Environmental Covenants: A Guide for Homeowners

The Washington State Pollution Liability Insurance Agency (PLIA) assists heating oil tank owners and operators with advice and guidance on petroleum cleanups through the Technical Assistance Program (TAP). Through TAP, PLIA's site managers review environmental reports and provide opinion letters based on that review and the requirements of the state cleanup regulations of Chapter 70A.305 RCW, the Model Toxics Control Act (MTCA).

For completed cleanups that meet the substantive requirements of MTCA, PLIA issues a No Further Action (NFA) opinion letter that can be helpful with property transfers. In certain cases, the property owner may need to place an **environmental covenant** on their property title or deed as a condition of an NFA letter.

What is an Institutional Control?

WAC 173-340-440, Institutional controls requires restrictions known as institutional controls be placed at certain cleanup sites when some contamination remains at a site. These controls can be physical, legal, or administrative. Controls are used to protect the integrity of a cleanup action and minimize the potential for future human exposure to pollution.

An environmental covenant describes what institutional controls are established at a cleanup site.

Types of Institutional Controls

1. **Physical measures:**
   - Fences or other barriers to limit access to the property.
2. **Legal measures:**
   - An environmental covenant that informs future property owners of the site's condition and restricts activities that could result in exposure to pollution.
   - Financial assurances (such as money set aside) by the property owner sufficient to cover costs associated with the operation and maintenance of a cleanup action, compliance monitoring, and corrective measures.
   - Maintenance requirements for engineered controls.
3. **Administrative measures:**
   - Educational programs that inform the public about site pollution and ways to limit exposure. Examples include signs, public notices, mailings, and health advisories.

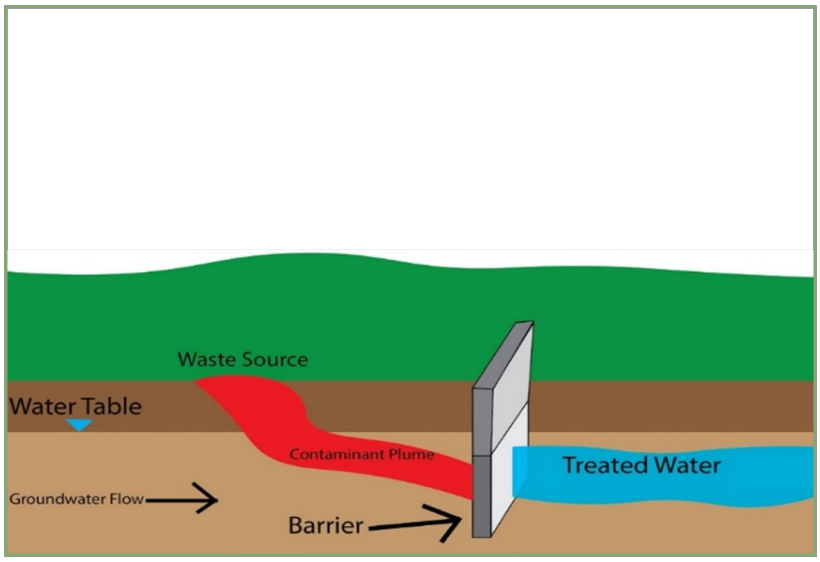
What is an Environmental Covenant?

An environmental covenant is a type of institutional control itself. It is a legal mechanism that lists restrictions or obligations regarding how the property can be used. The current owner of the property is required to follow the terms of the environmental covenant.

What is an Environmental Covenant? (continued)

Environmental covenants serve a couple of important purposes.

1. They limit or prohibit activities on the property that could result in exposure to hazardous substances.
2. They alert current property owners of restrictions on how the property can be used, and ongoing obligations such as vapor monitoring.

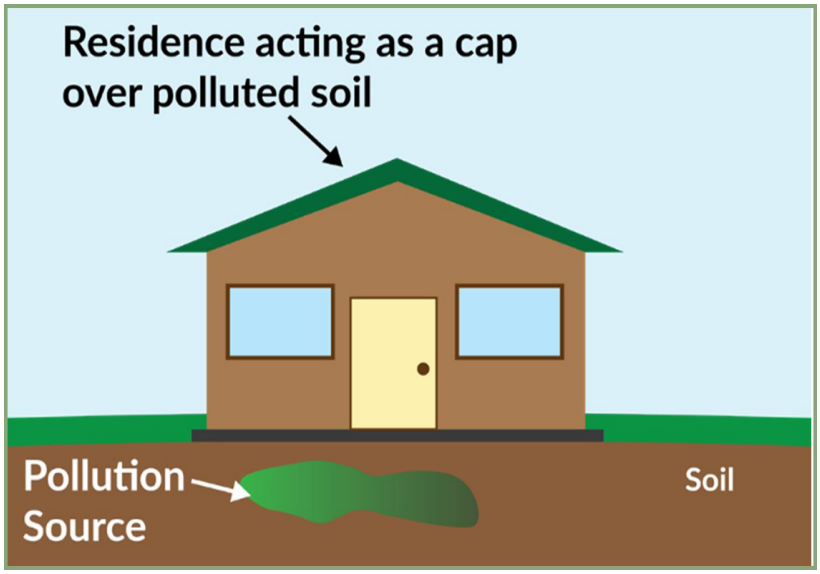


Example of groundwater flow barrier engineered control.

Environmental covenant may set out requirements which protect **engineered controls** on a site. Engineered controls are physical controls that help prevent the spread of, or exposure to, pollution. Some examples of engineered controls include groundwater flow barriers, vapor control systems, and "capping," which involves placing clean soil, asphalt, or concrete over polluted soil.

Why are Environmental Covenants Necessary?

The state's cleanup regulations, the Model Toxics Control Act (MTCA) outlines cleanup requirements for heating oil sites. These involve establishing cleanup levels where on-site pollution does not threaten human health or environment, and selecting cleanup actions so that the site meets the substantive requirements of MTCA.



Example of a residence acting as a cap over polluted soil. In some cases, pollution may be inaccessible underneath a home. An environmental covenant may be appropriate to establish institutional controls that prohibit certain constructions activity to prevent exposure to pollution contained.

When contamination above cleanup levels remains at a site, a covenant would be necessary for one of these reasons:

1. The remedy takes a long time, and the property owner wants to make sure the property is protective until contamination is no longer above cleanup levels.
2. The remedy needs to be protected. For example, if a clean soil cap is placed over contaminated soil, a covenant would need to be put in place to prevent digging in the area of the cap.
3. The remedy allows for inaccessible contamination to remain in place so long as a covenant is in place.

What is the Process for Establishing an Environmental Covenant?

When a site manager determines that a covenant is required under WAC 173-340-440(4) for a site, the following steps are taken:

1. For sites enrolled in TAP, the PLIA site manager identifies issues to be addressed by the covenant and sends a letter or email to the property owner detailing next steps.
2. The homeowner or their service provider arranges for a title company to conduct a title search in order to identify all landowners or other parties holding an interest or encumbrance on the property.
3. The consultant, property owner, or property owner's legal counsel drafts the covenant using PLIA's template and Confirmation Monitoring and Contingency Plan (CMCP) and sends these to PLIA for review and comments. The site manager reviews comments on the draft covenant and makes appropriate changes. This may take multiple reviews/edits.
4. The consultant, property owner, or property owner's legal counsel sends the draft covenant to the city or town land use planning department where the property is located for review and comments. In the case that the property resides in an unincorporated area, the draft covenant should be sent to the county planning department. The site manager and property owner review local land use planning authority comments and make edits.
5. Once the local land use authority's comments have been incorporated into the covenant, PLIA Executive Director signs the covenant as "holder" or "grantee" of the covenant.
6. The site manager arranges for the property owner to sign the covenant as "grantor."
7. The consultant, property owner, or property owner's legal counsel files the covenant with the county auditor in every county where the property subject to the covenant is located. PLIA does not file the covenant.
8. Once recorded, the property owner sends the original covenant to PLIA.
9. The site manager sends a No Further Action (NFA) with a covenant letter to the property owner. This opinion will have the covenant and CMCP attached.
10. The covenant is reviewed by PLIA every five years.

If at any point of the process the covenant is rejected, amendments and refiling may be necessary.

How does an Environmental Covenant get Removed?

If during PLIA review, the circumstances listed in Subsection 4 of WAC 173-340-440, Institutional Controls that require an institutional control no longer apply to the site at that time, then PLIA will give public notice and opportunity for comment on the removal of the covenant. After the public comment period ends, and there are no changes, PLIA will remove the covenant and issue the site an updated NFA letter.

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