



**Energy  
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Local Concerns. National Impact.

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Mr. David Geiser  
U.S. Department of Energy  
1000 Independence Ave., SW  
Washington, DC 20585

**Subject: ECA Comments to the DOE Draft Policy Titled “*Cleanup Driven by Risk-Based End States*” and Draft Guidance Titled “*Development of Risk-Based End State Visions*”**

Dear Mr. Geiser:

Energy Communities Alliance (“ECA”), the membership organization of local governments adjacent to U.S. Department of Energy (“DOE”) facilities, appreciates the opportunity to provide comments on the DOE draft policy titled “*Cleanup Driven by Risk-Based End States*” and draft guidance titled “*Development of Risk-Based End State Visions*” (collectively referred to as the “Draft Guidance”).

As ECA has stated several times in its policies, ECA supports risk-based cleanup when DOE can ensure the long-term protection of human health and the environment and where DOE, after analyzing the cost of cleanup that will not leave contaminants in place, determines that there will be a cost savings to the United States. ECA, as an organization, has written several publications and policy papers and has participated in numerous DOE and U.S. Environmental Protection Agency (“EPA”) meetings on how to make risk-based cleanup work. Hence, ECA’s comments on the Draft Guidance focus not on the ideas behind risk-based cleanup, but on how to make risk-based cleanup work in DOE.

**Background: Decisions Impact Local Communities**

ECA’s members look at DOE cleanup decisions as impacting the future of their communities. Local governments are interested in environmental cleanup in and around their communities because the sites are located in their communities, and they have a fundamental duty to provide for the health, safety, environment, quality of life, and economic future of their citizens. DOE has told local governments over the years that at more than 100 DOE sites, a significant amount of environmental contamination will remain in place when the “cleanup” is complete because the sites will be remediated to

risk-based levels. ECA understands that some of the sites will be cleaned up to a level based on the risk to humans and the environment assuming the site is used in specific ways that limit human exposure to the hazards left in place, while other sites may become storage sites for environmental contamination, either because of the complexity of the contamination or the need to store materials whose toxicity cannot be reduced.

Incorporated by reference to these comments is an analysis by ECA and the Environmental Law Institute titled "The Role of Local Governments in Long-Term Stewardship at DOE Facilities." The publication, although focused on long-term stewardship ("LTS"), focuses on how to ensure that risk-based cleanups, where environmental contaminants will be left in a local community, can work.

### **Learn From Success Stories: Selection of End State Must Include the Impacted Local Government**

Although the Draft Guidance is silent on what DOE and communities have done to date to develop the "end-state" of the sites, it is a key ingredient to making risk-based cleanup work. DOE has worked closely with several local governments, states, community members and EPA to define a site's end-state vision and gear cleanups to meet community interests. There is no greater challenge for a community facing the cleanup and closure of all or part of a DOE facility than to identify its interest and goals, and ensure that final cleanup standards enable such interests to be met. Such a process, if properly done, will also serve to identify the role(s) of parties post-closure to manage elements of long-term stewardship.

Success seems to be in the grasp of at least two DOE sites—Mound and Rocky Flats. ECA's members at those sites worked in partnership with DOE, state regulators, EPA and local citizens. The road has not been easy, but all parties involved have arrived at the current state by clearly defining the future use of the sites.

At Rocky Flats, Mound, and other sites this alignment of community interests, DOE and regulator interests, and prioritization of remedial alternatives and goals has been an essential element in the community and DOE reaching agreement on the details of a risk-based cleanup. It seems appropriate that once again Assistant Secretary Roberson and her staff are using lessons learned from these sites to improve the decision-making process at other sites.

That said, ECA is concerned that the Draft Guidance seems to relegate "communities" to a limited "consultative" role in developing the end-state vision, as the ultimate decision would rest with DOE. To the extent that the local government and citizens have developed their common vision for the future use of the site—DOE uses the term "intended land use"—then the process as outlined for a risk-based end state to enable such a vision could work, provided ECA's second concern (see below) is addressed. The end state at Rocky Flats and Mound was defined through a dialogue

between the local governments, citizens, the state and DOE—not by asking the DOE site personnel to define an end state. Support for the cleanup has been garnered by having the local governments and citizens working with DOE to develop the path forward and to negotiate agreements. We hope the successes can be built upon at all sites and used as a blueprint by DOE when finalizing its Draft Guidance. At sites where the “local community” has not formulated an intended land use, the Draft Guidance suggests that DOE, by developing the risk-based end state and then presenting it to the “local community,” will de facto decide the future use of the site. If ECA’s understanding of the process is correct, DOE’s approach then appears fundamentally flawed and would be contrary to DOE’s model cleanup sites and ECA policies.

Also, assuming a future use vision exists or can be quickly developed, DOE is allowing virtually no time to develop a risk-based end state that meets the community’s future use vision. At Rocky Flats and Mound the intended land use (national wildlife refuge and industrial facility, respectively) provides a key marker for developing a risk-based cleanup; however, there are other key technical and policy factors (protecting water quality, focusing on existing contaminant pathways first) that are equally integral to the development of a risk-based cleanup strategy. In fact, the latter factors can take a longer time to resolve. DOE must therefore ensure that the Draft Guidance remains aggressive *and* allows for sufficient time to address what my experience has shown to be an extremely complex issue. As noted in the Draft Guidance, success has come about where DOE can harness local government support.

### **DOE Cannot Safely Leave Contaminants in Place Until It Creates a Credible LTS Plan at Each Site**

The Draft Guidance generally identifies that DOE will use “institutional controls” and it includes a short paragraph: “[l]ong-term monitoring and surveillance methods must be designed. . . .” ECA, National Academy of Science, National Governors Association, Environmental Law Institute, DOE’s Environmental Management Advisory Board, and countless others have clearly identified that DOE cannot currently ensure protection of human health and the environment where it conducts risk-based cleanup. The solution that DOE and all of the above mentioned groups have relied upon is the development of credible LTS plans. Long-term stewardship must be part of the discussion of risk-based cleanup and DOE must create a clear, coherent and reliable LTS process. Currently, DOE has not clearly defined for communities how it can ensure that LTS will work at its sites, DOE does not have a grasp of the specific tools to implement LTS, the parties (institutions) that will be responsible for implementing LTS, the cost of implementing LTS among other items that are necessary for successful risk-based cleanup, or the idea that DOE will continually analyze new technologies to remediate areas that it cannot currently remediate. The Draft Guidance does not address how DOE will integrate LTS into this risk-based cleanup process. DOE must address how it will integrate LTS into risk-based cleanups in the Draft Guidance beyond mentioning that it will rely on LTS “. .

. to assure that the contaminants remain sequestered and human health and the environment are protected.”

ECA understands that DOE plans to move forward with a LTS program. ECA supports the creation of a LTS program, but ECA wants to ensure that the LTS program is integrated with the remedy selection program (the Draft Guidance). Otherwise, DOE will continue to develop remedies without the understanding of whether LTS can be implemented at the site in a manner that will actually protect human health and the environment over the long term.

### **Local Government Involvement Must Be Clearly Stated**

The Draft Guidance does not clearly identify a formal role for the “host” local government to participate in any meaningful way. Please use the examples of Rocky Flats and Mound as examples on how to move forward on involving local governments in the process to assist DOE and the local community to benefit through collaboration.

As ECA has stated, local governments are charged with specific legal mandates under state and federal laws, and serve as stewards of public resources such as land and revenue, including land use planning and control. Local governments represent the elected representative of the entire community, and are the “asset holder” with the primary stake in DOE site decisions. Local governments are not just stakeholders. Local governments represent the first line of communication with affected citizens, not the local citizens advisory board and not national activists. Public participation should play an important role in DOE decision making, but public meetings and advisory boards are not a substitute for direct communication and interaction with affected local governments. Several DOE site personnel still believe that talking to an advisory board is sufficient public outreach and input; hence the Draft Guidance should clarify that the site is required to work directly with the local governments. Each site manager ought to be required to give a presentation to the respective local governing bodies to begin building trust from the outset.

### **Timing**

ECA is skeptical that the things that ECA believes are important to be accomplished to implement this Draft Guidance can occur at all sites within the time frame specified in the Draft Guidance. Developing end states involving the local government, the state, citizens and others in a community takes longer than outlined in the Draft Guidance.

In the past, DOE headquarters has asked its sites to develop land use plans with the “local community” in short time frames. In those cases the sites developed the plans and provided the plans to the “local community” to comment on, but the sites ended up

submitting final plans that were not supported by the local community. Some sites may require additional time in order to properly complete the task requested.

## **Cost**

Cleaning up the contaminated DOE sites in local communities is a top priority for ECA. The cost of cleanup always seems to be the focus of DOE while the level of cleanup seems to be the focus of the local communities. The actual cost of "cleanup" to DOE must also include the cost of "managing the site," "long-term stewardship" and other "post-cleanup costs." Most DOE host communities have been told that specific sites have been completely cleaned up to risk-based levels only to learn several years later that DOE was incorrect and the site needed to be cleaned up repeatedly. These so-called "cleanups" do not save time or money, except for that year's DOE budget.

DOE should conduct an analysis of what is the difference in cost of incremental levels of cleanup at a site, including the cost of cleanup that does leave contaminants above state and federal action levels in place. Further, the Department would be doing a disservice if it only looked at costs as "EM" costs, or "DOE" costs. The costs must be identified as the cost to federal, state, tribal and local governments.

The cost to the local government can be great when DOE either fails in its cleanup to risk-based levels or continually has contamination problems in a community. DOE, the regulators, and the local governments need to acknowledge that there is an "economic risk" that communities bear for anything less than complete cleanup. Economic risk needs to be identified as a risk in the Draft Guidance. The economic risk is caused by the real or perceived risk to human health and the environment present at DOE sites. DOE has told ECA in the past that it cannot deal with such an issue, but decision makers should consider it when end states are determined.

For example, the new CERCLA waste disposal cell at the Oak Ridge site is a good example where, in the end, it may be less expensive if DOE would have shipped the contamination off-site. The cell, according to those familiar with the site, is leaking. Now, millions of dollars (that were going to be saved) may now need to be invested at the site.

## **Federal Facility Agreement Compliance**

DOE argues in this Draft Guidance that current Federal Facility Agreements ("FFAs") compliance will not promote cleanup at the sites. At the time these FFAs were signed, DOE, EPA and the states told the citizens around these sites and Congress that the FFAs would promote cleanup. ECA believes that FFAs are binding contracts between the parties that signed the agreements. ECA does not support the amendment of FFAs where the sole purpose is based upon DOE not meeting previously agreed upon milestones. ECA understands that all long-term agreements must be reviewed and where

*all* of the parties agree on amendments to create efficiencies, these agreements should be amended. The Draft Guidance states “the regulatory agreements . . . were generally established prior to an adequate understanding of the nature of the risks and hazards at the site.” The risks at many sites still are not properly characterized or known. Further, the reason that many of these sites have not been fully characterized is because DOE is remediating many of the sites as “removal” actions rather than “remedial” actions under CERCLA to circumvent what has been characterized as “too many studies.”

ECA supports reviews of FFAs to create efficiencies. Unilateral changes to FFAs do not necessarily create efficiencies. ECA is concerned that if the FFAs are amended without the agreement of all parties, the decisions could lead to litigation and hence the slowing of the cleanup process. The goals of DOE, EPA and the state are the same—cleaning up the site quickly and efficiently. Hence, ECA suggests that DOE work carefully with the regulators to ensure that all parties understand and agree on the best path forward for cleanup of the DOE sites.

### **General Comments**

ECA did not develop specific comments for each section. However, ECA would ask that DOE please create a “definitions” section to ensure the consistency of words throughout the documents. For example, “steady state” and “end state”; “relevant” pathway and “irrelevant” pathway; “completion” and “exit strategy.”

### **Conclusion**

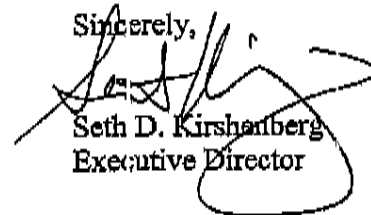
To best protect local government interests and bring greater equality and partnership to the process, ECA supports the addition of provisions that would: (1) ensure that the work of communities that have developed end states and that are far along in the process will not have to repeat the process; (2) ensure the role of local governments is stated clearly throughout the document and strengthened to require the site managers to work directly with the local governments; (3) clarify that the local government, not DOE, is charged with developing a future use vision, and, specifically increase the importance of the risk-based end state meeting the community's future use vision and not vice versa; (4) identify actual costs to federal, state, tribal and local governments; (5) ensure LTS is part of the decision making and that DOE actually has a LTS process that is clear and can be implemented; (6) develop realistic timing for implementing the Draft Guidance; and (7) prioritize Draft Guidance Section 6.0, “End State Vision Considerations,” to meet the goals stated in this letter.

ECA continues to support DOE's efforts to ensure that cleanup occurs quickly. However, DOE must ensure that it utilizes its successes as models and works with the local governments adjacent to the DOE sites to develop solutions to these complex problems. Health and environmental risks are key issues for citizens who live adjacent to

these sites. DOE must ensure that when it relies upon risk-based cleanup DOE can guarantee the community's health and safety.

ECA appreciates your consideration of our comments. Please contact me directly at (202) 828-2494 with any questions regarding ECA's comments. We look forward to continue to work with you on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Seth D. Kirshenber", is written over the typed name and title. The signature is stylized and somewhat cursive.

Seth D. Kirshenber  
Executive Director

cc: ECA Board of Directors