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OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

OSWER Directive 9355.6-12

MEMORANDUM

SUBJECT: Sample Federal Facility Land Use Control ROD Checklist with Suggested Language (LUC Checklist)

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TO: Superfund National Policy Managers, Regions 1 – 10
Regional Federal Facility Program Managers

The purpose of this memorandum is to transmit EPA issued guidance, *Sample Federal Facility Land Use Control ROD Checklist with Suggested Language (LUC Checklist)*, OSWER Directive 9355.6-12. The LUC Checklist provides direction on describing and documenting land use controls (LUCs) in federal facility response actions under CERCLA in Records of Decision (RODs), remedial designs (RDs), and remedial action work plans (RAWPs). The LUC Checklist also provides recommended language for creating enforceable LUC requirements in these documents to ensure the protectiveness of CERCLA remedies.

If you have any questions about the LUC Checklist, please contact Jyl Lapachin, FFRRO at (703) 603-0046, Sally Dalzell, FFEO at (202) 564-2583, or Gracie Pendleton, FFEO at (202) 564-2588.

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**SAMPLE FEDERAL FACILITY LAND USE CONTROL ROD CHECKLIST WITH
SUGGESTED LANGUAGE¹**

Directions: This checklist applies to all federal facility RODs. At Air Force facilities, numbers 1-8 and 10-19 should be included in the ROD as applicable (generally, numbers 18 and 19 apply at closing facilities, but they may have application elsewhere). For all other federal facility RODs (DOE, Navy, Army and others), the LUC implementation details are generally placed in a post-ROD enforceable document. Therefore, numbers 1-9 below would usually appear in the ROD, while numbers 10-19 would be placed in a post-ROD enforceable document such as the LUC Remedial Design or Remedial Action Workplan. In some Regions, the term LUC Implementation Plan is used rather than LUC Remedial Design or Remedial Action Workplan. The specific post-ROD document where the LUC implementation details are designated may vary by site (for instance, it may be called a LUC Implementation Plan or LUCIP), as long as the specific document is identified in the ROD and is enforceable.

Air Force RODs should address numbers 1-8 and 10-19, below. All other federal facility RODs should address numbers 1-9, below and numbers 10-19 in the RD/RAWP.

Where appropriate, Regions should consider including concepts and provisions in RODs, etc., similar to the samples provided below in order to ensure protective remedies:

_____1. Map/Figure showing boundaries of the land use controls

_____2. Document risk exposure assumptions and reasonably anticipated land uses, as well as any known prohibited uses that might not be obvious based on the reasonably anticipated land uses. (For example, where “unrestricted industrial” use is anticipated, list prohibited uses such as on-site company day-care centers, recreation areas, etc.)

_____3. Describe the risks necessitating the LUCs.

_____4. State the LUC performance objectives. We have had comments on these because several of the objectives have not been clear. The following are some examples of what we have been looking for:

1. Prevent access or use of the groundwater until cleanup levels are met.
2. Maintain the integrity of any current or future remedial or monitoring system such as monitoring wells, impermeable reactive barriers.
3. Maintain the 12-inch vegetative soil layer to limit ecological contact.

¹While the checklist applies to land use controls, ROD reviews indicated a slight problem with the Declaration language which often states who selected the remedy. Where that language is included, please ensure that the federal agency and EPA select the remedy.

4. Prohibit the development and use of property for residential housing, elementary and secondary schools, childcare facilities and playgrounds.

____5. Generally describe the LUC, the logic for its selection and any related deed restrictions/notifications. (See also #16, below)

____6. Duration language: "Land Use Controls will be maintained until the concentration of hazardous substances in the soil and groundwater are at such levels to allow for unrestricted use and exposure."

____7. Include language that the [federal agency] is responsible for implementing, maintaining, reporting on, and enforcing the land use controls. This may be modified to include another party should the site-specific circumstances warrant it.

____8. Where someone else will or the federal agency plans that someone else will ultimately be implementing, maintaining, reporting on, and enforcing land use controls, the following language should be included:

"Although the [federal agency] may later transfer [has transferred] these procedural responsibilities to another party by contract, property transfer agreement, or through other means, the [federal agency] shall retain ultimate responsibility for remedy integrity."

____9. **[ONLY INCLUDE IN NON-AF RODS]** Refer to the remedial design (RD) or remedial action work plan (RAWP) for the implementation actions. Because this is a new idea (i.e., including the LUC implementation actions in either or both of these two primary documents), to ensure that the requirement is clear and enforceable, we developed the following language where it makes sense:

"A LUC Remedial Design will be prepared as the land use component of the Remedial Design. Within 90 days of ROD signature, the [federal agency] shall prepare and submit to EPA for review and approval a LUC remedial design that shall contain implementation and maintenance actions, including periodic inspections." Another option is to refer to the enforceable schedule in the IAG for the RD or RAWP."

____10. Commitment by federal agency to address any situation that may interfere with the effectiveness of LUC:

"Any activity that is inconsistent with the IC objectives or use restrictions, or any other action that may interfere with the effectiveness of the ICs will be addressed by the [federal agency] as soon as practicable, but in no case will the process be initiated later than ___ days [10 days suggested] after the [federal agency] becomes aware of the breach."

____11. Commitment by federal agency to notify EPA of and address any situation that may interfere with the effectiveness of LUC:

"The [federal agency] will notify EPA and [the state] as soon a practicable but no longer than ten

days after discovery of any activity that is inconsistent with the IC objectives or use restrictions, or any other action that may interfere with the effectiveness of the ICs. The [federal agency] will notify EPA and [the state] regarding how the [federal agency] has addressed or will address the breach within 10 days of sending EPA and [the state] notification of the breach.”

_____12. Notification to EPA and the state regarding land use changes:

[For closing base]: [We are seeing in federal agency RODs language requiring the property transferee to notify EPA and the state prior to notifying the federal agency about possible land use changes. We have switched that around so that the federal agency reviews the proposal first. This should save EPA some resources.]

“Prior to seeking approval from the EPA and [the state] the recipient of the property must notify and obtain approval from the [federal agency] of any proposals for a land use change at a site inconsistent with the use restrictions and assumptions described in this ROD.”

[For active base]:

“The [federal agency] shall notify EPA and state _____ days [45 days suggested] in advance of any proposed land use changes that are inconsistent with land use control objectives or the selected remedy.”

_____13. Notification regarding transfers and federal-to-federal transfers:

“The [federal agency] will provide notice to EPA and [the state] at least six (6) months prior to any transfer or sale of [OUs at issue] so that EPA and [the state] can be involved in discussions to ensure that appropriate provisions are included in the transfer terms or conveyance documents to maintain effective ICs. If it is not possible for the facility to notify EPA and [the state] at least six months prior to any transfer or sale, then the facility will notify EPA and [the state] as soon as possible but no later than 60 days prior to the transfer or sale of any property subject to ICs. In addition to the land transfer notice and discussion provisions above, the [federal agency] further agrees to provide EPA and [the state] with similar notice, within the same time frames, as to federal-to-federal transfer of property. The [federal agency] shall provide a copy of executed deed or transfer assembly to EPA and [the state].”

_____14. Concurrence language: “The [federal agency] shall not modify or terminate Land Use Controls, implementation actions, or modify land use without approval by EPA and the [state]. The [federal agency] shall seek prior concurrence before any anticipated action that may disrupt the effectiveness of the LUCs or any action that may alter or negate the need for LUCs.”

_____15. Monitoring and reporting language. Note that Regions may alter the monitoring frequency based on site-specific needs.

“Monitoring of the environmental use restrictions and controls will be conducted annually by the [federal agency]. The monitoring results will be included in a separate report or as a section of another environmental report, if appropriate, and provided to the USEPA and the [the state]. The annual monitoring reports will be used in preparation of the Five Year Review to evaluate the

effectiveness of the remedy.

The annual monitoring report, submitted to the regulatory agencies by the [federal agency], will evaluate the status of the ICs and how any IC deficiencies or inconsistent uses have been addressed. The annual evaluation will address whether the use restrictions and controls referenced above were communicated in the deed(s), whether the owners and state and local agencies were notified of the use restrictions and controls affecting the property, and whether use of the property has conformed to such restrictions and controls.”

____16. A comprehensive list of LUCs. The LUC should not be confused with the LUC objectives. The term LUC refers to the actual LUC instrument which is used to accomplish the objectives. The LUCs are likely to be a legal mechanism or administrative measure used to impose use restrictions (e.g. permits, orders, restrictive covenants, zoning), but they may also include measures such as fences and guards. If the description of the LUCs in #5 above is comprehensive, it could substitute for #16's listing of LUCs.

____17. For active facilities, a description of the internal procedures for implementing the LUCs (e.g., orders, instructions, Base Master Plan) and a commitment by the [federal agency] to notify EPA in advance of any changes to the internal procedures that would affect the LUCs.

Generally, #s 18 and 19 apply at a BRAC installation, but they may have application elsewhere.

____18. Other property transfer language:

a. “Deed Restrictions: “Each transfer of fee title from the United States will include a CERCLA 120(h)(3) covenant which will have a description of the residual contamination on the property and the environmental use restrictions, expressly prohibiting activities inconsistent with the performance measure goals and objectives.

The environmental restrictions are included in a section of the CERCLA 120(h)(3) covenant that the United States is required to include in the deed for any property that has had hazardous substances stored for one year or more, known to have been released or disposed of on the property. Each deed will also contain a reservation of access to the property for the [federal agency], USEPA, and [the State], and their respective officials, agents, employees, contractors, and subcontractors for purposes consistent with the [federal agency] Installation Restoration Program (“IRP”) or the Federal Facility Agreement (“FFA”). The deed will contain appropriate provisions to ensure that the restrictions continue to run with the land and are enforceable by the [federal agency].”

b. “Lease Restrictions: “ During the time between the adoption of this ROD and deeding of the property, equivalent restrictions are being implemented by lease terms, which are no less restrictive than the use restrictions and controls described above, in this ROD. These lease terms shall remain in place until the property is transferred by deed, at which time they will be superseded by the institutional controls described in this ROD.”

c. “Notice: “Concurrent with the transfer of fee title from the [federal agency] to transferee, information regarding the environmental use restrictions and controls will be communicated in

writing to the property owners and to appropriate state and local agencies to ensure such agencies can factor such conditions into their oversight and decision-making activities regarding the property.”

____19. Ensure that the document adequately describes pre-transfer LUCs, not just post-transfer LUCs.