



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(INSTALLATIONS AND ENVIRONMENT)
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WASHINGTON, D.C. 20350-1000

28 January, 2002

MEMORANDUM FOR DIRECTOR, ENVIRONMENTAL, SAFETY &
OCCUPATIONAL HEALTH DIVISION (N45)
DIRECTOR, LAND USE AND MILITARY
CONSTRUCTION DIVISION (CMC-LF)

Subj: DEPARTMENT OF THE NAVY ENVIRONMENTAL POLICY MEMORANDUM
02-01; THIRD PARTY SITES AND AFFIRMATIVE CERCLA CLAIMS

Ref: (a) OPNAVINST 5090.1B, Chapter 15
(b) MCO 5090.2a, Chapter 10
(c) CNO letter of 17 March 1989; Policies and Responsibilities for Actions
Involving Cleanup of Navy Generated Hazardous Waste (HW) at Off-Station
Disposal Sites

This Environmental Policy Memorandum provides guidance on the management of:
(1) third-party site claims brought against the Department of the Navy (DoN) under the
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or
the Resource Conservation and Recovery Act (RCRA), and (2) affirmative claims that
DoN can bring against parties who have contaminated DoN realty and caused DoN to
incur response costs to deal with such contamination.

Third-Party Site Claims Management. For some time and at certain locations, DoN has
been using solely its resources and authority to address DoN contamination at what are
commonly called third-party sites, i.e., those sites where DoN has been accused of
disposing of hazardous waste, where the property has never been owned or controlled
by DoN and where a federal or state regulator or private party is demanding DoN
involvement in, or reimbursement for, ongoing, past, or future cleanup activities. Recent
events involving DoN, Department of Justice and the Environmental Protection Agency
have caused us to review this approach. After consultation with the Navy Office of
General Counsel and others, the policy at reference (c) is hereby rescinded and
references (a) and (b) shall be amended to conform to this policy. Effective
immediately:

- All current third-party site remediation efforts are to be reviewed by the cognizant
Naval Facilities Engineering Command (NAVFAC) Engineering Field
Division/Engineering Field Activity (EFD/EFA) environmental and legal personnel.
Unless the expenses in question are incurred by U.S. EPA for which
reimbursement is sought solely from DoN and/or other federal agencies by EPA,
the cognizant EFD/EFA, through its Office of Counsel, shall notify the Navy
Litigation Office (LITOFF) and provide pertinent information about the site.

LITOFF will review the material and take appropriate action. LITOFF shall have principle responsibility within DoN for all matters pertaining to DoN's alleged liability at the site. NAVFAC, through the EFD/EFAs, will provide support as needed. In so far as CERCLA 104(e), or other similar requests seeking information concerning possible DoN involvement at third party sites are received from regulatory agencies, such requests shall be responded to by the appropriate EFD/EFA having responsibility for the state in which the site at issue is located. A copy of any DoN response that indicates possible DoN involvement at a particular site shall be sent to LITOFF.

- In resolving DoN liability at third party sites, ER,N funding is not available to pay for the DoN share of a court judgment or compromise settlement. However, ER, N funding may be used for other expenses in connection with the resolution of DoN liability. Examples of such expenses include travel for DoN personnel to attend potentially responsible party meetings and pre-litigation case evaluation expenses (e.g., consulting experts, reproduction costs, potentially responsible party group administrative costs). ER, N is not to be used to fund "remediation expenses." Examples of "remediation expenses" include sampling, testing, removals (emergency and otherwise), remedial investigations, preliminary assessments, site investigations, feasibility studies, remedial design, remedial action, long-term monitoring, and long-term operations. "Remediation expenses" shall be provided through compromise settlements executed by the Department of Justice pursuant to their compromise settlement authority. DoN documents concurring in any compromise settlement shall acknowledge the exercise of the Department of Justice's authority and DoN's understanding that DoN's share of liability shall be paid from the judgment fund. Consistent with authority to agree with Department of Justice settlement agreements, the Associate General Counsel (Litigation) is authorized to concur in Department of Justice executed compromise settlement agreements resolving DoN liability for payment of response costs.
- Requests for deviation from this guidance shall be routed through the chain of command with endorsement and require written approval from DASN (E) prior to obligation of funds.

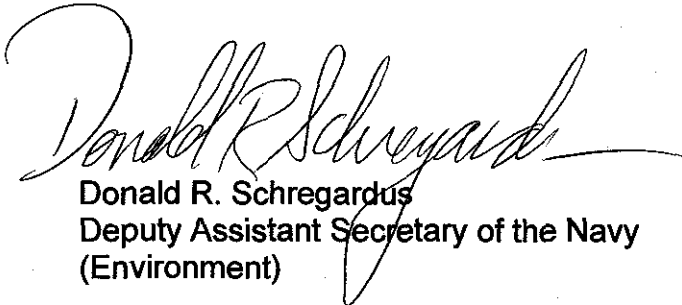
Affirmative Claims Management. There are two key scenarios where contamination of DoN property is caused by other than federal agencies. First, contamination caused by an entity which is allowed to operate on DoN property, and second, contamination of DoN property from sources outside DoN's property. In both scenarios, DoN's harm typically includes not only the costs to remediate the contamination in question, but also damage to natural resources for which DoN is trustee under either CERCLA or the Oil Pollution Act (OPA).

It is in DoN's interest to vigorously pursue these claims. Our immediate goal is to pursue these claims through CERCLA or contract compromise settlements, such as with Government Owned-Contractor Operated (GOCO) facilities, in lieu of litigation.

Whenever the possibility of a need for pursuing affirmative claims arises, DoN activities shall inform LITOFF as soon as possible. LITOFF will work closely with activities, major claimants and the Naval Facilities Engineering Command to determine which sites and situations warrant an affirmative claim. Once it is decided to go forward with an affirmative claim, NAVFAC, LITOFF, and major claimants, as necessary, will begin assembling the data and information needed to approach the potentially responsible party that contaminated our realty. LITOFF will have the lead on negotiating and pursuing these affirmative claims. NAVFAC EFD/EFAs and other major claimants will provide support as needed.

If such claims cannot be settled by contract negotiations, or a CERCLA settlement in lieu of litigation, then DoN will determine if litigation is advisable. If a CERCLA compromise settlement is negotiated with the third party, or if litigation is determined to be an option, DoN must be represented by counsel from the Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice. The Department of Justice has approval procedures that must be followed whenever a federal agency wants to pursue affirmative litigation (or CERCLA compromise settlements in lieu thereof). Generally, the process involves making a written request of DOJ. The request will usually take the form of a briefing memorandum that sets forth the factual background and legal issues involved along with an explanation of why affirmative action is needed. Any statute of limitations issue or similar time sensitive restrictions on the ability to pursue the affirmative claim needs to be highlighted. The Assistant Attorney General for the Environment and Natural Resources Division, or the Environmental Enforcement Section Chief, must sanction the approval of the request.

LITOFF shall have principle responsibility within DoN for working with DOJ to resolve such claims whether through CERCLA compromise settlement or affirmative litigation. The Associate General Counsel (Litigation) must approve and sign the request/briefing memorandum to DOJ. NAVFAC and other major claimants will provide support as needed.



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(Environment)