

Regulatory Guidance Letter 89-03

SUBJECT: Activities Within Superfund Sites

DATE: August 29, 1989

EXPIRES: December 31, 1991

1. See RGL 89-2 for guidance on EPA Superfund site activities.
2. Generally, when reviewing applications for permits to undertake activities at Superfund sites, designated pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), district engineers should avoid permitting activities that would hamper future clean-up efforts or would allow hazardous discharges without safeguards to protect liability to the United States.
3. There are two provisions of CERCLA, relating to liability to the United States, that warrant special consideration. First, Section 107(f)(1) of CERCLA (42 USC 9607(f)(1)) states that *"no liability to the United States ... shall be imposed ... where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license ..."* In view of this provision, careful consideration should be given to the wording of the Corps permit documentation to ensure that a permittee is not inadvertently exempted from liability to the United States for natural resource damages.
4. Second, Section 107(j) of CERCLA (42 USC 9607(j)) states that *"recovery by ... the United States ... for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."* A "federally permitted release" is defined in Section 101(10) of CERCLA (42 USC 9601(10)) as "discharges in compliance with a legally enforceable permit under section 1344 of title 33 ..." Although Section 107(j) does not necessarily exempt the permittee from all liability to the United States, it does exempt the permittee from liability for response costs under CERCLA if the release is federally permitted.
5. In most cases, where there is any doubt about whether a Corps permit will inappropriately exempt the permittee from liability to the United States, the district engineer should include a special condition in the permit that is worded in such a way as to ensure that the permittee accepts potential liability for both response costs and natural resource damages, to the same extent as would be inherent under CERCLA, when he accepts his Corps permit.

6. In cases where irreversible and irretrievable commitments of natural resources have not been identified in the Corps documentation and where no discharges of any concern are being authorized, a Corps permit may be issued without imposing any special conditions to preserve the permittee's liability to the United States. However, in such cases, it will usually be appropriate to indicate, in the permit cover letter, the limitations on any discharges being authorized -- such as only clean material from upland sites for riprap bank protection.

7. This guidance expires 31 December 1991 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

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