

EPA Releases Interim Guidance on Institutional Controls for Public Comment

December 3, 2010

On November 30, the U.S. Environmental Protection Agency (EPA) published notice of its interim final guidance, “Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites” (Guidance). The Guidance provides agency personnel with information and recommendations for planning, implementing, maintaining, and enforcing institutional controls (ICs) for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Brownfields, federal facility, underground storage tank (UST), and Resource Conservation and Recovery Act (RCRA) site cleanups. This Guidance has the potential to affect both ongoing and completed cleanups done under these federal programs. Comments on this interim final Guidance are due to EPA by January 14, 2011.

ICs are nonengineered instruments used to minimize the potential for human exposure to contamination and to protect the integrity of a response action. ICs include administrative and legal controls such as easements, zoning controls, and deed notices.

This Guidance seeks to clarify the roles and responsibilities of government agencies and private parties in implementing and maintaining ICs at contaminated properties. To that end, the Guidance contains recommendations for full life-cycle planning of ICs; an evaluation of their effectiveness; language drafting considerations; implementation of specific proprietary, governmental, and informational controls; monitoring and reporting to maintain ICs; and the enforcement of proprietary and governmental controls.

The Guidance spans 27 pages and discusses a myriad of considerations.¹ The following are highlights from the Guidance:

- **Full life-cycle planning recommendations.** The Guidance recommends full life-cycle planning during remedy selection that should include input from outside sources in order to ensure that the most appropriate response, including any ICs, is selected. Site leads are encouraged to document, in writing, any arrangements between parties for the implementation, maintenance, and

¹ The full version of the Guidance is located online at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ba9030>.

enforcement of ICs. Further, it is recommended that preliminary IC evaluation be included as part of site investigation efforts, such as during the RI/FS stage in a CERCLA remedial action.

- **Ensuring effective IC implementation.** To ensure effective implementation of ICs, the Guidance recommends use of detailed IC Implementation and Assurance Plans (ICIAPs) to document the activities necessary to implement and ensure the long-term stewardship of ICs and to specify the persons responsible for conducting such activities. It is also recommended that full life-cycle planning include detailed cost estimation and community involvement.

Additionally, the Guidance flags implementation issues such as documentation of use restrictions and IC instruments in decision documents, drafting IC language in selected instruments, and local government involvement assistance in planning and regulating certain ICs. The Guidance also provides recommendations for implementing proprietary controls, such as documenting controls and selecting a grantee under CERLCA and RCRA, and highlights specific proprietary controls that may be appropriate at CERCLA and RCRA sites. The Guidance also reviews types of governmental controls such as groundwater use restrictions, zoning, fishing bans, waterway use restrictions, and cooperative agreements.

- **Maintenance recommendations.** Maintenance recommendations include ensuring there is a process in place to facilitate the routine and critical evaluation of ICs in order to determine whether ICs remain in place, continue to meet stated objectives and performance goals, and are providing the protection required. The Guidance suggests that this includes *rigorous* periodic monitoring and reporting in intervals that are appropriate for site-specific considerations. Site leads are also encouraged to coordinate with state, tribal, and local government when developing an approach to inspecting, monitoring, and reporting, as the state, tribal, or local government may have direct authority for long-term monitoring of ICs.

Increased monitoring and reporting require additional funds. The Guidance suggests the billing of responsible parties as one of the ways state, tribal, or local governments can ensure appropriate funding to carry out monitoring and reporting of ICs, and further suggests that it may be possible for state, tribal, or local authorities to use CERCLA Section 107 liability provisions to secure potentially responsible party (PRP) financing for reporting and monitoring.

- **Enforcement tool overview.** The Guidance provides an overview of the types of enforcement tools that may be available for handling issues relating to implementation, maintenance, and breaches of ICs. It also highlights difficulties that may arise when using ICs such as implementation, maintenance, and enforcement being subject to the originating governmental entity's discretion and variations among state enforcement requirements.

The Guidance suggests that commencement of enforcement actions against the responsible party may be necessary. Examples provided in the Guidance of enforcement actions relating to ICs include the issuance of an administrative order under CERCLA Section 106 and/or RCRA Section 7003(a). Finally, the Guidance cautions against premature close-out of CDs, orders, or permits, despite a long-term requirement for ICs. One practical implication of this is that PRPs will not be able to end their relationships with regulator agencies once the construction work is complete. This may result in increased oversight costs relating to maintenance of any ICs at the site.

This Guidance will likely increase the focus placed on ICs by site management during remedial investigation and planning stages, may increase costs of remediation if PRPs are expected to cover any costs associated with monitoring and reporting relating to ICs, and may result in an increase in enforcement actions if the procedures in place fail to be effective at ensuring that ICs remain in place and continue to provide the necessary protection.

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