



ACQUISITION
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
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WASHINGTON, DC 20301-3000

DEC 29 2008

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(INSTALLATIONS, ENVIRONMENT, AND LOGISTICS)
DIRECTOR, DEFENSE LOGISTICS AGENCY (DES-E)

SUBJECT: Interim Policy for Defense Environmental Restoration Program (DERP)
Eligibility

Forwarded for your implementation is the attached policy. This policy is effective upon signature and supersedes Sections 3, Applicability and Scope, and 7, Funding Eligibility, in the *Management Guidance for the Defense Environmental Restoration Program* (hereinafter the *Management Guidance*) (September 28, 2001). The rest of the *Management Guidance* remains in effect. The Department regularly revisits policies to address how best to satisfy the governing statutes, regulations, and programmatic needs related to management, oversight, and execution of various programs. This includes reevaluating DERP policies related to the eligibility policy for the DERP, the Environmental Restoration Accounts (ERAs) and the Base Realignment and Closure (BRAC) accounts. Certain cutoff dates identified in the *Management Guidance* are hereby rescinded.¹ This policy will be included in the next update of the *Management Guidance* to be published as the DERP Guidance Manual.

The following overarching policy principles apply to the DERP:

1. All environmental restoration activities, identified as eligible in the Attachment to this Memorandum, shall comply with the statutory requirements of 10 U.S.C. §§ 2700 - 2710. The DoD Components shall implement the DERP consistent with related Departmental Directives, Instructions, policy, and guidance.
2. In addition to the authorities in 10 U.S.C. §§ 2700 - 2710, the DoD Components shall protect human health and the environment by exercising those Presidential authorities under 42 U.S.C. §§ 9601 through 9675 (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)), delegated to the Secretary of Defense under Executive Order (E.O.) 12580, *Superfund Implementation* (January 23, 1987) and E.O. 13016, *Amendment to*

¹ Properties are only eligible for Formerly Used Defense Sites (FUDS)-ERA if the property transfer from DoD and the release occurred prior to 17 October 1986.

Executive Order No. 12580 (August 28, 1996) and in accordance with part 300 of title 40, Code of Federal Regulations, the *National Oil and Hazardous Substances Pollution Contingency Plan* (NCP).

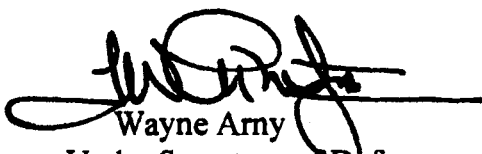
3. The ERAs, established in 10 U.S.C. § 2703(a), and the BRAC Accounts established in sections 2906 and 2906A of the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. section 2687 note, are the sole sources of funding for environmental restoration activities identified as eligible in the Attachment to this Memorandum, irrespective of the statutory authority governing the activity or the date of the release.²

The DoD Components shall immediately begin inventorying the sites deemed eligible based on these changes to the DERP policy for the ERAs and BRAC accounts funding. No later than September 30, 2009, the DoD Components shall include in the DERP database system information about the sites newly included based on these changes to the eligibility policy.

The DoD Components shall plan, program and budget for sites brought into the DERP based on the changes to the eligibility policy during the next budget submission cycle.

My action officers will initiate development, in collaboration with your action officers, of goals and metrics for sites affected by changes to the eligibility policy. The deadline for completion of this task is the end of FY 2009.

My points of contact are Ms. Deborah Morefield, at (703) 571-9067 or Deborah.Morefield@osd.mil for the DERP and ERA accounts funding eligibility and Mr. Robert Furlong, at (703) 571-9073 or Robert.Furlong@osd.mil for the BRAC accounts funding eligibility.


Wayne Army
Deputy Under Secretary of Defense
(Installations and Environment)

Attachment:
As stated

² According to 40 U.S.C. §§ 572(b)(5)(A) & (B), a portion of the proceeds from the sale of military installation real property owned by the United States may also be available to pay for environmental restoration in some circumstances. 10 U.S.C. § 2667(e)(1)(C) provides that, under certain conditions, money rental proceeds from the lease of military property may be available to pay for environmental restoration of military property or facilities. In addition, under some circumstances, a military construction project may assume the costs related to addressing contamination discovered before or during the construction activity.

Attachment 1: Eligibility and Funding Policy

1. Pursuant to 10 U.S.C. § 2701, the DERP includes all environmental restoration activities undertaken by a DoD Component. The term "environmental restoration" under the DERP includes response actions:

- 1.1 Undertaken by a DoD Component within the United States:

- 1.1.1 At a facility or site owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary of Defense;
- 1.1.2 At a facility or site that was under the jurisdiction of the Secretary of Defense and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances³; or
- 1.1.3 At a facility or site that is not on real property that is or was owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary of Defense, provided that contamination attributable to DoD has migrated (e.g., by groundwater flow) or unexploded ordnance (UXO) has come to be located (e.g., munitions landing off an operational range that were not promptly retrieved) from a site described in sections 1.1.1 or 1.1.2.⁴

- 1.2 That address:

- 1.2.1 A release of hazardous substances, pollutants, and contaminants;
- 1.2.2 A release of petroleum, oil, or lubricants (POL)⁵;
- 1.2.3 A release of hazardous wastes or hazardous waste constituents;
- 1.2.4 UXO, discarded military munitions (DMM), or munitions constituents (MC) at defense sites (i.e., Munition Response Areas (MRAs)/Munition Response Sites (MRSs))⁶;
- 1.2.5 The correction of other environmental damage that creates an imminent and substantial endangerment to the public health or welfare or to the environment;

³ This includes the Departments of War, Army, Navy, and Air Force prior to the creation of the Department of Defense as an executive department.

⁴ This includes contamination attributable to DoD whether or not it has commingled with contamination attributable to another source or sources.

⁵ CERCLA contains a petroleum exclusion so it may not be used to address certain releases of POLs. POL releases may be addressed under other applicable authorities consistent with DERP, such as the Resource Conservation and Recovery Act (RCRA).

⁶ "Defense site" is defined in 10 U.S.C. 2710(e)(1) as "locations that are or were owned by, leased to, or otherwise possessed or used by the DoD. The term does not include any operational range, operating storage or manufacturing facility, or facility that is used for or was permitted for the treatment or disposal of military munitions." See 32 CFR Part 179 for the definitions of MRAs and MRSs.

1.2.6 The demolition and removal of unsafe buildings and structures.⁷

2. In exceptional cases, a DoD Component may petition DUSD(I&E) for clarification or approval to allow a specific activity to be considered as an eligible environmental restoration activity.⁸
3. In addition to payments attributable to environmental restoration activities set forth in section 1, the ERAs are available to pay the ordinary and necessary costs of the DoD Components' administration of their environmental restoration programs. This includes the costs of preparing and presenting claims of the DoD Component at Third Party Sites, and the costs of evaluating and defending claims against the DoD Component, related to the environmental restoration programs and sites at which DoD or its Component's liability is alleged.
4. The term "environmental restoration" does not include:
 - 4.1 The closure (along with required closure plans and post-closure requirements) of treatment, storage, or disposal (TSD) units regulated under a RCRA permit or interim status. Specific requirements associated with closure and post-closure are found in subpart G of part 264 of title 40, Code of Federal Regulations (CFR) (for permitted facilities) and subpart F of part 265 of title 40, CFR (for interim status facilities), with related unit-specific requirements (e.g., waste piles, landfills) appearing in subparts within parts 264 and 265 of title 40, CFR;⁹
 - 4.2 Any routine operation, management, or maintenance at an operating DoD facility or site that is not part of an environmental restoration activity, including routine operational range maintenance and sustainment activities;
 - 4.3 Activities to terminate a Nuclear Regulatory Commission license under the Atomic Energy Act, section 2011 et seq. of title 42, U.S.C., and conducting associated decommissioning requirements;
 - 4.4 An immediate or short-term response required to limit, address, or mitigate a spill or release (e.g., activities in furtherance of an emergency or spill response plan);
 - 4.5 Explosives or munitions emergency responses;

⁷ Building debris and demolition removal (BD/DR) environmental restoration activities conducted at FUDS properties may include the demolition and removal of unsafe buildings and structures and the removal of unsafe debris. There must be evidence that DoD left the building or debris in an unsafe condition at the time of disposal. Activities under the BD/DR program at active and BRAC installations can only be conducted with funds requested for environmental restoration purposes appropriated to the DoD Component ERA or BRAC accounts. Furthermore, the DUSD(I&E) must formally authorize the use of such funds for the requested purpose. The DoD Components must provide a written request for funds that includes the detailed reason for BD/DR requirements, a project cost estimate, and a schedule. The DoD Components must receive approval on the request prior to programming funds.

⁸ For example, the DoD Components have requested funding and the DUSD(I&E)/EM has approved the request at certain non-DoD properties based upon the narrow circumstances identified by the OSD Deputy General Counsel (Environment & Installations) Memorandum, "Request for Resolution of the Availability of Environmental Restoration Accounts to Meet Legal Responsibilities Under CERCLA at Third Party Sites" (March 4, 1998).

⁹ Closure of a TSD unit is a planned part of the lifecycle of the waste management unit, whereas corrective action responds to past releases of solid or hazardous waste at a permitted or an interim status facility.

- 4.6 Responses at contractor-owned, contractor operated facilities, unless they come within sections 1.1.1 or 1.1.2;
- 4.7 Removal of aboveground storage tanks and associated piping, or underground storage tanks and associated piping for tanks at active installations that were or are subject to subpart 280.40 of title 40, CFR, release detection requirements and whose existence was known to the installation since these requirements were in effect;
- 4.8 Responses to address releases that are the result of an act of war;
- 4.9 Responses at State National Guard properties not formerly owned by, leased to, possessed by or otherwise under the jurisdiction of the Secretary of Defense¹⁰, at the time of actions that caused the release of hazardous substances or other environmental damage;
- 4.10 Responses at locations outside the United States;
- 4.11 Responses at Defense Plant Corporation and similar properties for which successor agencies and departments other than DoD are responsible for environmental restoration activities;
- 4.12 Responses to address a release caused by the non-military activities of the U.S. Army Corps of Engineers;
- 4.13 Responses, including surveys, containment, removal or disposal, to asbestos and lead-based paint that have been released to the environment, except where incidental to an ERA-eligible activity or in accordance with the DUSD(I&E) Memorandum, *Lead-Based Paint Policy for Disposal of Residential Real Property* (January 7, 2000);
- 4.14 Activities that duplicate a response that was completed under another cleanup authority (e.g., a CERCLA response where a release was already investigated and addressed under a State cleanup authority), except if the response was not completed. This paragraph does not prohibit returning to complete necessary actions;
- 4.15 Activities that are subject to a legal agreement or property transfer document (e.g., deed, Environmental Services Cooperative Agreement) between DoD (or the United States) and another party that assigns restoration responsibility to a party other than DoD. The DoD Component should evaluate this document(s) to determine if it is effective, enforceable, and if the other party is viable and therefore able to perform the necessary work under the circumstances at the site. (If the DoD Component determines based on the evaluation that the document(s) is not effective and enforceable or the other party is not viable, then the activities may be eligible if they otherwise meet the requirements of this Memorandum);

¹⁰ See footnote 2.

- 4.16 Responses at facilities for which there are no records showing that the property is currently or was formerly owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary of Defense at the time of actions leading to contamination, except in accordance with section 1.1.3; or
- 4.17 Activities funded by a specific appropriation.
- 5. The following payments are ineligible for ERA or BRAC accounts funding:
 - 5.1 The payment of environmental fines or other penalties (e.g., penalties stipulated in a Federal Facility Agreement) unless the act or omission for which the fine or penalty is imposed arises out of an activity funded by the ERAs or BRAC accounts and payment is expressly authorized by an Act of Congress and funds are appropriated for this purpose;
 - 5.2 Payment of Environmental Protection Agency administrative or oversight costs, unless expressly authorized by an Act of Congress and funds are appropriated for this purpose. EPA oversight costs do not include payments in support of the Memorandum of Understanding between the U.S. Environmental Protection Agency and the U.S. Department of Defense on "Support for DoD Cleanup Implementation for BRAC Installations Rounds I – IV", February 20, 2008, or successor agreements; and
 - 5.3 Any payment pursuant to a court judgment or compromise settlement.
- 6. Where the requirements of the Judgment Fund (section 1304 of title 31, U.S.C.) are satisfied, the Judgment Fund is available to pay court judgments and compromise settlements certified for payment by the Financial Management Service, Department of the Treasury, at request of the Department of Justice, arising from a Federal agency's liability under environmental law.
- 7. The following are ineligible as BD/DR activities:
 - 7.1 Activities at sites where the hazard is a result of neglect or deliberate or careless acts by an owner/grantee subsequent to DoD control, regardless of whether the deed or disposal document required the owner/grantee to maintain the property improvements.
 - 7.2 Activities undertaken by one or more private interests (i.e., any entity other than a Federal agency or a State, local, or Indian tribal government) unless the lease or lease termination, permit, or deed or other title transfer document that conveyed the property from DoD or the General Services Administration specifically requires DoD to restore the property.
 - 7.3 Activities at sites where the restoration of the property would primarily benefit private interests.

- 7.4 Activities at sites where an owner subsequent to DoD has received benefit from the government in lieu of property restoration (e.g., by a payment or offset in the purchase price).
- 7.5 Activities involving partial demolition of a structure (i.e., the demolition must be of the entire building or structure to be allowed).
- 7.6 Activities involving structures or debris that were altered or beneficially used by owners subsequent to DoD control.
- 7.7 Activities involving asbestos-containing materials or lead-based paint in surveys, containment, removal, and/or disposal projects; except as required to safely complete an approved project within Occupational Safety and Health Administration guidelines and DoD policy.
- 7.8 Activities at sites where the lease, permit, or deed or other title transfer document relieves the government from the obligation of property restoration or imposes on another party a requirement to perform restoration.