

Institutional Controls & RCRA

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Why ICs?

- ◆ Part of the risk-based cleanup paradigm.
- ◆ Response, in part, to criticisms regarding the cost, and slow pace, of some cleanups – w/ increased costs you have more litigation which slows the return of properties to productive use.
- ◆ Allows response to be customized to current and expected future land use (RAFLU). Allows for more flexibility in remedy selection.

What are ICs?

Not defined in RCRA. Per EPA Guidance (*Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Clean-ups, September 2000*) they are:

- ◆ Non-engineered instruments such as administrative and/or legal controls that minimize the potential for human exposure to contamination by limiting land or resource use, and protect the integrity of the remedy.
- ◆ Generally to be used in conjunction with, rather than in lieu of, engineered measures such as treatment or containment.

Roles of ICs in Remedies

- ◆ ICs have two primary purposes
 - » minimize the potential for exposure – e.g., don't dig thru the cap
 - » protect the remedy – e.g., maintain the cap
- ◆ ICs should be considered during all stages of corrective action.
- ◆ ICs in use under both the RCRA corrective action and closure/post closure programs.
- ◆ EPA expects the use of ICs in remedies under RCRA to be similar to their use under CERCLA in order to achieve consistency in cleanups.

Where do ICs come from?

- ◆ RCRA – no express statutory authority, but numerous references in closure/post-closure regs., Parts 264/265, Subpart G
 - » .116 - survey plat requirement
 - Survey plat provides notice but does not impose enforceable AULs
 - » .117(c) – “post-closure use of property on or in which hazardous wastes remain . . . must never be allowed to disturb the integrity of the final cover” How achieved?
 - » .119 – post closure notices – geared toward notice.
 - “notation on the deed” – informational – protective? – enforceable? “[O]r some other instrument” provision.

ICs and RCRA

- ◆ *Ensuring Effective and Reliable Institutional Controls at RCRA Facilities*, OSW/OSRE 6/14/2007.
 - » sets forth “guiding principles and recommendations that can help EPA and state decision makers on the use of [ICs] at RCRA facilities.”
 - » “Corrective action complete with controls.”

General Categories of ICs

- ◆ Governmental
- ◆ Enforcement and Permitting
- ◆ Informational
- ◆ Proprietary

Governmental

- ◆ Regulatory tools usually implemented by state or local authorities – may include zoning, ordinances, building permits/codes.
- ◆ Example 1 – MRBCA LTS GW Appendix J-2 model ordinance.
- ◆ Example 2 – DGLS “special area” designation per the Well Drillers’ Act.

Enforcement & Permitting

- ◆ Administrative Orders (including those issued under 3008(h) and 7003), CDs, permits.
- ◆ Enforceable mechanisms that EPA can use to minimize potential for exposures, ensure protectiveness.

Informational Devices

Usually a “secondary” layer – best when combined with other form of IC

- ◆ State registries (may have enforceable components)
- ◆ Deed notices
- ◆ Advisories
- ◆ Signage

Typically lacks enforceability

Proprietary Controls

- ◆ Proprietary Controls – EPA’s term to collectively refer to institutional controls that are based in the traditional law of real property
- ◆ “Deed restrictions or notices”
 - » Commonly used term but has no legal meaning
- ◆ Easements
- ◆ Covenants

Planning ICs During Remedy Selection

- ◆ ICs are subject to the same evaluation criteria as are engineering controls.
- ◆ ICs should be considered during all phases of corrective action; may be an IM or part of the CMI.
- ◆ Must be thoroughly analyzed in the CMS.
- ◆ CMS/SOB must address:
 - » Objective of the IC (prevent dermal contact with soils, prevent damage to cap, etc.).
 - » Mechanisms that may be used to achieve objectives.
 - » Timing – when in place and for how long?
 - » Responsibility – who will be grantor/holder/agency? Who will enforce? Who does O&M?

Uniform Environmental Covenants Act (UECA)

- ◆ Environmental Covenant
 - » Negates many of the common law impediments to enforcement of a restrictive covenant.
- ◆ Grantor can be Grantee/Holder.
- ◆ EPA/State can be a agency/department w/ right to enforce. Third-party designation not necessary.
- ◆ Approx. 26 states have adopted – pending in others.

UECA in R7

- ◆ Enacted in MO, IA, and NE.
- ◆ Each state has a “model” EC that we use.
- ◆ Consistency in AULs.
- ◆ KS (KDHE) has an EUC program.
 - » Voluntary enrollment required.
 - » Fee based on size, COCs, mobility/toxicity, maintenance requirements.
 - » Long-term O&M of the IC provided.