

WAC 173-340-440 Institutional controls. (1) Purpose. Institutional controls are measures undertaken to limit or prohibit activities that may interfere with the integrity of an interim action or cleanup action or that may result in exposure to hazardous substances at a site. Institutional controls may include:

(a) Physical measures such as fences;

(b) Use restrictions such as limitations on the use of property or resources; or requirements that cleanup action occur if existing structures or pavement are disturbed or removed;

(c) Maintenance requirements for engineered controls such as the inspection and repair of monitoring wells, treatment systems, caps or groundwater barrier systems;

(d) Educational programs such as signs, postings, public notices, health advisories, mailings, and similar measures that educate the public and/or employees about site contamination and ways to limit exposure; and

(e) Financial assurances (see subsection (11) of this section).

(2) Relationship to engineered controls. The term institutional controls refers to nonengineered measures while the term engineered controls means containment and/or treatment systems that are designed and constructed to prevent or limit the movement of, or the exposure to, hazardous substances. See the definition of engineered controls in WAC 173-340-200 for examples of engineered controls.

(3) Applicability. This section applies to remedial actions being conducted at sites under any of the administrative options in WAC 173-340-510 and 173-340-515.

(4) Circumstances required. Institutional controls shall be required to assure both the continued protection of human health and the environment and the integrity of an interim action or cleanup action in the following circumstances:

(a) The cleanup level is established using Method A or B and hazardous substances remain at the site at concentrations that exceed the applicable cleanup level;

(b) The cleanup level is established using Method C;

(c) An industrial soil cleanup level is established under WAC 173-340-745;

(d) A groundwater cleanup level that exceeds the potable groundwater cleanup level is established using a site-specific risk assessment under WAC 173-340-720 (6)(c) and institutional controls are required under WAC 173-340-720 (6)(c)(iii);

(e) A conditional point of compliance is established as the basis for measuring compliance at the site;

(f) Any time an institutional control is required under WAC 173-340-7490 through 173-340-7494; or

(g) Where the department determines such controls are required to assure the continued protection of human health and the environment or the integrity of the interim or cleanup action.

(5) Minimum requirements. Cleanup actions that use institutional controls shall meet each of the minimum requirements specified in WAC 173-340-360, just as any other cleanup action. Institutional controls should demonstrably reduce risks to ensure a protective remedy. This demonstration should be based on a quantitative, scientific analysis where appropriate.

(6) Requirement for primary reliance. In addition to meeting each of the minimum requirements specified in WAC 173-340-360, cleanup actions shall not rely primarily on institutional controls and monitor-

ing where it is technically possible to implement a more permanent cleanup action for all or a portion of the site.

(7) Periodic review. The department shall review compliance with institutional control requirements as part of periodic reviews under WAC 173-340-420.

(8) Format.

(a) For properties owned by a person who has been named as a potentially liable person or who has not been named a potentially liable person by the department but meets the criteria in RCW 70.105D.040 for being named a potentially liable person, appropriate institutional controls shall be described in a restrictive covenant on the property. The covenant shall be executed by the property owner and recorded with the register of deeds for the county in which the site is located. This restrictive covenant shall run with the land, and be binding on the owner's successors and assigns.

(b) For properties owned by a local, state, or federal government entity, a restrictive covenant may not be required if that entity demonstrates to the department that:

(i) It does not routinely file with the county recording officer records relating to the type of interest in real property that it has in the site; and

(ii) It will implement an effective alternative system to meet the requirements of subsection (9) of this section.

The department shall require the government entity to implement the alternative system as part of the cleanup action plan. If a government entity meets these criteria, and if it subsequently transfers its ownership in any portion of the property, then the government entity must file a restrictive covenant upon transfer if any of the conditions in subsection (4) of this section still exist.

(c) For properties containing hazardous substances where the owner does not meet the criteria in RCW 70.105D.040 for being a potentially liable person, the department may approve cleanup actions that include restrictive covenants or other legal and/or administrative mechanisms. The use of legal or administrative mechanisms that do not include restrictive covenants is intended to apply to situations where the release has affected properties near the source of the release not owned by a person potentially liable under the act. A potentially liable person must make a good faith effort to obtain a restrictive covenant before using other legal or administrative mechanisms. Examples of such mechanisms include zoning overlays, placing notices in local zoning or building department records or state lands records, public notices and educational mailings.

(9) Restrictive covenants. Where required, the restrictive covenant shall:

(a) Prohibit activities on the site that may interfere with a cleanup action, operation and maintenance, monitoring, or other measures necessary to assure the integrity of the cleanup action and continued protection of human health and the environment;

(b) Prohibit activities that may result in the release of a hazardous substance that was contained as a part of the cleanup action;

(c) Require notice to the department of the owner's intent to convey any interest in the site. No conveyance of title, easement, lease, or other interest in the property shall be consummated by the property owner without adequate and complete provision for the continued operation, maintenance and monitoring of the cleanup action, and for continued compliance with this subsection;

(d) Require the land owner to restrict leases to uses and activities consistent with the restrictive covenant and notify all lessees of the restrictions on the use of the property. This requirement applies only to restrictive covenants imposed after February 1, 1996;

(e) Require the owner to include in any instrument conveying any interest in any portion of the property, notice of the restrictive covenant under this section;

(f) Require notice and approval by the department of any proposal to use the site in a manner that is inconsistent with the restrictive covenant. If the department, after public notice and comment approves the proposed change, the restrictive covenant shall be amended to reflect the change; and

(g) Grant the department and its designated representatives the right to enter the property at reasonable times for the purpose of evaluating compliance with the cleanup action plan and other required plans, including the right to take samples, inspect any remedial actions taken at the site, and to inspect records.

(10) Local government notification. Before a restrictive covenant being established under this chapter, the department shall notify and seek comment from a city or county department with land use planning authority for real property subject to the restrictive covenant. Once a restrictive covenant has been executed, this same department shall be notified and sent a copy of the restrictive covenant. For independent cleanups reviewed by the department under WAC 173-340-515 that use restrictive covenants, the person conducting the cleanup shall be responsible for these notifications.

(11) Financial assurances. The department shall, as appropriate, require financial assurance mechanisms at sites where the cleanup action selected includes engineered and/or institutional controls. It is presumed that financial assurance mechanisms will be required unless the PLP can demonstrate that sufficient financial resources are available and in place to provide for the long-term effectiveness of engineered and institutional controls adopted. Financial assurances shall be of sufficient amount to cover all costs associated with the operation and maintenance of the cleanup action, including institutional controls, compliance monitoring, and corrective measures.

(a) Mechanisms. Financial assurance mechanisms may include one or more of the following: A trust fund, a surety bond, a letter of credit, financial test, guarantee, standby trust fund, government bond rating test, government financial test, government guarantee, government fund, or financial assurance mechanisms required under another law (for example, requirements for solid waste landfills or treatment, storage, and disposal facilities) that meets the requirements of this section.

(b) Exemption from requirement. The department shall not require financial assurances if persons conducting the cleanup can demonstrate that requiring financial assurances will result in the PLPs for the site having insufficient funds to conduct the cleanup or being forced into bankruptcy or similar financial hardship.

(12) Removal of restrictions. If the conditions at the site requiring an institutional control under subsection (4) of this section no longer exist, then the owner may submit a request to the department that the restrictive covenant or other restrictions be eliminated. The restrictive covenant or other restrictions shall be removed, if the department, after public notice and opportunity for comment, concurs.

[Statutory Authority: Chapter 70.105D RCW. WSR 01-05-024 (Order 97-09A), § 173-340-440, filed 2/12/01, effective 8/15/01; WSR 96-04-010 (Order 94-37), § 173-340-440, filed 1/26/96, effective 2/26/96; WSR 91-04-019, § 173-340-440, filed 1/28/91, effective 2/28/91.]