

**Comments by: City of Kansas City, Missouri regarding Long-Term Stewardship**

**Submitted by David Marshall to Tim Chibnall via email on 02/22/2011**

Comment #1: 10 CSR 26-2.081(2)(A)1 – “If the department agrees that the current ...the department shall require a non-enforceable informational long-term stewardship measure but shall not require an enforceable long term stewardship measure for the property.” This statement I just do not understand.

**Department response:** This specific subsection of the LTS rule is intended to explain that only a non-enforceable informational LTS measure, such as a deed notice or a No Further Remedial Action letter, is needed when the only variable at issue is future land use. Land use would be the only variable at issue when the Department has agreed that the reasonably anticipated future use of the site is non-residential and contaminant concentrations do not exceed the standards applicable to any of the non-residential exposure pathways that are complete at the site.

Comment #2: (3) “If a release at an **operating** UST facility (*or not operational*) results in migration of chemical(s) of concern onto a neighboring property...” Also note that we should consider that any soil or ground water contamination may migrate “undetected” off site and suddenly manifest itself at some distance off site at a later date. I would think that a neighboring property may be “bypassed” and the site that contamination is encountered may not be tied back to the actual source.

**Department response:** Other rule provisions ensure that whether and to what extent contaminants might migrate in soil or groundwater in the future is known prior to the point at which decisions regarding LTS and site closure are made. In particular, the plume stability requirements found at subsection (17)(C) of 10 CSR 26-2.076 adopted and subsequently withdrawn by the Hazardous Waste Management Commission in 2009 ensure a plume is stable before the site is closed.

Comment #3: (6)(B)4 “A description of the type, concentration and location of petroleum – related contamination on the property.”

NOTE: I thought we were considering all chemicals of concern (COC’s) including petroleum-based products. I would think that we should not confine our concern to just petroleum- based “chems.”

**Department response:** The rules in question pertain to “regulated substances” stored in underground storage tanks. “Regulated substances” are defined at 10 CSR 26-2.012(1)(R)3 (which incorporates the definition at Section 319.100(14) RSMo). The rules are applicable to all petroleum products that fall within the definition at Section 319.100(14)(b). For such products, the chemicals that are of concern are those listed in Table 1 of the 2009 adopted/withdrawn version of 10 CSR 26-2.075.

That being said, the Department believes that substituting the term “regulated substance” in place of “petroleum” would clarify the applicability of the rules. A change in this regard will be considered during the impending rulemaking.

Comment #4: (6)(C)1 “An owner or operator may record a No Further Corrective Action letter issued...” I would strongly suggest that the letter be conditional and separate but in consideration of the deed restriction and that it’s impact only stands while the requesting owner remains in possession of the described tract and complies with any and all conditions of maintenance.

**Department response:** Please note the following is offered to explain the provisions in the 2009 adopted/withdrawn LTS rule in response to the comment. The Department does not intend for the response to mean that any future LTS rule will necessarily include the same provisions.

The Department sees the recording of a No Further Corrective Action letter in a property chain of title as equivalent to recording a Deed Notice. Therefore, in instances where a Deed Notice is appropriate, the Department believes a NFA letter is an acceptable substitute. Where site conditions are such that a Restrictive Covenant (i.e., “deed restriction”) is required in order to ensure a pathway does not become complete, the Department does not propose to allow recording a NFA letter instead. A Restrictive Covenant is viewed as an enforceable instrument requiring or prohibiting certain activities or uses of and at a property, whereas recording a NFA simply provides future owners certain information regarding site conditions. However, the Department can rescind a NFA if additional contamination is found or site conditions change such that remaining contamination poses an unacceptable risk. Even so, the Department does not propose or intend for a NFA to be used instead of a Restrictive Covenant. In addition, once recorded in a property chain of title, a NFA letter cannot be removed from that title, though it can be rescinded or amended by filing an additional document. Because the document stays in the title, it remains valid and relevant to future owners of the property.

Comment #5: (6)(C)B – Why make the NFA letter a complete nullity? Add the following language “as an informational device”.

**Department response:** Please note the following is offered to explain the provisions in the 2009 adopted/withdrawn LTS rule in response to the comment. The Department does not intend for the response to mean that any future LTS rule will necessarily include the same provisions.

The rule required that the NFA letter be recorded in the property chain of title to ensure future property owners are aware of site conditions so that future use of the property is consistent with the limitations imposed by those conditions. As a result, the validity of the Department’s NFA decision is contingent on the NFA letter being recorded in the chain of title. Failure to record the letter therefore invalidates the NFA determination.

Comment #6: Restrictive Covenant - (7) (A) 7 D,E,F: “If determined to be necessary by department” should be changed to language that points back to the standard.

**Department response:** The Department did not point back to the standards because we intended for the decision as to whether the maps discussed at (7)(A)7.D, E, and F are necessary to be dependent on site-specific conditions.

Comment #7: (2) – first sentence: ...property within... Perhaps better stated as “at any site, or property within a site, where”). Probably a moot point in most cases because “site” is defined as the contiguous area in which contaminants exceed DTLs. However, sometimes analysis will show that the impacted area is smaller than the original site boundaries.

**Department response:** Based on stakeholder comments previously received by the Department, the Department intends to change the definition of “site” from that appearing in the 2009 adopted/withdrawn version of 10 CSR 26-2.012 to a definition consistent with that historically used and akin to “the property on which underground storage tanks are or were found and at which the contamination originated.” We believe this change in definition addresses the comment.

Comment #8: (2)(A)1 – Non-enforceable is unacceptable. It means that the Department cannot even make sure the notice is actually recorded on the title and follows the land. The term “deed notice” or similar term is sufficient here.

**Department response:** Please note the following is offered to explain the provisions in the 2009 adopted/withdrawn LTS rule in response to the comment. The Department does not intend for the response to mean that any future LTS rule will necessarily include the same provisions.

While an informational measure is not enforceable in the manner in which a Restrictive Covenant is enforceable, the Department has the authority to withhold issuance of the NFA, or to rescind a NFA, if the conditions of issuance are not met. With respect to the comment, the Department would withhold issuance of the NFA until it received documentation that the required informational measure had been recorded. In addition, because an informational measure cannot be removed from a chain of title once recorded, the measure necessarily runs with the land. Finally,

Comment #9: (2) (A) 1: ...future use of **property...**: The term here needs to be “site” not property. The site may extend to adjacent properties that should be considered in this analysis.

**Department response:** The 2009 adopted/withdrawn rule used the word “property” rather than “site” because LTS measures are property-specific; this is true even though the need for LTS is generally based on overall site conditions. That being said, the Department intends to change the definition of site in future rules as explained in the response to comment #7 above.

Comment #10: (6) (C) 1: Deed Notice or Other Informational Device – Interesting. Industry might get the impression that their NFA letters gets them out of LTS, but the same requirements of (2) (A) and (B) above should still apply.

**Department response:** Please note the following is offered to explain the provisions in the 2009 adopted/withdrawn LTS rule in response to the comment. The Department does not intend for the response to mean that any future LTS rule will necessarily include the same provisions.

The Department maintains that recording a NFA letter in lieu of a Deed Notice is a conditionally acceptable form of LTS rather than a means of avoiding LTS. In addition, as the comment implies, recording a NFA letter in the chain of title meets the provisions at subsections (2)(A) and (B) of the adopted/withdrawn 2009 rule.

Comment #11: (7) Restrictive Covenant – I am concerned that “restrictive covenant” is too vague and may include a range of legal instruments some of which will not be enforceable and durable. These problems were solved under the Missouri Uniform Environmental Covenants Act, but tanks were expressly excluded from that law. The substantive legal improvements made under the MUECA law should be imported into this rule so that petroleum restrictive covenants can be relied upon for as long as they are needed.

**Department response:** The Department agrees that MoECA solved the problem of covenant enforceability and durability and was disappointed that tanks were excluded from the law. To make use of the MoECA provisions at tank sites would require the introduction and passage of new legislation; the Department does not currently plan to propose new legislation to the legislature in this regard.