CHAPTER 1

An Overview of Institutional Controls

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Introduction
The specter of environmental liability, whether real or perceived, has driven manufacturers, developers, and others to flee potentially contaminated urban areas, or “brownfields,” in favor of undeveloped and pristine “greenfields.” The result has been increased unemployment, declining tax bases, urban blight, and increased crime in this nation’s urban areas.

In a grassroots movement that began in 1988, Minnesota first developed an alternative to the costly and inefficient federal cleanup programs that were the driving force behind the flight of businesses from contaminated urban areas. In the two decades that followed, almost every state joined this movement. This movement has resulted in new regulatory and tax mechanisms at the state and local level to increase the use and redevelopment of abandoned or underutilized commercial and industrial properties. These programs, including state voluntary cleanup programs, privatized cleanup programs (like Massachusetts’s Licensed Site Professional program), and “brownfields” programs, typically use risk-based corrective action principles to achieve a “no significant risk” or comparable cleanup level.

State voluntary cleanup programs have been particularly effective in bringing contaminated properties back into productive use because they

- establish clear cleanup requirements
- provide some limitations on liability
- create financial incentives for cleanup and redevelopment through tax credits, grants, or revolving loan funds
- streamline the governmental review process
- provide clear documentation of when sufficient cleanup has been conducted

Residual contamination may be allowed to remain in place in a program using risk-based corrective action principles if the residual chemicals of concern do not present an unacceptable threat to human health or the environ-
ment. Whether there is a risk can be determined using accepted risk assessment methods. The parties must examine

- the chemicals of concern
- the sources of exposure (i.e., the location of the chemicals of concern in relation to receptors)
- the pathways of exposure (air, water, soil)
- human and ecological receptors (including, but not limited to, office workers, construction workers, residents, waterways, and endangered species)

to determine whether the residual contamination would present “no significant risk” to human health and the environment, based on reasonably foreseeable future uses of the site.

Once assumptions have been made about the chemicals of concern, sources of exposure, pathways of exposure, likely receptors, and future land uses, those assumptions need to be “locked in” to prevent inconsistent future land uses. This can be accomplished by using institutional and engineering controls. Likewise, certain activities may need to be restricted in order to prevent activities and events that may be in conflict with the selected response action. Again, institutional and engineering controls would be used to identify and implement any restrictions or limitations on land use.

**Definition of Institutional Controls**

Institutional controls are a type of activity and use limitation (AUL). AULs are “legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern or to prevent activities that could interfere with the effectiveness of a response action.” These restrictions are designed to reduce or eliminate potential exposure to chemicals of concern, prevent activities that may interfere with a response action, and ensure maintenance of a condition of “no significant risk” to human health and the environment. Institutional controls can take the form of easements, restrictive covenants, equitable servitudes, environmental covenants, zoning, building permits, well drilling prohibitions, contractual agreements (such as permits and consent decrees), informational devices, or other types of controls.

Institutional controls may be either temporary or permanent in duration, as required by the conditions or attributes of the site. It may also be prudent to “stack” or “layer” institutional controls rather than rely on a single type of control. For example, a property owner may enter into a restrictive covenant with a prospective purchaser while also filing a declaration of easement and restrictive covenant with the state under the state cleanup program. This example involves both a traditional property law device, the restrictive covenant, together with a statutory informational device, the declaration of easement and restrictive covenant, where the state may have direct enforcement rights as well.
Institutional controls should provide notice to property owners, lenders, tenants, potential purchasers, and parties who review land records (such as title companies and appraisers) of the presence and location of residual chemicals of concern. These controls should identify site uses and activities that are consistent with maintaining a condition of “no significant risk,” as well as site uses and activities that should not occur in the future because of the potential to expose persons or ecological receptors inappropriately. Finally, institutional controls should also specify ongoing maintenance and operation obligations necessary to meet the objectives of the selected response action.

Examples of Institutional Controls

There are four basic types of institutional controls: proprietary controls, governmental controls, informational devices, and enforcement tools. Each of these controls is described in greater detail below.

Proprietary Controls

Proprietary controls are those tools that are available under traditional property law. Typical examples include restrictive covenants, easements, equitable servitudes, and “deed restrictions.” Private parties who intend to use a proprietary control as an institutional control need to understand state property law, including the legal formalities required to create the restriction and any limitations that may apply to the restriction in the jurisdiction where the site is located.

Real property rights are frequently described as a “bundle of sticks.” One way in which to create an institutional control is to convey one or more of these “sticks” to a third party. Whether that third party is a prospective purchaser, the state, the local government, an adjoining property owner, or someone else depends on a number of factors, including whether a conveyance is anticipated and whether the state or local government is willing to be a recipient of the “stick.” The interest in the land that is conveyed is usually nonpossessory in nature.

In order for proprietary controls to be enforceable, they must be created in accordance with certain legal formalities:

- The control must be in writing. The terms of the restriction must be spelled out with great specificity and recorded in the local or county land office or deed registry.
- The parties’ intention must be that the restriction be placed on the land for a clear and unambiguous period of time. The restriction must precisely reflect the parties’ intentions regarding the scope and duration of the restriction and must “run with the land,” thereby binding future owners and occupants.
- The restriction must “touch and concern” the land. It must center on the use of the land and affect the land itself in some way. A deed...
restriction that limits the use of the land can be said to “touch and concern” the property.

There must be a relationship—i.e., privity—between the parties. Only persons with a certain relationship to the property can enforce a deed restriction. Typically, privity is only found between a buyer and a seller, or between neighboring property owners, or a property owner and a governmental agency if the property interest is conveyed to the governmental agency.

One of the advantages of proprietary controls that run with the land is that they can be enforced by the beneficiary of the restriction without the need to establish an “imminent and substantial endangerment.” There must be a grantor, a grantee, an intent that the control run with the land, recordation, and a benefit to the public. In other words, these restrictions require some type of conveyance and someone who is willing to bear the burden of enforcing the restriction. These restrictions can be challenged and possibly extinguished if the type of restriction is disfavored under the common law of the state where the control is imposed.

To avoid some of the problems that have arisen under traditional property law doctrines, it is prudent when drafting an institutional control to specify the intent of the control very clearly. For example, who has the right to enforce the control? Does the control run with the land? What types of uses are permitted? What types of uses are prohibited? Who will maintain the control?

The following are examples of the more common types of proprietary controls.

**Restrictive Covenants**

Restrictive covenants are a nonpossessory interest in real estate. They must be created pursuant to certain legal formalities in the context of the transfer of a possessory interest in real estate from one party to another. The restrictive covenant contains the promise by one party to another to use, or to refrain from using, the property in a particular manner. For example, the prospective purchaser may agree to use the property for industrial purposes only, or may agree to refrain from using the groundwater for any purpose other than monitoring.

**Easements**

An easement is a property right that is conveyed by one landowner to another party, either giving the second party access onto the property or prohibiting certain uses of the property. An easement may be either affirmative or negative in nature. Easements may also be “appurtenant” or “in gross.” Appurtenant easements are those that are created to benefit an adjoining property. An easement “in gross” is one that is not related to any property that the holder of the easement may own. For example, if the state
were the holder of the easement, this would likely be an easement in gross. Both negative easements and easements in gross were disfavored under the common law, thereby limiting their usefulness as institutional controls. However, these impediments are beginning to disappear as many states have amended their laws. Where clear statutory authority exists, easements are being more commonly used by both federal and state environmental authorities as institutional controls in their cleanup programs.

**Equitable Servitudes**

An equitable servitude is similar to a restrictive covenant but may not meet all of the legal formalities for creating a restrictive covenant. Equitable servitudes are typically recognized when a party is seeking equitable relief, rather than money damages. An equitable servitude may run with the land if the subsequent landowner has had notice of the restriction, the restriction touches and concerns the land, and the owner’s intent to bind future landowners is clear.

**“Deed Restrictions”**

As noted above, the term “deed restriction” has no clear legal meaning in traditional property law. Nevertheless, several state cleanup programs use the term “deed restriction” to refer to the type of institutional control that will be imposed. The term is typically used to mean any kind of restrictive covenant, easement, or servitude that places limits and conditions on the use and conveyance of land. A well-drafted restriction describes appropriate and inappropriate uses of the property. In particular, the “deed restriction” may describe prohibitions on the disturbance of a containment cap; restrictions on certain uses of groundwater; controls on the type, placement, or use of wells; or restrictions on access to the land.

**Contractual Obligations**

Another type of institutional control that can be utilized is to require private parties to restrict land uses by contract. In this situation, however, the obligations are incurred only by the parties to the contract. The state may not intervene in the bargain or attempt to enforce the provisions of the agreement. In addition, the state probably will not be able to assert any control over, or attempt to institutionalize, the process or scope of the agreement. Any attempts to do so would be considered interference with the private parties’ right to freely negotiate liabilities and restrictions among themselves. While this type of control may be useful in settling immediate issues between two parties, it is not effective as a long-term solution. Alternatively, however, the state may enter into a contract with a party to require long-term monitoring, use restrictions, or financial assurances for the long-term funding of corrective action.
State and Local Government Controls

State Statutory Institutional Controls

Because of the difficulties in implementing and enforcing proprietary controls under traditional property law, and prior to enactment of the Uniform Environmental Covenants Act (discussed in the next subsection), several states enacted legislation to overcome some of these common law barriers. For example, Massachusetts established both a Grant of Environmental Restriction and a Notice of Activity and Use Limitation. Connecticut adopted a Declaration of Environmental Land Use Restriction and Grant of Easement. Arizona promulgated a Declaration of Environmental Use Restrictions. These states have overcome by statute some of the common law limitations discussed above.

A statutory restriction is utilized by many states in their model codes to ensure that the restriction is binding against the landowner and successors in interest. In the context of state voluntary cleanup programs, restrictions are often created between the property owner and the state. In the better state programs, the restriction will state that the appropriate state agency may enforce the restriction. The restriction should also be recorded or registered with the appropriate land records and authorities, to provide future landowners with notice.

If a statutory restriction is violated, its terms may be enforced in several ways. In some states, an affected person or agency may go to court to obtain an injunction to enforce the terms of the restriction, or, if the state statute allows for it, the state attorney general may seek civil penalties. In addition, any liability protections offered under the state voluntary cleanup program may be voided and the property owner may be required to conduct additional remediation to achieve an "unrestricted use" standard.

Uniform Environmental Covenants Act

By 2000, many parties, including the U.S. Department of Defense (DoD), recognized the continued difficulty that many parties were having in implementing reliable and durable institutional controls. Faced with what was expected to be yet another huge round of military base closings, DoD approached the National Conference of Commissioners on Uniform State Laws (NCCUSL) to determine whether a model state law could be adopted that would provide a better mechanism for implementing, enforcing, modifying, and terminating institutional controls. NCCUSL convened a study group in 2001 that concluded that a model law would be helpful. The NCCUSL drafting committee, consisting of commissioners from at least 12 states and numerous outside advisors, then met for two years to draft the model law. The proposed Uniform Environmental Covenants Act (UECA) was presented to the full Conference in August of 2003 for approval and was adopted by NCCUSL at that time. The model law was also approved by the American Bar Association in the spring of 2004.
The model law then needed to be introduced and adopted in individual states. Ohio was the first state to adopt UECA in December of 2004. Nine states adopted UECA in 2005; six more states adopted it in 2006; five more states in 2007; and three more states by the end of 2008. As of November 2011, 24 states and one U.S. territory had adopted UECA, and it is being considered by the legislatures in several other jurisdictions.

One of the goals of UECA is to ensure that institutional controls will be accurately reflected on land records and effectively enforced over time as valid real property servitudes. UECA does so by addressing certain common law impediments and by integrating environmental covenants into the traditional real property system. A second goal of UECA is to encourage the return of previously contaminated properties to productive use.

UECA achieves these goals by creating a new type of institutional control, the environmental covenant. An environmental covenant is a device, created by state statute, that is intended to mimic real property law devices but without their limitations and deficiencies. UECA addresses a number of the deficiencies in state property law by creating a broader universe of parties who may be “holders” of the environmental covenant; by expanding the universe of parties who may have a direct right to enforce the covenant; by clarifying that the rights and affirmative obligations established in the covenant run with the land; by abrogating a number of common law defenses and barriers; and by creating a clear process for modifying or terminating the restrictions when they are no longer needed.

Key definitions are contained in section 2 of the Act. UECA section 2(4) defines an environmental covenant as a “servitude arising under an environmental response project that imposes activity and use limitations.” To assuage the “dirt” lawyers on the drafting committee, which felt that a covenant under real property law could not impose affirmative obligations, the model law clarified that an environmental covenant is really a servitude, which can impose affirmative obligations as well as impose restrictions. “This Act emphasizes that an environmental covenant is a servitude in order to implicate this full body of real property law and to sustain the validity and enforceability of the covenant. By first characterizing the environmental covenant as a servitude, the Act expressly avoids the argument that an environmental covenant is simply a personal common law contract between the agency and the owner of the real property at the time the covenant is signed. . . .” Thus, the environmental covenant will run with the land and be binding on current and future owners and occupants of the land. An environmental covenant under UECA will be available only if there is an “environmental response project.” An “environmental response project” is a cleanup action being overseen by a federal, state, or local environmental agency, including a state voluntary cleanup action. UECA cannot be used in connection with privately conducted cleanups that are proceeding without any governmental oversight. In addition, the Act creates the concept of a “holder,” a person who is the grantee of the environmental covenant. Finally, the Act defines “activity and use limitations” as the restrictions (such as...
as no residential use or no use of ground water) and the affirmative obligations (such as the requirement to periodically inspect the cap or to operate a ground water treatment system) that may be imposed on the property as part of the cleanup process.¹⁹

UECA section 4 describes the essential elements of an enforceable environmental covenant. A covenant must (1) identify itself as an environmental covenant under UECA; (2) contain a legally sufficient description of the property; (3) describe the activity and use limitations on the property; (4) identify every holder;²⁰ (5) be signed by the agency, every holder, and, unless waived by the agency, every owner of the fee simple of the real property that is the subject of the covenant; and (6) provide the location of the administrative record for the relevant environmental response action.²¹

UECA section 4(b) also provides an “optional road map” of other types of provisions that may be helpful, such as including a requirement for periodic reporting; a requirement that the agency be notified upon transfer of the property or a proposed change in use or an application for a building permit; a brief narrative description of the contamination and the remedy; restrictions or limitations on amendments to the covenant; and rights of the holder beyond the right to enforce the covenant.²²

In order to be sure that environmental covenants are not undermined by various common law doctrines, UECA section 5 specifically abrogates these common law defenses and states that an environmental covenant is enforceable even in circumstances where other restrictions on real property might not be, such as where the covenant is in a form not traditionally recognized under the common law of a given state, where there is no privity of estate or contract, where there is no appurtenant interest in the real property, where the owner and holder are the same person, and in other listed circumstances. UECA section 5(c) also clarifies that instruments imposing institutional controls prior to the effective date of the Act are not made invalid or unenforceable by the passage of UECA in that jurisdiction.

UECA section 7 provides that a copy of the covenant must be given to parties as required by the environmental agency, who may include each person who signed the covenant, each person with a recorded interest in the property, each person in possession of the property, each municipality or other unit of local government in which the property is located, and any other person designated by the agency.

UECA section 8 requires environmental covenants to be recorded in the land records of every county in which any portion of the land is located. UECA section 12 allows states to maintain a registry of all environmental covenants, including amendments to or terminations of those covenants, in lieu of requiring recordation of all environmental covenants in the local land records. The registry provision was made optional under UECA in order to avoid imposing any fiscal burdens on the states.

UECA section 9 provides that environmental covenants are perpetual, unless otherwise specified in the covenant, or if amended as provided in UECA section 10, or otherwise terminated or amended in accordance with
other provisions of UECA. Importantly, an environmental covenant is not “extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.”23 Nor can an environmental covenant be extinguished, limited, or impaired by application of state marketable title acts or dormant mineral interests statutes.24

Finally, UECA section 11 provides that an environmental covenant may be enforced in a civil action for injunctive or other equitable relief by a number of parties, including any party to the covenant, the relevant agency, municipalities, any person with an interest in the real property or whose collateral or liability might be affected by an alleged violation of the covenant, and others.

It is also important to understand what UECA does not do. As mentioned above, UECA is not available as an institutional control that can be used in purely private cleanup actions, since regulatory agency approval and participation is required. For this reason, it is important to understand whether the instrument being used in a transaction is a UECA covenant, with the enhanced durability and reliability offered by that statute, or whether it is a more traditional type of institutional control, with potential limitations under the common law or otherwise. It is also important to recognize that UECA does not specify the degree of cleanup that is required at a site (the “how clean is clean” debate), nor does it specify which type of institutional control (i.e., the restrictions or affirmative obligations) may be appropriate at a site, nor does it resolve the question of whether state agencies may impose institutional controls on federal facilities. All of those decisions are left to the traditional environmental cleanup process. Finally, UECA does not bind prior interests in the property unless those interests have been subordinated to the covenant, and it does not provide independent condemnation authority.

All in all, UECA creates a much more consistent and reliable mechanism than is available under most state laws or the common law for implementing, enforcing, modifying, and terminating institutional controls, thereby providing regulatory agencies, property owners, tenants, potential buyers, and communities with a level of comfort regarding management of residual risk from contamination left in place after remediation.

Zoning and Variances

Local land use authorities may adopt restrictive or “overlay” zoning that prohibits certain uses within certain areas. For example, restrictive zoning may be used to prevent residential uses in a formerly industrial area. Restrictive zoning may also be used to prevent the placement of wells in an area with a regional groundwater contamination issue. These controls, however, are more difficult to use when targeting one or two specific properties and may be changed as a result of local political pressures (without a full appreciation for why the controls were placed on the land in the first place).
Building Permits

A few local jurisdictions may review land use restrictions before issuing building permits. However, the more typical situation is that the local permitting agency reviews for local code compliance only, rather than for conditions that may have been imposed by an environmental covenant, deed restriction, or other private contractual arrangements. The application for a building permit signals a change in use of land or existing structures. Such a change at a property with institutional controls in place could invalidate the exposure assumptions used to establish those controls.

Building permits are a type of authority asserted by a locality (i.e., town, city, county) that can be used to implement institutional controls. Generally, building permits are required to erect, construct, reconstruct, demolish, alter, or use any building or structure covered under local ordinances regulating health and safety. Regulated activities often extend to changes in plumbing, gas, mechanical, electrical, and fire protection systems. The permitting process includes both a review of the application and one or more inspections of the location. Enforcement powers associated with the permitting process include fines, injunctions, and withdrawal of occupancy certificates. The broad scope of activities regulated by the permitting process makes it an effective and comprehensive tool for monitoring the land use activities of owners and operators.

The local building department generally oversees the permitting system; however, the application is typically reviewed by several agencies (planning, public works, utilities, fire department). This structure for interagency coordination suggests that the building department might be an appropriate place for storage, management, and retrieval of information pertaining to environmental restrictions (e.g., federal and state orders/agreements, deed restrictions, and environmental data). Some states, in fact, require that institutional controls be filed not only in the local land records and with the state, but also with the local chief municipal officer, board of health, zoning official, and building code enforcement official. Additionally, the inspection process provides an existing mechanism for periodic verification that owners/operators are complying with institutional controls.

There do not appear to be any existing statewide programs that use building permits as a formal mechanism for implementing institutional controls. New Jersey and California have considered the use of this type of system to centralize activities such as soil disturbance and building interior changes through one agency. Some localities, including Emeryville, California, and New York City, have established systems that attempt to coordinate their building permit or zoning procedures with knowledge about residual contamination and institutional controls. At least one private sector vendor, Terradex, tracks requests for building and excavation permits and is able to communicate this information to agencies and other parties that are concerned about potential breaches of engineering and institutional controls.
Well restriction areas are a form of local governmental control that prohibits or conditions the construction of wells in a defined area. Well drilling prohibitions are accomplished through several mechanisms.

Many states have developed regulations that prohibit construction of a private well without a written permit. Limited water quality testing and well inspections are required prior to acceptance of the well for human use. Special use permits may be issued by state or local regulatory agencies prior to issuing permits for new development. Local and state health agencies may use groundwater quality information to deny well permits for affected aquifers for the purpose of protecting public health, welfare, and safety.

Overlay zoning draws new zones on top of a municipality’s existing zoning map to provide additional protections and restrictions. As an outgrowth of the Safe Drinking Water Act provision for protection of sole source aquifers,28 aquifers and their quality are designated through a specific classification system. In Connecticut, a published map of existing quality and classified uses of its groundwater resources is available for inspection.29 Groundwater underlying Superfund or other contaminated sites is classified as GB, and human consumption through drinking wells is prohibited. Vermont has classified groundwater at two Superfund sites as Class 4 (not suitable for human consumption) and maintains its groundwater classifications on a geographic information system.30

Governmental ordinances may be used to preserve the integrity of any groundwater remedial action by prohibiting or conditioning the placement and use of any or all types of wells within the area, especially in cases where the existing water supply is a potential threat to health. At the county level, such as in Howard County, Maryland, the county health officer may order a property owner to connect to the public water supply if the property’s water supply presents a potential threat to human health and if an operating public water main is available for delivery of water service to the property. The Howard County Code has provisions for notification of the property owner, decision appeal, compliance, and financial assistance for those property owners with financial difficulties.31 In Wisconsin, the state offers financial assistance for well replacement to certain persons.32

Restrictions on well installation and use may be placed as notices within deeds and recorded in the land records. These are private controls between the past owner and current owner of the property, governed by state property law. The restrictions can be terminated upon a showing that the concentrations of the chemical(s) of concern in the well restriction area have been remediated in accordance with state standards.

In Wisconsin, a groundwater use restriction is placed in the land records against title to the property at sites where natural attenuation has been demonstrated to be effective in containing a plume and reducing contaminant concentrations.33 At the time that the restriction is filed, the case is considered closed, and there are no additional monitoring requirements on the responsible party.
Informational Devices

Notice is a type of institutional control that is used to identify the location of chemicals of concern, and to disclose any restrictions on access, use, and development of all or part of a site. Notice can be provided in one or more forms:

- notice in the land records
- actual notice to the other party to a real estate transaction
- notice to appropriate government agencies
- notice through signage or other postings

Some states require that there be record notice of any previous releases of hazardous substances or materials on a property. Under various transfer acts, record notice may be required at the time that title to real estate is transferred. In other jurisdictions, actual notice is required to the prospective purchaser at the time that real estate is being transferred. In some jurisdictions, if this notice is not provided, the buyer or tenant has the right to cancel the transaction or to seek penalties. In other jurisdictions, notice to the government is also required before a transaction can occur.

All of these forms of notice are designed to ensure that the parties to a real estate transaction are aware of the environmental conditions on the property before they conclude the transaction. Under a few state laws, notice may also allow the government the ability to enforce institutional controls against subsequent purchasers of the property.

State voluntary cleanup programs typically provide that institutional controls must be filed in the local land records and/or with the state. For example, Arkansas requires that its deed restrictions, known as implementing agreements, be filed in the circuit court where the property affected by the restriction is located, and Massachusetts requires that the grant of environmental restriction or the notice of activity and use limitation be recorded with the registry of deeds and with the state. Many states require that deed restrictions be either identical or substantially similar to model documents provided by the state environmental protection agency. At least one state, Texas, imposes institutional controls through its municipal setting designation process.

Record Notice

Most states have a provision requiring the owner/operator of a site containing residual chemicals of concern to file a notice on the land records. This notice provides subsequent purchasers with information regarding past or present activities that may have left chemicals of concern at the site.

The notice requirements can be narrowly drawn to include the use restrictions only, or can be broad enough to include all the components that went into the formation of a restrictive covenant, such as the opinion of a licensed site professional. The record notice may be ancillary to a transfer act, whereby recordation is only required in conjunction with a land transaction. Sometimes record notice is informational only, and sometimes it is part of a legally enforceable control.
Direct Notice

Direct notice is when one party to a real estate transaction is required to convey actual or constructive knowledge of environmental conditions and use restrictions to the other party. The transaction may be voided or damages may be sought if the notice is not given. Remedies for failure to give notice may include cancellation of the transaction, liability for actual damages, and civil penalties.

Direct notice protects potential purchasers of land and helps ensure that subsequent parties adhere to use restrictions and other limitations. The failure of an "interim" landowner to provide notice of any contamination of which he has knowledge may also void the "third party" or "innocent landowner" defense under section 101(35) of CERCLA.

Notice to Governmental Authority

Many states also require an owner/operator to provide notice to the state’s environmental agency at the time of any land transaction. Notice may be required prior to completion of the transaction or within a specified period of time. This notice aids the state in ensuring that institutional controls are being properly followed.

Some state statutory programs require notice to local officials as well. These officials may include municipal clerks, local zoning officials, construction code officials, and local health officials. Since many states are short on resources to monitor and enforce environmental restrictions, many rely on local authorities to inform them when a transaction has occurred that could involve a property with environmental restrictions.

Registry Act Requirements

State environmental agencies may also require that a list be maintained of all properties that have been used for hazardous substance disposal, or that have any restriction on their use or transfer. Each state will have its own process for listing, which may involve rights to a hearing and appeal by the landowner. Oregon, for example, provides for the listing of all facilities with a confirmed release of hazardous waste or hazardous materials; this list is available to the public. Similar programs are also in place in Iowa, Missouri, and New York. Once a site is listed, the state may impose restrictions on the use and transferability of the site. In order for these schemes to be enforceable, notice of the listing is also recorded at the local land registry or other location, and the listing becomes part of the chain of title to the property.

Transfer Act Requirements

In addition to registry act programs, states may also institute transfer programs that require full evaluation of the environmental condition of the site before a transfer can occur. Other institutional controls that establish enforceability and responsibility may be utilized in conjunction with this.
type of program. A transfer act imposes obligations on the landowner to make certain information available to other parties to the transaction. Failure to comply with Transfer Act requirements may make the transaction voidable by the other party, or may become the basis for a lawsuit, even if the contract has been executed.\textsuperscript{57}

**Geographic Information System (GIS) Tracking**

Some states utilize a web-based geographic information system (GIS) registry in an effort to provide enhanced public accessibility to information about contaminated lands. Wisconsin, which imposes land use controls through state law rather than deed restrictions, is at the forefront of this effort.\textsuperscript{58} Information about the state’s contaminated lands can be found at the Bureau for Remediation and Redevelopment Tracking System (BRRTS),\textsuperscript{59} an online database of contaminated properties, and the Remediation and Redevelopment Sites Map,\textsuperscript{60} a web-based mapping system that provides contamination data using GIS tracking. The GIS registry covers sites where the cleanup of soil or groundwater contamination is ongoing or has been completed.\textsuperscript{61} By clicking on the “Find Location” tab, users can search the registry in a variety of ways, including by BRRTS activity, by city or village, or by coordinates. Once a user has identified a specific location, he can view maps of that location at varying layers, including by administrative and political boundaries, land descriptions, transportation, and elevation. Site-specific information about each layer on the map can be obtained by clicking on the “Identify” tab. Information from the BRRTS database can also be accessed through the registry site. Given that the overall goal of GIS registry sites is to increase public access to environmental protection and planning information so that citizens may make more informed decisions about land use, registry sites that are both comprehensive and easy to use will be the most successful.

**Access Restrictions**

Access controls are another type of institutional control used to limit access to property that contains residual contamination. Access controls are being used, for example, in Iowa,\textsuperscript{62} Michigan,\textsuperscript{63} and New Jersey,\textsuperscript{64} to limit exposure by controlling who may physically enter the site. Types of access controls include fencing and gate entry, security, and signs or warnings. The level of access control necessary to protect a site is determined by

- site location (is it in or near a residential or mixed-use neighborhood?)
- site neighbors (are there any sensitive land uses, such as child care centers, or schools, in close proximity?)
- site usage (is the site typically frequented by many people, or does it contain a pathway frequently traveled by the surrounding community?)

To be truly effective, access controls also require long-term maintenance and custodial care. Financial and legal responsibility for these controls must be determined in advance.
Enforcement Tools

Government agencies actively involved in conducting or overseeing a cleanup will have enforcement authorities that can be used to impose institutional controls. These tools, however, are generally contractual in nature and do not run with the land. They are useful when a control is only needed for the short term, or when the current landowner is likely to own the property for as long as controls are needed.

Orders and Consent Decrees

Enforcement authority is broad in scope and can address virtually any aspect of a cleanup. An order or consent decree may, among other things, specify activities that are prohibited at a particular property, and may be filed in the local land records.

Federal and state regulatory programs use orders as a mechanism for implementing institutional controls. For example, section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes the U.S. Environmental Protection Agency (EPA) to issue administrative orders, or to seek a court order, whenever there is an imminent and substantial endangerment to public health, welfare, or the environment. Many state laws contain similar authority. Federal and state programs under the Resource Conservation and Recovery Act (RCRA) also contain order authority, although more narrowly focused. For example, for unpermitted facilities with “interim status,” section 3008(h) of RCRA authorizes the EPA to issue orders for corrective action, and again state law often provides similar authority. In addition, section 7003 of RCRA authorizes the issuance of an order when there is an imminent and substantial endangerment. Even some state voluntary cleanup programs use orders as a mechanism for moving those sites through their programs. Orders most often are negotiated and issued on consent, although they may also be issued unilaterally.

The disadvantage of orders and consent decrees is that they are essentially contracts, and thus are binding only on the parties to the order, in most cases, the signatories. The governmental agency can require the owner to record these orders and consent decrees in the land records. However, even if a subsequent party is on notice of the order, notice alone does not make the order binding on the subsequent owner if the property changes hands. Therefore, orders and consent decrees have limitations as long-term controls. In a few states, the state has specific statutory authority to issue orders that run with the land.

Orders are valuable as a shorter-term fix, or as a bridge to a more permanent control. Depending on the statutory authority involved, an order may also be enforceable by citizen suit, which may be considered desirable in some cases (e.g., it allows not only the federal or state agency having control over the cleanup but also third parties who might not be directly involved in the cleanup decision to assume responsibility for oversight and enforcement).
Permits

Permits may also be used to specify permitted and prohibited activities and uses on a property. They suffer the same disadvantages as consent orders, in that they are essentially a private contract between the property owner and the government, and they may not automatically bind a subsequent property owner, even if the permit is recorded in the land records.

The Enforceability of Institutional Controls

A critical consideration in selecting an institutional control is whether it will be legally enforceable, and enforceable over an appropriate period of time. Institutional controls that are directly enforceable by a governmental agency obviously have substantial appeal to those agencies. Nevertheless, it is equally important to recognize that indirect enforcement mechanisms, such as the demands of lenders and prospective purchasers for assurances that the property is in full compliance with the conditions of a No Further Action letter or Certificate of Completion, can go a long way to ensure compliance with institutional controls.

Degrees of Enforceability

There is a wide range of enforceability in the various types of institutional controls currently being used. At one end are purely informational instruments, such as deed notices, which are not directly enforceable, and at the other end are environmental covenants, proprietary controls, governmental controls, permits, and orders, which are directly enforceable by some third party.

Under a legally enforceable instrument, the landowner can be compelled in a court action to abide by the terms of the institutional control. The question is who has the authority to enforce the restriction, and what type of standard needs to be met to obtain enforcement of the instrument’s terms. The parties who have the right to enforce an environmental covenant in a state that has adopted UECA will be identified in the statute and will have the right to seek injunctive or equitable relief. For a proprietary control, the enforcing agent may be the former property owner, an adjoining property owner, or the state. The enforcing agent merely needs to establish that a condition of the easement or restrictive covenant has been violated. On the other hand, if a condition of a permit or consent order is violated, the enforcing agent is usually a governmental entity, which may need to establish an “imminent and substantial endangerment” in order to obtain prompt relief.

Informational devices can be enforced indirectly. Deed notices, for example, do make landowners aware that certain activities and uses are incompatible with the condition of the land. Concerns about tort liability and the potential inability to obtain financing or resell land also discourage landowners from disregarding the restrictions in a deed notice.
Under some state programs, deed notices may be required as a condition for approval of a cleanup plan and release from further liability. In such cases, while the notices do not create directly enforceable restrictions, any violation of their terms may void the release, creating an additional incentive to ensure that the restrictions in the deed notice are strictly observed.

Another consideration in evaluating enforceability is whether the control binds only the current occupant, or future owners as well. Environmental covenants, land use ordinances, and most property interests run with the land; orders and permits do not.

**Requirement of Conveyance**

Unless a state has specifically provided otherwise by statute, a conveyance of some kind will be required to establish an enforceable restrictive covenant or a property interest. There must be a transaction between the landowner and some other party in which rights are actually conveyed to the holder (in a state that has adopted UECA) or grantee (in a state relying on property law) (both the holder and the grantee, as the case may be, are then able to enforce those rights). It will generally be necessary to find a suitable holder or grantee. (A variation on this scenario is for the landowner to convey the property to a buyer, but retain the right to enforce the use limitations.) Potential holders or grantees may include regulatory agencies, local governments, community organizations, or other parties responsible for the cleanup. Local and state regulatory agencies may be reluctant recipients of these property rights. The following questions may arise:

- What procedure must be followed to convey a property right to a governmental entity? (These entities generally do not want to be forced or obligated to receive undesirable property rights.)
- What form or procedure must be followed for the conveyed property right to be considered of value from a regulatory perspective? (For example, in Massachusetts, the applicable regulations spell out the procedure and include a specific form that must be used.)

**Doctrines Limiting Long-Term Enforceability**

The passage of UECA in 24 states and one U.S. territory has helped to alleviate concerns over the long-term enforceability of at least one type of institutional control, the environmental covenant. As discussed above, UECA specifically abrogates a number of common law defenses, including, inter alia, the need for vertical and horizontal privity and the limitations imposed by state marketable title acts, that would have otherwise limited the long-term reliability and effectiveness of these controls.

In states where institutional controls are being imposed through proprietary controls, it is necessary to become familiar with the state’s real estate laws to ensure that the tool being used will in fact be reliable over the long
term. While legal rules can vary from state to state, and are evolving over time, some state property law doctrines can present significant obstacles to long-term enforceability in the context of cleanups. Historically, the common law allowed restrictions on the use of property to run with the land only where they benefited some adjoining property. Easements or covenants that were not for some neighbor’s benefit but were simply held by some other party, were classified as “in gross” and generally could be enforced only against the original landowner.

Restrictions for cleanup purposes are likely to be “in gross”—they are held not by an adjoining landowner, or for the benefit of the adjoining land, but by some unrelated third party such as a government agency for the benefit of the public (or the restricted landowner itself). Therefore, there is a risk that such restrictions may be found unenforceable against subsequent landowners.

Over time, courts have recognized exceptions to the common law rules. Today, in many states, it is quite possible that a restriction in gross, entered into for the public benefit, will be enforceable against subsequent landowners as long as that intent is clearly stated in the document. However, even where courts do not honor the traditional doctrine against restrictions in gross, other peculiarities of local real estate law may present barriers to long-term reliability.

The Need for an Enforcer

Legal instruments do not enforce themselves; they require someone to monitor compliance and take legal action if necessary. Finding some entity willing and able to take responsibility for this function is critical to the long-term reliability of the controls.

Who can enforce the control will depend largely on the type of control being used. Environmental covenants under UECA will identify the “holder” as well as any other persons who have a right to enforce the covenant. Under state property law, the specific type of control, such as an easement, is generally enforceable only by the named grantee (or its assigns). Therefore, in determining to whom the interest will be conveyed, it is important to ask whether this is the most appropriate enforcer. For example, if the land is being sold to a developer, is the developer the best enforcer of the restriction? It is also important to keep in mind that, if the grantee neglects to enforce the control, it may be difficult or impossible for any other party to compel it to do so, unless the applicable statute and regulations reserve those rights to the state. Restrictions imposed through local regulation are generally enforceable only by the local government. Whether the locality has the resources, or the motivation, to effectively oversee and enforce the controls will depend on local circumstances. Controls that use existing permit systems, such as building permits, may be more reliable in this regard.

Implementation Considerations

The need for, reliability of, and ease of implementing institutional controls need to be considered early in the process. In evaluating what types of reme-
dial actions may be appropriate at a site, it is important that the bases for
current and future land uses are known and clearly understood. It is also
important to have a good understanding of

- potential risks to receptors (e.g., types and concentrations of chemicals
  of concern)
- potential exposure pathways (e.g., inhalation, ingestion, dermal)
- whether a remedial action decision will tie land to a specific land use
- limitations on various legal doctrines, and the risk of change in local
  regulations

An implementability analysis should look at several factors, including

- whether there is a small enough number of landowners to make nego-
tiating environmental covenants or proprietary controls on a case-by-
case basis feasible
- whether landowners are likely to consent to the restrictions
- whether the potentially responsible party is likely to be asked for
  excessive compensation if it tries to seek environmental covenants or
  proprietary controls from adjoining property owners
- whether the institutional control affects the current or planned use of
  the property
- whether the institutional control affects the marketability of the
  property
- whether the institutional control requires actions beyond those that
  would normally or typically occur

As federal, state, and local regulators and private parties have obtained
more experience in implementing institutional controls, they have identified
some of the key considerations for making these controls work.

**Description of Restricted Activities and Uses**

It is critically important that the restricted uses and activities be described
not only accurately but as narrowly as possible. For example, if there is a
concern that there are contaminated soils 10 feet below the ground surface,
and that these soils should not be disturbed in the future without an appro-
priate risk assessment being conducted, it would be overly broad to prohibit
all excavation in the future on the site. A more appropriate restriction would
be to prohibit all excavation beneath a certain depth unless the property
owner has first submitted a risk assessment to the state environmental
agency for its prior review and approval. Another approach would be to
require the use of a health and safety plan that adequately controls the rele-
vant risks. Likewise, if a clay cap is part of the remedy at a site, and the cap
needs to be periodically inspected and maintained, it would be inappropri-
ate to prohibit all walking or driving on the site, as such a restriction would
make it impossible to inspect and maintain the cap.
Description of Permitted Activities and Uses

It is equally important to provide a description of activities and uses that are permitted on the site. It may be impermissible to use groundwater for drinking water purposes, but it may be appropriate to have the groundwater sampled periodically. It is important to identify that this use of groundwater is permissible. It is also important to describe the permitted activities and uses (as well as the prohibited activities and uses) in terms that the general public will understand. If the restriction is written in a manner that is overly technical (e.g., low frequency and high or low intensity activities and uses by a child) or in terms that are overly vague (e.g., nonresidential uses that do not result in prolonged human exposure to soil contaminants), the restriction is not particularly helpful in explaining the permitted activities and uses to the public.

Maintenance Requirements

Many types of institutional and engineering controls will require periodic inspection and monitoring. It is important to identify early in the process who will be responsible for conducting these activities, who will pay for required inspections and monitoring, and who will enforce these controls in the event that they are violated. The parties should tailor their inspection, monitoring, and maintenance programs to the type of engineering controls being used. Some have suggested that funds should be set aside to pay for these long-term operating and maintenance obligations.

Subordination Requirements

An environmental covenant under UECA will not bind prior interests in the property unless those interests have been subordinated to the environmental covenant. Similarly, a few states have explicitly provided in their statutes that third parties, such as lenders, will have to subordinate their interests in the property to the interests of the state in enforcing the institutional control. Massachusetts, for example, requires a property owner who uses a grant of environmental restriction, wherein certain property interests are actually conveyed to the state, to file a Subordination Agreement (Form 1072B) with the state as well. It is generally in the mortgagee’s interest to consent to this request. In the event of foreclosure, the relevant recorded documents (e.g., the AUL in Massachusetts) are not eliminated, and the mortgagee does not lose the benefit of the regulatory protections offered by the state closure documents.

Disclosure Requirements in Deeds, Leases, and Mortgages

An important consideration for prospective purchasers, tenants, lenders, appraisers, and others is how they will obtain notice that real property is subject to an institutional control. Some of the leading environmental data-
base companies are now identifying institutional controls listed in federal or state registries. However, despite promulgation of EPA’s final “all appropriate inquiries” rule, many environmental consultants are still not identifying the presence of institutional controls on property as part of their routine Phase I environmental site assessment reports. Many users fail to provide title report information to their consultants, and consultants are content to report this omission as a “data gap.” This is not sufficient, particularly given the importance of preserving the integrity and effectiveness of institutional controls as part of a property owner’s “continuing obligations” under the Small Business Liability Relief and Brownfields Revitalization Act. This information can be obtained by requesting a copy of the title report (not a “chain of title” report or a title insurance policy) or reviewing the underlying agency administrative record as part of the Phase I process.

Fortunately, some states in their statutory programs have explicit provisions regarding who must be provided information about institutional controls. Some states require that a prospective purchaser, tenant, lender, adjoining property owner, and/or local government official be notified of the existence of an institutional control on the property. Failure to notify these persons as required may be considered a violation of a condition of the No Further Action letter or the Certificate of Completion, potentially voiding the liability protections that the property owner thought he or she had obtained.

Mechanisms for Modifying or Terminating the Controls

Some states have provided specific mechanisms for modifying or terminating their No Further Action or Certificate of Completion procedures that have led to the imposition of an institutional control, whereas other states have not. Modification of the No Further Action letter or Certificate of Completion that imposed the institutional control may be appropriate where the contamination degrades naturally, or where cleanup technologies change, making it possible to remediate certain chemicals of concern where it previously was not economically or technically feasible. If the state does not have a mechanism for allowing a private party to come back and seek a modification of the No Further Action letter or Certificate of Completion, and therefore modification or termination of the institutional control, the land use may become “locked in” and it may be impossible to take advantage of the property’s highest and best use in the future. Ideally, a state should have a formal administrative mechanism whereby a property owner may seek a modification of the No Further Action letter or Certificate of Completion. It is important to remember, however, that even where an administrative process exists, only the “grantee” of the restriction may actually modify or terminate the restriction.

Parties to an environmental covenant in states that have adopted UECA will have a far easier time modifying or terminating the covenant if circumstances change, because UECA establishes a clear process for modifying or terminating the covenant. UECA section 10 describes how a covenant can be
amended or terminated by consent. Generally, the agency, the current property owner, each person who signed the covenant in the first instance, and the holder must consent and sign the amendment or termination agreement. Pursuant to UECA section 9(b), an environmental covenant may be amended or terminated by a court under the doctrine of changed circumstances if the regulatory agency has determined that the intended benefits of the covenant can no longer be realized and if the parties specified in UECA section 10 have been given notice of the court’s intent to modify or terminate the covenant.75

Impact of Noncompliance with the Controls
In almost half of the states that have a formal voluntary cleanup program, a violation of any condition of a No Further Action letter or Certificate of Completion may result in the voiding of the liability protections offered under those documents.76 Since the use of an institutional control at a site is frequently identified as a condition of either the No Further Action letter or a Certificate of Completion, it is important to understand that any violation of the conditions of the institutional control may result in a voiding of the liability protections that were the principal reason for going through the state voluntary cleanup program in the first place. In addition, a few state programs provide that the property owner may be required to conduct additional remediation to meet an “unrestricted use” standard,77 or that the property owner may be subject to civil penalties and fines.78

Whether the Control Runs with the Land
A number of the state voluntary cleanup programs explicitly provide that an institutional control will run with the land. If the property is located in a state that has not adopted UECA, or if the state’s program does not identify whether the control runs with the land, the control may be governed by the requirements and limitations of the common law doctrines discussed above.

Easements
Many states explicitly require that an easement be given in their favor so that the state may periodically inspect the control and enforce it if necessary. Again, if the property is located in a state without a comprehensive program, or if the state’s program does not authorize the use of easements in favor of the state or a local government, some thought should be given as to who will inspect and enforce the control.

Emergencies
When drafting an institutional control, it is important to consider what might happen in the event of an emergency. For example, if the site contains buried utilities, which might need to be repaired or upgraded in the future,
and there is a broad-based prohibition against excavating on the site, it is important to consider how one should handle an emergency. What if the underground water line bursts? Will the need to make the repair void any liability protections that otherwise existed at the site? At least one state has addressed this issue by providing procedures in the event of an emergency.\textsuperscript{79} The property owner is expected to address the emergency as quickly as possible and to notify the state of the conditions and duration of the emergency.

**Legal Authority**

It is important to identify early in the remediation process who may have the authority to implement and enforce an institutional control at the site. If the site is in a state that has not adopted UECA or that has a less comprehensive voluntary cleanup program, it may be difficult to develop an enforceable institutional control. State and local governments are frequently unwilling to be the beneficiary of a restrictive covenant or easement. Similarly, the existing state and local statutory authority may not be sufficient to impose an institutional control, such as a prohibition on the installation of wells or a prohibition on the use of groundwater. It is critical to have an understanding of the limitations of available state and local legal authorities before committing to a particular remediation strategy.

**Public Participation Issues**

It is important for parties to consider whether and when the public needs to be involved in a decision involving the use of institutional controls at a site. Local officials, residents, neighboring businesses, environmental groups, and others may all be “customers” of a site cleanup, since they live and work with the results over time.

At least two aspects of institutional controls may trigger specific requirements for public involvement: (1) the specification of current and reasonably likely future uses that will be made of the site (and resulting potential exposures to chemicals of concern remaining in soil and/or groundwater), and (2) the selection of the remedy and an appropriate institutional control that establishes prohibited and permitted activities at the site and associated continuing obligations and conditions.

Some states require that specific opportunities for involvement be provided for every site (usually at the point where a full assessment of site conditions and risks is available and when a remediation plan has been drafted). Other states require that public notice be provided at specific points in the cleanup process and that opportunities for public involvement be provided when local officials or citizens indicate their interest. Some state requirements may apply to any site that is being assessed and cleaned up, while others may apply only to sites that are more contaminated or present higher levels of risk of harm to human health and the environment.
Conclusion

More abandoned and underutilized properties are being cleaned up because of the increasing acceptance of federal and state cleanup programs using risk-based decision-making principles. For these programs to succeed, there must be mechanisms for successfully implementing and enforcing institutional controls. Fortunately, with the promulgation of UECA by NCCUSL in 2003, and its adoption in 24 states and one U.S. territory as of November 2011, the tools for successfully implementing, enforcing, modifying and terminating institutional controls have gotten much better.

The relationship between risk and the type of institutional control to be implemented needs to be fully understood and communicated to all affected parties. Once implemented, care needs to be taken to ensure that the existence of the control is fully communicated in the future so that the effectiveness of the response action is not impaired. Long-term stewardship of these controls remains an important concern.

Notes

1. Definition of activity and use limitation from the ASTM Standard Guide for the Use of Activity and Use Limitations, Including Institutional and Engineering Controls (E 2091-11). Generally, this chapter uses the term “institutional controls,” even though the term “activity and use limitations” (AULs) might be equally or more appropriate.

2. The term “deed restriction” does not have any commonly understood legal meaning in traditional property law, even though this term is frequently used in state voluntary cleanup programs.

3. For example, under common law doctrines, easements “in gross” have frequently been disfavored under state law.

4. For example, Connecticut, Massachusetts, and Oregon explicitly provide that the state may enter into an easement agreement with the property owner to implement an institutional control. Similarly, during the 105th Congress, legislators considered proposed revisions to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) that would have clarified the Environmental Protection Agency’s ability to enter into environmental easement agreements at National Priority List sites. See S. 8, 105th Cong., 1st Sess. (1997); see also H.R. 2727 and H.R. 3000, 105th Cong., 2d Sess. (1998). The 106th Congress introduced one bill, H.R. 1300, that would have provided for the use of institutional controls as a part of the remedy selection and required that use of such controls be listed in a National Registry. See H.R. 1300, 106th Cong., 1st Sess. (1999). In the 107th Congress, legislators referenced institutional controls in S. 350. See S. 350, 107th Cong., 1st Sess. (2001).


10. In Massachusetts, the Grant of Environmental Restriction (a specific type of deed restriction) inures to the benefit of the state Department of Environmental Protection, see 310 Mass. Code Regs. 40.1071(2)(e) (2011), and the department is given the right to record the environmental restriction if the property owner fails to do so. Id. § 1073(2). See also N.J. ADMIN. CODE § 26E-8.2 (2011); Cal. Dep’t of Toxic Substances Control, Official Policy/Procedure (Attachment C) (May 1990); COLO. REV. STAT. § 25-15-322 (2011). See also UNIF. ENVTL. COVENANTS ACT § 2(5) (West, Westlaw through 2009 Meeting of the National Conference of Comm’rs on Uniform State Laws). At least one state, Nebraska, has amended the model law so that neither the state nor any of its municipalities will be a holder under the Nebraska version of UECA.

11. As of November 2011, UECA had been adopted in Alabama, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, the U.S. Virgin Islands, Utah, Virginia, Washington, and West Virginia. A complete up-to-date listing of the states that have adopted, or that are considering adoption of, UECA can be found at Unif. Law Comm’n, Environmental Covenants Act, http://uniformlaws.org/Act.aspx?title=Environmental%20Covenants%20Act.

12. UECA, Prefatory Note.

13. Id.

14. See UECA § 2(4).

15. See UECA § 2, cmt. 5.

16. Id. See also UECA § 3(a) & cmt. (“Subsection [3](a) confirms that the holder holds an interest in real property, thus distinguishing that right from a personal or contractual right that does not run with the land.”); § 5(a) (providing that environmental covenants that comply with the act run with the land).

17. UECA § 2(5).

18. See UECA § 2(6). At least one state, Nebraska, has amended the model law so that neither the state nor any of its municipalities will be a holder under the Nebraska version of UECA.

19. See UECA § 2(1).

20. A “holder” is a grantee of the environmental covenant. UECA § 2(6).

21. See UECA § 4(a).

22. See UECA § 4(b), cmt. 9 (“Section 4(b) is a permissive provision intended by the breadth of its provisions . . . to encourage the agency and the other parties to include provisions in the particular covenant that are tailored to the specific needs of that project. This may well be accomplished in order to maximize the likelihood that the covenant, when properly implemented and monitored, will protect human health and the environment.”).

23. UECA § 9(c).

24. UECA § 9(d).


29. CONN. GEN. STAT. § 22a-133c (2011) (hazardous waste disposal site inventory).
30. This geologic information is maintained through the Department of Geology, University of Vermont.


35. For example, in the District of Columbia the seller of property is required to notify the purchaser of any underground storage tanks on the property, or the previous presence and removal of any underground storage tanks on the property. D.C. Code § 8-113.02(g) (2011).


37. Under Iowa law, written approval of the director of the Department of Natural Resources is required before the sale, conveyance, or transfer of title to a hazardous waste or hazardous substance disposal site. Iowa Code Ann. § 455B.430 (West 2011). Under Missouri law, the seller shall notify the department of the transfer within 30 days after the transfer. Mo. Ann. Stat. § 260.465 (West 2011).

38. For example, under the Massachusetts Contingency Plan (MCP), the Department of Environmental Protection may enforce the terms of an activity and use limitation (AUL), even if it is only a notice of AUL and not a grant of environmental restriction. The department can do so as a regulatory matter to enforce the MCP.


42. 5 Tex. Health & Safety Code § 361.801 et seq. (Vernon 2011).


44. See, e.g., Ohio Rev. Code Ann. § 3746.05 (West 2011).


46. See, e.g., Iowa Code Ann. § 558.69 (West 2011).

47. Massachusetts Notice of Activity and Use Limitation.

48. Massachusetts Grant of Environmental Restriction.


58. Wisconsin law requires that the department maintain and make available to the public a database of sites for which remedial action has been approved or for which a case closure letter has been issued and that have residual contamination. Wis. STAT. ANN. § 292.12 (West 2011). The database, which became web-based in 2001, is available at Wis. Dep’t of Nat. Res., Bureau for Remediation and Redevelopment Tracking System on the Web, http://dnr.wi.gov/org/aw/rr/brrts/index.htm.

61. The registry does not list all closed remediation sites, but only those where closure was approved after August 1, 2002. Wis. Dep’t of Nat. Res., Welcome to RR Sites Map, http://dnr.wi.gov/org/aw/rr/gis/index.htm.
64. N.J. STAT. ANN. § 58:10B-13(a)(4) (West 2011).
68. See, e.g., Wyo. STAT. ANN. § 35-11-1601(e) (2011).
69. The Environmental Protection Agency is attempting to correct this deficiency by emphasizing in its model CERCLA RD/RA Consent Decree the need to acquire a property interest (such as an easement or restrictive covenant) running with the land to make the institutional controls binding on future landowners. See 63 Fed. Reg. 9541 (Feb. 25, 1998). The revised model CERCLA RD/RA Consent Decree contains procedures by which property owners can convey to the United States (or other responsible entities) access rights and rights to enforce land or water use restrictions.
70. In Arizona, for example, a declaration of environmental use restriction must be recorded, run with the land, and burden the property. Owners electing to use institutional controls must submit a written report each year regarding their status. See Ariz. Rev. STAT. ANN. § 49-152 (2011). In Iowa, administrative orders may be enforced in the local district court by successor owners, local governments, the department, and participants in the cleanup. Iowa CODE ANN. § 455H.206 (West 2011).
74. Massachusetts requires that information about activity and use limitations be incorporated into deeds, mortgages, leases, and other instruments of transfer. New Jersey requires that deed notices be filed with the county clerk, county health officer, mayor, local zoning official, and local construction code officials. See N.J. ADMIN. CODE § 7:26E-8.2(g) (2011).
75. At least four states (Delaware, Iowa, Minnesota, and Mississippi) have amended the model law to give the state environmental agency a unilateral right to amend the environmental covenant when the covenant no longer serves its intended purpose. The drafters of UECA do not believe that this type of provision is a good idea, as it will be more difficult to convince potentially responsible parties and properties owners to enter into environmental covenants if the state agency can amend or terminate the covenant without their knowledge and consent in the future.
76. These states include Delaware, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, and West Virginia.
77. See, e.g., Fla. STAT. §§ 376.77–376.85 (2011).
78. 35 PA. CONS. STAT. § 6026.102 (2011).
79. Massachusetts provides that the prohibitions in the activity and use limitation will be suspended during the emergency, as long as the property owner promptly notifies the state about the emergency, limits excavation to the minimum reasonably necessary extent, and implements all necessary measures to limit actual or potential risk to human health and the environment.