Chapter 23
USE AND ENFORCEABILITY OF INSTITUTIONAL CONTROLS IN RISK-BASED ENVIRONMENTAL CLEANUPS—THEY'RE CHEAP AND GOOD LOOKING, BUT WILL THEY LAST?

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Synopsis

§ 23.01 Introduction*

Federal and state environmental agencies are increasingly allowing less stringent cleanups of contaminated properties, based on site-specific risk assessments that take into account the probable future use of the sites and the measures that can be implemented to limit public exposure to the residual contamination. Those measures can take the form of "engineered controls," which are physical barriers separating the public from the contamination, or "institutional controls," which are legal or administrative measures that limit public use of contaminated properties. Use of such controls can significantly expedite cleanup times and reduce cleanup costs, yet serve to protect both the public health and the environment.

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This paper initially examines the use of institutional controls in conducting these so-called "risk-based" cleanups, the different types of institutional controls, and how institutional controls are implemented. The paper then examines the concerns that have been raised regarding the enforceability of the negative easements and covenants that are typically used as institutional controls, legislative measures that have been implemented to address those enforceability issues, and drafting techniques that can be used to help avoid the risk of an institutional control failing.

§ 23.02 What Are Institutional Controls and Why Are They Useful?

The U.S. Environmental Protection Agency (EPA) defines institutional controls as non-engineered measures such as legal or administrative controls that help to minimize the potential for public exposure to contamination or to enhance or protect the integrity of a remedy.[1] Institutional controls work by limiting land or resource use or by providing information that helps modify or guide human behavior at a site.[2] Institutional controls can range from easements or covenants to zoning restrictions, excavation permits, or well drilling restrictions.

[1] Emerging Role of Institutional Controls

Environmental cleanups conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] the Resource Conservation and Recovery Act (RCRA),[4] and state Superfund statutes traditionally were conducted with treatment technologies that significantly reduced

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[1] Office of Solid Waste & Emergency Response, EPA, *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*, OSWER 9355.0-74FS-P, at 2 (2000) [hereinafter *Site Manager's Guide*].

[2] Office of Solid Waste & Emergency Response, EPA, *Institutional Controls: A Guide to Implementing, Monitoring and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups* 2 (Dec. 2002) *available* at http://www.epa.gov/superfund/action/ic/guide/icgdraft.pdf [hereinafter *Draft Institutional Controls Guide*]. Note that the *Draft Institutional Controls Guide* has not been finalized and should not be relied on as authority.

[3] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000).

[4] Solid Waste Disposal Act, 42 §§ U.S.C. 6901-6992k (2000).

the volume, toxicity, and mobility of the hazardous substances in the soil and groundwater at a site.[5] A site was considered "clean" when hazardous substances were removed to a level that posed no known risk to human health or the environment.[6] Such a cleanup satisfied the expectation that once cleaned a site could be made available for unrestricted future land use whether that be residential, industrial, or recreational.[7] However, this traditional cleanup approach has come under much criticism in recent years. With the decreasing availability of federal funds and limited private resources for cleanups, critics have argued that this approach has been wasteful and has resulted in significant expenditures of resources without much added protection of human health and the environment.[8]

As a consequence, a new paradigm of environmental cleanups has recently emerged.[9] Under this new paradigm, cleanup objectives are achieved by a more practical approach that combines permanent remedies with mechanisms that limit exposure to the hazardous substances that remain at a site. This new risk-based approach is premised on the notion that by limiting exposure to hazardous substances through land use restrictions, the same amount of protection of human health and the environment can be achieved without undertaking costly and time-consuming cleanups.[10] In other words, by tailoring cleanups to anticipated future land uses the same protec-

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[5] *See, e.g.*, 42 U.S.C. § 9621(b)(1) (2000) (stating that such remedial actions "are to be preferred over remedial actions not involving such treatment").

[6] Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 *Tul. Envtl. L.J.* 63, 89-90 (Winter 1996).

[7] Alex Geisinger, "Rethinking Risk-Based Environmental Cleanup," 76 *Ind. L.J.* 367, 370 (Spring 2001).

[8] *Id.* at 370-71 (citing Stephen Breyer, *Breaking the Vicious Circle* 11-19 (1993)).

[9] The new paradigm established itself very quickly. In the first 12 years after CERCLA was enacted, institutional controls were used in approximately 14% of all cleanups. Larry Schnapf, "Protecting Health and Safety with Institutional Controls," 14 *Nat. Resources & Env't* 251 (Spring 2000). Since the mid-1990s, about 60% of all remedies approved by EPA have utilized some form of institutional controls to address long-term management issues at contamination sites. *Id.* The percentage of cleanups utilizing institutional controls is even higher for sites administered under state brownfield and voluntary cleanup statutes. *Id.*

[10] Geisinger, *supra* note 7, at 371.

tions can be achieved more cheaply and rapidly. Under this new cleanup paradigm, institutional controls are the mechanisms used to ensure that, in future land uses, human exposure to hazardous substances left at a site is limited.[11]

Though EPA does not view institutional controls as a means to circumvent the objectives of permanent treatment, EPA does consider institutional controls to be an integral component of a complete remedy, particularly at CERCLA sites.[12] In the National Contingency Plan (NCP), the implementing regulations of CERCLA, EPA expressly acknowledges that institutional controls are appropriate when more permanent or active treatment of hazardous substances is impractical: "treatment of the principal threats posed by a site, with priority placed on treating waste that is liquid, highly toxic or highly mobile, will be combined with engineering controls (such as containment) and institutional controls, as appropriate, for treatment residuals and untreated waste."[13]

While the NCP emphasizes that institutional controls should be used to supplement permanent treatment remedies, institutional controls can be used as the sole remedy in circumstances where active response measures are determined to be impracticable.[14] EPA also recognizes the use of institutional controls at RCRA corrective-action sites.[15] Similarly, most states have enacted risk-based voluntary cleanup programs that also set cleanup standards according to reasonably foreseeable future land uses. In almost all cases, the projected future land use for such sites is secured with a variety of institutional controls.[16]

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[11] Envtl. Law Inst., *Institutional Controls In Use*, ELI Project No. 922042, at 3-4 (1995).

[12] *See generally Draft Institutional Controls Guide, supra* note 2.

[13] 40 C.F.R. § 300.430(a)(1)(iii)(C) (2002) (emphasis added). The regulation further states that EPA "expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate." *Id.* § 300.430(a)(1)(iii)(D).

[14] *Id.*

[15] *See* "Proposed Rules: Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities," 61 Fed. Reg. 19,432 (proposed May 1, 1996); Draft Guidance, "Completion of Corrective Action Activities at RCRA Facilities," 67 Fed. Reg. 9174 (Feb. 27, 2002).

[16] *See* ASTM Int'l., *Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls*, E 2091-00, at 7-9 (2000).

Thus, institutional controls can and increasingly will play an important role in cleanup programs throughout the nation.

§ 23.03 Types of Institutional Controls

Institutional controls encompass a wide variety of administrative and legal tools that can be used to help ensure that future land uses are consistent with the risk-based cleanup decisions made at the site. Some of the most commonly used institutional controls are known as "proprietary controls" and are often implemented in the form of easements, covenants, and equitable servitudes. Other commonly used institutional controls include governmental controls, informational tools, and enforcement agreements and permits.

[1] Proprietary Controls

Proprietary controls are based on state property law and are designed to limit future activities at a site to prevent unacceptable risks to human health and the environment. Proprietary controls can be used to limit human exposure to the contamination, impose restrictions on activities that may compromise the integrity of a remedy, and provide continuing access to a site for operation and maintenance activities such as groundwater sampling. Private party cleanups often employ proprietary controls because they can be implemented without involving federal, state, or local regulatory authorities. Proprietary controls also are attractive at sites that require long-term institutional controls because they purport to create legal property interests that bind subsequent owners. However, as discussed in the latter half of this paper, the enforceability of the most commonly used proprietary controls can be problematic and careful attention is required to ensure these controls will survive over time and remain enforceable against successors in title.[17] These controls are described briefly below.

[a] Easements

An easement is a property right conveyed by a landowner to another party, which gives that party specific rights with regard to the landowner's property.[18] An "affirmative easement"

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[17] *See* discussion *infra* § 23.07.

[18] See *infra* § 23.07[2] for a more detailed discussion of easements.

allows the easement holder to use the subject property for a particular purpose, such as access to conduct groundwater sampling. A "negative easement" imposes limits on how the landowner can use the subject property, such as a prohibition on deep excavation on a property. Because valid easements bind subsequent landowners to the same extent as the original landowner, they are useful tools to control land use over long periods of time.

[b] Covenants Running with the Land

Covenants running with the land (real covenants) are agreements made in connection with a conveyance of property to use, or limit the use of, the property in a certain manner.[19] For example, a landowner might transfer his or her property but require the grantee to agree not to use the property for residential purposes. Because a valid real covenant binds all subsequent landowners, it is a useful tool for imposing long-term land use restrictions.

[c] Equitable Servitudes

Equitable servitudes arose in courts of equity when courts began enforcing agreements concerning land use that did not meet all of the formal requirements of real covenants.[20] Thus, if a court were to conclude that a covenant not to excavate did not constitute a real covenant, it might enforce the covenant against subsequent landowners as an equitable servitude. Because equitable servitudes are enforced only in equity, the holder of an equitable servitude cannot seek damages for a breach of the servitude; it can only be enforced by injunction.[21] Again, because valid equitable servitudes bind all subsequent landowners, they can be used to impose perpetual restrictions on the use of land.

[d] Reversionary Interests

A reversionary interest is created when a landowner conveys property but specifies that the property will either automatically revert to the transferor under specified conditions or the

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[19] See discussion *infra* § 23.07[1] regarding the elements of a valid real covenant.

[20] See discussion *infra* § 23.07[1] regarding the elements of a valid equitable servitude.

[21] See discussion *infra* § 23.07[1][a][iii] regarding these remedies.

transferor can elect to take the property back upon the occurrence of certain conditions.[22] For example, a seller of property on which contaminated soils have been consolidated and capped may include in the deed a provision stating that if deep excavation is ever conducted near the cap, the property will revert to the seller. Reversionary interests are binding upon subsequent purchasers of the property, and each new owner must comply with the conditions or lose the property.

Reversionary interests are rarely used in government-lead cleanups for a variety of reasons.[23] First, creating such an interest requires a land transfer, which typically does not occur during a cleanup. Secondly, the governmental agency does not own the contaminated site and cannot create an interest that would revert to itself. Instead, at most the agency could require the landowner to create a reversionary interest for itself if the owner ever transfers the land. Thus, reversionary interests are not particularly effective enforcement tools for governmental agencies.

[e] Conservation Easements

Various states have adopted statutes that provide for easements to conserve and protect natural and scenic properties. These easements, commonly referred to as conservation easements,[24] could be used, for example, to ensure that open space is maintained on a parcel to prevent activities on the land that might impair the integrity of a tailings cap.

Conservation easements created pursuant to statutes are not subject to the kind of enforceability issues discussed below that affect traditional easements and covenants. However, conservation easements are only occasionally used as proprietary controls, because these creatures of statutes are not designed to prevent exposures to contamination or to protect engineered controls. Instead, by definition, conservation easements are restrictions imposed on land to protect the natural and scenic

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[22] *See* 1 Richard R. Powell, *Powell on Real Property* § 13.05[1] & [2] (Patrick J. Rohan, rev. ed., 2003).

[23] See discussion *infra* § 23.07[8][a] regarding use of reversionary interests as proprietary controls in the private context.

[24] *See* Uniform Conservation Easement Act (1981), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm.

condition of the land.[25] Because the typical cleanup site is neither natural nor scenic, conservation easement statutes typically do not provide a means to impose proprietary controls. Conservation easements also cannot be used in most private cleanups because a governmental body or charitable organization must hold the easements.[26]

[f] Statutory Environmental Covenants

As discussed in more detail below, some states have passed statutes specifically designed to provide owners of contaminated property with more options for creating enforceable restrictions on the future use of their land.[27] These statutes, often referred to as "environmental covenant statutes," override the common law impediments to relying on easements and covenants as proprietary controls, by statutorily providing that such covenants or easements bind future owners of the land, despite any common law rules to the contrary.

[2] Informational Devices

Informational devices provide the public with information about risks from contamination at a particular site. These tools are easy to use because, unlike most proprietary controls, they do not require a conveyance of a property interest. Although an informational device, such as a deed notice, may be effective to provide notice to future landowners and discourage inappropriate uses of contaminated land, these controls do not restrict a subsequent property owner's legal right to use his or her property.[28] Common examples of informational tools are deed notices, state hazardous waste site registries, and advisories.

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[25] *E.g.*, Utah Code Ann. § 57-18-2(1) (2002). However, note that the definition of conservation easement under the Uniform Act is slightly broader and includes easements given for the purposes of "protecting natural resources [or] maintaining or enhancing air or water quality." Uniform Conservation Easement Act, *supra* note 24, § 1(1). Certain kinds of proprietary controls might fit within this broader standard.

[26] Uniform Conservation Easement Act, *supra* note 24, § 1(2).

[27] *See* discussion *infra* § 23.07[6] & [7].

[28] One of the most famous examples of an informational device that did not provide long-term protection is the notice that Hooker Chemical incorporated into the deed for the Love Canal property near Niagara Falls, New York. The deed notice declared the presence of waste products on the property from the manufacturing of chemicals and stated that the grantee assumed all risk and liability related to the future use of the property. United States v. Hooker Chemicals & Plastics Corp., 850 F. Supp. 993, 1027-

[a] Deed Notices

Deed notices are non-enforceable informational documents filed in public land records. They can be used to advise the public of the nature and extent of the contamination and the associated public health risks, that a site is subject to a consent decree and to institutional controls, that the property is located within a current or former Superfund site, and that certain activities on the property could result in risks to human health or the environment.

[b] State Registries of Hazardous Waste Sites

Many states maintain registries of contaminated sites. Other institutional controls can require that any person conveying title to a property identified on the registry disclose to potential purchasers that the property is listed. Some state statutes also provide that the use of property listed on the registry cannot be substantially changed without state approval.[29] One limitation of the use of registries as institutional controls is that the procedures vary from state to state and are discretionary.[30] However, the registries can be effective in providing information to the public, particularly in combination with the use of other institutional controls.

[c] Advisories

Advisories are governmental warnings that provide notice about potential risks to users of land, surface water, or groundwater. These types of warnings are aimed at warning against particular activities and are not likely to prevent incidental exposure to hazardous substances in the soil or groundwater. Advisories generally have a very short useful life and must be continually renewed to be effective. Like the state registries, these measures are most useful when used in conjunction with other institutional controls.

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28 (W.D.N.Y. 1994). Hooker Chemical's corporate successor ultimately settled its CERCLA liability with the United States for $129 million. Press Release, U.S. Dep't of Justice, "Occidental to Pay $129 Million in Love Canal Settlement" (Dec. 21, 1995), *available at* http://www.usdoj.gov/opa/pr/Pre_96/December95.

[29] *See, e.g.,* Missouri Hazardous Waste Management Law, Mo. Rev. Stat. § 260.465 (2002) (regarding use of abandoned or uncontrolled hazardous waste disposal sites listed on the registry).

[30] *Draft Institutional Controls Guide, supra* note 2, at 16.

[3] Governmental Controls

Governmental controls use the regulatory authority of a governmental entity to impose restrictions on property under its jurisdiction to protect the public health and safety.[31] Governmental controls consist primarily of zoning ordinances, groundwater use restrictions, and site-specific use restrictions.

Governmental controls generally do not require extensive negotiation, drafting, or recording of parcel-specific instruments, as is often the case with proprietary controls.[32] These controls can be effective for areas that involve large numbers of parcels or in circumstances where some of the affected landowners are not liable parties for the environmental contamination. Also, governmental controls are not subject to the enforceability issues that affect proprietary controls.

Governmental controls require the cooperation of the relevant governmental entity that has the authority to adopt them. Moreover, governmental controls depend on that cooperation continuing in perpetuity. Just as a local government can decide to cooperate with the EPA and impose a particular zoning restriction on an area, the next administration can decide to modify or terminate the restriction.[33] Accordingly, governmental controls cannot provide a guarantee that restrictions will be enforced on a long-term basis.

[a] Zoning

Zoning restrictions are one of the most common types of governmental controls. Zoning controls are implemented through local ordinances and are generally not subject to extensive formalities.[34] For example, a local government could prohibit residential development in an area of contamination. Zoning restrictions can also be used to prohibit activities that could disturb certain aspects of a remedy or increase the risk of public exposure to residual contamination left in place at a site. Zoning re-

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[31] *See* John Pendergrass, "Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health," 29 *Envtl. L. Rep.* 10243, 10245-46 (May 1999).

[32] *Site Manager's Guide*, *supra* note 1, at 12.

[33] Geisinger, *supra* note 7, at 387.

[34] Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 735-37 (Cal. Ct. App. 1996).

strictions are commonly used as institutional controls because they involve well-established administrative procedures that simplify the process of implementing institutional controls.

[b] Groundwater Use Restrictions

Groundwater use restrictions are commonly used as institutional controls to limit or prohibit certain uses of groundwater at a site. Implementation of these restrictions depends on state laws governing groundwater ownership and use. Use restrictions can include the establishment of groundwater management or protection areas, prohibitions on certain uses of groundwater, capping or closing of wells, and prohibitions on the drilling of new wells.[35] These restrictions are often included in deed notices to bolster their implementation.

[c] Site-Specific Restrictions on Access or Use

In addition to zoning restrictions, local governments may exercise their police power by imposing site-specific restrictions to protect public health and safety.[36] For example, local governments can adopt ordinances that limit or prohibit certain activities on a contaminated site that could pose a threat to public health, such as excavation in areas where subsurface contamination exists. State or local governments could also require that anyone seeking a building permit in a contaminated area be notified of the contamination and advised of measures to protect themselves from potential exposure risks.

[4] Enforcement Agreements and Permits

Institutional controls are sometimes combined directly with enforcement tools such as administrative orders and consent decrees[37] or permits to limit or prohibit certain activities or land uses. For example, a consent decree may prohibit a landowner from conducting dredging activities at a site where known contamination exists. While these tools are very effective in controlling the actions of parties subject to them, they only bind those parties that are named in the order or decree.

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[35] *Draft Institutional Controls Guide, supra* note 2, at 13.

[36] *Id.* at 14.

[37] *See* EPA, *Model RD/RA Consent Decree* (2001), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf.

Thus, this kind of institutional control cannot be used to ensure that a restriction is honored over time.

§ 23.04 Institutional Control Planning

[1] Thorough, Thoughtful, and Early Planning

One of the most critical components of an effective institutional controls program is thorough and thoughtful planning. This planning should begin early in the remedy selection and design process to ensure the long-term reliability of the institutional controls adopted.[38] In light of the long-term purposes of institutional controls and their impact on future land use, several important issues must be considered early on in the process. First, what institutional controls are appropriate for a site? Second, what are the legal and practical limits of the available institutional controls? Third, which parties will ultimately be responsible for ensuring that the institutional controls selected for a site remain effective and enforceable for as long as they are needed—however long that may be.[39]

The right blend of institutional controls can help ensure the long-term effectiveness and permanence of a remedy. However, inadequate institutional controls can lead to reevaluation and modifications of the remedy components, including the institutional control components. Thus, at CERCLA sites, for example, it is important that institutional controls, like the engineered components of the remedy, are thoroughly evaluated during the feasibility study phase of the remedy selection process. Adding institutional controls to the remedy as an afterthought, without a thorough consideration of their objectives, how they fit into the overall remedy, and whether they can be effectively monitored and enforced, can jeopardize the effectiveness and protectiveness of the entire remedy.[40]

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[38] For CERCLA sites, the evaluation should be considered in the remedial investigation/feasibility study report; for CERCLA sites addressed through non-time-critical removals, the evaluation should be considered in the engineering evaluation/cost analysis study; and for RCRA corrective actions, the evaluation should be part of the RCRA corrective measures study. *Draft Institutional Controls Guide*, *supra* note 2, at 3.

[39] *Id.*

[40] *Site Manager's Guide, supra* note 1, at 2.

[2] Involvement of Interested Stakeholders

During the remedy evaluation phase, the party responsible for the cleanup should seek input from all interested stakeholders including federal, state, and local governments; other responsible parties; and the local community. Early coordination and cooperation with the relevant government agencies, particularly local agencies, in the selection, implementation, and monitoring of institutional controls is important to ensuring their durability and effectiveness. Local government is the only entity that has the legal authority to implement and enforce certain types of institutional controls such as zoning ordinances. Also, local governments generally have an important role in determining future land use of sites in their community and can assist in the community relations aspect of a cleanup.

[3] Cost Considerations

Cost estimates for implementing, monitoring, and enforcing institutional controls should be developed early in the cleanup process. Depending on the institutional controls selected, the cost estimates might address, for example, the cost of legal fees associated with obtaining easements, the cost of purchasing property rights, and the cost of personnel to monitor and enforce institutional controls at a site. Estimating the costs of institutional controls is important for several reasons. First, the CERCLA process requires that, in the remedy selection process, the responsible party compare the cost-effectiveness of remedies that rely on institutional controls to the cost-effectiveness of permanent remedies that would eliminate the need for such controls.[41] Given the required duration of institutional controls, their costs may extend well beyond the traditional 30-year timeframe used to estimate cleanup costs under CERCLA and RCRA.

Another reason to estimate the costs of institutional controls early in the process is to provide the basis for an analysis of whether the costs and risks inherent in a risk-based cleanup outweigh the costs of conducting a permanent cleanup. In some circumstances, a permanent cleanup may even be cheaper than

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[41] 40 C.F.R. § 300.430(e)(9)(i) (2002).

a risk-based cleanup because of the ongoing need to monitor and enforce the institutional controls.

Even in the more typical case where the risk-based cleanup appears to be the less expensive alternative, other considerations may suggest that it is not the best alternative. Various circumstances can increase the risk of an institutional control failing. For example, whether governmental controls restricting land development will be effective over the long term depends to a large extent on the political climate in the area and what kind of development pressures affect the site. Poor rural counties are sometimes lax in enforcing zoning restrictions and not particularly sensitive to environmental concerns. Economically challenged counties and towns also tend to welcome any land development that will increase the tax base. In such instances, there is a risk that governmental controls will fail, particularly where a site appears to have good development potential. In this circumstance, careful consideration should be given to whether proprietary controls can be relied upon to limit the development of the site. If an analysis of state law suggests that the proprietary controls may also fail because they may not be enforceable against subsequent landowners,[42] there is a significant risk that the entire remedy will fail.

In this kind of situation, serious consideration should be given to whether the risks of the institutional controls failing outweigh the cost savings of a risk-based cleanup. When institutional controls fail, the consequences for the responsible party are potentially severe. In addition to stipulated penalties imposed pursuant to the enforcement agreement, the responsible party for the site also faces the possibility of toxic tort claims and could be required to conduct further cleanup activities.[43] Accordingly, where the cost savings of a risk-based cleanup are not substantial, and the risks of institutional con-

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[42] See discussion *infra* § 23.07[1]-[4] regarding the enforceability issues affecting proprietary controls.

[43] To protect against the risk of stipulated penalties, parties should try to negotiate language in the enforcement agreement that specifies that the failure of a future property owner or operator at the site to comply with environmental restrictions does not trigger stipulated penalties. *See* United States v. J.H. Baxter & Co., No. CIV.A. C01-2024SC, 2001 WL 902552, at *11 (N.D. Cal. Aug. 6, 2001).

trols failing appear significant, a permanent cleanup may be the more cost effective approach.

§ 23.05 Selection and Implementation of Institutional Controls

[1] Selecting Institutional Controls

Whether institutional controls are appropriate at a site depends on whether the site will support unlimited land use and unrestricted exposure, regardless of anticipated future land uses, or whether the integrity of an engineered remedy requires protection.[44] If the residual contamination at a site limits its land use or if there are any exposure limitations required for a remedy to be protective, then institutional controls are generally appropriate.[45] In such instances, the responsible party should begin to evaluate the best institutional controls for addressing site-specific circumstances. The types of institutional controls selected depend, in part, on whether the need for such controls is driven by the need to protect an engineered remedy or to protect against an anticipated future land use or a potential exposure.

Institutional controls are considered to be response actions under CERCLA and RCRA. Like engineered components of a remedy, institutional controls must meet all statutory requirements and are subject to the nine evaluation criteria provided in the NCP.[46] Of these criteria, typically the long-term effectiveness and permanence criterion is the most critical in evaluating proposed institutional controls. In evaluating whether an institutional control will be effective over the long term, a number of factors must be considered including whether the controls will need to be imposed on numerous landowners, the size of the area to be managed, the contaminated media to be cleaned up, the persistence of the contamina-

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[44] *Draft Institutional Controls Guide, supra* note 2, at 4.

[45] Cleanup options that leave residual contamination on site include capping wastes in place, construction of containment facilities, groundwater pump and treat, and natural attenuation. These options typically require institutional controls to prevent disturbance of wastes capped in place or to avoid exposure to contaminated groundwater during the attenuation period.

[46] 40 C.F.R. § 300.430(e)(9) (2002).

tion, and whether the local government is willing and able to monitor and enforce long-term institutional controls.[47]

In circumstances where institutional controls must be effective for a long duration, either proprietary or governmental controls should be considered because they at least purport to be enforceable against successors in title. However, both controls have their weaknesses. As will be discussed in detail later in this paper, common law doctrines in many states may preclude enforcement of certain proprietary controls against subsequent landowners.

At some sites, governmental controls may be preferable to other types of controls. For example, a local government may be willing to pass an ordinance that prohibits deep excavation that might cause exposure to subsurface residual contamination. In such instances, implementation of governmental controls may be preferable to informational devices that generally have a short useful life or enforcement tools that would be binding only on certain parties.[48] Also, where numerous parcels of land are involved, pursuing governmental controls is more practical than proprietary controls because the latter would require obtaining easements from multiple landowners.[49] However, as discussed above, governmental controls are subject to the whims of future governmental administrations and cannot ensure long-term restrictions on land use.[50]

Often institutional controls can be used simultaneously—i.e., "layered"—to enhance the protectiveness of a remedy. To restrict future land use, a responsible party might impose an easement on the property restricting use of the land for residential purposes, seek a zoning change restricting residential use, enhance awareness of the restriction through deed notices, and enter into an enforcement agreement such as a consent decree.[51] Institutional controls may also be applied in series to

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[47] *Site Manager's Guide, supra* note 1, at 8.

[48] *See* Lawrence P. Schnapf, "How to Use Institutional Controls for Contaminated Sites," 17 (1) *Prac. Real Est. Law.* 25, 26-27 (2002).

[49] *See id.*

[50] *See* discussion *supra* § 23.03[3].

[51] *Site Manager's Guide, supra* note 1, at 2.

ensure short-term and long-term reliability. For example, a responsible party might agree to an administrative order on consent that initially prohibits the landowner from any development activities during the cleanup, and then later requires the site owner to notify EPA if the site is sold and to work with the local government to implement certain zoning restrictions on the site.[52]

Once institutional controls have been selected for a site, various measures must be taken to ensure that the controls will be enforced and remain effective over time. The remaining portion of this paper focuses on these issues as they apply to proprietary institutional controls, particularly easements, covenants, and equitable servitudes. These issues often are the most complex and challenging for practitioners in this area.

[2] Implementing Proprietary Institutional Controls

Typically, proprietary controls such as easements and covenants are implemented in the enforcement agreement. In the agreement, the responsible party agrees to execute and record a document creating an easement or covenant running with the land that imposes the use restrictions contemplated by the remedy.[53] The specific measures required to implement the proprietary control often depend on the jurisdiction in which the property is located. Other factors affecting implementation of the proprietary control include (1) whether the responsible party is the site owner; (2) if not, whether the landowner is willing to convey the necessary property interests; and (3) who will be the holder of the proprietary control.[54]

At most responsible party-lead sites, responsibility for implementing proprietary controls typically rests with the responsible party. This responsibility generally is enforced through a consent decree, administrative or voluntary cleanup order, or similar mechanism. These enforcement mechanisms should identify the objective of the institutional control, the type of proprietary control to be used, the party that will be the holder of the proprietary control, and include a requirement

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[52] *Id.*

[53] *Model RD/RA Consent Decree, supra* note 37, ¶ 26(c).

[54] *Draft Institutional Controls Guide, supra* note 2, at 9.

that the holder notify EPA or the state if the control is violated.[55] To ensure effective implementation, an experienced real estate attorney with expertise in real property law of the jurisdiction where the site is located should be involved in drafting these provisions. The provisions should provide a legal description of the site, a description of the nature and extent of the contamination, the parties involved, a description of the resource or use being restricted, provisions for enforcement, the parties' rights, language to assure that the proprietary control is binding on subsequent purchasers, and specific notice and approval provisions to modify or terminate the control.[56]

In some instances, the remedy requires restricting land not owned by the responsible party. EPA will require the responsible party to exercise best efforts to obtain the necessary proprietary control, which will often require that compensation be paid to the landowner.[57] If the responsible party cannot obtain the proprietary control despite best efforts, then the responsible party may be required to compensate the EPA or the state for all costs it incurs in acquiring the proprietary control.[58]

Effective implementation of a proprietary control requires that there be a suitable party to enforce the control. The party primarily responsible for enforcing a proprietary control should hold title to the easement or covenant that imposes the control. At CERCLA and other regulated sites, EPA or a state environmental agency typically holds title to that property interest.[59]

Where ownership of the site is to be transferred, a site owner that is a responsible party should consider incorporating proprietary controls into the transfer by creating new covenants or easements running in its favor. In effect, the responsible party can attempt to create a new set of proprietary controls held by itself that mirrors, or even exceeds, the proprietary controls

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[55] *Id.*

[56] *Id.*

[57] *Model RD/RA Consent Decree, supra* note 37, ¶¶ 27 & 28.

[58] *Id.* ¶ 28.

[59] Under section 104(j) of CERCLA, 42 U.S.C. § 9604(j) (2000), EPA may choose to be the grantee of a proprietary control at a CERCLA site. However, once the remedy is completed, another entity must take the property interest or the interest must be terminated. *Id.*

imposed by the governmental agency.[60] Such a strategy allows the responsible party to minimize its potential liability by becoming, in essence, a holder of the proprietary controls, with a right to enforce them.

In addition, as discussed below, in many states, proprietary controls have a better chance of being enforced against subsequent landowners if they are included in a transfer of an interest in land. If the owner retains its own set of proprietary controls in a subsequent transfer of the site, it can help guard against the possibility that the proprietary controls imposed during the cleanup will not be enforceable against subsequent purchasers. Thus, if the holder has difficulty enforcing the original proprietary controls, the responsible party may be able to achieve the same result by enforcing its own separate property rights.

§ 23.06 Monitoring Proprietary Controls

Rigorous periodic review of proprietary controls is critical to ensuring their long-term effectiveness. The responsible party should ensure that there is a process that routinely and critically evaluates whether the proprietary controls remain in place and whether they continue to provide the protections required by the remedy. CERCLA cleanups provide mechanisms, such as operations and maintenance requirements and a five-year review process, for ensuring appropriate institutional control monitoring.[61]

[1] Operation and Maintenance

The principal tool for ensuring effective institutional control monitoring at CERCLA sites is a detailed operation and maintenance plan.[62] This plan typically describes the required monitoring activities and schedules, responsibilities for performing

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[60] However, as discussed below in § 23.07[7], most environmental covenant statutes do not apply to privately created easements and covenants. Accordingly, the effectiveness of this strategy will depend on the state common law rules that are discussed below in § 23.07[1]-[5].

[61] *See* 40 C.F.R. § 300.430(f)(4)(ii) (2002).

[62] A similar plan referred to as a site management plan is prepared for RCRA corrective action sites or state voluntary cleanup sites. Also, at sites where a site owner transfers land and retains or creates its own proprietary controls in the transfer, the site owner might require the subsequent landowner to prepare a site management plan to monitor and enforce such controls at a site.

such activities, reporting requirements, and the process to be followed to address any potential issues.[63] Though the frequency of institutional control monitoring varies depending on site-specific circumstances, operations and maintenance monitoring typically occurs annually. If the responsible party anticipates that the frequency of monitoring may change over time, the enforcement agreement should include language that defines the process for approving a change.

[2] Periodic Reviews

Another institutional control monitoring tool is the periodic review, or in the case of CERCLA sites, the five-year review. These reviews are required if the remedy leaves residual contamination that does not allow for unlimited land use and unrestricted exposure at a site. During this review, the site is inspected and the effectiveness of the institutional controls in protecting human health and the environment or the integrity of the engineered remedy is evaluated. The review may include an evaluation of title to the property to determine whether proprietary controls have been modified or terminated. If any of the institutional controls are not in place during the review, EPA will likely require the responsible party to commit to a schedule as to when such controls will be implemented.[64] If EPA determines that additional institutional controls are required, it may seek to invoke the "additional work" provisions in the enforcement agreement.[65] The additional work can include requiring the responsible party to implement land use restrictions or requiring additional cleanup activities if the responsible party refuses to implement enforceable land use restrictions.[66]

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[63] *Draft Institutional Controls Guide, supra* note 2, at 17.

[64] *See Site Manager's Guide, supra* note 1, at 9.

[65] *Model RD/RA Consent Decree, supra* note 37, ¶¶ 18-21.

[66] In such instance, this may require an amendment to the record of decision, an explanation of significant differences, or a RCRA permit modification, depending on the significance of the change in the remedy. *Site Manager's Guide, supra* note 1, at 9.

§ 23.07 Enforceability Issues Associated with Using Real Covenants, Equitable Servitudes, and Negative Easements as Proprietary Controls

Having examined how proprietary controls are selected, implemented, and monitored, this paper now examines issues concerning the enforceability[67] of the most commonly used proprietary controls: real covenants, equitable servitudes, and easements.[68] Also addressed are the legislative measures that have been adopted to address these enforceability issues and drafting techniques that can help avoid the failure of these proprietary controls.

If certain criteria are met, real covenants, equitable servitudes,[69] and easements create real property interests that give the holder of the interest the right to prevent, or to require, a particular type of activity on a parcel of land and enforce that right against subsequent purchasers of the land. These interests, collectively referred to as servitudes, have different legal characteristics, but they have one thing in common: none of the three provides a perfect vehicle to ensure that a use restriction designed to protect the environment (an environmental use restriction) will be enforceable against subsequent owners of the land.[70]

[1] The Common Law Rules Regarding Real Covenants and Equitable Servitudes

Real covenants and equitable servitudes that are enforced in equity are covenants that affect real property and bind subse-

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[67] Throughout this paper, the terms "enforceability" or "enforceable" refer to whether the restrictions can be enforced against subsequent purchasers of the transferred land, not enforceability between the original contracting parties.

[68] *See* discussion *supra* § 23.03[1].

[69] Note that both real covenants and equitable servitudes are sometimes referred to as "restrictive covenants."

[70] The question of the enforceability of proprietary controls has been briefly addressed in several recent articles. *See, e.g.*, Geisinger, *supra* note 7; Heidi Gorovitz Robertson, "Legislative Innovation in State Brownfields Redevelopment Programs," 16 *J. Envtl. L. & Litig.* 1 (Spring 2001); Pendergrass, *supra* note 31; John S. Applegate & Stephen Dycus, "Institutional Controls or Emperor's Clothes? Long-Term Stewardship of the Nuclear Weapons Complex," 28 *Envtl. L. Rep.* 10631 (1998); Susan C. Borinsky, "The Use of Institutional Controls in Superfund and Similar State Laws," *Fordham Envtl. L.J.* 1 (Fall 1995).

quent purchasers of the land.[71] While these covenants are widely used as tools to impose land use controls in a variety of settings, the law governing those tools remains murky. As one commentator so succinctly put it, the jurisprudence of real covenants and equitable servitudes is an "unspeakable quagmire."[72] The rules applied in this area are complex, vague, and rarely based on common sense, leading to a result-oriented jurisprudence under which it is difficult to predict how a court might resolve a given issue.[73] Because many state courts have not developed a clear statement of these rules, a practical difficulty in using covenants to impose environmental use restrictions is that it is often simply not possible to determine whether a particular covenant will be found to be enforceable against subsequent purchasers.

Traditionally, in order for a covenant to run with the land and bind subsequent purchasers, three elements must be satisfied: (1) the covenant must touch and concern land, (2) there must be horizontal and vertical privity of estate, and (3) the parties must have intended that the covenant run.[74]

In order for a covenant to be deemed an equitable servitude and bind subsequent purchasers of the land: (1) the covenant must touch and concern land, (2) the parties must have intended that the covenant run, and (3) the successor must have taken the land with notice of the covenant.[75]

In considering how to draft a covenant that will be binding on successive landowners, the primary concerns are whether the privity and touch and concern elements can be satisfied. The notice requirement is easily fulfilled by proper recording. The

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[71] 9 Powell, *supra* note 22, § 60.01[2].

[72] *Id.* § 60.01[5] (quoting Rabin, *Fundamentals of Modern Real Property Law* 489 (1974)).

[73] *See id.* § 60.01[5].

[74] Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 623 (Utah 1989). Of course, under many modern recording statutes, as a practical matter, notice of the covenant will be required before subsequent purchasers can be bound. *See* 1 James H. Backman & David A. Thomas, *A Practical Guide to Disputes Between Adjoining Landowners—Easements* § 3.01[3][c][vi] (2002).

[75] 9 Powell, *supra* note 22, § 60.01[5].

intent requirement can be met by simply stating the intent in the transfer document.

[a] The Privity Requirement

Enforcement of a real covenant requires that two elements of the privity requirement be satisfied: horizontal privity and vertical privity. Horizontal privity exists when the covenant is created in a transfer of an interest in land.[76] Vertical privity exists when the original parties to the covenant transfer their interest to subsequent purchasers.[77]

[i] Horizontal Privity

When EPA or a state agency initially requires a landowner to record a notice of deed restrictions, there is, of course, no horizontal privity. If the responsible party owns the site, such party can address this lack of privity by imposing the restriction when it subsequently transfers the land. This will not create privity for the covenant held by the EPA or the state agency, but it will establish privity for the covenant held by the responsible party that can be separately enforced. However, often the responsible party is not the site owner, and EPA sometimes requires a responsible party to exercise "best efforts" to obtain a deed restriction from nearby landowners.[78] In these circumstances, it is not possible to create a covenant that is supported by horizontal privity.

[ii] Vertical Privity

The responsible party also cannot ensure that vertical privity will always exist with respect to the burdened land[79] because that party cannot control subsequent land transfers. In many instances, a landowner that is in a position to violate a covenant will be in privity with the original covenanting party. There are exceptions, however. For example, in most states, an

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[76] *Id.* § 60.04[3][c][iii]. Note that many courts have done away with the horizontal privity requirement. *Id.* § 60.04[3][c].

[77] *Id.* § 60.04[3][c][iv].

[78] *Model RD/RA Consent Decree, supra* note 37, ¶ 27.

[79] In this discussion, the focus is on whether privity exists on the burdened side because, in a cleanup context, the issue is whether the original promisee can enforce the covenant against subsequent owners of the site. However, it should be noted that similar doctrines affect the running of the benefit of a covenant. *See Restatement (First) of Prop.* § 547 (1944).

adverse possessor would take free of the covenant because there is no privity between the adverse possessor and the record owner.[80] In addition, some courts require that, for privity to exist, the successor must have acquired the same estate as that held by the covenanting party.[81] So, for example, if a covenanting party that owns the land in fee simple absolute transfers a life estate or grants a lease, the life estate or leasehold is not burdened by the covenant.

[iii] The Consequence of a Lack of Privity: The Remedy Available

Because privity is not a requirement for the enforcement of a covenant as an equitable servitude, the fact that a landowner may not always be able to satisfy the privity requirement does not mean that these servitudes are inadequate enforcement tools. The practical distinction between a real covenant and an equitable servitude is the remedy available for a breach of the covenant. If a covenant is deemed to run with the land, it can be enforced in law or equity, i.e., injunctive relief and damages can be obtained. On the other hand, as its name suggests, an equitable servitude is only enforced in equity, i.e., only injunctive relief is available.[82] Thus, to ensure that a lack of privity does not destroy the protection of a covenant, the holder of the covenant must be vigilant in monitoring the land's use to ensure that violations are identified and enjoined before they can cause damage. Of course, vigilance will provide no protection against violations of covenants that result in immediate damage, such as a violation of some no-excavation covenants.

[b] The Touch and Concern Requirement

Under traditional covenant analysis, a real covenant or equitable servitude will be enforced against subsequent purchasers of the land only where the covenant "touches and concerns" land. This requirement is the most troubling issue in considering whether covenants can be effectively used as proprietary controls.

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[80] Backman & Thomas, *supra* note 74, § 3.01[3][c][v][B][I].

[81] *Id.*; 9 Powell, *supra* note 22, § 60.04[3][c][iv]; Geisinger, *supra* note 7, at 392.

[82] 9 Powell, *supra* note 22, § 60.04[2].

[i] The Meaning of Touch and Concern

While most courts agree that to be enforced as a real covenant or an equitable servitude a covenant must touch and concern land, they have not provided a clear test for determining when a covenant does touch and concern land. The Utah court, in a widely cited decision, *Flying Diamond Oil Corp. v. Newton Sheep Co.*,[83] explored the various formulations of the touch and concern rule:

- The covenant in purpose and effect substantially alters the rights that flow from ownership of the land.
- The covenant must "bear upon the use and enjoyment of the land and be of the kind that the owner of an estate or interest in land may make because of his ownership right."
- "If the performance of a covenant can be enforced regardless of one's status as owner of an interest in the land, the covenant is personal and, absent other restrictions, assignable."
- "A real covenant bestows a benefit or imposes a burden only on the rights of a landholder, as landholder."
- The covenant must be of "such character that its performance or nonperformance will so affect the use, value, or enjoyment of the land itself that it must be regarded as an integral part of the property."
- The test is whether it "enhances the land's value [on the benefit side], and for the burden side, whether it diminishes the land's value."[84]

Ultimately, the *Flying Diamond* court, like most modern commentators and courts, adopted the last of these tests. This test focuses on the economic impact of the covenant. A covenant touches and concerns land on the burdened side "if the covenantor's legal interest in land is rendered less valuable by the covenant's performance."[85] On the benefited side, a covenant touches and concerns land if the "covenantee's legal interest in land is rendered more valuable by the covenant's performance."[86]

However it is formulated, the touch and concern requirement has been widely criticized as not providing a predictable gauge

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[83] 776 P.2d 618 (Utah 1989).

[84] *Id.* at 623-25.

[85] 9 Powell, *supra* note 22, § 60.04[3][a].

[86] *Id. See, e.g.*, City of Reno v. Matley, 378 P.2d 256, 260 (Nev. 1963).

for assessing when a covenant touches and concerns land.[87] Commentators regularly observe that courts are increasingly lenient in applying the touch and concern requirement,[88] but this trend only means the ground is shifting. It does not make it any easier to predict how a court will address a particular covenant. The hallmark of the touch and concern standard continues to be its unpredictability.

[ii] Must the Covenant Touch and Concern on Both the Benefited Side and the Burdened Side?

The courts are in disagreement as to whether the touch and concern element must be satisfied both as to the burden and the benefit side of the covenant. When considering whether a burden will run, some courts require that the touch and concern requirement be satisfied on both the benefit and burden side of the equation, whether enforcing the covenant in law or equity.[89] Other courts reach a contrary conclusion.[90] Still other courts take the position that in order for the burden to run at law, the touch and concern requirement must be satisfied as to both the benefited and burdened land, but an equitable servitude can be enforced in equity even if there is no benefited land.[91] Moreover, in many western states, there is simply no case law on the subject. And to confound the question even further, as many commentators have observed, courts tend to apply these rules strictly or leniently depending upon their view of the social utility of the particular covenant involved.[92] Again, predictability is not this body of law's strong suit.

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[87] *See* Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," 35 *Real Prop. Prob. & Tr. J.* 225, 232-33 (Summer 2000). *See also* A. Dan Tarlock, "Touch and Concern Is Dead, Long Live the Doctrine," 77 *Neb. L. Rev.* 804, 810 (1998) ("Touch and concern continues to be diligently, if incoherently, applied by courts because it has a function, although courts often have trouble articulating it.").

[88] *See* Backman & Thomas, *supra* note 74, § 3.01[3][c][iv][A].

[89] 9 Powell, *supra* note 22, § 60.04[3][a].

[90] *Id.*

[91] *Compare Restatement (First) of Prop.* § 537 & cmt. c (1944) (for covenant to run with the land there must be benefited land) *with id.* § 539, cmt. k (equitable servitude can be enforced even where there is no benefited land).

[92] 9 Powell, *supra* note 22, § 60.04[3][a].

[c] The Special Problems of Affirmative Covenants

To ensure that a partially remediated site does not pose a threat to human health and safety or the environment, proprietary controls often include provisions requiring the landowner to take affirmative steps to help guarantee that result. For example, a remedial action may require installation, monitoring, and maintenance of fences and various types of barriers. Or it may require the landowner to notify EPA and the state agency if a proposal is made to change the zoning restrictions on the property. In some jurisdictions, there may be a question as to whether such an affirmative obligation can run with the land.

In the late nineteenth century, English courts took the view that affirmative covenants could not run with the land.[93] Although only a few American jurisdictions expressly adopted this rule,[94] there is still some reluctance among the courts to enforce covenants that impose affirmative burdens.[95] While this vestige of the common law is disappearing as modern real estate developments increasingly require that various types of affirmative burdens be imposed on land, it has not been abolished in all jurisdictions.[96]

[2] Negative Easements and the Benefited Land Requirement

A promise not to use land in a certain manner can also be characterized as a negative easement. Most easements are affirmative, i.e., they authorize the holder to conduct an activity on another's land. In contrast, a negative easement gives the holder the right to preclude a particular activity from being conducted on another's land.[97] Such easements are used to guarantee a landowner that adjoining property will not be used in such a way as to impair the use and enjoyment of its own property.

Historically, courts did not favor negative easements because they restricted productive uses of land and clouded title and

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[93] French, *supra* note 87, at 230.

[94] *Id.*

[95] *Restatement (Third) of Prop.: Servitudes* § 3.1, cmt. k (2000) (reluctance reflected in application of touch and concern requirement).

[96] *See* 9 Powell, *supra* note 22, § 60.06[1]-[2].

[97] *Restatement (First) of Prop.* § 452 (1944).

their existence was not apparent to prospective purchasers inspecting the land.[98] This distrust has continued to the present day.[99] Courts "with some significant exceptions . . . will not recognize purported negative easements" beyond the four easements recognized by the English common law: easements for air, light, subjacent and lateral support, and the flow of water.[100]

The types of negative easements traditionally recognized by the courts are, by their nature, "appurtenant" to land. An appurtenant easement "is created to benefit and does benefit" the holder of the easement in the use and enjoyment of its land.[101] An easement that does not benefit any particular land is referred to as an "easement in gross."[102]

The law does not favor interests held in gross.[103] This disfavor, combined with the courts' dim views of negative easements in general, has led most commentators to conclude that a negative easement in gross is not enforceable against successors to the burdened land.[104] Such easements are virtually identical in purpose and effect to a covenant or an equitable servitude. Accordingly, the same reasons that cause courts to require that covenants benefit land before enforcing them against subsequent purchasers have also led courts to impose the same requirement on negative easements.[105]

A typical example of a negative easement in gross is a conservation easement, which prohibits development of the land in order to protect its natural or scenic values. These easements

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[98] *See* Nat'l Conf. of Comm'ners on Uniform State Laws, *Commissioners' Summary of the Uniform Conservation Easement Act*, *available at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ucea.asp (explaining the need for a uniform law providing for the creation of conservation easements).

[99] 7 *Thompson on Real Property* § 60.02(e)(1) (David A. Thomas ed., 1994).

[100] *Id.*

[101] *Restatement (First) of Prop.* § 453 (1944).

[102] *Id.* § 454.

[103] *Commissioners' Summary of the Uniform Conservation Easement Act*, *supra* note 98, at 1.

[104] 4 Powell, *supra* note 22, § 34.11[3].

[105] *See id.* § 34.11[3] (whether viewed as a negative easement or as an equitable servitude, it is doubtful such an interest will be enforceable against subsequent owners where "the benefit is only personal (in gross)"). *See also* Geisinger, *supra* note 7, at 390.

are typically held by a governmental or conservation group and are held in gross because such entities own no benefited land. To address concerns about the enforceability of such easements, most states have adopted statutes specifically authorizing conservation easements and providing that such easements bind the land, even when the benefit is held in gross.[106]

[3] Environmental Use Restrictions Rarely Touch and Concern or Benefit Land

In many jurisdictions, whether characterized as a real covenant, an equitable servitude, or a negative easement, an environmental use restriction must benefit some land before it will be enforced against subsequent purchasers of land. Accordingly, in those jurisdictions, neither EPA nor the state can enforce these proprietary controls against subsequent purchasers. Those entities do not own land in the vicinity of the burdened land and can make no argument that the restrictions benefit their land. Similarly, the owner of a contaminated site that wishes to impose an environmental use restriction in a conveyance of the entire site will retain no land that could be benefited by the covenant.

Owners that transfer only a portion of their land, retaining nearby land, might attempt to impose an environmental use restriction on the land, arguing that the restriction benefits the retained land. However, many of the most common environmental use restrictions may not be viewed as benefiting land. That result is not particularly surprising because in most cases they were never intended to benefit land. The purpose of such restrictions is to benefit the public by limiting its exposure to the contamination. Rarely are they intended to benefit neighboring lands.

For example, in most circumstances, a restriction prohibiting residential use of a site would likely not be viewed as benefiting the retained land. Many use restrictions do benefit land because they prohibit uses that are perceived to be detrimental to nearby lands. However, residential use typically is not viewed as being detrimental to nearby lands. Thus, in the usual circumstance, it is unclear how a ban on residential use

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[106] *E.g.*, Utah Code Ann. § 57-18-2(1) & (3) (2002).

could be viewed as benefiting nearby land. On the other hand, if the site is located in an industrial zone, an argument could be made that a residential use restriction does benefit the nearby land because it creates a non-residential buffer around the industrial facilities.

Similarly, an excavation or drilling restriction would not typically be viewed as benefiting nearby land because the restriction simply prevents the public's exposure to contamination and has no impact on neighboring property. There are, however, certain fact scenarios that might give rise to a reasonable argument that such restrictions do benefit nearby lands. If, for example, an excavation restriction relates to the contaminated bed and bank of a stream, the restriction does benefit downstream property because it prevents the contaminated materials from being washed downstream. Similarly, if the contaminated materials are light enough to be blown by the wind, the owner of nearby property can forcefully argue that preventing such materials from being unearthed benefits its land by protecting it against contamination.

A landowner seeking to ensure the enforceability of a proprietary control by retaining land in the vicinity of the contaminated site must commit to the long-term ownership of the retained land. Real covenants and equitable servitudes are enforceable by the owner of the land benefited by the restriction, not by the person or entity that imposed the restriction in the first instance.[107] An appurtenant easement, i.e., one that benefits other land, transfers with a transfer of the benefited land. Attempts to reserve the easement in a transfer of the benefited land will either be void, will terminate the easement, or will convert it into an easement in gross.[108] As discussed above, in most jurisdictions converting a negative easement into an easement in gross is equivalent to terminating the easement.

[4] Termination of Covenants and Easements

Another difficulty in relying on covenants, equitable servitudes, and negative easements as proprietary controls is that they can be extinguished by a variety of common law doctrines

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[107] *Restatement (First) of Prop.* § 549 (1944).

[108] *Id.* § 487 & cmt. b.

and statutory devices. Servitudes can be terminated by abandonment, estoppel, prescription, condemnation, or laches.[109] On occasion, courts also refuse to enforce easements and covenants under the doctrines of frustration of purpose and changed conditions.[110] Under those doctrines, servitudes that no longer serve their purpose can be modified or extinguished.[111] Courts also sometimes refuse to enforce a servitude on the grounds of "relative hardship," if the harm to the defendant from the enforcement would outweigh the benefit to the plaintiff.[112] Finally, both covenants and easements held in gross can be extinguished under marketable record title acts[113] and in some jurisdictions by tax deeds.[114]

[5] The New *Restatement*: New Rules for Covenants and Easements

The recently published *Restatement (Third) of Property: Servitudes* proposes a number of dramatic departures from the common law concepts that have traditionally governed covenants and negative easements.[115] First, the new *Restatement* eliminates the distinctions between covenants, equitable servitudes, and easements, calling all three "servitudes" and imposing the same set of requirements in order for the servitudes to bind subsequent purchasers.[116] The new *Restatement* eliminates

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[109] *Id.* §§ 504-507, 558, 559, 562 and 565. *See also* 4 Powell, *supra* note 22, §§ 34.20 to 34.23[1]; 9 Powell, *supra* note 22, § 60.10[1].

[110] *Restatement (First) of Prop.* § 564 (1944).

[111] *See* 9 Powell, *supra* note 22, § 60.10[2].

[112] *Restatement (First) of Prop.* § 563 (1944). *See also* 9 Powell, *supra* note 22, § 60.10[1].

[113] *See, e.g.*, Marketable Record Title Act, Wyo. Stat. Ann. §§ 34-10-101 to 34-10-109 (Michie 2001).

[114] *Restatement (First) of Prop.* § 509 (1944) (easements in gross are extinguished by tax sale). *See also* 4 Powell, *supra* note 22, § 34.23[2]. *But see Restatement (First) of Prop.* § 567 (tax sale does not extinguish a covenant).

[115] For an overview of the new *Restatement*, see French, *supra* note 87. The *Restatement (Third) of Prop.* is the first *Restatement* addressing the law of servitudes since the original *Restatement (First)* was published in 1944. The *Restatement (Second) of Property* addressed only Landlord and Tenant and Donative Transfer Issues. For a listing of the various Restatements addressing property law issues, see Am. L. Inst's website *at* http://www.ali.org.

[116] *Restatement (Third) of Prop.: Servitudes* § 1.1 (2000).

the horizontal and vertical privity requirements[117] and the touch and concern requirement of covenant law,[118] and dispels any notion that an affirmative burden cannot run with the land.[119] The new *Restatement* also eliminates the requirement that a negative easement be appurtenant to other land.[120]

Instead of these traditional rules, under the new *Restatement*, a servitude will be enforced against subsequent owners or possessors of land[121] if the covenant is valid, enforcement does not violate public policy, the parties intended to bind subsequent owners, and the subsequent owner took with notice of the servitude.[122] Under the new *Restatement*, a servitude need not benefit any land in order to be enforced against the subsequent purchaser of the burdened land. Whether previously characterized as negative easements or covenants, servitudes may "be created to be held in gross."[123]

The drafters of the *Restatement* admit that case law does not support this new approach: "[T]he Restatement Third is designed to restate the law of servitudes for the future, rather than to document the past."[124] To date, the courts have not widely adopted the *Restatement* approach[125] and it seems unlikely that they will embrace the new doctrines in the near future. Not all commentators agree with the drafters' conclusion that while the new rules might not be the law, they should

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[117] *Id.* § 2.4 (horizontal privity eliminated); *id.* § 5.2 & cmt. b (vertical privity eliminated).

[118] *See* French, *supra* note 87, at 232-33.

[119] *Restatement (Third) of Prop.: Servitudes* § 3.1, cmt. k (2000)

[120] *Id.* § 2.6 (benefits held in gross allowed).

[121] See *id.* §§ 5.1 to 5.9 for the new *Restatement*'s succession rules that have replaced the vertical privity requirement. Under the new *Restatement*, with certain exceptions, benefits and burdens run to all subsequent owners and possessors of the land.

[122] Backman & Thomas, *supra* note 74, § 3.01[3].

[123] *Restatement (Third) of Prop.: Servitudes* § 2.6 (2000). *See also id.* § 1.2, cmt. h ("[T]here are no differences between negative easements and restrictive covenants. The benefit of any servitude may be created and held in gross.").

[124] *Restatement (Third) of Prop.: Servitudes*, Tentative Draft No. 1, intro. at xix.

[125] *See* Alfred L. Brophy, "Contemplating When Servitudes Run With the Land," *St. Louis U. L.J.* 691, 692-93 (2002) (the *Restatement* approach "may win converts in the courts. However, at this point, courts are still talking about the traditional requirements . . . .").

be the law.[126] In addition, while *Restatements* typically carry great weight in the courts, this *Restatement* reflects an abrupt departure from prior precedent. It seems likely that, like the commentators, not all courts will agree that this new approach is the right one.

[6] The Draft Uniform Environmental Covenants Act

In April 2002, the National Conference of Commissioners on Uniform State Laws commenced drafting the Uniform Environmental Covenants Act (Uniform Act),[127] which could be adopted in all states to eliminate concerns regarding the enforceability of certain environmental use restrictions. The Uniform Act uses the term "environmental covenant" to include all environmental use restrictions, whether they are couched in terms of an easement or a covenant. A cardinal feature of the current draft is that it only applies to environmental covenants imposed in a remediation project conducted with governmental oversight.[128] Thus, landowners that wish to impose environmental use restrictions on property outside of a governmentally approved cleanup cannot rely on the protections afforded under the Act. The draft Uniform Act, however, does clarify that the statute will not invalidate any interest that is otherwise enforceable under state law,[129] indicating that the enactment of the statute is not intended to suggest that other environmental use restrictions are invalid.

Section 5 of the draft Uniform Act specifies that an environmental covenant binds subsequent purchasers of property and is valid even though: it is not appurtenant to property, it imposes a negative burden, it imposes affirmative obligations on the owner of the burdened property, the benefit or burden of the covenant does not touch or concern property, and there is

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[126] *See, e.g.*, Tarlock, *supra* note 87, at 811 (criticizing the new *Restatement*'s rejection of the touch and concern requirement and observing that the approach "has quite limited academic and judicial support").

[127] *See* Nat'l Conf. of Comm'rs on Uniform State Laws, *Draft Uniform Environmental Covenants Act* (2003), *available at* http://www.law.upenn.edu/bll/ulc/ueca/may2003draft.htm. [hereinafter *Uniform Act*].

[128] *Id.* § 2(5) & (6).

[129] *Id.* § 5(d).

no privity.[130] Significantly, for those parties that will have already attempted to implement environmental use restrictions prior to the date the statute is enacted, the current draft purports to validate those pre-existing servitudes.[131]

The draft Uniform Act specifies that as a condition to signing the environmental covenant, the relevant agency may require the owner to obtain subordination agreements from any person with an interest in the property, subjecting that interest to the covenant.[132]

The draft Uniform Act authorizes a variety of persons to enforce an environmental covenant by injunctive relief, including the "holder," the agency involved, local governments, as well as "a person . . . whose liability may be affected by the alleged violation of the covenant."[133] A "holder" of an environmental covenant can be any person, including the landowner, local governments, and the agency in charge of the cleanup, and there can be more than one holder.[134] Thus, the Act would give responsible parties authority to enforce environmental covenants to prevent breaches of the covenant that may increase their liability.

A significant aspect of the current version of the Uniform Act is a set of provisions intended to ensure that environmental covenants will be perpetual. Under the draft, an environmental covenant is not subject to being extinguished by any of the common law or statutory termination devices discussed above.[135] In addition, an environmental covenant cannot be terminated in an eminent domain proceeding unless the relevant agency consents, and a covenant cannot be terminated under the doctrine of changed circumstances unless the agency consents and all parties to the covenant have been made par-

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[130] *Id.* § 5(a) & (b).

[131] *Id.* § 5(c).

[132] *Id.* § 4(c).

[133] *Id.* § 11.

[134] *Id.* § 21(7) & (10) (definitions of holder and person); *id.* § 4(a)(5) (all "holders" must sign the instrument creating the covenant).

[135] *Id.* § 9. *See supra* § 23.07[4] for a discussion of these devices.

ties to the judicial proceeding.[136] The parties may amend or terminate an environmental covenant only with the consent of the agency, the current owner, the holder, and any other party that signed the covenant.[137] Because responsible parties that are not holders of the covenant may nevertheless sign the document and become parties to the covenant,[138] they can assure themselves that they will be apprised of, and allowed to participate in, any termination or modification proceeding.

[7] Existing Environmental Use Restriction Statutes

A number of states, including several western states, have recently adopted their own versions of an environmental covenant statute providing that, when recorded, certain kinds of environmental use restrictions will run with the land and bind subsequent landowners. While these statutes vary widely in scope and form, most take the approach reflected in the draft Uniform Act and only serve to validate environmental use restrictions that are imposed in a regulatory setting.[139] Of the statutes surveyed, only California's statute purports to validate a private environmental covenant as a covenant running with the land.[140]

In the main, the existing environmental covenant statutes are far less comprehensive than the Uniform Act. For example, few of the current statutes include retroactive provisions purporting to validate environmental use restrictions imposed prior to the effective date of the act.[141] In addition, none of the statutes reviewed contain provisions stating that the statute is not to be interpreted as indicating that other types of environmental covenants and easements are unenforceable. These omissions are significant. It can be argued that a statute drafted to ensure that certain environmental use restrictions run with the land reflects the legislature's belief that, absent the statute, such re-

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[136] *Uniform Act, supra* note 127, § 9(a) & (b).

[137] *Id.* § 10.

[138] *Id.* § 4(a)(5) & Reporter's Notes.

[139] *See, e.g.*, Ariz. Rev. Stat. §§ 49-152(H), 49-158(D) (Supp. 2003); Colo. Rev. Stat. § 25-15-321 (2001); Mont. Code Ann. § 75-10-727 (2001); Utah Code Ann. § 19-9-103 (Supp. 2003); Wyo. Stat. Ann. § 35-11-1607 (Michie 2001).

[140] Cal. Civ. Code § 1471 (West Supp. 2003).

[141] *But see* Colo. Rev. Stat. § 25-15-326 (2001) (prior use restrictions validated).

strictions would not do so. That negative implication could make it more difficult to argue that other types of environmental use restrictions are binding on subsequent purchasers.

The existing statutes have several other deficiencies. For example, none explicitly addresses procedures for subordinating prior interests in the land to the environmental covenant. In addition, of the states surveyed, only Arizona has adopted a statute that protects environmental use restrictions from being extinguished by common law doctrines or statutory devices.[142] Finally, few of the statutes expressly grant responsible parties the power to enforce the restriction[143] or the right to consent to a modification or termination of the restriction.[144] In sum, while each of these statutes addresses the fundamental question of whether an environmental use restriction is enforceable,[145] few address the related issues posed by that question as comprehensively as does the draft Uniform Act.

[8] Drafting and Transactional Considerations

In most states, in the absence of a validating statute, there can be no assurance that an environmental use restriction will be enforceable against subsequent owners of the land. However, other mechanisms are available to approximate that result, and careful drafting may increase the odds of a use restriction being enforced over time. Most of these tools cannot be used in the context of imposing proprietary controls in a regulated cleanup, but could be used in a subsequent transfer of a remediated site to ensure compliance with the previously imposed proprietary controls.

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[142] Ariz. Rev. Stat. §§ 49-152(F), 49-158(B) (Supp. 2003).

[143] *See, e.g.*, Ariz. Rev. Stat. §§ 49-152(F), 49-158(B) (Supp. 2003); Wyo. Stat. Ann. § 35-11-1607(e) (Michie 2001). *But see* Colo. Rev. Stat. § 25-15-322 (2001) (the grantor and third party beneficiaries can enforce the covenant); Utah Code Ann. § 19-9-106 (Supp. 2003) (covenant enforceable by the Department and "other affected parties"; the statute does not define the term).

[144] *See, e.g.*, Ariz. Rev. Stat. §§ 49-152(D), 49-158(L) (Supp. 2003); Mont. Code Ann. § 75-10-727 (2001); Utah Code Ann. § 19-9-105 (Supp. 2003); Wyo. Stat. Ann. § 35-11-1607(f) (Michie 2001).

[145] Note, however, that while the recently enacted Utah statute was likely intended to make environmental covenants binding on subsequent purchasers, the statute does not expressly state that they are. Utah Code Ann. §§ 19-9-101 to 19-9-108 (Supp. 2003).

[a] Reversionary Interests

Although traditional covenant and easement doctrines are not well suited for enforcement of environmental use restrictions, reversionary interests can provide additional protection for those owners of contaminated sites that are considering a transfer of their property. Under the common law, a landowner can convey real property with a provision that if a specified event occurs or does not occur, the property will either automatically revert to the grantor or the grantor can choose to take back the property. A "fee simple determinable" is created when the transfer document specifies that, if a specific event occurs or does not occur, the property automatically reverts back to the original grantor.[146] A "fee simple subject to a condition subsequent" is created when the granting document specifies that upon the occurrence or non-occurrence of an event, the grantor or its successor *may* terminate the interest and regain the property.[147]

Unlike covenants and negative easements that may be enforced by injunctive relief, a reversionary interest does not allow the transferor to preclude the activity before it occurs. The transferor's "remedy" is to take the property back if the prohibited activity takes place. Thus, reversionary interests are best suited for restrictions, like nonresidential use restrictions, where the damage caused by a violation of the restriction is not immediate. Even as to other restrictions, there is value in a reversionary interest because it acts as a strong deterrent. Landowners that know that engaging in a prohibited behavior will result in the loss of their land typically do not engage in the behavior.

[b] Drafting the Environmental Covenant

[i] State the Intent Clearly

As discussed above, intent to bind subsequent landowners is a requirement for either real covenants or equitable servitudes to run with the land. Because courts like to enforce the parties' intent when they can, the practitioner should not make the

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[146] 1 Powell, *supra* note 22, § 13.05[1].

[147] *Id.* § 13.05[2].

court search for that intent. Vague statements that the provisions of the deed are binding on the parties' successors and assigns might be sufficient, but a clearer statement such as the following is more likely to be honored:

> Covenants Running With the Land. The covenants contained in this Deed are intended to, and shall, run with the Property and shall bind successors to the Property in perpetuity.

To further confirm the parties' intent, assertions that the parties intend that the covenants touch and concern land can be used:

> The parties agree and understand that the Non-Residential Covenants are intended to and do benefit and touch and concern lands retained by Grantor located in the vicinity of the Property.

In addition, if there is a specific reason why the parties believe the covenant does benefit retained land, that reason could be set out in the recitals.

[ii] Consider Using a "Self-Replicating" Covenant

Although it will not make a covenant run that would not otherwise do so, a "self-replicating" covenant such as the one quoted below offers some protections for a landowner. After setting out the various land use restrictions to be imposed, the following clause can be inserted in an attempt to ensure that subsequent transferees are personally obligated by the covenants:

> Subsequent Transfers. Grantee shall include in any deed or other instrument conveying or transferring an interest in the Property provisions substantially similar to those contained in paragraphs x-x of this Deed (including this Paragraph x), such that the transferee under such deed or instrument shall be bound by those provisions to the same extent as Grantee.

Because the original landowner will not be in privity of contract with a remote grantee of the property, the original landowner may not be able to sue the grantee for not including the clauses in a transfer of the property; however, there will be a party that could do so—the remote grantee's immediate grantor. In addition, the repetition of the covenant in each transfer ensures against a purchaser taking the property without actual notice of the use restrictions, increasing the odds that the covenants will be honored. Finally, in states with marketable re-

cord title acts, the repetition of the covenants during successive transfers will protect the covenants from being extinguished under those acts.

[c] Deferring Transfer of the Site and Lobbying

In states that have not adopted an environmental covenant statute, a site owner may consider whether the safest course is to retain the site until one is adopted. This alternative is particularly advisable in states that either do not have enough case law upon which to base a conclusion as to the enforceability of the proprietary controls or that have adopted a rigid view of when these servitudes can be enforced against subsequent landowners. The rate at which environmental covenant statutes have been adopted over the past few years suggests that the wait should not be a long one. Site owners should also consider getting involved in lobbying efforts to ensure that any statute that is adopted is comprehensive and applies retroactively. In addition, many site owners will want to ensure that if the statute does not apply to private proprietary controls, it at least provides a vehicle that would allow the site owner to impose those kinds of controls with agency approval.

§ 23.08 Conclusion

Risk-based cleanups incorporating the right blend of institutional controls can achieve the same level of protectiveness of human health and the environment as a permanent cleanup, but for substantially less cost. However, thorough planning, beginning early in the remedy selection process, is critical to ensuring that institutional controls are implemented, monitored, and enforced properly to ensure their long-term effectiveness. In states that have not adopted environmental covenant statutes, this planning must include a thorough analysis of the state's covenant and easement case law to determine whether the proposed proprietary controls will be enforceable over time, as well as a consideration of what additional measures can be adopted to increase the chances that the restrictions will be honored.