



Institutional Controls Update – ERC Templates

A Note From the Branch Chief

Hello again! IDEM recently created the new [What's in My Neighborhood](#) webpage, which offers faster and easier access to records and data.

This interactive map contains 11 layers showing the Office of Land Quality's and the U.S. EPA's cleanup sites. These layers provide information on site locations, general site status, and environmental data associated with the [Indiana Brownfields Program](#), [EPA Cleanups in My Community](#), [RCRA Hazardous Waste Corrective Action](#), [Leaking Underground Storage Tanks](#), [Site Investigation](#), [State Cleanup](#), [Superfund](#), and the [Voluntary Remediation Program](#). Layers also show land-use restricted [Institutional Controls](#) sites, current and known historical [dry cleaners and laundries](#), and [sites of special interest](#).

Additional layers will be added as developed, with a second map release scheduled for December 2021.

Kevin Davis, Remediation Services Branch Chief

IDEM recently developed revised Environmental Restrictive Covenant (ERC) templates. If your site is already in the review process, it is not necessary to change the ERC template. Rather, the October 2021 ERC templates should be used moving forward.

Here are the changes to the ERC template:

1. There are only two ERC templates; one for projects in the Petroleum Branch and one for projects in the Remediation Services Branch. Program-specific options within the templates are available to choose from.
2. **3rd WHEREAS Para:** With IDEM's new "[What's In My Neighborhood](#)" website, it is important that restricted property owners are aware that their restricted sites are depicted and visible. Restricted properties are public information.
 - a. Added language "...Real Estate is also depicted as a polygon on IDEM's <https://on.in.gov/ideminteractivemap>."
3. **I. Restrictions:** Added VFC citation for Soil Management Plans (SMPs) and Operation and Maintenance and Monitoring Plans (OMM). It is necessary that engineered controls with limited lifespans have OMM plans to ensure the remedy remains effective. SMPs are required for those restricted sites with construction worker restriction areas.
4. **Signature Page:** Removed Disinterested Witness Language. On Feb. 18, 2021, HEA 1056 changed the law back to allow for either an acknowledgment (defined by Indiana Code 33-42-00.5-2) or proof by a disinterested witness.
5. **Exhibit B:** Removed "optional" from site map requirement. Maps are required for RCRA, CERCLA, hazardous substance sites, and if there are engineering controls or an "affected area."
6. **Exhibits:** Added request for Easement Search. IDEM is aware that existing easements may take priority over ERCs that are later placed on property. RPs need to do a title search to determine if there are easements that conflict with LURs. An example of a direct conflict is an easement that allows digging or excavation when the land use restriction prohibits digging or excavation.

Institutional Controls Webpage

The [Institutional Controls webpage](#) will be updated in the coming weeks. We will showcase the map of IC restricted sites and provide additional information on easement searches and the new self-auditing project. Draft long-term stewardship documents will also be made available. Stay tuned!

Community Involvement Plan

The [Community Involvement Plan](#) is available on IDEM's [Nonrule Policies webpage](#). Effective Sept. 10, 2021, this non-rule policy document provides a framework and expectations for performing community involvement in IDEM's remediation programs.

NEWS and UPDATES

New Annual Report

The Voluntary Remediation and State Cleanup Programs are rolling out a new required Annual Report for responsible parties to complete and submit for active remediation sites. The [Annual Report form](#) satisfies both statutory requirements (see [IC 13-25-5-15](#), *Voluntary remediation work plan; implementation; reports*) for making regular reports to the commissioner concerning the site remediation and the current [Voluntary Remediation Agreement](#).

The purpose of the Annual Report is to assure IDEM that work is progressing in a timely manner and that completion of the project can reasonably be assumed to be on, or near, the scheduled date.

The two-page report template prompts responsible parties to inform IDEM about what was accomplished in the last year and what is planned for the coming year. It should be a big-picture assessment of site progress that helps to answer questions like,

“What work was performed, or is planned for the field?” and “What reports were submitted?”

The Annual Report is due on Jan. 31, 2022 and should cover progress made in 2021 as well as plans for 2022. Annual Reports will be made public and placed in the Virtual File Cabinet (VFC) file for each site. The report will help project managers, stakeholders, and any other interested parties see progress and keep sites moving toward closure. If sites are not moving forward according to schedule, then the project manager and responsible parties should discuss how to get back on track to meet remediation and closure goals. For active sites, the effort required will be minimal.

DID YOU KNOW?

Easements and ERCs

Environmental Restrictive Covenants (ERCs) are used to obtain regulatory closure for many sites where releases have occurred. Easements on real estate are also very common. An easement is a permanent right of access to real property that the easement holder does not own. Easements “run with the land,” so when a property is sold to a new owner, the easement still exists, and the new owner must allow access.

Easements can be found by doing a title search. To ensure that ERCs are enforceable on property that has already-existing easements, all proposed ERCs should include: 1) a map showing all easements that affect the property and 2) a copy of any easements that relate to the property. If, after a review of the easement and the proposed land-use restrictions in the ERC, IDEM determines that the easement and ERC have conflicting terms, the ERC may not be enforceable and cannot be used for regulatory closure. The person placing the ERC on the property has the option of obtaining a subordination of the easement to the

ERC or renegotiating the easement so that it does not conflict with the ERC. IDEM has developed a subordination template on the [IDEM Institutional Controls webpage](#) and advises that persons wanting to use ERCs on properties with potentially conflicting easements obtain knowledgeable environmental and/or real estate counsel to discuss all options.

Most ERCs, like those that restrict use of groundwater at the site, won't conflict with most easements, which typically allow access to the property.

HELLOS and GOODBYES

With a heavy heart and great sadness, we notify you that Kyle Hendrix of the Indiana Brownfields Program passed away unexpectedly on Sept. 18, 2021. Many of you will remember Kyle as a true gentleman and kind soul. Kyle leaves behind his loving wife and son. Kyle will be deeply missed by his IDEM and IFA family.

However, an ERC that requires maintenance of an engineered or vegetated cap or cover, or prohibits excavation, could conflict with an easement that allows excavation (e.g., utility line maintenance). In these situations, IDEM cannot approve an ERC as a means of managing risk, because the ERC may not be enforceable. A subordination of the easement to the ERC, or an amendment of the easement to require compliance with the ERC, is necessary to ensure enforceability of the ERC, and protection of human health and the environment.