

Easterly, Jennifer S - DNR

From: Schorle.Bernard@epamail.epa.gov
Sent: Monday, September 25, 2006 12:43 PM
To: Easterly, Jennifer S - DNR
Subject: Fw: Example IC Plan

Attachments: ICplanjuly06.doc



ICplanjuly06.doc
(43 KB)

Here is something that Sheri sent me that supposedly shows what is involved in an IC plan. Note that this is **enforcement confidential** so it cannot be passed on to the PRPs.

When I talked to her, she mentioned an IC study. I thought that this was part of an IC Plan, and apparently it could be. but it can also be separate.

She is supposed to get me some additional language related to all of this.

What we are looking at doing is not be specific in the five-year review report, but indicate that it could be either the state or us that would develop the plan. Ideally the PRPs would have to do some of the work to get us what is needed. However, the attorney assigned to the site, who is not in today, thought that the state should be doing the plan, so I don't know if he will accept the either/or language. So I would appreciate your checking with you management to see how they feel about something like this. In the end, I expect that we would have to work together--I don't believe anyone knows what is involved.

I got her other email and I will forward it to you. I believe this is really just about the study, and it is what the PRPs would be asked to do.

----- Forwarded by Bernard Schorle/R5/USEPA/US on 09/25/2006 12:33 PM

SHERI
BIANCHIN/R5/USEP
A/US

09/25/2006 11:43
AM

BERNARD SCHORLE/R5/USEPA/US@EPA

Sharon Jaffess/R5/USEPA/US@EPA

To

cc

Subject

Example IC Plan

Hi Bernie,

(See attached file: ICplanjuly06.doc)

Here is an example of an IC Plan. Please note that it is enforcement confidential.

I will send you the other language that we discussed shortly.

Thanks

Sheri

Sheri L. Bianchin
Remedial Project Manager
Institutional Controls Coordinator
U.S. EPA- Region 5
77 W. Jackson Blvd. (SR-6J)
Chicago, IL 60604
312-886-4745

****DRAFT****

**ENFORCEMENT CONFIDENTIAL/DO NOT RELEASE/FOIA EXEMPT
Institutional Control Plan - Date: July 2006**

**Electro-Voice, Inc., Superfund Site (Federal Enforcement Lead)
600 Cecil Street, City of Buchanan, Berrien County, Michigan**

Contacts: Giang-Van Nguyen, RPM
 Jan Carlson, ORC

I. Identification of Restricted Areas (Areas that do not support unlimited use and unrestricted exposure (“UU/UE”)) and Summary of Existing Institutional Controls

The table below summarizes existing institutional controls for these restricted areas.

Restricted Areas (areas that do not support UU/UE)	IC Objective/ Mechanism Identified in ROD	IC currently in place
a) hazardous waste landfill cap placed over former lagoon areas (see attached map)	“deed restriction” to prohibit construction in former lagoon area	Owner agreed to restrictions in Consent Decree. Owner recorded “Declaration of Restrictions on Real Property”
b) former dry well area soils remediated to industrial standards (see attached map)	“deed restrictions” to prohibit residential use	Owner agreed to restriction in Consent Decree. Owner recorded “Declaration of Restrictions on Real Property”
c) groundwater exceeds MCLs for VOCs under property	“deed restriction” to prohibit installation of wells on the property	City of Buchanan Ordinance prohibits use of groundwater any area designated as contaminated by a state or federal regulatory agency.
d) groundwater VOC plume - off property - natural attenuation est time - 50 years (see attached map)	Ordinance to prohibit installation of groundwater wells in plume area exceeding MCLs	City of Buchanan Ordinance prohibits use of groundwater in any area designated as contaminated by a state or federal regulatory agency.

II. Evaluation of ICs on the source property (OU 1) (Areas a-c above)

U.S. EPA signed a Record of Decision dated June 8, 1992 that required “deed restrictions” on the Electro-Voice (“EV”) property to implement the following IC objectives: a) to prohibit installation of drinking water wells on the EV property; and b) to prohibit construction in the

lagoon area and dry well area on the EV property. Electroplating waste was disposed of in the lagoon area and paints and solvents were disposed of in the dry well area. A hazardous landfill cap was placed over the lagoon area and the dry well area was remediated via SVE to industrial cleanup levels.

Pursuant to a Consent Decree entered on December 21, 1993 in U.S. v. Electro-Voice, Inc. 1:93-CV-753 (W.D. Mich. S. Div.), EV agreed to execute and record an appended document entitled "Declarations of Restrictions on Real Property". Page 4 of the Statement of Work refers to this document as restrictive covenant/deed restrictions. Paragraph 9 of the Consent Decree states that each deed, title or other instrument conveying an interest in the property shall reference the restrictions applicable to the property.

EV recorded a document entitled "Declarations of Restrictions on Real Property" with the County Recorder on January 13, 1994 in Liber 1619 on Page 826. The Declaration is only signed by one party (EV). Under common law, the owner needs to grant a right to or covenant with a second party in order for the restrictive covenant to be enforceable against future owners. The Declaration does not purport to "run with the land" and appears to bind EV only. The "Declaration" would not be considered a proprietary interest and probably would not be enforceable against future owners of the property.

Recommendations:

IC Modification: The evaluation team recommends implementation of new restrictive covenants whereby the owner will grant Michigan authority to enforce the restrictive covenant under Part 201 of NREPA and U.S. EPA will be a third party beneficiary of this restrictive covenant. The Michigan statute will overlay any negative common law and result in a more enforceable restrictive covenant.

Telex (EV's successor) now owns the property and is currently marketing the property. The enforcement team and Telex have discussed implementation of restrictive covenants on the property. Telex has agreed to execute a restrictive covenant and to reserve this restrictive covenant in the deed in any sale of the property. The enforcement team has forwarded a draft restrictive covenant and a covenant deed (with reservation of restrictive covenant/environmental easements) to Telex, which Telex has agreed to use. U.S. EPA has requested a copy of a current title commitment from Telex. U.S. EPA has requested that Telex evaluate whether current encumbrances negatively impact the restrictions on the property and to request subrogation agreements from the owners of such encumbrances.

ROD Modification: The requirement for a restrictive covenant would be considered at most a "minor change" requiring only a note to the file as described on page 12 of the *Strategy to Ensure Institutional Control Implementation at Superfund Sites*, OSWER No. 9355.0-106 dated September 2004. The ROD identifies the appropriate objectives/restrictions required on the property. The ROD identifies "deed restrictions" to implement the objectives. The National Contingency Plan (NCP) uses the term "deed restrictions" generally as a type of institutional control. The term "deed restrictions" has no clear meaning in traditional property law but is used to refer generally to proprietary controls such as restrictive covenants and easements on the

property. A restrictive covenant implementing these objectives/restrictions would simply be implementation of the designated remedy and thus no modification of the Record of Decision is necessary.

III. Evaluation of ICs - Off Property Groundwater Plume (OU 2)

U.S. EPA signed a Record of Decision dated September 21, 1999 for Operable Unit 2 - Off Property Groundwater Contamination. This ROD uses natural processes, monitoring, institutional controls (local ordinance) and contingency actions to address the off-property groundwater. The estimated cleanup time frame is approximately 53-66 years.

The City of Buchanan currently has a local ordinance (Chapter 38, Article IV, Sections 38-90 to 38-98) that prohibits the installation of drinking water wells or use of groundwater in areas designated by state or federal agencies as contaminated. The City has the authority to assess fines of \$500 for failure to comply with this provision. In addition Electro-Voice obtained "Declarations" prohibiting the installation of drinking water wells for about half of the properties within the area of groundwater contamination. The OU 2 ROD determined that additional restrictive covenants in the off-property plume area were not necessary due to the existence of the groundwater ordinance.

The groundwater plume has shifted beyond expected groundwater plume area and the enforcement team has requested the PRPs to implement contingency measures including increased monitoring and a groundwater well inventory of the area.

Recommendation: The enforcement team will send a revised map of the groundwater plume (including a buffer area) to the City of Buchanan and request that the City update the restricted area and subject this area to the restrictions identified in the existing City Code. The existing ROD states that contingency actions may be implemented such as additional monitoring, updating the local ordinance to restrict the plume area and a containment system or treatment system in response to monitoring. In addition, the ROD states that use restrictions are necessary where groundwater standards are exceeded. The City ordinance and the potential for increases in the restricted area was discussed in the ROD and therefore a modification of the ROD for just the IC portion of the expanded plume at most would require an ESD. Final decision document changes will be addressed when the results of increased monitoring are obtained and reviewed.

IV. Schedule

IC Action Needed	Progress	Actual Date	Plan Date
<p>Implement Restrictive Covenant On Property to prohibit interference with landfill cap in former lagoon area, to prohibit residential use in the dry well area and to prohibit installation of groundwater wells on the property</p>	<p>EPA sent draft restrictive covenant and deed to owner; owner has agreed in principle</p>	<p>5/06</p>	
	<p>EPA requested updated title commitment from owner and identification of subrogation agreements for property interests not compatible with landfill and industrial uses.</p>	<p>5/06</p>	
	<p>Mark IV conducted a survey of the landfill area and limited industrial use area (see attached map)</p>	<p>6/06</p>	
	<p>EPA completes review of title commitment and sends notice of restrictive covenant to prior in time property interests that are incompatible with land use restrictions.</p>		<p>8/06</p>
	<p>Owner sign final Restrictive Covenants</p>		<p>9/06</p>
<p>Groundwater Ordinance- review and send revised groundwater plume map to the City of Buchanan</p>	<p>EPA Review of Ordinance</p>	<p>7/06</p>	
	<p>EPA revised map of groundwater plume area (see attached map)</p>	<p>7/06</p>	
	<p>EPA request to PRPs conduct well inventory of groundwater plume area</p>		<p>8/06</p>
	<p>EPA send letter to the City of Buchanan designating the revised plume area and buffer area as contaminated</p>		<p>9/06</p>
	<p>EPA signs ESD</p>		<p>6/07</p>

cc: Sheri Bianchin, IC Coordinator
 Jan Carlson, IC Legal Coordinator
 Rosita Clarke, Five Year Coordinator

Sign Off Section Chief, Superfund
 Section Chief, ORC

**Region 5 - Sample PRP Letter requesting IC Investigation/Study
January, 2006**

This sample letter may be used to request PRPs to **prepare an IC investigation/study that evaluates existing ICs, recommends any necessary corrections to existing ICs, and/or proposes new/additional ICs for areas with inadequate ICs.** Authority for the request may be based on provisions of existing enforcement documents (such as IC specific provisions, five year review, modification of work, additional work or maintenance provisions from a CD, UAO, or SOW). Enforcement teams may add requests for data or other studies as appropriate.

VIA CERTIFIED MAIL

Address
Address
Address
Address

**Re: [Name] Superfund Site
Institutional Controls Investigation/study
[City], [State]
Civil Action No. _____**

Dear Mr./Ms. _____ :

The U.S. Environmental Protection Agency (EPA) is undertaking an initiative to evaluate institutional controls (ICs) at Superfund sites. ICs may be needed to restrict uses of sites where on-site hazardous substances remain above levels that allow for unlimited use and unrestricted exposure (UU/UE). ICs may be necessary to prevent interference with Superfund remedy components. A description of EPA's IC initiative may be found in A Strategy to Ensure Institutional Control Implementation at Superfund Sites, OSWER No. 9355.0-106 (2004), <http://www.epa.gov/superfund/action/ic/strategy.htm>.

EPA is seeking the cooperation of potentially responsible parties as part of this nationwide effort. The purpose of this letter is to seek your assistance in evaluating ICs for the _____ Superfund Site located at [City, State]. Specifically EPA is requesting that you submit an IC investigation/study to EPA within **45 days of the receipt of this letter**. Please provide EPA with a notice of intent to comply with this request **within 10 days of the date of receipt of this letter**.

[Five year review] ~~Add this paragraph~~ The IC investigation/study will be used by EPA in its current review of the remedial action for the Site pursuant to Section 121 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. ' 9621. Section 121 of CERCLA mandates that, no less often than every five years, EPA must review remedial actions where hazardous substances, pollutants or contaminants remain in place to

assure that human health and the environment are being protected by the remedial action.]

As you know [the Settling Defendants or Respondents] have implemented a remedial action for the Site pursuant to [Consent Decree, Civil Action No. ____, (AConsent Decree@) or Unilateral Order No. ____]. The Site remedy does not allow unlimited use and unrestricted exposure. The long term protectiveness, effectiveness and integrity of the remedy depends on compliance with ICs that implement the following land/groundwater restrictions:

Examples: - replace with site specific information

Restricted Areas (Areas that do not allow unlimited use or unrestricted exposure)	Institutional Control Objective /Restriction/Performance Standard
Area of the Site where soil has been remediated to commercial/industrial cleanup levels (See attachment 1 - attach an accurate map or legal description if available)	prohibit residential use of the areas
Site remedial components: e.g. groundwater pump and treat system	prohibit interference with the system
Area of the Site where the groundwater plume exceeds performance standards (See attachment 2 - attach an accurate map if available)	prohibit consumptive use of the groundwater plume area until performance standards are achieved
Area of Site with RCRA Subtitle C or D landfill cap	prohibit interference with the cap

[Add Authority for request from Existing Consent Decree or UAO - see examples below]

[**Periodic Review** - Under [Paragraph [17] of Section VII (Periodic Review) of the Consent Decree], [the Settling Defendants] have agreed to implement studies and investigations in order to permit EPA to conduct reviews of whether the remedial action is protective of human health and the environment. The IC investigation/study is necessary for EPA to conduct its review of whether the remedial action is protective of human health and the environment.]

[**Modification of Work - add this paragraph** Under [Paragraph [14] of Section VI (Modification of the SOW or Related Work Plans) of the Consent Decree], EPA may require modifications to the SOW or other Work Plans (e.g. RD/RA Work Plan, Operation and Maintenance Plan) to implement work necessary to achieve and maintain the performance standards of the remedial action or to carry out and maintain the effectiveness of the remedy set forth in the ROD. The IC investigation/study is an appropriate modification to [the RDRA Work Plan, Operation and Maintenance Work Plan or other Plan] because institutional controls are necessary to achieve and maintain the performance standards of the remedial action and the effectiveness of the remedy set forth in the ROD.]

The goal of the IC investigation/study is: a) to evaluate whether institutional controls currently exist that adequately implement the objectives/performance standards described above; b) to identify and recommend any corrective measures to existing ICs necessary for their effectiveness; and c) to recommend any new or additional ICs necessary to achieve and maintain the objectives/performance standards described above.

IC Study Report requirements

Within 45 days of receipt of this letter, please submit a draft IC investigation/study report to EPA for review and approval that includes the following minimum requirements:

1. Demonstrate that existing proprietary controls have been properly recorded and are free and clear of all liens and encumbrances [For Proprietary Controls]

Such a demonstration shall include: a) a title insurance commitment using ALTA Commitment form 1982 as amended for information only purposes by a title company; b) copies of documents referenced in the title commitment; c) copies of the existing proprietary controls showing the recording stamp; d) copies of encumbrances, utility right of ways, leases and subleases impacting restricted areas; e) map and GIS information that identifies parcel numbers and boundaries of current encumbrances (such as utility easements) that impact restricted areas; and f) copies of subrogation agreements for encumbrances;

2. Demonstrate that existing proprietary controls were signed by a person or entity that owned the property at the time of signature [For Proprietary Controls]

3. Demonstrate that governmental controls are currently in effect [For Governmental Controls] Provide a current, dated and official copy of existing governmental controls [ordinance, statutes etc.] that implement the IC objectives for the restricted areas described in the Table above; Discuss any sunset provisions in the governmental control;

4. Evaluate whether existing controls cover the entire area that needs to be restricted [For Both Proprietary Controls and Governmental Controls] This evaluation shall include:

a. Discuss what information was used to depict the restricted area covered by the control? Is the restricted area and control based on reliable and up to date information, data and maps;

b. Provide Map and GIS information of [**restricted areas identified in the Table above including area where groundwater exceeds performance standards; area remediated to industrial standards etc.**] based on current and up to date monitoring data;

c. Provide Map and GIS information of the [**legal description covered by an existing restrictive covenant or other proprietary control; and/or areas regulated by governmental**

controls]; and

- d. Provide maps and GIS that overlay the information of 3.b and 3.c.

All maps and GIS information must identify: site boundaries, streets, property ownership and assessors parcel numbers or other plat or survey information. Identify the accuracy of the GIS coordinates (i.e. within 0.01 feet). Format the GIS coordinates into an ESRI polygon-shape file. The shape file shall be projected into the UTM, NAD 83 projection system. Please identify the UTM zone. Provide an attribute name in the shape file for each polygon submitted. For example: Asite boundary@, Aresidential use prohibited@, Agroundwater use prohibited@ and Ainterference with landfill cap prohibited@;

5. Assess Objectives, Restrictions and Performance Standards of the Institutional Controls [For Both Proprietary and Governmental Controls] Discuss whether all IC objectives/performance standards/restrictions described in the Table above are clearly stated in the control;

6. Assess monitoring and compliance with Institutional Controls

a. [For Both Proprietary and Governmental Controls] Discuss how, when and by whom compliance with the institutional controls is monitored. Discuss whether the results of the IC monitoring are routinely and promptly shared with EPA and the State. Discuss whether there are measures in place to ensure that modifications to the restriction require EPA and the State approval. Does EPA and/or the State have a Memorandum of Understanding with the governmental entity? Discuss whether the property is being used in a manner consistent with the restrictions. Summarize results of site inspection and interviews with owners, lessees and other holders of property interests. Are owners, lessees and other holders of property interests aware of and complying with the restrictions?

b. [For Governmental Controls]: Where can information be obtained about the governmental control [ordinance, code]? How do affected parties such as homeowners, contractors and resource users obtain information about the governmental control? Are affected parties and resource users aware of and understand the restrictions described above? Have there been breaches of use restrictions described above. If so, how were they addressed by the governmental agency?]

7. Discuss effectiveness of Institutional Controls [For Both Proprietary and Governmental Controls]

[For Proprietary Controls] Discuss whether the proprietary controls Arun with the land@ (i.e. restrictions are binding on subsequent property owners) under applicable state law.

[For Both Proprietary Controls and Governmental Controls]. Assess whether the controls are

effective in the short term in maintaining the objectives/restrictions/performance standards in the Table above. Assess whether the control will be effective in the long term in maintaining the objectives/restrictions/performance standards in the Table above. Discuss whether existing ICs are preventing exposure. Discuss whether land and/or resource use has changed since execution of the ROD? Is current or expected land use consistent with the City or County Master Plan? Does the property owner have any plans to sell or transfer the property? Are there any new developments, either constructed or planned, in the area? Are there any new construction permits pending? If so, what are the plans regarding property's ICs? Discuss how the current land and resource uses relate to exposure assumptions and risk calculations. Discuss whether there are any unintended consequences resulting from the use of a particular restriction; and

8. Recommendations [For Both Proprietary and Governmental Controls]

Propose any corrections to existing institutional controls that are necessary to ensure that the land and groundwater use restrictions described in the Table above are implemented correctly, are maintained and will be protective in the short term and the long term. Propose controls for remaining areas that do not support unlimited use and unrestricted exposure but are not covered by existing controls and include a title commitment for any proposed proprietary control. Propose subrogation agreements for any encumbrance that impacts restricted areas. Propose monitoring requirements and modifications to the [Operation and Maintenance Plan] to ensure that ICs are maintained and complied with in the short term and in the long term. The monitoring plan must include a schedule and an annual certification to EPA that ICs are in place and remain effective.

Please provide EPA with a notice of intent to comply with this request **within 10 days of the date of receipt of this letter**. If you have any questions concerning this request, please contact _____, Assistant Regional Counsel at _____ or _____ Remedial Project Manager at _____.

Sincerely,

RPM
Superfund Division

ATTORNEY
Office of Regional Counsel

bcc:

_____, Enforcement Specialist
_____, Sheri Bianchin, IC Coordinator
_____, Jan Carlson, IC Legal Coordinator