

Environment - USA

EPA issues new comprehensive guidance on institutional controls

Contributed by **Sidley Austin LLP**

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In December 2012 the Environmental Protection Agency (EPA) issued two new guidance documents on the use of institutional controls at contaminated sites regulated under the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, brownfields programmes and other federal programmes.

Institutional controls are often an important part of the clean-up at such sites. They generally fall into four categories:

- **Proprietary controls** – these consist of restrictions or other requirements that govern the land use of a particular property or properties and are established by agreement between the property owner and a government agency or other party, which can enforce the controls. Examples include deed restrictions, restrictive covenants and "negative easements" (ie, easements that restrict use). They typically prohibit or restrict future activities and uses of the property that could interfere with the effectiveness of a particular clean-up action (eg, a groundwater treatment system) or result in an unacceptable risk to human health or the environment (eg, residential use of a commercial property and/or certain types of excavation).
- **Governmental controls** – these consist of land use or resource use restrictions that are imposed by a governmental entity. Examples include zoning, building codes, groundwater use regulations and commercial or recreational fishing bans. They are imposed to prohibit or restrict activities that are determined to pose an unacceptable risk to health or the environment.
- **Enforcement and permit tools with institutional control components** – these consist of administrative orders, permits, consent decrees and similar legal documents that limit certain site activities or require the performance of specific activities (eg, monitoring of site restrictions). They can be negotiated or issued unilaterally by the EPA.
- **Informational devices** – these provide information or notification to potentially affected persons that residual contamination remains at the site and that certain activities should be avoided. Examples include recorded deed notices, state registries of contaminated sites and fish consumption advisories. They generally do not provide enforceable restrictions.

The more significant new EPA guidance is entitled "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites".⁽¹⁾ It provides in one place a comprehensive discussion of many of the issues involved in all of the above categories of institutional control. These include assessing the need for such institutional controls, selecting and planning for such controls, implementing the controls (eg, drafting and negotiating the relevant documents) and maintaining the controls, as well as mechanisms for enforcing the institutional controls. The guidance explains that site managers and attorneys associated with contaminated sites should:

- familiarise themselves with appropriate state statutes;
- identify the government bodies with jurisdiction over the site; and
- coordinate with local practitioners, community members and local government representatives as necessary.

It also notes the importance of developing and documenting a strategy for implementing and maintaining institutional controls at a site.

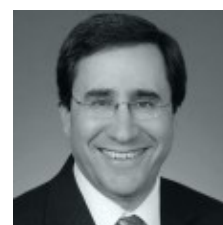
The guidance notes that a good way to ensure effective implementation of institutional controls is to develop an institutional control implementation and assurance plan that documents responsibilities over the full life of each institutional control, and to include

Authors

James R Bieke



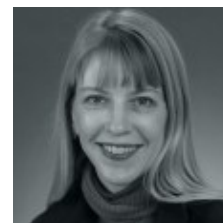
Samuel I Gutter



Robert M Olian



Judith M Praitis



this plan (or a reference to it) in the final decision document. To assist in that effort, the second EPA guidance document issued in December 2012, entitled "Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites", provides guidance for the development of such plans.(2)

For further information on this topic please contact [James Bieke](#), [Sam Gutter](#), [Robert Olian](#) or [Judith Praitis](#) at Sidley Austin LLP by telephone (+1 202 736 8000), fax (+1 202 736 8711) or email (jbieke@sidley.com, sgutter@sidley.com, rolian@sidley.com or jpraitis@sidley.com).

Endnotes

(1) Available at www.epa.gov/superfund/policy/ic/guide/Final%20PIME%20Guidance%20December%202012.pdf.

(2) Available at [www.epa.gov/superfund/policy/ic/guide/ICIAP%20guidance%20\(FINAL\)%20-%202012.04.2012.pdf](http://www.epa.gov/superfund/policy/ic/guide/ICIAP%20guidance%20(FINAL)%20-%202012.04.2012.pdf).

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