDEP Site ID # {site id number}, {facility name, address} and intends to restrict exposure to contamination in the following manner: {describe the type of controls such as land use restrictions, water use restrictions, caps over contaminated soil, etc.}.

Complete copies of the draft Declaration of Restrictive Covenant, and FDEP’s preliminary evaluation are available for public inspection during normal business hours 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays at FDEP {address of location of documents}.

Local governments with jurisdiction over the property subject to the institutional control, real property owner(s) of any property subject to the institutional control, and residents of any property subject to the institutional control have 30 days from publication of this notice to provide comments to FDEP. Such comments must be sent to FDEP {name and address of person to receive comments and person’s email address}.

1. Sections 376.30701(2)(d), 376.3071(5)(b)4, 376.3078(4)(d) and 376.81(1)(d), F.S. [↑](#footnote-ref-1)
2. Also see Rule 62-780.650 and 62-780.680, F.A.C. [↑](#footnote-ref-2)
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. [↑](#footnote-ref-3)
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. [↑](#footnote-ref-4)
5. There will be exceptions to this limitation, for example, by court order in the case of a site under FDEP enforcement. Special instructions for enforcement proceedings are not addressed in this guidance document. If necessary, please coordinate with the appropriate FDEP enforcement attorney. [↑](#footnote-ref-5)
6. See Attachment 31: Engineering Controls Reporting and Monitoring. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. 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. [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. 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.  [↑](#footnote-ref-10)
11. 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. [↑](#footnote-ref-11)
12. Restrictive covenants and deed restrictions are similar. The difference lies 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 is enforceable by the seller against the buyer and those successive owners of the property. 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). [↑](#footnote-ref-12)
13. See Section 704.06 and Chapter 376, F.S. Restrictive Covenants are the preferred IC at most sites. [↑](#footnote-ref-13)
14. 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. [↑](#footnote-ref-14)
15. Other forms of ICs include government controls such as zoning, local ordinances, permits, area-wide water management district restrictions on well permitting, and comprehensive land use planning and management, conservation easements and FDEP consent orders. Zoning is not permanent and therefore not sufficiently protective of human health and the environment over the long term. Permit conditions bind only the permittee for the life of the permit, rather than binding all subsequent owners in perpetuity. Area-wide water management district restrictions on well permitting may be appropriate if used in conjunction with other parcel-specific ICs in a “layered” approach to provide an adequate level of protection. Conservation easements are more appropriately used to protect a natural resource rather than to apply a restriction to a contaminated parcel of property.

    Comprehensive land use and management plans adopted by governments can be changed, and therefore may not provide sufficient protections. However, the FDEP has made an exception in the past for property owned by the federal government. The FDEP has agreed to the use of appropriately drafted language and restrictions in a Memorandum of Agreement (MOA) on Land Use Controls as an IC for active facilities owned by the federal government. However, in any agreement with the federal government based on this MOA, the FDEP should include language to assure that if the federal government later sells the property, FDEP should require the imposition of an RC if cleanup will not be resumed. Any such agreement should also require that FDEP be immediately notified of any sale or intended sale of restricted property. Review of the IC for federal property should be coordinated with the Department of Defense & Brownfield Partnerships section in the Waste Cleanup Program or the Enforcement Section of the OGC. FDEP and FDOT have entered into a MOA dated June 16, 2014, that allows petroleum contamination to remain in FDOT right of way in certain circumstances as set forth therein without the recordation of a restrictive covenant in the public records of the county on the affected FDOT property. However, closure in reliance on this MOA requires additional actions by both the site/project manager and the owner of the source property, as described below. See Attachment X.

    FDEP consent orders using restrictions can only be enforced against the person signing the consent order, pursuant to Section 120.69, F.S., and so are not as protective as RCs over long periods of time if property ownership changes. Thus, consent orders with use restrictions are best used for certain entities where long-term ownership of the property is fairly certain, such as a government-owned property (e.g., airports). The consent order should contain a provision that requires immediate notification to the FDEP or the District Office prior to the change of ownership of the contaminated property. A standard consent order can require the recording of an RC. Additionally, the consent order itself can be modified to comply with the real property law requirements and be recorded as a form of IC, thus binding future property owners. However, because not all parts of a consent order bind future property owners (such as penalties), and because consent orders contain language not necessarily applicable to the restrictions themselves, this option can be confusing to use and is, therefore, not recommended. Another approach has been the use of a hybrid MOA RC at sea ports in Florida. Again, based on expected continued land use as a port, which is generally commercial/industrial, the DEP is willing to enter into a MOA with a port authority that addresses how IC/EC will be implemented at a port on a port-wide basis, so that the port will not have to execute and record individual RCs at each parcel within the port property. The MOA RC approach is also being considered for implementation at airports in Florida. [↑](#footnote-ref-15)
16. “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. [↑](#footnote-ref-16)
17. The sample RC and review process will be modified based on who is the site manager.

    *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). [↑](#footnote-ref-17)
18. 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). [↑](#footnote-ref-18)
19. 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. [↑](#footnote-ref-19)
20. A copy of the recorded deed is necessary, but the copy does not need to be certified. [↑](#footnote-ref-20)
21. 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). [↑](#footnote-ref-21)
22. 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. [↑](#footnote-ref-22)
23. 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. [↑](#footnote-ref-23)
24. 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. [↑](#footnote-ref-24)
25. 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. [↑](#footnote-ref-25)
26. 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. [↑](#footnote-ref-26)
27. 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. [↑](#footnote-ref-27)
28. Where an alternative IC is to be relied upon as an alternative to a restriction on groundwater usage, the items marked with an “\*” should be provided. [↑](#footnote-ref-28)