

CP-#44 / Natural Resource Damages Policy	
New York State Department of Environmental Conservation	
DEC Policy	
Issuing Authority: Basil Seggos, Commissioner	
Date Issued: 1/21/2010	Latest Date Revised: 12/12/2018

I. Summary:

This policy describes the commitment by the Department of Environmental Conservation (Department) to the operation of a comprehensive Natural Resource Damages (NRD) Program. This policy is necessary to enable the Commissioner, as the designated Trustee for State natural resources, to fulfill their legal obligation to act on behalf of the public to recover damages for injuries to natural resources and to use any recoveries to restore, replace, or acquire the equivalent of those injured resources.

II. Policy:

It is the policy of the Department of Environmental Conservation to ensure that the State's natural resources are protected and, where injured, such resources are restored or replaced in accordance with the law. NRD claims compensate New York for the injury to, loss of use of, and/or destruction of its natural resources. NRD claims seek damages for natural resource injuries which are not fully addressed by any remedial actions, as well as damages for the temporary or permanent loss of services which natural resources provide.

An effective NRD program requires the involvement of several Department programs and Regional Offices. However, a group within the Department must be designated as the lead entity for the NRD program, to coordinate divisional and regional involvement, to ensure the damages to the natural resources of New York State are effectively compensated, and to ensure meaningful NRD restoration actions. This policy establishes Department program responsibilities for fulfilling the Commissioner's NRD obligations.

This policy supersedes O&D Memoranda #88-13, #93-10, #94-18 and the previous CP-44 issued January 21, 2010.

The policies and procedures set out in this document are intended solely for the use and guidance of personnel of the Department. They are not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation.

The Department reserves the right to act at variance from the guidelines set forth in this Policy.

III. Purpose and Background:

On November 30, 1987, the Commissioner of Environmental Conservation was designated to be the Trustee for New York State's natural resources under applicable federal law, including the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act, and the Oil Pollution Act, complementing the Department's responsibilities under the New York Environmental Conservation Law, Article 12 of the New York Navigation Law, and other applicable law, to conserve, improve and protect New York's natural resources. The purpose of this policy is to reaffirm the Department's commitment to a comprehensive program to pursue natural resource damages claims and to use NRD recoveries to restore injured resources to the maximum extent possible.

Every inactive hazardous waste disposal site, solid waste management facility, hazardous substance or oil spill, SPDES or non-point discharge, or emission of contaminants to the air, amongst others, raises the possibility that natural resource injuries could have occurred. Similarly, injuries to natural resources may occur when lands, streams or wetlands are disturbed and when fish or wildlife are taken. Furthermore, when injuries remain after remedial efforts are complete, or when the significant services provided by resources are lost prior to, during, or after remediation, an NRD claim can compensate the people of the State of New York through the provision of restored natural resources for these injuries. NRD settlements and restoration projects are not a replacement or substitute for reconstruction, restoration, or mitigation actions required for remediation projects or for any legally-required actions.

An effective NRD program is dependent on clearly defined responsibilities of the Department programs essential for assessing natural resource injuries and developing effective restoration or other actions for recovering the loss. Critical to finishing this effort is clear roles and responsibilities for implementing restoration plans through to project completion.

IV. Responsibility:

New York State's NRD program requires the involvement of technical staff from several Department programs and Regional Offices. Program responsibilities for completing an NRD case are as follows:

Office of General Counsel (OGC) – OGC will take the lead in pursuing NRD cases and will be responsible for coordinating and communicating with appropriate Central Office and Regional technical staff for the assessment of natural resource damages and implementation of NRD restoration activities. Expertise and support for the NRD Program is provided by OGC, which is responsible for conducting or coordinating any analysis needed to support the settlement or prosecution of cases. OGC will also coordinate the internal review of Draft NRD restoration plans with appropriate Divisions and Regional programs prior to releasing restoration plans for public review.

Finally, OGC will ensure that restoration plans are successfully implemented, by coordinating with the relevant Regional Director or appropriate Division Director to assign a staff person to complete each restoration plan.

Division of Environmental Remediation (DER) – DER provides technical expertise and information related to hazardous waste remediation sites and petroleum and hazardous substance spills. OGC will coordinate with DER to identify NRD claims and assess damages where hazardous waste or petroleum have potentially injured natural resources.

Division of Materials Management (DMM) - DMM provides technical expertise and information related to hazardous waste, radioactive waste, solid waste and pesticides. OGC will coordinate with DMM to identify NRD claims and assess damages where hazardous waste, radioactive waste, solid waste or pesticides have potentially injured natural resources.

Division of Fish and Wildlife (DFW) – DFW, including the Bureau of Ecosystem Health, provides technical expertise on fish and wildlife resources, freshwater wetlands, aquatic and terrestrial habitats and public access to fishing and hunting. OGC will coordinate with DFW on NRD assessments of injury to resources over which DFW has expertise, and when developing restoration plans to restore or replace injured fish and wildlife resources. Additionally, the Bureau of Ecosystem Health produces fish and wildlife contaminant data and houses toxicological expertise useful for assessing natural resource injury and tracking recovery.

Division of Marine Resources (DMR) – DMR provides technical expertise on living marine resources and their habitat. OGC will coordinate with DMR on NRD assessments of injury to resources over which DMR has expertise and when developing restoration plans to restore or replace injured living marine resources and their habitat.

Division of Lands and Forests (DLF) - When NRD restoration projects involve the conveyance of an interest in land or planning for open space, OGC shall coordinate with DLF as early as possible to consider all options before a final determination is made regarding the conveyance and to ensure that the ultimate conveyance is fully approved as required by law.

Division of Water (DOW) – DOW provides technical expertise on water resources throughout New York State. OGC will coordinate with DOW on injury assessments, where appropriate, and particularly when developing restoration plans to restore or replace injured surface water and ground water resources.

Regional Offices – Regional Directors will be asked to engage the appropriate Regional staff whose technical expertise is required for an NRD case. The assignment of Regional staff to work on a NRD case will be made at the discretion of the Regional Director, as staff time and resources allow. Assigned Regional office staff will assist OGC in assessing natural resource

injury and determining appropriate NRD restoration projects for restoring or replacing the injured resources. For NRD cases involving the creation or restoration of freshwater aquatic habitats, habitat alteration, access to fish and wildlife resources, or acquisition of lands, OGC will coordinate through the Regional Director with the Regional Natural Resource Supervisor to ensure appropriate program staff are consulted.

V. Procedure:

The Deputy Commissioner and General Counsel has been delegated authority to issue NRD-related documents by Commissioner's Delegation 16-02. OGC negotiates the terms of agreements and settlements, and pursues cases as needed. OGC conducts and coordinates NRD assessments and the implementation of restoration projects following the technical guidance provided by relevant Divisions and Regional Offices of the Department. The involved Divisions and Regional Offices will depend on the location and the type of natural resource injury assessed.

OGC is responsible for conducting or coordinating the analysis needed to support the settlement or litigation of cases and for managing the NRD Fund. As appropriate, OGC staff will coordinate with other programs that have information relevant to identify potential NRD claims and pursue those claims. In the circumstance where significant staff time or resources will be necessary to support the development of an NRD case or implement NRD restoration, OGC will identify and coordinate the use of technical staff time with the involved Divisions or Regions.

When draft NRD restoration plans are prepared, OGC will coordinate review of the plan with the Division Director for the relevant natural resource and the Regional Director for the location of the injury and/or NRD restoration. OGC will coordinate this Division and Region review of draft restoration plans prior to the execution of an enforcement document containing a project-based NRD settlement or the publication for appropriate public comment of a restoration plan developed for the use of funds held in the NRD Fund. Furthermore, OGC will ensure that restoration plans are successfully implemented, by coordinating with the relevant Regional Director or appropriate Division Director to assign a staff person to complete each restoration plan. OGC will also track all assessment and restoration projects on a docket of NRD cases. As noted in section IV, when the restoration projects involve the conveyance of an interest in land or planning for open space, OGC shall coordinate with the Division of Lands and Forests.

The responsibility for implementing, maintaining, interpreting, and updating this policy lies with OGC in consultation with the affected Divisions or Regions.

VI. Related References:

- Organization and Delegation Memoranda #88-13 dated April 15, 1988, #93-10 dated April 29, 1993, and #94-28 dated August 8, 1994 (all hereby superseded).
- New York State Department of Environmental Conservation Civil Penalty Policy dated 6/20/90, Section IV(D)(2)(a).
- Commissioner's Delegation of Authority 16-02.
- OGC 10: Natural Resource Damages Claims Procedures.