

**SUBCHAPTER F: INSTITUTIONAL CONTROLS**

**§350.111**

**Effective March 19, 2007**

**§350.111. Use of Institutional Controls.**

(a) Whenever required by this chapter, the person or landowner shall file a copy of the appropriate deed notice, VCP certificate of completion or restrictive covenant in the real property records of the county in which the property is located to notify future owners of any limitations on the use of the property. Deed notices, VCP certificates of completion and restrictive covenants shall include the following information:

(1) a metes and bounds description of the portion(s) of the affected property to which the institutional control applies;

(2) a plat map clearly demarcating the portion(s) of the affected property to which the institutional control applies. The map must contain a north arrow, a correlating map scale, and a legend identifying any used symbols or abbreviations;

(3) a certification by a registered professional land surveyor so registered by the Texas Board of Professional Surveying attesting to the accuracy of the descriptions provided in paragraphs (1) and (2) of this subsection;

(4) a statement discussing the appropriate land use (i.e., residential or commercial/industrial) for the affected property;

(5) an explanation as to which environmental media contain COCs above PCLs;

(6) a statement documenting any property use limitations or any requirements for maintenance of physical and/or institutional controls, or compliance with health and safety plans;

(7) the TCEQ Program and identifier number, and the availability of more detailed information at or through the TCEQ Central Records Office or Web Site; and

(8) the physical address and mailing address for the TCEQ Central Records Office.

(b) The person shall record a deed notice, VCP certificate of completion or by agreement with an innocent landowner cause a restrictive covenant to be recorded in accordance with subsection (c) of this section and the additional applicable requirements detailed in paragraphs (1) - (14) of this subsection, unless the affected property is subject to a zoning or governmental

ordinance that is equivalent to the deed notice, VCP certificate of completion or restrictive covenant that would otherwise be required under this subsection.

(1) For on-site and off-site properties where an institutional control is required pursuant to §350.31(h) of this title (relating to General Requirements for Remedy Standards), the person shall file a deed notice or VCP certificate of completion which indicates that long-term response actions are being conducted at the affected property.

(2) For on-site and off-site properties that have achieved Remedy Standard A for commercial/industrial land use, pursuant to §350.31(g) of this title (relating to General Requirements for Remedy Standards) the person shall note in a deed notice or VCP certificate of completion that if any person desires to use the property for residential purposes, they must first notify the commission at least 60 days in advance of such use and that additional response actions may be necessary.

(3) For on-site and off-site properties where an institutional control is required pursuant to §350.31(g) of this title (relating to General Requirements for Remedy Standards) because a physical and/or institutional control has been used to attain Remedy Standard B, the person shall describe in a deed notice or VCP certificate of completion the physical control (including the physical location and/or the lateral extent) and the reason the physical and/or institutional control must remain in place to be protective of human health and the environment, unless or until the agency approves any modifications.

(4) For any on-site or off-site properties with changes in circumstances as discussed in §350.35 of this title (relating to Substantial Change in Circumstances) that negate the need for a deed notice or VCP certificate of completion, the person shall describe the reason the original deed notice or VCP certificate of completion is no longer necessary to protect human health and the environment. If the executive director agrees, the executive director will execute a superceding deed notice that may be filed in the deed records.

(5) For on-site or off-site properties with a landowner who is an innocent owner or operator and where an institutional control is required under §350.31(g) of this title (relating to General Requirements for Remedy Standards) to limit the property to commercial/industrial land use, a restrictive covenant shall limit the property to commercial/industrial land use. The restrictive covenant shall include a statement indicating that if any person desires in the future to use the property for residential purposes, then the agency must grant approval prior to such use.

(6) For on-site or off-site properties with a landowner who is an innocent owner or operator and where an institutional control is required in response to §350.31(g) of this title (relating to General Requirements for Remedy Standards), because a physical and/or institutional control has been used to obtain Remedy Standard B, a restrictive covenant shall compel the

maintenance of or prohibit the removal of the physical control and shall describe any physical control (including the physical location and/or lateral extent) and the reason the physical control and/or institutional control must remain in place to be protective of human health and the environment. The restrictive covenant shall include a statement indicating that if any person desires in the future to alter the physical or institutional control, the agency must grant prior approval to any such changes.

(7) For any on-site or off-site properties with changes in circumstances as discussed in §350.35 of this title (relating to Substantial Change in Circumstances) that negate the need for a restrictive covenant, the person shall describe the reason the original restrictive covenant is no longer necessary to protect human health and the environment. If the executive director agrees, the executive director will execute a release of restrictive covenant that may be filed in the deed records.

(8) For on-site and off-site properties where an institutional control is required pursuant to §350.51(1)(3) of this title (relating to Affected Property Assessment), the person shall indicate, in a deed notice or VCP certificate of completion, the size of the assumed exposure area for residents and that if future exposures are limited to smaller areas, the affected property should be reevaluated to ensure protection of human health.

(9) For on-site and off-site properties where an institutional control is required pursuant to §350.51(1)(4) of this title (relating to Affected Property Assessment), the person shall indicate, in a deed notice or VCP certificate of completion, the size of the assumed exposure area for commercial/industrial workers and that if future exposures are limited to smaller areas, the affected property should be reevaluated to ensure protection of human health.

(10) For on-site and off-site properties with a landowner who is an innocent owner or operator and where an institutional control is required pursuant to §350.51(1)(3) of this title (relating to Affected Property Assessment), a restrictive covenant shall indicate the size of the assumed exposure area for residents and prohibit subdivision of the property into individual tracts smaller than the assumed exposure area. The restrictive covenant shall include a statement indicating that if any person desires in the future to subdivide the property, the agency must grant prior approval to any such changes.

(11) For on-site and off-site properties with a landowner who is an innocent owner or operator and where an institutional control is required pursuant to §350.51(1)(4) of this title (relating to Affected Property Assessment), a restrictive covenant shall indicate the size of the assumed exposure area for commercial/industrial workers and prohibit subdivision of the property into individual tracts smaller than the assumed exposure area. The restrictive covenant shall include a statement indicating that if any person desires in the future to subdivide the property, the agency must grant prior approval to any such changes.

(12) For on-site and off-site properties where an institutional control is required pursuant to §350.74(j)(2)(L) of this title (relating to Development of Risk-Based Exposure Limits), the person shall indicate, in a deed notice or VCP certificate of completion, the approved exposure frequency and duration and that exposures exceeding these approved levels are not protective of human health.

(13) For on-site and off-site properties with a landowner who is an innocent owner or operator and where an institutional control is required pursuant to §350.74(j)(2)(L) of this title (relating to Development of Risk-Based Exposure Limits), a restrictive covenant shall indicate the approved exposure frequency and duration and prohibit exposures exceeding these approved levels. The restrictive covenant shall include a statement indicating that if any person desires to change the exposure frequency and/or duration, the agency must grant approval prior to any such changes.

(14) For on-site and off-site properties where an institutional control is required pursuant to §350.74(b)(1) and §350.31(g) of this title (relating to Development of Risk-Based Exposure Limits, and General Requirements for Remedy Standards, respectively) because occupational inhalation criteria are used as the basis for determining the protective concentration of COCs in the working air environment, the person shall note, in a deed notice or VCP certificate of completion, the fact that the response action taken in response to this chapter relies on monitoring air concentrations of COCs and compliance with occupational inhalation criteria and a required health and safety plan for the affected property.

(c) The person shall submit a written request to the landowner to obtain permission to file the deed notice or VCP certificate of completion or to solicit agreement to have an innocent landowner execute a restrictive covenant. This written request must contain a copy of the proposed deed notice, VCP certificate of completion or restrictive covenant, the address and phone number of the commission's Public Interest Counsel as someone the landowner may contact, and a clear explanation as to the content and purpose of the institutional control. The person shall obtain written consent from the landowner for the filing of the deed notice or VCP certificate of completion prior to filing of a deed notice or VCP certificate of completion required to be filed under this chapter in the real property records unless the person is a governmental entity that is not a responsible party or subsections (b)(4), (d), or (f) of this section apply. Restrictive covenants shall be executed only by the landowner. A restrictive covenant in favor of TCEQ and the State of Texas which runs with the land shall be the required institutional control with the exception of institutional controls required under §350.31(h) and §350.74(b)(1) of this title (relating to General Requirements for Remedy Standards and Development of Risk-Based Exposure Limits, respectively) unless information is presented which demonstrates that:

(1) the landowner is not an innocent owner or operator as defined in §350.4 of this title (relating to Definitions and Acronyms), in which case the person shall file a deed notice or VCP certificate of completion;

(2) it is technically impracticable to obtain a residential-based Remedy Standard A response action and an innocent landowner refuses to execute a restrictive covenant, or a non-innocent landowner refuses to consent to the filing of a deed notice or VCP certificate of completion; a court of competent jurisdiction has determined the amount of compensation due the landowner as compensation for filing a deed notice or VCP certificate of completion in the real property records for that property; and the person has paid into the court registry compensation, if any, determined by the court, in which case the person shall file a deed notice or VCP certificate of completion;

(3) after extensive and diligent inquiry by the person, the executive director concludes that the landowner cannot be found, in which case the person shall file a deed notice or VCP certificate of completion; or

(4) the person is a governmental entity that is not a responsible party, and the innocent landowner refuses to execute a restrictive covenant.

(d) Landowner consent shall not be required for the filing of deed notice or VCP certificate of completion under this chapter if it is technically impracticable to obtain a residential-based Remedy Standard A response action, and the person demonstrates that:

(1) the non-innocent landowner refuses to grant consent for the filing of a deed notice or VCP certificate of completion, or an innocent landowner refuses to file a restrictive covenant;

(2) a court of competent jurisdiction has determined the amount of compensation due the landowner as compensation for filing a deed notice or VCP certificate of completion in the real property records for that property; and

(3) the person has paid into the court registry compensation, if any, determined by the court.

(e) The person shall provide a copy of the request for landowner consent for filing of a deed notice or VCP certificate of completion or copy of the request for the innocent landowner to execute a restrictive covenant, and proof of the date of receipt by the landowner of the request, with the RACR, unless required earlier in accordance with §350.33(f)(2), (f)(3)(F), or (f)(4)(C) of this title (relating to Remedy Standard B). Proof of written landowner consent for the filing of deed notice or a VCP certificate of completion or the written agreement of the innocent

landowner to execute a restrictive covenant shall be provided to the executive director before the executive director will approve the RACR, unless the provisions in subsections (b)(4), (d) or (f) of this section are met.

(f) Landowner consent for deed notice or VCP certificate of completion shall not be required if, after extensive and diligent inquiry by the person, the executive director concludes that the landowner cannot be found.

Adopted February 21, 2007

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