U.S. Department of Homeland Security
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Washington, DC 20472

FEMA

OCT 30 2012

MEMORANDUM FOR: FEMA Regional Administrators
Regions I - X

ATTENTION: Recovery Division Directors

FROM: Deborah Ingram
Assistant Administrator
Recovery Directorate

SUBJECT: Amendment to Recovery Policy 9523.5 *Debris Removal from Waterways* on Limited Debris Removal from Streams

The purpose of this memorandum is to amend Recovery Policy RP9523.5 *Debris Removal from Waterways* and provide guidance for implementation of the policy changes. The policy provides guidance on the eligibility of debris removal from waterways under the Public Assistance Program. This amendment specifically addresses debris removal from streams where both the FEMA Public Assistance Program and the Natural Resources Conservation Service (NRCS) Emergency Watershed Protection Program may be applicable.

Under the policy, debris removal from streams is eligible, however it is limited to the work reasonably required to eliminate immediate threats to life, public health, and safety, or to remove debris that is immediately up/down stream of and in close proximity to improved property. As originally issued, Recovery Policy RP9523.5 provided that the removal of debris for which another Federal agency such as NRCS has specific authority was ineligible under the Public Assistance Program (see Sections VI. and VII.D.1 of RP9523.5, dated March 29, 2010). FEMA has determined that there is no statutory bar to providing Federal grant assistance to applicants in such circumstances, absent a duplication of benefits, and is thus amending the policy to allow for limited debris removal assistance in the form of FEMA Public Assistance grant funding when another Federal agency has specific authority to also assist.

The removal of debris from streams in areas that are located in identified watersheds that fall under the purview of the NRCS Emergency Watershed Protection Program is eligible under the FEMA Public Assistance Program in limited circumstances. First, eligibility is limited to debris removal from streams that meets all requirements for eligibility under the Public Assistance Program, including a determination that it is in public interest based on immediate threats to life, public health, and safety, or threats of significant damage to improved property (see 44 CFR § 206.224 Debris removal). This also includes a demonstration by an applicant that it has legal responsibility to remove the debris and the applicant's responsibility to take action where there is an immediate threat to life, public health and safety should be independent of any expectation, or request, that

FEMA will reimburse costs incurred for debris removal. The applicant must also comply with all applicable environmental and historic preservation requirements triggered by the debris removal activity. Second, only that activity that is reasonably necessary to avert the threat and which will not be addressed under the other Federal agency program will be eligible under the Public Assistance Program. Except in these limited circumstances, debris removal from streams for which another Federal agency has authority, such as the NRCS Emergency Watershed Protection Program, is ineligible under the Public Assistance Program. FEMA Public Assistance personnel in the Regions and at Joint Field Offices should work closely with NRCS and U.S. Army Corps of Engineers representatives to assess debris in streams and waterways to determine application of the agencies' respective authorities and programs.

Amendment: This memo issues an amended version of RP9523.5. Specifically, Section VII.B.8.of RP9523.5 now reads as follows:

8. Debris removal from a stream by an applicant for which another Federal agency has specific authority, is ineligible under the Public Assistance Program, except for limited debris removal that is:

    a. Reasonably necessary to eliminate an immediate threat to life, public health and safety; OR

    b. Located immediately up/down stream of or in close proximity to improved property and which poses an immediate threat of significant damage to that property; AND

    c. The other Federal agency is not providing assistance for the activity.

Applicability: This amendment to RP9523.5 will allow for greater flexibility in providing assistance and will not result in a significant reduction of assistance under the Public Assistance program and thus is not subject to the notice and consultation requirements of Section 325 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), 42 U.S.C. § 5165c. This amendment applies to all major disasters and emergencies declared on or after the date of the issuance of this memo.

If you have any questions about this policy, please contact Bill Roche, Director, Public Assistance Division, via email at William.Roche@fema.dhs.gov , or phone (202) 646-3834.

Attachment

FEMA

RECOVERY POLICY

RP9523.5

I. **TITLE:** **Debris Removal from Waterways**

II. **DATE OF ISSUANCE:** OCT 30 2012

III. **PURPOSE:** To provide guidance for determining the eligibility of debris removal from navigable waterways, the coastal and inland zones, and wetlands under the Public Assistance Program.

IV. **SCOPE AND EXTERNAL AUDIENCE:** This policy applies to all emergencies and major disasters declared on or after the date of publication of this policy. It will continue in effect until rescinded or superseded. If rescinded or superseded, this policy will continue to apply to all emergencies and major disasters declared between the date in Paragraph II and the date it is rescinded or superseded. The policy does not apply retroactively to emergencies and disasters declared prior to the date of issuance in Paragraph II. The policy is intended for all personnel involved in the administration of the Public Assistance Program.

V. **AUTHORITY:** Sections 403, 407, and 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, (Stafford Act), as amended, 42 U.S.C. 5170b, 5173, and 5192.

VI. **OBJECTIVES:**

A. The U.S. Army Corps of Engineers (USACE) has primary responsibility for the removal of debris from Federally maintained navigable channels and waterways. Section 202 of the Water Resources Development Act of 1976 (PL 94-587) authorizes USACE to remove debris from Federally maintained commercial harbors, and water areas immediately adjacent thereto. Sections 15, 19, and 20 of the River and Harbor Act of 1899, as amended, authorize USACE to remove sunken vessels or other obstructions from navigable waterways under emergency conditions. A navigable waterway is one that has been authorized by Congress, and which USACE operates and maintains for general (including commercial and recreational) navigation.

B. USACE's policy is to oversee removal of sunken vessels by an identifiable owner, operator or lessee if the sunken vessel is in or likely to be moved into a Federal navigation channel. USACE will remove a vessel using its emergency authorities only if the owner, operator, or lessee cannot be identified or they cannot effect removal in a timely and safe manner.

C. Title 33 Code of Federal Regulations (CFR) Part 153, **Control of Pollution by Oil and Hazardous Substances, Discharge Removal** authorizes the United States Coast Guard (USCG) to remove sunken vessels in order to prevent marine pollution. In 1985, USACE and the USCG signed a Memorandum of Agreement to enhance coordination between the two agencies for the removal of sunken vessels and other obstructions to navigation from navigable waters of the United States. Under this agreement, USACE and the USCG work together to determine if a sunken vessel either poses a threat to navigation or a pollution threat to public health and safety. If the agencies determine that the vessel poses a threat to navigation, USACE will remove the vessel using the emergency authorities proscribed in Section 20 of the River and Harbor Act of 1899. If the sunken vessel poses a pollution threat, under 33 CFR Part 153 **Control of Pollution by Oil and Hazardous Substances, Discharge Removal**, and the Abandoned Barge Act of 1992, the USCG's authority to remove the vessel is subject to a determination that its removal is essential to abate a pollution threat from the vessel. In most cases, USCG authorized actions are limited to removing oil and other hazardous substances from the vessel while leaving the vessel in place.

D. Under the National Contingency Plan, the USCG is also responsible for the removal of oil discharges and hazardous substance releases that occur in the coastal zone. The Environmental Protection Agency (EPA) is responsible for the emergency removal of oil, pollutants, hazardous materials and their containers from inland zones. The precise boundaries of coastal and inland zones are determined by an interagency agreement between the EPA and the USCG.

E. Section 216 of the Flood Control Act of 1950, PL 81-516, 33 U.S.C. 701b-1; and Sections 403-405 of the Agricultural Credit Act of 1978, PL 95-334, as amended by Section 382 of the Federal Agriculture Improvement and Reform Act of 1996, PL 104-127, 16 U.S.C. 2203, authorize the National Resources Conservation Service (NRCS) to provide assistance, through its Emergency Watershed Protection

(EWP) program, to implement emergency measures to EWP-eligible facilities where a sudden impairment of a watershed threatens life or property as determined by the NRCS State Conservationist. These emergency measures include, but are not limited to, providing financial and technical assistance to remove debris from streams. The measures that are taken must be environmentally and economically sound. Additional EWP criteria are in 7 CFR Part 624.

F. Sections 403, 407, and 502 of the Stafford Act and 44 CFR § 206.224 **Debris removal**, authorize FEMA to provide funding to eligible applicants to remove debris, wreckage, and sunken vessels from publicly and privately owned waters to eliminate an immediate threat to lives, public health and safety, or improved property; or to ensure the economic recovery of the affected community. The debris, wreckage, and sunken vessels must be the direct result of a Presidentially declared emergency or major disaster and located in the designated area, and the applicant must have the legal responsibility to remove the threat (see 44 CFR § 206.223 **General work eligibility**). FEMA may fund the removal and disposal of eligible debris, wreckage, and sunken vessels from non-Federally maintained navigable waterways, the coastal or inland zones, or wetlands only when another Federal agency does not have the specific authority to fund the activity (see 44 CFR § 206.208(c)(2)). FEMA will make eligibility determinations on a case-by-case basis in coordination with the State and other Federal agencies, as necessary (see section VIII.B.8. of this policy regarding debris removal from streams).

G. Pursuant to 44 CFR § 206.208 **Direct Federal assistance,** FEMA may provide direct Federal assistance through a mission assignment to another Federal agency to remove eligible debris when the State and local government certify that they lack the capability to perform or contract for the requested work. The duration of mission assignments for debris removal is limited to 60 days from the emergency or major disaster declaration date. Extensions to this time limitation may be made based on extenuating circumstances or unusual project requirements (see 44 CFR §206.208(d)).

VII. DEFINITIONS:

A. **Coastal Zone:** As defined for the purpose of the National Contingency Plan (NCP), refers to all United States waters subject to the tide, United States waters of the Great Lakes, specified ports and harbors on inland rivers, waters of the contiguous zone, other waters of the high seas subject to the NCP, and the land surface or land substrata, ground waters, and ambient air proximal to those waters. The term coastal zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/USCG agreements and identified in Federal regional contingency plans.

B. **Federally Maintained Navigable Channels and Waterways:** For the purpose of this policy, refer to those waters that are maintained under the authorities and responsibilities of the USACE. These channels include USACE authorized projects (e.g., specified harbors, canals, turning basins, anchorage and mooring areas, and waterways) that are designed, constructed, and maintained by the USACE for use by commercial and/or recreational navigation traffic.

C. **Inland Zone:** The environment inland of the coastal zone excluding the Great Lakes and specified ports and harbors on inland rivers. The term inland zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/USCG agreements and identified in federal regional contingency plans.

D. **Non-Federally Maintained Navigable Waterways:** Public waterways that are currently used for commercial and recreational navigation traffic and are not Federally maintained or under the authority of a Federal agency.

E. **Specified Ports and Harbors:** Those ports and harbor areas on inland rivers, and land areas immediately adjacent to those waters, where the USCG acts as predesignated on-scene coordinator. Precise locations are determined by EPA/USCG regional agreements and identified in federal Regional Contingency Plans and Area Contingency Plans.

F. **Wetlands:** Areas that are inundated or saturated by surface or ground water with a frequency sufficient to support, or that under normal hydrologic

conditions does or would support, a prevalence of vegetation or aquatic life typically adapted for life in saturated or seasonally saturated soil conditions (e.g., swamps, fresh and saltwater marshes, bogs, fens).

VIII. POLICY:

A. Approval for FEMA Assistance

FEMA may fund the removal and disposal of eligible disaster-generated debris, wreckage, and sunken vessels from the coastal zone or inland zone, non-Federally maintained navigable waterways, and wetlands by an eligible applicant, if (1) the debris, wreckage, or sunken vessel is the direct result of a Presidentially-declared disaster (44 CFR § 206.223(a)), (2) the removal is in the public interest (44 CFR § 206.224(a)), and (3) another Federal agency does not have specific authority to perform or fund the work (44 CFR § 206.208(c)(2)).

In order to be eligible for assistance, an eligible applicant must provide documentation of this work, to include: a public interest determination; legal responsibility; debris types and quantities to be removed; and debris removal locations.

1. Public Interest Determination: Pursuant to 44 CFR § 206.224 **Debris removal**, debris removal is in the "public interest," when its removal is necessary to (1) eliminate immediate threats to life, public health, and safety; or (2) eliminate immediate threats of significant damage to improved property; or (3) ensure economic recovery of the affected community to the benefit of the community-at-large.

Applicants should provide FEMA documentation to support one of the following:

a. Immediate Threat to Life, Public Health, and Safety Determination. The basis of a determination by the State, county or municipal government's public health authority or other public entity that has legal authority to make such a determination that disaster-generated

debris in a navigable waterway in the designated area constitutes an immediate threat to life, public health, and safety; or

b. Immediate Threat of Significant Damage to Improved Property Determination. The basis of the determination by the State, county, or municipal government that the removal of disaster-generated debris from a navigable waterway is cost effective. Debris removal is cost effective if the cost to remove the debris is less than the cost of potential damage to the improved property; or

c. Ensure Economic Recovery of the Affected Community to the Benefit of the Community at Large Determination. The basis of the determination by the State, county, or municipal government that the removal of debris from a navigable waterway is necessary to ensure economic recovery of the affected community to the benefit of the community-at-large.

2. Legal Responsibility: Pursuant to 44 CFR §206.223(a)(3), **General work eligibility**, an eligible applicant must demonstrate that it had the legal responsibility at the time of disaster to remove debris and obstructions from the impacted waterway. An applicant's legal authorities, codes, and ordinances should be germane to the condition(s) presenting an immediate threat to life, public health, and safety, and not merely define the applicant's uniform level of services. The applicant's legal responsibility to take action where there is an immediate threat to life, public health, and safety should be independent of any expectation, or request, that FEMA will reimburse costs incurred for debris removal.

B. Eligible

1. FEMA will determine the amount of eligible debris to be removed that is necessary to eliminate an immediate threat to life, public health, and safety from non-Federally maintained navigable waterways, the coastal zone or inland zone, and wetlands on a case-by-case basis. FEMA will conduct eligibility assessments with the assistance of representatives from the applicant, State, and other Federal agencies, as necessary. Applicants should provide maintenance

records or surveys to demonstrate the pre-disaster condition and capacity of the waterway and its facilities, as appropriate.

2. FEMA will reimburse reasonable costs for the use of side scan sonar that identifies eligible submerged debris and sunken vessels after the applicant provides an eligible initial scope of work and cost estimate, and FEMA has determined that the removal of the debris is in the public interest, as described in Section VII.B.1. Side scan sonar missions should be limited in scope to address the impacted areas of non-Federally maintained navigable waterways and developed in coordination with FEMA and the State. Applicants should provide documentation that demonstrates the need for the use of side scan sonar to identify immediate threats. This documentation should be directly related to the impacted area(s) and debris estimates and locations.

3. FEMA may determine that debris located at or below the surface of a non-Federally maintained navigable waterway, or in the coastal or inland zone, is eligible to a depth equal to the maximum draft of the largest vessel that utilized the waterway prior to the storm plus two feet. Example: If the maximum draft of the largest vessel using the waterway is four feet, two feet will be added so that any debris below this six feet zone is not eligible.

a. FEMA may determine that debris extending from the waterway bottom upward into the eligible zone is also eligible for complete removal.

b. Applicants should document the maximum draft of waterways for tidal waters by using depths taken at low tide.

4. The removal of trees still rooted to an embankment may be eligible if:

a. The tree is partially or wholly floating or submerged in the waterway; and

b. The tree presents an immediate threat to life, public health, and safety; and

c. Another Federal agency does not have specific authority to fund or perform the work.

In such cases, FEMA may determine that the cost to cut the floating or submerged portion of the tree at the water's edge is eligible.

5. FEMA may determine that debris along the bank of a non-Federally maintained navigable waterway, in the coastal zone or inland zone, or along the bank of a wetland is eligible if it presents an immediate threat to life, public health, and safety, or to improved property.

6. Debris removal from privately-owned canals, waterways and banks is only eligible when necessary to eliminate an immediate threat to navigation that impedes the access of emergency service providers or if approved by the Federal Coordinating Officer under the guidelines established in Disaster Assistance Policy 9523.13, *Debris Removal from Private Property*.

7. Eligible debris removal from a stream is limited to the minimum effort required to eliminate an immediate threat to life, public health, and safety, or debris that is immediately up/down stream of and in close proximity to improved property.

8. Debris removal from a stream by an applicant for which another Federal agency has specific authority, is ineligible under the Public Assistance Program, except for limited debris removal that is:

a. Reasonably necessary to eliminate an immediate threat to life, public health and safety; OR

b. Located immediately up/down stream of or in close proximity to improved property and which poses an immediate threat of significant damage to that property; AND

c. The other Federal agency is not providing assistance for the activity.

9. FEMA may fund the removal and disposal of containers of pollutants and hazardous substances from the coastal zone or inland zone, non-Federally maintained navigable waterways, and wetlands by an eligible applicant, if the removal is in the public interest, and another Federal agency does not have specific authority to perform the work.

10. FEMA may determine that a storm-damaged vessel can be treated as eligible debris if the vessel cannot be salvaged or returned to seaworthiness and it is floating or submerged in the coastal or inland zones, a non-Federally maintained navigable waterway, or wetland. However, if any part of the damaged vessel can be used to identify an owner, the applicant should contact the owner and follow its local ordinances and State laws to demonstrate legal responsibility to remove and dispose of the vessel.

C. Ineligible

1. The removal of debris by an applicant for which another Federal agency has specific authority, or from Federally maintained navigable channels and waterways, is ineligible under the Public Assistance Program, except for limited debris removal from a stream as provided for in section VIII.B.8. of this policy.

2. The removal of wreckage and sunken vessels from Federally maintained navigable channels and waterways is ineligible.

3. The removal of debris from privately owned canals, waterways and banks is generally ineligible, except in cases described in Section VII.B.6.

D. Duplication of Benefits

Pursuant to Section 312 of the Stafford Act, FEMA is prohibited from providing funds for work that is covered by another source of funding. Therefore, applicants should take steps to verify whether insurance coverage or any other source of funding exists for the debris removal work.

E. Environmental Protection and Historic Preservation Review Requirements

Eligible waterway debris removal and disposal activities must satisfy environmental protection and historic preservation compliance review requirements as established by 44 CFR Parts 9, **Floodplain Management and Protection of Wetlands**, and 10, **Environmental Considerations**, and all other applicable local, State and Federal legal requirements.

IX. RESPONSIBLE OFFICE: Recovery Directorate (Public Assistance Division).

X. SUPERSESSION: For all disasters declared after the date of issuance in Paragraph II, this policy supersedes RP9523.5, dated March 29, 2010, and all previous guidance on this subject.

XI. REVIEW DATE: This policy will be reviewed 3 years from the date of issuance in accordance with Directive 112-12.

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Recovery Directorate