DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
2000 NAVY PENTAGON
WASHINGTON, D.C. 20350-2000

IN REPLY REFER TO

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21 DEC 2001

From: Chief of Naval Operations
To: Commander, Naval Facilities Engineering Command

Subj: POLICY ON NATURAL RESOURCE INJURY AND DAMAGES IN THE INSTALLATION RESTORATION PROGRAM

Ref: (a) Department of Defense Interim Policy on Integration of Natural Resource Injury Responsibilities and Environmental Restoration Activities, 02 May 2000

Encl: (1) Navy/Marine Corps Policy on Natural Resource Injury and Damages in the Installation Restoration Program

1. Enclosure (1) is provided in response to concerns received from the field to clarify and amplify reference (a). Enclosure (1) provides policy pertaining to investigation of potentially impacted natural resources during the Ecological Risk Assessment (ERA) process. This policy also discusses working with Natural Resource Trustees during the ERA process and selecting a response action, to the extent practicable, that will reduce the impacts to natural resources.

2. Enclosure (1) has been coordinated with the Marine Corps.

3. For further information or questions please contact Wanda L. Holmes of my staff at (703) 604-5420 or DSN 664-5420 or email holmes.wanda@hq.navy.mil.

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NAVY/MARINE CORPS POLICY ON NATURAL RESOURCE INJURY AND DAMAGES IN THE INSTALLATION RESTORATION PROGRAM

BACKGROUND

The Department of the Navy (DON) places high priority on protecting natural resources under Navy management and control. Installation Restoration (IR) sites may impact our natural resources. Non-DON entities may also impact Navy and Marine Corps (Navy/MC) natural resources. This policy provides clarification on investigating the impact to natural resources and provides direction on selecting and conducting response actions in the DON IR Program. This policy also states how the Navy will conduct Natural Resource Damage Assessments (NRDA) against non-Navy parties that have injured our natural resources. This policy expands the Department of Defense issued Interim Policy on Integration of Natural Resource Injury Responsibilities and Environmental Restoration Activities (May 2000).

DELEGATION AND AUTHORITY

Military components have been delegated the authority to act on Secretary of Defense behalf as Natural Resource Trustees (NRT) with regard to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by virtue of DODINST 4715.7. The Assistant Secretary of the Navy (I&E) retains the authority to act as the NRT for the purpose of recovering damages to natural resources under the jurisdiction of DON as contained in CERCLA Section 107(f) as delegated by Section 1(c) of Executive Order 12580, as amended by E.O. 12777 and E.O. 13016.

APPLICABILITY

Policies and procedures contained herein apply to site investigations and cleanups funded under Environmental Restoration, Navy (ER,N) and Base Realignment and Closure (BRAC). Further, procedures are included under this policy for incidences where non-DON parties have injured our natural resources.

DEFINITIONS

Natural Resources (NR) - "means land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States…any State or local government…any Indian tribe." (43 CFR Subtitle A, 11.14).

Natural Resource Injury (NRI) - "means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance…" (43 CFR Subtitle A, 11.14). The aspects of injury could be determined during the site's ecological risk assessment.

Interim Injury - injury that occurred in the past before the response action was initiated.

Residual Injury - injury to the natural resource that is remaining after the completion of the response action.

Natural Resource Damages (NRD) - "means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA." (43 CFR Subtitle A, 11.14).

Natural Resource Trustee (NRT) - "means any Federal natural resource management agency designated in the NCP and any State agency designated by the Governor of each state, pursuant to section 107(f)(2)(B) of CERCLA…" (43 CFR Subtitle A, 11.14). Those Federal trustees include the Secretary Department of Defense, Secretary of the Interior (US Fish and Wildlife Service), Secretary of Commerce (National Oceanic Atmospheric Administration), Secretary of Agriculture and Secretary Department of Energy (National Contingency Plan, July 2000). NRTs have statutory responsibility with regards to protection and/or management of natural resources or to stewardship as a manager of Federally owned land.

Natural Resource Damage Assessment (NRDA) - "means the process of collecting, compiling, and analyzing information, statistics, or data through prescribed

methodologies to determine damages for injuries to natural resources." (43 CFR Subtitle A, 11.14).

POLICY

Within the IR Program the DON shall address the "injury" to the natural resources (i.e., natural resource injury as defined above) whether the resource is owned by the DON or another party. DON will not use ER,N/BRAC funds to conduct Natural Resource Damage Assessments. Nor shall ER,N/BRAC funds be otherwise used to determine damages to natural resources, whether the resource is owned by the DON or another party. This policy requires that:

1. The injury to natural resources shall be investigated during the Ecological Risk Assessment process of the IRP.

If there are natural resources potentially impacted by Navy/MC hazardous substance releases, the impacted resources shall be investigated during the Ecological Risk Assessment (ERA) process in the Remedial Investigation phase. During the ERA process the Remedial Project Manager (RPM) shall involve appropriate NRTs during the selection of the screening benchmarks, the assessment and measurement endpoints, and the problem formulation. Endangered species (Federal- or State-listed) shall not be selected as assessment or measurement endpoints. However, if listed species are present, endpoints should be developed that will serve as appropriate surrogates for evaluating impacts to the listed species. Although natural resource trustee involvement is encouraged in the cleanup program the DON is the lead response agency and the DON and appropriate parties (e.g., EPA at DON facilities on the National Priorities List) shall make all final decisions. In most cases, the evaluation of NRI will be conducted during the ERA, however some injuries may be human health based (for example exceeding drinking water standards) and thus require evaluation during the human health risk assessment process.

2. To the extent practicable, select a response alternative that best addresses the NRI caused by past practices.

To the extent practicable, the RPM shall select a response alternative that focuses on eliminating the cause of the injury and restoring the resource. However, any response alternative exceeding the original site boundaries should be carefully evaluated with regard to appropriateness, cost and overall benefit to the resource. For example, if the response action includes wetland replacement/creation than replacement/creation should not exceed a 1 to 2 ratio of the original wetland area (review the guidance for Applicable or Relevant and Appropriate Requirements).

3. Document the response action that will address the injury to the natural resource in the Record of Decision (ROD).

If the response action selected has an element that addresses the injury to the natural resource it shall specifically be stated in the ROD. This provides documentation of the DON's attempt to restore the natural resource in the event that a natural resource damage claim is filed against DON.

4. To the extent practicable, select a response alternative that minimizes injury to the natural resource.

RPMs should try to avoid additional destruction or injury to a natural resource while cleaning up a site. Choosing the appropriate cleanup alternative(s) is key to minimizing implementation impacts and reducing residual injuries to natural resources during the cleanup process. RPMs shall carefully select a response alternative that addresses protection of human health and the environment according to the nine evaluation criteria set out in the National Contingency Plan (NCP) and the potential impact of implementing the selected response alternative on the nearby natural resources. No action and natural recovery alternatives should be evaluated when evaluating risk reduction and potential injury. The RPM should select the response alternative, whenever practicable, that will result in the least amount of residual injury.

5. Paying damages for loss of services related to interim injury and/or residual injury shall not be addressed during the Installation Restoration Process.

ER,N/BRAC funds are used to evaluate and remediate sites that have been contaminated by past Navy/MC releases of CERCLA hazardous substances. Paying Natural Resource Damages (NRD) and conducting Natural Resource Damage Assessments are not ER,N or BRAC funding eligible. Damages are assessed on the injury to the natural resource by the Natural Resource Trustee(s). NRD can only be recovered by the NRTs, and must be obtained using the legal system. For the purposes of DON, NRD is a claim against the U.S. Government for natural resources injured by the DON. A NRD claim must be filed within three year after the response action (final environmental response action) has been completed (CERCLA Sec. 113 (g)(1)). The Department of Justice (DOJ) Judgment Fund typically represents DON in the Defense of such NRD claims. If damages are ultimately awarded, such funds can only be used by the trustee(s) to restore, replace, or acquire the equivalent of the natural resources that were injured by the release of a CERCLA hazardous substance.

6. The impact to NR at Munitions Response (MR) sites shall be considered when planning site preparation work for investigations and response actions.

For MR sites the RPM shall consider the impact to NR as well as the overall risk and worker safety during the planning of any site preparation for investigation and response actions. The impacts to the NR from site preparations such as controlled burns and clear cutting to locate possible military munitions (unexploded ordnance and abandoned ordnance) shall be considered before performing the operation. The RPM shall select the methods for site investigation preparation that are most effective for the location of military munitions that result in the least amount of injury to the NR. The RPM shall also select the response action that is most effective in minimizing the risk of the workers from the military munitions with the least amount of injury to the NR. The response action shall address the NRI caused by past practices, to the extent practicable.

7. ER,N/BRAC funds shall only be used to restore the natural resource that was injured as a result of a contaminant release and any subsequent cleanup, and shall not be used to construct or repair non-natural resource items.

ER,N/BRAC funds shall not be used to construct or repair non-natural resource items such as boat ramps, piers, bridges, access ramps, building, etc. ER,N/BRAC funds can be used to restore natural resources such as wetlands, shorelines, drinking water and native vegetation.

8. DON will consider conducting a Natural Resource Damage Assessment if our natural resource has been injured by non-DON activities. This assessment will not use ER,N/BRAC funding.

When another responsible party has injured a DON natural resource, the Navy shall consider conducting a Natural Resource Damage Assessment. In such cases, DON shall follow the DOI standards (i.e., 43 CFR Part 11) or the NOAA standards (i.e.,15 CFR 990) for conducting NRDA depending on the type of injury to the natural resource - releases of hazardous substances or mixtures of hazardous substances and POL being addressed by DOI standards, and pure POL releases being addressed by NOAA standards. DON shall contact any other affected NRTs that may also have jurisdiction over the natural resource. The appropriate DON counsel shall determine the best legal course of action to take and whether DOJ should be involved.

CONCLUSION

In conclusion, this policy stresses using risk assessments to evaluate NRIs, involving NRTs to the extent practicable, selecting remedies that address the injuries to the natural resource, spending ER,N/BRAC funds only on addressing injuries and not on non-resource-related items, and obtaining damages from other parties if they injure DON natural resources.