

DEP Streamlines Process for Implementing Restrictive Covenants Required for Cleanup Closure With Conditions

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In June 2012, the DEP released a new revision to its Institution Controls Guidance Procedures document, which substantially streamlines the approval process associated with implementation of restrictive covenants required to be recorded before a Site Rehabilitation Completion Order (SRCO) is issued by the DEP for a contaminated site that is closed "with conditions" (such implementation of a cap, restriction on use of groundwater or future residential use) under the DEP's various risk-based corrective action rules. The revisions will substantially reduce the time and expense involved by eliminating, except in limited circumstances, the need for a property owner to obtain third party written approvals (primarily from lenders and easement holders) of a restrictive covenant (RC) before the DEP issues the SRCO. The revisions were the result of a collaborative effort between the DEP and the Florida Brownfield Association (FBA) to improve the process for completing cleanup at brownfields and other sites closed using risk-based corrective action.

Under prior policy, the Department required a lender holding a mortgage on a property to be closed with conditions to execute a recordable subordination of the mortgage, confirming that the lender would not wipe out the RC in foreclosure in the event that the owner defaulted. However, practical experience during the recent economic downturn has shown it to be very unlikely that a lender would ever choose to extinguish a RC through foreclosure — an action that would render the property out of compliance, subject to rescission of the SRCO, and unmarketable — particularly when the lender could proceed with foreclosure, leaving the RC in place, or simply sell the note, mortgage and pending foreclosure action to a third party.

Similarly, with recorded easements, the DEP historically required a recordable consent and joinder from the holders of recorded easements, confirming their agreement to comply with the terms of

the RC. This has proved extremely difficult, expensive and time-consuming to obtain — requiring formal action by local governments that held platted or other utility easement rights, and prolonged attempts to contact and coordinate with private utilities not equipped to handle such requests.

Under the new guidance, rather than obtain a recordable subordination or consent and joinder, the owner must now provide written notice to the party of the intent to enter into the RC with the DEP, and provide proof of that notice to the Department. This notice can be provided on or after the time the owner publishes notice of the Department's intent to enter in the RC in the local newspaper — a requirement under existing policy. The form of the notice to the lender or easement holder is similar to the form of notice the owner is required to publish.

There remain very limited and well-defined situations where a lender or easement holder still will be required to execute a recordable subordination of mortgage or consent and joinder. For a lender, those are limited to situations where site closure is dependent on an engineering control with an active control system that involves a substantial recurring expense or where the failure to maintain the control system could result in an imminent hazard (within a few days or weeks). This would include, for example, the operation of active gas collection systems that remove ignitable, corrosive, reactive or toxic vapors or maintenance of active holding tanks or ponds holding substantial volumes and control mechanisms requiring daily/weekly attention. In addition, subordination will be required if the mortgage specifically limits use of the property in a way that directly conflicts with the RC. For the easement holder, consent and joinder will be required only when an active control meeting the criteria is located in the easement area, or an engineering control (such as a cap) is located in the easement area, and the easement holder has a right to interfere with the control. Finally, consent and joinder can be required when the easement holder has rights to disturb the soil or groundwater in connection with potential installation of utilities, but has not yet done so, unless the owner demonstrates that the risks posed are small based on the nature and extent of existing contamination in the easement area.

As is the case with the published notice, the lender or easement holder will have 30 days from the date of receipt to provide comments to the Department. In addition, those third parties may exercise any rights they have under the mortgage or easement if the RC is in violation of the terms of the instrument, and retain the right of any substantially interested party to object to the issuance of the SRCO based on the RC. Fundamentally, the policy revisions place the right and responsibility for interpreting and enforcing private party contract rights with the appropriate parties — the parties to that agreement and not the Department while ensuring that those parties have been provided with adequate notice and multiple points of entry to the process. In addition, DEP staff are not put in the position of evaluating the contract rights or intentions of parties to existing recorded instruments, which has proven inefficient and time-consuming and subject to differing interpretation.

These changes have also allowed the Department to eliminate the requirement that DEP technical

staff review title work before sending draft RCs to Tallahassee for review, further streamlining the RC review process. The Department is expected to formally roll out the revisions to the regulated community through a webinar to occur later this year.

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