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5.0 COORDINATION WITH OTHER PROGRAMS, PLANS, AND REGULATORY AUTHORITIES

5.1 OVERVIEW

Two major federal laws guiding the restoration of the injured resources and services of Pearl Harbor are OPA and NEPA. OPA and its regulations provide the basic framework for natural resource damage assessment and restoration. NEPA sets forth a specific process of impact analysis and public review. In addition, the Trustees must comply with other applicable laws, regulations and policies at the federal, state and local levels. As well, it will be necessary to take Navy interests into consideration. The potentially relevant laws, regulations and policies are set forth below.

In addition to laws and regulations, the Trustees must consider relevant environment or economic programs or plans that are ongoing or planned in or near the affected environment. For example, as previously noted, the restoration projects may be occurring, in part, in an area designated as a federal Superfund site. A number of documents have been and will be produced as a part of that Superfund process. As well, the Trustees propose to work with the sponsors of the ongoing Pounala Marsh Project. The Trustees must ensure that their proposed restoration activities neither impede nor duplicate such programs or plans. By coordinating restoration with other relevant programs and plans, the Trustees can enhance the overall effort to improve the environment of Pearl Harbor.

In initiating the Final RP/EA, the Trustees elected to combine the Restoration Plan required under OPA with the environmental review processes required under NEPA. This is expected to enable the Trustees to implement restoration more rapidly than had these processes been undertaken sequentially.

5.2 KEY STATUTES, REGULATIONS AND POLICIES

- Oil Pollution Act of 1990 (OPA), 33 USC 2701, et seq.; 15 CFR Part 990

OPA establishes a liability regime for oil spills which injure or are likely to injure natural resources and/or the services that those resources provide to the ecosystem or humans. Federal and State agencies and Indian tribes act as Trustees on behalf of the public to assess the injuries, scale restoration to compensate for those injuries and implement restoration. Section 1006(e)(1) of OPA [33 USC 2706 (e)(1)] requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere (NOAA), to promulgate regulations for the assessment of natural resource damages resulting from a discharge or substantial threat of a discharge of oil. Assessments are intended to provide the basis for restoring, replacing, rehabilitating, and acquiring the equivalent of injured natural resources and services.

This rule provides a framework for conducting sound natural resource damage assessments that achieve restoration. The process emphasizes both public involvement and participation by the Responsible Party(ies). The Trustees have followed the regulations in this assessment.

- Park System Resource Protection Act, 16 USC 19jj

Public Law 101-337, the Park System Resource Protection Act (16 USC 19jj), requires the Secretary of the Interior to assess and monitor injuries to NPS resources. The Act specifically allows the Secretary of the Interior to recover response costs and damages from the Responsible Party causing the destruction, loss of, or injury to park system resources. This Act provides that any monies recovered by the NPS may be used to reimburse the costs of response and damage assessment and to restore, replace or acquire the equivalent of the injured resources.

- Hawaii Environmental Response Law, Title 10, Chapter 128D, Hawaii Revised Statutes

The State of Hawaii response law addresses the release or threatened release of any hazardous substance, including oil, into the environment. It creates an environmental response fund which can be used to pay for, among other things, costs of removal actions and costs incurred to restore, rehabilitate, replace or acquire the equivalent of any natural resources injured, destroyed or lost as the result of a release of a hazardous substance. The statute further provides that there shall be no double recovery for natural resource damages. The statute states that upon the request of the Department of Health, the attorney general will recover such costs from the responsible parties. The State of Hawaii Department of Health has promulgated regulations to address the cleanup of releases of hazardous substances. The federal and state Trustees have participated in cooperative injury assessment and restoration planning activities so as to avoid the possibility of any double recovery.

- National Environmental Policy Act (NEPA), as amended, 42 USC 4321, et seq. 40 CFR Parts 1500-1508

Congress enacted NEPA in 1969 to establish a national policy for the protection of the environment. NEPA applies to federal agency actions that affect the human environment. NEPA established the Council on Environmental Quality (CEQ) to advise the President and to carry out certain other responsibilities relating to implementation of NEPA by federal agencies. Pursuant to Presidential Executive Order, federal agencies are obligated to comply with the NEPA regulations adopted by the CEQ. These regulations outline the responsibilities of federal agencies under NEPA and provide specific procedures for preparing environmental documentation to comply with NEPA. NEPA requires that an Environmental Assessment (EA) be prepared in order to determine whether the proposed restoration actions will have a significant effect on the quality of the human environment.

Generally, when it is uncertain whether an action will have a significant effect, federal agencies will begin the NEPA planning process by preparing an EA. The EA may undergo a public review and comment period. Federal agencies may then review the comments and make a determination. Depending on whether an impact is considered significant, an environmental impact statement (EIS) or a FONSI will be issued.

The Trustees have integrated this Restoration Plan with the NEPA process to comply, in part, with those requirements. This integrated process allows the Trustees to meet the public involvement requirements of OPA and NEPA concurrently. The Final RP/EA was intended to accomplish partial NEPA compliance by:

- summarizing the current environmental setting,
- describing the purpose and need for restoration action,
- identifying alternative actions,
- assessing the preferred actions' environmental consequences, and
- summarizing opportunities for public participation in the decision process.

Project-specific NEPA documents will need to be prepared for those proposed restoration projects not already analyzed in an EA or EIS. As noted in Section 4.0, the Pouhala Marsh project and the Visitor Center Boat Dock project have undergone or are undergoing environmental review by their respective federal agencies.

- Hawaii Environmental Impact Statements, Title 19, Chapter 343, Hawaii Revised Statutes

In this chapter, Hawaii has established a system of environmental review to ensure that environmental concerns are given appropriate consideration in decisionmaking along with economic and technical considerations. The statute provides for public review and opportunity for comments on a range of activities such as proposed use of state or county lands or proposed use within the shoreline area. The statute notes that when an action is subject both to this chapter and NEPA, the state agencies "shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements." This cooperation would include concurrent public review.

The Trustees will integrate the federal and state environmental review requirements as they proceed with restoration planning and implementation.

- Clean Water Act (CWA) (Federal Water Pollution Control Act), 33 USC 1251, et seq.

The CWA is the principal law governing pollution control and water quality of the nation's waterways. Section 404 of the law authorizes a permit program for the disposal of dredged or fill material into navigable waters. The U.S. Army Corps of Engineers (Corps) administers the program. In general, restoration projects which move significant amounts of material into or out of waters or wetlands -- for example, hydrologic restoration of marshes -- require Section 404 permits.

Some of the preferred NRDA restoration projects in the Final RP/EA will require such permits. For one preferred project, enhancement of Pouhala Marsh, Ducks Unlimited already has secured the permit.

Under Section 401 of the CWA, restoration projects that involve discharge or fill to wetlands or navigable waters must obtain certification of compliance with state water quality standards. The Hawaii Department of Health implements the Section 401 certification program. Generally, restoration projects with minor wetlands impacts (*i.e.*, a project covered by a Corps general permit) do not require Section 401 certification, while projects with potentially large or cumulative impacts must undergo a certification review.

- Coastal Zone Management Act (CZMA), 16 USC 1451, et seq., 15 CFR Part 923

The goal of the CZMA is to preserve, protect, develop and, where possible, restore and enhance the nation's coastal resources. The federal government provides grants to states with federally-approved coastal management programs. The State of Hawaii has a federally-approved program. Section 1456 of the CZMA requires that any federal action inside or outside of the coastal zone that affects any land or water use or natural resources of the coastal zone shall be consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. It states that no federal license or permit may be granted without giving the State the opportunity to concur that the project is consistent with the state's coastal policies. The regulations outline the consistency procedures.

To comply with the CZMA, the Trustees intend to seek the concurrence of the State of Hawaii that their preferred projects are consistent to the maximum extent practicable with the enforceable policies of the state coastal program.

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601, et seq.

CERCLA provides the basic legal framework for cleanup and restoration of the nation's hazardous substances sites. Generally, parties responsible for contamination of sites and the current owners or operators of contaminated sites are liable for the cost of clean up and restoration. CERCLA establishes a hazard ranking system for assessing the nation's contaminated sites with the most contaminated sites being placed on the NPL. The Pearl Harbor Naval Complex is listed on the NPL.

To the extent that restoration projects are proposed for areas containing hazardous substances, the Trustees will avoid exacerbating any potential risk posed by such substances and will undertake no actions which might constitute "arrangement for disposal of hazardous substances." Fill in the eight-acre parcel at Pouhala Marsh that the Trustees propose to restore has been sampled and analyzed. Based on that sampling and analysis, the fill has been characterized as non-hazardous. At this time, the Trustees are not aware of any other potential hazardous substance problem associated with the areas where the proposed restoration projects will occur.

The Waiawa Unit of the Pearl Harbor National Wildlife Refuge is immediately adjacent to the Pearl City Landfill on the shoreline of the Pearl City Peninsula and is an Operable Unit of the Pearl Harbor Naval Complex NPL site. Solid and liquid hazardous wastes were disposed in this landfill. Before removing any red mangroves from the shoreline of the Waiawa Unit, the USFWS will coordinate with the appropriate individuals to determine whether these hazardous wastes could potentially be mobilized by their proposed actions.

- Endangered Species Act (ESA), 16 USC 1531, et seq., 50 CFR Parts 17, 222, 224

The ESA directs all federal agencies to conserve endangered and threatened species and their habitats and encourages such agencies to utilize their authorities to further these purposes. Under the Act, the National Marine Fisheries Service (NMFS) and the USFWS publish lists of endangered and threatened species. Section 7 of the Act requires that federal agencies consult

with these two agencies to minimize the effects of federal actions on endangered and threatened species.

The Trustees have determined that the two preferred ecological projects -- enhancement of Pouhala Marsh and red mangrove removal at the Waiawa Unit -- will benefit some endangered species such as Hawaiian stilts, Hawaiian ducks and Hawaiian moorhens. It is possible that the red mangrove removal project could disturb endangered species. Prior to implementation of that project, the Trustees will conduct Section 7 consultations.

- Magnuson-Stevens Fishery Conservation and Management Act, 16 USC 1801 et seq.

The Magnuson-Stevens Fishery Conservation and Management Act as amended and reauthorized by the Sustainable Fisheries Act (Public Law 104-297) established a program to promote the protection of essential fish habitat (EFH) in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. After EFH has been described and identified in fishery management plans by the regional fishery management councils, federal agencies are obligated to consult with the Secretary of Commerce with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any EFH.

The Trustees believe that the proposed restoration projects will have no adverse effect on EFH and will promote the protection of fish resources and EFH. Prior to implementation of any restoration projects that may potentially create a potential adverse impact to EFH, the Trustees will consult with the National Marine Fisheries Service.

- Hawaii Conservation of Aquatic Life, Wildlife, and Land Plants, Title 12, Chapter 195D

Recognizing that many species of flora and fauna unique to Hawaii have become extinct or are threatened with extinction, the state established procedures to classify species as endangered or threatened. The statute directs the DLNR to determine what conservation measures are necessary to ensure the continued ability of species to sustain themselves. The Trustees will work with the appropriate state officials concerning the potential disturbance of endangered species related to the mangrove removal project. See discussion above.

- Fish and Wildlife Coordination Act (FWCA), 16 USC 661, et seq.

The FWCA requires that federal agencies consult with the USFWS, NMFS, and state wildlife agencies for activities that affect, control or modify waters of any stream or bodies of water, in order to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. This consultation is generally incorporated into the process of complying with Section 404 of the Clean Water Act, NEPA or other federal permit, license or review requirements.

In the case of NRDA restoration actions under this RP/EA, the fact that the three consulting agencies for the FWCA (*i.e.*, USFWS, NMFS and DLNR) are represented by the Trustees means that FWCA compliance will be inherent in the Trustee decisionmaking process.

- Rivers and Harbors Act, 33 USC 401, et seq.

The Rivers and Harbors Act regulates development and use of the nation's navigable waterways. Section 10 of the Act prohibits unauthorized obstruction or alteration of navigable waters and vests the Corps with authority to regulate discharges of fill and other materials into such waters. Restoration actions that require Section 404 Clean Water Act permits are likely also to require permits under Section 10 of the Rivers and Harbors Act. However, a single permit usually serves for both. Therefore, the Trustees can ensure compliance with the Rivers and Harbors Act through the same mechanism.

- Executive Order (EO) 12898 - Environmental Justice

On February 11, 1994, President Clinton issued EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. This EO requires each federal agency to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low income populations. EPA and the CEQ have emphasized the importance of incorporating environmental justice review in the analyses conducted by federal agencies under NEPA and of developing mitigation measures that avoid disproportionate environmental effects on minority and low-income populations. The Trustees have concluded that there are no low income or ethnic minority communities that would be adversely affected by the proposed restoration activities.

- Executive Order (EO) 11988 – Construction in Flood Plains

This 1977 Executive Order directs federal agencies to avoid to the extent possible the long- and short- term adverse impacts associated with the occupancy and modification of flood plains and to avoid direct or indirect support of development in flood plains wherever there is a practicable alternative. Each agency is responsible for evaluating the potential effects of any action it may take in a floodplain.

Before taking an action, the federal agency must determine whether the proposed action will occur in a floodplain. For major federal actions significantly affecting the quality of the human environment, the evaluation will be included in the agency's NEPA compliance document(s). The agency must consider alternatives to avoid adverse effects and incompatible development in flood plains. If the only practicable alternative requires siting in a floodplain, the agency must: (1) design or modify the action to minimize potential harm, and (2) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain.

The Trustees considered this Executive Order with regard to their proposed actions. Two projects – the shoreline protection system and replacement of the Visitor Center boat dock – were investigated and the Trustees determined that they were not located in a floodplain.

- Defensive Sea Area 33 USC 475; Executive Order (EO) 8143

EO 8143 (May 26, 1939) established the "defensive sea area" which encompasses Pearl Harbor itself and the area immediately outside the entrance channel to the harbor. The Executive Order prohibits any person, other than persons on public vessels of the United States, or any vessels other than public vessels of the United States from entering or navigating within the defensive sea area without authorization of the Secretary of the Navy. Entry control over Pearl Harbor has been

delegated to the Commander, Navy Region Hawaii. Under 33 USC 475, the Secretary of the Navy is directed to adopt rules and regulations governing the navigation, movement and anchorage of vessels in the waters of Pearl Harbor and the entrance channel to the harbor.

5.3 OTHER POTENTIALLY APPLICABLE LAWS AND REGULATIONS

This section lists other laws that potentially affect NRDA restoration activities. The statutes or their implementing regulations may require permits from federal or state permitting authorities.

Archaeological Resources Protection Act, 16 USC 470, *et seq.*

Clean Air Act, 42 USC 7401, *et seq.*

Marine Mammal Protection Act, 16 USC 1361, *et seq.*

Migratory Bird Treaty Act, 16 USC 703, *et seq.*

National Historic Preservation Act, 16 USC 470, *et seq.*

National Park Act of August 19, 1916 (Organic Act), 16 USC 1, *et seq.*

USS *Arizona* Memorial Enabling Legislation (PL 87-201)

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8.0 BUDGET SUMMARY

The Trustees and Chevron reached a settlement in principle in 1998. The Federal District Court in Honolulu approved the settlement September 9, 1999.

Under the terms of the settlement, Chevron will:

- Design and construct riprap repair to the USS *Arizona* Memorial Visitor Center shoreline in a project valued at \$1,000,000.00.
- Pay \$550,000.00 to address lost visitor services at the USS *Arizona* Memorial. Three percent of this amount (*i.e.*, \$16,500.00) will be paid to the U.S. Department of Justice Working Capital Fund pursuant to Section 108 of the Department of Justice Appropriations Act of 1994, Public Law No. 103-121. The remainder (*i.e.*, \$533,500.00) will partially reimburse the NPS for the design, removal and replacement of the shoreside dock at the Visitor Center, a preferred alternative to address the lost visitor services.
- Pay \$1,000,000.00 to implement the preferred projects to address the biological injuries: mangrove removal and associated projects at the Waiawa Unit of the Pearl Harbor National Wildlife Refuge and enhancement and maintenance endowment of Pouhala Marsh.

Final costs and allocation of available funds for restoration projects will depend on finalization and approval of associated design documents.