



Research Brief

The Godfather of Institutional Controls and Stewardship

Elissa Parker
*Vice President
 Research and Policy*

Throughout this issue you can see the name John Pendergrass. An ELI senior attorney for almost two decades, Jay sometimes seems to head, or at least be involved in, all the Institute's key programs and projects. Jay is director of ELI's State Center, director of our judicial education program, co-director of the Institute's international work — and for 17 years the *Forum's* AROUND THE STATES columnist.

There is another success story that has played out over the years: Jay's work on the use of "institutional controls" to manage closed and completed contaminated sites. Introduced at national conferences as the "godfather of long-term stewardship and institutional controls," Jay, through diligent scholarship and dogged advocacy, has had a major impact on environmental law and policy.

Since the 1950s and even into the early 1990s, the person who shut down a toxic dump would insert a provision in the deed declaring that the site contains toxic substances. The provision might have said that the site should not be

used for residential or other specific purpose, or that a cover or underground barrier needed to be constructed. It might have provided that the groundwater was never to be used for drinking. These conditions were dubbed institutional controls by the government and considered sufficient for long-term stewardship.

The deed provision often did not carry over to the succeeding purchaser. A purchaser — which might be a school district or day care center — would not even find the provision in the course of a title search. It would remain unaware of the toxic wastes. It would not know that a barrier or cover needed to be maintained and remain in place.

Zoning, another early control, would designate the toxic site for industrial use, with the expectation that the designation would prevent a hospital or housing project from being built. This approach failed too, because in many states an area zoned industrial can also contain residential and commercial uses. And usually there was nothing to prevent a subsequent zoning decision from reversing that designation.

Jay is nationally recognized as the lawyer who educated the government and the public on why these controls would not succeed. He spearheaded the work that led to reform of the policies designed to protect citizens when hazardous substances are left on site. His work led to reforms in national and state practice, assuring long-term protection means what it says.

When he joined ELI in the late 1980s, Jay initiated a study of whether and how institutional controls could protect public health. Drawing on his expertise in science and law — particularly his knowledge of groundwater issues — he played a central role in ELI's studies of federal and state Superfund programs.

As a result of this work, in 1991 the Department of Defense asked ELI to look at the base closure process and to determine how to facilitate redevelopment of bases with contaminated sites. Many of Jay's recommendations were enacted by Congress as part of the bill that made DOD subject to EPA enforcement under the Re-

source Conservation and Recovery Act.

Jay also secured EPA support for an investigation of institutional controls that had been in place for some time at older Superfund sites. When his research revealed major problems, he recommended significant changes in site closure.

The EPA fact sheet on institutional controls, issued in 2000, adopted virtually all of Jay's recommendations. The agency began developing strong policies on how to design and use institutional controls. EPA went on to direct that Superfund sites that had completed construction and adopted institutional controls be revisited.

These recommendations were also reflected in the 2003 Uniform Environmental Covenants Act issued by the National Conference of Commissioners on Uniform State Laws, which, when adopted by a state, changes property law. Twenty states have already adopted the act, assuring that institutional controls will remain in place as long as needed.

Jay continues to serve as a resource on responsible, effective, and long-term stewardship. State legislators and staff call on him frequently for advice on state laws. During their work on reauthorizing Superfund and the 2002 brownfields bill, Jay was a key resource for congressional staffers. And he speaks on these issues around the country regularly at legal seminars and conferences.