

A GUIDE TO LAND USE COVENANTS IN WEST VIRGINIA

OVERVIEW

The West Virginia Department of Environmental Protection (WVDEP) oversees environmental response projects throughout the state. These projects require remedies such as removal, treatment, and control of the contamination—alone or in combination—to address risk. When it is not possible or practical to completely remove or treat all contamination on a site, engineering controls and/or institutional controls are used to prevent residual contamination from spreading or causing harm.

- Engineering controls are physical barriers constructed to prevent exposure, or isolate materials from people, animals, and the environment (e.g., fences or soil caps).
- Institutional controls are administrative and legal controls that minimize the potential for human exposure or contamination and protect the integrity of the cleanup (e.g. restrictive covenants or city ordinances).

LAND USE COVENANTS

The West Virginia Department of Environmental Protection generally utilizes Land Use Covenants (LUCs)—also referred to as environmental covenants—as institutional controls on sites where removal and treatment of all contamination is not possible or practical. LUCs are legal instruments that impose activity and use limitations (AULs) where residual contamination is present on a property.

A Land Use Covenant serves three purposes:

1. Informs prospective owners or tenants of the environmental conditions of the property
2. Ensures long-term compliance with AULs that are necessary to prevent unacceptable exposure to environmental contamination
3. Maintains integrity of the remedy over time

Land Use Covenants are recorded to property deeds located in the county recorder's office. With the LUC remaining in the "chain of title," it reliably communicates environmental conditions and restrictions to current and future persons who own or have an interest in the property through property transactions.

CONTENTS

A Land Use Covenant generally includes:

- Legally sufficient description of the property
- Description of activity and use limitations
- Name and location of any administrative record for the environmental response project
- List of covenant holders
- Brief narrative of the contamination and remedy
- Requirements for notice following property transfer or other specified interests
- Requirements for periodic compliance reporting

Land Use Covenants must be signed and notarized by the agency, every holder, and the property owner(s).



This 30-acre site was previously home to a tin plating mill, plate glass manufacturer, and metal and plumbing parts manufacturer, until all operations ceased and the site was abandoned in 1995. The property participated in the WV Voluntary Remediation Program to determine environmental impacts from previous site uses and restore the property for redevelopment.



A cap (clean soil and asphalt pavement) was placed in certain areas, and a land use covenant was recorded with the property deed to prohibit residential use of the property. Today, the site is populated with several commercial businesses, including banks, restaurants, retail stores, and a hotel.

COMMON ACTIVITY AND USE LIMITATIONS

Activity and use limitations commonly imposed on properties through Land Use Covenants include:

a. Residential Land Use

Properties that are remediated to industrial standards (rather than more stringent residential standards) may only be used for nonresidential purposes (e.g. commercial, industrial, or manufacturing activities).

b. Groundwater Usage

When contaminants in groundwater are in excess of drinking water standards, use of the groundwater is prohibited, except for monitoring or remediation purposes.

c. Excavation, Drilling, or Penetration of the Land Surface

When certain engineering controls, such as a soil cap, are used as a remedy for the site, excavation, drilling, or penetration of the land surface is prohibited without a knowledgeable contractor to safely handle potentially contaminated soil.

d. Building Construction

When vapor intrusion from contaminated soil and/or groundwater is a concern, new building construction may be prohibited, unless vapor barriers and/or ventilation systems are installed.



A glass manufacturing plant operated on this 3-acre site from the 1930s through the late 1980s. The property—situated in a growing residential area and next to a public rail trail—had been abandoned with dilapidated buildings for decades when the local county commission took ownership and entered the property into the WV Voluntary Remediation Program.



A soil cap was placed over the site, and a land use covenant was recorded with the property deed to restrict excavation, drilling, or penetration of the cap without a qualified contractor to properly handle potentially contaminated soil. Today, the site is safe for public recreational use and serves as a popular trailhead with greenspace, parking, restrooms, and a kayak/canoe launch.

SITE REUSE WITH LAND USE COVENANTS

Because a Land Use Covenant helps reduce or eliminate the risk of people coming in contact with contamination at a site, a LUC can allow a previously undeveloped or abandoned property to be returned to safe and productive use. However, it is important to recognize that LUCs can affect future development on a site. If a person remediating a site knows the intended future use, that should be taken into consideration prior to implementing a remedy. This will ensure that AULs listed in the LUC do not interfere with the planned use.

LONG-TERM MONITORING AND ENFORCEMENT

In addition to reporting requirements imposed on property owners and/or covenant holders, WVDEP continuously monitors and regularly inspects properties with recorded Land Use Covenants to protect citizens from coming in contact with contamination at a site. When a property owner, contractor, or other stakeholder needs assistance with understanding a LUC and its AULs, WVDEP is available to provide guidance.

If violation of a LUC occurs, the agency, affected persons, and municipality or other unit of local government may file a civil action for injunctive or other equitable relief.

AMENDMENT OR TERMINATION

Land Use Covenants remain on the property deed in perpetuity. If it is determined that residual contamination no longer presents an unacceptable risk to human health or environment (typically through additional remediation and sampling at the site), it is possible for the LUC to be amended or terminated. This requires consent by the agency, current property owner(s), and all original signers of the LUC (provided that those persons are still in existence).

WVDEP REMEDIATION PROGRAMS

Land Use Covenants are routinely placed on properties that complete remediation through the RCRA Corrective Action Program, UECA-LUST Program, and Voluntary Remediation Program. All LUCs are executed pursuant to the Uniform Environmental Covenants Act (W. Va. Code § 22-22B).



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