

Institutional Controls

Hazardous Site Inventory

Georgia's state superfund law, the Hazardous Site Response Act (O.C.G.A. §12-8-90), establishes requirements for institutional controls at sites that have been placed on the hazardous site inventory (the state superfund list). These requirements apply to all listed sites prior to attainment of cleanup standards, and continue to apply to certain sites even after cleanup is complete. The Rules for Hazardous Site Response (Chapter 391-3-19) identify five cleanup standards, called risk reduction standards, that apply to all listed sites. Types 1 and 2 are residential standards (Type 1 using standard assumptions and Type 2 site-specific assumptions), and Type 3 and 4 are non-residential (again, standard and site specific, respectively). The Type 5 standard is applied at sites where achievement of the Types 1-4 standards is impracticable, and institutional and/or engineering controls must be relied on as a part of the remedy.

The Rules for Hazardous Site Response define institutional control requirements as follows:

391-3-19-.08 Property Notices

(1) **Notices to private property instruments.** This Rule applies to the owner of any property that is included in a site which is listed on the Hazardous Site Inventory and which has been designated as needing corrective action pursuant to Rule 391-3-19-.06(6). The requirements of this paragraph do not apply to the owner of any property at the site where the Director concurs with a demonstration that the property complies, independently of other properties at the site, with either Type 1 or Type 2 risk reduction standards.

(a) From and after the date any owner receives written notice from the Director under Rule 391-3-19-.06(6)(d) that property of such owner that is listed on the Hazardous Site Inventory has been designated as needing corrective action, the owner of any such property shall include the following notice in any warranty deed, mortgage, security deed, lease, rental agreement, or other instrument that is thereafter given or caused to be given by the property owner which creates an interest in or grants a use of the property:

"This property has been listed on the state's hazardous site inventory and has been designated as needing corrective action due to the presence of hazardous wastes, hazardous constituents, or hazardous substances regulated under state law. Contact the property owner or the Georgia Environmental Protection Division for further information concerning this property. This notice is provided in compliance with the Georgia Hazardous Site Response Act."

[Note: The term "instrument that is thereafter given or caused to be given by the property owner which creates an interest in or grants a use of the property" does not include options or contracts to purchase real property.]

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(b) Rule 391-3-19-.08(1)(a) shall not apply after filing of the affidavit referred to in Rule 391-3-19-.08(6).

(2) **Affidavit in county deed records.** No later than forty five (45) days from the date the Director issues the written notice pursuant to Rule 391-3-19-.06(6)(d) that a property or part thereof listed on the Hazardous Site Inventory has been designated as needing corrective action, the owner of any such property shall cause to be prepared an affidavit of such fact in recordable form as set forth in O.C.G.A. § 44-2-20 and shall file such affidavit with the clerk of the superior court of each county in which the real property or any part thereof lies. Such affidavit shall be recorded in the clerk's deed records pursuant to O.C.G.A. § 44-2-20. Such affidavit shall include the statement provided in Rule 391-3-19-.08(1). The requirements of this paragraph do not apply to the owner of any property where the Director concurs with a demonstration that the property complies, independently of other properties at the site, with either Type 1 or Type 2 risk reduction standards.

(3) **Petitions for hearing.** The notices required by Rule 391-3-19-.08(1) and (2) shall be stayed if the property owner files a petition for a hearing in accordance with O.C.G.A. 12-8-73 within thirty (30) days of the date the Director issues the written notice pursuant to Rule 391-3-19-.06(6)(d) that the site upon which the property is located needs corrective action.

(4) **Documentation of property notices.** Within thirty (30) days after the recorded affidavit required by Rule 391-3-19-.08(2) is returned by the county clerk to the property owner, the property owner shall submit a copy of such recorded affidavit to EPD.

(5) **Director's affidavit in county deed records.** Where ownership or control of any real property at a site subject to Rule 391-3-19-.08(1) and (2) is involuntarily acquired by a unit of state or local government through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign, the Director shall give thirty (30) days notice to any person who owned, operated, or otherwise controlled activities at the property immediately beforehand that the property is subject to the requirements of Rule 391-3-19-.08 and that, barring said person's contest under Rule 391-3-19-.08(3), the Director shall prepare and file the notice referenced in Rule 391-3-19-.08(2).

(6) **Subsequent affidavits.** If, subsequent to the filing of the initial affidavit referenced in Rule 391-3-19-.08(2), the Director determines that no further action is needed, and the property is removed from the Hazardous Site Inventory pursuant to Rule 391-3-19-.05(4), the Director shall notify the property owner in writing of such determination whereupon the property owner may file an additional affidavit with the clerk of superior court attaching a copy of such determination, which shall be restricted to the following declaration:

"This property was listed on the state's hazardous site inventory and was designated as needing corrective action due to the presence of hazardous wastes,

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hazardous constituents, or hazardous substances regulated under state law. However, this property has since been designated as needing no further action and has been removed from the state's hazardous site inventory. A copy of that determination is attached hereto. The notice requirements of O.C.G.A. § 12-8-97 no longer apply to this property and prior notices given under this code section are no longer in effect. The property owner or the Georgia Environmental Protection Division may be contacted for further information concerning this property. This notice is provided in compliance with the Georgia Hazardous Site Response Act."

(7) **Restrictive covenants.** The owner of any property at which the Type 5 risk reduction standards of Rule 391-3-19-.07(10) are being used shall, upon the request of the Director, execute a restrictive covenant for such property. The covenant shall be recorded with the clerk of superior court for the county in which the property is located, and a copy shall be provided to any zoning or land use planning authority that has jurisdiction over the property. Such restrictions shall run with the land and be binding on the owner's successors and assigns. If the Director determines subsequent to the execution and recording of the restrictive covenant that the property is in compliance with Type 1, 2, 3, or 4 risk reduction standards and removes the property from the Hazardous Site Inventory, the Director shall so notify the property owner whereupon the restrictive covenant may be amended or revoked. The restrictive covenant shall be prepared by the Director and may include, but not necessarily be limited to, provisions to accomplish the following:

(a) Prohibit activities on the property that may substantially interfere with a remedial action, operation and maintenance, long-term monitoring, or other measures necessary to ensure the integrity of the remedial action.

(b) Prohibit activities that may result in human exposures above those specified for residential scenarios in Rule 391-3-19-.07(6) and (7) or for non-residential scenarios at Rule 391-3-19-.07(8) and (9), whichever scenario is applicable, and activities that would result in the release of a regulated substance which has been remedied in accordance with Rule 391-3-19-.07(10).

(c) Allow the Director to enforce the restrictions set forth in the covenant by legal action in a court of appropriate jurisdiction.

(d) Require the installation and maintenance of a permanent marker on each side of the site which delineates the restricted area.

(e) Describe uses of the property that are prohibited.
Authority O.C.G.A. Sec. 12-8-90 et seq.

Additional Institutional Controls

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Funding under the CERCLA 128(a) grant has allowed the enhancement of Georgia's institutional control capability. Properties where voluntary cleanup takes place under Georgia's Hazardous Site Reuse and Redevelopment (Brownfields) Act may be subject to any of the abovementioned institutional control mechanisms. Determination of the need for such measures is made on a case-by-case basis, however, certain baseline institutional control provisions apply.

Any property that is certified to a residential risk reduction standard (Types 1 or 2) is considered to require no institutional controls. Any property that certifies to a non-residential risk reduction standard (Types 3, 4, or 5) is considered to have a *de facto* land-use control in place. Because there is no statutory requirement for institutional controls at sites that are not listed on the hazardous site inventory, Georgia will use CERCLA 128(a) funding to track, monitor, and enforce these land use restrictions. Periodic verification of land use consistent with the risk reduction standards will be achieved through visual inspection of a percentage of properties each year, and may include updates through correspondence on the remainder. Changes in land use that result in non-compliance with a risk reduction standard are subject to loss of the liability limitation issued under Georgia's Brownfields law, and may result in enforcement action.