

**IMPLICATIONS OF THE EMERGING FOCUS
ON LONG-TERM PERFORMANCE OF
INSTITUTIONAL CONTROLS ON
CLEANUP STANDARD SELECTION**

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Environmental Protection Keys to Unlocking Brownfields Properties

- Flexible environmental protection standards
- Cost efficiency in attainment of environmental protection standards
- Reasonable certainty as to the environmental obligations

Common Features of Brownfields Programs

- Menu of alternative cleanup standards, including risk-based corrective action standards
- Reasonably well-defined process for site characterization and remediation standard selection
- Legislatively authorized limitations on cleanup liability

Risk-Based Cleanup Standards

- Determination of “no unacceptable risk” from exposure to residual contamination left in place
- Implementation of engineering controls and/or institutional controls to assure that the exposure scenario does not change in the future

Categories of Institutional Controls

- Proprietary Controls
- Informational Devices
- State and Local Government Controls
- Regulatory/Enforcement Controls

Popular Institutional Controls

- Privately Crafted Proprietary Controls
 - Deed Restrictions
 - Restrictive Covenants
 - Easements
- Information Devices
 - Deed Notices
 - Direct Notice to Successor-in-Interest

The Allure of Risk-Based Cleanup Standards

- Flexibility in attaining the remediation standard
- Presumed cost efficiency relative to removal of contaminants

Reaction to the Wide-spread Selection of Risk-Based Cleanup Standards

- Challenges on environmental protection and environmental justice grounds
- Increasing attention by regulatory agencies as to the initial sufficiency and long-term maintenance of institutional controls

The Emerging Doctrine on Institutional Controls

- ASTM Standard E 2091-00-8: “Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls” (July 2000)
- EPA Draft Guidance: “Institutional Controls - A Guide to Implementing, Monitoring and Enforcing Institutional Controls . . . ” (December 2002)
- National Conference of Commissioners on Uniform State Laws: “Uniform Environmental Covenants Act” (August 2003)

The Emerging Doctrine on Institutional Controls (cont.)

- The Small Business Liability Relief and Brownfields Revitalization Act of 2001
- State voluntary cleanup program regulations and guidance

Elements of the Emerging Doctrine

- Third-party monitoring and/or regulatory agency “audits” of the implementation of proprietary institutional controls and recorded deed notices
- Creation of special institutional control registries
- Increased regulatory agency involvement in the establishment and implementation of proprietary institutional controls

Elements of the Emerging Doctrine (cont.)

- Increased outreach to local government and the public
- Specific third-party notice requirements
- Compliance as a prima facie element of statutory defense to liability

Environmental Protection Keys to Unlocking Brownfields Properties Redux

- Flexible environmental protection standards
- Cost efficiency in attainment of environmental protection standards
- Certainty as to the environmental obligations

The Uncertainty of Institutional Controls

- Required duration?
- Projected future costs of maintenance and enforcement?
- Responsibility for breaches of proprietary institutional controls by successors or third parties?
- Responsibility for the failure of a governmental institutional control?

Possible Disincentives to Rely on Institutional Controls

- Notice requirements for normally routine property maintenance and rehabilitation projects
- Potential re-openers of remedy for conduct of parties beyond your control
- Potential financial assurance requirements
- Insurability of a third-party breach of institutional control

Evaluation of Institutional Control-Dependent Cleanup Plan

- Does the party responsible for the cleanup intend to maintain long-term ownership and control of the property?
- Is removal of residual contamination a technically feasible alternative?

Evaluation of Institutional Control-Dependent Cleanup Plan (cont.)

- Is the party responsible for placing institutional controls in control of the property or properties involved?
- Are contemplated state/local government controls already in place?

Evaluation of Institutional Control-Dependent Cleanup Plan (cont.)

- Can the party responsible for the maintenance of institutional controls reliably enforce them?
- Can the party responsible for long-term maintenance of institutional controls satisfy financial assurance test without a third-party instrument?

CONCLUSIONS

- When removal of residual contamination is practicable, the burden, cost and uncertainty of maintaining institutional controls may alter the remedial alternative selection calculus.
- When removal of residual contamination is impracticable, the burden, cost and uncertainty of maintaining institutional controls may downgrade the attractiveness of the project.
- A thorough “life-cycle” analysis of the implications of long-term maintenance of institutional controls must be performed at the project inception stage.