

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
POLICY FOR NATURAL RESOURCE DAMAGE ASSESSMENTS

October 9, 1997

I. Background

The Governor of the State of Delaware has designated the Secretary of the Department of Natural Resources and Environmental Control (DNREC) to be the State's trustee for its natural resources, in accordance with the Superfund Amendments and Reauthorization Act (SARA) of 1986. As the State's natural resource trustee, the Secretary is responsible for assessing damages for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances or oil. The Secretary must also ensure that any injured resources are restored, replaced, or that the equivalent natural resources are acquired, and that compensation is received for lost use and nonuse values of the injured natural resources.

Any individual responsible for injury to natural resources as a result of a release of hazardous substances or oil is liable for restoration, replacement, or acquisition of the equivalent of the resources, for lost use and nonuse values of the resources, and all expenses incurred by DNREC associated with the assessment of the damages.

Following are the regulatory requirements and procedures to be followed to ensure that injured resources are properly compensated for and that the State's natural resource trustee responsibilities are carried out.

II. Statutory Authority

FEDERAL

Natural resources are defined in the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended, Section 101 (16) as:

"...land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, appertaining to or otherwise controlled by the United States..., any State or local government, or any foreign government."

In accordance with CERCLA Section 107 (f)(2) and with Section 311 of the Clean Water Act (CWA), both Federal and State natural resource trustees are responsible for assessing any damages or potential damages from releases of oil or hazardous substances to the resources falling under their jurisdiction. In addition, the trustees have the responsibility of ensuring that the injured resources are rehabilitated, restored, replaced or that equivalent natural resources are acquired, and that lost use and nonuse values of the natural resources are compensated for.

In accordance with CERCLA Section 122 (j)(2), a responsible party may request a covenant not to sue for future liability for natural resource damages from the natural resource trustees. This covenant may be granted by the natural resource trustees if the responsible party agrees to

undertake the actions necessary to protect, restore and/or replace any natural resources injured and to compensate for lost use and nonuse values of the natural resources, including assessment costs. If the responsible party does not agree to undertake the appropriate response actions, a trustee may file a claim against the responsible party for the value of the injured resources, including lost use and nonuse values and the trustee's costs associated with the assessment of damages.

In general, natural resource damage claims must be filed within three years of the discovery of the injury. For sites on the National Priorities List (NPL), CERCLA restricts filing of a claim by a trustee prior to the selection of a remedial action (i.e., after the Record of Decision (ROD) is signed) but requires the filing to be done within three years of completion of the remedial action. Any moneys recovered for natural resource damages must be used to restore, replace or acquire the equivalent of the injured resources, with the exception of the costs associated with the performance of a damage assessment.

The Oil Pollution Act of 1990 (OPA) was written to deal specifically with oil spills. The act defines natural resources and natural resource trusteeship in essentially the same way as CERCLA. Trustees are responsible for assessing damages for the natural resources under their trusteeship, and for development and implementation of a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship. Responsible parties are liable for, among other things, natural resource damages (including assessment costs) and damages for loss of subsistence use of natural resources which have been injured, destroyed, or lost. Final regulations, written by the National Oceanic and Atmospheric Administration (NOAA), were promulgated in January 1996.

STATE

The Hazardous Substance Cleanup Act (HSCA), 7 Del. Code Chapter 91, Section 9105 establishes liability for all costs associated with a release of a hazardous substance from a facility and for all natural resource damages resulting from the release, and empowers the Secretary of DNREC to recover all costs and damages from all responsible parties. Under HSCA, oil is considered a hazardous substance, and therefore oil spills can be addressed.

The natural resource damage assessment regulations promulgated pursuant to HSCA are patterned after the CERCLA regulations but are more flexible and allow the Department more discretion in determining assessment methodologies, restoration approaches and use of recovered damages.

7 Del. Code Chapter 60, Section 6001 (C)(3) requires the State to develop a program that provides for the protection and conservation of the land, water, underwater and air resources of the State, for public recreational purposes and for the conservation of wildlife and aquatic life. Section 6005 (C) mandates cleanup and restoration of the environment by any person who is found to have violated Chapter 60, or liability for all expenses incurred by DNREC in abating the violations or controlling a pollution incident related to the violation.

7 Del. Code Chapter 62, Section 6207 (b)(1) empowers the State to assert damage claims for injury to natural resources from oil pollution. In addition, it allows the State to recover all

necessary costs associated with the investigation of damages and loss of use of the natural resources. No damage assessment regulations have yet been written under Chapter 62, however.

7 Del. Code Chapter 63, Section 6308 states that the Secretary of DNREC, upon receipt of information that the treatment, storage or disposal of any hazardous waste may present an imminent and substantial hazard to the health of persons or to the environment, may take such action as is determined to be necessary to protect the health of such persons or the environment.

III. Staffing Requirements

PROJECT MANAGER

The DNREC staff member with overall responsibility for oversight and implementation of the response and remedial actions related to a release of hazardous substances at a particular site or incident shall be hereafter referred to as the project manager. This individual will typically be a project officer or on-scene coordinator from the Superfund, Emergency Response, or Hazardous Waste Branches, depending upon the statute under which the action is being conducted.

TRUSTEE REPRESENTATIVE

The trustee representative shall be responsible for coordination of natural resource damage actions for the Department and shall support the project manager as detailed below. The Secretary of DNREC will specifically appoint this individual according to the statute under which the response action is being conducted, and according to the funding source under which the damage assessment activities are to be conducted.

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TECHNICAL SUPPORT GROUP

The Directors of each Division of DNREC shall appoint appropriate technical staff to serve as members of a technical support group for the purpose of assisting in review and/or development of plans and reports, conducting assessments, oversight of restoration activities, determination of requirements for granting covenants-not-to-sue to responsible parties, and other activities as described below. Each member shall provide technical support as it relates to the natural resources under the jurisdiction of that individual's branch or division.

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FISH KILL COORDINATOR

In cases where a spill or release results in a fish kill, the fish kill coordinator (appointed by the Director of the Division of Fish & Wildlife) will proceed according to existing DNREC protocol and conduct an immediate investigation. The fish kill coordinator will then coordinate remediation and damage assessment with the trustee representative and project manager.

IV. Procedures for Damage Assessment and Restoration

These procedures follow Section 10 of the Regulations Governing Hazardous Substance Cleanup (April 1995).

PREASSESSMENT

Upon determination of any release or threat of a release of hazardous substances, including oil, the project manager shall notify the trustee representative. The trustee representative shall determine the need for and initiate any pre-assessment actions, such as a preliminary natural resource survey (PNRS), a pre-assessment screen, and notification of federal trustees. The trustee representative shall coordinate the involvement of the technical support group in pre-assessment and subsequent damage assessment activities.

If not already accomplished as part of any DNREC Division-specific or Branch-specific liability notification mechanism, the trustee representative shall notify the responsible party of its potential liability for damages (monetary compensation and/or the need to restore or replace any injured natural resources).

DAMAGE ASSESSMENT

If a damage assessment is determined to be appropriate, DNREC may request that the responsible party conduct all or part of the assessment. This assessment shall be proposed to DNREC in an assessment plan submitted to the project manager. This plan may be incorporated into any DNREC Division or Branch-specific remedial investigation plans routinely prepared when a release of hazardous substances occurs (e.g., the Remedial Investigation (RI) Work Plan for Superfund sites). The technical support group shall assist in the review of the proposed assessment activities.

If DNREC assumes responsibility for documenting any natural resource damages, the trustee representative shall be responsible for ensuring that a natural resource damage assessment is conducted either by DNREC or by a contractor specializing in such work. The technical support group shall assist in the review and/or development of the assessment plan.

Upon approval of the assessment plan by DNREC, the assessment shall be conducted. This may be completed as part of the DNREC Division- or Branch-specific response actions routinely performed when a release of hazardous substances occurs (e.g., as part of the RI at Superfund sites). The results of the assessment shall be documented in an assessment report which may be incorporated into any DNREC Division- or Branch-specific report routinely prepared to assess the impact of a release of hazardous substances (e.g., the RI/FS report at Superfund sites). The technical support group shall assist in reviewing the assessment.

RESTORATION

Upon assessment of damages, the project manager and the trustee representative, with any necessary technical support, shall prepare recommendations for selection of an appropriate cost-effective restoration alternative for approval by the Secretary of DNREC.

Based upon the alternative selected, a restoration plan shall be developed. If responsible party-financed, the plan shall be submitted to the project manager and reviewed by the trustee representative and the technical support group. Upon approval, the project manager shall notify the responsible party in writing. The plan may be incorporated into any DNREC Division- or Branch-specific remedial action plan routinely prepared when a discharge of hazardous

substances occurs (e.g., as part of the Record of Decision or Remedial Decision Record and Remedial Design/Remedial Action (RD/RA) at federal or state Superfund sites). The plan shall be implemented by the responsible party with DNREC oversight. Oversight shall be the responsibility of the Division, Branch or program that has management authority over the resources being restored. This responsibility will be designated by the Secretary on a site/incident-specific basis.

For restoration projects being conducted by DNREC, implementation shall be the responsibility of the Division, Branch or program that has management authority for the resources being restored, as designated by the Secretary.

Restoration alternatives should be derived from, based upon, incorporated into, and integrated with existing DNREC watershed-specific and/or resource-specific resource management plans or programs to the maximum extent practicable. This includes regional restoration plans and those developed jointly with other states in the region.

JOINT JURISDICTION OVER NATURAL RESOURCES

There will be cases in which Federal and State trustees will have joint jurisdiction over the same natural resources, or instances where several states will want to pursue a claim jointly. In these instances, the trustee representative will coordinate information exchange and damage assessment activities with the appropriate Federal or State trustees, the technical support group, and the Attorney General's Office.

Where possible, the trustee representative shall coordinate the development of regional restoration plans in concert with the appropriate Federal and State trustees. These plans shall be developed as part of pre-incident response planning in order to eliminate the need to develop a restoration plan after a damage settlement is reached.

COVENANTS NOT TO SUE

Upon successful implementation of a restoration plan or provision of adequate compensation to the State, the responsible party may request from DNREC a covenant not to sue for future liability for natural resource damages resulting from the documented release. The request shall be reviewed by the project manager, the trustee representative, and the technical support group. The project manager and the trustee representative shall then prepare recommendations on whether or not to grant the responsible party's request for a covenant-not-to-sue and submit these recommendations, via memorandum, to all Division Directors and the Attorney General's Office. Each Division Director shall document his or her agreement with the recommendations via memorandum to the project manager and trustee representative. The recommendations shall then be submitted by the project manager and the trustee representative to the Secretary. The Secretary shall then review the recommendations and shall grant or deny the responsible party's request.

In cases where a covenant not to sue for damages is requested by a responsible party, (usually at the RD/RA consent decree negotiation stage) and the State does not plan to conduct a formal natural resource damage assessment the State trustee representative shall coordinate with the technical support group to determine appropriate actions which the responsible party will be

