OFFICE OF THE UNDER SECRETARY OF DEFENSE

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ACQUISITION AND TECHNOLOGY

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DUSD(ES/CL)

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER, RESERVE AFFAIRS, INSTALLATIONS AND ENVIRONMENT)
DIRECTOR, DEFENSE LOGISTICS AGENCY (D)

SUBJECT: Guidance on Land Use Control Agreements with Environmental Regulatory Agencies

Attached is the template, referenced in the January 17, 2001, DoD "Policy on Land Use Controls Associated with Environmental Restoration Activities," that shall be used when drafting a voluntary agreement for the implementation of land use controls (LUCs) at DoD installations. As stated in the DoD LUC policy, there is no legal or regulatory requirement for these agreements; they are voluntary and are intended to improve the visibility and viability of LUCs at an installation.

These voluntary agreements with environmental regulatory agencies should only be developed in exceptional cases to facilitate the use of LUCs at a specific installation (normally active installations only) for property under the control of the Component, and are primarily a description of the parties' specific responsibilities within the existing framework of laws and regulations regarding land use controls. They are not enforceable regulatory documents, nor are they to be an enforceable term or condition of an environmental restoration decision document or interagency agreement.

Components may elect to adopt a LUC management strategy at installations consistent with the principles stated in this guidance without necessarily entering into an agreement with regulatory agencies. An agreement is normally effected through a memorandum of agreement (MOA) or memorandum of understanding (MOU). Generally, MOUs memorialize agreements and MOAs additionally contemplate a reimbursable support requirement.

This guidance provides flexibility to Components to develop tailored installation agreements that are consistent with DoD policy. As stated in the DoD LUC policy, an agreement with a regulatory agency that is consistent with the attached template and the principles outlined below is exempt from the 72-hour review requirement. Significant deviations from the template, however, are subject to the 72-hour review requirement.

As stated in the DoD LUC policy, whenever possible, installations shall use existing processes and mechanisms (e.g., the installation environmental restoration management action plan, existing land use management practices) for the implementation and management of LUCs. For property being transferred out of Federal control, documents such as the deed and contract for sale are appropriate places to define LUC responsibilities. A separate agreement may be needed with a private party (such as the transferee) assuming LUC responsibilities. Neither the DoD LUC policy nor this guidance restricts such agreements. Such agreements with private parties, however, should be consistent with the DoD LUC policy and the principles and template contained in this guidance.

Principles incorporated in the template and to be highlighted in Agreements with regulatory agencies are as follows:

- Agreements shall be consistent with applicable law and authority. Agreements shall not include additional substantive requirements beyond those authorized in Federal and applicable state or local laws and regulations not in conflict with Federal law.

- Responsibility for managing and monitoring LUCs should be at the local level; the property owner should have the primary responsibility, and existing local processes should be used.

- Agreements should address only specific sites where LUCs will be employed, not the installation as a whole, and preferably should be drafted only after the remedy is proposed or selected.

- As DoD does not have authority to dispose of any real property rights at an active installation (e.g., recording a restrictive covenant or easement), implementing LUCs will not create, dispose, or alter any real property rights on active installations.

- DoD has authority to make land use decisions at active installations; however, where a proposed land use change requires a change to the decision document, the decision document change normally will require the same level of regulatory involvement as the original decision document.

- Mutually acceptable and reciprocal reservation of rights clauses should be used to avoid otherwise irreconcilable conflicts and stalemates in the development of the Agreement.

- State services in support of LUC Agreements and implementation of LUCs are not covered by the Defense State Memorandum of Agreement (DSMOA) process and related funding. Payment of applicable, nondiscriminatory state and local fees for LUC implementation and monitoring activities are allowable but must be consistent with DoD policy and guidance.

- Agreements will not limit the ability of the parties to delete any site from the Agreement based on a change in cleanup standards that obviates the need for the LUC.

- The Agreement shall specify that it will terminate upon transfer of the subject property, and LUC responsibilities should be incorporated into the contract for sale and deed.

The point of contact for this guidance and template is Mr. Shah A. Choudhury at (703) 697-7475.

Gary D. Vest
Principal Assistant Deputy Under Secretary
of Defense (Environmental Security)

Attachment:
as stated

cc:
DUSD(I)
DGC(E&I)

Template for Land Use Controls Agreement with Environmental Regulatory Agencies

This template provides an annotated outline for Agreements with regulatory agencies for the management and monitoring of Land Use Controls (LUCs) on property under the control of an installation. The outline consists of section headings with a short description of what should be contained; additional explanatory matter is provided in italics. The template provides a wide range of circumstances to cover the greatest extent possible in an Agreement; Components and installations are encouraged to eliminate inapplicable provisions and tailor Agreements by using only those specific sections and provisions relevant to the specific circumstances of the remedy and site. In drafting an Agreement, the emphasis should be on what is to be done by the installation or the regulatory agency; describing an existing process and responsibilities may suffice. Neither taxpayers nor protection of human health and the environment are served by developing redundant processes or paperwork that divert funding, effort, and focus away from the substance of environmental restoration efforts and management of LUCs. Any additional requirements contemplated under the Agreement must be cost-effective and directly assist in addressing risks.

Background

This section describes the background and reasons why LUCs are being used at the installation. The following descriptions, as applicable to the installation and specific sites with LUCs, are to be used.

- Statement that investigative activities have revealed contamination and a list (if available) of those sites for which site-specific remedies with associated land use controls have been selected or previously implemented.
- Statement that Federal or state risk-based cleanup criteria were applied in the remedy selection process to prevent unacceptable exposure.
- Statement that installation desires that site remedy determinations take future land use into account.
- Statement that land use controls are intended to ensure land use restrictions remain in place and effective as long as necessary to ensure remedy remains protective of human health and the environment.
- Statement that existing processes and mechanisms are to be used in the implementation, management, and monitoring of LUCs.

Definitions

This section is intended for defining terms specific to the Agreement, such as definitions of LUCs or decision documents tailored to the installation and specific sites subject to the Agreement.

Purpose

This section should state the objective(s) to be accomplished through execution of the Agreement. The objective(s) will be one or more of the following:

- To implement a process to ensure appropriate long-term maintenance of LUCs. The process will elevate general awareness of LUCs by installation personnel to ensure long-term protection.

- To implement a process for the installation to periodically update the appropriate regulatory agency concerning the continuation of any LUCs and any planned changes in land use that may affect any site remediated in accordance with risk-based criteria.
- To integrate site remedies with LUCs into the installation's facility planning process.
- To provide reasonable assurances that pathway and exposure assumptions relied upon in making the remedial decision will remain valid until different site controls or unrestricted use are appropriate.

Applicability

Agreements should focus on site-specific remedies, rather than general provisions relating to the entire installation or the remedy selection and remedial action process.

- Statement that any future decisions involving LUCs on the installation must be consistent with the Agreement.
- Statement that the Agreement will take effect only after remedy selection.
- Statement that implementation of LUCs under the Agreement will not have the effect of creating, disposing, or altering any real property rights on active installations. *(Note: Unless otherwise authorized by law, e.g., BRAC, DoD is not authorized to create a use restriction for recordation. Deed recordation by DoD of a use restriction on active installation property is creating, disposing, or altering a real property interest on Federal property that is prohibited by Federal property law, regulations, and policy.)*

Site Inspection/Review/Certification

This section covers management and review of LUCs, primarily internal installation responsibilities. Reference to existing procedures or providing regulatory agencies a notification and an invitation to observe installation inspections may suffice, and is preferred to developing duplicative inspection regimes.

- Provision for periodic (as agreed) monitoring or visual inspections of LUC sites by the installation.
- Statement that inspections and reviews by the installation are for purposes of verifying that LUCs are properly maintained.
- Provision for notice to the appropriate regulatory agency of deficiencies, and that all appropriate measures have been taken to correct the deficiencies.
- Provision for an annual report to the appropriate regulatory agency confirming the continued retention of all LUCs. *(This provision is intended primarily for active installation Agreements; if regulatory agencies are to be notified of deficiencies and actions taken, then this provision is redundant and may not be needed.)*

Annotation

This section is intended for use in Agreements where transfer of property is not anticipated, e.g., active installations. In some states, there may be a requirement to record use restrictions in the local land records, something that is prohibited by Federal property law, regulations, and policy for active installation real property. This recordation requirement, however, may be fulfilled through an agreement with the state to annotate use restrictions at the installation, and some combination of describing installation processes for monitoring and managing land use, reporting major land use changes, and a provision for deed recordation if the property is transferred out of Federal control in the future.

- Statement that the installation will develop and incorporate appendices (LUC site listing and others, as needed) into the installation master planning process and geographic information system (GIS) (as available and applicable to the installation), and will provide written notification to the state regulatory agency when incorporated.
- Statement, if applicable, that the Agreement satisfies state requirements for LUC recordation.

Land Use Changes/Agency Coordination

This section is primarily intended for use in Agreements where transfer of property is not anticipated, e.g., active installations, as an alternative to state legal requirements for recording land use changes in local land records, something that is prohibited by Federal property law, regulations, and policy for active installation property. Where a land use change will violate a use restriction or risk assumptions in the underlying remedy decision, the installation must undertake further environmental restoration actions to ensure compatibility of land use with residual contamination. Where a land use change does not violate the use restrictions in the remedy but may undermine the effectiveness of the LUCs associated with the property, the installation may need to modify the LUCs to ensure inappropriate activities do not occur.

- Procedure for providing notification to the appropriate regulatory agency regarding any major land use changes.
- Definition of "major change in land use" (as applicable):
  1. Any change in land use (e.g., from industrial or recreational to residential) that would be inconsistent with those specific exposure assumptions in the human health and/or ecological risk assessments that served as the basis for the LUCs that were implemented at the site.
  2. Any site activity that may disrupt the effectiveness of the implemented LUC (e.g., excavation at a landfill; groundwater pumping that may impact a groundwater pump and treat system; a construction project that may affect ecological habitat protected by the remedy; the permanent removal of a fence; or the permanent removal of warning signs).
  3. Any site activity intended to alter or negate the need for the specific LUC(s) implemented at the site.
- Provision for evaluation of how a proposed major land use change will affect the remedy and assessment of the need for additional LUCs or changes in the selected remedy.

MOA Integration

This section, to be used only if needed, will describe the type of information about site-specific LUCs and any standard language to be included in decision documents. Reference to the Agreement in the decision document, however, does not make the Agreement an enforceable term or requirement of the decision document or in an interagency agreement/Federal facilities agreement.

Commitment to Obtain Funding

For a Memorandum of Understanding, this section describes the installation assurance to obtain funding for the implementation, management, and monitoring of LUCs. Please note these activities may be funded from sources other than an environmental restoration account. In exceptional cases, where the installation desires reimbursable services (i.e., a Memorandum of Agreement is being used), this section should briefly describe the funding mechanism that is contemplated. Note that use of the Defense State Memorandum of Agreement (DSMOA) process

and related funding is limited to reimbursing state support services during remedy selection and implementation of the physical remedy. State services in support of LUC Agreements and implementation, management, and monitoring of LUCs are not covered by the DSMOA process.

- Statement that the installation will use best efforts to obtain necessary funding to ensure continued maintenance of LUCs.

Future Property Conveyances

This section is intended for Agreements both at active installations (where transfer of property is not anticipated and the Agreement is substituting for state legal requirement for deed recordation) and at BRAC installations (where property transfer is anticipated). The following provisions should be tailored to the appropriate circumstances. Referencing an established process (e.g., Finding of Suitability to Transfer (FOST) process for the transfer of BRAC property) may suffice, and is preferred to creating new or additional requirements.

- Provision for written notice to regulatory agency at least (X) days before such intended conveyance. Notice should indicate mechanisms necessary to ensure that LUCs will remain in place after property is conveyed. *(This provision, where applicable, is intended primarily for active installation Agreements in lieu of deed recordation. The notice is intended to be informational to note the change in ownership and LUC responsibilities.)*
- Statement that each LUC will be reviewed and incorporated into those property disposal procedures required to meet CERCLA requirements.
- Statement that the LUC site will be deleted from the Agreement upon transfer of the property.

Change in Applicable Standards

- Statement that the Agreement will not limit the ability of parties to delete any site from the Agreement based on either a change in cleanup standards or a change in contaminant concentration levels allowing for unrestricted use of the formerly LUC-encumbered property, e.g., deleting a site where groundwater contaminant levels have reached the remediation objective through treatment.

Future Communications

- Statement that parties to the Agreement will notify each other (within X days) of relevant points of contact to receive all correspondence and communications.

Site Access

- Provision for regulatory agency access to sites covered by the agreement at reasonable times consistent with the military mission, security, and health/safety requirements, and upon presentation of proper credentials.
- Statement that regulatory agency access will be coordinated with the installation's environmental restoration program manager.

Disputes

- Provision of dispute resolution procedures. Parties will agree to engage in good-faith effort to resolve all disputes that may arise about the parties' good-faith compliance with the terms of the Agreement.

Reservation of Rights

This section provides for mutually acceptable and reciprocal reservation of rights clauses used to avoid otherwise irreconcilable conflicts and stalemates in the development of the Agreement.

- Installation reserves rights granted to DoD under Federal law, regulation, or executive order, including any right to put all property under control of the installation commander to those uses deemed necessary in his discretion for mission accomplishment or necessary by appropriate military authority to meet needs of DoD. *(Note: The installation must ensure that the land use will not violate a use restriction or risk assumptions in the underlying remedial decision and that the land use is compatible with residual contamination.)*
- Statement that DoD is CERCLA lead agency.
- Statement that DoD has sole authority to make land use decisions on active installations.
- Regulatory agencies reserve rights to require installation to comply with Federal and state laws and regulations applicable to investigation, cleanup, and long term maintenance of those sites covered by the agreement.

Anti-Deficiency Act

- Statement that the Agreement does not obligate DoD or EPA (if party to the Agreement) to expend any funds in violation of the Federal Anti-Deficiency Act.

Amendment

- Provide procedures for making amendments to the Agreement. Amendments must be in writing and executed by all parties to the Agreement.

Termination

- Statement that Agreement terminates upon mutual concurrence by parties that the objectives of the Agreement have been fulfilled.
- Provision that in the event of a dispute, any party can withdraw from the Agreement upon (X) days written notice to other parties, but only after reasonable efforts have first been made by the parties to resolve any disputes.

Representative Authority

- A certification that signatories to the Agreement are authorized to enter into a binding agreement on behalf of their respective agencies.

Appendices (as applicable to the Agreement)

All appendices must be consistent with the Agreement, creating no rights or obligations beyond those specified in the Agreement.

- LUC Site Listing. For each site it will include site name, site description, and site location. Appendix will be updated periodically (as agreed) to reflect additions or deletions of sites. Copies of all updates will be sent to the regulatory authorities.
- Agency Points of Contact.
- Other appendices, as specified in the Agreement.