OFFICE OF THE UNDER SECRETARY OF DEFENSE

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ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OCT 2 - 2003

Honorable Marianne Lamont Horinko
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 5101
Washington, DC 20460

Dear ~~Ms. Horinko~~ Marianne:

The Environmental Protection Agency (EPA) and the Department of Defense have worked hard over the previous months to resolve the issue of our respective agencies roles in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) response actions. We appreciate your Agency's commitment to this dialogue. As we have discussed, I have determined that my office will support the two Department of Defense approaches enclosed: (a) an approach based on the Navy Principles; and (b) an approach based on the Air Force Principles. My office will fully support our components in either approach, to further accomplishment of the President's Management Agenda by replacing an "emphasis on process" with a "focus on results."

I understand that EPA fully supports the Navy Principles, but that the Agency, at this time, may have reservations over the Air Force approach. As we have discussed, however, I understand that EPA headquarters, though exercising appropriate policy supervision, will neither require nor forbid the Regions from negotiating on the basis of either approach. It is our hope that this dual-track, interim approach can lead to improvements in the administration of both our programs and in the protection of the environment.

Again, let me express my sincere appreciation for your Agency's constructive approach to this complex and important issue.

Sincerely,

Ray

Raymond F. DuBois
Deputy Under Secretary of Defense
(Installations and Environment)

Enclosures

PRINCIPLES AND PROCEDURES FOR SPECIFYING, MONITORING AND ENFORCEMENT OF LAND USE CONTROLS AND OTHER POST-ROD ACTIONS

PREAMBLE

Since the Department of Defense (DoD) /Environmental Protection Agency (EPA) Model Interagency Agreement (IAG)/Federal Facility Agreement (FFA) was developed in 1988, EPA and Navy have gained considerable knowledge and understanding about post-Records of Decisions (ROD) activities, especially Land Use Controls (LUCs). Thinking, policies, regulations and procedures concerning LUCs have evolved considerably since DoD and EPA developed the 1988 FFA model language. New statutes and regulations related to LUCs are being considered in many states. Accordingly, EPA and the Department of the Navy (DON) believe that a set of Principles will assist Navy field commands and EPA Regions to better implement our respective Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) responsibilities. The Principles described below do not replace or substitute for any existing CERCLA statutory or regulatory requirement. Rather they provide a mutually agreeable framework to provide a more efficient process to implement LUCs at National Priority List (NPL) installations.

These Principles will guide the EPA and DON personnel involved in these decisions. They are written in full knowledge that state regulatory and trustee organizations have independent responsibilities and authorities. EPA and the DON recognize the importance of the state role in helping to ensure a cleanup is protective of human health and the environment. Headquarters EPA and DoD will jointly develop a communications plan to ensure we include the states in this important issue.

These Principles support the President's Management Agenda by focusing on improving environmental results. The Principles encourage continued innovation and improvement in CERCLA implementation. EPA and the Components should continue to propose and pilot initiatives at Component installations or at other properties for which they are responsible. This includes proposing variations in, or alternatives such as performance-based practices to, the approach described in this document.

PRINCIPLES

- At sites where remedial action is determined necessary to protect human health and the environment, the actions must be documented in accordance with CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

- At sites where contaminants are left in place at levels that do not allow for unrestricted use, LUCs are used to ensure that the contaminants do not pose an unacceptable risk to human health or the environment. LUCs consist of engineering controls and/or institutional controls.

- The EPA and DON desire to ensure that LUCs are specified, implemented, monitored, reported on, and enforced in an efficient, cost-effective manner that ensures long-term protectiveness. In addition, in accordance with CERCLA and the NCP, if an equally protective but more cost-effective remedy is identified, DON may propose, and EPA will consider, using the more cost-effective remedy.

- The EPA acknowledges the DON's role and responsibilities as the Federal Lead Agent for response actions. This role includes selecting remedies with EPA at NPL sites and funding response actions.

- The DON acknowledges EPA's role and responsibilities for regulatory oversight and enforcement at NPL sites. This role includes ultimate ability to select the remedy at NPL sites if EPA disagrees with DON's proposed remedy and dispute resolution fails.

- Federal Facilities Agreements (FFAs) are CERCLA 120 agreements used by DON and EPA to describe in detail the roles and relationships among DON, EPA and often the state. They form the foundation for these relationships regarding DON's response actions at NPL sites. FFAs also contain installation specific details and procedures for planning, budgeting, and dispute resolution. DON and EPA desire FFAs to be as standardized as possible and relatively static (i.e., the FFA should not need to be changed for a given installation).

- Primary Documents developed under the FFA are relatively dynamic and document important plans and actions. In that sense, they are action-oriented. For example, a Site Management Plan is revised yearly via collaboration among DON and EPA remedial project managers and is an important tool for planning response actions and demonstrating commitment to the public. Likewise, a LUC Remedial Design (RD) or Remedial Action Work Plan (RAWP) describes those actions that are needed to ensure viability of both long-term engineered and institutional control remedies.

- Records of Decision should document the remedy selection process and remedy decision in accordance with CERCLA and the NCP, as well as applicable and

appropriate guidance, regulations, standards, criteria, and policy. With regard to LUCs, the ROD should describe the LUC objectives; explain why and for what purpose the LUCs are necessary, where they will be necessary, and the entities responsible for implementing, monitoring, reporting on and enforcing the LUCs. The ROD will refer to the RD or RAWP for implementation actions.

- Where situations arise (such as new cleanup standards; new or additional contamination is discovered on a site, etc.) that require additional response actions that go beyond the actions and objectives described in a ROD, and any related ROD Amendment or Explanation of Significant Difference (ESD), the additional actions required and their remedial objectives will be further documented in an ESD or ROD Amendment, as appropriate. There may also arise situations after a remedy has been completed that require removal actions to protect human health and the environment, such as the newly discovered contamination posing an imminent risk to human health. In such circumstances, documentation as required in the removal process should be created.

- Given the above, EPA and DON agree that the most efficient framework for specifying, implementing, monitoring, reporting on and enforcing LUCs is:
  - a standard FFA for NPL sites,
  - a clear, concise RoD with LUC objectives, and
  - a RD or RAWP with LUC implementation actions.

Note: These documents are described more fully below.

- EPA and DON will move expeditiously to finalize all outstanding FFAs using a standard FFA template as a guide to minimize the development/writing process.

Note: A "standard FFA" means the Agreement presently being used between EPA and DoD using the DoD-EPA model language, plus site-specific statements of fact, plus the additional primary document shown in Attachment (1).

- EPA and DoD will initiate a task force with appropriate headquarters and field representatives from EPA and the military services. The task force will make recommendations as to how to ensure that the same documentation can be used to memorialize both remedial action completion and deletion, as well as to determine the process whereby DoD and EPA will document the completion of the remedial actions required by the ROD in a single primary document. The task force will examine ways to reduce document size, review time, and revisions. The task force will recommend changes to guidance and policy that will help reduce document

size or streamline the process in order to manage costs. The task force may also include other stakeholders.

After reviewing the task force recommendations EPA and DoD will determine how to ensure that the same documentation can be used to memorialize both remedial action completion and deletion, as well as to determine the process whereby DoD and EPA will document the completion of the remedial actions required by the ROD in a single primary document. In addition, EPA and DoD will streamline the remedial process and better manage costs. While the efforts of the Task Force are meant to complement the Principles described above, its work is separate from the Principles and must not impede their implementation. The work of the Task Force also must not impede completion or closeout of individual sites or operable units.

GENERAL PROCEDURES

1. Federal Facility Agreement

- The LUC implementation and operation/maintenance actions will be included in the RD or RAWP which are already primary documents deliverable under standard FFAs. In addition, the same documentation as determined by the task force and approved by the Parties to memorialize both the remedial action completion and deletion will be provided as a primary document for new FFAs. For existing FFAs without such a primary document, this document will be provided as an attachment to the RD or RAWP with the same enforceability as a primary document.

Note: Model FFA language will need to be supplemented to reflect these Principles and Procedures. Attachment (1) contains necessary modifications to FFA language.

2. Record of Decision

- It is EPA's and DON's intent that Records of Decision (RoDs) continue to be consistent with CERCLA and the National Contingency Plan. Relative to land use controls and institutional controls, the ROD shall:
  - Describe the risk(s) necessitating the remedy including LUCs;
  - Document risk exposure assumptions and reasonably anticipated land uses;
  - Generally describe the LUC, the logic for its selection and any related deed restrictions/notifications;
  - State the *LUC performance objectives*. (See attachment (2) for examples of

LUC performance objectives);
- List the parties responsible for implementing, monitoring, reporting on, and enforcement of the LUC;
- Provide a description of the area/property covered by the LUC (should include a map);
- Provide the expected duration of the LUCs; and
- Refer to the RD or RAWP for LUC *implementation actions,* since these details may need to be adjusted periodically based on site conditions and other factors. (See attachment (2) for examples of LUC implementation actions).

- The ROD at transferring properties will need to be crafted based on the responsibilities of the new owner and state-specific laws and regulations regarding LUCs. At transferring properties, compliance with the LUC performance objectives may involve actions by the subsequent owners in accordance with deed restrictions, however, ultimate responsibility for assuring that the objectives are met remains with DON as the party responsible under CERCLA for the remedy. DON and regulators will consult to determine appropriate enforcement actions should there be a failure of a LUC objective at a transferred property.

3. LUC Remedial Design (RD) or Remedial Action Work Plan (RAWP)

- The RD or RAWP will be provided as a primary document in accordance with the FFA.
- The RD or RAWP will describe short and long-term implementation actions and responsibilities for the actions in order to ensure long-term viability of the remedy which may include both LUCs (e.g., institutional controls) and an engineered portion (e.g., landfill caps, treatment systems) of the remedy. The term "implementation actions" includes all actions to implement, operate, maintain, and enforce the remedy. Depending on the LUC and site conditions, these actions can include:
- Conducting CERCLA five-year remedy reviews for the engineered remedies and/or LUCs.
- Conducting periodic monitoring or visual inspections of LUCs; frequency to be determined by site-specific conditions.
- Reporting inspection results.
- Notifying regulators prior to any changes in the risk, remedy or land use including any LUC failures with proposed corrective action.
- Including a map of the site where LUCs are to be implemented.

For active bases,

- Developing internal-DON policies and procedures with respect to LUC monitoring, reporting, and enforcement in order to institutionalize LUC management and to ensure base personnel are aware of restrictions and precautions that should be taken; Consulting with EPA at least 14 days prior to making any changes to these policies and procedures to ensure that any substantive changes maintain a remedy that is protective of human health and the environment.
- Developing a comprehensive list of LUCs with associated boundaries and expected durations.
- Notifying regulators of planned property conveyance, including federal-to-federal transfers. "Property conveyance" includes conveying leaseholds, easements and other partial interests in real property.
- Obtaining regulator concurrence before modifying or terminating land use control objectives or implementation actions.

For closing bases/excess property:

- Notifying regulators of planned property conveyance, including federal-to-federal transfers.
- Consulting with EPA on the appropriate wording for land use restrictions and providing a copy of the wording from the executed deed.
- Defining responsibilities of the DON, the new property owner and state/local government agencies with respect to LUC implementation, monitoring, reporting, and enforcement.
- Providing a comprehensive list of LUCs with associated boundaries and expected durations.
- Obtaining regulator concurrence before modifying or terminating land use control objectives or implementation actions.

Note: The mix of responsibilities among DON, the new property owner, and other government agencies depends on state and federal laws and regulations that are applied in the state. Implementation actions at closing bases may include elements characteristic of both active and closing bases, depending on the timing of transfer.

- Should there be a failure to complete LUC implementation actions at an active base, the EPA Region shall notify the installation and seek immediate action. Should there be a failure to complete LUC actions after such notification to the base, EPA may notify the Deputy Assistant Secretary of the Navy (Environment) who will ensure that LUC actions are taken.

- Should there be a failure to complete implementation actions that are the responsibility of a subsequent owner or third party at a transferred property, EPA and DON will consult on the appropriate enforcement action. Should there be a failure to complete implementation actions that are the remaining responsibility of DON at a transferred property, the EPA Region will notify the cognizant Navy Engineering Field Division. If necessary, EPA may notify the Deputy Assistant Secretary of the Navy (Environment) who will ensure that corrective action is taken.

  Note: The RD or RAWP should contain no more or no less implementation actions than needed to ensure the viability of the remedy. There is a delicate balance required. EPA and DON both desire to ensure protectiveness while minimizing process and documents. The parties agree to work diligently to define the appropriate implementation actions for each LUC. EPA and DON believe the key elements can be easily developed between RPMs in a matter of a few hours. Based on detailed discussions and the examples shown in Attachment (2), EPA and DON expect that the LUC portion of the RDs or RAWPs to be in the range of 2-6 pages. If combined with a sampling plan, there may be additional pages needed to list the analyses, sampling locations and frequencies.

4. <u>LUC Data</u>

- The DON will ensure that all LUCs at its installations are included in the Service LUC database.

Attachments:
1. Incorporating Land Use Control (LUC) Objectives and Implementing Actions into Federal Facilities Agreements (FFAs)
2. Examples of LUC objectives and LUC Implementation Actions

Attachment 1

INCORPORATING LAND USE CONTROL (LUC) OBJECTIVES AND IMPLEMENTATION ACTIONS INTO FEDERAL FACILITIES AGREEMENTS (FFAs)

FFA Model Template Additions/Changes

1. Definitions Section:

Add: "Land use controls" shall mean any restriction or administrative action, including engineering and institutional controls, arising from the need to reduce risk to human health and the environment.

2. Primary Documents:

Add: A document memorializing remedial action completion.

Note: EPA and DoD believe it is important that a primary document: (1) document the completion of remedy-in-place and/or site close-out and (2) receive concurrence from EPA. The task force discussed above will make recommendations on the scope and content of the document, and DoD and EPA will determine this document after reviewing the task force recommendations. In the meantime, EPA and DON shall enter into FFAs which include a primary document memorializing remedy completion. The document shall not duplicate information in the Administrative Record or previously provided to EPA. Previously provided information shall be referenced and itemized. New information/data (e.g., sampling data) may be needed to demonstrate that the Remedial Action Objectives have been met. The report shall also include any as-built drawings for remedies if different from the remedial design. EPA and DoD do not envision this to be a lengthy document, but shall contain only the information needed to justify the remedy completion. EPA and DoD believe the document should discuss how the remedial objectives in the ROD have been met. It should not be used to expand the scope of requirements beyond the remedial actions required in the original ROD or any subsequent amendment or explanation of significant difference. Instead, if new requirements are needed for a protective remedy, these will be documented in an Explanation of Significant Difference or ROD Amendment, as appropriate, prior to reaching the milestone. The EPA and DoD will determine the precise nature of this document after reviewing the task force's recommendations.

Change: Eliminate the sub-bullets (subsidiary documents) under remedial action work plan for document streamlining purposes.

Attachment 2

EXAMPLES OF LUC OBJECTIVES AND LUC IMPLEMENTATION ACTIONS

(Note: Actions are to be tailored to site-specific conditions.
This is neither a mandatory nor a complete list)

LUC OBJECTIVES (contained in ROD)

- Ensure no construction on, excavation of, or breaching of the landfill cap.
- Ensure no residential use or residential development of the property.
- Ensure no withdrawal and/or use of groundwater.
- Ensure no excavation of soils without a use permit and special handling procedures.

LUC IMPLEMENTATION ACTIONS (contained in the RD or RAWP)

- Conduct a CERCLA five-year remedy review of the LUC and provide to EPA for review.
- Conduct annual inspections of the LUC and report results (active or BRAC – responsible party to be defined).
- Record the LUC in the base master plan. (active)
- Produce a survey plat of the LUC by a state registered land surveyor. (active or BRAC).
- File the survey plat with the local government/Circuit Court for purposes of public notification (active or BRAC)
- Place a survey plat in CERCLA administrative record, and send copies to EPA and state. (active or BRAC).
- Develop and implement a base procedure that requires excavation to be approved by the Public Works Officer or equivalent official. (active)
- Develop and implement a base procedure that requires changes in land use to be approved by the Public Works Officer or equivalent official. (active)
- Notify the regulatory agencies 45 days in advance of any Base proposals for a major land use change at a site inconsistent with the use restrictions and exposure assumptions described in the RoD, any anticipated action that may disrupt the effectiveness of the land use controls, any action that might alter or negate the need for the land use controls, or any anticipated transfer of the property subject to the land use controls.
- Obtain regulator concurrence before modifying or terminating land use control objectives or implementation actions.
- Maintain a comprehensive list of LUCs with associated boundaries and expected durations.

Note: These examples are consistent with draft EPA guidance: "Describing Institutional Controls in Remedy Decision Documents at Active Federal Facilities".

PRINCIPLES OF AGREEMENT FOR PERFORMANCE-BASED RECORDS OF DECISION IN ENVIRONMENTAL RESTORATION

1. *The President's Management Agenda* clearly directs federal agencies to reform their activities to prioritize performance and results so that "emphasis on process will be replaced by a focus on results." Thus the focus of the Air Force's (AF) environmental restoration program is to select, implement, maintain, and where necessary review and monitor remedial action results that protect human health and the environment. EPA has joint responsibility with the AF to select the remedy at National Priority List (NPL) facilities, and an interest in confirming that such remedies remain in place and continue to be protective. The actions of both agencies should reflect the President's direction to restore freedom to manage to responsible agencies, eliminating excessive command and control, approval mechanisms and red tape that hinder efficiency.

2. Records of Decision (RODs) are public documents that should direct: (i) remedy implementation based on performance needed to achieve remedial objectives, (ii) notification and dialogue among parties, (iii) reasonable access to sites for performance verification, and (iv) accountability for performance on the part of the AF.

3. The AF has the responsibility and obligation to carry out the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and National Contingency Plan (NCP) requirements as it implements, maintains, and where necessary reviews and monitors protective remedies needed to achieve remedial objectives.

4. Restoration resources in the form of time, money and personnel should be focused on defining remedial objectives (i.e., results) and the essential actions required to achieve those objectives. Such objectives and essential actions are enforceable requirements of the ROD under CERCLA and the NCP.

a. The ROD should be streamlined to contain remedial objectives, essential implementation and maintenance actions to achieve the objectives, and other content elements required by CERCLA and the NCP. These performance objectives in the ROD, supported by the "essential actions" taken to meet them, are enforceable requirements of the remedy.

b. The Air Force must still determine the detailed steps to take to carry out actions that achieve remedial objectives. This can include, as appropriate, O&M plans or detailed implementation plans; the details of such documents will be shared with regulators for review and comment, but are not subject to additional EPA approval and enforcement beyond that applied to the ROD, subject to Section 8 below.

c. The ROD should not require new or further deliverables and documents, or contain repetitive information, and should use cross-references, existing data, templates, and remedy selection assumptions wherever it makes sense and is cost-effective to do so.

5. The Air Force will be held accountable to achieve the remedial objectives and essential actions identified in the ROD. This means being prepared for enforcement action should the Air Force fail to perform its essential responsibilities.

a. The Air Force remains subject to CERCLA enforcement mechanisms by EPA, states, and citizens if it fails to implement and maintain a protective remedy, such as, but not limited to, citizen suits, civil penalties, etc.

b. The Air Force remains subject to stipulated penalty provisions where existing Federal Facilities Agreements (FFAs) identify RODs as "primary documents."

6. The Air Force will agree to provide essential information to EPA, states and the public regarding the status of achieving performance objectives and essential actions identified in the ROD. EPA and states can independently verify such information through reasonable access to documents and facilities. Depending on site-specific risk factors that may warrant a change in reporting frequency, the expectation is that an annual summary report will be appropriate, supplemented by additional prompt reporting of any remedy deficiency or failure that presents or could imminently lead to an actual risk to human health and the environment, and the actions taken or planned to address and correct such deficiency or failure. Such limited monitoring and reporting, as described here, is an exception to the prohibition on post-ROD implementation measures reflected in the 23 Jan 2002 Air Force Policy and Guidance on Remedy Selection Documentation in Records of Decision (RODs).

7. Because "success" and "compliance" will be defined in terms of achieving performance objectives and essential actions, rather than meeting document exchange deadlines, Air Force personnel must foster and maintain dialogues with the regulators, particularly concerning technical implementation issues. Work plans or other technical documents that are not independently enforceable or subject to regulator approval should nonetheless undergo review by all parties to ensure compatibility with ultimate remedial objectives. The failure to do so will increase the likelihood of a legitimate challenge by the regulators and the public as to whether remedial action objectives in fact are being achieved (or have been achieved, if a closeout determination is at issue).

8. Integration of Performance-Based Response Actions with existing FFAs and RODs:

a. The process improvements developed as part of the Air Force performance-based principles do not change obligations under existing FFAs or RODs. However, parties to existing FFAs may amend them or interpret them to incorporate these performance-based actions and improvements.

b. If an existing FFA already addresses implementation, O&M plans, or completion and review provisions (e.g., identifies an O&M plan as a "primary" document"), then such documents should conform to the enforceable objectives and actions contained in the ROD.

c. The Air Force should update the ROD as necessary to protect human health and the environment in conformance with Section 300.435 of the National Contingency Plan (i.e. perform a ROD amendment for fundamental changes, or an Explanation of Significant Difference (ESD) for significant changes, or record non-significant or minor changes in the post-ROD site file). If the Air Force finds that such an update is necessary, it should be done in accordance with the approach defined by these principles. In particular, if hazardous substances are left in place above unlimited use and unrestricted exposure levels, the 5-year review affords the Air Force an opportunity to confirm the conclusions in an existing ROD or to update the ROD if differences significantly or fundamentally alter the basic features of the selected remedy with respect to scope, performance or cost.

d. The Air Force shall incorporate these principles both in negotiating future Interagency Agreements and in modifying existing FFAs.