



**Colorado Department
of Public Health
and Environment**

**Colorado Department of Public Health and Environment
Hazardous Materials and Waste Management Division Policies**

**Policy Title: Revised Policy on Timing of Creation of Environmental Covenants
and Notices of Environmental Use Restrictions, December 2011**

Program(s) Initiating the Policy: All

Program(s) Subject to the Policy: All

Statutory and Regulatory Citations: CRS §§25-15, 201; 25-15-317 through 327

**Background of Revised Policy on Timing of Creation of Environmental Covenants
and Notices of Environmental Use Restrictions, December 2011**

The Department issued a policy on timing of environmental covenants in January 2006. This policy replaces the 2006 Timing Policy.

The Department has a preference for cleanups that are sufficiently thorough to allow unrestricted use and unlimited exposure (hereafter, that meet the unrestricted use standard), as compared to cleanups that require land or water use restrictions to protect human health and the environment. Likewise, a facility owner may desire to reach the unrestricted use standard to avoid any stigma that the presence or residual contamination might present for its property, to maximize the marketability of the property or its own ability to utilize the property, or to avoid possible transaction costs that may be involved in creating institutional controls.

However, it is not always technically or economically feasible to reach the unrestricted use standard. Further, it is not always possible to predict whether a particular cleanup approach will result in sufficiently low residual contamination to meet the unrestricted use standard.

When environmental remediation approaches do not meet the unrestricted use standard, restrictions on the use of the affected land or water may be imposed to limit exposure to the residual contamination, and so protect human health and the

December 2011

1 | Page

environment. In 2001, Colorado adopted legislation (SB01-145) that created a statutory “environmental covenant” – a legally-enforceable mechanism for imposing restrictions on land and water use (and, in some cases, certain affirmative maintenance, operation and monitoring obligations) that are required in connection with an environmental cleanup. The statute was amended in 2008 to add an alternative to an environmental covenant called a “restrictive notice.” The restrictions and affirmative obligations contained in an environmental covenant or restrictive notice are commonly referred to as “institutional controls.”

Under Colorado’s institutional control statute, a covenant is required when an environmental regulator makes a “remedial decision” in an “environmental remediation project” that results in residual contamination at levels that are not safe for all uses, or that incorporates an engineered structure. However, no covenant is required for interim measures that are not intended as the final remedial decision.¹

Because environmental covenants and restrictive notices bind current *and* future users and owners of the land, they provide a vital measure of protection in cases where the remedial process does not achieve unrestricted use standards, or takes significant time to do so. Once it has been determined that long-term institutional controls will be needed, the covenant or restrictive notice should be implemented promptly.² Promptly creating and recording the covenant enhances institutional memory relative to the use restrictions, minimizes the chances that property transfers may impair the ability to obtain a covenant, and ensures the enforceability of the use restrictions contained in the covenant against all persons currently or subsequently possessing an interest in the property. Experience at contaminated sites around the country supports the importance of promptly implementing institutional controls.

¹ § 25-15-101(4.5) excludes “interim measures that are not intended as the final remedial action” from the definition of “environmental remediation project.”

² In some cases, where institutional controls are only needed for a short time during active remediation, implementing such controls through environmental covenants or restrictive notices may not be necessary. Instead, it may be sufficiently protective to impose the appropriate restrictions through the same regulatory mechanism that is being used to oversee the cleanup (e.g., Corrective Action Plan, CHWA consent order, etc.). Using a consent order or other regulatory mechanism to impose institutional controls can eliminate the transaction costs of creating a covenant or restrictive notice. The statute’s distinction between interim and final remedial decisions provides some flexibility to use different mechanisms to implement institutional controls in appropriate situations.

In all cases, analysis of the feasibility of implementing institutional controls should begin early in the remedial decision-making process. Because persons other than the facility owner may possess property interests in the land that will be subject to the proposed covenant or restrictive notice (e.g., the mineral interests may have been severed from the surface estate, there may be an easement for maintenance of a buried gas pipeline, or a lender may hold a mortgage on the property), it is not always feasible to implement the use restrictions proposed by the facility owner.

The Department issued a policy on timing of environmental covenants in January 2006. That policy sought to protect human health and the environment by requiring environmental covenants to be created and recorded promptly after the remedial decision that established the need for the covenant. In general, the policy required a covenant for all remedies that were not designed to achieve unrestricted use standards upon completion of remedy construction (not including operation and maintenance). It further specified that a signed covenant be submitted to the Department within 30 days of the date of a remedial decision that relied solely on institutional controls, or 30 days of completion of construction work for remedies that involved physical work. The 2006 policy did not explicitly address the distinction between “final” remedial decisions and “interim” measures.

Subsequent experience in implementing the Department’s various cleanup programs has demonstrated the need for greater clarity as to whether a particular decision is an interim measure or a final remedial decision (and thus whether the decision will trigger the requirement for a covenant or restrictive notice). Clarity is also required regarding the path to reach a final remedial decision. Today’s revised policy provides this additional clarity, supports the prompt creation of institutional controls, and also encourages use of cost-effective remedial approaches that may achieve the unrestricted use standard.

REVISED POLICY ON TIMING OF CREATION OF ENVIRONMENTAL COVENANTS AND NOTICES OF ENVIRONMENTAL USE RESTRICTIONS

1. **Applicability.** SB 01-145 defines “remedial decision” as the administrative determination that established the remedial requirements for the environmental remediation project. Examples of remedial decisions include:
 - a. approval of an integrated corrective action plan
 - b. approval of a remedial action plan
 - c. approval of a corrective measures plan
 - d. for CERCLA remedial actions, the Record of Decision
 - e. for CERCLA removal actions, the Action Memo
2. **Clarity in remedial decision-making.** In its remedial decisions, the Department will, following discussions with the facility representatives, identify the following matters:
 - a. The remediation goals of the proposed remedial action, and specifically whether the proposed remedial action is intended to achieve the unrestricted use standard;
 - b. The schedule for implementing the proposed remedial action, including an estimated date by which the proposed remediation goals will be achieved;
 - c. Whether the proposed remedial action is intended to be an interim or a final remedial action, and if interim:
 - i. A description and frequency of implementation of the proposed active treatment technology and method and schedule for evaluating the effectiveness of the interim action; and
 - ii. A decision logic for moving to a final remedial decision;
 1. For interim remedy proposals involving in situ treatment (as described in 5.a. below), this decision logic may provide that:
 - a. if the Department, after review of monitoring data and after reasonable consultation with the facility, determines that it is not technologically and/or economically feasible that further treatment iterations will reach the unrestricted use standard within a reasonable timeframe, it will make a final remedial decision to require prompt creation of an environmental covenant or restrictive notice; or
 - b. if the facility chooses to discontinue the use of active measures, the Department will make a final remedial decision to require prompt creation of an environmental covenant or restrictive notice;

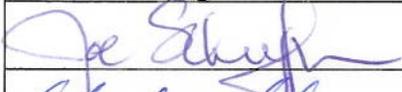
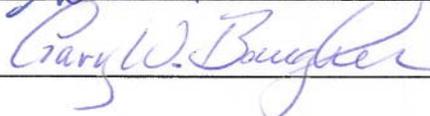
- d. For proposed remedial actions that are intended to meet the unrestricted use standard, a method for evaluating whether the remediation goal has been achieved, and a process for revising the remedial decision in accordance with this policy if the proposed remedy does not achieve the goal; and
 - e. Whether institutional controls will be required as part of the remedial action, and if so,
 - i. The mechanism for implementing the institutional controls; and
 - ii. A schedule for implementing the institutional controls
3. **Remedial decisions by other regulatory agencies.** In cases where another agency is responsible for making the remedial decision (e.g., CERCLA sites), the Department will encourage the other agency to follow this guidance in making its remedial decisions.
4. **Final remedial decision.** A “final” remedial decision is one in which no further actions to treat, remove or contain a defined area of environmental contamination are planned beyond those specified in the proposed remedy. Examples of remedial decisions that are typically final include decisions approving proposals to:
- a. Cap waste in place (triggers the requirement for an environmental covenant or restrictive notice);
 - b. Leave contamination in soil above levels that are safe for unrestricted use, without installing a cap (triggers the requirement for an environmental covenant or restrictive notice);
 - c. Rely on pump-and-treat technology or natural attenuation to restore contaminated groundwater to a condition that is safe for all uses (triggers the requirement for an environmental covenant or restrictive notice that would terminate when the contaminated groundwater reaches unrestricted use levels); and
 - d. Remove all contaminated soil to unrestricted use levels (does not trigger the requirement for an environmental covenant or restrictive notice).
5. **Interim remedial decision.** An interim remedial action removes, contains or treats environmental contamination, and is intended to be supplemented by subsequent remedial actions.
- a. Interim remedial actions also include proposals for in situ treatment of soil or ground water contamination to achieve unrestricted use levels that meet the following criteria:
 - i. Remediation is conducted through a limited number of applications of treatment additives (such as oxidizers, nutrients or biological agents);
 - ii. The number of applications needed to achieve unrestricted use levels is not known in advance, due to variability of environmental conditions or other factors.

- b. Examples of interim decisions include decisions approving proposals to:
- i. Treat ground water contamination through application of up to 4 rounds of permanganate until remedial standards are met or are determined not to be achievable (if, based on monitoring results and discussions with the facility, the Department determines the standards cannot be met, the decision will convert to a final remedial decision as provided in 2.c.ii, above);;
 - ii. Install a fence to prohibit access to contaminated soil while treatment options are evaluated;
 - iii. Treat soil or ground water contamination using an innovative or unproven technology; and
 - iv. Mitigate groundwater contamination by removing highly contaminated soils that are acting as a source before determining what sort of groundwater treatment will be used. (Note that this could be a final remedial decision regarding soil media, while being an interim decision regarding groundwater.)
6. **Time for measuring the “result” of a final remedial decision.** Some remedial actions are designed to eventually achieve unrestricted use standards, but may take many years or decades to do so. For purposes of determining whether such actions trigger the requirement for an environmental covenant or restrictive notice, the Department will evaluate the environmental conditions that exist at the completion of remedy construction, plus time necessary for monitoring to confirm that the remedy has achieved the design goals.
7. **Timing of creating environmental covenants and restrictive notices.** For final remedial decisions,
- a. The Division will require an environmental covenant or restrictive notice for any final remedy that is not designed to achieve unrestricted use upon completion of remedy construction (not including operation and maintenance). Environmental use restrictions shall be specified in the remedial decision document. The remedial decision document shall also include a requirement and a schedule for submission to the Division of a signed environmental covenant or restrictive notice. For remedies that involve physical work, the signed environmental covenant or restrictive notice will be submitted within 30 days of completion of remedy construction. For remedies that rely solely on institutional controls, the signed environmental covenant or restrictive notice will be submitted within 30 days of the remedial decision.
 - b. Environmental covenants or restrictive notices are also required for final remedies that are designed to achieve the unrestricted use standard, but fail to do so. Once the Department has received information that the remedy has failed to achieve the designed goal, it

will, in consultation with the facility, revise the remedial decision in accordance with this guidance.

8. **Sites with multiple environmental remediation projects.** Paragraphs 6.a and 6.b shall apply at large facilities with multiple environmental remediation projects, except as provided below:
- a. the Division will work with the facility to determine the most efficient approach to implementing institutional controls, and may consider:
 - i. A single site-wide covenant that would be modified to incorporate all subsequent decisions on other environmental remediation projects;
 - ii. One environmental covenant per environmental remediation project; or
 - iii. Multiple environmental covenants covering one or more environmental remediation project decisions; and
 - b. If there are multiple environmental remediation projects scheduled for final decisions within a year, the Division may exercise its discretion to defer the timing of the covenant execution so that a single covenant or modification to an existing covenant may be executed that encompasses all of the environmental remediation project decisions for that year. In choosing to exercise its discretion, the Division may consider relevant factors, including the facility's ability and willingness to execute the covenant (or modification) at the end of the year.

Approvals:

Signature	Title	Date
	Hazardous waste Program Manager	12/21/11
	Solid Waste Program Manager	12/13/11
	Remediation Program Manager	12/13/11
	Radiation Program Manager	12/13/11
	Division Director	12/21/11

Date Issued: 12/01/11
 Date of Last Review 12/01/11
 Date of Last Review 12/01/11

