



May 17, 2017

MEMORANDUM

TO: James Uthmeier, Esquire
Chair, Regulatory Task Force, United States Department of Commerce

FROM: Barbara J. Goldsmith
Executive Director, Ad-Hoc Industry Natural Resource Management Group

RE: The Need to Include the NOAA Natural Resource Damage Assessment Regulations (990 CFR Part 15) in the List of Commerce's Regulations to be Reviewed for Modification, Replacement or Repeal

Summary of Requested Action

The Department of Commerce/National Oceanic and Atmospheric Administration (NOAA) Natural Resource Damage (NRD) Assessment regulations need to be modified or replaced. Since 1980, there have been over 850 documented NRD cases involving nearly 1000 settlements totaling \$17 billion.¹ Individually and collectively, US-based companies have had to expend huge amounts in transaction costs as cases have stalled and then must pay NOAA for the work performed (with no set time or cost limits) to assess NRD at specific sites. *Any federal regulatory program that has resolution of NRD taking decades in some cases and/or is holding large amounts in the US Treasury because collection of funds from businesses has outpaced the Department's ability to spend funds collected to restore "injured" natural resources is a strong candidate for regulatory reform review.* **We respectfully request that the Department of Commerce/NOAA NRD assessment regulations be added to the list of regulations to be reviewed by the Department's Regulatory Task Force.**

Introduction and Purpose of Memorandum

This memorandum is written on behalf of the companies that make up the nearly 30-year-old Ad-Hoc Industry Natural Resource Management Group (Group). This unique group of major multinational companies is singularly focused on the interface between natural resources (air, water, land, biota) and industrial, energy and transportation activities. We have been the key industry group engaged with NOAA since it first proposed in 1994 NRD Assessment regulations governing discharges of oil into navigable waters as required under the Oil Pollution Act. The Group has enjoyed a positive relationship with

¹ Source: Ad-Hoc Industry Natural Resource Management Group Database. This proprietary database has catalogued the details of every NRD case since 1980 and likely comprises the most comprehensive information anywhere in the country on NRD liability and related issues.

NOAA. In addition to providing comments on every proposed rulemaking as they have come up, we also set up mechanisms for ongoing communication and practice exchange and have more recently launched cooperative initiatives with NOAA and other key Federal Government Departments -- all aimed at encouraging a reasonable, balanced, and predictable practice arena.

While there have certainly been advances over the years, we are at a critical juncture following the unprecedented effort expended by private and public sectors alike to assess and settle natural resource damages related to the Deepwater Horizon incident. This provides an ideal time to assess what is and is not working and the role that the NOAA regulations play in this.¹² We are heartened by the President's current efforts to examine those regulations that may be a candidate for change or replacement or repeal. **It is our view that NOAA's NRD regulations at 990 CFR Part 15 are an appropriate candidate for Regulatory Task Force review per the President's Executive Orders.** We are simultaneously suggesting to the Department of Interior Regulatory Task Force that they examine the NRD assessment regulations at 43 CFR Part 11 promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). In fact, the very existence of two sets of federal regulations may in itself create the kind of inefficiencies that the President's Executive Orders are seeking to avoid. NOAA's regulations were last updated in 2002 and DOI's in 2008.

The remainder of this memorandum highlights key areas of needed change and how alternate approaches could result in a more cost-effective approach to assessing natural resource injuries, reaching settlement, and restoring the services attendant to natural resources affected by a release of hazardous waste or oil.

Synopsis of Regulation

CERCLA provides that responsible parties for releases of hazardous substances are liable, in addition to cleanup, for "damages for injury to, destruction of, or loss of natural resources" caused by their releases (CERCLA § 107(a)(C)) – referred to as NRD. It provides further that NRD recovered may be used "only to restore, replace, or acquire the equivalent of [the injured] natural resources" (*id.* § 107(f)(1)). Similarly, OPA provides for the recovery of NRD for discharges of oil (OPA § 1006). Under both statutes, NRD are assessed and recovered by federal, state, and/or Indian tribal trustees for the natural resources affected. Two sets of regulations have been issued to govern the NRD assessment process – those promulgated by DOI under CERCLA pertaining to hazardous substance releases (43 CFR Part 11) and those promulgated by NOAA under OPA pertaining to oil discharges (15 CFR Part 990). Use of the regulations is optional per CERCLA and OPA; however, if a trustee uses the regulations, its NRD assessment is entitled to a rebuttable presumption in its favor in a judicial action to recover the NRD. However, despite the optional nature of the regulations, they form, in most cases, the basis of -- or the benchmark for -- assessments, in whole or part, which are then used to settle cases. Thus, the practical effect of the regulations' importance cannot be minimized.

Effects of the NRDA Regulations

There are a number of problems with the Interior and NOAA regulations and their implementation by the Department of Interior and NOAA, respectively, acting as "trustee" (for natural resources as defined under CERCLA and OPA, respectively) that make the assessment process inefficient, ineffective, and

¹² NOAA's review of its NRDA regulations should incorporate review of the trustee/US Environmental Protection Agency (EPA) interface to identify opportunities for improved regulatory effectiveness on remedial and NRD sides, recognizing the synergies inherent in the two programs. Likewise, we are requesting that NOAA incorporate review of the trustee/US Coast Guard interface.

unduly contentious, lead to unreasonably large and unbounded claims for NRD, and hinder prompt and cost-effective restoration of the affected natural resources. These problems include the following:

1. While both sets of regulations set forth a step-wise process for assessment and more recently focus on projects to restore injured natural resources, the NRD assessment process prescribed by the regulations, particularly the Interior regulations, is complicated and cumbersome and often leads to excessive delays in settlement and/or in restoring natural resources. Moreover, there are no cost or time limits imposed by the regulations. Trustees often spend many years – sometimes decades – conducting endless studies of the resources without restoring them.
2. In determining the natural resource injuries that are compensable in NRD, trustees sometimes improperly include impacts that have occurred over time but were not caused by responsible parties' releases, such as those resulting from naturally occurring substances/conditions, general industrial development, other sources, and permitted discharges.
3. Given the broad definitions of injuries, especially in the DOI regulations, trustees often include effects that have not caused any actual or demonstrable harm to the environment or to services provided by the resources to the public – such as impacts to groundwater that is not used by anyone, effects on individual biological organisms that have not been shown to affect local populations of the plants or animals, effects shown only in laboratory studies or at other sites and not at the actual site involved, effects derived from speculative injury models, etc.
4. While the regulations provide for NRD to include the cost of restoring the damaged resources (called “primary restoration”), they also allow recovery of NRD based on the asserted value of the interim loss of the resources or their services prior to primary restoration (called “compensable value” in the DOI regulations and “compensatory restoration in the NOAA regulations). They allow trustees to estimate that value through a variety of techniques, some of which are highly speculative, including techniques for attempting to estimate “non-use” value (value that the public may derive from the existence of a resource without using it, which is notoriously difficult to measure). This can lead trustees to seek the largest monetary damage payment their experts can devise, rather than seeking to implement the most cost-effective projects that can promptly restore the resources.

Better or Different Regulations Needed

Given problems such as those cited above, the NRD regulations meet the criteria of Section 3(d) of Executive Order 13777 (Enforcing the Regulatory Reform Agenda, Feb. 24, 2017) for regulations that an agency's Regulatory Reform Task Force should identify for potential repeal, replacement, or modification. Those criteria include regulations that are “outdated, unnecessary, or ineffective.” This is clearly true of the NRD assessment regulations.

Specific Issues Needing Task Force Review

The NRD assessment regulations -- and related implementation protocols -- should be revised to impose logical boundaries on the NRD assessment process so as to prevent or minimize the current potential for lengthy studies and unconstrained damage claims and lead to more expeditious and cost-effective restoration of affected resources.

Regulatory Changes Needed

Changes to the NOAA regulations to promote the above goal could include those changes below. The DOI regulations are longer and more complex than the NOAA regulations and we are simultaneously

providing to the Department of the Interior Regulatory Reform Officer (RRO) a number of suggested changes to DOI's NRDA regulations that would promote the above goal (see Appendix A).

Changes to the NOAA regulations could include:

- Revisions to the provisions on injury determination and quantification to emphasize that injuries are to be determined relative to baseline conditions (as defined in Appendix A) and are to be based on actual and demonstrable harm to natural resources at the site in question (as also defined in Appendix A).
- Elimination of the provision allowing valuation scaling (valuation of the lost and replacement services) for compensatory restoration, or at least application of the non-use valuation methods or other speculative methods in conducting such scaling.
- A requirement that every NRD assessment set out time and cost targets at the outset (and optionally also set a target date for settlement based on the facts of the case at the outset of the assessment or soon after the assessment begins).

Range of Possible Actions

Among the range of possible actions are:

- (1) Modify the regulations;
- (2) Consolidate the Interior and NOAA regulations;
- (3) Formulate a new and more direct mechanism – statutory, regulatory, other – to restore natural resources affected by hazardous waste releases and oil;
- (4) Issue Policy Memoranda at the highest level of the Department of Commerce/NOAA so as to alleviate the inefficiencies in the current regulations and setting forth criteria for the performance of NRD assessments, including:
 - Focus on restoring injured resources at the earliest practicable date by implementing cost-effective restoration projects.
 - Prohibition of compensable value or compensatory restoration in NRD assessments unless specifically approved at senior level of NOAA following a thorough evaluation of need
 - Ensure that injuries and service losses are measured relative to baseline, and that baseline must include all conditions that are unrelated to the specific releases (as defined in Appendix A).
 - Focus the determination of injury on documented actual and demonstrable harm to natural resources at the site in question and the consequent loss of services provided by those resources (as also described in Appendix A).
 - Set out time and cost targets for every new and pending NRD assessment.

Closing

The Group is prepared to provide case histories and data to aid Commerce/NOAA's Regulatory Task Force review of the Natural Resource Damage Assessment regulations.

We would be happy to answer any questions you may have and/or meet with the Task Force as desired. I may be reached at [Ex. 6] or by email at bjg@nrdonline.org.

Respectfully,

Barbara Goldsmith

FOR: Ad-Hoc Industry Natural Resource Management Group

Note: Nothing in this memorandum should be construed as representing the views of any individual member company of the Ad-Hoc Industry Natural Resource Management Group.

Appendix A

Suggested Changes Needed to Interior NRD Assessment Regulations at 43 CFR Part 11

1. Focus to the extent possible on primary restoration – i.e., restoring injured resources to their baseline condition at the earliest practicable date by implementing cost-effective restoration projects – and eliminate or constrain the concept of interim compensable value.
 - The focus on restoration is consistent with the provision in § 107(f)(1) of CERCLA that NRD may be used only for restoration, replacement, or acquisition of the equivalent.
 - If the allowance for interim damages is retained, replace compensable value with the concept of compensatory restoration, as used in the NOAA regulations – i.e., restoration projects to replace the interim lost services pending primary restoration. In addition, trustees should not be allowed to employ non-use valuation methods or other speculative methods in determining the value of the interim lost services.
2. Emphasize that damages must be based on injuries and lost services compared to baseline conditions – i.e., conditions that would exist in the absence of the specific releases in question – and that baseline must thus include all conditions unrelated to those releases, including, but not limited to, naturally occurring substances/conditions, general industrial development, other sources, and permitted discharges.
3. Eliminate the current detailed broad provisions defining injury and, instead, require that the determination of injury should be based on documented actual and demonstrable harm to natural resources at the site in question and the consequent loss of services provided by those resources, and should not be based on changes that do not affect services, effects on individual biological organisms rather than impacts to local populations, effects shown only in laboratory studies or at other sites and not at the site involved, and effects derived from speculative injury models.
4. Require every NRD assessment to set out time and cost targets for the assessment [optional: and settlement] at the outset.