

## Defense Environmental Restoration Account (DERA)/ Defense Environmental Restoration Program (DERP)

The Honorable Lucian Niemeyer, Assistant Secretary of Defense for Energy, Installations and Environment signed a memo dated 28 Nov 2017, invalidating National Guard use of DERA/DERP. This unprecedented action retroactively nullified the fund stream in same appropriation year (FY18). In some cases, this suspended remedial actions already promised to the public. In others, it stopped the investigative process on which the public was depending to determine source and remedial solutions for water supplies contaminated by federal activities.

The memo basically states that National Guard activities not on federally owned/operated facilities must use O & M funds for any IRP activities after preliminary investigation/site investigation steps. Waivers must be submitted for any guard activities requesting DERP funding beyond Preliminary Investigation/ Site Inspection (PI/SI). To date, there have been no ANG Bases cleared to use DERA funds IAW the waiver process.

The National Guard has been using DERA funding since 1986 for all types of CERCLA related investigation and remediation activities. This also includes well head treatment and/or development and implementation of new community water sources to replace those contaminated by DoD. The question becomes what has changed since 1986? If it is a change to legislation, we have yet to be pointed to the appropriate citation. If it is a change in interpretation, we have yet to be pointed to the appropriate language in question. Based on the memo, it appears the language from "10 USC 160: Environmental Restoration" is in question. Specifically, the definition of "the jurisdiction of the Secretary".

For the MA ANG, the vast majority of contamination sites are attributed to aircraft maintenance, training and related firefighting activities. All aircraft assigned to the MA ANG are FEDERAL assets, flown/maintained/supported by FEDERAL employees, utilizing fuel/chemicals /firefighting agents purchased using FEDERAL funds while training for FEDERAL missions! MA ANG aircraft are not gubernatorial assets and have no application to DSCA operations.

"Sacrificing Readiness for Remediation". All agree that CERCLA site investigation/cleanup/remediation is a TOP priority and a DOD responsibility. However, if ANG is no longer allowed DERP funding and must now use O & M, for which no Project Objective Memorandum (POM) process has been initiated, must pay bills will require the National Guard to utilize operational funds normally slated for maintenance and training; dramatically affecting unit mission readiness and lethality of the force. IF the POM process were started today, we will could possibly receive funding with 3-5 years, pending extensive review.

## **ISSUE #1**

NDAAs 20

1. Tremendous CODEL support changed language so SECDEF “may” use DERA funds for PFOS/PFOA contamination on NG Facilities, and
2. Changed the definition of “facility” to overcome the owned and operated jurisdictional language from the Niemeyer letter, and
3. Added \$29M in ANG O&M funds based upon the anticipated failure of item #1, and
4. Created mandates for future fluorine free foams, with hard set implementation dates.

NDAAs 20 Results

1. Office of the Secretary of Defense (OSD) still requires NG to “apply” for DERP authority. To date, no applications have been processed/approved.
2. Zero DERA dollars have been spent at NG facilities for remediation and/or immediate response actions
3. DoD has yet to find a suitable non-fluorinated substitute and is still mandated by the FAA to use the US Navy AFFF milspec foam for all part 149 facilities.

CODEL Request #1: (most important) Assist in either eliminating the application process identified by the Niemeyer memo, but technically no longer needed, or mandate a fast track of the application with a specific appeal process. ***GET DERP authority for NG facilities.***

## **ISSUE #2**

Massachusetts DEP has promulgated different standards under the Massachusetts Contingency Plan (310 CMR 40), which is the Commonwealth’s regulation paralleling CERCLA. The EPA Lifetime Health Advisory (LHA) for PFAS is 70 parts per trillion (ppt) for five compounds. MA groundwater (GW-1) standards for PFAS is 20 ppt for six compounds. Right now, any contamination between 20 and 69 ppt cannot be addressed by a federal program due to the difference in standards

For federal recognition of State standards that are lower than the LHA, the OSD Office of General Council (OGC) must review and approve the application of the local/regional standard under the Applicable or Relevant and Appropriate Requirements (ARARs) Section 121 (d) of CERCLA ; requires that on-site remedial actions attain or waive federal environmental ARARs, or more stringent state environmental ARARs, upon completion of the remedial action.

AFCEC OGC submitted the waiver request to OSD OGC in January of 2020...with no response to date

CODEL Request #2:—Convince OSD to accept promulgated/legal state standards.

### ISSUE #3

Because Barnes ANG Base's Expanded Site Inspection was still in draft when the decision to fund the ten ANG Bases for the next CERCLA phase, Remedial Investigation (RI), they were not on the list for FY20. The RI serves as the mechanism for collecting data to characterize site conditions, determine the nature of the waste, assess risk to human health and the environment, and conduct treatability testing to evaluate the potential performance and cost of the treatment technologies that are being considered, which would then be evaluated during the Feasibility Study (FS) , which is the final investigative phase of the CERCLA process. Without and RI, we cannot move forward on remediation.

CODEL Request #3: Ensure the 104<sup>th</sup> Fighter Wing receives funding for a Remedial Investigation in FY21.

As briefed, FY21 NDAA gave way to a new waiver process or PFAS sites, allowing non-comingled sites to be submitted in FY21 and comingled sites in FY22. Hopefully, this will result in the 104<sup>th</sup> FW getting in the cue for a Remedial Investigation (RI)/Feasibility Study (FS).

The overall goal is still to obtain unobstructed access to DERA funds by the National Guard; allowing for faster resolution to existing issues and opening the door for future emerging contaminant investigation and remediation.