

August 20, 2002

Mr. John Paul Woodley, Jr.
Office of the Under Secretary of Defense
Assistant Deputy Under Secretary of Defense
(Environment)
3000 Defense Pentagon
Washington, D.C. 20301-3000

Dear Mr. Woodley:

This letter is in response to the Department of Defense (DoD) Interim Guidance on Environmental Restoration Records of Decision (Policy), dated June 4, 2002, and the respective Air Force and Army policies, dated January 23, 2002, and April 25, 2002. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Federal Facilities Research Subcommittee has reviewed the DOD policy and finds it unacceptable. The primary thrust of the policy is to deny the rights of the Environmental Protection Agency (EPA), States, or citizens to ensure that post-ROD implementation, operation, maintenance and review provisions are conducted in compliance with legal requirements to protect human health and the environment. This letter does not address the legal issues of the DOD policy as the States attorneys' better address those issues. The adverse practical implications of this policy are addressed below.

The policy provides that implementation, monitoring or inspections, operation, maintenance and review of such measures are not to be included in the ROD or other post-ROD reports or documents as enforceable terms and measures. Also, Land Use Control Assurance or Implementation Plans, Operation and Maintenance Plans, Remedial Action Completion Reports, Site Closeout Reports, five-year reviews, or any other similar post-ROD documents, are not to be included as an enforceable term, condition, provision, requirement, or deliverable in an FFA, ROD, or other similarly enforceable agreement. Further, the policy recommends unilateral issuance and execution of RODs. Remedy implementation and reuses have been held up at a number of bases around the country for over a year because of DOD and the Air Force's adherence to its policy and direction on this issue.

First, this policy represents another instance in which DOD has proclaimed a path forward without involving stakeholders. As with the February 1999 Air Force Permit Policy, these unilateral proclamations undercut the day to day "partnering" efforts in which States continue to invest substantial resources and good will under the DSMOA program and other collaborative efforts through ECOS, ASTSWMO and at particular sites.

Second, a remedy is only as good as its implementation. DOD's attempt to separate the two is unjustifiable and ill advised. Public and State support for remedies depend upon their conviction that remedies will be protective over the long-term. Without such assurances, we will not concur



in RODs and the public will not accept them. Further without these assurances, remedies do not meet the "protectiveness" of the "long-term effectiveness" criteria of the National Contingency Plan. Such headquarter-prescribed lack of cooperation will only foster distrust and resentment in the field, leading to delays, disagreements and possibly litigation. The DOD position that it is their right and responsibility alone to ensure such long-term protectiveness -- denying the ability of States, citizens and the EPA to enforce appropriate measures -- subverts the professed philosophy of the executive branch and the intent of Congress that Federal agencies be subject to environmental laws to the same extent as private parties. Enforcement authorities do not evaporate once remedies are selected.

These issues are highlighted in instances where Federal agencies propose remedies that are not protective for unrestricted uses. The issues related to risk-based cleanups and institutional controls are among the most complex and contentious that we face. Skepticism over the legality, desirability and efficacy of such controls dominates the on-going dialogue. In particular, stakeholders have consistently pointed out the ineffectiveness of institutional controls over the long term due in part to the current lack of clear monitoring, reporting and enforcement responsibilities. This skepticism is exacerbated at Federal sites where the entity responsible for the pollution often designates the future land use, which then dictates the level of cleanup. DOD's attempt essentially to reinstate self-regulation once remedies are selected feeds the perception that it will not be held accountable, and that the long-term effectiveness of institutional controls will not be ensured. Thus, it has become considerably more difficult to obtain concurrence from States and support from local governments and citizens for selected remedies that do not completely and permanently eliminate contamination.

For these reasons, we strongly urge DOD to rescind this policy and re-commit itself to working together with States and communities to build trust and effect protective and cost-effective remedies at DOD sites across the country.

If you should have any questions or wish to discuss this matter further, please contact me at (916) 255-3750 or Ms. Dania Rodriguez of ASTSWMO at (202) 625-5973.

Sincerely,

Stan Phillippe, CA/DCR

Stan Phillippe, CA
Chair, ASTSWMO
Federal Facilities Research Subcommittee