

Institutional Controls: state of the practice and future developments

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A brief historical perspective

Love Canal

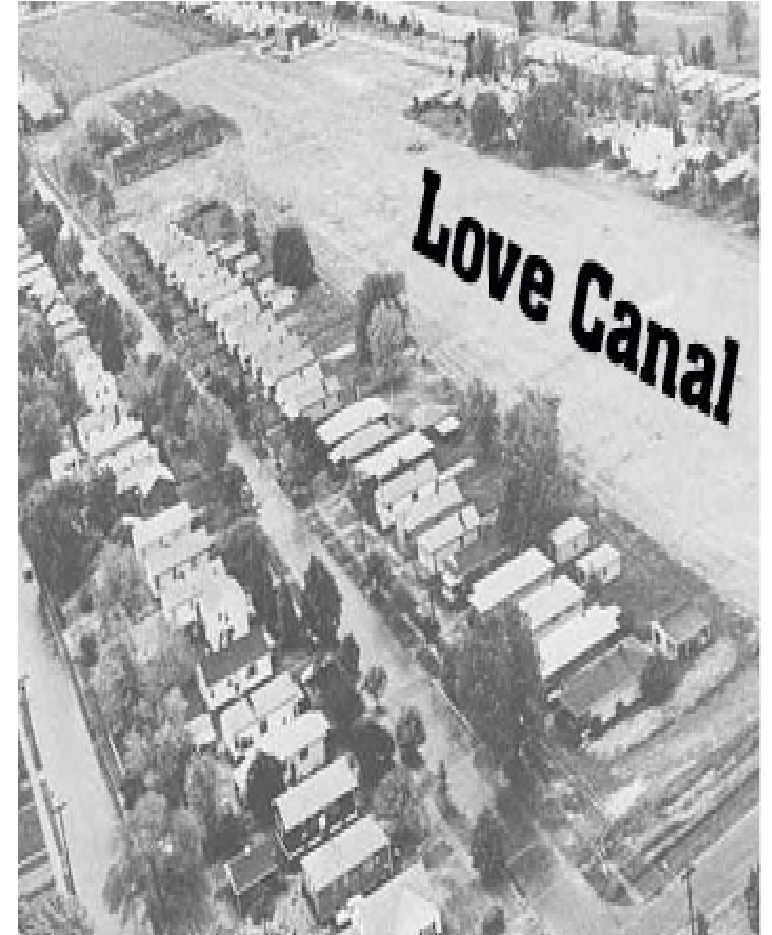
- One of the best known toxic waste cases in U.S. history became a site due to the failure of an Institutional Control.
- Hooker Chemical (now Occidental Chemical) and City of Niagara Falls had disposed of haz wastes in an old canal and covered it with fill creating 16-acre landfill. In the early 1950s Hooker then donated the land to Niagara Falls –whom accepted it.
- Hooker recognized the wastes presented a risk and put a deed notice that haz wastes were buried and the land could not be disturbed.
- Despite this notice, construction of a school, sewer lines, and homes began in the mid 1950s.

A brief historical perspective

Love Canal

- Thus the deed notice failed its warning purpose.
- Compensation, remediation, etc., costs are close to \$400M.
- 2004 site delisted and part of the CERCLA response action complete is that ICs be implemented.
- Love Canal has come full circle.

Love Canal: Before and After



Evolution process

FLORIDA

- Mid 1990s: As result of RBCA modifications, definition is incorporated into FS 376.301.
- Definition clearly states that other forms of IC than RCs, deed restrictions, or easements are ICs.
- From then to 2013, FDEP generally did not consider ICs other than the above. The durability of other ICs generally became an issue and unwritten policy was that other than RCs, acceptance of other ICs for site closure with conditions was an uphill climb.

State of the Practice today

Were are we? Leading the pack...

2013 – now: use of alternative forms of ICs to close site with conditions has certainly expanded. Some of the different forms are:

- Municipal ordinances requiring water and sewer connection to the MSA.
- Land Development Codes based on Comprehensive Plans.
- Homeowner Association Bylaws under FS 720.301
- Delineated Areas.
- DOT MOU.
- Well field protection zones codes?
- Deed notices?
- Zoning Restrictions?

Current Issues

What are we dealing with now?

- Purported notice requirements to purchasers and tenants in RMO II/III SRCO-c orders.
- Title work when RC has been recorded.
- DRCs or alternative ICs on roads rights of way owned by Counties and Cities. What are alternatives?
- Comfort letters. They may be site-specific and banks/equity capital may require liability exclusions. What are alternatives?
- Others?

FUTURE DEVELOPMENTS

2017 and beyond:

- Uniform Environmental Covenants Act (UECA) adoption?
- Compare and contrast UECA to State statutory provisions? Through the CMF or another group?
- Can or should DEP authorize an institutional control that extends off the source property onto adjacent properties not owned by the source property owner or other responsible party?
- What if the property owner only wants to restrict a portion of the property? Should the owner subdivide it before recording an institutional control?