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Times Beach Deleted from National Priorities List

On September 25th, EPA took the long-awaited step of deleting Times Beach, Missouri from the Superfund National Priorities List of hazardous waste sites. EPA and the State of Missouri have determined that the site no longer poses a significant threat to public health or the environment and that no further remedial measures are needed.

Along with Love Canal and the Valley of the Drums sites, Times Beach captured the nation's attention in the early 1980s and focused public concern on environmental matters. Over the past 18 years, all residents and businesses of Times Beach were permanently relocated, the land was purchased and con-

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25 Years of RCRA: *Building on Our Past to Protect Our Future*

Twenty-five years ago, hazardous waste was an enigma. We did not know how much waste was produced or what ultimately happened to it. By the middle of 20th century, the American people stood up and demanded that something be done about the dangers posed by pollution from industrial waste. And Congress listened. On October 21, 1976, Congress passed the most sweeping legislation on waste ever enacted: the Resource Conservation and Recovery Act (RCRA).

When signing the legislation, President Ford called hazardous waste disposal "one of the highest priority environmental problems confronting the nation," and tasked EPA with solving the problem. In the past 25 years, RCRA has made great strides in pollution prevention and waste minimization. Americans have updated and improved their methods of waste management and are cleaning up past contamination. Today, individuals, organizations, and businesses are not only working to reduce the amount of waste they generate, but to prevent it altogether. People and businesses are reducing risk from waste by practicing safer, smarter, and more economical waste management than ever before.

The success we have achieved in the last century is only a springboard to the challenges of the new century. We must continue our strong commitment to pollution prevention efforts and to introducing innovation and efficiency into our waste management systems. We must also continue to seek partnerships with industry, government, and the public. By working together, we will achieve resource conservation and eliminate threats from waste.

To commemorate RCRA's anniversary, EPA is preparing a report highlighting the successes of RCRA's protective framework. It acknowledges the vital roles that states, tribes, industry, and communities have played in that success. The report, *25 Years of RCRA: Building on Our Past to Protect Our Future*, will be available in hard copy and on the Office of Solid Waste website (www.epa.gov/epaoswer/osw) in December.

For more information, or to order hard copies of the report, call the RCRA Call Center. Callers within the Washington Metropolitan Area, call 703-412-9810 or TDD 703-412-3323 (hearing impaired). Long-distance callers, call 800-424-9346 or TDD 800-553-7672. Address written requests to: RCRA Information Center (5305W), 1200 Pennsylvania Ave., NW, Washington, DC 20460-0001.



CleanupNews is a quarterly newsletter highlighting hazardous waste cleanup cases, policies, settlements, and technologies.

EPA Contributes Emergency Support

Administrator Christie Whitman and employees of the United States Environmental Protection Agency have expressed their deepest condolences to everyone affected by the terrible tragedy of September 11th. At the request of FEMA in the aftermath of the attacks, EPA has worked closely with state, federal, and local authorities to provide expertise on cleanup methods for hazardous materials, as well as to monitor the presence of contaminants in samples of ambient air, drinking water sources, and runoff near the disaster sites. EPA and OSHA have been analyzing samples for the presence of pollutants such as asbestos, radiation, mercury and other metals, pesticides, PCBs, or bacteria that might create health hazards.

While careful not to impede the search, rescue, and cleanup efforts at the World Trade Center or the Pentagon disaster sites, EPA's primary concern has been to ensure that rescue workers and the public are not being exposed to elevated levels of potentially hazardous contaminants in the dust and debris, especially where practical solutions are available to reduce exposure. Among other activities, EPA brought ten 3,000-gallon capacity HEPA (highly efficient particulate air) filter vacuum trucks into lower Manhattan to help safely clean streets, vehicles, and buildings of potentially hazardous dust.

OERR's Environmental Response Team Center continues to support FEMA New York and the New York City Emergency Operations Center. Members of EPA's Chemical Emergency Preparedness and Prevention

Office have assisted FEMA in staffing the Emergency Support Function desk, which is responsible for hazardous material issues. EPA has been tasked to monitor air, debris, and water for presence of hazardous material, help identify personal protection equipment needed by the emergency responders, and organize decontamination stations for the emergency responders. EPA has also been involved in debris disposal issues.

On the Legislative Front

Brownfields and MTBE (methyl tertiary butyl ether) have been receiving attention on Capitol Hill in recent months. A number of brownfields bills were introduced in Congress this year. S. 350, the Brownfields Revitalization and Environmental Restoration Act of 2001, was introduced in February by Sen. Lincoln Chafee. It was passed with an amendment by the Senate on April 25th by a vote of 99 to 0, and sent to the House.

H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act, was introduced in the House of Representatives on September 10, 2001, by Rep. Paul E. Gillmor with seven co-sponsors. It would similarly promote the cleanup and reuse of brownfields, provide financial assistance for brownfields revitalization, enhance state response programs, and provide relief for small businesses from liability under Superfund. The bill was referred to subcommittees of the Energy and Commerce Committee and the Committee on Transportation and Infrastructure.

On MTBE, the Federal Reformulated Fuels Act of 2001 (S. 950), introduced by Sen. Bob Smith in May 2001, was approved without amendment by

the Senate Committee on Environment and Public Works on September 25th. The bill would require EPA to conduct studies of health problems related to MTBE. It would authorize the use of the Leaking Underground Storage Tank Trust Fund to carry out corrective actions in cases of MTBE releases, and to conduct inspections, issue orders, or bring actions under the underground storage tank regulation program. The bill would authorize certain states to impose controls on any fuel or fuel additive for the purpose of water quality protection, and would require the EPA Administrator to ban the use of MTBE in motor fuel within four years.

USTfields Pilots

On August 23, 2001, Administrator Whitman announced \$4 million in financial assistance to clean up contamination from leaking underground storage tanks (USTs) around the nation. EPA expects to select up to 40 pilot projects to help states and cities clean up these properties and return them to productive economic and public use. Modeled on the successful brownfields program, the new USTfields program involves abandoned or under-used industrial and commercial properties with perceived or actual contamination from petroleum from underground storage tanks (which brownfields cannot address under CERCLA).

Each selected pilot will receive up to \$100,000 in Leaking Underground Storage Tank Trust Fund monies. The deadline for submitting proposals for the USTfields Pilots has been extended to November 19, 2001.

For more information, go to <http://www.epa.gov/oust/ustfield/index.htm#pilots>.

Times Beach Now a State Park

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veyed to the State of Missouri, structures at the site were demolished, dioxin-contaminated soils were excavated and incinerated, and the site was restored to a state park.

Background

Times Beach was formerly an incorporated city in southwest St. Louis County, approximately 20 miles southwest of the City of St. Louis. The unpaved roadways of Times Beach were sprayed for dust control in the early 1970s with dioxin-contaminated waste oil.

The presence of dioxin contamination was initially confirmed by EPA through sampling conducted in

November 1982. In response to the discovery of dioxin contamination and a health advisory issued by the Centers for Disease Control, EPA announced the permanent relocation of the nearly two thousand residents of Times Beach in February 1983. The Times Beach site was added to the NPL later that year.

In 1988, EPA approved a temporary incinerator to be located at Times Beach for the treatment of dioxin-contaminated materials from Times Beach and other eastern Missouri sites. In 1990, a consent decree was entered between EPA, the State of Missouri, and the primary PRP group.

Under the consent decree, EPA was responsible for excavation and transportation of dioxin-contaminated soils from eastern Missouri

dioxin sites to Times Beach for incineration. The State was responsible for long-term management of the Times Beach site. The settling defendants were responsible for demolition and disposal of structures and debris remaining after the permanent relocation, construction of a ring levee to flood-protect an incinerator subsite, construction of a temporary incinerator, excavation of contaminated soils at Times Beach, operation of the incinerator, and restoration of Times Beach upon completion of response actions.

Full-scale operation of the incinerator between March 1996 and June 1997 treated a total of 265,354 tons of dioxin-contaminated materials from 27 eastern Missouri dioxin sites, including 37,234 tons of dioxin-contaminated materials from the Times Beach site itself. Solid treatment residue from the incineration of these materials was land disposed on-site after testing confirmed that required treatment levels had been achieved. Site restoration was completed by the settling defendants in accordance with a design approved by the State and EPA.

In September 1999, the State of Missouri announced the opening of Route 66 State Park, which encompasses the former Times Beach site. The newly created park has been among the most visited of all state parks in eastern Missouri.

Times Beach will remain eligible for Superfund-financed remedial actions following deletion from the NPL. In the event that a significant release of a hazardous substance is identified at the site, Times Beach can be restored to the NPL without application of the Hazard Ranking System.

For more information, contact Bob Feild, Remedial Project Manager, EPA Region 7, 913-551-7697.

Then: Times Beach incinerator in the mid-1990s...



And now.



The Triad Approach to Site Cleanup

By Dan Powell, Deana Crumbling, OSWER/Technology Innovation Office

The Technology Innovation Office (TIO) of the Office of Solid Waste and Emergency Response (OSWER) is supporting a streamlined approach to the monitoring and measurement activities that occur throughout the waste site cleanup process. The support reflects a growing trend towards using smarter and faster technologies and work strategies. TIO is coordinating with offices inside and outside OSWER and EPA (DOD, DOE, states, etc.) to inform regulators, practitioners, site owners, and others involved in site cleanup decisions about the benefits of a streamlined approach.

The new approach can significantly reduce the total cost and time for site cleanup while providing decisionmakers with better information on site conditions. The focus is on aligning the selection of sampling and analytical methods with the decisions and site objectives they support. Field analysis and rapid sampling technologies allow users to actively *and* economically manage the major sources of uncertainty in environmental data, namely, sampling error and sample representativeness.

Success hinges on the presence of an experienced field team leader empowered to “call the shots”...

The trend towards modernization and streamlining focuses on three main aspects, thus TIO is referring to it as the “triad” approach. The three prongs of the triad are:

- **Systematic planning** for all site activities. Rather than relying on prescriptive, one-size-fits-all approaches to method selection and sampling strategies, systematic planning requires site decisionmakers to clearly define end goals for the site and objectives for data collection. Systematic planning then involves charting the most resource-effective course to reach those end goals. A team of multi-disciplinary,

experienced technical staff translates the project’s goals into realistic technical objectives.

- **“Dynamic” work plans** allow project teams to make decisions in the field about how subsequent site activities will progress. This approach uses a regulator-approved decision-tree, and is supported by the rapid turnaround of data collected, analyzed, and interpreted in the field. Success hinges on the presence of an experienced field team leader empowered to “call the shots” based on the decision logic developed during the planning stage. Dynamic work plans allow users to fully realize the benefits of real-time data analysis and to reduce the number of mobilizations necessary to meet the data needs of decisionmakers.
- **On-site analytical tools**, rapid sampling platforms (e.g., direct push technologies), and on-site data interpretation and management are the key technology components making dynamic work plans possible. During the planning process, the team identifies the type, rigor, and quantity of data needed. Those decisions then guide the design of sampling regimens and the selection of analytical tools and methods.

The emphasis on aligning methods and data to the decisions and objectives they support is essential to managing uncertainty. It helps remove biases against new technologies vs. “approved” approaches,

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The “Triad” Approach Embodies Concepts Advanced by Other/Past Efforts

1. Performance Based Measurement Systems or PBMS (*EPA, Agency-wide effort*)
2. Data Quality Objectives Guidance (*EPA, Agency-wide*)
3. Expedited Site Characterization, Accelerated Site Characterization (*ASTM Guide*)
4. Superfund Accelerated Cleanup Model and Dynamic Field Activities Guidance (*EPA, Superfund Program*)
5. Dynamic Work Plans (*Tufts University, EPA Region 1 Project*)
6. Rapid Site Characterization (*Petroleum Industry*)

“Foreclosure” Prospective Purchaser Agreement

EPA has issued an unusual prospective purchaser agreement (PPA) as part of the Agency’s commitment to protecting greenfields by removing the liabilities associated with redeveloping contaminated properties. The PPA in question was for the Center Star Manufacturing Superfund Site in Oxford, Calhoun County, Alabama. What made it unusual was that a mortgage holder requested the PPA on behalf of an unknown prospective bidder at a scheduled foreclosure auction. The PPA enabled the mortgage holder, First Commercial Bank, to foreclose on the site property and protect the highest bidder at the foreclosure sale from incurring Superfund liability.

The site is the location of a defunct fabric processing facility operated by Center Star Manufacturing, Inc. Oper-

ations ceased in 1996 when the corporation filed for bankruptcy protection. Title to the site is currently vested in the Industrial Development Board of the City of Oxford (IDB). The IDB leased the property to Center Star Manufacturing, Inc. EPA has determined that the IDB is not a liable party due to the Lender Liability Exemption. In 1999, EPA conducted a removal action at the site in which various drums containing hazardous substances, contaminated debris, and other waste materials were removed. EPA conducted a preliminary assessment in December 1999, a site investigation in September 2000, and an expanded site investigation into the extent of ground water contamination in early 2001. As of January 12, 2001, EPA had incurred \$188,799.49 in response costs.

The Center Star PPA

The usual PPA process involves an agreement between EPA and a known purchaser. However, First Commercial Bank was in a situation where the only means of recovering its security was through the foreclosure process. EPA Region 4 drafted a PPA, negotiated an appropriate consideration amount (the bank agreed to reduce the security it received from the foreclosure funds), obtained the United States’ signature, and offered the PPA for public notice and comment in advance of offering the PPA to the highest bidder at the conclusion of the sale. Notice of the federal Superfund interest and offer of the PPA was placed in the foreclosure sale notices, and a copy of the PPA was made available to the public at the local library.

On June 5, 2001, the EPA staff attorney attended the foreclosure auction and prior to the sale, explained the potential Superfund liability, the PPA process, the PPA contract terms, and answered questions posed by the bidders. The property was purchased by the City of Oxford for redevelopment. Immediately after the sale (prior to taking title), the City of Oxford became a signatory to the PPA and cut a check to EPA for \$87,500. Absent this innovative PPA, the bank would not have been able to successfully foreclose on the property and the site would have remained abandoned and a blight within the community for years.

For more information, contact Kathleen Wright, EPA Region 4, 404-562-9574.

Allocation Pilots Completed

Allocating shares of costs for cleaning up Superfund sites among potentially responsible parties has long been a source of controversy. A settlement reached recently at the Whitehouse Oil Pits site in Jacksonville, Florida, marks the successful completion of an initial round of “allocation pilots.”

EPA offered participation in allocation pilots to PRPs at 12 sites beginning in 1995. The pilots were part of a package of Superfund administrative reforms that EPA was testing to determine its feasibility and its impact on settlements.

Under the pilot, allocation parties were initially given the opportunity to nominate additional parties. The parties then selected a neutral “allocator” to conduct a non-binding, out-of-court process resulting in an allocation report. The allocation report detailed each allocation party’s assignment of shares of responsibility. Parties were offered an opportunity to settle with EPA based on their allocated share. Under the pilot, EPA was responsible for 100 percent of the orphan share (i.e., shares of insolvent or defunct parties), as well as the shares of non-settling parties.

For sites that went through the entire process, it took approximately 18-24 months to complete the complicated settlement negotiations. The most difficult issue was getting the PRPs to agree to perform the response action under a consent decree.

For more information, contact Gary Worthman, EPA/OSRE, 202-564-4296.



EPA Sets Precedent in Successfully Pursuing Generators of Used Tires at Irvington

For the first time in the history of the Superfund program, EPA has successfully pursued an enforcement action against generators of used tires. Each year, EPA and state agencies expend millions of dollars in responding to tire fires. Usually, the owner/operator of the facility is insolvent and as a result, the taxpayer bears the financial burden of cleanup. For the first time, an EPA enforcement team has pursued the generators of the used tires under the theory that they were arranging for the disposal of a hazardous substance. The enforcement strategy against the generators is novel and was developed in Region 4 with the full concurrence of EPA Headquarters and the Department of Justice. Other EPA regions and state agencies have followed this case closely and are interested in pursuing similar enforcement activities. The settlement will greatly impact EPA's approach to enforcement actions at tire recycling facilities/dumps that require Superfund response actions.

In 1997, Region 4 responded to a fire involving 100,000 to 300,000 tires stockpiled at a site in Irvington, Alabama. EPA suppressed the fire and removed thousands of gallons of pyrolytic oil runoff from the fire that was threatening a wildlife sanctuary, incurring approximately \$230,000 in response costs. After investigation, EPA determined that the owner/operator was insolvent.

In the past, EPA's cost recovery efforts at similar sites have been limited to pursuing owners and operators who typically had few financial resources. However, because of recent

rulings in the law and the exclusion of whole tires under the Superfund Recycling Equity Act, EPA Region 4 and DOJ decided to pursue the tire generators at this site. Initially, the major generators balked, claiming that their disposal of used tires did not constitute disposal of a CERCLA "hazardous substance." Region 4 and DOJ persisted, however, and the tire generators agreed to settle their liability with EPA.

The Region relied on a Second Circuit case that held that a finished prod-

uct that contained hazardous substances was hazardous and that the intervening force of an event such as a fire that caused the release did not create a liability barrier. While the Second Circuit's holding could be applied to most consumer products, EPA exercised its enforcement discretion and has only applied this reasoning to tire fires where the Agency routinely expends fund money on large stockpiles of finished products. This settle-

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In Brief

- **Caldwell Trucking PRP Group v. Caldwell Trucking Company:** On September 19, 2001, the United States filed an amicus brief on behalf of the defendants in this private party action brought by plaintiff in state court for contribution and related relief. The United States argued that, because it had entered into a consent decree resolving defendants' liability for CERCLA cleanup costs at the site and extending to defendant contribution protection as provided in CERCLA Section 113(f)(2) for all site-related costs, a suit by plaintiffs for contribution toward cleanup costs and similar relief would be proscribed by CERCLA Section 113(f)(2) when and if that consent decree is entered by the U.S. District Court for the District of New Jersey.

Accordingly, the United States asked the state court to stay its proceeding until the U.S. District Court had an opportunity to decide whether to enter the consent decree. The United States further argued that, since maintenance of a state court contribution action directly conflicted with the intent of CERCLA Section 113(f)(2) to promote settlements by extending contribution protection to settling parties, such state court action was preempted by CERCLA Section 113(f)(2). (ESX-L-9812, N.J. Super. Law Div.) Contact: Steve Botts, EPA/RSD, 202-564-4217.

- **Sixth Circuit Holds That Passive Migration of Hazardous Substances Does Not Constitute Disposal Under CERCLA:** On September 4, 2001, the U.S. Court of Appeals for the Sixth Circuit in a private-party contribution action under CERCLA (*Bob's Beverage, Inc. v. Acme, Inc.*, 2001 WL 1011894 (6th Cir. 2001)) affirmed a district court's decision and held that: (1) a previous owner was not liable for response costs incurred by the present owner and operator; (2) that the previous owner who replaced a septic system did not cause the disposal of hazardous waste; and (3) that passive migration of hazardous substances does not constitute disposal within the meaning of CERCLA.

The Sixth Circuit stated that under CERCLA a disposal is not the same as a release; the term release is broader than disposal. According to the Sixth Circuit's interpretation of CERCLA's provisions, disposal requires evidence of active human conduct and addresses activity that precedes the entry of a substance into the environment. The decision in this case is consistent with the Court's prior decision in *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000). Contact: Clarence E. Featherson, EPA/RSD, 202-564-4234.

Triad Approach

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reduces confusion (and confusing, unnecessary data), and decreases the need for multiple sampling events.

The results, which TIO is now documenting in case studies, show faster, cheaper, yet still protective resolution of contaminated sites. *If used correctly*, innovative rapid-turnaround field analytical and software tools coupled with on-site decisionmaking can significantly condense a project's overall budget and lifetime, while increasing

the likelihood that the gathered data will guide transparent, scientifically defensible decisions.

EPA, along with a number of other federal agencies and state organizations, is accelerating the development of policies and information resources to support site decision-makers as they shift to newer, streamlined approaches. An array of educational, training, and guidance resources already exists and additional ones are under development. Access to these resources is provided through TIO's Internet site at <http://clu-in.org> web site (under "Site Characterization and Monitor-

ing"). The "Perspectives" area of this section includes a number of papers and resources more fully describing the concepts covered briefly above. The Superfund program is now developing guidance in this area as well (go to <http://www.epa.gov/superfund/programs/dfa>).

Updating hazardous waste site practices to accommodate these new tools and strategies has broad ramifications for both practice and policy. Revising institutional and regulatory barriers will take time and effort. Nevertheless, the benefits offered by "smarter strategies" make the effort worthwhile.

In the Courts

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ment also enhances environmental protection by giving notice to arrangers for tire disposal that there is potential liability for tire fires and that they should take precautions to ensure that the tires are disposed of at responsible and secure facilities.

For more information, contact Kathleen Wright, Region 4 Assistant Regional Counsel, 404-562-9574.

Eighth Circuit Affirms District Court's Award of Oversight Costs, Indirect Costs and Attorney's Fees

The Eighth Circuit Court of Appeals has held that the district court did not err in granting summary judgment to the United States, awarding it over \$4 million in cleanup costs in connection with the Des Moines TCE site. (*United States v. Dico, Inc.*, 2001 WL 1094944 (2001))

The defendant, Dico, Inc., argued that the definitions found in CERCLA do not permit the recovery of indirect and oversight costs. Dico relied on the Third Circuit's decision in *U.S. v. Rohm & Haas* (2 F.3d 1265 (1993)) which held that the government is not entitled to recover oversight costs in the context of a removal action. The Court disagreed and declined to accept the "narrow approach" adopted by the Third Circuit. Rather, the Court was persuaded by the Tenth Circuit which found that Rohm & Haas "departed significantly from prior case law that had construed the cost recovery provisions of CERCLA broadly." Putting aside the Rohm & Haas decision, the Court looked at the broad definition of "remedial action" and concluded that oversight activities are included in the definition and, therefore, are a recoverable cost under Section 107(a) of the statute.

Dico also argued that CERCLA does not authorize the recovery of the government attorney's fees and even if it did, the government bears the burden of proving that its attorney fees

are reasonable. The Court rejected both arguments, finding that the terms "response," "removal," and "remedial action" all include the language "enforcement activities related thereto" that allows for the recovery of attorney's fees. In addition, the Court noted that the language of CERCLA creates a conclusive presumption that all costs incurred by the government that are not inconsistent with the National Contingency Plan (NCP) are reasonable costs. Therefore, the Court concluded that Dico bears the burden of proving that the government's costs – attorney's fees or otherwise – are inconsistent with the NCP.

Although the Court found "attractive" the Ninth Circuit's decision in *U.S. v. Chapman* (146 F.3d 1166 (1998)), holding that the United States is only entitled to "reasonable" attorney's fees, the Court rejected that court's analysis, noting that all CERCLA requires is that response costs not be inconsistent with the NCP.

For more information, contact David Dowton, EPA, 202-564-4228.

November 15, 2001

Applications for FY 2002 Brownfields Cleanup and Revolving Loan Fund Pilots.

Download guidelines from www.epa.gov/swerosps/bf/applicat.htm#guide.

November 19, 2001

Applications for USTfields Pilots.

\$4 million available for up to 40 projects to clean up properties with petroleum contamination from leaking USTs. Go to www.epa.gov/oust/ustfield/index.htm#pilots.

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Glossary

CEPPO	Chemical Emergency Preparedness and Prevention Office	OERR	Office of Emergency and Remedial Response (EPA)
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act (Superfund law)	OSHA	Occupational Safety and Health Administration
EPCRA	Emergency Planning and Community Right-To-Know Act	PPA	Prospective Purchaser Agreement
FEMA	Federal Emergency Management Administration	PRP	Potentially Responsible Party
MTBE	Methyl tertiary butyl ether	RCRA	Resource Conservation and Recovery Act (hazardous waste)
NCP	National Contingency Plan	RSD	Regional Support Division (OSRE/EPA)
NPL	National Priorities List (Superfund)	SREA	Superfund Recycling Equity Act
		TCE	Trichloroethylene
		UST	Underground Storage Tank

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www.epa.gov/oeca/osre

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