



Florida Department of Environmental Protection

Institutional Controls For Risk Based Closure at Contaminated Sites

Toni Sturtevant

Office of General Counsel

5-23-16





Statutes and Rules

- Chapter 376, F.S. defines “Institutional Controls”
 - as “the restriction on use 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, or conservation easements.” 376.301(21), F.S.
- 62-780.680, Florida Administrative Code
 - Outlines No Further Action and No Action with Controls



Example Institutional Controls

- Restrictive Covenants as described in the ICPG (this is the most common type of control)
- Land Management Plans for State Owned Lands
- Memorandum of Agreement (MOA) for Land Use Controls or Memorandum of Agreement for Restrictive Covenant with governmental or quasi-governmental entity (ports and airports)
- The DOT MOA
- Use of Local Government Ordinance as an Institutional Control
- Layered Institutional Controls



DEP's Role in evaluating ICs

First, Proposed Controls are Technically Approved by the Project Manager:

- The control proposed for the contaminated site must meet rule criteria for closure under RMO II or RMO III to use an Institutional Control for closure with conditions
- The proposed IC must be technically appropriate based on affected media and exposure pathways
- Project Manager drafts cover memo to OGC to summarize the site, proposed restrictions, affected media, and any special circumstances



DEP's Role in evaluating ICs

They are then forwarded to OGC for legal review:

- Packages go first to the Agency Clerk, Lea Crandall to receive an OGC case number.
- Dan Blackwell is the paralegal tasked with initial review of IC packages in OGC. He is our first point of contact for IC questions. Dan is responsible for tracking all IC packages in OGC, and can answer many of the questions you may have, including which attorney is assigned to the IC file.
- You can reach Dan at dan.blackwell@dep.state.fl.us or at 850-245-2287.



DEP's Institutional Controls Procedures Guidance (ICPG)

- Latest draft Version is September 2015, and we expect additional updates as we continue along the 62-780 rulemaking path and continue to explore alternative ICs. A summer 2016 update is expected.
- The ICPG is a living document, periodically adjusted with experience, input from the public, and changes to relevant law.
- We refer to the ICPG for guidance in the use of ICs. Statute and rules provide our general authority, but not details due to the very site-specific nature of ICs.



DEP's Institutional Controls Procedures Guidance (ICPG)

- Any PRSR or member of the public interested in pursuing ICs or proposing an SRCO with Conditions will need a copy of the ICPG
- Download this guidance at:

<http://www.dep.state.fl.us/waste/categories/brownfields/pages/ICR.htm> (under the map of Florida links to the ICR)

- A word version is provided online, so a PRSR can easily use the document for cutting & pasting and simply fill in the blanks with their site-specific information



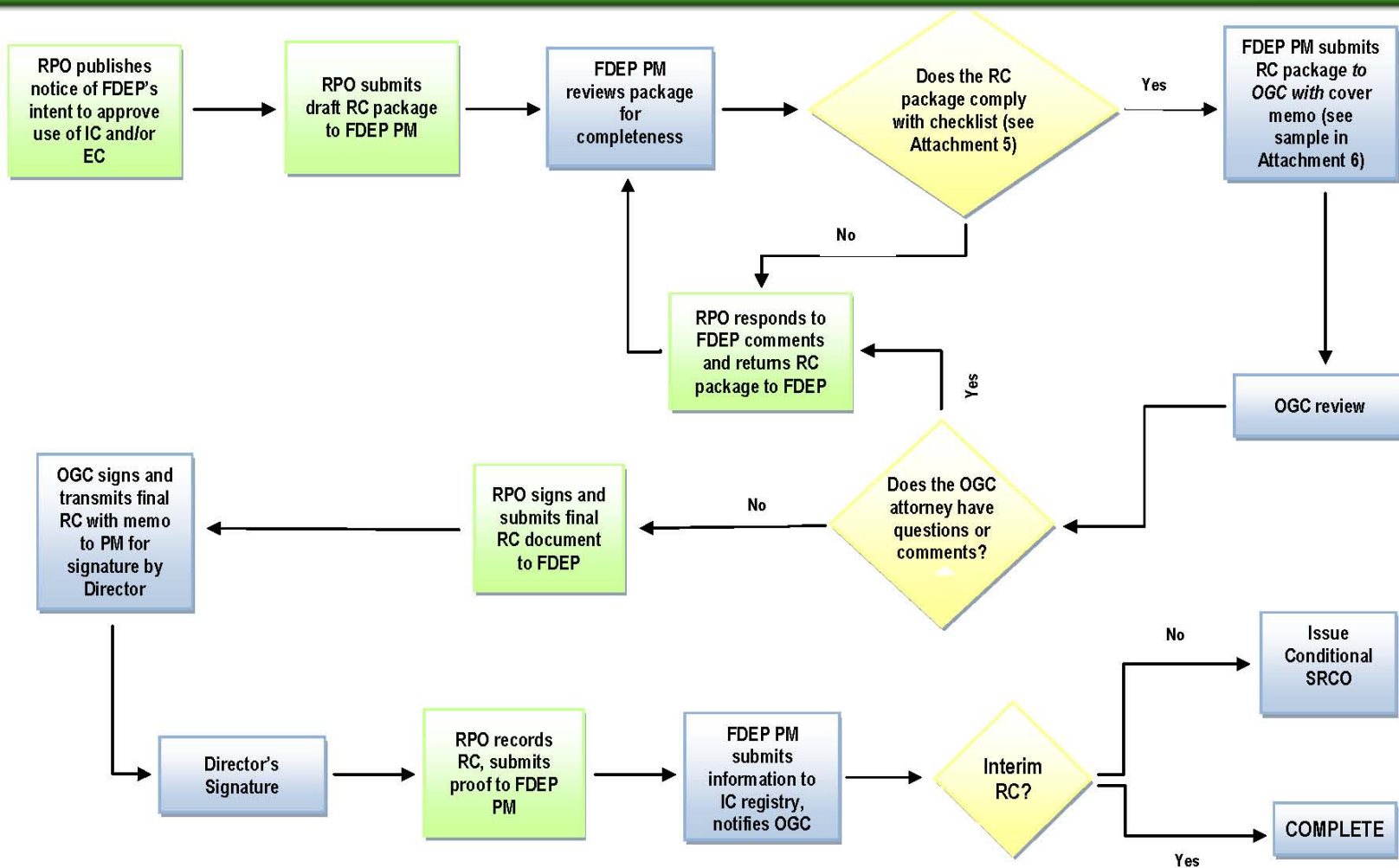
DEP's Institutional Controls Procedures Guidance



- Don't be intimidated (167 pages)
- Only 23 pages are actual text (provide background info, explanation of options, the process, etc.)
- The remaining pages are attachments that provide checklists, forms, charts and flow charts to help you.
- Also provides forms and templates to use that expedite DEP's review.
- **Please use Attachment 5 (RC checklist) and Check out Attachment 2 (IC Tips)**



Institutional Control Approval Process



Key: FDEP - Department of Environmental Protection
IC - Institutional Control

OGC - Office of General Counsel
PM - Project Manager/Site Manager

RC - Restrictive Covenant
RPO - Real Property Owner

SRCO - Site Rehabilitation
Completion Order



The next slides (11-25) deal with Restrictive Covenants as ICs



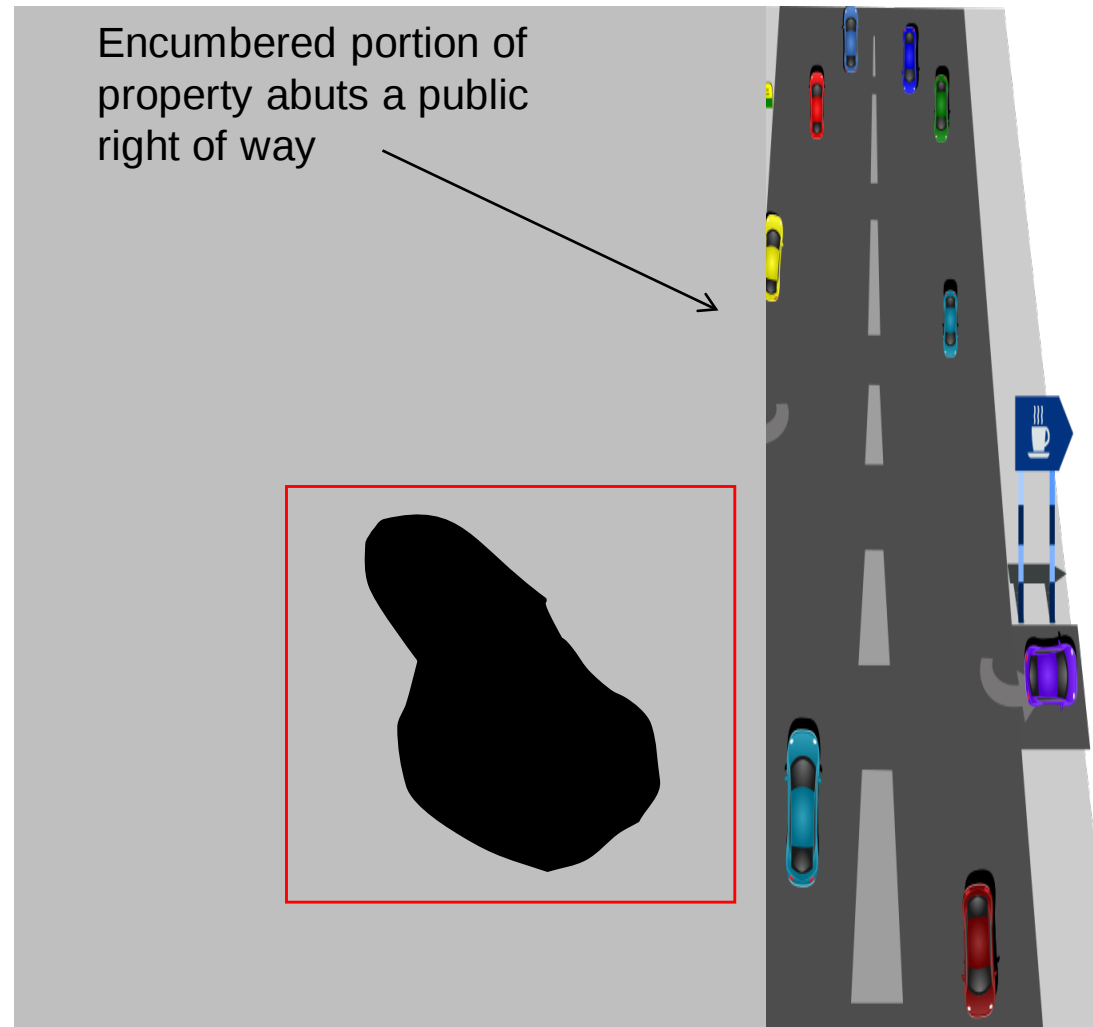
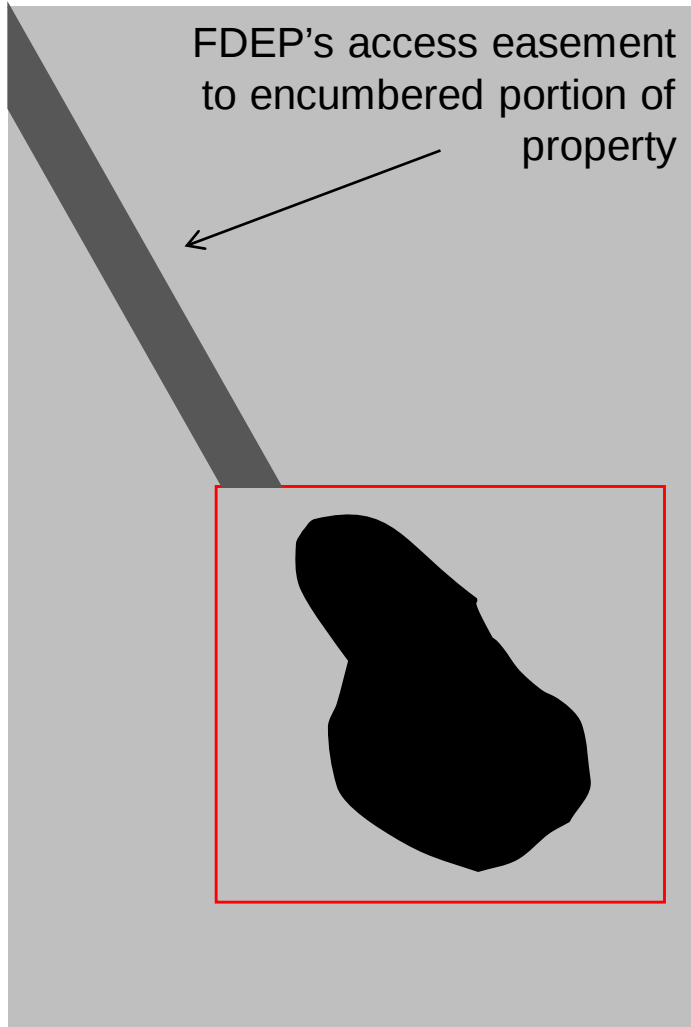


Template RCs in the ICPG

- Form A (Encumbrance Covers Entire Property) (See Attachment 3 in ICPG)
- Form B (Encumbrance Covers Part of the Property with Access) (See Attachment 3 in ICPG)
 - Form B may require a *separate* Access Easement Agreement if there is no public access to restricted area (See Attachment 4 in ICPG)
- If changing template language, PRSR should provide technical or legal justification to FDEP in cover letter to the FDEP



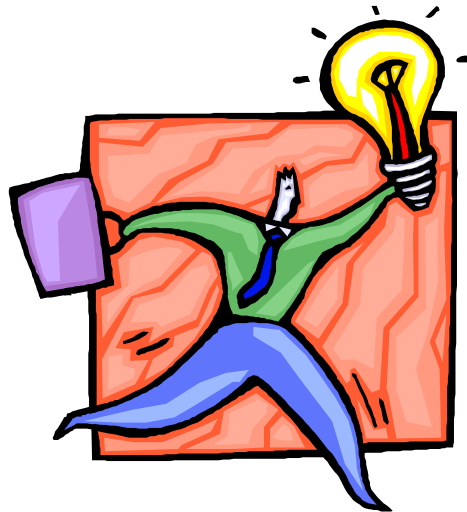
Form B (Encumbrance Covers Part of the Property with Access)





Tips for Success

- To avoid the common problems, PRSRs should review ICPG Attachment 2: “Institutional Control Tips” (a list of the 13 most common issues with RC packages).





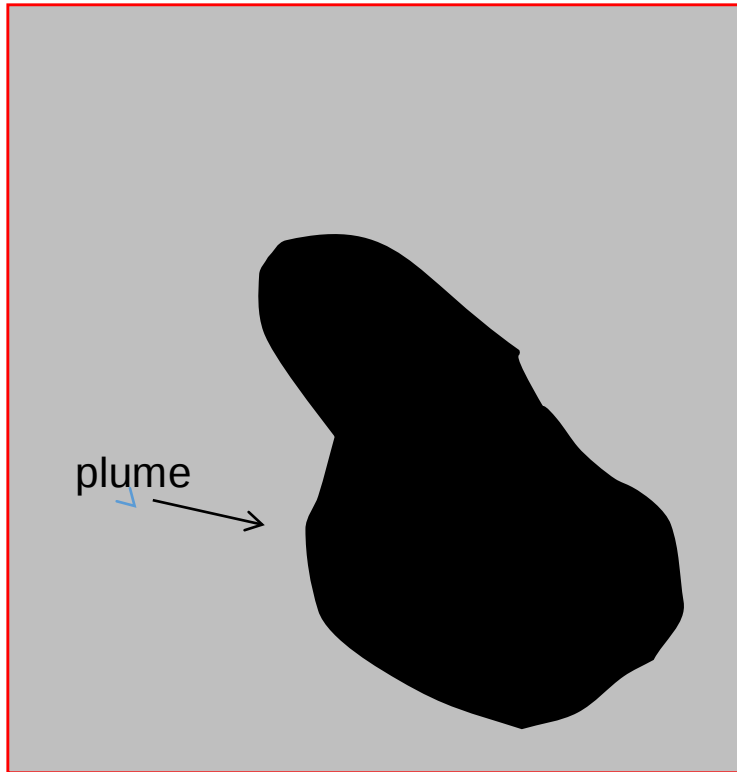
Restrictions: Whole Property vs. Partial Property

- Groundwater – restriction generally covers entire parcel, especially when parcel is small
 - Can be partial restriction if it's a larger parcel and if contaminants won't migrate out of restricted area.
 - Requires “buffer zone” based on technical analysis
 - For example, fate & transport modeling



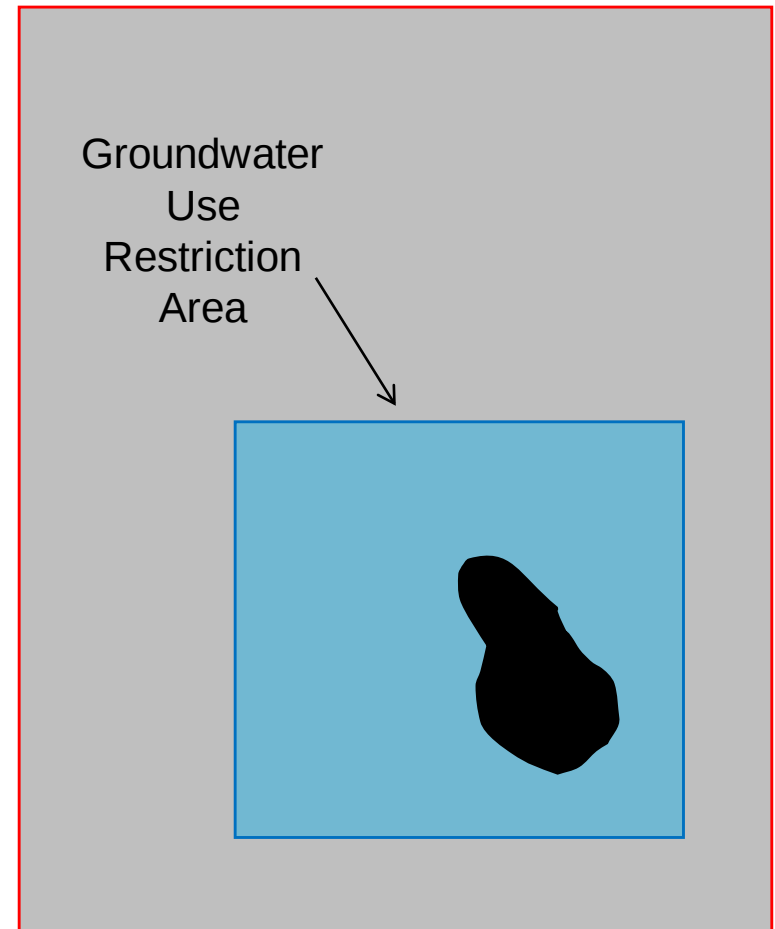
Restrictions: Whole Property vs. Partial Property

Property Boundary (1/2 acre parcel)



Whole Property Subject to
Groundwater Use Restrictions

Property Boundary (300 acre parcel)





Restrictions: Whole Property vs. Partial Property

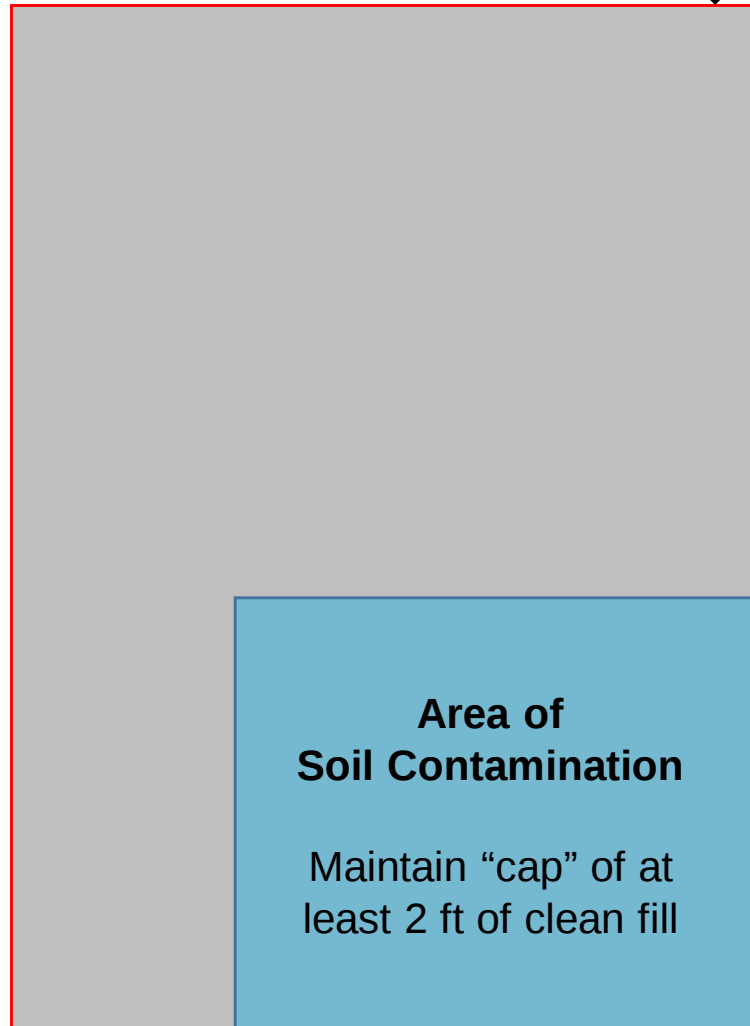
- o Soil – typically partial restriction w/ Engineering Control (EC); need Survey (i.e., PLS) to show contaminated area and exact location of EC



- o Building Foundations can serve as “caps” but need to be identified on PLS as an EC



Property Boundary (5 acre parcel)



**Area of
Soil Contamination**

Maintain "cap" of at
least 2 ft of clean fill

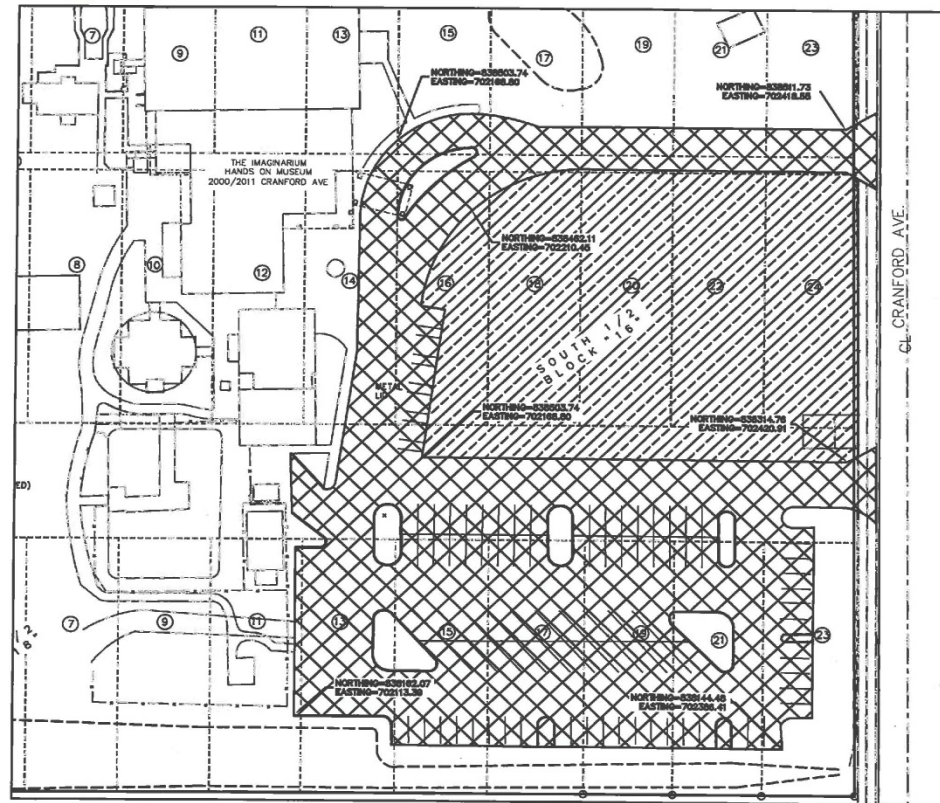


SITE MAP

LEGEND

- MANTAIN "CAP" OF 2 FEET
OF FILL AND LANDSCAPING
(SEE NOTE NO. 6)
- MANTAIN "CAP" OF ASPHALT
PAVEMENT (SEE NOTE NO. 6)

SCALE: 1" = 80'





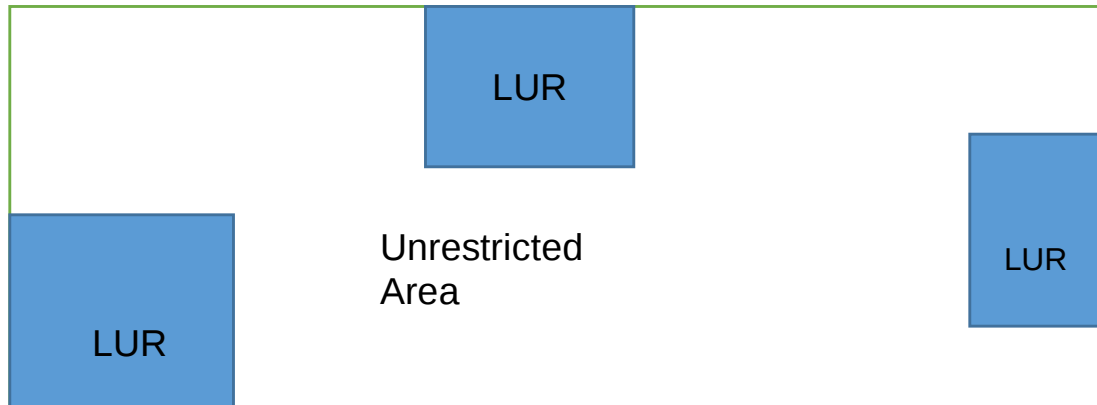
Soil Contamination: Caps vs. Land Use Restrictions

- If not using a cap to address Direct Exposure to soil contamination, then a Land Use Restriction (LUR) will be required.
- LURs are not appropriate if leachability is an issue (need impervious cap).
- PRSR should explain request or need for “double restriction” (e.g., a cap and a LUR).
Avoid belts & suspenders.



Land Use Restriction (LUR)

- LUR covers Whole Property
- NO “patch-work quilt” proposals:





Land Use Restrictions

- Why can't RC simply say "No residential use"?
- Rule categories of "Residential" and "Commercial/Industrial" are shorthand descriptions of types of exposures
- These terms are used in 62-780 RMOs and in 62-777 Look-up Table II (Soil CTLs).



SOIL CLEANUP TARGET LEVELS (CH. 62-777 TABLE II)



Table II
Soil Cleanup Target Levels

Contaminants	CAS#s	Direct Exposure		Leachability Based on Groundwater Criteria (mg/kg)	Leachability Based on Freshwater Surface Water Criteria (mg/kg)	Leachability Based on Marine Surface Water Criteria (mg/kg)	Leachability Based on Groundwater of Low Yield/ Poor Quality (mg/kg)	Target Organs/Systems or Effects†
		Residential (mg/kg)	Commercial/ Industrial (mg/kg)					
Aluminum phosphide	20859-73-8	35	880	***	***	***	***	-Body Weight
Ametryn	834-12-8	670	11000	0.8	0.08	0.08	8	-Liver
Ammonia (a)	7664-41-7	35000	880000	***	***	NA	***	-Respiratory
Aniline	62-53-3	27	150	0.03	0.02	0.02	0.3	-Blood -Carcinogen -Spleen
Anthracene	120-12-7	21000	300000	2500	0.4	0.4	25000	-None Specified
Antimony (b)	7440-36-0	27	370	5.4	3900	3900	54	-Blood
Aroclor mixture [see PCBs]								
Arsenic	NOCAS	2.1	12	***	***	***	***	-Carcinogen -Cardiovascular -Skin
Atrazine	1912-24-9	4.3	19	0.06	0.04	0.04	0.6	-Carcinogen -Cardiovascular
Azinphos, methyl [see Guthion]								
Azobenzene	103-33-3	7.9	31	0.03	0.4	0.4	0.3	-Carcinogen
Barium (soluble salts) (b)	7440-39-3	120**	130000	1600	NA	NA	16000	-Cardiovascular
Baygon [or Propoxur]	114-26-1	280	4100	0.2	0.002	0.002	2	-Blood -Neurological
Bayleton	43121-43-3	2400	46000	4.8	11	11	48	-Blood
Benomyl	17804-35-2	4000	77000	3.1	0.03	0.03	31	-Developmental
Bentazon	25057-89-0	2100	32000	1.2	NA	NA	12	-Blood
Benzaldehyde	100-52-7	3300	24000	4.8	0.4	0.4	48	-Gastrointestinal -Kidney
Benzene	71-43-2	1.2	1.7	0.007	0.5	0.5	0.07	-Blood -Carcinogen



Land Use Restrictions

- If “Residential” SCTL is exceeded, then LUR prohibits: agricultural, recreational and educational uses in addition to residential uses.

- Examples of Prohibited Uses:

- Fishing
- Hotels
- Parks
- Gardens
- Schools
- Daycares





Template Land Use Restrictions Language for RMO II

(This may be modified only in RMO III)

c. The following uses of the Property are prohibited: agricultural use of the land including forestry, fishing and mining; hotels or lodging; recreational uses including amusement parks, parks, camps, museums, zoos, or gardens; residential uses, and educational uses such as elementary or secondary schools, or day care services. These prohibited uses are specifically defined by using the North American Industry Classification System, United States, 2007 (NAICS), Executive Office of the President, Office of Management and Budget. The prohibited uses by code are: Sector 11 Agriculture, Forestry, Fishing and Hunting; Subsector 212 Mining (except Oil and Gas); Code 512132 Drive-In Motion Picture Theaters; Code 51912 Libraries and Archives; Code 53111 Lessors of Residential Buildings and Dwellings; Subsector 6111 Elementary and Secondary Schools; Subsector 623 Nursing and Residential Care Facilities; Subsector 624 Social Assistance; Subsector 711 Performing Arts, Spectator Sports and Related Industries; Subsector 712 Museums, Historical Sites, and Similar Institutions; Subsector 713 Amusement, Gambling, and Recreation Industries; Subsector 721 Accommodation (hotels, motels, RV parks, etc.); Subsector 813 Religious, Grantmaking, Civic, Professional, and Similar Organizations; and Subsector 814 Private Households.



CERCLA/Superfund ICs

- These are generally handled by site/project managers out of Tallahassee on EPA funded cleanups, but districts can have the lead for RPO funded superfund cleanups
- There is a separate Superfund RC template in the ICPG, which was negotiated between DEP and EPA
- Since EPA has the enforcement lead on these sites and RPOs generally need to meet additional EPA requirements of consent decrees, EPA is also layered into the process of developing ICs for these sites



Constructive Notice

- Constructive Notice (newspaper) is required and 30-day opportunity to comment [see subsection 62-780.680(8), F.A.C., and 62-780.220(7) in Consolidated Rule.]
- See ICPG Attachment 19 for
Constructive Notice Template
- PRSR needs to allow time for this, especially if a real estate deal is pending and the PRSR is anxious to get RC approved and recorded.





Actual Notice

- Actual Notice (by letter with return receipt) is required and 30-day opportunity to comment is required for the holders of encumbrances potentially affected by the IC (this will be discussed further!)
- See ICPG Attachment 9 for Actual Notice Template
- PRSR also needs to allow time for this, especially if a real estate deal is pending and the PRSR is anxious to get RC approved and recorded.
- DEP requires this notice for ICs other than RCs in certain situations (i.e. where contamination is shallow)





Remediation System Compound



Questions?

12/29/2009



Easements and Encumbrances

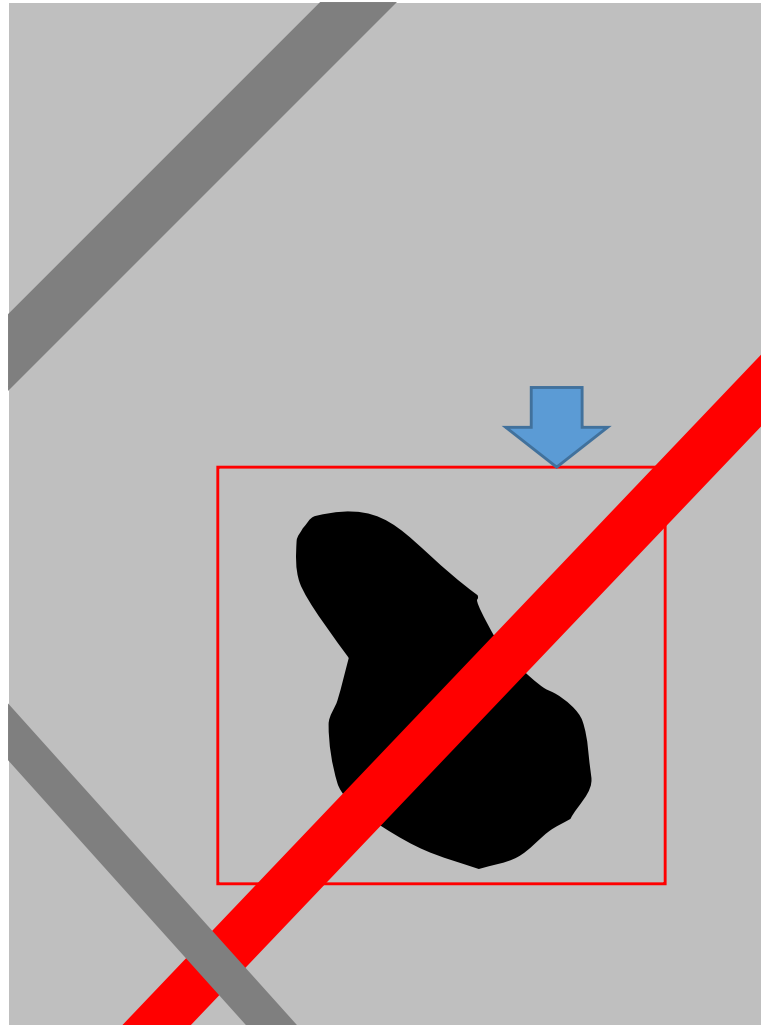
- One of the best ways to identify easements entitled to notice (or which an RP may wish to subordinate) is for the RPO to create an “easement or encumbrance map” showing location of all easements in relation to restricted area (see ICPG Attachment 14)





Easements and Encumbrances

Property with
three
easements;
one (red)
intersects
contaminated/
restricted area.





Easements: Joinder and Consent

RPO may still *choose* to use a joinder & consent, but it is only *required* when:

1. There is a “material conflict” between the easement or lease and the RC such as when the RC requires an active engineering control system located in the easement which includes a substantial recurring expense or if failure to maintain the active EC could result in an imminent hazard within a few days or weeks (this type of EC is very unusual);
2. An EC located in the easement requires a cap and the Easement Holder has the specific right to interfere with the establishment or maintenance of the EC; or
3. The Easement Holder has the right to disturb the soil or groundwater *and has not yet done so*. For example, the storm water pond or utility corridor has not yet been built (unless the owner can demonstrate that during the construction of the easement use, the likelihood of mobilizing contamination in groundwater or the risk of direct exposure to the soil contamination is small.)



Encumbrances: Financial Instruments

- Letter notice goes to the holder providing opportunity to comment on RC (See Attachment 9 in ICPG for template letter).
- Property owner required to send letter to each holder of a financial instrument that applies to the restricted area, unless the owner is required to obtain a subordination of mortgage.
- Subordination is required when the terms of the mortgage conflict with the proposed control.
- OGC analyzes RPO's determination of who is entitled to notice or when subordination is necessary.



Encumbrances: Financial Instruments

Subordination of Mortgage is *required* when:

1. There is a “material conflict” between the financial instrument and the RC, such as when the RC requires an active engineering control system, or if failure to maintain the active EC could result in an imminent hazard within a few days or weeks (this type of EC is very unusual).
2. The financial instrument specifically prohibits the limitation contained in the RC or requires the property to be used in a manner directly in conflict with the restrictions in the RC (a little more common, but still unusual).



Most Common IC Problems

- Title Search Missing or Out of Date
- Engineering Control Not Surveyed or Not Certified
- Engineering Control Maintenance Plan Not Prepared or not adequate
- No Proof of Notice of FDEPs Intent To Use Institutional Engineering Control



Public Records & ICs



- Site's Technical File is online in Oculus. Go to <http://dwmedms.dep.state.fl.us/Oculus/>. There is an online help guide for using Oculus.
- You will need the appropriate FDEP identification number for the site/facility to access documents in Oculus.
- All contaminated sites subject to IC/EC are listed on the FDEP's Institutional Controls Registry (ICR).



Institutional Controls Registry

- Once the PRSR presents proof of recording the RC to the PM, FDEP issues Conditional SRCO (But if Interim RC, then no SRCO).
- FDEP Project Manager is responsible for filling out the electronic ICR Data Sheet to submit info to ICR.
<http://www.dep.state.fl.us/waste/misc/dnd/icrdsheet.pdf>
f (at bottom click "Submit by Email")
- The ICR is available online at:
<http://www.dep.state.fl.us/waste/categories/brownfields/pages/ICR.htm>
- Critical tracking database (used for RC enforcement, audits, etc.), so PM and PRSR (and RPO, if different from PRSR) need to ensure that the ICR website info is correct for each RC.



FDEP's Audit & Enforcement Process and Institutional Controls

- FDEP conducts audits of ICs – checking that the cap is still in place, that current owner understands and is complying with water use or land use restrictions, etc.

(ICECAP = IC/EC Audit Program)

- Re-openers [statutory...see Section 376.30701(4), F.S., for example] included in SRCO language
- Subsequent purchaser's obligations –
must comply with RC, maintain EC, must not exacerbate contamination, etc.



Removing or Amending RCs

- If a contaminated site is subsequently cleaned up (either by natural attenuation or the RPO's choice to resume active cleanup), an IC can be amended or removed.



- See Attachment 26 in ICPG: Sample Termination and Release of Declaration of Restrictive Covenant



Questions???





Local Government Ordinances As ICs

- In certain situations County or Municipal Ordinances may be utilized as Institutional Controls where the contamination in question is limited to groundwater contamination
- Factors To Consider:
 - This is still a relatively new process and details are still being developed and considered.
 - Nature and concentrations of the contamination
 - Is the ordinance sufficient (possibly as part of a layered approach) to control access to and spread of contamination?
 - Is the ordinance preempted because it attempts to regulate well construction or consumptive use? OGC will make this analysis with the PRSR, but be aware of the potential pitfall.
 - Is there potential for construction dewatering or new storm water features near the facility? Can the risk of contamination mobilization associated with this be handled in an SRCO?
 - Will actual notice be required for encumbrance holders?



FDOT Memorandum of Agreement

- http://www.dep.state.fl.us/waste/misc/dnd/DEP_DOT_MOU_01Aug14.pdf
- Takes Advantage of the inherent “Barriers To Exposure” Provided by the FDOT’s Management of the ROW
 - Physical Barriers, i.e., road pavement, clean fill
 - Administrative Barriers, i.e., FDOT’s permitting process that is designed to control all activities in the ROW



MOU as an IC

- Petroleum contamination only
- In DOT rights of way
- IC = MOU + DOT Map Note + recorded notice



MOU Process

1. PRSR submits to DEP a proposal for DOT Map Note
2. DEP requests DOT add a ROW Map Note to DOT ROW map
3. DOT records Map Note on ROW Map
4. **Map Note** = DEP's Request Letter + summaries of soil and groundwater data + surveys and other documents detailing contamination



MOU Process, cont.

4. Map Note provides notice of contamination to DOT ROW permitted parties
5. PRSR records Map Note reference in County
6. FDEP issues conditional SRCO



DOT MOU

- Site manager should work closely with PRSR
- Revised 2015 ICPG enumerates procedural steps
- Sally Cooey (NWD) is working on finishing the first two MOU ICs, one of which has been finalized at this point.
- The Southeast district is following on with the next of these.
- Mary Stewart, OGC mary.stewart@dep.state.fl.us can help you!



Port and Airport Memoranda of Agreements

- In certain situations large industrial type landowners like Port Authorities and Airports may be interested in the use of a Memoranda of Agreement for Land Use Controls or a Memoranda of Agreement for Restrictive Covenant
- Factors To Consider:
 - This is still a relatively new process and details are still being developed and considered. So far, the Port of Jacksonville, Port Manatee, Port of Pensacola, and the Fort Lauderdale International Airport have taken advantage of this option.
 - The concept is that the RPO establishes a single umbrella mechanism of control for their whole large property through an agreement with DEP that functions as an Institutional Control.



The Institutional Control Future?

- The Division of Waste Management and OGC are happy to talk with RPOs about other Institutional Controls in addition to Restrictive Covenants
- Such ICs include:
 - Local Government Controls: Ordinances
 - MOAs with large landowners like ports and airports
 - MOAs with other governmental entities
 - Use of Delineated Areas (delineated by rule) as controls
- We will continue to evaluate institutional controls other than DRCs on a case by case basis as we gather information and draw conclusions
- The Contaminated Media Forum is still gathering stakeholder input
- Rulemaking efforts for 62-780 are currently underway



Acronym List

- **ASTM** = American Society for Testing & Materials
- **CTL** = Cleanup Target Level
- **EC** = Engineering Control
- **F.A.C.** = Florida Administrative Code
- **FDEP** = Florida Department of Environmental Protection
- **F.S.** = Florida Statutes
- **IC** = Institutional Control
- **ICECAP** = IC/EC Audit Program
- **ICPG** = Institutional Controls Procedures Guidance
- **ICR** = Institutional Controls Registry
- **OGC** = Office of General Counsel



Acronym List (Continued)

- **PLS** = Professional Land Survey
- **PM** = FDEP Project Manager or FDEP Site Manager
- **PRSR** = Person Responsible for Site Rehabilitation
- **RBCA** = Risk-Based Corrective Action
- **RC** = Restrictive Covenant
- **RMO** = Risk Management Option
- **RPO** = Real Property Owner
- **SRCO** = Site Rehabilitation Completion Order
- **UECA** = Uniform Environmental Covenants Act



QUESTIONS?

If you need assistance with a specific legal question related to IC/EC, then contact:

Mary Stewart at mary.stewart@dep.state.fl.us

or

Toni Sturtevant at toni.sturtevant@dep.state.fl.us

Our Program Attorney for both Waste Cleanup and Petroleum is:

Rebecca Robinette at
rebecca.robinette@dep.state.fl.us



Any Final Questions?

