

Section C.1: Non-Recorded Institutional Controls (“NRICs”)¹

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It is important to note that, other than cases involving MOAs between the FDEP and other institutional or governmental entities, at the present time, these NRICs should only be used to address *groundwater* contamination at a site (which can include impacts off of the source property). When addressing soil contamination using either land use restrictions or an engineering control (e.g., a concrete cap), a Restrictive Covenant (“RC”) recorded in the public records of the County in which the site is located is the only type of control that effectively ensures that the type of land use remains in perpetuity, or that an engineering control remains in place and is properly maintained to permanently cover the area of soil contamination.

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Factors to consider when evaluating whether an NRIC is adequately protective of human health, public safety, and the environment, include the following:

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- The nature and concentrations of contaminants;
- The size and location of the contaminant plume relative to existing and projected improvements on the property;
- The scope and coverage of any applicable local ordinance:
 - Requirement for connection to county/municipal/community water delivery system for both potable and irrigation water;
- Status of site development and existing infrastructure for provision of potable and irrigation water;
- Current and projected use of the property and likelihood of need for additional water use in the future;
- Potential for additional construction in the area (i.e., possibility of dewatering, discharging of contaminated groundwater to surface soils, causing plume migration; etc.);
- Potential for installation of new stormwater features or enlargement of existing stormwater features at or near the affected property;

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- Whether the property(ies) affected by remaining groundwater contamination related to the site proposed to be closed utilizing an NRIC is subject to the jurisdiction of a water management district’s (“WMD’s”) water well permitting rules and authority or is within the jurisdiction of a county, county health department, or other local government which has received delegated water well permitting authority from a WMD pursuant to Fla. Stat. §§ 373.308–309 (“Delegated Local Government”):

- Whether the jurisdictional WMD or Delegated Local Government has codified rules controlling well construction requirements and/or prohibiting the issuance of water well permits for wells that would increase the potential for harm to public health,

¹ In November 2013, the Division of Waste Management issued a memorandum regarding institutional controls, including the use of institutional controls that do not require RCs. Revisions to this Institutional Control Program Guidance in 2016 restate and clarify that November 2013 memorandum.

safety and welfare or would degrade the water quality of the aquifer by causing pollutants to spread.²

- Whether the jurisdictional WMD or Delegated Local Government has procedures in place by which it may reflect and/or record the location of areas of groundwater contamination within a geographic information system (“GIS”) computer database (or similar system) to ensure that no permits for potable wells, irrigation wells, or any other water wells subject to permitting requirements under Part III of Chapter 373, F.S. will be issued in such areas of groundwater contamination without implementation of appropriate well construction requirements if such wells would adversely affect public health or degrade the water quality of an aquifer.

When proposing an NRIC, the Person Responsible for Site Rehabilitation (“PRSR”) should submit much of the same information as in a typical RC package including the Deed and Legal Description. Instead of a draft RC, the PRSR should submit electronic copies of the proposed NRIC and any documentation that is necessary to validate or provide context to the control. For example, in cases where a PRSR is relying on a local ordinance, the ordinance itself should be submitted. Along with the ordinance, the PRSR should submit a statement explaining whether the property(ies) is currently in compliance with that ordinance, and a statement of whether the ordinance relies upon delegation of authority from another governmental entity. Documentation of that delegation should also be provided. Since some local ordinances are quite lengthy, the PRSR should direct the FDEP to the specific provisions that are relevant. In cases where a PRSR is relying on the water well permitting rules and authority of a WMD or of a Delegated Local Government, the PRSR should submit the applicable well permitting rules of the WMD or Delegated Local Government, the documentation of delegation, a depiction of the area to be restricted, and a GIS-compatible computer shapefile setting forth the area of contaminated groundwater in which groundwater use will be restricted.

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An additional decision that will have to be made when using an IC of this nature, is whether title work is necessary to identify the holders of “materially affected” encumbrances on the property and provide them with notice of the proposed closure using the control. [See subsection 62-780.220(7), F.A.C.] This decision should be made on a site by site basis because it depends on both the nature of the site as well as the nature of the control. For sites where contamination goes beyond property boundaries, this evaluation is necessary for each parcel. Factors to be considered in this evaluation include:

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Commented [TMH1]: FBA Members plan to open discussions with FDEP regarding whether NRICs can “materially affect” encumbrances. This issue is addressed in FBA’s cover letter.

- Depth to groundwater contamination;
- Status of site development and existing or planned infrastructure on the site;
- Ownership of each property;
- Involvement and knowledge of off-site property owners as to the nature and extent of contamination;

² See, e.g., applicable within the Southwest Florida Water Management District (“SWFWMD”), Fla. Admin. Code r. 40D-3.505(3) (“[t]he District will deny a permit application to construct a water well if use of the well would increase the potential for harm to public health, safety and welfare, or if the proposed well would degrade the water quality of the aquifer by causing pollutants to spread.”)

- Nature of the property interests subject to the restriction in relation to the contamination causing the need for restriction.