



# **Institutional Controls in British Columbia:**

## **A Review of Current Practices and an Evaluation of Program Amendment Options**

### **FINAL REPORT**

**Submitted To:**

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## List of Acronyms

BC	British Columbia
CEA	Classification Exception Area
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CPU	Certificate of Property Use
DEP	Department of Environmental Protection
DEUR	Declaration of Environmental Use Restrictions
DTSC	Department of Toxic Substances Control
EC	Engineering Control
EMA	Environmental Management Act
GIS	Geographical Information System
IC	Institutional Controls
LUC	Land Use Contract
LTA	Land Title Act
LGA	Local Government Act
MOE	Ministry of Environment
MTCA	Model Toxics Control Act
NFR	No Further Remediation
PID	Parcel Identifier
PIN	Parcel Identification Number
RCRA	Resource Conservation and Recovery Act
Registry	Environmental Site Registry
RSC	Record of Site Condition
Site ID	Site Identification Number
TRRP	Texas Risk Reduction Program
UECA	Uniform Environmental Covenant Act
UST	Underground Storage Tank
USEPA	United States Environmental Protection Agency
VCP	Voluntary Cleanup Programs
WMA	Waste Management Act

## Introduction

This report summarizes and reviews the Institutional Controls (IC) program currently in place within British Columbia (BC). It also provides an overview of the IC programs within Ontario, Quebec, and selected United States jurisdictions. Finally, this report evaluates various options for IC program amendments in BC.

The phrase “institutional controls” refers to legal or administrative mechanisms to restrict land use where, during or at the completion of site cleanup, residual contamination remains. In many cases, residual contamination remains at sites because potential exposures to site contamination, under anticipated future uses, does not demand a full cleanup. At these sites, safe reuse may occur even where some residual contamination remains.

Clean up standards at these future use-based cleanups often allow contamination to remain in place, if it will not pose an unacceptable risk in light of anticipated future land uses. For example, industrial use scenarios typically allow more lenient cleanup standards than, for example, residential use scenarios. And regardless of the type of anticipated land use, future use-based cleanups often also rely on additional future use assumptions, such as, that groundwater will not be withdrawn from the site area or that excavation will not occur below, for example, fifteen feet.

For these cleanups, ICs seek to ensure that future use assumptions actually hold true during the time when residual contamination remains – which could be very long. The British Columbia Ministry of Environment (MOE) largely relies on the following ICs:

- The public notice feature of the Site Registry;
- Conditions which MOE imposes within site cleanup “Approvals in Principle” and “Certificates of Compliance;” and
- Covenants MOE enters into with site owners, under section 219 of the Land Title Act.

In the United States, the states rely on a varied mix of ICs. These ICs divide into four categories: 1) proprietary controls, i.e. restrictive covenants and environmental easements; 2) government controls, i.e., local zoning or police power ordinances; 3) informational devices, i.e., IC databases, registries, or geographical information systems; and 4) enforcement orders or agreements which contain IC-related conditions, i.e., Consent Orders, Certifications of Completions, or No Future Remediation letters. For each of these tools, the IC life cycle starts at IC implementation, and then follows to include IC tracking, long-term IC maintenance, IC enforcement, and IC termination. Across this IC life cycle, some of the IC mechanisms employed in the United States match with those employed in BC, and some differ.

Table 1 (following page) highlights the key features of IC programs within other United States and Canadian jurisdictions, as well as the potential relevance to BC.

**Table 1: IC Comparison by Jurisdiction - Summary**

Topic	Jurisdictions Reviewed	Key Features	Relevance for British Columbia Program
<b>IC Implementation</b>			
Preference for the Use of Proprietary Controls	California Florida Georgia Michigan Quebec Texas Washington	<ul style="list-style-type: none"> <li>Relies on existing infrastructure of land records system.</li> <li>Notice given to prospective purchasers.</li> <li>Enforceable in most cases.</li> </ul>	Investment has already been made in a site registry. Proprietary controls may lead to continued enforceability against third parties without additional legislation.
Reliance on Site Registries	Missouri New Jersey Ontario	<ul style="list-style-type: none"> <li>Centralized means of providing notice of ICs and for tracking IC implementation.</li> <li>Not always enforceable.</li> </ul>	Site registry filing is generally mandatory. Investment has already been made in site registry. Registry does not result in enforceable ICs in of itself.
Use of Government Controls	Illinois Texas	<ul style="list-style-type: none"> <li>Used in instances where proprietary controls are not available (e.g., groundwater contamination).</li> <li>Subject to approval and must be functionally equivalent to proprietary controls.</li> </ul>	Government controls are appropriate in instances where proprietary controls are not available, and in the absence of other means of enforcement.
Local Government Involvement During IC Approval	California Florida Ontario Washington	<ul style="list-style-type: none"> <li>Involvement of local government ensures continued effectiveness of ICs.</li> </ul>	There is no formal process for involving local government in implementation of ICs. Notice is provided and actions may be limited as a result of ICs.
Requirement of Long-Term IC Assurance Planning (IC Implementation Plans)	California New York	<ul style="list-style-type: none"> <li>Places burden on responsible party to demonstrate long-term effectiveness and enforceability of ICs.</li> </ul>	Ministry appears to have authority to require assurance planning as a condition of receiving an approval in principle or a certificate of compliance.

**Table 1: IC Comparison by Jurisdiction – Summary...Continued**

Topic	Jurisdictions Reviewed	Key Features	Relevance for British Columbia Program
<i>IC Tracking Systems</i>			
Specially Designed IC Tracking Systems	California Colorado Florida New Jersey New York Ontario Pennsylvania Wisconsin	<ul style="list-style-type: none"> <li>• U.S. EPA has published data standards for IC tracking systems.</li> <li>• Systems typically provide list of sites where institutional controls exist.</li> <li>• Some systems describe the use restrictions and provide link to actual IC documents.</li> <li>• Some systems are searchable by IC type.</li> <li>• In some jurisdictions, the act of inclusion in tracking system makes ICs enforceable, while in other jurisdictions the system only provides notice of ICs.</li> <li>• GIS tool in place with web-based interface and interactive maps.</li> <li>• Mapping of sites with ICs implemented; some systems show boundaries of IC-impacted areas.</li> </ul>	Existing Site Registry is tool for IC tracking. Additional IC content could be included. Legislation could provide enforceability of ICs in site registry. Existing site registry is not GIS enabled.
Property Recording	All Jurisdictions	<ul style="list-style-type: none"> <li>• Records all interests on property providing information to any person looking for data on a specific site.</li> <li>• May be too specialized to be useful outside of context of land transactions.</li> <li>• Some jurisdictions (Ontario) do not need to rely on land title records because of enforceability of use restrictions in tracking system.</li> </ul>	Recording of use restrictions on land title is available in British Columbia.
Local Permitting Process	New York Ontario Quebec	<ul style="list-style-type: none"> <li>• Involves local government in basing permit decisions on knowledge of existing ICs.</li> <li>• Only successful when information is available to local permitting authority.</li> </ul>	Permit process by municipalities can be restricted based on existence of ICs. Municipalities are given notice of approvals in principle and certificates of compliance.

**Table 1: IC Comparison by Jurisdiction – Summary...Continued**

Topic	Jurisdictions Reviewed	Key Features	Relevance for British Columbia Program
<i>Long Term Maintenance of ICs</i>			
Deed Restrictions Tied to Land	All Jurisdictions	<ul style="list-style-type: none"> <li>Common property law makes continued enforceability uncertain without specific enabling legislation.</li> <li>UECA States ensures environmental covenants are tied to the land and are even potentially enforceable by non-signatory agencies.</li> <li>Some States (NY and CA) have legislatively created instruments for recording use restrictions that run with the land.</li> </ul>	Restrictive covenants appear enforceable against subsequent owners in British Columbia.
No Further Action Letters/Certificates of Completion Enforced Against Subsequent Owner	Illinois Texas Ohio Ontario	<ul style="list-style-type: none"> <li>Land use restrictions are enforceable against subsequent owner when articulated in appropriate documents.</li> <li>Some jurisdictions require that document be recorded with deed in order to be enforceable.</li> </ul>	Legislation would likely be required.
IC Audits and Inspections	Arizona Illinois Massachusetts New Jersey New York	<ul style="list-style-type: none"> <li>Site owner/operator must periodically review and certify effectiveness of ICs.</li> <li>Agency-led monitoring/auditing may be utilized.</li> </ul>	No active program in place for agency-led monitoring/auditing. Periodic certification could be a condition of approval in principle or certificate of compliance.
IC Cost Estimates and Financial Assurance	Arizona Missouri Ontario Texas Washington	<ul style="list-style-type: none"> <li>Some jurisdictions assess fees for sites with ICs.</li> <li>Some jurisdictions require financial assurance.</li> </ul>	Financial assurance could be condition of approval in principle or certificate of compliance.
Active Notice	Arizona California Florida Georgia Michigan New York Ontario Quebec	<ul style="list-style-type: none"> <li>Requires notice of ICs be given to local jurisdictions responsible for making land use decisions.</li> <li>May limit ability of local agencies to change property use without approval from environmental agency.</li> </ul>	There is active notice of approval in principle or certificate of compliance. Local agencies may also become aware in context of site profile process. Some local land use decisions are restricted without existence of approval in principle and certificate of compliance.

**Table 1: IC Comparison by Jurisdiction – Summary...Continued**

Topic	Jurisdictions Reviewed	Key Features	Relevance for British Columbia Program
<b><i>IC Enforcement, Penalties &amp; Consequences for Non-Compliance</i></b>			
Provisions within Deed Restrictions	California New York Quebec	<ul style="list-style-type: none"> <li>Deed restrictions are typically enforceable in law (money damages) or in equity (injunctive relief).</li> <li>Parties able to enforce may be limited to agency or may include third parties not specifically identified in the deed restriction.</li> </ul>	Restrictive covenants appear enforceable against subsequent owners in British Columbia.
Consequence: Voided No Further Action & Completion Certificates	Missouri Michigan New York Ohio Ontario	<ul style="list-style-type: none"> <li>Failure to comply with land use restrictions may open party up to potential liability.</li> <li>May become automatically void (self-implementing).</li> </ul>	Rescission of approvals in principle and certificates of compliance is a consequence of failure to meet applicable conditions.
Other Statutory Enforcement	California Missouri Illinois	<ul style="list-style-type: none"> <li>Civil and criminal penalty provisions are sometimes available as an enforcement tool for ICs.</li> </ul>	Currently nonexistent in British Columbia.
Loss of Environmental Liability Protections	All U.S. States Ontario Quebec	<ul style="list-style-type: none"> <li>Losing liability protection is a consequence of failure to meet IC requirements in most jurisdictions.</li> </ul>	Liability protection based on issuance of approvals in principle and certificates of compliance could provide incentives for maintaining ICs.
Enforcing ICs Against Subsequent Purchasers/Lesseees	Massachusetts New York Ontario Quebec Washington	<ul style="list-style-type: none"> <li>Notifications may be required for occupants and lessees.</li> <li>Legislation may make subsequent owners responsible for IC compliance.</li> <li>Protections may be afforded the seller when subsequent owner violates an IC provision.</li> </ul>	Deed restrictions remain enforceable against subsequent owners. However, conditions in approvals in principle and certificates of compliance are not generally enforceable.
<b><i>IC Termination</i></b>			
IC Termination	Florida Georgia New York Ontario Quebec	<ul style="list-style-type: none"> <li>Specific requirements for termination may be prescribed.</li> <li>Typically, agency approval is required.</li> </ul>	No clearly defined process for terminating ICs.

Chapter IV provides detailed discussion about the following options to amend BC's IC program:

Exclusively Rely on Restrictive Covenants.

- As an Alternative to Reliance on Restrictive Covenants, Increase Enforceability of Conditions within Certificates and Approvals and Rely Exclusively on Them.

Establish a Site Owner/Operator-Performed IC Inspection and Certification Program.

Improve Institutional Control Tracking.

- Establish an Institutional Control Fee.
- Amend the Site Profile Process To Ensure that Permit-Seekers Complete Site Profiles at Sites with Prior-Issued Certificates or Approvals, Where Conditions Within the Certificates or Approvals Exist.
- Publish Additional IC Protocols and Guidances.

## Chapter I : Overview of British Columbia IC Program

### I. Introduction

The main components of British Columbia's institutional control program include: 1) the placement of conditions within approvals in principle and certificates of compliance; 2) *Land Title Act* section 219 restrictive covenants; and 3) the site registry. These mechanisms provide varied means to restrict future land uses or activities, in order to ensure that any residual contamination does not pose a risk to human health or the environment. *Land Title Act* section 392 notifications and other proprietary and governmental controls play only a minor role in this IC program. The following sections discuss the IC program in British Columbia.

Section II provides an overview of BC's Environmental Management Act (EMA). Section III reviews approvals in principle and certificates of compliance, with a focus on the use and enforceability of conditions within these tools. Section IV discusses the tracking and maintenance of the conditions placed within approvals in principle and certificates of compliance. Section V reviews restrictive covenants as authorized under the *Land Title Act*. Section VI reviews registered notices as also authorized under the *Land Title Act*. Section VII overviews the site registry's use for tracking conditions within approvals in principles and certificates of compliance. Finally, Section VIII reviews examples of other institutional control tools used in British Columbia.

### II. Overview of the Environmental Management Act (EMA)

The EMA holds "responsible persons" liable for the cleanup of contaminated sites, and it also sets forth rules for site cleanup. The EMA identifies "persons responsible for remediation of contaminated sites" to include: 1) current and past site owners and operators; and 2) generators and transporters of substances who caused a contaminated site. The EMA also enumerates "persons not responsible for remediation." Among others, not responsible persons include: 1) persons who would fall into the Act's liability categories only because of an act or omission of a third party; 2) innocent purchasers of contaminated sites, who performed due diligence prior to purchase; and 3) persons who own or operate a site contaminated by the migration of contaminants from neighboring properties.

Concerning future liability, and indirectly concerning ICs, section 46(m) of EMA specifically addresses the liability of persons who received a certificate of compliance for site cleanup (see below for more discussion on certificates of compliance). In the case where MOE issues a certificate of compliance, responsible persons for the now-remediated contaminated sites may qualify as "persons not responsible for remediation" in the case where *another person* subsequently proposes or undertakes to:

- change the use of the contaminated site; *and*
- provide additional remediation.

This provision leaves some room for varying interpretations. But, at least to some extent, it seems to limit cleanup liability for those who receive certificates of compliance.

Section 29 of the Contaminated Sites Regulation, which implements EMA, addresses cleanup liability for owners and tenants. Under section 29 of the Regulation, in the case where a lease tenant contaminated a site, the owner of the site may qualify as a responsible person if the owner "knew or had a reasonable basis to know" that the tenant's operations would cause the site to become contaminated. This provision

may be relevant to the situation where lease tenants operate sites where, though remediated, future land use conditions remain.

Under the *Environment Management Act*, varying procedures exist for achieving site remediation. These include:

- Remediation orders under section 48;
- Voluntary remediation agreements under section 51;
- Independent remediation under section 54; and
- Pollution abatement orders under section 83.

Most remediations in BC occur as independent remediations. Less occur as voluntary remediations, and even less under order. Generally, as the name implies, independent cleanups occur independently – remediating parties must simply notify MOE at the beginning and end of cleanup. Voluntary cleanups occur under agreements between the MOE and the remediating party. Cleanups under a remediation or pollution abatement order occur when MOE brings an enforcement action.

Regardless of which cleanup regime applies, cleanups may attain either numerical standards, set forth within section 17 of the Contaminated Sites Regulation, or risk-based standards set forth within section 18. Numerical standards exist for soil, sediment, surface water, and groundwater. In addition to these media, standards exist for five different future use scenarios – agricultural, commercial, industrial, urban park, and residential. For soil below 3 metres, section 18(3) of the Regulation only requires cleanups to meet commercial standards, regardless of the surface site use. For groundwater, in the case where it “is not currently being used at the site,” section 18 allows MOE to specify protective numerical standards.

In addition to numerical standards, the Regulation allows cleanups to risk-based standards. Under section 18(6) of the Regulation, a person who applies the risk-based standards must prepare an environmental risk assessment report. The report must identify:

- the potential risks of any substances “causing contamination before and after remediation;” and
- procedures, including monitoring, designed to mitigate any significant risks.

Concerning the mitigation of risks, Section 18(7) of the Regulation authorizes the director to impose requirements “to prevent or mitigate risks” identified in the risk assessment report, or otherwise known to him.

The EMA, in section 53, broadly allows (but does not require) remediating parties to request, and MOE to grant, “approvals in principle” (hereafter approvals) and “certificates of compliance” (hereafter certificates). Approvals often mark the first of two major steps during cleanup oversight. The second step involves the issuance of certificates (see further below). Generally, within an approval, MOE states that remediation plans have “been approved by the director.”

Under section 53(1)(c) of EMA, approvals may authorize responsible persons to implement remediation plans “in accordance with conditions specified by the director.” Under section 47(3) of the Regulation, MOE may specify conditions for, among other things:

- preparation, registration, and criteria for final discharge of a restrictive covenant (restrictive covenants may limit future land use, see below for more discussion); and
- “testing and monitoring to evaluate the quality and performance of any remediation measures.”

Approvals commonly cite remediation plans, preliminary site investigations, detailed site investigations, and risk assessments, if any. They also identify the lands covered by the approvals and, in the case of remediation to numerical standards, the approved professional who reviewed and recommended the remediation plan for approval.<sup>1</sup> Schedule “A” of the approval consists of a site plan and Schedule “B” lists conditions to which the approval is subject.

In addition to approvals, under section 53(3) of EMA, MOE may issue certificates at sites *if*:

- The site has been remediated in accordance with numerical or risk based standards, any orders, an approved remediation plan, an any requirements imposed by the director;
- Information about the remediation and any substances remaining on site has been recorded in the site registry;
- If required by the director, a plan has been prepared for monitoring substances remaining on site, and works have been installed to implement the plan;
- Security in relation to management of contamination at the site has been provided subject to conditions specified by the director and requirements set forth in the *Regulation*; and
- If required by the director in prescribed circumstances or for prescribed purposes, the responsible person has prepared and provided proof of registration of a restrictive covenant under section 219 of the *Land Title Act*.

Under the current MOE practice, certificates contain information, statements, and conditions similar to those found in approvals in principle. Like approvals, certificates include Schedule “A” and Schedule “B,” where Schedule “B” often includes conditions upon which the certification is granted. Conditions which relate to future land use or land activities, operate as ICs.

Under section 53(5) of EMA, MOE may rescind approvals or certificates if “conditions imposed ... are not complied with.”

EMA’s language seems to suggest that MOE may impose conditions within both approvals and certificates. As discussed more below, however, a recent Environmental Appeals Board decision, see *Petro-Canada v. Assistant Regional Waste Manager and Deputy Director of Waste Management*, Appeal Nos. 2004-WAS-001(a) and 2004-WAS-002(a), January 17, 2006, raises serious questions about the MOE’s authority to do this.

EMA also allows for “approved professionals” to carry out specified functions. Pursuant to section 42 of EMA, MOE may identify approved professionals. Approved professionals may perform activities set forth within either the Regulation or MOE protocol. Under section 10 of the Regulation, MOE may hire approved professionals to assist with reviewing plans for either numerical or risk-based remediations. Under MOE’s Protocol 6, approved professionals may process applications for approvals at low-risk and medium-risk sites, when those sites will be remediated to numerical, rather than risk based, standards.

Finally, EMA addresses the relation between site cleanups and the local property development process. Under section 40 of the EMA, as discussed in more detail further below, during the local permit process persons must prepare site profiles for properties which previously operated as commercial or industrial

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<sup>1</sup> See “Protocol 6 for Contaminated Sites: Eligibility of Applications for Review by Approved Professionals,” July 28, 2004.

properties. For these sites, under section 946.2 of the *Local Government Act*, a municipality cannot grant a variety of land development permits unless MOE approves.<sup>2</sup>

### **III. Approvals in Principle and Certificates of Compliance and Typical Conditions in Them under Section 53 of the *Environmental Management Act***

As discussed above in Section I, MOE imposes conditions within approvals and certificates. In some cases, conditions limit certificates to only certain types of future land use. At numerical-based cleanups, for example, a certificate may provide:

This is to certify that as of the date indicated below, the lands identified below have been satisfactorily remediated to meet prescribed standards for *commercial land soil use*.

Conditions in both approvals and certificates also refer to the future maintenance of “works” (also known as engineered controls). Conditions have included, for example:

A barrier to migration of groundwater in the shallow fill unit shall be maintained along the east property boundary until the offsite course of chlorinated solvents is remediated. The purpose of the barrier is to alter the axis of groundwater flow in the fill on the suspected source site (offsite one lot east) so that the subject site is not in the migration path. The barrier design must be stamped by a professional engineer.

In many cases, conditions require the presence of an environmental consultant during any future subsurface work. For example, many conditions require qualified environmental consultants to be:

Available to identify, characterize and appropriately manage any environmental media of suspect quality which may be encountered during any future subsurface work at the site.

When a remediation is risk-based, Schedule “B” of both approvals and certificates commonly references the risk assessment and contains the following or a similar condition:

Any changes to the conditions or circumstances described in the risk assessment could invalidate the assessments. If a change in the conditions or circumstances occurs, the site owner is required to notify the ministry and submit revised or amended assessments for review and approval to the ministry. Otherwise, this certificate becomes void.

Because this condition references the risk assessment, Schedule B does not typically state the actual conditions or circumstances which must continue to exist at a site. Rather, persons must review risk assessment documents to learn this information.

#### **A. *Are Conditions in Approvals and Certificates Enforceable?***

Yes, but some limitations and hindrances to enforcement exist. Five indirect mechanisms exist to enforce the conditions within either approvals in principle or certificates of compliance. These include the following.

- i. MOE may prevent municipalities from issuing a variety of land use development permits.

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<sup>2</sup> This statement would not apply to a municipality that opted out of the site profile system pursuant to section 4(4) of the *Contaminated Sites Regulation*. Identical conditions in section 85.1 of the *Land Title Act* govern an approving officer’s authority to approve a subdivision application.

MOE may rescind either approvals or certificates, which it previously issued.

MOE may refuse to grant certificates if certain conditions, including conditions within prior-issued approvals, have not been satisfied.

MOE may rely on EMA's general enforcement authorities to indirectly enforce conditions within approvals or certificates.

MOE may "enforce" conditions by memorializing them within restrictive covenants.

But limitations and hindrances upon enforcement of these conditions exist.

EMA does not authorize MOE to impose penalties, issue injunctions or to otherwise directly enforce conditions. Rather, enforcement must occur under one of the four indirect regimes listed immediately above.

The recent *Petro-Canada* decision raises significant questions concerning whether conditions within certificates may be imposed and, in turn, enforced.

MOE's enforcement of conditions in certificates and approvals may be limited due to resource limitations.

The following sub-sections discuss each of these points, in turn.

#### MOE May Prevent Municipalities from Issuing a Variety of Land Use Development Permits

Under section 40 of the *Environmental Management Act*, persons must complete site profiles when they apply, to a municipality or land title approving officer, for a variety of land use-related permits. These include permits or approvals for zoning, development, development variance, soil removal, demolition, or subdivision. The obligation to complete site profiles becomes triggered if the applicant "knows or reasonably should know" that the site was used for industrial or commercial purposes.

An exception exists to this general rule in the case where a site profile has been previously completed. Under section 4(1)(b) of the Regulation, a permit applicant need not prepare a site profile form if:

the site is the subject of an approval in principle or certificate of compliance *relevant to the current use of the site* and any use *proposed by the person*, but only if the person has no reason to believe that there has been any additional or new contamination at the site after issuance of the approval in principle or certificate of compliance.

This exception, however, may not cover some cases where conditions exist within previously issued certificates or approvals. For example, the exception might not apply where a permit applicant's *proposed use* would violate an existing condition within a certificate or approval. If the exception did not apply, the applicant would need to prepare a site profile – even though a previous site profile existed.

Once the site profile obligation becomes triggered, the permit-seeker must complete a MOE-provided site profile form.<sup>3</sup> Sections IV through VIII of the form ask a series of yes-no questions about a variety of environmental issues that currently or in the past existed. In addition, section IX asks whether the property is subject to liens or restrictive covenants, and whether "other charges or encumbrances stemming from contaminant or wastes remaining onsite or from other environmental conditions" exist. Section 6(1)(c)(i) of the Regulation requires municipalities, unless the municipality has opted out of these requirements, to forward the site profile form to the MOE if the applicant answered "yes" to any question in sections IV to IX.

<sup>3</sup> See [http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375\\_96/375\\_96sch1.htm](http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375_96/375_96sch1.htm).

The questions within section IX, in particular, should elicit a “yes” answer when conditions within certificates or approvals exist. The language “other charges or encumbrances stemming from contaminant or wastes remaining on site” seems to squarely capture certificate or approval conditions which impose limits or obligations related to future land use. In addition, section IX would clearly elicit a “yes” answer for properties subject to liens or restrictive covenants. As noted above, “yes” answers require the municipality to forward the form to the MOE.

Once forwarded, section 946.2(2) of the *Local Government Act* prohibits municipalities or officers from issuing permits or approvals, without MOE approval. In order to issue permits or approvals, municipalities must receive notifications from MOE that:

- No site investigation is required;
- The site does not qualify as a contaminated site;
- The MOE approves the permit because “in the opinion of the director the site would not present a significant threat or risk if the application were approved;” or
- Independent or voluntary remediation is occurring;

Thus, MOE appears to have wide latitude to prevent a permit or approval. For example, MOE may decide whether “the site would [] present a significant threat or risk if the application were approved.” If, based on the application, future land uses would violate conditions within certificates or restrictions and, in turn, present a risk; MOE seems within its authority to prevent the permit approval.

## ii. Rescission of Approvals and Certificates

Section 53(5) of EMA, among other things, authorizes MOE to rescind an approval or certificate if *conditions* imposed on either are not satisfied. In the case of property redevelopment, where a person desires local development, zoning, and related permits, rescission may carry great force. Without MOE’s issuance of either an approval or a certificate, as described above, in many cases local land development permits may not be issued.

In addition to securing local permits, approvals and certificates may hold significant value to persons who desire or have already received private financing for properties where remediation has already occurred. Typical lending agreements include provisions, under which, lenders may declare a loan to be in default. If default provisions become triggered, lenders may demand full payment immediately or reclaim the property which the loan financed. Typical default provisions require persons to remain compliant with various laws and regulations, including environmental laws. According to a representative of RBC Financial Group, non-compliance with approval or certificate conditions would trigger typical loan default provisions.<sup>4</sup>

Finally, approvals and certificates may also hold value to persons wishing to sell their property. Though this report does not study the topic here, most practitioners agree that property often holds a higher value when its cleanup has been certified by an environmental agency. Thus, the force of rescission, or the threat of rescission, depends on the value of the approvals and certificates. In the case of property redevelopment, property sale, or where retaining project financing is important, rescission may carry great

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<sup>4</sup> Personal communication between Don Allen, DPRA Incorporated, and James Evans, Senior Manager, Environmental Risk Management, RBC Financial Group (Feb.15, 2006).

force. Indeed, interviews with stakeholders and their representatives confirm that, in many cases, approvals and certificates are highly prized and eagerly sought.<sup>5</sup>

Rescission may not carry force if it would not affect permits, financing, or the ability to sell. Concerning permits, once a project is built, the value of acquiring permits diminishes significantly, if not completely. Concerning financing, the value of securing or retaining financing, of course, would not exist if the project did not rely on financing. But even where they do, just because rescission may trigger loan default provisions, it does not necessarily follow that a lender would actually exercise this provision. First, as a practical matter, lenders may simply not know about the rescission. And even if they became aware of a rescission, lenders only seem likely to exercise default provisions if the value of the property falls below (and continues to fall below) the loan amount. While rescission may affect property value, so do many other factors. Thus, a meaningful relation may not always exist between the act of rescission and a property's value.

Similarly, in the case of a person wishing to sell their property, rescissions may only carry little force if the rescission would not impact the sale price.

### iii. Withholding Certificates of Compliance

As discussed above in Section I, section 53(5) of EMA authorizes MOE to withhold certificates if “conditions imposed...are not complied with.” The issue of withholding will most often arise in the case where an applicant claims to have completed cleanup, but conditions within approvals have been violated, or where the applicant does not agree to abide by conditions that would be placed in a certificate. Like the case for rescissions, withholding a certificate may hold meaningful consequences where financing, permits, or property sale remain at stake.

Certificate withholding may be particularly powerful when project financing is at stake. Loan agreements for commercial or industrial property in British Columbia commonly require not only that the owner or developer obtain an approval in principle but that he or she also obtain a certificate. Withholding might carry force in the case of permit issuance, but because permits may be issued where the MOE has issued an approval, permits will already often exist at this stage. And as in the case for rescissions, in cases where withholding may affect a property sale price, it may carry force – but many factors affect real estate pricing.

In addition to selling, securing loans, and securing permits, certificate withholding seems forceful when persons have invested both time and money to secure approvals and, in turn, to conduct site remediation. In order to secure approvals, the applicant must identify himself as a responsible person and incur both the ministry's fees and the expense of preparing a remediation plan. Moreover, issuance of an approval triggers designation of the site as contaminated under section 53(2) of the *Act* if the site had not already been so determined under section 44(1). It seems unlikely that a responsible person would ignore an approval in principle altogether without good reason.

Even though certificates hold value in many cases, in some cases little incentive for securing certificates seems to exist. For example, municipalities have complained that, in some cases, MOE issues an approval and, in turn, the municipality grants local development permits – but then “nothing happens.” Remediation development activities do not occur, even though the municipality granted permits with the

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<sup>5</sup> Personal communication between Don Allen, DPRA, Inc., and Waldemar Brault, Barrister & Solicitor, and Paul J. Mathieson, Assistant Vice President, Commercial Financial Services, HSBC Bank Canada (Feb. 16, 2006).

expectation that they would. And property development, under the authority of the municipal permits, continues to proceed.

This post-approval inaction might occur for a variety of reasons. It is possible, though no evidence exists for this, which the approval application was capricious or fraudulent and, in turn, such applicants never intended to complete remediation plans. Otherwise, this inaction might occur because commercial forces fail to provide incentives for project progress. This inaction remains possible, because MOE does not typically set time limits for remediation as conditions within their approvals.

iv. MOE May Enforce Conditions Within Certificates by Memorializing the Conditions in Restrictive Covenants

Under section 53 of EMA, the MOE may, in prescribed circumstances and purposes, require the registration of a restrictive covenant as a condition to issuance of a certificate. Thus, in some cases, conditions that might have been placed in certificates may, instead or also, be contained within restrictive covenants.

A fuller discussion of the circumstances and purposes for environmental covenants, and their enforcement, exists further below in this Chapter, and in Chapter IV.

v. MOE May Rely on EMA's General Enforcement Authorities to Indirectly Enforce Conditions Within Approvals and Certificates

Section 60 of EMA provides a means to indirectly enforce such conditions. Section 60 authorizes the MOE to exercise any of its authorities or functions, even though they may have been previously exercised, when "activities occur on a site that may change its condition or use." Invoking this provision, however, would simply triggers MOE's available "authorities or functions." The question remains, then, of which authorities or functions it might apply to the case where site activities or uses violate the conditions within an approval or certificate.

In addition to the authority to withhold or rescind approval and certificates as discussed above, MOE's EMA authorities include remediation orders under section 48, pollution abatement orders under section 83, and environmental protection orders under section 85. Remediation orders may be issued to "responsible persons." Pollution abatement orders, however may be issued to broader class of "persons" defined in section 83. Environmental protection orders may be issued to anyone "affected" by a "work, undertaking, product use or resource use [that] has, or potentially has, a detrimental environmental impact." In cases where a person violates a condition within a covenant or approval, either if these enforcement provisions might conceivably be triggered. The latter two types of orders, because they do not turn on "responsible person" might plausibly be brought to bear upon an otherwise not "responsible person" who violates a condition within a certificate or order.

Section 60 also authorizes the director of waste management to exercise any of his powers or functions under Part 4 if "a responsible person fails to exercise due care with respect to any contamination at the site." For the purpose of this report, DPRA did not examine that BC case law might have given to the phrase "due care." In the United States, the phrase "due care" exists within CERCLA's 3<sup>rd</sup> party defense. Generally, persons claiming this defense must show, among other things, that a 3<sup>rd</sup> person caused the release at issue and that they (the defense seeker) exercised due care by, for example, notifying authorities about the release, responsibly responding to it, and not exacerbating the release. Regardless of the precise meaning of "due care" under EMA, it seems plausible that a person who fails to comply with conditions

in approvals or certificates, including IC conditions, may qualify as a responsible person who failed to exercise due care. In turn, the MOE could exercise any of its powers to enforce against this person.

vi. **EMA Does Not Authorize Direct Penalties For Violating A Condition Within A Certificate or Approval**

Section 115 of EMA authorizes the MOE to exercise a variety administrative penalty provisions under the circumstances it enumerates. And section 120 authorizes penalties for a variety of enumerated offences. Neither section 115 nor section 120 appears to contain any provisions which authorize enforcement penalties for violating a condition within a certificate or approval. Thus, only the indirect enforcement mechanisms, discussed above, may be brought to bear when conditions are violated.

vii. **The Petro-Canada Decision Raises Significant Question About the MOE's Ability to Impose Conditions Within Certificates and Approvals**

A recent ruling by a Panel of the Environmental Appeals Board<sup>6</sup> raises questions about whether and which type of conditions the MOE may impose within certificates. This case involved two petroleum cleanup sites. For one, the MOE issued a Conditional Certificate of Compliance. For the other, the MOE issued a Certificate of Compliance. In both certificates, the MOE included a notation, within Schedule "B," providing that:

The site owners indemnify the provincial Crown ... against loss, damages, costs, actions, suits and claims arising from the contamination remaining at the site.

MOE seemed to include this notation in order to limit any future risk that the Crown may face. Such risk may have possibly existed because, by issuing a certificate which allowed contamination to remain in place and because of the possibility that every possible contaminant on site had not been investigated thoroughly, the Crown could plausibly have faced future liability under EMA.

The Panel decided that this so-called indemnity clause was invalid because, the Panel explained, it qualified as an invalid exercise of discretion by MOE. The Panel reasoned that the legislature did not grant the MOE with discretion to include, within certificates, "any conditions or terms that [MOE] sees fit." Rather, it reasoned, such conditions must be consistent with the Act.

The Act at issue here was EMA's predecessor, the Waste Management Act (WMA). Effective July 2004, EMA repealed and replaced the WMA. However, the WMA provisions at issue seem sufficiently similar to those within EMA and, thus, EMA's amendments to WMA do not seem to affect the Panel's ruling.

The Panel focused on two WMA provisions which, plausibly, might have authorized MOE to include the indemnity clause. First, the provision, within section 27.6(2) of WMA, providing that the director may issue a certificate if the site has been remediated in accordance with "any requirements imposed by the [MOE]." The Panel reasoned that the "any requirements imposed" language referred to requirements imposed prior to or during the remediation process. In turn, the Panel concluded that term "requirements" did not encompass post-remediation conditions or requirements included within certificates of compliance. Because MOE included the indemnity clause as a condition to the certificate, rather than a requirement related to the remediation imposed prior to or during remediation, the Panel held it invalid.

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<sup>6</sup> *Petro-Canada v. Assistant Regional Waste Manager and Deputy Director of Waste Management*, Appeal Nos. 2004-WAS-001(a) and 2004-WAS-002(a), January 17, 2006.

The Panel also considered the provision, within 27.6(3) of WMA, providing that the director may issue a certificate if the site has been remediated and “any security...required by the [MOE] has been provided relative to the management of substances on the site.” Here, the Panel concluded that the meaning of the term “security” did not encompass the indemnity clause that MOE included within the certificate. “Security,” the Panel explained, refers to collateral which one party gives to another as an assurance that it will pay future debts. In contrast, according to the Panel, the certificate’s indemnity clause operated as a simple promise to pay, without any collateral.

In addition to looking at the meaning of “security,” the Panel went further. It reasoned that, even if the indemnity clause fell within the meaning of “security,” it still would be invalid in this case. The Panel noted that, under the WMA, MOE may issue a certificate when “any security required by the [MOE] ... has been provided.” The Panel interpreted this phrase to mean that the MOE must actually ask for and, in turn, accept “security” before issuing a certificate. In contrast, in this case, the MOE simply included the indemnity clause within the certificate, without first asking for or securing an agreement concerning its inclusion.

In addition to evaluating the “requirement” and “security” language, the Panel also evaluated the relevance of WMA’s reference to the Land Title Act (LTA). The WMA and its implementing regulations provide that MOE may issue certificates if persons register a restrictive covenant under the LTA. Under the WMA, these LTA restrictive covenants may only serve four enumerated purposes, see section 48(1)(a)-(d) of the Regulation, one of which includes indemnifying the Crown. Unlike the WMA’s “security” language, the Panel concluded that the Act’s language concerning restrictive covenants clearly allowed these covenants to include indemnity provisions. Thus, it reasoned, MOE could have required a restrictive covenant which included the indemnity clause at issued.

However, the Panel further reasoned that, just because MOE can require restrictive covenants to include indemnity clauses, it does not follow that the MOE can include indemnity clauses within the conditions to certificates. Indeed, the Panel interpreted the absence of the Act’s express authority to impose indemnity clauses within certificates, in contrast to the clear authority to include indemnity clauses in restrictive covenants, as the legislature’s intent to exclusively allow indemnity clauses within restrictive covenants. The Panel concluded that the MOE may only require indemnity clauses within restrictive covenants, and not within certificates.

What does *Petro-Canada* mean to other conditions in certificates? When issuing certificates for risk-based cleanups, MOE commonly attaches the following condition.

Any changes to the conditions or circumstances described in the risk assessment could invalidate the assessments. If a change in the conditions or circumstances occurs, the site owner is required to notify the ministry within 30 calendar days and submit revised or amended assessments for review and approval by the ministry. Otherwise, this certificate becomes void.<sup>7</sup>

When considering this “changed condition” requirement, a subsequent tribunal, assuming it followed the *Petro-Canada* logic, would probably undergo the following analysis. First, it would look to section 53(3) of EMA. This section enumerates the requirements which, if satisfied, allow the MOE to issue a certificate. Similar to the way the *Petro-Canada* Panel looked to the “security” and “requirement” language, a “changed condition” inquiry would evaluate whether section 53(3) authorized such a

<sup>7</sup> See, e.g., *Certificate of Compliance*, Schedule “B”, Charlie Lake Store, SITE Identification Number Site 6088, November 23, 2005.

“changed condition” requirement. Second, the inquiry might look to whether the MOE asked for and received an agreement to include this “changed conditions” requirements in the certificate. Finally, the inquiry would also look to whether EMA’s allowable purposes for restrictive covenants, as set forth within section 48(1)(a)-(d) of the Regulation, include this “changed condition” requirement.

Based on this *Petro-Canada* logic, the “changed condition” requirement might be limited to restrictive covenants and, in turn, excluded from certificates. The restrictive covenant purposes, as set forth in section 48(1) of the regulation, expressly contemplate changes at a site which would invalidate risk assessments. And the language of section 53(3) does not clearly contemplate such “changed condition” requirements. Thus, a reasonable interpretation of *Petro-Canada* might conclude that the legislature intended such “changed condition” requirements to exist only in restrictive covenants.

However, a good contrary argument seems to exist. The argument would reason that the “changed condition” requirement may simply operate as a restatement of the authority which EMA grants MOE, under section 60 and section 53(5). Section 60, in general, allows MOE to re-invoke any of its authorities even if it had already exercised them. For example, section 60 allows MOE to act if “activities occur on a site that may change its conditions or use.” Section 53(5) allows MOE to rescind certificates if “conditions imposed ... are not complied with.” These provisions, especially when read together, may provide sufficient statutory authority for the “changed condition” requirement. Thus, the “changed condition” requirement might be distinguished from the indemnity clause in *Petro-Canada*.

The application of *Petro-Canada* to the “changed condition” requirement, or other certificate conditions and requirements, could follow varying lines of reasoning and, in turn, varying conclusions. A full briefing on the impact of *Petro-Canada* falls beyond the scope of this report. While the above paragraphs inform the inquiry, here we may only conclude that *Petro-Canada* raises significant questions on the MOE’s ability to impose conditions within certificates and approvals.

#### viii. MOE’s Enforcement of Conditions May Be Limited Due to Resource Limitations

Conditions within approvals and certificates require significant resources to enforce. MOE must, for example, keep track of every site at which a condition exists. Then, it must remain aware of the actual conditions imposed. In turn, it would need to perform a variety of monitoring functions designed to ensure that future land uses actually comply with conditions. To do this it might need to review site profiles on whether they pertain to sites with previously-issued certificates with conditions. It would also need to perform additional periodic monitoring, above site profile reviews, to compare site uses to certificate or approval conditions. Finally, where violations existed, it would need to bear the burden of undertaking an enforcement action.

From all reports, however, the ministry currently lacks the resources to monitor implementation of remediation plans or compliance with conditions in either approvals or certificates. Without such information, exercising any enforcement authority is problematic at best, and some stakeholders express the view, or speculate, that certificate conditions are often ignored.

#### **B. *Should Conditions in Approvals and Certificates Be Enforceable?***

Yes. And as discussed above, various indirect means exist to enforce them. The question becomes, however, whether these indirect means suffice, or whether MOE should possess more direct means to enforce these conditions.

If MOE continues to rely on conditions within certificates or approvals, more direct and powerful means

should be available to enforce them. Conditions within certificates often limit future land use in order to protect persons and the environment from contamination-related risks. In turn, violation of conditions puts either people or the environment at risk.

While indirect means exist to enforce these conditions, enforceability issues exist because: 1) conditions do not transfer to subsequent purchasers (i.e., run with land); 2) because only indirect means, and not direct means, exist to enforce them; and 3) because *Petro-Canada* raises questions about the MOE's authority to impose conditions within certificates.

Chapter IV provides more detailed discussions on mechanism that might be used to increase the enforceability of conditions within certificates or approvals.

### ***C. What Is the Validity of a Condition in an Approval or Certificate When the Land is Transferred to a New Owner?***

Because they do not qualify as interests in land, it is unlikely that conditions within either approvals in principle or certificates of compliance run with the land. As discussed above, section 53 of EMA seems to authorize the MOE to impose conditions on approvals and certificates. But section 53 of EMA does not purport to create interests in land. The *Land Title Act* further suggests that these types of conditions do not qualify as interests in land.

Section 23(g) of the *Land Title Act* lists "condition" among interests to which property may be subject. But section 39 provides that a registrable instrument is one "sufficient to pass or create an estate or interest in land." Sections 181(1) and 197(1)-(2) of the *Land Title Act* confirm that a condition is considered to be a "charge" against land, which the *Act* defines as "an estate or interest in land less than the fee simple." Moreover, the *Act* does not even provide authority for filing a notice of approval or certificate conditions as it does for contaminated land notices under section 392.

If conditions in approvals and certificates do not run with the land, they cannot impose any obligations on subsequent purchasers. This conclusion is consistent with the facts that 1) approvals and certificates are addressed to current site owners, and 2) neither the *Act* nor the *Regulation* requires notification of the ministry when property for which an approval or certificate was issued is transferred.

## **IV. Tracking and Maintenance of Conditions in Approvals in Principle and Certificates of Compliance**

### ***A. How Are Conditions in Approvals and Certificates Tracked?***

The ministry reviews remediation plans and their implementation in connection with applications for approvals and certificates, but it does not otherwise track them or compliance with their conditions. This reflects the ministry's current lack of resources for site monitoring. A site registry notation indicating that a certificate was issued for a risk-based remediation should alert knowledgeable users that the certificate is subject to conditions, but the site registry cannot track the conditions without monitoring data. Inability to track compliance with conditions precludes their enforcement and needs to be addressed. In view of the ministry's resource constraints, it would seem best to consider the outsourcing of monitoring functions to the responsible parties themselves. That is, approvals and certificates should require that responsible persons report information to the ministry that would allow it to track and evaluate compliance with any conditions included in them.

**B. How Are Conditions in Approvals and Certificates Made Publicly Available?**

Approvals and certificates are made publicly available through the following site registry notations:

- Approval in Principle Requested.
- Approval in Principle Issued.
- Certificate of Compliance Requested.
- Certificate of Compliance Issued Using Risk Based Standards.
- Certificate of Compliance Issued Using Numerical Standards.

The public has access to approvals and certificates through 1) site registry detail reports, which include the notations listed above, 2) requests to the ministry for copies of the actual approvals and certificates, and 3) requests made under the province's *Freedom of Information Act*. Moreover, section 52(2) of the *Regulation* requires the director to send a copy of any approval or certificate he issues to the municipality where the subject contaminated site is located.

**C. How Are Conditions in Approvals and Certificates Maintained and Followed Up?**

They are not. The Environmental Management Branch once included an Operations and Compliance Group that performed some additional monitoring and follow-up functions with respect to approvals and certificates, but the group was disbanded due to staff attrition and other resource constraints. Under its current practice, MOE does not ensure that current site uses actually comply with the conditions within certificates or, in turn, within the future land use assumptions relied upon in risk assessments.

Through the site profile process, as described above, some degree of maintenance and follow-up is possible. EMA and the Local Government Act seem to require site profiles to be submitted to MOE for sites with prior-issued certificates, if conditions within those certificates might restrict the intended future use of a site. The EMA and Local Government Act language, however, is not entirely clear on this point. While MOE receives numerous site profiles, as a practical matter MOE receives very few site profiles for sites with prior-issued certificates. It remains unclear whether these permits simply have not been sought at these sites, or whether permit applicants and municipalities do not send along site profiles to MOE.

**D. How Are Conditions in Approvals and Certificates Terminated?**

Conditions may be terminated along with the approval or certificate if the director exercises his rescission authority under section 53(5) of the *Environmental Management Act*. Otherwise, an approval and any conditions attached to it terminate upon issuance of a certificate of compliance. The certificate certifies that the approved remediation plan has been implemented in accordance with the director's requirements and that the other requirements for issuance of a certificate set forth in section 53 have been satisfied. Conditions in certificates of compliance, however, are generally stated to remain in effect "until no longer required by the director."

**V. Covenants under Section 219 of the *Land Title Act***

Section 219 covenants are implemented by property owners through registration against title to the land subject to the covenant. Property owners may give covenants in favor of the Crown, a Crown corporation or agency, a municipality, a regional district, the Greater Vancouver Transportation Authority, or a local trust committee under the *Islands Trust Act*. Thus a municipality with delegated powers in respect of

certificates of compliance under section 57(3) of the *Act* could presumably require registration of a covenant designating itself rather than the Crown as covenantee.<sup>8</sup>

Land title searches will disclose the existence of restrictive covenants and their terms, and copies of covenants are available through site information requests. Covenants also may be monitored by owners, prospective purchasers, or lenders, each with a view to obtaining their discharge either under section 48(3) of the *Regulation* in the case of remediation to numerical standards or under section 48(2) in the case of remediation to risk-based standards.

The following site registry notations are used to record restrictive covenant milestones:

- Restrictive Covenant Review Requested;
- Restrictive Covenant Accepted.

**A. *What Criteria Have Been Used to Decide if a Covenant under Section 219 of the Land Title Act Should Be Required by the Director?***

Section 48(1) prescribes four purposes for which MOE may require a restrictive covenant. MOE may require a covenant for:

Inspection and maintenance of “works”;

Restricting soil disturbance or preventing a change in land use which would, if it occurred, invalidate a risk assessment assumption;

Contamination monitoring;

Indemnifying the Crown from losses, charges, actions, or suites related to contamination remaining at a site.

But MOE may only require a covenant, if these purposes “are unlikely to *be satisfactorily met* by the entry of notations in the site registry.”

The decision to require registration of a covenant in preference to relying on site registry notations to satisfy the section 48(1)(a)-(d) purposes is largely driven by the perceived risk of the site and the professional judgment of MOE staff.

When issuing an approval in principle, section 47(3)(b) authorizes the MOE to specify conditions for “risk assessment and risk management measures which may be required for part or all of a site for any reason.” Sections 18(6) and (7) of the *Regulation* impose similar requirements on a person applying risk-based standards and confer similar authority on MOE. MOE evaluates the need for a section 219 covenant by weighing the remediation plan against the risk assessment in light of the classification of the site as low-, medium-, intermediate-, or high-risk and any other factors it deems appropriate.

In practice, MOE staff weigh numerous factors, including but not limited to:

uncertainties in the risk assessment;

the type of activity that produced the contamination;

anticipated future site uses;

whether ongoing treatment of wastes is necessary;

whether soil disturbance or change in land use would create a significant risk;

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<sup>8</sup> As of the date of this report, no delegations under section 57(3) had been made.

whether free product or leachable materials are present at the site;  
whether the responsible person who would manage on-site contamination pursuant to *in situ* authorization under the *Hazardous Waste Regulation* is viable; and  
whether the risks posed by the site justify the effort required to draft and reach agreement on the terms of a covenant.

**B. *What Criteria Should Be Used to Decide if a Covenant under Section 219 of the Land Title Act Should Be Required by the Director?***

No published procedures, either public or MOE-internal, exist to help guide such “satisfactorily met” decisions. Generally, MOE tends to reserve the use of covenants for the highest risk sites.

MOE does differentiate between low-, medium-, intermediate-, and high-risk sites. For example, MOE’s Protocol 6 restricts the kind of work that approved professionals may perform at higher-risk sites. And MOE allows cleanups to attain risk-based standards.

But like the case for whether to employ a covenant, no guidance exists on how to classify a site within the various risk categories.

Staff members and stakeholders largely believe that it would benefit both MOE and other stakeholders if policy, guidance, or statements of principles, informed by the experience of current MOE staff, were developed for:

Risk Assessments;  
Remedy Selection; and  
Whether to Employ Covenants.

The forthcoming protocol on financial security and the Science Advisory Board’s submission of a final site classification protocol are seen as hopeful signs that the ministry is moving in this direction.

See the program amendment options, in Chapter IV (section VII), for more discussion on which criteria should be used to decide whether to employ a covenant rather than relying on the registry.

**C. *Are Covenants under Section 219 of the Land Title Act Enforceable?***

Yes, but some question exists on whether the Regulation’s covenant discharge provisions limit enforcement at numerical-based cleanups. Section 219(3) of the *Land Title Act* makes it clear that covenants are enforceable against both the covenantor and his successors in title, i.e., that it runs with the land. The *Land Title Act* expressly states that section 219 covenants may be either negative or positive, and it need not be “annexed to land owned by the covenantee.” These features ensure that common law technicalities do not pose obstacles to enforcement. Section 219 covenants may be made in favour of, among other parties, the Crown, a Crown Corporation, or a municipality. Thus, for covenants granted in favour of MOE, MOE would have the right to take legal action against covenantors to enforce them. The MOE’s legal action, and its remedy, would be determined pursuant to the *Land Title Act* - EMA does not provide any direct causes of action or remedies for covenant violations.

The Regulation, in sections 48(2) and 48(3), expressly addresses covenant discharge. Under the Regulation, covenant discharge *must* occur in some circumstance, while it *may* occur in others. In the case of cleanup to numerical standards, under section 48(3) of the Regulation, MOE must discharge a restrictive covenant when:

A remediation has been carried out to numerical standards; and MOE has issued a certificate for the cleanup.

This section could be interpreted to mean that, once MOE issues a certificate, restrictive covenants can no longer exist at numerical standard sites.

Section 48(2), however, allows a different interpretation. Section 48(2) allows a person to request a covenant discharge “if the person believes that the conditions which gave rise to the covenant no longer exist or have been complied with.” It remains silent on MOE approval of this request, as well as any criteria MOE might employ while considering a discharge request.

This provision could be interpreted to mean that, even at numerical-based cleanup sites, covenants may continue to exist after certification. This interpretation would reason, first, that numerical standards often give rise to post-certification conditions. Consider, for example, a site cleaned to industrial numerical standards – future conditions would prevent non-industrial uses. Second, it would reason that the covenant was (or will be) required in order to assure that condition holds true. Finally, it would reason that MOE may only discharge the covenant if the site no longer required non-industrial use restrictions. Thus, under this interpretation, restrictive covenants at numerical sites may live beyond certifications.

At risk-based cleanups, the covenant discharge requirements operate more cleanly. Section 48(3) expressly applies to numerical cleanups. Thus, only section 48(2) applies to risk based cleanups. In turn, no threat of post-certification discharge exists. Rather, a person may simply request a covenant discharge “if the person believes that the conditions which gave rise to the covenant no longer exist or have been complied with.”

## **VI. Registered Notices under Section 392 of the *Land Title Act***

The director may file a notice in the appropriate land title office if land is contaminated with a “special” (hazardous) waste that will expose someone “entering and using” the land to a “danger to health.” The notice must contain a legal description of the land, specify the nature of the contamination, and state the estimated period that the danger is expected to persist. The land titles registrar reviews the statutory sufficiency of the notice and endorses the title with its particulars. Once the director is satisfied that the danger no longer exists, he must notify the registrar, who then must cancel the endorsement. There is no prescribed form for the notice. The Land Title Branch would expect to receive any notice in letter form. The branch has developed a model notation.

Section 392 of the *Act* states that no liability attaches to any person because of anything done or omitted to be done under the section unless it was done or omitted in bad faith. This provision and the words “may file” indicate the elective nature of the filing. The filing application number would be required to search the land title registry for a specific notice; there is no way to perform a “macro” search for them to obtain a report similar to the custom reports that can be obtained from the ministry’s site registry.

**A. Have Any Notices Been Filed under Section 392 of the Land Title Act? If Not, Why Not?**

No notices have been filed under section 392.<sup>9</sup> The topic of section 392 notices is not covered in the *Land Title Practice Manual* published by the Continuing Legal Education Society of British Columbia.

Land title staff members offer several hypotheses for the apparent unpopularity of these instruments. The threshold requirements for filing a notice are fairly onerous and they speak to a situation that rarely if ever arises in the context of property development. While the director is authorized to file the notice, he would probably be reluctant to do so without consulting public health authorities and relying on their judgment as to the severity of the danger to health posed by the hazardous wastes at the site. In many cases, the health authorities would be aware of the danger before the director was, and would request the filing if they thought the danger warranted it. Moreover, land title notices are not the best way to alert the public to health risks, which are frequently short-term or transient.

A further disincentive to filing a section 392 notice is that the land owner could appeal the action under the *Judicial Review Procedure Act*. While section 392(6) of the *Land Title Act* seeks to protect both the director and land title registrar from liability for action or inaction in respect of these notices, no provision of section 392 has ever been tested in court.

Another line of informed speculation holds that the ministry would resort to filing a section 392 notice only when a property owner refused to register a section 219 restrictive covenant. This would seem likely only if the threshold requirements for a section 392 notice had been met and the presence of hazardous wastes had undermined development plans for the site. This combination of circumstances seems not to have occurred in British Columbia.

**VII. Site Registry Notations Pursuant to Section 43 of the *Environmental Management Act***

The site registry consists of an Oracle database known as SITE and the documents in the ministry's case files that are referenced in the database. Information required to be noted in the registry is specified in section 43(2), (3), and (4), 53(3)(b), and 59(7) of the *Act*, and section 8(1) and (4) of the *Regulation*. Section 8(1) requires MOE to provide the site registrar with information about remediation plans prepared and submitted under section 53 of the *Act*, approvals in principle, certificates of compliance, and "information related to the monitoring, verification or confirmation of compliance with a remediation plan" among other things.

Notations in the database are made by the MOE registrar and his staff as he receives information from the director of waste management. Section 43(2) requires that the director provide information to the registrar "in a form suitable for inclusion in the site registry." The registrar maintains a list of standard site notations that track the provisions of the *Act* and *Regulation* cited above. The list used under EMA's predecessor, the *Waste Management Act*, included 84 different notations. Following the passage of EMA, MOE revised the list to eliminate redundant or obsolete notations. The current list includes 72 different notations.

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<sup>9</sup> Personal communication between Don Allen, DPRA Incorporated, and Dennis Doyle, Office of the Attorney General (Feb. 24, 2006) and Sandra King, Strategic Operations, Land Title Branch, Land Title and Survey Authority of British Columbia (Feb. 25, 2006).

Site notations identify milestone events. For example, the notation “Restrictive Covenant Under Review” indicates that the director has exercised his authority under section 48(1) of the *Regulation* to require registration of a restrictive covenant under section 219 of the *Land Title Act*. Moreover, it confirms that the responsible person has submitted a draft covenant to the director for review. The notation “Restrictive Covenant Accepted” indicates that the director has found the covenant “acceptable” as required under section 53(3)(e) of the *Act*. Likewise, the notation “Notice of Independent Remediation Completed” indicates that the notice required pursuant to section 54(2)(b) of the *Act* has been submitted to the director.

The registry’s primary function is to act as a public repository of site information, not as a program management tool, and registry notations are not used to actively monitor compliance with statutory or regulatory requirements. For example, the site registry notation “Notice of Independent Remediation Completion Submitted” indicates that the responsible person has submitted the notice of completion of independent remediation required under section 54(2)(b) of the *Act*. The registry, however, does not say whether the notice was submitted within 90 days of completion of the remediation, as required by the *Act*.<sup>10</sup>

Once a notation is made on the site registry, it remains there unless the registrar determines that it was entered in error or duplicates information in the database. The ministry does not exercise enforcement functions as such in regard to site registry notations, and there is no procedure for terminating them.

Notations cannot be “violated” as they are purely informational. Section 120(17) of the *Act* does, however, make it an offence to fail to take certain actions about which information is required to be included in the registry under section 43(2). These actions include submitting site profiles and conducting and preparing reports about preliminary and detailed site investigations.

Section 120(17)(j) also makes it an offence not to comply with a provision of regulations issued pursuant to sections 62 and 63 of the *Act*. Section 62(1)(d) authorizes the Lieutenant Governor in Council to issue regulations identifying the “other information” that section 43(2)(f) requires the director to provide to the registrar for inclusion in the registry. Section 63 authorizes MOE to make regulations about a number of matters affecting the registry. For example, MOE may make regulations “requiring a person who moves soil from a contaminated site to another location to provide to the ministry prescribed information in a format suitable for inclusion in the site registry.”

These provisions are designed to ensure that MOE receives the information required to be submitted for inclusion in the registry, and passes it on to the MOE registrar in a form suitable for that purpose. Once the registrar has entered that information in the registry, however, his job is done.

#### **A. Public Access to the Site Registry**

The public has access to information in the registry via BC Online at [www.bconline.gov.bc.ca](http://www.bconline.gov.bc.ca), which provides an extensive *Site Registry User’s Guide*, the latest update of which is dated February 5, 2006. The contents of SITE are copied to BC Online every Saturday night. Members of the public may request an electronic search of the registry. The registry may be searched by parcel identifier (“PID”), Crown lands parcel identification number (“PIN”) or file number, site identification number (“Site ID”), address, latitude and longitude, or postal code. Members of the public may request a synopsis report, detail report, or custom report. As set forth in the *Site Registry User’s Guide*, a synopsis report includes:

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<sup>10</sup> This is one of the functions once performed by members of the former Operations and Compliance Group.

- the site's approximate latitude and longitude, if available;
- the regional office ministry file number;
- the Victoria office ministry file number;
- the date to which information in the site record is current;
- the site's fee category;
- the site's address, city, province, and postal code;
- "count" fields showing how many associated items are in the detail report. These items include notations, documents, site associations, site participants, suspected land uses, and parcel descriptions. Details of these items do not appear in the synopsis report. If a site is Pending, all count fields are set to zero;<sup>11</sup>
- the site's status within the ministry; and
- if a site profile exists, pertinent sections from the most recent complete site profile submitted to the site registrar.

A detail report includes everything in a synopsis report plus details of all associated items such as notations, documents, site associations, site participants, suspected land uses, and parcel descriptions. Selection of a detail report on BC Online also enables the searcher to print a profile history report that includes information from all current and historic site profiles relating to the site. The *User's Guide* does not mention custom reports, but Fact Sheet 20 notes that the ministry can prepare them for a scaled fee. Custom reports often focus on particular site characteristics, e.g., particular industrial uses or specific notations. The ministry receives approximately 300 registry queries per week. Members of the public also may obtain copies of the documents referenced in the SITE database for a fee established by the ministry.

**B. *Effectiveness of Site Registry Notations for Satisfying the Purposes in Section 48(1)(a)-(d) of the Contaminated Sites Regulation***

As discussed above, MOE may require registration of a restrictive covenant if the purposes set forth in section 48(1)(a)-(d) "are unlikely to be satisfactorily met by the entry of notations in the site registry." Other than this statutory language, as also discussed above, no formal criteria exist for deciding that a covenant rather than a site notation should be required.

In order to truly measure the effectiveness of registry notations, a study would compare actual site conditions to the conditions referred to in registry notations, and identify whether conflicts exist. Such a detailed analysis fell beyond the scope of this effort. Thus, this report reviews the registry effectiveness question by studying its notations, and their likely effect on future behavior.

As MOE staff members and other stakeholders explain, registry notations are expected to serve the section 48(1) purpose by publicizing future use conditions, which also exist within approvals in principle and certificates of compliance. Based on this publication, for example, prospective purchasers and others performing due diligence would presumably review the registry and, in turn, identify whether land use conditions exist. If they did, these persons would seek to learn whether the conditions had been complied with, and they would presumably also help to ensure that they continued to be in the future. Due diligence would amount to *de facto* enforcement of approval and certificate conditions, ensuring that section 48(1)(a)-(d) purposes were accomplished.

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<sup>11</sup> A "Pending" site is one that is under review or for which data are being updated. A Site Registry record exists but detailed information on the site is not currently available.

Consider the case of risk-based cleanup. The registry uses four notations to identify sites where risk-based remediation has been or may be performed:

- Remediation Plan Submitted With Risk Assessment Review Requested.
- Restrictive Covenant Review Requested.
- Restrictive Covenant Accepted.
- Certificate of Compliance Issued Using Risk-Based Standards.

The registry also enables users to obtain detailed information about conditions at such sites by making site information requests for underlying documents, e.g., site investigation reports, approvals in principle, and certificates of compliance. These notations and the public's access to the underlying documents satisfy the requirement in section 53(3)(b) of the *Act* that "information about the remediation and any substances remaining on the site" be recorded in the site registry before issuance of a certificate of compliance.

The reliance placed on the registry by section 48(1) of the *Regulation*, however, raises the question whether current notations adequately serve the *de facto* enforcement function described above. Their most obvious shortcoming is their brevity and the lack of any prominent indication on the registry of their potential significance for stakeholders. Notations do not appear on synopsis reports at all, but only on detail reports in a much abbreviated form. Moreover, since EMA abolished the formal distinction between conditional and unconditional certificates of compliance found in the former *Waste Management Act*, registry notations no longer expressly identify certificates that are subject to conditions.

If notations are to carry the weight placed on them by section 48(1), it would seem they should be more detailed and more forcibly brought to the attention of registry users. One might disagree with this point if all users of the site registry were sophisticated stakeholders well versed in the contaminated site remediation process and its terminology, but several stakeholders have expressed doubts that registry users invariably fit this description. If they do not, one may doubt that notations in their current form would always alert persons to the existence of contaminants remaining on site and the need to consult underlying documents.<sup>12</sup>

It should be noted that site notations currently in use include some for activities that neither the *Act* nor the *Regulation* requires be included in the registry. An example is the notation "Notice of Independent Remediation Completion Submitted" discussed above. This practice should be commended and expanded as needed to the extent resources permit. Chapter IV provides additional discussion of this option.

Because the registry simply provides notices, its effectiveness also depends on whether the conditions which it refers to are, in turn, effective. The registry typically refers to conditions that exist within approvals and certificates. The *Petro-Canada* decision may undermine section 48(1)'s reliance on the site registry because it holds that one of the very purposes outlined in section 48(1) - indemnifying the Crown - may not be accomplished by making it a condition of a certificate. At least for the case of indemnifying the Crown, it does not seem that the registry, rather than a covenant, could "satisfactorily meet" the purposes of section 48(1).

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<sup>12</sup> Also, the more detailed and explicit the information in the site registry is, the more difficult it should be to rely on the "innocent landowner" defense in section 46(1)(d) of the *Environmental Management Act*. The same purpose would be served by use of *Land Title Act* section 392 notices and by noting certificate conditions in the land title registry.

### VIII. Example of Other IC Tools Used in British Columbia

We have so far learned little about other tools used in British Columbia to affect institutional controls. Proprietary instruments such as easements and rights-of-way are more likely to figure in the property development process as obstacles than as tools for establishing desired use or resource controls. One of our informants, a representative of RBC Financial Group, stated that such proprietary instruments are often encountered in the course of performing due diligence in connection with the financing of development activity. If such interests in the land are perceived to interfere with the borrower's intended use or to jeopardize the lender's security, the object of all concerned is to remove them. This is an attitude familiar to the ministry in the context of section 219 covenants, which commonly include one or more provisions similar to the following "Memorandum as to Encumbrances, Liens and Interests":

"[XYZ] being the holder of the encumbrance or entitled to the lien or interest referred to in the Memorandum above written, hereby approves of, joins in and consents to the granting of the within Covenant and doth covenant and agree that the same shall be binding upon its interest in or charge upon the said lands and shall be an encumbrance upon the said lands prior to the above-noted in the same manner and to the same effect as if it had been dated, executed and registered prior to the dating, execution and registration of the said [interest in or charge upon the land]."

Other tools may have received little attention in British Columbia because of the use of land use contracts ("LUCs"). The former *Municipal Act* allowed local governments and property owners to enter into contracts specifying land uses and development conditions, but the current *Local Government Act* does not. Section 930 of the latter provides that existing LUCs may be amended or discharged in favour of rezoning or redesignating the property, but the *Act* does not authorize entering into new ones. Development permits and permit variances have largely superseded land use contracts as municipal land use control devices.

Land use contracts may still be used at the provincial level in a manner similar to annual lease agreements in the United States. These are contracts between the U.S. Forest Service and private parties for the use of natural resources. They usually contain restrictive provisions that serve to protect federal resources through easements or other lessee obligations.

It is interesting to note that restrictive covenants under section 219 of the *Land Title Act* have a much wider ambit than the purposes they can serve under section 48(1) of the *Contaminated Sites Regulation*. As noted above, covenantees may include the Crown, a Crown corporation or agency, a municipality, a regional district, the Greater Vancouver Transportation Authority, or a local trust committee under the *Islands Trust Act*. There appears to be no restriction as to who may be a covenantor. A covenant may restrict land or building use and impose subdivision, building, and sale restrictions or conditions. Covenants may also be used to provide that land or an amenity be protected, preserved, conserved, maintained, enhanced, restored, or kept in a natural or existing state. Section 219 covenants for any of these purposes are enforceable against the covenantor's successors in title without being appurtenant to land owned by the covenantee, and may be either negative or positive in nature, i.e., may require the covenantor either to do something or refrain from doing something.

## Chapter II: Overview of the IC Programs in Ontario and Quebec

### I. Ontario IC Program

Like the British Columbia program, a key feature of the Ontario program involves its heavy reliance on its Environmental Site Registry. As described more fully below, once a Record of Site Condition has been properly filed in the Registry, Ontario law authorizes the enforcement of any land use restriction in a Registry-noted Certificate of Property Use against third parties and subsequent landowners. Under the Ontario law, municipalities cannot issue permits for activities that would contravene a land use restriction filed with the Record of Site Condition in the Registry.

#### A. IC Implementation

In Ontario, the Ontario Ministry of the Environment (Ministry) provides two approaches for addressing contaminated properties.<sup>13</sup> First, meeting generic site condition standards. Second, meeting site-specific standards derived from the preparation of a risk assessment.

##### i. ICs for Properties Meeting Generic Site Condition Standards

The generic site condition standards for soil vary based on the intended land use of the property. In addition, the Ministry allows the application of a stratified site condition standard for soil such that a less stringent standard is applicable to soil that is 1.5 metres below the surface. For groundwater, there are separate site condition standards for potable and non-potable groundwater. The land use and groundwater assumptions relied on for identifying the applicable site condition standards do not trigger any requirement for the implementation of site-specific institutional controls. However, there are some uniform controls in place under Ontario environmental laws that apply to sites for which a Record of Site Condition (RSC) has been filed in the Environmental Site Registry (Registry).

Filing of a RSC is generally not mandated. However, filing is necessary if the owner of the property wishes to be protected from future orders from the Ministry of Environment related to the contamination.<sup>14</sup> If filed, a RSC must contain information identifying the type of property use for which the RSC is filed, which site condition standards were applied to the property, and the maximum known concentrations of contaminants as of the certification date.

When an RSC is filed in the Registry, certain persons are protected against orders issued by the Ministry. This liability protection is afforded to:

- the person who filed the RSC;
- a subsequent owner of the property;
- a person who is in occupation of the property or who was in occupation of the property at any time after the RSC was filed;
- a person who has charge, management or control of the property or had charge, management or control of the property at any time after the RSC was filed; and

<sup>13</sup> *Records of Site Condition, A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Conditions*, Ontario Ministry of the Environment, §§ 6.0 and 7.0 (October 2004).

<sup>14</sup> Subsection 168.7(1) of the Environmental Protection Act

a person who before the certification date owned the property, was in occupation of the property, or had charge, management, or control of the property if certain requirements are met.<sup>15</sup>

The liability protections cover contaminants released into the environment before the RSC certification date, which remained in or under the property on or after the certification date. The regulation marks the certification day as the last day of sampling which confirmed that the property met numerical standards or risk-based cleanup standards.<sup>16</sup>

The liability protection does not apply to any person who causes or permits the actual use of the property to be different from the use specified in the RSC, unless the site condition standards for the actual use are less stringent than the use specified in the RSC.<sup>17</sup> In addition, the liability protection does not apply to any person who contravenes a regulation governing the management of soil on property where the stratified site condition standards were used.<sup>18</sup> These exceptions are forms of institutional controls that apply uniformly to all contaminated sites addressed using the generic site condition standards for which RSCs have been filed in the Registry.

## ii. ICs for Properties Meeting Site-Specific Standards

An owner of property may perform a risk assessment in lieu of applying the generic site condition standards. The risk assessment must be accepted by the Ministry. As a condition of acceptance, the Ministry may issue a certificate of property use (CPU). The CPU may require the owner to take any necessary action to prevent, eliminate, or ameliorate any adverse effect on the property. Such action may include installing equipment, monitoring contaminant, or recording and reporting information. The CPU may also require the owner to refrain from using the property for any use specified in the CPU or from constructing any building specified in the CPU.<sup>19</sup> The CPU is required to be included in the RSC filed for the property in the Registry. Although existing guidance indicates that the Ministry may issue an order requiring the CPU to be registered on title,<sup>20</sup> there is no statutory mandate for such an order and interviews with Ministry staff indicate that there is no legal need for requiring that a CPU be registered on title when an RSC has been properly filed in the Registry.<sup>21</sup> If filed, a RSC must contain a statement indicating whether a CPU has been issued.

Regarding a property for which a risk assessment was performed to develop site-specific standards, liability protection is not provided for any person who contravenes a term or condition of a CPU, any order made with respect to risk management measures described in a RSC filed in the Registry, or a regulation governing the management of soil at such sites.<sup>22</sup>

## iii. ICs For All Properties Used For Industrial or Commercial Purposes

The only time an RSC must be filed in the Registry is when a person proposes to change actual property use for any property from industrial or commercial use to agricultural or other use, institutional use,

<sup>15</sup> Subsection 168.7(1) of the Ontario Environmental Protection Act

<sup>16</sup> Section 17 of Ontario Regulation 153/04

<sup>17</sup> Subsection 168.7(4) of the Ontario Environmental Protection Act

<sup>18</sup> Subsection 168.7(6) of the Ontario Environmental Protection Act

<sup>19</sup> Subsection 168.6(1) of the Ontario Environmental Protection Act

<sup>20</sup> *Records of Site Condition, A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Conditions*, Ontario Ministry of the Environment, p. 24 (October 2004).

<sup>21</sup> Telephone interviews with Jerry Herlihy, Legal Branch, Ontario Ministry of Environment (February 28, 2006) and Mark Turner, Standards Development Branch, Ontario Ministry of Environment (March 1, 2006).

<sup>22</sup> Subsection 168.7(5) of the Ontario Environmental Protection Act

parkland use, or residential use.<sup>23</sup> This requirement essentially ensures that such changes in land use are always supported by confirmation that the property meets either the site condition standards for the intended use or site-specific standards developed by the performance of a risk assessment.

## **B. IC Tracking System**

The Registry includes information from RSCs. Filing of RSCs is generally not mandatory but must be completed if a party wishes to obtain protection from certain orders that may be issued by the Ministry of the Environment. In addition, an RSC must be filed prior to changing actual property use from industrial or commercial use to agricultural or other use, institutional use, parkland use, or residential use. The Environmental Site Registry is made publicly available at the following URL address: <http://www.ene.gov.on.ca/envirnet/BESR/index.htm>.

An RSC filed in the Registry must include the following information:<sup>24</sup>

- Name and address of the property owner filing the RSC
- Name and address of any other current owners of the property
- Legal description and municipal address of the property
- GIS coordinates for the property
- Name and address of the qualified professional who assessed the site
- Current property use and the proposed property use
- List of reports relied upon for the assessment
- Whether or not a Phase II ESA was conducted
- Standards met by the property (if applicable)
- Maximum test results for the quality of soil remaining on the property (if applicable)
- Maximum test results for the quality of groundwater or sediment on the property (if applicable)
- Certification statements made by the property owner
- Certification statements made by the qualified professional who assessed the site
- Quantity of soil that has been remediated and left on the property (if applicable)
- Quantity of soil that has been removed from the property (if applicable)
- Quantity of soil brought to the property for use as fill (if applicable)
- Types of controls, treatment or monitoring works used or needed at the site for mitigation of soil or groundwater contamination (if applicable)

The Registry also indicates if a CPU has been issued for a property and will indicate how a copy of the CPU can be viewed or obtained. The Registry also provides information regarding environmental orders that have been issued with respect to a property for which an RSC has been completed and filed. Along with the RSC, certain supporting documentation is required to be submitted to the Ministry. This documentation includes a copy of the deed for the property, a certified copy of the Certificate of Status if the owner is a corporation, and proof that an agent has been authorized to make the land owner's certification statements in the RSC (if applicable).<sup>25</sup>

The Ministry provides a notice in the Registry advising users who have dealings with property to consider performing their own due diligence with respect to the environmental condition of the property in addition to reviewing available information contained in the Registry.

<sup>23</sup> Section 168.3.1 of the Ontario Environmental Protection Act

<sup>24</sup> Subsection 168.4(2) of the Ontario Environmental Protection Act and Section 16 of Ontario Regulation 153/04

<sup>25</sup> Section 16 of Ontario Regulation 153/04

### ***C. Long Term Maintenance of ICs***

#### ***i. Whether ICs Run with the Land***

An order may be issued against any person who contravenes a term or condition of a CPU or any order made under the Environmental Protection Act with respect to risk management measures described in a RSC filed in the Registry.<sup>26</sup> As such, the terms of a CPU are enforceable against subsequent owners of a property. In addition, an order may be issued against any person who contravenes a regulation governing the management of soil on property where the stratified site condition standards were used or for which a risk assessment was used to develop site-specific standards.<sup>27</sup> This uniformly applicable limitation on land use would also be enforceable against subsequent owners.

#### ***ii. IC Financial Assurance***

CPUs may include a variety of financial assurance-related requirements. The CPU may require the remediating party to financial assurance for the performance of any action specified in the CPU. The CPU may also require the provision of temporary or permanent alternate water supplies to replace contaminated water supplies. Failure to provide financial assurance specified in a CPU is grounds for an order prohibiting or restricting the use of the property.<sup>28</sup>

#### ***iii. Active Notice (Forced Review of ICs Prior to Activity)***

If a CPU contains a provision requiring the owner of property to refrain from using the property for a specified use or from constructing a specified building on the property, the owner must, in turn, ensure that a copy of the use/building restriction is given to every occupant of the property. The use/building restriction applies to every occupant, and the owner must ensure that every occupant complies with the provision.<sup>29</sup>

In addition to the property owner, the Ministry of the Environment also possesses obligations. Whenever the MOE issues, alters, or revokes a CPU, it must notify the chief building official and the municipal clerk, and the clerk of any upper-tier municipality in which the property is located. In some instances, MOE must also notify other officials, such as where the property lies in an area where a board of health, planning board, or conservation authority has jurisdiction.<sup>30</sup>

Finally, municipalities also possess obligations. When CPUs call for use/building restrictions, municipalities and other government bodies are prohibited from issuing any permit, license, approval or other instrument which would authorize a person to use the property for the restricted use.<sup>31</sup> A municipality is not allowed to opt out of this requirement.<sup>32</sup>

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<sup>26</sup> Subsection 168.7(5) of the Ontario Environmental Protection Act

<sup>27</sup> Subsection 168.7(6) of the Ontario Environmental Protection Act

<sup>28</sup> Subsection 132(1.1) of the Ontario Environmental Protection Act

<sup>29</sup> Subsection 168.6(4) of the Ontario Environmental Protection Act

<sup>30</sup> Section 50 of Ontario Regulation 153/04

<sup>31</sup> Subsection 168.6(6) of the Ontario Environmental Protection Act

<sup>32</sup> Telephone interview with Mark Turner, Standards Development Branch, Ontario Ministry of Environment (March 29, 2006).

#### ***D. IC Enforcement, Penalties & Consequences for Non-Compliance***

If a RSC is filed in the Registry, the Ministry's authority to issue orders is limited with respect to a contaminant that was discharged into the natural environment before the certification date and was on, in or under the property as of the certification date. This protection is provided for the following persons:<sup>33</sup>

- The person who filed the RSC
- Subsequent owners of the property
- Any person who is in occupation of the property or who was in occupation of the property at any time after the RSC was filed
- Any person who has charge, management or control of the property or had charge, management or control of the property at any time after the RSC was filed.
- Under certain conditions, any person who, before the certification date, owned the property, was in occupation of the property, or had charge, management, or control of the property.

This protection from orders does not apply if the RSC contains false or misleading information or if any of the contaminant moved from the property to another property after the certification date. In addition, the Ministry may issue orders to persons who cause or permit an actual use of the property that is different from the use specified in the RSC, unless the site condition standards for the actual use are less stringent than the standards applicable to the specified use.<sup>34</sup>

An order may be issued against any person who contravenes a term or condition of a CPU or any order made under the Environmental Protection Act with respect to risk management measures described in a RSC filed in the Registry.<sup>35</sup>

An order may be issued against any person who contravenes a regulation governing the management of soil on property where the stratified site condition standards were used or for which a risk assessment was used to develop site-specific standards. An order may also be issued for any person who contravenes a regulation governing the disposal of soil, rock or related material from the property.<sup>36</sup>

#### ***E. IC Termination***

The Director may, on his or her own initiative or on application by the owner of the property, alter any terms and conditions in the CPU, impose new terms and conditions, or revoke the CPU.<sup>37</sup>

## **II. Quebec IC Program**

Instead of relying on a unique environmental or contaminated site registry as a key feature of its IC program, Quebec utilizes the existing general land registry for implementation, tracking, and enforcement of institutional controls. As described more fully below, under Quebec's law, once a notice of use restriction is registered in the land register, land use restrictions become enforceable against third parties and subsequent landowners. In addition, municipalities must maintain their own lists of contaminated sites based on the notices registered in the land register. Where permit applications cover contaminated

<sup>33</sup> Subsection 168.7(1) of the Ontario Environmental Protection Act

<sup>34</sup> Subsection 168.7(4) of the Ontario Environmental Protection Act

<sup>35</sup> Subsection 168.7(5) of the Ontario Environmental Protection Act

<sup>36</sup> Subsection 168.7(6) of the Ontario Environmental Protection Act

<sup>37</sup> Subsection 168.6(3) of the Ontario Environmental Protection Act

sites, local governments may only grant building and subdivision permits if they first receive a certification, by a qualified expert, that the permitted activity will not contravene any land use restrictions.

## **A. *IC Implementation***

### **i. Contamination Notices**

Where a characterization study reveals the presence of contaminants in concentrations exceeding the regulatory limits, the person or municipality who had the study performed must apply for registration in the land register of a notice of contamination.<sup>38</sup> A notice of contamination must contain, in addition to a description of the land, the name and address of the applicant for registration of the notice and of the owner of the land, the name of the municipality in which the land is situated and the land use authorized by the zoning by-laws, and a summary of the characterization study stating among other things the nature of the contaminants present in the land. The applicant must provide a copy of the notice of contamination bearing a registration certificate or notice certified by the land registrar to the Minister of the Environment. The Minister must submit a copy to the municipality in which the land is situated.<sup>39</sup>

### **ii. Land Use Restrictions**

A rehabilitation plan may provide that contaminants in concentrations exceeding the regulatory limits remain on the property, on the condition, however, that a risk assessment and groundwater impact assessment are submitted with the plan. The plan must also contain a statement of land use restrictions that will apply, including the resulting obligations associated with the land use restrictions.<sup>40</sup> Approval of the rehabilitation plan by the Minister may be subject to conditions.<sup>41</sup>

The Minister shall provide notification of the plan to any landowner not involved in its development. If the plan includes land use restrictions, the Minister must not approve it unless the owner has given consent in writing to the plan and the consent document accompanies the plan submitted for approval.<sup>42</sup> Consent must also be provided in writing before the Minister can make an amendment to the plan.

If the Minister-approved rehabilitation plan calls for land use restrictions, the person who submitted the plan must apply to register a notice of use restriction in the land register. This notice must contain the description of the land, the name and address of the applicant for registration, a description of the works required under the plan, a statement of the land use restrictions and resulting obligations, and an indication of the place where the plan may be viewed.<sup>43</sup> The applicant must provide a copy of the notice bearing a registration certificate or notice certified by the land registrar to the Minister. The Minister must submit a copy to the municipality in which the land is located.<sup>44</sup>

### **iii. ICs For Specific Properties Used For Industrial or Commercial Purposes**

Any person intending to change the use of land where an industrial or commercial activity of a category designated by regulation of the Government has been present is required to perform a site

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<sup>38</sup> Section 31.58 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>39</sup> Id.

<sup>40</sup> Sections 31.45, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>41</sup> Sections 31.46, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>42</sup> Id.

<sup>43</sup> Sections 31.47, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>44</sup> Id.

characterization. The change in the use of land is subject to the Minister's approval of a rehabilitation plan if contaminants are present in the land in concentrations exceeding the regulatory limits. The plan must also contain a statement of land use restrictions that will apply, including the resulting obligations associated with the land use restrictions.<sup>45</sup>

### ***B. IC Tracking System***

The Ministry of the Environment has not developed any IC tracking systems. The Ministry maintains a list of contaminated sites. However, this list does not contain specific information about the nature of contamination left in place or any applicable land use restrictions associated with the property.

The land register acts as the primary method for tracking land use controls. If a Minister-approved rehabilitation plan calls for land use restrictions, the person who submitted the plan must apply to register a notice of use restriction in the land register. This notice must contain a description of the land, the name and address of the applicant for registration, a description of the works required under the plan, a statement of the land use restrictions including resulting obligations, and an indication of the place where the plan may be viewed.<sup>46</sup>

Every municipality must prepare and maintain a list of contaminated sites situated in its territory. The list must reflect the sites for which the municipality receives notices of registration of contamination notices or use restrictions in the land register.<sup>47</sup> This information in a municipality's list must be made available to the public. However, there is no mandate that the list identify the existence or nature of land use restrictions associated with site rehabilitation.

### ***C. Long Term Maintenance of ICs***

#### ***i. Whether ICs Run with the Land***

Registration of the notice of use restrictions in the land register renders the rehabilitation plan effective against third parties and any subsequent owner of the land is bound by the obligations provided for in the rehabilitation plan relative to land use restrictions.<sup>48</sup>

#### ***ii. IC Financial Assurance***

A rehabilitation plan must contain a statement of land use restrictions that will apply, including the resulting obligations associated with the land use restrictions. In addition, approval of the rehabilitation plan by the Minister may be subject to conditions.<sup>49</sup> Such conditions could feasibly include the provision of financial assurance.

#### ***iii. Active Notice (Forced Review of ICs Prior to Activity)***

The applicant must provide a copy of the notice bearing a registration certificate or notice certified by the land registrar to the Minister following application for registration in the land register of a notice of contamination or use restriction. The Minister must submit a copy to the municipality in which the land is

<sup>45</sup> Sections 31.53 & 31.54 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>46</sup> Sections 31.45, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>47</sup> Section 31.68 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>48</sup> Sections 31.47, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>49</sup> Sections 31.45, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

situated.<sup>50</sup> Every municipality is required to prepare and maintain a list of contaminated sites situated in its territory. The list must reflect the sites for which the municipality receives notices of registration of contamination notices or use restrictions in the land register.<sup>51</sup>

Where the land is entered on the list of contaminated sites and is the subject of a rehabilitation plan approved by the Minister, a building or subdivision permit may only be issued if the application is accompanied with the attestation of an expert establishing that the project is consistent with the provisions of the rehabilitation plan.<sup>52</sup>

#### ***D. IC Enforcement, Penalties & Consequences for Non-Compliance***

Registration of the notice of use restrictions renders the rehabilitation plan effective against third parties and any subsequent owner of the land is bound by the obligations provided for in the rehabilitation plan including land use restrictions.<sup>53</sup>

#### ***E. IC Termination***

Notices of decontamination terminate environmental contamination-related land use restrictions. Either the person who initially registered a notice of contamination or the owner of the affected property may apply to register a notice of decontamination if: 1) decontamination has been carried out; and 2) a subsequent characterization study showed no contamination; or 3) a characterization showed that contaminants do not exceed the regulatory limits. A notice of decontamination must contain: 1) a description of the land; 2) the name and address of the applicant and of the property owner; 3) the name of the municipality in which the land is situated; 4) the land use authorized by the zoning by-laws; and 5) a summary of the characterization study stating, among other things, the nature of the contaminants present in the land.<sup>54</sup>

The applicant must provide a copy of the notice of decontamination bearing a registration certificate or notice certified by the land registrar to the Minister. The Minister must submit a copy to the municipality in which the land is situated.<sup>55</sup> The notice must also mention any land use restrictions registered in the land register that have been rendered unnecessary as a result of decontamination.<sup>56</sup>

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<sup>50</sup> Sections 31.47, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>51</sup> Section 31.68 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>52</sup> Id.

<sup>53</sup> Sections 31.47, 31.51, 31.56 & 31.57 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>54</sup> Section 31.59 of the Quebec Environment Quality Act (R.S.Q., c. Q-2)

<sup>55</sup> Id.

<sup>56</sup> Id.

## Chapter III: Highlights of IC Programs Within Select United States Jurisdictions

### I. Introduction

Site cleanups within any given state typically occur under any one of, usually about five, cleanup programs. Generally, these cleanup programs include:

The federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA);  
The federal Resource Conservation and Recovery Act (RCRA), which most states have been “authorized” by US EPA to run;  
State-equivalents of CERCLA (i.e., state superfund programs);  
State brownfield or voluntary cleanup programs (VCPs); and  
State underground storage tank (UST) cleanup programs.

In some states, the IC requirements work uniformly across all cleanup programs. In others, IC program elements may only apply, for example, to VCP cleanups.

The British Columbia Environmental Management Act (EMA), in contrast, provides a single statutory regime under which both voluntary and ordered cleanups occur. The EMA, in effect, combines the elements of the various programs that work in the U.S. states. Thus, in the descriptions below, we overview IC program elements from any one of the state cleanup programs, without necessarily distinguishing among them.

The US Environmental Protection Agency and IC practitioners divide the universe of ICs into four categories.<sup>57</sup>

- Proprietary controls, such as restrictive covenants and negative easements, for example, which record land use restrictions in a property’s direct chain of title.
- Government controls such as municipal ordinances or state laws, for example, which restrict or condition land use.
- Informational devices which provide notice of residual contamination and include, for example, notices in the chain of title (a.k.a. deed notice), web site registries, and outreach efforts.
- Environmental agency enforcement orders and environmental agency-private party agreements, such as certificates of completion and no further action (NFA) letters, which contain conditions, land use restrictions or promises to implement land use restrictions, but are not always recorded against the property’s chain of title.

For these ICs, but with a focus on proprietary controls and informational devices (i.e. registries), the following sections discuss the IC program elements in various United States jurisdictions. Section II discusses IC Implementation; section III, IC Tracking; section IV, long-term maintenance; section V enforcement; and section VI, termination.

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<sup>57</sup> EPA, Institutional Controls: A Guide To Implementing, Monitoring, And Enforcing Institutional Controls At Superfund, Brownfield, Federal Facility, UST, And RCRA Corrective Action Cleanups (2003), Avail. At [www.epa.gov/superfund/action/ic/guide/index.htm](http://www.epa.gov/superfund/action/ic/guide/index.htm); Astm International, E 2091-00, Standard Guide For Use Of Activity And Use Limitations, Including Institutional And Engineering Controls (2000).

## II. IC Implementation

IC Implementation includes the processes of IC approval, IC drafting and, finally, putting the IC into operation (i.e., recording a covenant, placing within a registry, enacting an ordinance). IC approval refers to the process where environmental agencies authorize the use of an IC as part of the cleanup remedy. IC drafting simply refers to the process of actually crafting the conditions or restrictions, into some type of legally enforceable document or administrative program.

The following sub-sections address key features of various IC implementations, focusing primarily on IC approval issues, across state IC programs.

### A. *Many States Express a Strong Preference for the Use of Proprietary Controls*

As part of their IC approval criteria, many states directly require the use of recorded instruments, such as deed restrictions and deed notices, and will not approve a different type of IC. This general trend seems to differ from EMA's preference of site registry recording.

California regulations require that "land use covenants ... shall be executed" whenever cleanups allow hazardous substances to remain at a property at levels which are not suitable for unrestricted use.<sup>58</sup> The Texas IC program allows for deed restrictions and deed notices, and, in some cases, "functionally equivalent zoning or ordinances" depending on the cleanup scenario which triggered the IC use.<sup>59</sup> Michigan's cleanup program requires either deed notices or deed restrictions, but allows local ordinances in some circumstances. Michigan allows deed notices in the case where a cleanup relied on a certain future use (i.e., commercial or industrial).<sup>60</sup> Michigan allows deed restrictions when a barrier to contamination exposure is required (i.e., no excavation).<sup>61</sup> In Georgia, "Type 5" risk based cleanup sites require the filing of a restrictive covenant.<sup>62</sup> The Washington program requires deed restrictions in almost all cases, except for certain cases of off-site contamination.<sup>63</sup> Florida prohibits government controls, and instead relies largely on deed restrictions.<sup>64</sup>

Why this trend for deed restrictions and deed notices? Deed restrictions and deed notices rely on an existing institution – the property recording, title abstracting, and title insurance institution. This institution puts prospective purchasers on constructive notice of environmental restrictions and, in an increasing number of states, the restrictions clearly run with the land (in some states this issue remains unclear, see below for additional discussion). By relying on these types of "recorded" controls and their associated institutionalized processes, states do not need to build and administer new institutions, such as site registries. Rather, as some practitioners explain, these states confidently place their restriction into the property law institution, with confidence that the institution will do its job to enforce the restrictions.

But even where they rely on the existing property institution, many states also create an IC registry. In such states, the registries provide useful notice to stakeholders and the interested public. Unlike local

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<sup>58</sup> 22 Cal. Code. Reg. § 67391.1(a).

<sup>59</sup> Texas Commission on Environmental Quality, Remediation Division, TCEQ Regulatory Guidance 9-10 (Nov. 2002).

<sup>60</sup> See Implementing Institutional Controls at Brownfields and Other Contaminated Sites 204 (Amy L. Edwards ed., 2003) (hereafter *Implementing Institutional Controls*).

<sup>61</sup> *Id.* at 205.

<sup>62</sup> Ga. Comp. R. & Regs r. 391-3-19-.08(7).

<sup>63</sup> See *Implementing Institutional Controls* at 271.

<sup>64</sup> Florida Department of Environmental Protection, Division of Waste Management, Institutional Controls Procedure Guidance 10 (Feb. 2004) (avail. at <http://gisweb.dep.state.fl.us/dwm/icr/viewer.html>).

property recording offices, these registries offer a single location to easily view IC information across a state. IC tracking and IC registries are discussed in more detail below.

**B. Some States Rely on Site Registries as an Enforceable IC or in Lieu of an Enforceable IC.**

Pursuant to the Missouri Hazardous Waste Management Law, the state's environmental agency created the "Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites in Missouri."<sup>65</sup> The Registry broadly covers any hazardous waste release site. But because the term hazardous substance is broader than the term hazardous waste, it fails to include some hazardous substance sites.<sup>66</sup> The statute requires the registry to include 5 categories of sites. Category 4 sites include those that have been properly closed but require continued management.

The placement on the Missouri registry automatically triggers enforceable land use restrictions. "Once a site is placed on the Registry ... the use of the site may not change substantially without the written approval" of the state agency.<sup>67</sup> "Substantial" means changes that result in the spread of contamination, increases human exposure to hazardous materials, increases adverse environmental impacts, or makes potential remedial actions to correct problems at the site more difficult.<sup>68</sup>

The registry intends to protect property purchasers from unknowingly buying contaminated land, land use restricted land, or without knowing that the site hazardous waste was released at the site. Thus, in addition to triggering this land use restriction, placement on the registry requires site owners to file a notice within the property's chain of title, alerting title searchers to the site's listing on the registry.<sup>69</sup> This provides an added layer of assurance that property buyers will learn that a site exists on the registry. Creating another layer of assurance, placement on the registry also obligates sellers to notify buyers about the property's listing on the registry.<sup>70</sup>

Notwithstanding the restrictions and obligations that placement on the Missouri registry imposes, Missouri requires environmental deed restrictions (i.e., restrictive covenants) as a central part of its IC program.<sup>71</sup>

Rather than environmental covenants, New Jersey largely relies on its registry, in combination with biennial IC certifications, to enforce its IC program. New Jersey sets forth distinct IC requirements for soil and groundwater residual contamination. For residual soil contamination, New Jersey requires a deed notice.<sup>72</sup> When groundwater contamination remains, New Jersey requires the creation of a "Classification Exception Area," which excepts portions of aquifers from their existing use classification as either Class I, II, or III classification.<sup>73</sup> Like a deed notice, the CEA provides notice of groundwater pollution, and triggers monitoring and reporting obligations, but it does not itself create a legal restriction on land use.<sup>74</sup> Only in limited cases, when certain groundwater uses are likely to occur (based on land use planning

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<sup>65</sup> See Mo. Ann. Stat. § 260.440.

<sup>66</sup> Missouri Dept. of Nat. Resources, Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites In Missouri – Frequently Asked Questions (Jul. 2003).

<sup>67</sup> See Mo. Code Regs. tit. 10 § 25-10.010.

<sup>68</sup> Id.

<sup>69</sup> Missouri Dept. of Nat. Resources, Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites In Missouri – Frequently Asked Questions (Jul. 2003).

<sup>70</sup> Id.

<sup>71</sup> See Missouri Dept. of Nat. Resources, Haz. Waste Program, Cleanup Levels for Missouri (CALM) Appendix E: Institutional Controls (1998).

<sup>72</sup> N.J. Stat. Ann. § 58:10B-13(a); N.J. Admin. 7:26E-8.1.

<sup>73</sup> See Implementing Institutional Controls, *supra* note 53, at 220.

<sup>74</sup> N.J. Admin. 7:26E-8.3(a).

predictions), New Jersey may actually require a groundwater restriction.<sup>75</sup> New Jersey operates a robust IC tracking system, which employs geographical information system (GIS) technology and which clearly depicts both groundwater CEAs and soil deed notice areas. New Jersey primarily assures IC reliability through the notice that this registry supplies, in combination with biennial IC certification requirements.

### ***C. Some States Only Allow Government Control ICs, if Approved for Use as an IC***

The Illinois' Tiered Approach to Corrective Action regulations, for groundwater, allows persons to rely on a government ordinance as an institutional control for groundwater, if the ordinance was approved by the environmental agency.<sup>76</sup> Texas only allows the use of zoning or other ordinances which are "functionally equivalent" to restrictive covenants.<sup>77</sup> The Texas environmental agency makes such functional equivalent determinations based on factors it enumerates.<sup>78</sup>

### ***D. Local Government Involvement During IC Approval***

Generally, state IC programs have been criticized for approving ICs – a decision that affects land use - without involving local government land use planning and zoning agencies. But some state programs have begun to involve local governments, and this seems to be an increasing trend. Under the Washington State Model Toxics Control Act, the state environmental agency must notify and seek comments from city or county land use planning agencies before establishing a deed restriction under the MTCA.<sup>79</sup> Once the covenant has been executed, it must be sent to the local government.<sup>80</sup> In California, response actions (including ICs) undergo a public participation process.<sup>81</sup> And, concerning ICs, the California environmental agency must consult with local agencies "as appropriate."<sup>82</sup> The Florida DEP requires public notification and participation prior to final approval of any IC.

### ***E. In Some States, IC Approval Requires IC Assurance Planning***

In New York, the 2004 recently enacted Brownfield Cleanup Program, see N.Y. ENVTL. CONSRV. LAW § 27-1401 *et. seq.*, sets pre-requisites for IC approval. According to this law, the department may approve remedial work plans which include ICs, if:

[t]he remedial work plan includes:

- (i) a complete description of any proposed [ICs] and the mechanisms that will be used to implement, maintain, monitor, and enforce such restrictions and controls, both by the applicant and by state and local government.
- ....
- (iii) an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed [IC] and an analysis of the long-term costs of implementing, maintaining, monitoring and enforcing such controls, including costs that may be borne by state or local governments;

<sup>75</sup> See Implementing Institutional Controls, *supra* note 53, at 221.

<sup>76</sup> Implementing Institutional Controls, *supra* note 53 at 161; <http://www.epa.state.il.us/land/groundwater-ordinances/index.html> (providing list of approved ordinances).

<sup>77</sup> Texas Commission on Environmental Quality, Remediation Division, TCEQ Regulatory Guidance 10 (Nov. 2002).

<sup>78</sup> See *id.*

<sup>79</sup> Wash. Rev. Code § 70.105D.030(1)(f).

<sup>80</sup> Implementing Institutional Controls, *supra* note 53 at 280.

<sup>81</sup> 22 Cal. Code Reg. § 67391.1(a).

<sup>82</sup> *Id.*

- (iv) sufficient analysis to support a conclusion that effective implementation, maintenance, monitoring and enforcement of [ICs] can be reasonably expected.<sup>83</sup>

Regulations to implement these statutory requirements remain in progress, but proposed regulations exist.<sup>84</sup>

California requires the preparation of a plan for IC implementation and enforcement. In California, the Department of Toxic Substances Control may not approve a response action document, which involves ICs, unless the response satisfied specified criteria. The response action document must clearly set forth and define land use prohibitions; it must promise to record a land use covenant; and the document must include an IC implementation and enforcement plan.<sup>85</sup>

### III. IC Tracking Systems

#### A. IC Tracking

##### i. IC Tracking Data Standards

The USEPA has recently published data standards for institutional control tracking systems. These standards hope to ensure that state-specific tracking efforts rely on similar terminology and data structures, so that information may be easily shared. See <http://www.envdatastandards.net/content/article/detail/673>. Many states IC tracking systems pre-date the standard. Whether states will update their systems to comport with the standards remains uncertain.

##### ii. Non-Geographical Information System (GIS) IC Tracking Systems

As discussed above, some state registries carry enforcement provisions, which become triggered upon placing a site within the registry. Most state tracking systems, however, simply provide notice of ICs.

The California “Calsites” database lists deed restricted sites. See [http://www.dtsc.ca.gov/Mandated\\_Postings.cfm#CP\\_JUMP\\_103495](http://www.dtsc.ca.gov/Mandated_Postings.cfm#CP_JUMP_103495). California has also enacted legislation, which mandates that California track and make publicly available a listing of deed-restricted sites.<sup>86</sup> Though it lists deed restrictions on the registry, California relies on the legal force of environmental covenants for enforcement authority – thus, environmental covenants would be enforceable even if not listed on the registry. The registry simply provides notice. The environmental covenants, which it lists, must also be recorded within local records office, pursuant to California’s property recording law. But the registry provides important stakeholder and public information. In one place, it allows for a summarized view of all sites where environmental covenants exist, and a link to a copy of the actual environmental covenant.

Colorado provides the “Environmental Covenant List” - a list of sites at which real covenants exist. See <http://www.cdphe.state.co.us/hm/covenant/envcovenantslist.asp> Like California, rather than the registry, Colorado relies on the legal force of environmental covenants for enforcement. The registry simply provides notice. Also like California, in one place, the Colorado list allows for a summarized view of all

<sup>83</sup> N.Y. Envtl. Conserv. Law § 27-1415(7)(a).

<sup>84</sup> See <http://www.dec.state.ny.us/website/der/superfund/375draft.pdf>.

<sup>85</sup> 22 Cal. Code. Reg. § 67391.1.

<sup>86</sup> See Cal. Health and Safety Code, § 57012.

sites where environmental covenants exist. The list also summarizes the various environmental covenant restrictions, but it does not provide an actual link to the actual covenant.

The New York Environmental Site Remediation Database contains records of all the sites being remediated under any of the Division of Environmental Remediation's remedial programs. The database includes the Registry of Institutional and Engineering Controls. The database can be accessed at <http://wwwapps.dec.state.ny.us/apps/derfoil/index.cfm>. The database allows one to select from a variety of IC types (i.e., environmental easement, deed restriction, consent order) in order to search through the entire database to find sites that employ the IC. The database shows that ICs exist, but it does not provide links to the actual IC documents.

Pennsylvania has developed a spreadsheet that lists institutional controls implemented under Act 2. See <http://www.depweb.state.pa.us/landrecwaste/cwp/view.asp?A=1243&Q=465692>. The list simply provides notice that ICs exist but, unlike California, it does not provide links to the actual IC documents.

### iii. GIS IC Tracking Systems

In Florida, all institutional controls are recorded on the Florida DEP's Institutional Controls Registry to allow for agency tracking and enforcement. See <http://www.dep.state.fl.us/waste/default.htm>. The IC registry utilizes GIS tools to provide a user-friendly web-based interface to interactive maps. The maps show the state and mark locations within the state where ICs have been placed. The registry also allows for a search by address, city, and county. By selecting an IC location, the registry then provides summary information about the IC employed. Florida requires all ICs to be recorded in the registry. For IC submittals into the registry, Florida provides an IC data form – which asks submitters for the necessary information. Also for submitters, Florida provides data standards for GIS location information.<sup>87</sup>

As discussed above, New Jersey largely relies on its registry for compliance assurance with deed notices and classification exception areas. Accordingly the registry provides a robust GIS-based system, accessible on the world wide web. See <http://www.state.nj.us/dep/gis/depsplash.htm#>. This GIS system, among other things, precisely identifies the location boundaries of deed notices and classification exception areas. It then allows users to “drill down” to gather additional information about the deed notice and/or classification exception area such as, among other things, site name, type of IC, and residual chemical contaminants.

Wisconsin also provides a robust IC tracking system, using GIS technology. See <http://maps.dnr.state.wi.us/imf/dnrifm.jsp?site=brrts>. Wisconsin's “GIS Registry of Closed Remediation Sites” identifies closed sites with groundwater or soil contamination remaining above state cleanup levels. The Wisconsin registry provides a statewide view of IC locations and, by zooming in, precisely shows the location boundaries of soil and groundwater ICs. The registry also allow users to “drill down” to both summary information about the site as well as portable document files (.pdf) of, among other things, remediation plans, closure letters, and conditional closure letters.

## **B. Property Recording**

Property recording occurs within local property record offices throughout the states. These property recording offices, pursuant to state recording laws, record all property interests (i.e., mortgages, fee ownership, easements, etc.) for all properties. Under state laws, such recording of property interests puts

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<sup>87</sup> For additional information, see Florida Department of Environmental Protection, Division of Waste Management, Institutional Controls Procedure Guidance (Feb. 2004) (avail. at <http://gisweb.dep.state.fl.us/dwm/icr/viewer.html>).

prospective purchasers on constructive notice of the existence of the recorded interest. Thus, if an IC was property recorded, it will exist within a property record office's records and subsequent purchasers will be held to have notice of that restriction.

Many property recording systems remain as paper-based information management systems, though municipalities are increasingly developing electronic databases of property records. Property recording systems accommodate parcel-specific searches. Thus, for any given property, property recording systems allow access to all property records, including those concerning prior ownership and prior-existing encumbrances. These systems, however, are typically complicated and employ specialized terms. Thus, most laypersons do not possess the skills to properly search property recording systems. Typically, title abstracters conduct property record searches.

Property record searching, most typically, only occurs during land sales. Thus, for example, property record searching does not occur when an existing owner seeks a development permit to build additional buildings on his or her property.

### ***C. Local Permitting Process***

The local permitting process, or the "entitlement" process, grants land owners necessary construction, excavation, or development permits. Generally, any new or modified land use (a term broadly defined) triggers the need for various local permits. Local land use permitting offices (typically the planning office) track certain types of land use restrictions – i.e., flood plain areas, hillside development areas, wetland areas, and seismic zones. But, except in very few jurisdictions, local permitting offices do not track ICs.

This has been an area of recent discussion within the United States IC community, because many IC practitioners recognize the importance of a local government process to "screen" for ICs, prior to permit issuance.<sup>88</sup> Some states are making progress on this front. Many states require state agencies to notify local governments when they issue ICs (see discussion, below, on active notice). A recent New York statute goes farther. In addition to the notification to local governments, it affirmatively requires local governments to compare applications against environmental easements prior to issuing permits (also see active notice discussion).

## **IV. Long Term Maintenance of ICs**

### ***A. In an Increasing Number of States, Deed Restrictions Clearly Run with the Land***

Except for a few states (summarized below) the property law in most states, which most attorneys describe as arcane, leaves uncertain whether environmental-related restrictions "run with land" and, thus, bind subsequent owners. In response to this, the Model Uniform Environmental Covenant Act (UECA) provides a model Act that, among other things, ensures that environmental covenants will run with the land. See [www.environmentalcovenants.org](http://www.environmentalcovenants.org) (providing the model act in its entirety). In addition to the conventional parties to a covenant (grantor-grantee), the model act also allows other signatories to the covenant (i.e., environmental agencies, non-profit agencies, etc.) to enforce the covenant. The model act also allows the local jurisdiction, in which any environmental covenant operates, to enforce the terms of the covenant. The UECA has been adopted in ten states – Maine, Maryland, Delaware, Nevada,

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<sup>88</sup> See Michael Sowinski and Richard Oppen, Land Use Control Implementation Plans – The Child of More Intercourse between Land Use and Environmental Law, Zoning and Planning Law Report, Vol. 29, No. 3 (2006).

Nebraska, Iowa, South Dakota, Kentucky, West Virginia, and Ohio – and introduced in others. See [www.environmentalcovenants.org](http://www.environmentalcovenants.org) (showing the states where UECA has been enacted and introduced).

Some “non-UECA” states provide a statutory scheme that allows environmental restrictions to run with the land. In California, under a variety of statutory provisions, environmental covenants run with land.<sup>89</sup> Section 1471 of the California Civil Code provides the broadest statutory provision concerning environmental covenants. It provides:

(a) covenant made by an owner of land or by the grantee of land to do or refrain from doing some act on his or her own land, which doing or refraining is expressed to be for the benefit of the covenantee, regardless of whether or not it is for the benefit of land owned by the covenantee, shall run with the land owned by or granted to the covenantor if all the following requirements are met:

- 1) The land of the covenantor that is to be affected by the covenant is particularly described in the instrument containing the covenant.
- (2) The successive owners of the land are expressed to be bound thereby for the benefit of the covenantee in the instrument containing the covenant.
- (3) Each act that the owner or grantee will do or refrain from doing relates to the use of land and each act is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code.

In New York, the 2003-enacted Environmental Easement Law, *see* N.Y. ENVTL. CONSERV. LAW § 71-3601 *et. seq.*, makes environmental easements binding upon all subsequent owners and occupants of the property. The easements may be enforced in perpetuity against the grantor, subsequent owners, lessees, and any person using the property. In addition to the easement owner (i.e., the grantee), the grantor, the State, or the municipality in which the property is located can enforce the environmental easements. At least five other non-UECA states provide clear statutory provisions that make environmental deed restrictions run with the land.<sup>90</sup>

***B. In Some States, No Further Action Letters/Certificates of Completion Can Be Enforced Against Subsequent Owners.***

In Illinois, No Further Remediation (NFR) letters, to the extent they contain land use limitations, may be enforced against subsequent property owners.<sup>91</sup> Concerning NFR enforcement against subsequent owners, the statutory and regulatory scheme works as follows. “The following instruments may be institutional controls ... No Further Remediation Letters.”<sup>92</sup> NFR letters shall include “[t]he level of the remediation objectives, specifying, as appropriate, any *land use limitation* imposed as a result of such remediation efforts.”<sup>93</sup> The remediation applicant who receives a NFR letter “shall submit the letter ... to the Office of the Recorder or the Registrar of Titles ... within 45 days after receipt of the letter.”<sup>94</sup> Illinois law, then, broadly prohibits *any person* from conducting a site use that conflicts with land use

<sup>89</sup> See Implementing Institutional Controls, *supra* note 53 at 135-141.

<sup>90</sup> See Implementing Institutional Controls, *supra* note 53, at 121 (Arizona); *id.* at 153 (Colorado); *id.* at 236 (North Carolina); *id.* at 203 (Michigan); *id.* at 179 (Massachusetts).

<sup>91</sup> See 415 ILCS § 5/22.50; personal conversation between Michael Sowinski, DPRA, and Mark Wight, Division of Legal Counsel, Illinois Environmental Protection Agency.

<sup>92</sup> 35 Ill. Admin. Code § 742.1000(c).

<sup>93</sup> 35 Ill. Admin. Code § 740.610(a) (emphasis added).

<sup>94</sup> 415 § ILCS 5/58.8(a); 35 ILL. ADMIN. CODE Tit. 35, § 740.620.

limitations, including those within NFRs. “No person” shall use a site “in a manner inconsistent with the land use limitation” unless the person has appropriately cleaned the property for the use, and received a new NFR letter.<sup>95</sup>

In Texas, rather than being directly enforceable, recorded Certificates of Completion qualify as a deed notice.<sup>96</sup> Under the Texas program, a Certificate of Completion qualifies as an institutional control. An IC is “a legal instrument placed in the property records in the form of a deed notice, *Voluntary Cleanup Program Certificate of Completion* (VCP Certificate of Completion), or restrictive covenant.”<sup>97</sup> A deed notice is “[a]n instrument filed in the real property records ... intended to provide to owners, prospective buyers and others notice and information regarding, but which does not, by itself, restrict use of the affected property.”<sup>98</sup> But if, either within it or attached to it, Certificates of Completion contain “restrictive covenants,” the Certificate of Completion qualifies as a restrictive covenant and, in turn, runs with the land.<sup>99</sup>

In Ohio, similar to the way certificate of completion conditions might be, the environmental agency seeks to ensure that deed notice provisions become converted into deed restrictions. The Ohio environmental agency issues Declaration of Environmental Use Restrictions.<sup>100</sup> Like the no further remediation/certificate of completion letters in most states, DEURs can only be enforced against the party to whom they were issued – not subsequent property owners.<sup>101</sup> Recording this Declaration often acts as a pre-requisite for the agency’s issuance of a covenant not to sue.<sup>102</sup> But to help ensure that DEUR restrictions do bind subsequent owners, the Declaration must contain a promise that the current land owner will include the DEUR’s restrictions within the deed of any subsequent transaction.<sup>103</sup> This eventual deed restriction will, because it arises out of a land transaction, run with the land. A failure to include the Declaration’s restrictions within a future deed conveyance would, in all likelihood, violate the covenant not to sue and, in turn, re-open the original DEUR party to new cleanup requirements.

### C. IC Audits and Inspections

Some state IC programs impose obligations upon landowners to periodically certify the IC. New Jersey requires that persons responsible for the IC complete a bi-annual IC certification.<sup>104</sup> And New Jersey provides an 8-page IC certification form requiring, among other things, the preparer to attest to the effectiveness of the IC. Rather than biennial, Arizona requires annual IC certification. But it only requires the completion of a less burdensome 1-page form, which requires a brief summary of the IC and a certification that it “is being maintained and remains effective.”<sup>105</sup> The New York’s 2004-enacted Brownfield Cleanup Program requires the “owner of a brownfield site” to submit annual IC certifications, prepared by a licensed professional engineer, attesting that “nothing has occurred that would impair the

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<sup>95</sup> 415 ILCS § 5/22.50

<sup>96</sup> Texas Commission on Environmental Quality, Remediation Division, Institutional Controls 10 (Nov. 2002) (available at [http://www.tceq.state.tx.us/comm\\_exec/forms\\_pubs/pubs/rg/rg-366\\_trrp\\_16\\_199932.pdf](http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-366_trrp_16_199932.pdf)) (hereafter TCEQ IC Guidance).

<sup>97</sup> Tex. Admin. Code. tit. 30 §350.4(a)(47) (emphasis added).

<sup>98</sup> Id. at § 350.4(a)(22).

<sup>99</sup> TCEQ IC Guidance, at 10.

<sup>100</sup> Implementing Institutional Controls, *supra* note 53, at 254.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> See N.J. Admin. Code tit. 7, § 26E-8.4 to 8.7.

<sup>105</sup> Institutional Control Annual Status Report (on file with author).

ability of such controls to protect the public health and environment...”<sup>106</sup> Regulations to implement this statutory provision remain in draft form.<sup>107</sup>

In Illinois, when groundwater ordinances are used as ICs, the person must track the ordinance to make sure that it remains on the books – unless the municipality has signed a Memorandum of Agreement with the environmental agency, agreeing to notify the agency of ordinance changes.<sup>108</sup>

Rather than imposing the burden on land owners, some states contemplate a state-run IC monitoring program. In Massachusetts, for example, Brownfield legislation includes a requirement that all ICs be audited by the state environmental agency.<sup>109</sup> The scope of the DEP audit can vary from a fairly brief file review to a site visit and interview of a person associated with the future use limitation combined with a comprehensive evaluation of all relevant response actions and all materials submitted to DEP.<sup>110</sup> Although Arizona requires annual submissions of IC certifications (see above), it also conducts agency-led IC monitoring, funded by Arizona’s one-time IC fee (see immediately below for more details on the IC fee). And like other states, in New York, the Department retains the right to enter and inspect any property subject to an environmental easement.<sup>111</sup>

#### **D. IC Cost Estimates and Financial Assurance**

In Arizona, an administrative regulation entitled “Declaration of Environmental Use Restriction Fee” charges a one-time fee for IC or engineering control (EC) use.<sup>112</sup> The rule sets forth itemized cost requirements for IC and EC use. Fees have ranged from \$5,000 to \$200,000, depending on site complexity.<sup>113</sup> In New York, the 2004 enacted Brownfield Cleanup Program requires a showing of IC costs, as a pre-requisite for IC approval.<sup>114</sup> According to this law, the New York environmental agency may approve remedial work plans that include ICs, if the remedial work plan includes:

an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed [IC] and an analysis of the long-term costs of implementing, maintaining, monitoring and enforcing such controls, including costs that may be borne by state or local governments.<sup>115</sup>

Regulations designed to implement this statutory requirement remain proposed. The proposed regulations provide some additional details.

[t]he remedial party must submit to the Department a detailed written estimate of the cost, in current dollars, for implementing the institutional or engineering controls. The cost estimate must be based on the cost of implementing the institutional or engineering controls as set forth in the remedial work plan; and ...must reflect consideration of the size, type, and location of the area subject to the institutional or engineering controls; and

<sup>106</sup> Env'tl. Conserv. Law § 27-1415(7)(b).

<sup>107</sup> See <http://www.dec.state.ny.us/website/der/superfund/375draft.pdf>.

<sup>108</sup> See Implementing Institutional Controls, *supra* note 53 at 161; see also <http://epadata.epa.state.il.us/land/gwordinance/> (providing list of approved ordinances).

<sup>109</sup> See Implementing Institutional Controls, *supra* note 53 at 197.

<sup>110</sup> *Id.*

<sup>111</sup> Env'tl. Conserv. Law § 71-3601(11).

<sup>112</sup> See Ariz. Comp. Admin. R. & Regs. R18-606.

<sup>113</sup> Personal conversation between Michael Sowinski, DPRA and Amanda Stone, Arizona Department of Environmental Quality (Feb. 2005).

<sup>114</sup> See N.Y. Env'tl. Conser. Law § 27-1401 *et. seq.*

<sup>115</sup> N.Y. Env'tl. Conserv. Law § 27-1415(7)(a).

the remedy and the nature and extent of contamination subject to the institutional control/engineering controls.<sup>116</sup>

In Texas, the environmental agency specifically addresses the need for long-term maintenance in the TRRP.<sup>117</sup> The agency requires that financial assurance be established for any post-response action care associated with and institutional control.<sup>118</sup> The financial assurance requirements cover the cost of: 1) monitoring environmental media; 2) inspecting and maintaining physical controls; and 3) operation of any physical controls.<sup>119</sup> The person performing the response must provide a written cost estimate for post-response activities, within the Response Action Plan.<sup>120</sup>

Missouri requires an IC monitoring fee, which ranges from \$5,000 to \$15,000.<sup>121</sup> And the state of Washington provides the agency with discretion to decide whether to require financial assurance for the “long term effectiveness of engineered and institutional controls.”<sup>122</sup>

***E. Active Notice (forced review of ICs prior to activity)***

In California, in some cases, the DTSC has required an actual physical monument or signage on the property stating there is a restriction with a DTSC telephone contact number.<sup>123</sup> Additionally, for a limited universe of cleanup sites, California law imposes affirmative obligations on both the state agency and the local government. It provides the following:

- (d) The department shall notify the planning and building department of each city, county, or regional council of governments of any recorded land use restriction imposed pursuant to Section 25202.5, 25222.1, 25229, 25230, 25355.5, or 25398.7 within the jurisdiction of the local agency. Upon receiving this notification, the planning and building department shall do both of the following:
  - (1) File all recorded land use restrictions in the property files of the city, county, or regional council of government.
  - (2) Require that any person requesting a land use which differs from those filed land use restrictions on the property apply to the department for a variance or a removal of the land use restrictions pursuant to Section 25233 or 25234.
- (e) A planning and building department of a city, county, or regional council of governments may assess a property owner a reasonable fee to cover the costs of taking the actions required by subdivision (d).<sup>124</sup>

While this California provision only pertains to a limited universe of sites, the New York 2003 Environmental Easement law imposes similar obligations for a broad universe of sites. In New York, the Department will provide all impacted municipalities with a copy of environmental easements, and any

<sup>116</sup> NY Draft Regulation 6 NYCRR Subpart 375-1.8(h)(available at <http://www.dec.state.ny.us/website/der/superfund/375draft.pdf>)

<sup>117</sup> Implementing Institutional Controls, *supra* note 53, at 266.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Mo. Code Regs. tit. 10 §25-15.010(8)(A)(3).

<sup>122</sup> Implementing Institutional Controls, *supra* note 53 at 280.

<sup>123</sup> Implementing Institutional Controls, *supra* note 53, at 144.

<sup>124</sup> Cal. Health & Safety Code § 25220.

modifications or terminations of environmental easements.<sup>125</sup> Municipalities must notify the Department upon receipt of an application for a building permit or any other application that affects land use or development.<sup>126</sup> The municipality may not approve the application unless the Department provides approval.<sup>127</sup>

Rather than imposing obligations on local governments, some state statutes simply require the state environmental agency to notify local governments about ICs. For example, Michigan's underground storage program imposes this obligation upon persons who complete cleanups. It provides that "a person who implements corrective action activities shall provide notice of the land use restrictions that are part of the corrective action plan to the local units of government in which the site is located within 30 days of submittal of corrective action plans."<sup>128</sup> Florida also imposes this obligation upon the persons conducting cleanup. Florida IC guidance provides that "[t]he property owner or their agency should submit a copy of any recorded restrictive covenant ... to the local government with land use authority."<sup>129</sup> Other states impose this burden on the state agency. For example, in Georgia, a copy of the restrictive covenant must be provided to any zoning or land use planning authority that has jurisdiction over the property.<sup>130</sup> In Arizona, "the department shall provide a copy of the declaration of environmental use restriction to the local jurisdiction with zoning and development plan approval for the property."<sup>131</sup>

## V. IC Enforcement, Penalties & Consequences for Non-Compliance

### A. Enforcement Provisions & Penalties Within Deed Restrictions

In many states, the terms within deed restrictions provide enforcement provisions or, otherwise, the common law of the state allows for enforcement. States vary, but generally deed restrictions can be enforced in law (money damages) or in equity (injunctive relief). For example, California's model covenant includes a standard provision that allows California, as the covenantee, to enforce the terms of the covenant within the bounds of California real property law. The standard language allows California to require the property owner to modify or remove any "improvements" constructed in violation of the covenant.<sup>132</sup> And the standard language allows California to "file civil and criminal actions against the owners as provided by law."<sup>133</sup>

Under UECA and in some non-UECA states, in addition to the covenantee or the grantee of covenant/easement, other entities possess enforcement authority. In New York's non-UECA Environmental Easement law, "[a]n environmental easement may be enforced in law or equity by its grantor, by the state, or any local government."<sup>134</sup> Under UECA, "an action for injunctive or other equitable relief" may be maintained by the party to the covenant, the municipality where the property is located, the "agency" (UECA requires environmental agency signatures to UECA covenants, even where another entity, and not the agency, acquires the actual property interest), persons affected by the covenant violation, and other persons that the covenant expressly includes.<sup>135</sup>

<sup>125</sup> N.Y. Envtl. Conserv. Law § 71-3607.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Implementing Institutional Controls, *supra* note 53, at 212 fn 26.

<sup>129</sup> Florida Department of Environmental Protection, Division of Waste Management, Institutional Controls Procedures Guidance 8 (Feb. 2004).

<sup>130</sup> Ga. Comp. R & Regs § 391-3-19-.08(7).

<sup>131</sup> Ariz. Rev. Stat. Ann. § 49-158(I).

<sup>132</sup> Implementing Institutional Controls, *supra* note 53, 140.

<sup>133</sup> *Id.* at 141.

<sup>134</sup> N.Y. Envtl. Conserv. Law § 71-3605(10).

<sup>135</sup> Uniform Environmental Covenant Act §11.

**B. Non Compliance Consequence: Void No Further Action/Certification of Completion**

According to a “non-scientific” study conducted by the state of Missouri on the IC penalty provisions of 49 state Voluntary Cleanup Programs (VCPs), voiding no further action letters was the most common penalty – 25 states relied on voiding no further action letters.<sup>136</sup> For example, in Michigan, if ICs “lapse or are not complied with,” the department’s approval of the remedial action plan is void.<sup>137</sup> In New York, the Department may revoke a site’s Certificate of Completion issued to any person who intentionally violates an Environmental Easement.<sup>138</sup>

The Ohio program works similarly, but it also involves covenants not to sue. Ohio’s brownfield cleanup law authorizes the agency to enter into covenants not to sue – in which the state essentially promises the liable party that, subject to the conditions in the covenant not to sue, the liable party will not be required to do additional work. Within these covenants not to sue, the agency may include requirements to comply with ICs.<sup>139</sup> Pursuant to the Ohio Revised Code § 3674.12, covenants not to sue become automatically void (i.e., it is a self executing provision) on and after the date of commencement of any non-complying use. Thus, the agency does not directly enforce ICs. Rather, they rely on the covenant not to sue becoming void. When voided, the agency then enjoys all the enforcement power of its cleanup law.

**C. Other Statutory Enforcement Provisions**

According to the Missouri IC penalty study (see immediately above), five states provided direct monetary penalties for IC violations. California provides a good example. California’s Health & Safety Code explicitly empowers the DTSC to issue penalties for IC non-compliance.<sup>140</sup> Enforcement options include injunctive relief, administrative or civil penalties up to 25K per day, and the possibility of criminal penalties.<sup>141</sup>

As discussed above, in Illinois, the Illinois Environmental Protection Act allows enforcement against “any person” who violates NFR conditions - covering subsequent owners and third parties. Violation of any of the Illinois Environmental Protection Act triggers civil and criminal penalties.<sup>142</sup>

**D. Non Compliance Consequence: Loss of Environmental Liability Protections**

The Federal CERCLA impacts cleanup in all states because the risk of CERCLA liability nearly always exists. CERCLA provides limited defenses, including the innocent landowner, bonafide prospective purchaser, and contiguous landowner defenses. Among other things, as a condition for maintaining CERCLA liability defenses, defense seekers must, among other things, satisfy the following statutory obligations:

1) the person is in compliance with any land use restrictions established or relied on in connection with the response action;

<sup>136</sup> See <http://www.lucs.org/elibrary.cfm?id=f685354d%2D030c%2D49ea%2D9072%2D6f84c75cc248>.

<sup>137</sup> Implementing Institutional Controls, *supra* note 53, at 204.

<sup>138</sup> N.Y. Envtl. Conserv. Law § 71-3605(6).

<sup>139</sup> Implementing Institutional Controls, *supra* note 53, at 252.

<sup>140</sup> Implementing Institutional Controls, *supra* note 53, at 140.

<sup>141</sup> *Id.*

<sup>142</sup> See 415 IL CS §§ 5/42- 5/45.

2) the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.<sup>143</sup>

These IC-related continuing obligations, if violated, put responsible parties and current landowners at risk of losing an otherwise available CERCLA defense and, in turn, of incurring CERCLA liability.

California's California Land Reuse and Revitalization Act of 2004, AB 389 (Montanez), similar to CERCLA, makes bonafide prospective purchaser, innocent landowners, and contiguous owner liability immunities contingent upon compliance with ICs (this mimics the federal brownfield law).<sup>144</sup> In order to maintain this immunity, AB 389 requires such "innocent" to perform various IC duties – which vary among different types of cleanups.

### ***E. Enforcing ICs Against Subsequent Purchasers/Lessees.***

In Massachusetts, subpart A of the Mass Contingency Plan addresses violations of environmental restrictions.<sup>145</sup> Massachusetts 1998 Brownfields legislation specifically addressed the liability for subsequent purchasers – i.e., where one party has imposed an IC and then later sells to another.<sup>146</sup> In these cases, the statute provides protections for the former party (the seller).<sup>147</sup>

Other states require owners of IC-encumbered property to notify any leaseholders about the IC. For example, in New York the 2003 Environmental Easement law requires environmental easements to contain a promise to include "environmental easements in any leases, licenses, or other instruments granting a right to use the property that may be affected by such easement."<sup>148</sup> In the state of Washington, environmental covenants, among other things, must require the owner to notify the state environmental agency prior to any property interest conveyance (including leases).<sup>149</sup> Any leases that the owner lets must include restrictions on use consistent with the covenant.<sup>150</sup>

## **VI. IC Termination**

Many states set forth specific requirements or events, upon which, IC termination may occur. In Florida, the statutes, regulations, and guidance document provide substantive and procedural requirements for removing an institutional control. Acceptable reasons include that (1) contamination no longer exists (2) the owner is cleaning up the contamination, or (3) modification of restrictions to address changes in circumstances. In Georgia, under Rule 391-3-19-.08(7), the restrictive covenant may be revoked only with the approval of the Director once the property is in compliance with Type 1, 2, 3 or 4 cleanup standards and is removed from the Hazardous Sites Inventory. In New York, an environmental easement may only be extinguished or amended by a release or amendment executed by the grantee and filed with the office of the recording office for the county in which the land is located.<sup>151</sup>

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<sup>143</sup> Office of Enforcement and Compliance Assurance, U.S. Env'tl. Prot. Agency, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations to CERCLA Liability ("Common Elements") 6 (2003).

<sup>144</sup> See Cal. Health & Safety Code § 25395.81.

<sup>145</sup> Implementing Institutional Controls, *supra* note 53, at 191.

<sup>146</sup> *Id.* at 197.

<sup>147</sup> *Id.*

<sup>148</sup> N.Y. Env'tl. Conserv. Law § 71-3605(2)(e).

<sup>149</sup> Implementing Institutional Controls, *supra* note 53, at 279.

<sup>150</sup> *Id.*

<sup>151</sup> See N.Y. Env'tl. Conserv. Law § 71-3505(3).

## Chapter IV: IC Program Enhancement Options

When environmental agencies allow cleanups to anticipate future land uses, cleanups often allow contamination to remain in place and, in turn, human health and environmental protection depends upon compliance with future use assumptions. Assuring compliance with future use assumptions, at least in part, falls upon the environmental agency. Based on the review of BC's existing cleanup program (Chapter I) and the IC practices of other Canadian and US jurisdictions (Chapters II & III), this chapter evaluates various options that BC might employ to amend its IC program and, in turn, improve its ability to assure compliance with cleanup-related future land use restrictions.

The following sections discuss the major features of each option and, in turn, evaluate it against the following criteria.

- minimizes the use of government resources
- maximizes timeliness and efficiency of government administration
- minimizes the cost to the client/regulated community
- minimizes potential for litigation
- efficiency of any public notification
- timing and efficiency of tracking requirements
- degree of non-compliance consequences
- continued effectiveness, even after land transfers.

The implementation of any option might occur through legislation, regulation, protocol, guidance, or internal MOE procedures. While the following sections provide policy discussions about each option, they do not suggest precise implementation procedures. In section 63 and 64, EMA enumerates rather broad purposes for which MOE may publish regulations or a protocol. It seems likely, therefore, that the following IC program amendment options could largely be accomplished through regulation or protocol.

### I. Exclusively Rely on Restrictive Covenants

#### A. *Summary of IC Program Amendment*

As discussed above, in Chapter I, in order to require ICs MOE relies primarily on site registry notations and conditions within certificates of compliance, and less so on restrictive covenants. Under this IC program enhancement option, MOE would shift away from certificates and to the exclusive use of restrictive covenants. In the case where contamination remained in place, under this option, MOE would routinely, and exclusively, require the registration of restrictive covenants. The following topics address the major features of this IC program amendment.

*Covenants vs. conditions in certificates.* As Chapter II discusses in detail, conditions within certificates face many enforcement-related issues. Thus, their enforcement potential, in many cases, remains weak or uncertain. *Petro-Canada* raises questions about the ability even to impose conditions. But even when imposed, conditions within certificates do not run with the land. Covenants do not face these enforcement issues. Also, covenants seem more likely to be discovered during land transactions. Along with all property interests, the land title registrar records restrictive covenants. This reliable recording system reduces the burden on MOE to do the same. The process of buying property routinely involves a chain of title search which, in turn, identifies encumbrances and other matters affecting title. While conditions within certificates may be uncovered during transaction-related environmental due diligence (but see

discussion on site registry notations), covenants will almost certainly become discovered during land sales.

*Effect on future liability of proponents and remediating parties.* Even when a person receives a certificate for cleanup, EMA does not seem to shield that person from future cleanup liability. As discussed in Chapter I, EMA does provide some protection to these persons but only where another person violates a future land use condition *and also* performs additional cleanup. This legislative choice apparently seeks to ensure that the original “polluter pays” if future site activities re-trigger the need for site cleanup. This aspect of EMA remains controversial, and many project proponents – who may be willing to clean and redevelop a site to future use standards – seek EMA liability protection once they receive a certificate from MOE. Such liability protection will help, they would claim, to encourage cleanup and redevelopment. If future use limitations were routinely contained in covenants, this argument for future liability protection might enjoy stronger public policy support. Restrictive covenants run with the land, and thus their conditions remain enforceable against properties, regardless of who owns them, unless MOE discharges the covenant. Thus, covenants provide a means to shift the risk of cleanup liability to subsequent owners – pursuant to the covenant, subsequent owners must either abide by the restriction or, if they desire a different land use, perform additional cleanup. This potential shift does, however, run the risk of allowing a liability loophole in the case where, although future owners do not violate land use restrictions within covenants, newly discovered contamination triggers the need for more cleanup. To address this, a legislative amendment to EMA could immunize the original responsible party from liability, unless future cleanup is triggered by an event not covered in a covenant. While we stop short of making this recommendation (given the inextricably linked cleanup policy issues it raises), it does seem like an idea worth investigations. This “scope of the covenant” limit to liability would leave remediating parties open to some liability, it would be less than under the current scheme. And this type of “scope of the covenant” future liability protection may be more readily insured or indemnified.

*Required regulation change.* Section 53(3) of EMA authorizes MOE to require responsible persons to register a restrictive covenant in “prescribed circumstances or for prescribed purposes.” The Regulation lays out these prescribed purposes, and allows MOE to require a covenant only if these purposes are “unlikely to be satisfactorily met by the entry of notations in the site registry.” If the Regulation simply deleted this phrase, MOE would possess wider authority to require restrictive covenants.

*Groundwater.* The purposes for which covenants may be required does not cover groundwater use. If MOE shifts to a greater reliance on covenants, it might amend the Regulation to identify groundwater use restrictions as a purpose for which covenants may be issued.

*Model restrictive covenant.* Crafting future use limits and related conditions can be difficult. Indeed, MOE’s experience shows that negotiating and registering covenants require significant resources intensive. A model restrictive covenant may reduce this burden. The model covenant would identify the future use assumptions which MOE would commonly expect under varying post-remediation scenarios where contamination remains in place. In turn, the preparation of covenants may occur more efficiently. A number of U.S. states have developed model restrictive covenants.

*Who is the covenant made in favour of?* In addition to MOE, the LTA allows restrictive covenants to be made in favour of municipalities. If municipalities were willing to accept a restrictive covenant, future enforcement efforts would be shifted to them. Thus the covenant scheme, at least possibly, allows other entities to bear some of the enforcement burden.

*The existing site profile process would help assure enforcement of restrictive covenants.* Section IX of the site profile form expressly asks whether a restrictive covenant affects the site. Thus, through the site profile process, MOE would become aware of land activities at sites where restrictive covenants operate.

*Relation to certificate of compliance.* While some enforcement issues remain unclear for conditions within certificates, unless *Petro-Canada* becomes applied very broadly, it seems likely that conditions within certificates can be enforced against the party to whom the certificate was issued. Thus, if MOE wished to hold the remediating party potentially liable, even after it sold the affected property, it could. To do this, in addition to requiring a covenant, MOE may also include conditions within a certificate. This option would operate as a slight modification to the exclusive use of covenants. But it would allow MOE means, if it desired, to maintain a direct mechanism to enforce against the remediating party even after a land sale.

*Relation to site registry.* As discussed above, in Chapter I, the following site registry notations are used to record restrictive covenant milestones:

- Restrictive Covenant Review Requested.
- Restrictive Covenant Accepted.

Thus, the current registry function would identify sites at which restrictive covenants operate. The discussion of IC tracking, below, provides additional discussion of this topic.

## ***B. Evaluation of Relevant Criteria.***

*Use of government resources.* MOE's experience has shown that crafting and negotiating covenants requires significant resources. While other reasons exist, one reason involves the effort to detail the specific restrictions that will exist and criteria, if any, for their termination. To ease this burden, on both the agency and the private party, many U.S. jurisdictions have developed a model covenant. As noted above, this model covenant could set expectations of covenants so that ground rules would be set prior to covenant negotiations. In the case of numerical standards, the model covenant might include standard language which limited future use for each numerical category – i.e, industrial, commercial, etc. In the case of risk based cleanups, the model covenant could identify the future use assumptions that MOE would commonly expect under varying risk-based cleanup scenarios.

*Timeliness and efficiency of government administration.* This criteria raises the same issues as the “use of government resources,” discussed immediately above. A model covenant may increase the pace of issuing covenants.

*The cost to the regulated community/client.* As compared to the issuance of conditions within a certificate, the process of crafting and negotiating restrictive covenants would impose costs upon clients. But these costs may pale in comparison to the potential reduction in long term risk. Environmental covenants may reduce the potential for future liability against the remediation party. Upon future sale, environmental covenants provide a powerful risk transfer mechanism – transferring the future use restrictions and, in turn the potential consequences for failing to abide by them, to subsequent owners. Especially in combination with potential legislatively created “scope of the covenant” liability limits (discussed above), the benefit of restrictive covenants may meaningfully outweigh their costs.

*Potential for litigation.* Future litigation about any type of restrictive covenant is always possible. Often, litigation issues focus on the language within the covenant itself – where two parties disagree, for example, on the breadth of a restriction. This potential does not seem any different than it would for

conditions within certificates. Indeed, given *Petro-Canada*, the litigation potential over conditions in certificates seems greater.

*Efficiency of any public notification.* This IC program enhancement does not directly impose public notification requirements. The discussion below concerning IC tracking enhancements contemplates the possibility of increased reliance on restrictive covenants and, in turn, addresses public notification.

*Timing and efficiency of tracking requirements.* This IC program enhancement does not directly impose a tracking requirement. The discussion below concerning IC tracking enhancements contemplates the possibility of increased reliance on restrictive covenants and, in turn, addresses tracking efficiency. However, as noted above, the registry's current process tracks whether covenants exist at sites.

*Degree of non-compliance consequences.* The consequences would be imposed on the person who actually violated the restriction. And, the consequences would exist pursuant to the LTA. Generally, under the LTA, enforcing restrictions allows for the enjoining (or preventing) a violating activity and, in some cases where a violating land development has already occurred, the violating activity must be demolished. Enforcement would not rely on EMA's definition of "contaminated site" or "responsible person" nor would it otherwise rely on EMA. This differs from the case where conditions exist within certificates – in that case enforcement occurs under EMA.

*Continued Effectiveness, Even After Land Transfers.* Strong. As discussed above and in Chapter I, restrictive covenants run with the land.

## **II. As an Alternative to Reliance on Restrictive Covenants, Increase Enforceability of Conditions Within Certificates and Approvals and Rely Exclusively on Them**

### **A. Summary of IC Program Amendment**

The discussion on covenants, immediately above, makes the point that reliable and long term enforcement of covenants might make them an attractive tool to assure that cleanup-related future land use assumptions hold true. The same end would be achieved if conditions within certificates and approvals (especially certificates) could be made more enforceable. Thus, much of the discussion above applies to the case of more enforceable conditions within certificates. This option would increase the enforceability of the conditions within certificates. Enforceability issues exist because: 1) conditions do not transfer to subsequent purchasers (i.e., run with land); 2) because only indirect means, and not direct means, exist to enforce them; and 3) because *Petro-Canada* raises questions about the MOE's authority to impose conditions within certificates.

The following paragraphs discuss these three topics, as well as additional topics relevant to the increased enforceability of conditions within certificates and approvals.

*Obligations transfer to new owners (regardless of whether they qualify as responsible persons under EMA).* As discussed above, in Chapter III, the Illinois statutory regime allows conditions within no further action letters to transfer to new owners. Similarly, BC might amend EMA to say something like "No person may violate or cause to be violated the conditions within certificates of compliance or approvals in principle." The "no person" language would work broadly to capture any person, regardless of whether they qualified as a responsible person, if such person violated certificate or approval conditions.

*Direct means to enforce.* In addition to provisions suggested above, BC could add “any person who violates a condition or caused a condition to be violated may be subject to civil penalties up to ....”

*Petro-Canada.* Chapter I, above, discusses *Petro-Canada* in detail. *Petro-Canada* suggests that: 1) conditions must pertain to remediation, and the condition must be one that EMA allows within certificates; 2) conditions must be asked for and agreed to prior to the time when the certificate is issued; and 3) conditions made for a purpose which a covenant could perform, might be invalid. As discussed above in Chapter I, a good argument exists that conditions which limit future use fall within the authority that EMA provides. To help assure that a condition within a certificate can pass muster under *Petro-Canada*, MOE might first include these conditions within approvals or otherwise negotiate them during the remediation – to help ensure that the *Petro-Canada* logic would find that the conditions relate to the remediation.

*Notice MOE of change in ownership.* If conditions in certificates run with the land, and if conditions can be enforced by MOE, MOE needs to know when a change in ownership occurs. Such notice would allow MOE to help assure that future owners abide by conditions within certificates. Current site profile Regulations exempt vendors from notifying MOE when they sell property – even though EMA would allow this. Thus, the regulation could be amended.

## **B. Evaluation of Relevant Criteria**

*Use of Government Resources.* Increased enforceability of conditions, in and of itself, would not increase the burden on MOE resources. However, with increased enforceability comes increased opportunity to enforce and, in turn, the potential for increased resources to be spent on monitoring enforcement. If conditions within certificates and approvals comprise the primary means by which MOE enforced future land use restrictions, MOE might need to increase its internal abilities to track and enforce the conditions (but see below discussion on IC certification, which could largely shift this burden to private parties). As discussed under IC tracking, below, effective enforcement would require efficient tracking of sites at which ICs exist. It would also require increased review of site profiles and, perhaps, periodic site monitoring. Continued (or expanded) use of conditions within certificates promises to increase the burden on MOE’s resource over time, as more of these types of sites exist and as more persons seek to change land uses.

*Timeliness and Efficiency of Government Administration.* This option would be an efficient means to ensure that future land use conditions are complied with. Without an increased ability to enforce these conditions, MOE would be forced to rely on less efficient indirect means to enforce a violation of conditions, or to take no enforcement action at all.

*The cost to the regulated community/client.* Increased enforceability of conditions does not impose direct costs to clients. Rather, it simply helps to assure that site conditions remain the same as those presumed during future-use-based cleanup. To the extent that increased enforceability helps prevent projects that would, if completed, violate conditions, it might even save clients money. Such condition-violating development would run the risk of being enjoined or, if the violation became publicized and the environmental risks exposed, losing its value. In addition, like the case of covenants, dependable enforcement of future conditions might allow remediating parties to remain free of future liability.

*Potential for Litigation.* Increased enforcement power increases the likelihood of conflicts and, in turn, litigation. Thus, if violations of conditions occurred, and if MOE were to bring enforcement actions, more litigation would be a possible result.

*Efficiency of any public notification.* This IC program enhancement does not directly impose public notification requirements. The discussion below concerning IC tracking enhancements contemplates the possibility of increased enforceability of conditions within certificates or approvals and, in turn, addresses public notification.

*Timing and efficiency of tracking requirements.* This IC program enhancement does not directly impose a tracking requirement. The discussion below concerning IC tracking enhancements contemplates the possibility of increased enforceability of conditions within certificates or approvals and, in turn, addresses tracking efficiency. However, as noted above, the registry's current process tracks whether certificates of compliance exist at sites.

*Degree of Non-Compliance Consequences.* The program described above holds meaningful potential to increase the degree of non-compliance consequences. Non-compliance consequences would be imposed upon the person who actually violated the restriction.

*Continued Effectiveness, Even After Land Transfers.* Strong. As discussed above, this option would enable conditions within certificates or approvals to transfer to new owners.

### **III. Establish a Site Owner/Operator-Performed IC Inspection and Certification Program**

#### **A. Summary of IC Program Amendment**

An IC certification program would require either responsible parties or owners of property where ICs exist, to periodically inspect and, in turn, certify to MOE that all ICs have been implemented, remain in place. This program enhancement would improve IC monitoring. Thus, as MOE increases the use of ICs (in whatever form, i.e., conditions within certificates, notations in the registry, or covenants), this IC certification program will provide MOE and interested stakeholders meaningful assurance that the ICs continue to operate properly.

A component of this program enhancement may also include an MOE audit of a portion of private party-performed IC certifications. For example, MOE may audit 5% or 10% of annual IC certifications. This audit, or the mere possibility of MOE performing this audit, would increase the quality of IC certifications.

Regardless of whether legislation, regulation, or protocols establish IC certification, any of these tools needs to address similar issues. These issues include:

- The period of IC inspection and certification, i.e., annual or bi-annual.
- The detail of the IC inspection. The inspection may be detailed. For example, it might require detailed information about the site and property use, the precise nature of the future use restrictions, and a detailed description of whether the actual site uses comply with these restrictions. Or, the inspection may simply require a certification statement, promising that land use restrictions have not and are not likely to be violated.
- The person responsible for performing the inspection. This topic must address whether originally responsible persons or subsequent purchasers of affected property must perform the inspection and certification.
- Whether it must be performed by an approved professional, or whether the inspecting person must possess certain qualifications.

- Whether and which penalties may be imposed for failure to perform, or properly perform, the inspection and certification.

## **B. Evaluation of Relevant Criteria**

*Use of government resources.* The burden of this IC program enhancement would largely lie with the private sector. Thus, as compared to its benefits, demands on MOE resources may be limited. As noted above, MOE burden may include an audit of a portion of the inspections. In addition, MOE would need to keep track of whether certifications were completed, whether they were properly completed, and whether the IC certification triggered additional action. MOE resources would be required to enforce this inspection requirement.

*Timeliness and efficiency of government administration.* Because these inspections and certifications would be conducted by private parties, the timeliness and efficiency of government administration is not a relevant issue.

*The cost to the client/regulated community.* The regulated community, or client, would bear some cost. The burden on them would largely depend on the detail of the IC certification that MOE might require. Based upon the experience of states like Arizona (see above), IC inspections would probably require the client to expend a level of effort ranging from four to forty hours per inspection. But complex sites might require additional efforts.

*Potential for litigation.* This IC program amendment would not seem to trigger litigation.

*Efficiency of any public notification.* This IC program enhancement does not directly impose public notification requirements. The discussion below concerning IC tracking enhancements contemplates the possibility of an IC certification program and, in turn, addresses public notification.

*Timing and efficiency of tracking requirements.* This IC program enhancement does not directly impose a tracking requirement. The discussion below concerning IC tracking enhancements contemplates the possibility of an IC certification program and, in turn, addresses tracking efficiency.

*Degree of non-compliance consequences.* This would depend upon the penalty provisions that this IC program enhancement created.

*Continued effectiveness, even after land transfers.* Again, this would depend upon the design of the IC program amendment. But it seems entirely plausible that the amendment could require the inspection and certification until any conditions requiring land use limits no longer exist.

## **IV. Improve IC Tracking**

### **A. Summary of IC Program Amendment**

As discussed above, the MOE registry focuses on recording milestones within the cleanup process. Based on these milestones, web-based searches allow persons to deduce that additional information exists which, in turn, they may find by either requesting a tailored report from MOE or personally reviewing MOE paper files.

Robust IC tracking can go a long way to help ensure compliance. Even if direct means to enforce future land use limits do not exist, the combination of good IC tracking with MOE's indirect means to enforce

them (see Chapter I), may significantly assure compliance. The following IC tracking amendments might help to assure compliance with cleanup-related future land use restrictions.

*List sites where future land use conditions exist.* Chapter III overviews good models for this – as both GIS and non-GIS systems. California and Colorado provide good examples of non-GIS IC tracking. Under this model, MOE may simply list the site name and address for each site at which some type of cleanup-related future land use restriction exists – whether within a certification, approval, covenant, or other instrument. Similar to the California list, MOE may provide a web link which lists something like “Cleanup Sites with Future Land Use Restrictions.”

*List the actual future land use conditions.* In addition to listing the sites, MOE might also allow web-based access to the actual documents and language which limits future land uses. This would require scanning documents – certificates, covenants, risk assessments – so that a web researcher could readily find the actual restrictions. Or, rather than scanning documents, MOE may simply summarize the restrictions and refer the researcher to the actual documents for more information – Colorado takes this approach.

*Post annual IC certifications.* If MOE were to move forward with an IC certification program, MOE might include the IC certifications within the registry – again, this would require scanning documents. Or, alternatively, it may simply note “certification received” and refer the searcher to the actual file for more information. Posting these certifications on the web would provide a powerful means for MOE to show public stakeholders that, indeed, sites comply with future land use conditions. Such posting would also increase the incentive on property owners to properly perform IC inspections.

*Maintain/post schedule of IC certifications.* As part of the IC certification program, assuming MOE implements this, MOE may also maintain a publicly available schedule for IC certifications. Again, this would encourage compliance.

*Termination of future land use conditions.* The registry might also track whether IC termination has occurred. Tracking termination, of course, allows searchers to know that a once-required restriction no longer exists.

*Publicize violations.* If MOE discovers non-compliance with future use conditions, it may wish to widely publicize it. MOE may even include a link on its web site announcing “Future Land Use Compliance Violations.” Such negative publicity might also help to encourage compliance.

## **B. Evaluation of Relevant Criteria**

*Use of government resources.* An initial one-time cost would be required to amend the registry’s database, and to review existing certificate conditions to allow for an inventory of sites where conditions exist. Once the database infrastructure allows for easy compilation of sites with conditions, the daily administrative effort might be minimal. The registry currently tracks over 70 information items. The additional effort to also track whether conditions exists, does not seem to impose a significant resource issue. If MOE also seeks to scan actual documents, such as certificates and risk assessment, this could increase the work load. But, even so, scanning technology, document management, and web posting of documents is routinely accomplished with standard technology. Thus, upon closer investigation, this effort may not actually require significant resources.

*Timeliness and efficiency of government administration.* A long-standing process exists for the site registry, and this amendment would simply expand to it. MOE's ability to track sites with conditions would be as timely and efficient as MOE's current site registry process.

*The cost to the client/regulated community.* This IC program amendment would not pose any direct cost to the client.

*Potential for litigation.* This amendment does not seem to pose a meaningful risk of litigation. This amendment simply provides efficient notice of public information.

*Efficiency of any public notification.* A summary listing of sites with future land use conditions, and the related information described above, would meaningfully increase the public notification feature of the registry. It would allow quick and ready access to information about future land use conditions at remediated sites.

*Timing and efficiency of tracking requirements.* A long-standing process exists for the site registry, and this amendment would simply expand to it. MOE's ability to track sites with conditions would be as timely and efficient as MOE's current site registry process.

*Degree of non-compliance consequences.* This IC program amendment does not pose additional requirements that could be violated – it merely improves notice. Thus, this criterion is not relevant.

*Continued effectiveness, even after land transfers.* The tracking of future land use conditions, under the amendment described above, would remain in place throughout land transfers.

## **V. Amend the Site Profile Process To Ensure that Permit-Seekers Complete Site Profiles at Sites with Prior-Issued Certificates or Approvals, Where Conditions Within the Certificates or Approvals Exist.**

### **A. Summary of IC Program Amendment**

As discussed above, MOE seems to already possess significant ability to prevent local permits which would create risks at sites where, although cleanup has occurred, contamination remains in place. However, the site profile process could more certainly ensure MOE review of new land use-related permits at sites where future land use conditions exist. Thus, this option would modify the current site profile process to help ensure that, in the future, MOE reviews permit applications at sites where cleanup has occurred, but future land use restrictions exist. As future use-based cleanups mature, more and more instances will exist where persons will seek to change the land use at sites affected by conditions within certificates or approvals. The following topics outline the steps necessary to amend the site profile process.

*Clarify the site profile exemption.* As discussed above, in Chapter I, an exception exists to this general rule that site profiles must be completed for sites which had been used for commercial or industrial purposes. Under section 4(1)(b) of the Regulation, a permit applicant need not prepare a site profile form if:

the site is the subject of an approval in principle or certificate of compliance *relevant to the current use of the site* and any use *proposed by the person*, but only if the person has no reason to believe that there has been any additional or new contamination at the site after issuance of the approval in principle or certificate of compliance.

Thus, under this exception, in many cases where a site profile form had already been completed, an applicant need not prepare another one. This exception, however, may not cover some cases where conditions exist within previously issued certificates or approvals. For example, the exception might not apply where a permit applicant's *proposed use* would violate an existing condition within a certificate or approval. If the exception did not apply, the applicant would need to prepare a site profile – even though a previous site profile existed. But the language of the exception could be more clear. The regulation could directly say that at sites where conditions exist within prior-issued certificates or approvals, applicants must complete site profiles and municipalities must forward those site profiles to MOE.

*Update section IX of the site profile form.* Closely related to the site profile exemption discussed immediately above, the site profile form could more clearly address conditions within certificates. Section IX's current language asks whether "other charges or encumbrances stemming from contaminant or wastes remaining onsite or from other environmental conditions" exist. While this language seems to cover conditions within certificates or approvals, it could more expressly say so.

Clarify MOE's ability to prevent permit issuance. Section 946.2(2) of the *Local Government Act* prohibits municipalities or officers from issuing permits or approvals, without MOE approval. In order to issue permits or approvals, municipalities must receive notifications from MOE that:

- No site investigation is required;
- The site does not qualify as a contaminated site;
- The MOE approves the permit because "in the opinion of the director the site would not present a significant threat or risk if the application were approved."
- Independent or voluntary remediation is occurring;

Thus, MOE appears to have wide latitude to prevent a permit or approval. The MOE might, however, issue protocol or guidance on its intended process for withholding permits or approvals.

*Internal process to review applications.* For some time, MOE has reviewed site profiles to determine whether a site requires environmental investigations. As future use based cleanups mature, MOE will likely receive site profiles for sites where a condition within a certificate or approval exists (or perhaps where a restrictive covenant exists). Whether a proposed land activity complies with a condition, may often be difficult to determine – or controversial. Thus, MOE should anticipate this eventuality. It might publish a protocol or guidance to help set the procedures and rules for this type of review.

## **B. Evaluation of Relevant Criteria**

*Use of government resources.* If site profiles more routinely come to MOE for sites where future use restrictions exist, resources must address these submissions and, in turn, report back to municipalities. The degree of government resources will directly depend on the number of such site profiles – which, in turn, will depend on the number of future use-based cleanups that exist. MOE should consider this potential resource implication when deciding how it might amend its IC program. As discussed above, annual IC certifications and municipal involvement with enforcing conditions (e.g. as the entity to whom a covenant is made in favour of), might reduce reliance on monitoring conditions through the site profile process.

*Timeliness and efficiency of government administration.* This could be an inefficient process. Each time MOE receives a site profile which seeks to change land use at a site where a condition exists, MOE may

need to perform a site-specific evaluation. The evaluation must look closely at the risks posed by the new activity, the conditions limiting it and, perhaps, the residual contamination.

*The cost to the client/regulated community.* This IC program amendment would impact clients, in the future, who wish to change land uses at sites where conditions within certificates (or covenants) restrict future uses. The cost is not a direct one, but it would work to reduce the incentive for new development or, if development proceeds, it might increase the time for permitting.

*Potential for litigation.* Meaningful potential may exist. In cases where a person desires to change a land use that may conflict with a future use condition, strong possibility exist that this person and MOE may disagree on the type of use that may occur. Such disagreement sets the stage for litigation.

*Efficiency of any public notification.* This option does not trigger additional public notification requirements.

*Timing and efficiency of tracking requirements.* This option does not trigger additional tracking requirements.

*Degree of non-compliance consequences.* The site profile process might set new (or clarify) rules addressing when site profiles must be submitted and, in turn, the authority for MOE to prevent new land uses. Failure to submit a site profile or failure to abide by MOE instruction could trigger enforcement consequences. The degree of the consequence for failing to submit the form, would follow EMA's current rules for this. The degree of consequence for failure to abide by MOE instruction would depend on which mechanism contained the future use restriction. If the restriction existed as a condition within a certificate, this would trigger the enforcement issues discussed in detail above. If the restriction occurred within a covenant, non-compliance would likely empower MOE to compel compliance pursuant to the LTA.

*Continued effectiveness, even after land transfers.* The amended site profile process would exist for sites and, thus, it would transfer to subsequent owners. The question remains though of, even though a person must submit a profile, whether the conditions within a certificate or approval would be enforceable against him or her. See the discussion above, and in Chapter I, for more details on enforceability of conditions.

## **VI. Establish an Institutional Control Fee**

### **A. Summary of IC Program Amendment**

This program enhancement would set a fee for IC use. Thus, whenever MOE issues a certificate, which relies on a future land use restriction – either within a certificate, covenant, or otherwise – MOE would charge a fee meant to recover the costs that the MOE would bear during its future efforts to monitor and enforce the future land use restriction. The fee may take the form a one-time fee, payable upon issuance of the certificate – this is the model followed by Arizona (see above). Or, it may require an annual or bi-annual fee that coincided with IC certifications.

### **B. Evaluation of Relevant Criteria**

*Use of government resources.* Rather than requiring additional MOE resources, this IC program amendment recognizes that IC stewardship imposes resource obligations upon MOE and, in turn, seeks to recoup MOE costs from persons who ostensibly benefit from the use of ICs.

*Timeliness and efficiency of government administration.* Because the fee would provide revenue, it would work to enhance the efficiency of government administration. And because it simply collects a fee, this option does not impact timeliness of administration.

*The cost to the client/regulated community.* The cost to the client, of course, depends on the fee schedule. But this option would impose a real cost to clients. This cost, however, should be weighed against the benefit of IC use. ICs allow cleanups to achieve standards which contemplate future land use. This, in turn, often results in lower cost cleanups by, for example, allowing cleanups to reach industrial rather than residential standards. The impact of the IC fee, arguably, would only meaningfully impact clients if the cost of the fee approached the cost savings that risk based cleanups allow. In the case where cleanup cost savings outweigh IC fees, the cost to the client would not seem significant. In turn, the cost to the client would not seem to meaningfully affect a client's incentive to perform cleanup. If the cost of the IC fee approached the benefit of reduced-price cleanups, cleanups which could cost-effectively be more fully achieved, might be. Thus, this option might prevent less-than-full cleanup without regard to the incremental cost of achieving a full cleanup.

*Potential for litigation.* This IC program amendment would not seem to trigger litigation.

*Efficiency of any public notification.* This IC program enhancement does not directly impose public notification requirements. The discussion below concerning IC tracking enhancements contemplates the possibility of an IC fee program and, in turn, addresses public notification.

*Timing and efficiency of tracking requirements.* This IC program enhancement does not directly impose a tracking requirement. The discussion below concerning IC tracking enhancements contemplates the possibility of an IC fee program and, in turn, addresses tracking efficiency.

*Degree of non-compliance consequences.* In the case of a one-time fee, non-compliance (e.g., refusal to pay the fee) would cause non-issuance of a certificate or approval. In the case of an annual fee, non-compliance consequences would depend on the design of the IC program amendment. In this case, one appropriate consequence would be rescission of the certificate or the exercise of other indirect condition enforcement (see above). If IC program amendments increase MOE's ability to enforce certificate conditions (see above), failure to pay the fee could trigger direct enforcement actions.

*Continued effectiveness, even after land transfers.* Again, this would depend upon the design of the IC program amendment. But it seems entirely plausible that the amendment could require the inspection and certification until any conditions requiring land use limits no longer exist

## **VII. Publish Additional IC Protocols and Guidances**

This section outlines recommendations for additional guidance or a protocol concerning future use restrictions at future-use based cleanups. Such protocols or guidance would help set predictable expectations for clients, as well as bringing increased clarity and efficiency to internal MOE operations.

*General Over-Arching Guidance on IC Implementation and Enforcement.* Some U.S. jurisdictions such as, for example, Florida, Texas, and Missouri, as well as the federal EPA, publish detailed IC guidance. Similar MOE guidance might provide details on the following.

- IC Selection
- IC Implementation

- IC Monitoring
- IC Enforcement.

For example, guidance could explain the circumstances which MOE would allow site cleanups to rely on institutional controls. The guidance might also explain when, during cleanups, parties must state their intention to rely on ICs – IC planning, therefore, could begin early in the cleanup process. In addition, guidance could explain IC monitoring obligations and enforcement-triggering circumstances (and consequences). Generally, IC guidance could help to settle many of the operational uncertainties within the evolving IC program. The following subject might also be included in IC guidance or, because of the detail required, might stand alone as separate guidance.

*Guidance on criteria to employ when choosing notations within registry vs. restrictive covenants.* As discussed above, the MOE applies various risk-related criteria to decide whether to affect future land use conditions through the use of a restrictive covenant or notations within the site registry. Generally, as a matter of practice, MOE reserves restrictive covenants for high risk sites.

The inquiry about whether to require notations to the registry or restrictive covenants really involves an evaluation of three tools:

- notations on the registry;
- conditions within certificates or approvals (about which the registry provides notice); and
- restrictive covenants.

Notations simply provide notice. Notations might exist to announce restrictive covenants or conditions within certificates or approval. It is also possible that notations could announce (or imply) that contaminant remains in place, even though a condition might not exist within a certificate. For example, the following registry notations would do just this.

- Certificate of Compliance Issued Using Risk Based Standards.
- Certificate of Compliance Issued Using Numerical Standards.

Notations, alone, without conditions in a certificate or a restrictive covenant in place, seem to be weak tools for assurance of future land use conditions. Such conditions rely purely on the will of information recipients and, within practical limitations, the MOE's ability to re-open remedies under the authority of section 60 of EMA. Notations to the registry should not be used as the sole basis to control future land uses at remediated sites.

Thus, the question becomes whether future use conditions should lie within conditions or restrictive covenants. A series of decision factors or criteria might not work well in this situation. Factors inevitably leave much to the discretion of the decision maker, leave the affected community uncertain and, in turn, raise the potential for disagreement about decisions.

In the best case, MOE would choose one tool. Thus, future use restrictions would always occur in certificates of compliance or restrictive covenants. Both tools seek to achieve the same purpose – to make sure that, when contamination remains in place, future land uses do not put persons at risk. Section I and II above, as well as Chapter I, discuss the relative merits of conditions in certificates and covenants, as well as opportunities to amend each. Guidance on this issue will meaningfully clarify the IC program in BC.

*Specialized guidance on IC inspection/certification guidance.* IC inspection and certification guidance could be handled in over-arching guidance. But, given its potentially detailed nature, it could be reserved for individual guidance. The guidance would set forth the inspection requirements that MOE inspects, the frequency, and the form of inspection reporting.

*Specialized guidance on reviewing site profiles at sites where future use conditions exist.* This guidance would provide detailed instruction on the process to decide whether and which new construction or land activity may occur at sites where future use conditions exist.

## Chapter V: Conclusion

BC provides a comprehensive IC program. But, the BC program could provide a more robust means to assure long-term viability of ICs. IC practices in other jurisdictions, in both Canada and the United States, provide good examples of IC practices that might also work in BC. With the benefit of learning from IC practices in other jurisdictions, BC could improve its IC stewardship program. Based on the IC experiences and practices of other jurisdictions, and in light of BC's current program, BC should consider the following IC program amendment options.

- Exclusively Rely on Restrictive Covenants.
- As an Alternative to Reliance on Restrictive Covenants, Increase Enforceability of Conditions within Certificates and Approvals and Rely Exclusively on Them.
- Establish a Site Owner/Operator-Performed IC Inspection and Certification Program.
- Improve Institutional Control Tracking.
- Establish an Institutional Control Fee.
- Amend the Site Profile Process To Ensure that Permit-Seekers Complete Site Profiles at Sites with Prior-Issued Certificates or Approvals, Where Conditions Within the Certificates or Approvals Exist.
- Publish Additional IC Protocols and Guidance documents.