

BUTTONING UP: THE NUTS AND BOLTS OF IMPLEMENTING INSTITUTIONAL AND ENGINEERING CONTROLS

2022 Annual Florida Brownfields Conference



**Travis Moore Hearne, Esq.
Shareholder**

Mechanik Nuccio Hearne & Wester, P.A.

Ph: 813.276.1920 / Email: travis@floridalandlaw.com

**MECHANIK
NUCCIO
HEARNE
— & —
WESTER**
Attorneys at Law

Environmental Site Rehabilitation Overview

- Florida Statutes provide that the owner or operator of a facility is liable for all costs of removal or remedial action resulting from the release of a **Hazardous Substance** as defined under federal law. Fla. Stat. § 403.727(4). The liable person is the “person responsible for site rehabilitation” (“**PRSR**”). Fla. Stat. § 376.301(31).
- The practical effect: the owner of a contaminated site (or, in some cases, some other responsible party) must, in most cases, conduct **environmental site rehabilitation** (“**ESR**”).
- The ESR Process is governed by Rule 62-780, F.A.C., *Contaminated Site Cleanup Criteria*.
- The Brownfields Program is for sites undergoing ESR.

Environmental Site Rehabilitation *Components*

- ESR has the following key components:
 - **Site Assessment** ("SA"): governed by 62-780.600, F.A.C. Determine the types of contaminants present, site characteristics, determine the horizontal and vertical extent of contamination.
 - **Source Removal**: governed by 62-780.525, F.A.C. Removal of specific known contaminant sources in order to reduce exposure or control contaminant migration.
 - **Remedial Action**: governed by 62-780.700, F.A.C. Excavation and disposal, treatment, or other methods to actively reduce contaminant levels.

Environmental Site Rehabilitation Components

- **No Further Action** (“**NFA**”): governed by 62-780.680, F.A.C. A proposal by the PRSR to finalize ESR. May propose use of controls, if necessary, or not, if cleanup target levels (“**CTLs**”) are met.
- **Implementation of Controls**: governed by FDEP’s institutional controls procedures guidance (“**ICPG**”).
- **Site Rehabilitation Completion Order** (“**SRCO**”) or Conditional SRCO (“**CSRCO**”) issued. SRCO/CSRCO constitutes final agency action regarding cleanup activities. 62-780.680(9).

Conditional Closure *Overview*

- Florida statutes authorize the use of controls to support conditional closure of contaminated sites. Fla. Stat. § § 376.30701; 376.81; 376.3078.
- Controls function to prevent or minimize exposure to contaminants that cannot be fully remediated and must remain in place following site remediation.
- Controls provide an expedited and economical way to impose requirements on a site that prevent or minimize potential future exposure to contaminants.

Conditional Closure

Types of Controls

- Goals: Eliminating or minimizing exposure, migration, and leaching.
- Two broad categories of controls: **Engineering Controls ("ECs")** and **Institutional Controls ("ICs")**.
 - ECs are physical objects or processes that reduce or eliminate exposure to or migration of contamination. Fla. Stat. § 376.301(17).
 - ICs are legal or regulatory restrictions on the use of the site that reduce or eliminate exposure to or migration of contamination. Fla. Stat. § 376.301(21).

Conditional Closure

Types of Engineering Controls

- Examples of ECs:
- Two-foot thick layer of clean fill placed over areas of remaining deeper soil contamination to prevent exposure;
- Impervious surfaces (including asphalt, concrete, building slabs or foundations) placed over areas of remaining deeper soil contamination to prevent exposure and infiltration/leaching;
- Slurry walls or other hydraulic barriers to prevent migration of groundwater contamination.

Conditional Closure

Types of Institutional Controls

- Primary types of ICs:
 - Groundwater use restrictions (wells, stormwater features, dewatering).
 - Land use restrictions (prohibition of residential and related uses)
- Accomplished via declaration of restrictive covenant (“**DRC**”) or non-DRC IC (“**NDIC**”); namely, existing permitting rules and regulations, specified GIS databases (i.e., FDOT, CSX).

The Nuts & Bolts: ICPG Submission Items

ICPG Guidance & Submission

- Once conditions set forth in 62-780.600 are met, PRSR may submit a site rehabilitation completion report (“**SRCR**”) and no further action proposal (“**NFA**”) that proposes and details controls.
- Procedures to impose controls are set forth in FDEP Institutional Controls Procedures Guidance (“**ICPG**”).
- ICPG Available online:
<https://floridadep.gov/waste/waste/content/institutional-controls-procedures-guidance>

The Nuts & Bolts: ICPG Submission Items

ICPG Guidance & Submission

- Items and tasks to be prepared/submitted:
 - Attachment 5, Technical Checklist
 - Attachment 6, Legal Referral and Checklist
 - Title work: ownership & encumbrance (“**O&E**”) or property information report (“**PIR**”);
 - Notice letters and published notices, if applicable
 - Draft DRC, if applicable
 - Exhibits to DRC, if applicable

The Nuts & Bolts: ICPG Submission Items

Attachment 6 - Legal Referral and Checklist

- Final pages of Attachment 6 detail the items that must be submitted with the IC/EC Package. First table shows types of ICs.

APPLICABLE INSTITUTIONAL CONTROLS			
What type of document is the Institutional Control?	Source Property	Non-Source Properties (if applicable)	Included in IC Package?
Declaration of Restrictive Covenant (DRC)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Superfund DRC	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Memorandum of Agreement/Understanding (MOA/MOU):	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOU -DOT (Petroleum only)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOU – CSX	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOA – Airport	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOA – Port Authority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Board of Trustee of the Internal Improvement Trust Fund (BOT)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SWFWMD ePermitting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Local Government Ordinance*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
LSSI NFA Order (Petroleum Only)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rule 62-524 Delineated Areas	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other Proposed Institutional Control (Please explain)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

* Zoning is not an acceptable institutional control; and, local government controls generally are not acceptable – consult OGC.

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Attachment 6 - Legal Referral and Checklist

- Second table shows items required to be submitted with all ICs.

FOR ALL INSTITUTIONAL CONTROLS:	Included in IC Package?
1. Title Work (Property Information Report, Encumbrance & Ownership (E&O) Report, or Title Insurance)? Note: should be less than 6 months old.	<input type="checkbox"/>
a. Are the supporting title documents included (copies of deeds, easements, liens, leases)?	<input type="checkbox"/>
2. A screenshot of the property appraiser website?	<input type="checkbox"/>
3. Legal description of the property(ies) to be restricted?	<input type="checkbox"/>
4. Mailed Notices?	<input type="checkbox"/>
a. City (if applicable)?	<input type="checkbox"/>
b. County Administrator?	<input type="checkbox"/>
c. Water Management District (WMD)?	<input type="checkbox"/>
d. Other (materially affected easement holders, etc.)?	<input type="checkbox"/>
5. Published Notice (only if applicable)?	<input type="checkbox"/>
a. If so, when and why?	<input type="checkbox"/>
6. Are the required ICR GIS Shapefiles provided in a zip file (.shp, .shx, .dbf, and .prj)	<input type="checkbox"/>

The Nuts & Bolts: ICPG Submission Items

Attachment 6 - Legal Referral and Checklist

- Third table shows items required to be submitted with DRC ICs.

FOR DRC INSTITUTIONAL CONTROLS (i.e., Declarations):	YES	NO
1. Is the description of the contamination on the property(ies) in the DRC (typically Recital C) correct?	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the list of reports in the DRC (typically Recital C) correct and complete?	<input type="checkbox"/>	<input type="checkbox"/>
3. Do the restrictions in the DRC match those in the technical review?	<input type="checkbox"/>	<input type="checkbox"/>
4. <u>Exhibit A</u> contains: a. Legal description of the entire property (even if only a portion of the property will be encumbered/restricted) b. Legal description of Restricted Property (if applicable) c. Legal description of Access Easement (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>
5. <u>Exhibit B</u> contains (applicable if only a portion of the parcel will be restricted): A Specific Purpose Survey, Boundary Survey or Sketches to Accompany Descriptions (as defined under Chapter 5J-17, F.A.C.) prepared using the Standards of Practice (collectively referred to as a "Survey") should be provided, and it should include four corners labeled with the State Plane Coordinates (SPC) system or geographical coordinates, clearly labeling the attachment as Exhibit "B," and labeling the encumbered area on the attachment as "restricted area" or another phrase that tracks the RC language].	<input type="checkbox"/>	<input type="checkbox"/>
6. <u>Exhibit C</u> contains a survey or site plan (applicable if stormwater features exist on property; may be combined with Exhibit B).	<input type="checkbox"/>	<input type="checkbox"/>
7. If only a portion of the property will be restricted (i.e., Restricted Property), access is addressed in the DRC and shown on the survey?	<input type="checkbox"/>	<input type="checkbox"/>

The Nuts & Bolts: ICPG Submission Items

Attachment 6 - Legal Referral and Checklist

- Fourth table shows items required to be submitted with NDICs.

FOR NON-DRC INSTITUTIONAL CONTROLS (i.e. MOUs):	Included in IC Package?
1. Has a copy of the document which is to be the institutional control been included (i.e. MOU/MOA, etc.)?	<input type="checkbox"/>
2. If relying on a local ordinance, is the Water Management District delegation agreement included in IC package?	<input type="checkbox"/>
3. Draft C-SRCO for legal review included in IC package?	<input type="checkbox"/>

The Nuts & Bolts: ICPG Submission Items

DRC IC Components

- DRC ICs required when:
 - No NDIC available for groundwater restriction;
 - Engineering controls apply;
 - Land use restrictions apply.

The Nuts & Bolts: ICPG Submission Items

DRC IC Components

- DRC

FOR DRC INSTITUTIONAL CONTROLS (i.e., Declarations):	YES	NO
1. Is the description of the contamination on the property(ies) in the DRC (typically Recital C) correct?	<input type="checkbox"/>	<input type="checkbox"/>
2. Is the list of reports in the DRC (typically Recital C) correct and complete?	<input type="checkbox"/>	<input type="checkbox"/>
3. Do the restrictions in the DRC match those in the technical review?	<input type="checkbox"/>	<input type="checkbox"/>
4. <u>Exhibit A</u> contains: a. Legal description of the entire property (even if only a portion of the property will be encumbered/restricted) b. Legal description of Restricted Property (if applicable) c. Legal description of Access Easement (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>
5. <u>Exhibit B</u> contains (applicable if only a portion of the parcel will be restricted): A Specific Purpose Survey, Boundary Survey or Sketches to Accompany Descriptions (as defined under Chapter 5J-17, F.A.C.) prepared using the Standards of Practice (collectively referred to as a "Survey") should be provided, and it should include four corners labeled with the State Plane Coordinates (SPC) system or geographical coordinates, clearly labeling the attachment as Exhibit "B," and labeling the encumbered area on the attachment as "restricted area" or another phrase that tracks the RC language].	<input type="checkbox"/>	<input type="checkbox"/>
6. <u>Exhibit C</u> contains a survey or site plan (applicable if stormwater features exist on property; may be combined with Exhibit B).	<input type="checkbox"/>	<input type="checkbox"/>
7. If only a portion of the property will be restricted (i.e., Restricted Property), access is addressed in the DRC and shown on the survey?	<input type="checkbox"/>	<input type="checkbox"/>

The Nuts & Bolts: ICPG Submission Items

Example DRC

Attachment 3A: Declaration of Restrictive Covenant, Form A – Any Section of DRC Encumbers the Entire Property

*{{FORM A: THIS FORM SHOULD BE USED IF **ANY SECTION OF THE DRC ENCUMBERS THE ENTIRE PROPERTY** OF GRANTOR.}}*



This instrument prepared by:
*{{name, company & full mailing
address of NON-DEP person
who prepared covenant – typically the real property
owner or attorney}}*

DECLARATION OF RESTRICTIVE COVENANT

THIS DECLARATION OF RESTRICTIVE COVENANT (hereinafter "Declaration") is made by *{{property owner}}* *{{" a _____ corporation}}* (hereinafter "GRANTOR") and the Florida Department of Environmental Protection (hereinafter "DEP"). This Declaration, made pursuant to either Chapter 376 or 403, Florida Statutes (F.S.), is neither extinguished nor affected by the Marketable Record Title Act in accordance with section 712.03, F.S.

RECITALS

A. GRANTOR *{{name of owner on the deed and on the title search report should precisely match GRANTOR's name}}* is the fee simple owner of that certain real property situated in the County of _____, State of Florida, more particularly described in Exhibit "A" attached hereto and made a part hereof (hereinafter the

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

transactions, DEP does not require payment for the opportunity to use the conditional closure option; therefore, any discussion of payment in this document is typically inappropriate}}:

1. The foregoing recitals are true and correct and are incorporated herein by reference.
2. GRANTOR hereby imposes the following restrictions and requirements:

{{GROUNDWATER USE RESTRICTIONS.}}

- a. Groundwater Use. There are restrictions on use of the groundwater under the Property. Any monitoring wells installed on the Property shall be pre-approved in writing by DEP's Division of Waste Management (DWM) in addition to any authorizations required by the Division of Water Resource Management (DWRM) and the Water Management District (WMD).

For any other groundwater wells to be installed on the Property, a plan signed and sealed by a Florida-registered professional engineer or Florida-registered professional geologist to address and ensure there will be no exposure to contaminated groundwater must be submitted to the DEP's DWM. The plan must include the well location, drilling method, casing depth, total depth, proposed maximum daily flow rate and volume, and a technical evaluation (including calculations, fate and transport modeling, as applicable) to demonstrate that the proposed groundwater extraction will not cause the spread or migration of contaminated groundwater and that receptors will not be exposed as a result of contaminant migration. The plan shall also outline the procedures for proper characterization, handling and disposal of any contaminated media encountered during installation. DEP's DWM will keep the plan in the site file as documentation of site conditions and will rely on this professional certification for demonstrating compliance with this restriction. A revised exhibit must be amended to the Declaration and recorded when any groundwater well is altered, modified, expanded, or constructed. The GRANTOR is advised that other federal, state, or local laws and regulations may apply to this activity. A copy of all permits obtained for the installation of groundwater wells at the Property must be provided along with the plan submitted to DEP's DWM. *{{The remainder of this paragraph is intended to conform with language in other documents and should not be changed when drafting the DRC for a particular property.}}* DEP will rely on this Declaration and certified plan to construct new or modify existing groundwater wells to ensure that there is no exposure to contaminated groundwater entering into new or expanded groundwater wells resulting in risk to human health, public safety, or the environment due to the contaminated site. Construction of groundwater wells on the Property could destabilize the groundwater plume or increase potential for exposure to contaminants resulting in risk to human health, public safety,

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

or the environment. For this reason, if GRANTOR seeks to construct groundwater wells on the Property, GRANTOR shall submit the certified plan to DEP DWM in addition to obtaining any authorizations that may be required by DEP DWRM, the WMD, or other federal, state, or local laws and regulations that may apply to this activity. Unless it is demonstrated that the cleanup criteria under subsection 62-780.680(1), F.A.C., have been achieved, DEP, in addition to other remedies available under law, may institute proceedings to revoke this Declaration and the Order *{{delete "and the Order" if no Order is to be issued}}* and require the proper abandonment of the wells and the resumption of site rehabilitation activities if any such groundwater wells are constructed or commenced without submittal of a certified plan.

- b. Dewatering. For any dewatering activities on the Property, a plan signed and sealed by a Florida-registered professional engineer or Florida-registered professional geologist to address and ensure the appropriate handling, treatment and disposal of any extracted groundwater that may be contaminated must be submitted to DEP's DWM. The plan must include the location(s) of the dewatering activity and the effluent disposal area(s) relative to known areas of groundwater contamination, proposed flow rates, duration, volume, estimated drawdown, (based upon design calculations), a technical evaluation demonstrating that the dewatering will not cause the migration of contamination and procedures for proper characterization, treatment and handling of any contaminated groundwater that may be encountered during dewatering. DEP's DWM will keep the plan in the site file as documentation of site conditions and will rely on this professional certification for demonstrating compliance with this restriction. The GRANTOR is advised that other federal, state, or local laws and regulations may apply to this activity. A copy of all permits obtained for the implementation of dewatering must be provided along with the plan submitted to DEP's DWM. *{{The remainder of this paragraph is intended to conform with language in other documents and should not be changed when drafting the DRC for a particular property.}}* DEP will rely on this Declaration, Rule 62-621.300, F.A.C., and the guidance incorporated therein, and the signed and sealed dewatering plan as the institutional controls to ensure that no exposure to contaminated groundwater resulting in risk to human health, public safety or the environment will occur due to dewatering activities on the contaminated site. Rule 62-621.300, F.A.C., requires a permit when conducting dewatering in the area of a contaminated site. For this reason, if GRANTOR seeks to conduct dewatering on the Property, GRANTOR shall submit the signed and sealed plan to DEP DWM in addition to obtaining any authorizations that may be required by DEP DWRM, the WMD, or other federal, state, or local laws and regulations that may apply to this activity. The dewatering plan must ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated to avoid adversely

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

or the environment. For this reason, if GRANTOR seeks to construct stormwater features on the Property, GRANTOR shall submit the certified plan to DEP DWM in addition to obtaining any authorizations that may be required by DEP DWRM, the WMD, or other federal, state, or local laws and regulations that may apply to this activity. Unless it is demonstrated that the cleanup criteria under subsection 62-780.680(1), F.A.C., have been achieved, DEP, in addition to other remedies available under law, may institute proceedings to revoke this Declaration and the Conditional Site Rehabilitation Completion Order *{{delete "and the Order" if no Order is to be issued}}* and require the resumption of site rehabilitation activities if any such stormwater features are constructed or commenced without submittal of a certified plan.

OR

{Option 2: Currently, there are existing stormwater features, the existence of which has been determined to not adversely affect the remaining contamination

Attached as Exhibit __, and incorporated by reference herein, is a Survey *{{a Specific Purpose Survey, Boundary Survey or Sketches Accompanying Legal Descriptions prepared in accordance with the Minimum Technical Standards (MTS) that depicts an area and includes geographical coordinates referenced to the State Plane Coordinates System or other geographical coordinates. Such a legal description and Survey should be a clearly labeled, legible attachment to the Declaration and the area to be noted should also be clearly labeled on the drawing (e.g., "stormwater swale," "stormwater detention or retention facility," "ditch."}}* identifying the size and location of existing stormwater swales, stormwater detention or retention facilities, and ditches on the Property. Such existing stormwater features shall not be altered, modified or expanded, and there shall be no construction of new stormwater swales, stormwater detention or retention facilities or ditches on the Property. If stormwater features must be constructed, modified, altered or expanded, a plan signed and sealed by a Florida-registered professional engineer, or a Florida-registered professional geologist must be submitted to DEP's DWM in addition to any authorizations required by the DWRM and the WMD. The plan must include the feature location, construction and design specifications relative to known areas of soil and groundwater contamination, and a technical evaluation (including calculations, fate and transport modeling, as applicable) to demonstrate that the new stormwater facilities will not cause the migration of contamination. The plan shall also outline the procedures for proper characterization, handling and disposal of any contaminated media that may be encountered during construction. DEP's DWM will keep the plan in the site file as documentation of site conditions and will rely on this professional certification for demonstrating compliance with this restriction. The GRANTOR is advised that other

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

federal, state, or local laws and regulations may apply to this activity. A copy of all permits obtained for the implementation of dewatering must be provided along with the plan submitted to DEP's DWM. A revised exhibit must be amended to the Declaration and recorded when any stormwater feature is altered, modified, expanded, or constructed. *{{The remainder of this paragraph is intended to conform with language in other documents and should not be changed when drafting the DRC for a particular property.}}* DEP will rely on this Declaration and certified plan to construct new or modify existing stormwater features to ensure that there is no exposure to contaminated groundwater entering into new or expanded stormwater features resulting in risk to human health, public safety, or the environment due to the contaminated site. Construction of stormwater swales, stormwater detention or retention features, or ditches on the Property could destabilize the groundwater plume or increase potential for exposure to contaminants resulting in risk to human health, public safety, or the environment. For this reason, if GRANTOR seeks to construct stormwater features on the Property, GRANTOR shall submit the certified plan to DEP DWM in addition to obtaining any authorizations that may be required by DEP DWRM, the WMD, or other federal, state, or local laws and regulations that may apply to this activity. Unless it is demonstrated that the cleanup criteria under subsection 62-780.680(1), F.A.C., have been achieved, DEP, in addition to other remedies available under law, may institute proceedings to revoke this Declaration and the Conditional Site Rehabilitation Completion Order *{{delete "and the Order" if no Order is to be issued}}* and require the resumption of site rehabilitation activities if any such stormwater features are constructed or commenced without submittal of a certified plan.

{{SOIL RESTRICTIONS.}} *The DRC language used to address soil contamination depends in part on whether the concern is direct exposure, leachability, or both (see cleanup criteria in Chapter 62-780, F.A.C., and tables of cleanup target levels (CTLs) in Chapter 62-777, F.A.C., for further guidance). Additionally, the choice of which DRC language to include for soils may depend on the intended future land use.*

In general, ECs (e.g., caps, parking lots, building foundation) should be identified on a survey that is incorporated by reference as an exhibit to the DRC. The survey should consist of a Specific Purpose Survey, Boundary Survey or Sketches with Accompanying Legal Descriptions prepared in accordance with the Minimum Technical Standards (MTS) that depicts the restricted area and includes points along the boundary of the area noted referenced to the State Plane Coordinates System, or other geographical coordinates (collectively, "Survey"). Such a Survey should be a clearly labeled, legible exhibit to the DRC and the area to be restricted should also be clearly labeled on the Survey (e.g., "area of EC," "capped area," "location of slurry wall," "restricted area"). The terms used to label locations on the Survey should match the terms used in the text of the document discussing that location.}}

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

If, however, the EC is to apply to the entire property, then only a legal description of the Property is necessary.}}

- d. Soil Engineering Controls. *{{Use this language when leachability CTLs are exceeded;}}* The "Area of Soil Contamination" as located on the Property and shown on Exhibit ____ shall be permanently covered and maintained with an impermeable material that prevents human exposure and prevents water infiltration (hereinafter referred to as "the Engineering Control"). *{{OR use the following language when the problem is direct exposure of the soil and leachability is not a concern:}}* "The "Area of Soil Contamination" as located on the Property and shown on Exhibit ____ shall be permanently covered and maintained with a minimum of two (2) feet of clean and uncontaminated soil that prevents human exposure (hereinafter referred to as the "Engineering Control"). *[Note: this is the minimal cap required to address direct exposure, but GRANTOR may use an impermeable cap (e.g., parking lot).]}* An Engineering Control Maintenance Plan (ECMP) has been approved by DEP. The ECMP specifies the frequency of inspections and monitoring for the Engineering Control and the criteria for determining when the Engineering Control has failed. The Engineering Control shall be maintained in accordance with the ECMP. The ECMP may be amended upon the prior written consent of DEP. The ECMP, as amended, relating to DEP Facility No. *{{9 digit #; or other appropriate tracking number, as applicable;}}*, can be obtained by contacting the appropriate DEP district office or Tallahassee program area.
- e. Excavation and Construction. Excavation and construction below the Engineering Control is not prohibited on the Property provided any contaminated soils that are excavated are either: 1) placed back into the excavation and the Engineering Controls are reconstructed or 2) are removed and properly disposed of pursuant to Chapter 62-780, F.A.C., and any other applicable local, state, and federal requirements. Nothing herein shall limit any other legal requirements regarding construction methods and precautions that must be taken to minimize risk of exposure while conducting work in contaminated areas.
- f. Subdivision of Property. *{{If the criteria for direct exposure were met using average soil contaminant concentrations calculated based on a 95% Upper Confidence Limit (UCL) approach and subdivision of the exposure units (EUs) needs to be prohibited, the following paragraph should be added:}}* The criteria for direct exposure of contamination in the soil was based upon an average soil contaminant concentration calculated using a 95% Upper Confidence Limit (UCL) approach with an exposure unit (EU) of *{{size of unit}}* pursuant to Rule 62-780.680, F.A.C. Therefore, the Property may not be subdivided into parcels smaller than *{{size}}* without prior written approval from DEP's DWM *{{or "Division of Waste*

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

Management" if not previously defined}}. A subsequent amendment to this Declaration shall be recorded on the Property in accordance with Paragraph 7.

{{LAND USE RESTRICTIONS (LUR): If the above options describing ECs such as soil caps or concrete pads are not utilized to control exposure, then the following LUR language should be used to address soil contamination. Typically, a soil cap EC and a LUR should not both be used on the same property for the same contamination, however, there are occasions when both are required. A restriction on the use of the land should be clearly and exhaustively described for the Property.

Reliance only on local zoning or land use classifications is insufficient to adequately restrict the use of the land or adequately describe the restriction in perpetuity. Additionally, there is often confusion because the cleanup rule categories for land use are lumped into "residential" and "commercial/industrial." This is for ease in using the look-up tables for cleanup target levels. But, simply using the term "residential," will create inconsistent application and interpretation of what this limitation means across the state because every local government creates its own definition for each land use category, including "residential." The categories selected from the classification codes available to meet the RMO II/III requirements for closure are conservative based upon an assumption that the LUR is the only restriction being used.

The categories listed below provide the detail necessary to adequately protect human health based on calculations using the various land use scenarios' exposure duration and frequency. The categories are consistent with the Chapter 62-777, F.A.C., cleanup target levels and governing statutes regarding acceptable risk levels under Florida's risk-based corrective action principles. These codes come from the North American Industry Classification System, United States, 2017 because it is one of the only comprehensive and standardized systems for categorizing human activity and use of the land. All listed sub-sectors and codes are intended to include the subcategories within each.

In order to utilize the LUR option for an RMO II closure, contaminant levels in soils should not exceed the "commercial/industrial" cleanup target levels. If using the LUR option for an RMO III closure, then a site-specific alternative cleanup target level may be established using appropriate risk assessment methodologies. Lastly, if the GRANTOR wants a LUR but does not want to use the default land use restrictions listed below, then the RMO III closure option should be conducted. It is recommended that you speak with the DEP site or project manager before pursuing this option.}}

- g. Land Use Restrictions. The following uses of the Property are prohibited: agricultural use of the land including forestry, fishing and mining; hotels or lodging; recreational uses including amusement parks, parks, camps, museums, zoos, or gardens; residential uses, and educational uses such as elementary or secondary schools, or day care services. These prohibited uses are specifically defined by using the North American

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Example DRC

Industry Classification System, United States, 2017 (NAICS), Executive Office of the President, Office of Management and Budget. The prohibited uses by code are: Sector 11 Agriculture, Forestry, Fishing and Hunting; Subsector 212 Mining (except Oil and Gas); U.S. Industry 512132 Drive-In Motion Picture Theaters; U.S. Industry 519120 Libraries and Archives; U.S. Industry 531110 Lessors of Residential Buildings and Dwellings; Industry Group 6111 Elementary and Secondary Schools; Subsector 623 Nursing and Residential Care Facilities; Subsector 624 Social Assistance; Subsector 711 Performing Arts, Spectator Sports and Related Industries; Subsector 712 Museums, Historical Sites, and Similar Institutions; Subsector 713 Amusement, Gambling, and Recreation Industries; Subsector 721 Accommodation (hotels, motels, RV parks, etc.); Subsector 813 Religious, Grantmaking, Civic, Professional, and Similar Organizations; and Subsector 814 Private Households.

3. All references to "GRANTOR" and "DEP" shall also mean and refer to their respective legal representatives, successors and assigns.

4. For the purpose of monitoring the restrictions contained herein, DEP is hereby granted a right of entry upon, over and through and access to the Property at reasonable times and with reasonable notice to GRANTOR. Access to the Property is available via an immediately adjacent public right-of-way. *{{If the Property does not abut a public right-of-way, then an access easement will be necessary, and the access easement must be clearly shown and labeled on the survey included as an exhibit to this DRC. Please see Attachment 3B of the ICPG for further instruction on what to include in this DRC for such access easement.}}*

{{The remaining paragraphs 5 – 9 are based on principles of real property law and include necessary language in order to create an enforceable and durable DRC. Generally, these paragraphs should not be modified.}}

5. It is the intention of GRANTOR that this Declaration shall touch and concern the Property, run with the land and with the title to the Property, and shall apply to and be binding upon and inure to the benefit of GRANTOR and DEP, and to any and all parties hereafter having any right, title or interest in the Property or any part thereof. DEP may enforce the terms and conditions of this Declaration by injunctive relief and other appropriate available legal remedies. Any forbearance on behalf of DEP to exercise its right in the event of the failure of GRANTOR to comply with the provisions of this Declaration shall not be deemed or construed to be a waiver of DEP's rights hereunder. This Declaration shall continue in perpetuity, unless otherwise modified in writing by GRANTOR and DEP as provided in paragraph 7 below. These restrictions may also be enforced in a court of competent jurisdiction by any other person, firm, corporation, or governmental agency that is substantially benefited by this Declaration. If GRANTOR does not or will not be able to comply with any or all of the provisions of this Declaration, GRANTOR shall notify DEP in writing within three (3) calendar days.

MECHANIK
NUCCIO
HEARNE
— & —
WESTER

Attorneys at Law

The Nuts & Bolts: ICPG Submission Items

Title Work & Notice Letters

- Notices required by 62-780.220(7), F.A.C.:

(7) Notice Requirements for Closure Using Institutional, Engineering Controls or Alternative CTLs. Sections 376.30701(2)(c) and (d), F.S., provide specific notice requirements for conditional closure using institutional controls, engineering controls or alternative CTLs. Prior to the Department's approval of institutional controls, institutional and engineering controls, or alternative CTLs, the PRSR shall mail notice of the Department's intent for such approval to the local government(s) with jurisdiction over the property(ies) subject to the institutional or engineering control, to real property owner(s) of any property subject to the institutional or engineering control, to any resident or business tenant, and to any party holding a materially affected encumbrance in the area subject to the control (see the Institutional Control Procedures Guidance referenced in subsection 62-780.100(7), F.A.C., for guidance). Notice mailed to the registered agent of any party, if applicable, shall be sufficient notice for the purposes of this subsection. Where there are multiple residences (e.g., a condominium), businesses or tenants on any property subject to the institutional or engineering control, the PRSR may publish notice in lieu of mailing to such residences, businesses or tenants. The notice shall be mailed or published by the PRSR within 30 days after the Department's provisional approval of the No Further Action Proposal with institutional or engineering controls. The PRSR shall provide the Department with a copy of the mailed notice and a list of names and addresses to whom the notice was sent and the date it was sent. For published notice, proof of such notice that meets the requirements of subsections 62-110.106(5), (8) and (9), F.A.C., shall be provided. The notice shall provide the local government(s) with jurisdiction over the property(ies) subject to the control(s), real property owner(s) of any property subject to the control(s), and residents of any property subject to the control(s), any party holding an easement for the area subject to the control(s), and business tenants of any property subject to the controls, the opportunity to comment to the Department within 30 days after receipt of the notice of the Department's intent of approval. For a description of the agency action proposed, the notice shall contain "to issue a Site Rehabilitation Completion Order with institutional controls for a contaminated site." Additionally, the notice of rights language shall be replaced with "Local governments, real property owner(s) of any property subject to the institutional or engineering control, and residents of any property subject to the institutional or engineering control have 30 days from receipt (or publication) of this notice to provide comments to the Department." The notice shall also provide the appropriate mailing address and, if warranted, electronic mail address to which comments should be sent. See subsection 62-780.100(7), F.A.C., Institutional Controls Procedures Guidance, for sample notice templates.

Editorial Note: Portions of this rule were copied from rule 62-770.220; 62-782.220; and 62-785.220, F.A.C.

The Nuts & Bolts: ICPG Submission Items

Title Work & Notice Letters

- Notices required by 62-780.220(7), F.A.C.:
 - Local governments with jurisdiction over IC/EC area;
 - Real property owners (“**RPOs**”) within IC/EC area;
 - Tenants within IC/EC area (multiple tenants can be noticed via publication);
 - Holders of “materially affected” encumbrances.

The Nuts & Bolts: ICPG Submission Items

Title Work & Notice Letters

- Identifying “materially affected” encumbrance holders requires review of PIR / O&E (title report).
- Legal judgment necessary to determine nature of encumbrances.
- Ambiguity in “materially affected” standard.
- Often utilities, mortgage holders, cross-easements, are “materially affected”
- Monetary liens & notices of commencement not generally “materially affected,” since no right to possess or enter property that conflicts with IC/EC.
- PIR / O&E must be no more than 6 months old.

BUTTONING UP: THE NUTS AND BOLTS OF IMPLEMENTING INSTITUTIONAL AND ENGINEERING CONTROLS

2022 Annual Florida Brownfields Conference



**Travis Moore Hearne, Esq.
Shareholder**

Mechanik Nuccio Hearne & Wester, P.A.

Ph: 813.276.1920 / Email: travis@floridalandlaw.com

**MECHANIK
NUCCIO
HEARNE
— & —
WESTER**
Attorneys at Law