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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 in Hawaii 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. 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. The Trustees must attempt to 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 affected by the Incident.

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 used these regulations as guidance in this assessment.

- 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 Finding of No Significant Impact (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 RP/EA is intended to accomplish NEPA compliance by: (1) summarizing the current environmental setting, (2) describing the purpose and need for restoration action, (3) identifying alternative actions, (4) assessing the preferred actions' environmental consequences, and (5)

summarizing opportunities for public participation in the decision process. Project-specific NEPA documents may be needed for some of the proposed restoration projects.

- 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.

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.

The Trustees do not believe that any of the proposed projects will adversely affect the state's coastal zone. However, 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.

- Marine Mammal Protection Act (MMPA), 16 USC §§ 1361, et seq.

The Marine Mammal Protection Act is the principal federal legislation which protects marine mammals. It also recognizes the important role that marine mammals play in the ecosystem as well as their recreational and aesthetic value. The MMPA places a moratorium, with few exceptions, on the taking or importing into the United States of marine mammals or their products. The MMPA defines "take" as "to harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any marine mammal." The Department of the Interior/U.S. Fish and Wildlife Service and the Department of Commerce/NOAA share responsibility for the management and conservation for these species.

It is possible that Hawaiian monk seals may be in the area where the net removal project will occur. Trustee observers will ensure that no marine mammals are disturbed during the net removal project.

- 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. Prior to implementation of the proposed projects, the Trustees will conduct Section 7 consultations in conjunction with Essential Fish Habitat (EFH) consultation as noted below.

As noted in the Final RP/EA, several federal and state-listed species frequent the areas impacted by the oil spill. The proposed projects will provide benefits to some of those species such as the green sea turtle, the Hawaiian monk seal, the Newell's shearwater and the Hawaiian dark-rumped petrels, and protected plants in the vicinity (Hawaii NHP 2000). The Trustees will ensure that no endangered or threatened species are disturbed during the restoration projects. Should it be determined that any of the proposed projects will adversely affect a threatened or endangered species, the Trustees will either redesign the project or substitute another project.

- Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), 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) establishes a program to promote the protection of 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. The Trustees will consult with NMFS prior to implementation of any restoration project occurring in an area covered by the Western Pacific Fishery Management Council.

- 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 protected species as a result of the net removal and predator control projects. 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 Final 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 flood plain.

Before taking an action, the federal agency must determine whether the proposed action will occur in a flood plain. 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 flood plain, 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 flood plain. The Trustees have determined that none of the proposed projects is located in a flood plain.

5.3 OTHER POTENTIALLY APPLICABLE LAWS AND REGULATIONS

This section lists other laws that potentially affect the Trustees' restoration activities. The statutes or their implementing regulations may require permits from federal or state permitting authorities. The permitting process also may require an evaluation of statutes other than those noted below.

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

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

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

National Marine Sanctuaries Act, 16 USC §§ 14

National Wildlife System Administration Act, 16 USC §§ 668dd, *et seq.*

Executive Order 12996, National Wildlife System Administration

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8.0 BUDGET

Final costs and allocation of available funds for restoration projects will depend on a determination by the Trustees as to whether the proposed projects will be implemented under the Final Restoration Plan, and then finalization and approval of associated design documents.