



# OSWER Directive Initiation Request

1. Directive Number

9650.10

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## 3. Title

LUST Trust Fund Cooperative Agreement Guidelines

*EPA-OSWER 9650.10*

## 4. Summary of Directive (include brief statement of purpose)

This Directive consolidates and updates all previously issued program policy guidelines for the Leaking Underground Storage Tank Trust Fund. It provides information to assist States and EPA Regional Offices in negotiating, awarding, and overseeing Trust Fund Cooperative Agreements.

## 5. Keywords States, Regions, Cost Recovery, Underground Storage Tanks, LUST Trust Fund, Cooperative Agreements

6a. Does This Directive Supersede Previous Directive(s)?

☐

No

☒

Yes

What directive (number, title)

9650.6; 9650.6-1; 9650.7

b. Does It Supplement Previous Directive(s)?

☒

No

☐

Yes

What directive (number, title)

## 7. Draft Level

☐

A - Signed by AADAA

☐

B - Signed by Office Director

☐

C - For Review & Comment

☐

D - In Development

8. Document to be distributed to States by Headquarters?

☐

Yes

☒

No

This Request Meets OSWER Directives System Format Standards.

9. Signature of Lead Office Directives Coordinator

*Beverly Thomas*

Date

*12/22/88*

Beverly Thomas, OUST Directives Coordinator

10. Name and Title of Approving Official

*Johnnie Webster*

Date

*2/8/89*

Johnnie Webster, OSWER Directives Officer

EPA Form 1315-17 (Rev. 5-87); Previous editions are obsolete.

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**LUST TRUST FUND**

**COOPERATIVE AGREEMENT GUIDELINES**

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

**OFFICE OF UNDERGROUND STORAGE TANKS**

TABLE OF CONTENTS

<u>ISSUE</u>	<u>SECTION</u>
OVERVIEW OF THE LUST TRUST FUND .....	I
APPLICABILITY OF 40 CFR PART 31 GRANT REGULATIONS .....	II
STATE COST SHARE REQUIREMENTS .....	III
ALLOWABLE COSTS .....	IV
TRUST FUND USE AT GOVERNMENT FACILITIES .....	V
SOLVENCY OF OWNERS AND OPERATORS .....	VI
STATE PROGRAM APPROVAL AND COOPERATIVE AGREEMENTS .....	VII
A. Linking of Trust Fund with State Program Approval Process	
B. Relationship of the Trust Fund to EPA's Transition Strategy	
STATE UST PROGRAMS AND COOPERATIVE AGREEMENTS .....	VIII
A. State Capabilities	
B. State Certification of Authority	
C. State Program Work Plan	
D. Federal Oversight - Program Appraisal Strategy	
Exhibit 1: FY 89 Activities Reporting Requirements for U.S. EPA Office of Underground Storage Tanks	

TABLE OF CONTENTS (continued)

<u>ISSUE</u>	<u>SECTION</u>
CORRECTIVE ACTION .....	IX
A. Compliance with Corrective Action Regulations	
B. Guidance for Conducting Federal-Lead Underground Storage Tank Corrective Actions	
C. State's Priority System for Addressing UST Releases	
PUBLIC PARTICIPATION .....	X
STATE'S QUALITY ASSURANCE PROGRAM .....	XI
ADMINISTRATIVE REQUIREMENTS FOR A STATE COOPERATIVE AGREEMENT APPLICATION .....	XII
COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND STORAGE TANK TRUST FUND (OSWER DIRECTIVE 9610.10) .....	APPENDIX A

## I. OVERVIEW OF THE LUST TRUST FUND

In October 1986, Congress amended Subtitle I of the Resource Conservation and Recovery Act (RCRA) to provide EPA, and States with Cooperative Agreements, new enforcement and corrective action authorities to respond to actual or suspected releases from petroleum USTs. Under the amendments, EPA, or States with Cooperative Agreements, may undertake any of the following actions, or direct tank owners and operators to do so:

- o Test tanks for leaks when a leak is suspected;
- o Investigate a site to evaluate the source and extent of petroleum contamination;
- o Assess how many individuals may have been exposed to petroleum contaminants and the seriousness of exposure, and estimate resulting health risks;
- o Clean up contaminated soil and water;
- o Provide safe drinking water to residents at the site of a tank leak; and
- o Provide for temporary or permanent relocation of residents.

The 1986 amendments to RCRA also provide a Federal Trust Fund to finance the cleanup of petroleum releases from underground storage tanks (USTs). This Trust Fund, financed through an excise tax of 1/10 of one cent per gallon on motor fuels, is expected to raise \$500 million over a five year period. However, there are some guidelines that a State must follow before using Trust Fund dollars. When a leak or spill is discovered, the States should first seek to identify the tank's owner or operator and direct him to perform the cleanup at his expense. A State should only rely on Trust Fund dollars to clean up a site when they cannot identify a responsible tank owner or operator who will undertake corrective action properly and promptly. Even when the Trust Fund is used, tank owners or operators are liable to the State for costs incurred, and are subject to cost recovery actions.

## II. APPLICABILITY OF 40 CFR PART 31 GRANT REGULATIONS

In a joint effort with other Federal agencies, EPA has recently revised and published common grant regulations that provide consistency in the administration of grants and Cooperative Agreements. The revised regulations, promulgated on March 11, 1988, have an effective date of October 1, 1988.

The common rule, 40 CFR Part 31, published in the Federal Register on March 11, 1988, supercedes certain EPA general assistance regulations currently contained in 40 CFR Parts 30 and 33. Specifically, Part 31 is applicable to State and local governments and Federally recognized Indian tribal governments and supercedes all regulations pertaining to these entities in 40 CFR Parts 30 and 33. Parts 30 and 33 have been revised to consist of requirements applicable to grantees other than State and local governments.

Part 31 is intended to further Federalism principles by reducing Federal "controls" over State governments. Part 31 will diminish the Federal role/presence in the States' conduct of certain LUST Trust Fund related activities because it allows States to use their own procedures in such areas as procurement and financial management.

Awards involving FY 89 Trust Fund monies will need to reference and adhere to the revised grant regulations. EPA's Grants Administration Division has established the following general policy regarding the applicability of Part 31:

- o Part 31 applies to all Cooperative Agreements whose budget or project periods began on or after October 1, 1988;
- o Part 31 applies to all amendments of existing agreements in which all of the activities in the amendment's scope of work will be performed after October 1, 1988; and
- o Parts 30 and 33 apply to all Cooperative Agreements and amendments whose budget or project periods began before October 1, 1988.

### III. STATE COST SHARE REQUIREMENTS

#### Policy

In order to comply with Section 9003(h)(7)(B) of Subtitle I, new or amended Cooperative Agreements that utilize FY 89 Trust Fund monies must incorporate a minimum 10 percent State cost share requirement for work done under the Cooperative Agreement. The cost share requirement applies to FY 89 monies that are awarded after January 24, 1989 (the effective date of the "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks -- Subpart H, Financial Responsibility"). Awards of Trust Fund Monies prior to January 24, 1989 are not required to incorporate the cost share provisions.

#### Guidance

The State cost share requirement begins with any award of FY 89 Trust Fund monies after January 24, 1989, the effective date (not the "compliance" date) of the "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks -- Subpart H, Financial Responsibility." The date of the award is the date on which the Regional Administrator makes a Cooperative Agreement offer to the State. The cost share requirement does not apply to unspent FY 88 monies which the State may expend after January 24, 1989.

The State cost share percentage should be applied to the total allowable cost (see Section IV, Allowable Costs) of the program covered by the State's Cooperative Agreement. State Cooperative Agreement work plans should reflect a total program budget, a minimum 10 percent of which will be contributed by the State. All expenditures under the Cooperative Agreement are presumed to be shared on the same percentage basis as the overall ratio of Federal to State monies under the Cooperative Agreement.

The manner in which States provide their cost share is to be negotiated with the Region and must be in compliance with the grant requirements of 40 CFR Part 31. Acceptable methods for cost sharing include:

- o contributions, e.g., staff and equipment; and
- o direct, non-Federal funds expended or obligated by the State, or a political subdivision of the State, for cost-allowable activities.

Trust Fund expenditures that the State recovers from responsible parties may also be used to satisfy the State's cost share requirements. See Appendix A, Cost Recovery Policy for the LUST Trust Fund, for more information on use of recovered funds.

The amount of the State's contribution should be negotiated in advance and specified in the State's Cooperative Agreement. If the State intends to use LUST Trust Fund cost recoveries to assist in meeting its cost share requirement, it must be specifically allowed for in the Cooperative Agreement. Use of cost recovered funds in this way does not change the dollar amount that the State agrees to provide as its cost share. Regardless of the source of funds the State uses to satisfy its cost share requirement, the State's contributions must be verifiable from its records, in accordance with applicable grant regulations.



#### IV. ALLOWABLE COSTS

##### Policy

Section 9003(h) of RCRA provides that Trust Fund monies may be used for the following general categories of activities, both before and after the promulgation of EPA's regulations for underground storage tanks:

- o corrective action;
- o enforcement;
- o cost recovery;
- o exposure assessment;
- o provision of temporary and permanent alternate water supplies; and
- o relocation of residents.

These general categories include the following specific allowable activities:

- o emergency response and initial site hazard mitigation;
- o investigation of suspected leaks and source identification up to the time that a leak is determined to come from an unregulated source;
- o exposure assessments to determine potential health effects of a leak and the establishment of corrective action priorities;
- o development, issuance, and oversight of enforcement actions directed to responsible owners/operators;
- o cleanup of releases;
- o long-term operation and maintenance of corrective action measures;
- o purchase and/or lease of equipment;

- o recovery of costs from liable tank owners and operators; and
- o reasonable and necessary administrative and planning expenses directly related to these activities.

The Trust Fund may only be used for addressing actual or suspected petroleum releases from underground storage tank systems subject to Subtitle I jurisdiction. This includes tanks that EPA has exempted or deferred from regulation until a later date in accordance with 40 CFR Part 280. The Trust Fund may not be used to address releases from tanks that are statutorily exempt from Subtitle I jurisdiction, although it may be used to investigate suspected releases up to the time that a leak is determined to come from a statutorily exempt source.

Allowable activities are limited to actions in response to an existing or suspected release of petroleum from an UST. Thus, an inspection and investigation to assess the site of a reported leak would be an allowable activity, but an inspection conducted as part of a routine or random inspection scheme would not be allowable.

In addition, as noted in the Conference Report to the 1986 Subtitle I Amendments, staff or activities that enhance the general technical or legal capabilities of a State and that are not directly related to leaking petroleum USTs are not allowable. Furthermore, Trust Fund money cannot be used to lobby the State legislature to pass LUST legislation.

Costs incurred by States prior to the award of the Cooperative Agreement with EPA will not be covered by the Trust Fund and are not eligible for reimbursement.

### Guidance

#### **Alternative Water Supplies:**

Temporary or permanent provision of water to protect human health while waiting for corrective action measures to take effect is clearly an allowable cost. It is conceivable that, in some cases, the provision of a permanent alternative water supply by the State will be necessary, and more cost-effective than corrective action, relocation, or even extended "temporary" provision of bottled or trucked-in water. Allowable costs for permanent water supplies are limited to the initial capital costs, and do not include operation and maintenance costs of the system.

As part of their decision-making process, States should evaluate the cost-effectiveness of providing a permanent water supply in comparison to other corrective action and clean-up alternatives. When considering the cost of providing permanent alternative water supplies the State should consider both the total cost per site as well as the cost per affected household. Relatively high total costs may be reasonable if large numbers of households are affected.

#### Relocation of Residents:

Temporary relocation of residents is an allowable cost where it is necessary to protect human health or where corrective action activities cannot be undertaken safely while residents remain in their homes. States should evaluate the cost effectiveness of this measure versus other measures, such as a temporary water supply or in-house air filtration or venting units.

Permanent relocation should be considered an allowable cost only under extreme circumstances in which permanent relocation is the only available option for protecting human health or is the most cost-effective option. If permanent relocation must be undertaken, States must comply with the Uniform Relocation Act (42 U.S.C. 4610 et. seq.) regarding property acquisition and relocation of residents.

#### Operation and Maintenance:

Operation and maintenance (O&M) costs for corrective action measures, other than permanent water supplies, are allowable costs under the Trust Fund. States will use discretion in deciding whether to fund O&M costs out of the Trust Fund or through other means (e.g., responsible party contributions and State or local funds).

States will be responsible for setting priorities between initiating cleanups at new sites or continuing O&M at old sites. EPA's commitment is limited to providing money only for the work identified in the Cooperative Agreement, and not to fully fund sites where the State may choose to continue O&M. Further, EPA cannot commit monies to States beyond the budget period.

**Purchase or Lease of Equipment:**

Trust Fund monies may be used to purchase equipment if the equipment is necessary for LUST Trust Fund corrective action or enforcement activities. EPA generally approves equipment purchases through the award of Cooperative Agreements. Planned purchases of equipment should be included in the State's proposed work plan, negotiated and agreed to by EPA and the State, and reflected in the "Equipment" budget item under the Cooperative Agreement. Thus, EPA does not anticipate the need for routine approval by EPA of individual equipment purchases made by the State that are reflected in the Cooperative Agreement budget. However, any purchases of equipment that represent a substantial change from the approved budget or work plan in the Cooperative Agreement require prior approval from EPA.

Where corrective action equipment is purchased for use at a single site, its cost should be attributed only to that site. Equipment may be used at multiple sites, however. Where this occurs, the costs of equipment that is over \$10,000 should be allocated among sites where the equipment is used for corrective action. An exception to this rule may be made for equipment used at a large number of sites (e.g., response vehicles, field test equipment) for which it would be impractical to allocate costs to individual sites.

States should consult EPA's grant regulations for guidance in final disposition of equipment and supplies purchased with Trust Fund monies.

**V. TRUST FUND USE AT GOVERNMENT FACILITIES****Policy**

The Trust Fund ordinarily will not be used to address petroleum UST releases from government facilities. Governmental entities should be expected to meet their own obligations of addressing environmental hazards for which they are the source.

The Trust Fund may be used if necessary, however, at Federal, State, or local government UST facilities (subject to Subtitle I jurisdiction) in the following limited situations:

- o emergencies, including the mitigation of imminent hazards, and
- o site investigations, enforcement actions, and oversight of responsible party (RP)-lead cleanups.

The Trust Fund may not be used for cleanups at Federal or State UST facilities. The Trust Fund may, however, be used for cleanups at local government facilities, if the State determines that the local entity is incapable of carrying out corrective action properly. This policy does not convey additional authorities to the State with regard to access to governmental facilities nor is it intended to alter State policies with regard to intergovernmental relations.

**Guidance**

Use of the Trust Fund for emergencies and mitigation of imminent hazards is allowable because human health and the environment should not be endangered if actions can be taken to minimize it. The State, however, should pursue recovery of such expenditures from the responsible government entity.

As with other RPs, use of the Trust Fund for site investigations, enforcement, and oversight of government entity-lead cleanups results in desirable leveraging of Trust Fund monies. Cost recovery of these expenditures should be consistent with the cost recovery policy contained in Appendix A of these guidelines.

The Trust Fund may not be used for cleanups at Federal or State UST facilities. EPA considers these entities (by definition) to have the requisite financial strength to cover the costs of taking corrective action and compensating third parties in the event of a release. The State should require these entities to undertake and pay for the cost of cleanup, and should take enforcement action if necessary.

The Trust Fund may be used for cleanups at local government facilities, if the State determines they are incapable of carrying out corrective action properly, and if the State decides they are high priorities compared to other eligible sites. The State should treat these entities as they would other responsible parties. The State should first try to have the government entity undertake and pay for the cleanup, and expect the entity to have the required level of financial assurance. If the Trust Fund is used, cost recovery should follow.

## VI. SOLVENCY OF OWNERS AND OPERATORS

### Policy

Solvent responsible parties (RPs) are expected to undertake and pay for corrective action, either voluntarily or in response to corrective action orders. The level of financial responsibility required to be maintained by owners and operators is not a limitation of their liability. When a release is discovered, States should first seek to identify the tank's owner or operator and direct him to perform the cleanup at his expense. Where time and circumstances permit, States should pursue RP cleanups through enforcement mechanisms. States may rely on the Trust Fund for cleanups when they cannot identify an RP who will undertake action properly and promptly.

Solvency becomes a consideration when undertaking cost recovery. With regard to the financial condition of responsible parties, solvency is defined as the ability to pay financial obligations as they become due, including the costs of corrective action and cost recovery. In cost recovery situations, States should view solvency in terms of how much an RP can afford to pay without becoming insolvent. In pursuing cost recovery, States should not impair the ability of RPs to continue in business if the RP complied with financial responsibility requirements and there was no negligence or misconduct by the responsible party.

### Guidance

Although Congress intended that solvent owners and operators take responsibility for releases from their tanks, if the State determines that an RP is incapable "... of carrying out such corrective action properly," it may use Trust Fund monies to take corrective action. Several conditions may give rise to this determination. For example, an RP may refuse to comply with a request or order to take corrective action, or the RP may claim he cannot afford the cost of cleanup. Another example is when the costs of corrective action to be provided by the RP exceed the required level of financial responsibility and the State determines that expenditures from the Trust Fund are necessary to assure an effective corrective action. If such sites are among the State's priorities, the Trust Fund may be used for cleanup, with a more detailed analysis of the RP's ability to pay performed later, as part of the cost recovery process.

For cost recovery, when a State is deciding whether and for what dollar amount to pursue the RP, more scrutiny should be given to solvency. In these cases, the State should view solvency in terms of how much an RP can afford to pay without becoming insolvent. (Pursuant to RCRA Section 9003 (h)(11), however, States may not consider the RP's solvency, and are directed by the statute to seek full cost recovery if the RP has not complied with applicable financial responsibility requirements.) The State may view the RP's ability to pay in terms of a lump sum payment or on an installment basis, depending on State preference.

The rationale for not forcing RP's to become insolvent is found in the Congressional Conference Report for the Trust Fund legislation:

"A full cost recovery is not intended where the owner or operator has maintained financial responsibility as required. . . and the financial resources of the owner or operator (including the insurance or other method of financial responsibility which was maintained) are not adequate to pay for the costs of a response without significantly impairing the ability of the owner or operator to continue in business."

This provision is not a legal defense for RPs against further cost recovery where deemed appropriate, but it provides an indication of Congressional intent, particularly when small businesses are concerned.

See Appendix A, the LUST Trust Fund cost recovery policy, for additional information.



## VII. STATE PROGRAM APPROVAL AND COOPERATIVE AGREEMENTS

### A. Linking of Trust Fund With State Program Approval Process

#### Policy

States are expected to make reasonable progress during FY 89 toward submitting a completed application to EPA for approval of their UST prevention, corrective action, and financial responsibility programs under Section 9004 of RCRA. A State's success in making reasonable progress toward submitting a complete application may be grounds for increasing State access to the Trust Fund in FY 90.

#### Guidance

The long-term objectives of the Trust Fund clean-up and the UST regulatory programs are to protect human health and the environment from releases caused by leaking USTs. Cleaning up releases using the Trust Fund is an immediate need, but by itself is a short-term and temporary solution. The long-term solution is for States to develop prevention programs which, over time, will result in fewer leaking tanks. States must also develop financial assurance requirements or programs that will provide funds for future cleanups.

Regions are encouraged to use the Trust Fund as an incentive for States to develop prevention programs and apply for State program approval. Regions should develop criteria to measure and evaluate State progress. They should consider the degree of progress in allocating Trust Fund monies to States in FY 90.

## VII. STATE PROGRAM APPROVAL AND COOPERATIVE AGREEMENTS

## B. Relationship of the Trust Fund to EPA's Transition Strategy Policy

Following promulgation of EPA's corrective action regulations for underground storage tanks, States with Cooperative Agreements will be asked to carry out activities to implement the Federal regulations during the transition period prior to State program approval. There are no plans for EPA to conduct corrective action activities for petroleum UST releases in these States, except in emergency situations where a State requests EPA involvement in accordance with Section IX.B., Guidance for Conducting Federal-Lead Underground Storage Tank Corrective Actions.

Guidance

EPA has developed a Transition Strategy (OSWER Directive 9610.5, FY 1989-1990 Transition Strategy for the Underground Storage Tank Program) and Transition Tasks List (Draft OSWER Directive 9610.5-1) that identify roles for EPA and the States during the period of time between the effective date of the Federal UST regulations and the dates State programs are authorized by EPA to operate in lieu of the Federal program. This strategy emphasizes program implementation by State and local programs, with Federal resources in a supporting role. The transition period will be characterized by the continued development of State and local programs.

Activities that States carry out under their Trust Fund Cooperative Agreements will provide implementation of the Federal corrective action regulations during the transition period. The minimum site-specific activities necessary to implement the Federal corrective action program for petroleum USTs, as specified in 40 CFR Parts 280.60-280.67, are allowable costs for States to incur using the Trust Fund. It should be noted, however, that conduct of these transition period tasks in no way implies that a State's own program meets the "no less stringent" or "adequate enforcement" requirements of the State program approval process under Section 9004 of RCRA.

**VIII. STATE UST PROGRAMS AND COOPERATIVE AGREEMENTS****A. State Capabilities****Policy**

The legislation establishing the UST Trust Fund requires that in order for States to participate in the program, EPA must determine that they have "the capabilities to carry out effective corrective action and enforcement activities" to protect human health and the environment (Section 9003(h)(7)(A)(1)).

The State must have or obtain both the authority and capability to carry out effective corrective action and enforcement activities. The State must also establish corrective action and enforcement policies and procedures that can be applied to known or suspected releases from regulated underground storage tanks.

**Guidance**

EPA Regions will evaluate State capabilities as part of the Cooperative Agreement negotiating process. EPA's intent is to be flexible in its determination of capability. States must certify that they have the authority to carry out enforcement activities, corrective actions, and cost recovery or provide a schedule and plans for obtaining the necessary authority. However, a State does not have to have authority to conduct all the activities of the LUST Trust Fund Program in order to receive a Cooperative Agreement. A State can receive a Cooperative Agreement if it certifies that it has authority to conduct the activities committed to in the work plan.

The Regions will evaluate the States' existing or potential capabilities in these and other relevant areas. Given the widely varying level of development of State UST cleanup programs, the capabilities that will be expected immediately versus those that can be developed over time will vary from State to State.

**Enforcement:**

To demonstrate its enforcement capabilities, the State should describe its existing capabilities in this area, or a plan for obtaining such capabilities in the Cooperative Agreement. The description should include, at a minimum, identification of existing or potential staff capabilities, technical as well as legal, to pursue enforcement activities, and that staff's previous experience in UST-related enforcement activities, as well as ownership of or access to necessary equipment or facilities.

The State should have a set of clearly defined enforcement policies and procedures for addressing releases from petroleum USTs, or a plan for developing such policies and procedures. The policy and procedures should reflect the underlying philosophy of the Trust Fund to first seek corrective action by the responsible party, unless there is an imminent and substantial endangerment of human health and the environment. EPA will consider items such as proper identification of releases and responsible parties, proper documentation of enforcement actions, and timely and appropriate enforcement activity, in evaluating the State's enforcement policy and procedures.

The State may use its best professional judgment and enforcement discretion as long as they result in an effective enforcement program.

#### **Corrective Action:**

The State should describe its existing corrective action capabilities, or a plan for establishing such capabilities. The description should include, at a minimum, the identification of existing or potential staff capabilities, and ownership of or access to necessary equipment or facilities. The description may include capabilities such as:

- o Emergency response and hazard mitigation;
- o Investigation of suspected leaks and identification of the source;
- o Comprehensive site investigations;
- o Exposure assessments to determine potential health effects;
- o Provision of alternative water supplies;
- o Temporary or permanent relocation of residents;
- o Development of corrective action plans; and
- o Site cleanup, including removal, treatment, and disposal of surface and subsurface contamination.

Corrective actions are often carried out by contractors, at the direction of the State. As part of its capability discussion, where applicable, the State should describe its plan for securing the services of such contracting firms. This plan should include types of activities, estimated funding, and time frame for obtaining contractor services.

The State should describe its corrective action policies and procedures, or plans, with milestones, for developing such policies and procedures. This may include such items as a generic response plan or decision-making framework for corrective action, criteria for provision of alternative water supplies or relocation of residents, exposure assessment procedures, procedures for evaluation and selection of remedies, and any cleanup standards that the State may wish to impose. The State's corrective action policy should consider the relationship between corrective actions that may be taken and the need to protect human health and the environment.

**Cost Recovery:**

See Appendix A -- Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund.

## VIII. STATE UST PROGRAMS AND COOPERATIVE AGREEMENTS

## B. State Certification of Authority

Policy

There are three ways that a State can certify that it has legal authority to carry out the activities committed to in the work plan. First, the State can certify that it has specific authorities similar to Section 9003(h) of RCRA. Secondly, the State can certify that it has general state law authority sufficient to carry out the work plan activities, (e.g., authority to protect public health, to protect the environment, or to protect any State interest). Thirdly, the State can certify that it will use the authorities in RCRA Section 9003(h) to perform and require corrective action and Section 9003(h)(6)(A) to perform cost recovery. In making this type of certification, the State must assure that use of the RCRA authorities will not conflict with State law.

Guidance

In view of the State's expertise in interpreting State law, EPA's role in review of the certification is not to "second guess" a State interpretation of State law but rather only to assure that major legal issues have not been overlooked.

The attorney general, or someone designated by the attorney general, should either sign or concur in the certification\*, preferably before the Cooperative Agreement is awarded. If a signature or concurrence would significantly delay the awarding of the Cooperative Agreement (i.e., there are no other issues holding up the award), it is acceptable for someone other than the AG/designee to sign the certification. In this case, the agreement must contain a special condition requiring submission of the AG/designee's concurrence to EPA within a reasonable time, not to exceed 120 days after the award of the agreement. The person who signs at the time of award could be: 1) the head or general counsel of the State environmental agency; 2) the head of the division within the environmental agency that has direct responsibility for administering the program; 3) the head of any separate entity that may be responsible for administering the program, such as the director of the State water control board.

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\* The assumption is that the Attorney General is the ultimate interpreter of State law in the executive branch of the State. In at least one State, however, the Attorney General is primarily responsible for litigation, while there is also a General Counsel to the Governor, who has responsibility for advising all executive branch agencies on the scope of their authority. In this situation, the State General Counsel could substitute for the Attorney General.

If the concurrence of the AG/designee is not obtained within the time specified in the Cooperative Agreement, payments of Trust Fund money may be withheld, consistent with the requirements of 40 CFR Part 31.

A State should notify EPA promptly of any reduction in its authorities (e.g., successful challenge to its State statutory authority) that may significantly inhibit its ability to carry out the activities committed to in the Cooperative Agreement. Amendment of the Cooperative Agreement or recertification may be necessary in such circumstances.

**VIII. STATE UST PROGRAMS AND COOPERATIVE AGREEMENTS****C. State Program Work Plan**

States are to submit a program work plan to EPA, which is commensurate with the level of development of the State's corrective action program for petroleum USTs. The work plan shall include a budget and a description of proposed activities and outputs to be accomplished with Trust Fund monies during the State's Cooperative Agreement period. The budget should include a breakdown of associated costs of each planned activity and output. A proposed schedule for accomplishing each activity should be included. Activities may include, but are not limited to those mentioned in the following sections.

**1. Core Program**

Where certain basic program items do not currently exist, the Cooperative Agreement may provide for their development. Examples include:

- o Develop a system for assigning priorities to sites;
- o Establish enforcement policies and procedures;
- o Secure contractor services to perform corrective action;
- o Establish cost recovery policies and procedures;
- o Establish a site-by-site tracking system for activities, decisions, and site-specific costs;
- o Develop public participation procedures; and
- o Develop quality assurance practices.

**2. Site-Specific Activities**

The Cooperative Agreement should include a description of and associated budget for those activities that States plan to undertake at sites. It may include an estimate of the number of sites at which the State intends to undertake the various specific activities, and/or identification of individual sites at which specific work is contemplated. Examples of site-specific activities include:

- o Emergency response;



OSWER DIRECTIVE 9650.10

- o Source identification;
- o Site investigation;
- o Exposure Assessment;
- o Soil and ground-water remediation;
- o Provision of alternate water supplies;
- o Resident relocation (temporary or permanent);
- o Treatment, storage, and/or disposal of wastes and recovered materials; and
- o Oversight of cleanups, including those performed by responsible parties.

**VIII. STATE UST PROGRAMS AND COOPERATIVE AGREEMENTS****D. Federal Oversight - Program Appraisal Strategy****Federal Oversight**

EPA will oversee State programs, both formally and informally, in order to:

- o Ensure adequate environmental protection through sound administration and use of the Trust Fund;
- o Enhance State capabilities through effective communication, evaluation, and support; and
- o Describe and analyze the progress of programs on a regional and national scale.

EPA's Regional staff will have the primary responsibility for oversight of State programs. Regions and States should maintain a continuous dialogue so that States can communicate problems encountered in meeting their commitments and Regions can be responsive to State needs.

The Regions will formally review State programs at least once a year. They will rely on required reports, State records, and visits to the States to identify the successes and problems encountered in State programs. Formal program reviews should focus on overall performance rather than individual actions. To the greatest possible extent, reviews should be based on objective measures, standards, and expectations that are agreed to in advance in the Cooperative Agreement.

Effective oversight entails the joint analysis of identified problems to determine their nature, causes, and appropriate solutions. It also requires that the Regions identify and facilitate the transfer of successful approaches to other States and Regions. Finally, information and insights gathered in oversight activities should be used to refine subsequent Cooperative Agreements.

**Program Appraisal Strategy**

In FY 89, EPA will begin to implement a formal program appraisal system. The program appraisals will focus on balancing oversight of State UST programs with service to the State's needs. Guidance on the appraisal process is contained in the OSWER directive 9610.6, The OUST Program Appraisal Strategy. The types of reports that will continue to be part of EPA's appraisal process are summarized below.

1) **Quarterly Progress Reports, including:**

- a) Exception Reports;
- b) Trust Fund Usage Forecasts; and
- c) Financial Reports.

In quarterly progress reports for State Cooperative Agreements, EPA is requesting that each State submit data on activities that are supported by Trust Fund monies as well as comparable information on the accomplishments of the State's program as a whole. Exhibit 1 lists the data elements that are contained in the FY 89 quarterly progress reports. The required forms and instruction for the quarterly progress reports are issued separately from these guidelines, and will be updated and revised as necessary in the future.

All States should report in a timely and accurate fashion the data needed for the quarterly activities report and the Strategic Planning and Management System (SPMS) report for the EPA UST program. Regions will need to relay this data to OUST/HQ within 10 working days of the end of each Federal fiscal quarter. Regions and States may develop reporting schedules that allow them to meet these deadlines.

2) **Financial Status Report SF 269 or 269A (year end), and Federal Cash Transactions Report SF 272 (quarterly).**

The Office of the Comptroller is responsible for issuing Agency financial policies and procedures for tracking the LUST Trust Fund in the Agency's Financial Management System (FMS). State UST Programs will be required to comply with the Comptroller's interim financial policies and directives for the LUST Trust Fund (where they do not conflict with these guidelines), until such time as the State and EPA agree to implement the provisions of the Leaking Underground Storage Tank Trust Fund State Financial Management Handbook, scheduled for publication in January 1989. OUST will be coordinating its program appraisals with the Comptroller's fiscal review procedures as they are developed for FY 89.

## Exhibit 1

FY 89 ACTIVITIES REPORTING REQUIREMENTS FOR U.S. EPA OFFICE OF  
UNDERGROUND STORAGE TANKS

1. Number of Site Investigations Completed
2. Number of Emergency Responses Taken
3. Number of Sites Where Enforcement Actions Taken to Compel Cleanup
4. Number of Sites Where Cost Recovery Initiated
5. Site Cleanups for Petroleum Releases--Initiated
  - a. Responsible Party-lead
  - b. State-lead with Trust Fund money
  - c. State-lead with no Trust Fund money
6. Sites With Petroleum Releases--Under Control
  - a. Responsible Party-lead
  - b. State-lead with Trust Fund money
  - c. State-lead with no Trust Fund money
7. Site Cleanups for Petroleum Releases--Completed
  - a. Responsible Party-lead
  - b. State-lead with Trust Fund money
  - c. State-lead with no Trust Fund money
8. Exceptions Report (Identify by site where:)
  - a. State plans to use innovative or experimental technology at the site
  - b. State plans to provide permanent alternative water supply
  - c. State plans to permanently relocate residents
9. Forecasting Trust Fund Use;  
Number of Sites with Confirmed Releases Where:
  - a. Owner/Operator has been identified
  - b. Owner/Operator is insolvent/incapable of conducting timely clean-up
  - c. Responsible Party search not completed
  - d. Search for Responsible Party unsuccessful

EXHIBIT 1 (cont'd)

FY 89 ACTIVITIES REPORTING REQUIREMENTS FOR U.S. EPA OFFICE OF  
UNDERGROUND STORAGE TANKS

10. Financial Report

- a. State plans to spend over \$100,000 of Trust Fund money at site; include amount
- b. State has obligated over \$100,000 of Trust Fund money at a site; include amount
- c. State actually spent over \$100,000 of Trust Fund money at a site; include amount
- d. For any site, State reached a cost recovery settlement; include amount
- e. For any site, cumulative cost recovery payments received; include amount
- f. Optional: Aggregate State dollars outlayed for site responses

**LUST TRUST FUND  
COOPERATIVE AGREEMENT GUIDELINES**

**APPENDIX A**

**Cost Recovery Policy for  
the Leaking Underground Storage Tank Trust Fund  
(OSWER Directive 9610.10)**

- 31.20 Provides that States expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds;
- 31.21 Discusses methods of making payments to recipients;
- 31.22 Discusses applicable cost principles and limitations on use of Federal funds;
- 31.23 Discusses period of allowability of funds;
- 31.24 Discusses State match and cost sharing provisions;
- 31.25 Discusses use of program income (this section is particularly relevant to cost recoveries of Trust Fund expenditures);
- 31.32 Specifies that a State will use, manage, and dispose of equipment in accordance with State laws and procedures;
- 31.36 Specifies that for procurement, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds;
- 31.40 Details grantees responsibility to monitor grant and subgrant supported activities and report program performance;
- 31.41 Provides basic requirements for financial reports. Reports may be required no more frequently than quarterly, per OMB Circular. Standard forms for Financial Status Reports (SF-269 or SF-270 A) must be submitted to EPA within 90 days after the end of the budget period. Final reports are due 90 days after the expiration or termination of the Cooperative Agreement; and
- 31.45 Discusses Quality Assurance requirements.

**D. DEBARMENT AND SUSPENSION UNDER EPA ASSISTANCE PROGRAMS -  
40 CFR PART 32**

Provides rules for suspension and debarment of contractors from utilization under EPA assistance programs (also direct procurement). If a contractor is suspended or debarred, he may not participate in an EPA assistance program. EPA's Grants Administration Division maintains a list of such contractors.

## **XII. ADMINISTRATIVE REQUIREMENTS FOR STATE COOPERATIVE AGREEMENT APPLICATION**

This section summarizes the basic administrative requirements for a State Cooperative Agreement application. The regulations discussed in this section are:

- A. Nondiscrimination in EPA Assistance Programs - 40 CFR Part 7;
- B. Intergovernmental Review - 40 CFR Part 29;
- C. Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments - 40 CFR Part 31; and
- D. Debarment and Suspension under EPA Assistance Program - 40 CFR Part 32.

The discussion that follows provides a brief description of the requirements contained in each of the above regulations that are most pertinent to Trust Fund Cooperative Agreements. For additional guidance and a comprehensive review of EPA's administrative requirements for assistance under a Cooperative Agreement, refer to EPA's Assistance Administration Manual (available through the EPA Grants Administration Division).

### **A. NONDISCRIMINATION IN EPA ASSISTANCE PROGRAMS - 40 CFR PART 7**

Prohibits discrimination based on race, color, sex, or handicap. Requires applicants to submit an assurance of non-discrimination (compliance with Part 7) with a Cooperative Agreement application. The current Part 7 has incorporated the requirements previously under Part 12 (The Clean Water Act).

### **B. INTERGOVERNMENTAL REVIEW - 40 CFR PART 29**

Gives States the option of setting up a State process to review and comment upon applications for Federal assistance. May involve comment by State, area-wide, or local governmental units. EPA must respond to comments. Requires 60 day comment period before award. Part 29 implements Executive Order 12372.

### **C. UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS**

Provides numerous basic requirements concerning application for award and management of assistance agreements. The most relevant of these, at this stage of program development are:



## XI. STATE'S QUALITY ASSURANCE PROGRAM

### Policy

The State will develop and implement quality assurance practices in accordance with EPA's Uniform Administrative Requirements for Grants and Cooperative Agreements, 40 CFR Part 31.45. The regulation requires the development and implementation of quality assurance practices that will "produce data of quality adequate to meet project objectives and to minimize loss of data due to out-of-control conditions or malfunctions."

### Guidance

The purpose of a quality assurance (QA) program is to ensure that procedures for data collection and analysis are appropriate for the uses of that data, and, in particular, for environmentally related measurements, to provide data that are scientifically valid, defensible, and of adequate and known precision and accuracy.

Because the underground storage tank program deals with a known substance (petroleum), quality assurance procedures and methodologies normally should not have to be as extensive or as complex as those for a program where the pollutants can be of many types, often initially unknown. In the vast majority of situations, as opposed to the Superfund remedial action program, UST cleanups will deal with known petroleum materials and established procedures for corrective action. Accordingly, the details of the State's QA procedures should be appropriate to the circumstances of the releases for which the QA procedures will be applied, and should be designed to meet State program objectives.

For States desiring additional information, guidance on quality assurance is provided in EPA document QAMS-004/80; "Guidelines and Specifications for Preparing Quality Assurance Program Plans" (EPA 600/8-83-024). This is available from the National Technical Information Service, NTIS Publication No. PB 83-219667.

At a minimum, the State's public participation policy must reflect the requirements of 40 CFR Part 280.67. For each confirmed release that requires a Corrective Action Plan (as directed by the State), the State must notify the public and provide access to site release information. The State must also provide public notice if implementation of the Corrective Action Plan does not achieve the established cleanup levels and the State is considering terminating the plan.

## **X. PUBLIC PARTICIPATION**

### **Policy**

Section 7004(b)(1) of RCRA requires that public participation be provided for and encouraged by the States. In accordance with this requirement, the State will take lead responsibility for public notices, public meetings, and other public participation activities that are related to State actions funded by the LUST Trust Fund. Further, where corrective action is undertaken, public participation activities must reflect the public participation requirements of the Federal corrective action regulations, 40 CFR Part 280.67.

The State also will have or will develop a public participation policy for the State's LUST Trust Fund program. The Cooperative Agreement will include a statement of this policy or a schedule for developing one.

### **Guidance**

The purpose of the requirement for public participation is to promote two-way communication between the implementing agency and the affected public by:

- o Facilitating public understanding of State response procedures and actions; and
- o Encouraging public input into State response decisions and schedules.

It is EPA policy that public participation activities be appropriate to the circumstances of a release.

The States may address the public participation requirement by developing a policy for public involvement that recognizes the nature of the Trust Fund program, that is, relatively numerous, short-term and small-scale responses. This is in contrast to programs involving far more complex facilities and decision making such as the RCRA Subtitle C permitting program for hazardous waste facilities, or the Superfund remedial action program. Also, the State should consider the public's willingness to allow emergency actions without prior consultation, but understand that the public may demand information on and input into long-term responses to health threats. Thus, a State's public participation policy should be based on the severity of the threat to human health and the environment posed by a release, the scale and duration of the response, and the level of public interest.

## IX. CORRECTIVE ACTION

## C. State's Priority System for Addressing UST Releases

Policy

The State will ensure that a priority system for addressing UST petroleum release sites is established and maintained which incorporates the two priorities set forth in Section 9003(h) of RCRA. These priorities are:

- o releases which pose the greatest threat to human health and the environment; and
- o sites where the State cannot identify a solvent owner or operator of the tank who will undertake action properly.

The Cooperative Agreement will include a description of this system or a schedule, with milestones, for developing one.

Guidance

The purpose of the State priority system requirement is to ensure that sites addressed with Trust Fund monies provide the greatest impact on protection of human health and the environment and respond where private sector resources are inadequate. The system does not have to be extensive, complex or numerical in nature. Instead, it can use readily available information to establish broad, general classes of priority. States may address the "threat to human health and environment" criteria by considering factors such as total population exposed, proportion of the population affected in a community, number of drinking water wells contaminated, proximity to a major aquifer, and impact on sensitive populations or environmental areas. States also should develop methods for establishing capability and solvency of owner/operators.

This requirement does not necessarily presume the need to rank all UST releases in the State. Rather, it is a priority system or scheme that should be used as a screening device to assure that sites considered to be addressed with Trust Fund monies are within the higher priority classes established by the State.

**Obtaining Approval For Federal Response:**

As specified in the OSWER Directive 9360.0-16A, Guidance for Conducting Federal-Lead Underground Storage Tank Corrective Actions, Federal UST corrective actions that initially cost over \$250,000, and ceiling increases that bring the cost of an action over \$250,000, require approval of the Assistant Administrator (AA), Office of Solid Waste and Emergency Response (OSWER). The Office Director (OD) of the Office of Emergency and Remedial Response (OERR) will approve actions that initially cost up to \$250,000 and ceiling increases that bring the cost of an action up to \$250,000, with concurrence from the OD, Office of Underground Storage Tanks (OUST). In addition, Regional Administrators (RAs) may approve actions costing up to \$50,000 in acute, imminently life-threatening situations where response must be initiated before Headquarters can be contacted. This authority may be redelegated to Division Directors and On-Scene Coordinators (OSCs).

Depending upon the nature of the emergency that exists, response time requirements, and other relevant circumstances, either a formal written approval process or an oral process (with written follow-up) should be implemented. Headquarters approval must be obtained prior to initiating corrective action whenever possible. No Federal-lead corrective action will be approved unless an appropriate request is received from the State.

**IX. CORRECTIVE ACTION****B. Guidance for Conducting Federal-Lead Underground Storage Tank Corrective Actions****Policy**

It is EPA's policy that, except in rare circumstances, Fund-financed responses at underground storage tank petroleum releases will be conducted by States under Cooperative Agreement with EPA. Most States will have broad programmatic Cooperative Agreements to address emergency response and perform cleanups. In the absence of such agreements, the Region and State should develop site-specific Cooperative Agreements under which the State will conduct corrective actions at individual sites. EPA will undertake a corrective action only in instances where:

- o there is a major public health or environmental emergency;
- o the State is unable to respond; and
- o no responsible party is able or willing to provide an adequate and timely response.

Federal-lead corrective action will be limited to stabilization of the immediate situation, with the expectation that further cleanup will be conducted by the State under an appropriate Cooperative Agreement.

In addition to the criteria presented above, Federal-lead response should also depend on the existence of one or more of the following conditions indicative of a major public health or environmental emergency:

- o The release poses an immediate and substantial threat of direct human, animal, or food chain exposure to petroleum;
- o The release poses an immediate threat of fire or explosion;
- o The release poses an immediate and substantial threat to public drinking water supplies; or
- o The release immediately threatens a significant population or substantial amounts of property, or poses substantial threats to natural resources.