



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

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Memorandum

To: Director, Bureau of Indian Affairs
Director, Bureau of Land Management
Commissioner, Bureau of Reclamation
Director, U.S. Fish and Wildlife Service
Director, National Park Service
Director, Office of Environmental Policy and Compliance
Deputy Solicitor

From: Program Manager
Natural Resource Damage Assessment and Restoration Program

Subject: Documentation for Natural Resource Damage Assessment and Restoration
Settlements and Covenants Not to Sue

This memorandum identifies the need for documentation and sufficient explanation when the Department of the Interior (the Department) approves a settlement for natural resource damages associated with the release of hazardous substances or oil spills. The purpose of this guidance is twofold: 1) to ensure that settlements by the Department for natural resource damages are based on sound and supportable information, and 2) that Departmental settlement decisions are based on positions for protecting and restoring natural resources that are under the Department's trusteeship.

Settlements for natural resource damages must be supported with documentation for the basis of the recommendation, specifically that the terms and/or conditions meet the test of "appropriate action to protect and restore" the Department's affected resources.¹ Information must include, but not be limited to, the nature and extent of injury and on how restoration costs, lost use value, and assessment costs were calculated or estimated. This information should be sufficient to provide a rational basis for the recovery (e.g. monetary or in-kind restoration) and terms and conditions for a covenant not to sue. Sufficient evidence must demonstrate actual injury or likelihood of injury resulting from a release of a hazardous substance or discharge or threat of discharge of oil. Where restoration is to be performed by the settling party(ies), terms and conditions of a settlement shall include legally enforceable performance standards adequate to

¹Settlements for assessment costs only, incurred as a result of a Departmental decision not to assert a resource interest, but where there is injury to natural resources under the trusteeship of the Department are also covered under this policy. The documentation for a settlement of this type should include an explanation of the nature of the injury and the settlement rationale for recovering assessment costs only.

ensure that restoration will occur. Any monitoring required shall include standards or thresholds and actions to be taken if those thresholds are not satisfied. A description of the restoration objectives which support the terms of a settlement should be included in the documentation for the settlement.

A decision to grant a covenant not to sue for natural resource damages to a party based on a conclusion that the Department has no resources affected or where the decision to grant a covenant not to sue is based on a determination not to assert a resource interest (e.g., potential injuries are insufficient to justify pursuing a claim) should include an explanation that supports the Department's decision.

For NRDAR settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), settlements must include a re-opener, as required by CERCLA section 122(f)(6), unless there is a justification for a complete release due to extraordinary circumstances. A recommendation by an Authorized Official for a complete release based on extraordinary circumstances must include a written justification explaining how the "extraordinary circumstances" conditions of section 122 (f) (6) are met.²

Departmental personnel must work closely with the Solicitor's Office, which is delegated the authority to manage legal matters for the Department, including negotiating settlements. Recommendations to the Solicitor's Office on all settlements for natural resources damages must be signed by the Department's Authorized Official with an appropriate level of concurrence from the affected Bureaus. When a covenant not to sue recommendation is proposed for a case where the Department has determined that no resources are affected, or where the Department has determined that it is not going to assert a resource interest, and a NRDAR Authorized Official has not been designated, the appropriate NRDAR Regional Coordinator will obtain written confirmation from the resource management bureaus that the bureau(s) have no objection to the settlement. With that documentation as backup, the Solicitor will prepare a response to the Department of Justice.

Copies of all consent decrees and settlement agreements with potentially responsible parties and other trustees shall be provided promptly to the Program Manager and to Work Group member(s) representing the affected bureaus to facilitate the tracking of accomplishments and funds.

² *Acushnet River and New Bedford Harbor: Proceedings re Alleged PCB Pollution*; 712 F.Supp, 1019, 1038 1989 ("Acushnet IV"). In 1989 a federal court refused to approve a natural resource damages settlement that did not contain a re-opener for new information or unknown conditions. Since then, DOJ has a policy of including re-openers in natural resource damages Consent Decrees.