



Ad-Hoc INDUSTRY

NATURAL RESOURCE
MANAGEMENT GROUP

May 15, 2017

MEMORANDUM

TO: Samantha Dravis, Esq.
Regulatory Reform Officer, United States Environmental Protection Agency

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

RE: Request for Review -- The Inter-Relationship Between EPA Policies and Regulations and the Natural Resource Damage Assessment Regulations of the US Department of the Interior (43 CFR Part 11) and NOAA (990 CFR Part 15)

Summary of Requested Action

Since many of the nation's hazardous waste sites involve Natural Resource Damage (NRD) issues, there are potential opportunities to create a more cost-effective way to approach natural resources damages at Superfund sites. While EPA's responsibility relative to NRD is limited (with the notable exception of its role as trustee in the Deepwater Horizon Natural Resource Damage Assessment), in practice, cleanup and NRD are often tied together, notably related to data -- and in some cases, synergies between remedial actions and restoration projects (with both positive and negative outcomes). Since there are problems with the Interior and NOAA regulations (highlighted below), we believe that review of the Interior and NOAA regulations should also include a review of the interface with EPA regulations and policies to identify possible actions that could result in a more effective overall practice via regulatory or other changes.

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 all five Federal Government "trustee" Departments and Agencies. In addition to providing comments on relevant US DOI and NOAA NRDA rulemakings over the years, we have had in place (since 1999) mechanisms to permit ongoing communication and practice exchange and we have more recently launched cooperative database and other initiatives -- all aimed at encouraging a reasonable, balanced, and predictable practice arena.

While there have certainly been advances in NRD practice 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

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role that the current Interior and NOAA regulations play in this. 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 the Interior regulations at 43 CFR Part 11 and NOAA Regulations at 990 CFR Part 15 are appropriate candidates for Regulatory Task Force review by those agencies per the President's Executive Order 13777. Further, it is our view that these reviews might entail examination of the interface with EPA (and Coast Guard too) to identify possible opportunities and needs via regulation or otherwise. More effective NRDA regulations to remedy current problems and/or alternate (non-regulatory) approaches to assessing and settling natural resource damage issues could result in faster and more cost-effective cleanups.

Synopsis of Regulation

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") 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 natural resource damages (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, the Oil Pollution Act of 1990 (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 the Department of the Interior (DOI) under CERCLA pertaining to hazardous substance releases (43 CFR Part 11) and those promulgated by the National Oceanic and Atmospheric Administration (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 regulations and their implementation by the Department acting as "trustee" (for natural resources as defined under CERCLA) that make the assessment process inefficient, ineffective, and unduly contentious, lead to unreasonably large and unbounded claims for NRD, and hinder prompt and cost-effective restoration of the affected natural resources. Some of these problems are similarly present via the NOAA regulations. These problems include the following:

1. While the 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 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). 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 Group is separately writing to the US Departments of the Interior and Commerce to request that the NRD assessment regulations and related implementation protocols be reviewed and revised to impose logical boundaries on the NRD assessment process. Such action would 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. These reviews should incorporate review of the trustee/EPA interface to identify opportunities for improved regulatory effectiveness on remedial and NRD sides, recognizing the synergies inherent in the two programs.

Closing

The Group is prepared to provide case histories and data to aid US EPA’s Regulatory Task Force review of the interface with NRD issues when it addresses US EPA regulations that are candidates for modification, replacement or repeal.

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 202-628-6818 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.