

567—137.7(455H) Institutional and technological controls.

137.7(1) *Technological controls.* The purpose of a technological control is to effectively sever a pathway by use of technologies such that an applicable receptor could not be exposed to hazardous substances above an applicable target risk level. Subject to limitations in this chapter, technological controls are an acceptable response action either alone or in combination with other remediation systems and institutional controls. The purpose of technological controls may be to control plume migration through use of containment technologies, barriers, or other methods, as an interim or permanent response action or to permanently sever a pathway to a receptor. Technological controls may also be appropriate to treat or control contamination at the point of exposure. Any technological control proposed as a permanent response action option without meeting the reduction in contaminant concentrations objectives must establish that the pathway to a receptor will be permanently severed or controlled. The effectiveness of a technological control must be monitored under a department-approved plan. The department may require reasonable proof of financial assurance when necessary to ensure that a technological control remain effective.

137.7(2) *Institutional controls.* The purpose of an institutional control is to restrict access to or use of an affected area such that an existing or future receptor could not be exposed to hazardous substances addressed by the controls for as long as the target level is exceeded at applicable points of exposure and compliance. Single or multiple institutional controls may be used alone or in combination and may also be employed with technological controls and response action to effectively achieve, maintain and enforce an approved level of risk reduction and risk management. The following enumeration of types of institutional and technological controls is not a finding that each is per se an effective control. The effectiveness of any institutional or technological control or combination of controls must be evaluated on a case-by-case basis and in accordance with specified conditions in this chapter. Institutional and technological controls include:

- a. A state or federal law or regulation which can be shown to effectively achieve, maintain and enforce the required land-use restrictions and controls.
- b. An ordinance of any political subdivision of the state which can be shown to effectively achieve, maintain and enforce the required land-use restrictions and controls.
- c. A contractual obligation recorded and executed in a manner satisfying Iowa Code chapter 558. Recorded notices and affidavits, including a no further action letter as provided in rule 137.11(455H), which do not create rights or obligations or restrict land use but serve to put current and future property owners on notice of present or future conditions within the affected area.
- d. A control which the participant demonstrates to the department reduces or manages the risk from a release through the period necessary to comply with the applicable standards, including but not limited to informational devices such as public notices, informational registries, notices to regulatory authorities and continuing site activities such as periodic inspections, equipment repair and maintenance, and soil and groundwater monitoring.
- e. An environmental covenant established in accordance with 2005 Iowa Code Supplement chapter 455I, 2005 Iowa Code Supplement section 455H.206, and 567—Chapter 14.

137.7(3) *Environmental covenants.* Participants may submit a draft environmental covenant to the department for review and approval in accordance with 567—Chapter 14.

137.7(4) *Public notification.* The department shall prepare a public notice prior to approval of any no further action classification which is conditioned upon use of institutional or technological control(s). The public notice will describe the results of the risk assessment conducted in the affected area, any proposed or completed response action, the vertical and horizontal extent and concentrations of existing soil and groundwater contamination in the affected area, and the actual and potential pathways of exposure the controls are intended to address. The notice will describe the purpose of the institutional and technological control(s) being proposed and the predicted period of coverage. The notice will provide the opportunity for members of the public to review department files, make written comments and request a public hearing. The department may schedule a public hearing on the basis of requests from the public and when it determines the particular remedial options proposed for a site warrant public consideration, for example, when issues of whether and to what concentrations gross

contamination should be allowed to remain within the affected area given the relative effectiveness of institutional controls and other community concerns and development plans.

a. The notice will be served by certified mail on all property owners that the actual or modeled data indicates are or may be affected by the present or future conditions addressed by the control. The notice will be published in a newspaper of general circulation most likely to reach persons in the immediate locality.

b. If the controls are intended to restrict surface or subsurface future land use, the notice shall be sent to each local regulatory body having jurisdiction and control over or a direct interest in regulation of these activities. These may include but are not limited to municipal or county zoning boards, municipal building authorities, public utilities and economic development agencies. If the controls are intended to restrict groundwater use, the notice shall be sent to the county or city board of health responsible for private well permitting.

c. Failure to provide notice to an interested party shall not constitute a basis for invalidating a subsequently approved no further action classification.

137.7(5) *No further action certificates.* Any no further action certificate shall contain a specific reference to any applicable institutional and technological control and shall meet the requirements in rule 137.11(455H). The reference must identify the location of any recorded instrument, contractual agreement or other documents applicable to the control, provide a brief description of the terms of the control and, where appropriate, site diagrams.

137.7(6) *Enforcement of institutional and technological controls.* Institutional and technological controls which have been incorporated into a no further action certificate pursuant to rule 137.10(455H), or have been approved prior to issuance of a no further action certificate, may be enforced in Iowa district court by the department, a political subdivision of this state, the participant or any successor in interest to the participant as provided in Iowa Code section 455H.206(4). Enforcement of the terms of an environmental covenant shall be in accordance with 2005 Iowa Code Supplement chapter 455I, 567—Chapter 14, and the terms of the environmental covenant.

137.7(7) *Failure of an institutional and technological control(s).* The effectiveness of institutional and technological controls may be jeopardized for several reasons including situations where the technological controls are no longer effective in achieving their technical objectives, the validity of technological or institutional control is challenged due to a pending or final administrative or judicial action or legislative action changing its regulatory effect (e.g., change in an ordinance), or persons fail to comply with the terms of the institutional or technological control. The effect of the failure of a technological or institutional control to achieve its intended purpose is to remove the no further action classification and put all interested parties in the same position had the no further action classification not been made. When the department has reason to believe technological or institutional control(s) is jeopardized or determines that the control is no longer effective, the following policy and procedure shall apply:

a. The department shall make reasonable efforts to provide notice of the failure or noncompliance to the participant(s), protected parties, persons having legal standing to enforce the terms of the controls, other persons who may be legally responsible for contamination at the site and persons legally obligated to comply with the terms of the controls. The notice shall inform these parties of the consequences of failure of the controls and provide the opportunity for one or more of them to correct the deficiency by taking further response action or undertaking enforcement action to obtain compliance with the terms of the controls.

b. The participant(s) and other persons legally responsible for contamination at the site shall have primary responsibility to correct deficiencies or seek enforcement of the terms of controls, if they wish to maintain a no further action classification and any attendant statutory protections. The department may in its discretion seek enforcement of controls where persons fail to comply with the terms when it determines there is a strong likelihood of success, other participant(s) or legally responsible persons are unable or unwilling to undertake enforcement, and utilization of the controls remains consistent with these rules and site conditions currently in effect at the site. However, the department is not obligated to seek enforcement of the terms of any technological or institutional controls nor does the election

not to undertake enforcement constitute a defense to further action by responsible parties or a basis for challenging the rescission of the no further action classification.

c. The department may also elect to require statutorily responsible parties to correct the deficiency as an alternative to rescinding the no further action classification.

d. Failure of a participant to timely undertake additional response action and response may result in termination of enrollment and loss of benefits under these rules and Iowa Code Supplement chapter 455H. Any person found to have intentionally violated an environmental protection easement or other institutional or technological control, whether included in a no further action letter or as part of an approved response action, may lose any of the benefits under these rules or Iowa Code Supplement chapter 455H.

137.7(8) *Modification and termination of institutional and technological controls.* A participant or successor in interest to a participant, or an owner of property subject to an institutional or technological control, may seek approval from the department for the removal, discontinuance, modification or termination of an institutional or technological control. The person must demonstrate that the control in its present form is no longer required to ensure compliance with applicable standards. The person seeking revision must undertake sufficient risk assessment and provide sufficient assessment data to establish that the applicable compliance standards can be met based on the proposed modification. The department may also determine based on a revised assessment that the applicable controls are no longer effective to meet compliance standards and may require other response action. The department shall issue an amendment to any previously issued no further action letter specifying the approved modification of the institutional or technological controls. Modification and termination of an environmental covenant shall be consistent with these rules and shall conform with 2005 Iowa Code Supplement chapter 455I and 567—Chapter 14.