

Policy Issues at Formerly Used Defense Sites (FUDS)

Frequently Asked State Questions

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Introduction

The Association of State and Territorial Solid Waste Managers (ASTSWMO) Federal Facilities Research Center's State Federal Coordination Focus Group developed this paper in response to a number of issues States and Territories (henceforth collectively referred to as States) are experiencing when performing oversight work on Formerly Used Defense sites (FUDS). The comments and views in this document have not been reviewed or adopted by ASTSWMO's Board of Directors, and therefore, the word "States" throughout this document refers only to the members of the Focus Group.

The U.S. Department of Defense (DoD) has identified the U.S. Army as the executive agent for the FUDS Program. The U.S. Army, in turn, has delegated the FUDS program management and execution to the U.S. Army Corps of Engineers (USACE). Many of the State-USACE issues detailed below relate to policies established by the USACE that present interpretations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Defense Environmental Restoration Act (DERA) laws. The responses to the issues are written from States' viewpoints and experiences and are not formal State legal positions.

Frequently Asked Questions

1. The USACE routinely represents its Engineer Regulation (ER) No. 200-3-1, *Environmental Quality, FUDS Program Policy, May 10, 2004*, as a legally binding document. Does this policy carry the same weight as promulgated law or regulation?

No. ER No. 200-3-1 does not follow the same development process as promulgated law or regulation. Federal laws and statutes are enacted by the U.S. Congress, through publicly elected representatives of U.S. citizens. Federal regulations are promulgated by federal agencies, and their adoption is authorized by federal law or statute (as enacted by the U.S. Congress). Statutes and regulations are laws that are legally binding and developed through a specific, legally established process that includes public comment periods and final promulgation.

On the other hand, the ER No. 200-3-1 is an internal document developed by the USACE to provide guidance to staff on USACE policy and management of the FUDS program. Policy does not have the force and effect of law and it does not override law. To the extent that this policy is contrary to law, it is ineffective. The mere fact that the USACE named this policy an

“Engineer Regulation” does not make the document a regulation. Unfortunately, the use of the word “Regulation” in the policy’s title creates confusion as to its applicability, both for staff at the USACE and for others affected by this policy, particularly State regulators.

2. Does the ER 200-3-1 carry the same weight as negotiated agreements such as the Defense State Memorandum of Agreement (DSMOA) and Statewide Management Action Plans (SMAPs)?

No. Negotiated agreements such as the DSMOA and SMAPs take precedence over FUDS internal policies, such as ER 200-3-1, or other guidance developed by individual parties. The DSMOA — entered into between the DoD and the States — is a document whose terms are agreed to by all of the parties to the agreement. DSMOA and SMAP terms are negotiated, compromises are made, and there is a clear understanding of the duties and responsibilities of the parties prior to signature. In contrast, the ER 200-3-1 policy was created unilaterally by USACE and was not agreed to by the States. Additionally, ER 200-3-1 was developed after most States had entered into their individual DSMOAs. The DSMOA states that “[t]he terms of this Agreement may be modified at any time by mutual Agreement of the parties” (Section V). Therefore, the ER 200-3-1 cannot change the provisions of the DSMOA without agreement of both DoD and the States. Any assertion by the USACE that provisions contained in ER 200-3-1 modify or change requirements under the DSMOA is incorrect.

3. USACE has claimed that it is legally prohibited from using Defense Environmental Restoration Program (DERP)-FUDS funding at Potential Responsible Party (PRP) Projects. The USACE policy is that FUDS work on a site may stop if it is identified as a PRP Project. Is this true?

No. According to USACE, a “PRP Project” is one where the USACE has determined that, along with DoD, other parties involved in the site bear potential CERCLA liability for hazardous substance releases. Regardless of what argument USACE uses to dispute the need to remediate and pay oversight costs at PRP sites, USACE, as the acting agent for DoD, is liable as the former owner/operator and is responsible for remediation of any release that occurred during the federal government’s ownership of the site under CERCLA.

The USACE is taking over responsibility for cleaning sites contaminated by branches of DoD. These individual branches are responsible parties under CERCLA and are liable for the cleanup at the site. As a consequence, USACE is acting as the responsible party at the contaminated site. Responsible parties are liable for contamination jointly and severally. This means that all are liable for the whole cleanup individually (i.e. if there are three responsible parties at a site and two go bankrupt, the one remaining responsible party is liable for the entire cleanup). USACE’s liability for oversight costs does not terminate upon the designation of additional PRPs at a site.

In addition to USACE's liability under CERCLA, the DERA, the enacting legislation for the DERP, states in a pertinent part with regards to the USACE's responsibilities at contaminated sites as follows:

(c) Responsibility for Response Actions—

(1) Basic Responsibility – The Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from each of the following:

(B) Each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances." 10 U.S.C. §2701(c)(1)(B) (emphasis added)

DERA contains no prohibition against performing this work at a PRP site. Congress did, however, recognize and provide for situations where PRP sites are identified. DERA states that the above mandate shall not apply to a removal or remedial action if the Administrator has provided for response action by a non-DoD PRP in accordance with Section 122 of CERCLA. Contrary to USACE's policy, work by USACE can only stop when they have complied with this provision, in other words, when they have successfully negotiated the applicable settlement agreement. Prior to execution of the settlement agreement, USACE is responsible for performing response actions at the site.

Further, the phrase "at the time of actions leading to contamination by hazardous substances" does not limit USACE's responsibility at FUDS that are exclusively contaminated by DoD activities. Rather, the phrase qualifies USACE's responsibility for response actions at FUDS only in terms of time (i.e., the Secretary shall carry out response actions at sites contaminated by hazardous substances when such sites were owned or controlled by the federal government). In other words, the DERA statute does not obligate USACE to conduct a response action at a site if the hazardous substance release occurred after USACE transferred ownership of the site. The DERA statute does require that USACE perform response actions for releases that occurred at the site when it was under the jurisdiction of the federal government.

Finally, it is USACE program policy to not conduct response actions on sites with other viable PRPs, and USACE will involve the federal Department of Justice in order to "cash out" of the site, requiring other PRPs to perform the cleanup. Nowhere in the DERA does it state that a site designated as a PRP site is suddenly ineligible for funding for necessary investigation and cleanup, including providing DSMOA funds to reimburse States for oversight activities.

4. USACE claims that it cannot pay State oversight costs for any PRP sites unless a separate agreement has been negotiated. Is this true?

No. USACE is acting for the liable DoD party under CERCLA 42 USC §9607(a)(1) and (2). As such, it is liable for, among other things, "all costs of removal or remedial action incurred by the

United States Government or a State or an Indian tribe consistent with the national contingency plan....” [42 USC §9607(a)(4)(A)].

The Superfund Amendment and Reauthorization Act, an amendment to CERCLA, specifically makes provisions of CERCLA applicable to the federal government. It States, in part: “[e]ach department, agency, and instrumentality of the United States...shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title” [42 USC §9620]. As stated above, USACE, as any nongovernmental entity, is liable for these oversight costs jointly and severally and cannot refuse to pay solely because a site has other PRPs.

In addition to cost recovery provisions in CERCLA, the DSMOA, signed jointly by States and DoD, contains an agreed upon list of all sites covered by the agreement and the responsibilities of the parties as it pertains to those sites. The DSMOA also sets out the contractual requirements for reimbursement of costs associated with State services to DoD for site remediation.

The DSMOAs do not exclude PRP sites from eligibility. The concept that PRP sites are ineligible for DSMOA (and the Cooperative Agreement (CA)) has not been demonstrated by USACE through any legal authority. Finally, as noted above, the DSMOA is an agreement signed by both States and DoD, and it requires the agreement of both parties for modification. States have never agreed to the ineligibility of PRP sites for DSMOA funds although the USACE has unilaterally determined sites are ineligible for listing on Attachment A of the CA.

5. Since FUDS are properties that have been transferred out of DoD control or ownership before 1986, does indemnification language (including liability-shifting or restrictions clauses) contained in deeds overcome the responsibilities placed on the federal government (DoD as the responsible agency) through CERCLA and other laws?

No. Liability for contamination under CERCLA cannot be shifted by private party agreement or deed provisions (see CERCLA §107(e)(1), 42 U.S.C. §9607(e)1). The government, State and federal, can still sue other parties for their liability under CERCLA. If liability has been shifted in a private agreement or deed, the parties must resolve this between themselves or in court.

6. Some FUDS property transfer documents or deeds contain deed restriction language. For example, some FUDS’ deeds are from the 1940’s and contain language that states the land cannot be used for residential purposes or is transferred “where is as is.” Are these deed restrictions binding on future parties indefinitely in that they run with the land?

Not likely. Deed restrictions (sometimes known as institutional controls) are only valid indefinitely if they are enacted through statutory authority. If the restrictions are not placed on the land through statutory authority they are subject to common law. Common law (i.e. not statutory law enacted by the legislature, but law created by the judicial system in cases) can

eliminate certain land restrictions through time and make it so the deed restrictions no longer “run with the land.” Deed clauses such as “where is” and “as is” are not deed restrictions but are typically contained in Quit Claim deeds, which are deeds without warranty.

In many instances, the goal of an institutional control (long term, sometimes perpetual protections attached to the land and imposing restrictive uses and/or affirmative obligations) has clashed with traditional property law. Generally, property rules under common law do not favor restrictions on land, especially long term restrictions. Common law has limitations on who may enforce restrictions, how long they can last, and the formalities that must be adhered to in order to create the restrictions. Common law can vary by State and can interfere with institutional controls placed on properties with residual contamination because common law calls into question the longevity of these controls. Statutory institutional controls seek to overrule common law concepts that would call into question the validity and enforceability of a covenant by stating that the covenants are valid and enforceable even if:

- 1) they are not appurtenant to an interest in real property;
- 2) they can be or have been assigned to a person other than the original holder;
- 3) they are not of a character that has been recognized traditionally at common law;
- 4) they impose a negative burden;
- 5) they impose an affirmative obligation on a person having an interest in the real property or on the holder;
- 6) the benefit or burden does not touch or concern real property;
- 7) there is no privity of estate or contract;
- 8) the holder dies, ceases to exist, resigns or is replaced; or
- 9) the owner of an interest subject to the covenant and the holder are the same person.

Since many property transfers for FUDS occurred several years ago, other than a court case, there is no way of knowing whether any transfer or deed document for FUDS property containing land use restrictions or covenants have any legal standing. This would have to be a determination made in court, and would vary from State to State.