

**Proposed Idea for “Long Term Stewardship”**  
**Carol Eighmey, Petroleum Storage Tank Insurance Fund**  
**Submitted 2/22/11 to MDNR via email**

(1) In cases where an engineering control or an activity and use limitation is used in the corrective action plan to mitigate risk for a complete exposure pathway, it shall be sufficiently reliable, durable, and enforceable, in accordance with the following:

(A) For the groundwater domestic use pathway, the activity and use limitation must consist of at least one (1) of the following:

1. A restrictive covenant;
2. A durable local ordinance;
3. A substantial and reasonably durable engineered control that is expected to remain in place and functional for at least as long as the residual contamination poses an elevated risk. This will generally need to be accompanied by a restrictive covenant or deed notice, except for permanent streets, highways and other similarly durable structures;
4. Well location and construction requirements in 10 CSR 23-3; or
5. An alternative engineering or institutional control approved by the department.

(B) For the vapor intrusion pathway, the activity and use limitation must consist of at least one (1) of the following:

1. A restrictive covenant;
2. A deed notice;
3. A substantial and reasonably durable engineered control that is expected to remain in place and functional for at least as long as the residual contamination poses an elevated risk. This will generally need to be accompanied by a restrictive covenant or deed notice, except for permanent streets, highways and other similarly durable structures;
4. An alternative engineering or institutional control approved by the department.

(C) For other exposure pathways, any proposed engineering controls or activity and use limitations must be included in the corrective action plan and must be approved by the department.

(D) Regardless of the exposure pathway, even where not required by the department, owners and operators may utilize a deed notice or other informational device or a restrictive covenant as an additional precaution at their discretion.

**Department response:** Please note that this response is being offered at a time when the Department is considering various options for long-term stewardship rule requirements and in recognition of ongoing discussions with stakeholders. Therefore, the response

should not be considered as the Department's final position regarding the matter of long-term stewardship for tank sites.

In some cases, local ordinances as discussed at (1)(A)2 of the comments can be an effective activity and use limitation (AUL) when they specifically prohibit actions that would cause an exposure pathway to become complete. A common example is an ordinance that prohibits the installation of water wells and hookup to a municipal water supply. However, the Department maintains that the durability of a local ordinance as an AUL is dependent on the ordinance being the subject of a Memorandum of Agreement (MOA) between the local government and the Department. The MOA ensures that the local government will notify the Department should the ordinance be repealed or substantively modified so that the Department can take appropriate actions to ensure human health remains protected.

Regarding (1)(B)2 of the comments, the Department does not view a Deed Notice as a durable and effective AUL for the vapor intrusion pathway. When an AUL is necessary because contaminant concentrations at a site exceed the target levels for a specific exposure pathway, an enforceable LTS measure, such as a Restrictive Covenant, an ordinance and MOA, or an existing applicable state rule, must be used. An enforceable measure as opposed to an informational measure is necessary because the former is a stronger tool, the violation of which is consequential, that is more likely to be effective in preventing an exposure pathway from becoming complete. A Deed Notice is not enforceable.

Regarding (1)(A)3 and (1)(B)3 of the comments, the Department maintains that a Restrictive Covenant must accompany all engineered controls except those that are not under the control of the tank owner/operator, such as city streets, highways, and similar structures.

Regarding the use of a restrictive covenant to control risks associated with the vapor intrusion exposure pathway (reference (1)(B)1 of the comments), the restrictive covenant would need to specifically prevent the construction of a structure over the contamination or require that any structure built over the contamination to have a vapor mitigation measure such as a vapor barrier or venting system. The covenant would also need to require specific certification, inspection and maintenance requirements, as appropriate, for the vapor mitigation measure.