



**DEPARTMENT OF THE NAVY**

CHIEF OF NAVAL EDUCATION AND TRAINING

250 DALLAS ST

PENSACOLA FLORIDA 32508-5220

CNETINST 5090.7

OS441

**03 JUN 1999**

CNET INSTRUCTION 5090.7

Subj: LAND USE CONTROLS AT ENVIRONMENTAL REMEDIATION SITES  
ON BOARD U.S. NAVY INSTALLATIONS

Ref: (a) Comprehensive Environmental Response, Compensation,  
and Liability Act (CERCLA), 42 U.S.C.  
(b) Resource Conservation and Recovery Act (RCRA)  
(c) OPNAVINST 5090.1B

Encl: (1) Sample Memorandum of Agreement (MOA)

1. Purpose. To establish a systematic program, protective of human health and the environment, governing the maintenance of land use controls at environmental remediation sites onboard U.S. Navy installations in the Chief of Naval Education and Training (CNET) Area of Responsibility (AOR). Land Use Controls (LUCs) may consist of both engineered controls (e.g., a fence, signs, or a landfill cap) and non-engineered controls (e.g., base master plan land use notations).

2. Applicability. This instruction applies to all CNET activities that hold Class I property (land) with sites undergoing environmental remediation within CNET's AOR where LUCs have been or will be implemented as part of any interim or final site remedy.

3. Discussion. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) (references (a) and (b)) are the two primary federal laws governing the remediation of sites contaminated with hazardous substances and hazardous wastes. The U.S. Navy created the environmental remediation program to oversee the cleanup of these sites onboard naval facilities. Per reference (c), the Naval Facilities Engineering Command (NAVFACENGCOM) has been assigned the responsibility for centralized management of the installation restoration program. Remediation standards for cleanup of contaminated sites are established to ensure protection for human health and the environment.

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a. Substantial savings can be realized through the selection of cleanup remedies which take into account anticipated future land use(s) (e.g., industrial). However, to be effective, these future LUCs must be strictly monitored and maintained as needed. Both the U.S. Environmental Protection Agency (U.S. EPA) and several state environmental regulatory agencies have expressed concern over the Navy's ability to ensure the long-term maintenance of any LUCs to be implemented at contaminated sites. This concern has resulted in these agencies being reluctant to accept final site remedy decisions that rely in whole or in part upon LUCs. Providing appropriate assurances to these agencies that the U.S. Navy has a mechanism in place to ensure LUC maintenance at our installations will allow the Navy to benefit from the application of more cost effective risk-based cleanup criteria.

b. This instruction establishes the requirement that each CNET installation enter into an agreement with the U.S. EPA and cognizant state regulatory agencies for ensuring the continued maintenance of LUCs at those remediation sites where such controls have been or will be implemented as part of any final site remedy.

#### 4. Action

a. Commanding Officer (CO). COs of installations conducting environmental remediation projects shall undertake the following specific actions:

(1) In conjunction with the cognizant NAVFAC component, negotiate a Memorandum of Agreement (MOA) between the installation and the U.S. EPA and appropriate state regulatory agencies which will facilitate the selection of cost effective risk-based cleanup standards that are protective of human health and the environment. Unless prior authorization is obtained from CNET (OS44), the MOA should contain the general provisions reflected in enclosure (1), to include at a minimum the following:

(a) A requirement for the retention of the identified land use category (e.g., industrial or recreational) throughout the specified remediation period. Restrictions on changes in land use should be linked to such vehicles as the base master planning process.

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(b) A requirement for the installation environmental program manager to conduct periodic LUC inspections at covered sites, with incorporation of this responsibility into the environmental program manager's position description. These inspections should be done on either a quarterly, semiannual or annual basis as deemed appropriate.

(c) A requirement for the installation Environmental Compliance Board (ECB) or the activity environmental program manager (if an ECB does not exist) to review on a quarterly basis the status of adherence to all implemented LUCs and report to the CO the status of compliance with the LUC.

(d) A requirement to forward an annual report to the U.S. EPA and appropriate state agency (with a copy to CNET and the designated NAVFAC component) certifying retention of the specified LUC category for each affected site on the installation.

(e) Procedures to obtain concurrence from the U.S. EPA and state agency on changes to a previously identified LUC for a site. Concurrence of the agencies must be obtained in writing prior to commencing any construction or other activity inconsistent with the previous LUC. Requests for review of a LUC change proposal must address the degree of change proposed, the effectiveness of the remediation effort to date, and any natural remediation which may have occurred since the original remedial actions.

(f) A requirement to notify the U.S. EPA and appropriate state regulatory agency if, despite proper precautions, an unauthorized change in land use is discovered by the installation. The change in land use will be reported immediately to the agencies for collaborative determination of an appropriate remedy.

(g) An acknowledgement that any funding associated with additional remediation caused by a LUC change (whether approved or unauthorized) will be the responsibility of the installation.

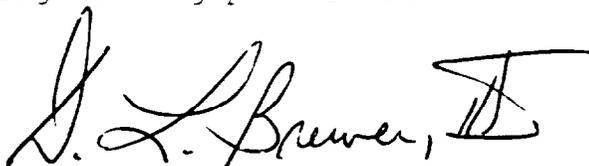
b. NAVFAC. As the agency responsible for the management of environmental remediation projects, the designated NAVFAC component shall undertake the following actions:

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(1) Take the lead in negotiating the MOA for installation restoration projects to establish the specific terms for future LUC maintenance at each covered installation with the cognizant U.S. EPA regional office and state regulatory agency.

(2) Review each installation's compliance with the terms of its MOA when conducting the tier two Environmental Compliance Evaluation (ECE) in support of CNET.

5. Special Note. Efficiency in site remediation will be given consideration in determining funding priorities.

A handwritten signature in black ink, reading "D. L. Brewer, III". The signature is written in a cursive style with a large, stylized initial "D" and "B".

D. L. BREWER, III  
Vice CNET

Distribution (CNETINST 5218.2C):  
List I (1-7, 11, 23, 38, 50-51)

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**MEMORANDUM OF AGREEMENT  
AMONG  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
THE  
(STATE ENVIRONMENTAL AGENCY)  
AND THE  
U.S. DEPARTMENT OF THE NAVY  
(ACTIVITY NAME, LOCATION)**

THIS AGREEMENT is entered into this (Date) day of (Month) (Year), by and between the U.S. Environmental Protection Agency ("U.S. EPA"), the (State Environmental Agency) and the U.S. Department of the Navy, (Activity Name, Location) ("Activity Name" or "Station") also referred to herein as "the Parties", for the specific purposes hereinafter set forth.

1. BACKGROUND. Environmental investigative activities being undertaken on (Activity Name) have revealed and may in the future reveal certain areas of environmental contamination ("sites") on the Station. These sites include those where CERCLA hazardous substances, RCRA hazardous wastes or hazardous constituents, and/or petroleum products or their derivatives were or may have been released into the environment as a result of activities conducted over the history of the installation. Such sites may generally be categorized as follows:

- a. Those having been fully investigated and site specific remedy(ies) previously implemented;
- b. Those having been fully investigated and site remedy(ies) having been selected but have not yet been implemented;
- c. Those having been fully investigated but final remedy selection decisions have not yet been made;
- d. Those in need of initial or further site investigative activities before the appropriate final remedy(ies) can be selected and implemented.

Because (Activity Name) is currently and will likely remain a multi-use facility with industrial, recreational and residential land uses, the Station desires future site remedy determinations take land use into account in order to facilitate the use of risk-based cleanup criteria. The Parties agree, when land use controls (LUCs) are necessary to assure the reliability of land use assumptions, it is essential appropriate procedures be put in place to ensure such controls will be maintained for as long as necessary to keep the chosen remedy fully protective of human health and the environment.

Enclosure (1)

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2. DEFINITION. As used herein, the term "land use control" or "LUC" means any restriction or control arising from the need to protect human health and the environment, limits the use of and/or exposure to, environmentally contaminated media (e.g., soils, surface water, ground water) at any site on (Activity Name). The term includes controls on access (e.g., engineered and nonengineered mechanisms such as fences, caps, security guards.) Additionally, the term encompasses both affirmative measures to achieve the desired control (e.g., night lighting of an area) and prohibitive directives (e.g., no drilling of drinking water wells). The term also includes "institutional controls," which are nonengineered mechanisms for ensuring compliance with necessary land use limitations (e.g., public advisories, Base Master Plan notations, applicable legal restrictions on land or water usage).

3. PURPOSE. The Parties intend to accomplish the following specific objectives through execution of this Agreement:

a. To implement a process to ensure appropriate long-term maintenance of those LUCs having already or may hereafter be selected for implementation as part of remedy selection for any site on the Station. It is intended such a process will in turn:

(1) Facilitate the application of Federal and/or State risk-based cleanup criteria to site cleanups through consideration of assumed future land usage at those sites where LUCs will be necessary to make such assumptions reliable;

(2) Elevate the general level of awareness amongst (Activity Name) personnel as to the need to maintain such controls in order to ensure long-term protection of human health and the environment.

b. To implement a process for (Activity Name) to periodically advise U.S. EPA and (State Environmental Agency) representatives of the continued maintenance of any LUCs implemented onboard the Station and of any planned changes in land use which might impact any site remediated in accordance with risk-based criteria based on the assumption land usage would be controlled, (e.g., restricted to industrial use);

c. To implement procedures for integrating all site remedies including LUCs into the Base Master Planning Process;

d. To provide, in part, through (Activity Name)'s good faith compliance with this Agreement, reasonable assurances to U.S. EPA and (State Environmental Agency), those specific pathway and exposure assumptions relied upon in applying a risk-based cleanup standard to a given site will remain valid until such time as the Parties agree either different site controls or unrestricted site usage would be appropriate.

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4. APPENDICES. Within thirty (30) days after execution of this Agreement, (Activity Name) agrees to develop the following Agreement Appendices:

a. A draft site listing (Appendix A) for those presently known sites on (Activity Name) appropriately being covered under the terms of this Agreement. This draft will be sent to U.S. EPA and (State Environmental Agency) for review and concurrence prior to finalization and should include a site location reference tied to the Base Master Plan. Once finalized, initial Appendix will be updated on at least a quarterly basis by (Activity Name) to reflect any additions or deletions of sites as may hereafter be agreed to by the Parties. Copies of all agreed upon updates shall be promptly distributed to U.S. EPA and (State Environmental Agency). If no site additions or deletions have been made during a previous quarter, then no Appendix update need be prepared or distributed for this period.

b. Individual Land Use Control Implementation Plans ("LUCIPs") (Appendix B) for all known sites to be covered under the terms of this Agreement. Each LUCIP shall identify both the LUC objective for the site being addressed as well as those particular LUCs relied upon to achieve objective. Each LUCIP will also specify what must be done in order to implement and maintain the specific LUC's required for the site and should contain a cross reference to whatever decision document(s) apply to the site. As future decisions involving LUCs are made at sites on (Activity Name), these sites will become covered under this Agreement and listed in Appendix A, and a new LUCIP appropriate to each such newly covered site will be added to Appendix B. In conjunction with (Activity Name)'s Base Master Plan, these plans should serve as a central LUC reference source to assist Station personnel with completing those periodic site inspections, reviews, and certifications required under Paragraph V of this Agreement.

5. SITE INSPECTION/REVIEW/CERTIFICATION. Within thirty (30) days of finalizing the Appendices to be developed in accordance with the requirements of Paragraph 4 above, (Activity Name) agrees to initiate the following specific actions:

a. Conduct quarterly visual inspections of all sites where LUCs have previously or may hereafter be implemented as such sites shall be identified in Appendix A to this Agreement. These inspections shall be for the purposes of verifying all necessary LUCs have been implemented and are being properly maintained. The Station's Environmental Program Manager will be responsible for ensuring all required inspections are performed; U.S. EPA and (State Environmental Agency) are provided with 30 days advance notice of, and opportunity to observe Station personnel as they conduct at least one of the quarterly inspections each year; U.S. EPA and (State Environmental Agency) are notified of

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any deficiencies noted; and all appropriate measures are undertaken in a timely fashion to correct any deficiencies with timely notification to U.S. EPA and (State Environmental Agency) detailing corrective actions taken.

b. Conduct quarterly reviews by the Station's Environmental Compliance Board (ECB) (as established IAW Paragraph 1-2.14 of OPNAVINST 5090.1B) of the Station's status in complying with all previously implemented LUCs. Any non-compliance issues will be appropriately resolved with U.S. EPA and (State Environmental Agency).

c. Prepare and forward an annual report to U.S. EPA and (State Environmental Agency) signed by the Station Commanding Officer (with copy to appropriate NAVFACENGCOM), certifying the continued retention of all implemented LUCs associated with those sites identified in Appendix A to this Agreement (as last updated).

6. AGENCY COORDINATION. Effective upon execution of this Agreement, (Activity Name) agrees to implement the following agency notification and concurrence procedures:

a. At least sixty days (except in emergency situations) prior to implementation of any major change in land usage (as hereinafter defined) at any site subject to LUCs, the Station shall provide notification of any such change to U.S. EPA and (State Environmental Agency). Such notifications shall be provided for the purpose of obtaining U.S. EPA and/or (State Environmental Agency) concurrence with the Station's determination as to whether the contemplated change will or will not necessitate the need for re-evaluation of the selected remedy or implementation of specific measures to ensure continued protection of human health and the environment. No major land use change should be implemented until such concurrence is obtained, consistent with the timeliness requirements set forth in subparagraph (b) below. For major land use changes affecting petroleum contaminated sites, although such notifications will be sent to both U.S. EPA and (State Environmental Agency), the Station need only obtain (State Environmental Agency)'s concurrence with the proposed change. Each notification/request for concurrence shall include:

(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 site remedy;

(2) An evaluation of the need for any additional remedial action or LUCs resulting from implementation of the anticipated major land use change; and,

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(3) A proposal for any necessary changes in the selected site remedy.

b. Upon being notified by the Station of an anticipated major land use change at a site U.S. EPA and/or (State Environmental Agency) shall evaluate the information provided pursuant to paragraph (a) above, and shall respond in a timely fashion prior to such land use change.

c. The Parties agree, the following shall constitute a major change in land usage:

(1) Any change in land use (e.g., from industrial or recreational to residential) inconsistent with those specific exposure assumptions in the human health and/or ecological risk assessments and served as the basis for the LUCs were implemented at the site;

(2) Any site activity disrupting the effectiveness of the implemented LUC. For example, excavation at a landfill; groundwater pumping impacting a groundwater pump and treat system; a construction project impacting ecological habitat protected by the remedy; removal of a fence; unlocking of a gate, or removal of warning signs.

(3) Any site activity intended to alter or negate the need for the specific LUC(s) implemented at the site.

d. The Station also agrees to immediately notify U.S. EPA and (State Environmental Agency) if, despite its best efforts to ensure compliance with Paragraph (a) above, any major change in land use at any site with an implemented LUC is discovered not having been previously reviewed and concurred in by U.S. EPA and/or (State Environmental Agency) in accordance with Paragraph. Such notifications will provide all pertinent information as to the nature and extent of the change and describe any measures implemented or to be implemented (to include a timetable for future completion) to reduce or prevent human health or ecological impacts.

7. MOA INTEGRATION. The Parties agree, when site-specific LUCs are to be implemented, an adequate description of the same along with conditions for their use should be included in whatever Decision Document reflects the selected remedy for a site as well as in the associated LUCIP. Additionally, Appendix C contains standard language for inclusion in such documents which may consist of CERCLA Records of Decision (RODs) or Decision Documents (DDs), Remedial Action Plans (RAPs), closure or post closure plans for RCRA regulated units or formal modifications to a facility's RCRA/HSWA permit, or in separate approval or No-Further-Action (NFA) letters issued by U.S. EPA or (State Environmental Agency) whichever has oversight authority over the site in question.

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8. FUNDING COMMITMENT. The Station 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 covered under this Agreement and, where necessary, the timely re-implementation of any LUCs and/or completion of site restoration activities necessitated by any inappropriate change to an implemented LUC. It is not intended by the Parties, this Paragraph be construed in any way to limit the rights otherwise reserved by U.S. EPA and (State Environmental Agency) under Paragraph XIV of this Agreement.

9. FUTURE PROPERTY CONVEYANCE. Should the decision later 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) in any site on (Activity Name) with an existing LUC(s), then the Station shall ensure:

a. U.S. EPA and (State Environmental Agency) are provided with notice at least sixty days prior to any such intended conveyance. Such notice shall indicate the mechanism(s) intended to be used to reasonably ensure any LUC(s) which may need to remain in place after interest conveyance will be maintained, and

b. Each LUC is reviewed and incorporated into those property disposal procedures (e.g., preparation of the Environmental Baseline Survey for Transfer (EBST) and Finding of Suitability for Transfer (FOST)) to be utilized to meet CERCLA and 40 CFR 373 notice requirements, so the transferee(s) is given adequate notice of existing site condition(s).

It is understood, the planned conveyance of any site with LUCs may prompt U.S. EPA or (State Environmental Agency) to re-evaluate the continued appropriateness of any previously agreed upon LUC(s) based upon the level of assurance provided, necessary LUCs will be maintained.

10. CHANGE IN APPLICABLE STANDARDS. Nothing herein should be construed to preclude (Activity Name) from proposing at any time or from the Parties otherwise agreeing to effect the deletion of any site from coverage under the terms of this Agreement on account of either: (i) a post-remedy implementation change to applicable Federal or State risk-based cleanup standards, or (ii) a change in previously documented contaminant concentration levels allowing for unrestricted use solely as a result of the effects of man induced or naturally occurring bioremediation/attenuation.

11. FUTURE COMMUNICATIONS. Within ten days of execution of this Agreement each Party shall notify the other Parties as to the name(s), address(es), telephone number(s), electronic mail address(es) and facsimile number(s) of their respective representative(s) who shall receive all correspondence and communications on behalf of the Party pertaining to all matters falling under

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the terms of this Agreement. A listing of agency POCs shall be attached hereto as Appendix D and updated by the Parties as appropriate.

12. SITE ACCESS. (Activity Name) herein agrees to provide U.S. EPA and (State Environmental Agency) representatives, their contractors or consultants access to all sites to be covered by this Agreement at all reasonable times consistent with military mission, national security and health/safety requirements upon presentation of proper credentials. The Station's Environmental Program Manager or his/her designee will coordinate access and escort to restricted or controlled-access areas, arrange for base passes and coordinate any other access requests arising. U.S. EPA and (State Environmental Agency) representatives shall have the authority to enter and move freely around any site at all reasonable times for purposes including, but not limited to, reviewing the efforts performed by (Activity Name) in complying with the terms of this Agreement; conducting such tests as these agencies may deem necessary and verifying all information/data submitted by (Activity Name) personnel pursuant to this Agreement. Nothing in this Agreement is intended or shall be construed to limit in any way the right of entry or inspection either U.S. EPA or (State Environmental Agency) may otherwise have by operation of law.

13. DISPUTES. All Parties agree to use Partnering principles in a good-faith effort to resolve any and all disputes which may hereafter arise with regards to the Station's substantial good-faith compliance with the terms of this Agreement or other matters relating to the Sites addressed hereunder

14. RESERVATION OF RIGHTS. It is agreed and understood U.S. EPA and (State Environmental Agency) reserve all rights and authorities each agency may currently have or hereafter acquire by law to require (Activity Name) comply with those federal and state laws and regulations applicable to the investigation, cleanup and long term maintenance of those sites to be covered by this Agreement. It is also understood, the Commanding Officer, (Activity Name) herein reserves those rights and authorities granted to the Department of Defense (DoD) by federal or state law, regulation, or executive order. On behalf of the Department of the Navy, the Commanding Officer (Activity Name) further reserves the right to put all property under his cognizance to those uses deemed necessary in his discretion for mission accomplishment or otherwise deemed necessary by appropriate military authority to meet the needs of the DoD.

15. ANTI-DEFICIENCY ACT. Nothing in this Agreement shall be construed as obligating the Navy or U.S. EPA, their officers, employees, or agents to expend any funds in excess of appropriations authorized for such purposes in violation of the federal Anti-Deficiency Act (31 U.S.C. Section 1341).

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16. AMENDMENT. Any amendments to this Agreement shall be in writing and will be executed by the undersigned signatories or their duly authorized designees or successors and shall be attached to this original Agreement.

17. TERMINATION. This Agreement shall terminate at such time as the undersigned representatives of the Parties or their successors, mutually concur the aforesaid objectives of the Parties have been fulfilled and the need for such an Agreement no longer exists. Alternatively, any Party may unilaterally withdraw from this Agreement upon sixty (60) days written notice to the other Parties but only after reasonable efforts have first been made by all Parties to resolve the dispute(s) leading to the taking of such action. If any Party decides to unilaterally withdraw, the Parties shall nonetheless work towards resolving any outstanding issues as may exist between them. It is understood, should the Navy choose to unilaterally withdraw from this Agreement, U.S. EPA and (State Environmental Agency) may choose to reconsider any remedy(ies) associated with any site with a LUC still in place at the time of such withdrawal.

18. REPRESENTATIVE AUTHORITY. Each undersigned representative of the Parties to this Agreement certifies she or he is fully authorized to enter into the terms and conditions of this Agreement and to execute the same so as to effectively bind each Party to its terms.

19. EXECUTION. This Agreement shall become effective on the date the last of the authorized representatives of the Parties signs.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION (X)

By: \_\_\_\_\_

For: Regional Administrator

FOR THE (STATE ENVIRONMENTAL AGENCY)

By: \_\_\_\_\_

Title: \_\_\_\_\_

FOR THE DEPARTMENT OF THE NAVY, (Activity Name)

By: \_\_\_\_\_

Title: \_\_\_\_\_  
Commanding Officer

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APPENDIX A

LAND USE CONTROL  
SITE LISTING

Date last updated: \_\_\_\_\_

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## APPENDIX B

LAND USE CONTROL  
IMPLEMENTATION PLAN  
FOR SITE \_\_\_\_\_

1. Site Description: (e.g., former fire fighting training area, approximate size 150' x200' and contaminant(s) of concern.)
2. Site Location: (e.g., northeast corner of the Station between buildings 250 and 260 as reflected on BMP page \_\_\_/GIS IS index under IR Site \_\_\_\_.)
3. LUC Objective(s): (e.g., to restrict public access to an area for recreational use.)
4. LUC(s) Implemented to Achieve Objective(s): (e.g., installation of a fence, warning signs, etc., or BMP notations restricting residential or recreational usage.)
5. Decision Document: (e.g., ROD/DD dated \_\_\_\_\_ or NFA letter dated \_\_\_\_\_.)
6. Other Pertinent Information:



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## APPENDIX C

SAMPLE ROD/DD  
MOA INCORPORATION LANGUAGE

Insert the following language in those RODs/DDs providing for the use of LUCs).

By separate Memorandum of Agreement (MOA) dated \_\_\_\_\_ with U.S. Environmental Protection Agency (U.S. EPA) and the Florida Department of Environmental Protection ((State Environmental Agency)), (Activity Name), on behalf of the Department of the Navy, agreed to implement base-wide, certain periodic site inspection, condition certification and agency notification procedures designed to ensure the maintenance by Station personnel of any site-specific Land Use Controls (LUCs) deemed necessary for future protection of human health and the environment. A fundamental premise underlying execution of agreement was, through the Navy's substantial good-faith compliance with the procedures called for therein, reasonable assurances would be provided to U.S. EPA and (State Environmental Agency) as to the permanency of those remedies including the use of specific LUCs.

Although the terms and conditions of the MOA are not specifically incorporated or made enforceable herein by reference, it is understood and agreed by the Navy, U.S. EPA and (State Environmental Agency), the contemplated permanence of the remedy reflected herein shall be dependent upon the Station's substantial good-faith compliance with the specific LUC maintenance commitments reflected therein. Should such compliance not occur or should the MOA be terminated, it is understood, the protectiveness of the remedy concurred in may be reconsidered and additional measures may need to be taken to adequately ensure necessary future protection of human health and the environment.

