

United States  
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## Table of Contents

I. Purpose .....	1
II. Background .....	1
III. Criteria for Corrective Action .....	2
IV. Eligible Activities .....	3
V. Managing Non-Responsible Party-Lead Corrective Actions in Indian Country .....	3
VI. Cost Recovery .....	4
VII. Delegations of Authority to Initiate Corrective Action on Indian Lands Funded by the LUST Trust Fund .....	5
VIII. Approval Process .....	5
Conclusion .....	6

## **I. Purpose**

This guidance document is designed to provide direction to Underground Storage Tank (UST) Program regional office personnel for the initiation and coordination of federal-lead corrective actions in Indian Country in response to petroleum releases from UST systems. The guidance discusses how to determine if LUST Trust Fund money may be used and what documentation is necessary for undertaking federal-lead corrective action in Indian Country. The guidance also establishes a policy for cost recovery for cleanups conducted in Indian Country using LUST Trust Fund money.

This guidance document supersedes the Interim Guidance on Conducting Federal-lead UST Corrective Actions for Petroleum Releases on Indian Lands (OSWER Directive 9610.9) and supplements the LUST Trust Fund Cooperative Agreement Guidelines (OSWER Directive 9650.10A) and Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund (OSWER Directive 9610.10A). The guidance for conducting Federal-lead UST Corrective Action for States (OSWER Directive 9360.16A) remains unchanged. Regional office personnel should continue to follow applicable policies and procedures for federal-lead corrective actions as described in OSWER Directive 9360.16A.

The policies set out in this memorandum are not final agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any right, benefit or trust responsibility, enforceable by any party, in litigation with the United States. EPA officials may decide to follow guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of site specific circumstances. The Agency also reserves the right to change this guidance at any time without prior notice.

## **II. Background**

Section 205 of the Superfund Amendments and Reauthorization Act (SARA) amended Subtitle I of the Solid Waste Disposal Act (SWDA) to give EPA and states, under cooperative agreements, the authority to respond to petroleum releases from leaking USTs. The amendments also established a LUST Trust Fund to finance both federal and state UST program activities. States receive money from the LUST Trust Fund by entering into cooperative agreements with the federal government. However, EPA does not enter directly into LUST Trust Fund cooperative agreements with Indian tribes. RCRA Section 8001 grants, on the other hand, have been awarded to Indian tribes. These grants are available for "research, investigations, experiments, training, demonstrations, surveys, public education programs, and studies," and may be used to fund cleanups to the extent that the cleanup can be legitimately characterized by one of the above statutory terms.

In July 1989, the Office of Underground Storage Tanks (OUST) issued interim guidance for conducting federal-lead UST corrective actions in Indian Country. The guidance discussed procedures to be followed, including how to determine whether federal-lead corrective action is justified, and what documentation is necessary for undertaking federal-lead UST corrective actions in Indian Country. The guidance recommended that federal-lead involvement in corrective actions in Indian Country be limited to cases in which (1) there is a serious "time-critical" threat to human health and the environment; (2) the tribe is unable to respond; and (3) the owner-operator is unable or unwilling to provide an adequate and timely response. The guidance defined "time-critical" as either an immediate threat--a release that may require

response within hours or days of discovery--or a near-term threat--a release that may require response within six months. Recognizing that many Indian tribes lacked the resources or capability to oversee or conduct corrective actions, the guidance set forth criteria for initiating a federal response to releases in Indian Country that were less stringent than those set forth in the guidance for federal-lead correction actions in States (see OSWER Directive 9360.16A, Guidance For Conducting Federal-Lead Underground Storage Tank Corrective Actions). However, the interim guidance did not address long-term corrective actions in Indian Country.

The focus of the 1989 interim guidance on federal-lead corrective actions was sites that posed a "time-critical" threat to human health and the environment. This new guidance document addresses all sites that meet the criteria for a federal response set forth in Section 9003 of RCRA. It makes explicit that EPA will not limit federal-lead corrective action in Indian Country to only those sites that pose a "time-critical" threat, but will consider all sites which may become a threat to human health and the environment.

The successful implementation of this policy is contingent on a sufficient level of resources. EPA receives limited resources to implement a comprehensive UST program in Indian Country, including federal-lead cleanups. The application of limited resources to federal-lead cleanups must occur within the context of ensuring that sufficient resources remain to successfully implement a comprehensive UST program in Indian Country.

### **III. Criteria for Corrective Action**

The basic criteria for a federal response are set forth in Section 9003(h) of Subtitle I of the Resource Conservation and Recovery Act (RCRA). Section 9003(h) provides that a response may be conducted only if corrective action is necessary to protect human health and the environment and one or more of the following criteria are met:

- No person can be found, within 90 days or such shorter period as may be necessary to protect human health and the environment, who is—
  - an owner or operator of the tank concerned
  - subject to corrective action regulations, and
  - capable of carrying out such corrective action properly
- The situation requires prompt action to protect human health and the environment;
- Corrective action costs exceed the financial responsibility requirements established for the tanks, and expenditures from the LUST Trust Fund are necessary to ensure effective action; or
- The tank owner or operator has failed, or refused, to comply with an administrative order to perform corrective action.

With respect to federal-lead corrective actions and the issuance of administrative orders, priority should be given to releases posing the greatest threat to human health and the environment. EPA regional offices will use a risk-based corrective action process that categorizes sites according to risk to human health and the environment to make these distinctions. When necessary, prioritization within categories will be utilized to determine which sites get funded. EPA headquarters intends to work with regional offices to develop a national risk-based corrective action process in FY 1996.

## **IV. Eligible Activities**

Once a decision has been made that a site is eligible for LUST Trust Fund financing and that the risk posed by the release warrants federal action, the following general categories of activities may be conducted using monies from the LUST Trust Fund: exposure assessment, provision of temporary and permanent alternate water supplies, relocation of residents, enforcement, corrective action, and cost recovery. These general categories include, but are not necessarily limited to, the following specific allowable activities:

- emergency response and initial site hazard mitigation;
- investigation of suspected releases and source identification up to the time that a release is determined to come from an unregulated source;
- exposure assessment to determine potential health effects of a release and the establishment of corrective action priorities;
- development, issuance, and oversight of enforcement actions directed to responsible owners and operators;
- cleanup of releases;
- long-term operation and maintenance of corrective action measures;
- purchase and/or lease of equipment;
- recovery of costs from liable UST owners and operators; and
- reasonable and necessary administrative and planning expenses directly related to these activities.

## **V. Managing Non-Responsible Party-Lead Corrective Actions in Indian Country**

When a release is discovered, EPA should first make a reasonable effort to contact tank owners and operators who are responsible for the release and notify them of their responsibility to undertake corrective action. (In cases when an Indian tribe has developed its own UST codes, the tribe may also be involved in contacting and notifying owners and operators of their responsibility to undertake corrective action.) LUST Trust Fund dollars should be relied on to clean up a site only when a responsible tank owners and operators who will undertake corrective action properly and promptly cannot be identified, when the responsible party (RP) has proven to be insolvent based on financial analysis, when enforcement actions taken to compel the RP to action have been ignored or otherwise ineffective in compelling compliance, or in emergency situations (see the section on delegations of authority below). When the LUST Trust Fund is used, UST owners and operators are liable to the federal government for costs incurred and are subject to cost recovery actions.

Once a decision has been made that a site is eligible for LUST Trust Fund financing and that the risk posed by the release warrants federal action, EPA regional offices should follow applicable procedures specified in OSWER Directive 9360.16A for managing accounting information, initiating on-site actions, and managing federal-lead UST corrective actions. In general, federal-lead remedial response for UST releases should be performed by the same EPA contractors that conduct oil and hazardous substance corrective actions or by state contractors or by other means deemed appropriate.

It should be noted, however, that the fact that a site is determined to warrant use of the LUST Trust Fund for a federal action does not necessarily require that the region take the lead in remediating the site, i.e.,

states may be designated the lead agency for conducting a cleanup in certain circumstances. When a region wants to be able to designate a specific state as a lead agency in the event of a release in Indian Country in that state, the region should include language in that state's cooperative agreement to allow it to be the lead agency pursuant to appropriate tribal consent and regional approval for cleanup costs and options at a specific site. In cases when the state is designated the lead agency for conducting a cleanup, it may be appropriate for the state to be involved in cost recovery. In these cases, regions should consult with OUST for more specific guidance.

## **VI. Cost Recovery**

The primary purpose of cost recovery (OSWER Directive 9610.10A, Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund) is to provide incentives for owners and operators to comply with the technical and financial responsibility requirements, and most importantly clean up releases from their own tanks. To ensure the most efficient and effective use of resources, OUST's national cost recovery policy gives the states considerable discretion in operating their own cost recovery programs. This flexibility is extended to EPA regional offices as they consider cost recovery actions in Indian Country. The following guidance describes fundamental components of regional cost recovery programs for Indian Country.

As the current cost recovery policy recognizes, EPA regional offices have the discretion to determine when and how they should pursue cost recovery for sites in Indian Country. A regional office's pursuit of cost recovery should be based on the following factors: solvency of the RP, the cost of the cleanup, the likelihood of recovery, the deterrent value of the case and the opportunity costs (see OSWER Directive 9610.10A, Section E). In general, cases when owners/operators are not in compliance with the financial responsibility requirements or are recalcitrant, but financially solvent, should be considered high priority. If the RP is insolvent or financially distressed, or the expense of pursuing cost recovery is likely to exceed the cost of the cleanup, the case should be deemed a low priority. Regional offices are expected to establish region-specific cost recovery procedures that are consistently followed.

When LUST Trust Fund money is expended at a leaking UST site, the owner and operator are liable for all costs of corrective action and enforcement, including interest, and indirect and management and support costs associated with these activities that are paid for by the Trust Fund (see OSWER Directive 9610.10A). Where the region expends Trust Fund money for corrective action or enforcement, and action thresholds (see OSWER Directive 9610A, Section F) have triggered site-specific accounting, the region should pursue recovery of costs from responsible parties or must document in writing a decision not to and the reason why.

Regardless of the action taken by the region in exercising its discretion in cost recovery cases, it is expected to fully document its decisions and to formally close out cases. Regional cost recovery activities in Indian Country should reflect decisions that are in the best interests of the overall Indian Country program and the efficient use of Trust Fund monies. For further clarification of the above guidance, consult OSWER Directive 9610.10A.

## **VII. Delegations of Authority to Initiate Corrective Action on Indian Lands Funded by the LUST Trust Fund**

**Expenditure Levels:** The current authority for initiating federal-lead corrective actions in Indian Country is set forth by Delegation 8-33 and further clarified in OSWER Directive 9610.9. Pursuant to the existing delegation and directive, Federal-lead UST corrective actions that initially cost 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) must approve actions that 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, 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.

Headquarters intends to revise the delegation as follows:

- Regional Administrators (RAs) may approve actions costing up to \$50,000 in acute, life-threatening situations where response must be initiated before headquarters can be contacted. This authority may be redelegated to Division Directors.
- The Office Director of the Office of Underground Storage Tanks will approve actions that initially cost between \$50,000 and \$250,000 and will approve ceiling increases that bring the cost of an action over \$50,000.
- 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, Office of Solid Waste and Emergency Response.

These delegations changes will also apply in cases when a state is designated the lead agency for conducting a cleanup. Headquarters will notify regional offices when the revised delegation is effective.

**Funding Sources:** In exercising this authority, regions are limited to expending funds already committed to or in the possession of the region unless OUST has authorized additional funds in writing. The delegation should in no way be construed to authorize regional managers to expend headquarters funds without express and prior approval.

## **VIII. Approval Process**

LUST Trust Fund-financed corrective action in Indian Country should be approved only if the criteria outlined in Section 3 are met and the risk posed by the site to human health and the environment warrants federal action. To initiate headquarters approval of a LUST Trust Fund-financed action in Indian Country, the Regional Division Director or higher regional management official must submit a written request to the Office Director of the Office of Underground Storage Tanks. The written request should address the following topics: site location; nature of the incident; quantity and types of substances released; potential receptors; estimated total cost to remediate the site; amount and source of funds already spent to stabilize or remediate the site; and, attempts made to locate and compel the responsible party to undertake cleanup.

## **Conclusion**

This policy document sets forth basic criteria for federal-lead corrective actions in Indian Country in response to petroleum releases from UST systems. The policy establishes that all sites that meet the legislative criteria found in Section 9003 of RCRA will be considered for federal response. Furthermore, it says that EPA regional offices will use a risk-based corrective action process to give priority to releases posing the greatest threat to human health and the environment. Although EPA receives limited resources for program implementation, including federal-lead cleanups, EPA believes that implementation of this policy will lead to improved corrective actions of UST releases in Indian Country.