DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
600 ARMY PENTAGON
WASHINGTON DC 20310-0600

REPLY TO
ATTENTION OF

DAIM-ED-R (200)

AUG 06 2002

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Interim Guidance on Environmental Restoration Records of Decision

1. Reference memorandum, DUSD(ES), 4 Jun 02, SAB (enclosure 1).

2. Enclosure 1 provides guidance to the Services when documenting remedial actions, particularly those containing land use controls. The Army must incorporate this guidance into the environmental restoration decision process.

3. This interim guidance outlines general risk-based elements to be incorporated into records of decision (RODs), as well as specific elements to be incorporated into RODs addressing remedial actions that include land use restrictions. This guidance also provides:

a. Model ROD documentation language acknowledging policy-level disagreement; and

b. Model language for a transmittal letter forwarding a Component-signed ROD for EPA signature.

4. Should a substantive dispute arise with a regulator pursuant to implementation of this guidance, the issue will immediately be elevated in accordance with the enclosed 25 Apr 02 ACSIM memorandum, Interim Notification Guidance on Documenting and reviewing Land Use Controls developed under the Army Environmental Restoration Program (enclosure 2).

5. My points of contact are Ms. Susan Abston (DAIM-ED-R), (703) 693-0679, email susan.abston@hqda.army.mil, or facsimile (703) 697-0338; and Ms. Angela Atkins, (703) 693-0642, email angela.atkins@hqda.army.mil.

2 Encls

LARRY J. LUST
Major General, GS
Assistant Chief of Staff
for Installation Management

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OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JUN 4 2002

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY (ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ENVIRONMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH)
STAFF DIRECTOR, ENVIRONMENT AND SAFETY, DEFENSE LOGISTICS AGENCY SUPPORT SERVICES (DSS-E)

SUBJECT: Interim Guidance on Environmental Restoration Records of Decision

The purpose of this memorandum is to clarify 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 Components should 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.

Using the CERCLA framework, DERP employs 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 in a ROD as required by CERCLA and its implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This requirement fully applies to remedies that have a use restriction component. The DoD as the lead agency has the obligation to move expeditiously through the cleanup process to address risks to human health and the environment. To facilitate this progress, Components are to follow this guidance to finalize and issue RODs.

Encl. 1

All RODs need to focus on the risk and action(s) selected to address risk. Thus, the ROD needs to 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 remaining residual contaminants, 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 (as stated in the OSWER guidance) needs to generally describe:

- the remedial action objective(s) of the use restrictions;
- the specific controls proposed to effectuate the restriction(s) "(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 area/property covered by use restriction and associated control(s);
- the duration of the control(s), if not permanent; and
- the "entities responsible for implementing and maintaining 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. 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, a Component 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 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.

The April 23, 2001, DUSD(I&E) moratorium memorandum precluding Components from entering Federal Facility Agreements (FFAs), or modifying existing FFAs, that include Land Use Control Assurance or Implementation Plans, Operation and Maintenance Plans, Remedial Action Completion Reports, Site Closeout Reports, Five-Year Reviews, or any other similar post-ROD documents remains in effect pending resolution of current discussions between DoD and EPA. Similarly, the May 25, 2001, DUSD(I&E) clarification letter that states this moratorium also preclude including such documents, plans, reports, or reviews as an enforceable term, condition, provision, requirement, or deliverable in an FFA, ROD, or other similarly enforceable arrangement remains in place.

While finalizing a ROD, should a Component encounter regulator demands to include in RODs, or other post-ROD enforceable documents, provisions that conflict or deviate from DoD policy and guidance, the issue(s) shall be immediately elevated within the Component. We are working with EPA at a policy level to resolve differences in legal and policy interpretations. In general, if the only substantive disputes are the supplemental land use restriction and control issues or other post-remedy implementation, maintenance, completion or review provisions, then you should note in the ROD and Responsiveness Summary the nature of the dispute and that the ROD may be amended at a later time based upon resolution of the policy-level disagreement. As long as the Component can establish that EPA does concur with the underlying physical remedy, the Component may and shall unilaterally issue and then execute the ROD respecting those consensus elements of the physical remedy. Attached are model language and statements to be included in such ROD documentation. The elevation of and any dispute related to such specific use restriction and control, or other post-remedy issues, should not and must not be allowed to impede execution of those remedial selection and ROD elements for which there is agreement. My point of contact for this matter is Mr. Shah A. Choudhury, at (703) 697-7475.

John Paul Woodley, Jr.

John Paul Woodley, Jr.
Assistant Deputy Under Secretary of Defense
(Environment)

Attachment:
As stated

Model ROD documentation language acknowledging policy-level disagreement:

The [Component] acknowledges that the US EPA maintains specific provisions respecting [inspection, monitoring, reporting, maintaining and enforcing LUCs/ICs], and provisions for developing an [Operation and Maintenance Plan], [Five-Year Review Report], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Closeout Report],[and others, as appropriate] are required components of remedy selection and the ROD. The [Component] acknowledges that US EPA maintains that without such specific provisions the remedy is not fully protective. It is the position of the [Component] that such provisions are not part of required remedy selection or the ROD; therefore, the [Component] has not identified these provisions as remedial components in this ROD. The [Component] has at attachment ___ included these disputed provisions; however, they are not thereby made a term, condition, provision or requirement of this ROD or the selected remedy, but are for purposes of illustration and information only. The [Component] acknowledges that, pursuant to 42 USC Sec. 9620(e)(4)(A) and 40 CFR Sec. 300.430(f)(4)(iii), the Administrator of the EPA has sole remedial action selection authority at Federal facilities on the NPL if EPA and the [Component] are unable to agree on remedy selection. It is EPA's position that the disputed provisions described above fall within the meaning of "remedy" and EPA's remedy selection authority. The [Component] expressly reserves its position that these disputed provisions do not fall with the meaning of "remedy" or EPA's remedy selection authority. The [Component] commits to subsequently revising this ROD, in accordance with the procedural requirements of CERCLA and the NCP, if (a) DoD subsequently determines and agrees programmatically to include such provisions as components of the remedy selected and the ROD, or (b) DoD is directed to include such provisions at the conclusion of a dispute resolution process involving EPA and [Langley Air Force Base or other installation, as appropriate]. The [Component] expressly reserves its right to invoke any applicable federal inter-agency dispute resolution process to resolve whether the specific provisions are within the scope of the EPA Administrator's authority to select remedies. The [Component] expressly acknowledges that by EPA signing and concurring with the remedy selected and identified by the [Component] 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], [Five-Year Review Report], [Land Use/Institutional Control Implementation Plan], [Remedial Action Completion Report], [Site Closeout Report], [and others, as appropriate] are required components of the remedy selection process and the ROD and that without such provisions the remedy is not fully protective.

DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
600 ARMY PENTAGON
WASHINGTON, DC 20310-0600

REPLY TO
ATTENTION OF

DAIM-ED-R

APR 2 5 2002

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Interim Notification Guidance on Documenting and Reviewing Land Use Controls (LUCs) developed under the Army Environmental Restoration Program

1. Reference memorandum, SFIM-AEC-ERP, 17 Aug 01, subject: Interim Army Management Plan for Land Use Controls Associated with Environmental Restoration Activities.

2. This memorandum is to clarify appropriate steps for documenting and reviewing LUCs in environmental restoration decision documents (DDs) or Records of Decision (RODs) at Army active and transferring installations, and at Formerly Used Defense Sites (FUDS). This topic has been a source of recent disagreements between the Department of Defense (DOD) and the U.S. Environmental Protections Agency (EPA) that have stalled the restoration process at a number of DOD installations. Accordingly, this guidance provides a process to be used until further guidance is developed to avoid such potential delays.

3. The major Army commands (MACOM), U.S. Army Corps of Engineers (USACE) divisions, installations, and USACE districts shall immediately notify the Office of the Director of Environmental Programs (ODEP) if a regulatory agency refuses to sign a DD/ROD because of land use control issues. In support of timely execution of environmental cleanup and protection of human health and the environment, the affected installations and USACE districts shall submit their DDs/RODs subject to such disagreement through their chain of command to ODEP for further guidance.

4. Active and transferring installations shall notify the U.S. Army Environmental Center (USAEC) of any DD/ROD that the installation anticipates to be controversial to the EPA, state regulatory agency, or the public in general regarding land use controls. Such notification should occur as soon as the issue has been identified but no later than during review of the draft DD/ROD by the USAEC. The point of contact at the USAEC is Mr. Derek Romitti, (410) 436-1506, fax (410) 436-1548, electronic mail Derek.romitti@aec.apgea.army.mil.

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Encl. 2

5. At FUDS properties, the USACE districts through their USACE division shall notify Headquarters, USACE of any DD or ROD that the district anticipates to be controversial to the EPA, state regulatory agency, or the public in general regarding land use controls. Such notification should occur as soon as the issue has been identified but no later than during review of the draft DD/ROD by the USACE. The point of contact at the USACE is Mr. Julian Chu, (202 761-4695, fax (202) 761-1960, electronic mail julian.t.chu@hq02.usace.army.mil.

6. The Army shall continue to follow the process for documenting LUCs outlined in the referenced Army Interim Land Use Control Management Plan. More specifically, the Army shall include the following information about LUC(s) in the decision document:

- the type of land use control;
- the reasonably anticipated future land use;
- the location and source of the contamination that the control addresses;
- the role of the LUC in achieving the remedial action objective;
- the means for terminating and/or modifying the control.

7. The Army shall not include details pertaining to LUC enforcement, monitoring, or reporting in the decision document. Such details should be documented instead in a secondary implementation plan. On a case-specific basis, the Army may enter voluntary agreements with regulatory agencies that identify LUC implementation activities and responsibilities. Such agreements will not be appended to – or otherwise associated with – formal remedial decision documents.

8. My points of contact in the ODEP for this action are: Susan Abston, (703) 693-0679, fax (703) 697-0338, e-mail susan.abston@hqda.army.mil; or Angela Atkins, (703) 693-0642, e-mail angela.atkins@hqda.army.mil.

VR,

R. L. VAN ANTWERP
Major General, GS
Assistant Chief of Staff
for Installation Management

Recieved 21 Jun 02

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21 JUN 2002

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MEMORANDUM THRU ~~DIRECTOR OF THE ARMY STAFF~~ CJ 21 Jun 02

FOR ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT

SUBJECT: Interim Guidance on Environmental Restoration Records of Decision

This memorandum forwards the subject interim guidance for your implementation by all Army activities involved in Army Active Sites, Base Realignment and Closure, or Formerly Used Defense Sites environmental restoration programs. The enclosed interim guidance clarifies documentation requirements for remedial actions for Department of Defense Components that contain land use restrictions in Records of Decision (RODs) required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Ray Fatz
Raymond J. Fatz
Deputy Assistant Secretary of the Army
(Environment, Safety and Occupational Health)
OASA(I&E)

Enclosure

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