

## Appendix 3

### Selected Responses to Question 15

#### ASTSWMO State Superfund Focus Group Research Project

#### State Approaches to Monitoring and Oversight of Land Use Controls

Question 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?*

Alaska: The use of restrictive covenants on mechanisms has been very effective in guiding new development at sites. Probably the most ineffective mechanism is a so-called "deed restriction." Though staff place restrictions on the property deeds regarding the placement of drinking water wells, the enforcement of the "restriction" is questionable. It is thought that most Responsible Parties abide nonetheless.

California: Department of Toxic Substances Control (DTSC) enacted its land use covenant regulation in 2003 when it was realized the extent to which remedies being proposed included land use restrictions. Overall, the regulation has been very successful in putting in place mechanisms that make DTSC's covenant oversight activities more efficient and successful. This is a dynamic situation and DTSC will need to remain diligent to ensure that oversight efforts are successful in the long term. Restrictions will only be successful if proper oversight is maintained and this will be a challenge for DTSC and other States as more and more land use controls are used. There is an example of a site where a site visit by DTSC staff identified a violation of a restriction and immediate action was taken to ensure the party came back into compliance.

Illinois: The majority of issues involve not recording the No Further Remediation (NFR) letters and deterioration of required barriers. Most issues are resolved by the current owner, which may include repaving the required barrier. Illinois EPA has voided two NFRs for lack of repairs out of 2,656 effective NFRs issued under its Voluntary Program.

Kansas: The Kansas Department of Health and Environment (KDHE) approach has been particularly effective when KDHE staff and the landowner/responsible entity inspect the site together. Compliance issues, repairs or maintenance needs are more clearly discussed and understood.

An example of a non-compliant site involved a landowner who did not provide notification or obtain prior written approval from KDHE to construct improvements on the property. KDHE staff observed this non-compliance during an Environmental Use Control (EUC) inspection. The landowner did not likely review or understand the requirements of the EUC Agreement (EUCA), since construction was begun immediately after the EUCA document was recorded.

Maryland: As a result of an inspection, a site that had a land use restriction for industrial use was found to have a day care facility. The day care facility was moved to a different location due to its inconsistency with the LUC.

New York: The period review system has not been in place long enough to accurately evaluate its effectiveness. While multiple sites have successfully seen the receipt and acceptance of the Property Review reports, few have exhibited non-compliance.

Rhode Island: Based on an audit that was conducted between September 2007 and May 2008, the Rhode Island Department of Environmental Management (RIDEM) Office of Waste Management found that 84% of the 277 recorded Environmental Land Usage Restrictions (ELURs) were in compliance. The audit was conducted by visiting and inspecting each site with ELURs. Sixteen percent of the sites with ELURs were found to be out of compliance. All but two sites came back into compliance in response to issuance of Letters of Non-Compliance (LNC) and Notices of Intent to Enforce (NOIE).

It was found that a majority of the 16% of non-compliant sites were in non-compliance because ownership changed frequently since the time the ELURs were recorded. New owners are usually unaware of the ELURs making it difficult for RIDEM to ensure compliance from year to year. While it is uncertain at this point how to alleviate this problem, the continuance of a yearly comprehensive audit of the ELURs will prove to be successful in monitoring for non-compliance. This audit was successful because each site was individually evaluated and its compliance status was entered into a database, which has made it extremely helpful in allowing RIDEM to monitor each site.