ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM: AMENDMENTS TO 35 ILL. ADM. CODE 740	)	R01-27 (Rulemaking – Land)
	)	
IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM: PROPOSED 35 ILL. ADM. CODE 740.SUBPART H (SCHOOLS, PUBLIC PARKS, AND PLAYGROUNDS)	)	R01-29 (Rulemaking – Land) (Consolidated)

NOTICE OF FILING

To:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
(Original and Four Copies)

Matthew J. Dunn, Chief
Environmental Bureau
Office of the Attorney General
James R. Thompson Center
100 West Randolph, 12th Floor
Chicago, IL 60601

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Department of Energy and
Natural Resources
524 South Second Street, Suite 400
Springfield, IL 62701-1787

Thomas V. Skinner, Director
Illinois Environmental Protection Agency
1021 Grand Avenue, East
P.O. Box 19276
Springfield, IL 62794-9276

All Other Persons on the Attached Service List

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the attached : (1) Appearance of Georgia Vlahos; and (2) Pre-Filed Testimony of Georgia Vlahos; and (3) Pre-Filed Testimony of Richard Butterworth in the above-titled matter, copies of which are hereby served upon you.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY

By: Georgia Vlahos
GEORGIA VLAHOS

DATED: March 21, 2001

Georgia Vlahos
Naval Training Center
2601A Paul Jones Street
Great Lakes, Illinois 60088-2845
Telephone: (847) 688-4422
Facsimile: (847) 688-6917
E-mail: georgia.vlahos@cnet.navy.mil

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	)	

APPEARANCE

I hereby file my appearance in this proceeding on behalf of the United States of America, Department of the Navy.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY

By: Georgia Vlahos
GEORGIA VLAHOS

DATED: March 21, 2001

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PRE-FILED TESTIMONY OF GEORGIA VLAHOS

Good morning, my name is Georgia Vlahos. I am Counsel to the Commander of Naval Training Center Great Lakes located in North Chicago, Illinois. My duties include advising the Commander in his capacity as the Department of the Navy's Regional Environmental Coordinator for USEPA Region 5, an area that, of course, includes the State of Illinois. In this regard, I assist the Command in coordinating environmental policy among the various Naval and other Department of Defense ("DoD") components in the Region concerning, among other things, those pertaining to environmental compliance, environmental restoration and property disposal.

My testimony here was developed in consultation with other DoD component agencies. On behalf of the Navy and the other military services, I thank you for the opportunity to be here today and provide you with our views on the revisions to the Part 740 Site Remediation Program ("SRP") regulations proposed by the Illinois Environmental Protection Agency (the "Agency"). I shall refer to these revisions as the "Agency Proposal."

The Agency Proposal introduces the concept of "perfecting" No Further Remediation ("NFR") letters by recording them in county land records. As will be addressed in testimony to be presented to you today by a representative of the General Services Administration, this recording requirement is problematic for federal landholding entities. This is because federal entities do not generally "own" the federal lands on which they operate and, therefore, have no legal authority to record restrictions on the future use of that land.

I appear before you to present an alternative to this recording requirement for the Navy and other federal landholding agencies in Illinois. Our proposal reflects our desire to apply the Land Use Control Memorandum of Agreement ("LUC MOA") concept, which was recently incorporated by the Board into the TACO rules in Part 742, into the Part 740 regulations for the Site Remediation Program ("SRP").

At this point, I must note that, by suggesting revisions to the Agency's proposal, we in the DoD community do not mean to imply that we view every effort we undertake to address hazardous substance contamination on our facilities as subject to SRP requirements. As I'm sure this Board is aware, unlike the private sector, DoD has its own independent CERCLA lead agency authorities which allow us to deal directly with hazardous substance releases on, or from, our facilities. However, we believe there could well be times where we might want to seek a NFR letter from the Agency in connection with a site where long term instititutional controls are contemplated. Hence, we believe it appropriate to allow such sites to be encompassed under the same LUC MOA concept which was adopted in the new TACO regulations and which we hope will soon be adopted under the LUST program rules.

I. Preference for Risk-Based Cleanups

We concur with the General Assembly's statement of intent for the Site Remediation Program set forth in Section 58 of the Illinois Environmental Protection Act that, under appropriate circumstances, risk-based site cleanups are desirable in Illinois. Such cleanups can be a protective, timely and cost-effective alternative to more extensive and potentially cost prohibitive remedial measures which may, or may not, ultimately permit unrestricted use of the affected property. We wish to secure the flexibility afforded by this approach for our sites in this State where both the Agency and we agree that use of a risk-based cleanup approach is practicable.

Unfortunately, unless federal landholding agencies are provided a similar alternative to recording NFR letters as is proposed for the Illinois Department of Transportation ("IDOT") in the new Section 740.621 of the Agency's Proposal, our ability to utilize the SRP will be jeopardized since the existing regulations in Subpart F of Part 740 contain specific deed recordation requirements which we are legally precluded from satisfying. All that we in the federal community seek is to have the same ability that now exists for private industry and that is proposed for IDOT to close our sites with full Agency concurrence utilizing risk-based approaches.

II. Why an exception should be made for federal facilities

Because we are asking this Board to adopt our alternative to the NFR recordation requirement contained in the existing SRP regulations, we need to explain how, in the absence of a publicly recorded land record, we will ensure the future maintenance of any land use restrictions applicable to a site. First, we would have no problem recording NFR letters for active installations, which contain a notice but no land use restrictions.

Under those circumstances, the letters cannot be construed as imposing restrictions on future uses of the property and, therefore, do not run afoul of the prohibition against restricting future land use. For circumstances where the NFR letters contain land use restrictions, we have proposed to the Agency and today present for your consideration the use of a tri-party LUC MOA between the federal landholding agency, USEPA Region 5 and the Agency similar to that provided for IDOT in Section 740.621 of the Agency's Proposal. The Navy has executed such LUC MOAs in other states and U.S. EPA Regions and, more important, this Board recently approved their use as a form of institutional control by federal landholding entities under the amended TACO Regulations. Furthermore, this LUC MOA approach is consistent with the recently established DoD "Policy on Land Use Controls Associated with Environmental Restoration Activities," which was issued by the Deputy Under Secretary of Defense for Environmental Security on January 17, 2001. I would be happy to provide a copy of this policy to the Board and to any other interested person.

Under the form of LUC MOA we propose, DoD facilities within the State would commit to, among other things, certain periodic site inspection and reporting requirements to ensure that our facility personnel adequately maintain those site remedy-based land use controls necessary for long term protection of human health and the environment. I have provided, as Exhibit 1 to my testimony, a model LUC MOA for your consideration that has been negotiated between a DoD working group, EPA Region 5 and Agency representatives. We believe it provides a sound and adequately protective alternative to requiring federal entities such as ourselves to record NFRs at active, non-transferring installations and at installations that may be transferred from one federal landholding entity to another. The LUC

MOA makes clear that compliance with its provisions is a prerequisite for the continued validity of NFRs.

III. Conclusion

In conclusion, we are proposing to the Board, that the Part 740 SRP regulations be revised to exempt federal facilities from the aforementioned NFR recordation requirement subject to a given facility's execution of, and subsequent compliance with, a tri-party LUC MOA with the Agency and U.S.EPA.

Respectfully submitted,

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY,

By: Georgia Vlahos
GEORGIA VLAHOS

Georgia Vlahos
Counsel
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2601A Paul Jones Street
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EXHIBIT 1

(Model LUC MOA)

Date: 10/30/00

MEMORANDUM OF AGREEMENT
BETWEEN THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
THE
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 5
AND THE
U.S. DEPARTMENT OF **(NAVY, ARMY, AIR FORCE)**

THIS AGREEMENT is entered into this _____ day of _____, by and between the U.S. Environmental Protection Agency ("U.S. EPA"), the Illinois Environmental Protection Agency ("Illinois EPA") and the U.S. Department of the **(Navy, Army or Air Force; Installation Name)** also collectively referred to herein as "the Parties," for the specific purposes hereinafter set forth.

I. BACKGROUND

Environmental investigative activities being undertaken on **(Installation Name)** have revealed and may in the future reveal certain areas of environmental contamination ("Sites") on **(Installation Name).** These Sites include those subject to regulation under either the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 USC 9601 *et. seq*; the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et. seq*., and/or the provisions of the Illinois Environmental Protection Act, ("the Act") (415 ILCS 5/1 *et. seq*.), where hazardous substances, hazardous wastes or hazardous constituents, or petroleum products or their derivatives were 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 that have been fully investigated and specific remedy(ies) previously implemented;

b. Those that have been fully investigated and remedy(ies) have been selected but have not yet been implemented;

c. Those that have been fully investigated but final remedy selection decisions have not yet been made; or,

d. Those in need of initial or further investigative activities before the appropriate final remedy(ies) can be selected and implemented.

(Installation Name) desires that future site remedy determinations take land use into account in order to facilitate the use of risk-based remediation criteria established by U.S. EPA under CERCLA or Illinois EPA under the Act or its corresponding program rules, as may apply to a given Site. The Parties agree that when land use controls ("LUCs") are necessary to ensure the reliability of land

use assumptions, it is essential that 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. In addition, the Parties agree that it is imperative to ensure that prospective purchasers of the property are fully informed of the existence of such controls and their responsibility to maintain them.

The Parties also recognize that the General Services Administration maintains that **(Installation Name)** does not have the authority to place land use restrictions in county land records because it would be considered an unauthorized disposal of an interest in federal property (since title is held by the United States and not by **(Installation Name).** Therefore, this Agreement is designed, in part, to ensure that if **(Installation Name)** desires to undertake a risk-based remediation of any Site falling under the program authorities of the Illinois EPA, that it comply with all applicable LUC requirements of the Act and its corresponding rules.

II. APPLICABILITY

This Agreement applies to each Site where **(Installation Name)** is required to undertake investigative and remedial activities in accordance with CERCLA or applicable Illinois EPA remediation program requirements and where **(Installation Name)** desires to utilize either U.S. EPA CERCLA risk-based Site remediation guidance or Illinois EPA's Tiered Approach to Corrective Action Objectives (TACO) regulations (35 Ill. Adm. Code 742) to undertake a risk-based remediation of the Site. Such Sites shall specifically include those falling under the following Illinois EPA programs:

a. Leaking Underground Storage Tank ("LUST") Program (35 Ill. Adm. Code 732);

b. RCRA Part B Permits, corrective action, and Closure Plans (35 Ill. Adm. Code 724 and 725); and,

c. Site Remediation Program ("SRP") (35 Ill. Adm. Code 740).

Due to the unique nature of ownership interests in the real property at active federal facilities and the inability of **(Installation Name)** to comply with the LUC recording requirements of the Act and corresponding rules of the Illinois EPA, compliance with this Agreement will be deemed to fulfill those requirements until such time as any Site with LUCs on **(Installation Name)** that falls under any of the aforementioned Illinois EPA programs is transferred out of federal ownership. At the time of such transfer, all requirements of the Act and corresponding rules of the Illinois EPA as shall apply to that Site must be met.

III. DEFINITION

For the purposes of this Agreement, the term "Land Use Control" or "LUC" means any restriction or control arising from the need to protect human health and the environment that limits the use of or exposure to environmentally contaminated media (e.g., soils, surface water, groundwater) at any Site on **(Installation Name).** The term includes controls on access (e.g., engineered barriers, such as caps, and non-engineered mechanisms, such as fences or 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." Institutional controls are legal mechanisms for imposing a restriction on land use.

IV. 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 that may have already or may hereafter be selected as part of the remedy for any Site on **(Installation Name)**. It is intended such a process will in turn:

   1. Facilitate the application of Federal or State risk-based remediation criteria to Site remediations 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 **(Installation 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 **(Installation Name)** to periodically advise U.S.EPA and Illinois EPA representatives of the continued maintenance of any LUCs implemented on the **(Installation Name)** and of any planned changes in land use impacting 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 that include LUCs into the facility land use planning process;

d. To provide, in part through **(Installation Name's)** good faith compliance with this Agreement, reasonable assurances to U.S. EPA and Illinois EPA

those specific pathway and exposure assumptions relied upon in applying a risk-based remediation standard to a given Site will remain valid until such time as the Parties agree, pursuant to the applicable program procedures under which the Site is conducting remediation, that either different Site controls or unrestricted Site usage would be appropriate; and

e. To satisfy **(Installation Name's)** obligation to comply with those LUC requirements to be reflected in any NFR determinations (or their equivalent) issued by U.S. EPA or Illinois EPA until such time as **(Installation Name)** and U.S.EPA or Illinois EPA, whichever agency has program authority, determines that those LUCs are no longer necessary for the protection of human health and the environment.

V. APPENDICES

a. The following Appendices are now or shall hereafter become a part of this Agreement as further specified in paragraphs 1 through 4 below:

1. The attached Site listing (Appendix A) for those presently known Sites covered under the terms of this Agreement. Appendix A will be updated at on a quarterly basis by **(Installation Name)** to reflect any additions or deletions of Sites as may hereafter be agreed to by the Parties. Copies of all quarterly updates must be promptly distributed to U.S. EPA and Illinois EPA. If no Site additions or deletions have been made during a previous quarter, then no Appendix need be prepared or distributed for that period.

2. Individual Land Use Control Implementation Plans ("LUCIPs") (Appendix B) for all known Sites to be covered under the terms of this Agreement. These LUCIPs will be developed by **(Installation Name)** within **(insert "thirty (30)" or" sixty (60)" days)** of execution of this Agreement. Each LUCIP will: (1) identify the Site's location by reference to the facility's land use plan or by other means sufficient to enable the Parties to readily locate the Site; (2) identify both the LUC objective for the Site being addressed as well as those particular LUCs to be relied upon to achieve the objective; (3) specify what must be done in order to implement and maintain the specific LUCs required for the Site; and (4) contain a cross-reference to whatever decision document(s) apply to the Site. As future decisions involving LUCs are made at Sites on **(Installation 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 **(Installation Name)** **(Base Master Plan)**, these plans should serve as a central LUC reference source to assist **(Installation Name)** personnel with completing those periodic

Site inspections, review, and certifications required under Paragraph VI of this Agreement.

3. The attached Sample Record of Decision ("ROD") or Decision Document ("DD") language (Appendix C) containing a specific reference to this Agreement; and

4. The attached listing (Appendix D) of the appropriate agency and facility Points of Contact ("POCs").

b. Appendix E will contain all future NFR determinations (or their equivalent) as issued by U.S. EPA or Illinois EPA that pertain to Sites covered by this Agreement.

VI. SITE INSPECTION/REVIEW/CERTIFICATION

Within thirty (30) days of finalizing the LUCIP appendices mentioned above or sixty (60) days after execution of this Agreement, whichever occurs first, **(Installation Name)** shall initiate the following specific actions:

a. Conduct **(insert - quarterly, semi-annual, or annual as negotiated by the Parties)** visual inspections of all Sites where LUCs have previously or may hereafter be implemented at such Sites identified in Appendix A to this Agreement. These inspections will be for the purposes of verifying all necessary LUCs have been implemented and are being properly maintained. The **(Installation Name)** **(Environmental Program Manager)** will be responsible for: (1) ensuring all required inspections are performed; (2) providing U.S. EPA and Illinois EPA with thirty (30) days advance notice of, and opportunity to participate in, **(insert "one quarterly," one semi-annual" or "the annual")** inspection conducted each calendar year; (3) notifying U.S. EPA and Illinois EPA of any deficiencies noted within thirty (30) days, and; (4) ensuring that corrective measures are undertaken as soon as practicable to correct any such deficiency(ies) with timely notification to U.S. EPA and Illinois EPA detailing corrective actions taken or providing a timetable outlining future remediation activities. If the agency that has program authority for the program under which remediation is taking place declines to concur, then such agency and **(Installation Name)** shall work together to resolve how the noted deficiencies will be corrected.

b. If **(Installation Name)** has, or hereafter establishes, an environmental compliance board or similar body charged with coordinating and overseeing environmental compliance on the installation, such body shall conduct quarterly reviews to assess the **(Installation Name's)** status in

complying with all previously implemented LUCs. Any non-compliance issues will be appropriately resolved with U.S. EPA or Illinois EPA, whichever has program authority over the Site(s) where deficiencies were found.

c. Prepare and forward an annual report **(insert due date)** to U.S. EPA and Illinois EPA signed by the **(Installation Name) (Commanding Officer)** certifying the continued retention of all implemented LUCs associated with those Sites identified in Appendix A to this Agreement (as last updated).

VII. AGENCY COORDINATION

Effective upon execution of this Agreement, **(Installation Name)** agrees to implement the following agency notification and concurrence procedures:

a. Except under circumstances reasonably determined by the **(Installation Name)** to be an emergency, the **(Installation Name)** shall provide at least sixty (60) days notice prior to implementation of any Land Use Change (as defined in Section VII.d.) at any Site subject to LUCs. The **(Installation Name)** will provide notification of any such change to U.S. EPA and Illinois EPA. Such notification must be provided for the purpose of obtaining either U.S. EPA or Illinois EPA concurrence (whichever shall have program authority over the affected Site(s)) with the **(Installation Name)** 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.

b. Except in the case of an emergency where **(Installation Name)** personnel reasonably believe it is not practicable to wait for U.S. EPA or Illinois EPA concurrence, no Land Use Change should be implemented until U.S. EPA or Illinois EPA concurrence is obtained, consistent with the timeliness requirements set forth in subparagraph (c) below. For Land Use Change(s) affecting LUST or RCRA closure or corrective action Sites over which the State has program authority, although such notifications will be sent to both U.S. EPA and Illinois EPA, the **(Installation Name)** need only obtain Illinois EPA's concurrence with the proposed change. Each notification or request for concurrence must 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 Land Use Change; and,

3. A proposal for any necessary changes in the selected Site remedy.

c. Upon being notified by **(Installation Name)** of an anticipated Land Use Change at a Site, U.S. EPA or Illinois EPA or both shall evaluate the information provided pursuant to paragraph (b) above, and respond in a timely fashion prior to such land use change.

d. The Parties agree that any of the following will constitute a Land Use Change:

1. Any change in land use (e.g. from industrial to residential) inconsistent with any land use contained in those specific exposure assumptions in the human health or ecological risk assessments that served as the basis for the LUCs implemented at the Site;

2. Any Site activity disrupting the effectiveness of the implemented LUC. Examples include, but are not limited to: 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; or,

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

e. The **(Installation Name)** also agrees to immediately notify U.S. EPA and Illinois EPA if, despite its best efforts to ensure compliance with paragraphs (a) and (b) above, any Land Use Change at any Site with an implemented LUC is discovered not having been previously reviewed and concurred in by U.S. EPA or Illinois EPA in accordance with paragraph (a). 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.

VIII. 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 will 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 as CERCLA RODs or 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 Remediation (NFR) letters issued by U.S. EPA or Illinois EPA, whichever has oversight authority over the Site in question.

IX. 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 **(Installation Name)** with an existing LUC(s), then **(Installation Name)** shall ensure:

a. U.S. EPA and Illinois EPA are provided with notice at least sixty (60) days prior to any such intended conveyance. Such notice must: (1) indicate the mechanism(s) intended to be used to reasonably ensure any LUC(s) needing to remain in place after interest conveyance will be maintained; and (2) include an assurance that **(Installation Name)** has fully advised the property disposal agent who shall prepare the deed(s) or other instruments that will be used to convey the property of the need to include those LUCs that must remain on the property in those documents.

b. All existing "NFR" determinations (or their equivalent) issued by U.S.EPA or Illinois EPA, have been appended to this Agreement and that a copy of the same is provided to the property disposal agent who will handle the conveyance of any Site with LUCs still in place.

c. Each LUC is reviewed and incorporated into those property disposal documents (e.g., **Environmental Baseline Survey for Transfer ("EBST") and Finding of Suitability for Transfer ("FOST")**) to meet CERCLA and 40 CFR 373 notice requirements and that copies of the following documents are made available by the property disposal agent to the intended transferee(s) for recordation as may be required by applicable federal or State law:

   1) All No-Further-Remediation (NFR) letter(s) or determinations (or their equivalent) issued by U.S.EPA or Illinois EPA as pertain to the property; and,

   2) All RODs or similar Site decision documents as pertain to the property.

d. Each transferee is given adequate notice of existing Site condition(s) and informed of the responsibility that they will be assuming for maintaining

any LUCs previously implemented on the property. The notice will indicate that if the LUCs are not maintained, any NFR determination based on the LUCs may no longer be valid.

It is understood the planned conveyance of any Site with LUCs may prompt U.S. EPA or Illinois EPA to re-evaluate the continued appropriateness of any previously agreed upon LUC(s) based upon the level of assurance provided that all necessary LUCs will be adequately maintained.

X. CHANGE IN APPLICABLE STANDARDS

Nothing herein should be construed to preclude **(Installation 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.

XI. FUTURE COMMUNICATIONS

Upon 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 should receive all correspondence and communications on behalf of the Party pertaining to all matters falling under the terms of this Agreement. The listing of agency POCs, which is attached hereto as Appendix D, will be updated by the Parties as appropriate.

XII. SITE ACCESS

(Installation Name) herein agrees to provide U.S. EPA and Illinois EPA representatives, 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 installation's **(Environmental Program manager)** or his/her designee will coordinate access and escort the regulatory personnel to restricted or controlled access areas, arrange for base passes and coordinate any other access requests that arise. Nothing in this Agreement is intended to be construed to limit in any way the right of entry or inspection, either U.S. EPA or Illinois EPA, may otherwise have by operation of law. U.S. EPA and Illinois EPA representatives will 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 **(Installation 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 **(Installation Name)** personnel pursuant to this Agreement.

XIII. DISPUTES

All Parties agree to engage in a good-faith effort to resolve any and all disputes, hereafter arising with regard to the **(Station's)** substantial good-faith compliance with the terms of this Agreement or other matters relating to the Sites addressed hereunder.

XIV. RESERVATION OF RIGHTS

It is agreed and understood U.S. EPA and Illinois EPA reserve all rights and authorities each agency may currently have or hereafter acquire by law to require **(Installation Name)** to 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. Moreover, Illinois EPA specifically reserves the right to rescind any NFR letter or determination issued in connection with any Site covered under this Agreement if the LUC(s) associated with that Site(s) are not properly maintained. It is also understood the **(Commanding Officer), (Installation Name)** herein reserves those rights and authorities granted to the Department of Defense (DoD) by federal or state law, regulation, or executive order including, but not limited to, CERCLA, Executive Order 12580 (Superfund Implementation), and the National Contingency Plan (40 CFR Part 300). On behalf of the **Department of** the **(Navy, Army, Air Force), (the Commanding Officer) (Installation 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.

XV. ANTI-DEFICIENCY ACT

Nothing in this Agreement will be construed as obligating the **(Navy, Army, Air Force)** 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).

XVI. AMENDMENT

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

XVII. TERMINATION

This Agreement will 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, Army, Air Force)** choose to unilaterally withdraw from this Agreement, U.S. EPA and Illinois EPA may choose to reconsider any remedy(ies) associated with any Site with a LUC still in place at the time of such withdrawal.

XVIII. 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.

XIX. EXECUTION

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

FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:_____ Title:_____

Date: _____

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 5

By:_____ Title:_____

Date: _____

FOR THE **DEPARTMENT OF THE (NAVY, ARMY, AIR FORCE)**

By:_____ Title:_____

Date: _____

APPENDIX A

LAND USE CONTROL
SITE LISTING

Date last updated: _____

Site:	LUCIP #:
1.	
2.	
3.	
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APPENDIX B

LAND USE CONTROL
IMPLEMENTATION PLAN
FOR SITE _____

1. Site Description: (e.g., former fire fighting training area, approx. size 150' x 200' and contaminants of concern)

2. Site Location: (e.g., northeast corner of the Station between buildings 250 and 260 as reflected on BMP page _____/GIS index under IR Site or GPS information provided in decimal degrees to the nearest sixth digit).

3. LUC Objectives(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 No Further Remediation (NFR) letter dated _____).

6. Other Pertinent Information:

APPENDIX C

SAMPLE ROD/DD
MOA INCORPORATION LANGUAGE

(Insert the following language in those RODs/DDs providing for the use of LUC(s).

By separate Memorandum of Agreement ("MOA") dated _____, with U.S. Environmental Protection Agency ("U.S. EPA"), the Illinois Environmental Protection Agency ("Illinois EPA"), and **(Installation Name)**, on behalf of the **Department of the (Navy, Army, Air Force)**, agreed to implement base-wide, certain periodic Site inspection, condition certification and agency notification procedure designed to ensure the maintenance by **(Installation Name)** personnel of any Site-specific Land Use Controls ("LUCs") deemed necessary for present and future protection of human health and the environment. A fundamental premise underlying execution of this agreement was through the **(Branch of Services)** substantial good-faith compliance with the procedures called for therein, reasonable assurances would be provided to U.S. EPA and Illinois EPA as to the permanency of those remedies that included the use of specific LUCs.

It is understood that the terms and conditions of the MOA are not specifically incorporated or made enforceable herein by reference. Should compliance with the MOA 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.

APPENDIX D

AGENCY AND FACILITY POINTS OF CONTACT

ILLINOIS EPA

Name:

Address:

Phone:

U.S.EPA, REGION 5

Name:

Address:

Phone:

(INSTALLATION NAME)

Name:

Address:

Phone:

APPENDIX E

SITE NFR DETERMINATIONS

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM: AMENDMENTS TO 35 ILL. ADM. CODE 740	)	R01-27 (Rulemaking - Land)
IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM: PROPOSED 35 ILL. ADM. CODE 740. SUBPART H (SCHOOLS, PUBLIC PARKS, AND PLAYGROUNDS)	)	R01-29 (Rulemaking – Land) (Consolidated)

PRE-FILED TESTIMONY OF RICHARD R. BUTTERWORTH, JR.,

Good morning, my name is Richard R. Butterworth, Jr. I am a Senior Assistant General Counsel in the Office of General Counsel, General Services Administration ("GSA"). My testimony is provided on behalf of the GSA.

I have been an employee of the GSA for 13 years, and have been in my current role for the past five years. In addition to other duties, I serve as chief counsel for the Office of Property Disposal within the Public Buildings Service, GSA. In that capacity I am responsible for policy development, legislative initiatives, regulatory interpretation and adoption, overall program legal review, and for individual real property disposal actions.

I appreciate the opportunity to address this Board specifically on the legal limitations which exist on the ability of federal agencies to deed record land use restrictions on federal property.

I. Why Federal Installations Need a Recording Exemption

Federal Installations in Illinois need the proposed recording exemption because unlike privately-owned facilities, certain legal limitations exist on the ability of federal agencies to deed

I. Why Federal Installations Need a Recording Exemption

Federal Installations in Illinois need the proposed recording exemption because unlike privately-owned facilities, certain legal limitations exist on the ability of federal agencies to deed record land use restrictions on federal properties to be retained in federal hands. To understand the scope of federal agency real property management authority, it must first be recognized that those real properties which the various federal agencies occupy or otherwise control are not "owned" as such by them, but rather by the United States as sovereign. This is simply because the ultimate authority to manage all federally-owned land rests with Congress pursuant to the Property Clause of the U.S. Constitution (Article IV, Section 3) and Congress has not chosen to assign ownership over federal lands to any particular agency or agencies.

GSA derives its authority to manage and dispose of federal lands from the Federal Property and Administrative Services Act of 1949, as amended, the same statute under which my agency was established. See 40 U.S.C. §§ 471, et seq. (hereafter "Property Act"). One of the principal purposes of the Property Act was to provide economies of scale and consolidation of resources and authorities within the Federal Government. One of those key areas of consolidation was the authority to manage and dispose of real property. Specifically, GSA was authorized to ensure the effective utilization of "excess" real property (property which a landholding agency has determined is no longer needed to accomplish its particular mission) and the efficient disposal of "surplus" real property (excess property for which there is no other federal agency need). See 40 U.S.C. § 483, 484. GSA is authorized to provide these functions for all federal executive agencies. Therefore, unless an agency has specific authority to dispose of real property, once a landholding agency has determined that the property is excess to its needs, it must turn the property over to GSA for disposition.

The Department of Defense ("DoD") is in a unique situation in the Federal Government in that it has a specific delegation of the same property and management functions as GSA but only with regard to closing or realigning base properties identified under one of the various Base Closure and Realignment ("BRAC") statutes passed by Congress in recent years. Therefore, in those limited circumstances, DoD can act as both the landholding and disposal agency – in effect, stepping into the shoes of GSA..

While it is true that Congress has chosen on other occasions to grant certain specific property management authorities to other federal agencies, including the DoD, the scope of those authorizations has been very limited. For example, federal agencies have the general authority to grant utility easements or right-of-ways to third parties. . However, the Department of Justice has previously determined that the authority Congress provided to agencies to execute these types of instruments does not extend to other broader disposals of property interests.

The Property Act defines the term "property" to include "**any** interest in property." See 40 U.S.C. § 472(d). Accordingly, it is GSA's position that the granting of a property right in perpetuity, such as a restriction on the future use of federal property as envisioned in the proposed SRP regulations, is an "interest in property" as defined by the Property Act. Thus, only GSA and not the landholding agency can grant such an interest.

GSA has chosen not to delegate the authority to landholding agencies to record land use restrictions that would run with the land in perpetuity for three principal reasons. First, we believe it would be contrary to Congressional desires as to who should hold property disposal authority. In the case of DoD, the fact that Congress has only chosen to expressly grant that agency full property disposal authority in the context of BRAC real estate actions clearly indicates that it was not their intent for DoD to have those same authorities in the context of

managing active base properties. Secondly, GSA believes that recorded land use restrictions should only be agreed to in the context of an actual property disposal so that such restrictions can truly reflect the risks associated with known site conditions in the context of a particular contemplated reuse of the property rather than some hypothetical use in the future. At the time of disposal, GSA or any landholding agency with disposal authority could review the institutional controls previously set in place during the landholding agency's use of the property and determine, with appropriate regulatory agency input, whether those controls should remain and become permanent use restrictions or be modified in order to be truly protective in the context of the pending reuse.

And finally, as mentioned previously, GSA strongly believes there are other effective means to impose use restrictions on federal property without requiring that those restrictions be recorded. For example, while federal landholding agencies may be legally precluded from recording permanent use restrictions, those agencies may enter into land use restriction agreements, which may run for the length of the agency's custody of the property. Since many agencies retain their primary facilities for many years, such agreements can implement land use controls practically in perpetuity. The LUC MOA process that was adopted in the TACO regulations and has been proposed in the LUST regulations results in exactly such an agreement. Therefore, GSA hopes that the Board will adopt the amendment proposed by the Defense agencies in this proceeding which are intended to mirror the LUC MOA process.

We believe it important to also point out to this Board that in addition to those LUCMOA agreement, two federal laws, namely CERCLA and NEPA, independently impose certain pre-property disposal related notice requirements and other obligations on federal landholding agencies. These obligations are of a kind not similarly imposed on any private landholder. For

example, CERCLA Section 120(h)(3) requires federal agencies disposing of surplus properties to specifically state in the form of a deed covenant that all remedial action necessary to protect human health and the environment with regard to identified hazardous substance activity has been taken prior to conveyance. The United States also commits to return to the property to correct any other hazardous substance condition from prior federal activity that was not previously identified.

Second, federal landholding agencies must comply with the National Environmental Policy Act ("NEPA") in the context of making closure and "excessing" decisions. Under NEPA, federal agencies are required to assess potential impacts to the "quality of the human environment" from the proposed federal disposal action. Thus, if any institutional controls are affected by an agency's decision to close a facility or declare property excess, the landholding agency must evaluate those impacts and allow public comment on that evaluation. GSA must also comply with NEPA for our disposal actions and, if there is contamination in place on property GSA is disposing, we routinely notify the appropriate State regulatory agency to obtain their input on the need for land use restrictions on the property.

In light of the foregoing, GSA urges the Board to adopt the amendment to the proposal submitted by Federal agencies. GSA believes that the proposal will adequately address our concerns regarding a "perfection" of the NFR that would include deed recordation for ongoing Federal facilities. While the deed recordation requirement has been removed, GSA believes the proposal contains adequate safeguards to ensure the viability of the institutional controls. These safeguards include identification and notice requirements, procedures to ensure ongoing updates are communicated to IEPA, measures to ensure continued compliance with the LUC MOA, and

advance notification to IEPA of any proposed disposal of a property regulated by an institutional control.

In conclusion, we at GSA support the proposal to modify the proposed SRP rules as submitted by DOD to take into account the unique authorities given to, and responsibilities imposed upon, federal agencies' management of federal real property. I appreciate the opportunity the Federal Government has had to work with the Board and IEPA to resolve this issue and I thank you for the opportunity to present this testimony to you today.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing (1) Appearance of Georgia Vlahos, (2) Pre-Filed Testimony of Georgia Vlahos, and Pre-Filed Testimony of Richard Butterworth has been served upon the Clerk by personal delivery and upon each other person on the attached Service List by First Class U.S. Mail, postage prepaid, this 21st day of March 2001.

Georgia Vlahos

Georgia Vlahos