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U S NAVY COMMENTS ON DRAFT RESOURCE CONSERVATION AND RECOVERY ACT  
PART B PERMIT MODIFICATION CNC CHARLESTON SC  
2/2/2002  
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL



DEPARTMENT OF THE NAVY

SOUTHERN DIVISION  
NAVAL FACILITIES ENGINEERING COMMAND  
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Code ES3TH  
2 February 2002  
5090/11

Mr. John Litton, P.E.  
Director, Division of Hazardous and Infectious Waste Management  
S. C. Department of Health and Environmental Control  
2600 Bull Street,  
Columbia, SC, 29201

Subj: DRAFT RCRA PERMIT MODIFICATION

Dear Mr. Litton:

The purpose of this letter is to submit the comments on the Draft RCRA Part B permit modification that was noticed for public review on December 21, 2001. The permit modification contains two sections; (1) the Statement of Basis for twenty five (25) sites recommended for No Further Action and; (2) the proposed addition of the Land Use Control Management Plan (LUCMP), to be incorporated as Appendix F to the permit. The Navy has no concerns with the Statement of Basis and concurs on the findings and recommendations. The Navy does have issues that need to be addressed with respect to the LUCMP. The comments attached to this letter reflect the concerns of the Navy and the Navy's remediation contractor regarding the inclusion of this section.

The Navy requests the opportunity to meet with the Department after having reviewed these comments and prior to the Department's issuance of a Responsiveness Summary. The intent of the meeting would be to seek resolution of the Navy's concerns while satisfying the Department's needs in LUC tracking and enforcement. If you have any questions, please contact myself or Amy Daniel at (843) 820-5525 or (843) 743-9985 respectively.

Sincerely,

A handwritten signature in black ink that reads "M. A. Hunt".

M.A.HUNT, P.E.  
Environmental Engineer  
BRAC Division

Encl: Comments on RCRA Part B Permit Modification  
Copy to w/enclosure:  
SCDHEC (David Scaturro, Keith Collinsworth)  
CH2M Hill (Gary Foster)  
EPA Region IV (Dann Spariosu)  
CSO (Amy Daniell)

Comments on the RCRA Part B Permit Modification  
M.A.Hunt, P.E  
BRAC Environmental Coordinator  
Southern Division, NAVFAC  
2 February, 2002

#### Background

These comments are based on review of the DRAFT RCRA Part B Permit Modification that was public noticed by South Carolina Department of Health and Environmental Control (SCDHEC) on 21 December, 2001 and which runs through 18 February, 2002. The comments are submitted for consideration from the Navy as the permittee and have been compiled by the author from comments received from reviewers both within the Navy and under Navy contract. The permit modification contains two sections; (1) the Statement of Basis for twenty five (25) sites recommended for No Further Action and; (2) the proposed addition of the Land Use Control Management Plan (LUCMP), to be incorporated as Appendix F to the permit. The Navy has no concerns with the Statement of Basis and concurs with the findings and recommendations as stated. The Navy does have concerns with the inclusion of the LUCMP as Appendix F in the permit, these concerns are stated in the following paragraphs.

#### General

In general the Navy questions the legality, appropriateness and timing of the requirement to incorporate the LUCMP as Appendix F into the permit. In regards to the legality, the inclusion of Appendix F and the revised language in Module II.I.5 (i) of the permit modification expose the Navy and other regulated entities to additional liability in interpretation of what constitutes land use changes, undefined terms such as deficiencies and impractical notification or oversight requirements. The Navy is unaware of any public meetings that were held to announce these changes and which would have provided notice of the Department's intent to revise the permit terms and conditions. These meetings provide an opportunity for both the public and the regulated community to comment and for the Department to understand the implication and impacts of the policy it implements. Assuming that the Department's intent is to include Appendix F in the permit of every RCRA permitted facility in the State, it may be constructive to conduct such a public meeting to solicit input from other regulated entities.

There is also a question of appropriateness if the Department's intention is to require the LUCMP to extend to LUC oversight even after property transfer. The Navy does not believe we are alone in our concern that the use of a RCRA Permit to regulate land use through a permit condition enforced upon a permittee that no longer has control of the property is highly irregular. There are other means through deed restrictions, zoning and Brownfields legislation that would allow the Department to obtain the property interests to enforce Land use restrictions within established authorities.

There are no sites requiring any land use restrictions in this permit modification. For the property where land use restrictions will be needed the Navy will continue to be the owner until a remedy is in place and an operating properly and successfully (OPS) determination is made. In most cases this is anticipated to be a short timeframe (i.e. land use restrictions requiring only the preparation of deeds and recording). Relatively few sites may take a year or more to reach this

determination. The Navy intends to submit the requisite environmental documentation required by CERFA and proceed with property transfer as soon as the Statement of Basis is approved. Given only a period of several months between SOB approval and transfer it would seem that there would be less urgency in implementation of this requirement.

If it is determined that Appendix F is required and will be incorporated into the permit, different reporting durations may need to be considered and/or different responsibilities may be appropriate given the nature of the land use control and the degree of risk that is involved if that control is violated. It is also important to make a distinction that the LUCMP is intended to apply only to LUC oversight and not to the implementation or operation and maintenance of remediation systems.

Specific (See also the italicized comments in the text of Appendix F at the end of this section)

#### 1. Definitions

The definition of LUCs contained in the Appendix F does not differentiate between use only (i.e. industrial versus residential) and engineering controls or access restrictions. These are likely to have distinctly different concerns and reporting requirements.

#### 2. Purpose

##### a.) LUC Inspection – Review – Certification.

This section requires quarterly inspections and notification to the Department on SWMU/AOC that have land use controls as part of the final remedy. The nature of these inspections should be further defined. To accomplish the required advanced notification (30 days), inspection and notification of deficiencies (need to define deficiencies) on a quarterly basis will likely require significant resources just for administrative functions. This is again assuming that this applies to LUC oversight alone. This frequency of inspection will not likely reduce the chance of inadvertent exposure to site contaminants or the increased risk as a result. A more suitable frequency may be annual reporting supplemented by the five year reviews required by CERCLA.

##### b.) Section II. Change in Land Use.

The Navy agrees that changes in land use which may change the exposure assumptions used in developing the human health and ecological risk assessments should require the reevaluation of the land use controls implemented. These may include changes that would disrupt the effectiveness of the land use control or that may negate the need for the controls. Depending on how this is interpreted though, any intrusive work (i.e. utility work) could constitute a land use change which would then require a permit modification. This would be overly burdensome for any development of the property. Consideration should be given to stating that changes that permanently affect the effectiveness of the land use control require permit modification. Work that is done with the properly trained personnel and with the proper protective equipment should be allowed to occur if the site is restored once the work is complete. The landowner should be responsible for reporting whether a permanent change has occurred and providing this determination during annual reporting to the Department.

##### c.) Section III. Request for permit modification for land use change.

This section further places the burden upon the Navy for land use changes that occur based on the definition of land use change. The Navy and the Department should agree to specific circumstances which constitute a land use change and would therefore trigger the notification, review and permit modifications required by this section. As an example, would a release by a subsequent land owner require the Navy to request a permit modification.

d.) Section IV. Funding Commitment or Financial Assurance  
The second paragraph does not apply to Federal Facilities.

e.) Section V. Request for permit modification for property conveyance.  
The notification of pending property transfer is only possible as long as the Navy is the property owner although the duration of advance notice should be negotiable. It would be unreasonable for the Navy to be responsible for monitoring all subsequent real estate transactions and in particular if the LUCs involve only industrial use restrictions. Subsequent developers must often react according to existing market conditions which would certainly change in the period that such a notification would occur. Such restrictions would likely unnecessarily burden the Navy and the Department in being involved in real estate transactions and may reduce the marketability of the property for the Redevelopment Authority. Unless the Department intends to scrutinize subsequent landowners and approve or disapprove property conveyance it would seem reasonable that this reporting occurs subsequent to and not before property conveyance.

f.) Section VI. Implementation of Land Use Controls  
The requirement to include in the CMI Workplan a surveyed plat certified by a professional land surveyor for every SWMU and AOC identified in Appendix A-8 may not be appropriate for sites within the footprint of the former Charleston Naval Shipyard and the Old Landfill (SMWU 9). Given the density of sites and widespread contaminants, such as PAHs and Arsenic in soil, this entire area will require an industrial use restriction. In this case it would be preferable to provide a survey of the entire shipyard and a separate figure to identify the SWMU or AOC footprint within that area.

This section also infers that certain inspections, methods and procedures (monitoring well inspection under inspection methods, etc.) be described in Appendix F. These are activities that are normally implemented by the Corrective Measures Implementation Workplan. If this is a LUCMP it should be specific to the requirements of LUC oversight and management alone.

## APPENDIX F - LAND USE CONTROL MANAGEMENT PLAN

### DEFINITION

As used herein, the term "land use control" or "LUC" with regard to real property, means any restriction or control that limits the use of and/or exposure to any portion of that property, including water resources, arising from the need to protect human health and the environment. The term encompasses "institutional controls", such as those involved in real estate interests, governmental permitting, zoning, public advisories, deed notices, and other "legal" restrictions. The term also includes restrictions on access, whether achieved by means of engineered barriers (e.g., fence or concrete pad) or by human means (e.g., the presence of security guards). Additionally, the term includes both affirmative measures to achieve the desired restrictions (e.g., night lighting of an area) and prohibitive directives (e.g., no drilling of drinking water wells for the duration of the corrective action). Considered altogether, the LUCs for a facility will provide a tool for how the property should be used in order to maintain the level of protectiveness that one or more corrective actions were designed to achieve.

### PURPOSE

When land use controls (LUCs) are necessary to assure the reliability of land use assumptions, the Permittee must put appropriate procedures in place to ensure that such controls will be maintained for as long as necessary to keep the chosen remedy fully protective of human health and the environment. This Land Use Control Management Plan (LUCMP) was developed to assure the effectiveness and reliability of the required LUCs for as long as any LUCs continue to be required in order for the corrective action to remain protective and to serve as an enforceable document for any noncompliance. The requirements described herein are only applicable to those SWMUs and/or AOCs for which LUCs were selected as part of the final corrective action. The conceptual outline for the LUC should be developed as part of the final corrective action. The specific details, as outlined in module II, for the implementation of the LUC should be outlined in the CMI Workplan (or other Corrective Action document approved by the Department). Appendix A-8 provides a list of SWMUs and/or AOCs for which LUCs are selected as part of the corrective action, a summary of the corrective action requiring LUC, and a reference to the document selecting the final corrective action.

The purpose of the LUCMP is to accomplish the following specific objectives for SWMUs and/or AOCs listed in Appendix A-8:

To implement a process for the Permittee to periodically advise the Department of the continued maintenance of any LUCs and of any planned changes in land use which might impact these LUCs.

To implement procedures for integrating all SWMUs and/or AOCs into the Facility Planning Process as applicable (e.g. Facility Management Plan). **In light of the pending conveyance of all the property now comprising the permitted facility to the CNCRDA, the Navy will have no Facility Management control over, or Management Plan for, the CNC. This element is only appropriate for active facilities where transfer of ownership is not contemplated.**

To implement procedures for integrating all SWMUs and/or AOCs into the Property Conveyance Process as applicable.

To implement a process to inform current and future property users of environmental conditions at SWMUs and/or AOCs.

## I. LUC INSPECTION - REVIEW - CERTIFICATION

The Permittee shall initiate the following specific actions:

- A. Conduct quarterly inspections/review of all SWMUs and/or AOCs identified in Appendix A-8. These inspections shall be for the purposes of verifying that all necessary LUCs have been implemented and are being properly maintained. *The Navy views this as an rather arbitrary and overly burdensome requirement which has no correlation to potential human health or environmental risks associated any improper land use change at a given site(s). At most, annual inspections should suffice to provide adequate oversight to ensure continued protectiveness of implemented LUC remedies.* The Permittee will be responsible for the following:
1. Ensuring that all required inspections are performed.
  2. Ensuring that the Department is provided with thirty (30) days advance notice of, and opportunity to observe facility personnel as they conduct at least one of the quarterly inspections each year. *(The Navy views this joint inspection requirement as excessive in light of those separate Permittee inspection and certification requirements set forth in the draft permit. Other standard Permittee facility / equipment inspection requirements (e.g., those at 40 CFR 264.15, 40 CFR 264.174, & 40 CFR 264.195), do not carry with them the added burden that the Permittee allow for Department observance of Permittee inspection activities so why should LUC compliance oversight be any different. Moreover, since separate certification requirement will carry with it additional enforcement implications, an incentive will already exist for performing adequate LUC inspections so as to reasonably ensure that LUC compliance will being maintained. Furthermore, Department personnel will otherwise have the right under the permit to inspect for LUC compliance on their own at any time so why should the Navy have to arrange for annual Department oversight.*
  3. Ensuring that the Department is notified in writing within thirty (30) days of any deficiencies noted.
  4. Ensuring that all appropriate measures are undertaken within thirty (30) days to correct any deficiencies and timely notification in writing to the Department detailing measures taken. *( The Navy believes that this thirty day requirement is too rigid. Depending upon the nature of the deficiency found and risk posed by such, additional time might well be necessary or appropriate to allow for the undertaking of corrective measures. We propose that the following wording be substituted: " within thirty days or as soon thereafter as practicable..."*
- B. Prepare and forward an annual report to the Department signed by the Permittee certifying the continued maintenance of all LUCs associated with those SWMUs and/or AOCs identified in Appendix A-8. *(The Navy questions the need for a separate annual certification if annual inspections by the Permittee will be mandated. Instead,*

**an annual confirmation that the required inspection was performed and listing of any deficiencies found during the inspection should suffice)**

## II. CHANGE IN LAND USE

The following shall constitute a change in land use:

- A. Any change in land that would be inconsistent with those specific exposure assumptions in the human health and/or ecological risk assessments or other criteria that served as the basis for selecting the LUCs as part of the final corrective action.
- B. Any activity that may disrupt the effectiveness of the LUC. Including but not limited to: excavation at a SWMU and/or AOC; groundwater pumping that may impact a groundwater mixing zone or groundwater corrective action or monitoring program; a construction project that may impact ecological habitat protected by the corrective action; removal of access control; removal of warning signs; or rezoning.
- C. Any activity that may alter or negate the need for the specific LUCs. *(This criteria is very vague and may cause compliance controversies in the future as to what should have been reported as a "change in land use" based upon reasonable yet differing interpretations of this "alter or negate" language. The Navy would like to see this section deleted or at least clarified).*

## III. REQUEST FOR PERMIT MODIFICATION FOR LAND USE CHANGE

- A. The Permittee will provide written notification to the Department at least sixty days (60) (except in emergency situations- where notice should be given as soon as practicable) prior to implementation of any change in land use at the SWMUs and/or AOCs identified in Appendix A-8. A request for a permit modification will be provided for the purpose of obtaining the Department's concurrence with the Permittee's determination as to whether the contemplated change will or will not necessitate re-evaluation of the selected corrective action or implementation of specific measures to ensure continued protection of human health and the environment. *(The Navy does not understand why we should be required to submit a request for permit modification to the Department if all we are seeking is a concurrence that a anticipated change in land use will not necessitate re-evaluation of an existing site remedy-related LUC. To require a request for permit modification under those circumstances would be unreasonably burdensome).*
- B. No land use change should be implemented until the permit modification is effective. The request for modification will include the following at a minimum: *(Navy believes this prohibition on future land use changes is unnecessarily restrictive as currently tied to formal permit modification. See above comment objecting to need for formal modification request if Navy believes land use change will not necessitate remedy re-evaluation and other means of obtaining Department concurrence with that determination is possible)*

1. An evaluation of whether the anticipated land use change will pose unacceptable risks to human health and the environment or negatively impact the effectiveness of the selected corrective action;
2. An evaluation of the need for any additional corrective action or LUCs resulting from implementation of the anticipated land use change; and,
3. A proposal for any necessary changes in the selected corrective action.

#### IV. FUNDING COMMITMENT or FINANCIAL ASSURANCE

The Permittee agrees to use its best efforts to obtain all necessary funding through the appropriate authorities or source(s) to ensure the continued maintenance of all LUCs associated with SWMUs and/or AOCs identified Appendix A-8 and, where necessary, the timely re-implementation of any LUCs and/or completion of corrective action necessitated by any inappropriate change to a LUC.

The Permittee shall provide financial assurance to continue maintenance of LUCs selected during final corrective action or post closure care and, where necessary, reimplementation of LUCs and/or completion of corrective action necessitated by any inappropriate change to a LUC in accordance with R.61-79.264.101 (b) and (c). The proof of financial assurance should fulfill the requirements of one of the options specified in R.61-79.264.145. ***(Federal facilities have historically been and should continue to be exempt from providing financial assurance information).***

#### V. REQUEST FOR PERMIT MODIFICATION FOR PROPERTY CONVEYANCE

Should the decision be made to transfer to any other agency, private person, or entity, either title to, or some lesser form of property interest (e.g., an easement, or right of way, etc.) SWMUs and/or AOCs identified in Appendix A-8, then the Permittee will ensure that at a minimum in accordance with R.61-79.270.42:

- A. The Department is provided with written notification at least ninety (90) days prior the initiation of the property conveyance process. Such notice shall indicate the following: ***(The Navy believes that this requirement is overly broad since a decision to convey a portion of the facility may well occur less than ninety days prior to "initiation of" the process of conveyance. The Navy believes that thirty or forty-five day notice prior to the date of actual conveyance should be sufficient).***
  1. The type of property conveyance (e.g., an easement, or right of way, etc.)
  2. The anticipated final date for the conveyance
  3. Future property owners

4. A list of SWMUs and/or AOCs affected by the conveyance
  5. Mechanism(s) that will be used to maintain any LUCs which may need to remain in place after the property conveyance.
- B. All LUCs for SWMUs and/or AOCs identified in Appendix A-8 must be incorporated into the property conveyance documents so that the transferee(s) is given adequate notice of existing site condition(s). The details of the LUC provided in the property conveyance documents must be consistent with the details in the document where the final corrective action was selected
  - C. It is understood that for the planned conveyance of any SWMUs and/or AOCs identified in Appendix A-8, the Department will re-evaluate the continued appropriateness of any previously agreed upon LUC(s) based upon the level of assurance provided, to ensure that necessary LUCs will be maintained and enforced.

## VI. IMPLEMENTATION OF LAND USE CONTROLS

For every SWMU and/or AOC identified in Appendix A-8, the Permittee must provide the information listed below prior to implementing any LUC. This information should be presented in the CMI Workplan (or other Corrective Action document approved by the Department).

- A. SWMU and/or AOC Description: (e.g., provide survey plat map certified by a professional land surveyor)
- B. Location/Area Under Restriction: (e.g., northeast corner of the facility between buildings 250 and 260 as reflected on BMP page \_\_\_ / GIS index under IR Site \_\_\_).
- C. LUC(s) Implemented and Corresponding Objective(s): (e.g., installation of a fence to restrict public access, etc.)
- D. Corrective Action Selection Document: (e.g., CMS dated \_\_\_\_\_).
- E. Field Implementation Methods with Appropriate Figures: (e.g., engineering design drawings, etc.).
- F. Inspection Methods and Maintenance Procedures: (e.g., Monitoring well plan to include analytical suite, well identification, reporting format, etc.)
- G. Facility Planning Process: (e.g., a tracking system for facility employees to ensure proper maintenance of LUCs.) *(See above comment about Navy not having a Facility Planning Process for the CNC in light of pending conveyances)*
- H. Schedule for Submitting a Contingency Plan to be Implemented in the Case that Corrective Action and LUCs are no Longer Effective: (e.g. procedure for notification and implementation corrective action in the event that pump and treat system is not achieving modeled goals, etc)

I. Corrective Action Completion – LUC Termination Process: (e.g. Pump and treat system has achieved goals and prohibition of drilling of drinking water wells is no longer needed, etc.)

J. Other Pertinent Information: