

**Formerly Utilized Sites Remedial Action Program Experience,
A Site Owner's Guide - 10235**

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ABSTRACT

The Formerly Utilized Sites Remedial Action Program (FUSRAP) is a Department of Energy (DOE) program executed by the Army Corps of Engineers (US ACE, or Corps) to clean up legacy radioactive or chemical contamination on private contractor and Government sites, including vicinity properties, resulting from work related to “the Nation’s early atomic energy program,” where work was usually conducted prior to 1974 under Atomic Energy Commission (AEC) or Manhattan Engineer District (MED) contracts. Although the Program is mature, from time to time new information comes to light, or site owners discover contamination remaining from this work. Sometimes, contamination previously cleaned up does not meet current standards. These sites could be eligible for the Program and Government assistance. New sites are still being accepted, and US ACE receives a yearly appropriation to clean up FUSRAP sites.

Participation in the Program is not without its risks, and the Government may seek to recover a share of the cleanup costs. Moreover, program scopes and budgets are limited, and responsibilities are shared between DOE and USACE, which can be confusing to a newcomer.

INTRODUCTION

In the mid-to-late 1970’s, the Atomic Energy Commission (“AEC”) evaluated sites for radioactive contamination related to work on AEC and Manhattan Engineer District (“MED”) contracts. (MED relates to the “Manhattan Project” of World War II.) Contamination, usually in the form of residual uranium and thorium ore processing materials, was cleaned up, usually at Government expense. As the AEC evolved into what is now the Department of Energy (“DOE”), the evaluation and cleanup program became the Formerly Utilized Sites Remedial Action Program (“FUSRAP,” pronounced foos-rap). The Program continues today, and eligible sites are added regularly but infrequently. Much has been written about the legal authorities of the agencies executing FUSRAP, but this presentation focuses on some history, site eligibility, and what a private site owner in the Program can expect.

LEGISLATIVE AUTHORITY

Until 1997, FUSRAP was an internal DOE program without a formal basis in legislation. Then, in a Fiscal Year 1998 Appropriation [1], Congress directed the U.S. Army Corps of Engineers to execute FUSRAP, but left responsibility for the Program with DOE.¹ Based on historical and newly-provided information, DOE decides which sites are eligible for further evaluation and cleanup given the potential for “contamination resulting from work related to the Nation’s early

¹ As stated in a November 6, 1997, letter from Senator P. Domenici and Rep. J. McDade to Energy Secretary F. Pena and Defense Secretary W. Cohen describing the intent of the transfer of responsibility in the Appropriation.

atomic energy program.”² The Corps conducts the evaluations and cleanups, where warranted, as set forth in a Memorandum of Understanding between the agencies [2]. From time to time, Congress adds sites to the Program by legislation. Congress, in later annual appropriations, also mandated that the Corps follow the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) [3] when cleaning up FUSRAP sites, and designated the Corps as the lead agency for selecting a remedy [4].

SITE ELIGIBILITY PROCESS

Congress and DOE are the Program gatekeepers -- Congress by legislation, and DOE by evaluation of site historical information, or newly provided information, and application of selection and exclusion criteria. Sites added directly by Congress, for example the Shpack Landfill in Massachusetts and the Shallow Land Disposal Area in Pennsylvania [5], bypass the DOE eligibility determination, and go directly to the Corps for evaluation under CERCLA, and cleanup, if warranted. DOE passes along other sites to the Corps, if determined eligible.

DOE evaluates sites for eligibility based on an internal FUSRAP Manual [6], which defines the Program. The Corps has summarized DOE’s eligibility criteria in its own execution policy, Engineer Regulation 200-1-4 [7]. Generally speaking, for a site to be eligible for FUSRAP, DOE must find that:

- Evidence, usually in the form of historical records, but sometimes in recently-conducted surveys, shows the site has a high potential for radioactive contamination as a result of MED/AEC-related operations occurring prior to 1974;
- DOE has authority to conduct a remedial action (based on criteria in the FUSRAP Manual [6]);
- The site is not licensed by the Nuclear Regulatory Commission or a state;
- The site is not under the jurisdiction of another remedial action program; and
- MED/AEC-related contamination is distinguishable from contamination resulting from commercial activities at the site.

Keeping in mind that FUSRAP is based on DOE policy and is not mandated by legislation, DOE can, and has, waived the above criteria on occasion. Corps execution of FUSRAP, on the other hand, is mandated by legislation, and the Corps *shall* evaluate and clean up eligible sites, where warranted.

SITE DESIGNATION PROCESS

DOE and the Corps use the terms “eligibility” and “designation” as terms of art. “Eligibility,” determined by DOE in the manner described, does not constitute a finding that cleanup is warranted. The Corps conducts further evaluations to decide whether to “designate” the site as an active site for further expenditure of funds.

² This language appears in yearly FUSRAP Appropriations, e.g., Pub. L. 105-52 [1].

ER 200-1-4 [7] provides the Corps process for further evaluation of eligible sites and a final designation for cleanup. Congress limits the Corps' authority to spend appropriated funds to clean up contamination only from work performed as part of the "Nation's early atomic energy program." This excludes expenditures to clean up contamination resulting from commercial (non-Government) activities. If the Corps determines:

- That contamination meets the above (non-commercial) criterion,
- A CERCLA Preliminary Assessment determines a cleanup is warranted, and
- A Preliminary Legal Analysis shows some Federal Government responsibility for the contamination, the site likely will be designated for expenditure of funds for cleanup, subject to congressional approval.

Thus, radioactive contamination, by itself, is not sufficient to warrant a FUSRAP cleanup.

SCOPE OF FUSRAP CLEANUPS

As mandated by Congress, the Corps follows CERCLA requirements when cleaning up contamination under FUSRAP. This does not mean the Corps conducts a full CERCLA remediation of all hazardous substances on the entire site. Rather, the Corps applies CERCLA to clean up the eligible materials under FUSRAP, within a limited geographical area, i.e., the area contaminated by the "FUSRAP materials."

Commercial materials, e.g., NRC-licensed radioactive materials, commingled with the FUSRAP materials will, of necessity, be cleaned up and disposed of, but legal limits on the scope of expenditures of appropriated funds require the Corps to seek reimbursement for the added costs associated with the commercial materials.

COSTS

Unlike the early days of the Program, where AEC conducted and funded cleanups, pressure from Congress led DOE and now the Corps to seek reimbursement from site owners for some of the cleanup costs.³ Since receiving the Program from DOE, the Corps has applied standard CERCLA owner, operator, and arranger liability requirements to FUSRAP cleanups, and working with the Department of Justice, has recovered some costs, all from negotiated settlements without litigation. Corps District Commanders have discretion, depending on health and safety and budget considerations, to proceed with cleanup while cost considerations are settled. Given current financial pressures, unless health and safety dictates otherwise, funding substantial work at new sites can be extensively delayed and cost discussions could precede cleanup work.

³ Note the title of the Corps' ER 200-1-4 [7], which includes the term "Recovering Costs."

DOE and Congress continue to add sites to the program as owners discover residual radioactive and chemical contamination, usually resulting from ore processing and uranium metal machining, traceable to early MED/AEC activities. An Internet search for the DOE FUSRAP Considered Sites Database [8] will lead to a searchable list of sites already evaluated and links to relevant documents. A DOE eligibility determination does not guarantee a cleanup, but will move a site along in the process, resulting in comprehensive assessment by the Corps, and possibly designation as an active site for expenditure of funds, possibly leading to cleanup. Cleanup can be conducted by a site owner, subject to Corps oversight, or conducted completely by the Corps. Budgets are limited and can result in limited activity on any site or substantial delays prior to active cleanup, but once active cleanup starts, the Corps tries to fund continuous activity to avoid demobilizing contractors.

Given budget pressures, a FUSRAP cleanup may not be a free ride, but settlements so far have tended to be fair, and at worst, costs so far have been shared between the parties rather than the entire cost being borne by the site owner.

REFERENCES

1. Energy and Water Development Appropriations Act, 1998, Pub. L. 105-62.
2. “Memorandum of Understanding between the U.S. Department of Energy and the U.S. Army Corps of Engineers Regarding Program Administration and Execution of the Formerly Utilized Sites Remedial Action Program (FUSRAP),” March 1999 (www.lm.doe.gov/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1660).
3. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, *et seq.*
4. Energy and Water Development Appropriations Act, 2000, Pub. L. 106-60, § 611.
5. U.S. Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. 107-117, § 8143.
6. U.S. Department of Energy, “FUSRAP Management Requirements and Policies Manual, Revision. 2,” May 6, 1997.
7. U.S. Army Corps of Engineers, “Formerly Utilized Sites Remedial Action Program (FUSRAP) – Site Designation, Remediation Scope, and Recovering Costs,” ER 200-1-4, 30 August 2003 (<http://140.194.76.129/publications/eng-regs/er200-1-4/entire.pdf>).
8. U.S. Department of Energy, FUSRAP Considered Sites database (http://www.lm.doe.gov/Considered_Sites/).