



DEPARTMENT OF THE AIR FORCE
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON DC



ASSISTANT SECRETARY, INSTALLATIONS, ENVIRONMENT & LOGISTICS

07 OCT 2003

MEMORANDUM FOR SEE DISTRIBUTION

FROM: SAF/IE
1665 Air Force Pentagon
Washington, DC 20330-1665

SUBJECT: Air Force Policy on Performance-Based Records of Decision (RODs) for
Land Use Control (LUC) Implementation

The *President's Management Agenda* has provided a clear mandate to transform our environmental program to a business model, results-oriented approach in which "emphasis on process will be replaced by a focus on results." As the President stated, "...what matters most is performance and results." Commanders must have the maximum flexibility to use land and natural resources to meet the mission consistent with protecting human health and the environment. The total cost and time to restore these resources is increasing despite 20 years experience and technological advances. Working with our regulatory partners, we must take actions to improve performance.

Approximately two-dozen Records of Decision (RODs) to select remedies are currently delayed while discussions between DoD, the services and the regulators are on going as to how best to achieve land use controls (LUCs) without adding undue process. Substantial areas of agreement on remedies have been achieved and the Air Force has successfully executed performance-based RODs to implement LUCs in several EPA regions (e.g., Hanscom, Travis). The DUSD(I&E), Mr. Raymond Dubois, has recently fully endorsed the Air Force approach to EPA and stated DOD's intention to fully support the Air Force in its implementation of this performance-based approach (Atch 1).

You are directed to engage as soon as possible with the regulators for the purpose of finalizing the delayed RODs using the performance-based model (Atchs 2-4). The Air Force goal is to execute all delayed RODs in 90 days. Should EPA decline to agree with the remedy selection at a National Priorities List Site based on our performance based model or other process/documentation issues in the ROD, SAF/IEE should be notified immediately through channels. Please ensure prompt and wide dissemination of this policy. My point of contact is Ms Elaine Ross at (703) 697-9297.

NELSON F. GIBBS
Assistant Secretary
(Installations, Environment & Logistics)

- 4 Attachments:
1. DUSD(I&E) 2 Oct 03 memo to EPA

2. Air Force Principles
3. LUCs Procedures at Active Installations
4. LUCs Procedures at BRAC Installations

cc.

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OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

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,

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

Enclosures



AIR FORCE PRINCIPLES 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 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.

Land Use Controls (LUCs) Procedures at Active Installations

The following Land Use Control (LUC) provisions should be incorporated, as applicable, without prior Air Force/DoD review into the ROD for the site(s) or operable unit(s) being addressed. Documents that are referenced in the list below (for example, survey plats, monitoring reports, etc.) are not/should not be Primary or Secondary Documents and documents are not subject to regulator approval.

The appropriateness of including specific provisions will be based on the conditions and risk(s) presented by a particular site:

- Generic commitment that the Air Force will implement, monitor, maintain and enforce remedies that protect human health and the environment (including LUCs) in accordance with CERCLA and the NCP
- Remedial objectives for LUCs (also called LUC Objectives)¹
- Basic description of use restrictions² and essential actions to carry them out (for example, fences, signs, base approvals for drilling)
- The purpose for which LUCs are necessary (for example, to avoid or minimize risk of exposure)³
- What entities are responsible for implementing, monitoring, and enforcing LUCs
- The duration of LUCs (for example, unlimited or until certain objectives are achieved)
- Where LUCs are necessary (narrative description or map or survey plat). Notice to be placed in an appropriate official land record (base land management document) and/or local land use records. Check with real estate personnel to ensure that a notice is filed rather than something that creates a property interest
- Periodic monitoring and/or visual inspection of LUCs, with the frequency to be determined by site-specific risk⁴
- Report(s) to be provided to regulators that reflect the results of the periodic monitoring and/or visual inspection and which can be placed in the Administrative Record and/or Information Repository

¹ The objectives should be described with enough specificity that one can determine whether or not an objective is met. Objectives generally should refer to the risk to which the remedy responds and that will be avoided or minimized. Remedial objectives are the primary measure of successful performance – is the objective being achieved?

² For example, limitation to industrial use, prohibition on drilling groundwater wells, limiting general public access to avoid risk, etc

³ This can be described separately or as part of the remedial objectives.

⁴ The expectation is that normally an annual summary report will be appropriate. However, if there is little risk presented by a site (for example, all contamination is contained in soil beneath a building) or relatively greater risk of human exposure at a site (land is in high pedestrian traffic area with a variety of potential activities), the frequency may be adjusted down or up if justified. It is acceptable to have the frequency of monitoring mutually determined (based on risk); if the frequency is later adjusted, EPA guidance defines it as a minor, non-significant change.

- Prompt notification to regulators of any remedy deficiency or failure that presents or could imminently lead to actual risk to human health and the environment, along with corrective actions taken or planned to address such deficiency or failure⁵
- Provisions for prior concurrence by regulators to (a) termination of LUCs or (b) LUC modifications for a major land use change at a site inconsistent with use assumptions and restrictions underlying the ROD, any anticipated action that may disrupt the effectiveness of the LUCs, or any action that may alter or negate the need for LUCs⁶
- Prior notification to regulators for transfers of property subject to LUCs, consistent with CERCLA Section 120(h)
- Provisions requiring inclusion of LUCs in the Base Comprehensive Plan or similar document(s) governing land use at an installation; the LUC description should be sufficient to identify the nature of the use restriction (whether through a narrative description or mapping) and an appropriate point of contact⁷

In addition, as required by CERCLA Section 121(e), DoD/Services will conduct five-year reviews at sites where LUCs are in place to assure that human health and the environment are being protected by the remedial action being implemented.

The Air Force recognizes that, at sites where contaminants are left in place above levels allowing unlimited use and unrestricted exposure, LUCs are used to ensure that these contaminants do not pose an unacceptable risk to human health or the environment. Thus, where there is failure of LUC Objectives (or failure of LUC implementation actions that could lead directly to remedy failure), the Air Force acknowledges that the regulators may seek to re-open the remedy decision in addition to exercising any other authorities they may have under CERCLA.

If regulators seek provisions outside the scope of this list and beyond what is outlined in DoD's guidance on LUCs, then seek guidance from your MAJCOM (additional guidance from Air Staff as necessary). Sample language for these provisions is available from ILEVR and JACE if such language would be helpful. If regulator requests are anticipated to generate a dispute, then inform engineering and legal chains and elevate immediately.

⁵ "Prompt" reporting is assumed to be within three business days.

⁶ "Regulators" refers to EPA for NPL sites, and to states as appropriate based on Federal Facility Agreement or other legal obligations.

⁷ Copies of the LUC/use restriction language to be placed in the Base Comprehensive Plan may be provided to regulators for information/verification of performance.

Land Use Controls (LUCs) Procedures at BRAC Installations

The following Land Use Control (LUC) provisions should be incorporated, as applicable, without prior Air Force/DoD review into the ROD for the site(s) or operable unit(s) being addressed. Documents that are referenced in the list below (for example, survey plats, monitoring reports, etc.) are not/should not be Primary or Secondary Documents and are not subject to regulator approval. The listed provisions are intended broadly to outline acceptable provisions rather than detailed procedures; existing AFRPA directions and procedures related to Land Use Controls/Institutional Controls will continue to apply to BRAC installations (for example, the AFRPA LUC/IC Management Plan and the AFRPA BRAC LUC/IC Performance Measures Template).

The appropriateness of including specific provisions will be based on the conditions and risk(s) presented by a particular site:

- Generic commitment that the Air Force will implement, monitor, maintain and enforce remedies that protect human health and the environment (including LUCs) in accordance with CERCLA and the NCP
- Remedial objectives for LUCs (also called LUC or IC Objectives)¹
- Basic description of use restrictions² and related remedial actions (for example, fences, signs, pre-approvals for drilling activity, zoning restrictions)
- The purpose for which LUCs are necessary (for example, to avoid or minimize risk of exposure)³
- What entities are responsible for implementing, monitoring, and enforcing LUCs
- The duration of LUCs (for example, unlimited or until certain objectives are achieved)
- Where LUCs are necessary (narrative description or map or survey plat)
- Deed and lease restriction(s): transfer of fee title will include a CERCLA 120(h)(3) covenant, which will describe any residual contamination and applicable use restrictions, expressly prohibiting activities inconsistent with remedial objectives.⁴ Each deed and leases in furtherance of conveyance will also contain a right of access to the property for the Air Force, USEPA, and the state, and their respective officials, agents, employees, contractors, and

¹ The objectives should be described with enough specificity that one can determine whether or not an objective is met. Objectives generally should reference the contaminants of concern and eliminating or minimizing the exposure pathway(s) between contaminants and the focus group. Remedial objectives are the primary measure of successful performance – is the objective being achieved?

² For example, limitation to industrial use, prohibition on drilling groundwater wells, limiting general public access to avoid risk, etc.

³ This can be described separately or as part of the remedial objectives.

⁴ AFRPA has developed a model 120(h)(3) covenant, which includes the use restrictions as a component of the warranty that all necessary remedial action has been taken. The LUC description in transfer/lease documents should be sufficient to identify the nature of the use restriction (whether through a narrative description or mapping) and an appropriate point of contact. Copies of the LUC/use restriction language may be provided to regulators for information/verification of performance.

subcontractors for purposes consistent with the Air Force Installation Restoration Program ("IRP") or the Federal Facility Agreement ("FFA").

- Concurrent with the transfer of fee title and leases in furtherance of conveyance, information regarding the environmental use restrictions and controls will be communicated in writing to property owners and to appropriate state and local agencies
- Periodic monitoring and/or visual inspection of LUCs, with the frequency to be determined by site-specific risk, conducted by the Air Force at least through the first five-year review cycle⁵
- Report(s) to be provided to regulators⁶ that reflect the results of the periodic monitoring and/or visual inspection and which can be placed in the Administrative Record and/or Information Repository
- Prompt notification to regulators of any remedy deficiency or IC violation of which the Air Force is aware, which results in an exposure to unacceptable levels of contamination that the controls were intended to prevent, along with corrective actions taken or planned to address such deficiency or failure (whether by the Air Force or a third party)⁷. Any violations that breach federal, state or local criminal or civil law will be reported to the appropriate civil authorities.⁸
- Provisions for property recipient to seek prior concurrence by regulators to (a) termination of LUCs or (b) LUC modifications for a major land use change at a site inconsistent with use assumptions and restrictions underlying the ROD, any anticipated action that may disrupt the effectiveness of the LUCs, or any action that may alter or negate the need for LUCs (this is prior to seeking Air Force approval)

In addition, as required by CERCLA Section 121(c), DoD/Services will conduct five-year reviews at sites where LUCs are in place to assure that human health and the environment are being protected by the remedial action being implemented.

The Air Force may arrange for third parties or other entities to perform any and all of the above actions. Any such arrangement shall be undertaken and executed in accordance with all applicable legal requirements, to include the Air Force's functions, obligations, and responsibilities under CERCLA.

⁵ The expectation is that normally an annual summary report will be appropriate. However, if there is little risk presented by a site (for example, all contamination is contained in soil beneath a building) or relatively greater risk of human exposure at a site (land is in high pedestrian traffic area with a variety of potential activities), the frequency may be adjusted down or up if justified. It is acceptable to have the frequency of monitoring mutually determined (based on risk); if the frequency is later adjusted, EPA guidance considers it a minor, non-significant change.

⁶ The term "regulators" refers to EPA and the state regulatory agencies.

⁷ "Prompt" reporting and action are assumed to be as soon as practicable after the Air Force becomes aware of the violation, but in no case will the process be initiated later than ten business days thereafter.

⁸ The Air Force will exercise such rights as it retained under the transfer documents to direct that activities in violation of the controls be immediately halted. To the extent necessary, the Air Force will engage the services of the Department of Justice to enforce such rights.

The Air Force recognizes that, at sites where contaminants are left in place above levels allowing unlimited use and unrestricted exposure, LUCs are used to ensure that these contaminants do not pose an unacceptable risk to human health or the environment. Thus, where there is failure of LUC Objectives (or failure of LUC implementation actions that could lead directly to remedy failure), the Air Force acknowledges that the regulators may seek to re-open the remedy decision in addition to exercising any other authorities they may have under CERCLA.

If regulators seek provisions outside the scope of this list and beyond what is outlined in DoD's guidance on LUCs, then seek guidance from your Program Manager. Sample language for these provisions is available from AFRPA/LD upon request.⁹ If regulator requests are anticipated to generate a dispute, then inform engineering and legal chains and elevate immediately.

⁹ The following supporting documents are available upon request: Model 120(h) covenant, Environmental Restrictive Covenant Form, IC Classification Document, Monitoring and Enforcement Sections of the LUC/IC Management Plan, and Draft LUC/IC Inspection Form and Report.