| Indiana Department of Environmental Management | Status<br>Pending | Policy Number<br>Waste-00081-NPD | IDEM |
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| **Agency Nonrule Policy Document**<br><br>**Subject**<br>Institutional Controls Program Guide | **Authorized**<br>Brian Rockensuess, Commissioner | | |
| | **Supersedes**<br>New | **Issuing Office(s)**<br>Office of Land Quality | |
| | **Originally Effective**<br>TBD | **Renewed or Revised**<br>Not Applicable | |

***Disclaimer:*** *This nonrule policy document is being established by the Indiana Department of Environmental Management consistent with its authority under IC 13-14-1-11.5. It is intended solely to provide guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate State Environmental Board and may be put into effect by IDEM 30 days afterward. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM also will submit the policy to the Indiana Register for publication.*

## 1.0 PURPOSE

This nonrule policy document *(NPD)* provides guidance on the use of institutional controls as a route to conditional site closure through the Office of Land Quality (OLQ) remediation programs.

## 2.0 SCOPE

This policy applies to all Indiana Department of Environmental Management (IDEM), OLQ programs: Petroleum Remediation Program, State Cleanup Program, Solid Waste Program (under very limited circumstances), Hazardous Waste Program, (which may exercise enforcement discretion and determine when investigation and remediation is complete), Voluntary Remediation Program, Federal Programs, and Indiana Brownfields Program, (which exercises discretion pertaining to program participation). This policy applies to responsible parties, owners, operators, and program participants seeking conditional closure using an institutional control.

## 3.0 SUMMARY

This NPD provides guidance on use of institutional controls as a method for conditional closure in collaboration with IDEM's Risk-based Closure Guide (WASTE-0046-R2). This NPD provides information regarding:

3.1. Introduction to the purpose and scope of the Institutional Controls Group

3.2. Rules and laws

3.3. Environmental restrictive covenant (ERC)

3.4. ERC modification and termination

3.5. ERC self-audits

3.6. Environmental restrictive ordinance (ERO)

3.7. Long term stewardship

3.8. Forms

3.9. When issues arise

3.10. Document and electronic data file submittal guidelines

## 4.0 DEFINITIONS

4.1. "Closure" – IDEM's written recognition a party has demonstrated attainment of remediation objectives in a particular area. The written instrument for this decision varies by remedial program.

4.2. "Conceptual site model" – A comprehensive description of a site and the processes by which contamination may move from sources to receptors.

4.3. "Environment" – The complex of physical, chemical, and biologic factors which include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other similar natural resources (IC 13-11-2-137) which act upon an organism or ecological community.

4.4. "Environmental restrictive covenant" (ERC) IC 13-11-2-193.5 – Any deed restriction, restrictive covenant, environmental covenant, environmental notice, or other restriction or obligation with respect to the land which:

1) Is executed before July 1, 2009, and:
   (A) Limits the use of the land or the activities that may be performed on or at the land or requires the maintenance of any engineering control on the land designed to protect human health or the environment.
   (B) By its terms is intended to run with the land and be binding on successors.
   (C) Is recorded with the county recorder's office in the county in which the land is located. and
   (D) Explains how it can be modified or terminated. or

2) Is executed after June 30, 2009, and:
   (A) Limits the use of the land or the activities that may be performed on or at the land or requires the maintenance of any engineering control on the land designed to protect human health or the environment.
   (B) By its terms is intended to run with the land and be binding on successors.
   (C) Is recorded with the county recorder's office in the county in which the land is located.
   (D) Explains how it can be modified or terminated.
   (E) Grants the department access to the land.
   (F) Requires notice to a transferee of:
      (i) The land, or
      (ii) An interest in the land
   of the existence of the restrictive covenant. and
   (G) Identifies the means by which the environmental files at the department that apply to the land can be located.

4.5. "Environmental restrictive ordinance IC 13-11-2-71.2" – Any ordinance with respect to land, which:

(1) Is adopted by a municipal corporation (IC 36-1-2-10); and
(2) Limits, regulates, or prohibits any of the following with respect to groundwater: a) withdrawal, b) human consumption, and c) any other use.

4.6. "Environmental restrictive ordinance" IC 36-1-2-4.7 - with respect to land, any ordinance that (1) is adopted by a municipal corporation; and (2) seeks to control the use of groundwater in a manner and to a degree that protects human health and the environment against unacceptable exposure to a release of hazardous substances or petroleum, or both.

4.7. "Groundwater" – Has the meaning set forth in IC 25-39-2-10.

4.8. "Institutional controls" – Administratively or legally enforceable measures which limit human exposure to chemicals of concern exceeding applicable closure levels; institutional controls typically do not involve engineered solutions.

4.9. "IDEM project manager (PM)" –IDEM staff responsible for overseeing technical and regulatory requirements associated with performing investigation or remediation. The PM is responsible for ensuring that responsible parties or program participants take steps consistent with this policy.

4.10. "No Further Action Letter" – Has the meaning set forth in 329 IAC 7.1-2-9.

4.11. "On-site" – Has the meaning set forth in 329 IAC 7.1-2-11.

4.12. "Participant" – Person responsible for taking steps to obtain access to third party properties from the property owners to perform investigation or remediation activities. This role is often fulfilled by an agent of the participant such as an environmental consultant.

4.13. "Petroleum" – Has the meaning set forth in IC 13-11-2-160.

4.14. "Receptor" – A human or ecological entity exposed to a stressor.

4.15. "Release" – Has the applicable meaning set forth in IC 13-11-2-184.

4.16. "Residential land use" – Use of any property as a place of residence or for residential activities, such as a daycare center. Agriculture is considered a residential land use.

4.17. "Responsible party" – The individual, company, group, or other entity legally responsible for areas where chemicals of concern are known to have been released, or legally responsible for compliance under state or federal environmental regulations. Includes responsible persons (CERCLA and IC 13-25-4); owners and operators (IC 13-23-13); owners, operators, and responsible persons (IC 13-24-1).

4.18. "Responsible person (RP)" – Has the applicable meaning set forth in IC 13-11-2-192.

## 5.0 ROLES

5.1. The Consultant shall (when engaged by the Responsible Party):

A. Represent the property owner or responsible person (RP).

B. Conduct investigations and remediation work and communicates with IDEM.

C. Prepare closure documentation or other documents for a site on behalf of an O/O/P or RP.

D. Coordinate activities with the IDEM OLQ PM to achieve closure of a site, if necessary.

E. Perform investigatory or remediation work.

5.2. The IDEM OLQ PM shall:

A. Receive, evaluate, and provide comments on documents associated with the institutional controls.

B. Prepare correspondence to the RP and consultant communicating the status of institutional controls.

C. Conduct meetings with the RP or the consultant to discuss conditional closure of a site, if necessary.

D. Ensure all pertinent documents are correctly loaded into the Virtual File Cabinet for storage. IDEM's Virtual File Cabinet is available at https://www.in.gov/idem/legal/2363.htm.

5.3. The Responsible Party shall:

A. Comply with applicable notification rules in 329 IAC 9.

B. Respond in a timely manner to all requests for information from the IDEM OLQ PM.

C. Provide data, maps, or records to the IDEM OLQ PM reflecting site conditions.

D. Sign and notarize the Environmental Restrictive Covenant (ERC).

## 6.0 POLICY

6.1. OLQ's Institutional Controls Group (ICG) will review institutional controls proposed as a route to conditional closure for sites participating in OLQ remediation programs following all applicable state statutes, rules, and NPDs.

6.2. The responsible party, or consultant working on its behalf will provide recorded ERCs to IDEM for tracking purposes.

6.3. The ICG will provide self-audits to current property owners to ensure knowledge of, and compliance with, ERCs.

6.4. IC 13-14-2-6 gives IDEM the authority to proceed in court, by appropriate action, to enforce a restrictive covenant according to the terms of the covenant.

6.5. The responsible party, or consultant will obtain a signature on State Form 53079 from the unit legislative body to rely upon environmental restrictive ordinances (EROs) deemed legally sufficient by IDEM's Office of Legal Counsel.

6.6. The ICG will review, monitor, and provide oversight of sites with approved long-term stewardship plans until such time as the long-term stewardship agreement provisions are fulfilled.

6.7 The Institutional Controls Program Guide (attachment) provides additional detail.

## 7.0 REFERENCES

7.1. Indiana Statutes

A. IC 13-11-2-193.5 Restrictive covenant (definition)

B. IC 13-11-2-71.2 Environmental restrictive ordinance (definition)

C. IC 13-12-3-2 Remediation and closure goals, objectives, and standards for certain remediation projects

D. IC 13-14-2-6 Court actions by the commissioner (Authorizes IDEM's Commissioner to proceed in court to enforce ERCs as defined by IC 13-11-2-193.5)

E. IC 13-14-2-8 Certain restrictive covenants not subject to department approval; department review and action on certain activities and land use restrictions

F. IC 13-14-2-9 Modification of restrictive covenants; recovery of expenses incurred

G. IC 13-22 Hazardous Waste Management

H. IC 13-23 Underground Storage Tanks (USTs)

I. IC 13-24 Petroleum

J. IC 13-25 Hazardous Substances

K. IC 13-25-4-24 Contaminated property; restrictive covenants (Requirements for certain ERCs, including but not limited to the requirement to describe the identity, quantity, and location of every hazardous substance on the property)

L. IC 13-25-4 Hazardous Substances Response Trust Fund (State Cleanup Program)

M. IC 13-25-5 Voluntary Remediation of Hazardous Substances and Petroleum (Program)

N. IC 13-25-5-8.5(c) (Requirement to adequately characterize nature and extent of contamination)

O. IC 13-25-5-8.5(e) The department shall consider and give effect to restrictive covenants and environmental restrictive ordinances in evaluating risk-based remediation proposals.

P. IC 13-25-5-8.5 Voluntary remediation work plan objectives; additional action to protect human health and the environment not necessary under certain circumstances; risk-based remediation objectives and proposals

Q. IC 13-25-5-8.5(f) (Requires written notice of reliance on ERO to municipality)

R. IC 36-1-6-11 Notices to department of environmental management concerning environmental restrictive ordinances; waiver of notice; ordinance must state notice requirements but is not void for failure to state (Municipal Corporation) (Give written notice to IDEM 60 days before an amendment or repeal of an ERO and 30 days after passage, amendment, or repeal of an ERO.)

S. IC 36-2-4-8 Adoption and effective date of ordinance, order, or resolution; requirements (Counties). (Give written notice to IDEM 60 days before an amendment or repeal of an ERO and 30 days after passage, amendment, or repeal of an ERO.)

T. IC 36-2-7.5 Recording Documents Containing Social Security Numbers

U. IC 36-3-4-14 Ordinance or resolution adoption; requirements (Marion County). (Give written notice to IDEM 60 days before an amendment or repeal of an ERO and 30 days after passage, amendment, or repeal of an ERO.)

V. IC 36-4-6-14 Ordinance or resolution adoption; requirements (Cities). (Give written notice to IDEM 60 days before an amendment or repeal of an ERO and 30 days after passage, amendment, or repeal of an ERO.)

W. IC 36-5-2-10 Ordinance, order, or resolution adoption; requirements (Towns). (Give written notice to IDEM 60 days before an amendment or repeal of an ERO and 30 days after passage, amendment, or repeal of an ERO.)

X. IC 4-21.5 Administrative Orders and Procedures

Y. IC 4-21.5-3-5 Notice required; certain licensing and other decisions; persons who must be notified; contents; effectiveness order; stays (by IDEM for certain determinations).

7.2. Indiana Administrative Code

A. 329 IAC 1-2-7 Cost recovery (for Proposed Modifications or Terminations of ERCs)

B. 329 IAC 7.1-4-1 Ranking (Assessment of hazardous substance response sites)

C. 329 IAC 9-1-14.5 UST "Corrective action" means action taken to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including emergency measures taken as part of an initial response to the release under 329 IAC 9-5-2.

7.3. Agency Policies

A. Risk-based Closure Guide; Risk-based Closure Guide NPD Waste-0046-R2 – Provides technical guidance for release characterization, risk evaluation, and, when necessary, remedy selection and implementation.

B. Procedures for Gaining Access to Third Party Properties by Responsible Parties performing Remediation Waste-0065-NPD – Provides steps to be taken and documentation to be provided by a responsible party who is attempting to access third party properties for the investigation or remediation of contamination in soil, groundwater, surface water, sediment, or indoor air.

C. Community Involvement Plan; Community Involvement Plan NPD Waste-0070-NPD – Provides a systematic/tiered approach to community involvement for all remediation programs.

## 8.0 SIGNATURES

Brian Rockensuess, Commissioner
Indiana Department of Environmental Management

10-24-22
Date

Peggy Dorsey, Assistant Commissioner
Office of Land Quality

10-12-22
Date

Nancy King, General Counsel

10/20/22
Date

This policy is consistent with agency requirements.

Quality Assurance Program
Office of Program Support
Indiana Department of Environmental Management

24 Oct 2022
Date