



Welcome to the CLU-IN Internet Seminar

NARPM Presents...Managing Institutional Controls at Superfund Sites

Sponsored by: EPA Office of Superfund Remediation and Technology Innovation

Delivered: December 5, 2013, 1:00 PM - 2:30 PM, EST (18:00-19:30 GMT)

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Seminar Homepage

The image shows a screenshot of a seminar homepage for the EPA Technology Innovation and Field Services Division. The page title is "Site Characterization for Hazardous Contaminants: Guidelines for EPA Region 10 Pollution Prevention Staff". The page content includes a "Presentations" section with a list of slides, a "Feedback" section with a form, and a "Join the Seminar" section with a "Go to Seminar" button. Three callout boxes are overlaid on the page: "Join the seminar online" points to the "Go to Seminar" button; "Download Slides" points to the "Download Slides" link in the "Presentations" section; and "Feedback" points to the "Feedback" section.

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Housekeeping

- Entire broadcast offered live via Adobe Connect
 - participants can listen and watch as the presenters advance through materials live
 - *Some materials may be available to download in advance, you are **recommended to participate live via the online broadcast***
- Audio is streamed online through by default
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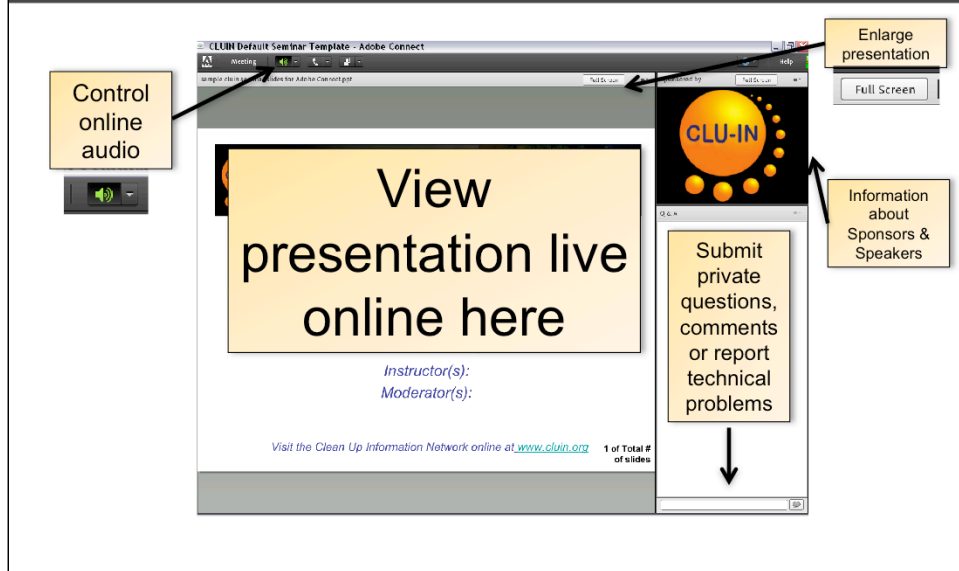
Although I'm sure that some of you have these rules memorized from previous CLU-IN events, let's run through them quickly for our new participants.

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You should note that throughout the seminar, we will ask for your feedback. You do not need to wait for Q&A breaks to ask questions or provide comments. To submit comments/questions and report technical problems, please use the ? Icon at the top of your screen. You can move forward/backward in the slides by using the single arrow buttons (left moves back 1 slide, right moves advances 1 slide). The double arrowed buttons will take you to 1st and last slides respectively. You may also advance to any slide using the numbered links that appear on the left side of your screen. The button with a house icon will take you back to main seminar page which displays our agenda, speaker information, links to the slides and additional resources. Lastly, the button with a computer disc can be used to download and save today's presentation materials.

With that, please move to slide 3.

New online broadcast screenshot



NARPM Presents: Managing Institutional Controls at Superfund Sites

December 5, 2013



Craig Boehr, EPA HQ OSRE
Steve Ridenour, EPA HQ OSRTI

IC Basics

- Non-engineered instruments, such as administrative and legal controls, that help to minimize the potential for exposure to contamination and/or protect the integrity of a response action.
- Limit land and/or resource use or by providing information that helps modify or guide human behavior at a site.
- Used a short-term basis (for restoration remedies until cleanup goals and UU/UE achieved) or on a long-term basis (where waste is left in place in perpetuity)
- Federal facilities use “LUCs” and the SF removal program uses “PRSCs”

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LUCs = land use controls, PRSCs = post-removal site controls

EPA's IC Workload

- IC implementation area amounts to significant workload for EPA's Superfund program and Regional Counsel
- EPA Superfund IC Registry (ICTS) – Centralized database on site-specific status of ICs; mostly construction complete sites
 - System gives sites IC status designation
 - Over 50% of sites may require future IC work (IC implementation needed, without all ICs implemented at site, no information publicly available, sites need additional review)
- Five-Year Reviews identify IC-related issues with regularity, consistent with ICTS data
 - Significant percentage of FYRs identify at least one IC issue

EPA's Recent IC guidance

- PIME Guidance (Dec 2012) – Identifies and addresses many of the common issues that may be encountered when using ICs pursuant to several of EPA's cleanup programs
- ICIAP Guidance (Dec 2012) – Provides EPA Regions with a template for developing IC plans at contaminated sites where the response action includes ICs
- Five-Year Review IC Guidance Supplement (Sept 2011) – Provides recommendations for evaluating protectiveness in five-year reviews for the IC component of remedies
- Implementing ICs in Indian Country (Nov 2013) – Cross-program handbook designed to recognize unique circumstances distinguishable from EPA's current IC practice
- These guidance documents can be found at:
<http://www.epa.gov/superfund/policy/ic/guide/index.htm>

Planning ICs– General Considerations

- Starts during RI/FS . . . continues throughout implementation
- Cleanup objectives (i.e., RAOs) that identify what will be accomplished by ICs (e.g., prevent excavation of landfill cap)
- Choosing the right type of IC instrument depends on...
 - Intended duration of the ICs
 - Number of parcels requiring restrictions
 - Support for ICs by affected landowners
 - State/tribal/local government cooperation
 - And many more!



Developing IC plans

- IC Implementation and Assurance Plans (ICIAPs) are used to help implement, maintain, enforce, and terminate (if applicable) the ICs selected in decision documents
 - Develop during RD phase
 - Revise as site conditions warrant (but does not substitute for a remedy decision document)
- Discusses roles and responsibilities for IC life-cycle among various stakeholders
- EPA guidance provides a recommended template for this type of IC plan

Uniform Environmental Covenants Act (UECA)

- Drafted and approved in 2003; in more than half the states and territories
- Environmental Covenant: Restricts site activities where contamination remains in place
 - Imposes “activity and use limitations” (restrictions/obligations)
 - Legal instrument, recorded, runs with land, perpetual
 - Eliminates common law defenses, addresses related legal issues
 - Broadens universe of “holders” and “enforcers”
 - “Agency” has right to enforce; EPA can be Agency without acquiring property interest
- EPA does not endorse UECA but is supportive of this and other efforts to strengthen state IC laws

Implementing ICs– Landowner Issues

- Property owners generally responsible for addressing contamination, including implementing/maintaining ICs
- Response action may call for ICs to be placed on property of landowner who did not cause/contribute to contamination
 - E.g., contamination migrates, IC part of monitoring, new purchaser
 - PRPs typically responsible for obtaining ICs from other landowners whose land must be restricted (sometimes difficult)
- Early identification and engagement encouraged
 - Notify landowners of ICs being considered, reasons, proposals
 - Enforcement tools may alleviate landowners' concerns
 - Maintain communication about general cleanup process, participation opportunities
 - State/local government may have more success in communication

Implementing Proprietary Controls, Part 1

- Typically heavy reliance on state law/practice; should be aware of relevant state legislation/regulations
- At Enforcement-Lead sites:
 - Responsibility to implement lies with PRP
 - PRP required to execute and record PCs (Model RD/RA CD) or use “best efforts” to get landowners to do the same
 - Required to abide by specific land/resource use restrictions
 - Importance of reviewing title
- At Fund-Lead sites:
 - Responsibility to secure implementation lies with EPA/State (lead agency)
 - Importance of reviewing title

Implementing Proprietary Controls, Part 2

- Selecting the Grantee or “Holder” (UECA)
 - Holds covenant or title to real property interest; has primary responsibility for maintaining/enforcing PC
 - Can be States, PRPs, local government, civic organizations, or EPA (consistent with 104(j))
 - Viability of grantee should be performed prior to/ during response selection process
 - Willing and able to maintain IC?
 - Likely to exist for duration of control?
 - Will grantee be accountable?
 - If no suitable grantee, alternative ICs may be necessary



Implementing Proprietary Controls, Part 3

- Drafting the instrument
 - Depending on site-lead, PRP/EPA/State drafts
 - PRP may seek assistance from experienced real estate attorney
 - Additional documentation: title search, site survey, site mapping
- “Subordination” issues
 - Other interests in land may impact proprietary control viability
 - Subordination agreement may be use to resolve senior interests
 - Unrecorded interests (e.g. leases) may also need to be subordinated to assure compliance by lessees

Tribal Consultation – Implementing ICs in Indian Country

- Consultation – Encouraged where ICs considered as component of site response action on tribal lands; consultation often critical to ensuring long-term effectiveness of ICs
- Implementing ICs in Indian Country – Supports EPA priorities of tribal outreach, capacity building, transparency, environ. justice
 - Jurisdiction – Explains how tribal sovereignty, categories of property ownership, and DOI may play a role in IC implementation
 - Land Records and Title Concerns – Explains how DOI maintains property title, how some ICs may require tribal approval, and possible disadvantages to recording on title
 - Working with Tribes – Addresses cultural traditions and EPA resources to work with tribes

Implementing Governmental Controls, Part 1



- Generally
 - State/local governments may impose controls at their discretion; EPA has no authority to compel governments to amend/adopt new regulations to impose IC, or keep regulations that currently impose IC
 - “Common Understandings” encouraged between stakeholders to document/clarify roles and responsibilities
- Groundwater use restrictions (depending on state law)
 - Water use restrictions, well construction/abandonment requirements
 - GW management zones, protection areas, limitations on well drilling
- Zoning ordinances
 - Generally exercise of state/local/tribal government
 - Limitations: Limited duration, re-zoning, variances, cumulative zoning
 - Local gov’t coordination key to long-term maintenance/enforcement

Implementing Governmental Controls, Part 2

- Fish consumption bans
 - Usually administered by state health or resource mgmt agencies
- Waterway use restrictions
 - Usually to protect sediment caps from damage
 - Usually administered by state/local agencies, U.S. Coast Guard and U.S. Army Corps of Engineers
- Permits/Ordinances
 - Notification to building permit applicants of remaining contamination
 - Control, prohibit specific activities (ban on swimming)
 - “One-call” underground services alert



Implementing Informational Devices

- Recorded notices
 - Provide notice that contamination exists; identify land/resource uses that may result in unacceptable exposures
 - Some jurisdictions – can be removed by owner or expire
 - Include re-filing requirement
- State registries (some states have)
 - Database listings, web-based maps, IC or contaminated site inventories
 - Procedures for listing/delisting sites varies, often discretionary
 - Information may not be up to date
- Advisories
 - Publicly-issued warnings to resource users (e.g., private well users, fish consumers)
 - Generally issued by public health agencies



Maintaining ICs – General Considerations

- Rigorous periodic monitoring and reporting
- Evaluate whether ICs: remain in place, meet objectives
- Have multiple parties responsible for monitoring and reporting, where possible
- Frequent reminders of restrictions:
 - Correspondence, warning labels/signs
 - At least annually
- “One call” systems



Maintaining ICs – Periodic Reviews

- Specify frequency in ICIAP or other detailed plan on ICs
- Annual certification to EPA that ICs are in place
- Title reviews
- Five-year review process
 - Identify IC issues
 - Recommend follow-up actions
 - Supplemental EPA guidance on evaluating ICs during five-year review



Maintaining ICs – State/Tribal/Local Government Oversight

- May be responsible for:
 - Issuance, inspection of building/excavation permits
 - Reporting on proprietary controls if they're the grantee/holder
 - Zoning restrictions, notify EPA of any amendments

Enforcing Proprietary Controls

- Seek voluntary compliance first
- “Enforcement First” Policy – maximize PRP participation in seeking compliance with proprietary control
- Legal/procedural requirements can vary (UECA v. common law statute)
- In UECA-based jurisdictions, authority to enforce typically lies with:
 - Parties to covenant; parties with right to enforce
 - Federal/State environmental agency
 - Person whose interest is affected by violation
 - Local government

Enforcing Governmental Controls

- Typically enforced by other government agencies; challenge for EPA to enforce controls
 - Recommended that EPA site attorneys use defined administrative process to communicate among levels of government (written petitions, administrative hearings) to enforce governmental control
 - Use ICIAPs or other agreements (“common understandings”) to set up enforcement procedures in advance; may contain provisions that describe steps if local/state agencies not enforcing/maintaining governmental controls

Enforcement Tools

- CDs, FFAs, UAOs, permits
- Can use to enforce implementation or maintenance of an IC
- Can seek penalties from PRP if IC not properly carried out (e.g., payments for reimbursement, costs to address IC breaches, and/or penalties)

ICs/LURs – Continuing Obligations, Part 1

- 2002 Brownfields Amendments – Provided new protections to CERCLA liability applicable to landowners
 - BFPP, 107(r); CPO, 107(q); ILO, 107(b)(3)
 - EPA “Common Elements” Guidance – 2003 interim final guidance on these landowner liability protections
 - Comply with **land use restrictions** established or relied on in connection with the response action
 - Do not impede the effectiveness or integrity of any **institutional control**
 - How does one satisfy these elements in order to take advantage of a landowner liability protection?

ICs/LURs – Continuing Obligations, Part 2

- EPA Guidance (PIME/Common Elements) – Land Use Restrictions not the same as Institutional Controls
 - ICs are often used to implement or establish LURs
- Not impeding IC integrity/effectiveness – Has party taken steps that undermine/conflict with objectives of the IC?
 - Steps short of physical activities may jeopardize defense
 - Reasonable Steps – IC implementation or compliance may be a reasonable step in order to be a BFPP
- Limited case law – Ashley II of Charleston, LLC vs. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 500-502 (D.S.C. 2011), court concluded defendant had satisfied IC/LUR element but did not address meaning of terms

Other Resources

- ASTM E2790-11: Standard Guide for Identifying and Complying with Continuing Obligations – Tool to help understand LUR/IC compliance
- ASTM E2091-11: Available since 2000, provides basic guidance on IC issues
- ABA Book on Institutional Controls (2nd ed. 2012) – Provides additional guidance on these issues and what is happening at the federal, state, and private sector level

QUESTIONS?

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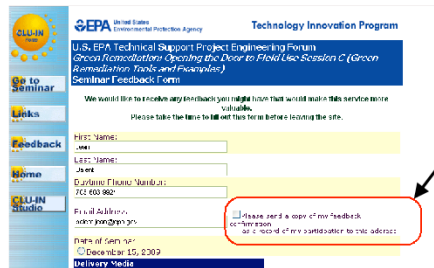
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- To view a complete list of resources for this seminar, please visit the [Additional Resources](#)
- Please complete the [Feedback Form](#) to help ensure events like this are offered in the future



The screenshot shows the EPA Technology Innovation Program website. The main heading is "U.S. EPA Technical Support Project Engineering Forum Green Remediation: Opening the Door to Field Use Session 0 (Green Remediation Tools and Examples) Seminar Feedback Form". Below the heading, there is a message: "We would like to receive any feedback you might have that will assist in this service being available. Please take the time to fill out this form before leaving the site." The form contains several input fields: "First Name:" with the value "John", "Last Name:" with the value "John", "Company/Institution/Organization:" with the value "TSC Env. Inc.", and "E-mail Address:" with the value "john.john@tscinc.com". There is a checkbox labeled "Please send a copy of my feedback confirmation" which is checked. Below the checkbox, it says "or e-mail if it is a substitute to this address:". At the bottom, there is a "Delivery Media" dropdown menu.

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