

February 11, 2002

Tomian McDaniel  
ACOE HQ  
Attn: CEMP-RI  
441 G Street, NW  
Washington, DC 20314

Dear Ms. McDaniel:

The Army Corps of Engineers (ACOE) has requested State input on the following two documents: "Land Use Control Guidance for Formerly Utilized Sites Remedial Action Program" and "Site Closeout Policy for the Formerly Utilized Sites Remedial Action Program." Members of the ASTSWMO Radiation Focus Group, who represent various State environmental agencies, developed these preliminary comments. This submittal reflects the views of this group. These comments have not been reviewed or adopted by ASTSWMO's Board of Directors, and do not represent a formal position of the Association.

The ASTSWMO Radiation Focus Group believes that these documents:

1) generally address the issues concerning document review, future land use, implementation, and maintenance; and 2) give careful consideration to both the timing and content of Land Use Controls (LUC) in order to achieve Site Closeout. In addition, the documents recognize the role of State and local governments, as well as private landowners, in implementing land use controls in the majority of cases.

However, the documents do not always appear to be consistent in recognizing these roles and giving the parties a sufficient role in the initial planning of these controls. There should be additional emphasis on the early involvement of State and other parties in the cleanup, planning and implementation process. The documents may also need to clearly state that to the extent LUCs rely on State and local government implementation and enforcement, the federal government must recognize this authority to implement institutional controls on federal lands. Failure of federal agencies to comply with these authorities (which has already happened), results in a failure of the LUC and a need for cleanup to unrestricted use.

The documents also appropriately call for the early involvement of DOE in the planning of LUCs, since DOE will be responsible for the long term monitoring and surveillance at the sites.

One issue that States are extremely sensitive to is the predisposition of responsible parties to cleanups requiring restricted land use. ACOE discusses comparing restricted and unrestricted cleanup options in the feasibility study only once. This is appropriate, and



we truly appreciate the inclusion of this statement. However, we believe that there should be a statement added to the LUC document, acknowledging that the existence of this guidance should not be interpreted as a predisposition to favor cleanups requiring land use controls.

Similarly no mention is made of Natural Resource Damages (NRD). At least, the Natural Resource Trustees should be notified if a natural resource has potentially been injured. Lastly, we would like to verify that based on our conversation of February 5, 2001, the term "engineering regulation" is not meant as a promulgated regulation. Both these documents appropriately are classified as policy.

We appreciate your willingness to meet with us and to provide the opportunity to comment on the guidance and policy, and applaud the ACOE's efforts to provide enhanced State input. We hope that the ACOE will continue to provide such opportunities to improve FUSRAP.

Sincerely,

*Jeff Deckler, CO/pe*

Jeff Deckler, CO  
Chair, ASTSWMO Radiation Focus Group

## Comments on the Land Use Control Policy

1. 6.c: 7.b: Clarification is needed to define what the term "five-year review" means. CERCLA specifies that reviews are to be made periodically and no less often than every five years. As we discussed in our meeting, the ACOE and DOE may want to evaluate the timing of the first review with respect to the transfer of the property. It may make sense for the first review to occur prior to the transfer, because of ACOE familiarity with the site, and in order to identify any problems before the transfer occurs. Most importantly, whichever agency performs the review, EPA guidance on 5-year reviews should be followed.
2. 7.c. line 2: Strikeout/Add: "~~performing~~ **evaluating** the baseline risk assessment...."
3. 7.c: The baseline risk assessment does not determine whether an LUC is necessary, it determines whether current risks are sufficient to require remedial action. The type of remedial action, including whether to use LUCs, is then determined in the feasibility study. Also, cost evaluations must be made in the feasibility study (FS) and the record of decision (ROD) in order to compare costs of cleanup to unrestricted versus long term LUCs. The paragraph should be revised to reflect this distinction.
4. 8: There is no description as to how future land use planning changes will be addressed. This issue must be taken into consideration.
5. 8.a line 18 - last sentence: "The reasonably anticipated future land use assumptions allow ACOE, in consultation with regulatory agencies, to determine the appropriate remedy and whether LUCs are necessary." Clarification should be added that LUCs such as deed restrictions are necessary anytime a site is not cleaned up for unrestricted future use.
6. 8.b (1): The document does a good job in recognizing the jurisdictional role the States and local governments (and property owners) have in implementing land use controls. However, this section seems to indicate that these entities will only be involved in the process after some degree of internal coordination by the statement that this process "ultimately extends to regulators..." Due to the critical role of these other parties, we suggest that they be brought into the discussion at the earliest stages of land use control consideration. This includes private property owners, who should be involved in the initial discussions when controls are being considered on their property.
7. 8.b (1): There is no description as to how LUCs can/will be monitored on private property. ACOE should consider deed restrictions, or other instruments that allow for site access by ACOE, the State, and local government for monitoring.

8. 8.b (1): With the development and maintenance of the LUCs we believe that the federal government is adding work to the State or local governments without fiscal compensation. Therefore, we propose the following change to line 14/last sentence. ".....develop LUCs including the **support of the management** ....."
9. 8.b (2): Not only should ACOE Districts work with DOE to discuss LUC development and implementation, but they should also coordinate with DOE during the time of remedy evaluation and selection to ensure that a thorough evaluation of life cycle costs associated with various alternatives using LUCs are considered.
10. 8.c (1): It is an excellent idea to compare costs and implementability of remedies requiring LUCs with remedies for "unrestricted use". In fact, it is necessary to fully evaluate remedial options against the nine criteria in CERCLA. However, in 8.c (1) second sentence, we propose that the sentence be changed to read: "Remedies requiring a land use restriction shall include **estimates of ACOE's and DOE's life cycle costs** of implementing and maintaining the LUCs".
11. 8.d: Generally, the document does a good job of ensuring that land use controls are fully scoped and expensed prior to composing the Record of Decision (ROD). This is appropriate and follows EPA guidance. Somewhere in this section it should be stated that the decision document must include a detailed description of the land use control and the implementation plan. This may not be at the level of detail of the Land Use Control Plan, but must be adequate for the reader to understand the control and its implications on the future land use. For example, any proposed LUC should describe what the control is, how it works, and who is responsible for implementation and enforcement. If a particular mechanism, such as a deed restriction or an environmental covenant is known, it should be described.
12. 8.d (1): A sentence should be added that the costs to maintain the LUCs and remunerate the private property owner shall be provided by the federal government.
13. 8.e (5): This section discusses the coordination with State and local governments and private parties during the feasibility study. The Focus Group believes this is appropriate, and represents the latest timeframe that these parties should be initially contacted. It is critical that these parties are involved in all discussions concerning potential remedies and possible uses of land use controls versus unrestricted cleanups. The Focus Group notes that it may also be prudent to involve the affected parties during the remedial investigation phase of the project, in order to reach an agreement regarding the sufficiency of the investigation to provide the necessary information to make sound cleanup decisions. We also believe that at some point, EPA should be included in the coordination of the LUC plan.

Line 20: "The plan shall also specify the process for discontinuing LUCs if some or all of the LUCs become unnecessary." We suggest that language supporting the need for additional LUCs be added.

14. 8.e (5) end of paragraph: If the LUCs are enforceable under the ROD, then the Land Use Control Implementation Plan should also be enforceable, just as an Operation and Maintenance Plan or Long-Term Monitoring Plan developed pursuant to a ROD would be enforceable.
15. 8.e (6): This section states that "USACE shall provide the final site-specific LUC implementation plan to all parties involved in maintaining and ensuring that LUCs remain effective. The implementation plan shall be provided to the regulators and made available to the public." Where the States and local governments have the responsibility to implement or enforce the LUCs, then the States and local governments should be involved in developing the implementation plan.
16. 8.f (2): Section 8.f includes several examples of LUC mechanisms. The introduction to this section should also note that the timeframe the LUC must remain effective must be considered when choosing the appropriate LUC mechanisms. What works for 10 years may not be effective over a 100 or 1000-year timeframe.
17. 8.f (3): Self Certification can be an important component of assuring LUCs remain effective. However, it must be noted that these should be used only as part of a layered LUC plan, and that verification of LUC effectiveness must also be performed by the federal, State, or local jurisdiction responsible for enforcing the LUC.
18. 8.f (4): Although permanent markings may be an appropriate layer in an institutional control plan, they cannot be relied upon as a sole source of notification. The permanence of such markers over long timeframes is questionable.
19. 8.h: The development of a LUC database is an excellent idea. However, States aren't even mentioned in this section. We believe that States should be consulted in the development of the database.
20. 8.i: For clarity, please add to the beginning of the fourth sentence of this paragraph, "**If applicable due to site conditions,...**"

## Comments on the Site Close Out Policy

1. 5.a – last sentence: Strikeout ~~stringent~~ and add **protective**.
2. Sections 6.b-d describes the preparation of a remedial action report (RAR), and the review of that report by the interested parties. Section 6.d states that ACOE will solicit input at the “earliest appropriate time”. From a State perspective, it should be made clear that States (and other parties) will be able to review and comment on a draft RAR, and that these comments will be addressed in the final RAR. The current language could be interpreted to mean that the State(s) will expeditiously receive copies of the final document.
3. 6.e: From a State perspective, the concept of “State acknowledgement” is insufficient. Sites should not be closed out until the State fully concurs that the sites has been remediated. If cleanups are planned and implemented with that goal in mind, State concerns will be addressed in all phases of the cleanup, from initial planning, through the remedial investigation and feasibility study, and on to the Record of Decision. With States included as true partners in the process, their concurrence at the end will be a meaningful confirmation of the ACOE’s work. Absent such participation, acknowledgment by the State that the ACOE’s ROD has been met would not necessarily indicate approval of the cleanup. For example, in one State, at least one ROD was adopted without State concurrence. In that case, acknowledgement that the ACOE has implemented the ROD would be irrelevant, from the State’s viewpoint.

Line three/Second sentence: Based on the discussion above, we propose that the following sentence should be changed to read, “The executing district is responsible for ~~obtaining~~ **requesting** State ~~acknowledgement~~ **approval** for both NPL and non-NPL projects, and EPA concurrence for NPL projects, that the remedial action has attained the cleanup requirements specified in the ROD(s).”

4. 6.e: If there is a disagreement at this point between the State and ACOE, it should be subject to the dispute resolution process in the Cooperative Agreement (dispute resolution may resolve this issue, so that State agreement with the site closeout would occur). Regarding issue resolution, the policy should clearly state that a site would not be closed out until issues are resolved. The process to resolve these issues should be that process set forth in State cooperative agreements.
5. 6.f: States believe that it is a good idea to have two years of working knowledge of the ICs before the transfer of property to DOE occurs. We also propose the following change: “The executing district must ensure that any plans for Land Use Controls (LUCs) or post-remedial maintenance and monitoring actions are **noted in the ROD and** executed....”

6. 6.g: As stated in comment number 3, the concept of "State acknowledgement" is insufficient. In addition, it would seem prudent to involve DOE in the review process.
7. 6.h: The notification described in this section is after the fact, and does not provide the general public or more importantly the landowner with any opportunity to comment. This notification should occur earlier in the process, and in the case of the landowner, coordination should begin in the initial planning stages of the cleanup.
8. Appendix A II, D. Summary of remedial investigation/feasibility study results:  
**Add four subcategories:**
  1. **Nature and Extent of Contamination**
  2. **Baseline Human Risk Assessment**
  3. **Baseline Ecological Risk Assessment**
  4. **Feasibility Study**
9. Appendix A II Summary of Site Conditions F2 Strikeout/Add: "~~Derived concentration guideline levels~~" "**remediation goals**".
10. Appendix A VIII Site Summary A: Add: Achievement of ROD Remedial Action Goals (**Protectiveness and compliance with regulations**) and add two new categories:
  - H. **ATSDR "health effects" status**
  - I. **NRDA status**