

**FINAL**

**GUIDANCE FOR  
USE OF INSTITUTIONAL CONTROLS**

**Oregon Department of Environmental Quality**

**Waste Management and Cleanup Division  
811 SW Sixth Avenue  
Portland, OR 97204**

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## **ACKNOWLEDGEMENTS**

The following Department of Environmental Quality staff participated in the development of this guidance:

Jeff Christensen  
Dan Crouse  
Kevin Dana  
Dan Hafley  
Brooks Koenig  
Ann Levine  
Norm Read

Additional review was provided by Kurt Burkholder, Department of Justice; and the Waste Management & Cleanup Division Guidance Steering Committee.

## **DISCLAIMER**

This guidance document is intended solely as guidance for employees of the Department of Environmental Quality. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department may take action at variance with this policy statement.

APPROVED BY:     Mary Wahl      
Mary Wahl, Administrator  
Waste Management & Cleanup Division

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# Guidance for Use of Institutional Controls

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**Statutory Basis** When HB 3352 was passed by the 1995 Legislature and signed into law by Governor Kitzhaber, DEQ recommitted itself to finding cost-effective ways to protect human health and the environment from the release of hazardous substances. Remedial actions to achieve protective levels may include treatment, excavation, containment, engineering controls, and **institutional controls**. ORS 465.315(1)[c].

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**Institutional Control Definition** An institutional control is a legal or administrative tool or action taken to reduce the potential for exposure to hazardous substances. Institutional controls may include, but are not limited to, use restrictions, environmental monitoring requirements, and site access and security measures. OAR 340-122-115(32). Not every governmentally-imposed or other legal restriction is an institutional control in the remedial context. Only those controls that are selected or approved by the Director to limit exposure to hazardous substances are remedial action institutional controls. Institutional controls are distinguished from engineering controls which are physical measures selected or approved by the Director for the purpose of preventing or minimizing exposure to hazardous substances. Engineering controls may include, but are not limited to, fencing, capping, horizontal or vertical barriers, hydraulic controls, and alternative water supplies.

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**When are Institutional Controls considered in the remedy selection process?** As defined above, institutional controls may be part or all of the remedy selected or approved by the Director. While there may be a multitude of different regulations affecting how land is used (e.g., local zoning) prior to implementing a remedy, these controls are not in place for the purpose of limiting exposure to hazardous substances. Institutional controls may be a part of either a removal or a remedial action, and the Director may approve or select institutional controls at any point within the remedial action including interim remedial actions.

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**Intended Audience** This guidance is intended for use by DEQ staff as an aid to determine what institutional controls might be used within the remedial context. The guidance, examples, and sample forms may help both staff and the responsible party better understand the role of institutional controls.

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**When are Institutional Controls used and what restrictions may be included?**

Institutional controls are used when exposure to hazardous substances can be effectively blocked by having legal or administrative measures in place. Typically, institutional controls will be an element in the Record of Decision (ROD) and the Consent Order or other decision document. Most institutional controls will be recorded in the county property records. Institutional controls will often complement some other aspect of the remedial action. For example, one may have an institutional control that complements an engineering control: the paper institutional control will prohibit disturbance (or require maintenance) of the physical engineered cap. Institutional controls may prohibit or restrict some actions, or they may require affirmative action. The examples listed below are typical but not exhaustive:

- **Restrictions on Water Resources**

- ⇒ Prohibiting use
- ⇒ Limiting use
- ⇒ Monitoring of use
- ⇒ Limiting surface water intakes
- ⇒ Prohibiting well installations
- ⇒ Prohibiting operation of well
- ⇒ Limiting well construction or use
- ⇒ Abandoning well

- **Restrictions on Land**

- ⇒ Prohibiting or requiring DEQ approval for disturbance of soil
- ⇒ Prohibiting or requiring DEQ approval for disturbance of cap
- ⇒ Prohibiting or requiring DEQ approval for disturbance of vegetation
- ⇒ Limiting use/activities on land
- ⇒ Limiting structures (e.g., no basement)

- **Notice**

- ⇒ Notice to DEQ regarding changed conditions
- ⇒ Notice to adjoining property owners
- ⇒ Notice to workers on-site
- ⇒ Notice to future owners

- **Access**

- ⇒ Granting (e.g., DEQ or contractors)
  - ⇒ Limiting or denying (e.g., limit exposure)
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**Oregon’s Tool  
Box of  
Institutional  
Controls:**

There are numerous legal or administrative tools that were loosely labeled institutional controls in the past. This guidance separates out remedial action institutional controls from other mechanisms that might be administered by a governmental agency. The focus is on measures specifically implemented to protect human health and the environment from hazardous substances.

- **Remedial Action Institutional Controls Selected or Approved by DEQ and Incorporated into Record of Decision (ROD) or other Decision Document**
  - ⇒ Equitable Servitude and Easement
  - ⇒ Deed Notice
  - ⇒ Environmental Hazard Notice
  - ⇒ Other measures selected or approved by the Director (may include some of the mechanisms below)
  
- **Other Mechanisms That May Augment Institutional Controls or Provide Notice But Whose Primary Purpose is Not Exposure Limitation or Is Not Selected or Approved by the Director.**
  - ⇒ Prospective Purchaser Agreements
  - ⇒ Listing on Environmental Cleanup Site Information (ECSI) database
  - ⇒ “No Further Action” letters (NFAs)
  - ⇒ Records of Decision (RODs and ROD Re-openers)
  - ⇒ Real Estate Transfer Disclosures
  - ⇒ Land Use Controls (Zoning Regulations, Comprehensive Plan Designations)
  - ⇒ Other Agency Restrictions (e.g., Water Resources Department (WRD) Critical Groundwater Areas, wellhead protection; Water Quality Groundwater Area of concern)
  - ⇒ Health Advisories
  - ⇒ Contamination utility locate service

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**Are  
institutional  
controls  
relevant to  
current and  
future land  
uses as part of  
the baseline  
risk  
assessment?**

All institutional controls, whether remedial action institutional controls or non-remedial-action institutional controls, may be relevant to current and reasonably likely future uses at a property. However, the existence of an institutional control is not conclusive in itself as to uses. For example, there are non-remedial-action institutional controls on land use implemented by other governmental bodies (e.g., zoning restrictions) which may be factored in the land use determination and likely exposures. However, these controls may change or fail and not reflect future conditions so future risks are typically calculated absent these controls.

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**How can institutional controls be evaluated with respect to the balancing factors?**

All remedies must be protective, and all remedies, including institutional controls, must be evaluated in light of the balancing factors in OAR 340-122-090 (effectiveness, long-term reliability, implementability, implementation risk, and reasonableness of cost). There are few hard, readily-quantifiable measures for evaluating institutional controls.

The effectiveness and reliability of the institutional control may depend on how the control is drafted and how it can be enforced. Reliability may be increased by the existence of augmenting mechanisms, but such mechanisms may not be necessary in every instance to determine that an institutional control is reliable.

Implementability becomes more difficult where off-property restrictions may be required. If an institutional control would result in a restriction on the use of land or water of an innocent party, the responsible party will normally negotiate with the innocent party and DEQ to establish an effective and reliable servitude or easement. Depending on the restriction, the responsible party may have to compensate the innocent party.

Typically, institutional controls will carry little or no implementation risk, but such risks among different remedies should be compared in the feasibility study.

While the initial cost of the institutional control may be minimal, the long-term costs involved with institutional controls may be difficult to quantify. Costs for securing off-property institutional controls are part of the remedial costs, but effects on the value of the property are not.

The Guidance on Feasibility Studies is available in a separate document and contains more details on how to apply the various balancing factors.

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**When is it appropriate to consider institutional controls on surrounding property?**

If one way to protect human health, safety, welfare and the environment is to restrict use of adjacent property or groundwater, the Department may explore use restrictions in the Feasibility Study. In general, use restrictions on surrounding property can be implemented only if the property owner agrees to the restrictions. If the property owner does not agree, the use restrictions will most likely fail the implementability criteria in the Feasibility Study evaluation.

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**How are institutional controls determined to be working?**

Monitoring and periodic review will be part of the institutional control to ensure that the control is working. The extent and frequency of monitoring and periodic reports will vary with the project. There may be a certain amount of random monitoring of the institutional control (e.g., due diligence inquiries prior to property transfers), but periodic review by DEQ should be a part of the institutional control and the selected remedy. A property with a remedial action institutional control will remain on DEQ's Environmental Cleanup Site Information (ECSI) database, Confirmed Release List, and Inventory as long as the institutional control remains in effect.

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**Must there be institutional controls at every site?**

No. If you otherwise provide protection to or below the acceptable risk level as defined in DEQ rules for unrestricted access to the site, you will not have to include some form of institutional control. However, if risk without an institutional control is above the acceptable risk level (ARL), additional remedial measures, including institutional controls, will be required.

**How does one select the right tool for the right use?** The matrix can be used as an aid for selecting the most appropriate control for a site.

<b>Tool</b>	<b>Uses</b>	<b>Advantages</b>	<b>Disadvantages</b>
Equitable Servitude and Easement (legal document with grantor/grantee)	<ol style="list-style-type: none"> <li>1. Restrict/limit wells or water use;</li> <li>2. Restrict/limit land use (e.g., industrial use);</li> <li>3. Protect engineering controls (e.g., caps);</li> <li>4. Ensure DEQ access;</li> <li>5. Require notice or permission for certain acts.</li> </ol>	<ol style="list-style-type: none"> <li>1. Restrictions stay in place over long term;</li> <li>2. Enforceable by Department;</li> <li>3. Helps to “preserve assumptions” of risk assessment;</li> <li>4. Can be negotiated or crafted to fit site.</li> </ol>	<ol style="list-style-type: none"> <li>1. Requires property owner’s consent;</li> <li>2. Some uncertainty regarding enforceability under common law;</li> <li>3. May not be implementable for off-property contamination;</li> <li>4. Property remains on DEQ’s Inventory;</li> <li>5. May affect property value.</li> </ol>

Environmental Notice (legal document recorded with property records)	<ol style="list-style-type: none"> <li>1. Provides information as to confirmed environmental facts;</li> <li>2. Generally applicable if no affirmative restrictions or limitations are required.</li> </ol>	<ol style="list-style-type: none"> <li>1. Notice may be recorded without agreement of property owner;</li> <li>2. May be recorded for off-property contamination (recite documented facts only);</li> <li>3. Provides a “softer” notice in chain of title.</li> </ol>	<ol style="list-style-type: none"> <li>1. Not enforceable against owner or successor;</li> <li>2. Not enforceable by itself;</li> <li>3. May provide only limited notice (i.e., only those doing thorough title search);</li> <li>4. Difficult to estimate effectiveness.</li> </ol>
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Environmental Hazard Notice (modifies local zoning)	<ol style="list-style-type: none"> <li>1. Use restrictions are outside of property recording law.</li> <li>2. Restrictions are part of land use regulations.</li> </ol>	<ol style="list-style-type: none"> <li>1. Potential area-wide tool;</li> <li>2. Potential for more active review of controls by entities other than DEQ.</li> </ol>	<ol style="list-style-type: none"> <li>1. Difficult to implement due to numerous procedural steps.</li> </ol>
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**What vehicles may be used to augment Institutional Controls?**

DEQ's Environmental Cleanup Site Information (ECSI) site file should always contain information regarding institutional controls. If a site has a continuing remedial action institutional control, it must remain on the Inventory of Sites Requiring Further Action. Additionally, the decision documents (e.g., RODs) will also identify the institutional controls that need to be in place. Documents implementing a ROD (e.g., a Consent Order) may provide enforcement mechanisms that are separate from the institutional control. For example, the Consent Order may have stipulated penalties or re-openers for violation of the institutional control or other aspects of the remedy. Likewise, a Certification of Completion should also include language to enforce the institutional control.

The most likely augmenting control outside the Department will be the Comprehensive Plan and zoning designations of the local jurisdiction. This information will normally complement use restrictions established in the Equitable Servitude and Easement (ESE).

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**Termination or Modification of Institutional Controls**

An institutional control shall remain in force until the Department approves a modification or termination and release of the control. Such modification or termination shall be recorded in the same manner as the original control. A person may subsequently request termination of the control if the conditions that require the control no longer exist. Such a request shall be granted by the Department if the Department determines that the control is no longer necessary to protect human health and the environment.

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**Boilerplate available**

See attached boilerplate for Equitable Servitude and Easement (ESE) and Deed Notice.

# **APPENDICES**

**[DEQ BOILERPLATE]**  
EQUITABLE SERVITUDE AND EASEMENT

This Equitable Servitude and Easement is made \_\_\_\_\_, 199\_\_ between \_\_\_\_\_ (Grantor) and the Oregon Department of Environmental Quality (DEQ or Grantee).

RECITALS

A. Grantor is the owner of certain real property (Property) located in \_\_\_\_\_ County, Oregon, the location of which is more particularly described in Attachment A to this Equitable Servitude and Easement.

B. On \_\_\_\_\_, 199\_\_, the Director of the Oregon Department of Environmental Quality selected the remedial action for the Property set forth in the Record of Decision for the Property (ROD). The remedial action selected in the ROD requires, among other things: \_\_\_\_\_ **[Summarize main elements of ROD, specifically requirement of institutional control]**.

C. On \_\_\_\_\_, 199\_\_, \_\_\_\_\_ entered into \_\_\_\_\_ **[Reference consent order, decree, or agreement]**, under which \_\_\_\_\_ agreed to implement the institutional controls required by the ROD.

D. The provisions of this Equitable Servitude and Easement are intended to protect human health and the environment.

1. GENERAL DECLARATION

Grantor declares that all real property located in \_\_\_\_\_ County, State of Oregon, and described in Attachment A to this Equitable Servitude and Easement, is and shall be conveyed, transferred, leased, encumbered, occupied, built upon, or otherwise used or improved, in whole or in part, subject to this Equitable Servitude and Easement. Each condition and restriction set forth in this Equitable Servitude and Easement touches and concerns the Property and the easement granted in paragraph 4 herein, shall run with the land for all purposes, shall be binding upon all Owners as set forth in this Equitable Servitude and Easement, and shall inure to the benefit of the State of Oregon. Grantor further conveys to DEQ the perpetual right to enforce the conditions and restrictions set forth in this Equitable Servitude and Easement.

2. DEFINITIONS

2.1 "DEQ" means the Oregon Department of Environmental Quality, and its employees, agents, and authorized representatives acting on its behalf. "DEQ" also means any successor or assign of DEQ under the laws of Oregon, including but not limited to any entity or instrumentality of the State of Oregon authorized to perform any of the functions or to exercise any of the powers currently performed or exercised by DEQ.

2.2 "Owner" means any person or entity, including Grantor, who is the record owner of fee simple title or a vendee's interest of record to any portion of the Property, including any successor or holder of fee simple title or a vendee's interest of record to any portion of the Property, excluding any entity or person who holds such interest solely for the security for the payment of an obligation.

### 3. EQUITABLE SERVITUDE (RESTRICTIONS ON USE)

**[Insert site-specific restrictions in accordance with ROD and implementing consent order, decree, or other agreement. The following are examples only.]**

3.1 **[No groundwater use]** No use shall be made of groundwater at the Property, by extraction through wells or by other means, which use involves consumption or other beneficial use of the groundwater. This prohibition shall not apply to extraction of groundwater associated with temporary dewatering activities related to construction, development, or the installation of sewer or utilities at the Property.

3.2 **[Maintenance of cap]** Except upon prior written approval from DEQ, no operations or uses shall be made on or of the Property that will or likely will penetrate the surface cover or jeopardize the cover's functional integrity, including without limitation any excavation, drilling, scraping, or erosion. The Owner of the Property shall maintain the surface cover and any other permanent feature of the remedy described in the ROD in accordance with a monitoring and maintenance plan approved in writing by DEQ.

3.3 **[Prohibited uses]** The following operations and uses are prohibited on the Property:

- 3.3.a Residential use of any type; and
- 3.3.b Agricultural use of any type.

4. EASEMENT  
(RIGHT OF ENTRY)

During reasonable hours and subject to reasonable security requirements, DEQ as Grantee shall have the right to enter upon and inspect any portion of the Property to determine whether the requirements of this Equitable Servitude and Easement have been or are being complied with. Violation of any condition or restriction contained in this Equitable Servitude and Easement shall give to DEQ the right, privilege, and license to enter upon the Property where such violation exists and to abate, mitigate, or cure such violation at the expense of the Owner, provided written notice of the violation is given to the Owner describing what is necessary to correct the violation and the Owner fails to cure the violation within the time specified in such notice. Any such entry by DEQ shall not be deemed a trespass, and DEQ shall not be subject to liability to the Owner of the Property for such entry and any action taken to abate, mitigate, or cure a violation.

5. GENERAL PROVISIONS

5.1 All conditions and restrictions contained in this Equitable Servitude and Easement shall run with the land, until such time as any condition or restriction is removed by written certification from DEQ that the condition or restriction is no longer required in order to protect human health or the environment.

5.2 Any person who at any time owns, occupies, or acquires any right, title, or interest in or to any portion of the Property is and shall be conclusively deemed to have consented and agreed to every condition and restriction contained in this Equitable Servitude and Easement, whether or not any reference to this Equitable Servitude and Easement is contained in the instrument by which such person or entity acquired an interest in the Property.

5.3 The Owner of any portion of the Property shall notify DEQ at least ten (10) days before the effective date of any conveyance, grant, gift, or other transfer, in whole or in part, of the Owner's interest in the Property.

5.4 The Owner of the Property shall notify DEQ within thirty (30) days following Owner's petitioning for or filing of any document initiating a rezoning of the Property that would change the base zone of the Property under the \_\_\_\_\_ zoning code or any successor code.

5.5 Upon any violation of any condition or restriction contained in this Equitable Servitude and Easement, DEQ, in addition to the remedies described in paragraph 4, may enforce this Equitable Servitude and Easement as provided in the \_\_\_\_\_ **[If applicable, specify consent order, decree, or agreement provision]**, or may seek any other available legal or equitable remedy to enforce this Equitable Servitude and Easement.

IN WITNESS WHEREOF Grantor and Grantee have executed this Equitable Servitude and Easement as of the date and year first set forth above.

GRANTOR: \_\_\_\_\_  
(Name)

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_)

The foregoing instrument is acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_\_\_, by \_\_\_\_\_ of \_\_\_\_\_, on its behalf.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My commission expires: \_\_\_\_\_

GRANTEE: \_\_\_\_\_  
State of Oregon Department of  
Environmental Quality

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_)

The foregoing instrument is acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_\_\_, by \_\_\_\_\_ of \_\_\_\_\_, on its behalf.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My commission expires: \_\_\_\_\_

**[DEQ BOILERPLATE]**

NOTICE OF HAZARD

1. The following notice regards real property located at:  
**[Insert/attach legal description]** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

2. Notice is given that \_\_\_\_\_ **[Describe hazardous substances]** is present in \_\_\_\_\_ **[Specify soils, groundwater, and/or surface water]** in concentrations of \_\_\_\_\_ **[Describe concentrations, if known]**. \_\_\_\_\_ **[Hazardous substance]** may be hazardous to human health.

3. For further information regarding this notice, you may contact: **[DEQ contact and address]**.

After recording, return certified copy to:  
**[DEQ contact and address]**