

**FUDS PROGRAM GUIDANCE TO IMPLEMENT ARMY INTERMIM POLICY  
FOR INTEGRATING NATURAL RESOURCE INJURY RESPONSIBILITIES AND  
ENVIRONMENTAL RESPONSE ACTIVITIES**

- 1 **Purpose.** This guidance implements the May 2, 2000 Department of Defense (DOD) Interim Policy on Integration of Natural Resource Injury Responsibilities and Environmental Restoration Activities, and the Army Interim Policy for Integrating Natural Resource Injury Responsibilities and Environmental Response Actions issued by DASA(ESOH) on 11 July 02 as they apply to the Formerly Used Defense Sites (FUDS) Program.
- 2 **Scope.** This guidance addresses the requirements of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Army/DOD policies pertaining to the notification of and coordination with Natural Resource Trustees (Trustees) associated with USACE execution of its FUDS mission. It also addresses the FUDS program manager's (PM) roles and responsibilities related to execution of this program.
- 3 **Definitions.** The glossary contains definitions for key terms used in this guidance as well as an acronym list.
- 4 **Requirements.** USACE will notify and coordinate with Trustees whenever a release of a CERCLA hazardous substance, contaminant or pollutant that may result in actual or potential injury to a natural resource is discovered during the course of performing CERCLA response action at a FUDS property. In addition, USACE will consider the potential for Natural Resource Injury (NRI) during the remedy/removal action selection process. Notification, coordination and selection of remedy shall be done in accordance with the guidance and procedures set forth below.
  - 4.1. USACE will notify Trustees when the release of a CERCLA hazardous substance has the potential to cause NRI in accordance with CERCLA Section 104(b)(2), the NCP and this guidance.
  - 4.2. In its lead agency role, USACE will coordinate [its FUDS project] assessments, investigations and planning with Trustees in accordance with CERCLA, the NCP and this guidance.
  - 4.3. The USACE PM will utilize the services of a qualified Army natural resource professional as defined in the glossary of this guidance.
  - 4.4. Response actions will be evaluated as to their potential to produce NRI, and whenever practicable, appropriate and consistent with the NCP, response actions will be selected that limit NRI during the response action.

4.5. The USACE will not use Environmental Restoration-FUDS (ER-FUDS) funds to enhance or restore natural resources beyond CERCLA remediation requirements, to compensate Trustees, directly or indirectly, or to assess Natural Resource Damages (NRD) at FUDS.

5 **Steps to Implement the Army Policy.** Policy implementation consists of the following steps:

5.1. **Identification of Trustees.** Upon discovery of information showing that a release or threat of a release of hazardous substance at a FUDS may potentially result in NRI, the PM must identify appropriate Trustees in order to initiate notification and coordination efforts. A Trustee exists only if there are natural resources present (as defined in the glossary of this guidance). In order to determine if a Trustee exists for a given FUDS property, the PM should contact the Regional Response Team (RRT) to identify Trustees. If the RRT identifies a Trustee for the FUDS property and it has been determined that the release poses the potential for NRI, then that Trustee(s) should be notified. There are 13 RRTs, one for each of ten federal regions, plus one for Alaska, one for the Caribbean, and one for the Pacific Basin. Each RRT maintains a Regional Contingency Plan (RCP) and has state, as well as federal government representation. PMs can contact their RRT at:

<http://www.nrt.org/production/nrt/home.nsf>

5.2. **Notification of Trustees.** Once Trustees have been identified for the FUDS property, the next step in the process is notification. Notification is initiated by submitting a notification letter to identified Trustees for the site informing them of the [potential] release and providing a brief summary of site information and data. The letter should also provide a Point of Contact (POC) within USACE (usually the PM) through which the Trustee can request additional information. District Counsel (OC) review shall be made of notification letters prior to submittal to Trustees. An example notification letter has been provided as Attachment 1.

5.3. **Trustee Coordination.** Immediately following Trustee notification, the PM should begin coordination activities with the Trustee(s). During the coordination process, the PM should keep the Trustees informed of project planning and provide final investigative and assessment reports for their information. An example Trustee coordination letter is provided as Attachment 2. District Counsel shall review coordination letters prior to submittal to Trustees.

PMs should not agree to execute environmental or ecological studies requested by Trustees beyond those consistent with the NCP that are performed during the RI or EE/CA. Under no circumstance should project personnel or project documents make statements that identify or quantify NRI. Any costs associated with studies to identify/quantify NRI are to be borne by Trustees and shall not be funded with ER-FUDS dollars. Whenever Trustees request additional studies to evaluate impacts to

biological receptors or natural resources, the PM shall consult with a USACE CERCLA ecological risk assessor assigned to the project to determine if the request falls outside the range of data typically gathered for a CERCLA response (e.g., Remedial Investigation or Removal Action).

- 5.4. Utilization of an Army Natural Resource Professional. Throughout Trustee coordination activities for the site, the PM shall utilize the services of an Army natural resource professional as defined in the glossary of this guidance. For the majority of FUDS projects, this person will be the District CERCLA ecological risk assessor. If the District does not have a qualified CERCLA risk assessor, the PM may utilize the services of a risk assessor at the HTRW design district, a contractor or contact the HTRW Center of Expertise (CX) for assistance. If utilizing a contractor, the PM must have the contractor's scope of work and workplan(s) reviewed by an Army NR professional for adequacy.
- 5.5. Consideration of NRI During the Remedy Selection Process. During the CERCLA remedy/removal action selection process, specific selection criteria must be evaluated. For a remedial action, there are 9 selection criteria to be evaluated (40 CFR 300.430(e)(9)(iii)). They are:

- Overall protection of human health and the environment;
- Compliance with Applicable and Relevant or Appropriate Requirements (ARARs);
- Long-term effectiveness and permanence;
- Reduction in toxicity, mobility and volume through treatment;
- Short-term effectiveness;
- Implementability;
- Cost;
- State acceptance; and
- Community acceptance

During the EE/CA process, the evaluation criteria are comprised of the following three criteria:

- Effectiveness [includes protectiveness and ability to achieve removal action objectives];
- Implementability [includes technical feasibility, availability, and administrative feasibility]; and
- Cost

In either circumstance (the RI or the EE/CA), the potential for the remedy to cause NRI must be considered during the remedy/removal action selection process. For RA, this consideration occurs in the evaluation of the overall protectiveness, the long-term effectiveness and the short-term effectiveness of the remedy. During an EE/CA, it occurs during the evaluation of the protectiveness of the removal action and should include evaluation of short- and long-term effects on natural resources.

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The potential for an alternative to cause NRI should not be the sole driver in selecting a remedy, but rather should be considered as discussed above.

- 6 **Assistance.** For assistance with any of the requirements or guidelines in this guidance document, FUDS please contact J.R. Gibson, CEMP-RF.

## GLOSSARY OF TERMS

**Army Natural Resource Professional:** An Army professional with an undergraduate or graduate degree in natural resources management sciences or environmental sciences (including, but not limited to agronomists, range conservationists, wildlife biologists, ecologists, ecological risk assessors), and/or who has the responsibility for supporting the Army natural resource management responsibilities.

To meet Army responsibilities to consider and minimize potential natural resource injuries in the CERCLA response process, it is important the designated Army natural resource professional be a Department of Army (DA) employee or its contractors. FUDS PMs shall not utilize individuals associated with Trustees such as the United States Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA), States or Tribes (or institutions closely aligned with these Trustees). These individuals have a potential conflict of interest and should not act as the designated Army natural resource professional for CERCLA response-related NRI issues.

**CERCLA Hazardous Substance:** Any substance defined as a hazardous substance in CERCLA Section 101(14). For a listing of CERCLA hazardous substances, see 40 CFR 302. [Note: The term does not include petroleum, including crude oil or any fraction thereof not specifically listed or designated as a hazardous substance in CERCLA Section 101(14).]

**Lead Agency:** 40 CFR 300.5 states that for releases of hazardous substances, pollutants or contaminants that are on or the sole source of the release is from, any facility or vessel under the control of DOD, then DOD will be the lead agency. For purposes of this guidance, when USACE is undertaking a CERCLA response at a FUDS property, DOD is the lead agent unless otherwise specified by OC.

**Natural Resource:** Per CERCLA Section 101(16), natural resources are land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone defined by the Magnuson Fishery Conservation and Management Act of 1976), any state or local government, any foreign government, any Indian Tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian Tribe. This definition is used per Army policy in lieu of the definition for “natural resource” in Army Regulation 200-3, “Natural Resources – Land, Forest and Wildlife Management.”

**Natural Resource Damage:** The liability – either in money damages or other forms of compensation – assessed by a Natural Resource Trustee in the adjudication or settlement of a legal claim regarding NRI (a damage claim includes both compensation for injuries and the administrative costs incurred by Trustees). This term is defined in CERCLA Section 101(8) as damages for injury or loss of natural resources as set forth in section 107(a) or 111(b). A Trustee cannot initiate a legal claim for NRD until after a CERCLA cleanup is completed, or, if appropriate, after remedy selection. See CERCLA Section 113(g)(1). Further, NRD can

only be used by a Trustee to restore, replace, or acquire the equivalent of natural resources injured by a release of a CERCLA hazardous substance, where such release occurred after December 11, 1980. See CERCLA Section 107(f). Finally, NRD involves a claim against the United States that must be paid from the Judgment Fund rather than directly from agency appropriations.

**Natural Resource Injury:** A measurable adverse change, either short- or long-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to the release of CERCLA hazardous substance(s) or exposure to a product of reactions resulting from the release of a hazardous substance. [This term is not defined in CERCLA, but rather in DOI regulations at 43 CFR 11.14.

**Natural Resource Trustee:** Any Federal agency designated in the Subpart G to the NCP has having Natural Resource Trustee responsibilities pursuant to CERCLA Section 107(g)(2)(A); any State agency designated by the Governor of each State pursuant to CERCLA Section 107(f)(2)(B); or a Federally recognized Indian Tribe pursuant to CERCLA Section 126. The Army is a Natural Resource Trustee for land and natural resources under its jurisdiction, management and control. The Army is NOT a Trustee at FUDS, Army post-transfer sites, or third-party sites because these properties are no longer – or were never – under DOD jurisdiction, management, and control. In addition to providing valuable input into development and selection of remedies, Trustees are authorized to assess NRD and bring claims against PRPs.

LIST OF ACRONYMS

ARAR – Applicable, or Relevant and Appropriate Requirement  
ASR – Archives Search Report  
AR – Army Regulation  
BD/DR – Building Demolition/Debris Removal  
CX – Center of Expertise  
CFR – Code of Federal Regulations  
CERCLA – Comprehensive Environmental Response, Compensation and Liability Act  
CON/HTRW – Containerized/Hazardous, Toxic and Radioactive Waste  
DERP – Defense Environmental Restoration Program  
DOC – United States Department of Commerce  
DOD – United States Department of Defense  
DOE – United States Department of Energy  
DOI – United States Department of Interior  
EE/CA – Engineering Evaluation/Cost Analysis  
ER-FUDS – Environmental Restoration-Formerly Utilized Defense Site  
FUDS – Formerly Utilized Defense Site  
HTRW – Hazardous, Toxic and Radioactive Waste  
NCP – National Oil and Hazardous Substances Pollution Contingency Plan  
NDAI – No Department of Defense Action Indicated  
NOAA – National Oceanic and Atmospheric Administration  
NRD – Natural Resource Damage  
NRI – Natural Resource Injury  
NRT – National Response Team  
OC – Office of Counsel  
OE – Ordnance and Explosives  
OPA – Oil Pollution Act  
PM – Project Manager  
POC – Point of Contact  
PRP – Potentially Responsible Party  
PAE – Preliminary Assessment of Eligibility  
RA – Remedial Action  
RI – Remedial Investigation  
SI – Site Inspection  
USACE – United States Army Corps of Engineers  
USFWS – United States Fish and Wildlife Service  
USDA – United States Department of Agriculture

**ATTACHMENT 1**  
**EXAMPLE Trustee NOTIFICATION LETTER**

Name of Trustee (Person)  
Office  
Trustee Agency  
Address

Dear Ms/Mrs./Mr. \_\_\_\_\_:

In accordance with Section 104(b)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act (CERCLA/SARA) and 40 CFR Part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan), I am writing to formally notify you that the U.S. Army Corps of Engineers (USACE) has determined through ongoing investigations that potential injuries to natural resources may have resulted from releases of CERCLA hazardous substances, pollutants, or contaminants at the (insert name of FUDS property and location).

For your convenience, a brief description of (insert name of FUDS property) is included in Enclosure 1.

Please provide any specific concerns regarding the contamination, the response action, and the natural resources at (insert name of FUDS property) to (insert name and address & phone number of receiving USACE POC) within 45 days of receipt of this letter.

The point of contact for this action is (insert POC name) at (insert commercial telephone number). [NOTE: Only include this paragraph if the USACE POC is different from that indicated in the previous paragraph]

Sincerely,

Title/signing official  
Position

Enclosure

**ENCLOSURE 1  
SUMMARY OF SITE INFORMATION**

Name of FUDS Property  
Name of FUDS PM or POC

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Name of FUDS Project on Property  
Location of FUDS Property

Federal Register Notice Date (if on NPL)

Paragraph Describing the Site:

Paragraphs Describing/Summarizing Investigation and Results to Date:

Paragraph Describing Effects of Contamination (if known). For example, residential wells affected, etc.:

**ATTACHEMENT 2**  
**EXAMPLE Trustee COORDINATION LETTER**

Name of Trustee Person

Office

Trustee Agency

Address

Dear Ms/Mrs./Mr. \_\_\_\_\_

In accordance with Section 104(b)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act (CERCLA/SARA) and 40 CFR Part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan, NCP), I am writing to initiate coordination efforts between all involved natural resource Trustees at the (insert name and location of FUDS property) The US Army Corps of Engineers (USACE) has determined from ongoing assessments or investigations that potential injuries to natural resources may result from releases under our investigation.

For purposes of coordinating Trustee information, the USACE has designated (insert name, phone number and address of USACE POC) as the primary point of contact for natural resource Trustee issues.

We request that your organization contact (insert name of USACE POC) to coordinate Trustee involvement with the ongoing Formerly Utilized Defense Site (FUDS) property environmental restoration activities at the property.

Sincerely,

Name of Signatory Person  
Position