**TECHNICAL BRIEFING – USEPA RESPONSE TO LAND USE CONTROL (LUC) ISSUES – MARCH 2012**

The document reviewed was a response by the U.S. Environmental Protection Agency (Angela Carpenter, Chief – Special Projects Branch) dated March 27, 2012 to the Army in regard to the issue of LUCs and the applicability of New Jersey Department of Environmental Protection (NJDEP) Soil Remediation Standards (SRS) to the Picatinny Arsenal site.

Background

The issue of applicability of the NJDEP SRS goes back to December 2009 when Picatinny Arsenal agreed to include the newly promulgated SRS as Applicable or Relevant and Appropriate Requirements (ARARs). Prior to promulgation of the standards the levels were classified by the Army as guidance or "to-be-considered criteria." The USEPA countered that they were evaluating the SRS as ARARs and considering other matters such as use of existing vegetative covers (i.e., grass lawn) as an engineering control, constructed soil covers of only 6-inch thickness, and other measures that might not otherwise be applied at a Superfund site outside of New Jersey. There were numerous meetings between the USEPA, the NJDEP, and the Army along with an exchange of correspondence by the various involved parties. An earlier technical briefing (dated January 2012) covered the NJDEP's response to the 25 Site Feasibility Study (FS) and the matter of LUCs and discussed the history of the difference of opinion between the Army and the regulatory agencies.

Prior Correspondence

Last year the Army sent a letter (March 10, 2011) to the USEPA summarizing the Army position on the outstanding LUCs and ARARs issue despite the USEPA saying that such a summary was not necessary and that the agency understood the Army's position. The Army concluded the summary with what they understood to be the "CERCLA required process" as follows:

1. *For soils that have risk assessment results less than 1E-4 risk for unrestricted use, the site conditions will be protective for an unrestricted use scenario and no action will be required under CERCLA.*
2. *For soils that have risk assessment results greater than 1E-4 risk for the current and reasonably anticipated future use, a CERCLA response action will be taken with the NJ Soil Remediation Standards (SRS) being identified as applicable for the constituents identified as risk drivers (i.e. contributing the majority of the risk and/or hazard).*
3. *For soils on sites that do not pose an unacceptable risk (i.e., have a risk lower than 1E-4) under the*

*current or intended future use (e.g., industrial use), but would exceed the NJ promulgated residential or non-residential standards, the Army will implement Institutional Controls to ensure that land-use does not change in the future to a use that would result in unacceptable risks.*

USEPA Position

The recent USEPA response was short in length. The reply addressed each of the three scenarios that the Army has presented as follows:

1. ***Army: For soils that have risk assessment results less than 1E-4 risk for unrestricted use, the site conditions will be protective for an unrestricted use scenario and no action will be required under CERCLA.***
   *USEPA: EPA agrees with this assessment.*

   At least there is agreement on one point, however, the statement is fairly general and fails to stipulate consideration of state regulations and standards. Issues 2 and 3 below get to the crux of the matter.

2. ***Army: For soils that have risk assessment results greater than 1E-4 risk for the current and reasonably anticipated future use, a CERCLA response action will be taken with the NJ Soil Remediation Standards (SRS) being identified as applicable for the constituents identified as risk drivers (i.e. contributing the majority of the risk and/or hazard).***
   *USEPA: EPA's position is that the SRS are ARARs for all contaminants found at a site, not just those identified as risk drivers. Section 121 (d)(2)(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not limit ARARs to risk drivers, so unless the relevant state statute does, all contaminants for which an ARAR exists need to be addressed.*

   The implications of adhering to the USEPA's interpretation are that the SRS will apply for all constituents not just those that are risk drivers. Given that the NJDEP SRS can be based on more conservative assumptions than the USEPA risk value, this could mean more extensive remediation (i.e., active remediation) would be required. Based on the potential of more active remediation, costs could escalate beyond that currently anticipated. This is conjecture and was not stated in any of the correspondence.

   The USEPA considers the implementation of LUCs at a site to be a response action under CERCLA which would trigger compliance with ARARs including the NJ SRS. This could increase the number of sites requiring active remediation.

3. ***Army: For soils on sites that do not pose an unacceptable risk (i.e., have a risk lower than 1E-4) under the current or intended future use (e.g., industrial use), but would exceed the NJ promulgated residential or non-residential standards, the Army will implement Institutional Controls to ensure that land-use does not change in the future to a use that would result in unacceptable risks.***
   *USEPA: EPA's position is that if a remedial action is taken pursuant to CERCLA response authority, all ARARs must be addressed. Also, the Army must demonstrate that active response measures are not practicable before institutional controls can be implemented as the sole remedy.*

   The NJDEP SRS are considered ARARs based on issue no. 2 and all ARARs must be addressed. The USEPA is unequivocal about the consideration of ARARs.- Even though the Army has argued that site use will not change and that there is a perimeter fence and procedures in place to avoid intrusive activities, these measures do not constitute a reason for not being able to complete active remediation.

In concluding the agency stated that the positions of both the USEPA and the Army are "well-delineated" and recounted the positions as follows:

"…the Army believes that ARARs analysis is triggered only where the risks/hazards are above the generally acceptable risk range/hazard index, and then only the risk drivers for the site are identified as chemical specific ARARs. EPA disagrees completely: our position is that if a CERCLA remedial action is warranted, all ARARs (action, chemical and location-specific) must be addressed, and not just for risk drivers. Our position is consistent with the language in Section 121(d)(2)(A) of CERCLA, the NCP, and existing EPA guidance, while the Army has not provided any citations in support of its position."

As an aside the March 2011 letter from the Army to the USEPA did contain citations of regulations and guidance that the Army presumed to support their arguments. However, it appears by the current USEPA response that those citations were not deemed germane to the present arguments.

<u>Potential Path Forward</u>

At this point the issue has not been elevated to a formal dispute. It is possible that the matter

could be raised to a formal dispute given that the USEPA has disagreed with the Army's understanding of two of the three scenarios that they presented and that those two scenarios represent the fundamental difference between interpretations. Or it is possible that the Army could accept the USEPA's determination. The Army has other CERCLA sites in New Jersey that will be affected by the outcome so it remains to be seen what direction they may follow. Remediation of the remaining Picatinny Arsenal sites in accordance with USEPA's interpretation will be likely to increase the remediation costs and set a precedent for other New Jersey sites (or even other states where there are more restrictive state standards than those derived from a risk-based approach) that the Army may not want to establish. Until one or the other side budges there is insufficient accord to move forward and it appears that a large number of sites will not be able to proceed any further in the remedial process.