

THE BENEFIT AND THE BURDEN OF INSTITUTIONAL CONTROLS IN BROWNFIELD PROJECTS

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**Brownfield Site
Development Project
HIGHLIGHTS**



COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 PAID TO THE ORDER OF **River Hill Power Company LLC** **\$1,000,000.00**
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KEY TO UNLOCKING BROWNFIELD SITES

- Risk Based Remediation Standards Tailored to Restricted Future Use of the Site
- Institutional Controls to Maintain Restrictions on Site Uses and Activities

BENEFIT AND BURDEN OF INSTITUTIONAL CONTROLS

- Benefit: Key to Unlocking the Brownfield Project
- Burden: Long-Term Obligation to Monitor, Maintain and Enforce Institutional Controls

“Institutional Controls” Generic Definition

Restrictions or Limitations on the Use of or
Access to Property

- Legal or Administrative
- Physical?

“Institutional Controls”
Pennsylvania Land Recycling Act
35 P.S. 6026.103

“A measure undertaken to limit or prohibit certain activities that may interfere with the integrity of a remedial action or result in exposure to regulated substances at a site. These include, but are not limited to, fencing or restrictions on the future use of the site.”



Categories of Institutional Controls

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

Common Law “Proprietary Controls”

- Restrictive Covenants
- Easements
- Equitable Servitudes
- Deed Restrictions

Limitations of Common Law Proprietary Controls

- Hostility to long-term restrictions on real property
- Limitations on standing to enforce
- Who has long-term interest to enforce

Uniform Environmental Covenants Act

- Published by National Conference of Commissioners on Uniform State Laws in August 2003
- Introduced in Pennsylvania House of Representatives in 2003 and 2005
- 2005 Bill is HB 1249 Printer's No. 1476



Features of Uniform Environmental Covenants Act

- Provides statutory cure to common law limitations
- Specifies holders who have statutory standing to enforce (including EPA, DEP and Municipality)
- Increased Transparency (Review/Approval by EPA or DEP)
- Central Registry

Information Devices

- Notices in Land Records (Required by Land Recycling Act 35 P.S. §§ 6026.303(g), 304 (m) and 305 (g))
- Direct Notice to Successors in Interest
- Direct Notice to Tenants

Pending Amendment to Pa. One Call Statute

- Introduced in 2005-2006
HB 2223 Printer's No. 3323
SB 1104 Printer's No. 1545
- Includes Environmental “Engineering Controls”
within the definition “Line or Facility”
- Requires owner of Engineering Controls to be
member of One Call System



State and Local Government Institutional Controls

- Zoning Ordinances
- Subdivision and Land Development Codes
- Construction Codes
- Water Supply Authority Regulations

Pennsylvania Uniform Construction Code 34 Pa. Code Ch. 403

- State-wide Applicability
- Municipal opt-in for enforcement
- Incorporates by reference international residential code and international plumbing code

Land Recycling Act Non-Used Aquifer Designation Process

- Demonstrated by Remediator (site specific)
- Designated by Municipality (area specific)
- Certified by DEP

Caveat: Not necessarily accepted by EPA



Regulatory Enforcement Controls

- Permits
- Post Remediation Care Plans
- Administrative Consent Orders
- Court-Entered Consent Decrees

Increasing Scrutiny of Institutional Controls

- 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

Increasing Scrutiny of Institutional Controls (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

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.