

ASTSWMO FORMERLY USED DEFENSE SITES POSITION PAPER

Introduction

The Formerly Utilized Defense Sites (FUDS) Program was initiated by Congress in 1984 and is implemented by the Army Corps of Engineers (ACOE) in an effort to eliminate environmental liability at formerly owned, utilized, controlled or operated sites. These sites may be contaminated as a result of past Department of Defense (DoD) use.

States have specific concerns with the FUDS program since these properties are not subject to the same level of control as active bases. Since the initiation of the FUDS program, various topics of concern have surfaced and the program has evolved to address many of these issues. Beginning in 2001, the ACOE established a State Management Action Plan (MAP), which continues to aid in priority setting of FUDS in each State. In addition, the Military Munitions Response Program (MMRP) was created in 2002 to address the large inventory of federal facilities, including FUDS, with remaining munitions issues. The MMRP looks at sites at their initial phases of assessment and requires DoD to obtain significant State input and coordination. Further issues such as the Resource Conservation and Recovery Act (RCRA) and State authority, EPA role, Potential Responsible Party (PRP) issues, and complex technical issues in the restoration of these FUDS still remain to be discussed and resolved.

State and United States Environmental Protection Agency (EPA) Role at FUDS

The EPA is generally the lead agency at sites that are listed on the National Priorities List (NPL) unless it is agreed that the State shall maintain lead authority. Circumstances that may prompt the designation of State lead authority for a site on the NPL may include legal actions and the identification of RCRA corrective action issues that are pending at time of listing on the NPL. However, the majority of the FUDS properties across the country are not of NPL caliber. Generally at non-NPL FUDS, the State would be the lead agency unless arrangements are made for EPA to act as the lead agency. In some States, resource constraints as well as site-specific circumstances may result in EPA being delegated the lead regulator on a specific FUDS.

In general, the ACOE actions at FUDS properties have proceeded very slowly. Inadequate resources and disputes over responsibility for cleanup are the main reasons for slow progress at FUDS.

MAP Process

The overarching objective of the MAPs is to establish streamlined processes for managing and executing key elements of the FUDS program. Individual State MAPs vary as to content, with some MAPs covering all phases of the cleanup process including the early stages such as the inventory project review (INPR). In addition, some MAPs include implementation of a shared database to track project status, and project schedules.



Where possible, States are encouraged to use the interactive processes in their MAP (e.g., periodic joint reviews, conflict resolution process, etc.) to address scheduling concerns before serious disputes arise.

Military Munitions Response Program

As part of the Fiscal Year 2002 National Defense Authorization Act, Congress directed DoD to establish an inventory and assign a relative priority for munitions responses to each location in the inventory of defense sites known or suspected of containing unexploded ordnance (UXO), discarded military munitions (DMM), or munitions constituents (MC). By 2004, the Office of the Deputy Under Secretary of Defense for Installations and Environment established a directive, which prescribes that by the end of fiscal year 2007 a Preliminary Assessment (PA) and by 2010 a Site Inspection (SI) will be completed for each Munitions Response Site (MRS). Under this directive, DoD has a goal that all MRSs are adequately assessed and prioritized for further action. A nationwide approach was developed for conducting the PA/SIs in which each eligible FUDS project containing at least one MRS is evaluated in compliance with Comprehensive Environmental Response and Compensation Liability Act (CERCLA) and the National Contingency Plan (NCP), and in adherence to DoD, Army, and ACOE policy, guidance, and requirements. The States must be involved to ensure that DoD has a complete inventory of MMRP sites in their State.

It is necessary that the MMRP collaborate with States in the management, investigation and prioritization of this subset of FUDS. ACOE however has not adequately involved States in MMRP site investigations currently being performed. To meet the deadlines established by DoD's directive, ACOE has issued performance based contracts for completion of the PA/SI phase for several of the FUDS MRS. States and ACOE districts were not involved in developing the scope of work under this contract, and most States feel that the scope of the site investigations being conducted is inadequate. Though the contractor meets with each State to solicit comments on their MC sampling plan for each MMRP site, due to a lack of funding there is little flexibility under the scope of work to add additional samples or conduct additional geophysical work that the State may feel is warranted.

Currently, the ACOE is not fully assessing historic water ranges. Recent beach rejuvenation projects and decorative shell harvesting operations have placed ordnance-contaminated materials on beaches and driveways making the ordnance accessible to the general public. While in many cases the relative risk associated with former water impact and disposal areas may be limited, the sites still need to be assessed, prioritized and considered in the overall MMRP cost to complete estimate.

FUDS Technical Issues

The nature of FUDS projects present a number of technical challenges, which can be exacerbated due to disagreement on applicable technical and regulatory requirements, as well as resource limitations. Generally, the technical challenges of FUDS projects are

similar to those at active military installations, since both must address issues such as the wide range of former DoD activities and associated potential chemicals of concern, historical waste management practices (or lack thereof), data gaps in historical records, and magnitude of the project (with associated funding issues). In addition, many times investigations do not conform to State cleanup requirements. A typical example is the recurring disagreements concerning the proper procedures for investigating and remediating former small arms (including skeet) ranges.

Liability Avoidance and PRP Sites

CERCLA Section 107 defines “Potentially Responsible Parties (PRPs)” as all current owners and operators; all past owners and operators at the time of disposal; all persons who arranged for the treatment or disposal at a facility of hazardous substances or pollutants or contaminants they owned or possessed; and all persons who transported hazardous substances or pollutants or contaminants to the facility for treatment or disposal, if they helped select the receiving facility. CERCLA Section 101(21) defines persons as including the United States Government; and Section 120(a), as amended by SARA, provides that Federal agencies are liable to the same extent as private persons under Section 107. The ACOE, as DERP’s agent for environmental restoration at FUDS, is required to represent the interests of DoD on CERCLA PRP liability issues at FUDS properties. Typically, PRP issues involve complex legal issues, thus ACOE relies heavily on counsel support with FUDS PRP sites.

Unfortunately, the ACOE focuses its PRP efforts toward settlement of any DoD CERCLA liability with other PRPs, rather than on conducting response actions at those FUDS with PRP issues. This approach is the policy direction given to DoD Divisions and Districts in the Engineering Regulation 200-3-1. ACOE is directed to coordinate its PRP settlement efforts with the Department of Justice (DOJ). FUDS ER 200-3-1 states that this policy of not conducting response actions on sites with other viable PRPs is based on the following:

- Fiscal law restraints, which prevent ER-FUDS funds from being used to clean up contamination not caused by DoD;
- Lack of adequate resources to pursue cost-recovery or contribution actions;
- Concern that the burden of proof is not unnecessarily shifted to the United States with respect to any action;
- Necessity to preclude diversion of program dollars from other FUDS program actions;
- Desire to avoid incurrence of long-term cost demands on the FUDS program; and
- Desire to foster the National policy that the “polluter pays” for contamination for which it is liable and that general taxpayer funds should not be used to relieve PRPs of their liability.

Accordingly, States are confronted with FUDS that receive little or no action from ACOE on FUDS PRP sites as they are stuck in “settlement negotiations” or on lists awaiting

DOJ attention. ER 200-3-1 does give the ACOE the discretion to implement response actions at FUDS- PRP sites where the only PRP is the current property owner and whose activities have not contributed to the identified contamination. However, implementation of response actions at these FUDS-PRP sites is not occurring across the country. The ACOE seems content to allow these PRP sites to sit on the list and await DOJ attention.

The States feel that evaluation of all PRP sites is needed in the near future to identify priority sites that warrant attention sooner. It may be prudent for States to select priority PRP sites and provide these to the ACOE as FUDS that warrant attention. Obviously, any sites that present conditions that might indicate a potential for off-site contaminant migration or unacceptable risks to the public should be candidates for a priority PRP site list. Alternatively, ACOE Districts should screen PRP site lists and identify potential candidates for a priority list with States' input.

Liability and Indemnification Issue with FUDS

Some States have been notified by the ACOE that no new work will be initiated on FUDS until a legal review of property records has been conducted. The purpose of this legal review is to determine if there is language in the sale records or property transfer documents indicating that the property owner indemnified the DoD when they accepted the property from DoD. According to ACOE representatives this review was initiated based on recent court rulings in private sector cases which determined that original property owners were exempt from CERCLA liability based on: 1) language in the deed transfer documents that indemnified the original property owner; and 2) the date of property transfer occurring prior to the enactment of CERCLA.

If the ACOE's legal review determines that DoD has been indemnified for the contamination, then the FUDS site will then become a potential responsible party site. This means that, unless the State or another party (the current land owner) takes enforcement action against the government, nothing will happen at the site. Once enforcement action is initiated, the site is referred to the DOJ for settlement. This process is not quick and will further delay necessary cleanup actions at FUDS.

A major impact is how this affects those FUDS sites contaminated with munitions and explosives of concern. DoD has committed to evaluate and address FUDS through the MMRP. Several MEC sites are on uncontrolled property and may pose a serious hazard. If DoD determines that it is no longer responsible for the MEC they discarded, other federal agencies or States may be forced to address these sites.

DISPUTE RESOLUTION / ENFORCEMENT

Enforcement at FUDS properties take several forms, from the property owner's independent clean up during development of their property to the use of a legal instrument (voluntary cleanup agreement, unilateral order, Court ordered action) to compel cleanup. For FUDS properties, enforcement where the DoD caused a release would be against the specific branch of the service. The ACOE's FUDS Policy as

currently interpreted is inconsistent with CERCLA in several areas as identified above. States should consult their State attorney for appropriate PRP listing and legal strategy.

Several laws can also be used to leverage cleanup if the facts in the case are appropriate. These include the National Environmental Policy Act (although if CERCLA is followed there is an equivalency, but failure to follow voids this equivalency), Solid Waste Disposal Act, Natural Resources Damage Claim, Federal Insecticide Fungicide and Rodenticide Act, Nuisance Laws and possible other state laws. Check with your State attorney to determine the best course of action based on the facts in the case.

According to the ACOE, to be able to use enforcement at a FUDS site on a State's DSMOA Attachment A, the site must first go through formal dispute. Currently, disputes are taking several months to several years to resolve and there is a lack of consistency regarding dispute resolution. The use of Alternative Dispute Resolution (ADR) is recognized under the DSMOA CA for most States. ACOE has not wanted to initiate ADR although they have allowed some States to use ADR at their own costs. The dispute process is ineffective as it stalls progress of the cleanup, and keeps the State from quickly requiring DoD to comply with State and federal laws through enforcement. A better, faster, quicker approach is needed.

ASTSWMO Position

- The FUDS MAPs must be used to strengthen and improve cooperation and communication between EPA, States and the ACOE. ASTSWMO believes the use of MAPs results in improvements to the planning and execution of FUDS projects.
- It is key to involve States early in the process. This includes, but not limited to MMRP, INPRs, and removal actions. Collaboration with States by DoD helps avoid pitfalls of revisiting assessments or decisions, is fiscally responsible, saves time and produces a mutually satisfactory closure to very difficult issues.
- Prioritization requires State participation and DoD should comprehensively identify FUDS and provide each State with all available information regarding prioritization of remediation of FUDS.
- DoD should also clearly communicate to States eligibility for FUDS in the restoration budget and when FUDS sites are identified.
- Investigations and remediation must conform to State cleanup requirements.
- The DSMOA Attachment A should not be used as a tool to prevent States and Territories from effectively pursuing remediation at PRP or unfunded sites.

Adopted by the ASTSWMO Board of Directors July 12, 2007 in Chicago, IL.