



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH)
STAFF DIRECTOR, DEFENSE LOGISTICS AGENCY
INSTALLATION SUPPORT ENVIRONMENT (DS-E)

SUBJECT: Department of Defense (DoD) Guidance for Dispute Resolution within the Defense and State Memorandum of Agreement (DSMOA) Program

The DSMOA dispute resolution process is essential to expeditiously resolving issues in the DSMOA program. The attached guidance provides the DoD Components and the United States Army Corps of Engineers Grants Officer a better understanding of the Department's position on the nature of the dispute resolution process and ensures the process' continued value in resolving restoration issues. My office will incorporate this guidance in the next revision of DoD Manual 4715.20, Defense Environmental Restoration Program (DERP) Management.

I request the DoD Components identify points of contact for the DSMOA dispute resolution process to the Army Corps of Engineers within 120 days of the issuance of this memo. I also request the Army, as lead agent, contact states to identify their points of contact for the DSMOA dispute resolution process. These proactive steps will expedite the formal dispute resolution process. Once we have identified the officials to contact, we can then discuss and reach agreement for timeframes to apply in resolving disputes with a view to reducing the extensions used in the DSMOA dispute resolution provision.

In order to ensure the proper level of oversight over the DSMOA program, I request that the Grants Officer, through the applicable chain of command, notify this office prior to taking remedial action against a State for the State's failure to engage in required dispute resolution.

My point of contact on this matter is Mr. Terry Bowers, at 703-693-9447, terry.bowers@osd.mil.

John Conger
Acting Deputy Under Secretary of Defense
(Installations and Environment)

Attachments:
As stated

GUIDANCE ON DISPUTE RESOLUTION WITHIN THE DEFENSE AND STATE MEMORANDUM OF AGREEMENT (DSMOA) PROGRAM

The purpose of this guidance is to promote understanding by the DoD Components and the United States Army Corps of Engineers DSMOA grants officer of the DoD position on the DSMOA dispute resolution process. It also directs action to ensure the continued value of dispute resolution in addressing restoration issues.

DoD recognizes that the dispute resolution process is an essential part of the DSMOA program by providing to the States and DoD Components a framework for resolving issues. Dispute resolution is preferable to regulatory enforcement or litigation which are costly, damage working relationships, and cause delays in the cleanup program. An established dispute resolution process ensures decision-making remains in the hands of policymakers.

The DSMOA requires that the parties—the State and the DoD Component—engage in a non-binding dispute resolution process when disagreements arise over any environmental restoration issue, including those related to reimbursement. The parties should first attempt to resolve any disagreements informally at the DoD remedial project manager/State technical representative level. If they cannot resolve the disagreement in such an informal manner, either party may invoke dispute resolution under the terms of the DSMOA (or authorized alternatives such as under a Federal Facility Agreement or a comparable alternative tiered dispute resolution process). The actual process used by dispute resolution officials is highly flexible and differing methods may be applied at any level upon agreement of the parties. The parties may, in writing, mutually agree to delegate dispute resolution authority for a particular level or tier to other officials in that tier. If the dispute has not been resolved after using the dispute resolution process, either party may resort to whatever legal avenues are available to it.

Scope. The DSMOA dispute resolution process applies to the restoration actions covered by the DSMOA. The dispute resolution process does not apply to other regulatory programs that are not part of the restoration action. Regulatory enforcement actions by a State under its compliance authorities for projects not included in the DSMOA (e.g., the installation compliance program under the Clean Air Act, Clean Water Act, and Solid Waste Disposal Act) are not subject to the DSMOA dispute resolution process. In situations where there is an applicable Federal Facility Agreement (FFA) to which the State is a party, the FFA dispute resolution process applies in place of the DSMOA requirements.

Levels of Dispute Resolution. The DSMOA dispute resolution process applies when the Component project manager and the State technical representative are unable to resolve a matter of disagreement and one of the parties determines to refer the matter to the next level. Dispute resolution thereafter is a three-level process that concludes at a senior political level (Governor/Secretary). The dispute resolution official(s) identified in the DSMOA for each level may delegate, in writing and by mutual consent, that official's role to other officials within that level.

- The parties should arrange delegations well in advance of dispute resolution because discussions to reach mutual consent on such delegations would likely take time and could further delay a resolution.

- The official receiving the delegation should be of approximately equal authority with the delegator or a direct subordinate within the same office.
- No person should be a dispute resolution official for more than one level.

Completing Dispute Resolution. DSMOA dispute resolution is a process and does not require resolution of the dispute to be deemed complete.

- During both the first and second level of dispute resolution, either party may determine that dispute resolution discussion for that level has been exhausted so long as the minimum discussion timeframe required by the DSMOA for that level of dispute resolution has been exhausted. In the alternative, the parties may mutually agree within a shorter timeframe that further discussion at that level would be unproductive. When the minimum discussion timeframe has been exhausted and a party determines it wishes to elevate the matter to the next level without further discussion, it may do so by notifying the other party of the determination. Once the minimum discussion timeframe has been exhausted, mutual consent is not required to elevate a dispute.
- For the third level of dispute resolution, either party may decide when it has completed discussion and may do so by notifying the other party. Mutual consent is not required to terminate the dispute resolution process at the third level nor is there any required timeframe.
- Since either party may, subject to first exhausting the minimum DSMOA discussion timeframes, terminate further discussion at each level of dispute resolution, it is the responsibility of that party to affirmatively notify the other party that it is elevating the dispute to the next level or the process is being terminated in the case of the third level.
- Because the parties engage in dispute resolution in good faith, DoD Components should not terminate discussions prematurely even if a minimum timeframe has been exhausted.

Notification. A party should clearly state in writing that it is invoking dispute resolution in order to ensure the record clearly indicates that the dispute resolution process is occurring and the minimum DSMOA discussion timeframes have begun. All subsequent notices should also be in writing.

State Enforcement. States raised concerns about their ability to take an enforcement action without first completing the DSMOA dispute resolution process.

- If the DoD Component and the State agree that a proposed enforcement action is not subject to dispute resolution, the DSMOA dispute resolution process does not apply.
- The DSMOA agreement requires both States and DoD Components to raise their disputes and follow the formal DSMOA dispute resolution process. The grants officer may determine that a pre-emptive state enforcement action is a material breach of the DSMOA and its cooperative agreement. The grants officer must be satisfied that any required DSMOA dispute resolution process has occurred prior to a State instituting an enforcement action and should consult with the relevant DoD Components to inform this decision.
- If the grants officer determines that failure to engage in required dispute resolution does constitute a material breach of the DSMOA, the grants officer will consider the impact of a proposed remedy on the overall cleanup program in the State in conformance with the DoD Grant and Agreement Regulations. The remedy should be designed to return the

parties to compliance with the DSMOA and minimize the impact on the Department's cleanup program and the State's budgetary planning.

- In those instances where a State claims that, because of the nature of the violation, it could not wait until the dispute resolution process was completed before taking enforcement action, the grants officer should also consider the validity of the basis for the State's enforcement action and any legitimate necessity for expedited action by the State in determining the appropriate remedy for the State's failure to comply with the dispute resolution provision of the DSMOA.
- If the dispute resolution process is completed without reaching a mutual agreement, a State may then institute an enforcement action without violating the DSMOA.

Alternative Dispute Resolution Processes. If the parties agree to use a dispute resolution process other than the DSMOA or FFA processes, the DoD Component will ensure the process is described in writing and clearly identifies the procedures, participants, and timelines that will apply.

State Cost Reimbursement. State costs of engaging in dispute resolution are DSMOA eligible for reimbursement as long as they are not related to enforcement actions. State costs related to enforcement actions are not eligible for DSMOA reimbursement.