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Enforcement

Long-term management of ICs requires adequate enforcement tools to promote compliance and protect receptors from an imminent or potential threat of from a release or exposure. A legal framework supporting enforcement will clearly communicate to a potential obligated party (OP) the consequences of a violation of an IC. In addition, enforcement tools should be progressive, consistently applied, and promote confidence that the IC enforcement process is administered responsibly. A sound IC legal framework provides notice to the OP of potential enforcement action for violations, legal defensibility of the IC, a transparent and defined process for the execution of enforcement actions and, ultimately, deterrence of IC violations.

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The ability to enforce is a fundamental component to IC compliance. While some states lack specific authority, other states, including Arizona, Colorado, Connecticut, Indiana, Kansas, Massachusetts, New Jersey, North Carolina and Utah, among others, have at least some authority for enforcement. Administrative authority is frequently preferred over judicial authority because of the reduced cost and timeliness of resolving a violation directly with an authorized agency in comparison to the relatively high cost and delay that comes with resolution through court action (Asimow 2015). Government institutions use statutes, regulations, and ordinances to enforce ICs, while affected private parties may use common law or citizen suit provisions in existing laws (for example, Resource Conservation and Recovery Act, Clean Air Act, and the Comprehensive Environmental Response, Compensation and Liability Act). Common law suits may follow traditional legal principles of trespass, nuisance, and other claims.

Although some state environmental programs may lack specific authority for enforcement, they may exercise reopener clauses or rescind closure reports, no further action letters, covenants not to sue, and certificates of completion for sites where ICs are not implemented or maintained. For example, in ITRC's survey of 27 states concerning IC programs, 22 respondents reported that they have injunctive authority to require an RP to cease activities and five reported that they have rescission authority.

Selected State Enforcement Authority

Arizona *requires that declarations of environmental use restriction must be recorded, run with the land, and burden the property. Owners electing to use institutional controls must submit a written report each year regarding their status. See Ariz. Rev. Stat. Ann. § 49-152 (2011)(Arizona 2011).*

Colorado *requires that an environmental covenant or restrictive notice imposed at any remediation project is enforceable in the event of actual or threatened failure to comply. Both administrative and judicial authority to enforce are available in Colorado. See C.R.S. 25-15-322 (2015)(Colorado 2015).*

Connecticut's *authority allows for judicial action upon violation of an institutional control, leading to injunctive relief and the recovery of penalties of up to $25,000 for each violation. "Each violation shall be a separate and distinct offense and, in case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense." Conn. Code §22A-133P (2015)(Connecticut). Connecticut's code is particularly thorough, even to the point of including mitigation and criminal sections (see [provide link to the sections cut])*

Kansas *authorizes administrative enforcement action, including the issuance of orders for corrective action and revoking approvals of remedial action. Judicial enforcement is also authorized through the state's office of attorney general. See K.S.A. §65-1.229 (2015)(Kansas 2015).*

Massachusetts *authorizes an administrative enforcement framework that begins with the issuance of compliance assistance letters to property owners who have a Notice of Activity and Use Limitation (AUL) on a property deed. MDEP may audit any property for which an AUL has been recorded. An audit evaluates whether the AUL has been properly implemented and whether the activities and uses occurring in the area subject to the AUL are consistent with*

the terms of the AUL. A failure to comply with the terms of an AUL is a failure to comply with the Massachusetts Contingency Plan, and enforcement action may be initiated. The law provides for administrative penalties of up to $25,000 per day for failure to comply with the terms of an AUL. MA Code § 21A-16 et seq. (Massachusetts).

For additional comparative examples, see IN Code § 13-14-2-6 (Indiana)(Indiana); N.C.S. § 143B-279.9(a) (North Carolina)(NC), providing administrative enforcement of land use restrictions through "the remedies provided by any provision of law that is implemented or enforced by the Department or by any means of a civil action; N.J. ARRCS 7:26C-9.5 (New Jersey)(NJ).

A state agency's administrative authority stems from statutory authority granting an agency the ability to administer an IC program. The absence of such authority among localities and states may require a legislative initiative to obtain such authority. Alternatively, a close legal review of existing state enforcement authority may result in a defensible interpretation that the authority could also apply to the enforcement of an IC.

This guidance assumes that a local or state agency retains administrative authority for the enforcement of ICs, and that such authority may be administered independent of costlier and lengthy judicial action.

Purpose of a Compliance and Enforcement Program

An IC enforcement model can follow traditional environmental enforcement models for water, air, and waste. For example, Connecticut has authority to enforce ICs that is similar to enforcement models commonly used in other areas of environmental enforcement (see Conn. Code §22A-133P (2015)(Connecticut). The authority allows for judicial action upon violation of an IC, leading to injunctive relief and the recovery of penalties of up to $25,000 for each violation. Connecticut's code also provides for a gravity based evaluation of penalties, mitigation, and criminal enforcement.

This model potentially lends an IC enforcement credibility because of the relative familiarity in the regulator and regulated communities to these enforcement processes. Similar to traditional enforcement strategies, IC violations may be based on their seriousness (duration, magnitude, and culpability) and their impact or threat of impact to human health, the environment, and the interference with the effective administration of an IC program.
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A range of informal (voluntary compliance) and formal (involuntary compliance) enforcement tools are available and can be used to evaluate the most appropriate enforcement plan for a specific IC. These tools, along with careful site-specific IC planning, allow resolution of a violation with the least amount of adversarial attention. Effective IC enforcement planning also provides notice to an OP of the potential interested parties and consequences of a violation, thereby promoting compliance. IC enforcement should meet the following goals, which are consistent with the goals identified in air, waste and water enforcement programs:

- Encourage compliance with IC requirements while precluding continuing or repeat violations.
- Require remediation or other corrective action resulting from the impact of violations.
- Recover civil penalties, where appropriate, including amounts sufficient to remove any economic benefit of noncompliance with an IC.
- Deter violations and encouraging environmental stewardship.

Adequate notice of potential enforcement action should be given in the event of an IC violation. Standard form language is often employed to provide an effective method of notice. For example, "*Failure of an owner or occupant to comply with any of the restrictions set forth herein shall be grounds to require that the owner or occupant modify or remove, or cause to be modified or removed, any improvements constructed in violation of that paragraph. Violation of this covenant shall also be grounds to file civil actions against the owner or occupant as provided by law.*"

Challenges to IC Compliance and Enforcement

An effective IC enforcement program promotes certainty in the legal process; however, currently no model legal framework supports this goal. Twenty-three states and Washington, D.C., and the Virgin Islands have enacted some form of UECA (ASTSWMO 2015). Although UECA provides language allowing for a "civil action for injunctive or other equitable relief for violations," it does not provide any specific legal framework to promote compliance and deter violations (Commissioners

2003). The model language provides only for conventional, common law relief once a violation occurs. Common law relief presumes judicial action is required to enforce.
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The UECA model also states that it "does not limit the regulatory authority of an agency under other [state or local] authorities", (Commissioners 2003) thereby acknowledging the authority of government agencies to regulate the IC field. Subsection (b) of Section 11 recognizes that in many situations the statutes authorizing an environmental response project will provide authority for enforcement of an environmental covenant in addition to rights specified in the environmental covenant. The absence of model enforcement provisions in UECA leaves a void in a comprehensive strategy to promote compliance and deter violation of ICs in the context of a state or local regulatory framework.

Contributing further to enforcement difficulties, many states cannot adequately manage and monitor ICs. ITRC's survey illustrates weaknesses in state monitoring and compliance efforts. Further, the data also amplifies the necessary relationship between adequate IC management tools and the foundation they provide to a meaningful IC enforcement program:

Absence of a Common Legal Framework

There is currently no model framework to guide a compliance and enforcement strategy for ICs. Federal environmental laws (for example, Resource Conservation and Recovery Act, Clean Water Act, and Clean Air Act) commonly include provisions concerning local and state delegation of authority, minimum program standards applicable to all delegated localities, and states, and enforcement authority (RCRA; CWA; and CAA). These laws provide an important legal foundation, guiding local and state programs in a collective effort to protect human health and the environment. These environmental laws also establish a baseline for national consistency.

In comparison, ICs have no common legal framework, federally established standards, enforcement authority or collective guidance on an enforcement process. ICs are most commonly tied to laws independently administered by state and local jurisdictions. Various government agencies or private parties capable of exercising authority over ICs create uncertainty and inconsistency in the IC legal framework. Some ICs may also be subject to multiple jurisdictions and multiple sets of legal principles where geographical site boundaries cross local or state jurisdictional boundaries.

Enforcement Case Study: Formal Enforcement with a Federal Facility

Failures by the U.S. Department of the Air Force (USAF) at Eielson Air Force Base (AFB) to comply with the Eielson Air Force Base Federal Facilities Agreement (FAA) and with obligations set out in Records of Decisions (RODs) led to a negotiated settlement between the U.S. Environmental Protection Agency (EPA), the Alaska Department of Environmental Conservation (ADEC) and the USAF to resolve compliance failures. Eielson AFB personnel and contract support staff failed to fully implement institutional and engineering control obligations (collectively, Land Use Controls or LUCs). After initial negotiations between USAF, ADEC and EPA concerns failed to reach resolution, ADEC and EPA initiated the FAA dispute resolution process, resulting in the USAF being required to develop an enforceable Land Use Control Implementation Plan (LUCIP). The LUCIP is an example of a stewardship plan for an active federal facility with multiple sites containing LUCs. During the Five-Year Review process required by CERCLA, validation of the LUCIP ensures that the LUC mechanisms are still in place.

Complex and Complicated Identification of Proper Parties

ICs are generally divided into four categories. Different IC categories may require different legal methods for enforcement. Identification of the types of ICs that will be used can determine what enforcement authority is most appropriate and who is responsible for enforcing the IC. IC identification also assists in determining who has the greatest legal interest and who may be in the best position to enforce the IC.

Who administers enforcement depends on the type of IC being enforced. For example, proprietary controls are considered private because they tend to affect a single parcel of property and are established by private agreement between the property owner and a second party who, in turn, can enforce the controls. Governmental controls impose restrictions on land and resource use pursuant to the authority of a government agency. Enforcement is administered by the government entity in these cases. For example, some federal landholding agencies, such as the Department of Defense, possess the authority to enforce ICs on their property. Enforcement and permit tools with IC components are legal tools, such as administrative orders, permits, Federal Facility Agreements (FFAs) and consent decrees that limit or require the performance of specific activities. These legal tools may be issued unilaterally or negotiated by regulatory and other authorized government

agencies. Informational devices often provide notification of residual contamination in the form of a recorded notice to local communities, tourists, recreational users or other interested persons. Informational devices generally are not designed to serve as enforceable restrictions. (USEPA 2012a) an effort to identify the parties who can potentially enforce, IC instruments should identify all available enforcement authority and all parties able to exercise such authority. An identification of all parties, as a practical matter, lists all local, state, and tribal jurisdictions, as well as all known interested, and private parties. Although parties may change over time, full party identification at the time of IC development assists in understanding the various enforcement roles in the event of an IC violation. Understanding individual enforcement roles, in turn, helps to determine who is in the best position to enforce violations based on interests and authority, especially where there may be overlapping, similar or competing interests. Finally, the information also places the IC holder on notice of individual and collective enforcement interests, potentially providing a disincentive to an IC violation.

Although various jurisdictions (state, local, and private) may have legal authority to enforce a violation in some fashion, enforcement is commonly administered by a local or state environmental agency with administrative authority over an IC violation in a geographic or jurisdictional area. However, an assessment of each of these interests and their respective enforcement authorities should be completed to determine which interest holder has the most effective and appropriate enforcement tools. Further, the interest holder with the most effective enforcement authority may be able to satisfy the interests of all interested parties. This most effective approach can be determined by a simple exercise of communication and coordination with other potentially interested parties. Asserting an enforcement action under one primary government agency can achieve corrective action, promote enforcement efficiency, reduce legal confusion, and improve the enforcement process for all interested parties.

In many cases, the OP will be the IC holder. However, depending on the IC and circumstances of violation, the OP may be different than the IC holder. Other than the IC holder, OP may also include subsequent landowners, tenants, adjacent landowners, licensees, grantees or any other third party using the property with an IC or conducting activities that affect the IC.

Compliance and Enforcement Options

Planning for a potential enforcement action is completed at the time of development of the IC, even though an IC holder may never be in violation. Effective enforcement of an IC depends on thoughtful IC planning. For example, if the enforceability of each specific IC requirement is not addressed during the planning and selection stage, then the enforcing entity may not be able to require compliance. Enforcement action may be considered when IC requirements:

- have not been observed;
- have not been implemented or fail to meet requirements;
- have not been adequately maintained or monitored;
- fail to have required certification; or
- fail to meet reporting requirements.

Once a violation is identified through monitoring, inspection, reporting or an IC performance evaluation, a basic IC enforcement model may be divided into two phases, including informal (voluntary compliance) and formal (involuntary compliance). Both are part of a progressive system to achieve corrective action of the IC violation. Figure 6 illustrates this system.

Enforcement According to Authority

Enforcement may be different, depending on the authority employed. For example, periodic reviews can result in a "pass" or "fail" of monitoring requirements. If a site passes a periodic review, the review is made available for public review and comment, and another review is scheduled in five years. A site fails a periodic review if it is determined that the remedy is not protective of human health and the environment. In this event, there may be several options for enforcement. First, correct the problem within a short time frame (for instance within 30 days) and incorporate the correction into the review. If the problem cannot be corrected in short order, then the site may be "reopened." For sites in a Voluntary Cleanup Program, this means a no-further-action determination may be rescinded. The responsible party (RP) may then be required to correct the problem and re-enter the Voluntary Cleanup Program or referred for enforcement action. Second, formal sites under an order may require the RP to re-enter negotiations to correct the failed requirement.

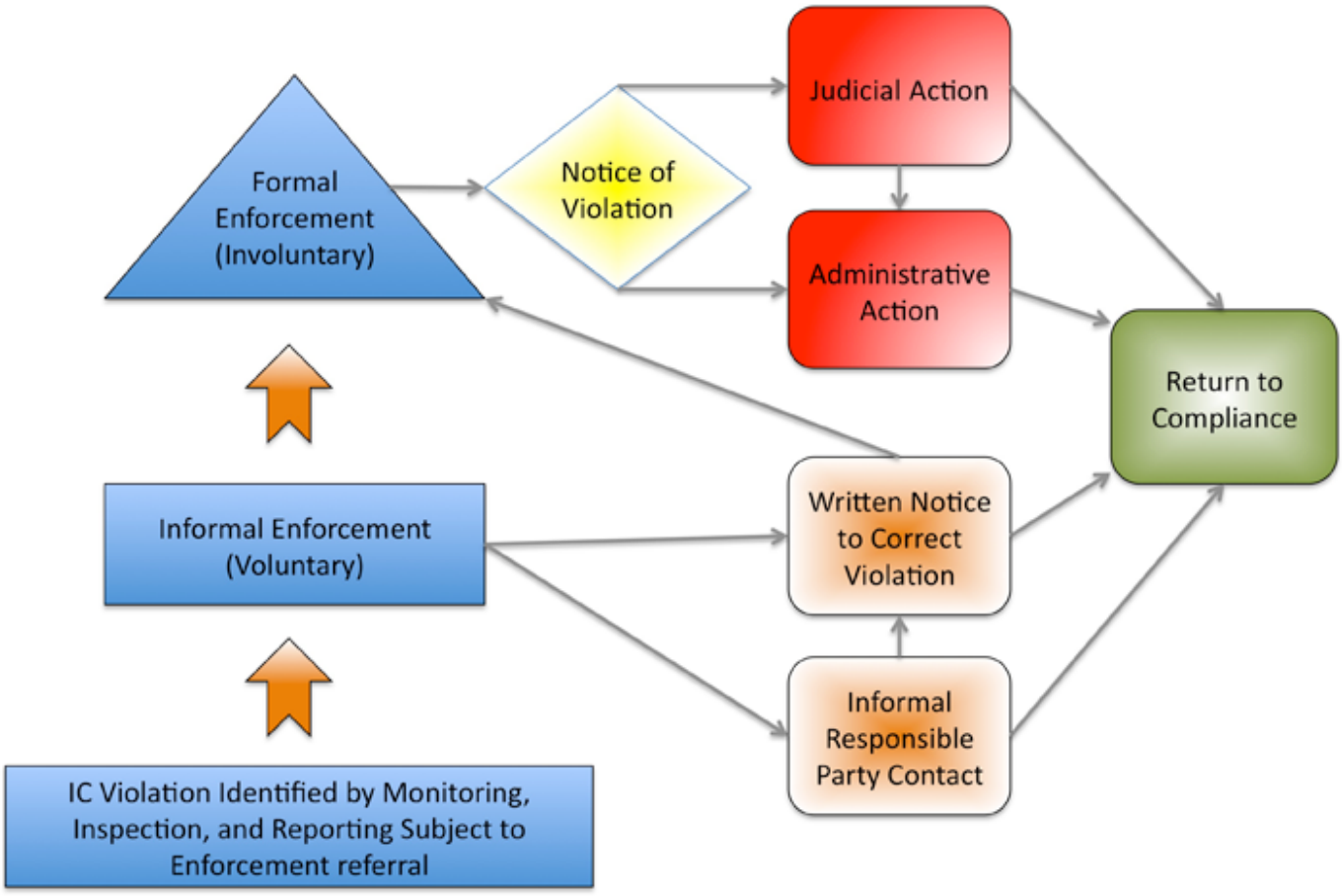

Figure 6. Basic model for enforcement process.

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Voluntary Compliance

Informal methods emphasize enforcement avoidance, as well as intervention to educate an OP on how to comply with IC requirements. Informal, voluntary compliance may require a range of options to achieve corrective action, including phones calls, site visits, dialogue with the OP and warning letters. Less adversarial, informal methods are generally appropriate for violations with little impact to the environment and when the OP does not have a significant history of noncompliance. Requesting voluntary compliance from an OP through early problem identification and informal communication is often an effective method to resolve IC violations quickly. Note that correspondence with an OP during the informal enforcement phase establishes an important evidentiary record for formal enforcement action when an OP continues to fail to comply with IC requirements.

Enforcement Case Study: Informal Enforcement

During an inspection of ICs conducted by the Montana Department of Environmental Quality (MDEQ)s, inspectors determined through a records review that a property owner was not conducting regular monitoring and inspection of sidewalks used to encapsulate asbestos in compliance with a site Operations & Maintenance Plan. MDEQ issued a Warning Letter to the RP as notification of the violation and requested corrective action. The RP responded to MDEQ, and returned to compliance in a timely manner without further escalation of enforcement action.

Voluntary compliance typically works well if corrective action of the IC violation can be achieved in a short period of time (for instance 30 days) and does not present a significant risk to human health and the environment. Schedules or predetermined deadlines to achieve corrective action with verification of completion should be considered. Follow-up site visits and records of communication support potential transition to more formal, involuntary compliance should the OP resist corrective action of a violation.

Voluntary compliance action may take many forms, and can vary from state to state; examples include an Informal Correction Letter (ICL), a Request for Corrective (or Compliance) Action (RCA), a Deficiency Letter (DL), or an Inspection

Report that identifies one or more issues concerning IC requirements. Voluntary compliance instruments serve a common purpose by notifying the OP of a violation. At a minimum, an OP needs: 1) a description of the facts and observations underlying each violation; 2) relevant IC requirements; 3) legal references where appropriate; 4) proposed corrective action; and 5) an opportunity to respond.

Materials that support an informal enforcement action can be provided to further support the action and to assist the OP in fully understanding the IC violation. These materials can include inspection reports, photographs, maps, and copies of relevant regulations or laws. After issuing an informal enforcement action, close tracking and follow-up of each corrective action requirement is considered to ensure an OP returns to compliance. Confirmation of an OP's return to compliance may also include obtaining written or electronic confirmation from an OP, conducting a follow-up site visit or both. If an OP successfully completes a durable return to compliance, an acknowledgement letter (i.e. No Further Action) may be used to close the enforcement action.

In the event an OP fails to respond to voluntary compliance measures or fails in any requirement for corrective action within the specified schedule, escalation of the violation may be considered, including issuance of a Notice of Violation (NOV) and referral for formal enforcement.

Enforcement Case Study: Formal Enforcement with Penalties and Corrective Action

During an inspection conducted by the Colorado Department of Public Health and Environment (CPHE) of a development site, inspectors observed a contractor excavating greater than 18 inches below ground surface in violation of a recorded Environmental Land Use Restriction (ELUR). CPHE initiated action to immediately terminate excavation. In addition, enforcement action was initiated for a penalty and corrective action. In calculating the maximum penalty, CPHE estimated excavation in the unauthorized area occurred over 11 days, resulting in a penalty amount of $275,000 ($25,000 per day). Based on mitigating factors in the case, CPHE and the RP ultimately negotiated a settlement that included a $75,000 penalty and completion of a revised excavation work plan. The RP also agreed to produce a safety video that informed all current and future employees of the history, concerns, and restrictions associated with the site.

Involuntary Compliance

Requiring involuntary compliance from an OP through formal enforcement is generally considered a final administrative measure to resolve IC violations. Formal enforcement is usually procedurally burdensome, legally intensive, and not as cost effective as informal compliance.

An NOV or similar formal notice is typically issued to an OP to inform them that the violation is ready to be referred for formal enforcement action. Formal action employs a system of escalating enforcement tools, including NOVs and administrative orders that may impose penalties and injunctive measures. NOVs notify an OP of an alleged IC violation and signify that the alleged noncompliance is ongoing, persistent, severe or of such significance that the violation is appropriate for further enforcement action. NOVs generally mark the transition from voluntary to involuntary compliance. If a violation is confirmed, the matter may be resolved by Consent Order or similar formal enforcement tools.

OPs failing to respond to informal enforcement measures, violations with significant environmental impact or OPs with a history of noncompliance may generally be considered for an NOV without the benefit of voluntary compliance measures. Formal administrative enforcement measures may include administrative orders, civil judicial action and, in the most serious cases, criminal action (California 2016) NOVs typically have high legal significance among local and state agencies, requiring specific statutory authority to be issued.

The most common elements of an NOV include:

- a description of the facts and observations underlying each violation
- relevant IC requirements
- legal references where appropriate
- proposed corrective action
- an opportunity to respond

Some states may require that a hearing be offered to the OP as part of an NOV to fully determine the factual basis of any IC

violation.

As a general reference point, NOVs are appropriate for alleged violations that either impact or present an imminent and substantial threat to human health or the environment, present a violation of an essential element of an IC program, involve violations where corrective action cannot be achieved in a short period of time (for instance 30 days) or involve OPs with a significant record of noncompliance. Materials that support an NOV provide further support for the action and assists the OP in fully understanding the IC violation. These materials can include inspection reports, photographs, maps, and copies of relevant regulations or laws.

Managing Failure

When IC compliance failure occurs, enforcement can be strategically applied toward the RP's return to compliance, deterrence of any further violation, and the protection of receptors from threat of release or exposure.

Assessing civil penalties in administrative actions requires specific statutory authority. Assessing appropriate civil penalties should be carefully evaluated and calculated on the basis of the gravity of the IC violation (the "gravity component"). The penalty may also reflect the removal of any economic benefit of noncompliance. Gravity based penalty analysis typically includes: 1) the severity of the violation(s); 2) the extent of any potential or actual environmental harm; 3) compliance history; 4) economic benefit of noncompliance; and 5) the ability to pay the penalty. An appropriately applied penalty should take away an RP's incentive to violate and maintains an economic playing field for the regulated community that maintains compliance. Stated in different terms, in an effort to promote IC compliance, the cost of noncompliance should exceed the cost of compliance.

Enforcement Case Study: Formal Enforcement with Penalties

A Concord, MA company was assessed a $5,692 penalty for failing to restrict exposure to soil contamination at a Worcester site in 2013.

The Massachusetts Department of Environmental Protection (MDEP) assessed a $5,692 penalty to Lincoln Crossing, LLC for violating environmental cleanup requirements. A Notice of Activity and Use Limitation (AUL) was recorded with the Worcester Registry of Deeds for the site in April 1995 to prevent future exposure to soil contamination from former manufacturing activities. However, during an inspection at the property, earth moving activities by a tenant at the site were observed without a required health and safety plan or soil management plan, both violations of the 1995 AUL. In addition, MDEP determined that the AUL was deficient and not referenced in the tenant's lease, as required by cleanup regulations. As part of a negotiated agreement with MDEP, Lincoln Crossing agreed to record an amended deed restriction and pay $4,000 of the assessed penalty. The remaining penalty was suspended as long as there were no further violations for one year.

When evaluating the use of a penalty, a foundation of facts can inform the gravity-based method described above. As part of the investigation of an IC violation, some basic areas to assess include whether the IC violation: 1) caused actual or potential environmental harm; 2) is especially egregious or severe; 3) placed another person in imminent harm; 4) is contrary to the specific terms of an administrative order or judicial decree; 5) is part of a pattern of violations; 6) severely impacts an environmental media or resource; and 7) is the result of a pattern or practice that demonstrates the willful avoidance of regulatory requirements. (Virginia Department of Environmental Quality)

Penalty calculations should observe the interests of equity, deterrence, and fairness. As a result, a civil penalty is not appropriate in all cases. State enforcement programs commonly grant immunity from civil penalties for voluntarily disclosed environmental violations. Consistent with federal policy, many states exercise enforcement discretion to mitigate the gravity portion of a penalty for violations that are discovered pursuant to a voluntary assessment and that are voluntarily and promptly self-reported and corrected.(USEPA 2002) Finally, some states allow the amount of a civil penalty to be partially mitigated by a Supplemental Environmental Project (SEP). (Virginia Department of Environmental Quality)

Most state and federal environmental statutes include injunctive relief as a potential enforcement tool. While some statutes give guidance to the manner in which courts issue injunctions, some environmental statutes only mention injunctive relief without specific guidance on its employment.(Zwart 2006) Predating most core federal environmental statutes, injunctive

relief was pursued under common law doctrines of nuisance and/or trespass for many years as a substitute to specific statutory authority. These common law doctrines provided authority for courts to issue orders requiring OPs to terminate the activity underlying the nuisance or trespass. A failure to terminate can result in contempt of the court's order. Generally, courts determine whether an injunction is appropriate based on: 1) the likelihood of irreparable harm in the absence of the injunction; 2) whether the likelihood of harm is outweighed by the likelihood of harm to the OP if the injunction is granted; and 3) protection of the public's interest in cessation of the OP's actions.

Alternatively, corrective action is generally viewed as an administrative tool used by agency-level enforcement programs. Corrective action requires an OP to take specific action within a specific timeframe or refrain from taking certain actions. It is typically reserved for violations when no other adequate legal remedy exists. Corrective action may be useful in addressing an IC violation. For example, corrective action may require an OP to: a) obtain an IC permit; b) properly notify the public or a potential purchaser of an IC or to properly transfer an IC; c) remove or modify any improvement or construction in violation of a covenant or one that impairs or potentially impairs the performance of a remedy; or d) prohibit or further control an unanticipated use or activity on the property.

Appropriate use of corrective action as an enforcement tool necessitates that the action maximizes a benefit to the environment, is achievable by the OP and bears a reasonable relationship to the IC violation it is intended to remedy. (United States Court of Appeals 1987) The underlying goal of corrective action should be to restore and maintain the integrity of the IC or modify the IC if it is not protective.

Optimizing Enforcement and Construction of a Basic Model

A compliance and enforcement strategy that effectively deters violations is fundamental to the success of long-term management of ICs. Effective enforcement tools are progressive, consistently applied, and provide sufficient notice to an OP that failure to meet IC requirements will be addressed with escalating and potentially costly enforcement consequences.

Planning for an IC enforcement action should take place at the time site-specific IC requirements are developed to carefully evaluate enforceability, interested parties, jurisdictional requirements, and methods of enforcement. Enforcement planning should occur as early as the development of a LTS Plan and should include, at a minimum, a thoughtful analysis of the following:

- all relevant authority to enforce, including statutory, administrative and common law authority
- all parties with authority to enforce, including an understanding of their respective interests
- a coherent process to enforce that is consistent, progressive, and responsibly applied
- an understanding of what circumstances trigger violations and when to enforce

The construction of a basic IC enforcement model can be premised on traditional environmental enforcement models for water, air, and waste, lending the IC enforcement program to familiarity and the credibility of an already established precedent. These enforcement programs employ a progressive, phased approach, including informal (voluntary compliance) and formal (involuntary compliance), that can be applied to IC enforcement and the achievement of corrective action.