ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT AND SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)

SUBJECT: Federal Facility Agreement Model Language—Policy on Deviations

After reviews of recently negotiated draft Federal Facility Agreements, concerns have been raised about certain provisions that were found to deviate from the 1988 Environmental Protection Agency (EPA)-Department of Defense (DoD) Federal Facility Agreement (FFA) model language, most recently revised on 10 Feb 1999. Accordingly, I believe it would be useful for me to clarify DoD policy regarding the use of the FFA model language and the authority of the DoD Components to negotiate FFAs containing language that deviates from the model.

By issuing the 1988 FFA model language, DoD and EPA intended to accelerate the negotiation of interagency agreements required by the 1986 Amendments to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) by eliminating the necessity of re-negotiating fundamental issues repeatedly at the local levels. Both parties recognized that the interests of stakeholders were best served by a process that moved quickly through negotiation to actual cleanup. EPA was also motivated by the desire to negotiate these agreements early to improve on the CERCLA § 120(e) statutory provision, which did not require that agreements be in place until 180 days after the EPA Administrator had reviewed the Remedial Investigation/Feasibility Study (RI/FS). DoD sought and got nation-wide resolution on such issues as Resource Conservation and Recovery Act (RCRA)/CERCLA integration, dispute resolution, extensions, consultation/document production, ERA funding, force majeure, and stipulated penalties. In 1989 the National Association of Attorneys General, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), and National Governors' Association (NGA) endorsed most of these provisions with edits to incorporate state participation.

These overriding purposes for FFA model language were reaffirmed in 1999 when DoD and EPA agreed to specific changes to the 1988 model. The joint EPA-DoD signing statement contained the following explicit statement:

> Along with the unchanged portions of the 1988 model language, this new model language should be included in all future cleanup agreements between EPA and DoD.

Accordingly, the following policy considerations and limitations are hereby established, both for internal DoD direction and guidance and to ensure that we present a consistent position to regulatory agencies:

a. The EPA and DoD FFA model language consists of the original 1988 model, with edits for state participation dated March 17, 1989, and DoD/EPA revisions dated 10 Feb 1999.

b. Any deviations from the FFA model language in a particular FFA do not thereby become changes to the FFA model language and are not binding precedent for other FFAs for that or any other DoD Component.

c. Changes to the FFA model language can be effected only through formal negotiations and agreement among DoD, the Services, and EPA.

d. The FFA model language was never intended to cover all issues that would be included in an FFA, and the DoD Components are free to negotiate additional, necessary provisions on a site-by-site basis that do not conflict with the FFA model language. Such additional provisions do not become part of the model language, nor are they binding precedent for other FFAs for that or any other DoD Component.

To the extent that a DoD Component negotiates provisions that deviate from the FFA model language in a proposed FFA, that Component will specifically identify each such change and its rationale when submitting the proposed FFA for the 72 hour review required by my memorandum of May 10, 1999. In addition, that DoD Component will identify and provide rationale to reviewers for any other significant provision in the draft FFA that would qualify or limit any FFA model provision, as well as novel additions to the model language.

If EPA is unwilling to enter into an FFA at a given site without changes to the FFA model language, and the DoD Component has not been persuaded by EPA that the changes are necessary to our efforts to protect human health or the environment, then the Component should offer to enter into a statutory FFA -- one containing the mandatory requirements set forth in CERCLA Section 120(e)(4). Alternatively, the Component should seek to include those mandatory requirements in the records of decision (ROD) for that National Priorities List (NPL) site. Congress has expressly acknowledged such RODs can legally satisfy the CERCLA FFA requirement (See the House Conference Report accompanying the Superfund Amendments and Reauthorization Act (SARA), H.R.99-962 at page 242). In instances where no agreement is reached with EPA, we are required to report the circumstances to Congress in accordance with CERCLA § 120(e)(5).

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