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Tim Bahr, Division Director  
Division of Waste Management  
Florida Department of Environmental Protection  
2600 Blair Stone Road  
Tallahassee, FL 32399

**Re: Florida Brownfields Association Comments Regarding Non-Recorded Institutional Controls & Follow-Up to March 5, 2020 Meeting**

Dear Mr. Bahr:

We thank you and the rest of the Florida Department of Environmental Protection (“**FDEP**” or “**Department**”) team for taking the time to meet with representatives of the Florida Brownfields Association (“**FBA**”) on March 5, 2020 at FDEP’s offices in Tallahassee. The FBA greatly appreciates the Department’s time and attention to matters raised by FBA members and the clarifications made by FDEP staff regarding Department policy.

Pursuant to Item (6) of the March 31, 2020 *Summary & Notes of March 5, 2020 Meeting Between Representatives of Florida Brownfields Association (“FBA”) and Florida Department of Environmental Protection (“FDEP”) to Discuss Use of Non-Recorded Institutional Controls (“NRICs”)*, FBA members have collaborated to prepare suggested revisions to the Department’s Institutional Controls Procedures Guidance (“**ICPG**”).

The suggested revisions encompass the following topics and issues:

- (1) In keeping with the topics discussed at the March 5 meeting, Sections C.1. and C.2. of the ICPG have been revised to include specific discussion of the Water Management District (“**WMD**”) permitting NRIC and to provide some legal background on the relevant law.
- (2) Terminology throughout has been standardized to refer to Institutional Controls other than Restrictive Covenants as “Non-Recorded Institutional Controls” (“**NRICs**”), and water management districts are referred to throughout as “**WMDs**.”
- (3) FBA intends to pursue dialogue with the Department on the question of whether regulation of well construction by local governments is legally pre-empted by the law cited in footnotes 1 and 2 of ICPG Section C.2. The law cited therein addresses itself to permitting the use of water under Part II of Chapter 373, and not to regulation of well construction under Part III of Chapter 373. Some changes have been proposed to Section C.2. to clarify the significance of the law cited in the footnotes.

- (4) As stated in a comment to FBA’s document proposing changes to Section C.2., FBA intends to engage in and open discussions with FDEP regarding the statutory standard at Fla. Stat. s. 376.301(22) and the requirement that ICs “minimize exposure” to contaminants. It is FBA’s opinion that elimination of risk posed by circumstances based on an assumption that exposure will result from a violation of law or a restrictive covenant, or a circumstance that is highly unlikely, given the totality of circumstances, including practical and real world considerations, is not required.
- (5) FBA intends to pursue further dialogue with the Department on the question of what types of county or municipal ordinances or other local law, such as comprehensive plan provisions, might be sufficiently protective to function as NRICs. Language has been suggested in Section C.2. regarding certain types of law that might suffice.
- (6) FBA has suggested in Section C.2. that Irrigation Water Screening Levels (“**IWSLs**”) be utilized when determining whether certain NRICs are sufficiently protective relative to non-potable uses such as irrigation.
- (7) FBA has suggested throughout the ICPG that the precise language from Rule 62-780.220(7) — which provides that encumbrance holders must receive actual, mailed notice if their rights are “materially affected” by the proposed institutional control — be applied and standardized throughout. FBA has suggested removing other terminology, such as “material conflict” and “intersect,” which do not appear in Chapter 62-780.
- (8) On a related note, FBA intends to pursue dialogue with the Department regarding whether encumbrance holder rights can in a legal sense be “materially affected” by NRICs that utilize existing, independent permitting requirements that govern the encumbrance holder’s activities on-site regardless of the Department’s approval of a site closure. FBA members contend that in such a case, encumbrance holders fall outside the class of notice parties described in Rule 62-780.220(7) and can receive notice in some form other than actual, mailed notice.
- (9) FBA has also suggested revisions to Section C.17., *IC Notice Procedures*, that clarify notice addressees and acceptable delivery methods and that utilize the “materially affect” standard appearing in Rule 62-780.220(7) rather than the “material conflict” language, which does not appear in the rule.
- (10) FBA has also suggested revisions to the template notice letters provided at Attachment 9A, *Mailed Notice of Intent to Approve Use of Institutional Control for Real Property Owners, Residents, Lessees, Encumbrance Holders*. These revisions are intended to standardize references to “materially affected” encumbrance holders as noted above.
- (11) As reflected in proposed changes to Attachment 9A, FBA proposes to remove language that appears to require the person responsible for site rehabilitation (“**PRSR**”) to attach copies of recorded easements to notice letters sent to easement holders.
- (12) As noted in comments to FBA’s documents proposing changes to Attachments 9A and 9D, FBA would like to discuss with the Department the timeframes, process, and considerations for Department evaluation and response to comments that are received by the Department in response to notices to easement or encumbrance holders – particularly as they relate to easement holders.

(13) FBA has proposed revisions to Attachment 9D, *Mailed Notice of Intent to Approve Use of Institutional Control for Non-Source Property Owners*, to reflect many of the same considerations noted above, including clarifications related to the scope of WMD permitting rules. The comment noted in the preceding paragraph is reiterated in FBA's comment on Attachment 9D.

(14) FBA members have called attention to what appears to be a typo in Attachment 13, *Sample Joinder and Consent of Encumbrance Holder*, consisting of language requiring encumbrance holders to "subordinate" encumbrances to Declarations of Restrictive Covenant ("DRCs").

We appreciate the Department's dedication to cooperating with FBA and others within our state's community of environmental professionals to improve Florida's approach to protecting our environment and allowing Florida's economy to flourish.

If you have any questions or would like to discuss this letter and the enclosed materials, please do not hesitate to let us know. Thank you.

Best regards,

*/s/ Jason S. Lichtstein*

Jason S. Lichtstein  
President, Florida Brownfields Association (FBA)

*/s/ Frank L. Hearne*

Frank L. Hearne  
Co-Chair, FBA Technical Committee

*/s/ Timothy Terwilliger*

Timothy Terwilliger  
Co-Chair, FBA Technical Committee