INTRODUCTION

AMY L. EDWARDS

The critical role of institutional controls in the redevelopment of brownfields and other contaminated sites was highlighted by the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (hereinafter “the Brownfields Amendments”). The success of brownfields redevelopment rests in part upon the ability to use risk-based corrective action, including institutional and engineering controls. However, for these types of cleanups to succeed, all stakeholders must have confidence that institutional controls can be properly implemented, maintained, and enforced over time as long as they may be needed.

The second edition of Implementing Institutional Controls at Brownfields and Other Contaminated Sites discusses the substantial strides that have been made over the past decade to improve regulators’ and practitioners’ awareness and understanding of institutional control issues. In particular, nearly half of the states have now adopted the Uniform Environmental Covenants Act (UECA) since its promulgation as a model state law in 2003. This edition of the book discusses why UECA is important and how most states are handling institutional control issues, whether they have adopted UECA or not. Other institutional control tools, such as the EPA’s use of five year reviews under the federal Superfund law, Land Use Control Implementation Plans, and state and local innovations (such as municipal setting designations in Texas), are also discussed. This book is intended to be a companion piece to two other American Bar Association publications, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property, 3d ed. (Todd S. Davis and Scott A. Sherman eds., 2010) and Environmental Aspects of Real Estate and Commercial Transactions: From Brownfields to Green Buildings, 4th ed. (James B. Witkin ed., 2011).

Over the past two decades, numerous studies have been conducted to identify the shortcomings in our prior efforts to implement and enforce institutional controls. Federal, state, and local environmental agencies have held workshops, improved training, issued guidance, and established tracking systems. Several states have promulgated new laws or issued detailed regulations and guidance on institutional controls. Community groups have held frequent workshops to educate citizens about the purpose and role of institutional controls in cleanups. A decade ago, a leading standards writing organization, ASTM, published first-of-its-kind guidance on this issue, the Standard Guide for Use of Activity and Use
Limitations, Including Institutional and Engineering Controls (E2091), which was updated in 2011. ASTM has also recently published a Standard Guide for Identifying and Complying with Continuing Obligations (E2790-11), which addresses *inter alia* land use restriction and institutional control issues. Between 2002 and 2003 the National Conference of Commissioners on Uniform State Laws developed UECA. However, even more needs to be done.

Practitioners in this field understand that we can’t agree on many things, including what to call these restrictions. Different terminology is used by different groups: the Environmental Protection Agency uses the term “institutional controls,” but does not include engineering controls within its definition. The Department of Defense and other groups, such as the International County/ City Management Association (ICMA), use the terminology “land use controls,” or LUCs. ASTM and the Commonwealth of Massachusetts use the terminology “activity and use limitations,” or AULs, to include both the legal and engineering controls that are part of a cleanup remedy. UECA has created an “environmental covenant,” a unique legal instrument which is available only in states that have adopted UECA. Finally, there has been substantial discussion about the terminology used in the 2002 Brownfields Amendments—“land use restrictions” (LURs) and “institutional controls”—including how these terms may differ and what must be done to be “in compliance with LURs” and to “not impede the effectiveness or integrity of ICs” in order to establish one of the landowner liability protections (LLPs) under the 2002 Brownfields Amendments.

Real estate practitioners approach these issues from a totally different perspective, and focus on whether these restrictions are “covenants,” “easements,” or “servitudes,” and whether they convey a limited property interest or a regulatory interest. Further education, outreach, and dialogue between “sludge” and “dirt” lawyers will be needed if these restrictions are going to work as planned from both an environmental and a real estate perspective.

This book, first published in 2003, is an updated effort to “level the playing field” and continue the dialogue on legislative and educational efforts that will be needed to improve our implementation, monitoring and enforcement of institutional controls at brownfields sites. Educational efforts are being conducted on many fronts, including guidance and training initiated by the Environmental Protection Agency, ASTM, ICMA, the Center for Public Environmental Oversight, Resources for the Future, and the Environmental Law Institute. These efforts are to be commended and supported.