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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: Policy on Land Use Controls Associated with Environmental Restoration Activities

1. PURPOSE AND SCOPE.

This policy provides DoD Components with environmental restoration and land use management responsibilities an overall DoD framework for implementing, documenting, and managing land use controls (LUCs) for real property being transferred out of Federal control and for active installations. The two attached documents amplify the policy in this memorandum:

- DoD Guidance on Land Use Controls Associated with Environmental Restoration Activities for Property Planned for Transfer Out of Federal Control.
- DoD Guidance on Land Use Controls Associated with Environmental Restoration Activities for Active Installations.

This policy and attached guidance documents were finalized after consideration of stakeholder and Component input on the interim policy and guidance dated August 31, 2000. This policy and guidance now supercede the interim policy and guidance. As described in the background section below, the DoD LUC framework exists within the context of environmental restoration and property disposal requirements. Thus, this policy focuses on the unique aspects of the framework dealing with management of LUCs and does not re-state existing DoD policy or legal requirements for the remedy selection or property disposal processes.

2. DEFINITION.

LUCs include any type of physical, legal, or administrative mechanism that restricts the use of, or limits access to, real property to prevent or reduce risks to human health and the environment. Physical mechanisms encompass a variety of engineered remedies to contain or reduce contamination and/or physical barriers to limit access to property, such as fences or signs. The legal mechanisms used for LUCs are generally the same as those used for institutional controls (ICs) as discussed in the National Contingency Plan (NCP). ICs are a subset of LUCs

and are primarily legal mechanisms imposed to ensure the continued effectiveness of land use restrictions imposed as part of a remedial decision. Legal mechanisms include restrictive covenants, negative easements, equitable servitudes, and deed notices . Administrative mechanisms include notices, adopted local land use plans and ordinances, construction permitting or other existing land use management systems that may be used to ensure compliance with use restrictions.

3. BACKGROUND.

DoD and EPA have issued guidance on how to incorporate future land use into the environmental restoration process (see DoD's July 25, 1997, policy memorandum, *Responsibility for Additional Environmental Cleanup after Transfer of Real Property* and EPA's May 25, 1995, directive, *Land Use in the CERCLA Remedy Selection Process).* Reasonably anticipated future land use assumptions are typically made before completing any Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) investigation and may be based on various factors, including statutory land use designations, contractual arrangements for property transfer, zoning, community reuse plans, and installation master plans. The application of reasonably anticipated future land use assumptions may result in a remedy decision and remedial action under the CERCLA that does not require a physical action to be taken. The decision and action may require restrictions on the use of the property, implemented by LUCs, to ensure that future activity remains consistent with the reasonably anticipated future land use.

LUCs may be needed when the environmental restoration decision requires controls on, or limits to, property use to prevent or limit exposure to hazardous substances, pollutants, or contaminants. A determination that a LUC is necessary or that a particular response action is not needed may be made by comparing sampling data with appropriate screening levels developed for various land use scenarios, or through a baseline risk assessment using exposure assumptions appropriate for the reasonably anticipated land use.

Restrictions or controls on land use, in some cases, may also be needed before making or implementing an environmental restoration decision. LUCs may be used while conducting environmental restoration investigations, or during implementation of cleanup activities. Reasons for using LUCs may include site security for property and equipment, safety concerns typical for a construction or industrial area, and concerns about health or potential exposure to possible contamination. LUCs used for a specified period of time or needed until completion of specific environmental restoration activities are often called cleanup LUCs or interim LUCs.

As land use planning and management are typically local functions, this policy and the attached guidance documents focus on how Components can internally implement and coordinate the management of LUCs through applicable land use planning tools to ensure the efficacy of the use restrictions. This policy and attached guidance documents do not alter existing DoD policy regarding environmental restoration decisions or address how LUCs should be selected. The policy and guidance assume that an appropriate environmental decision has been made in accordance with applicable legal requirements such as the CERCLA and the NCP. The policy and guidance do not reopen existing environmental restoration decisions, but

provides mechanisms for implementing, in the most effective way possible, those environmental restoration decisions that require LUCs.

4. POLICY.

The intent of this policy is to ensure land use activities in the future remain compatible with the land use restrictions imposed on the property during the environmental restoration process. The attached guidance documents provide detail on implementing the policy throughout the pre-transfer, transfer, and post-transfer stages of the property transfer process, or, for active installations, the installation land use management process. This policy and implementing guidance are effective August 31, 2000, the date of the interim policy. Neither the policy nor the guidance documents require or suggest that environmental restoration decisions that were concluded before the effective date of this policy be reopened. To the extent practicable, however, future implementation of LUCs based on previously concluded environmental restoration decisions should comply with the policy and attached guidance documents. This policy and guidance will be incorporated into the next revision of appropriate DoD directives, instructions, and other implementing documents. Components will plan, program, and budget for necessary funding in appropriate accounts to implement this policy and supporting guidance.

a. Requirements applying to both *Transferring Property* and *Active Installations*.

(1) Feasibility Studies. Feasibility Studies that consider a remedy requiring a land use restriction shall include the costs of implementing and maintaining the LUC, as well as an evaluation of an "unrestricted use" alternative. This will enable decision-makers to appropriately consider cost in the remedy selection process. Feasibility Studies started after October 31, 2000, shall conform to this requirement. Feasibility Studies already in progress on or before October 31, 2000, should attempt to conform to this requirement where practicable.

(2) Decision Documents.

- Environmental restoration decision documents (e.g., RODs) for remedies with LUCs shall describe the exposure scenario used to select the remedy, including the assumptions made concerning current and reasonably anticipated future land use(s), and specify the uses that may be made of the property or the activities to be prohibited.
- Decisions to take no further action shall be documented in a decision document. This decision document should set forth the rationale behind the finding and include the relevant exposure assumptions and documentation of the reasonably anticipated future land use. Any currently existing restrictions on land use that were part of the determination of reasonably anticipated future land use should also be described.

(3) LUC Implementation. Components shall put appropriate control mechanisms (discussed in the attached guidance documents) in place to manage LUCs and shall incorporate LUCs into the existing land use management processes of the locality (for property being transferred out of Federal control) or the installation (for DoD-controlled property).

- Components should use a layering strategy or a system of mutually reinforcing controls, as described in the attached guidance documents, to effectively implement LUCs.

- Components should describe the LUC strategy, delineating the responsibilities of all parties involved in implementing the LUCs. The level of detail should be commensurate with the size of the parcel and controls needed, and can be part of an existing land use management document or process. This strategy or plan is an internal management tool and does not impose any additional legal obligations.
- Components should not use Defense-State Memoranda of Agreement (DSMOA) as the mechanism for paying for monitoring, enforcing, or otherwise managing LUCs by state regulatory agencies.

*(4) **LUC Database**.* Components should maintain a central database of properties restricted by LUCs in order to manage their responsibilities. The database should include relevant information on the property, types of LUCs established, any DoD land use monitoring and management responsibilities, and the location of real estate records. For property that is to be transferred out of Federal control, Components should, to the extent feasible and relevant, make the germane property and LUC information available for inclusion in an appropriate existing state or local government database or LUC registry.

*(5) **LUC Modification/Termination**.* LUCs shall be modified or terminated through the same process used to establish the LUC, and if terminated, deleted from the mechanisms discussed in the attached guidance documents. Unless the situation otherwise requires an amendment to the decision document, modification or termination alone does not require amendment to the decision document. Upon termination of a LUC, Components shall undo the system of mutually reinforcing controls, if one was put in place, to avoid future confusion about the status of the property. If the decision document needs to be amended, Components should obtain the same level of applicable review from Federal, state, or local regulatory agencies as the original decision on establishing a use restriction.

*(6) **Memorandums of Agreement/Understanding (MOA/MOU)**.* As there is no legal requirement to establish a MOA/MOU for LUCs with regulatory agencies, these documents should be used only in exceptional cases to facilitate use of LUCs. The policy preference is to use existing processes and mechanisms in the development, implementation, and management of LUCs. If, however, a separate agreement with a regulatory agency is needed to facilitate the use of LUCs, such agreements shall be consistent with existing law and authority. These agreements should only address specific sites where LUCs will be employed and not the installation as a whole, and preferably should be drafted after proposal or selection of the remedy. Such agreements will not abrogate DoD's CERCLA authorities, must acknowledge DoD's lead agency status, and should explicitly acknowledge such authorities and rights. Mutually acceptable and reciprocal reservation of rights clauses should be used to avoid otherwise irreconcilable conflicts and stalemates in negotiations. Such separate agreements should be developed in consultation with other Components and the Office of the Secretary of Defense (OSD) and are subject to a 72-hour OSD and Component review requirement. Agreements following all relevant aspects of an accepted template (separately issued) are exempt from this review requirement, provided the Component has validated the consistency with the template; otherwise, all significant deviations from the template are subject to the 72-hour review requirement.

*(7) **Federal Agency-to-Agency Property Transfers***. For Federal agency-to-agency property transfers (including transfers between Components), the receiving agency generally will be responsible for the monitoring, enforcement, maintenance, and management of LUCs. In addition, the Component transferring the property should inform the receiving agency of the need to inform the local government about LUC matters that may affect adjacent non-Federal property.

b. Requirements applying only to *Transferring Property*.

*(1) **LUC Responsibility***. Many types of LUCs exist solely within the jurisdiction of local governments (e.g., zoning, planning, and construction permitting processes). Additionally, the property owner has the most direct control over LUCs on transferred property. Therefore, Components should consult and work collaboratively with the local government and the prospective property owner to take responsibility for the management and enforcement of LUCs.

Components should, to the extent consistent with applicable law and authority, comply with fee requirements established for the purpose of utilizing state and local mechanisms and tools of general applicability for monitoring, enforcing, or otherwise managing LUCs, provided these fees are imposed uniformly for all properties within the jurisdiction of the state or local government. If recurring fees for similar services are generally imposed by the state or local government on all properties within their jurisdiction, the recurring fees should be the responsibility of the current property owner of the transferred property. As an example, it may be appropriate for the Component to pay the initial fee required of all parties for registering LUCs on a state registry for property being transferred, with subsequent recurring fees being paid by the transferee or current owner.

*(2) **State Land Use Issues***.

- Components should use state LUC registries where available. If possible and appropriate, the property disposal agent should grant a property interest, consistent with applicable law, to the relevant state or local agency allowing the state or local agency to maintain and enforce the LUC.
- As most LUCs ultimately may be memorialized in the deed as restrictions (e.g., restrictive covenants, negative easements, equitable servitudes), it is essential that the property disposal agent consult state property law and state environmental law when drafting the restriction because state law may require the use of a particular type of instrument or operative language.

c. Requirement applying only to *Active Installations*.

*(1) **LUC Responsibility***. On active installations, Components have the authority over land use planning and can internally restrict and control use of such property.

*(2) **Land Use Compatibility***. Because the use of property subject to LUCs may change, it is important for the installation to ensure land use activities remain compatible with restrictions on land use. The installation shall institute a process to review and evaluate the effect on human health and the environment of any proposed land use changes for areas covered by LUCs.

d. Policy Supplementation and Conformity.

Components may supplement this policy and guidance based on their own specific needs and the land use management tools available at their installations, provided such supplements are determined at the Component Deputy Assistant Secretary level to be consistent with this policy and guidance. Any significant deviation requires prior coordination with the Office of the Deputy Under Secretary of Defense (Environmental Security) [ODUSD(ES)]. Any existing Component policy or guidance must be revised to be consistent with this policy and implementing guidance documents. Component-specific supplements must be provided to ODUSD(ES) upon issuance.

5. FOLLOW-UP AND POINT OF CONTACT

DoD is committed to working with all appropriate Federal, state, and local agencies and prospective property owners to ensure LUCs on property being transferred are effective and remain protective. The point of contact for this policy is Mr. Shah A. Choudhury at (703) 697-7475.

Sherri W. Goodman
Deputy Under Secretary of Defense
(Environmental Security)

Attachments:
as stated

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

Department of Defense Guidance on Land Use Controls Associated with Environmental Restoration Activities for Property Planned for Transfer Out of Federal Control

1. PURPOSE.

This document provides DoD Components with environmental restoration and land use management responsibilities guidance on developing, implementing, recording, and managing land use controls (LUCs) for property planned for transfer from Department of Defense (DoD) to non-Federal entities. This guidance is based on DoD *Policy on Land Use Controls Associated with Environmental Restoration Activities*. LUCs include any physical, legal, and/or administrative mechanism that restricts the use of, or limits access to, real property to prevent exposure to contaminants above permissible levels. LUCs are employed to protect the integrity of the engineering remedy (if present) and human health and the environment after transfer of property.

The objective when implementing LUCs is to develop a system of mutually reinforcing controls to ensure that land use is consistent with restrictions imposed on the property during the environmental restoration process. Implementing LUCs through established real estate and land use management mechanisms provides the best assurance that LUCs will be effective. Beyond establishing the appropriate implementation mechanisms before transfer, DoD may have only limited authority to control the use of property it no longer owns. Because state and local laws govern property transfer and land use, actions to implement and manage LUCs will be governed largely by state and local requirements.

This guidance provides a range of options that may be used separately or collectively for incorporating land use controls into existing land use management processes. It also discusses the roles of the DoD Component environmental office and property disposal agent in the implementation and management processes. The intent of this guidance is to provide an overall framework with a range of available options depending on site-specific circumstances.

2. APPLICABILITY AND SCOPE.

a. Transfers Out of Federal Control. This guidance applies to real property being transferred out of Federal control where a decision to restrict land use has been made as part of the environmental restoration process. Such property includes early transfers made pursuant to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 120(h)(3)(C) and property assigned to another Federal agency solely for the purpose of transfer to a non-Federal entity.

b. Leased Property. If Federal real property is put into reuse through a long-term lease before being transferred by deed, the framework described in this guidance is applicable for implementing LUCs. Those lease restrictions shall be reflected in the Finding of Suitability to

Lease and lease documents as further described in the May 18, 1996, *DoD Policy on the Environmental Review Process to Reach a Finding of Suitability to Lease (FOSL).*

c. Exclusions. This guidance does not apply to property that remains in Federal control, including active installations (see *DoD Guidance on Land Use Controls Associated with Environmental Restoration Activities for Active Installations*) and property transferred to another Federal agency for its programmatic use. This guidance does not apply to U.S. Army Civil Works property.

3. GUIDANCE. The guidance below outlines the process for implementing, documenting, and managing LUCs for property planned for transfer from DoD to non-Federal entities.

a. Pre-Transfer.

(1) Consideration of Land Use Controls. In the remedy selection process, uses other than residential or unrestricted use may be considered. For property being transferred, an important goal is to facilitate community redevelopment efforts; however, *this does not imply that reuse alone dictates the selection of the environmental restoration remedy*. This remedy must be selected in accordance with the remedy selection criteria established in the CERCLA and the National Contingency Plan (NCP) that include cost, implementability, and short and long-term effectiveness. For Base Realignment and Closure (BRAC) property, the Local Redevelopment Authority's (LRA's) redevelopment plan (specifically the land use plan) typically will be the basis for land use assumptions. If there is no such redevelopment plan, the supporting property disposal agent or real property management office will develop the reasonably anticipated land use. A tool for considering various land use and remedy options is the DoD *Guide to Assessing Reuse and Remedy Alternatives at Closing Military Installations* available on DoD's Environmental Cleanup Web Page at [*http://www.dtic.mil/envirodod/brac/*]. Development of the reasonably anticipated future land use assumption may entail evaluation of a range of likely land uses taking into account factors such as current land use, current zoning classification, property characteristics, and the land use in the surrounding area. The reasonably anticipated future land use assumptions allow the Component (in conjunction with regulatory agencies) to determine the appropriate remedy and whether LUCs are necessary.

Unlike other activities in the cleanup process, which are the sole responsibility of the environmental office, the development of LUCs is a team effort. Close and continual communication between the supporting environmental office and property disposal agent is essential during the development of LUCs and throughout the entire land use process. Once a decision is made that LUCs are needed, the supporting environmental office, in conjunction with the property disposal agent, determines what types of LUCs will be most effective to protect human health and the environment and to facilitate reuse. Typical LUCs include restrictions on residential use, excavation, and ground water use restrictions.

(2) Finding of Suitability to Transfer. After selecting an appropriate use restriction that results in a LUC, the environmental office shall provide sufficient information on the nature and intent of the restrictions to the property disposal agent to ensure that the restrictions are clearly

described in property conveyance documents. This information should include a specific description of the LUC; the rationale for the LUC; and the description and location of the affected property. The information should be contained in a Finding of Suitability to Transfer (FOST) or in a functionally equivalent document. The FOST, or equivalent document, functions primarily as a bridge between the environmental process (memorializing the environmental restoration decisions and actions taken) and the real estate process (describing land use planning and management decisions). The FOST should document the specifications of the LUC (e.g., no excavation, no groundwater use) that need to be included in the deed and implemented through land use management and control mechanisms described later in this document. The property disposal agent will develop the specific deed language.

*(3) **Implementation of Land Use Controls.*** Generally, the types of mechanisms that restrict land use are either governmental or proprietary. Governmental mechanisms are normally controlled and managed by the local government as delegated by the state. Such local police power authorities include land use planning, zoning, and site development/building permitting codes and ordinances. Proprietary controls are contractual mechanisms, usually established in a deed or contract for sale in the form of covenants, easements, or equitable servitudes; these mechanisms usually require a property owner to do or refrain from doing something and can be used to impose a duty on the landowner to comply with use restriction. Another form of a proprietary mechanism is a deed notice that can be used to provide information on use restrictions on the property. A particular property may require different types of mechanisms for a specific use restriction. Because many of these mechanisms exist solely within the authority of the state or local government or apply to the actions of the property owner, the property disposal agent should work closely with the appropriate local or state agencies and potential transferee early in the disposal process.

(a) State Requirements. LUCs shall comply with state LUC management provisions, consistent with Federal law and DoD environmental policy. The Component environmental office or the property disposal agent, as appropriate, should request information from the appropriate state agency on mechanisms used to track and enforce LUCs. If possible and appropriate, the Component or property disposal agent should grant a property interest, consistent with applicable law, to the relevant state or local agency having authority to hold such an interest that would allow the state or local agency to maintain and enforce the LUC. This will help ensure that real estate rights for the state in which the property is located are enforceable.

(b) Layering Strategy. The most effective method of implementing LUCs is through a layering strategy or system of mutually reinforcing LUCs. When deciding what land management controls may help to reinforce a restriction, the Component shall investigate mechanisms available in the local area, such as the zoning code or a state land use control registry. State and local government land use management mechanisms and tools with general applicability to all property within their jurisdiction have the potential to become a LUC. For example, fully implementing a prohibition on groundwater use may entail a deed restriction, a zoning ordinance, a local ordinance restricting use of groundwater, limitations on well drilling permits, and notice to the local community to ensure that a restriction

remains protective and prevents inappropriate uses of the property. Using available state and local real estate mechanisms ensures incorporation of LUCs into the local land use and regulatory processes and continued maintenance of the controls. Other state and local mechanisms already in place in the community (e.g., some communities have a "one-call" system for remediated properties similar to systems in use for obtaining information on buried utility lines) should also be considered. For further information on tailoring layering mechanisms, see DoD's Environmental Cleanup Web Page at [*http://www.dtic.mil/envirodod/brac/*].

(c) Describing the Land Use Control Strategy. To clearly delineate the responsibilities of all parties involved in implementing the LUCs, Components shall develop a LUC implementation plan, which should specify the physical, administrative, and legal mechanisms to be used to ensure the restricted use of, or access to, the specific property parcel. It should also identify the specific duties for those having LUC implementation responsibilities. This plan is an internal management tool and does not impose any additional legal obligations. The Component's plan will reflect the intent of all parties at the time the LUCs are developed and implemented. The level of detail in the plan shall be commensurate with the size of the site, the type of controls needed, and other relevant factors. The plan may be a separate document or part of the property disposal plan. Finalization and implementation of the plan identifying the LUC strategy should occur only after concluding all discussions and coordination with the transferee and local entities. During the five-year review process (discussed later in this document), validation of this plan ensures that LUC mechanisms are still in place. The plan shall also specify the process for discontinuing the land use controls and layering mechanisms if some or all of the LUCs become unnecessary.

(d) Roles of Other Parties. Other parties critical to the LUC process include the transferee, environmental regulators, and relevant state and local agencies. The appropriate DoD Component office should identify and establish contact with the transferee and these state and local agencies, which may include local planning and public works agencies, planning and zoning commissions; licensing, permitting, and inspection agencies; tax assessors; and state and Federal environmental regulators. Depending on the function of the state or local agency (i.e., primarily environmental or land use management), the appropriate Component office (environmental or property disposal) should coordinate that part of the layering strategy. Once the parties involved in the layering strategy have been identified and after individual discussions have been conducted, both the environmental office and property disposal agent should meet with the parties to discuss the Component's proposed LUC strategy and coordinate a final strategy amenable to all parties.

b. At Transfer.

(1) Deed Restrictions/Transfer Agreements. In accordance with the DoD July 25, 1997, policy memorandum, *Responsibility for Additional Environmental Cleanup after Transfer of Property,* the property disposal agent shall ensure the LUCs, along with provision for future DoD access to the property, are incorporated into the property transfer documents. The property disposal agent, in consultation with the environmental office and input from the transferee, will draft the

necessary language for the LUCs, as most LUCs ultimately will be memorialized in the deed as restrictions (e.g., restrictive covenants, negative easements, equitable servitudes). At a minimum, the property disposal agent should verify with the environmental office that the LUC, as drafted, addresses the particular environmental restoration concerns at the site. In drafting the restriction, the property disposal agent should consult both state property and environmental law because it may require the use of a particular type of instrument or operative language. For example, Connecticut environmental law provides a form for drafting the deed restriction and model language that must be used to create an environmental use restriction.

In addition to the specific language describing the restriction, the transfer documents (such as the contract for sale) shall reference the environmental documents containing the restriction rationale. At a minimum, these documents should reference the FOST (if BRAC property) or other functionally similar document, the decision document (such as the ROD), and other appropriate environmental documents (e.g., the Environmental Baseline Survey). The transfer documents should also include a reference to the location of the CERCLA Administrative Record. The transfer documents should contain, as appropriate, additional reference information, such as the exposure assumptions used to make the environmental restoration decision or remedy selection. Typically, this type of information is included in the FOST or the Environmental Baseline Survey (EBS) for the transfer. Federal contact information (e.g., a specific agency office address and telephone number) should be included in the transfer documents in case a problem arises with a LUC, additional contamination is found, or the transferee wishes to modify or terminate a LUC.

In addition, the deed should specifically state the restricted uses of the property beyond the basic categories of residential, commercial, recreational, or industrial. For instance:

> "industrial uses permitted include office space and light industrial, but exclude residential housing, playgrounds, nurseries, child-care facilities, and elder-care facilities" or
>
> "the Grantee covenants and agrees that it shall not consume or otherwise use the groundwater underlying the property."

In developing deed restrictions, the property disposal agent should distinguish the property being restricted from the sections of the property being transferred for unrestricted use. This ensures the identity of the specific parcel with use restrictions is not lost over time and will help ensure deed restrictions survive subsequent property transfers. Suggested ways to describe the restricted portions of property include referencing metes and bounds and/or landmarks. The identification of specific parcels with LUCs in the purchase agreement and deed will also prevent undue loss of value for the entire property and will not burden parcels not requiring LUCs.

Because the property disposal agent drafts the purchase agreement, it should negotiate the responsibilities of the transferee for maintaining LUCs. These responsibilities include, at a minimum, compliance with LUCs, but should also include notifying DoD and other identified stakeholders if a violation of the LUCs occurs. The responsibilities should be memorialized in

the purchase agreement and deed. These documents should also state that the transferee's protections under CERCLA section 120(h)(3) and section 330 of Public Law 102-484 are tied to these responsibilities to maintain LUCs.

Because some states have statutory limits on the length of time that a covenant or easement can be in effect (e.g., Rhode Island), renewal of such LUCs may be necessary. In negotiating the purchase agreement, the property disposal agent should reach agreement with the transferee on how the restriction is to be renewed. The property disposal agent should memorialize the agreement reached in the deed to provide notice to future purchasers.

*(2) **Recordation of Land Use Controls***. The property disposal agent shall comply with the applicable requirements of state real estate and environmental law governing the implementation of land use restrictions. These requirements may include registering the use control with the state environmental regulatory agency or local land use agency, or using state model language in drafting the use control. The transferee will be responsible for recording the land use restriction. Recordation of the land use restriction must comply with the requirements of state property law for recording deeds, plus any local requirements, as long as they are not inconsistent with Federal law.

At transfer, the property disposal agent should ensure that copies of the deed are provided to appropriate local government offices such as the local planning and public works agencies; planning and zoning commissions; licensing, permitting, and inspection agencies; and tax assessors. This provides an additional source of notice about restrictions. The local agencies may record the restriction on their geographic information system (GIS) or tax maps or in the subdivision records to formally incorporate the LUC into their existing local development review and permitting processes.

c. <u>Post-Transfer</u>. This section discusses the actions necessary on the part of the Component and others (e.g., transferee, state and local governments) to ensure LUCs are effectively maintained and, when necessary, modified or terminated.

(1) Land Use Management Tools. A number of options, used separately or collectively, can ensure the management and maintenance of land use controls over time and proper incorporation into local land use ordinances and management systems. The options presented below provide Components with the flexibility to use the tool or tools appropriate to a specific property.

(a) <u>State Land Use Control Management Systems</u>. A growing trend in state environmental law is state requirements for managing LUCs that arise because of environmental factors. These requirements mandate methods of developing LUCs and documenting them in state developed registries. Such laws may also require involvement of state regulators to modify and/or enforce LUCs. State environmental laws may resolve state property law issues surrounding enforcement of LUCs by allowing LUCs to be enforced by third parties, including state and local agencies. Where such generally applicable mechanisms exist for managing LUCs, DoD and the transferee will comply with such requirements absent a

conflict with Federal law. The options below generally provide the same recommendations for LUC management as state laws discussed in this paragraph.

(b) Notice. Notifying affected entities of the existence of LUCs is an effective method to prevent inappropriate use of transferred property. Components should not rely solely on recorded real estate records to provide constructive notices on LUCs. The transferee, the Component, or relevant state or local agencies can provide the notices. A one-time written notice should be sent when the LUC is first implemented and annual reminder notices can be generated. The responsibility for and frequency of the notice will depend on the agreement reached between the property disposal agent and the transferee. The property disposal agent should negotiate notice requirements with the future transferee with input, as appropriate, from environmental regulatory and local government agencies. The written notification should be provided through a variety of mechanisms, including public notice or letter.

(c) Self Certification. Another type of notice mechanism is self-certification, in which the responsibility for confirming that LUCs remain protective is placed on the transferee (and all subsequent transferees) of the property. For example, on a regular basis, the transferee certifies the land is still being used for the intended purpose, such as industrial or agricultural use. Self-certification can provide a cost-effective means of gaining knowledge on the property use from the person closest to the property. This responsibility should be reflected in the transfer documents. The parties should also determine which agencies (e.g., state or local agency, or Component property disposal agent) will receive the self-certification. Components should negotiate with the transferee to certify to more than one agency (e.g., environmental regulators, local government officials) as part of the layering strategy. Components should use this mechanism with caution and only in conjunction with a provision for spot-checking self-certification reports, because this mechanism relies on the veracity of the transferee's reporting.

(d) Markings. Where possible, if the area of the property being restricted is sufficiently small, permanent markers may be used to identify restricted use areas. Plaques at the site also may be used to indicate prohibited activities.

(e) Five-Year Reviews and Long Term Monitoring (LTM). Where performed as part of the environmental restoration process and as required by the CERCLA, five-year reviews and long-term monitoring of environmental restoration sites may provide convenient opportunities for the Component to concurrently review LUCs. At that time, the integrity of the LUCs or layering mechanism can also be checked (e.g., are zoning and land use still consistent with the use restrictions, are required markers/fences still in place?).

(f) Remedial Action Operation. Reviews of on-going remedies during the remedial action operation phase provide opportunities for concurrent review of LUCs. For example, when inspecting a pump-and-treat system, a visual inspection can be made to see that no private well digging has occurred and no irrigation equipment is in evidence.

*(2) **Preventing Land Use Control Violations**.* DoD expects the transferee and subsequent owners to abide by the LUCs included in the transfer documents. State or local development and approval processes, such as zoning, subdivision and site plan approval, site development and building permitting, should be used to enforce and manage LUCs. This is necessary because the Component may not be able to enforce LUCs established through the regulatory authority of a state or local government. Because DoD will no longer have ownership of the property, the Component should work with the relevant local government agencies and the potential transferee to ensure their enforcement of LUCs after the transfer of property. Those entities are in the best position to first become aware of any LUC violation and take action to enforce the use restrictions. Local government has a responsibility to protect public health and general welfare through land development review, approval, and permitting processes. In many of these states with established the LUC management systems, as mentioned above (paragraph 3.c.(1)*(a)*), the state provides LUC enforcement.

*(3) **Modification/Termination of Land Use Controls.*** Modification or termination of LUCs may become necessary. This shall be done in accordance with the July 25, 1997, DoD policy memorandum, *Responsibility for Additional Environmental Cleanup After Transfer,* the CERCLA, and state law. DoD will participate in the termination or modification of LUCs in two scenarios: (1) if a remedy meets its cleanup goals, the Component will modify or terminate the deed restriction and revise the deed as appropriate; and (2) if a transferee, with the Component's prior approval, has cleaned the property to a stricter cleanup standard, the transferee may request modification or termination of the LUC by the Component. If appropriate, for amendments to decision document, Components should obtain the same level of applicable review from Federal, state, or local regulatory agencies as the original decision on establishing a use restriction. The two scenarios are described below:

<u>*Scenario #1.*</u> Once the Component determines a remedy has attained its cleanup goals, the Component, if warranted, should act to modify or terminate the restriction on the property. This benefits the transferee by making the title more marketable, but also benefits DoD by terminating remaining LUC requirements and associated costs for the property. The Component should seek appropriate involvement from the relevant environmental regulators confirming attainment of the remedial objectives and should then revise the deed restriction accordingly.

<u>*Scenario #2*</u>. If a transferee desires to clean up property to a higher standard that allows more uses of the property, the transferee must pay for any needed additional studies or environmental restoration actions. The Component shall also require the transferee to post a surety bond or some other form of financial assurance to ensure the additional cleanup will be completed once undertaken by the transferee without the Component needing to pay for it. After reaching the appropriate cleanup level, the transferee (at its expense) would seek the necessary involvement from the appropriate environmental regulators confirming the attainment of the cleanup objectives. Upon providing the property disposal agent with proof of this regulator's concurrence, the transferee would prepare a quitclaim deed for the property disposal agent's signature, which would relinquish the LUC (i.e., the deed restriction).

Upon termination of a LUC, it is important to undo the system of mutually reinforcing controls, if one was put in place, to avoid future confusion about the status of the property. This will usually require the property disposal agent to provide a one-time notice and direction to all entities involved in the layering scheme, including recording a release in the appropriate land records offices for a restriction in the original deed.

d. Records Management. Establishing LUCs is a team effort between the environmental office and property disposal agent. Tracing the history of LUCs, if questions arise, requires reference to a combination of environmental and real estate records. The property disposal agent should maintain a central database of properties with LUCs (transferred or leased property). This database should include relevant information on the property, types of LUCs established, land use monitoring and management responsibilities, and the location of real estate records. While this database is intended for internal Component use in managing their responsibilities, Components should, to the extent feasible and relevant, make the germane property and LUC information available for inclusion in an appropriate existing state or local government database or LUC registry.

To address any future concerns about a property, the Component should retain the following types of real estate related records:

- Finding of Suitability for Transfer
- Environmental Baseline Study (the applicable portion is generally included in the FOST)
- Purchase Agreement
- Deed
- Cooperative Agreement, or similar documents that specify LUC management responsibilities.

The environmental restoration information that may be required will be contained in the Administrative Record required by the CERCLA. However, Component environmental offices should modify their database of environmental restoration sites to track any continuing environmental restoration responsibilities (e.g., five-year reviews and long term monitoring) and relevant information such as the cleanup level and risk assumption scenario (e.g., industrial, commercial, recreational).

Department of Defense Guidance on Land Use Controls Associated with Environmental Restoration Activities for Active Installations

1. PURPOSE.

This document provides DoD Components with environmental restoration and land use management responsibilities guidance on the use of available installation land use planning and management tools for implementing, documenting, and managing land use controls (LUCs) for real property at active installations. This guidance is based on Department of Defense (DoD) *Policy on Land Use Controls Associated with Environmental Restoration Activities*. LUCs include any physical, legal, or administrative mechanism that places restrictions on the use of, or limits access to, real property to prevent exposure to contaminants above permissible levels. The intent of using these controls is to protect the integrity of the engineering remedy (if present) and human health and the environment by limiting the activities that may occur at a particular site.

Components control land use at active installations and can internally restrict the use of such property. Consequently, this guidance provides different mechanisms to implement and manage LUCs than those used for property being transferred out of Federal control. For example, this guidance does not provide for the use of deed restrictions to restrict property because deed restrictions cannot be created without a conveyance and property is not being transferred at active installations. Furthermore, Federal real property policy generally does not permit creation of deed restrictions by a land holding agency, such as a DoD Component. As a practical matter, even if deed restrictions could be placed on active installation property, deed restrictions would not be effective for notifying installation personnel of the existence of land use controls because deed restrictions are recorded in the local land records office and title searches are typically not performed when making land use decisions at active installations. Therefore, for Federal land remaining under Federal ownership and control, alternative methods for institutionalizing LUCs are required.

The intent of this guidance is to provide for the protection of human health and the environment by ensuring the compatibility of land use at active installations with any restrictions imposed on the property during the environmental restoration process. This guidance permits flexibility in tailoring and using specific tools and processes at the installation-level, rather than dictating a specific set of measures for use.

2. APPLICABILITY AND SCOPE.

a. Active Installations. This guidance applies to real property at active installations in the United States and U.S. territories. The guidance applies whenever a decision to restrict land is made as part of the environmental restoration process.

b. Leased Property. This guidance also applies to installation property leased to third parties. (In such a situation, in addition to the process outlined below, the Component should inform the

lessee of the existence of the LUCs and make the lessee's compliance with the LUCs a binding condition of the lease.)

c. Exclusions.

(1) Civil Works Property. This guidance does not apply to U.S. Army Civil Works properties.

(2) Federal Agency-to-Agency Transfers. For Federal agency-to-agency transfers (including transfers between Components), the receiving agency will generally be responsible for the monitoring, enforcement, maintenance, and management of LUCs. Components transferring the property need to consider the long-term fiscal and legal consequences of retaining any LUC or property management responsibility in choosing to retain specific responsibilities. While this guidance does not apply to property upon transfer to a non-DoD agency, the Component transferring the property should inform the receiving agency of LUCs on the property, and the need to inform the local government about LUC matters that may affect adjacent non Federal property.

(3) Transferring Property. For guidance on implementing land use controls for surplus property being transferring out of Federal control, refer to *DoD Guidance on Land Use Controls Associated with Environmental Restoration Activities for Property Planned for Transfer Out of Federal Control.*

3. GUIDANCE. The guidance below outlines the process for implementing, documenting, managing, and terminating LUCs at active installations.

a. Implementing Land Use Controls. Once a decision has been made in consultation with the supporting land use planning/management office to place limitations on the use of DoD real property due to environmental restoration concerns, the installation shall develop an implementation plan for LUCs. The implementation plan is an internal management tool that explains how LUCs will be established and documented. It also defines who will be responsible for maintaining and managing them. The implementation plan should be incorporated into the Installation Master Plan or its equivalent. At a minimum, the implementation plan shall describe the location of the land subject to the LUC; explain the LUC (e.g., restrictions on excavation, use of groundwater) and generally allowed uses (e.g., equipment storage, recreation); and specify the duration of the LUC. The plan shall also provide for modifications to the LUC as site conditions change (e.g., if the remedial action improves the groundwater quality). The plan should specify the frequency and requirements of LUC inspections and indicate whether any of these inspections are part of the inspection process for other environmental programs (e.g., internal or external environmental audits).

Implementation of LUCs also involves coordination among the installation personnel responsible for maintaining certain resources. The office that drafts the land use control implementation plan should coordinate with the other affected entities. For example, if the LUCs involve a prohibition on the use of groundwater, then the office that manages groundwater

resources should be informed of the LUC; or if the LUCs include a restriction on soil use in a particular area on the installation, construction and maintenance personnel should be informed.

b. Documenting Land Use Controls. Whenever a decision has been made to restrict land use at active installations, the decision document, such as a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Record of Decision (ROD) or Action Memorandum, should generally explain the restricted uses of the property.

Because LUCs on active installations are not recorded in deeds, Components must use their own systems and processes for recording LUCs. The installation shall incorporate LUCs into the existing land use planning and management systems routinely used at the installation for planning and construction decisions. A combination of common mechanisms, discussed below, and other available tools should be used to effectively track and manage LUCs at the installation.

(1) Geographic Information Systems (GIS)/Overlay Maps. Computerized maps can depict an installation's historic structures, wetlands, utility systems, and other information as layers for purposes of visual display and analysis. LUCs should be appropriately incorporated into these systems.

(2) Installation Master Plan. The Installation Master Plan (sometimes called the Base Comprehensive Plan or General Plan) is used for land use and construction project planning. The installation should incorporate LUCs into appropriate sections of the Master Plan to allow for routine consideration of LUCs in making land use and planning decisions. If the Master Plan is GIS-based, a separate layer should be specifically created for LUC information. In addition, the LUC should be recorded on any installation plat.

(3) Installation Offices. LUCs should also be filed with the installation offices that are responsible for managing the buildings and grounds, utility systems, and construction. The installation contract and real estate/real property offices should also have LUCs on file so that contracts and outgrants can reflect LUCs as appropriate.

c. Maintaining Land Use Controls. The effectiveness of LUCs may depend on routine maintenance activities, such as mowing the grass to keep site markers visible and maintaining fences around controlled access areas. It is also dependent on incorporating the maintenance of the LUC into the existing processes of the installation. Some LUCs may be short-term and last only as long as an ongoing environmental restoration system is in place; other LUCs may need to remain in place for a longer period. To ensure that LUCs remain effective and to provide flexibility, this section provides a range of options to use separately or collectively, depending on the type of LUCs, site conditions, and installation processes available.

(1) Site Approval Process. The site approval process is the process for reviewing and approving excavation and construction projects, as well as other land use changes at the installation. To ensure the integrity of the controls and to prevent violations, consideration of LUCs should be incorporated into this process. This could involve reviewing the GIS layer that depicts the LUCs as part of a site/construction approval process.

*(2) **Markers**.* Installations may identify areas of restricted use by placing permanent markers around the perimeter of the restricted area. The offices (and/or contractor personnel) responsible for grounds maintenance, construction, and safety should be notified of the existence of these markers, instructed as to their purpose, and directed to inform appropriate officials if the markers are displaced or unauthorized use occurs.

*(3) **Inspections**.* The inspection of LUCs should become part of existing inspections conducted at the installation. Depending on the type of LUCs, these inspections could include a visual check to ensure that proper maintenance of LUCs is taking place.

*(4) **Environmental Self-Audit**.* Evaluating and verifying LUCs should be part of the Component's environmental audit and self-inspection program, and should be incorporated into the self-audit checklist and required report.

*(5) **Training**.* Installations should provide training to personnel, such as grounds, maintenance, real estate/real property, and contractor personnel, regarding the physical location of LUCs and how to care for property subject to LUCs. These personnel should also be informed of allowed and restricted activities.

*(6) **Internal Notice**.* The relevant office (e.g., Planning, Facilities, Engineering) should periodically send out a notice to other affected offices to serve as a reminder of the existence of LUCs.

*(7) **Five-Year Reviews and Remedial Actions**.* Where performed as part of the environmental restoration process and as required by the CERCLA, five-year reviews and long-term monitoring of environmental restoration sites conducted to assess remedy effectiveness may provide a convenient opportunity for the installation to concurrently review LUCs.

In addition, the installation should inspect LUCs as part of a review of ongoing CERCLA remedial actions. For example, when inspecting a pump-and-treat system, checks can be made to see that that no well digging and/or irrigation equipment is present.

d. <u>Addressing Land Use Control Non-Compliance</u>. If, during an installation inspection or through some other process, it becomes apparent that a LUC is being violated, appropriate installation officials should be notified immediately. These officials should take steps to ensure the integrity of the LUC is restored, including any required notifications and corrective actions. In addition, it may be useful to coordinate responsibility for LUC management with installation occupational safety and public safety offices to include LUCs in their regular inspections of, and patrols on, the installation property and activities.

e. <u>Land Use Compatibility</u>. At active installations, use of an area containing LUCs may change. The installation must ensure land use remains compatible with the LUC. The installation should institute a process to review and evaluate the effect on human health and the

environment of any proposed land use changes. This process, conducted in consultation with the appropriate environmental restoration office, should seek to answer the following questions:

- Is the proposed land use inconsistent with the exposure scenario outlined in the risk assessment?
- Will the land use change adversely affect the effectiveness of the selected site remedy?
- Will the need for any additional remedial actions arise as a result of the implementation of the land use change?

If the answer to any of the above questions is yes, the appropriate process required by environmental regulations and guidance to revise the site remedy, which may require consultation with environmental regulatory agencies, must be followed. This includes reassessing the decision document to determine if an amendment is required for the proposed land use change.

f. Modifying/Terminating Land Use Controls. When the remedy meets the cleanup goals, the installation may need to modify or terminate the LUCs. If, upon meeting the cleanup goal, land use may be unrestricted, the LUC shall be terminated. If some LUCs no longer apply and some are still required, the LUC implementation plan shall be modified to reflect what restrictions still apply.

LUCs at active installations should be modified or terminated through the same process used to establish the LUC, and if terminated, deleted from the documentation mechanisms discussed in this guidance. Installation personnel should refer to the land use control implementation plan, which identifies where LUCs are documented. Additionally, decision documents should be assessed to determine if amendments to decision documents are required by modification/termination of LUCs. Regulatory agencies generally need to be involved in amending the environmental restoration decision document to the same extent as they were in the original decision document.

g. Records Management. LUCs are established and implemented through environmental and land use management processes; consequently, tracing the origin of LUCs requires a combination of these records. LUC records need to be retained by the installation so it will have sufficient information to determine if land use changes can be made in the future. The LUC implementation plan (discussed above) should reference the location of the pertinent LUC records including, but not limited to, the Record of Decision, Feasibility Study, Installation Master Plan, or any of the other systems used to record LUCs.

The environmental restoration information that may be required will be contained in the Administrative Record required by the CERCLA. However, Component environmental offices should modify their database of environmental restoration sites to track any continuing environmental restoration responsibilities (e.g., five-year reviews and long term monitoring) and relevant information such as the cleanup level and risk assumption scenario (e.g., industrial, commercial, recreational).