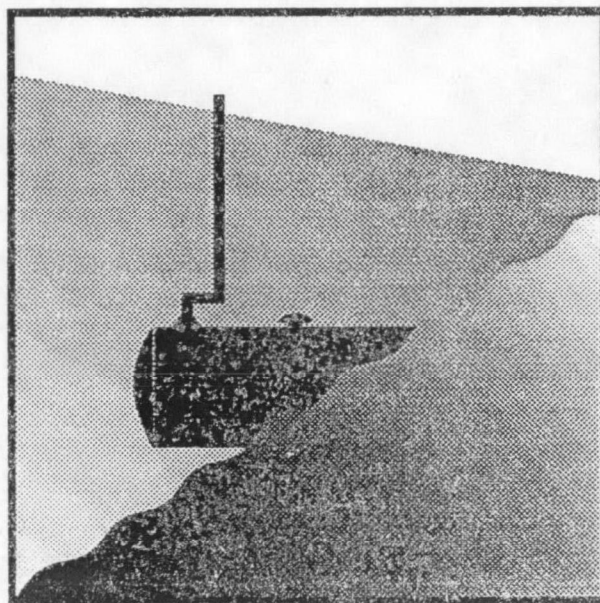


LUST Trust Fund Compendium



U.S. Environmental Protection Agency
Office of Underground Storage Tanks

March 1991

An Introduction to the
UST and LUST Trust Fund Compendiums

Why have a compendium?

The Regional Program Managers expressed the need for a tracking system for Office of Underground Storage Tanks (OUST) documents as well as a central place to refer to these documents. Historically, some documents have not been received or if received misplaced, destroyed or not routed to all concerned parties. We have developed compendiums and a tracking system to resolve these issues.

What is in these compendiums?

The compendiums contain major UST and LUST policy and guidance documents which are two 3-ring binders. One binder will house documents related to UST activities. A second binder will house documents that relate to LUST activities. Only OUST's major policy and guidance documents will be included in these compendiums. To conserve space you may find documents that address both UST and LUST issues in only one binder. Acquaint yourself with the compendiums by referring to the table of contents.

Who are these compendiums for and who is responsible for them?

The compendiums are for the Regional UST program and the Regional Counsel working on UST issues. There is one compendiums coordinator in OUST and one in each region to maintain the region's compendiums.* One set of the compendiums will be sent to the Regional compendiums coordinator and a second set will be sent to the appropriate Regional Counsel.

* You will need to determine who will update the Regional Counsel compendiums.

What about updating the compendiums?

Building upon the premise that every new policy and guidance document is immediately distributed to the regions by the originator, the compendiums would only provide reference copies and thus should only require updates on a quarterly basis. If the flow of new additions warrants it, we can send out updates more frequently.

How can you determine that a document is missing?

A numbering system based upon subject, calendar year and sequential number is used to integrate document identification and tracking receipt of documents. For example, a new addition to the State Program Approval section, Guidance subsection can be numbered as such: SPA/G/90-1. This number contains "SPA" for State Program Approval section, "G" for guidance subsection, "90" for calendar year and "1" for sequential number within this subsection. Using this example, if you next receive a document numbered SPA/G/90-3, you will know that document numbered SPA/G/90-2 is missing.

Will these compendiums replace the LUST Trust Fund compendiums issued in 1988?

To avoid confusion, the new compendiums should be seen as a replacement of the existing compendiums. You should keep the 1988 compendiums as a reference binder to archive infrequently used and old policy and guidance documents. Documents from the new compendiums will be archived on an annual basis. A memorandum will be sent to you with instructions on what documents to archive.

If you have any questions about the compendiums please direct them to Lela Hagan at FTS 475-7261 and after April 12, 1991 at FTS 398-8863.

ORC is copy of compendium & selective. See John Mason for
complete copy. ORC has items marked with *.

LUST TRUST FUND COMPENDIUM

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FY 1993 LUST Trust Fund Allocation [Provides formula to be used for the allocation along with estimates for each Region.]	5/20/92
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Quarterly Data for FY 1993 LUST Trust Fund Allocation [Explains which STARS quarterly data will be used for the LUST Trust Fund allocation. Ask RPMs for documentation on STARS data.]	4/16/92
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FY 1992 LUST Trust Fund Allocation [Presents FY 1992 Regional Trust Fund allocation.]	6/4/91
Final FY 1991 LUST Trust Fund Allocation [Presents FY 1990 Regional Trust Fund allocation.]	11/19/90

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FY 1990 Trust Fund Allocation [Presents FY 1990 Regional Trust Fund allocation.]	1/5/90
FY 1988 Trust Fund "Bonus Pool" Guidance [Explains criteria and procedures for accessing the bonus pool.]	4/8/88
Final FY 1989 Trust Fund Allocation [Presents FY 1989 Regional Trust Fund allocation.]	4/7/88
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COOPERATIVE AGREEMENTS

Financial Management

Financial Management of the LUST Trust Fund Program [Describes the financial management and related cost recovery responsibilities of States participating in the LUST Trust Fund.]	11/2/90
Leaking Underground Storage Tank Trust Fund Fiscal Review Guide [Explains requirements and suggested procedures for assessment of financial management of State programs. Fiscal Policies and Procedures Branch, Financial Management Division.]	6/89
LUST Trust Fund State Financial Management Handbook [Describes the financial management and related cost recovery responsibilities of States participating in the LUST Trust Fund.]	3/89
Letter of Credit Drawdown Procedures for States Receiving LUST Trust Fund Cooperative Agreements [Describes interpretation and supplement EPA Letter of Credit Compliance Manual. Office of the Comptroller.]	8/12/87

Guidance

Revisions to LUST Trust Fund Policy and Guidance [Revisions for State money match requirements.]	8/23/91
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<u>Title [Abstract]</u>	<u>Date</u>
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COOPERATIVE AGREEMENTS Continued

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LUST Trust Fund Cooperative Agreement Consolidated Guidelines [Consolidated guidelines for administering LUST Trust Fund Cooperative Agreements.]	2/8/89
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COST RECOVERY

Current Interest Rate for LUST Trust Fund Expenditures [Recommends minimum interest rate to be used by States to calculate interest charges on Trust Fund expenditures.]	1/24/92
Interest Charges on 1990 Trust Fund Expenditures [Recommends minimum interest rate to be used by States to calculate interest charges on Trust Fund expenditures.]	2/16/90
Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund [Outlines policies, priorities, and procedures for cost recovery under the LUST Trust Fund.]	10/7/88
Development of LUST Cost Recovery Policy and Financial Management Guide [Overview of key policy decisions for cost recovery. Office of the Comptroller and OUST.]	3/25/88

INDIAN LANDS

Final Indian Lands Implementation Tool Kit [Presents the final changes made to the Indian Lands Implementation Tool Kit.]	1/91
Final UST Program Indian Lands Strategy [Defines UST program activities regarding Indian lands for FY 1988 and 1989.]	3/14/88

REPORTING

Quarterly Activities and Clarifications of Trust Fund Allocation Definitions [Provides additional clarification of the definitions used in the Quarterly Activities Report and the Trust Fund allocation method for FY 1991.]	12/21/90
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<u>Title [Abstract]</u>	<u>Date</u>
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REPORTING (continued)

Program Definitions and Reporting Matrix {Identifies source documents and corresponding reporting forms for required reporting elements.}	3/21/90
Final Definitions for Measures of National Program Progress {Defines measures used to evaluate program progress.}	9/26/89
Trust Fund Reporting Requirements for FY 1990 {Response to comments on the draft FY 1990 Trust Fund Activities Reporting Requirements along with the final requirements.}	6/12/89

(06/27/95)

Cost Recovery



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

OCT 9, 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: LUST Trust Fund Cost Recovery Policy and Special
Conditions

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

ATTN: Waste Management Division Directors,
Regions I-III, V-IX
Water Management Division Directors, Regions IV, X

Attached is the final Cost Recovery Policy for the Leaking Underground Storage Tank (LUST) Trust Fund. Also attached is a set of special conditions for LUST Trust Fund cooperative agreements that reflect the policy. Both are products of an intensive effort to develop a framework for cost recovery that incorporates the State-centered design of the Underground Storage Tank program.

The Office of Solid Waste and Emergency Response worked closely with the Office of General Counsel, the Office of the Comptroller, the Regional UST programs and other Headquarters offices over the last year to develop this innovative policy. These offices were also instrumental in helping us obtain concurrences on our approach from the Department of Justice (DOJ), the Office of Management and Budget, and Congressional staff.

The two most innovative aspects of the policy should provide States with the autonomy and incentive to pursue recoveries aggressively and efficiently. First, to streamline the recovery process, States will generally be able to litigate and settle cost recovery claims without the involvement of EPA or DOJ. Second, to provide incentives for pursuing cost recovery, States will retain recovered Trust Fund expenditures to perform additional cleanups or to satisfy their cost share requirements.

-2-

This policy replaces the cost recovery section (Section II.I) of OSWER Directive 9650.7 (Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements), dated April 7, 1988. This policy will also be incorporated into a set of consolidated LUST Trust Fund Guidelines that will be released in the next few weeks.

To encourage States to proceed with recoveries on cleanups now underway, Regions should amend all existing LUST Trust Fund cooperative agreements to include the attached special conditions. This will also eliminate inconsistencies in recordkeeping and recovery procedures that would otherwise make oversight of the program unnecessarily complex.

I am certain that this policy will help us continue to build strong State underground storage tank programs. I want to congratulate everyone who contributed to the development of the policy.

Attachments

cc: Charlie Grizzle
Larry Jensen
Dave Ryan
Harvey Pippen
Tony Musick
Ron Bachand
Howard Corcoran
Louise Wise
Regional UST Program Managers

**COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND
STORAGE TANK TRUST FUND**

A. Overview

This is EPA's first complete statement of its policies on cost recovery under the Leaking Underground Storage Tank (LUST) Trust Fund. It has required a year of coordinated effort by various EPA offices to develop and to secure necessary approvals within the Agency and from other agencies and officials in the executive and legislative branches of government. Working with and through States to implement this policy, EPA expects that it will help cost recovery to become a practical and effective tool that States will use to both stimulate and fund more cleanups of releases from underground storage tanks.

Objectives of Cost Recovery

The primary purpose of cost recovery under the LUST Trust Fund is to provide incentives for owners and operators to comply with technical and financial responsibility requirements, and most importantly to clean up releases from their own tanks. EPA expects that State-lead cleanups followed by cost recovery will continue to occur in a minority of cases, because the majority of cleanups are conducted by owners and operators. When cost recovery is necessary, it will generate income for additional cleanups.

Cost recovery as practiced under the LUST Trust Fund will depart significantly from the approaches taken in other Federal environmental response programs. Consistent with the State-centered design of the underground storage tank program, States will implement the cost recovery program, have considerable discretion in operating it, and benefit directly from their successful recoveries.

The two most innovative aspects of EPA's cost recovery policy for the LUST Trust Fund should provide States with the autonomy and the incentive necessary to pursue recoveries aggressively and efficiently. First, States with cooperative agreements will litigate and settle recovery claims without the routine involvement or concurrence of EPA or the Department of Justice. Second, States may retain any Trust Fund monies they recover for use on additional Fund-eligible cleanups and activities.

Legal Rationale

The legal rationale behind this approach was developed by the Agency in consultation with the Department of Justice.

Under 28 U.S.C. Section 516, the Department of Justice (DOJ) must conduct any litigation in which the United States has an interest unless there is an exception authorized by law. EPA interprets section 9003(h) of Subtitle I to be such an exception, allowing States under cooperative agreements that have the capabilities to carry out effective corrective actions and enforcement activities to exercise various program authorities, including the cost recovery authority provided in section 9003(h)(6). These States may also settle cost recovery litigation as part of the exercise of enforcement discretion conveyed by section 9003(h).

Additionally, EPA interprets section 9003(h) to provide authority for States to administratively settle cost recovery claims. EPA believes that this authority includes the ability to compromise or terminate Trust Fund claims based on considerations of equity as described in section 9003(h)(6)(B) (e.g., reducing the claim to the amount of required financial responsibility).

Finally, EPA has determined that, consistent with the "program income" concept described in OMB Circular A-102, that States may retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements. Thus, appropriate requirements in 40 C.F.R. Parts 30 and 31 on the documentation and use of program income apply to recoveries of Trust Fund money.

Recovery Procedures

Variations in State recovery procedures can be expected, but generally States will be responsible for all of the following activities in cases that they deem to be high priorities:

- o Determination of a release
- o Notification of responsibility to the owner or operator
- o Negotiation for corrective action (in non-emergency situations)
- o Cleanup (if the owner or operator is incapable or unwilling to clean up)
- o Demand for payment
- o Negotiation for a settlement of the recovery claim

OSWER Directive 9610.10

- o Litigation (when demand for payment and efforts to reach an administrative settlement fail)
- o Collection and case closure

States are encouraged to tailor the specifics of these procedures to suit their individual programs and to save program resources. In addition, the detailed policy guidance that follows has been developed to help ensure that cost recovery resources are used efficiently and stimulate compliance by owners and operators.

B. State and Federal Roles in Cost Recovery

Policy

Under their cooperative agreements, States are responsible for all legal, programmatic, and administrative activities necessary to recover their expenditures from the LUST Trust Fund. This includes undertaking administrative and judicial recovery actions and settling claims. They are responsible for required reporting and recordkeeping including documenting that their Trust Fund recoveries are used for additional eligible activities under their cooperative agreements. EPA will provide general policy guidelines to States and make funding available for recovery programs through the States' cooperative agreements. EPA will also assess the performance of State cost recovery programs and provide support and assistance to States where they are needed to improve performance. The Agency will generally be bound by settlements and judgments reached in States, but reserves the right to pursue recoveries independently in the extreme case. Also, EPA may pursue recoveries in those rare cases where the Agency has performed a federal-lead response.

Guidance

States are expected to have adequate legal authorities to undertake cost recovery either by having or acquiring their own authorities, or certifying that they are able to use federal authorities. States with their own recovery authorities should also cite Subtitle I in their recovery actions (i.e., demand letters, administrative orders, and judicial complaints) to establish the liability of owners/operators to the federal government for Trust Fund expenditures.

EPA is currently formulating policies on a number of issues related to recovery litigation. One major unresolved issue is whether States should bring judicial recovery actions in State or federal courts. Until these issues are resolved, States should, within one week, notify EPA's Office of Regional Counsel when filing judicial recovery actions for sites where they have used Trust Fund money for cleanup or enforcement. This will give EPA the opportunity to consult with the State, determine whether the action might affect the scope of the Agency's Subtitle I authorities, and if necessary, provide technical or legal assistance to the State. However, EPA will not require States to delay recovery litigation while the Agency reviews complaints submitted by States.

States must maintain accounting and recordkeeping systems that will document all Trust Fund expenditures, support cost recovery with site-specific records, and demonstrate that recovered funds are retained and used for additional eligible activities or as matching funds under their cooperative agreements. State recordkeeping and accounting must conform to requirements in these guidelines and in the forthcoming LUST Trust Fund State Financial Management Handbook, when it becomes available.

States will have considerable discretion in prioritizing cases for cost recovery and determining an appropriate level of effort to devote to each case. At a minimum, in each case States should make reasonable efforts to contact owners and operators who are liable for releases, notify them of their liability for enforcement and corrective action costs, and demand payment. In those rare cases where equitable factors support compromise or termination¹ of the Trust Fund claim, States should ensure that the bases for any compromise or termination are adequately supported in the records of the State and reflect the efficient use of Trust Fund resources. States may compromise Trust Fund claims when, for example, an owner/operator demonstrates that he/she lacks the financial resources to pay the claim; the State determines that the likelihood of success on litigating the claim as small because of the absence of proof of liability or unavailability of required witnesses; or costs of judicial collection is disproportionately high. States should note that their ability to reduce claims based on the equities described in section 9003h(6)(B) is limited to cases where owners/operators have maintained required levels of financial assurance.

Because they are more cost effective, negotiated settlements are generally preferred over litigation. In many cases, however, EPA expects that it will be necessary for States to initiate and pursue judicial action to compel recalcitrant owners and operators to pay cleanup costs. In deciding whether to litigate individual cases States should consider the solvency of the owner/operator, the costs of cleanup, the likelihood of recovery, the case's deterrence value and the opportunity costs (the resources necessary to proceed that could otherwise be used in pursuing other cases or in other parts of the State's Trust Fund program).

1/ As used here, the term "compromise" means accepting less than the full value of the claim. The term "termination" means forgoing any cost recovery whatsoever.

Even where no administrative or judicial settlement is reached, States must formally close out all cases and document the reasons for deciding not to proceed further. Factors justifying case closure include the situations where costs of pursuing a case further will approach or exceed the potential recovery, bankruptcy of the owner/operator, and other reasons. States should not allow the statute of limitation (SOL) to run and justify closure solely on that basis. States should generally pursue cases promptly and file actions in a timely manner to enhance the chances for recovery. States should revise their priorities for individual recovery cases as SOL deadlines approach. Until the issue is resolved by the courts, States relying solely on Subtitle I cost recovery authorities should be prudent and proceed assuming a three year limit applies, despite the fact that EPA believes that a six year limit is applicable. This is necessary because some courts have applied the three year limit to similar cases.

When States make successful recoveries at sites where Trust Fund monies were used, they may retain the Trust Fund share as program income consistent with OMB Circular A-102 and 40 CFR Parts 30.525 and 31.25. This means that States may use recovered federal Trust Fund monies for additional Fund-eligible cleanups and activities under their agreements. When States choose to do so, they must inform EPA, and keep appropriate records of how the recoveries were used. States may also use LUST Trust Fund recoveries to meet their cost share requirement under section 9003(h)(7)(B). If a State elects to do this, it must be specified in their cooperative agreement. In negotiating their cooperative agreements, States and Regions should develop contingency plans that will allow States to obligate their recoveries efficiently. States should calculate the federal Trust Fund share of their recoveries on a site-by-site, pro rata basis. For example, if a State spends 50 thousand dollars of LUST Trust Fund money at a site, and the State ultimately recovers 50 percent of all Federal and State money used at the site, it must redirect 25 thousand dollars of "program income" into Fund-eligible activities.

EPA expects States with cooperative agreements to adequately fund and staff recovery efforts to deal with anticipated case loads. Cost recovery activities are allowable costs under Subtitle I. Where the recovery program is dependent on the Attorney General's Office, the State should consider the need for formal funding arrangements (e.g., a memorandum of agreement) to ensure legal staffing for cost recovery referrals. When the Trust Fund is not used to pay for such legal staffing, States may wish to investigate the possibility of counting these legal services as "in-kind contributions" toward satisfying their match requirements under 40 C.F.R. Part 31.24.

EPA's principal responsibilities in cost recovery are to provide funding, policy, guidance, oversight, and assistance to States. The Agency's operational role in cost recovery will generally be limited to pursuing recoveries in those cases where EPA responds directly to a release, and in rare cases of overfiling.

EPA intends to make its expectations for the activities and performance of cost recovery programs reasonable and clear to States in advance. This will occur through policy, guidance, routine communications, program appraisal and reviews, and the negotiation of cooperative agreements. The oversight and assistance functions of EPA's program, grants, and financial management offices will accommodate variations in State procedures and capabilities to the maximum extent possible. The Agency's goals will be to help build State capabilities, particularly in developing recovery programs and to improve performance. At present, EPA has no numerical expectations for the performance of State recovery programs. Early in the recovery program it will focus on States' progress toward putting basic systems, policies, and procedures in place that will enable them to recover Trust Fund expenditures efficiently and effectively.

EPA is working with several States on pilot projects to develop realistic expectations for program performance, and to identify effective recovery procedures. The results will help EPA support State programs with tools and guidance. They will also help the Agency formulate and communicate more precise expectations for program performance.

Generally, EPA will be bound by States' judicial actions and settlements. However if EPA finds that a State is not effectively implementing cost recoveries, the Agency will offer the State necessary assistance in correcting any problems. The Office of Underground Storage Tanks will be most interested in seeing that States have adequate accounting and recordkeeping systems in place and that States identify, develop, and pursue appropriate recovery cases in a timely and sound manner. If problems in these or other areas persist, the Agency may take appropriate action under regulations governing cooperative agreements. In extreme cases, EPA may consider filing a recovery action against the owner/operator even though the State has the authority to initiate an action or has already done so.

C. Recoverable Costs

Policy

Owners and operators are liable for all costs of corrective action and enforcement, including interest, indirect and "management and support" costs associated with these activities that are paid for by the Trust Fund. States are not required to pursue Trust Fund expenditures for program management costs incurred by the U.S. E.P.A.

States will assess and may collect interest on Trust Fund expenditures used for corrective action and enforcement. Interest charges should provide incentives for responsible parties to settle cost recovery claims. Procedures for assessing interest charges are described separately in this document.

Owners and operators are also liable for Trust Fund expenditures made by States in overseeing responsible party cleanups. Generally, the costs of oversight are comparatively low and the number of cases is very large. Therefore, EPA expects that States will exercise discretion in determining an appropriate level of effort to devote to pursuing oversight costs.

Guidance

In each case, States will exercise their discretion in determining exactly which costs they will pursue. EPA is more interested in a State's overall record in cost recovery than in retrospectively examining decisions to pursue particular costs in hundreds or thousands of cases. Direct costs are most easily documented and defended in litigation. However, EPA is developing, and will soon distribute a simple procedure which will allocate all non-site Trust Fund costs including "management and support" costs to individual sites. Using this methodology, States will have available to them the full cost of a particular site cleanup at the time of the cost recovery action. To the extent that they are legally able, States should allocate all Trust Fund expenditures to sites for the purpose of cost recovery. States may also develop their own systems for allocating non-site costs and/or include additional State overhead costs that are beyond the scope of their cooperative agreements.

OSWER Directive 9610.10

EPA expects that the costs of overseeing cleanups by cooperative owners and operators will usually be a lower priority for recovery because Fund expenditures for oversight of a typical cleanup will be comparatively small. In addition, States may wish to exercise their discretion and not pursue these costs in cases where this will provide valuable incentives for owners and operators to clean up releases from their tanks.

In some cases States will expend significant enforcement resources to compel reluctant owners or operators to cleanup or to pay cleanup costs (e.g., legal costs associated with cost recovery, protracted negotiations, issuance of cleanup orders and litigation). These costs are recoverable. Presenting these costs to liable owners and operators with the direct costs of cleanup will give States additional leverage in their attempts to reach agreements for responsible party cleanups and recovery of costs.

D. Interest Charges

Policy

Owners and operators are liable for interest charges on Trust Fund expenditures at their sites. States should assess interest on expenditures from the Fund in the cost recovery process. States are allowed to retain recovered interest for additional eligible activities.

Guidance

Section 9003(h) of the Resource Conservation and Recovery Act (RCRA) describes the States' role in recovering LUST Trust Fund expenditures - but does not specifically address the collection of interest on those expenditures. However, EPA is entitled under the Debt Collection Act and common law authorities to collect interest on Trust Fund expenditures. Since States will have responsibility for recovering Trust Fund expenditures under section 9003(h), the States will also assess and are encouraged to pursue interest charges. Because States are permitted to retain recoverable Fund expenditures for additional cleanups and recoveries, they can also retain recovered interest for use on additional eligible activities. The States' collection of interest will deter responsible parties from resisting payment in order to gain an interest-free loan on the uncollected expenditures.

Before assessing interest, the State should notify the debtor through a written notice (demand letter explaining the agency's requirements concerning the debt and the interest). Interest shall accrue from the date on which notice of the debt and interest requirements is mailed or hand-delivered to the responsible party.

The minimum recommended rate of interest that States should assess for the current year is 6.00 percent. It is found in the Yearly Percentage Bulletin printed every December with the rate for the following fiscal year. The rate is equal to the average investment rate for the Treasury tax and loan accounts. It represents the current value of funds to the United States Treasury, and is published by the Treasury's Financial Management Service. EPA will notify States of the new rates each year.

EPA is examining the possibility of calculating a minimum interest rate that more closely approximates the yield on Trust Fund investments. The Agency will notify States if and when they are to use this type of minimum rate.

A State may assess a higher rate of interest if it reasonably determines that this is necessary to protect the expenditures from the Trust Fund. The rate of interest as initially assessed will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. New agreements should reflect the current value of funds to the Treasury at the time the new agreement is executed.

Interest should not be recovered if the amount due (Trust Fund expenditures) is paid within 30 days after the date from which the written notice was delivered to the responsible party. However, the State may decide, on a case-by-case basis, to extend the 30-day period for payment.

As part of their responsibility for settling claims, States may decide not to pursue the collection of interest on a debt entirely or in part once it has been assessed when they determine it is in the best interest of the program. States may decide not to pursue interest if the collection of interest puts the responsible party in financial distress, or the cost of collecting the interest will be more than the amount collected.

E. Priorities For Cost Recovery

Policy

Under their cooperative agreements States should have or should develop systems to set priorities for cost recovery cases. They should devote greatest efforts to cases where owners or operators are solvent but recalcitrant, and to cases where they fail to comply with applicable financial responsibility requirements. Some effort should be devoted to all cases involving Trust Fund cleanups or enforcement actions. This means, at a minimum, a search for responsible parties (RPs) and a demand for payment if an RP is located.

Guidance

Where the State expends Trust Fund money for corrective action or enforcement, and "action thresholds" (see section "F") have triggered site-specific accounting, the State will pursue recovery of costs from responsible parties. Timely processing of cases (and litigation where necessary) increases the chances of successful recovery. However, the level of recovery effort that should be devoted to any case should be based on a weighing of the resources necessary to recover the claim against the amount that may be recovered and the prospects for recovery. The determination should be based on factors such as: the solvency of the RP, the cost of cleanup, the likelihood of recovery, the deterrent value of the case, and the opportunity costs (resources that could be used in pursuing other cases or in other parts of the State's Trust Fund program).

States will develop their own priority systems based on these and other relevant considerations, but there are general circumstances where cost recovery should be assigned a high priority, low priority, or is impracticable because owners or operators cannot be located.

- High priority - Solvent RPs who refuse to comply with corrective action orders or are otherwise recalcitrant should be pursued aggressively, to serve as a warning to the regulated community and to stimulate compliance by other RPs.

- High priority - Owners and operators who do not comply with financial responsibility requirements should be pursued vigorously. Although Section 9003 of RCRA generally allows consideration of whether pursuit of full cost recovery will significantly impair an RP's ability to continue in business, States are precluded by statute from considering this factor if the RP has not complied with financial responsibility requirements in effect at the time.
- Low priority - States should generally commit fewer resources to insolvent or financially distressed RPs, although selective pursuit within the class should be undertaken where the RP could afford lesser amounts, is hiding assets, fails to cooperate, or was negligent in allowing the release to occur. Whenever States perform corrective actions using the Trust Fund, the RP should, at a minimum, be sent a demand for payment. The level of additional State effort beyond this point should be based on an evaluation of the factors listed above. Where cooperative owners and operators perform cleanups, States may wish to make recovery of oversight costs a low priority, to encourage voluntary cleanups.
- Impracticable - Sites where a liable owner or operator cannot be identified will require expenditures from the Trust Fund for cleanup. Efforts to recover costs expended at these sites will rarely result in recovery of funds. However, States should make reasonable efforts to locate a liable owner or operator before assigning a low priority to cost recovery in these cases.

F. Documentation Of Costs

Policy

States are required to document all Trust Fund expenditures and all corrective action and enforcement costs on a site-specific basis at each site where they have met any one of the following "action thresholds": 1) performed an emergency response; 2) begun a detailed site investigation; or 3) determined that an owner or operator is or is likely to be recalcitrant.

Guidance

States must establish a financial cost accounting system that tracks the costs of cleanup and enforcement activities on a site-specific basis when any one of the specified "action thresholds" is met. States are normally not required to begin site-specific accounting until States or their contractors begin a Trust Fund-financed, detailed site investigation or an emergency response has begun. A detailed site investigation is an attempt to determine the source, extent and severity of a release. An initial site visit (e.g., to determine if a release has occurred) should generally not trigger site-specific accounting because not all sites will be candidates for significant Trust Fund expenditures and cost recovery. If an RP is clearly recalcitrant, however, site-specific accounting should begin as soon as costs are incurred. Generally, contractor activity at a site will trigger site-specific accounting.

Site-specific information needed on corrective action activities and costs for sites where Trust Fund monies are used includes:

- Site location and description
- Results of site investigations (including identification of responsible parties)
- Enforcement actions taken
- Documentation of responses taken and time frames
- Documentation of all costs, identifying Trust Fund monies expended including contractor invoices

Enforcement costs include all expenditures reasonably related to inducing a recalcitrant RP to comply and to recovering clean-up expenditures. They include the salaries and other expenses associated with case development, negotiations, and litigation.

Does not
include
oversight of
an RP lead
pd by state
Fund or by
the RP.

States should establish cost-effective accounting systems to support recovery of Trust Fund monies in courts. Features of cost documentation that are essential to recovering costs in court include:

- Systems that are adequate for both cost recovery purposes (i.e., will support the State's claim in administrative or judicial action to recover) and audit purposes. At a minimum, the system should provide proof that the work or purchase was authorized by the State; the work or purchase was completed; the State was billed; and the bill was paid.
- In many cases, States may have to respond to arguments that the costs claimed are unreasonable and unnecessary.

The Financial Management Division of EPA's Office of the Comptroller is developing more detailed guidance for State accounting and recordkeeping. The LUST Trust Fund State Financial Management Handbook will be made available by early FY 1989 to help States meet these accounting requirements.

OSWER Directive 9610.10

Special Conditions

REQUIREMENTS FOR INCLUSION
IN LUST STATE COOPERATIVE AGREEMENTS

1. State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also 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. Parts 30 and 33 (for procurement) apply to other cooperative agreements and amendments.
2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (OSWER Directive 9650.7) where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities. The State may also use LUST Trust Fund recoveries to meet its cost share requirements under RCRA Section 9003 (h)(7)(B), in accordance with 40 CFR 31.25 (g)(3).

(CONTINUATION OF SPECIAL CONDITION 3 --
INSERT 1 OR 2 BELOW)

(INSERT 1, for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities or for State cost share requirements, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2, for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and



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

B. Houston
Mason

13 JAN -6 PM 12:09

NOV -8 1994

ATLANTA, GA

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: LUST Trust Fund Cost Recovery Policy

FROM: Lisa Lund, Acting Director *Lisa Lund*
Office of Underground Storage Tanks

TO: UST Regional Program Managers

This memorandum is in response to a number of requests from EPA regions that the Office of Underground Storage Tanks (OUST) clarify the Cost Recovery Policy for the Leaking Underground Storage Tank (LUST) Trust Fund with regard to when states are required to issue demand letters to initiate cost recovery proceedings against a responsible party, or to pursue cost recovery in general. It is not necessary for a state to issue a demand letter in situations where the decision to forgo cost recovery for allowable reasons has been made. This memorandum describes a variety of situations that might occur where a decision regarding the need for a either a demand letter or pursuit of cost recovery may arise.

The memorandum also considers separate questions raised to OUST regarding: cost recovery documentation, site-specific accounting, and whether or not cost recovery is required for LUST Trust Fund monies expended to address releases caused by natural disasters.

Cost Recovery and the Issuance of Demand Letters

The relevant section in the Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10A) occurs on page five and states:

"At a minimum, in each case States should make reasonable efforts to contact owners and operators who are liable for releases, notify them of their liability for enforcement and corrective action costs, and demand payment. In those rare cases where equitable factors support compromise or termination of the Trust Fund claim, States should ensure that the bases for any compromise or termination are adequately supported in the records of the State and reflect the efficient use of Trust Fund resources."

Copied to staff on 3/13/95
UST coordinators



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The intent of this and related sections of the cost recovery policy are discussed in more detail below.

The cost recovery policy distinguishes between sites where formal enforcement and/or state-lead corrective action occurs and sites involving use of LUST Trust Fund monies to oversee responsible party (RP)-lead cleanups. As the policy states on page nine "...States may wish to exercise their discretion and not pursue these [oversight] costs in cases where this will provide valuable incentives for owners and operators to clean up releases from their tanks." Thus, states are not required to send demand letters for payment to RPs where the LUST Trust Fund has been used for corrective action oversight.

The cost recovery policy establishes "action thresholds" that require site-specific accounting for the costs of cleanup and enforcement only when one of the following actions occurs at a site:

- o State performs a LUST Trust Fund-financed emergency response,
- o State initiates a LUST Trust Fund-financed detailed site investigation or cleanup, or
- o State determines that the RP is likely to be recalcitrant and that the use of LUST Trust Fund monies is likely.

Thus, cost recovery is anticipated in situations limited to those meeting these action thresholds. Some cost recovery effort should be devoted to all cases that meet the action thresholds, except as described below. Consistent with the cost recovery policy this means, at a minimum, a search for an RP and a demand for payment if the RP is located.

1) Cost Recovery and the Unknown Responsible Party

Cost recovery is difficult or impossible to pursue in cases where an owner or operator is unknown. EPA does encourage states to identify responsible parties through research, hydrogeologic means and, where appropriate, enforcement, when the state believes the effort would represent an efficient use of Trust Fund monies (for example, where the state anticipates that the cost of cleanup will substantially exceed the cost to identify a responsible party). If an owner or operator cannot be identified, a demand letter (and the pursuit of cost recovery) is not required.

If a responsible owner or operator is ever identified, the state should then assess whether a complete cost recovery action is an efficient use of Trust Fund resources. Under the cost recovery policy, when a responsible party is identified after Trust Fund monies are expended, it is necessary to issue a demand

letter for payment, at a minimum. After this point, states have considerable discretion in assigning priorities to individual cost recovery cases and in determining the appropriate level of effort to devote to each case. The state also has discretion to compromise or terminate the claim based on case-specific factors.

2) Cost Recovery and the Unwilling/Recalcitrant Responsible Party

EPA strongly encourages states to aggressively pursue cost recovery in cases where a recalcitrant owner or operator is unwilling to take corrective action and LUST Trust Fund monies are used for cleanup. In these situations, state issuance of a demand letter for payment would always be a part of the state's cost recovery action. States are encouraged to take a strong position in negotiating settlements with these responsible parties.

3) Cost Recovery and the Financially Unable Responsible Party

Many states utilize Trust Fund monies for cleanup primarily where owners and operators are unable (including financially unable) to carry out corrective actions. In some of these cases, if a formal determination of insolvency is made (either prior to or after the use of Trust Fund monies) this determination may be used to document that a demand letter, and the pursuit of cost recovery, is not necessary. A more formal determination of insolvency than is required for state access to the Trust Fund for cleanup would be required to dispense with a demand letter and pursuit of cost recovery.

The LUST Trust Fund Cooperative Agreement Guidelines (OSWER Directive 9650.10A) allow for use of the Trust Fund for cleanup in cases where the state "...cannot identify an RP who will undertake action properly and promptly." This includes situations where "...the RP may claim he cannot afford the cost of cleanup." In such instances, where Trust Fund monies are used for cleanup based on an informal or anecdotal determination of financial ability, and no further determination of solvency is made, a demand letter for payment should be a part of the cost recovery process.

Other Issues

Documenting Cost Recovery Decisions

It should be stressed that regardless of the action taken by the state in exercising its discretion in cost recovery cases, the state is required to fully document its decisions and to formally close out all cases. The Cost Recovery Policy encourages states to make decisions that are in the best interests of their overall program and that reflect efficient use of Trust Fund monies.

Site-Specific Accounting

A related question is whether site-specific accounting is required for a site that meets an action threshold, when the state decides in advance not to pursue cost recovery. EPA requires states to continue site-specific accounting in these situations, both to assure that LUST Trust Fund monies are used for their intended purpose and for financial auditing purposes. Further, the responsible party's financial condition could improve during the conduct of the cleanup or additional assets may be identified, in which case the state would have adequate data to support a cost recovery action.

Cost Recovery of LUST Trust Fund Monies Used for Releases Caused by Natural Disasters

The Mid-west Floods of 1993 raised the separate question of whether cost recovery is required for LUST Trust Fund monies expended to address releases caused by natural disasters, such as floods, hurricanes, and earthquakes. While Subtitle I of RCRA provides no explicit waiver of the cost recovery provisions when LUST Trust Fund monies are spent to address releases caused by natural disasters, we believe that it may be inappropriate to pursue cost recovery in these circumstances.

The rationale for OUST's position is that under the cost recovery provisions of Subtitle I, section 9003(h)(6), UST owners and operators are liable for cost recovery under the same standard of liability that applies under section 311 of the Clean Water Act. Section 311 provides a defense to liability where the discharge or release was caused by "an act of God." OUST believes that releases caused by natural disasters are within the defense as "an act of God." Therefore, section 311 would relieve an owner or operator from liability for cost recovery and, thus, would relieve the state from pursuing recovery of those particular monies. The state, under a cooperative agreement, has the discretion to determine whether a release was caused by an "act of God," and whether or not to pursue cost recovery in any particular case. As with other cost recovery situations, however, the state is required to fully document its decision and formally close out all cases.

The more difficult questions are the factual one of whether the "act of God" or natural disaster was the sole cause of a given UST release, and the procedural one of who has the burden of proving this fact. The section 311 "defense to liability" language states that the owner or operator must prove that the "act of God" was the sole cause of the release, i.e., generally the state LUST programs should put the burden on the UST owner/operator to document their defense. However, in any litigation, a plaintiff, i.e., the state, can decide for itself that the defendant has such a strong defense that it is not worth

pressing a given claim. In some cases, a state might be justified in not requiring the owner/operator to document causation, as long as the state itself has sufficiently documented the fact that the "act of God" or natural disaster was the sole cause of the release.

I hope this clarifies the LUST Trust Fund Cost Recovery Policy regarding the need for a demand letter for payment and pursuit of cost recovery in general. If you have any questions or would like to discuss these issues further, please feel free to contact either John Heffelfinger at (703) 308-8881, or Amy Haseltine at (703) 308-8898.

cc: UST Regional Branch Chiefs
Regional UST Attorneys
State UST/LUST Program Managers
Jane Souzon, OGC
Lee Tyner, OGC
Dawn Messier, OGC
OUST Management Team
OUST Desk Officers



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

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PROTECTION
NOV 14 PM 12:25
EPA REGION IV
ATLANTA, GA

NOV - 8 1994

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: LUST Trust Fund Cost Recovery Policy

FROM: Lisa Lund, Acting Director *Lisa Lund*
Office of Underground Storage Tanks

TO: UST Regional Program Managers

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Other Issues

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cc: UST Regional Branch Chiefs
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State UST/LUST Program Managers
Jane Souzon, OGC
Lee Tyner, OGC
Dawn Messier, OGC
OUST Management Team
OUST Desk Officers



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

MAR 7 1995

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Current Interest Rate for LUST Trust Fund Cost Recovery Actions

FROM: Lisa Lund, Acting Director *Lisa Lund*
Office of Underground Storage Tanks

TO: Regional UST Program Managers

This is to provide notice that for cost recovery actions initiated or ongoing during calendar year 1995, the minimum recommended interest rate to be assessed on funds from the Leaking Underground Storage Tank (LUST) Trust Fund is three (3.0) percent. Please see that appropriate individuals in each of your States receive written notice of this change.

To the extent that they are legally able, States should assess and pursue recovery of interest from tank owners and operators, particularly where States have performed corrective actions using the LUST Trust Fund. Interest charges can provide owners and operators with important incentives to settle recovery claims. In many cases, they also provide States with significant income which they may retain along with other LUST Trust Fund recoveries for use on other eligible sites and activities. The Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10A) contains a more complete discussion of interest charges on Trust Fund expenditures.

The suggested minimum interest rate for Trust Fund recoveries is equal to the U.S. Treasury Current Value of Funds Rate. We will notify you of yearly future changes in this rate.

cc: Dave Webster - Region I
Stanley Siegel - Region II
Robert Greaves - Region III
Mary Kay Lynch - Region IV
Norman Niedergang - Region V
Guanita Reiter - Region VI

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

MAR 7 1995

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

4WM-GP

MAR 10 1995

Mr. Doyle Mills, Manager
Underground Storage Tank Branch
Kentucky Department of Environmental
Protection
14 Reilly Road
Frankfort, Kentucky 40601-1190

Dear Mr. Mills:

Enclosed is a copy of the guidance manual titled "COST RECOVERY PROCEDURES FOR STATE UST PROGRAMS TO RECOVER LUST TRUST FUND EXPENDITURES," prepared by the Region IV UST Attorney's Workgroup and dated January 1995. The manual is designed to be a practical guide to carrying out successful cost recovery actions.

I have also enclosed a copy of a memorandum dated November 8, 1994, from Lisa Lund, Acting Director of the Office of Underground Storage Tanks (OUST), which speaks to a number of questions raised to OUST on the subject of cost recovery. Ms. Lund's memorandum should be interpreted as an extension of EPA's Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10A). The Attorney Workgroup's Cost Recovery Manual should be used as a guide to carry out the OSWER policy contained in Directive 9610.10A.

To date, Region IV has awarded \$62,852,093 in LUST Trust Fund grants. Our records indicate that as of the end of the first quarter FY 1995, the Region IV grantees had recovered \$513,577.16 of their LUST Trust Fund expenditures. This is less than one percent of the total funds awarded.

I bring this to your attention because as time goes on we should expect an increased emphasis on the issue of cost recovery, from both OUST and the Office of the Inspector General. As you know, the OSWER guidance provides great flexibility to the states in making specific LUST Trust Fund cost recovery decisions. Therefore, in the event of an audit, I don't foresee the quantity of funds recovered becoming an issue if the state's cost accounting and cost recovery procedures are above reproach.

The Cost Recovery Procedures Manual should be helpful in improving your cost recovery process which will in turn increase your cost recovery rate. I encourage you to utilize the manual as the practical tool it was designed to be.

This letter sent to all LUST grantees.

I greatly appreciate the time and effort the Attorney Workgroup devoted to developing the Procedures Manual. I am confident it will prove to be a very helpful document.

Sincerely,

A handwritten signature in cursive script, appearing to read "John K. Mason".

John K. Mason, Chief
Underground Storage Tank Section

Enclosures



DIRECTIVE NUMBER: 9610.10A

TITLE: Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund

APPROVAL DATE: May 24, 1994

EFFECTIVE DATE: May 24, 1994

ORIGINATING OFFICE: Office of Underground Storage Tanks

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents): Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund, OSWER Dir 9610.10, October 7, 1988

LUST Trust Fund Cooperative Agreement Guidelines, OSWER Dir 9650.10A, May 24, 1994

Leaking Underground Storage Tank Trust Fund State Financial Management Handbook, Financial Management Division - Fiscal Policies and Procedures Branch, March 1989

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LUST/CR/94-



United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1. Directive Number

9610.10A

2. Originator Information

Name of Contact Person

Lisa Hunter

Mail Code

5403W

Office

OUST

Telephone Code

703-308-8896

3. Title Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund

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

This Directive consolidates and updates previously issued cost recovery guidelines for the Leaking Underground Storage Tank Trust Fund. Special conditions that incorporate the policy into Trust Fund cooperative agreements are included.

5. Keywords Cost Recovery, LUST Trust Fund, Underground Storage Tanks, Special Conditions

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

☐ No

☒ Yes

What directive (number, title)

9610.10

b. Does It Supplement Previous Directive(s)?

☒ No

☐ Yes

What directive (number, title)

7. Draft Level

☐

A - Signed by AA/DAA

☒

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

Shonee Clark, OUST Directives Coordinator

Date

5/24/94

10. Name and Title of Approving Official

David W. Ziegele, OUST Office Director

Date

5/24/94

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

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**COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND
STORAGE TANK TRUST FUND**

A. Overview

This is EPA's first complete statement of its policies on cost recovery under the Leaking Underground Storage Tank (LUST) Trust Fund. It has required a year of coordinated effort by various EPA offices to develop and to secure necessary approvals within the Agency and from other agencies and officials in the executive and legislative branches of government. Working with and through States to implement this policy, EPA expects that it will help cost recovery to become a practical and effective tool that States will use to both stimulate and fund more cleanups of releases from underground storage tanks.

Objectives of Cost Recovery

The primary purpose of cost recovery under the LUST Trust Fund is to provide incentives for owners and operators to comply with technical and financial responsibility requirements, and most importantly to clean up releases from their own tanks. EPA expects that State-lead cleanups followed by cost recovery will continue to occur in a minority of cases, because the majority of cleanups are conducted by owners and operators. When cost recovery is necessary, it will generate income for additional cleanups.

Cost recovery as practiced under the LUST Trust Fund will depart significantly from the approaches taken in other Federal environmental response programs. Consistent with the State-centered design of the underground storage tank program, States will implement the cost recovery program, have considerable discretion in operating it, and benefit directly from their successful recoveries.

The two most innovative aspects of EPA's cost recovery policy for the LUST Trust Fund should provide States with the autonomy and the incentive necessary to pursue recoveries aggressively and efficiently. First, States with cooperative agreements will litigate and settle recovery claims without the routine involvement or concurrence of EPA or the Department of Justice. Second, States may retain any Trust Fund monies they recover for use on additional Fund-eligible cleanups and activities.

Legal Rationale

The legal rationale behind this approach was developed by the Agency in consultation with the Department of Justice.

Under 28 U.S.C. Section 516, the Department of Justice (DOJ) must conduct any litigation in which the United States has an interest unless there is an exception authorized by law. EPA interprets section 9003(h) of Subtitle I to be such an exception, allowing States under cooperative agreements that have the capabilities to carry out effective corrective actions and enforcement activities to exercise various program authorities, including the cost recovery authority provided in section 9003(h)(6). These States may also settle cost recovery litigation as part of the exercise of enforcement discretion conveyed by section 9003(h).

Additionally, EPA interprets section 9003(h) to provide authority for States to administratively settle cost recovery claims. EPA believes that this authority includes the ability to compromise or terminate Trust Fund claims based on considerations of equity as described in section 9003(h)(6)(B) (e.g., reducing the claim to the amount of required financial responsibility).

Finally, EPA has determined that, consistent with the "program income" concept described in OMB Circular A-102, that States may retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements. Thus, appropriate requirements in 40 C.F.R. Parts 30 and 31 on the documentation and use of program income apply to recoveries of Trust Fund money.

Recovery Procedures

Variations in State recovery procedures can be expected, but generally States will be responsible for all of the following activities in cases that they deem to be high priorities:

- o Determination of a release
- o Notification of responsibility to the owner or operator
- o Negotiation for corrective action (in non-emergency situations)
- o Cleanup (if the owner or operator is incapable or unwilling to clean up)
- o Demand for payment
- o Negotiation for a settlement of the recovery claim

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- o Litigation (when demand for payment and efforts to reach an administrative settlement fail)
- o Collection and case closure

States are encouraged to tailor the specifics of these procedures to suit their individual programs and to save program resources. In addition, the detailed policy guidance that follows has been developed to help ensure that cost recovery resources are used efficiently and stimulate compliance by owners and operators.

B. State and Federal Roles in Cost Recovery

Policy

Under their cooperative agreements, States are responsible for all legal, programmatic, and administrative activities necessary to recover their expenditures from the LUST Trust Fund. This includes undertaking administrative and judicial recovery actions and settling claims. They are responsible for required reporting and recordkeeping including documenting that their Trust Fund recoveries are used for additional eligible activities under their cooperative agreements. EPA will provide general policy guidelines to States and make funding available for recovery programs through the States' cooperative agreements. EPA will also assess the performance of State cost recovery programs and provide support and assistance to States where they are needed to improve performance. The Agency will generally be bound by settlements and judgments reached in States, but reserves the right to pursue recoveries independently in the extreme case. Also, EPA may pursue recoveries in those rare cases where the Agency has performed a federal-lead response.

Guidance

States are expected to have adequate legal authorities to undertake cost recovery either by having or acquiring their own authorities, or certifying that they are able to use federal authorities. States with their own recovery authorities should also cite Subtitle I in their recovery actions (i.e., demand letters, administrative orders, and judicial complaints) to establish the liability of owners/operators to the federal government for Trust Fund expenditures.

EPA is currently formulating policies on a number of issues related to recovery litigation. One major unresolved issue is whether States should bring judicial recovery actions in State or federal courts. Until these issues are resolved, States should, within one week, notify EPA's Office of Regional Counsel when filing judicial recovery actions for sites where they have used Trust Fund money for cleanup or enforcement. This will give EPA the opportunity to consult with the State, determine whether the action might affect the scope of the Agency's Subtitle I authorities, and if necessary, provide technical or legal assistance to the State. However, EPA will not require States to delay recovery litigation while the Agency reviews complaints submitted by States.

States must maintain accounting and recordkeeping systems that will document all Trust Fund expenditures, support cost recovery with site-specific records, and demonstrate that recovered funds are retained and used for additional eligible activities under their cooperative agreements. State recordkeeping and accounting must conform to requirements in these guidelines and the Leaking Underground Storage Tank Trust Fund State Financial Management Handbook (March 1989).

States will have considerable discretion in prioritizing cases for cost recovery and determining an appropriate level of effort to devote to each case. At a minimum, in each case States should make reasonable efforts to contact owners and operators who are liable for releases, notify them of their liability for enforcement and corrective action costs, and demand payment. In those rare cases where equitable factors support compromise or termination of the Trust Fund claim, States should ensure that the bases for any compromise or termination are adequately supported in the records of the State and reflect the efficient use of Trust Fund resources. States may compromise Trust Fund claims when, for example, an owner/operator demonstrates that he/she lacks the financial resources to pay the claim; the State determines that the likelihood of success on litigating the claim as small because of the absence of proof of liability or unavailability of required witnesses; or costs of judicial collection is disproportionately high. States should note that their ability to reduce claims based on the equities described in section 9003h(6)(B) is limited to cases where owners/operators have maintained required levels of financial assurance.

Because they are more cost effective, negotiated settlements are generally preferred over litigation. In many cases, however, EPA expects that it will be necessary for States to initiate and pursue judicial action to compel recalcitrant owners and operators to pay cleanup costs. In deciding whether to litigate individual cases States should consider the solvency of the owner/operator, the costs of cleanup, the likelihood of recovery, the case's deterrence value and the opportunity costs (the resources necessary to proceed that could otherwise be used in pursuing other cases or in other parts of the State's Trust Fund program).

- 1/ As used here, the term "compromise" means accepting less than the full value of the claim. The term "termination" means forgoing any cost recovery whatsoever.

Even where no administrative or judicial settlement is reached, States must formally close out all cases and document the reasons for deciding not to proceed further. Factors justifying case closure include the situations where costs of pursuing a case further will approach or exceed the potential recovery, bankruptcy of the owner/operator, and other reasons. States should not allow the statute of limitation (SOL) to run and justify closure solely on that basis. States should generally pursue cases promptly and file actions in a timely manner to enhance the chances for recovery. States should revise their priorities for individual recovery cases as SOL deadlines approach. Until the issue is resolved by the courts, States relying solely on Subtitle I cost recovery authorities should be prudent and proceed assuming a three year limit applies, despite the fact that EPA believes that a six year limit is applicable. This is necessary because some courts have applied the three year limit to similar cases.

When States make successful recoveries at sites where Trust Fund monies were used, they may retain the Trust Fund share as program income consistent with OMB Circular A-102 and 40 CFR Parts 30.525 and 31.25. This means that States may use recovered federal Trust Fund monies for additional Fund-eligible cleanups and activities under their agreements. When States choose to do so, they must inform EPA, and keep appropriate records of how the recoveries were used. In negotiating their cooperative agreements, States and Regions should develop contingency plans that will allow States to obligate their recoveries efficiently. States should calculate the federal Trust Fund share of their recoveries on a site-by-site, pro rata basis. For example, if a State spends 50 thousand dollars of LUST Trust Fund money at a site, and the State ultimately recovers 50 percent of all Federal and State money used at the site, it must redirect 25 thousand dollars of "program income" into Fund-eligible activities.

EPA expects States with cooperative agreements to adequately fund and staff recovery efforts to deal with anticipated case loads. Cost recovery activities are allowable costs under Subtitle I. Where the recovery program is dependent on the Attorney General's Office, the State should consider the need for formal funding arrangements (e.g., a memorandum of agreement) to ensure legal staffing for cost recovery referrals. When the Trust Fund is not used to pay for such legal staffing, States may wish to investigate the possibility of counting these legal services as "in-kind contributions" toward satisfying their match requirements under 40 C.F.R. Part 31.24.

EPA's principal responsibilities in cost recovery are to provide funding, policy, guidance, oversight, and assistance to States. The Agency's operational role in cost recovery will generally be limited to pursuing recoveries in those cases where EPA responds directly to a release, and in rare cases of overfiling.

EPA intends to make its expectations for the activities and performance of cost recovery programs reasonable and clear to States in advance. This will occur through policy, guidance, routine communications, program appraisal and reviews, and the negotiation of cooperative agreements. The oversight and assistance functions of EPA's program, grants, and financial management offices will accommodate variations in State procedures and capabilities to the maximum extent possible. The Agency's goals will be to help build State capabilities, particularly in developing recovery programs and to improve performance. At present, EPA has no numerical expectations for the performance of State recovery programs. Early in the recovery program it will focus on States' progress toward putting basic systems, policies, and procedures in place that will enable them to recover Trust Fund expenditures efficiently and effectively.

EPA is working with several States on pilot projects to develop realistic expectations for program performance, and to identify effective recovery procedures. The results will help EPA support State programs with tools and guidance. They will also help the Agency formulate and communicate more precise expectations for program performance.

Generally, EPA will be bound by States' judicial actions and settlements. However if EPA finds that a State is not effectively implementing cost recoveries, the Agency will offer the State necessary assistance in correcting any problems. The Office of Underground Storage Tanks will be most interested in seeing that States have adequate accounting and recordkeeping systems in place and that States identify, develop, and pursue appropriate recovery cases in a timely and sound manner. If problems in these or other areas persist, the Agency may take appropriate action under regulations governing cooperative agreements. In extreme cases, EPA may consider filing a recovery action against the owner/operator even though the State has the authority to initiate an action or has already done so.

C. Recoverable Costs

Policy

Owners and operators are liable for all costs of corrective action and enforcement, including interest, indirect and "management and support" costs associated with these activities that are paid for by the Trust Fund. States are not required to pursue Trust Fund expenditures for program management costs incurred by the U.S. E.P.A.

States will assess and may collect interest on Trust Fund expenditures used for corrective action and enforcement. Interest charges should provide incentives for responsible parties to settle cost recovery claims. Procedures for assessing interest charges are described separately in this document.

Owners and operators are also liable for Trust Fund expenditures made by States in overseeing responsible party cleanups. Generally, the costs of oversight are comparatively low and the number of cases is very large. Therefore, EPA expects that States will exercise discretion in determining an appropriate level of effort to devote to pursuing oversight costs.

Guidance

In each case, States will exercise their discretion in determining exactly which costs they will pursue. EPA is more interested in a State's overall record in cost recovery than in retrospectively examining decisions to pursue particular costs in hundreds or thousands of cases. Direct costs are most easily documented and defended in litigation. However, the Leaking Underground Storage Tank Trust Fund State Financial Management Handbook (March 1989) contains a procedure that States can use to allocate all non-site Trust Fund costs including "management and support" costs to individual sites. Using this methodology, States will have available to them the full cost of a particular site cleanup at the time of the cost recovery action. To the extent that they are legally able, States should allocate all Trust Fund expenditures to sites for the purpose of cost recovery. States may also develop their own systems for allocating non-site costs and/or include additional State overhead costs that are beyond the scope of their cooperative agreements.

D. Interest Charges

Policy

Owners and operators are liable for interest charges on Trust Fund expenditures at their sites. States should assess interest on expenditures from the Fund in the cost recovery process. States are allowed to retain recovered interest for additional eligible activities.

Guidance

Section 9003(h) of the Resource Conservation and Recovery Act (RCRA) describes the States' role in recovering LUST Trust Fund expenditures - but does not specifically address the collection of interest on those expenditures. However, EPA is entitled under the Debt Collection Act and common law authorities to collect interest on Trust Fund expenditures. Since States will have responsibility for recovering Trust Fund expenditures under section 9003(h), the States will also assess and are encouraged to pursue interest charges. Because States are permitted to retain recoverable Fund expenditures for additional cleanups and recoveries, they can also retain recovered interest for use on additional eligible activities. The States' collection of interest will deter responsible parties from resisting payment in order to gain an interest-free loan on the uncollected expenditures.

Before assessing interest, the State should notify the debtor through a written notice (demand letter explaining the agency's requirements concerning the debt and the interest). Interest shall accrue from the date on which notice of the debt and interest requirements is mailed or hand-delivered to the responsible party.

The minimum recommended rate of interest that States should assess is found in the Yearly Percentage Bulletin printed every December with the rate for the following fiscal year. The rate is equal to the average investment rate for the Treasury tax and loan accounts. It represents the current value of funds to the United States Treasury, and is published by the Treasury's Financial Management Service. EPA will notify States of the new rates each year.

EPA is examining the possibility of calculating a minimum interest rate that more closely approximates the yield on Trust Fund investments. The Agency will notify States if and when they are to use this type of minimum rate.

A State may assess a higher rate of interest if it reasonably determines that this is necessary to protect the expenditures from the Trust Fund. The rate of interest as initially assessed will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. New agreements should reflect the current value of funds to the Treasury at the time the new agreement is executed.

Interest should not be recovered if the amount due (Trust Fund expenditures) is paid within 30 days after the date from which the written notice was delivered to the responsible party. However, the State may decide, on a case-by-case basis, to extend the 30-day period for payment.

As part of their responsibility for settling claims, States may decide not to pursue the collection of interest on a debt entirely or in part once it has been assessed when they determine it is in the best interest of the program. States may decide not to pursue interest if the collection of interest puts the responsible party in financial distress, or the cost of collecting the interest will be more than the amount collected.

E. Priorities For Cost Recovery

Policy

Under their cooperative agreements States should have or should develop systems to set priorities for cost recovery cases. They should devote greatest efforts to cases where owners or operators are solvent but recalcitrant, and to cases where they fail to comply with applicable financial responsibility requirements. Some effort should be devoted to all cases involving Trust Fund cleanups or enforcement actions. This means, at a minimum, a search for responsible parties (RPs) and a demand for payment if an RP is located.

Guidance

Where the State expends Trust Fund money for corrective action or enforcement, and "action thresholds" (see section "F") have triggered site-specific accounting, the State will pursue recovery of costs from responsible parties. Timely processing of cases (and litigation where necessary) increases the chances of successful recovery. However, the level of recovery effort that should be devoted to any case should be based on a weighing of the resources necessary to recover the claim against the amount that may be recovered and the prospects for recovery. The determination should be based on factors such as: the solvency of the RP, the cost of cleanup, the likelihood of recovery, the deterrent value of the case, and the opportunity costs (resources that could be used in pursuing other cases or in other parts of the State's Trust Fund program).

States will develop their own priority systems based on these and other relevant considerations, but there are general circumstances where cost recovery should be assigned a high priority, low priority, or is impracticable because owners or operators cannot be located.

- High priority - Solvent RPs who refuse to comply with corrective action orders or are otherwise recalcitrant should be pursued aggressively, to serve as a warning to the regulated community and to stimulate compliance by other RPs.

- High priority - Owners and operators who do not comply with financial responsibility requirements should be pursued vigorously. Although Section 9003 of RCRA generally allows consideration of whether pursuit of full cost recovery will significantly impair an RP's ability to continue in business, States are precluded by statute from considering this factor if the RP has not complied with financial responsibility requirements in effect at the time.
- Low priority - States should generally commit fewer resources to insolvent or financially distressed RPs, although selective pursuit within the class should be undertaken where the RP could afford lesser amounts, is hiding assets, fails to cooperate, or was negligent in allowing the release to occur. Whenever States perform corrective actions using the Trust Fund, the RP should, at a minimum, be sent a demand for payment. The level of additional State effort beyond this point should be based on an evaluation of the factors listed above. Where cooperative owners and operators perform cleanups, States may wish to make recovery of oversight costs a low priority, to encourage voluntary cleanups.
- Impracticable - Sites where a liable owner or operator cannot be identified will require expenditures from the Trust Fund for cleanup. Efforts to recover costs expended at these sites will rarely result in recovery of funds. However, States should make reasonable efforts to locate a liable owner or operator before assigning a low priority to cost recovery in these cases.

F. Documentation Of Costs

Policy

States are required to document all Trust Fund expenditures and all corrective action and enforcement costs on a site-specific basis at each site where they have met any one of the following "action thresholds": 1) performed an emergency response; 2) begun a detailed site investigation; or 3) determined that an owner or operator is or is likely to be recalcitrant.

Guidance

States must establish a financial cost accounting system that tracks the costs of cleanup and enforcement activities on a site-specific basis when any one of the specified "action thresholds" is met. States are normally not required to begin site-specific accounting until States or their contractors begin a Trust Fund-financed, detailed site investigation or an emergency response has begun. A detailed site investigation is an attempt to determine the source, extent and severity of a release. An initial site visit (e.g., to determine if a release has occurred) should generally not trigger site-specific accounting because not all sites will be candidates for significant Trust Fund expenditures and cost recovery. If an RP is clearly recalcitrant, however, site-specific accounting should begin as soon as costs are incurred. Generally, contractor activity at a site will trigger site-specific accounting.

Site-specific information needed on corrective action activities and costs for sites where Trust Fund monies are used includes:

- Site location and description
- Results of site investigations (including identification of responsible parties)
- Enforcement actions taken
- Documentation of responses taken and time frames
- Documentation of all costs, identifying Trust Fund monies expended including contractor invoices

Enforcement costs include all expenditures reasonably related to inducing a recalcitrant RP to comply and to recovering clean-up expenditures. They include the salaries and other expenses associated with case development, negotiations, and litigation.

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States should establish cost-effective accounting systems to support recovery of Trust Fund monies in courts. Features of cost documentation that are essential to recovering costs in court include:

- Systems that are adequate for both cost recovery purposes (i.e., will support the State's claim in administrative or judicial action to recover) and audit purposes. At a minimum, the system should provide proof that the work or purchase was authorized by the State; the work or purchase was completed; the State was billed; and the bill was paid.
- In many cases, States may have to respond to arguments that the costs claimed are unreasonable and unnecessary.

The Financial Management Division of EPA's Office of the Comptroller has developed more detailed guidance for State accounting and recordkeeping. The Leaking Underground Storage Tank Trust Fund State Financial Management Handbook was published in March 1989 to help States meet these accounting requirements.

OSWER Directive 9610.10A

Special Conditions

**REQUIREMENTS FOR INCLUSION
IN LUST STATE COOPERATIVE AGREEMENTS**

1. State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also 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. Parts 30 and 33 (for procurement) apply to other cooperative agreements and amendments.
2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund (OSWER Directive 9610.10A, May 1994), where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities.

(CONTINUATION OF SPECIAL CONDITION 3 --
INSERT 1 OR 2 BELOW)

(INSERT 1, for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2, for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and

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- (iii) To the extent the State is successful in recovering these costs, it will dedicate these funds for additional Trust-Fund-eligible activities, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this cooperative agreement.
- (iv) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

[END OF INSERT 2]

- 4. State agrees to maintain supporting documentation and appropriate records in support of any future cost recovery efforts. The State shall adhere to the principles of documentation and records retention specified in the Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund (OSWER Directive 9610.10A, May 1994). On topics not addressed by these guidelines, the State agrees to adhere to the principles of documentation and record retention specified in the Leaking Underground Storage Tank Trust Fund State Financial Management Handbook (March 1989). The State agrees to make these records available to the federal government, as needed, on a case-by-case basis.
- 5. State agrees to provide reports as outlined in the LUST Trust Fund Cooperative Agreement Guidelines (OSWER Directive 9650.10A, May 1994). These reports consist of Quarterly Progress Reports, Financial Status Reports (SF 269), Federal Cash Transactions Report (SF 272), and Exception Reports.
- 6. State agrees to identify Letter of Credit drawdowns under EPA's three major activity codes. The three codes are: "7" -- General Support and Management, "E"-- Site Cleanup Actions, and "4" -- Enforcement.



DIRECTIVE NUMBER: 9650.10A

TITLE: LUST Trust Fund Cooperative Agreement Guidelines

APPROVAL DATE: May 24, 1994

EFFECTIVE DATE: May 24, 1994

ORIGINATING OFFICE: Office of Underground Storage
Tanks

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents): LUST Trust Fund
Cooperative Agreement Guidelines, OSWER Dir 9650.10,
February 8, 1989

Cost Recovery Policy for the Leaking Underground Storage
Tank Trust Fund, OSWER Dir 9610.10A, May 24, 1994

Leaking Underground Storage Tank Trust Fund State Financial
Management Handbook, Financial Management Division - Fiscal
Policies and Procedures Branch, March 1989

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OSWER Directive Initiation Request		United States Environmental Protection Agency Washington, DC 20460		1. Directive Number 9650.10A
2. Originator Information				
Name of Contact Person John Heffelfinger		Mail Code 5403W	Office OUST	Telephone Code 703-308-8881
3. Title LUST Trust Fund Cooperative Agreement Guidelines				
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 Cooperative Agreement, LUST Trust Fund, Cost Recovery, Underground Storage Tanks, States, Regions				
6a. Does This Directive Supersede Previous Directive(s)? <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes What directive (number, title) 9650.10				
b. Does It Supplement Previous Directive(s)? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes What directive (number, title)				
7. Draft Level <input type="checkbox"/> A - Signed by AA/DAA <input checked="" type="checkbox"/> B - Signed by Office Director <input type="checkbox"/> C - For Review & Comment <input type="checkbox"/> D - In Development				

8. Document to be distributed to States by Headquarters?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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This Request Meets OSWER Directives System Format Standards.	
9. Signature of Lead Office Directives Coordinator <i>Shonee Clark</i> Shonee Clark, OUST Directive Coordinator	Date 5/24/94
10. Name and Title of Approving Official David W. Ziegele, OUST Office Director	Date 5/24/94

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

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COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND STORAGE TANK TRUST FUND (OSWER DIRECTIVE 9610.10A)	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, supersedes 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 supersedes 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.

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The amount of the State's contribution should be negotiated in advance and specified in the State's Cooperative Agreement. 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;

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- 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.

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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.

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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 methods 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 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.

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.

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 (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)(i)).

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.

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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.

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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.

* 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.

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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;

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- 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

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 Oversight Strategy

In FY 89, EPA began to implement a formal program oversight system. The program oversight focuses on balancing oversight of State UST programs with service to the State's needs. The types of reports that will continue to be part of EPA's oversight 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 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 Targeted Activities for Results System (STARS) 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 are required to comply with the provisions of the Leaking Underground Storage Tank Trust Fund State Financial Management Handbook (March 1989).

Exhibit 1

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

1. Number of Confirmed Releases
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. 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
7. Exceptions Report (Identify by site where:)
 - a. State plans to provide permanent alternative water supply
 - b. State plans to permanently relocate residents
8. 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)

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

9. 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

IX. CORRECTIVE ACTION

A. Compliance with Corrective Action Regulations

Policy

Corrective actions taken after the effective date of the Federal corrective action regulations (40 CFR Parts 280.60-280.67) must be performed in a manner that is consistent with the substantive requirements of the Federal regulations.

Guidance

This policy pertains to the actual performance of UST cleanups. It is not intended to supplant the State program approval process for corrective action. For example, States need not have, at time of award, their own statutes and regulations in place that are no less stringent than the Federal regulations. Rather, States need to assure that the actual cleanups performed, either by RPs or the State, reflect the substantive requirements of the Federal corrective action regulations, until approval of the State's program to operate in lieu of the Federal program.

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.

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

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.

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.

OSWER DIRECTIVE 9650.10A

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.

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.

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:

OSWER DIRECTIVE 9650.10A

- 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 availability 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-269A) 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.

**LUST TRUST FUND
COOPERATIVE AGREEMENT GUIDELINES**

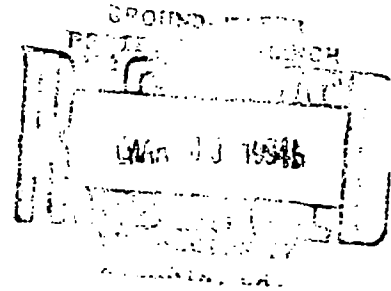
APPENDIX A

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



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

MAR - 1 1994



OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Current Interest Rate for LUST Trust Fund Expenditures

FROM: David Ziegele, Director *David Ziegele*
Office of Underground Storage Tanks

TO: Regional UST Program Managers

This is to provide notice that for expenditures made during calendar year 1994, the minimum recommended interest rate to be assessed on funds from the Leaking Underground Storage Tank (LUST) Trust Fund is three and three tenths (3.3) percent. Please see that appropriate individuals in each of your States receive written notice of this change.

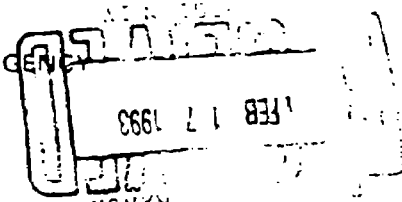
To the extent that they are legally able, States should assess and pursue recovery of interest from tank owners and operators, particularly where States have performed corrective actions. Interest charges can provide owners and operators with important incentives to settle recovery claims. In many cases, they also provide States with significant income which they may retain along with other LUST Trust Fund recoveries for use on other eligible sites and activities. The Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10) contains a more complete discussion of interest charges on Trust Fund expenditures.

The suggested minimum interest rate for Trust Fund recoveries is equal to the U.S. Treasury Current Value of Funds Rate. We will notify you yearly of future changes in this rate.

cc: Regional UST Branch Chiefs
Dana Tulis
Doug Barrett, FMD
Maureen Ross, GAD
Jane Souzon, OGC
OUST Desk Officers



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FEB 12 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: UST Cost Recovery Policy

FROM: David Ziegele, Director *Di H. Ziegele*
Office of Underground Storage Tanks

TO: UST Regional Branch Chiefs

At the June meeting between OUST and the UST Regional Branch Chiefs in Minneapolis, there was a discussion of a possible revision of the UST cost recovery policy by OUST. This was discussed in view of concerns regarding the general inactivity in cost recovery and the lack of consistency between states.

OUST has reviewed the policy in light of these concerns. We believe that the policy still adequately reflects the program philosophy towards cost recovery. That philosophy is built around several important assumptions:

- o The majority of cleanups will be accomplished by responsible parties.
- o State-lead actions are likely to be taken at orphan sites or sites where the owners and operators are financially incapable of financing a corrective action.
- o In many cases, the use of state assurance funds will diminish the importance of cost recovery of LUST Trust Fund monies from owners and operators beyond deductible amounts.

Consistent with the above assumptions, the policy acknowledges that, at many sites where states perform corrective actions utilizing federal LUST Trust funds, the prospects for significant recoveries will be limited and cost recovery will not be pursued. In those instances, it is extremely important that formal documentation of the decision to not cost recover be maintained in each site-specific file. Clearly, there are other scenarios (such as emergency responses or unwilling responsible parties) where cost recovery is warranted and should be actively sought. Again, in these situations, adequate records of negotiated settlements or compromised claims must be maintained.

- (iii) To the extent the State is successful in recovering these costs, it will dedicate these funds for additional Trust-Fund-eligible activities ~~or for State cost share requirements~~, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this cooperative agreement.
- (iv) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

[END OF INSERT 2]

- 4. State agrees to maintain supporting documentation and appropriate records in support of any future cost recovery efforts. The State shall adhere to the principles of documentation and records retention specified in the OSWER Directive 9610.10 Cost Recovery Policy for the LUST Trust Fund (October, 1988). On topics not addressed by these guidelines, the State agrees to adhere to the principles of documentation and record retention specified in The State Superfund Financial Management and Recordkeeping Guidance until such time as the State and EPA agree to implement the requirements of The Leaking Underground Storage Tanks Trust Fund State Financial Management Handbook. The State agrees to make these records available to the federal government, as needed, on a case-by-case basis.
- 5. State agrees to provide reports as outlined in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements; (April 7, 1988). These reports consist of Quarterly Progress Reports, Financial Status Reports (SF 269) Federal Cash Transactions Report (SF 272), and Exception Reports.
- 6. State agrees to identify Letter of Credit drawdowns under EPA's three major activity codes. The three codes are: "7" -- General Support and Management, "E"-- Site Cleanup Actions, and "4" -- Enforcement.

The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. ~~States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.~~
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and

(CONTINUATION OF SPECIAL CONDITION 3 --
INSERT 1 OR 2 BELOW)

(INSERT 1. for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities ~~or for State cost share requirements~~, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2. for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

Special Conditions

REQUIREMENTS FOR INCLUSION
IN LUST STATE COOPERATIVE AGREEMENTS

1. State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also 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. Parts 30 and 31 (for procurement) apply to other cooperative agreements and amendments.
2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (OSWER Directive 9650.7) where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities. ~~The State may also use LUST Trust Fund recoveries to meet its cost share requirements under RCRA Section 9003 (h)(7)(B), in accordance with 40 CFR 31.25 (g)(3).~~

third party liability costs, and should not be used in the case of solvent RPs who can afford the cost of corrective action. Thus, State funds used for this purpose would not be used in a LUST Trust Fund eligible manner and would not qualify toward satisfying the State match requirement.

An added rationale for not permitting States' traditional method of using their funds to qualify as match is that Congress intended that owners and operators be held responsible for releases from their tanks, and required them to obtain financial responsibility. The LUST Trust Fund was intended to be used as a backup source of funding, after funds were provided by the tank owner's financial assurance mechanism, which in these cases is the State fund.

A general rule of thumb that can be used is that if the circumstances of the case are such that the criteria for using the LUST Trust Fund are met, then State UST fund expenditures should generally qualify for matching purposes. For those States that desire to use their UST fund toward satisfying the LUST Trust Fund State match requirement, this provision should be incorporated into the State's LUST Trust Fund cooperative agreement with the Agency.

3. States are not required to cost recover their State match funds.

While EPA's LUST Trust Fund cost recovery policy requires States to pursue recovery of Trust Fund expenditures, this provision applies only to Federal monies that are expended, to funds supplied by the State as part of the State's cost share requirement. The rationale for this conclusion is found in EPA's LUST Trust Fund Cost Recovery Policy, which states that expenditures from the LUST Trust Fund constitute a debt and a liability of the owner/operator to the United States. While this provision clearly applies to the Federal portion of Trust Fund expenditures, it does not apply to the State's cost share contribution.

Attachment

cc: Howard Corcoran, OGC
Jane Souzon, OGC
Lee Tyner, OGC
Harvey Pippen, GAD
Bruce Feldman, GAD
Maureen Ross, GAD
Sallyanne Harper, FMD
Liz Milstead, FMD
Elissa Karpf, OIG

Consistent with our existing cost recovery policy, States may still retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements.

2. Some expenditures from State financial assurance funds can be used to meet State match requirements.

Another question we addressed in Atlanta was whether expenditures from State UST funds could be used toward satisfying the ten percent State match requirement under the State's LUST Trust Fund cooperative agreement. We concluded that State UST fund monies can be applied toward the match, provided they are spent on LUST Trust Fund allowable activities. The use of State funds in this manner should be approached with caution, however, because many expenditures from State funds (e.g., reimbursement of cleanup costs at sites owned by solvent tank owners) would not be allowable costs under the LUST Trust Fund. This issue is discussed in more detail below.

There may be a limited number of situations where State UST funds could be used in a manner that would be considered allowable under the LUST Trust Fund. Some examples of qualified uses of State funds for match purposes include, but are not limited to, the following:

- o **Oversee RP-lead cleanups, under the State fund program.** Since oversight of RP-lead cleanups is a LUST Trust Fund allowable activity, regardless of the solvency of the RP or presence of other methods of financial responsibility, State funds used for this purpose would be used in a LUST Trust Fund allowable manner.
- o **State-lead cleanups that meet LUST Trust Fund criteria.** For States that allow themselves direct access to their UST fund, several situations may arise where State funds could be expended in a LUST Trust Fund allowable manner. These situations include:
 - emergencies
 - abandoned tanks (no identifiable RP)
 - recalcitrant RPs (despite the presence of the State fund)
 - investigation of a release to determine its source

In contrast to the situations described above, the traditional method of expending monies from most State UST funds would generally not be considered LUST Trust Fund allowable and, thus, such expenditures would not be considered eligible for use in satisfying the State match requirement. For instance, most State funds are set up to pay for or reimburse a tank owner for the cost of corrective action and/or third party liability after payment of a deductible. The LUST Trust Fund cannot be used for



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

AUG 23 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RES

MEMORANDUM

SUBJECT: Revisions to LUST Trust Fund Policy and Guidelines

FROM: David W. Ziegele, Acting Director
Office of Underground Storage Tanks

TO: UST Regional Program Managers, Regions 1-10

This memo provides written notice of changes in our policies on allowable sources of State matching funds for satisfying the cost share requirement under LUST Trust Fund cooperative agreements. These policies were presented to you last year at the Regional Program Managers' meeting in Atlanta, and have been applicable since that time. We apologize for the length of time it has taken us to commit them to writing. They will be formally incorporated into the LUST Trust Fund Guidelines (OSWER Directive 9650.10) in the future. The policies and this memo have been reviewed and agreed to by the Office of General Counsel, Office of the Inspector General, the Grants Administration Division, and the Financial Management Division.

1. Recovered Federal LUST Trust Fund money may no longer be used as matching funds.

In the past, our written Trust Fund policy and special conditions allowed States to use recovered Federal funds to meet their cost share ("match") requirement, if specific provisions were made for such an arrangement in their cooperative agreements. At the request of the Office of the Inspector General, and in consultation with the Office of General Counsel, we decided to withdraw this option from future cooperative agreements.

As we discussed in Atlanta, and with many of you individually since then, there was no need to modify any cooperative agreements that were then in existence, even if they allowed States to use cost recovered monies as State matching funds. However, any cooperative agreements involving FY 1991 (and beyond) LUST Trust Fund monies were required to delete this option from the standard special conditions. You were encouraged to notify your States of this change at that time, particularly if their existing agreements contained this option. Attached is a marked-up copy of the special conditions, which show the necessary revisions.

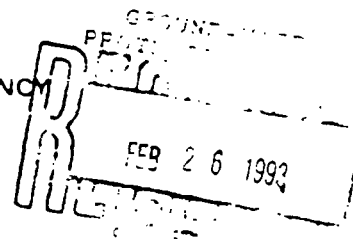
I apologize for any confusion that may have resulted from the February 12 memo.

Attachment

cc: Regional Program Managers
OUST Management Team
John Heffelfinger
David Hamnett



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



FEB 24 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Correction of February 12 Memo on Cost Recovery

FROM: David Ziegele, Director *David Ziegele*
Office of Underground Storage Tanks

TO: UST Regional Branch Chiefs

I am writing to correct a minor misstatement of our current policy on LUST Trust Fund cost recovery that was contained in a memo I sent you on February 12, 1993. That memo explained our decision to retain the current cost recovery policy without modifications.

Page two of the memo summarizes some basic precepts and requirements of the policy including those governing management of recovered federal funds. The memo incorrectly says that states may use recovered federal Trust Fund monies to meet requirements for matching funds under their cooperative agreements. In fact, OUST withdrew that option for use of recovered federal funds at the request of the Office of the Inspector General and the Office of General Counsel. This decision was announced in 1990 and confirmed in writing to our Regional UST Program Managers in a memo dated August 23, 1991.

I have attached a copy of the August 23, 1991 memorandum which was written before we were routinely sending all program correspondence to you. It summarizes three changes in Trust Fund policy and includes required language for special conditions that reflect the current policy. This language should have been incorporated into all cooperative agreements involving FY 1991 Trust Fund monies as well as all subsequent agreements. OUST developed the special conditions (along with the cost recovery policy) in cooperation with the Offices of General Counsel and the Comptroller to incorporate the minimum requirements for cost recovery into each cooperative agreement. The Regional UST programs should continue to use appropriate sections of these special conditions until further notice.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

MAR 19 1993

MEMORANDUM

SUBJECT: UST Cost Recovery Policy
FROM: John K. Mason, Chief *John K. Mason*
Underground Storage Tank Section
TO: Addressees

I am attaching a copy of two memos from David Ziegele, one (February 12, 1993) is regarding the possibility of revision to the UST cost recovery policy. The other (February 24, 1993) is a correction to the previous memo with supporting documentation attached.

OUST review finds the cost recovery policy still adequately reflects the program philosophy towards cost recovery. The attached memo outlines the minimal requirements to which states must conform with the cost recovery policy.

If you have any questions, please contact me at 404/347-3866

Attachments

Addressees:

ALABAMA, Sonja Massey
FLORIDA, Marshall Mott-Smith
GEORGIA, Randy Williams
KENTUCKY, Doyle Mills
MISSISSIPPI, Walter Huff
NORTH CAROLINA, Burrie Boshoff
SOUTH CAROLINA, Stan Clark
TENNESSEE, Chuck Head



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

FEB 25 1993

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Current Interest Rate for LUST Trust Fund Expenditures

FROM: David Ziegele, Director *David W. Ziegele*
Office of Underground Storage Tanks

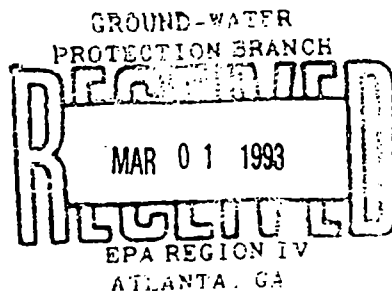
TO: Regional UST Program Managers

This is to provide notice that for expenditures made during calendar year 1993, the minimum recommended interest rate to be assessed on funds from the Leaking Underground Storage Tank (LUST) Trust Fund is four (4) percent. Please see that appropriate individuals in each of your States receive written notice of this change.

To the extent that they are legally able, States should assess and pursue recovery of interest from tank owners and operators, particularly where States have performed corrective actions. Interest charges can provide owners and operators with important incentives to settle recovery claims. In many cases, they also provide States with significant income which they may retain along with other LUST Trust Fund recoveries for use on other eligible sites and activities. The Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10) contains a more complete discussion of interest charges on Trust Fund expenditures.

The suggested minimum interest rate for Trust Fund recoveries is equal to the U.S. Treasury Current Value of Funds Rate. We will notify you of future changes in this rate.

cc: Regional UST Branch Chiefs
Dana Tulis
Liz Milstead
Maureen Ross
Jane Souzon
Desk Officers



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

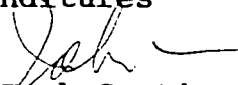
REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

MAR 11 1993

MEMORANDUM

SUBJECT: Current Interest Rate for
LUST Trust Fund Expenditures

FROM: John K. Mason, Chief 
Underground Storage Tank Section

TO: Addressees

The attached memo from David Ziegele, dated February 25, 1993, informs us of the minimum recommended interest rate to assess on the Leaking Underground Storage Tanks (LUST) Trust Fund's expenditures. The rate for expenditures made during calendar year 1993 from the LUST Trust Fund is four (4) percent.

If you have any questions, please call me at 404/347-3866.

Attachments

Addressees:

ALABAMA, Sonja Massey
FLORIDA, Marshall Mott-Smith
GEORGIA, Randy Williams
KENTUCKY, Doyle Mills
MISSISSIPPI, Walter Huff
NORTH CAROLINA, Burrie Boshoff
SOUTH CAROLINA, Stan Clark
TENNESSEE, Chuck Head



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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

JAN 24 1992

MEMORANDUM

SUBJECT: Current Interest Rate for LUST Trust Fund Expenditures

FROM: David Ziegele, Director
Office of Underground Storage Tanks

TO: Regional UST Program Managers

This is to provide notice that for expenditures made during calendar year 1992, the minimum recommended interest rate to be assessed on funds from the Leaking Underground Storage Tank (LUST) Trust Fund is six (6) percent. Please see that appropriate individuals in each of your States receive written notice of this change.

To the extent that they are legally able, States should assess and pursue recovery of interest from tank owners and operators, particularly where States have performed corrective actions. Interest charges can provide owners and operators with important incentives to settle recovery claims. In many cases, they also provide States with significant income which they may retain along with other LUST Trust Fund recoveries for use on other eligible sites and activities. The Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10) contains a more complete discussion of interest charges on Trust Fund expenditures.

The suggested minimum interest rate for Trust Fund recoveries is equal to the U.S. Treasury Current Value of Funds Rate. We will notify you of future changes in this rate.

cc: Dana Tulis
Liz Milstead
Maureen Ross
Jane Souzon
Desk Officers

LUST/CR/92-1



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

APR 10 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Current Interest Rate for LUST Trust Fund Expenditures
FROM: David Ziagele, Acting Director
Office of Underground Storage Tanks
TO: Regional UST Program Managers

This is to provide notice that for expenditures made during calendar year 1991, the minimum recommended interest rate to be assessed on funds from the Leaking Underground Storage Tank (LUST) Trust Fund is eight (8) percent. Please see that appropriate individuals in your States receive written notice of this change.

To the extent that they are legally able, States should assess and pursue recovery of interest from tank owners and operators, particularly where States have performed corrective actions. Interest charges can provide owners and operators with important incentives to settle recovery claims. In many cases, they also provide States with significant income which they may retain along with other LUST Trust Fund recoveries for use on other eligible sites and activities. The Cost Recovery Policy for the LUST Trust Fund (OSWER Directive 9610.10) contains a more complete discussion of interest charges on Trust Fund expenditures.

The suggested minimum interest rate for Trust Fund recoveries is equal to the U.S. Treasury Current Value of Funds Rate. We will notify you of future changes in this rate.

cc: Mike Williams
Liz Milstead
Marshall Schy
Jane Souzon
Desk Officers

LUST/CR/91-1

Printed on Recycled Paper



DIRECTIVE NUMBER: 9610.10

TITLE: Cost Recovery Policy for the Leaking
Underground Storage Tank Trust Fund

APPROVAL DATE: October 7, 1988

EFFECTIVE DATE: October 7, 1988

ORIGINATING OFFICE: Office of Underground
Storage Tanks (OUST)

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents):

Supplemental Guidelines for FY89 LUST Trust Fund
Cooperative Agreements; OSWER Directive 9650.7;
April 7, 1988.

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F DIRECTIVE DIRECTIVE D.



OSWER Directive Initiation Request

Directive Number

9610.10

2. Originator Information

Name of Contact Person
David Hamnett
Title

Mail Code
OS-410

Office
FOUST

Telephone Code
475-9377

Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund

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

This Directive is the first full statement for States and EPA Regional Offices of the policies, priorities, and procedures for cost recovery under the LUST Trust Fund. Special conditions that will incorporate the policy into Trust Fund cooperative agreements are included.

5. Keywords

Cost Recovery, LUST Trust Fund, Underground Storage Tanks, Cooperative Agreements, Special

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



No



Yes

What directive (number, title)

Conditions

b. Does It Supplement Previous Directive(s)?



No



Yes

What directive (number, title) 9650.7;

Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (Replaces Cost

7. Draft Level



A - Signed by AA/DAA



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
Beverly Thomas

Date

9/15/88

10. Name and Title of Approving Official

Sharon Foote
Sharon Foote, OSWER Directives Officer

Date

10-7-88

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

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

OCT 7

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: LUST Trust Fund Cost Recovery Policy and Special
Conditions

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

ATTN: Waste Management Division Directors,
Regions I-III, V-IX
Water Management Division Directors, Regions IV, X

Attached is the final Cost Recovery Policy for the Leaking Underground Storage Tank (LUST) Trust Fund. Also attached is a set of special conditions for LUST Trust Fund cooperative agreements that reflect the policy. Both are products of an intensive effort to develop a framework for cost recovery that incorporates the State-centered design of the Underground Storage Tank program.

The Office of Solid Waste and Emergency Response worked closely with the Office of General Counsel, the Office of the Comptroller, the Regional UST programs and other Headquarters offices over the last year to develop this innovative policy. These offices were also instrumental in helping us obtain concurrences on our approach from the Department of Justice (DOJ), the Office of Management and Budget, and Congressional staff.

The two most innovative aspects of the policy should provide States with the autonomy and incentive to pursue recoveries aggressively and efficiently. First, to streamline the recovery process, States will generally be able to litigate and settle cost recovery claims without the involvement of EPA or DOJ. Second, to provide incentives for pursuing cost recovery, States will retain recovered Trust Fund expenditures to perform additional cleanups or to satisfy their cost share requirements.

-2-

This policy replaces the cost recovery section (Section 11.1) of OSWER Directive 9650.7 (Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements), dated April 7, 1988. This policy will also be incorporated into a set of consolidated LUST Trust Fund Guidelines that will be released in the next few weeks.

To encourage States to proceed with recoveries on cleanups now underway, Regions should amend all existing LUST Trust Fund cooperative agreements to include the attached special conditions. This will also eliminate inconsistencies in recordkeeping and recovery procedures that would otherwise make oversight of the program unnecessarily complex.

I am certain that this policy will help us continue to build strong State underground storage tank programs. I want to congratulate everyone who contributed to the development of the policy.

Attachments

cc: Charlie Grizzle
Larry Jensen
Dave Ryan
Harvey Pippen
Tony Musick
Ron Bachand
Howard Corcoran
Louise Wise
Regional UST Program Managers

COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND
STORAGE TANK TRUST FUND

A. Overview

This is EPA's first complete statement of its policies on cost recovery under the Leaking Underground Storage Tank (LUST) Trust Fund. It has required a year of coordinated effort by various EPA offices to develop and to secure necessary approvals within the Agency and from other agencies and officials in the executive and legislative branches of government. Working with and through States to implement this policy, EPA expects that it will help cost recovery to become a practical and effective tool that States will use to both stimulate and fund more cleanups of releases from underground storage tanks.

Objectives of Cost Recovery

The primary purpose of cost recovery under the LUST Trust Fund is to provide incentives for owners and operators to comply with technical and financial responsibility requirements, and most importantly to clean up releases from their own tanks. EPA expects that State-lead cleanups followed by cost recovery will continue to occur in a minority of cases, because the majority of cleanups are conducted by owners and operators. When cost recovery is necessary, it will generate income for additional cleanups.

Cost recovery as practiced under the LUST Trust Fund will depart significantly from the approaches taken in other Federal environmental response programs. Consistent with the State-centered design of the underground storage tank program, States will implement the cost recovery program, have considerable discretion in operating it, and benefit directly from their successful recoveries.

The two most innovative aspects of EPA's cost recovery policy for the LUST Trust Fund should provide States with the autonomy and the incentive necessary to pursue recoveries aggressively and efficiently. First, States with cooperative agreements will litigate and settle recovery claims without the routine involvement or concurrence of EPA or the Department of Justice. Second, States may retain any Trust Fund monies they recover for use on additional Fund-eligible cleanups and activities.

Legal Rationale

The legal rationale behind this approach was developed by the Agency in consultation with the Department of Justice.

Under 28 U.S.C. Section 516, the Department of Justice (DOJ) must conduct any litigation in which the United States has an interest unless there is an exception authorized by law. EPA interprets section 9003(h) of Subtitle I to be such an exception, allowing States under cooperative agreements that have the capabilities to carry out effective corrective actions and enforcement activities to exercise various program authorities, including the cost recovery authority provided in section 9003(h)(6). These States may also settle cost recovery litigation as part of the exercise of enforcement discretion conveyed by section 9003(h).

Additionally, EPA interprets section 9003(h) to provide authority for States to administratively settle cost recovery claims. EPA believes that this authority includes the ability to compromise or terminate Trust Fund claims based on considerations of equity as described in section 9003(h)(6)(B) (e.g., reducing the claim to the amount of required financial responsibility).

Finally, EPA has determined that, consistent with the "program income" concept described in OMB Circular A-102, that States may retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements. Thus, appropriate requirements in 40 C.F.R. Parts 30 and 31 on the documentation and use of program income apply to recoveries of Trust Fund money.

Recovery Procedures

Variations in State recovery procedures can be expected, but generally States will be responsible for all of the following activities in cases that they deem to be high priorities:

- o Determination of a release
- o Notification of responsibility to the owner or operator
- o Negotiation for corrective action (in non-emergency situations)
- o Cleanup (if the owner or operator is incapable or unwilling to clean up)
- o Demand for payment
- o Negotiation for a settlement of the recovery claim

- o Litigation (when demand for payment and efforts to reach an administrative settlement fail)
- o Collection and case closure

States are encouraged to tailor the specifics of these procedures to suit their individual programs and to save program resources. In addition, the detailed policy guidance that follows has been developed to help ensure that cost recovery resources are used efficiently and stimulate compliance by owners and operators.

B. State and Federal Roles in Cost Recovery

Policy

Under their cooperative agreements, States are responsible for all legal, programmatic, and administrative activities necessary to recover their expenditures from the LUST Trust Fund. This includes undertaking administrative and judicial recovery actions and settling claims. They are responsible for required reporting and recordkeeping including documenting that their Trust Fund recoveries are used for additional eligible activities under their cooperative agreements. EPA will provide general policy guidelines to States and make funding available for recovery programs through the States' cooperative agreements. EPA will also assess the performance of State cost recovery programs and provide support and assistance to States where they are needed to improve performance. The Agency will generally be bound by settlements and judgments reached in States, but reserves the right to pursue recoveries independently in the extreme case. Also, EPA may pursue recoveries in those rare cases where the Agency has performed a federal-lead response.

Guidance

States are expected to have adequate legal authorities to undertake cost recovery either by having or acquiring their own authorities, or certifying that they are able to use federal authorities. States with their own recovery authorities should also cite Subtitle I in their recovery actions (i.e., demand letters, administrative orders, and judicial complaints) to establish the liability of owners/operators to the federal government for Trust Fund expenditures.

EPA is currently formulating policies on a number of issues related to recovery litigation. One major unresolved issue is whether States should bring judicial recovery actions in State or federal courts. Until these issues are resolved, States should, within one week, notify EPA's Office of Regional Counsel when filing judicial recovery actions for sites where they have used Trust Fund money for cleanup or enforcement. This will give EPA the opportunity to consult with the State, determine whether the action might affect the scope of the Agency's Subtitle I authorities, and if necessary, provide technical or legal assistance to the State. However, EPA will not require States to delay recovery litigation while the Agency reviews complaints submitted by States.

States must maintain accounting and recordkeeping systems that will document all Trust Fund expenditures, support cost recovery with site-specific records, and demonstrate that recovered funds are retained and used for additional eligible activities or as matching funds under their cooperative agreements. State recordkeeping and accounting must conform to requirements in these guidelines and in the forthcoming LUST Trust Fund State Financial Management Handbook, when it becomes available.

States will have considerable discretion in prioritizing cases for cost recovery and determining an appropriate level of effort to devote to each case. At a minimum, in each case States should make reasonable efforts to contact owners and operators who are liable for releases, notify them of their liability for enforcement and corrective action costs, and demand payment. In those rare cases where equitable factors support compromise or termination¹ of the Trust Fund claim, States should ensure that the bases for any compromise or termination are adequately supported in the records of the State and reflect the efficient use of Trust Fund resources. States may compromise Trust Fund claims when, for example, an owner/operator demonstrates that he/she lacks the financial resources to pay the claim; the State determines that the likelihood of success on litigating the claim as small because of the absence of proof of liability or unavailability of required witnesses; or costs of judicial collection is disproportionately high. States should note that their ability to reduce claims based on the equities described in section 9003h(6)(B) is limited to cases where owners/operators have maintained required levels of financial assurance.

Because they are more cost effective, negotiated settlements are generally preferred over litigation. In many cases, however, EPA expects that it will be necessary for States to initiate and pursue judicial action to compel recalcitrant owners and operators to pay cleanup costs. In deciding whether to litigate individual cases States should consider the solvency of the owner/operator, the costs of cleanup, the likelihood of recovery, the case's deterrence value and the opportunity costs (the resources necessary to proceed that could otherwise be used in pursuing other cases or in other parts of the State's Trust Fund program).

1/ As used here, the term "compromise" means accepting less than the full value of the claim. The term "termination" means forgoing any cost recovery whatsoever.

Even where no administrative or judicial settlement is reached, States must formally close out all cases and document the reasons for deciding not to proceed further. Factors justifying case closure include the situations where costs of pursuing a case further will approach or exceed the potential recovery, bankruptcy of the owner/operator, and other reasons. States should not allow the statute of limitation (SOL) to run and justify closure solely on that basis. States should generally pursue cases promptly and file actions in a timely manner to enhance the chances for recovery. States should revise their priorities for individual recovery cases as SOL deadlines approach. Until the issue is resolved by the courts, States relying solely on Subtitle I cost recovery authorities should be prudent and proceed assuming a three year limit applies, despite the fact that EPA believes that a six year limit is applicable. This is necessary because some courts have applied the three year limit to similar cases.

When States make successful recoveries at sites where Trust Fund monies were used, they may retain the Trust Fund share as program income consistent with OMB Circular A-102 and 40 CFR Parts 30.525 and 31.25. This means that States may use recovered federal Trust Fund monies for additional Fund-eligible cleanups and activities under their agreements. When States choose to do so, they must inform EPA, and keep appropriate records of how the recoveries were used. States may also use LUST Trust Fund recoveries to meet their cost share requirement under section 9003(h)(7)(B). If a State elects to do this, it must be specified in their cooperative agreement. In negotiating their cooperative agreements, States and Regions should develop contingency plans that will allow States to obligate their recoveries efficiently. States should calculate the federal Trust Fund share of their recoveries on a site-by-site, pro rata basis. For example, if a State spends 50 thousand dollars of LUST Trust Fund money at a site, and the State ultimately recovers 50 percent of all Federal and State money used at the site, it must redirect 25 thousand dollars of "program income" into Fund-eligible activities.

EPA expects States with cooperative agreements to adequately fund and staff recovery efforts to deal with anticipated case loads. Cost recovery activities are allowable costs under Subtitle I. Where the recovery program is dependent on the Attorney General's Office, the State should consider the need for formal funding arrangements (e.g., a memorandum of agreement) to ensure legal staffing for cost recovery referrals. When the Trust Fund is not used to pay for such legal staffing, States may wish to investigate the possibility of counting these legal services as "in-kind contributions" toward satisfying their match requirements under 40 C.F.R. Part 31.24.

EPA's principal responsibilities in cost recovery are to provide funding, policy, guidance, oversight, and assistance to States. The Agency's operational role in cost recovery will generally be limited to pursuing recoveries in those cases where EPA responds directly to a release, and in rare cases of overfiling.

EPA intends to make its expectations for the activities and performance of cost recovery programs reasonable and clear to States in advance. This will occur through policy, guidance, routine communications, program appraisal and reviews, and the negotiation of cooperative agreements. The oversight and assistance functions of EPA's program, grants, and financial management offices will accommodate variations in State procedures and capabilities to the maximum extent possible. The Agency's goals will be to help build State capabilities, particularly in developing recovery programs and to improve performance. At present, EPA has no numerical expectations for the performance of State recovery programs. Early in the recovery program it will focus on States' progress toward putting basic systems, policies, and procedures in place that will enable them to recover Trust Fund expenditures efficiently and effectively.

EPA is working with several States on pilot projects to develop realistic expectations for program performance, and to identify effective recovery procedures. The results will help EPA support State programs with tools and guidance. They will also help the Agency formulate and communicate more precise expectations for program performance.

Generally, EPA will be bound by States' judicial actions and settlements. However if EPA finds that a State is not effectively implementing cost recoveries, the Agency will offer the State necessary assistance in correcting any problems. The Office of Underground Storage Tanks will be most interested in seeing that States have adequate accounting and recordkeeping systems in place and that States identify, develop, and pursue appropriate recovery cases in a timely and sound manner. If problems in these or other areas persist, the Agency may take appropriate action under regulations governing cooperative agreements. In extreme cases, EPA may consider filing a recovery action against the owner/operator even though the State has the authority to initiate an action or has already done so.

C. Recoverable Costs

Policy

Owners and operators are liable for all costs of corrective action and enforcement, including interest, indirect and "management and support" costs associated with these activities that are paid for by the Trust Fund. States are not required to pursue Trust Fund expenditures for program management costs incurred by the U.S. E.P.A.

States will assess and may collect interest on Trust Fund expenditures used for corrective action and enforcement. Interest charges should provide incentives for responsible parties to settle cost recovery claims. Procedures for assessing interest charges are described separately in this document.

Owners and operators are also liable for Trust Fund expenditures made by States in overseeing responsible party cleanups. Generally, the costs of oversight are comparatively low and the number of cases is very large. Therefore, EPA expects that States will exercise discretion in determining an appropriate level of effort to devote to pursuing oversight costs.

Guidance

In each case, States will exercise their discretion in determining exactly which costs they will pursue. EPA is more interested in a State's overall record in cost recovery than in retrospectively examining decisions to pursue particular costs in hundreds or thousands of cases. Direct costs are most easily documented and defended in litigation. However, EPA is developing, and will soon distribute a simple procedure which will allocate all non-site Trust Fund costs including "management and support" costs to individual sites. Using this methodology, States will have available to them the full cost of a particular site cleanup at the time of the cost recovery action. To the extent that they are legally able, States should allocate all Trust Fund expenditures to sites for the purpose of cost recovery. States may also develop their own systems for allocating non-site costs and/or include additional State overhead costs that are beyond the scope of their cooperative agreements.

EPA expects that the costs of overseeing cleanups by cooperative owners and operators will usually be a lower priority for recovery because Fund expenditures for oversight of a typical cleanup will be comparatively small. In addition, States may wish to exercise their discretion and not pursue these costs in cases where this will provide valuable incentives for owners and operators to clean up releases from their tanks.

In some cases States will expend significant enforcement resources to compel reluctant owners or operators to cleanup or to pay cleanup costs (e.g., legal costs associated with cost recovery, protracted negotiations, issuance of cleanup orders and litigation). These costs are recoverable. Presenting these costs to liable owners and operators with the direct costs of cleanup will give States additional leverage in their attempts to reach agreements for responsible party cleanups and recovery of costs.

D. Interest Charges

Policy

Owners and operators are liable for interest charges on Trust Fund expenditures at their sites. States should assess interest on expenditures from the Fund in the cost recovery process. States are allowed to retain recovered interest for additional eligible activities.

Guidance

Section 9003(h) of the Resource Conservation and Recovery Act (RCRA) describes the States' role in recovering LUST Trust Fund expenditures - but does not specifically address the collection of interest on those expenditures. However, EPA is entitled under the Debt Collection Act and common law authorities to collect interest on Trust Fund expenditures. Since States will have responsibility for recovering Trust Fund expenditures under section 9003(h), the States will also assess and are encouraged to pursue interest charges. Because States are permitted to retain recoverable Fund expenditures for additional cleanups and recoveries, they can also retain recovered interest for use on additional eligible activities. The States' collection of interest will deter responsible parties from resisting payment in order to gain an interest-free loan on the uncollected expenditures.

Before assessing interest, the State should notify the debtor through a written notice (demand letter explaining the agency's requirements concerning the debt and the interest). Interest shall accrue from the date on which notice of the debt and interest requirements is mailed or hand-delivered to the responsible party.

The minimum recommended rate of interest that States should assess for the current year is 6.00 percent. It is found in the Yearly Percentage Bulletin printed every December with the rate for the following fiscal year. The rate is equal to the average investment rate for the Treasury tax and loan accounts. It represents the current value of funds to the United States Treasury, and is published by the Treasury's Financial Management Service. EPA will notify States of the new rates each year.

EPA is examining the possibility of calculating a minimum interest rate that more closely approximates the yield on Trust Fund investments. The Agency will notify States if and when they are to use this type of minimum rate.

A State may assess a higher rate of interest if it reasonably determines that this is necessary to protect the expenditures from the Trust Fund. The rate of interest as initially assessed will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. New agreements should reflect the current value of funds to the Treasury at the time the new agreement is executed.

Interest should not be recovered if the amount due (Trust Fund expenditures) is paid within 30 days after the date from which the written notice was delivered to the responsible party. However, the State may decide, on a case-by-case basis, to extend the 30-day period for payment.

As part of their responsibility for settling claims, States may decide not to pursue the collection of interest on a debt entirely or in part once it has been assessed when they determine it is in the best interest of the program. States may decide not to pursue interest if the collection of interest puts the responsible party in financial distress, or the cost of collecting the interest will be more than the amount collected.

E. Priorities For Cost Recovery

Policy

Under their cooperative agreements States should have or should develop systems to set priorities for cost recovery cases. They should devote greatest efforts to cases where owners or operators are solvent but recalcitrant, and to cases where they fail to comply with applicable financial responsibility requirements. Some effort should be devoted to all cases involving Trust Fund cleanups or enforcement actions. This means, at a minimum, a search for responsible parties (RPs) and a demand for payment if an RP is located.

Guidance

Where the State expends Trust Fund money for corrective action or enforcement, and "action thresholds" (see section "F") have triggered site-specific accounting, the State will pursue recovery of costs from responsible parties. Timely processing of cases (and litigation where necessary) increases the chances of successful recovery. However, the level of recovery effort that should be devoted to any case should be based on a weighing of the resources necessary to recover the claim against the amount that may be recovered and the prospects for recovery. The determination should be based on factors such as: the solvency of the RP, the cost of cleanup, the likelihood of recovery, the deterrent value of the case, and the opportunity costs (resources that could be used in pursuing other cases or in other parts of the State's Trust Fund program).

States will develop their own priority systems based on these and other relevant considerations, but there are general circumstances where cost recovery should be assigned a high priority, low priority, or is impracticable because owners or operators cannot be located.

- High priority - Solvent RPs who refuse to comply with corrective action orders or are otherwise recalcitrant should be pursued aggressively, to serve as a warning to the regulated community and to stimulate compliance by other RPs.

- High priority - Owners and operators who do not comply with financial responsibility requirements should be pursued vigorously. Although Section 9003 of RCRA generally allows consideration of whether pursuit of full cost recovery will significantly impair an RP's ability to continue in business, States are precluded by statute from considering this factor if the RP has not complied with financial responsibility requirements in effect at the time.
- Low priority - States should generally commit fewer resources to insolvent or financially distressed RPs, although selective pursuit within the class should be undertaken where the RP could afford lesser amounts, is hiding assets, fails to cooperate, or was negligent in allowing the release to occur. Whenever States perform corrective actions using the Trust Fund, the RP should, at a minimum, be sent a demand for payment. The level of additional State effort beyond this point should be based on an evaluation of the factors listed above. Where cooperative owners and operators perform cleanups, States may wish to make recovery of oversight costs a low priority, to encourage voluntary cleanups.
- Impracticable - Sites where a liable owner or operator cannot be identified will require expenditures from the Trust Fund for cleanup. Efforts to recover costs expended at these sites will rarely result in recovery of funds. However, States should make reasonable efforts to locate a liable owner or operator before assigning a low priority to cost recovery in these cases.

F. Documentation Of Costs

Policy

States are required to document all Trust Fund expenditures and all corrective action and enforcement costs on a site-specific basis at each site where they have met any one of the following "action thresholds": 1) performed an emergency response; 2) begun a detailed site investigation; or 3) determined that an owner or operator is or is likely to be recalcitrant.

Guidance

States must establish a financial cost accounting system that tracks the costs of cleanup and enforcement activities on a site-specific basis when any one of the specified "action thresholds" is met. States are normally not required to begin site-specific accounting until States or their contractors begin a Trust Fund-financed, detailed site investigation or an emergency response has begun. A detailed site investigation is an attempt to determine the source, extent and severity of a release. An initial site visit (e.g., to determine if a release has occurred) should generally not trigger site-specific accounting because not all sites will be candidates for significant Trust Fund expenditures and cost recovery. If an RP is clearly recalcitrant, however, site-specific accounting should begin as soon as costs are incurred. Generally, contractor activity at a site will trigger site-specific accounting.

Site-specific information needed on corrective action activities and costs for sites where Trust Fund monies are used includes:

- Site location and description
- Results of site investigations (including identification of responsible parties)
- Enforcement actions taken
- Documentation of responses taken and time frames
- Documentation of all costs, identifying Trust Fund monies expended including contractor invoices

Enforcement costs include all expenditures reasonably related to inducing a recalcitrant RP to comply and to recovering clean-up expenditures. They include the salaries and other expenses associated with case development, negotiations, and litigation.

States should establish cost-effective accounting systems to support recovery of Trust Fund monies in courts. Features of cost documentation that are essential to recovering costs in court include:

- Systems that are adequate for both cost recovery purposes (i.e., will support the State's claim in administrative or judicial action to recover) and audit purposes. At a minimum, the system should provide proof that the work or purchase was authorized by the State; the work or purchase was completed; the State was billed; and the bill was paid.
- In many cases, States may have to respond to arguments that the costs claimed are unreasonable and unnecessary.

The Financial Management Division of EPA's Office of the Comptroller is developing more detailed guidance for State accounting and recordkeeping. The LUST Trust Fund State Financial Management Handbook will be made available by early FY 1989 to help States meet these accounting requirements.

REQUIREMENTS FOR INCLUSION
IN LUST STATE COOPERATIVE AGREEMENTS

State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also 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. Parts 30 and 33 (for procurement) apply to other cooperative agreements and amendments.

2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (OSWER Directive 9650.7) where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities. The State may also use LUST Trust Fund recoveries to meet its cost share requirements under RCRA Section 9003 (h)(7)(B), in accordance with 40 CRF 31.25 (g)(3).

(CONTINUATION OF SPECIAL CONDITION 3 --
INSERT 1 OR 2 BELOW)

(INSERT 1, for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities or for State cost share requirements, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2, for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and

- (iii) To the extent the State is successful in recovering these costs, it will dedicate those funds for additional Trust-Fund-eligible activities or for State cost share requirements, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this cooperative agreement.
- (iv) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

[END OF INSERT 2]

- 4. State agrees to maintain supporting documentation and appropriate records in support of any future cost recovery efforts. The State shall adhere to the principles of documentation and records retention specified in the OSWER Directive 9610.10 Cost Recovery Policy for the LUST Trust Fund (October, 1988). On topics not addressed by these guidelines, the State agrees to adhere to the principles of documentation and record retention specified in The State Superfund Financial Management and Recordkeeping Guidance until such time as the State and EPA agree to implement the requirements of The Leaking Underground Storage Tanks Trust Fund State Financial Management Handbook. The State agrees to make these records available to the federal government, as needed, on a case-by-case basis.
- 5. State agrees to provide reports as outlined in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements: (April 7, 1988). These reports consist of Quarterly Progress Reports, Financial Status Reports (SF 269) Federal Cash Transactions Report (SF 272), and Exception Reports.
- 6. State agrees to identify Letter of Credit drawdowns under EPA's three major activity codes. The three codes are: "7" -- General Support and Management, "E"-- Site Cleanup Actions, and "4" -- Enforcement.



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

MAR 25 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Development of LUST Cost Recovery Policy and Financial Management Guidance

FROM: David P. Ryan, Comptroller
Ron Brand, Director
Office of Underground Storage Tanks (OUST)

TO: Addressees

Since last fall our offices have been working on several policy and guidance documents relating to cost recovery, and financial management and accounting for state and regional underground storage tanks programs. This memo summarizes key policy decisions made thus far which will be reflected in formal guidance documents we are preparing for you and the states and will distribute the next few weeks.

SUMMARY OF THE TRUST FUND COST RECOVERY POLICY

The Office of Underground Storage Tanks has shaped its proposed policy with four objectives in mind:

1. In cost recovery as in other parts of the UST program, EPA is committed to building a state-centered program.
2. The policy will provide incentives for responsible parties to clean up their releases and comply with regulations.
3. The policy will encourage states to manage their cost recovery program wisely by setting priorities among sites and making cost recovery efforts proportional to factors such as the cost of cleanup, the likelihood of recovery and the deterrent value of each case.
4. Recoveries will provide funds for additional cleanups.

The policy takes into account our mandate from Congress, the nature of the regulated community and the large number of sites requiring cleanups. The major characteristics of the policy are:

States are expected to set priorities for recovery cases, concentrating their efforts on owner/operators who are solvent but unwilling to undertake cleanup at their own expense. States should also consider the size of the potential recovery, the likelihood of recovery and the deterrent value of cases in setting their priorities. Higher priority cases will be pursued most aggressively, through litigation if necessary. States will generally pursue lower priority cases with less resource-intensive methods (e.g., billings). States are expected to close every case eventually and document the decisions to do so.

In order to provide an incentive for responsible party cleanups, states may exercise discretion in deciding whether to pursue the oversight costs associated with cleanups conducted by cooperative owner/operators. States will usually begin site-specific accounting once a detailed site investigation or an emergency response is begun. State accounting systems and recovery efforts are to focus primarily on the direct costs of cleanup and enforcement actions.

REMAINING ISSUES

Our staff managers have worked together to craft this policy. However, our work is not finished. We are now preparing to seek the Administrator's concurrence on our policy.

There are two key areas of the proposed policy which yet remain unresolved. They are: the states' legal authority to bring judicial recovery actions and reach settlements without Federal involvement and whether states can retain recovered funds for use on additional eligible activities. At present, we are examining the legal and policy implications of these proposals and will be conferring with various organizations inside and outside EPA.

SCHEDULE FOR POLICY AND GUIDANCE DOCUMENTS

OUST plans to use its 1989 Trust Fund Cooperative Agreement Guidelines to inform you about all aspects of the policy that are approved when the guidelines are issued. The guidelines will be distributed by April 1. When discussions with DOJ and OMB conclude OUST will issue a comprehensive cost recovery policy that will resolve the remaining issues. The Financial Management Division of the Comptroller's Office will complete and distribute their guidance after the LUST Cost Recovery Policy is final.

UST Cost Recovery Policy: This OSWER directive will explain the final EPA policies on cost recovery, including disposition of recovered funds. Release is scheduled for late April 1988.

State Handbook: This two-part guidance will describe for the states how to deal with EPA on fiscal matters and how to meet cost documentation requirements. Publication is planned during the summer of 1988.

Comptroller's Directive: This directive will outline for the Regions EPA's policies and procedures relating to cost documentation and the financial management of the Trust Fund. It will be released during the summer of 1988.

Review Protocol: This guide for the Regions will set out the steps they should follow when performing fiscal reviews of state programs. It is also due during the summer of 1988.

We hope you find this update informative and useful. We will keep you informed of our progress in getting final approval for the proposed policy. Until then, existing policies on these issues must remain in force.

If you have any questions regarding the proposed policy or our planned products please call us. Our staff members working on these issues are:

David Hamnett - OUST (475-9377)

Nikos Singelis - Budget Division/Comptroller's Office
(382-4198)

Liz Milstead - Financial Mgmt. Div./Comptroller's Office
(382-4205)

Addressees

Regional Comptrollers, Regions 1-10
Hazardous Waste Division Directors Regions 1-3, 5-9
Water Division Directors Regions 4, 10
Regional UST Coordinators



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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM:

SUBJECT: Interest Charges on 1990 Trust Fund Expenditures

FROM: Ron Brand, Director /original signed by/
Office of Underground Storage Tanks

TO: Regional Program Managers

Each year OUST recommends a minimum interest rate that States can use to calculate interest charges on expenditures from the Leaking Underground Storage Tank Trust Fund. The rate for expenditures made during calendar year 1990 is nine (9.00) percent. It is equal to the Treasury's Current Value of Funds Rate.

Tank owners and operators are liable for interest as well as associated corrective action and enforcement costs. In our cost recovery policy, we encourage States to pursue interest charges as an incentive for quick settlements. States may retain any interest that they recover.

Please notify the appropriate individuals in each of your States of the new rate.

cc: Liz Milstead (FMD)

FILE COPY

Printed on Recycled Paper

LUST/CR/90-1

INDIAN LANDS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

SUBJECT: Final Indian Lands Implementation Tool Kit

TO: UST Regional Program Managers

FROM: Pat Eklund, Chief *Pat*
Office of Underground Storage Tanks, Region 9
Josh Baylson
Josh Baylson
Office of Underground Storage Tanks

Enclosed is a final copy of the Indian Lands Implementation Tool Kit. We would like to highlight several changes that have been made since the second draft was circulated in September:

- Format - The majority of the Regions preferred having the text, tools, and appendices in one document. Three ring binders were chosen so that tools and other materials could be updated easily.
- Notification - Detailed information on the UST Data Management System has been removed from the tool kit because few Regions expressed an intent to use the system. Instead, a contact for information has been listed.
- Release Reporting, Investigation, and Confirmation - Tools 8.1 and 8.2, for use by Regional staff for receiving release information, have been combined into one tool that is easier to use.
- Release Response - Chapter 9, covering corrective action, remains in draft form and will be revised and finalized over the next few months. Chapter 9 currently reflects the traditional way of conducting corrective action. It will be revised to reflect the "new" way of conducting and overseeing corrective action that the UST program is promoting, i.e., eliminating, consolidating, and hastening steps in the corrective action process so that corrective action decision-making occurs in significantly shorter time frames than today, and with lower costs. When the revised chapter is finalized, it will be distributed to all Regions.

- Appendices - All appendices mentioned in previous drafts are included in this tool kit.

We want to thank you and your staff for your interest in this project and the comments which were very helpful in revising earlier drafts. If you have any questions please contact Pat at (415) 744-2079 (FTS 484-2079), or Josh at FTS 475-9725.

Attachment

cc: David Ziegele
Jim McCormick
Mike Williams

INDIAN LANDS IMPLEMENTATION TOOL KIT

January 1991

Prepared for:

U.S. Environmental Protection Agency
Office of Underground Storage Tanks
and
U.S. Environmental Protection Agency
Region IX

Prepared by:

ICF Incorporated

Acknowledgements

The development of this tool kit was a cooperative effort co-managed by U.S. EPA Region IX and U.S. EPA Headquarters. The tool kit could not have been completed without the input of tools and written comments from Regions V, VI, VIII, IX, and X. Several tools were prepared by Midwest Research Institute. ICF Incorporated completed the development and packaging of the tool kit. Editorial suggestions were provided by Jay Evans.

INDIAN LANDS IMPLEMENTATION TOOL KIT

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

MAR 14 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Final UST Program Indian Lands Strategy

FROM: Ron Brand, Director *Ron Brand*
Office of Underground Storage Tanks

TO: UST Regional Program Managers, Regions 5-6, 8-10

Attached please find the final "UST Program Indian Lands Strategy for FY 88 and FY 89 and Guidance for Regional Pilot Projects." This document defines UST Program activities on Indian Lands for the remainder of this fiscal year and for the next fiscal year. This strategy has evolved from two earlier draft strategies: the first was distributed by Ellie McCann, dated June 1987; and the second was distributed by Melanie Field, dated October 1987.

The focus of this strategy is on assessing the extent of UST-related human health and environmental problems on Indian Lands by conducting regional pilot projects in Regions 8 and 9. My decision to employ two pilots is based on resource constraints. These constraints involve not only resources to fund the pilots themselves, but also resources adequate to address the environmental problems that are likely to be uncovered as a result of the pilots. OUST is committed to seeing that releases from UST systems on Indian Lands will be addressed properly and with adequate resources.

This strategy will be revisited after the completion of the pilot projects in late-FY 89. At that time, a longer term UST Program Indian Lands strategy will be developed.

The next step is for Regions 8 and 9 to submit short (2-3 pages) revised pilot proposals, based on the information presented in this strategy. Revised proposals are due by April 25, 1988. The regional staff assigned to plan and manage these pilots should work closely with Josh Baylson of my staff (FTS 475-9725).

I am looking forward to seeing the results and lessons learned from these two pilot projects on Indian Lands.

cc: Martin Topper, OFA
Carrie Wehling, OGC
Joe Retzer, OUST
Ellie McCann, OUST
Helga Butler, OUST
Charles Moor, OUST
Claudia Goforth, OUST
Dana Tulis, OUST
Mark Waiwada, OUST
Josh Baylson, OUST

MAR 14 1988

UST Program Indian Lands Strategy
for FY 88 & FY 89 and
Guidance for Regional Pilot Projects

- I. Abstract
- II. Problem Statement
- III. Strategy
 - A. Scope
 - B. Objectives
- IV. Implementation Plan: Pilot Projects Guidance
 - A. Purpose
 - B. Structure
 - C. Priority Activities
- V. LUST Trust Fund
- VI. Schedule

I. Abstract

This document identifies problems associated with implementing federal regulatory and clean-up requirements for UST systems on Indian Lands. A two-year strategy and implementation plan, utilizing two regional pilots, are defined. A schedule for the plan is then presented.

II. Problem Statement

Indian Tribes are sovereign governments subject to federal laws, but not necessarily state laws. Most states lack jurisdiction on Indian Lands and, therefore, do not provide environmental protection services on Indian Lands within their borders. Some tribes have chosen to enter into agreements with state governments to accept state regulatory authority and services for environmental protection. Most tribes, however, prefer to work directly with the federal government on most issues and do not recognize state authority on their lands.

A major goal of EPA's UST program is for states to effectively regulate UST systems and to ensure that releases from UST systems are cleaned up. However, since most state programs do not have jurisdiction on Indian Lands, a strategy for cleaning up releases and for regulating UST systems on Indian Lands is needed.

Based on current notification data, there are an estimated 3,000-4,000 UST systems on Indian Lands nationwide -- about 0.2% of the regulated universe. This information, however, is limited and incomplete. The lack of complete and accurate information is a stumbling block to developing an effective, long-term strategy for addressing UST systems on Indian Lands. In addition, because there is a great deal of variation among tribes in terms of their relations with federal and state governments, and their interests and capabilities to operate environmental programs, a range of program options and responses need to be considered in the development of a long-term strategy for UST Program implementation on Indian Lands.

III. Strategy

A. Scope

This strategy covers the remainder of FY 88 and FY 89. Based on the information gathered as a result of the regional pilot projects described below, and other relevant considerations, a longer term UST program Indian Lands strategy also will be developed.

B. Objectives

The objectives of this two-year strategy are to:

- o maximize involvement of Indian Tribes in all activities;
- o provide compliance assistance, education, and outreach to owners/operators;
- o assess the extent of the problem: data collection on number, location, and types of UST systems;
- o identify opportunities for Indian run regulatory and clean-up programs: willingness, authorities, and funding;
- o identify potential problems: leaking and abandoned tanks;
- o clean up sites: oversight of responsible party financed cleanups and, if necessary, selected tribal- and/or federal-lead cleanups using the LUST Trust Fund; and
- o promote the involvement of other agencies/organizations to leverage their resources on site.

IV. Implementation Plan: Pilot Projects Guidance

A. Purpose

The regional pilot projects are designed to determine the extent of UST-related human health and environmental problems on Indian Lands throughout each region, and to provide EPA's national program office with information on the level of work/resources necessary to address these problems nation-wide.

B. Structure

There will be two regional pilot projects, each utilizing one Circuit Rider to carry out the activities identified in Section C, below. Regions 8 and 9 have been chosen for the pilot projects based on the following information:

Region 9: has 23% of the Indian population and 123 reservations, a larger Indian population and greater number of reservations than any other region.

Region 8: has 14% of the Indian population, 24 reservations, is the EPA lead region on Indian Lands, and has identified environmental problems related to USTs (including an endangered major aquifer, the Ogallala).

The two pilot projects will be funded by grants, which will be overseen by Regions 8 and 9. Regions 8 and 9 will be responsible to identify and develop specific allocation mechanisms (for example grants to IHS, BIA, or Indian organizations). The grants will be for up to \$50K per pilot for the 12 month period July 1988 to June 1989.

Regions 8 and 9 will need to submit brief (2-3 pages) revised pilot proposals that identify the specific allocation mechanism to be used, the proposed budget, and a plan outlining how the Circuit Rider will carry out the activities listed below.

As part of the pilot projects, Regions 8 and 9 will submit to OUST/Headquarters brief quarterly progress reports and a final report/evaluation.

The pilots will be monitored by a newly formed Pilot Projects Review Committee. The committee will be chaired by Josh Baylson (OUST) and composed of representatives of Regions 5, 6, 8, 9, 10, OGC, and OFA. The committee will review, quarterly, the progress and direction of the pilot projects.

C. Priority Activities

The table on page 5 portrays the priority activities for the pilot projects (including the Circuit Riders) for FY 88 and FY 89. Note that these activities are presented in priority order. If an activity has already been conducted, for example by regional staff, there is no need for it to be carried out again. Should all of the activities listed be completed before the end of the pilot projects, Regions 8 and 9 may determine what other activities will be performed during FY 89.

Priority Activities for Indian Lands -- FY 88 & FY 89

<u>Activities(in priority order)</u>	<u>Actor/s</u>		
	<u>Regional Staff</u>	<u>Circuit Riders</u>	<u>Indian Tribes</u>
1. Provide compliance assistance, information outreach, and build communication network	yes	yes	yes
2. Locate USTs and characterize regulated universe on all Indian Lands in the Region *		yes	yes
3. Identify opportunities for Indian run programs (including Indian tribes, organizations, and associations)	yes	yes	yes
4. Identify leaking & abandoned tanks needing corrective action		yes	yes
5. Pursue RP cleanups (including oversight)	**	yes	yes
6. Monitor new tank installations		yes	
7. Monitor tank closures		yes	
8. Clean up selected sites using the LUST Trust Fund in accordance with guidance on Trust Fund corrective actions on Indian Lands	yes	yes	yes
9. Investigate potential violations of federal UST regulations	**	yes	yes

* Including: number of tanks, types of tanks, contents of tanks, ages and conditions of tanks, number of tank owners, number of abandoned tanks, identify responsible parties, number of tanks per owner, and number of tanks per facility (i.e., "notification" data plus data on abandoned tanks).

** Regions may back up the efforts of tribes and circuit riders as necessary, resources permitting.

V. LUST Trust Fund

OUST will develop specific guidance on federal-lead corrective action on Indian Lands and on tribal access to the Trust Fund. This guidance will be issued in June 1988, before the pilot projects begin in July.

VI. Schedule

4/25/88	Regions 8 & 9 submit revised pilot proposals
5/9/88	OUST approves pilots and funding
7/11/88	Grants awarded
7/15/88	Issue guidance on federal-lead corrective action and tribal access to the Trust Fund
7/15/88	<u>Pilot projects begin</u>
10/15/88	First quarterly report due from regions
1/15/89	Second quarterly report due from regions
4/15/89	Third quarterly report due from regions
4/15/89	Begin development of strategy for FY 90 -->
7/15/89	Pilot projects completed
8/15/89	Final report/evaluation due from regions
10/1/89	Issue final strategy for FY 90 -->

REPORTING



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

MAR 21 1990

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Program Definitions and Reporting Matrix

FROM: Joseph Retzer, Director
Implementation Division, OUST

TO: Regional Program Managers

In response to requests from the February 21-22, 1990, RPMS meeting for clarifications of the interrelationship of all program reporting definitions we have developed the enclosed matrix. The attached matrix identifies the source document and the corresponding reporting form for each required reporting element for the UST program.

This matrix also identifies changes in the level of detail required for future reporting elements (those marked with * are due in FY91). This matrix should be a useful tool and can be used when explaining our reporting requirements to your states. If you have any comments or require additional information, please contact Steven McNeely at (202) 475-7262.

Enclosures

NATIONAL PROGRAM PROGRESS MEASURES CORRESPONDING TO
STATE GRANTS, TRUST FUND, QUARTERLY ACTIVITIES, AND SPMS REPORTING REQUIREMENTS

<u>National Program Progress Measure:</u> ¹	<u>State Grants</u> ²	<u>Trust Fund</u> ³	<u>Quarterly Activities</u> ⁴	<u>SPMS</u> ^{5*}
<u>A. Grants</u>	Section III: "Priority Tasks"			
G-1 SPA Application	P. 3, Task 2	N/A	N/A	UST-1A
G-2 States with Approved Programs	P. 3, Task 2	N/A	N/A	UST-1B
G-3 Transition Requirements	P. 3, Task 4	N/A	N/A	UST-3***
	Section VI: "Grant Negotiations"			
G-4 UST Closures	P. 4	N/A	UST-4A1** UST-4A2**	N/A
<u>B. Trust Fund</u>				
TF-1 Confirmed Releases	N/A	1	UST-4B	N/A
TF-2 Emergency Responses	N/A	2A 2B	UST-4C1** UST-4C2**	N/A
TF-3 Site Investigations	N/A	3A 3B 3C	UST-4D1** UST-4D2** UST-4D3**	N/A

References:

1. OUST Memorandum, "Final Definitions for Measures of National Program Progress," September 26, 1989, Section II, "State Reporting," pp.4 - 11.
2. OSWER Directive 9630.5, "FY-90 State UST Program Grant Guidance," April 1, 1989.
3. OUST Memorandum, "Trust Fund Reporting Requirements for FY 90," June 12, 1989.
4. OUST Memorandum, "FY-90 SPMS" December 21, 1989; which corrects the December 7, 1989, memo titled "SPMS and Quarterly Activity Reporting forms."
5. OUST Memorandum, "Final FY 1990 SPMS Measures and Responsiveness Summary," February 1, 1989.

* Soon to be called STAR

** Breakout not effective until FY 91

*** This element will be deleted in FY 91

NATIONAL PROGRAM PROGRESS MEASURES CORRESPONDING TO
STATE GRANTS, TRUST FUND, QUARTERLY ACTIVITIES, AND SPMS REPORTING REQUIREMENTS (continued)

<u>National Program Progress Measures</u>	<u>State Grants</u>	<u>Trust Fund</u>	<u>Quarterly Activities</u>	<u>SPMS*</u>
TF-4 Site Cleanups Initiated	N/A	4A 4B 4C	N/A	UST-2A1 UST-2A2 UST-2A3
TF-5 Petroleum Releases Under Control	N/A	5A 5B 5C	N/A	UST-2B1 UST-2B2 UST-2B3
TF-6 Cleanups Completed	N/A	6A 6B 6C	N/A	UST-2C1 UST-2C2 UST-2C3
TF-7 Enforcement Actions	P. 3, Task 4	7	UST-4E	N/A
TF-8 TF Expenditures	N/A	8A 8B 8C 8D (Exceptions)	Exception Site Report	N/A
TF-9 Cost Recovery	N/A	9A 9B 9C (Exceptions)	Exception Site Report	N/A
TF-10 Exception Sites	N/A	10A 10B 10C (Exceptions)	Exception Site Report	N/A

* Soon to be called STAR

** Breakout not effective until FY 91

*** This element will be deleted in FY 91

NATIONAL PROGRAM PROGRESS MEASURES CORRESPONDING TO
STATE GRANTS, TRUST FUND, QUARTERLY ACTIVITIES, AND SPMS REPORTING REQUIREMENTS (continued)

<u>National Program Progress Measures</u>	<u>State Grants</u>	<u>Trust Fund</u>	<u>Quarterly Activities</u>	<u>SPMS*</u>
<u>C. State Notification Data</u>				
SN-1 Number of USTs	Section III: "Priority Tasks" Page 3, Task 1 & Section VI: "Grant Negotiations" Page 4.	N/A	N/A	N/A
SN-2 Age Distribution of USTs	P.3, Task 1 and P.4	N/A	N/A	N/A
SN-3 UST Installations	P.3, Task 1 and P.4	N/A	N/A	N/A
SN-4 Financial Assurance Coverage	P.3, Task 1 and P.4	N/A	N/A	N/A

* Soon to be called STAR

** Breakout not effective until FY 91

*** This element will be deleted in FY 91



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

AUG 23 1991

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Revisions to LUST Trust Fund Policy and Guidelines

FROM: David W. Ziegele, Acting Director
Office of Underground Storage Tanks

A handwritten signature in dark ink, appearing to read "David W. Ziegele", is written over the typed name and title in the "FROM:" field.

TO: UST Regional Program Managers, Regions 1-10

This memo provides written notice of changes in our policies on allowable sources of State matching funds for satisfying the cost share requirement under LUST Trust Fund cooperative agreements. These policies were presented to you last year at the Regional Program Managers' meeting in Atlanta, and have been applicable since that time. We apologize for the length of time it has taken us to commit them to writing. They will be formally incorporated into the LUST Trust Fund Guidelines (OSWER Directive 9650.10) in the future. The policies and this memo have been reviewed and agreed to by the Office of General Counsel, Office of the Inspector General, the Grants Administration Division, and the Financial Management Division.

1. Recovered Federal LUST Trust Fund money may no longer be used as matching funds.

In the past, our written Trust Fund policy and special conditions allowed States to use recovered Federal funds to meet their cost share ("match") requirement, if specific provisions were made for such an arrangement in their cooperative agreements. At the request of the Office of the Inspector General, and in consultation with the Office of General Counsel, we decided to withdraw this option from future cooperative agreements.

As we discussed in Atlanta, and with many of you individually since then, there was no need to modify any cooperative agreements that were then in existence, even if they allowed States to use cost recovered monies as State matching funds. However, any cooperative agreements involving FY 1991 (and beyond) LUST Trust Fund monies were required to delete this option from the standard special conditions. You were encouraged to notify your States of this change at that time, particularly if their existing agreements contained this option. Attached is a marked-up copy of the special conditions, which show the necessary revisions.

Consistent with our existing cost recovery policy, States may still retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements.

2. Some expenditures from State financial assurance funds can be used to meet State match requirements.

Another question we addressed in Atlanta was whether expenditures from State UST funds could be used toward satisfying the ten percent State match requirement under the State's LUST Trust Fund cooperative agreement. We concluded that State UST fund monies can be applied toward the match, provided they are spent on LUST Trust Fund allowable activities. The use of State funds in this manner should be approached with caution, however, because many expenditures from State funds (e.g., reimbursement of cleanup costs at sites owned by solvent tank owners) would not be allowable costs under the LUST Trust Fund. This issue is discussed in more detail below.

There may be a limited number of situations where State UST funds could be used in a manner that would be considered allowable under the LUST Trust Fund. Some examples of qualified uses of State funds for match purposes include, but are not limited to, the following:

- o **Oversee RP-lead cleanups, under the State fund program.** Since oversight of RP-lead cleanups is a LUST Trust Fund allowable activity, regardless of the solvency of the RP or presence of other methods of financial responsibility, State funds used for this purpose would be used in a LUST Trust Fund allowable manner.
- o **State-lead cleanups that meet LUST Trust Fund criteria.** For States that allow themselves direct access to their UST fund, several situations may arise where State funds could be expended in a LUST Trust Fund allowable manner. These situations include:
 - emergencies
 - abandoned tanks (no identifiable RP)
 - recalcitrant RPs (despite the presence of the State fund)
 - investigation of a release to determine its source

In contrast to the situations described above, the traditional method of expending monies from most State UST funds would generally not be considered LUST Trust Fund allowable and, thus, such expenditures would not be considered eligible for use in satisfying the State match requirement. For instance, most State funds are set up to pay for or reimburse a tank owner for the cost of corrective action and/or third party liability after payment of a deductible. The LUST Trust Fund cannot be used for

third party liability costs, and should not be used in the case of solvent RPs who can afford the cost of corrective action. Thus, State funds used for this purpose would not be used in a LUST Trust Fund eligible manner and would not qualify toward satisfying the State match requirement.

An added rationale for not permitting States' traditional method of using their funds to qualify as match is that Congress intended that owners and operators be held responsible for releases from their tanks, and required them to obtain financial responsibility. The LUST Trust Fund was intended to be used as a backup source of funding, after funds were provided by the tank owner's financial assurance mechanism, which in these cases is the State fund.

A general rule of thumb that can be used is that if the circumstances of the case are such that the criteria for using the LUST Trust Fund are met, then State UST fund expenditures should generally qualify for matching purposes. For those States that desire to use their UST fund toward satisfying the LUST Trust Fund State match requirement, this provision should be incorporated into the State's LUST Trust Fund cooperative agreement with the Agency.

3. States are not required to cost recover their State match funds.

While EPA's LUST Trust Fund cost recovery policy requires States to pursue recovery of Trust Fund expenditures, this provision applies only to Federal monies that are expended, not to funds supplied by the State as part of the State's cost share requirement. The rationale for this conclusion is found in EPA's LUST Trust Fund Cost Recovery Policy, which states that expenditures from the LUST Trust Fund constitute a debt and a liability of the owner/operator to the United States. While this provision clearly applies to the Federal portion of Trust Fund expenditures, it does not apply to the State's cost share contribution.

Attachment

cc: Howard Corcoran, OGC
Jane Souzon, OGC
Lee Tyner, OGC
Harvey Pippen, GAD
Bruce Feldman, GAD
Maureen Ross, GAD
Sallyanne Harper, FMD
Liz Milstead, FMD
Elissa Karpf, OIG

OSWER Directive 9610.10

Special Conditions

**REQUIREMENTS FOR INCLUSION
IN LUST STATE COOPERATIVE AGREEMENTS**

1. State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also 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. Parts 30 and 33 (for procurement) apply to other cooperative agreements and amendments.
2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (OSWER Directive 9650.7) where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities. ~~The State may also use LUST Trust Fund recoveries to meet its cost share requirements under RCRA Section 9603 (h)(7)(B), in accordance with 40 CFR 31.25 (g)(3).~~

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(CONTINUATION OF SPECIAL CONDITION 3 --
INSERT 1 OR 2 BELOW)

(INSERT 1, for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities ~~or for State cost share requirements~~, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2, for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

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The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and

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- (iii) To the extent the State is successful in recovering these costs, it will dedicate these funds for additional Trust-Fund-eligible activities ~~or for State cost share requirements~~, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this cooperative agreement.
- (iv) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

[END OF INSERT 2]

- 4. State agrees to maintain supporting documentation and appropriate records in support of any future cost recovery efforts. The State shall adhere to the principles of documentation and records retention specified in the OSWER Directive 9610.10 Cost Recovery Policy for the LUST Trust Fund (October, 1988). On topics not addressed by these guidelines, the State agrees to adhere to the principles of documentation and record retention specified in The State Superfund Financial Management and Recordkeeping Guidance until such time as the State and EPA agree to implement the requirements of The Leaking Underground Storage Tanks Trust Fund State Financial Management Handbook. The State agrees to make these records available to the federal government, as needed, on a case-by-case basis.
- 5. State agrees to provide reports as outlined in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements: (April 7, 1988). These reports consist of Quarterly Progress Reports, Financial Status Reports (SF 269) Federal Cash Transactions Report (SF 272), and Exception Reports.
- 6. State agrees to identify Letter of Credit drawdowns under EPA's three major activity codes. The three codes are: "7" -- General Support and Management, "E"-- Site Cleanup Actions, and "4" -- Enforcement.