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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OSWER Directive No. 9200.4-22A

MEMORANDUM

SUBJECT: CERCLA Coordination with Natural Resource Trustees

FROM: Timothy Fields, Acting Assistant Administrator
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TO: Director, Office of Site Remediation and Restoration
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Assistant Regional Administrator, Office of Ecosystems
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This memorandum provides direction for ensuring that the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for coordination with Natural Resource Trustees (Trustees) are met, and clarifies Trustee activities that may be funded under CERCLA. Sections 104(b)(2) and 122(j) of CERCLA require coordination with all affected Trustees and an even greater degree of coordination with the Federal Trustees, in site characterization, response actions, and settlement negotiations. We ask that your managers, technical, and legal staffs dealing with site identification, ranking, response, and legal actions under CERCLA meet their

obligations to coordinate fully with Trustees in these activities and that they take full advantage of existing Interagency Agreements with Trustees to support that coordination.

Trustees often have information and expertise about the biological effects of hazardous substances, and the location of sensitive species and habitats that can assist EPA in characterizing the nature and extent of site-related contamination and impacts. Coordination at the investigation and planning stages also provides the Trustees early access to information they need to assess injury to natural resources and to meet statutory time lines. That, in turn, allows Trustees to make early decisions about whether restoration is needed in light of the response actions and should generally result in more efficient settlement negotiations and an opportunity to address all liabilities at the site more quickly.

Trustee coordination efforts are aimed at achieving three goals: providing Trustees the information needed to meet their legal obligations for actions; sharing information to better protect the public health and the environment; and reducing the time to settlement for all liabilities. CERCLA requirements for the coordination with Trustees are a means to achieve these three goals.

This Directive reinforces a previous directive issued in 1989 by Henry Longest (Director, Office of Emergency and Remedial Response) and Bruce Diamond (Director, Office of Waste Programs Enforcement) on Natural Resource Damages Coordination. To achieve that end, we plan to provide greater support to Regions for the implementation of this Directive by disseminating information on identification of Trustees and encouraging Trustees to meet their obligations for coordination.

The Trustees shall be given the opportunity to review and provide comments on decision documents to the extent practicable. These provisions for sharing information are consistent with those outlined in the OSWER Directive 9295.0-02 (April 1992 MOU between the National Oceanic and Atmospheric Administration and the U.S. EPA concerning the Notification and Coordination of Activities pursuant to CERCLA).

If natural resource liability is not resolved in connection with a settlement for CERCLA response or in the absence of a settlement, the Trustees may undertake natural resource damage assessment (NRDA) efforts. A NRDA assesses damage to public trust resources in order to restore injured resources and services and to compensate the public for their interim loss. As outlined in the National Contingency Plan Subpart G and 43 CFR

11, the development, funding, review, and adoption of an NRDA is the responsibility of the Trustees.

Documents produced during CERCLA response by other federal agencies responsible for cleanup (such as DOE/DOD) at facilities under their jurisdiction, custody or control should be reviewed by EPA Remedial Project Managers or On-Scene Coordinators. However, if any portion of these documents addresses restoration of trust resources and/or compensation for injured resources and services, that portion of the document would be the sole responsibility of Trustees and EPA review is not sought. In order to avoid confusion, these documents should separate the restoration of trust resources and/or compensation for injured resources and services from other assessments.

Roles and Responsibilities of EPA and Natural Resource Trustees

EPA and the Trustees have different but complementary roles under CERCLA. In general, EPA selects response actions to protect health and the environment at EPA lead sites. When assuming this responsibility, EPA applies those provisions of CERCLA that pertain to the development and implementation of removal and remedial actions at CERCLA sites and related activities, including site characterization (extent and nature of contamination and baseline risk assessment), remedial alternatives evaluation, and remedial selection, design, action, and monitoring. EPA is responsible for the development of Remedial Investigation/Feasibility Studies (RI/FS), Engineering Evaluation/Cost Analyses (EE/CA), and ecological risk assessments, proposed plans and Records of Decision, Action Memoranda, and remedial design and remedial effectiveness monitoring plans.

The NRDA is used to identify additional actions, beyond the response needed, to address natural resources. These include actions needed to restore the productivity of habitats or the species diversity that were injured by the past releases or to replace them with substitute resources). A Trustee may also seek to determine compensation for the loss of injured natural resources from the time of injury until the time they are fully restored by assessing lost human and ecological services.

EPA guidance recommends an ecological risk assessment as part of its process for assessing the impacts of site-related contamination. Ecological risk assessments analyze the actual or potential impacts of a hazardous substance release, and of the various removal or remedial action alternatives. Ecological risk information may be relevant in a NRDA and both EPA and the

Trustees should benefit from sharing information and coordination in the conduct of ecological risk assessments.

Identification of Trustees

Executive Order 12580 Section 1(c) and Section 300.600 of the National Contingency Plan (NCP) designate the Federal Trustees, which include the Department of Interior (DOI), the National Oceanic and Atmospheric Administration (NOAA) (by delegation from the Secretary of Commerce) and the Secretaries of Agriculture, Defense, and Energy. Section 300.615(b) states that Trustees are responsible for designating to the Regional Response Teams appropriate contacts to receive notifications. Section 300.615(c) outlines actions for Trustees to take. Executive Order 12580 should also be reviewed to more fully understand the identification, roles, and authorities of the Trustees. Appendix A provides an excerpt from the NCP on these subjects. Appendices B, C, and D includes a listing of current Federal and State Natural Resource Trustee representatives. This listing is incomplete because it does not identify native American Tribes, who must also identify their representatives to EPA regional offices for inclusion in the Regional Contingency Plan. The OSCs/RPMs should use the listing of trustees in the Regional Contingency Plan to notify trustee agencies of potential injuries to natural resources. Per NCP 300.615 Trustees should coordinate with each other to facilitate the exchange of information.

Notification of Natural Resource Trustees

Section 104(b)(2) of CERCLA requires that EPA promptly notify Federal and State Trustees of potential natural resource injuries and that EPA seek to coordinate the assessments, investigations, and planning of response activities with them. As a matter of policy, EPA should not only comply with these statutory directives, but should make every effort to encourage Trustee participation at all stages of response. The statutory requirements are reflected in the National Contingency Plan (40 CFR Part 300). Section 300.410(h) requires that On-Scene Coordinators (OSC's) and Remedial Program Managers (RPM's) "ensure that ... Trustees are promptly notified" of releases that may injure natural resources. Section 300.430(b)(7) requires that EPA "seek to coordinate necessary assessments, evaluations, investigations and planning with ... Trustees." Similarly, section 122(j)(1) of CERCLA requires not just that we notify the Federal Trustees of negotiations concerning releases that may have resulted in natural resource injury, but also requires that we shall encourage their participation in those negotiations.

Trustee participation is important because EPA is not authorized to negotiate on behalf of the Trustees.

EPA's policy is to encourage participation by all affected Trustees at every stage in the CERCLA process. Coordination with natural resource Trustees will help EPA assure that environmental impacts are more fully addressed as early as practicable and will facilitate timely and simultaneous settlement of all liabilities. Through the exchange of information regarding site conditions and response action impacts, EPA and Trustees can provide for more efficient use of resources, reduce costs, and reduce the time to reach final settlement. Coordination may also help Trustees identify actions that may trigger the statute of limitations for NRD actions.

1. Pre-Listing Coordination

EPA Regions should notify each Federal, State, and Tribal Trustee of the development of packages supporting the proposal or finalization of a site on the National Priorities List (NPL). Information from Trustee agencies can be useful in characterizing sites and should be considered in the preparation of listing packages.

OERR plans to provide both national lists and some site-specific information supporting listing decisions to Trustees. This approach is intended to reduce the workload of Regional offices and serve to help identify relevant Trustees.

2. Coordination of Response Activities

In order to promote the sharing of information and reduce the time required to identify and settle all liabilities, EPA will invite and encourage Trustee involvement in planning response activities.

Regions should use Biological Technical Assistance Groups (BTAGs) that include representatives from other Federal Agencies that serve as resource managers. Each Region is expected to maintain a fully functioning BTAG and involve this group in review of each stage of the Remedial Investigation/Feasibility Study, including early planning and scoping. Finally, as indicated in the section on identifying Trustees, Regions should encourage BTAGs to help in the identification of Trustees for a site but should not assume that BTAGs will identify all relevant Trustees.

3. Time lines for Notification

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A court decision (Kennecott Utah Copper Corp. v. Department of the Interior (D.C. Cir. July 16, 1996)) on natural resource claims at National Priorities List (NPL) and non-NPL sites reinforced the potential importance of both EPA's listing decisions as well as construction completion determinations on the damage claim statute of limitations for sites on the NPL.

Section 113(g)(1)(A) provides a general rule that natural resource damage claims must be brought within three years from the date of the discovery of the loss and its connection with the release in question. For NPL sites, claims for Natural Resources Damages must be brought within 3 years of completion of the remedial action (excluding operation and maintenance activities). The Department of Justice, Federal Trustees, and EPA generally argue that "completion of the remedial action" does not occur at multiple-operated unit ("OU") sites until the final OU is completed. However, the law on this issue is unsettled, and the completion of an interim OU might be found to trigger the statute of limitations period at some sites.

In order to assure that Trustees are notified of the completion of construction of each operable unit at sites, EPA will revise its guidance on Construction Completion to explicitly provide for notification of Trustees listed in the Regional Contingency Plans. While this stage may or may not be determined to be the "completion of the remedial action" for purposes of the statute of limitations, notification of Trustees is intended to ensure that they have adequate time to evaluate and present claims. Section 113(g)(1) of CERCLA provides that claims for natural resource damages at sites where the Federal Government is diligently proceeding with an RI/FS cannot be brought before selection of the remedial action and must be brought within 3 years after completion of the remedial action (excluding operation and maintenance activities). Therefore, Trustees have a compelling interest in knowing the status of pre-remedial and remedial activities at sites. To ensure that Trustees have adequate time to evaluate and present claims, EPA is revising guidance on Construction Completion. Also, EPA will seek to consult with Trustees prior to delisting. In the interim period before revision of the Construction Completion guidance, you should refer questions on Construction Completions to Rafael Gonzales, OERR (703) 603-8892.

Implementation

In order to facilitate notification and coordination between EPA and Trustees, we have taken two steps: (1) attached to this memorandum is the central contact each Region should use to

notify a Federal Trustee of a release or threatened release that may injure a natural resource under its jurisdiction, and (2) the Trustees must still work with EPA Regions to revise the Regional Contingency Plans, established pursuant to the NCP, to identify Trustee representatives for coordination during subsequent stages of response activities (e.g., planning, investigations, negotiations, construction completion/deletion).

Funding of Other Federal Agency Activities

CERCLA Section 111(c) authorizes using the Fund to pay the costs of (1) assessing natural resources damages, and (2) restoring damaged natural resources. Note, however, that SARA Section 517(c)(1)(A)(ii) [26 U.S.C. Section 9507(c)(1)(A)(ii)] provides that amounts appropriated from the Fund may not be used for the costs described in CERCLA Section 111(c)(1) and (2) (i.e., for NRDA for Natural Resource restoration).

EPA may request assistance from other agencies in evaluating releases and possible responses under Section 104. The overriding SARA prohibition leaves intact the authority of Section 111(c)(3) to use the Fund to notify the Trustees and to coordinate with them on site assessments, investigations, and planning activities being conducted under CERCLA Section 104. Such coordination costs, including those incurred by Trustees, can be paid out of the Fund. Thus, although the Fund cannot be used to pay the costs of NRDA or of natural resources restoration, the Fund can be used to pay Trustee agency costs for investigation and coordination activities supporting EPA's efforts.

Thus, Regions can provide supplemental funding to be used for such assistance through existing IAGs with Federal Trustees, which are managed by OERR. David Charters (908-906-6825) of OERR's Environmental Response Team in Edison, N.J., manages IAGs that may be used to augment funding for coordination and technical assistance.

Through increased coordination efforts with the Trustees we are seeking to make more efficient use of resources and reduce the time required to achieve settlements. In order to evaluate the effects of these efforts it is important that Regions thoroughly document their coordination actions with the Trustees and promptly communicate to Headquarters issues that arise in the implementation of this guidance.

If you have questions regarding EPA responsibilities under the statute or how to implement these responsibilities, please

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contact Joe Tieger in OSRE (202-564-4276) on matters related to coordination of negotiations, and Larry Zaragoza in OERR (703-603-8867) on matters related to notification of releases or coordination of planning, investigation or evaluations.

cc: Federal Trustees
ASTSWMO Task Force on NRD

Attachment

Appendix A
SUBPART G of the Final National Contingency Plan
TRUSTEES FOR NATURAL RESOURCES

§ 300.600 Designation of federal trustees.

(a) The President is required to designate in the National Contingency Plan (NCP) those federal officials who are to act on behalf of the public as trustees for natural resources. Federal officials so designated will act pursuant to section 107(f) of CERCLA and section 311(f)(5) of the Clean Water Act (CWA) and section 1006 of the Oil Pollution Act (OPA). Natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and such other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled (hereinafter referred to as "managed or controlled") by the United States (including the resources of the exclusive economic zone).

(b) The following individuals shall be the designated trustee(s) for general categories of natural resources, including their supporting ecosystems. They are authorized to act pursuant to section 107(f) of CERCLA, section 311(f)(5) of the CWA, or section 1006 of the OPA when there is injury to, destruction of, loss of, or threat to natural resources, including supporting ecosystems, as a result of a release of a hazardous substance or a discharge of oil. Notwithstanding the other designations in this section, the Secretaries of Commerce and the Interior shall act as trustees of those resources subject to their respective management or control.

(1) Secretary of Commerce. The Secretary of Commerce shall act as trustee for natural resources managed or controlled by the Department of Commerce (DOC) and for natural resources managed or controlled by other federal agencies and that are found in, or controlled under, or using waters navigable by deep draft vessels, tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf. However, before the Secretary takes an action with respect to an affected resource under the management or control of another federal agency, he shall, whenever practicable, seek to obtain the concurrence of that other federal agency. Examples of the Secretary's trusteeship include the following natural resources and their supporting ecosystems: marine fishery resources; anadromous fish; endangered species and marine mammals; and the resources of National Marine Sanctuaries and national Estuarine Research Reserves.

(2) Secretary of the Interior. The Secretary of the Interior shall act as trustee for natural resources managed or controlled by DOI. Examples of the Secretary's trusteeship include the following natural resources and their supporting ecosystems: migratory birds; anadromous fish; endangered species and marine mammals; federally owned minerals; and certain federally managed water resources. The Secretary of the Interior shall also be trustee for those natural resources for which an Indian tribe would otherwise act as trustee in those cases where the United States acts on behalf of the Indian tribe.

(3) Secretary for the land managing agency. For natural resources located on, over, or under land administered by the United States, the trustee shall be the head of the department in which the land managing agency is found. The trustees for the principal federal land managing agencies are the Secretaries of the DOI, the U.S. Department of Agriculture (USDA), the Department of Defense (DOD), and the Department of Energy (DOE).

(4) Head of authorized agencies. For natural resources located in the United States but

not otherwise described in this section, the trustee shall be the head of the federal agency or agencies authorized to manage or control those resources.

§ 300.605 State trustees.

State trustees shall act on behalf of the public as trustees for natural resources, including their surrounding ecosystems, within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state. For the purposes of subpart G of this part, the definition of the term "state" does not include Indian tribes. The governor of a state is encouraged to designate a state lead trustee to coordinate all state trustee responsibilities with other trustee agencies and with response activities of the RRT and OSC. The state's lead trustee would designate a representative to serve as a contact with the OSC. This individual should have ready access to appropriate state officials with environmental protection, emergency response, and natural resource responsibilities. The EPA Administrator or United States Coast Guard (USCG) Commandant or their designees may appoint the state lead trustee as a member of the Area Committee. Response strategies should be coordinated between the state and other trustees and the OSC for specific natural resource locations in an inland or coastal zone and should be included in the Fish and Wildlife Sensitive Environments Plan annex of the ACP.

§ 300.610 Indian tribes.

The tribal chairmen (or heads of the governing bodies) of Indian tribes, as defined in § 300.5, or a person designated by the tribal officials, shall act on behalf of the Indian tribes as trustees for the natural resources including their supporting ecosystems, belonging to, managed by, controlled by, or appertaining to such Indian tribe, or held in trust for the benefit of such Indian tribe, or belonging to a member of such Indian tribe, if such resources are subject to a trust, restriction, or alienation. When the tribal chairman or head of the tribal governing body designates another person as trustee, the tribal chairman or head of the tribal governing body shall notify the President of such designation. Such officials are authorized to act when there is injury to, destruction of, loss of, or threat to natural resources, including their supporting ecosystems as a result of a release of a hazardous substance.

§ 300.612 Foreign trustees.

Pursuant to section 1006 of the OPA, foreign trustees shall act on behalf of the head of a foreign government as trustees for natural resources belonging to, managed by, controlled by, or appertaining to such foreign government.

§ 300.615 Responsibilities of trustees.

(a) Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities.

(b) Trustees are responsible for designating to the Regional Response Teams (RRTs) and the Area Committees, for inclusion in the Regional Contingency Plan (RCP), appropriate contacts to receive notifications from the OSCs/RPMs of discharges or releases.

(c)(1) Upon notification or discovery of injury to, destruction of, loss of, or threat to natural resources, trustees may, pursuant to section 107(f) of CERCLA or section 311(f)(5) of the CWA, take the following or other actions as appropriate:

- (i) Conduct a preliminary survey of the area affected by the discharge or release to determine if trust resources under their jurisdiction are, or potentially may be, affected;
- (ii) Cooperate with the OSC/RPM in coordinating assessments, investigations, and

planning;

(iii) Carry out damage assessments; or

(iv) Devise and carry out a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. In assessing damages to natural resources, the federal, state, and Indian tribe trustees have the option of following the procedures for natural resource damage assessments located at 43 CFR Part 11.

(2) Upon notification or discovery of injury to, destruction of, loss of, or loss of use of, natural resources, or the potential for such resulting from a discharge of oil occurring after August 18, 1990, the trustees, pursuant section 1006 of the OPA, are to take the following actions:

(i) In accordance with OPA section 1006(c), determine the need for assessment of natural resource damages, collect data necessary for a potential damage assessment, and, where appropriate, assess damages to natural resources under their trusteeship; and

(ii) As appropriate, and subject to the public participation requirements of OPA section 1006(c), develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship;

(3)(i) The trustees, consistent with procedures specified in the Fish and Wildlife Sensitive Environments Plan Annex to the Area Contingency Plan, shall provide timely advice on recommended actions concerning trustee resources that are potentially affected by a discharge of oil. This may include providing assistance to the OSC in identifying/recommending preapproved response techniques and in predesignating shoreline types and areas in the ACPs.

(ii) The trustees shall assure, through the lead administrative trustee, that the OSC is informed of their activities regarding natural resource damage assessment that may affect response operations in order to assure coordination and minimize any interference with such operations. The trustees shall assure, through the lead administrative trustee that all data from the natural resource damage assessment activities that may support more effective operational decisions are provided in a timely manner to the OSC.

(iii) Carry out damage assessments; or

(iv) Devise and carry out a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources. In assessing damages to natural resources, the federal, state, and Indian tribe trustees have the option of following the procedures for natural resource damage assessments located at 43 CFR part 11.

(2) Upon notification or discovery of injury to, destruction of, loss of, or loss of use of, natural resources, or the potential for such, resulting from a discharge of oil occurring after August 18, 1990, the trustees, pursuant to section 1006 of the OPA, are to take the following actions:

(i) In accordance with OPA section 1006(c), determine the need for assessment of natural resource damages, collect data necessary for a potential damage assessment, and, where appropriate, assess damages to natural resources under their trusteeship; and

(ii) As appropriate, and subject to the public participation requirements of OPA section 1006(c), develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship;

(3)(i) The trustees, consistent with procedures specified in the Fish and Wildlife Sensitive Environments Plan Annex to the Area Contingency Plan, shall provide timely advice on recommended actions concerning trustee resources that are potentially affected by a discharge of oil. This may include providing assistance to the OSC in identifying/recommending preapproved response techniques and in predesignating shoreline types and areas in ACPs.

(ii) The trustees shall assure, through the lead administrative trustee, that the OSC is informed of their activities regarding natural resource damage assessment that may affect response operations in order to assure coordination and minimize any interference with such operations. The trustees shall assure, through the lead administrative trustee, that all data from the natural resource damage assessment activities that may support more effective operational

decisions are provided in a timely manner to the OSC.

(iii) When circumstances permit, the OSC shall share the use of federal response resources (including but not limited to aircraft, vessels, and booms to contain and remove discharged oil) with the trustees, providing trustee activities do not interfere with response actions. The lead administrative trustee facilitates effective and efficient communication between the OSC and the other trustees during response operations and is responsible for applying to the OSC for non-monetary federal response resources on behalf of all trustees. The lead administrative trustee is also responsible for applying to the NPFC for funding for initiation of damage assessment for injuries to natural resources.

(d) The authority of federal trustees includes, but is not limited to the following actions:

(1) Requesting that the Attorney General seek compensation from and the responsible parties for the damages assessed and for the costs of an assessment and of restoration planning; and

(2) Participating in negotiations between the United States and potentially responsible parties to obtain PRP-financed or PRP-conducted assessments or protection for threatened resources and to agree to covenants not to sue, where appropriate.

(3) Requiring, in consultation with the lead agency, any person to comply with the requirements of CERCLA section 104(e) regarding information gathering and access.

(4) Initiating damage assessments, as provided in OPA section 6002.

(e) Actions which may be taken by any trustee pursuant to section 107(f)(5) of CERCLA, Section 311(f)(5) of the CWA or section 1006 of the OPA include, but are not limited to any of the following:

(1) Requesting that an authorized agency issue an administrative order to pursue injunctive relief against the parties responsible for the discharge or release; or

(2) Requesting that the lead agency remove, or arrange for the removal of, or provide for remedial action with respect to, any oil or hazardous substances from a contaminated medium pursuant to section 104 of CERCLA or section 311 of CWA.

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