DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

Office Of The Assistant Secretary

2 3 JAN 2002

MEMORANDUM FOR AF/ILE
AFBCA/DR
NGB/CD

FROM: SAF/IEE
1660 Air Force Pentagon
Washington DC 20330-1660

SUBJECT: Air Force Policy and Guidance on Remedy Selection Documentation in Records of Decision (RODs)

Attached for your immediate implementation is guidance addressing remedy selection and documentation requirements for CERCLA records of decision (RODs), including those having land use controls (LUCs) as remedial components. The guidance provides explicit directions for Air Force components and installations, and is consistent with current DoD policy and guidance. As lead agency for CERCLA responses to releases on or solely originating from our installations, our first priority is to expeditiously protect human health and the environment through aggressive and responsible implementation of remedial action. It is imprudent and inconsistent with our lead agency functions, as delegated by Executive Order (EO) 12580, to hold up the execution of our cleanup actions pending resolution of legal and policy issues with EPA that may take many months.

Accordingly, it is Air Force policy that the Air Force shall:

1. Identify, describe and evaluate LUCs in the feasibility study, proposed plan and ROD in accordance with CERCLA and NCP requirements, and current DoD and Air Force policies and guidance, where LUCs are considered as necessary components of an Air Force remedy.

2. Consistent with the ROD, implement and maintain the remedy, to include LUC remedial components, to protect human health and the environment. As lead agency, we have the authority to and are responsible for implementing, operating, maintaining and reviewing the protectiveness of the remedy, to include LUC components. However, implementation, operation, maintenance and review of such measures are not to be included in the ROD or other post-ROD reports or documents as enforceable terms and measures.

3. Not include post-remedy selection and post-ROD implementation, operation, maintenance and review provisions, documents or reports as ROD deliverables, or as a term, condition, provision, or requirement of a ROD or any post-ROD report, plan, review or other document, as they are not part of "remedy selection." As required by CERCLA and the NCP, if a five-year review and protectiveness determination is required, this must be identified in the

ROD along with Air Force responsibility as lead agency to conduct it (42 U.S.C. §§9621(c) and 40 CFR §§ 300.430(f)(5)(iii)(C)).

4. Expeditiously elevate, through the appropriate chain of command, to the Air Staff and SAF/IEE, issues involving EPA efforts to impose any remedial component and ROD terms, conditions, provisions or requirements not required by law or authorized by DoD policy; and

5. Consistent with DoD and Air Force policy implementing CERCLA and NCP requirements, execute CERCLA lead agency functions, authorities and responsibilities, which include requirements to provide EPA, state and local agencies, and the public specified timely consultation, notice, review and comment, and participation opportunities (10 U.S.C. §§ 2701(a)(3) and 2705 and 10 U.S.C. § 9620(e) and f)). It is perfectly consistent with these authorities to enter voluntary, non-enforceable memorandum of agreement/understanding and similar arrangements with EPA, and with state and local agencies, to "formalize" these consultative, notice, review and comment, and participation opportunities and rights. These "formalized" opportunities can and should extend to Air Force, lead agency, post-remedy selection and post-ROD remedy implementation, operation, maintenance and review phases, to include LUC assurance and implementation plans, operation and maintenance plans, remedial action completion reports, site-close out reports, and five-year review and protectiveness determinations. This office will be providing further guidance on such agreements and arrangements.

If EPA attempts to unilaterally issue a ROD at an Air Force installation, to include RODs having the impermissible provisions discussed above, proceed to issue an Air Force ROD in accordance with this policy and the attached guidance. As EPA is not the lead agency at our installations, it lacks authority under DERP, CERCLA, EO 12580 and the NCP to issue for our installations either proposed plans, RODs, subsequent ROD revisions, or five-year reviews and protectiveness determinations. The attached guidance describes the language and reservations to be included in these records, plans, documents, reviews and reports, and associated correspondence to EPA, to document remedial agreement/consensus and disputed matters.

While EPA does, pursuant to CERCLA § 120(e)(4) (42 USC § 9620(e)(4)) jointly select remedies with the Air Force at our NPL facilities (subject to an Interagency Agreement), and in cases where agreement is not reached the remedy is selected by the EPA Administrator, this remedy selection authority of EPA does not extend to ROD issuance or the expansion of "remedy" and "remedy selection" to include post-remedy selection and post-ROD remedy implementation, operation, maintenance, and review provisions and functions. Accordingly, whenever the Air Force can establish that the Air Force and EPA do agree (have remedial consensus) as to the fundamental remedial "technical work," and that EPA's non-concurrence or lack of agreement (to include not signing the ROD) is based on the lack of inclusion in the ROD (or any other post-ROD enforceable document), of post-remedy selection matters such as remedy implementation, operation, maintenance, and review provisions, terms, conditions, requirements or deliverables in the ROD, then the Air Force shall:

a. Identify and document this agreement/ "remedial consensus" as to the "technical work"/fundamental remedy in the ROD;

b. Include in the ROD an appropriately tailored reservation of rights clause based upon the attached guidance;

c. Sign, publish and record the ROD in accordance with CERCLA and NCP requirements;

d. Address EPA positions, objections and assertions in the responsiveness summary that is filed with the ROD, and

e. Commence remedial action.

More specific guidance will be provided separately to address disputes and disagreements with EPA on LUCs and other post-remedy selection and ROD matters. I again emphasize that as lead agency the Air Force has both the authority and responsibility to plan and implement, expeditiously, remedies necessary to protect human health and the environment. The overarching intent, purpose and mandate of CERCLA is to expediently and effectively take remedial actions that are necessary to permanently address threats to human health and the environment. We cannot allow the current interagency disagreements over such matters and authorities to impede our cleanup progress and the commitments we have made in good faith to Congress and to communities on and off our installations. DoD and we are working with EPA at a policy level to resolve differences in legal and policy interpretations and positions. My point of contact for this memorandum is Lt Col Marc Trost, SAF/GCN, at DSN 225-4691, or commercial (703) 695-4691.

Terry A. Yonkers

TERRY A. YONKERS
Assistant Deputy Assistant Secretary
of the Air Force
(Environment, Safety, and
Occupational Health)

Attachment:
AF Guidance on Remedy Selection Documentation
in RODs w/2 Atchs

cc:
SAF/IE
SAF/IEI
SAF/GC
SAF/GCN
SAF/PAM
AFLSA/JACE
ADUSD(E)
ODGC(E&I)

Attachments:

1. Model ROD Documentation Language
Acknowledging Policy-Level Disagreements and Reservations
2. Transmittal Letter Provisions Forwarding AF Signed ROD
for EPA Remedy Selection Concurrence

AIR FORCE GUIDANCE
ON
REMEDY SELECTION DOCUMENTATION IN RODs

The purpose of this guidance is to clarify Air Force documentation requirements for remedial actions, to include specifically those containing land use restrictions, in Records of Decision (RODs) required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). General guidance on documenting the remedy decision is contained in paragraph 23.1 of the September 28, 2001, Management Guidance for the Defense Environmental Restoration Program (DERP). More specific guidance that the Air Force should, in our discretion, consider on the appropriate content of RODs is contained in the U.S. Environmental Protection Agency (EPA) Office of Solid Waste and Emergency Response (OSWER) July 1999 guidance document 9200.1-23P, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents.

CERCLA and DERP employ a risk management approach to take necessary and appropriate response action to protect human health and the environment from unacceptable risk(s) resulting from past contamination. When remedial action is taken, it must be documented as required by CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (42 USC Sec. 9617 and 40CFR Sec. 300.430(f)). This requirement fully applies to remedies that have a use restriction component. The AF as the lead agency at AF installations has the obligation to move expeditiously through the cleanup process to address risks to human health and the environment.

All RODs need to focus on the risk and action(s) selected to address risk. Thus, the ROD shall clearly:

- describe the risk(s) necessitating remediation;
- document risk exposure assumptions and reasonably anticipated land uses;
- state the remedial action objective(s);
- describe the remedy in general terms, specify the components of the remedy, and basis for the selection; and
- list the entity(ies) responsible for implementing and maintaining the selected remedial action.

These elements are consistent with the guidance contained in the DERP Management Guidance and OSWER 9200.1-23P.

In cases where use restrictions are selected as part of the remedy to address risk and exposure to any contaminants left in place, use controls are employed to manage the

future use of the property. Where this type of use control is an integral component of the remedial action, the ROD needs to generally describe:

- the "specific controls proposed (e.g., deed restrictions such as easements and covenants, deed notices, land use restrictions such as zoning and local permitting, ground-water use restrictions, and public health advisories)"
- the remedial action objective(s) of the use restriction;
- the area/property covered by use restriction and associated control(s);
- the duration of the restriction and control(s), if not permanent; and
- the "entities responsible for implementing and maintaining the restriction and controls (e.g., property owner, town zoning authority, State health agency)."

These elements are consistent with the guidance contained in DoD's January 17, 2001, Policy on Land Use Controls (LUCs) Associated with Environmental Restoration Activities and OSWER 9200.1-23P;

Use controls must be identified and described in the ROD only when selected as remedial components necessary to protect human health and the environment from unacceptable risk. In addition, an installation may voluntarily choose to implement supplemental physical, legal, or administrative measures that reinforce the selected use controls, as addressed in DoD's March 2, 2001, Guidance on Land Use Control Agreements with Environmental Regulatory Agencies. These supplemental measures may be documented in voluntary agreements, non-enforceable arrangements, and internal documents, all of which normally would be included in the information repository for the site. However, such supplemental measures shall not be included in the ROD or any post-ROD enforceable documents. Examples of supplemental voluntary measures that are not to be included are:

- provisions for periodic monitoring or visual inspections of use restrictions and controls (other than CERCLA five-year reviews);
- certifications and reports to regulators associated with monitoring or inspections; and
- requirements for land use control implementation or assurance plans.

In the event EPA asserts such supplemental measures or other remedy implementation, operation, maintenance or review functions must be included in the ROD, finalize the ROD by inserting a section(s) appropriately tailored on Tab 1 which acknowledges the differences between EPA and the Air Force and provides appropriate reservations for each. Transmit this Air Forced signed ROD to EPA for their concurrence and signature, utilizing appropriately tailored provisions from Attach 2.

Model ROD Documentation Language
Acknowledging Policy-level Disagreement and Reservations:

The Air Force acknowledges that the US EPA maintains that specific provisions, set out, for information purposes only, at attachment___to this ROD, respecting [inspection, monitoring, reporting, maintaining and enforcing LUCs/ICs], and provisions for developing an [Operation and Maintenance Plan], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Close-Out Report], and [Five-Year Review Report], [as appropriate] should be included in this ROD as part of the selected remedy. The Air Force expressly reserves its position that these disputed provisions do not fall within the meaning of "remedy" or EPA' s remedy selection authority, therefore, the Air Force has not identified these provisions as remedial components in this ROD and they are not hereby made a term, condition, provision or requirement of this ROD or the selected remedy. The Air Force acknowledges that, pursuant to 42 USC Sec. 9620(e)(4)(A) and 40 CFR Sec. 300.430(f)(4)(iii), the Administrator of EPA has sole remedial action selection authority at federal facilities on the NPL, subject to an IAG, if EPA and the Air Force are unable to agree on remedy selection. The Air Force expressly reserves its right to invoke any applicable federal interagency dispute resolution process to resolve whether the specific provisions are within the scope of the EPA Administrator's authority to select remedies, and to have such issues resolved "de novo" by such process. The Air Force commits to subsequently revising this ROD, in accordance with the procedural requirements of CERCLA and the NCP, if (a) DoD subsequently determines and agrees as a matter of law and/or policy to include such provisions as components of the remedy selected in the ROD, or (b) if DoD is directed to include such provisions at the conclusion of the dispute resolution process involving Langley Air Force Base and the EPA (including any recourse to the dispute resolution provisions of EO 12580, 12146 or other applicable interagency dispute resolution authority).

The Air Force expressly acknowledges that by EPA signing and concurring with the remedy selected and identified by the Air Force in this ROD, EPA is not waiving or prejudicing its position that such provisions respecting [LUC/IC inspection, monitoring, reporting, maintenance and enforcement], and provisions for developing an [Operation and Maintenance Plan], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Close-Out Report[, and [Five-Year Review Report], [as appropriate] should be components of the remedy selection process and the ROD. The Air Force and the EPA agree to abide by and comply with any resolution of this issue pursuant to EO 12580, 12146 or other applicable authority and process in this and future ROD/CERCLA actions.

Attachment 1

Transmittal Letter Provisions Forwarding
Air Force Signed ROD for EPA Remedy Selection Concurrence:

(1) As lead agency, the Air Force must ensure the cleanup work at [installation] moves forward, and the only substantively contested issue for this ROD is EPA' s assertion that a section be added addressing supplemental land use control implementation and maintenance measures [and other post-ROD provisions as appropriate). In all other respects, it is the Air Force' s understanding that EPA agrees with the selection of the fundamental remedy/technical work that the Air Force has identified in the ROD.

(2) The ROD signed by the Air Force meets statutory and regulatory (National Contingency Plan) requirements.

(3) The ROD also fully complies with the content requirements recommended by EPA in OSWER 9200.1-23P, July 1999, Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents.

(4) The Air Force is committed to carrying through its statutory obligations under CERCLA and the NCP for implementing and maintaining the remedy (including any land use controls), carrying out five-year reviews where hazardous substances remain at levels above those allowing unrestricted use, responding in any other way necessary to protect human health and the environment, and complying with statutory and regulatory requirements under CERCLA.

(5) The Air Force, as lead agency, recognizes and will fully meet its CERCLA and DERP requirements to provide EPA, state and local officials, and the public with notice, consultation, review and comment, and participation opportunities as to all phases of its response actions, to include post-remedy selection documentation, implementation, operation, maintenance and review. This responsibility and commitment may be formalized in a memorandum of agreement/understanding or other similar voluntary arrangements.

Attachment 2