

March 29, 2005

Pat Ferreebe
Office of the Deputy Under Secretary of Defense
(Environmental Management)
RAB Rule
P.O. Box #5413
McLean, VA 22103-5413

Dear Pat:

Thank you for the opportunity to review the proposed changes to the Department of Defense (DoD) Regulations regarding Restoration Advisory Boards (20 Code of Federal Regulations (CFR) 202), as published on January 28, 2005 in Volume 70, Number 18 of the Federal Register, at pages 4061 to 4074.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Community Involvement Work Group generally supports the proposed changes to the Restoration Advisory Boards (RAB) rule. We believe that RABs are important in providing the public an opportunity to participate in the environmental restoration process at DoD sites across the country. Based on the group's involvement at various Federal Facilities, we believe that an active RAB is beneficial to both the community members that live near a base, and to the installation. During the numerous years that we have been involved with the RABs, we have found and learned that the RABs have enhanced the level of trust between community members and the various Services.

However, our group has some concerns about specific portions of the proposed rule. It is our understanding that as written, the RAB rule may limit the opportunity for an honest dialog between the military and local communities that live on and around military installations. While we are confident that a cooperative relationship will be maintained at most installations across the country, the members agreed that the proposed rule could have such a negative effect at some installations. The RAB should be a forum for open, honest two-way communication, including situations where the local community disagrees with the military.

We agree with DoD that RABs provide a "continuous forum through which members of affected communities can provide input to an installation's ongoing environmental restoration activities."



Our specific concerns are listed below:

General Comment: The document does not indicate who will be responsible for RABs and community involvement when a Performance-Based Contract (PBC) is put in place. Public input is an important part to the success of any project. We do recommend that at least one public meeting be scheduled to discuss the overall PBC approach prior to embarking on the PBC project. This is an excellent chance to rectify any outstanding issues posed by the community. The State Regulator, and the DoD representative, with input from the public, should also establish a method to make DoD available to the public throughout the project.

1. **Page 4061: Summary, Second paragraph:** The “propose” should be replaced with “purpose”.
2. **Page 4062: Third Column, middle of first full paragraph:** The text should read “Deputy Under Secretary of Defense.”
3. **Page 4063: Second Column, end of first paragraph:** The text should read, “Installation will follow the prescribed...”
4. **Page 4064: B, Operating Requirements: Second column, second paragraph:** “An Installation Commander may adjourn a RAB when there is no longer a need for a RAB or when community interest in the RAB declines...”

Comment: Ambiguous. It is unclear where the decision points are regarding 1. When there is no longer a need for a RAB; and 2. When community interest in the RAB declines. The specific process to be followed in making these decisions and what would be the initiating action to do so for either decision point were not identified in the rule.

ASTSWMO offers the following proposed language to address these issues:

...Before making the decision to dissolve the RAB, the Installation Commander shall call a special meeting of the RAB during which the Board, in cooperation with the Commander, will evaluate and determine the following: 1. Does the Board membership continue to reflect adequate diversity among interested stakeholders; 2. What major factors are impeding the progress of the Board, what steps can be taken to address these impediments; and 3. Has the Board accomplished its goals such that termination of the Advisory Board is appropriate...

5. **Page 4064: B, Operating Requirement: Second column, third paragraph:** “Although Installation Commanders are expected to make every reasonable effort to ensure that a RAB performs its role as efficiently as possible, circumstances may prevent a RAB from operating efficiently or fulfilling its intended purpose. When this occurs, the Installation Commander will make a concerted attempt to resolve the issues that affect the RAB’s effectiveness. If unsuccessful, the Installation Commander may elect to dissolve

the RAB. The Installation Commander should discuss dissolution with regulators and the community as a whole before making a final decision.”

Comment: We have very serious concerns with this language. This allows the Commander to dissolve a RAB if the community or regulators have a contentious disagreement with the Commander on the environmental restoration programs or progress. Moreover, although language states that the decision should be discussed with the groups affected, the Commander could make a unilateral decision to dissolve the RAB in order to circumvent public comment.

Suggestion: Add language that states “The determination to dissolve a RAB should be made in conjunction with the impacted stakeholders (RAB).”

ASTSWMO offers the following proposed language to address these issues:

...That an agreement between two of the three main parties is necessary before a RAB is dissolved. The three main parties include: The Installation Commander, RAB citizen co-chair and the lead regulatory agency project manager...

6. Page 4065: A, General Requirements (b) Purpose and Scope of Responsibilities of a RAB:

Comment: This section indicates that the purposes of the RAB is to provide an expanded opportunity for stakeholders to act as a forum for discussion, and to provide an opportunity for the RAB members to review progress and participate in dialogue. This cannot be done when RAB members are not allowed to participate in the process until the end and decisions have already been made.

Suggestion: Include verbiage about encouraging RAB participation early and often. This might include allowing RABs to have access to draft documents and other project management meeting materials.

7. Page 4065: A, General Requirements: Second column, sixth bullet point/Page 4068 B, Operating Requirements: First column, thirteenth bullet: As part of the RAB members' functions: "Providing feedback to other community members on RAB activities and share community concerns and input with the RAB" and "Keeping the public informed about the proceedings of the RAB."

Comment: This bullet needs further clarification or defining. In some cases, contact with community members has been limited only to the RAB and the public participation requirements of CERCLA don't appear to always be implemented. There is a great deal of frustration on the part of RAB members who are trying to fulfill this function as best as possible with very little support or assistance from the installation..

8. **Page 4065: A, General Requirement: Third column, fourth bullet point:** “RAB adjournment means when an Installation Commander, in consultation with EPA, state, tribes, RAB members, and the local community, as appropriate, closes the RAB based on a determination that there is no longer a need for a RAB or when community interest in the RAB declines sufficiently.”

Suggestion: Change the wording “in consultation with...” to “with agreement of...” Also, please define “sufficiently”.

9. **Page 4065: A, General Requirements: Third column, fifth bullet point:** RAB dissolution means when an Installation Commander disbands a RAB that is no longer fulfilling the intended purpose of advising and providing community input to an Installation Commander and decision makers on environmental cleanup projects. Installation Commanders are expected to make every reasonable effort to ensure that a RAB performs its role as effectively as possible and makes a concerted attempt to resolve issues that affect the RAB’s effectiveness. There are circumstances, however, that may prevent a RAB from operating efficiently or fulfilling its intended purpose.

Comment: Definition of RAB dissolution gives complete power to the Installation Commander to decide that a RAB no longer fulfills its intended purpose. This potentially leaves RABs vulnerable to being disbanded in cases where the RAB is fulfilling the intended purpose to be guardians of the facility’s environmental program when the Installation Commander doesn’t want to hear dissenting opinions.

Suggestion/Proposed Language: Add language that states that an agreement between two of the three main partners is necessary before a RAB is dissolved. (The three main parties include: The Installation Commander, RAB citizen co-chair and the lead regulatory agency project manager).

10. **Page 4066: Second Column, end of first paragraph:** The text should read, “...expand the RAB and solicit new members...”
11. **Page 4066: A, Criteria for Establishment: Section 2. Paragraph a.:** The text states that “...Installation Commander finds sufficient and sustained community interest.”

Comment: It is unclear as to how this determination will be made by an Installation Commander.

Suggestion: There should be some guideline listed in order to make such a determination.

12. **Page 4066: A, Criteria for Establishment: Section 2. Paragraph a., Second column, paragraph two,** “Where RABs are not formed initially, installations undergoing

environmental restoration activities will reassess community interest at least every 24 months."

Comment: The two-year time frame seems extensive and an annual reassessment would be better.

13. **Page 4066: A, Criteria for Establishment: Section 2. Second column, fourth paragraph:** "That the Installation Commander have the lead responsibility for forming and operation the RAB..."

Comment: We believe that this language gives too much control to the Installation Commander.

Suggestion/Proposed Language: "If appropriate, the Installation Commander and the lead regulatory agency share responsibility in the formation and operation of the RAB."

14. **Page 4066: A, Criteria for Establishment: Section 2. Third column, first paragraph suggestion:**

Suggestion/Proposed Language: At the end of the sentence add the words "including the list of stakeholders invited to be on the board."

15. **Page 4067, A. General Requirements: Section 4. Composition of a RAB: Paragraph b:** It would seem important when selecting RAB members to include participation by a local Health Department representative.

16. **Page 4067, A. General Requirements: Section 4a. Composition of a RAB: First paragraph, 14th line:** Change lie to live.

17. **Page 4068: B. Operating Requirements: Section 6a. RAB Adjournment: Third column, first bullet point:** "RABs may adjourn in the following situations: A record of decision has been signed for all DERP sites on the installation."

Comment: It is often the case that the Record of Decision is only the first stage in restoration projects. Experience has shown that the public needs input throughout the cleanup process and at various stages of the design of specific projects.

Suggestion/Proposed Language: Modify the bullet to read that a RAB may be adjourned after all remedies are in place and are found to be operating properly and successfully (OPS).

18. **Page 4068: B. Operating Requirements: Section 6a. RAB Adjournment: Third column, third bullet point:** (RABs may adjourn in the following situations) "an installation has all remedies in place...."

Comment: It is most often the case that restoration decisions require constant modification. Again, experience has shown that the public needs input throughout the cleanup process and at stages of the design of specific projects. The RAB should remain involved at an installation until federal and/or State regulations regarding cleanup and remediation have been met.

Suggestion: Based on comment #18, this bullet might be unnecessary or should be modified to read that a RAB may be adjourned after OPS.

19. **Page 4069: B. Operating Requirements: 6a. RAB Adjournment: First column, second bullet point:** (RABs may adjourn in the following situations) "If there is no longer sufficient, sustained community interest..."

Comment: It is unclear as to the definition of "sufficient and sustained interest".

20. **Page 4069: B. Operating Requirements: 6a. RAB Adjournment: First column, third bullet point:** (Requirements for RAB dissolution) "The installation has been transferred out of DoD control and DoD is no longer responsible for making restoration response decisions."

Comment: Experience has shown that when DoD has transferred property and declared it free of contamination, often times, when development of the property begins, unknown contamination has been found.

Suggestion/Proposed Language: State that, "if after the transfer of property, certified by DoD to be free of contamination, environmental problems are discovered, if necessary RABs will be formed and supported by the branch of the military who was the former owner."

21. **Page 4069: B. Operating Requirements: 6b. RAB Dissolution: Second column, paragraph c:** "An installation may reestablish an adjourned or dissolved RAB if there is sufficient and sustained community interest.

Comment: Again, please define "sufficient and sustained".

22. **Page 4069: B. Operating Requirements: Section 6b. RAB Adjournment and Dissolution Operating Procedures, (2) Dissolution Procedures:**

Comment: It would be best if the Installation Commander would consider the RAB mission fulfilled when a majority of RAB members agree in writing to terminate the RAB. All RAB members agreeing on paper would be preferred but may not be realistic.

23. **Page 4069: B. Operating Requirements: Section 6c. Reestablishing an Adjourned or Dissolved RAB: Second/Third column, (c) last sentence:** "An installation may reestablish an adjourned or dissolved RAB if there is sufficient and sustained community

interest in doing so and there are environmental restoration activities still ongoing at the installation.”

Comment: Should read “... and there are environmental restoration activities still ongoing or that may start up again at the installation.”

24. **Page 4069: B. Operating Requirements: Section 6c. Reestablishing an Adjourned or Dissolved RAB: Third column, first paragraph:** “Where a RAB is adjourned or dissolved and environmental restoration activities continue, the installation should reassess community interest at least every 24 months. When all environmental restoration decisions have been made and required remedies are in place and properly operating at an installation, reassessment of the community interest for reestablishing the RAB is not necessary.”

Comment: As stated on page 3, the two-year time frame seems extensive and an annual reassessment would be better. During the operational phase of a cleanup, public input throughout the process is important.

Suggestion/Proposed Language: Include language that states that the need for a RAB can be assessed annually. Also, change language in the second sentence to read: “When all environmental restoration decisions have been made and required remedies are in place and properly operating at an installation, reassessment of the community interest for reestablishing the RAB may be conducted annually.”

25. **Page 4070: C. Administrative Support, Funding, and Reporting Requirements, Section 1. (b) Eligible Administrative Expenses:**

Comment: This section lists items that are eligible for RAB Administrative costs but not who will complete these tasks or who pays the manpower to get these things done.

Suggestion: It should state that the military installation is responsible for finding the funding and completing these tasks, as per the RAB’s request.

26. **Page 4070: C. Administrative Support, Funding, and Reporting Requirements, Section 1. (b) Eligible Administrative Expenses:**

Comment: “While DoD cannot identify all possible examples of activities unique to and directly associated with establishing and operating a RAB...”

Suggestion: In addition to the list of typical administrative support, it would be helpful to include “Create information materials for RAB members as it relates to the cleanup.”

27. **Page 4071: Section 202.1 Purpose, scope, definitions and applicability:**

Comment: In section (b)(2), the word “form” should be replaced with “forum”.

28. **Page 4072: Section 202.1**

Comment: In section (8), the rule indicates that “RAB adjournment shall mean when an Installation Commander, in consultation with the Environmental Protection Agency (EPA), state, tribes, RAB members, and the local community, as appropriate, closes the RAB based on a determination that there is no longer a need for a RAB or when community interest in the RAB declines.”

Suggestion/Proposed Language: This language should be inserted throughout the document where it discusses when the Installation Commander can adjourn a RAB. It is also suggested that the words “in consultation with” be replaced with “in agreement with”.

29. **Page 4073: Section 202.9(a) Public participation:**

Comment: Due to increased security, it is sometimes difficult for members of the public to gain access to military installations. The DoD should be encouraged to hold at least some meetings at an off-base location near the base (i.e., community center, local church, etc.) This has the additional advantage of allowing the RAB meeting to take place at a neutral location.

30. **Page 4073: Section 202.9(c)(2) Meeting minutes:**

The proposed rule specifies that the public records of the RAB should be available to the public at a “single, publicly accessible location”. In practice, many installations may be located in more than one town, city, or county, with separate information repositories for each.

Comment: This rule could be made more flexible by saying that the records will be “...available for public inspection and copying in **at least one**, publicly accessible location...” This would allow records to be maintained in more than one location if needed.

Section IV. B.5.c. of the accompanying Section-by-Section Analysis states that DoD also recommends mailing of meeting minutes to meeting attendees and others on the installation’s community relations mailing list. This would be a good place to also encourage the use of web pages, e-mail lists, and similar technologies to maximize public outreach.

31. **Page 4073: Section 202.10 RAB Adjournment and Dissolution:**

Comment: As stated before, we are concerned that this section gives the Installation Commander too much authority to dissolve a RAB “no longer fulfilling the intended purpose” of the RAB. We agree that a mechanism should be implemented for disbanding

a RAB that has strayed from its original mission. However, the present language leaves open the opportunity for an Installation Commander to dissolve a RAB that expresses disagreement with the commander's viewpoint, but is continuing to function effectively. This could be detrimental to both the military and the public by fostering an atmosphere of distrust.

Suggestion: There should be more consistency between the procedure for adjournment of a RAB, and the procedure for dissolution of a RAB. The procedure for adjournment is less formal than that for dissolution. Prior to dissolving a RAB, the Installation Commander must notify the RAB in writing, allow a 30-day period for written response, and allow an additional 30-day public comment period.

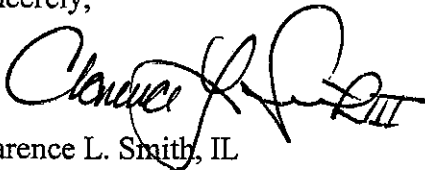
An Installation Commander is required to "consult" with the RAB, regulators, and local community prior to adjourning a RAB, but is not required to provide written notification beyond publication in a local newspaper. The commander is also not required to hold a public comment period before adjourning a RAB. The rule should require formal written notification of the RAB, regulators and local community before adjourning a RAB. The RAB should be allowed 30 days to respond in writing, and a 30-day public comment period should be required.

Proposed Language: We propose that DoD insert language allowing a dispute resolution process. "With regard to the dissolution of a RAB, if the Installation Commander and the RAB members or the lead regulatory agencies are unable to agree on this issue (and after a 30-day period), dispute resolution is initiated. If a resolution cannot be achieved at this level, the matter shall be referred in writing within 20 days to a general/flag officer or a member of the senior executive service in conjunction with the lead regulatory agency and the community for review.

If resolution is still not achieved at this point, the matter shall be referred in writing within 20 days to the Service Secretary along with the Governor of the State in question for review. If the dispute remains unresolved at this stage, the matter shall be referred to a mutually agreed upon, independent arbiter for a final decision. It is the intention of all involved parties that all disputes be resolved at the lowest possible level of authority within the framework established above. Timeframes for dispute resolution may be extended by mutual consent. The RAB will remain active and the DoD will still be responsible for restoration advisory board activities and funding until a final decision is made."

Thank you for providing us with the opportunity to comment. We look forward to working with you and others from DOD on community involvement issues as well as receiving a response to our comments. If you have any questions regarding our attached comments, please do not hesitate to contact myself at (217) 524-1655 or Dania Rodriguez, ASTSWMO (202) 624-5973.

Sincerely,

A handwritten signature in black ink, appearing to read "Clarence L. Smith, II". The signature is fluid and cursive, with the first name "Clarence" being the most prominent.

Clarence L. Smith, II
Chair, ASTSWMO Federal Facilities Research Subcommittee

Cc: ASTSWMO Community Involvement Workgroup
Trina Martynowicz, EPA