

Association of State and Territorial

ASTSWMO

Solid Waste Management Officials

CERCLA and Brownfields
Research Center

State Superfund Focus Group

**State Approaches To Monitoring
And Oversight Of Land Use Controls**

North Capitol Street, NW
Suite 315

Washington, DC 20001

<http://astswmo.org>

October 21, 2009

ASTSWMO STATE SUPERFUND FOCUS GROUP

STATE APPROACHES TO MONITORING AND OVERSIGHT OF LAND USE CONTROLS

Acknowledgements

This document was prepared by the ASTSWMO State Superfund Focus Group, with assistance from the U.S. Environmental Protection Agency under Cooperative Agreement RT-83376901. The views expressed in this document are those of ASTWMO and its members and do not necessarily reflect the policy or legal position of EPA. No EPA cooperative agreement funds were used for the actual collection of data.

ASTSWMO thanks the following members for their participation in development of this report:

Jay Naparstek, MA (Chair)
Terry Ayers, IL (Vice-Chair)
Bob Soboleski, NJ
Fred Mumford, NJ
Kevin Greene, VA
Wesley Turner, KY
Dana Bahar, NM
Mike Felix, NE
Brent Everett, UT
Roland Gutierrez, GU
Tom Gainer, OR

Introduction

Land Use Controls (LUCs) are a key element of risk-based clean-ups and closures. Risk-based remediation driven by current and future property use has become a standard approach in many State and Territorial waste site cleanup and Brownfields programs. LUCs also continue to be an important component of many federal Superfund remedies. As a result, there is an ever increasing universe of sites relying on LUCs as an integral part of an overall protective remedy. Proper implementation, monitoring, and enforcement of LUCs, which is vital to ensuring the long-term effectiveness of these remedies, continue to grow in importance. The importance of LUCs was highlighted by the 2001 Brownfields Amendments and is further reflected in the significant efforts made by the EPA, the States, and others over the last several years to establish effective LUCs implementation and tracking programs. The long-term success of these remedies and subsequent redevelopment will rest on understanding and effectively using LUCs.

As a follow-up to the 2007 report “State Status in the Implementation of Institutional Controls: Summary of Inventory Findings” , members of the ASTSWMO State Superfund Focus Group have prepared this companion document focusing on how States are conducting monitoring and oversight of LUCs. The objective of the previous work was to determine “who’s doing what” while this phase is more aptly described as “how it’s getting done.” The Focus Group agreed that it would be beneficial to State programs to collect and summarize additional information regarding how States are monitoring and overseeing LUCs and provide information on what those States perceive may or may not be effective in their cleanup programs.

At federal Superfund sites, as is true at sites addressed through many State programs, when contamination is left on site above levels that would allow for unrestricted use, LUCs, or Institutional Controls (ICs) in EPA terms, are required as part of an overall remedy. States work closely with EPA to ensure ICs at National Priority List (NPL) sites are implemented and monitored, to ensure effectiveness of the remedy. The protectiveness of ICs is also evaluated as part of five year reviews and States work closely with EPA to take corrective actions as necessary.

As EPA continues to refine its Institutional Control Tracking System (ICTS), a key step to enhancing the State-Federal partnership is a thorough understanding of the key elements of LUCs implementation strategies at the State level. There is also the added benefit of States learning from each other on successful and perhaps not so successful strategies.

Purpose

The purpose of this companion document is to serve as a resource for the States, EPA, local officials, and other parties interested in monitoring and oversight of LUCs. The document presents the results of research on approaches taken by a number of States across the country to monitor and oversee LUCs in their State. This resource document discusses a variety of issues and methods that States have developed related to monitoring and oversight of LUCs, including: identifying who is responsible for ensuring compliance; monitoring and oversight approaches; how oversight of LUCs is funded; and lessons learned by States that have developed and implemented oversight and monitoring programs. This document is not intended to be a comprehensive review of all States. Rather, it is a selection of States with established LUCs programs and monitoring and oversight practices presented for others to consider in the development of their own programs.

Methodology

Each Focus Group member selected one or two States with well-established LUCs programs in their region to research. A set of written questions (Attachment A) was developed by the Focus Group to collect information on how the selected States are performing monitoring and oversight of LUCs. Written responses from the selected States were submitted and reviewed by each member. Where necessary, a follow-up interview was conducted to collect additional information on particular parts of the written response.

Following submittal of the written responses and any follow-up interview, each Focus Group member was assigned to summarize responses to one or two questions received from all of the selected States. The summary responses are included in the Findings section of this report.

Findings

This section summarizes key findings for each of the 16 questions posed to the participating States. Each question is presented in italics, followed by highlights of the responses.

1. What is your State's approach to monitoring and oversight of Land Use Controls (LUCs)? Describe if and how your agency conducts monitoring of oversight for LUCs. If it is not done by your agency, is it done by another entity? If not done directly by your agency, is there an auditing component that is done by your agency?

Illinois, Maryland, and New York responded that State personnel conduct their own periodic reviews as part of their overall monitoring and oversight approach. Maryland indicated that these periodic reviews are conducted annually or biennially and may consist of site visits, windshield surveys, and/or property record reviews. Maryland also shares the LUCs information with local governments and includes LUCs information on a GIS-based website. Illinois conducts site visits every five years as part of the periodic reviews.

Alaska, California, Kansas, and Oregon require self-reporting through submittal of an evaluation report by the property owner or responsible party, which is then reviewed by State personnel. California and Kansas also cited specific statutory authority that was established as part of their overall monitoring and oversight approach. California, Kansas, and Oregon may also perform follow-up inspections to determine compliance. The frequency of these inspections range from annual to biennial to every five years and is dependent on site conditions or related to the Superfund five-year review of remedy decisions. Kansas may also review photographs included with the evaluation report, in lieu of conducting site inspections, at less complex sites. Kansas also regularly tracks, monitors, and updates LUCs information on their website. Rhode Island requires self-monitoring through submittal of an evaluation report by an environmental professional or company official. State staff then conduct audits of a certain percentage of the sites to determine compliance.

2. How/why did your agency choose this approach?

Rhode Island chose an auditing approach on a certain percentage of self-monitoring sites as a result of non-compliance with the self-monitoring requirements in their State. New York selected their approach to ensure the remedial components are in place, effective, and protective of human health and the environment. Illinois, Maryland, and Oregon based their approaches on resource constraints that required an efficient and cost effective approach to ensure LUCs compliance. In addition, Maryland decided to share LUCs information with local governments and develop a GIS-based website to provide a layering approach for monitoring and oversight activities and to make the information more easily accessible to local governments and the public. California selected their approach to ensure protection of human health and the environment as well as taking resource constraints into account. Kansas chose their approach to

provide enforcement authority and ability for State personnel to inspect and track LUCs sites. Alaska selected their approach because their previous tracking system was determined to be inadequate.

3. What is the frequency of monitoring/oversight conducted at each site with a LUC? Reviewed annually or other regular schedule? Does agency staff conduct site visits as part of monitoring and oversight? How often is this done?

State	Frequency of Monitoring/Site Visits	Agency Site Visits
Rhode Island	Yearly	Yes
New York	1-10 Years	Yes
Maryland	Yearly	Yes
Illinois	5 Years	Yes
Kansas	0.25-5 Years	Yes
Alaska	1-5 Years	Optional

4. As part of monitoring and oversight, are the County Registry of Deeds documentation (or equivalent in your State) reviewed to determine if LUCs have been recorded? If so, how often is this component evaluated. If not, why not?

Of the eight States that responded to this question, all eight indicated that proof of registration or recording of LUCs implemented as part of a remedy must be provided to the State agency overseeing the site remediation before closure of the site is finalized. Seven of the eight responding States indicated that recording occurs at the county in which the real property subject to the LUCs is located. One State, Alaska, has its own State recorders office at which the LUCs, if memorialized in a deed notice, must be recorded. All reporting States indicated that failure to submit adequate proof of recording would prohibit the State from declaring site closure or program compliance. Illinois responded that, if a copy of the LUCs is not provided, the State agency initiates a follow-up response to the applicant.

Surveyed States' responses indicated that official documentation accepted as proof of recording included certified, officially stamped, or notarized copies of the recorded restriction.

Alaska requires periodic reporting of the continued efficacy of the LUCs, but the respondent did not specify the frequency. Kansas and Illinois reported that reviews of recorded LUCs documents occur during LUCs inspections. Kansas also reported that a review of the local recording documentation occurs as part of periodic post-closure inspections, the frequency of which was not reported.

New York reported that during subsequent property reviews, it is the responsibility of the remedial party or site owner to certify that all institutional and engineering controls remain in place; consequently, the State does not review the local recording status post-closure.

In summary, all responding States require adequate proof of recording of institutional control documents, such as LUCs, in order for a site remediation relying on such to be considered

completed or closed. The question of how often these recorded instruments are reviewed post-closure by the overseeing State agency remains unanswered, as does the question, “why or why not?” It could be that many States, although not stated in this research, have legislation similar to Oregon’s which requires such notices to “run with the land” and remain in effect in perpetuity. Perhaps most States, although again not reported in specific responses, view the responsibility for ensuring that LUCs remain in place uncompromised to be the responsibility of the responsible party and/or landowner, as New York does. For many States, it may be that allowing LUCs as acceptable strategies for site cleanup may be too recent to precipitate the need for follow-up at this time.

Subsequent queries of States allowing LUCs may be necessary in the future to report and refine the best practices utilized for ensuring that LUCs notices remain properly recorded and serve as intended, which is as notification of LUCs in place at a subject property.

5. To what extent are interviews conducted with municipal officials responsible for implementation of city ordinances related to LUCs? To what extent are interviews conducted with the current owner/occupant to determine their knowledge, understanding, and compliance with land use restrictions? If not, why not?

The first part of this question was asked in order to determine the extent of notification and interaction with local government about the placement of LUCs on properties in their jurisdiction. Generally, an interview with the local government is not routine; however, most respondents reported that local governments are given the opportunity to comment through some sort of public notice process prior to site closure. Illinois reported that contact is made if the proposed LUCs appear to be inconsistent with existing ordinance. California reported that local ordinances are reviewed when proposed as part of layered LUCs package. Only Alaska reported that, when municipal ordinances are utilized as the LUCs, that communication with local officials is standard operating procedure. New York and Maryland report the localities must contact the State environmental agency when approving permits on property where there is an LUC on file.

The second part of the question was designed to determine the degree of notification given to the property owner about the existence of LUCs. For the most part, the owner of the property at the time of LUCs placement is aware of the LUCs. Three of the responding States reported that current landowners are aware or made aware of the LUCs as a result of periodic reporting to or following up monitoring by the State regulatory agency. California has a requirement that property owners must notify the agency of a conveyance of the property.

6. Is there any type of one-call system in place in your State that is being used for sites that rely on LUCs as part of the remedy?

Maryland reported integration of LUCs into a one-call type system, and New York is working toward a one-call type system. Illinois posts its listing of LUCs on its website; however, it is suspected that many other States also post a listing of LUCs on their websites. California has a contract with Terradex to monitor its LUCs, and it receives alerts from Terradex if some activity

is being proposed or conducted on a property that might impact restrictions in a Department of Toxics Substances LUC.

7. Is there any reporting required with respect to LUCs once they are in place? What type of reporting and by whom? Frequency of reporting? Who reviews/evaluates these reports? What sort of follow up may result from the reports?

State responses ranged from no reporting required to annual inspection reports. The majority of responses included passive or voluntary reporting from the responsible party, from annually to once every five years in frequency, and did not include a well-defined review system. California, Rhode Island, and Kansas appeared to have more rigorous requirements, including annual to five-year inspections by the responsible party or State staff, evaluation of compliance with LUCs, and follow up coordination on correcting deficiencies.

8. How does your agency respond to the findings of the reporting above and to any problems that are discovered with respect to implementation/performance of LUCs?

From above, California and Rhode Island described mechanisms to evaluate and correct deficiencies with LUCs and therefore had a better chance of catching problems. Rhode Island would additionally conduct a follow-up site inspection to evaluate the adequacy of corrective measures. All States said that they could revoke the closure document if attempts to correct problems were insufficient. California noted that they can also take administrative, civil, or criminal action against the party.

9. Are there any public notifications on the outcomes of monitoring and oversight, including submission of reports, results of audits, problems found?

While information regarding inspections of sites with LUCs is available through State websites, the States did not report ongoing formal requirements for reporting to local governments or the public as to their current compliance status.

10. Do local land use decisions (zoning, building permits, and certificates of occupancy) consider land use restrictions?

With the exception of New York, which might serve as a model for integrating the local government in LUCs, there is little interaction between State and local governments in establishing or maintaining these controls. While many States make information on land and water use restrictions available either through their website or files, due diligence may not be reliable. Even when there may be requirements for reporting proposed changes in land use, Kansas and Rhode Island noted that many new property owners are not aware of LUCs and any associated reporting or maintenance requirements placed on the property.

New York has enacted legislation and a regulatory process that are expected to greatly improve the effectiveness of land use restrictions. When an environmental easement is required, each affected local government is provided with a copy of the easement, in addition to recording the easement with the County, Whenever an affected local government receives an application for a

building permit or any other application affecting land use or development that is subject to an environmental easement, the local government must notify the State regulatory agency and refer the application to that Agency. The Agency then must evaluate whether the application is consistent with the environmental easement and notify the affected local government of its determination in a timely fashion. Over time, this might be expected to result in prospective property purchasers to exercise a greater degree of diligence in ensuring their property can be appropriately used. The fact that many States have or are developing electronic data systems to provide site use restriction information is integral to effective LUCs.

11. Does the transfer/sale of property affect the long-term effectiveness of LUCs? Does the responsibility for LUCs change with change in property ownership? Is there a reporting requirement to your agency when there is a change of property ownership?

All but one of the respondents felt that the long-term effectiveness of the LUCs should not be affected by a change in property ownership because the restrictions in their programs run with the land and/or are applicable to successors and assignees. Rhode Island added that the annual self-monitoring and reporting requirement would help to protect the long-term effectiveness. Illinois added that the threat of losing liability protection was incentive for future owners to comply with LUCs. Two States expressed concern that, while technically the new owners are bound to comply, that, either because they are not fully aware of the restrictions or because they are not fully motivated, there may be future compliance issues. Alaska responded that change in ownership is one of their biggest challenges because they have to renegotiate agreements with each subsequent owner. Presumably their restrictions do not run with the land to successors.

All but one of the States indicated that responsibility for LUCs does not change with property ownership. The explanations they provided suggested that the party that conducted the cleanup and the new or current owner have responsibility to ensure that LUCs are followed.

Five of the seven States said they have a requirement to be notified when there is a change of property ownership. Two of those, Alaska and Rhode Island, indicated that compliance with this requirement is not good. The two States that had no reporting requirement have LUCs that run with the land to future property owners.

12. Is there a notification requirement if the land use is changing in a way that conflicts with the LUCs?

Six of the seven States that responded indicated that a notification to their agency was required when changes in land use would conflict with LUCs. The one State that didn't require notification, Illinois, indicated that if a change in land use occurs that conflicts with the LUCs, their agency can act to void the State's site closure decision.

13. How does your State handle situations where the landowner refuses to place the necessary LUCs on the property? Does the State have the authority to require the action or implement the LUCs themselves? How often does this happen?

Without exception, the States that replied indicated that they have had very few instances of refusal to place a LUCs on the property due to the fact that the No Further Action letter or its equivalent is not issued until the property is placed under LUCs. If a property owner did refuse, then additional cleanup to levels appropriate for unrestricted use would be required for closure of the site.

None of the States indicated they had the direct authority to place LUCs on a property. Since the occurrences have been rare, no real testing of the legal waters has occurred.

14. How has your State's approach to monitoring and oversight of LUCs performed? Do you think it has been effective in encouraging compliance and identifying non-compliance? What do you think the strengths and weaknesses are to your approach? How would you change it if you could? Are there any planned changes? Are any changes being considered?

Many States have new programs that are difficult to evaluate at this time. The States with programs that have been in effect long enough to evaluate, are generally considered to be successful at this time. Of course one of the major constraints on determining if sites are in compliance is the amount of resources available to monitor performance and conduct inspections. To promote efficiencies in this area, several States are developing electronic databases to track audit inspections and the specific site conditions to help determine compliance.

Maryland, Illinois, and Kansas have already found non-compliant sites where LUCs have been issued but are not in exact agreement with the conditions agreed upon by the State and property owners. The cause of most of these issues has been identified as miscommunication or lack of communication between the parties.

Most programs are not expecting any changes in the near future. Alaska indicated that they were attempting to have the Universal Environmental Covenants Act (UECA) adopted in their State. Rhode Island identified a major legislative change that currently limits the term of a LUC to 20 years. The change, which would eliminate the term limit to the restrictions, is currently being considered. The majority of States indicated that the one thing that is needed most is to have sufficient resources assigned to their LUCs programs. Additional in-house resources or some sort of third party or self monitoring program will be necessary as the number of LUCs sites increase in the future.

15. Could you give an example of where the State's approach has been particularly effective and an example of where it was not successful in ensuring compliance and identifying non-compliance? Why was it and why was it not successful in those examples?

See Appendix ** for examples provided.

16. Could you estimate how many personnel hours and/or other State resources (e.g. contractor costs) are spent on monitoring and oversight of LUCs annually? Do you expect that this will change in the future (increase or decrease) and why?

Two States could not estimate the personnel hours and/or other resources spent specifically on monitoring and oversight of LUCs. One of those States, Oregon, said they could not because they did not track this specific information separately from other site-specific tasks. The other State gave no reason for not being able to estimate resources.

The other six States included in the project did provide some estimates as follows.

Rhode Island estimated they spend approximately 400 hours and \$10,000 annually on monitoring and oversight of LUCs. They expect the amount of time and money spent on this activity to decrease because of budget and staff reductions.

Maryland estimated that they spend two to three hours per site per year on monitoring and oversight, which includes records review and/or drive by inspections. Maryland did not comment on whether they expect that to change.

Illinois estimated that they spend approximately two full time equivalents (FTEs) (approximately \$150,000) per year conducting monitoring and oversight of LUCs. They expect these numbers to increase because they try to maintain a review frequency of five years and the number of sites with LUCs continues to increase.

Kansas estimated that they spent 2,610 hours and \$84,000 (approximately 1.3 FTEs) last year on monitoring and oversight of LUCs. This is funded by a combination of payments made by participants in their LUC program and federal grant funding. They expect the costs and hours to increase due to increasing participation in the program. However, they are also attempting to reduce the resources needed by training and utilizing local district staff for inspections as monitoring and oversight activities become more standardized and efficient.

Alaska said they have one staff person dedicated to LUC tracking. Currently this person does not spend all of his time on LUC tracking but they expect the workload to increase as more sites incorporate LUCs as part of their closeout.

California estimated that they spend over 1,000 staff hours on LUCs monitoring and oversight activities annually, including report review, site visits, and communication with property owners. They will be contracting with a private consultant to monitor construction activities around LUCs sites and provide notification on those activities to their agency. They have a contract for \$400,000/year for this work. They expect the resource needs to increase as the number of sites relying on LUCs is expected to increase.

Summary

As a follow up to the 2007 “State Status in the Implementation of Institutional Controls: Summary of Inventory Findings,” the State Superfund Focus Group identified monitoring and

oversight of LUCs as an area needing more research. Specifically, the group wanted to find out more about how States monitor and oversee LUCs at sites where such controls are a part of the overall remedy. The Focus Group was interested in similarities and differences among the States, as well as in the States perspective on how their approach has affected the success of the LUCs, and the resources committed to monitoring and oversight of LUCs. The methodology, research questions, and a summary of the responses are discussed in detail in earlier sections of this report.

In evaluating the States responses, a basic underlying theme critical for the success of LUCs emerges. Better awareness of the presence of LUCs, particularly by future land owners, including an understanding of the activities that are restricted and any ongoing actions needed to protect the remedy are necessary to help ensure the success of these restrictions. A regular monitoring and oversight program seems to be a key to assuring that land owners remain cognizant of the restrictions and helps to ensure compliance. Though most States reported a high rate of compliance, routine and regular site inspections to determine compliance with LUCs are necessary to ensure protectiveness of the remedial action. The type of monitoring and oversight, whether it is direct oversight by State personnel or self-monitoring and reporting, does not seem to be as critical to the success of LUCs. Other possible mechanisms to increase ongoing awareness are mentioned in the Findings section of this report.

The responses indicate that, in general, local government authorities are not currently involved to any significant level in the monitoring and oversight of LUCs. Improving efforts to keep local officials aware of the presence of LUCs and the associated restrictions would be a first step in creating a stronger partnership and would likely result in greater compliance with LUCs by property owners.

While the resources assigned to monitoring and oversight of LUCs varied among the responding States, it was generally agreed that the use of LUCs as an integral part of remedies would continue to increase. Some States indicated that their current approach to monitoring and oversight was based in part on resource constraints. Increases in the number of sites relying on LUCs will continue to strain State capabilities to conduct monitoring and oversight. Some States are already implementing innovative approaches to address this, including requiring self-monitoring and reporting and using an auditing approach. Considering a combination of direct oversight, modified oversight, and self-monitoring and reporting approaches, depending on specific site complexity, could help States address the increasing load.

As possible follow up to this research, the Focus Group would recommend research on identifying specific monitoring and oversight methods that are efficient and cost effective and that also increase awareness and voluntary compliance with LUCs.