

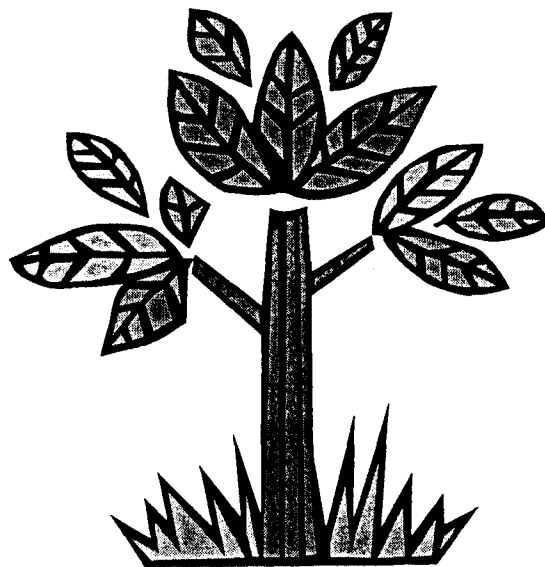
Association of State and Territorial

ASTSWMO

Solid Waste Management Officials

**Base Closure Focus Group
Performance-Based Remediation Contracts
White Paper and
Compendium of State Lessons Learned**

“A Guide To Performance-Based Environmental Remediation”



ASTSWMO BASE CLOSURE FOCUS GROUP

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Performance-Based Remediation Contracts White Paper and
Compendium of State Lessons Learned

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**THE ASSOCIATION OF STATE AND TERRITORIAL SOLID
WASTE MANAGEMENT OFFICIALS
BASE CLOSURE FOCUS GROUP WHITE PAPER
REGARDING PERFORMANCE-BASED CONTRACTS AND
COMPENDIUM OF STATE LESSONS LEARNED**

I. INTRODUCTION

The Department of Defense (DoD) and military services are quickly moving towards a new contracting vehicle for environmental remediation. This change has resulted in significant modifications to States' regulatory roles and responsibilities. With this change, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Base Closure Focus Group (BCFG) has developed this White Paper, with the goal of outlining issues associated with these new contracts and its impacts on DoD's environmental remediation and the States' regulatory oversight at DoD facilities.

The contracting changes are referred to as Performance-Based Contracts (PBC). As you read through the paper, the BCFG has attempted to define the process, answer questions that the reader may have regarding DoD's use of PBC (and similar processes) in cleaning up its sites with environmental contamination, the States' role in PBC, recommendations to improve the process, and case studies of sites that are using the PBC. It should be understood that: 1) there are inconsistencies within and between the military services in defining the types of contracts and how they are implemented, and 2) the roles of State regulators may change with time as the military services' use of PBC expands.

Because of its belief that it will result in a faster approach to attaining site remediation and closure, the Army is aggressively implementing PBC. At active installations, it has targeted 40% of the total projected funds in PBC for the fiscal year 2004, and 80% for the fiscal year 2005. The U.S. Army Corps of Engineers (ACOE) hopes to have PBC at 20% of Formerly Used Defense Sites (FUDS) by 2005. Specific projected percentages for the Navy and Air Force have not been developed.

In general, we believe that the use of PBC for environmental remediation can be an effective tool in remediating DoD sites, whether they are active, closed, aligned or formerly used defense sites. The BCFG also agrees with DoD that PBCs can be an effective process to expedite clean up and help it establish definitive out-year costs for Congress. However, the use of PBC has raised concerns with States, and ultimately for PBCs to achieve success there must be a collaborative process that engages both the DoD and State project managers from the beginning to site closeout.

II. WHAT ARE PERFORMANCE-BASED CONTRACTS?

PBCs are a contracting vehicle, which differs from the traditional approach to remediation contracting in that the endpoint, attainment of cleanup goals and State regulatory concurrence, is prescribed, but the path to attain these endpoints is left up to the contractor. Traditionally, remediation contracts have not only prescribed the endpoint, but also specified the direction that the contractors would follow to achieve it. Under this new PBC approach, performance risk is transferred to the contractor. By doing this, DoD believes that the contractor will be motivated to complete the remediation/site closeout in the most timely and cost effective manner.

III. WHAT IS THE PROCESS FOR DEVELOPING A PBC?

Currently, the Army is the military services' leader in initiating PBCs. The Army's current guidance/policy at active installations is that it will maintain oversight of the cleanup and determine, in consultation with State regulators, the desired performance objective for each site. The Army guidance states that a Statement of Objectives (SOO) or Performance Work Statement (PWS) will be developed which itemizes the performance measures necessary to achieve contract compliance. The Army's intent is to provide the potential contractor with sufficient information to allow them to develop cost estimates, while keeping the SOOs/PWSs general enough to provide flexibility in the remediation approach. The Army's guidance states that remediation approaches implemented at each site will be affected by the remediation phase existing at the time of contract award and other factors, including existing cleanup schedules in applicable federal facility agreements, permits or other controlling documents. Typically, the contract will require attainment of various performance measures identified in the SOO in triggering contractor payments.

State regulators should be given every opportunity to participate in the PBC process, from deciding if a site would benefit from PBC, to interviewing bidding contractors, to meeting with the contractor awarded the contract prior to initiation of field work. Federal contract law may preclude them from participating on the review and award committee, however, States should be able to participate in the presentations and interviews bidders provide to DoD.

IV. TYPES OF PBC

Various forms of contracts can be used to accomplish the goals of performance-based remediation such as:

A. Fixed-Price Remediation Contracts

The Army defines a Firm Fixed-Price Remediation Contract (FFPRC) as a contract that provides for a set price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places

the maximum risk and full responsibility for all costs and resulting profit or loss upon the contractor. It provides maximum incentive for the contractor to control costs and perform effectively. It imposes a minimum administrative burden upon the contracting parties.

B. Firm Fixed-Price Remediation Contracts with Insurance

A Firm Fixed-Price Remediation Contracts with Insurance or Guaranteed Fixed Price Remediation ((FFPRCI/GFPR) is similar to fixed price in that it provides for a price that is not subject to adjustment on the basis of the contractor's cost experience in performing the contract but includes at least one type of environmental insurance. Environmental insurance may be used to protect DoD from potential cost overruns, third party claims, or other liabilities.

This type of contract allows the contractor flexibility to use the most innovative technologies and techniques to close out sites in the most expeditious manner, resulting in early regulatory closure. From the Army's perspective, FFPRCI/GFPR creates greater certainty that environmental restoration work will be completed on schedule within an agreed upon budget. This allows for more effective planning because the Army is able to allocate appropriate resources to the restoration program and lock in restoration funding requirements at the current year dollars.

The decision as to whether or not environmental insurance is needed is usually based upon the overall cost of the project and the risk to the contractor. For those projects with minimal risk, the cost of the insurance may exceed the potential amount of cost overrun. If environmental insurance is appropriate, the value of the insurance is typically between 100% and 200% of the contract cost.

C. Firm Fixed-Price Remediation Contracts with Incentives

The Army defines a Firm Fixed-Price Remediation Contract with Incentives as a fixed price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of the final negotiated cost to the total target cost. The final price is subject to a price ceiling, negotiated at the onset.

These contracts are not frequently awarded by the military services due to the difficulty in negotiating incentives and developing the final price to the contractors. When awarded, this type of PBC may result in incentives that include expedited clean up timeframes. States should be aware of all contract incentives as they could directly influence its level of time, budget and effort in overseeing the remediation.

D. Cost Reimbursement Contracts with Incentives

The Army defines a Cost Reimbursement Contract with Incentives as a cost reimbursement contract that provides for an initially negotiated fee to be adjusted later based on the relationship of total allowable costs to target costs.

V. WHICH DOD SITES SHOULD BE CONSIDERED FOR PBC?

The Army guidance/policy claims that the PBC approach can be used at any stage of the remediation process. However, we believe the remediation stage at which military services might best incorporate the PBC approach should be site specific and dependant on the knowledge of the contamination, the types of contamination, and numerous other conditions. For example, we believe the initial stages of remediation often contain too many environmental unknowns to make PBC a viable approach. In the early stages of the remediation process, an experienced, knowledgeable contractor could have a very difficult, if not impossible, time determining the cost of remediation, and a legitimate insurance company could ask enormous rates due to the high risk.

The BCFG believes that PBC may be most appropriate for well-characterized sites where a remedial alternative has not yet been selected. This type of site limits the unknown risks to the contractor yet allows for maximum flexibility in the selection of innovative approaches to site remediation/closure. Sites where cleanup decisions have been agreed upon via decision documents, Records of Decision (RODs), Resource Conservation and Recovery Act (RCRA) permits or consent orders may not be appropriate for PBC, as remedy decisions have already been selected and cannot be materially changed without lengthy negotiations. Also, sites that are in the long-term monitoring/long-term operation (LTM/LTO) phase of a remedial action may not be appropriate for PBC as remedial decisions have already been made and the operation and monitoring requirements of the remedial action have already been agreed upon.

While previously limited to sites with chemical contamination, the ACOE is currently evaluating the use of FFPRCI for Ordnance and Explosives (OE) response actions at various FUDS, active DOD installations, Base Realignment and Closure Act (BRAC) sites, property adjoining DOD installations, and other federally controlled/owned sites which have been impacted by OE operations. As with all PBCs, the overall objective is to clear areas of OE to the extent that regulatory closure of the sites will be achieved.

It's possible to alleviate many of the State regulators concerns by having the State a party to discussions regarding the viability of a site to PBC, the remediation process and clean up expectations up front, before execution of any contracts.

VI. HOW ARE STATE REGULATORS IMPACTED BY PBC?

Although State regulators typically welcome a contracting process that provides for an expedited cleanup and places more accountability on DoD contractors, PBC may also be a source of concern as it can raise accountability issues. By shifting the risk, responsibility, and control of remediation projects to contractors, DoD believes the cleanup will move faster. While this is a possibility, the reduction of DoD at the installation level could result in delays as the contractors and regulators debate remedial alternatives.

From the regulator's perspective, the State will look directly to DoD for any environmental liability regardless of the use of PBCs. Because many cleanup projects are dictated by decision documents, RODs, RCRA permits or consent orders, DoD cannot simply shift the responsibility and control of remediation projects to contractors. DoD components remain the responsible party regardless of contracting vehicle and State regulators may continue to look to communicate directly with the DoD remedial project manager, not a contractor.

This also brings into question DoD's continued commitment to BRAC Cleanup Teams (BCTs). Because under PBCs the responsibility and control of remediation projects could be shifted to the contractor, the DoD's ability to work with the State and the Environmental Protection Agency (EPA) as partners in making cleanup decisions will be greatly reduced. This shift of responsibility and control also brings into question how States will approach the use of the dispute resolution process contained in the Department of Defense State Memorandum of Agreements (DSMOA), RODs, RCRA permits and consent orders.

In addition, because of the lack of DoD oversight, the potential exists for an increased workload on the part of the State regulatory agencies in the absence of installation oversight. While DSMOA cooperative agreements can be amended to cover increased oversight cost, this ignores the fact that many State regulatory agencies are working under legislative mandates to reduce staff.

Finally, it's important for State regulators not to be lulled into a false sense of security when environmental insurance is purchased at a DoD site. State regulators do not typically review the specific terms of the insurance policies. One key component of insurance is understanding exactly what is covered. It's important to note that the term "unknown" does not imply "all contamination that is not known about," rather, it is very specifically (and not consistently) defined in the insurance policy.

However, for contracts such as FFPRCI/GFPR, there is a definite benefit to having environmental insurance at a site as the additional review conducted by the insurance companies can add a level of comfort and certainty to the amount and type of remediation needed.

VII. ARE THERE OTHER CONTRACTING VEHICLES/APPROACHES TO DoD REMEDIATION?

A. Privatized UXO Clearances at FUDS

Although not within the definition prescribed by the DoD regarding PBC, some States are faced with, based on concerns of when work would be initiated by the ACOE, private landowners initiating their own OE clearances. The intent is that the DoD would then reimburse these private entities for costs associated with the remediation.

As an example, at the Former Lowry Bombing and Gunnery Range (FLBGR) in Colorado, several private developers became frustrated with the proposed ACOE schedule for clearance of OE on their property. The ACOE timing as to when these properties would be cleared stretched out for years. The developers, instead of loosing thousands of dollars while these properties stood idle, initiated efforts with the Colorado Department of Public Health and Environment (CDPHE) to implement their own OE clearances under the direction and oversight of CDPHE. Consent Agreements under RCRA were issued by CDPHE to each developer, setting out timeframes, deliverables and the remedial process. A Completion Report was required to be submitted to CDPHE, which, if approved, allows the developer to construct on the property under its intended land use.

The homebuilders, who followed State and federal policy, guidance and regulation associated with OE clearance, hired OE contractors. ACOE volunteered to be responsible for all destruction and disposal associated with live OE found on the properties.

The benefits of this approach are significant. The privatized clearances were found to be substantially less expensive and quicker than the procedures currently followed by ACOE. Properties can then be developed expeditiously, allowing beneficial reuse of these one-time military ranges. Finally, State regulators are assured a clear decision-making role in all aspects of the clean up, including how clean is clean.

DoD's position as to how it views these privatized OE clearances is unclear. To date, even with significant cost savings to the federal government, it remains undecided whether the DoD will reimburse the developers for their efforts at FLBGR.

B. Early Transfers

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 120 (h)(3)(C) (42 U.S.C. § 9620 (h)(3)(C)), was amended in September 1996, to allow Federal agencies to transfer property by deferring the covenant warranting that all necessary cleanup actions had been taken. Prior to this amendment, CERCLA 120(h) property transfers required a covenant by the

appropriate federal agency prior to transfer. This covenant, among other things, must indicate that all remedial action necessary to protect human health and the environment with respect to any hazardous substances remaining on the property has been taken.

The 1996 CERCLA amendments, in appropriate circumstances as described below, allow deferral of this covenant. Such a deferral, known as an early transfer, is allowed when the Governor of the State where the property is located concurs with the deferral request for property not listed on the National Priorities List (NPL). For NPL property, the EPA must provide the deferral with the concurrence of the Governor.

For the Governor to approve an early transfer:

1. The Governor must make findings pursuant to Section 120(h)(3)(C) of CERCLA that the property is suitable for transfer for the intended use;
2. That the use is consistent with protection of human health and the environment;
3. That the agreement governing the transfer contains the specific assurances described below;
4. That notice of the early transfer has been provided; and
5. That the early transfer will not substantially delay any necessary response action.

In many States, these findings are made upon the execution of numerous documents providing assurances that specific conditions will be met. These assurances are needed in order for the Governor to consider approval of the deferral of the federal covenant required for early transfer. Several of the documents contain enforcement provisions in the event of a breach of the agreement. Some of the documents also specify the actions in the event of a failure in the process. Overall and ultimate responsibility for implementation and maintenance of the remedy rests with the military service, as generally specified in CERCLA 120(h)(3)(A) and acknowledged in agreements described below. The documents discussed below provide unique layers and levels of assurance that remediation is protective of human health and the environment.

1. **Environmental Services Cooperative Agreement:**

The Environmental Services Cooperative Agreement (ESCA) is negotiated between the military service and the new owner. Nevertheless, it is helpful to have all parties involved in relevant aspects of the negotiation discussion as early as possible. The ESCA describes the geographic area in which work will be performed, and establishes, among other things, the terms and conditions necessary to obtain regulatory closure, including execution of any long-term operation and maintenance obligations and environmental liability insurance for the property. The ESCA provides a dollar amount to

be paid by the military service to the new owner in specified installments or a lump sum for remediation of the property.

Specific sections in the ESCA provide assurances that the military service remains responsible for specific conditions and failure of any and all remedies, and that the new owner will complete the requirements for regulatory closure, which means issuance of appropriate closure approval letter(s) from applicable regulatory agencies, and execution of any long-term obligations.

2. **Environmental Insurance Coverage:** A portion of the total remediation amount negotiated in the ESCA is typically used to pay a premium for environmental insurance coverage. This usually includes a form of a Pollution Legal Liability Select Policy, a Cleanup Cost Cap Program Policy, and a Contractor's Operations and Professional Services Policy.

The Pollution Legal Liability Policy is a general liability policy, which includes coverage of cleanup of certain unknown pre-existing and new conditions, including unexploded ordnance and general liability to third parties. The Cleanup Cost Cap Program Policy will only cover cleanup costs that exceed the anticipated maximum costs for the responsibility under the ESCA.

3. **Consent Agreement:** The purpose of the Consent Agreement is to establish a process and timetable for new owner's completion of the remedial actions. The Consent Agreement includes a description of the investigation and remediation process through site certification and implementation of operation and maintenance plans, an explanation of the roles and responsibilities of the parties, and provisions for the applicable regulatory agency's approval, cost recovery, and enforceability. Specifically, the Consent Agreement obligates the parties to implement and pay for site remediation.
4. **Financial Assurance Instruments:** The Consent Agreement requires an operation and maintenance plan to be prepared to specify long-term obligations. In certain situations, a Performance and Indemnification Agreement may also be negotiated to provide, among other things, that the new owner shall perform the long-term obligations under the Consent Agreement. Financial assurances to meet these obligations are provided in the forms of a completion bond and a monitoring bond that will exist until the applicable regulatory agency determines that all long-term obligations have been completed.

5. **Land Use Covenant:** In most cases when waste is left in place, a land use restriction is required upon the property to protect public health and the environment. Therefore, prior to transfer to a new owner, States may require that a Land Use Covenant (LUC) prohibiting certain uses of the property be executed and recorded. The LUC may require the property be restricted to limited uses, may prohibit digging, may require ongoing monitoring, or prohibit sensitive uses, such as residences, day care centers and hospitals. The LUC runs with the land into perpetuity and the LUC may be modified or terminated due to changing conditions at the property. A release or modification may be recorded once it has been established that the risk to public health and the environment has been eliminated or reduced.

6. **Federal Facilities Site Remediation Agreement:** Federal Facilities Site Remediation Agreement (FFSRA) includes a description of the investigation and remediation process through site certification and necessary operation and maintenance programs, an explanation of the roles and responsibilities of the parties, and provisions for the applicable regulatory agencies' approval, cost recovery, and enforceability.

7. **Resource Conservation and Recovery Act Hazardous Waste Facility Permit:** If the property to be transferred is part of a RCRA hazardous waste facility permit, then either an amendment or modification to the permit must be completed prior to transfer, and the new owner may have to take on the requirements of the permit.

DoD developed guidance in 1998 for obtaining approval for an early transfer for Non-NPL property. The process includes preparation of a Finding of Suitability for Early Transfer (FOSET). The FOSET document consists of DoD findings and determinations of the status of the environmental investigations on the proposed early transfer property. The FOSET must be reviewed by all parties and submitted for public comment. Once all the documents are complete, and the Governor has approved the early transfer, the property may be transferred.

Ultimately, when remedial actions have been completed or when the approved remedy for the site has been implemented and is operating properly and successfully, the DoD shall provide a warranty document to the transferee which states that all remedial actions have been taken in satisfaction of the requirement in CERCLA section 120(h)(3)(A)(ii)(I). The DoD will record this warranty, amending the deed.

The early transfer process can be a very successful tool to transfer property because it accelerates remediation, and advances economic development of an area. It also removes DoD as an impediment to cleanup to State standards, because the new

owner agrees, in the Consent Agreement, to clean up to State standards. The downside is that the DoD is no longer the owner of the property. Therefore, under a worst-case scenario, it may be difficult to make the DoD return to complete remediation at sites they no longer own.

VIII. ASTSWMO BCFG PBC RECOMMENDATIONS

The PBC approach can result in an improved remediation process. This approach can lead to remediation of a site in a more timely and cost efficient manner. As with any process, results are dependant upon the parties involved, the level of cooperation and understanding, funding and level of technical expertise.

However, it is imperative that the State regulatory agency be an integral part of the PBC process to ensure a smooth transition to its role and responsibility and an effective remediation and document review process. The following ASTSWMO BCFG recommendations have been made after reviewing past PBC experiences:

1. Require State Concurrence at which Sites will Undergo the PBC Process:

States must have a decision-making role on whether a site is appropriate for PBC. The type of contamination and the stage of remediation should factor into whether a PBC approach should be used at a particular site. As discussed above, not all sites or all contamination may be appropriate for the PBC approach.

As it begins its evaluation as to which sites would potentially benefit from PBCs, DoD must simultaneously initiate discussions with State regulators. As described in this White Paper, there are many other considerations that need to be considered in initiating PBC than whether it is a benefit to DoD. If it's found that a State regulatory agency cannot concur with the use of a PBC, DoD should work with regulators until concurrence is achieved on how site clean up will proceed.

As part of these preliminary discussions, it is critical that DoD meets and discusses the anticipated remediation schedules with State regulators. The DoD and its contractors will need to understand potential bottlenecks if State regulators are inundated with reviews and approval requests, since this may affect contractor profit. Early and continuous communication between the contractors, the DoD and the State regulator will go a long way in resolving many conflicts before they adversely impact the schedule or cost of the project.

2. DSMOA Funding:

State funding through the DSMOA program is essential to enabling many States to perform oversight at DoD facilities undergoing remediation. There are three main impacts that PBCs can have on States' DSMOA funding: (1) frequent changes and additions to planned work; (2) overtaxing limited State resources; and, (3) little or no input into the contracting process.

The DSMOA 6-step process is the basis of estimating State expenses for oversight. Specifically, Step 2, the Execution Plan phase, is an important step in the overall process. It is where the military installation's project manager lists specific tasks that need to be accomplished to complete certain remedial milestones. It is also where the State project manager agrees to perform certain regulatory oversight functions that need to be completed in order to achieve regulatory compliance or approval. Costs for State oversight reimbursement are estimated by State financial personnel based upon the previous Step 2 tasks, which become the basis of its two-year DSMOA funding.

While PBCs may increase the flexibility of a contractor to perform the required tasks, it is important to realize that numerous and frequent changes may adversely impact the States' ability to review and turn around deliverables submitted for regulatory compliance. DSMOA funding levels must be sufficient to allow States to perform uninterrupted oversight services. While the PBC concept may provide for greater flexibility by the military component, the current DSMOA process does not allow for the same flexibility in funding, thereby possibly creating a bottleneck in regulatory approvals of submitted documents. The PBC process may increase the document review and approval process for the State. For one or a few PBC contracts, the State program managers may be able to manage the increased document review and turn-around time; however, if these contracts increase to 40-80% of current levels, as anticipated by the Army, most States may not be able to support the process. Unplanned or greatly increased regulator workloads may result from expedited work efforts, thereby overloading limited State resources that were previously planned to some detail in DSMOA Step 2 Execution Plans. We are concerned that State regulators will have little or no input to contractors work efforts until too late in the process to have significant impact on the project, thereby delaying regulatory approvals of the work.

Finally, if flexibility is the key to site remediation through PBCs, it is paramount for the military components to be flexible in their DSMOA funding approvals to States. Military components must be able to quickly provide modifications to approved funding levels if State reviewers are to maintain expedited schedules. Changes to the project scope of work may

require additional approval time and funding to the State in order to accomplish new and planned work.

3. Clearly Defined DoD and State Roles in PBC Process:

In order for PBC to be a success, State regulators, DoD personnel and the contractor must agree on the roles the various parties will assume in the process. PBC cleanup must begin with a complete understanding of regulatory requirements and the State regulators' perspective on the site's clean up. Without integration and communication of the State perspective into the procurement process, bidders cannot develop an accurate cost estimate for obtaining regulatory closure, and the PBC process may not be successful.

To facilitate communication, State regulators need a constant point of contact with the responsible party, and it would be appropriate that DoD be that point of contact. State regulators intend to address all correspondence directly with DoD. In addition, all documents prepared by the contractor must be reviewed by DoD to ensure compliance with the State and EPA requirements prior to submission to the regulators. This approach has many benefits including DoD maintaining oversight of their contractor to ensure schedules and requirements of State regulators are being met and that the quality of their work is acceptable.

With direct oversight, DoD can quickly address any issues the State regulators may have with the contractors early in the contract process. This direct oversight and responsiveness to regulatory comments and issues will benefit the State regulators and the progress of the remediation.

4. Consistent Approach within and between the Military Services:

Since many States deal with more than one military service at installations within their jurisdictions, inconsistency among how the various services use PBCs can present problems in the regulatory approval process. In fact, sometimes there are inconsistent interpretations within each service as to how these types of contracting methods should be utilized. Inconsistent use and interpretation of how PBCs are to be used by a military service can delay, impede or complicate the ability of State regulators in the approval process of a military cleanup. Instead of building off of the experiences of previous clean ups, inconsistent use of PBCs may actually complicate and prolong clean up at military installations and former military sites.

Guidance and direction for the consistency of PBCs by each of the military services should come from DoD. Although flexibility in use of PBCs may be an advantage to the service in terms of time and money saved, it should be noted that lack of consistency would have the exact opposite affect on

State regulators. A consistent approach to PBCs by the military components would allow States to eliminate unnecessary time and effort spent in determining working relationships, lines of communication and cleanup goals for every site. It would allow for less "process time" (time spent working out how the various agencies will interact with each other) and more time spent on cleanup goals and objectives.

Finally, the military services need to be consistent in the definitions of what a PBC is and what it is intended to do. When the Army first announced its decision to use PBCs, there were a number of different interpretations as to what a PBC actually was and how it would be utilized. Again, DoD should define what a PBC is and what it isn't, and publish guidelines on how it should be used. In so doing, State regulators, military services, and contractors will have a common base for working together and be able to get to cleanup quicker and with less administrative and legal obstacles to slow down or impede remedial progress.

5. Require Opportunity to Interview Bidding Contractors:

States have an interest in ensuring that the bidders understand the State regulatory requirements and are capable of implementing the remedy. State participation in bidder interviews may be beneficial because the State regulator will be able to assess the bidders' understanding of State regulatory requirements and attempt to resolve technical and legal differences prior to bidding. In addition, the regulator may have previous experience with the bidder and their ability to implement an effective remedy. Finally, since it is the responsibility of the contractor to achieve regulatory closure, it is imperative that there is a clear understanding of what is expected to reach this milestone prior to the contract being awarded.

6. Oversight of the Contractor:

In some instances, State regulators have found that PBC contractors are completing tasks without any oversight. Although this is not always a problem, for some contractors direct oversight is essential. The reliability of the contractor's work and the conclusions drawn from it are directly tied to the methods used to do the work. If one of the advantages of PBC for DoD is the need for less oversight, then one of the drawbacks for States is the need for more regulatory oversight.

To resolve this concern, we recommend that until it can be established that the contractor will consistently work with the State regulator to identify and implement the best remedy at the site, according to State and federal statutory requirements, it is imperative that the DoD maintain oversight and a contact at the site. The DoD should continue to directly oversee the

actions of the contractor, unless the State regulator agrees that they have the ability and manpower to provide direct oversight.

As per recent discussions with State regulators, the DoD will be working with States in the development of a Quality Assurance Surveillance Plan (QASP). The goal of the QASP is to provide a coordinated effort, by both DoD and State regulators, in providing adequate oversight of PBC contractors. The ASTSWMO BCFG will keep States updated as this plan is being developed.

7. **State Regulatory Involvement: Enforcement, Concurrence, and Resolving Disputes with Contractors:**

Some States have experienced problems with the quality, honesty, and/or integrity of contractors completing remediation under the PBC process. All enforcement mechanisms available to the State regulator prior to the PBC are still available to the State after the implementation of the contract. If the contractor is in breach of any of the terms of the controlling documents, or any other statutory or regulatory requirements, the State may use any available procedures or processes to compel compliance, regardless of the PBC.

Since the State regulator does not have any contractual relationship with the contractor, it is inevitable, though unfortunate, that some contractors will not work with the regulators as required. This is most likely because the State regulator's interests (remediation of the site) and contractor's interests (maximize profits and meet the terms of the contract) are not necessarily aligned. Therefore, to ensure adequate and efficient regulatory closure, it is imperative that the contractor has a clear understanding of the regulatory requirements required by the State.

The ideal mechanism for State regulatory involvement, enforcement, concurrence and resolution of disputes would be through an enforceable agreement between the State regulator and the contractor. This type of agreement, such as a consent order, would describe, among other things, the property covered, known conditions, scope of work, and enforceable schedules. It would contain specific provisions for access, modification, termination, possibly dispute resolution procedures, and penalties for non-compliance.

If the contractor were not an owner of the property or a potentially responsible party (which is most likely the case), DoD would have to support this type of agreement and require it as part of the PBC process. DoD has stated that a condition of satisfaction of the PBC process by the contractor is based upon obtaining State regulatory site closure. There is no question that a State enforceable agreement with the contractor would

alleviate a lot of concerns and would be in the best interest for all parties involved.

Finally, in the case of RCRA-authorized States, under certain conditions the contractor may be considered the operator of the site. If a permit exists, it should be amended to include the contractor as an "operator," which carries specific obligations and enforcement tools. An owner or operator could be liable for any permit violation or failure to comply with State regulations or statutes.

8. Regulatory Closeout:

Regulatory closeout, also known as site closeout, can apply to a single waste management unit, group of units, or an operable unit, and occurs when all required remedial activities, including long-term monitoring, have been completed and the appropriate State regulatory authority has concurred that no further action is required. In addition to the active management of a remedial action site, documentation that any required institutional control measures have been implemented may be required prior to site closeout. For sites that are subject to a RCRA permit or enforcement order, modifications to the permit/order to reflect a change in regulatory status may be required prior to site closeout. Regulatory closeout does not preclude a responsible party from being required to undertake additional remedial action should it be determined that the conditions upon which the no further action determination was based are no longer valid.

As contractors will be responsible for achieving regulatory closeout at PBC sites, as stated above, they should meet early and often with State regulators in defining the State's expectations in achieving closeout. State regulators should be prepared to clearly define these expectations and may want to memorialize them in consent or enforceable agreements with the contractor.

9. Role of Public During PBC:

Although there is no formal role for the public in the PBC process, the public's input can be an important consideration to the success of any project. If the public is against a certain project or approach, then the PBC process can become difficult for everyone involved. Outside of PBC sites the public is allowed input into all phases of the DoD's environmental remediation process, whether through participation on a Restoration Advisory Board (RAB) or by submittal of oral or written comments. Both the DoD and State regulators must take this input into consideration.

The BCFG recommends that the DoD and State regulator schedule at least one public meeting to discuss the overall PBC approach prior to embarking on the project. This is an excellent time to gauge public interest and a

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 the DoD available to the public throughout the project.

If a site is proposed for a PBC that has a public input process in place, such as a RAB or similar board, we recommend that unless agreed to by its members, the public input process remain intact. It also recommends that DoD remain a co-chair of that public input body. The DoD component must remain involved with the public after a PBC is awarded. Although it is appropriate for the PBC contractor to present technical information and answer questions, the DoD component should be the primary communicator. This is necessary in order to maintain credibility and to ensure that the proposed remedy is presented accurately.

IX. CONCLUSIONS

The ASTSWMO BCFG believes that PBCs, when implemented with the recommendations identified in this White Paper, can provide numerous benefits to DoD's environmental remediation program. These include faster, more efficient cleanups with a better defined schedule for remediation and site closure, lower overall costs, saving on DOD oversight efforts which thereby reduces burden on federal dollars available, and less unforeseen delays, with environmental insurance used to guarantee that the project proceeds according to the agreed upon schedule.

Drawbacks of PBCs can include a substantial increase in State regulatory oversight, substantial changes to a State's DSMOA work plans and funding, confusion as to how to resolve disputes and changes to the public's input into remedial decisions. Early and constant communication by DoD with State regulators, and the public, will likely reduce or eliminate many of these potential drawbacks.

We recommend that the DoD take the lead in ensuring that all military services implement a consistent approach to PBCs including but not limited to: 1) adequate coordination and collaboration with State regulators, 2) defining which sites PBCs are awarded, 3) the types of PBCs used in environmental clean up, 4) the roles and responsibilities of DoD, State regulators and EPA, 5) defining contractors relationship with DoD and State regulators, 6) ensuring adequate contractor oversight by developing a QASP, and 7) ensuring adequate public input throughout the PBC process. States are willing to work with DoD in the development of these PBC policies.

Finally, it is understood that DoD intentions to consider site remediation complete once funds have been transferred to the contractor under a PBC contract. This is of great concern to the State regulators because of the false impression it gives to Congress. In fact, upon execution of a PBC contract, the money has been paid, but the remediation is not complete, and in most cases there is not much certainty that it will be completed for some time. In addition, the DoD is still the owner of the site, and of course still liable for all environmental contamination they caused. There is no question that the sites should not be presented to Congress as remediated and "response complete" status. This is premature and incorrect. At best, a separate category could be formed to identify what PBC contracts have been awarded.

X. STATE EXPERIENCES

ALABAMA

Ft. McClellan

An ESCA has been developed for Ft. McClellan. The ESCA allows the local reuse authority or developer to get early access to the property and to integrate cleanup with redevelopment plans. The ESCA at Ft. McClellan will include UXO areas. The reuse authority is also having difficulty calculating potential remediation costs (best guess cost for remediation) for the UXO areas that are currently included in the coordinated cost study.

Alabama views the ESCA process at Ft. McClellan as a positive approach, but is concerned about how accurate the costs estimates are going to be, and whether the inclusion of the UXO areas is appropriate. It was also their understanding that the Army would like to have some oversight role after transfer of the property, especially with regard to the UXO areas. The Alabama Department of Environmental Management (DEM) also thought the Army was considering whether they should retain some of the funding and perhaps release money over time as progress is being made. According to the State, Alabama also had a BRAC site that went through the more typical early transfer process (not privatization) and everything was going fine for that site.

CALIFORNIA

For the State of California, privatization is when DoD transfers contaminated property to a private or local entity (such as a local reuse authority, city, developer, etc.), where the private/local entity conducts the remediation. The statutory authority allowing such a transfer is found in CERCLA 120 (h)(3)(C) and is known as an early transfer. To date, California has completed 6 early transfers with DoD, of which one has been a privatized cleanup, where DoD is not completing the remediation. Currently, DTSC is negotiating the details of an early transfer at Mare Island Naval Station (MINS) that is also a privatized cleanup.

The most obvious benefit of privatization is the expedited, and often more efficient, remediation of the contaminated property, thereby promoting economic and values community-based (i.e., parks, open space, and other non-economic uses) reuse as quickly as possible. A private or local entity has a much greater interest in seeing property in its area put back into use, and often has a plan for integrating cleanup and reuse. Another benefit of privatization for California is the elimination of having to negotiate cleanup levels and standards with DoD. The private/local entity must enter into an enforceable agreement with DTSC. This agreement determines the States authority, oversight, document delivery, schedule, etc. This is a benefit because it eliminates the typical, time consuming back and forth with DoD to discuss these factors.

Rio Vista Army Reserve Center

The US Army proposed this site as a candidate for the guaranteed fixed-priced program in late 1999 and by January 2002 a No Further Action (NFA) ROD/RAP had been signed. The site was a former boat maintenance facility and was contaminated with heavy metals in surface and near surface soils. The site also had some petroleum sites. RVARC had no ground water contamination. This fact was verified by four consecutive quarters of ground water monitoring.

RVARC was a BRAC site that the Army was trying to transfer ownership to the City of Rio Vista. The site was being characterized by the ACOE. Prior to the fixed-price guarantee, the investigations were being stalled for a variety of reasons that included conflicts with the regulatory agencies and differences in schedules and agendas between the City of Rio Vista and the Army. This PBC was very successful because of the contractor's willingness to cooperate and listen to the regulatory agencies requests and their willingness to work with the City of Rio Vista

COLORADO

Lowry Air Force Base

In February 2000, the Lowry Redevelopment Authority (LRA) submitted a white paper to the Air Force recommending privatization of environmental cleanup at Lowry Air Force Base in Denver, CO. The LRA had transferred most of the clean parcels on the BRAC site and was now faced with significant delays in future transfers due to constant Air Force staffing turnaround and missed cleanup schedules. In May 2000, the LRA, in coordination with a private contractor, submitted a proposal to the Air Force to assume all economic and management liability associated with the environmental conditions at Lowry AFB. The proposal included a one-time payment from DoD to cover remediation cost and future liability, insurance protection to cover project over-runs and any unknown conditions, and an agreement for early transfer of contaminated property from the Air Force to the LRA.

Negotiation of all legal documents associated with the privatization took two years to complete, primarily due to the site being one of the first in the nation that the Air Force was attempting to privatize. These documents included: 1) a Cooperative Agreement between the Air Force and the LRA that identified each respective role in the clean up and set out the funding between the Air Force and the LRA; 2) a Consent Agreement between the LRA and the CDPHE which included enforceable milestones and a streamlined process to site closure through the Department's RCRA program, and 3) an Enforceable Agreement between the Department and the Air Force that provided assurances to CDPHE that the Air Force remained

ultimately responsible for the cleanup if the LRA defaulted and assured adequate funding for its oversight.

In April 2001, the Department developed a Stakeholder Advisory Group, comprised of various individuals from organizations and the public that were interested in cleanup of the BRAC site. This group provided input as to how the privatization would proceed and presented any issues they may have with the concept of privatization. One important result of the Stakeholder Group was assurances by the Air Force that the RAB would remain a critical component of public outreach after privatization was initiated.

In August 2002, the Department, the Air Force and the LRA signed privatization documents. The privatization is limited to cleanup of the site's groundwater and closure of Lowry's landfill. All remaining remediation associated with soils continues to be the responsibility of the Air Force. To date, privatization has benefited cleanup by expediting milestones, although no early transfers between the Air Force and the LRA have been executed.

The LRA is currently negotiating privatization of the remainder of Lowry, including asbestos remediation, clean up of OE, and other sites contaminated with numerous chemical wastes.

FLORIDA

With regard to privatization in Florida, the State has not had any actual privatizations to date. Like Alabama, the State has had one more typical early transfer at Orlando Naval Training Center (NTC) (Phase I), which went relatively smoothly and everything appears to be going fine with regard to follow on cleanup related work. Orlando NTC submitted an early transfer FOSET for Phase II, which was recently approved by the Governor (although four associated FOSTs needed to transfer the properties are still in progress). The Navy also just submitted a draft FOSET for Phase III at NTC Orlando. Other than that, Florida has also been having some discussions with the Air Force about potential Fixed Priced Remediation with Insurance (FPRI) contracts, but nothing concrete has been established.

GEORGIA

Ft. Gordon

The PBC initiative at Fort Gordon has included many partnering discussions/meetings, and measurable progress has been made toward completion of the site investigations. The Corrective Action Program at Fort Gordon is in the advanced investigative stage with four (4) Interim Measures successfully completed and approximately fourteen (14) RCRA Facility Investigation Reports scheduled to be submitted during the second and third quarters of FY2004. The Georgia Environmental Protection Division, Fort Gordon and its contractor continue to learn

each other's capabilities and limitations in achieving site cleanup and closure under the GFPR contract initiative and seek ways to optimize the corrective action process at Fort Gordon.

Although difficult to evaluate, the PBC seems to be reducing the time normally required under other contracting mechanisms in order to reach final remedy or no further action decisions because the Army and its contractor have a more pressing financial incentive. Consequently, there have not been many disagreements among the parties that are not quickly resolved. In addition, the opportunity to work with a single environmental contractor has provided a better continuity and response time for addressing concerns. We remain optimistic that this initiative will prove to be an improvement from the previous way of doing business at this installation.

ILLINOIS

Ft. Sheridan

Under a time-and-materials contract, contractors are motivated to identify additional work scope. Under a PBC, cutting corners and reducing remedy scope leads to greater profits. The Army is using a PBC for containment of three landfills at Fort Sheridan. Remedial design for Landfills 6 and 7 was underway prior to the issuance of the contract. The departure of the last on-site military Base Environmental Coordinator (BEC) at Fort Sheridan coincided with the letting of the contract. The PBC manager is based in Atlanta and manages eight or more contracts, in addition to Fort Sheridan's. The absence of an on-site Army representative with stop-work authority aggravates problems inherent to PBC. A contractor was hired to act as the BEC, but this person has very limited authority. When third-party oversight contractors and regulators observed construction activities at Landfill 7 that appeared to be inconsistent with the approved design, resolution was difficult and time consuming because of the confused lines of authority. Lack of oversight also contributed to a Clean Water Act violation caused by discharge of clay-stockpile sediments into Lake Michigan during a July 2003 storm.

The opportunity for cost savings and for contractor profits is greatest when remedy selection and/or remedial design has not yet been accomplished. This allows the contractor to "think outside the box" to find the most cost-effective remedy. This opportunity for cost savings is, at the same time, one of the defects of PBC. At Fort Sheridan's Landfill 5, remedy selection and remedial design will be performed under the PBC. Because PBC contractors seldom have any history with the site, previous agreements are frequently overlooked or ignored. Although the regulatory requirements for closing this landfill at Fort Sheridan had been decided 3-4 years earlier, the contractor ignored this agreement and proposed an engineered barrier (existing soil) "cap," pursuant to Illinois Tiered Approach to Corrective Action Objectives regulations. This proposal did not meet ARARs. Resolution of the containment ARARs was achieved after several months of negotiation. Shortly

after the Landfill 5 cap issue was resolved, a lengthy debate over groundwater monitoring ARARs ensued.

Implementation of the PBC at Fort Sheridan has required significantly more resources from the Illinois EPA than a cost-plus contract. Some of the resource demand can be attributed to the growing pains of implementing a new contracting mechanism. The remainder is due to the absence of Army oversight and guidance, and persistent ARARs-identification arguments from the contractor. Under PBC, regulators field significantly more contractor questions. The contractors do not ask the Army first. This requires the Illinois EPA to respond to minor issues that should have been handled by DoD. The DoD asserts that PBC is faster and cheaper. However, the latest projections indicate the remedy for Landfills 6 and 7 alone will be in place at the end of 2004 or early 2005. According to the original contract, the entire cleanup at Fort Sheridan was to be completed in September 2003.

The Air Force employed a fixed-price contract for capping of a landfill at the former Chanute Air Force Base. The Air Force provided engineering oversight of the construction. No construction deficiencies or ARARs issues have been discovered at Chanute to date, because the Air Force discovered and corrected construction deficiencies as they occurred.

The Army is currently procuring two more PBC contracts in Illinois, at the Rock Island Arsenal and the Joliet Army Ammunition Plant. The Rock Island procurement is effectively following the Army Environmental Center (AEC) plan for incorporating State input. Significant dialogue occurred between the State and the Army prior to the bidders' conference and the State was invited to address the bidders at the conference. The State was also invited to participate in interviews of the bidders. The Joliet procurement team has not invited any State participation following the initial scoping meeting. Although both of these procurements are being conducted by the AEC, their methodologies have been dissimilar.

KANSAS

Ft. Leavenworth

The Ft. Leavenworth PBC contract was awarded by DoD in 2002, and nine of the Fort's Solid Waste Management Units (SWMUs) have been included in PBC's so far. The contractor has provided a large number of document submittals to the regulators since the contract was awarded, and the complexity and volume of work plans and reports to be reviewed has strained both the Kansas Department of Health and Environmental (KDHE) and EPA's ability to respond in a timely manner. The ACOE is still involved in the project and is also reviewing these submittals. In March 2003, the ACOE agreed to concurrent reviews of documents, instead of reviewing them before the regulators received them as was being done previously,

even though the contractor is not contractually obligated to heed the ACOE's comments.

The main positive aspect of the PBC at the Fort is the consistent availability of funds and contractor support to conduct the work. Therefore, site investigation and cleanup can be performed when needed by a contractor familiar with the site. The main negative aspect of the PBC at the Fort may be the profit motivation of the contractor. Illinois' perception, right or wrong, that the contractor may attempt to cut corners in the investigations and push for cheaper (and potentially less protective) remedial actions. The contractor appears to resist KDHE and EPA's requested changes to their documents and puts a lot of effort into creating elaborate justifications for why things should be done their way. The contractor also attempted to begin fieldwork at one site before the work plan had been approved. KDHE and EPA have been reviewing submittals and comment responses very carefully to ensure that the contractor does not take shortcuts in the investigation and cleanup process.

MASSACHUSETTS

Fort Devens - Hingham Annex Site

Massachusetts has had a relatively good experience with a PBC recently completed at the Hingham Annex site, an annex of Fort Devens. Two to three years prior to this site entering into a PBC, the Massachusetts Department of Environmental Protection (MA DEP) went through all the reports that were generated on this site and along with the future property owner (in this case the Commonwealth Park Division) made a master list of what needed to be done. The contractor was well aware of what had to be implemented in order to get the job done and was willing to take MA DEP's advice and get the work done.

Since a very good working relationship was already established with the town, prior to the proposed GFPR contract, the town was open to the contract. However, there was some concern that contractors would take short cuts with the site, so MA DEP increased our State oversight on the project. One major issue that was brought to light was the issue of the remaining asbestos in the soil. At first, the contractor indicated that they hadn't budgeted for the asbestos but in the end they did address the contamination. The current property owner is very pleased with the work, which resulted in additional open/green space for the town.

MISSOURI

Lake City Army Ammunition Plant

Lake City Army Ammunition Plant (LCAAP), located in Jackson County, Missouri, is a very complex site, which is being addressed under three operable units and has

been placed on the National Priorities List (NPL). The DoD initiated a PBC at LCAAP in January 2004 with a very aggressive schedule. Due to the complex issues associated with the site, the aggressive schedule and time needed for the contractor to familiarize themselves with the site conditions, the initial draft documents did not meet the expectations of the State with respect to quality, data evaluation, and presentation of remedial activities. Communication between the State and the contractor was not at the level needed for presenting clear remedial plans that met regulator expectations. The State was forced to provide those expectations through document reviews.

The PBC contractor continues to make great strides in improving the working relationship with the State by familiarizing themselves with the site and its history and has proven to be very receptive to document review comments from the State. To date, LCAAP under the PBC has completed more quality primary and secondary documents than in any other year of its Installation Restoration Program. The contractor has also demonstrated a high level of competency in implementing field investigations. Another positive aspect to come from the PBC is that the Army has made the necessary funds available to "complete" the investigation work in all three operable units. This is eliminating the yearly battles between the State and LCAAP on funding priorities.

Historically, LCAAP has had difficulty finalizing documents and meeting scheduled milestones. Due to the aggressive nature of the PBC, this is no longer an issue at the facility and any reasonable requested schedule extensions have been granted without question. Thus far, the major point of contention has been in regard to the required level of characterization in potentially contaminated areas. These issues have been resolved through good-faith negotiations and compromise in working meetings.

Concerns regarding several areas of the PBC:

- The aggressive schedule to complete document reviews, and minimum communication between the PBC contractor and State, has been initially resource intensive on the part of the State. Will the improving working relationship between the PBC contractor and the State reduce the resource level for the State?
- What is the role of the Army under the PBC contract?
- How will the working relationship be affected if issues affect the bottom line of the PBC contractor?
- Will the Army fund the necessary remediation projects at LCAAP that are not covered by the PBC contract? Delays in funding these projects could ultimately affect the successfulness of the PBC contract.

Future Performance-Based Contracts (PBC)

Three additional DoD PBC's of varying complexity are scheduled to be implemented in Missouri in the near future. The facilities proposed for this implementation include Fort Leonard Wood, Camp Crowder, and Whiteman Air Force Base.

NEBRASKA

The State of Nebraska has only one site (Former Lincoln Air Force Base Atlas Missile Site 10, York, NE) where the ACOE, Omaha District, is utilizing a PBC for site remediation. The Nebraska Department of Environmental Quality's (DEQ) main concerns with the PBC (specifically at Site 10) are listed below.

It appeared that the ACOE was contracting work on a proposed plan before cleanup standards were set, in which case the contractor might pursue higher cleanup standards and minimal remediation in order to save money and make a larger profit. Thus, only short-term threats would be addressed and complete cleanup would not take place. The State would not have sufficient resources to counter arguments made by the contractors in support of remedies that were profitable to the contractors but not beneficial for the community. NDEQ recommended that contracts should be made after the ROD is in place so that appropriate cleanup goals can be determined involving the agencies as well as the community.

Minimal oversight by ACOE will create a burden for the State to provide all technical and regulatory assistance to the ACOE contractors. A rush to close the site will create an additional burden for the State as the contractor pushes to get documents approved.

Since the ACOE contract is performance-based, the quality of performance monitoring of the remedy by the same contractors might be compromised. Also, since the contractor buys insurance now, any design or monitoring related to suggestions down the road by NDEQ/ACOE may interfere with its terms; should remediation not be completed as scheduled by the contractor, insurance may not kick in as ACOE and State are held liable for the failure, while the contractor still gets paid for failed remedy.

Site closure requirements by ACOE within 5 years appear unrealistic, given that remedies such as pumping take longer. The performance criteria that the ACOE is looking to set in the beginning of the contract (so they do not have to interfere with the contractor's plan during the term of the contract), in many cases, cannot be specified until the remedy has been in place for some time.

DEQ has yet to see any advantages in utilizing PBC's. It would be interesting if some larger firms, in expectation of future profits, spend more research dollars to develop quicker remedial technologies to replace current ones that take tens and hundreds of years to clean! Meanwhile, DEQ have discussed our concerns with the

ACOE, who has assured NDEQ that they will frame the contracting process and the language so that the State's concerns are addressed.

NEW JERSEY

Ft. Dix

PBC's are being used at 10 sites at Fort Dix. All of the sites were in the remedial design stage when the contracts were issued. To date, NJ DEP and EPA have approved five remedial action work plans. The remaining five sites are still in the design phase.

At the start of the contract, EPA and NJ DEP agreed to a thirty-day review time for all documents. While this timeframe is difficult to meet at times, the documents submitted by the contractor have been of good quality, so reviews can be expedited. The sites under the PBC contract are ahead of schedule and both EPA and the State have been satisfied with the progress that has been made and the quality of the work.

Camp Pedricktown

When the PBC was awarded for Camp Pedricktown, the contractor first took additional samples to ensure that what the previous contractor reported was accurate. This additional work was rather extensive. After this sampling effort, the remedial action was implemented which consisted of soil removal and air sparging. In the near future, a no further action letter will be issued for both soil and ground water.

For this site, the PBC process was a success. An integral part of the process was the series of meetings held throughout the process between DoD, the contractor and NJ DEP along with having a good working relationship with the DoD personnel involved. Many technical decisions were made during these meetings, which eliminated the need for comment letters to be issued. The meetings allowed for better communication that led to NJ DEP issues being readily addressed.

PENNSYLVANIA

The Army was considering using PBCs at the following facilities in Pennsylvania: Fort Indiantown Gap (PA National Guard with ACOE cleanup projects), Tobyhanna Army Depot, Letterkenny Army Depot and USARC Bristol. Both Fort Indiantown Gap and USARC Bristol were considered too far along in the cleanup process to use the performance-based contracts effectively. Tobyhanna and Letterkenny are still being considered and will be evaluated further to determine if PBCs are the way to go.

The Army feels these types of contracts are more flexible while allowing for more creativity and innovation at cleanup sites, thereby reducing their costs and overhead. In PA, the regional offices determine the level and extent of resources needed to meet regulatory commitments by the military installations as well as other regulated entities. The Land Recycling and Environmental Remediation Standards Act (Act 2) specifies required turn around times that PA DEP personnel are required to meet for review and approval of deliverables. Failure to meet the required response times defaults to automatic approval of the submitted document.

To date, there have been no reported instances of deliverables submitted by the military installations being delayed or adversely impacting the regulatory approval process under Act 2. No stoppage of work has resulted at any military installation since the Cooperative Multi-Site Agreement was signed in 1998.

TENNESSEE

Tennessee Milan Army Ammunition Plant

The Army has recently awarded its first PBC in Tennessee at Milan Army Ammunition Plant. This site is a NPL site with a Federal Facilities Agreement (FAA). It will be some time before the State understands how PBC is going to work but initial meetings with the new contractor have been positive. The AEC has decided not to use the ACOE as their contracting agent. Since implementing its new organization for installation management the Army, i.e., the AEC has pushed the PBC process with little or no coordination with affected State regulatory agencies. As in any contracting process, there will be a Contracting Officer's Representative, (COR) who will do the day-to-day oversight of the contract for the contracting agency. The AEC is using one of the newly formed contracting agency field offices to manage the contracts they put in place. These offices have little experience in managing construction/remediation type contracts and this will be a major factor if problems arise during the execution of the contract.

At Milan the former BEC is retiring and another individual will take his responsibilities and he will be the COR for the PBC at Milan. He will be the one who determines if the contractor has met its milestones/deliverables to the regulators before being paid. This aspect of PBC will somewhat shift the burden for "approving an invoice" from the Army to State Regulators because the COR will not be authorized to pay the contractor until regulatory approval has been achieved. This will undoubtedly cause pressure on the regulator to be timely on reviews, etc. The contractor's cash flow will be a major factor in getting regulatory approval. Not too many contractors can go for extended periods without any payments for their working coming in – they still have to meet a monthly payroll for all of their folks. Past experience with changes in contracting methodology have shown that unless the Army trains a sufficient number of CORs to assist contracting officers, there will be problems with oversight of the contractor. The key to success will be the continued partnering process that has been ongoing in

Region IV States. If that process breaks down then the conversion to PBC will not succeed. The AEC has not been as supportive of partnering and this could have a major impact on future success in the region.

TEXAS

Defense Reutilization and Marketing Office (DRMO) - Kelly Air Force Base

A PBC contract was negotiated by the Air Force as a test case for the investigation and remediation of Yard 13, a RCRA solid waste management unit located on the DRMO facility at Kelly AFB. The goal of the PBC was to achieve the risk-based closure of the site and attain regulatory concurrence. Kelly AFB is a BRAC site, and as such, a BCT consisting of State, EPA and Air Force representatives was established at this site. In keeping with the BCT process established at Kelly AFB, the BCT members attended a scoping meeting with the PBC contractor to identify the regulatory requirements applicable to site closure. These requirements were to be incorporated into the site closure work plan.

During the course of this discussion, the PBC contractor initially disagreed with the closure requirements identified by the State RPM, which necessitated a protracted discussion, however, an agreement was eventually reached. Upon review of the resulting work plan submittal, the State RPM discovered that the PBC contractor had ignored the State's recommendations and failed to incorporate the identified requirements. This necessitated an additional meeting to resolve the outstanding issues. During the implementation of the required fieldwork, the PBC contractor made numerous calls to the State RPM asking for further clarification of regulatory requirements and input into the direction the project should proceed.

Following submission of the final site closure report, the PBC contractor made additional calls to the State RPM to check the status of the State's review and to suggest that the review be expedited as final payment to the PBC contractor was based upon State acceptance of the site closure report. Although the final closure achieved the stated risk-based closure goal, the level of oversight required by the State RPM for this project exceeded the level of oversight required on similar remediation projects conducted via a more traditional contracting approach.

VIRGINIA

Ft. Pickett

Ft. Pickett is one site in Virginia that is initiating the GFPR process. Site 13, Salvage Yard, at Fort Pickett (round 4 BRAC installation) was subject of a surface removal action and soil/subsoil and groundwater investigation. The removal action addressed debris piles, scrap, and ordnance related items. The activity has not progressed to the stage of identifying Plus/Deltas or lessons learned.

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