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

March 17, 2010

OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

MEMORANDUM

**Subject:** Clarification of LUST Eligibility and Grant Implications

**From:** Carolyn Hoskinson, Director  
Office of Underground Storage Tanks

A handwritten signature in black ink, appearing to read "Hoskinson", is written over the "From:" line.

**To:** UST/LUST Regional Division Directors, Regions 1-10  
UST/LUST Regional Deputy Division Directors, Regions 1-10  
UST/LUST Regional Branch Chiefs, Regions 1-10  
UST/LUST Regional Program Managers, Regions 1-10

Over the past couple of weeks, OUST has learned of instances in which states have made investments of LUST Trust Fund monies based on LUST eligibility interpretations involving the consideration of whether tanks on a property were "in use." This memorandum discusses the interpretation of the term "in use," associated eligibility determinations and potential grant implications.

EPA awards states cooperative agreements under section 9003(h)(7) of the Solid Waste Disposal Act (SWDA) to provide LUST funds to enable states to conduct corrective action at sites where the condition of tanks pose risks to public health and the environment ("corrective action funding"). One of the justifications for states to use corrective action funding is if the state cannot find within 90 days an owner or operator of a tank who is subject to and capable of performing corrective action (SWDA 9003(h)(2)(A)). A tank owner is defined within SWDA 9001(4) and relies on a tank being "in use." Consistent with this language as codified in 40 CFR 280.12, the owner is ... "any person who owns an UST system used for storage, use or dispensing of regulated substances."

States may only use corrective action funding at sites which meet the eligibility requirements of SWDA 9003(h)(2). Based on discussions with states and the regions, OUST has come to recognize that the regulations and the terms of the cooperative agreements entered into with states and territories are not explicit regarding how to interpret the phrase "in use" in all situations, particularly those involving local governments obtaining title to sites through tax foreclosure and other governmental actions. Therefore, OUST recommends that regional program managers work with regional award officials to ensure that States are not found to be in material non-compliance with respect to their cooperative agreements pursuant to 40 CFR 31.43.

OUST believes it appropriate for states to proceed with work on sites for which it has used its interpretation of “in use” to make the site LUST eligible and for which a financial commitment has already been made prior to the date of this memorandum. Such a commitment could be, for example, the obligation of LUST Trust funds to an engineering contract or a financial commitment regarding accessing or controlling the site following the determination of LUST Trust fund eligibility, such as a municipality taking title to the property.

OUST is hereby providing, in this memorandum, the following interpretation of “in use.” Specifically, when making judgments about ownership for the purposes of LUST eligibility under SWDA 9003(h)(2)(A), states must consider the term “in use” to mean the presence of regulated substance in the underground storage tanks. To determine whether regulated substance is present, states may use the definition of empty as described in 40 CFR 280.70. States may not make eligibility interpretations based on a consideration that a tank is not in use because the tank was not dispensing fuel or because any potential owner did not operate the UST system or cause any suspected contamination.

OUST requests that each Regional office communicate this interpretation of “in use” with their States. In addition, OUST encourages continued coordination between regional program managers and award officials regarding the consideration of LUST eligibility.

If you have any questions regarding this memo, please contact Adam Klinger at [klinger.adam@epa.gov](mailto:klinger.adam@epa.gov) or 703-603-7167.

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