



# LAND USE CONTROLS AT DoD TRANSFERRING PROPERTIES

The Department of Defense (DoD) Base Realignment and Closure (BRAC) environmental process facilitates reuse and transfer of military property to local communities while protecting human health and the environment. DoD is using a variety of instruments that facilitate cleanup to risk-based levels, while ensuring property undergoing realignment or closure is environmentally safe in its anticipated reuse.

Land use controls (LUCs) are tools used to make land use decisions consistent with restrictions imposed on the property during the environmental restoration process. Once the land has transferred from Federal to private ownership, DoD may only have limited authority to control property use. Because state and local laws govern property transfer and land use, actions to implement and manage LUCs will be governed largely by state and local requirements. For this reason, DoD is implementing LUCs through established real estate and land use management mechanisms. The following fact sheet describes LUCs and the steps for transferring properties with LUCs.

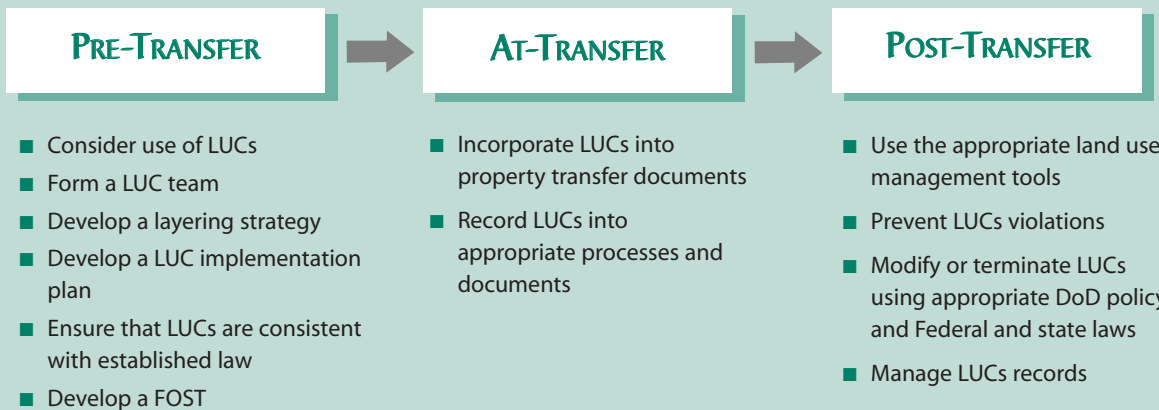
## WHAT ARE LAND USE CONTROLS?

LUCs include any type of physical, legal, or administrative mechanism that restricts the use of, or limits access to, real property to prevent exposure to contaminants above permissible levels. The intent of using these controls is to protect human health, the environment, and the integrity of an engineering remedy by limiting the activities that may occur at a particular contaminated site. The three types of LUCs are described below.

- Physical Mechanisms include a variety of engineered remedies to contain or reduce contamination, and/or physical barriers intended to limit access to property such as fences and signs.
- Legal Mechanisms include restrictive covenants, negative easements, equitable servitudes, and deed notices that are meant to ensure the continued effectiveness of land use restrictions imposed as part of a remedial decision.
- Administrative Mechanisms include notices, adopted local land use plans and ordinances, construction permitting or other existing land use management systems that may be used to ensure compliance with use restrictions.

## LAND USE CONTROLS PROCESS AT TRANSFERRING PROPERTIES

As DoD property moves from Federal to private ownership, implementing LUCs at transferring property follows a three stage process: pre-transfer, at-transfer, and post-transfer. Activities under each stage are described further in the following pages.





## WHAT ARE THE *PRE-TRANSFER* ACTIVITIES?

### CONSIDER USE OF LUCs

Once the reasonably anticipated future land use assumptions have been determined, the Component can select the appropriate remedy and determine if LUCs or alternative use restrictions are necessary. If a remedy requires the use of LUCs, the LUC must be protective of human health and the environment and ensure that land use is consistent with restrictions imposed on the property during the environmental restoration process.

### FORM A LUC TEAM

Implementing LUCs that are effective over time is a team effort. Internally, close and continual communication between the supporting environmental office and property disposal agent is essential during the development of LUCs and throughout the entire land use process. Once a decision is made that LUCs are needed, the environmental office and the disposal agent determine the types of LUCs that will be most effective to protect human health and the environment and to facilitate reuse. Externally, many of these use restriction mechanisms exist solely within the authority of the state or local government or apply to the actions of the property owner. In light of this, the property disposal agent needs to work closely with the appropriate local or state agencies and potential transferee early in the disposal process to ensure the effectiveness of the LUCs.

The Component should identify and establish contact with the transferee, environmental regulators, and state and local agencies. The internal and external teams should meet to develop a layering strategy and an implementation plan.

### DEVELOP A LAYERING STRATEGY

The most effective method of implementing LUCs is through a layering strategy that prevents inappropriate uses of the property. One example of a layering strategy for prohibiting groundwater use includes a deed restriction, a zoning ordinance, limitations on well drilling, and a notice to the local community.

## DEVELOP A LUC IMPLEMENTATION PLAN

To clearly delineate the responsibilities of all parties involved in implementing the LUCs, the Component will develop a LUC implementation plan. The implementation plan is not an enforceable agreement, but an internal management tool. The plan should include:

- The physical, administrative and legal instruments to be used to ensure the restricted use of or access to the specific property
- The specific duty of each party responsible for LUCs implementation
- The intent of the parties when the LUCs are developed and implemented
- The process for discontinuing LUCs and associated layering mechanisms.

## ENSURE THAT LUCs ARE CONSISTENT WITH APPLICABLE LAW

LUCs shall comply with state LUC management provisions, consistent with Federal law and DoD environmental policy. The Component should request information from the appropriate state agency on mechanisms used to track and enforce LUCs. If possible and appropriate, the Component should grant a property interest, consistent with applicable law, to the relevant state or local agency that would allow them to maintain and enforce the LUC. Granting the property interest will help ensure that the real estate right for the state is enforceable.

## DEVELOP A FINDING OF SUITABILITY FOR TRANSFER (FOST)

After the selection of the appropriate LUCs, the environmental office shall provide information on the nature and intent of the restrictions to the property disposal agent. The information should include:

- A description of the LUC
- The rationale for the LUC
- The description and location of the affected property.



The information should be contained in a Finding of Suitability to Transfer (FOST) or an equivalent document and act as a link between the environmental and the real estate process.

## WHAT ARE THE *AT-TRANSFER* ACTIVITIES?

### INCORPORATE LUCs INTO PROPERTY TRANSFER DOCUMENTS

The property disposal agent should ensure the LUCs are incorporated into the property transfer documents. The property disposal agent should consult both state property and environmental law for the necessary language for the LUC.

In developing the transfer documents, the Component property disposal agent should include the following:

- Reference to the environmental documents containing the restriction rationale
- Reference to the location of the CERCLA Administrative Record
- Additional reference information such as the exposure assumptions
- Federal contact information.

In developing the deed restrictions, the property disposal agent should:

- Specifically state the restricted uses of the property beyond basic land use categories such as residential and commercial
- Distinguish between property being restricted and property being transferred for unrestricted use
- Identify specific properties with LUCs.

In drafting the purchase agreement, the Component property disposal agent should detail:

- The transferee's responsibility for maintaining the LUCs, including notifying DoD and other identified stakeholders if a violation of a LUC occurs
- The transferee's protections under CERCLA section 120(h)(3) and section 330 of Public Law 102-484 to maintain LUCs

- How the restriction will be renewed
- Responsibilities and agreements in the purchase agreement and deed.

### RECORD LUCs INTO APPROPRIATE PROCESSES AND DOCUMENTS

The transferee is responsible for recording the land use restrictions and should comply with state or local requirements. The Component property disposal agent shall comply with the applicable requirements of state real estate and environmental law governing the implementation of LUCs, as long as they are not inconsistent with Federal requirements. The property disposal agent should:

- Register the LUCs with the state or local regulatory agency
- Use state model language in drafting the LUC
- Ensure that copies of the deeds are provided to the local government offices.

## WHAT ARE THE *POST-TRANSFER* ACTIVITIES?

### USE THE APPROPRIATE LAND USE MANAGEMENT TOOLS

There are a number of options that can be used separately or collectively to ensure the management and maintenance of LUCs over time. These tools ensure proper incorporation of LUCs into local land use planning and management systems. The textbox on the next page describes six common land use management tools.

### PREVENT LUCs VIOLATION

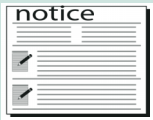
DoD expects the transferee and subsequent owners of the property to follow the LUCs included in the transfer documents. State or local development and approval processes, such as zoning, subdivision and site plan approval, site development and building permitting, should be used to enforce and manage LUCs. Because DoD will no longer have ownership of the property, the Component should work with the relevant local agencies and the transferee to ensure their enforcement of LUCs after the transfer process.



## LAND USE MANAGEMENT TOOLS



**STATE LUC MANAGEMENT SYSTEMS** – There is a growing trend in state environmental law that imposes state requirements for managing LUCs such as developing LUC registries. DoD and the transferee must comply with these state requirements and utilize the existing LUC management systems to the extent they do not conflict with Federal laws.



**NOTICE** – Notification of affected parties of the existence of LUCs is an effective method of preventing inappropriate land use. A one-time written notice should be sent to the landowner when the LUC is first implemented, followed by an annual reminder. The Components, transferee, or relevant state or local agencies can provide the notices. The notification could be provided through a variety of mechanisms, including public notice or letter.



**SELF-CERTIFICATION** – Self-certification is a land use management tool that places the responsibility for confirming the integrity of the LUC on the transferee. Self-certification can provide a cost-effective means of gaining knowledge on the property use from the person closest to the property.

The Component and the transferee should negotiate which agencies should receive the self-certification and should be recorded in the transfer document. The Component should use this tool with caution and only in conjunction with a provision for spot-checking self-certification reports, because this mechanism relies on the veracity of the transferee's reporting.



**MARKINGS** – Where possible, permanent markers such as signs should be used to identify restricted use areas and indicate prohibited activities.



**FIVE-YEAR REVIEWS AND LONG TERM MONITORING** – The CERCLA five-year review and long-term monitoring provide an opportunity to assess the effectiveness of the remedy and to review the integrity of the LUCs and the layering mechanism.



**REMEDIAL ACTION OPERATION** – The review of on-going remedies during the remedial action operation phase provides a great opportunity to concurrently review LUCs.

## LUCs MODIFICATION/TERMINATION

If appropriate, the Component should obtain the same level of review from Federal, state, or local regulatory agencies as the original decision to establish the restriction. After the termination of the LUCs, it is important to undo the system of mutually reinforcing controls to avoid future confusion about the status of the property. The property disposal agent should provide a one-time notice and direction to all entities involved in the layering scheme.

## MANAGE LUC RECORDS

To manage LUC records, the property disposal agent should maintain a central database of properties with LUCs for leased or transferred properties. The database should include:

- Relevant information on the property
- Types of LUCs established
- Land use monitoring and management responsibilities
- Location of real estate records.

## MANAGE LUC RECORDS

To address future concerns about a property, the Component should retain the following real estate records:

- Finding of Sustainability for Transfer (FOST)
- Environmental Baseline Survey (EBS)
- Purchase agreement
- Deed
- Cooperative agreement, or similar documents that specify LUC management responsibilities.

## CONCLUSION

DoD is committed to making sure that its property is environmentally safe for both military and civilian personnel at transferring properties. As land use planning and management are typically local functions, DoD's guidance focuses on implementation and management of LUCs through applicable local management systems and tools. DoD is working with all appropriate Federal, state, and local agencies and prospective property owners to ensure LUCs on property being transferred are effective and remain protective.