

## **FACT SHEET**

### **JUDICIAL SETTLEMENT AT FORMERLY USED DEFENSE SITES (FUDS)**

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#### **FUDS Program Background**

The FUDS Program was created by Congress to manage legacy environmental contamination at over 4,000 former Department of Defense (DoD) sites that were contaminated as a result of military operations. Congress selected the U.S. Army Corps of Engineers (USACE) as the lead federal agency to manage the investigation and remediation of these former DoD sites. Under the FUDS Program, Congress provides a separate line item funding source in the USACE's annual appropriations to fund USACE's investigation and remediation at these sites. However, USACE is prohibited by law from using their annual FUDS appropriations to cash out of their environmental liabilities at these sites.

In 2006, the estimated "cradle to grave" cost of the United States to address residual environmental contamination at FUDS sites was approximately \$18.2 billion dollars. For fiscal year 2007, Congress appropriated \$253.8 million to address all FUDS sites for that year. Consequently, the USACE is left with the unenviable task of addressing a multitude of sites, many of which present significant risks to human health and the environment, with a fraction of the funding required. Due to the serious lack of resources available, the reality of the FUDS Program is that USACE's investigation and remediation at most FUDS sites will be inadequate from the perspective of local citizens and entities forced with interacting with these problems on a day-to-day basis.

#### **FUDS Settlement Policy**

In an attempt to mitigate the effect of the lack of resources available from annual FUDS appropriations, the USACE has formulated a policy of judicially settling DoD CERCLA liability with other potentially responsible parties (PRPs) at appropriate FUDS sites. *See, USACE Manual, ER 200-3-1, Environmental Quality, Formerly Used Defense Sites (FUDS) Program Policy, 10 May 2004.* Judicial settlements are not paid out of the FUDS annual appropriations but are paid out of the United States' Judgment Fund. The FUDS Settlement Policy goal is to negotiate a fair and equitable settlement with other PRPS *who either have or will take the response action in exchange for a release of DoD liability under CERCLA, other applicable environmental law and rules of common law.*

## **FUDS Settlement Process**

Pursuant to their FUDS policy, the USACE recognizes it is sometimes better to settle DoD CERCLA liability with other PRPS rather than conducting response actions at properties. The process to achieve settlement with USACE is somewhat site-specific but some of the common steps for each site include:

1. Identification of appropriate sites
2. Assignment of a pro rata percentage of responsibility between the parties based on equitable factors
3. Development of a Cost-to-Complete
4. Development of a Stakeholder Action Plan
5. Technical discussions with the USACE District office regarding scope of any remaining investigation and remedial alternatives and their associated costs
6. Settlement negotiations with the assigned Department of Justice Attorney and/or USACE District Counsel
7. Approval of settlement by USACE chain-of-command
8. Implementation of all or portions of Stakeholder Action Plan as needed
9. Finalization of Settlement in the form of a judicially ordered Consent Decree
10. Implementation of Cost-to-Complete
11. Five-year reviews

## **The Session Law Firm**

The Session Law Firm devotes a significant portion of its practice to former Department of Defense and Department of Energy sites. Having received the bulk of their formal environmental legal training from the Army, two lawyers from The Session Law Firm are intimately familiar with the workings of the FUDS Program. While other environmental lawyers shy away from these sites, The Session Law Firm actively searches for the opportunity to assist local entities with the dizzying complexities presented by these sites.