



DEPARTMENT OF THE NAVY  
THE ASSISTANT SECRETARY OF THE NAVY  
(INSTALLATIONS AND ENVIRONMENT)  
WASHINGTON, DC 20350-5100

IN REPLY REFER TO

Interim Final —25 May, 1999

MEMORANDUM FOR THE CHIEF OF NAVAL OPERATIONS (N4)  
COMMANDANT OF THE MARINE CORPS (L)

Subj: DEPARTMENT OF THE NAVY ENVIRONMENTAL POLICY MEMORANDUM 99-02; LAND USE CONTROLS

Ref: (a) HQ GSA Memorandum for GSA's Regional Directors, 16 Oct 1998  
(b) DoN Environmental Policy Memorandum 95-02: Consideration Of Future Land Use In Determining Cleanup Standards For Base Realignment And Closure (BRAC) Property

Applicability. This policy memorandum establishes requirements for the development and use of land use controls as part of environmental restoration program decisions at active and closing bases. For purposes of this memorandum, the term environmental restoration includes site assessments, investigations, characterizations, cleanups and related management activities at both active and closing bases. The term relates to environmental restoration activities performed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and applicable state laws for past petroleum and hazardous substance releases. It does not include clearance of unexploded ordnance, building demolition, and debris removal that are otherwise authorized under the Defense Environmental Restoration Program (DERP).

Background. The President's authority under Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) the authority to respond to releases of hazardous substances, pollutants and contaminants has been delegated to the Department of Navy through Executive Order 12580. In particular, the Navy has been given the authority to respond to releases from its facilities and vessels, whether the release is from a facility on the National Priorities List (NPL) or not. In exercising the President's authority under CERCLA, the Navy is required to follow CERCLA and corresponding regulations and guidance issued by Environmental Protection Agency (EPA). The key CERCLA regulation promulgated by EPA is the National Contingency Plan (NCP). In the NCP, at 40 CFR 300.430(a)(1)(iii), EPA sets forth a series of standards that agencies must follow in selecting remedies for CERCLA releases. In the standards, EPA notes that at some sites, engineering and/or institutional controls may be the remedy of choice. Typically, engineering and/or institutional controls are chosen where the waste poses a low, long-term threat or where full treatment is impracticable.

Definitions. A distinction between engineering controls (ECs) and institutional controls (ICs) should be made. Taken together, ECs and ICs can be referred to as land use controls (LUCs). ECs encompass a variety of engineered remedies to contain and/or reduce contamination, and/or physical barriers intended to limit access to property. ECs include fences,

signs, guards, landfill caps, provision of potable water, slurry walls, sheet pile (vertical caps), pumping and treatment of groundwater, monitoring wells, and vapor extraction systems

In contrast, ICs are a variety of legal devices imposed to ensure that the ECs stay in place or, where there are no ECs, to ensure the restrictions on land use stay in place. ICs include affirmative and negative easements, affirmative and restrictive covenants, equitable servitudes, notices (in deeds, newspapers, etc.), zoning, educational materials, permits, (construction, excavation, well drilling, etc.), agreements with regulators, reporting on LUC maintenance.

The appropriate ECs should be selected to protect human health and the environment and meet the other criteria described in the NCP. ICs should be selected to maintain the viability and effectiveness of the selected remedy and any ECs.

Principles. The policies contained in this memorandum are based on the following guiding principles and are described more fully under the paragraph entitled Policy:

- It is in the best interest of the public and the Navy to ensure the long-term viability of LUCs. Section 120(h) of CERCLA and Section 330 of the Fiscal Year 1992 Defense Authorization Act provide for continuing liability for the Navy after cleanup and property transfer.
- Life cycle costs of LUCs should be considered when analyzing and selecting remedies to ensure all parties have a full understanding of the costs and responsibilities for remedial alternatives.
- Administrative process and related costs should be minimized by relying on existing procedures and mechanisms as much as possible during the establishment and maintenance of LUCs.
- The owner of the property has the most direct effect on the viability of LUCs (e.g., the installation for active bases and the transferee for closing bases). Key responsibilities for LUC maintenance and reporting should be placed on the property owner.
- The public must be involved in the analysis of LUCs and selection of remedies in accordance with the NCP.

General.

- a. Although LUCs may present a viable option as part of a remedy, it is important to consider the long-term, life-cycle costs of LUCs. Section 120(h) of CERCLA and Section 330 of the Fiscal Year 1992 Defense Authorization Act provide for continuing liability of an indefinite duration for DoN after cleanup and property transfer. Therefore, the long-term costs of maintaining LUCs must be weighed against the additional costs of cleanup to unrestricted use. In this regard, both restricted and unrestricted land use scenarios should be analyzed during the Tier 1 risk assessment screening process. Also, at least one alternative that provides an unrestricted property use should be considered during remedy selection phase. Such alternatives should be described in the Proposed Plan.

- b. When LUCs are being considered during the Feasibility Study phase, remedial project managers should consult with appropriate regulatory agencies to verify the effectiveness of the proposed LUCs and the means of implementation. Where property is to be transferred to a non-federal entity, remedial project managers, real estate managers, and counsel need to operate as a close-knit team to ensure that the selected LUCs are practical and legally enforceable under State law.
- c. Whenever LUCs are chosen as a remedy or part of a remedy, a description of the LUCs, logic for selection, site maps and description of prohibited activities must be included in the Proposed Plan (PP), Remedial Action Plan (RAP) and/or Record of Decision (ROD). These documents should be updated when a removal action or interim remedial action requiring LUCs is completed.
- d. Permanent markers, usually made of stone, steel or other durable materials, can be placed in the ground to designate areas where LUCs are in effect. Such markers should be used where appropriate.
- e. Detailed records of LUCs shall be maintained by DoN indefinitely.

Active Installations.

- a. At active installations, DoN does not have the authority to impose easements or covenants on property. The United States holds title to all federal land. Federal agencies do not own property; they manage property on their plant account in accordance with regulations promulgated by the General Services Administration (GSA). Only GSA has the authority to dispense with a property interest. As a matter of policy, GSA has indicated that it does not want U.S. property encumbered in any way (Reference (a)). However, a variety of other ICs such as base master planning procedures and agreements with regulators are acceptable means of ensuring the viability of LUCs at active installations.
- b. DoN personnel may negotiate local, state or regional agreements with regulators to define procedures for the quality assurance of LUCs. Such agreements should seek to maximize the use of existing documents, data systems, and procedures and avoid the creation of new ones (e.g., using the CERCLA five-year remedy review to verify LUCs).
- c. If a change in land use affecting in-place LUCs is being considered, the regulatory agency shall be notified as soon as possible in order to allow sufficient time for regulatory review and amendments to remedy selection decision documents. The notification will include:
  - 1) an evaluation of the risks to human health and the environment posed by the land use change and overall impact on remedy effectiveness;
  - 2) an evaluation of the need for any additional remedial action resulting from the anticipated land use changes; and
  - 3) a proposal for any necessary changes in the selected remedial action.

- d. The following are considered changes in land use affecting LUCs:
- 1) A change in land use that is inconsistent with the exposure assumptions in the human health or ecological risk assessment that was the basis for the LUCs (e.g., changes from industrial, commercial or recreational land use to a more sensitive land use such as residential or day-care areas).
  - 2) A change in land use that would allow activity that is prohibited under the existing ROD or would degrade the remedy.
  - 3) A change in land use that would require additional remediation before the new use could begin.
- e. The conditions and boundaries of sites subject to LUCs, as well as the terms and conditions of the LUCs themselves, must be recorded on appropriate installation maps, master plans, real estate records and Geographic Information Systems (GIS).
- f. Procedures for periodic inspection of LUCs must be established by installation Commanders.
- g. If the installation becomes excess to DoN needs and transfer is expected, including federal agency transfer, the regulatory agency shall be notified as soon as possible. Prior to transfer, the LUCs shall be reviewed and the policies described below for closing installations shall be followed.

#### Closing Installations.

- a. At closing installations, DoN has the authority to impose restrictions on the transferee's use of the property. In transferring restricted-use property, DoN has a perpetual interest in insuring that restrictions remain viable and are honored by all subsequent owners. This perpetual interest is based on the requirements under CERCLA Sec. 120(h)(3)(A)(ii) and Sec. 330 of P.L. 102-484 whereby DoN must indemnify transferees against response costs, personal injury and property damage attributable to DoN contamination. By ensuring the specified restrictions remain viable, DoN exposure to liability is reduced.
- b. The boundaries of sites and the conditions, terms, limitations of LUCs must be described in Findings of Suitability for Transfer (FOSTs) and recorded in deeds. In particular, DoN must retain the right to enter and inspect the property to ensure the viability of LUCs and/or to perform any additional remedial response actions. DoN managers will need to research applicable state laws to insure that LUC requirements "run with the land" such that subsequent transferees are as equally bound as the immediate transferee.
- c. Although each State's real estate definitions may differ, the deed easements and covenants will usually describe the Navy as the "dominant estate" and the transferee's property as the "servient estate." DoN has the authority to give regulators equal authority to impose property restrictions by giving them the same "dominant estate" authority as DoN. DoN real estate managers may decide to provide regulators with a "dominant estate" in order to increase the

enforcement of LUCs long term. In such cases, a reference must be placed in the deed and a separate deed conveying the additional dominant estate must be provided to the regulator.

- d. Deeds for restricted use property will contain requirements for subsequent owners to report annually at their expense to DoN on the viability of LUCs. Furthermore, if there is regulator interest, requiring copies of such reports to be sent to regulators is an additional measure of protection since regulators may be involved in enforcing any violations.
- e. Where the transferee is entitled to Section 120 and/or Section 330 protection and/or indemnification, DoN managers shall include, in the purchase agreement and the deed, a description of these protections and each parties' responsibilities under these provisions. An example of these protections and responsibilities can be found in the Lease in Furtherance of Conveyance for Naval Ordnance Station, Louisville, KY. Note: all transferees, except for Potentially Responsible Parties (PRPs) and federal agencies, are entitled to Section 120 protections. Only transferees of BRAC property, except for PRPs and federal agencies, are entitled to Section 330 indemnification. Non-BRAC transferees are not entitled to Section 330 indemnification.
- f. Some hazardous substances, hazardous materials, and/or contaminants can remain safely and legally on-site. Examples include: undamaged asbestos and non-deteriorated lead-based paint in buildings, and soils remediated to industrial (but not residential) standards. Safe removal of such remaining hazardous substances, hazardous materials and/or contaminants, or further remediation required due to a land use change, are the responsibility of subsequent owners and are not considered responsibilities of DoN under CERCLA Section 120. Reference (b) provides additional details.

The points of contact in OASN (I&E) and AGC (I&E) are Mr. Paul Yarosehak, (703) 588-6695, for environmental restoration policy matters; Mr. B.K. Schafer, (703) 604-8224 environmental restoration legal matters; and Ms. Angela Ryan, (703) 604-8222 for real estate legal matters.



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