

Assuring Adequate Notice and Enforceability of Environmental Covenants: A Key to Brownfields Redevelopment

For over 20 years, since the adoption of the Superfund statute,¹ the cleanup of property with environmental hazards has been underway in the United States.² Complex legal and technical issues have been tackled and responsible parties pay for cleanups at most contaminated sites under the close supervision of government regulatory agencies, under enforcement orders, permits and voluntary cleanup programs.³

There is a wide range of sites that may need cleanup, and a range of potential risks that may be posed. Each site is evaluated on an individual basis using principles of risk assessment and balancing factors such as cost and technical feasibility.⁴ Initially, cleanup programs focused on the most dangerously contaminated sites, such as the infamous Love Canal site in New York, and the Valley of the Drums site in Kentucky. But there are thousands of sites around the country where contamination is far less severe, or where perhaps there is merely the perception of contamination due to past industrial use. The huge expense and liability associated with cleanup of contaminated sites has created a class of sites known as “Brownfields,” where the fear of contamination and liability have stymied reuse.⁵ Policy makers are struggling to find the appropriate level of health protection and regulatory control while encouraging the productive reuse of former industrial properties.⁶

As potentially contaminated sites are being cleaned up, the question of how to insure the safe re-use of the land arises frequently. One mechanism

that is often discussed is the use of so-called “institutional controls” to insure that re-use of previously contaminated properties is safe. One type of institutional control is the use of restrictive covenants on property—the recording of a restriction in the public record to inform future users that, for example, a well may not be placed on the property for domestic use. This article explores the use and enforceability of restrictive covenants for contaminated properties and highlights two features of Indiana law that give Indiana regulators and property owners greater confidence in the long-term viability of restrictive covenants as a means of property control.

“Institutional Controls” for Remediated Properties. It has been noted that the Superfund program was “built on the failure of institutional controls. The inability of zoning regulations and private land use restrictions to control development at Love Canal near Niagara Falls, N.Y., led to construction of a school on an abandoned industrial dump”⁷ However, federal and state cleanup laws now require cleanup of contaminated property and establish liability for property owners to remediate hazardous substances.⁸

Cleanup of a contaminated property generally involves several stages. First the condition of the property is investigated by reviewing historical records, obtaining a title search, and looking at records at environmental regulatory agencies.⁹ In many cases, samples of soil and groundwater also will be obtained.¹⁰ Based on the data gathered in the investigative phase, the risks associated with the site will be assessed, and a remedy will be designed that can

best address those risks. Common remedies including removing or treating contaminated soil, removing the source of contamination (such as a leaking tank), and containing or treating contaminated groundwater.

Even when a site has been actively remediated, there will typically be some level of contamination that will be left at the site. Federal and state agencies have developed means of assessing risk and have published “look-up” tables which target cleanup levels for both residential and industrial scenarios.¹¹

Parties responsible for cleaning up also have the opportunity to perform a site-specific risk assessment that can further refine the risk assumptions.

“Institutional controls” is a term used to describe various non-engineering means of controlling risk from chemical contaminants that are present at a property.¹² Institutional controls may include mechanisms such as zoning ordinances, local ordinances restricting the use or installation of wells, and various proprietary controls such as restrictive covenants and easements.

Institutional controls serve several purposes in the cleanup context¹³:

1) to eliminate exposure pathways or reduce exposure to chemicals; 2) to provide notice to future property owners that certain activities on the property cannot be safely undertaken; and 3) to identify future activities that are not consistent with the “no significant risk” level calculated during the site closure process. In other words, if the risk-assessment was based on the fact that there is no exposure to residual contaminants in the groundwater, the institutional control is intended as a means of insuring that this assumption continues to be

valid in the future. Generally no restrictive covenant or other institutional control would be required where the site cleanup levels achieved residential cleanup levels.¹⁴ A site meeting residential levels would be qualified for unrestricted future use even though some low level of contamination remained at the site. A restrictive covenant would be required only where the cleanup levels at a site were based on an industrial scenario, as the site would not be considered safe for unrestricted, or residential, use in the future unless further cleanup work or assessment was completed.¹⁵

Indiana's Voluntary Cleanup and RISC Programs. The Indiana General Assembly has enacted several keys statutes to implement risk-based cleanup programs in Indiana and to enhance Brownfields redevelopment.¹⁶ Indiana's Voluntary Remediation Program (VRP), established in 1993, allows the use of risk assessment to determine the appropriate cleanup goals for a site.¹⁷ When a cleanup is completed under the VRP program, the responsible party receives a covenant not to sue from the state of Indiana.¹⁸ The Indiana Department of Environmental Management (IDEM) has also issued the Risk-Integrated System of Closure (RISC) guidance document, which allows closures under default and non-default residential and industrial scenarios.¹⁹ The RISC Guidance Document includes an appendix regarding institutional controls.²⁰ Whenever remediation of the site does not meet residential cleanup standards, notice is required to be provided "where a reasonably diligent inquiry into a property should uncover the existence of such a notice."²¹ The Guidance treats

the restrictive covenant primarily as a means of notifying future property owners of the uses of the property that would not be consistent with the cleanup.

However, as discussed below, IDEM now has the statutory authority to enforce restrictive covenants.²²

Critiques of Institutional Controls and Restrictive Covenants.

Regulatory agencies and commentators have expressed concern about the effectiveness of institutional controls, including restrictive covenants, to adequately protect the public at sites where cleanups have been accomplished, but residual contamination remains. The U.S. Environmental Protection Agency has announced policies, regarding sites in the RCRA hazardous waste program, that require enforcement orders or permits continue to be in place unless the site meets residential cleanup levels.

One of the key objections from regulators is the potential inability to enforce restrictive covenants. A draft internal guidance memo issued by EPA Region 5 in Chicago, was summarized by one commentator as follows:

. . . [EPA] Region V concludes that its only options are to impose permanent 7003 orders upon RCRA sites or require cleanup to unrestricted use levels. Alternatively, if the states in Region V are willing to commit in writing that they have the legal authority to enforce institutional controls and are willing to exercise that authority as long as it may be needed, the region is willing to defer to the states in Region V to enforce these controls.²³

Thus, EPA's policy would be to require a permit or order, such as a consent decree, in order to allow a risk-based closure based on an industrial

scenario so that the institutional controls would be enforceable by the agency. As recently as February 2002, EPA published its draft guidance regarding the completion of corrective action—“corrective action complete with controls” is a designation suggested by the agency to indicate that although the corrective action has been undertaken, it is still necessary to operate or maintain either a physical portion of the remedy or an institutional control.²⁴ Even if the only requirement is to maintain an institutional control, EPA’s current position is on-going monitoring by the regulatory agency is required, and the EPA cautions that a “thorough review is necessary to ensure [the agency’s] ability to enforce the institutional control through the permit or order mechanism.”²⁵

Another fault found by commentators is that restrictive covenants may not be an effective mechanism to provide notice to parties of the existence of the covenant, even many years in the future, and allow parties to heed the cautions it contains.²⁶ This is either because such covenants may be difficult to discover in the future, or covenants may be subject to provisions such as so-called marketable title acts that operate to extinguish many restrictions on property by statute. The remaining sections of this article will address both the issue of common law and statutory enforceability of restrictive covenants and the impact of Indiana’s Marketable Title Act on environmental covenants.

Indiana Common Law on Restrictive Covenants. Restrictive covenants are one form of proprietary controls on real property and are governed by state common law. Indiana has a long tradition of enforcing

restrictive covenants on property.²⁷ A covenant is a promise relating to real property that is created in a conveyance or other instrument.²⁸ Although the promise pertains to real property, it is a type of express contract.²⁹ Covenants are generally enforceable unless they violate public policy.³⁰

The nature of the burden created by the covenant determines if it is affirmative or negative.³¹ Affirmative covenants require the covenantor to do some act, such as paying money, supplying goods, or maintaining a drainage tile.³² In the environmental context, such a covenant might include maintaining a ground water treatment system, maintaining pavement over residual soil contamination or maintaining a fence. A negative covenant requires the covenantor to refrain from doing an act, for example using the land for other than residential purposes.³³ In the environmental context, this could be to refrain from excavating below a certain depth or to refrain from installing a ground water well.

In the case of Columbia Club, Inc. v. American Fletcher Realty,³⁴ the Indiana Court of Appeals set forth a succinct overview of the state of Indiana law on covenants:

Land use covenants create rights and duties between the original promising parties. The grantee's rights are called the 'benefit' of the covenant, while the grantor's duties are called the 'burden.' Covenants are either personal, enforceable only by the original parties to an agreement, or the 'run with the land.' When covenants run with the land, they may be enforced against remote grantees.

. . .[A] real covenant imposing an affirmative burden will run with the land if: (1) the covenantor and covenantee

intend it to run; (2) the covenant touches and concerns the land; and (3) there is privity of estate between subsequent grantees of the original covenantor and covenantee.³⁵

These concepts are “age-old essentials of a real covenant”³⁶ which are based on ancient English common law; they are

[W]ords used by courts in England in old cases to describe a limitation which the courts themselves created . . . and which the courts voluntarily apply. In truth the test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate.³⁷

The intent of the parties that the covenant run with the land is determined from the “specific language used by the parties and the situation of the parties when the covenant was made.”³⁸ But no particular language is required to demonstrate the intent to run with the land.³⁹

The “touch and concern” the land test has caused commentators to question the use of restrictive covenants in the context of environmental cleanups. In general, for a covenant to “touch and concern” the land, the covenant must be “logically connected”⁴⁰ to the property. The Indiana Court of Appeals explained this requirement as follows:

The clearest example of a covenant that ‘touches and concerns’ the land is one which calls for a party to do or refrain from doing, a physical act on the land. We have held that a covenant to maintain a tile drain was logically connected to the land because the drain was buried on the land.⁴¹

A restriction that required a party to refrain from installing a drinking water well or from excavating beneath a certain depth would appear clearly to “touch

and concern” the land. However, commentators have concluded that this might not be the case because the benefit of the covenant is held “in gross.”⁴² The concern is that the *government*, not the parties to the transaction that the common law principles were designed to protect, do not appear to have the ability to enforce the covenant under the common law principles. As one commentator states:

When the owner of contaminated property puts a restrictive covenant into the deed to comply with governmental requirements, the burden of the covenant falls on the land of the property owner. The benefit which accrues to the government, however, is not connected to government land; it exists “in gross.” Therefore the covenant does not run with the land and is not enforceable against successors in title.⁴³

This is an important distinction because the parties to the transaction would appear to be able to enforce the covenant. For example, if one industrial property owner sold property to a subsequent owner with a restriction against installing a ground water well, and a subsequent grantee violated that restriction, there would likely be little dispute as to enforceability by the original grantor. However, the government is not comfortable in relying on private party enforcement of restrictions that are important public safety protections.⁴⁴ And, private property owners may not wish to undertake the responsibility to enforce environmental restrictions on property in the future.

Without relying on an analysis of whether the restriction “touches and concerns” the land, the privity requirement also would seem to eliminate government, or any other third party, enforcement of a restrictive covenant.

The privity requirement concerns the relationship between the parties to the covenant. Horizontal privity is shown by some mutual or successive interest in the land burdened or benefited by the covenant.⁴⁵ The covenantors need not hold simultaneous interests if the covenant relates to a property transferred by one party to the other.⁴⁶ Vertical privity is found where the parties seeking to enforce the covenant are successors in title to the property that is the subject of the covenant.⁴⁷ The government typically does not hold any interest in the land being benefited or burdened by the covenant, so would have no common law right of enforcement.⁴⁸

As discussed in the following section, the uncertainty regarding the common law requirements for government enforceability of restrictive covenants led the Indiana General Assembly to adopt a statutory solution that allows the Indiana Department of Environmental Management to enforce environmental restrictive covenants.

Marketable Title Act. Under current Indiana law, a restrictive covenant may be extinguished by the passage of time, unless required formalities are followed. Indiana is one of at least twenty states that has adopted marketable title legislation based on language adopted in Michigan, Wisconsin and Ontario prior to 1960.⁴⁹ Indiana's Act dates to 1963.⁵⁰ The National Conference of Commissioners on Interstate Laws' Uniform Marketable Title Act, first promulgated in 1977, was derived from the Michigan Act and a Model Marketable Title. The Uniform Act first appeared as Part 3 of

Article 3 of the Uniform Simplification of Lands Transfers Act (USLTA). In 1990 a “standalone” version was promulgated.⁵¹

The preface to the Uniform Marketable Title states:

The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for reasonable periods only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record.⁵²

As described by a Massachusetts writer upon the pocket veto of a marketable title act by that Commonwealth’s Governor:

Massachusetts was poised in January [1999] to join the 20 or more states that have enacted so-called Marketable Record Title Statutes. The purpose of such legislation has been to render marketable those real estate interests which are evidenced by a chain of title for a specified period of time, by terminating or limiting the enforcement of rights, interests and claims respecting real property that are based on old records, instruments or events predating the statutory time period.

...

The Massachusetts legislation . . . deems any person with an interest in land and an unbroken chain of title thereto for 50 years or more, to have a good and clear record and marketable title, subject only to the exceptions set forth The “origin of title” [“root of title” in Indiana] would be that transaction . . . which was the most recent transaction of record that is no less than 50 years prior to the date on which marketability is being determined.⁵³

The Indiana Marketable Title Act has a significant impact upon environmental restrictive covenants because, under the Act, interests created prior to effective date of the origin or root of title normally are extinguished and no longer form a part of the “chain.”⁵⁴ Once extinguished by the passage of time, the right cannot be revived.⁵⁵ The holder of a covenant or easement may

preserve it – i.e. keep it from being extinguished – only by re-recording the limitation every fifty years:

(a) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the fifty (50) year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, verified by oath, setting forth the nature of the claim. A disability or lack of knowledge of any kind on the part of anyone does not suspend the running of the fifty (50) year period.⁵⁶
...

Referring to the Florida version of the Uniform Act, the Florida Supreme Court said that the Act provided for:

[A] simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished. The legislature did not intend to arbitrarily wipe out old claims and interests without affording a means of preserving them and giving a reasonable period of time within which to take the necessary steps to accomplish that purpose.⁵⁷

Because of the terms of the Marketable Title Act, an environmental covenant may be relied upon as a means of future notice and enforcement authority only to the extent that one of the parties to the covenant may be relied upon to refile it every fifty years.

Although the preface to the Uniform Marketable Title Act states that any major exception to the Act “largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception”⁵⁸ both the Uniform Act and the Indiana Act contain an exception for utility easements.⁵⁹

In 1996, Indiana amended its Marketable Title Act to admit another exception, for a restrictive covenant indicating that the property at issue had been the site of a hazardous waste landfill: “Marketable record title is subject to . . . [a]ll interests of the department of environmental management in land used for the disposal of hazardous wastes arising from the recording of a restrictive covenant under IC 13-22-3-3.”⁶⁰

What is the impact of this recent exception to the Marketable Title Act? It may mean a “title searcher” in the year 2046 and beyond no longer can stop at the first title document more than fifty years of age, but must trace back through earlier records to be sure that no landfill restrictive covenant exists. “But for” this exception to Ind. Code § 32-20, someone (presumably the “department” as it is the one required by Ind. Code § 13-22-3-3 to file the original document) otherwise would have had to preserve the covenant by refileing it before a post-2046 expiration date.

Uniform Environmental Covenants Act. The National Conference of Commissioners on Uniform State Laws is in the process of drafting a new model act to facilitate the implementation and enforcement of institutional controls at sites where residual contamination exists. The model law reportedly is being developed at the request of the Department of Defense and the Environmental Protection Agency.⁶¹ The Commissioners’ goal is to have its final version ready for submission to state legislatures by 2003.⁶²

The initial draft was based in part on a 2001 Colorado act, Senate Bill 01-

145 “concerning the enforceability of environmental real covenants.”⁶³ An “environmental covenant” is defined in the Colorado Act as “an instrument containing environmental use restrictions”.⁶⁴ “Environmental use restriction” means:

[A] prohibition of one or more uses or activities on specified real property, including drilling for or pumping groundwater; a requirement to perform certain acts, including requirements for maintenance, operation, or monitoring necessary to preserve such prohibition of uses or activities; or both, where such prohibitions or requirements are relied upon in the remedial decision for an environmental remediation project for the purpose of protecting human health or the environment.⁶⁵

The most current draft of the proposed Uniform Environmental Covenants Act⁶⁶ defines an environmental covenant as:

[A] servitude that imposes specified activity limitations and use restrictions on real estate described in the servitude to implement an environmental response project, and satisfies the requirements of Section 3 [Creation of Environmental Covenants] of this Act.⁶⁷

Both the Colorado Act and the draft Uniform Act contain provisions authorizing the state agency and any other party to the covenant to bring an action against a person alleged to be in violation of an environmental covenant.⁶⁸ The draft Uniform Act⁶⁹ exempts environmental covenants from the application of the Marketable Title Act.⁷⁰

Current Status of Indiana’s Provisions. Indiana has several environmental statutes that specifically require the recording of restrictive covenants. The first, Ind. Code § 13-22-3-3, discussed above in the section regarding marketable title, states that before allowing the operation of a landfill

for the disposal of hazardous waste, the IDEM commissioner and all owners of the land upon which the landfill is located must execute and record a restrictive covenant upon the land involved. IDEM is to file this instrument in the recorder's office in the county in which the landfill is located.⁷¹

A second environmental statute requiring the recording of restrictive covenants is found at Ind. Code § 13-25-4-24, part of a chapter that is commonly known as the "state cleanup" or "mini-Superfund" law. Section 24 applies to real property that was subject to state RCRA regulation, corrective action, or enforcement, or that was listed on the CERCLIS⁷² "if more than an insignificantly small amount of a hazardous substance remains on or beneath the surface of that property after the partial or final closure of a hazardous waste facility located on the property or the completion of a remedial action on the property under CERCLA or this chapter."⁷³ This section requires that the owner of the real property execute and record, in the office of the county recorder of the county in which the property is located, a restrictive covenant applying to the property if the commissioner determines that a restrictive covenant is necessary to protect the public health or welfare of the environment from unreasonable risk of future exposure to a hazardous substance.⁷⁴

In addition to these statutes, and as discussed earlier in this paper, IDEM has issued a RISC guidance document that includes an Appendix relating to institutional controls and their recording as restrictive covenants.⁷⁵ It is expected that with implementation of the RISC guidance, many property

owners will wish to take advantage of the industrial scenarios and will be required to record restrictive covenants.

In 2001, a definition of “restrictive covenant” was added to the Indiana environmental statutes, Ind. Code § 13-11-2-193.5⁷⁶:

"Restrictive covenant", for purposes of IC 13-14-2-6, means, with respect to land, any deed restriction, restrictive covenant, environmental covenant, environmental notice, or other restriction or obligation that:

- (1) 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;
- (2) by its terms is intended to run with the land and be binding on successors;
- (3) is recorded with the county recorder's office in the county in which the land is located; and
- (4) explains how it can be modified or terminated.

In the same 2001 Act the General Assembly amended a statute relating to the enforcement authority of the IDEM commissioner,⁷⁷ to add a new subsection to permit the commissioner to appear in court, by appropriate action, to:

[E]nforce a restrictive covenant (as defined in IC 13-11-2-193.5) approved by the commissioner and created in connection with any remediation, closure, cleanup, or corrective action under this title in accordance with the terms of the covenant.⁷⁸

Taken together, these two 2001 provisions mean that the IDEM commissioner may go to court to enforce a restrictive covenant that was: (a) approved by the commissioner, and (b) created in connection with any remediation, closure, cleanup or corrective action under Title 13, so long as the

covenant meets the definition of Ind. Code § 13-11-2-193.5. That is, it must: (1) either limit the use of the land or activities performed on the land, or require the maintenance of engineering controls; (2) be written to run with the land and be binding on successors; (3) be properly recorded in the county where the land is located; and (4) explain how it may be modified or terminated.

Arguably, this 2001 language is not inclusive enough to authorize the commissioner to enforce restrictive covenants created pursuant to Ind. Code § 13-22-3-3, concerning hazardous waste landfills (because that law requires the restrictive covenant to be created before allowing the operation of the landfill and thus is not created “in connection with any remediation”) or Ind. Code § 13-25-4-25 (unless the restrictive covenant, in addition to meeting the formalities of Ind. Code § 13-11-2-195.5, was not only required by the commissioner, but “approved by” the commissioner).⁷⁹

Finally, section 2(6) of the Marketable Title Act (Ind. Code § 32-20-3-2(6)) exempts only those interests arising “from the recording of a restrictive covenant under IC 13-22-3-3” (the hazardous waste landfill provision) from the requirement that a restrictive covenant is extinguished if not timely re-filed, leaving the large percentage of recorded environmental covenants in Indiana at risk.

Recommendations for Statutory Change. The Indiana statutes already address the two key objections that commentators have raised regarding restrictive covenants, i.e., that they are not enforceable by the government and

that they may not provide notice over long periods of time. However, as noted above, a comprehensive review of the Indiana statutory provisions suggests that some minor, clarifying changes would improve the clarity and enforceability of Indiana's law on environmental restrictive covenants.

(1) Marketable Title. Two statutory changes (or "tweaks") are necessary to assure adequate notice of restrictive covenants to future prospective purchasers. First, the definition of restrictive covenant found at Ind. Code § 13-11-2-193.5 should be amended to remove the limitation that makes it applicable only to IC 13-14-2-6, by changing "for purposes of IC 13-14-2-6" to "for purposes of this Title 13".

Second, section 2(6) of the Marketable Title Act (Ind. Code § 32-20-3-2(6)) needs to be changed to read:

(6) All interests of the department of environmental management ~~in land used for the disposal of hazardous wastes~~ arising from the recording of a restrictive covenant under ~~IC 13-22-3-3~~ Title 13 of the Indiana Code.

The result of these two modifications will be that the restrictive covenants of both Ind. Code § 13-22-3-3 and Ind. Code § 13-25-4-24, as well as any restrictive covenant that meets the definition of Ind. Code § 13-11-2-193.5, will be exempted from the requirement of the Marketable Title Act that this interest in land be re-recorded every fifty years, or be extinguished. The result: the interest will not expire, and a future title searcher will not be absolved of the requirement to continue searching beyond the fifty year mark for restrictive covenants recorded pursuant to Ind. Code Title 13.

(2) Enforcement Authority. With the modification to the definition of “restrictive covenant” described above, no additional change is necessary to effectuate IDEM’s authority to enforce most restrictive covenants, as the enforcement power of Ind. Code § 13-14-2-6(5) currently reads:

[T]he commissioner may proceed in court, by appropriate action, to: . . . enforce a restrictive covenant (as defined in IC 13-11-2-193.5) approved by the commissioner and created in connection with any remediation, closure, cleanup, or corrective action under this title in accordance with the terms of the covenant.

However, if it is desired to assure the enforceability of covenants entered into pursuant to Ind. Code § 13-22-3-3 (hazardous waste landfills) and Ind. Code § 13-25-4-25 (state cleanups), the following new subsection might be added to Ind. Code § 13-14-2-6:

[E]nforce a restrictive covenant created pursuant to the requirements of IC 13-22-3-3 or IC 13-25-4-25.

Summary and Conclusions. Indiana currently has in place provisions for recording and enforcing environmental restrictive covenants. These statutes provide a basis for protecting public health and the environment in the future, while still advancing the important interest of allowing Brownfields to be productively re-used. Indiana also has an existing exception to the Marketable Title Act that exempts at least one type of environmental restrictive covenant from extinguishment after fifty years.

Although the National Commissioners are in the course of drafting a model environmental covenants act, Indiana already has adopted much of the

necessary statutory framework. It may take little modification to meet these two objectives: (1) to insure that environmental covenants in Indiana provide adequate notice and are not extinguished over time; and (2) to clarify IDEM's authority to enforce all restrictive covenants that meet specific criteria. With the clarifying statutory changes suggested in this article, Indiana would be in a strong position to confidently use restrictive covenants in the future.

FOOTNOTES

¹ The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., is typically referred to as Superfund, a reference to the fund established to pay for cleanup of abandoned properties that are contaminated.

² The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 9601 et seq., also has provisions for cleanup of properties that are treatment, storage or disposal facilities for hazardous waste; this program is referred to as the RCRA Corrective Action program. Indiana has statutes equivalent to the federal statutes that allow the state environmental agency, the Indiana Department of Environmental Management (IDEM), to require private parties to undertake cleanup of contamination, and provide for state cleanup where private parties are not available to do the cleanup. See generally, Ind. Code § 13-25-4 (Hazardous Substances Response Trust Fund) and Ind. Code § 13-22-2 (which provides the statutory basis for Indiana's adoption of the equivalent of the federal RCRA hazardous waste regulations).

³ See, e.g., Ind. Code § 13-25-5, Indiana's Voluntary Remediation Program.

⁴ See, e.g., 40 C.F.R. Part 300.430 (e)(9), for the nine criteria that are used under the National Contingency Plan to evaluate a site remedy: overall protection of human health and the environment, compliance with applicable, relevant and appropriate regulations, long-term effectiveness and permanence, reduction of toxicity, mobility or volume through treatment, short-term effectiveness, implementability, cost, state acceptance and community acceptance.

⁵ For an overview of numerous state Brownfields programs, see, Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. Envtl. L. & Litig. 1, (2001).

⁶ The alternative is to drive development to "greenfields"—site where no industrial activity has previously occurred, thus fueling urban sprawl.

⁷ Mary R. English and Robert B. Inerfield, *Institutional Controls for Contaminated Sites: Help or Hazard?*, 10 Risk: Health Safety & Env't 121 (1999).

⁸ Although many contaminated properties have been identified by state and federal cleanup authorities, there continue to be sites where contamination is

unknown. The U.S. District Court for the District of Columbia recently decided a case involving contamination left over from munitions research in Washington D.C., on property once owned by American University. Loughlin v. United States, Civil Action No. 02-152(ESH), (D.C. 2002). The court refused to dismiss the action against the University. The University had argued that it had no duty to warn the purchasers of the contamination and houses were subsequently built on the property. Interestingly, while commercial parties are generally held to be required to investigate the property they are purchasing (at a minimum to establish the so-called “innocent landowner defense” under CERCLA), the court held that the residential purchasers, including a limited partnership in a real estate development, would not have been able to “discover the defects by inspection.” Slip op. at 10.

⁹ See, e.g., American Society for Testing and Materials (hereinafter “ASTM”), *E1527: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*. See also, Indiana Department of Environmental Management, Risk Integrated System of Cleanup, guidance document, infra note 19.

¹⁰ See, e.g., ASTM, *E1903, Standard Practice for Environmental Site Assessment: Phase II Environmental Site Assessment Process*, and RISC guidance, infra note 19.

¹¹ See, e.g., RISC guidance, infra note 19.

¹² Institutional controls, as used in this paper, do not include any type of physical controls or active remediation of a property. For example, a fence is a physical control of a property; paving to prevent infiltration of rain water and contact with the soil is a physical control; on-going pumping and treatment of contaminated groundwater, or even pumping to maintain a hydraulic gradient, is an engineering control. Engineering controls to prevent exposure or to continue to cleanup the site obviously require long-term maintenance and monitoring to ensure that the engineering controls continue to function as intended. See, e.g., *Use of Institutional Controls in the RCRA Corrective Action Program*, U.S. EPA Region 5, March 2000, p. 6-7.

¹³ ASTM, *Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls* (E 2091-00).

¹⁴ This is true whether the residential cleanup objective is a default number from a “lookup” table, or whether the residential cleanup objective is calculated based on a site-specific risk assessment. In many cases, a site specific risk assessment will set a cleanup objective which is orders of magnitude higher than

the default number obtained from the lookup table, and may even be higher than the default industrial cleanup objective.

¹⁵It should be recognized that there is a significant margin of safety in the methodologies used for residential cleanup levels, as well as industrial cleanup levels. The risk assessment process has been criticized for exaggerating risk levels at contaminated sites. See, e.g., *Exaggerating Risk: How EPA's Risk Assessments Distort the Facts at Superfund Sites Throughout the United States*, Hazardous Waste Cleanup Project (1993). These criticisms are aimed at the use of theoretical and worst-case assumptions. The following illustration of the problems with this approach to risk assessment is provided in the report: If you ask a friend who has never been to the airport when you should leave for a 9:30 flight, and he tell you about possible construction road construction delays (2 hours), the taxi driver might get lost (1 hour); the taxi might have a flat (3 hours), there might be rush hour delay (45 minutes), a long line at the ticket counter (45 minutes), and time to get through security and ride the shuttle (45 minutes)—which is a total of 9 hours and 15 minutes before your flight. Clearly this is a significant “safety margin” and you would waste a lot of time waiting. Under the Superfund risk assessment process, these types of theoretically possible, but improbable, assumptions are made, and then, rather than adding them together as in this example, they are multiplied. See, Exaggerating Risk, p. 6-7.

¹⁶See, e.g., Ind. Code § 6-1.1-42, Brownfields Revitalization Zone Tax Abatement, and Ind. Code § 13-25-5, the Voluntary Cleanup Program.

¹⁷ See, Ind. Code § 13-25-5-8.5. Under the statute, remediation objectives must be set for the site:

taking into consideration the following:

- (A) Expected future use of the site.
- (B) Measurable risks to human health, natural resources, or the environment based on the:
 - (i) activities that take place; and
 - (ii) environmental impact;on the site.

Ind. Code § 13-25-5-8.5(b)(2). This clearly allows residential and industrial scenarios to be considered in the decisions related to cleanup of the site.

¹⁸ See, Ind. Code § 13-25-5-18.

¹⁹ The Risk-Integrated System of Closure (RISC) guidance document includes a

User's Guide and a Technical Guide. All of the RISC guidance documents are available at the following website:

<http://www.in.gov/idem/land/risc/>

²⁰ See, Appendix 5 to the RISC Technical Guide.

²¹ Use of the current standards for investigation of property, see, ASTM standards, supra Notes 9 and 10, would likely be found to be “reasonably diligent inquiry.”

²² See notes 74-78 infra and accompanying text.

²³ Amy L. Edwards, *Long-Term Enforcement and Stewardship of Institutional Control*, BNA Environmental Due Diligence Guide, ¶ 231.1071 (2000).

²⁴ 67 Fed. Reg. 6174, 6176.

²⁵ Id. at 6176, FN 13.

²⁶ See, Drafting Committee for the Uniform Environmental Reuse Agreements projects of the National Conference of Commissioners of Uniform State Laws, *The Benefits of a Uniform State Law for Institutional Controls*, manuscript at p. 6.

²⁷ See., e.g., Conduitt v. Ross, 102 Ind. 166, 26 N.E. 19, (Ind. 1885), Pulos v. James, 261 Ind. 279, 302 N.E. 2d 768 (Ind. 1973), and Columbia Club, Inc. v. American Fletcher Realty Corporation, 720 N.E.2d 411 (Ind. Ct. App. 1999).

²⁸ Columbia Club, supra note 27, 720 N.E. 2d at 417.

²⁹ Id.

³⁰ Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459 (Ind. Ct. App. 1987). The court discusses briefly, 505 N.E. 2d at 465, the famous Shelly v. Kraemer (1948), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, case in which racially restrictive covenants were found to constitute a violation of the equal protection clause of the Fourteenth Amendment to the Constitution. However, the Indiana Court of Appeals distinguished that case from the facts in Adult Group Properties, where a residential-only restriction was challenged by those who wanted to build a group home for the developmentally disabled or mentally ill. The Court held that the residential restriction did not violate public policy and was enforceable and that the group home did not qualify as a residential use.

³¹ Columbia Club, *supra* note 27, at 418.

³² Id.

³³ Id. See also, Adult Group Properties, *supra* note 29, and Burnett v. Heckelman, 456 N.E. 2d 1094 (Ind. Ct. App. 1983), as examples of a case regarding the enforceability of covenants requiring that land be used only for residential purposes.

³⁴ Columbia Club, *supra* note 27.

³⁵ Id. at 418 (citations omitted).

³⁶ Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank, 278 N.Y. 248 at 254-55 (N.Y. Ct. App. 1938).

³⁷ Id. at 255-256. The New York Court of Appeals here was referring specifically to the “touch and concern the land” test for enforcement of a restrictive covenant, but the language seems as apt for the entire area of restrictive covenants, easements, servitudes and other appurtenances.

³⁸ Columbia Club, *supra* at note 27, at 418.

³⁹ Id., citing Adult Group Properties, *supra* note 30.

⁴⁰ Columbia Club, *supra* note 27, at 420.

⁴¹ Id.

⁴² Alex Geisinger, *Rethinking Risk-Based Environmental Cleanup*, 76 Ind. L. J. 367, 391, *citing*, Susan Borinsky, *The Use of Institutional Controls in Superfund and Similar State Laws*, 7 Fordham Env'tl. L. J. 1 (1995). Geisinger cites the Borinsky article for the proposition that the “vast majority of states take the position that the benefit of a real covenant must not be in gross to touch and concern the land.” Geisinger at 391. The Borinsky article cites two cases, one from California, Marra v. Aetna Constr. Co., 101 P.2d 490 (Cal. 1940) which is based on interpretation of a California statute, and one from North Carolina, Stegall v. Housing Auth., 178 S.E.2d 824 (N.C. 1971) which appears to turn on the fact that the intent of the parties and the description of the parcels was not clear enough for the court to enforce. The Marra case is very similar factually to the Indiana case of Burnett v. Heckelman, 456 N.E. 2d 1094 (Ind. Ct. App. 1983)—where a lot is restricted to residential purposes, but is now more valuable as commercial property. While the California court found that “such a

restriction is “of no possible benefit to Lot 6” and therefore unenforceable, the Indiana court clearly enforced the residential restriction. The court held that “We are not unsympathetic to Heckelman’s plight, however, as she acknowledges, the lots were purchased with full knowledge of the covenants To permit Heckelman to ignore the covenants now that her property could be more profitably used for commercial purposes would certainly be to her benefit. It would, however, be to the detriment of the other lot owners who purchased their property in reliance upon the restrictive covenants.” 456 N.E.2d at 1099.

⁴³ Borinsky, supra note 42, at 16-17.

⁴⁴ An entity at common law that did not hold an interest in the real estate would have difficulty enforcing a restrictive covenant. However, as early as 1938, the New York Court of Appeals recognized that a property owner’s association existed for no other purpose than enforcement of a covenant to maintain roads, beaches and public spaces, and therefore could maintain an action even though it held no interest in property. The Court held that “only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court” from allowing the property owners association to enforce the covenant even though benefits were “common rights.” Neponsit, supra note 36, at 261-263.

⁴⁵ Columbia Club, supra note 27, at 421.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ There has been controversy surrounding third party enforcement of conservation easements, which are easements created created to preserve natural resources. For example, a bill has been considered by the Pennsylvania legislature that would allow third party conservation groups to enforce conservation easements. See, Carole W. LaGrasses, *H.R. 975 Would Cancel Traditional Protections for Private Property, Allow Third Parties to Enforce Conservation Easements*, Property Rights Foundation of America, <http://prfamerica.org>.

⁴⁹ Prefatory Note, Uniform Marketable Title Act, 1990, p. 1.

⁵⁰ Acts 1963, chapter 369. Although based on the same sources, the Indiana Act and the Uniform Act differ in a number of details, the most notable being that the Model Act goes back only 30 years, while the Indiana Act goes back 50 years.

⁵¹ Prefatory Note, Uniform Marketable Title Act, 1990, p. 1: “The Act is derived from the Model Marketable Title Act prepared by Professor Lewis M. Simes and Clarence B. Taylor for the Section of Real Property, Probate and Trust Law of the American Bar Association and for the University of Michigan Law School. . . . Legislation based on the Michigan Act or the Model Act has been adopted in Connecticut, Florida, Indiana, Iowa, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, and Vermont. Marketable title legislation on somewhat different patterns is found in a number of other states.”

⁵² Prefatory Note, Uniform Marketable Title Act, 1990, p. 1.

⁵³ Edward J. Smith, *Can't Yet Chase Those Clouds Away: Governor Pocket Vetoes Marketable Title Act*, www.masslaw.com/mca/lotpa.htm, emphasis added.

⁵⁴ Ind. Code § 32-20-3-3 (formerly identified as Ind. Code § 32-1-5-3). Note that all of Indiana Code Title 32, Property, was recodified “without substantive change” by the 2002 General Assembly. Effective July 1, 2002, the Marketable Title Act is found at Ind. Code 32-20. For the ease of the reader more familiar with the pre-recodification citations, both cites will be given in these footnotes.

⁵⁵ Ind. Code § 32-20-3-2(4) (formerly Ind. Code § 32-1-5-2(d)).

⁵⁶ Ind. Code § 32-20-4-1(a) (formerly Ind. Code § 32-1-5-4(a)). Ind. Code § 32-20-4-2(c) (formerly Ind. Code § 32-1-5-5(c)) provides in part: “Until the notice is recorded and correctly indexed, it does not comply with section 1 of this chapter regarding notice.”

⁵⁷ *City of Miami v. St. Joe Paper Company*, 364 So. 2d 439, 442 (Fla. 1978).

⁵⁸ Prefatory Note, Uniform Marketable Title Act, 1990, p. 1.

⁵⁹ Ind. Code § 32-20-4-3(b) (formerly Ind. Code § 32-1-5-6) and Section 7(1) of the Uniform Marketable Title Act. Indiana’s language is much broader.

⁶⁰ Ind. Code § 32-20-3-2(6) (formerly Ind. Code § 32-1-5-2(f)).

⁶¹ Amy L. Edwards, *National Organization Begins Drafting Model Environmental Covenants*, Environment (Holland & Knight LLP newsletter), Vol. 10, Issue 4 (2001).

⁶² *Id.*

⁶³ Codified at Colo. Rev. Stat. §§ 25-15-317 through 25-15-327, plus revisions or additions of certain definitions at § 25-15-101 (4.3, 4.5, 4.7, 5.5, 12.5, 13.5), eff. July 1, 2001.

⁶⁴ Colo. Rev. Stat. §25-15-101(4.3), Colorado Senate Bill 01-145(2001), SEC. 1.

⁶⁵ Colo. Rev. Stat. § 25-15-101(4.7), Colorado Senate Bill 01-145(2001), SEC. 1. Note that the language of the Colorado law includes more than the “institutional controls” as defined in this paper. See supra note 12.

⁶⁶ Draft Uniform Environmental Covenants Act (UECA), for discussion at the July 26-August 2, 2002 meeting of the National Conference of Commissioners on Uniform State Laws.

⁶⁷ Id. at Section 2(5).

⁶⁸ Colo. Rev. Stat. § 25-15-322; see also, draft UECA, Section 10.

⁶⁹ Draft UECA, Section 13. The draft UECA also contains provisions to supplement recording in the county in which the property is located, by requiring at Section 7 for a registry of environmental covenants to be maintained by the department. Colo. Rev. Stat. 25-15-323 also requires a similar registry of covenants.

⁷⁰ As of 2001, the Colorado had not adopted the Marketable Title Act.

⁷¹ Ind. Code § 13-22-3-3(a), enacted in 1996.

⁷² Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), 42 U.S.C. § 9616.

⁷³ Ind. Code § 13-25-4-24(a).

⁷⁴ Ind. Code § 13-25-4-24(b).

⁷⁵ Ind. Code § 13-25-5, commonly known as the “voluntary cleanup law”, provides at section 16(a) that if the IDEM commissioner determines that an applicant has successfully completed a voluntary remediation work plan, the commissioner shall certify that the work plan has been completed by issuing the applicant a certificate of completion. Under section 16(c), a person who receives a certificate “shall attach a copy of the certificate to the recorded deed that concerns the property on which the remediation takes place.” Although not

a restrictive covenant, this filing serves notice to future purchasers that a past remediation has occurred.

⁷⁶ P.L. 61-2001, SEC. 2, codified at IC 13-11-2-193.5, emphasis added.

⁷⁷ Ind. Code § 13-14-2-6.

⁷⁸ Ind. Code § 13-14-2-5, emphasis added.

⁷⁹ Note that the February 15, 2001 version of the RISC Guide, supra note 19, provides at Appendix 5-1 and 2 that: “The environmental notice notifies future owners and lessees of contamination present at a site and ensures that the restrictions and controls included in the approved remedy are legally recorded. ... [IDEM] does not have the statutory authority to enforce an environmental notice.” This version of the RISC Guide has not been modified since the adoption of the new statutory provisions.