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ENERGY, INSTALLATIONS
& ENVIRONMENT

9/13/22

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)

SUBJECT: Clarification of and Updates to Formerly Used Defense Sites Program Guidance

In accordance with Department of Defense (DoD) Instruction 4715.07, *Defense Environmental Restoration Program (DERP)*, the Office of the Deputy Assistant Secretary of Defense for Environment and Energy Resilience (ODASD(E&ER)) provides oversight, including guidance, planning, programming, and budgeting, to the Army as the lead agent for the Formerly Used Defense Sites (FUDS) Program. As the lead agent, the Army conducts environmental restoration activities at FUDS properties and sites pursuant to Sections 2700-2710 of Title 10, U.S. Code (U.S.C.) and consistent with DoD Manual (DoDM) 4715.20, *DERP Management*. This memorandum clarifies and updates existing guidance in DoDM 4715.20 for the FUDS Program.

FUDS Eligibility Determinations. As administratively determined by the DASD(E&ER), the FUDS Program addresses locations that meet DERP eligibility requirements in accordance with DoDM 4715.20, where the property was transferred from DoD prior to October 17, 1986, and where the release occurred while DoD was the owner or operator. Subject to the oversight of the ODASD(E&ER), the Office of the Deputy Assistant Secretary of the Army for Environment, Safety and Occupational Health (ODASA(ESOH)) will determine final eligibility for FUDS Program action. The Army will make every effort to determine if a property was owned or operated by DoD and will consider a wide variety of real estate and operational records and information when determining eligibility.

Consistent with Section 2701 of Title 10, U.S.C., locations considered “otherwise possessed” by DoD may be eligible for DERP and will not be deemed ineligible solely due to a lack of documentation of a real property interest. Operational records may be used to support a finding that DoD was the owner or operator under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). DoDM 4715.20 contains DoD’s interpretation of the phrase “otherwise possessed or used” in accordance with Section 2710(e) of Title 10, U.S.C. As further clarification, if the historic record of ownership and operation is missing or incomplete, documentation of physical evidence (e.g., site visit documenting sufficient military munitions use) may be used to support a finding that DoD was the owner or operator under CERCLA or “otherwise possessed or used” the property.

In the context of FUDS property eligibility, the phrase “was under the jurisdiction of the Secretary” identifies DoD as a prior owner or operator under CERCLA and includes governmental entities that are the legal predecessors of DoD or its Components. Where real property records are not available for the FUDS property eligibility analysis, but there is evidence of DoD activities at the location, the Army will consider other information (e.g.,

physical evidence from a site visit documenting military munitions use, operational records) to determine DoD jurisdiction.

When there is evidence of DoD activities at the location, but DASA(ESOH) does not believe the property meets the eligibility criteria for the FUDS Program, it will provide the recommendation and supporting documentation to DASD(E&ER) for review and approval.

Changes in Eligibility. In some cases, FUDS eligibility determinations are subject to change based on new information or a review of existing information. If the Army acquires evidence to suggest that a property or portion of a property previously determined to be eligible for the FUDS Program is no longer eligible, the Army will provide documentation supporting the change in eligibility to ODASD(E&ER) for review and approval before halting FUDS response actions at that property. If the proposed change in eligibility is the result of a Responsibility Assessment, the Office of General Counsel of the Army will provide the complete Responsibility Assessment to the Office of the Secretary of Defense Office of the Deputy General Counsel for Environment, Energy, and Installations and ODASA(ESOH) will provide a non-privileged detailed summary to ODASD(E&ER).

Changes in Land Use. Because FUDS are no longer under DoD control, changes in future land use may impact the protectiveness of response actions. If a current or future landowner of a FUDS changes the land use to be inconsistent with an existing remedy (i.e., making the remedy no longer protective), DoD may be responsible for implementing additional remedial actions. In these situations, DASA(ESOH) will provide a summary of relevant information and a recommendation as to whether additional response actions are required to DASD(E&ER) for review and approval.

Cleanup Initiated by non-DoD Entity. Since FUDS have been out of DoD control for over 30 years, non-DoD entities (e.g., the landowner) may have already initiated cleanup activities on the property. This action alone does not exclude a site from eligibility for the FUDS Program. If the non-DoD entity requests that the Army take over the cleanup or work with the non-DoD entity to complete the cleanup, the Army will evaluate the situation and determine whether that is feasible based on the actions already taken. ODASA(ESOH) will coordinate with ODASD(E&ER) before creating a potentially responsible party (PRP) site under these circumstances.

FUDS PRP Sites. Since FUDS properties have been out of DoD control for a significant amount of time, there is a possibility that DoD may not be the sole source of contamination and parties other than DoD may be responsible for a release on the property. Due to the legal nature of the PRP process, not all documents can be shared with regulators or the public. However, the Army will ensure:

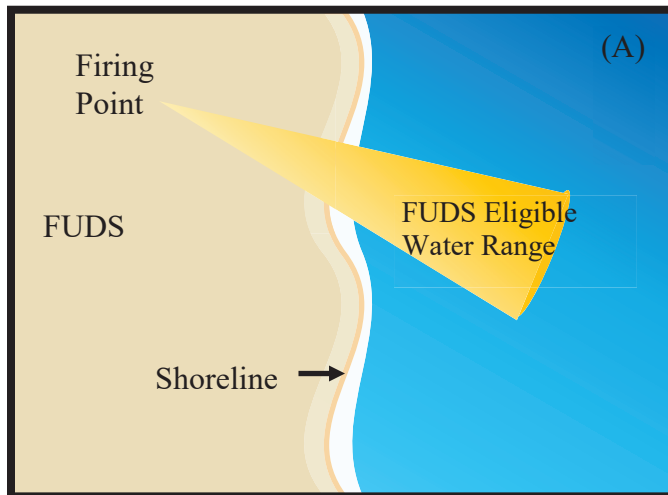
- A clear description detailing the steps of the FUDS PRP process is made available to environmental regulators and the public;
- Appropriate environmental regulators are notified and asked for applicable information related to a potential PRP site before the site is created;

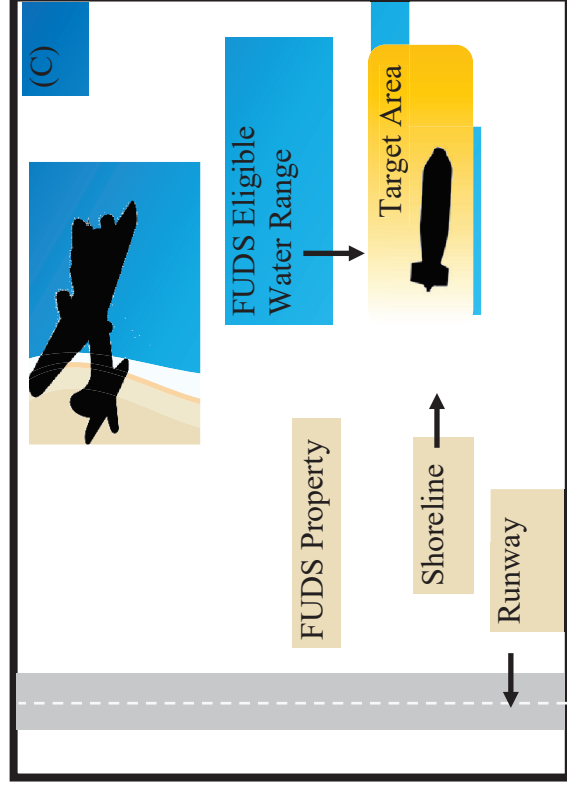
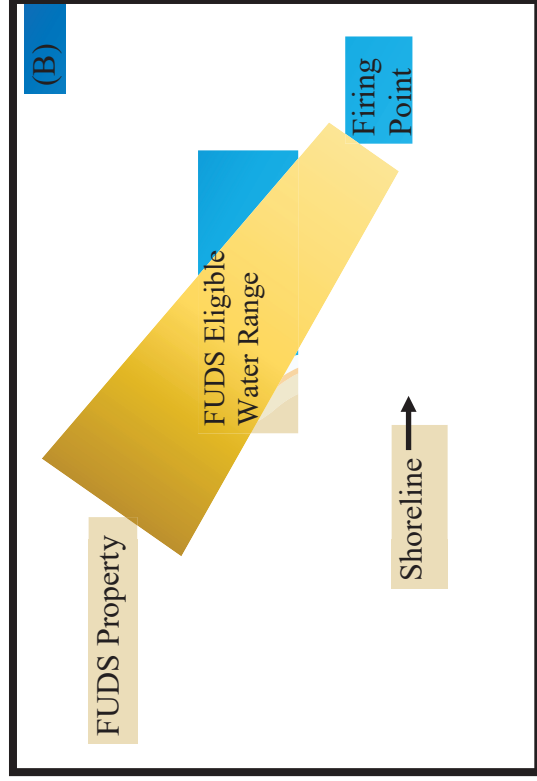
- Publicly available documents are shared with regulators in a timely manner, when requested; and
- Activities at PRP sites are monitored, with an emphasis on those receiving FUDS Environmental Restoration Account (ERA) funding in a given year.

Disposal Agency Accountability. Assumption of custody and accountability by a disposal agency is not automatic and varies with the type of facility and time period in which the property was excessed by DoD. Cleanup liability for a FUDS property after the property has been excessed to a disposal agency is retained by DoD, unless the agreement between DoD and the disposal agency states otherwise. If a question arises concerning unsafe conditions that developed after property is excessed from DoD and transferred to a disposal agency, a review of the correspondence between the DoD (the using agency) and the disposal agency is required.

Right of First Refusal. If an eligible FUDS property is adjacent to an active DoD installation, ODASA(ESOH) will contact the responsible DoD Component to coordinate environmental restoration activities. If the responsible DoD Component does not respond to the coordination request or if an agreement cannot be reached, ODASA(ESOH) will notify ODASD(E&ER) who will determine the appropriate cleanup program to address the contamination.

Water Targets. Water targets are typically locations in the water used as targets by DoD aircraft. Once they are no longer operational, these locations are eligible for DERP, and if associated with an eligible FUDS property (e.g., the DoD aircraft took off from the FUDS property) will be addressed under the FUDS Program. Examples of FUDS eligible water ranges and other FUDS eligible water areas are depicted in the figures below.





Releases at National Guard Facilities. Sometimes a State National Guard has operated or is operating on a FUDS eligible property and may be responsible for the release of a hazardous substance, pollutant, or contaminant at that location. The FUDS Program will be responsible for DoD releases that can be divisible from State National Guard releases. Where ODASA(ESOH) believes the State National Guard is responsible for a release, it will provide notification to the State. When a State National Guard release is commingled with a historic DoD release and cannot be segregated, ODASA(ESOH) will provide ODASD(E&ER) a

summary of relevant information and DASD(E&ER) will determine if the FUDS ERA is the appropriate source of funding for a required response.

Seeking Rights-of-Entry (ROE) at FUDS Properties. If the landowner does not respond or refuses to grant access after the Army's second ROE attempt, and the lead regulatory agency is unwilling or unable to assist in securing the ROE, the Army will send the landowner a third letter. If the landowner declines the ROE request or does not respond to the letter, the Army will attempt to obtain ROE at least once every five years. The Army will report the environmental liability for sites where it cannot obtain ROE on the financial statements. The Secretary of the Army will also report these sites in the DERP Information System in accordance with the Director, Environmental Management Memorandum *Revisions to Knowledge-Based Corporate Reporting System DERP Data Templates and Site Tracking*, dated November 1, 2012.

Pre-existing Land Use Controls (LUCs). If a FUDS property has a pre-existing LUC (e.g., a LUC established by another entity before DoD began the response activities) and the protectiveness of the DoD remedy is contingent on the pre-existing LUC, the Army will identify and incorporate the requirements and enforceability of the LUC into the decision document (DD) and LUC implementation plan. If the Army becomes aware that a pre-existing LUC is being or will be violated, it will coordinate with the appropriate regulatory authority to enforce the LUC. If the pre-existing LUC is no longer being implemented or maintained by the other entity and the appropriate authority cannot enforce the LUC, the Army will evaluate remedy protectiveness and, if it is no longer protective, modify the DD, as appropriate.

Unlimited Use and Unrestricted Exposure (UU/UE). UU/UE means the selected remedy does not include a restriction on land or groundwater use to be protective for current and reasonably anticipated future land uses. The Army will provide all proposals for making the determination that UU/UE will be or has been achieved based on pre-existing physical conditions or legal restrictions on the property to ODASD(E&ER) for review and approval.

Vapor Intrusion. In accordance with DoDM 4715.20, the Army will evaluate whether contamination in the soil or groundwater poses a potential for unacceptable risk from vapor intrusion into overlying or nearby existing structures at FUDS properties. The Army will evaluate the potential for a complete vapor intrusion pathway into overlying or nearby structures during the Site Inspection or Remedial Investigation. The Army will not document future vapor intrusion exposure risk from future construction of habitable buildings, but will provide notification to the landowner of potential vapor intrusion risks. (Note: DoDM 4715.20, paragraph 6.c.(4) does not apply to FUDS.) The Army will conduct appropriate response actions for a vapor intrusion pathway in existing structures when the potential for vapor intrusion of volatile chemicals exists and a site-specific assessment indicates an unacceptable risk to human health due to a release to the environment that is the responsibility of DoD and not the responsibility of any other party.

Administrative Record. A complete discussion of the DoD policy requirements for the administrative record is included in DoDM 4715.20. The administrative record will include documents and materials containing information that form the basis for the selection of response actions. Confidential or privileged documents must be kept in a separate portion of the

administrative record not accessible to the public. Whenever feasible, the Army will summarize or rephrase (with legal counsel assistance) those portions of a privileged document that pertain to the selection of the response action so that a summary or rephrased version can be included in the publicly accessible portion of the administrative record. ODASA(ESOH) will make every effort to ensure this is accomplished for FUDS-related documents.

Federal Agency Hazardous Waste Compliance Docket. Section 120(c) of CERCLA provides for the establishment of a Federal Agency Hazardous Waste Compliance Docket (“the docket”). In compliance with this requirement, the U.S. Environmental Protection Agency (EPA) issues a notice to the owner of the Federal property and requires the preparation of a Preliminary Assessment within a specified period for the entire Federal agency’s land. FUDS properties are generally not on the docket because they are not Federal facilities. However, the situation may arise where a FUDS is located on property currently owned by another Federal agency and on the docket. If EPA or another Federal agency requests information related to sites listed on the docket pursuant to Section 104(e) of CERCLA or other authority, ODASA(ESOH) will notify ODASD(E&ER) and ODASD(E&ER) will address the request.

This policy is effective immediately and will be incorporated into the next version of DoDM 4715.20. The point of contact for this matter is Ms. Alexandria Long, at (703) 571-9061 or alexandria.d.long.civ@mail.mil.

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Richard G. Kidd IV
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