



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 21, 2002

MEMORANDUM

SUBJECT: EPA Policy Towards Privately-Owned Formerly Used Defense Sites

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TO: Regional Administrators, Regions I-X

Over the past several years, the U.S. Environmental Protection Agency (EPA) has increased its focus on environmental investigations and cleanups of privately-owned Formerly Used Defense Sites (FUDS). This has occurred due to requests from States, Tribes, the general public and congressional staff and members. As a result, EPA has re-evaluated its approach to addressing privately-owned FUDS, particularly those not included on the Superfund National Priorities List (NPL), and is issuing this policy to the Regions in order to clarify the Agency's role at these sites.

For purposes of the attached policy, privately-owned FUDS are defined as those FUDS not currently owned by the Federal government. This includes FUDS owned by the States, Tribes, cities, and other governmental entities, as well as individuals, corporations, etc. The distinction is required because of differences in both statute, Executive Orders, and regulations relative to Federally-owned and non-Federally owned contaminated sites.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and also created, through §211, the Defense Environmental Restoration Program (DERP). DERP assigns the Secretary of Defense the responsibility to carry out response actions for environmental contamination at FUDS. Furthermore, EPA fully recognizes and supports the oversight and response role that many State and Tribal environmental regulatory agencies have been performing at FUDS and expects that role to continue. EPA believes that a better coordinated effort among all parties, as is discussed in this policy, will improve both the effectiveness of cleanup at FUDS and the public confidence in the actions taken at these sites.

The Offices of Solid Waste and Emergency Response and Enforcement and Compliance Assurance would like to express our appreciation to the EPA Formerly Used Defense Sites Workgroup that has developed this policy over the last three years. We also would like to express our appreciation to the Department of Defense, States, Tribes, and members of the public that have reviewed and commented on previous versions of this policy. While we have not been able to incorporate each and every comment into the policy, it is much improved by your thoughtful comments.

Questions about the policy should be directed to the Federal Facilities Restoration and Reuse Office at (202) 260 - 9924, the Federal Facilities Enforcement Office at (202) 564- 2510, the Office of Site Remediation and Enforcement at (202) 564 - 5110, or the Office of Emergency and Remedial Response at (703) 603 - 8960.

Attachment

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EPA Policy Towards Privately-Owned Formerly Used Defense Sites

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I. What is the scope of this policy?

This policy articulates how EPA expects to undertake its obligations and responsibilities to address privately-owned, non-NPL FUDS. (All subsequent references in this policy to “FUDS,” except as noted, refer to privately-owned formerly used defense sites.) This policy brings together in a single place, existing programmatic policies and approaches specifically relevant to FUDS; consequently this policy does not establish any new requirements or responsibilities for EPA or other stakeholders. It clarifies the applicability of existing policies and guidance and does not establish a new regulatory role for EPA. Specifically, this policy discusses EPA’s role in the site assessment of FUDS, EPA’s role in overseeing and implementing response actions at FUDS, and the enforcement alternatives available to EPA for ensuring that known or threatened releases of hazardous substances, pollutants or contaminants at FUDS are addressed in accordance with CERCLA or other applicable authorities. To facilitate the Department of Defense’s (DoD’s) implementation of DERP’s requirement to implement it “in consultation with” EPA (see 10 U.S.C. §2701-§2707), this policy outlines a framework for coordinating with DoD’s executing agent for the FUDS program, the Department of the Army. Within the Army, the U.S. Army Corps of Engineers (USACE) is the executing agent for the FUDS program. Finally, this policy is intended to promote consistency across the EPA Regions by providing guidance for addressing these sites in a more systematic manner.

EPA recognizes that State, Tribal or other environmental agencies oversee many non-NPL FUDS.¹ It is EPA’s intention under this policy to be consistent with existing deferral and coordination policies² and to minimize any potential duplication of effort on the part of the States, Tribes, the DoD/USACE, or other responsible parties. In issuing this policy, EPA acknowledges the States’ roles at non-NPL FUDS and is not attempting to change how EPA works with the States in addressing private sites. EPA expects that oversight of most non-NPL FUDS will continue to be provided primarily by the States and does not call into question existing State/USACE agreements. For a variety of reasons, however, there may be sites at which EPA will provide significant regulatory oversight of the USACE or may conduct environmental response actions at FUDS, such as when a State, Tribe, or community requests EPA assistance, or when EPA otherwise determines that site-specific conditions warrant such action. This policy encourages cooperative efforts among the involved regulatory agencies to establish the most efficient approach for ensuring that response actions are protective of human health and the environment.

For purposes of this policy and consistent with DERP, 10 U.S.C. §2701(c)(1)(B), FUDS are defined as sites which were previously under the jurisdiction of DoD and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances. EPA recognizes that DERP assigns DoD the responsibility to conduct

¹ In the context of this policy, references to States or Tribes are intended to include environmental regulatory agencies representing States, Tribes, Territories, Commonwealths, and others.

² See, for example, “Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities,” dated September 24, 1996.

response actions at FUDS subject to and consistent with CERCLA at FUDS.³ DoD focuses its efforts under DERP only on releases associated with DoD activities. EPA, however, has broader CERCLA response authorities at privately-owned FUDS and should ensure that known or threatened releases of hazardous substances, pollutants or contaminants, regardless of source, are responded to in accordance with CERCLA. EPA may perform response activities at privately-owned sites, including FUDS, as authorized in CERCLA §104⁴ and Executive Order 12580. Furthermore, while this policy focuses on authorities available to EPA under CERCLA, nothing in this policy should be construed as limiting EPA's or a State's authorities under other applicable statutes, such as the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), the Clean Water Act (CWA), or the Safe Drinking Water Act (SDWA).

II. What types of sites and situations fall under this policy?

This policy addresses EPA's role at privately-owned, non-NPL FUDS where there has been a release or threat of a release of a hazardous substance, pollutant or contaminant to the environment. This policy also outlines EPA's role in the site assessment of these sites, as well as the oversight and implementation of response actions at these sites. Federally-owned FUDS which meet the criteria set forth in CERCLA §120(c) should be included on the Federal Agency Hazardous Waste Compliance Docket and, where appropriate, evaluated for placement on the NPL in accordance with CERCLA §120(d) and existing EPA policies regarding site assessment and NPL listing.

III. How is this policy to be implemented?

A. How are EPA, States, and Tribes expected to coordinate?

1. Establishing Priorities and Workload Sharing

As a regulator, EPA intends to work collaboratively with the States and Tribes to implement this policy, particularly with regard to priority setting and workload sharing. Consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (see 40 CFR §300.500), Regions should provide an opportunity for meaningful and substantial State and Tribal participation in all elements addressed by this policy. This collaboration will help to identify the FUDS in greatest need of site assessment, response action, or oversight of USACE activities. EPA intends to work with the States and Tribes to jointly establish priorities for site assessment, oversight, and response at FUDS. Further, Regions should work with respective States and Tribes to distribute this workload among the various responsible agencies. Any priority setting and workload sharing agreements between Regions, States, and Tribes

³ Please note that although a site is a FUDS, this does not necessarily mean that DoD is a responsible party for cleanup, nor the sole responsible party.

⁴ By rule, however, only releases included on the NPL are eligible for Superfund financed remedial action. 40 C.F.R. §300.425(b)(1).

should be discussed with USACE. Risk to human health or the environment is the primary factor in establishing site assessment priorities. It is not the intent of this policy to make FUDS, as a group, a higher priority than other sites already in the Regions' site assessment queues. However, some FUDS may warrant more immediate attention. The Regions, in consultation with the States and Tribes, should determine where particular FUDS fit into existing priority-setting systems and incorporate them accordingly.

2. Coordination with USACE and other Parties

For non-NPL FUDS that have matured beyond the site assessment phase and where USACE is responding to or planning to respond to releases under DERP, EPA should collaborate with the States and/or Tribes to determine which agency will assume primary oversight or take a response action.

Upon establishing priorities, the Regions should also seek to establish work-sharing arrangements with amenable States and Tribes to facilitate efficient and effective site assessment and response action implementation/oversight of FUDS. USACE should be informed of any such work-sharing agreements reached. Although EPA is responsible for implementing CERCLA site assessment programs, these efforts are typically executed in concert with the States and Tribes through a variety of mechanisms, such as cooperative agreements. The Regions should take full advantage of any site assessment processes or agreements already in place between EPA and the States and Tribes and enhance such relationships where appropriate.

B. How are sites to be assessed?

EPA's authorities to conduct site assessment activities, including Preliminary Assessments (PAs) and Site Inspections (SIs), are discussed in CERCLA (Sections 105 and 116), the NCP (Sections 300.410, 300.420, and 300.425), and applicable EPA guidance.⁵ In performing CERCLA site assessments, EPA identifies and prioritizes sites, including FUDS, where a release or a threat of release of a hazardous substance, pollutant or contaminant may pose an unacceptable threat to human health or the environment. Regions should integrate FUDS into existing site assessment processes.

Although the site assessment processes described herein focus primarily on CERCLA processes and terminology, some Regions, States, or Tribes may choose to conduct assessments under other authorities, such as RCRA, TSCA, CWA, or SDWA, or comparable State or Tribal authorities where jurisdiction under those authorities exists.

1. FUDS Inventory

Because of the increasing significance and visibility of FUDS nationally, each of the

⁵ See, for example, "Guidance for Performing Preliminary Assessments Under CERCLA," EPA/540/G-91/013, September 1991, "Guidance for Performing Site Inspections Under CERCLA, Interim Final," Superfund Directive 9345.1-05, EPA/540-R-92-021, PB92-963375, September 1992.

Regions should develop a FUDS inventory that it can rely on to assist in meeting EPA's obligations and responsibilities at privately-owned, non-NPL FUDS. For the inventory, the Regions should include the full universe of FUDS, not just those which are privately-owned.⁶ Regional options for developing an inventory include, but are not limited to: creating an in-house, stand-alone information system (either electronic or paper); using the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database; relying on state databases; relying on USACE's FUDS database; etc. Where appropriate, modifications to existing EPA data management systems may be necessary to adequately capture data fields pertinent to FUDS.

Depending on which option is used, the Regions should consult and coordinate their efforts with the appropriate USACE Districts/Divisions, other Federal agencies (e.g., General Services Administration, the Forest Service, the Bureau of Land Management, etc.), the States and Tribes, and private parties. Existing information (e.g., files, records, and databases, particularly those maintained by USACE and the States) should be utilized to the maximum extent possible. Each Region's FUDS inventory should be in place as soon as possible, but no later than the end of fiscal year 2003. The Regions should also work with USACE, other Federal agencies, and the States and Tribes to establish a process for routinely (e.g., semi-annually) updating and maintaining the FUDS inventory to ensure that all parties have the most up-to-date, accurate information.

Each Region's FUDS inventory should, to the maximum extent possible, identify past and current uses of each site, the current property owner(s), and the types of environmental and human health threats known or suspected to exist at each site. Threats generally encountered at FUDS are similar to those found at current military facilities and may include, but are not limited to: hazardous and solid waste landfills; ordnance and explosives; radioactive wastes; and contaminated environmental media from a wide variety of sources, such as solvents, petroleum, oil, and lubricants, and other contaminants. When requested by the States or Tribes, and where information is readily available, the Regions should also try to note in the inventory the known or suspected presence of other environmental and human health threats, such as unsafe buildings and other structures, or other items of concern. The Regions, in collaboration with the States and Tribes, may use the inventory of FUDS to identify those sites that may require further assessment, response action, or oversight.

Although the inventory should include information on the nature of the contamination or the potential or actual threats at a given FUDS, it is not intended to capture all the information that may be needed to fully assess a site. The primary purpose of the inventory is to enable the Regions to collaborate with the States and Tribes on identifying which FUDS may require further attention (e.g., site assessment, response action, oversight, or site closeout). Regions may also want to use their inventory to track ongoing FUDS investigations and response actions.

2. Site Screening

As a result, this is the only section of the policy that references "other Federal agencies" besides DoD and USACE.

The Regions, in partnership with the States and Tribes, routinely screen sites to evaluate potential risks prior to considering entering these sites into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database. FUDS should be included in this evaluation process. Site screening is described in EPA guidance (see OSWER 9375.2-11FS) and is undertaken to focus CERCLA site assessment efforts on sites where an actual release or a threatened release of a hazardous substance, pollutant or contaminant may have an adverse impact on human health or the environment. Many Regions utilize State cooperative agreements or similar vehicles to conduct these screenings.

EPA may conduct pre-CERCLIS screening on sites, including FUDS, which have a known or threatened release of a hazardous substance, pollutant or contaminant. FUDS that were previously assigned a “No Further Action” (NOFA) or “No DoD Action Indicated” (NDAI) determination by USACE without regulatory concurrence are appropriate candidates for such screening, as well as FUDS where USACE may be actively pursuing investigatory or response actions. Pre-CERCLIS screening of FUDS previously designated NOFA/NDAI by USACE should be conducted according to priorities jointly established by EPA and the States and Tribes. EPA does not anticipate routinely re-evaluating sites where appropriate State or Tribal agencies have concurred with prior NOFA/NDAI determinations by USACE, unless additional information becomes available. Consistent with existing processes, the Regions should share the results of the pre-CERCLIS evaluations with the States and Tribes and consider their input before finalizing the screening process. At FUDS where USACE is undertaking substantial investigations regarding potential releases of hazardous substances, pollutants or contaminants it may be appropriate for the Regions to directly enter these sites into CERCLIS without conducting the pre-screening.

Regions, in consultation with the States and Tribes, may determine at the pre-CERCLIS screening stage that a site does not warrant listing in CERCLIS. The States and Tribes may elect to evaluate FUDS pursuant to their own authorities, independent of EPA’s determination.

After consultation and coordination with States, Tribes, and USACE, EPA may determine (based on the results of the pre-CERCLIS screening which may include information provided by USACE or other sources) that additional CERCLA site assessment work is necessary. EPA should enter these eligible FUDS into CERCLIS and take steps to ensure that further CERCLA assessment and any necessary cleanup work is performed. When appropriate, EPA will provide USACE and the States and Tribes with supporting documentation so that prior USACE NOFA/NDAI determinations may be re-evaluated. As noted earlier, some sites may warrant additional assessment or response action oversight under other authorities.

3. Preliminary Assessments/Site Inspections, Expanded Site Inspections, and HRS Scoring

Following site screening and subject to the work-sharing arrangements mentioned in Section IV.A of this policy, the Regions should use existing site assessment processes to conduct CERCLA Preliminary Assessments and any other necessary site assessment actions, such as Site

Inspections, Expanded Site Inspections (ESI), and Hazard Ranking System (HRS) scoring, for those FUDS requiring additional evaluation. As previously noted, many of these efforts will be implemented using cooperative agreements or other similar arrangements with the States and Tribes. After consultation with the States and Tribes, some FUDS may be listed on the NPL as a result of the additional evaluation, consistent with existing regulations and EPA policies. The authority to evaluate all sites, including FUDS, for inclusion on the NPL rests solely with EPA and has not been delegated to any other agency. EPA expects that the majority of FUDS will not be appropriate for inclusion on the NPL.

For those FUDS where USACE has completed its internal Preliminary Assessment/Site Inspection or program eligibility determination, or is implementing investigatory or response actions, the Regions should review USACE and State or Tribal information, including the administrative record and historical files, to determine whether such efforts satisfy CERCLA, the NCP, and applicable EPA guidance. In those instances where the Regions believe that the work undertaken by USACE either does not fulfill those requirements or is inadequate for evaluating all potential risks at a site, the Regions should attempt to work with USACE and the State or Tribe so that appropriate supplemental information can be gathered. If EPA and USACE fail to agree on the information needed to properly perform a Preliminary Assessment/Site Inspection or complete an HRS package, EPA, working with the State or Tribe, should collect the appropriate information and complete the site assessment activities.

As provided in Section 300.420(b)(5) of the NCP, any person may petition the EPA Regional Administrator to perform a Preliminary Assessment on a release or suspected release of a hazardous substance, pollutant or contaminant. Any Preliminary Assessment initiated as a result of a petition should be given due priority over other sites in order to complete the Preliminary Assessment within one year from when the petition was received, in accordance with Section 300.420(b)(5)(iii). FUDS that have petitions for assessment accepted by the Regional Administrator should be immediately included in a Region's FUDS tracking system and/or CERCLIS.

At any point in the site assessment process, following entry of a site into CERCLIS, the Region, in coordination with the State or Tribe, may determine that a site poses no substantial threat and indicate that No Further Remedial Action is Planned (NFRAP) under CERCLA. However, the States and Tribes may elect to further address such NFRAP sites pursuant to their own authorities. While EPA may make NFRAP determinations at any point in the site assessment process, Regions should also encourage responsible parties to implement early response actions during site assessment, where appropriate and in accordance with applicable regulations, when conditions warrant.

C. What about sites requiring EPA oversight or response?

Following evaluation, those FUDS that are appropriate for inclusion on the NPL should be proposed for listing, consistent with applicable regulations and EPA policies. For other FUDS, the Regions may determine that while a site does not merit inclusion on the NPL, risks posed by releases or threatened releases of hazardous substances, pollutants or contaminants may

warrant a response action under CERCLA or other authorities.

As previously stated, EPA will assess and respond to these non-NPL FUDS in the same manner as other privately-owned CERCLA sites. In addition, EPA plans to utilize the same enforcement approach for FUDS as is applied to privately-owned CERCLA sites. It is EPA's expectation that, for most non-NPL FUDS, the States and Tribes will continue to provide the primary oversight of USACE response actions. However, for FUDS where EPA plans to provide primary oversight under CERCLA at all or part of a FUDS, EPA should continue to follow its practice of attempting to reach with USACE and other appropriate parties an agreement that provides for performance of work and reimbursement of oversight costs before attempting other alternatives. Where time sensitivity requires an immediate response, EPA recognizes the difficulty of negotiating such agreements prior to initiation of the response.

If EPA is unable to reach agreement with USACE regarding either the need for coordinated action or the establishment of acceptable schedules for implementing actions, the Regions, in consultation with the States and Tribes, should consider the full range of enforcement authorities to compel cleanup based on the nature of the contamination and other site-specific conditions (see Section VI). In appropriate situations, EPA may implement CERCLA response actions at privately-owned FUDS (including remedial actions at FUDS listed on the NPL) to address releases and threats of releases of hazardous substances and proceed with cost recovery actions.

IV. What are EPA's expectations relative to Defense Environmental Restoration Program consultation?

10 U.S.C. §2701 requires that DoD consult with EPA in the execution of the FUDS program. Where USACE is responding under DERP at a FUDS, outlined below are EPA's expectations for consultation and review under DERP and the NCP.

A. What are EPA's site-specific consultation expectations?

EPA's expectations of USACE for site-specific consultation and review include, but are not limited to:

Providing EPA and the State/Tribe with site management plans, including schedule milestones;

Providing EPA and the State/Tribe with timely information relative to FUDS Inventory Project Reports (INPRs), categorical exclusions, NOFA/NDAI determinations, and identification of non-DoD potentially responsible parties (PRPs) at FUDS. If parties in addition to DoD may be liable for releases of hazardous substances, pollutants or contaminants at FUDS, EPA expects DoD to notify EPA and provide all relevant information in a usable format and in a timely manner;

Providing EPA and the State/Tribe with reasonable opportunities for meaningful

regulatory review of and comment on major project documents, including, but not limited to, historical property use records, work plans, sampling and analysis plans, investigatory/study reports, remedial investigation/feasibility study (RI/FS) reports, engineering evaluations/cost analyses (EE/CAs), decision documents, and remedial design/remedial action (RD/RA) plans; and,

Providing modified project documents in response to comments from EPA/States/ Tribes. EPA also expects DoD to provide written responses to comments, along with modified project documents.

In order to facilitate an efficient, expeditious response action, and to avoid an unnecessary duplication of effort and expenditure of resources by the United States government, in those cases where USACE has become aware of significant contamination from non-DoD sources, USACE should supply all pertinent information that it finds concerning the contamination, and its source or sources, to the Region, the State, and to any potentially affected Tribes.

When a FUDS response action is being conducted by USACE under an enforceable agreement with either EPA or the State/Tribe, EPA's expectation is that DERP consultation requirements will be satisfied, as provided in the agreement. Regions, with input from the States and Tribes, are encouraged to negotiate consent agreements with the DoD components or USACE, where appropriate, to better define consultation details for specific FUDS. However, to ensure that CERCLA and NCP criteria are satisfied, EPA should explore its enforcement alternatives, as outlined in Section VI, when the USACE fails to meet EPA's expectations for consultation under DERP.

B. What are EPA's expectations relative to programmatic consultation?

In addition to receiving notification on potential FUD sites, and an opportunity to provide timely review and comment on proposed response actions, per 10 U.S.C. Section 2705⁷, EPA, States and Tribes expect the opportunity for meaningful input at the programmatic level in the planning of response actions at FUDS by USACE.⁸ In keeping with the principles agreed upon in the Federal Facilities Environmental Restoration Dialogue Committee (FFERDC) report (April 1996), and as required by the consultation provision in DERP, EPA expects annually to provide input to USACE on FUDS program priorities. In some instances, processes allowing for meaningful regulatory input into non-NPL FUDS program planning may already be in place between the State and DoD through the Defense/State Memorandum of Agreement (DSMOA)

⁷ See 10 U.S.C. Section 2705(a) and (b) Notice of environmental restoration activities: Subsections (a) and (b); The Secretary of Defense will ensure that the EPA will receive prompt notice of discovery of releases or threatened releases of hazardous substances, pollutants or contaminants, the extent of threat to public health and environment, proposals to carry out response actions, the initiation of any response action and ensure that the EPA is given adequate opportunity to comment.

One such vehicle to consider is the development of Statewide Management Action Plans (SMAP).

program or other agreements. In those cases, the Region should consult with the State and USACE to define EPA's role in the planning processes.

In coordinated efforts with the States and Tribes, the Regions should actively engage the USACE Districts, Divisions, and Headquarters offices in planning project requirements at the site-specific level and subsequently assist USACE in integrating these individual site-specific requirements into a comprehensive funding plan, or work plan, for all FUDS within a Region. Additionally, EPA expects active and timely communication from USACE with respect to relative risk evaluations, project prioritization and eligibility, and USACE's designation of PRP sites and PRP investigations. EPA should provide to USACE, and share with the States/Tribes, written comments expressing any concerns with FUDS program planning/funding documents. EPA expects a written response from USACE substantively addressing those comments prior to issuance of a final FUDS funding plan. The goal of this effort is to develop consensus among the responsible agencies in identifying program funding needs and project priorities.

V. What are EPA's expectations on enforcement at FUDS?

This policy contemplates that most response actions and cleanup activities at privately-owned, non-NPL FUDS will be conducted under DERP and CERCLA. Similarly, and as outlined in the preceding sections, EPA expects that the process to be followed for identifying FUDS for which a response is necessary, determining the nature of the response, the level of and need for oversight, etc., will be consistent with these authorities, including enforcement. However, EPA's enforcement authority at non-NPL FUDS is not limited solely to CERCLA; accordingly, where necessary and appropriate, and in consideration of relevant State and Tribal issues, EPA will make use of the full range of available tools to compel response actions at privately-owned FUDS. When EPA determines that an enforcement response is necessary, EPA should focus on negotiating orders to conduct work with the parties responsible for releases of hazardous substances, pollutants or contaminants, including DoD, consistent with existing enforcement and cleanup policies.

To facilitate cleanup by non-DoD responsible parties, and consistent with enforcement priorities, Regions should also initiate PRP searches at FUDS early in the CERCLA process where parties in addition to DoD may be liable for releases of hazardous substances, pollutants or contaminants. In addition, Regions may issue unilateral orders to compel cleanup by any or all of the responsible parties under an appropriate enforcement authority, including, but not limited to, CERCLA, RCRA, or SDWA, where EPA determines that a site may present an imminent and substantial endangerment. Cleanup orders should include schedules for response action(s) that EPA determines to be needed, based on the site-specific situation. In appropriate situations, EPA may implement CERCLA response actions at privately-owned FUDS (including remedial actions at FUDS listed on the NPL) to address releases and threats of releases of hazardous substances, pollutants or contaminants, and proceed with cost recovery actions.

CERCLA §106, 42 U.S.C. §9606, authorizes issuance of Administrative Orders when there may be an imminent and substantial endangerment to public health, welfare, or the environment because of an actual or threatened release of a hazardous substance. Section 4(e) of

Executive Order 12580 requires that the Attorney General concur on CERCLA §106 orders issued against Federal agencies. Before the Attorney General's concurrence is sought, Regions should consult with the appropriate enforcement office at EPA Headquarters.

In addition to CERCLA, the Regions should consider the applicability of other enforcement authorities that can be used to compel investigation and/or cleanup by Federal agencies or others with liability for releases at FUDS.⁹ For example, petroleum may be covered by a RCRA order, but excluded under CERCLA. Further, §7003 of RCRA, 42 U.S.C. §6973, provides EPA with a broad enforcement tool that can be used to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.¹⁰ EPA may issue an Administrative Order to Federal agencies that have contributed or are contributing to such activities to require the agency to refrain from those activities or take any other necessary action. Section 1431 of the SDWA, 42 U.S.C. §300i, provides EPA broad authority to issue Administrative Orders to a Federal agency when EPA receives information that a contaminant is present or likely to enter a public water system or underground source of drinking water, and may present an imminent and substantial endangerment to human health.

Enforcement cases against Federal agencies often present issues of national significance. Consistent with EPA Office of Enforcement and Compliance Assurance (OECA) delegations, Regions should consult with the appropriate enforcement office at EPA Headquarters¹¹ before issuing administrative orders to Federal agencies.

VI. DISCLAIMER

This policy is intended for use by EPA personnel in addressing privately-owned FUDS. The statutory provisions and EPA regulations described in this document contain legally binding requirements. This document is not a regulation itself, nor does it change or substitute for those provisions and regulations. Thus, it does not impose legally binding requirements on EPA, States, or the regulated community. This policy does not confer legal rights or impose legal obligations upon any member of the public.

⁹ While there is no requirement for EPA to seek DOJ concurrence before issuance of an order under these other authorities, a RCRA §7003 unilateral administrative order may not become final without providing the responsible party an opportunity to confer with the Administrator. Moreover, as a matter of policy, involvement by EPA Headquarters is needed before issuance.

¹⁰ See October 1997 "Guidance on the Use of Section 7003 of RCRA," <http://www.epa.gov/oeca/osre/971020.html>.

¹¹ The responsible enforcement office will be either the Office of Site Remediation Enforcement (OSRE) or the Federal Facilities Enforcement Office (FFEO). For CERCLA cases and RCRA Sections 7003 and 3008(h) orders against Federal agencies, the Regions should follow the 1999 OECA memorandum entitled "Office of Enforcement and Compliance Assurance and Regional Roles in Civil Judicial and Administrative Site Remediation Enforcement Cases;" for all other cases where a Federal agency is the recipient of the order, Regions should consult with FFEO.

The general policy provided here may not apply to a particular situation based upon the circumstances. EPA and other decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from those described in this guidance where appropriate.