ATTACHMENT 2
MONITORING AND ENFORCEMENT OF LAND USE CONTROLS

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

April 2, 2003

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE
(INSTALLATIONS and ENVIRONMENT)

Subj: MONITORING AND ENFORCEMENT OF LAND USE CONTROLS

Ref: (a) DUSD(I&E) memo of April 23, 2001
(b) ADUSD(E) memo of June 4, 2002

For approximately 24 months, the Department of Defense (DoD) and the Environmental Protection Agency (EPA) have been in dispute over the responsibilities, authorities and related documentation concerning Land Use Controls (LUC) used to protect contaminated sites. The dispute has slowed or halted progress on a number of cleanup Records of Decision (RoDs) throughout DoD at both active and closed bases. Despite a long series of discussions and communications between the Office of the Secretary of Defense (OSD) and EPA, the dispute has not been resolved. In order to continue progress in the cleanup program, the Services developed alternative approaches for resolving the issue and were given direction by OSD to negotiate with EPA to develop RoDs and Federal Facilities Agreements (FFAs) using these approaches.

We are pleased to report that the Department of Navy (DON) has reached a comprehensive settlement to this issue through a series of negotiations with EPA headquarters and Regions over several months. Attachment (1) provides the framework to be followed by EPA and DON. The Department of Army has been participating throughout the negotiations and concurs with the approach. The key components are:

- Standard FFAs based on the EPA-DoD model with the addition of one "primary document" - a Remedial Action Completion Report. We believe documenting the completion of a remedial action/site closeout and getting EPA concurrence on the closeout is reasonable and good public policy.

- Performance-based RoDs that contain only broad LUC objectives, not DoD implementation actions. This eliminates potential debates in the field about whether changes to LUC implementation actions in a RoD are "significant".

- Remedial Designs or Remedial Action Work Plans (already primary documents under the EPA-DoD model) containing the LUC implementation actions.

- A commitment for an EPA-DoD task force to further streamline document size and number.

Our proposed approach concentrates on getting results - site completions and property transfers - rather than disputing EPA's post-RoD authorities. We believe this approach provides the most productive path forward and we plan to develop and submit RoDs and FFAs using this approach. We recommend that you rescind and/or revise references (a) and (b) since they do not reflect the new approaches by the services, are not compatible with draft, nationally applicable EPA guidance, and are not like recent RoDs approved by OSD. Additionally, we request elimination of the moratorium on signing RoDs without multi-service headquarters review as long as the RoDs comport with the attached Principles. The headquarters review of cleanup RoDs has created a choke-point and is contrary to our organizational streamlining and delegation practices.

We need to move forward and resolve this issue in consensus with EPA. We have a number of other important issues to work with EPA including legislative and regulatory range initiatives and the disposition of FFAs at Base Realignment and Closure (BRAC) installations on the National Priorities List where we desire to effect early transfers.

HT Johnson

Hansford T. Johnson
Secretary of the Navy
Acting

Attachment:
1. Principles and Procedures for Specifying, Monitoring and Enforcement of Land Use Controls and Other Post-RoD Actions

17 Mar 2003 v8.1

PRINCIPLES AND PROCEDURES FOR SPECIFYING, MONITORING AND ENFORCEMENT OF LAND USE CONTROLS AND OTHER POST-ROD ACTIONS

PREAMBLE

Since the Department of Defense (DoD)/Environmental Protection Agency (EPA) Model Interagency Agreement (IAG)/Federal Facility Agreement (FFA) was developed in 1988, EPA and DoD have gained considerable knowledge and understanding about post-Records of Decisions (RoD) activities, especially Land Use Controls (LUCs). Thinking, policies, regulations and procedures concerning LUCs have evolved considerably since DoD and EPA developed the 1988 FFA model language. New statutes and regulations related to LUCs are being considered in many states. Accordingly, EPA and the Department of Navy (DON) believe that a set of Principles will assist Navy field commands and EPA Regions to better implement our respective Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) responsibilities. The Principles described below do not replace or substitute for any existing CERCLA statutory or regulatory requirement. Rather they provide a mutually agreeable framework to provide a more efficient process to implement LUCs at National Priority List (NPL) installations.

These Principles will guide the EPA and DON personnel involved in these decisions. They are written in full knowledge that state regulatory and trustee organizations have independent responsibilities and authorities. EPA and the Navy recognize the importance of the state role in helping to ensure a cleanup is protective of human health and the environment. EPA and the Navy will jointly develop a communications plan to ensure we include the states in this important issue.

PRINCIPLES

- At sites where remedial action is determined necessary to protect human health and the environment, the actions must be documented in accordance with CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

- At sites where contaminants are left in place, LUCs are used to ensure that the contaminants do not pose an unacceptable risk to human health or the environment. LUCs consist of engineering controls and/or institutional controls.

- The EPA and DON desire to ensure that LUCs are specified, implemented, monitored, reported on, and enforced in an efficient, cost-effective manner that ensures long-term protectiveness.

- The EPA acknowledges DON role and responsibilities as the Federal Lead Agent for response actions. This role includes selecting remedies with EPA at NPL sites and funding response actions.

- The DON acknowledges EPA's role and responsibilities for regulatory oversight and enforcement, particularly at NPL sites. This role includes ultimate ability to select the remedy at NPL sites if EPA disagrees with DON proposed remedy and dispute resolution fails.

- Federal Facilities Agreements (FFAs) are CERCLA 120 agreements used by DoD and EPA to describe in detail the roles and relationships among DoD, EPA and often the state. They form the foundation for these relationships regarding DoD's response actions at NPL sites. FFAs also contain installation specific details and procedures for planning, budgeting, and dispute resolution. DON and EPA desire FFAs to be as standardized as possible and relatively static (i.e., the FFA should not need to be changed for a given installation).

- Primary Documents developed under the FFA are relatively dynamic and document important plans and actions. In that sense, they are action-oriented. For example, a Site Management Plan is revised yearly via collaboration among DON and EPA remedial project managers and is an important tool for planning response actions and demonstrating commitment to the public. Likewise, a LUC Remedial Design (RD) or Remedial Action Work Plan (RAWP) describes actions that will ensure viability of both long-term engineered and institutional control remedies.

- Records of Decision should document the remedy selection process and remedy decision in accordance with CERCLA and the NCP, as well as applicable guidance, regulations, standards, criteria, and policy. With regard to LUCs, the RoD should describe the LUC objectives, explain why and for what purpose the LUCs are necessary, where they will be necessary, and the entities responsible for implementing, monitoring, reporting on and enforcing the LUCs. The RoD will refer to the RD or RAWP for implementation actions.

- Given the above, EPA and DON agree that the most efficient framework for specifying, implementing, monitoring, reporting on and enforcing LUCs is:
    - A standard FFA for NPL sites.
    - A clear, concise RoD with LUC objectives.
    - RD or RAWP with LUC implementation actions.
- *Note: These documents are described more fully below.*

- EPA and DON will move expeditiously to finalize all outstanding FFAs using a standard FFA template as a guide to minimize the development/writing process.

- *Note: A "standard FFA" means the Agreement presently being used between EPA and DON using the DoD-EPA model language, plus site-specific statements of fact, plus the additional primary and secondary documents shown in Attachment (1).*

- EPA and DON will initiate a task force with appropriate headquarters and field representatives from EPA and the military services. The task force will examine ways to reduce document size, review time and revisions. The task force will seek ways to recommend changes to guidance and policy that will help reduce document size or streamline the process. The task force may also include other stakeholders.

GENERAL PROCEDURES

1. Federal Facility Agreement

- The LUC implementation and operation/maintenance actions will be included in the RD or RAWP which are already primary documents deliverable under standard FFAs. In addition, a Remedial Action Completion Report (RACR) will be provided as a primary document for new FFAs. For existing FFAs without a RACR, the RACR will be provided as an attachment to the RD or RAWP with the same enforceability as a primary document. For existing FFAs without a Five-year review, the Five-year review will be submitted to EPA as a secondary document and is subject to dispute resolution under the FFA.

Note: Model FFA language will need *to be supplemented to reflect these Principles and Procedures. Attachment (1) contains necessary modifications to FFA language.*

2. Record of Decision

- It is EPA's and DON's intent that Records of Decision (RoDs) continue to be consistent with CERCLA and the National Contingency Plan. Relative to land use controls and institutional controls, the RoD shall:
  - Describe the risk(s) necessitating the remedy including LUCs;
  - Document risk exposure assumptions and reasonably anticipated land uses;
  - Generally describe the LUC, the logic for its selection and any related deed restrictions/notifications;
  - State the *LUC performance objectives*. (See attachment (2) for examples of LUC performance objectives);
  - List the parties responsible for implementing, monitoring, reporting on, and enforcement of the LUC;
  - Provide a description of the area/property covered by the LUC (should include a map);
  - Provide the expected duration of the LUCs; and
  - Refer to the RD or RAWP for LUC *implementation actions*, since these details may need to be adjusted periodically based on site conditions and other factors. (See attachment (2) for examples of LUC implementation actions).

- The RoD at transferring properties will need to be crafted based on the responsibilities of the new owner and state-specific laws and regulations regarding LUCs. At transferring properties, compliance with the LUC performance objectives may involve actions by the subsequent owners in accordance with deed restrictions, however, ultimate responsibility for assuring that the objectives are met remains with DON as the party responsible under CERCLA for the remedy. DON and regulators will consult to determine appropriate enforcement actions should there be a failure of a LUC objective at a transferred property.

3. <u>LUC Remedial Design (RD) or Remedial Action Work Plan (RAWP)</u>

- The RD or RAWP will be provided as a primary document in accordance with the FFA.
- The RD or RAWP will describe short and long-term implementation actions and responsibilities for the actions in order to ensure long-term viability of the remedy which may include both LUCs (e.g., institutional controls) and an engineered portion (e.g., landfill caps, treatment systems) of the remedy. The term "implementation actions" includes all actions to implement, operate, maintain, and enforce the remedy. Depending on the LUC and site conditions, these actions can include:
  - Conducting CERCLA five-year remedy reviews for the engineered remedies and/or LUCs.
  - Conducting periodic monitoring or visual inspections of LUCs; frequency to be determined by site-specific conditions.
  - Reporting inspection results.
  - Notifying regulators prior to any changes in the risk, remedy or land use including any LUC failures with proposed corrective action.
  - Including a map of the site where LUCs are to be implemented.
  - *For active bases*,
    - Developing internal DON policies and procedures with respect to LUC monitoring, reporting, and enforcement in order to institutionalize LUC management and to ensure base personnel are aware of restrictions and precautions that should be taken; Consulting with EPA at least 14 days prior to making any changes to these policies and procedures to ensure that any changes maintain a remedy that is protective of human health and the environment.
    - Developing a comprehensive list of LUCs with associated boundaries and expected durations.
    - Notifying regulators of planned property conveyance, including federal-to-federal transfers. "Property conveyance" includes conveying leaseholds, easements and other partial interests in real property.
    - Obtaining regulator concurrence before modifying or terminating land use control objectives or implementation actions.

  - *For closing bases/excess property*:
    - Notifying regulators of planned property conveyance, including federal-to-

federal transfers.

- Consulting with EPA on the appropriate wording for land use restrictions and providing a copy of the wording from the executed deed.
- Defining responsibilities of DON, the new property owner and state/local government agencies with respect to LUC implementation, monitoring, reporting, and enforcement.
- Providing a comprehensive list of LUCs with associated boundaries and expected durations.
- Obtaining regulator concurrence before modifying or terminating land use control objectives or implementation actions.

Note: Tthe mix of responsibilities among DON, new property owner and other government agencies depends on state and federal laws and regulations that are applied in the state. Implementation actions at closing bases may include components characteristic of both active and closing bases, depending on the timing of transfer.

- Should there be a failure to complete LUC implementation actions at an active base, the EPA Region shall notify the installation and seek immediate action. Should there be a failure to complete LUC actions after such notification to the base, EPA may notify the Deputy Assistant Secretary of the Navy (Environment) who will ensure that LUC actions are taken.

- Should there be a failure to complete implementation actions that are the responsibility of a subsequent owner or third party at a transferred property, EPA and DON will consult on the appropriate enforcement action. Should there be a failure to complete implementation actions that are the remaining responsibility of DON at a transferred property, the EPA Region will notify the cognizant Navy Engineering Field Division. If necessary, EPA may notify the Deputy Assistant Secretary of the Navy (Environment) who will ensure that corrective action is taken.

Note: The RD or RAWP should contain no more or no less implementation actions than needed to ensure the viability of the remedy. There is a delicate balance required. EPA and DON both desire to ensure protectiveness while minimizing process and documents. The parties agree to work diligently to define the appropriate implementation actions for each LUC. EPA and Navy believe the key elements can be easily developed between RPMs in a matter of a few hours. Based on detailed discussions and the examples shown in Attachment (2), EPA and DON expect that the LUC portion of the RDs or RAWPs to be in the range of 2-6 pages. If combined with a sampling plan, there may be additional pages needed to list the analyses, sampling locations and frequencies.

4. LUC Data

- The DON will ensure that all LUCs at its installations are included in the DON LUC database.

Attachments:
1. Incorporating Land Use Control (LUC) Objectives and Implementing Actions into Federal Facilities Agreements (FFA's)
2. Examples of LUC objectives and LUC Implementation Actions

Attachment 1

INCORPORATING LAND USE CONTROL (LUC) OBJECTIVES AND IMPLEMENTATION ACTIONS INTO FEDERAL FACILITIES AGREEMENTS (FFAs)

FFA Model Template Additions/Changes

1. Definitions Section:

Add: "Land use controls" shall mean any restriction or administrative action, including engineering and institutional controls, arising from the need to reduce risk to human health and the environment.

2. Primary Documents:

Add: A Remedial Action Completion Report (RACR).

Note: EPA and DON believe the RACR is an important document to (1) document the completion of remedy-in-place and/or site close-out and (2) receive concurrence from EPA. The document shall not duplicate information in the Administrative Record or previously provided to EPA. Previously provided information shall be referenced and itemized. New information/data (e.g., sampling data) may be needed to demonstrate that the Remedial Action Objectives have been met. The report shall also include any as-built drawings for remedies if different from the remedial design. EPA and DON do not envision this to be a lengthy document, but shall contain only the information needed to justify the remedy completion. EPA and DON believe the RACR should discuss how the remedial objectives in the RoD have been met. It should not be used to expand the scope of requirements beyond the original RoD.

Change: Eliminate the sub-bullets (subsidiary documents) under remedial action work plan for document streamlining purposes.

3. Secondary Documents:

Add: Five-Year Remedy Review (required by CERCLA)

- Provided to EPA for review and comment
- Subject to dispute resolution

Note: EPA has an important oversight role regarding the continuing protectiveness of the LUC. Therefore, EPA and Navy believe it is reasonable that EPA should review and comment on the Five-year Remedy Review. Since the review is required by CERCLA, it does not need to be a Primary Document.

Attachment 2

EXAMPLES OF LUC OBJECTIVES AND LUC IMPLEMENTATION ACTIONS

(Note: Actions are to be tailored to site-specific conditions.
This is neither a mandatory nor a complete list)

LUC OBJECTIVES (contained in RoD)

- Ensure no construction on, excavation of, or breaching of the landfill cap.
- Ensure no residential use or residential development of the property.
- Ensure no withdrawal and/or use of groundwater.
- Ensure no excavation of soils without a use permit and special handling procedures.

LUC IMPLEMENTATION ACTIONS (contained in the RD or RAWP)

- Conduct a CERCLA five-year remedy review of the LUC and provide to EPA for review (as a secondary document deliverable under the FFA).
- Conduct annual inspections of the LUC and report results (active or BRAC – responsible party to be defined).
- Record the LUC in the base master plan. (active)
- Produce a survey plat of the LUC by a state registered land surveyor. (active or BRAC).
- File the survey plat with the local government/Circuit Court for purposes of public notification (active or BRAC)
- Place a survey plat in CERCLA administrative record, and send copies to EPA and state. (active or BRAC).
- Develop and implement a base procedure that requires excavation to be approved by the Public Works Officer or equivalent official. (active)
- Develop and implement a base procedure that requires changes in land use to be approved by the Public Works Officer or equivalent official. (active)
- Notify the regulatory agencies 45 days in advance of any Base proposals for a major land use change at a site inconsistent with the use restrictions and exposure assumptions described in the RoD, any anticipated action that may disrupt the effectiveness of the land use controls, any action that might alter or negate the need for the land use controls, or any anticipated transfer of the property subject to the land use controls.
- Obtain regulator concurrence before modifying or terminating land use control objectives or implementation actions.
- Maintain a comprehensive list of LUCs with associated boundaries and expected durations.

Note: These examples are consistent with draft EPA guidance: "Describing Institutional Controls in Remedy Decision Documents at Active Federal Facilities".