

## Section C.11: Owner's Notice to Existing Encumbrance Holders

The property owner should provide actual notice of FDEP's approval of the use of an IC to holders of any "materially affected" existing encumbrances in the property. Such Encumbrances include the following types of recorded documents as well as others: mortgages, liens, leases, and easements. Notice should be provided when the proposed restrictions in the IC materially affect the encumbrance holder's property rights. Easement holders' rights may or may not be materially affected, based on the express language of the grant of easement and the specific language of the proposed restriction. For example, if the IC restriction forbids groundwater use and the encumbrance property right grants ingress and egress across the surface of the property, then notice to that encumbrance holder is not necessary because the encumbrance holder's rights are not "materially affected" by the IC restriction even though the surface location is the same. However, if the IC restriction includes the requirement for a FDEP approved dewatering plan, and the encumbrance holder's right is for entry into the soil to lay and maintain utility lines, then notice may be required for that encumbrance holder if the laying and maintaining of utility lines is likely to require dewatering given depth to groundwater. The text of the encumbrance document must be examined carefully to determine whether the encumbrance holder rights are materially affected by the IC restriction. See subsection 62-780.220(7), F.A.C. Such notice to encumbrance holders should include information regarding the owner's intention to utilize an IC and request a Conditional SRCO, the type and location of the restrictions on the property and FDEP contact information. A template is provided. See [Attachment 9](#), Actual Notice of Intent to Approve Use of IC for Easement Holders & Financial Institutions. In cases when NRICs are considered, notice to all encumbrance holders will not always be required. In other cases, due to site specific conditions, such notice will be required. Therefore, it is important for PRSRs and case managers to work closely with OGC from the receipt of the request to use an NRIC. Additional discussion about how to evaluate site specific factors and make these decisions is in the "Non-Recorded Institutional Controls" section above.

To facilitate timely review of the notice, FDEP encourages that the notice be provided to encumbrance holders as early as possible; even as early as the time at which the IC package is submitted to FDEP for review. In addition to the template, FDEP also encourages the property owner to provide the encumbrance holder with a Specific Purpose Survey, Boundary Survey or Sketch and Description as defined under Chapter 5J-17, F.A.C., or other scaled map or diagram that accurately shows the location of the contamination and proposed restricted area in relation to the location of the encumbrance (e.g., easement) and a summary table of contaminant concentrations. See [Attachment 14](#) for an example of such a diagram. The site/project manager will review copies of all such notices to existing encumbrance holders, together with proof of delivery to each encumbrance holder. Notice should be provided in accordance with the terms for notice set forth in the recorded instrument (i.e., as described in the mortgage or easement), and if proof of delivery is not required by the recorded instrument, then as set forth in the rule.<sup>1</sup> Regardless of whether notice is specifically addressed by the terms of the recorded

<sup>1</sup> [Notice may be provided by email, US mail, overnight mail, courier. Fla. Admin Code r. 62-780.220\(7\).](#)

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instrument, if the encumbrance holder is a business entity formed in or otherwise qualified to do business in the State of Florida, the property owner should also send notice to the registered agent of the business entity which may be identified on the Florida Department of State's Division of Corporation Website [[www.sunbiz.org](http://www.sunbiz.org)]. This will ensure that the notice is properly received and subsequently routed for review within the business entity's organization.

- *Mortgage Holders (also known as Mortgagees)*. If there are mortgage holders (typically these are banks) or other holders of financial instruments (collectively referred to throughout this document as mortgage holders), then in addition to the above Notice, a "Subordination of Mortgage" (see [Attachment 10](#)) may be obtained by the owner and recorded along with an RC, if a RC is the chosen form of IC. However, FDEP will not need a subordination unless the mortgage materially conflicts with the RC. The FDEP does not expect that material conflicts between the RC and the mortgage will occur very often. Examples of when a material conflict may exist between the RC restrictions and a mortgage include, but are not limited to, the following:
  - the restriction requires an engineering control with an active control system, if the active control includes a substantial recurring expense or if the failure to maintain the active control could result in an imminent hazard (within a few days or weeks). Examples include:
    - active gas collection systems that remove ignitable, corrosive, reactive or toxic vapors (for example, landfill gas or hydrogen sulfide); or
    - maintenance of active containment structures such as holding tanks or ponds that may hold substantial volumes of fluid and any control mechanisms to maintain the appropriate level of material for those structures requiring daily or weekly attention
  - the language of the mortgage itself specifically prohibits limitations on the use of the property or, conversely, requires the property to be used in a manner directly in conflict with the land use restrictions in the RC.
- *Easements, Tenants (Lessees), and other Interests (collectively referred to as easement holder)*. The property owner should review the recorded encumbrances on the property to make a determination as to whether it is appropriate to seek subordination or joinder and consent from holders of recorded encumbrances. See [Attachment 12](#) and [Attachment 13](#).
- *Examples of situations wherein a property owner may wish to seek a Joinder and Consent* include, but are not limited to, the following:<sup>2</sup>
  - the restriction requires an engineering control with an active control system *located in the easement*, if the active control includes a substantial recurring expense or if the failure to maintain the active control could result in an imminent hazard (within a few days or weeks). Examples include:
    - active gas collection systems that remove ignitable, corrosive,

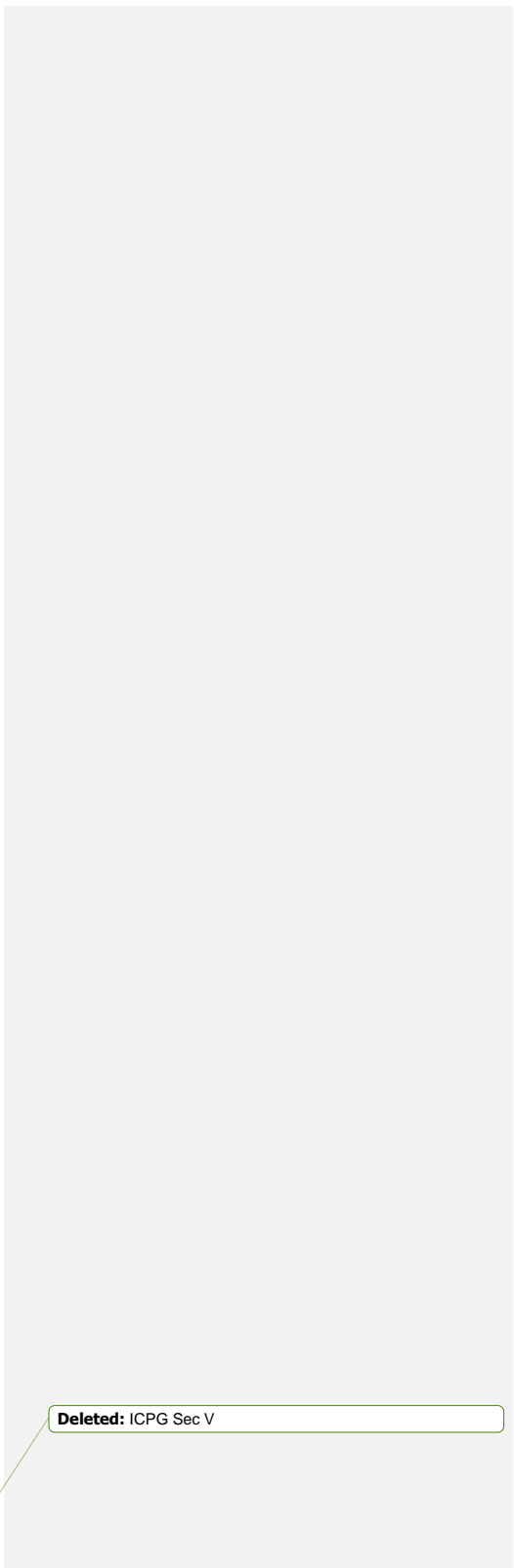
<sup>2</sup> The examples of a material conflict between the restrictions in a proposed RC and an existing encumbrance outlined in the guidance should not be construed as the only instances where a material conflict may exist. Whether or not a material conflict exists is a matter for the property owner and encumbrance holder to determine and resolve, if possible. For this reason, FDEP encourages the property owner to engage in dialogue with encumbrance holders early in the process to resolve any potential issues.

- reactive or toxic vapors (for example, landfill gas or hydrogen sulfide); or
  - maintenance of active containment structures such as holding tanks or ponds that may hold substantial volumes of fluid and any control mechanisms to maintain the appropriate level of material for those structures requiring daily or weekly attention.
- an engineering control *located in the easement* that requires a cap to prevent direct exposure to contaminated soil or to minimize the leaching of contaminants into the groundwater, and if an easement holder has the right to conduct activities that may interfere with the establishment or maintenance of this control.
- an easement holder has the right to disturb the soil or ground water for construction and maintenance unless it is demonstrated that during the construction of the use allowed in the easement or its maintenance:
  - the likelihood of mobilizing contamination in groundwater is small, or,
  - *the risk posed by exposure is acceptable.*

For example, if a city has a stormwater easement on the property that goes through the area with remaining groundwater contamination and has not yet built the stormwater conveyance or retention facility, then the property owner should consider obtaining a Joinder and Consent from the city because in digging the stormwater facility it is likely that the groundwater contamination will be mobilized and move in to the stormwater facility<sup>3</sup>. In cases where the stormwater easement allows continued maintenance of an existing system and such maintenance may mobilize contamination in ground water or there is a risk of direct exposure to contaminated soil, then Joinder and Consent from the encumbrance holder should also be pursued. A property owner may choose to seek Joinder and Consent from a utility or other easement holder for its underground or aboveground easement where the proposed restrictions in the RC encompass the easement. Such easements may provide for construction, maintenance, and repair (including replacement) of transmission, distribution or similar facilities which may result in excavation of contaminated soil or have the potential to mobilize ground water contamination. See [Attachment 12](#) and [Attachment 13](#), Sample Subordination of Encumbrance, Sample Joinder and Consent of Encumbrance. Even if a joinder and consent is determined by the property owner to be unnecessary, the owner should notify the easement holder of the existence of the contamination, restriction on use of the property, and the requirement to maintain an engineering control (if applicable) on the

<sup>3</sup> Remember, in evaluating whether to pursue a conditional SRCO and an RC, the assessment and other data is based upon the conditions of the property at the time the assessment and remediation work was conducted which is prior to, for example, the construction of a stormwater facility.

property which is subject to the easement. See [Attachment 9](#) for a template Notice letter.



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