



Cleanup Legal Issues

Army Environmental Cleanup Conference

U.S. Army Environmental Center
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Land Use Controls: Review & Challenges

LUCs – Policy Review

- Army ESOH endorsement of EPA-DOD Resolution of Principles for Specifying, Monitoring & Enforcing Land Use Controls for NPL sites (March 2004).
 - Focus on Applying “EPA-Navy LUC Principles” to both *Transferring Property* and *Active Installations*.
 - Assist installations on remedial documentation & implementation documents.
- Draft final Army LUC Guidance (January 2006)
 - LUCs integration into all cleanups (Non-NPL, RCRA corrective action, MMRP).
 - Army preference for long term maintenance and enforcement mechanisms. (e.g. Master Plan)
 - Sample ROD/ RD language for reference.

LUCs – Guideline

- Documentation of LUCs at non-NPL CERCLA sites:
 - An installation should use similar documentation at non-NPL sites, but State regulators should not be granted additional authority beyond that granted under CERCLA.
- Specifics on BRAC/Excess Property:
 - Transferee/lessees should have primary responsibility for LUC maintenance, monitoring, reporting and enforcement. The Army remains responsible for remedy integrity but should have a reduced role in long-term LUC oversight.
- LUC Documentation for RCRA Corrective Action Sites.
 - An installation should focus on inclusion of LUC implementation details in cleanup documents instead of the permit. Focus on implementation flexibility without need for permit modification.

LUCs – Challenges

- Long-term maintenance, monitoring & enforcement issues
 - Who’s responsible to whom? Transferee responsibility?
 - Regulator involvement – coordination, enforcement
 - Coordinate use of EPA ROD/RD checklist with AEC.
 - Effort underway for a joint EPA/DoD checklist.
- Installation Master Plans - *DRAFT AR 200-1*, All Program Areas: “Maintain an inventory of land use controls (LUCs) resulting from response decisions, and at active installations, integrate them into the installation master plan.” AR 210-20, May 2005.
- State Environmental Covenants – Use Restrictions recorded and enforceable by the state as a property interest.
- Uniform Environmental Covenant Act – legislative effort
- No DoD Authority to grant property interest on Active posts.
- Can grant state covenant upon transfer (GSA or BRAC)

NPL Site Closeout Guidance

- The DoD/ EPA Streamlining Task Force recently issued “*Joint Guidance on Streamlined Site Closeout and NPL Deletion Process for DoD Facilities*”.
- Criteria for Streamlined Remedial Action Completion Report (RACR).
- RACR is a primary document under FFA.
- No changes to model or current FFAs.
- RACR for OUs showing RAOs achieved [RC].
- Interim RACR for OUs with RIP/ OPS.
- Final RACR for last OU with summary of other RACRs.
- Notice of Intent to Delete [NOID] by EPA.
- No implementing Army Guidance is planned.
- Task Force is drafting model streamlined ROD.

Off-Site Remediation

What happens when it's not our property?

Coordination Information

- Contamination found off-post attributable to sites on-post.
- Determine contamination migration. Garrison commanders (GCs) must approve off-site data collection and any off-post monitoring to ensure that contamination has not migrated off-site.
- Notify AEC or BRAC including legal ASAP.
- Response actions may be conducted outside the installation boundary but additional oversight is necessary due to the lack of Army control over the property, potential legal liability and technical complexity, and the necessity for increased public involvement.
- Notify the DASA (ESOH) through AEC or BRAC prior to initiating any off-site response actions. Initiation is at investigation stage.
- Response plans need to be approved by AEC or BRAC.

Access & Liability Documents

- Adequate Off-Site access must be obtained consistent with level and length of the activity required.
- Simple, consensual right of entry agreements should always be sought first. Document all access agreements even if consensual.
- All agreements with financial commitments must be coordinated with AEC and legal office (AEC & COE).
- In coordination with AEC, contact the USACE FOA real estate office to obtain the rights of entry for any off-site response action.
- Court directed actions under CERCLA or condemnation proceedings must be coordinated with AEC and ELD prior to litigation.
- Claims for damages or injury resulting from off-site responses must also be coordinated with AEC and ELD.

BRAC/ Excess Sites Horizon Issue
CERCLA 120
Covenant “Come Back”
Response

CERCLA Covenant Response

- IAW CERCLA 120(h) property transferred by deed must include the CERCLA covenant “all additional remedial action found to be necessary after the date of transfer shall be conducted by the U.S.”
- Applies to residual hazardous substances on BRAC/Excess transferred properties. [Not FUDs]
 - Draft DoDI 4165.xx contains standardized covenant language.
 - DoD Policy on Responsibility for Additional Environmental Cleanup after Transfer of Real Property.
- Cause of Concern: Redevelopment of transferred sites
- When is additional remediation *by the Army* needed?
 - Discovery of unknown conditions
 - Remedy failure [if not caused by owner?]
 - NOT based on use inconsistent with LUCs/ use restriction imposed as part of remedy and transfer.

CERCLA Covenant Response

- Perform or Pay for the remediation? Access reserved but:
- Redevelopment schedule – business losses
- Developing policy: Enable Owners to remediate.
- Legislative and/or contractual options to implement:
 - Section 312 of FY 06 NDAA allows payment of *Certain Private Cleanup Costs in Connection with DERP* to owners of covenant property. Cooperative Agreements (10 USC 2701(d)). State/local entities may also use same authority.
 - PBC contingency plan also being considered.
 - Could transfer responsibility by deed but fiscal restriction on advance commitments to pay.
 - Perform or pay for remediation under same legal driver.
- Owner remediates first & then makes a claim?
 - 10 USC 2701(d) but more likely FTCA or CERCLA claim