Institutional Controls Implementation Guidance

Colorado Department of Public Health and Environment

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1. Introduction

In 2001, Colorado passed legislation (SB 145) creating "institutional controls" ("ICs") -- legal mechanisms to enforce land and water use restrictions imposed as part of environmental cleanups. The 2001 legislation created a statutory "environmental covenant," which has since been used more than 60 times to help ensure continued protectiveness of cleanups in Colorado. It also created another mechanism, involving a combination of a local ordinance and an intergovernmental agreement between the Hazardous Materials and Waste Management Division and the affected local government that has occasionally been used to address sites with substantial off-site contamination.

SB 145 was amended in 2008 to add a third mechanism for implementing institutional controls called a "notice of environmental use restrictions" or "restrictive notice." The restrictive notice was created with federal facilities in mind, but it can be useful in other situations as well.

This document describes the process the Hazardous Materials and Waste Management Division ("the Division") and Department of Law ("AGO") staff will follow in evaluating, creating, modifying, terminating, and implementing environmental covenants and restrictive notices ("ECs/RNs"), as well as the ordinance/intergovernmental agreement mechanism. Although institutional controls may sound simple in concept, creating durable, effective, enforceable controls is actually quite complex, and requires close coordination among the facility proposing to use an institutional control, the Division and the AGO.

2. Summary of Colorado's Institutional Control statute

As noted above, SB 145 and SB 037 (collectively referred to hereafter as "SB 145") create three different mechanisms for implementing ICs imposed as part of remediation decisions. But the statute does more than simply create these legal mechanisms. It also requires ICs be implemented in specific situations, and establishes procedures for ensuring that the people who need to know about the restrictions do, in fact, know of them. The statute specifies certain terms that must be included in all covenants and restrictive notices. It also creates procedures for modifying and terminating covenants and restrictive notices.

Briefly, an environmental covenant is required whenever an environmental regulator makes a "remedial decision" as part of an "environmental remediation project" that results in either (a) residual contamination remaining in the environment in concentrations that are safe for some, but not all, uses, or (b) an engineered feature or structure that requires monitoring, maintenance or operation, or that will not function as intended if it is disturbed.

A restrictive notice may be substituted for an environmental covenant. In cases where a covenant is required, but the owner of the subject property fails to create one within a certain time frame, the Division may unilaterally impose one.

In most respects, environmental covenants and restrictive notices operate in the same manner. However, there is ***potentially*** one difference between them. SB 145 explicitly defines a restrictive notice as an exercise of the state's police power. The statute is silent as to whether an environmental covenant is likewise a police power device, or is instead some sort of property law creation. Colorado takes the view that the covenant is a police-power-based mechanism. Federal government agencies view the matter differently, and consider the covenant to be an interest in property. If the federal government's view is correct, an environmental covenant would not bind a prior recorded interest in the affected property, unless the owner of the interest agreed to subordinate it to the covenant. A properly created restrictive notice, on the other hand, will bind all prior recorded interests, even if they have not been subordinated.[1]

In a situation where a facility has caused contamination on neighboring properties, a covenant is required whenever contamination will remain above unrestricted use levels, even on the off-site contaminated property.[2] Neighboring property owners will not have the same incentive to sign an environmental covenant as the facility proposing the restricted use cleanup, and it might prove impossible to get covenants from all the affected property owners. In such a case, the statute allows the Division to waive the covenant requirement, but ***only*** if the relevant local government enacts an ordinance imposing the appropriate use restrictions, and enters into an "intergovernmental agreement" with the Division under which the Division may enforce the restrictions in the ordinance, and has veto authority over any changes to the ordinance. This complex procedure has only been used a couple of times. Because of its resource-intensive nature, it is not generally appropriate, except in cases of widespread contamination involving many different off-site properties with owners who are not being required to remediate contamination. Absent this mechanism, the Division cannot waive the covenant requirement, [3] and so if all necessary covenants cannot be obtained, the remedy will have to be modified to eliminate the need for the use restriction on the off-site properties.

[1] It is a basic tenet of property law that a purchaser of property acquires the property subject to the rights of all existing interests in the property. The state's police power is not subject to this tenet, although regulatory actions may sometimes result in a "taking" of a pre-existing property interest that requires just compensation.

[2] Of course, the Division may decide it is not appropriate to allow off-site contamination to remain above unrestricted use levels.

[3] Except as provided in § 25-15-320(3)(a), C.R.S.

An "environmental remediation project" includes closure of a hazardous waste management unit or a solid waste disposal site, as well as any remediation of environmental contamination ("any remediation" includes remedies that rely solely on ICs) conducted under various federal and state laws. Federal statutes include the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Uranium Mill Tailings Radiation Control Act ("UMTRCA"). State statutes include the Colorado Hazardous Waste Act ("CHWA") , the Colorado Solid Waste Disposal Sites and Facilities Act ("SWDA"), and the Colorado Radiation Control Act ("RCA"). However, EC's are not required for interim cleanup decisions that are not intended as the final remedial decision.

As the list of statutes suggests, covenants will be required in instances where the Division is not the regulator. The Environmental Protection Agency, the Department of Agriculture, the Department of the Interior, the Department of Defense, and the U.S. Department of Energy could all make CERCLA decisions that would trigger the requirement for a covenant or restrictive notice. Nonetheless, only the Division can accept, hold, modify and terminate covenants and restrictive notices.

3. Creating environmental covenants and restrictive notices

Persons who are required to clean up environmental contamination may view environmental covenants as a quick and inexpensive alternative to cleaning up to levels that are safe for unrestricted use. Certainly, using institutional controls can reduce cleanup costs. But creating and implementing IC's is not free, and in some cases may not even be feasible. Before going too far down the road in developing, reviewing and approving a cleanup proposal that relies on IC's, both the party proposing to rely on the IC and the Division need to be sure the proposed use restrictions are feasible. If they are not, a different cleanup strategy will be required.

Whether a particular use restriction is feasible can depend on a number of factors. One important factor is whether there are other entities whose property rights may be affected by the proposed restriction. SB 145 addresses this issue in a couple of ways. First, the person who proposes to create the covenant or use restriction must provide notice to all persons who have an interest in the property or are in possession of the property, and must provide a copy of the notice and a list of the persons to whom the notice was sent to the Division. Specifically, §25-15- 321(5), C.R.S. requires any person who is "proposing to create, modify, or terminate an environmental covenant [to] provide written notice of their intention to all persons holding an interest of record in the real property that will be subject to the environmental covenant, to all persons known to them to have an unrecorded interest in the property, and to all affected persons in possession of the property." Section 25-15-321.5, C.R.S. requires the same notification in the case of restrictive notices.

Second, the person proposing to create the covenant or restrictive notice must provide the Division with "such title information as [it] may require." Title information (usually in the form of an "information only title commitment" or similar product from a title insurance company) identifies the prior recorded interests in a parcel of property. Obtaining up-to-date title information is critical in determining whether there are any prior interests that may conflict with the proposed use restrictions. So, it is important to obtain this information early in the remedy evaluation process.

As noted above, institutional controls imposed through property-law-based mechanisms will not bind prior recorded interests in the subject property (unless the owners of such interests agree to subordinate them). While controls that are imposed through police-power-based mechanisms will bind prior recorded interests, they may, in some cases, present "regulatory taking" issues. The law on regulatory takings is complex and often very fact-specific. The Division intends to implement institutional controls in a manner that is effective, protects human health and the environment, and does not impair constitutional rights. To these ends, the Division will require adequate title information early in the remedy decision-making process, and will work closely with the AGO in evaluating such information in light of the proposed use restrictions.

b. Steps in creating an environmental covenant or restrictive notice

The Division will follow a standardized process to evaluate and implement institutional controls. Each step in the process is listed below, followed by a discussion of the steps. There is some degree of flexibility, overlap and iteration in the process described below, so some cases may follow a slightly different path.

1. The Division, the AGO and the facility ("facility" is used here to refer to the entity that is required to clean up the site) meet ***early*** in the remedy selection process (i.e., when evaluating different remedial alternatives) and agree on the scope of use restrictions and language of notice to other persons with interests in the property.
2. The Division, the AGO or the facility contacts affected local government and determines consistency of proposed covenants with existing zoning.
3. The facility pays for necessary title work to identify current owners of any other interests in the property and provides copy to AGO/the Division.
4. The Division and the AGO determine whether any of the other property interests may conflict with the proposed use restrictions, and if so, how to resolve conflict. (This step may require consultation with owners of potentially affected interests.) Possible solutions to conflicts are:
    a) Change remedy to require different/fewer/no use restrictions
    b) Switch from an environmental covenant to a restrictive notice

   c) Switch to local ordinance and interagency agreement
   d) Obtain subordination agreement(s)
   e) Some combination of the above.
5. Draft environmental covenant/restrictive notice ("EC/RN") completed; facility provides notice of intent to create EC/RN to all persons with interest in the property. This notice includes the proposed EC/RN.
6. Facility provides the Division with a copy of the notice, contact info for all persons to whom it was sent, such title information as the Division may require.
7. The Division and AGO review comments received; identify and resolve any new conflicts; re-notice with new restrictions, if necessary.
8. Finalize remedial decision; finalize EC/RN; obtain any necessary subordination agreements.
9. Facility prepares survey if needed (generally, if creating new parcel).
10. Final review of EC/RN, legal description, survey; execute EC/RN.
11. AGO records EC/RN and any subordination agreements.
12. The Division provides a copy of the recorded EC/RN to the affected local government, posts to registry, and retains original.
13. Obtain updated title commitment.

Step one: Hold a scoping meeting with the facility early in the remedy selection process.

As mentioned above, SB 145 ***requires*** a covenant or restrictive notice for any cleanup that incorporates an engineered structure (such as a cap) or is safe for some, but not all, uses (i.e., "risk-based cleanup"). If it is not feasible to implement the proposed use restrictions, a different approach to cleanup will be required.

The feasibility of implementing a given use restriction depends primarily on the nature of the proposed restriction and whether it conflicts with other interests in the property or with local zoning requirements. It is important to understand both the current and potential uses of the property. Determining whether a proposed use restriction is feasible can be somewhat time-consuming. It may take some time for the Division and the facility to reach agreement on proposed use restrictions. Identifying the owners of other interests in the property takes time, as does resolving potential conflicts between the proposed use restriction with other interests in the property, or with local zoning requirements. Therefore, the Division and AGO should meet with the facility ***early*** in the cleanup process to discuss the issues involved in creating an effective EC/RN.

The overall purpose of the scoping meeting is to begin evaluating the feasibility of creating and implementing an EC/RN. There are four questions the Division considers in evaluating the feasibility of a proposed use restriction:

1. Are the restrictions practical and enforceable?
2. Will the Division be able to monitor the restrictions?
3. Will the restrictions affect another person's rights in the property?
4. Are the restrictions consistent with local land use requirements?

To begin answering these questions, the scoping meeting should address two main topics: (1) the nature of the cleanup and anticipated use restrictions; and (2) the steps involved in creating a covenant. Discussing the nature of the cleanup and the anticipated use restrictions will provide a forum for answering the first two questions, while discussing the process will highlight the third and fourth questions. Looked at another way, questions 1 and 2 go to feasibility from the Division's perspective, and questions 3 and 4 go to feasibility from the perspective of third persons and local government.

The Division and the facility should be in general agreement on the approach to cleanup and the proposed use restrictions. Many cleanups these days are relatively routine and the consultants and attorneys advising facilities are experienced, so it will often be possible to reach a comfort level relatively easily. But there will be cases where the Division concludes the facility's proposed remedial approach or use restrictions are not protective, not feasible, or are otherwise inappropriate. The Division is not required to agree to a remedy that relies on use restrictions.

As an example of an impractical use restriction, consider a site with volatile organic compounds (VOCs) in the soil and groundwater that has the potential to cause indoor air problems. Instead of remediating the contamination, the responsible party proposes a use restriction requiring windows in any building constructed on the site to open all ground floor windows at least 2 hours per day. It is obviously impossible to enforce such a restriction, and ludicrous to expect any building occupant to comply with it in winter months. A more reasonable restriction would be one requiring any building constructed on the site to have a sub-slab depressurization system.

While some use restrictions will be more easily enforced and monitored than others, all carry some costs. Therefore, in evaluating the feasibility of a given use restriction, the Division should also consider the feasibility of conducting additional remediation so fewer or no restrictions are necessary. There may be cases where a relatively small amount of additional remedial effort may suffice to achieve the unrestricted use/unlimited exposure standard.

The scoping meeting is an opportunity to get such issues out on the table and at least begin resolving them. This is also an appropriate time for the parties to discuss how the Division plans to monitor compliance with the proposed EC/RN. The parties should also identify funding sources to implement monitoring. In many

cases, funding monitoring is the facility's responsibility. The following laws and regulations may make the facility responsible for funding the monitoring of ICs:

1. At sites subject to CHWA corrective action or Parts 264/265 disposal unit closure requirements, annual fees provide funding for monitoring compliance with environmental use restrictions. See 6 CCR 1007-3, §§ 100.31(a)(2) and (4). Document review and activity fees provide funding for reviewing, responding to and evaluating documents required to be submitted in connection with environmental covenants. See 6 CCR 1007-3, § 100.32(a)(1)(xii).
2. CERCLA sites –resources needed to develop IC's and monitor compliance constitute response costs for which the facility is liable.
3. Solid Waste sites subject to SWDA – document review and activity fees and annual fees may be assessed in connection with implementation of ICs. 6 CCR 1007-2, §§ 1.7.2(A)(1)(g) (term "or associated documents" includes restrictive notices, IGA/ordinance); 1.7.3(A)(3).
4. CRCA sites – inspection fees may be assessed in connection with implementing ICs. 6 CCR 1007-1, § 12.4.3.

By the end of the scoping meeting, the facility should understand the steps involved in creating institutional controls, and especially what responsibilities it has in the process. The facility's responsibilities include:

1. Paying a title company or other qualified entity to do a title search that identifies all prior recorded interests.
2. Identifying the present owner of each prior recorded interest (may also be performed by a title company).
3. Notifying each owner of a prior recorded interest (as well as persons with unrecorded interests who are known to the facility) of the facility's intention to create a covenant or restrictive notice.
4. Providing the above information to the Division.
5. Obtaining "subordination agreements" in appropriate cases.
6. Obtaining approval from the affected local government for proposed uses in appropriate cases.

The facility also needs to understand that its desired use restrictions may not work if they conflict with other interests in the property, or if they conflict with local zoning requirements. Finally, the Division should discuss the recordation process with the facility.

Step two: Determine consistency with local zoning requirements

Per the statute, if the only uses of the property allowed under the proposed environmental covenant are prohibited by local ordinance or resolution, the Division must condition its approval of the EC on the facility obtaining approval from the local government that would allow one or more of the uses allowed under the proposed EC.[4] The Division will contact the local government to determine the answer to this question. The local government's response should be memorialized in writing, and retained in the file.

Step three: Facility obtains current title information and provides to the Division/AGO

The statute requires the facility to provide "such title information as the department may require." § 25-15-321(5)(c) and 25-15-321.5(1)(c), C.R.S. The facility proposing the EC/RN must pay for a title company (or other qualified entity) to perform appropriate title research. Questions regarding what title information is needed should be referred to the AGO. Title companies offer different types of products, some of which do not meet the Division's needs.

Typically, the first step in title research will be what title companies often call an "information only commitment" or "property information binder." The title commitment or similar document will identify whether any interests in the property have been transferred to another entity. But it will typically only show the document that originally created the encumbrance. Facilities may need to specifically request that the title insurance company also provide any assignments or conveyances of record for all encumbrances of record.

It is necessary to identify the current owner of all encumbrances to comply with the statute's requirement to notify the current owner of each recorded interest in the property. Because ownership interests in the property can change between the time the feasibility of the EC/RN is initially evaluated and the time the EC/RN is signed, title information will need to be supplemented by an "update" at the time the EC/RN is created.

The facility should provide the Division and the AGO with copies of the title commitment as soon as it is received, so the AGO can begin evaluating whether the proposed use restrictions may interfere with any of the other interests in the real property that will be subject to the covenant. Additional information may also be

[4] §25-15-321(4). There is no corresponding requirement for restrictive notices, but the Division will nonetheless follow the same approach.

required, such as copies of the documents creating the encumbrance, or information regarding the location of particular encumbrances.

The facility is also required to provide information regarding any entities known to it to have an unrecorded interest in the property. This information should include the nature of the interest (a lease might be a common example), a copy of any relevant documents, and the name and contact information for the entity holding the unrecorded interest.

Step four: AGO and the Division review title information to determine whether conflicts exist.

The AGO, in consultation with the Division, will evaluate whether the proposed use restrictions could impair the rights of other persons with an interest in the property. If there are any potential conflicts, they need to be resolved.

There are several strategies for resolving potential conflicts between proposed use restrictions and the property rights of prior recorded interest holders:

a) Obtain subordination agreement(s)
b) Revise use restrictions
c) Change remedy to require different/fewer/no use restrictions
d) Switch to Restrictive Notice
e) Switch to local ordinance and interagency agreement
f) Some combination of the above.

(a) Obtain subordination agreement(s). The owner of an affected interest may agree to subordinate his property right to the covenant.[5]

(b) Revise use restriction. Another method to resolve potential conflicts is to revise the use restriction. Perhaps the restriction was originally drafted to cover all of the property owned by the facility, but really only needs to cover the area of land where the landfill cap is located. Limiting the geographic scope of the use restriction might eliminate the conflict, if the affected property interest is also geographically limited (like most easements). This may be particularly useful for utility easements, as utility companies are unlikely to subordinate their easements.

[5] However, in cases where a severed mineral interest could be affected by the use restrictions, a subordination agreement is not legally adequate, and the owner of the mineral interest must sign a separate EC/RN. If the owner of the mineral interest refuses, and if they are not responsible for cleaning up the contamination, then the proposed remedy may need to be modified.

(c) Change remedy to require different/fewer/no use restrictions. In cases where there is a substantial conflict, it may be necessary to change the entire remedy. For example, if the facility wants to leave high levels of subsurface soil contamination in place and prohibit any excavation, but there is a severed mineral interest that includes a commercially valuable gravel deposit, the facility may need to remove more or all of the contamination. Alternatively, changing the use restriction to require compliance with a materials management plan may (depending on the specifics of the contamination) be an alternative that protects human health and the environment while allowing the owner of the mineral estate to utilize the property.

(d) Switch to a restrictive notice. As discussed above, the restrictive notice will bind prior recorded interests, as long as adequate notice has been provided. In some cases, this may be an appropriate solution. For example, suppose there are a number of severed mineral interests and easements for buried utilities and gas pipelines. Obtaining the consent of all the affected interest holders likely will not be possible. If a use restriction can be crafted that protects human health and the environment while not interfering significantly with the property rights of prior interest holders, a restrictive notice may provide a means to resolve the conflicting interests.

(e)Switch to local government ordinance and interagency agreement. The statute allows the Division to waive the requirement for an EC/RN in very limited circumstances. One is for situations where a covenant is needed on lands owned by a person who is not being required to remediate contamination, and such person refuses to grant the covenant (for example, an off-site groundwater plume). In this case, creating a binding use restriction requires the cooperation of the affected local government. The local government must be willing to adopt an ordinance imposing the use restrictions relied on in the remedial decision. It must also be willing to enter into an "intergovernmental agreement" with the Division under § 29-1-203, C.R.S. that essentially gives the Division "veto authority" over modifications to the amendment.

(f) Some combination of the above. Combining a restrictive notice with a narrow use restriction that does not constitute a regulatory taking, but is still protective, may be very useful in some circumstances (e.g., utility easements, severed mining interests).

Step five: The Division and the facility agree on language in the draft EC/RN; the facility notifies interest holders of intent to create EC/RN

Sections 25-15-321(5) and 321.5(1), C.R.S. require the person proposing to create the EC/RN to notify the holders of any interests that may be affected by the

covenant's restrictions of its intention to create a covenant.[6] In some cases, it may be necessary to discuss the proposed use restriction with the owner of the potentially affected interest to determine whether a conflict exists, and if so, how it might be mitigated.

Prior to sending out the notice, the facility must obtain the Division's concurrence on the proposed notice, because the notice must accurately describe the restrictions to be included in the covenant. The notice shall specify a 30-day time period within which any comments should be submitted to CDPHE. The AGO and the Division should also discuss with the facility which owners, if any, likely will be required to subordinate their interests to the EC.

Step six: Facility provides copies of the notices to the Division

The facility must provide the Division with a copy of the notice that was provided and the names and addresses of the persons who were notified. The AGO, in consultation with the Division, will review this information to be sure the facility notified all affected interest holders. The Division will retain this information in the file as documentation that proper notice was provided.

Step seven: The Division reviews any comments received on notice; identifies and resolves any conflicts; re-notices if necessary

Part of the purpose of providing notice of the proposed EC/RN is to allow the owners of any prior recorded interests to alert the state and the facility of potential conflicts with the proposed use restrictions. If this process discloses any previously unrealized conflicts, they should be resolved as previously described. It is possible that this process may change the use restrictions in such a way that the EC/RN needs to be re-noticed. The Division will consult with the AGO to evaluate whether re-noticing is required.

Step eight: finalize remedial decision, EC/RN and any subordination agreements.

Section 25-15-319(1)(b), C.R.S. states that the EC/RN must contain "any environmental use restrictions relied on in the remediation decision."

[6] In addition to prior interest holders identified in the title search, the property owner is required to notify the following of his intention to create a covenant: persons known to them to have an ***un***recorded interest in the property that could be affected, and any affected persons in possession of the property.

For cleanups conducted under its own authority, the Division will issue a final remediation decision document clearly stating the environmental use restrictions necessary to ensure protectiveness of the remedy. For CERCLA sites, the Division will work with the EPA or federal facility remedial project manager to obtain concurrence on the use restrictions that the proposed remedy will require.

In addition, the remedial decision document should contain appropriate language prohibiting the facility from encumbering the property from the time of the initial title commitment until the EC or the RN is recorded.

At this time, the Division should also finalize the EC/RN and ensure any necessary subordination agreements are executed.

Step nine: Prepare survey if needed

If the facility proposes to impose use restrictions on the entirety of an existing parcel of land, no survey is necessary. But if the facility proposes to impose the restrictions on an area of land that does not exist as a discrete legal parcel, a new legal parcel will have to be defined. To be legally sufficient, a legal description must be sufficiently precise to allow the parcel to be accurately identified in the real world. A survey performed by a licensed professional land surveyor will be sufficient to meet this standard.

Concern about cost may drive people to question the need for a licensed professional surveyor to survey the location of a new parcel. In most cases, a survey by a licensed professional surveyor should cost several hundred to a few thousand dollars. Compared to the cost of the response action, the surveying cost is generally minimal. A survey performed by a licensed professional surveyor will result in an accurate property description that is legally enforceable and identifiable in the real world, and will help ensure use restrictions apply only to areas where they are actually necessary.

Creating a valid legal description using GPS technology, instead of using a licensed professional surveyor, is fraught with difficulty. A combination of constructing monuments on the ground, locating the coordinates of those monuments by an appropriately trained individual using a survey-grade GPS and careful technique, and accurately measuring the direction and distances between monuments would likely suffice. Consumer-grade GPS devices are not sufficiently accurate to perform these functions (they are generally only accurate within 10-30 feet). Even mapping and GIS-grade GPS units are only accurate to within a couple meters.

Facilities are advised to consult the Division regarding approaches to creating legal descriptions other than relying on a licensed professional surveyor. [7]

Step ten: Final review and execution of the final EC/RN

The Division will review, prepare, and route the documents for final signatures. After the documents have been executed, the Division will give them to the AGO for recording.

Step eleven: AGO records EC/RN and any subordination agreements

"Recording" refers to the process of lodging the EC/RN with the clerk and recorder's office for the county(ies) in which the land subject to the EC/RN is located. When a document is recorded, it is assigned a permanent reference number (usually consisting of book and page numbers, and sometimes also a "reception number") that ensures subsequent purchasers of the property are notified of the existence of the covenant. Facilities may request a copy of the stamped document. The original recorded document is kept in the Division files.

Step twelve: Provide affected local government with a copy of the EC/RN, and place electronic copy on registry.

SB 145 requires the Division to provide a copy of all new, modified and terminated ECs and RNs to the "affected local government," i.e., the local government in whose jurisdiction the facility lies. SB 145 also requires the Division to include all ECs and RNs in a registry. The Division complies with this mandate by posting a scanned copy of all ECs and RNs on its website.

Step thirteen: Obtain updated title commitment

This should be pro forma, but it is necessary to be sure the facility did not transfer any interest in the property while the covenant was being reviewed/drafted. The remedial decision document should contain appropriate language prohibiting the facility from encumbering the property from the time of the initial title commitment

[7] The following websites provide some indication of the difficulty of using GPS to create an adequate legal description:
http://ashgps.com/ms/mm6/mm6_oly/WhatAccuracyShouldIExpectfromMyMobileMapper6GPS_RevA.pdf [a test of a GIS grade GPS unit, including post-processing to improve location accuracy],

http://oa.mo.gov/itsd/cio/architecture/domains/information/CC-SurveyGradeGPSARCAppl.pdf

until the EC or the RN is recorded. If the facility violates that prohibition (say, by getting a second mortgage or re-financing an existing mortgage) the Division may take appropriate enforcement action. Such action may include requiring the facility to obtain subordination agreements from any encumbrances created after the initial title commitment was issued until the EC or RN was recorded.

b. Is there a preference for choosing between an EC and an RN?

There are a few situations where a restrictive notice will be preferable to an environmental covenant. They include federal facilities and cleanups on federal lands, sites where it would be difficult to obtain subordination agreements from the owners of prior recorded interests, and sites where the party responsible for the cleanup refuses to cooperate in creating an environmental covenant.

In most respects, the two mechanisms operate similarly. The key difference between the two is that the statute defines the restrictive notice to be a police-power-based mechanism, but does not specify whether the environmental covenant is a police-power-based or property law-based mechanism. Because of the uncertainty surrounding the nature of the EC, the Division will take the conservative approach, and require subordination agreements from affected prior recorded interests when an EC is the mechanism being used to implement the institutional controls.

The RN amendments allow the Division to issue restrictive notices unilaterally when an entity that is required to create a covenant fails to do so within 30 days of the cleanup decision that triggers the EC requirement (for remedies relying solely on use restrictions) or 30 days of completion of the remedy (where the remedy also involves physical work). § 25-15-320(4)(a)(2), C.R.S.

4. Implementing ICs

a. Monitoring compliance with covenant

Until it gains more experience with implementation of ICs, or unless case-specific considerations counsel otherwise, the Division will inspect sites with ICs annually.

The Division may employ various methods to minimize the burden of monitoring compliance with ICs, such as requiring the property owner to submit an annual self-certification letter. Additionally, the Division may utilize local government or federal agency partners to assist in IC monitoring.

b. Modifying and terminating covenants

SB 145 provides that ECs and RNs may be modified at the request of the owner of the land that is subject to the EC or RN. Modifications and terminations require the approval of the Division. If the Division "determines that the proposal to modify or terminate the environmental covenant or restrictive notice will ensure protection of human health and the environment, it shall approve the proposal." The statute lists certain types of information that may support making such a determination (e.g., the owner is proposing additional cleanup, or sampling demonstrates contamination has diminished).

Modifications may follow the same process as new ECs and RNs, or they may follow a more streamlined process, depending on the nature of the modification. A modification that unequivocally reduces the extent of use restrictions will not impair any pre-existing property right, nor will it pose any threat of a regulatory taking. This type of modification may be created without concern about conflicts with prior interests. Similarly, because terminations remove all restrictions on the use of the property, there is no concern about conflicting with a prior interest. The statute imposes the same notification requirements for modifications and terminations as for creation of ECs and RNs, so even these burden-reducing and burden-eliminating changes will need to go through the notice process. The facility will need to obtain updated title information to ensure the current owners of all interests in the property are identified and noticed.

Some modifications may pose a risk of conflicting with the rights of prior interest holders, and accordingly should follow the process outlined above for creating ECs and RNs. Division staff should be sure to consult with the AGO regarding the potential for any such conflicts.

c. Enforcement

SB 145 provides that violations of ECs and RNs may be enforced through administrative compliance orders, or through judicial action, regardless of whether the site is subject to CHWA. The only real difference between enforcement of covenants and restrictive notices versus other CHWA violations is that no penalties are available for the former.