

Reimbursement of State Oversight of the Cleanup of Former Military Bases September 2008

Department of Defense (DoD) contaminant and hazard remediation activities are required to meet federal and state cleanup standards, in nearly every circumstance. As a consequence, states are required to oversee many aspects of the DoD or former DoD property cleanup process to ensure that DoD, local governments, and private sector work complies with state and federal environmental standards. Federal funding for state regulators' oversight of these standards is essential for most states to enable timely environmental regulatory agency participation. States have employed a variety of strategies to access these federal funds. In recent years, some states and DoD have had some disagreement regarding federal funding support for these oversight activities.

The [1992 Federal Facilities Compliance Act](#) clarified that states had the power to enforce hazardous waste management laws (especially the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) at federal facilities. As a result, states are integrally involved in federal facility cleanup oversight. The primary purpose of state oversight is to ensure compliance with state and federal regulatory requirements.

Defense and State Memorandum of Agreement (DSMOA)

DoD encourages state active participation in its environmental restoration program and has set forth several initiatives to foster state partnerships. The Defense and State Memorandum of Agreement (DSMOA) program establishes a mechanism for DoD to reimburse states and territories for their environmental cleanup oversight costs at both active and closed bases. The US Army Corps of Engineers administers this process. Most states and territories have entered into agreements with DoD and requested funding through DSMOA cooperative agreements to reimburse state/territory oversight and support of the environmental restoration and Base Realignment and Closure (BRAC) programs. These activities include document review, site inspections, compliance checks, regulatory oversight, technical evaluations, and attending meetings.

Since the early 1990s, state oversight costs have generally been reimbursed through a two-year DSMOA cooperative agreement (CA). Prior to the issuance of a DSMOA CA, each state submits cost estimates to DoD covering the upcoming two-year period. These cost estimates are based on input from the military installations derived from the amount of environmental cleanup planned for the facility over those two years. Once these estimates are approved by DoD, it issues a DSMOA CA to the state and allocates funding. Each state conducts their review and oversight of the environmental restoration activities and submits invoices to DoD for reimbursing the work completed. No advance funding is provided to the states and payment is based solely on the work performed.

Some states feel that the DSMOA program creates a positive communication and working relationship between DoD and the states. Their system also serves as a vehicle to resolve conflicts and avoid time-consuming litigation, which was often the case before the DSMOA program was implemented.

However, some states have raised concerns about the DSMOA process, such as:

- Some states are re-considering participation in the DSMOA program due to concern over DoD's recent approaches to the DSMOA process. DoD has withheld DSMOA reimbursements when a state applies enforcement authority that differs from DoD viewpoint at a DSMOA site. Some states are concerned that DoD will not reimburse them when a state enforcement action was taken without first going through dispute resolution (though states do not refute that DSMOA funds cannot be used for the enforcement action itself).

- Privatization and early transfer of closed military facilities may impact DSMOA funding for state oversight of the cleanup of individual bases. DSMOA funding may not be available for state oversight of cleanup once title for the property is no longer held by the federal government. Under privatization and early transfer states must arrange for reimbursement from the local reuse authority (LRA) or other entity involved in the cleanup. For oversight of retained conditions that remain the responsibility of the military at these sites, the state must enter into a site specific agreement with the component.

Recently, the nation's governors approved an NGA policy that urged a statutory change to specifically authorize DSMOA funds to be used for state property transfer activities under the Defense Environmental Restoration Program (DERP) and BRAC cleanup activities.ⁱ

DSMOA Alternative: Direct Component Reimbursement Agreements

Due to the aforementioned concerns about the DSMOA process, a number of states are exploring alternative methods of reimbursing state agency DoD oversight cost. Specifically, some states have explored contracting with an individual military service (e.g., Air Force, Navy) instead of accessing the DSMOA program. For example, in response to a dispute with DoD over the application of DSMOA funding, **Colorado** has sent a draft agreement to the Air Force and the Navy for direct non-DSMOA funding. If approved, this service-specific cooperative agreement would eliminate Colorado's need for the DSMOA agreement at the Air Force and Navy installations covered by the agreement.

In addition, **California** also has an alternative approach to cover oversight costs. In 1999, the US Department of Navy moved five closing installations into a Cost Reimbursement Pilot Program in cooperation with Californiaⁱⁱ. Under this program, the California Department of Toxic Substances Control has primary responsibility for cleanup oversight activities, while other state regulatory agencies (State Water Resources Control Board, Fish and Game and Department of Health Services) provided additional regulatory oversight. The pilot program allowed the opportunity for direct reimbursement from the Navy for eligible expenses that are incurred by state agencies and led to the development of the Navy Cost Reimbursement Cooperative Agreement program to replace the DSMOA program. The new process was consistent with California's program for providing oversight of the private sector.

Given the state innovation in developing an alternative to DSMOA, on June 18, 2008, Wayne Arny, Deputy Secretary of Defense (Installations and Environment) issued a [memorandum](#) authorizing the DoD Components to pursue alternative approaches to the DSMOA for reimbursing costs of state services where appropriate. This new policy will be incorporated into DoD's upcoming publication of the DERP Manual.

ⁱ See NGA Policy NR-08 - [Environmental Compliance at Federal Facilities](#).

ⁱⁱ For more information on California's direct cost reimbursement program with the US Navy, see "[Department of Navy Environmental Restoration Program Manual](#)," August 2006.