



ECO Update

Office of Emergency and Remedial Response
Hazardous Site Evaluation Division (OS-230)

Intermittent Bulletin
Volume 1, Number 3

The Role Of Natural Resource Trustees In The Superfund Process

This Bulletin is intended to help Remedial Project Managers (RPMs) and On-Scene Coordinators (OSCs) work with natural resource trustees during site assessment and remediation. It explains the authority and responsibilities of trustees, and the responsibilities of RPMs and OSCs with respect to trustee issues. The goal of this document is to help reduce delays and ensure compliance with relevant statutes by increasing understanding of trustee issues as they pertain to Superfund program.¹

Authorities

CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) (Part 101, section 16), defines natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources." CERCLA designates the President of the United States as the trustee for Federally protected or managed natural resources on behalf of the public and requires the President to:

- Assess damages from releases of hazardous substances,
- Pursue recoveries of damages and costs, and
- Use the sums recovered to restore, replace, or acquire the equivalent of the injured resource (Section 107 (f)(1) of CERCLA).

These functions are carried out by various trustees, as discussed later in this Bulletin.

The law also directs EPA to coordinate with natural resource trustees. This coordination includes:

- Prompt notification of potential injuries to natural resources at Superfund sites and incidents [§104(b)(2)];

In This Bulletin

Authorities.....	1
Who are the Natural Resource Trustees?.....	2
What is a Trust Resource?.....	4
Trustee Functions.....	5
How to Work with Trustees.....	7
Conclusion.....	10

¹ All sections of this Bulletin have benefitted greatly from material obtained from the Region 10 *Natural Resource Trustee Notification and Coordination Package* (September 1989). The Package was prepared by the National Oceanic and Atmospheric Administration Coastal Resource Coordinator in cooperation with the Department of Interior Regional Environmental Officer and the Region 10 Natural Resource Coordinator. Notification and coordination packages are also available in many other EPA Regions.

- Coordination of assessments, investigations, and planning [§104(b)(2)];
- Notification of negotiations with potentially responsible parties (PRPs), if the release of hazardous substances may have resulted in injuries to trust resources [§122(j)(1)]; and
- Encouraging trustees to participate in the negotiations [§122(j)(1)].

National Contingency Plan

As called for in CERCLA section 107(f), subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)² designates the heads of authorized Departments and agencies as trustees for natural resources and defines their jurisdiction. The NCP also spells out the responsibilities of the trustees following notification or discovery of a natural resource injury, loss, or threat. Depending on the stage of the remedial process and the nature of the injury, loss, or threat, the trustees may do one or more of the following, or “other actions as appropriate”:

1. 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;
2. Cooperate with the OSC / RPM in coordinating assessments, investigations, and planning;
3. Carry out damage assessments; or
4. Devise and carry out a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources.³

The NCP describes the trustees’ authority as including, but not limited to, the following actions:

1. Requesting that the Attorney General seek compensation from the responsible parties for the damages assessed and for the cost of assessment and of restoration planning; and
2. Participating in negotiations between the United States and potentially responsible parties (PRPs) to obtain PRP-financed or PRP-conducted assessments and restorations for injured resources or protection for threatened resources and to agree to covenants not to sue, where appropriate.⁴

² 40 CFR Part 300.

³ 40 CFR 300.615.

⁴ 40 CFR 300.615.

The NCP also defines EPA responsibilities with respect to natural resource coordination. EPA is required to carry out the following notification and coordination activities:

- Make available any information that can assist trustees in determining injuries to natural resources [§300.160(a)(3)]; and
- Coordinate with trustees in requiring PRPs to comply with CERCLA information requests [§300.615(d)(3)].

In addition, EPA may:

- Issue administrative orders to pursue injunctive relief against PRPs at the request of the trustee [§300.615(e)(1)]; and
- Conduct removal or remedial actions at the request of the trustee [§300.615(e)(2)].

Who Are The Natural Resource Trustees?

By Executive Order 12580 and in the NCP, the President has designated certain executive officers as Federal trustees for natural resources. They include the Secretaries of the Departments of Interior, Commerce, Defense, Energy and Agriculture. In addition, SARA Section 107(d) requires the Governor of each State to designate State trustees; most Governors have done so. Indian tribes also are trustees for their resources, functioning much as State trustees for resources on or related to tribal lands or for resources to which they otherwise may have treaty rights. Figure 1 summarizes the organization of trustee authority, as discussed below.

Federal Trustees

Federal trustees are designated because of (a) statutory responsibilities with regard to protection or management of natural resources, or (b) management of Federally owned land, or (c) both.

Secretary of Commerce

The NCP designates the Secretary of Commerce as trustee for:

...natural resources managed or protected by the Department of Commerce or by other federal agencies and that are found in or under waters navigable by deep draft vessels, in or under tidally influenced waters, waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf, and in upland areas serving as habitat for marine mammals and other protected species...Examples of the Secretary’s trusteeship include marine fishery resources and their supporting ecosystems; anadromous fish [saltwater fish that return to freshwater streams to breed]; certain endangered species and marine

mammals; and National Marine Sanctuaries and Estuarine Research Reserves.⁵

The Secretary of Commerce has delegated the Administrator of the National Oceanic and Atmospheric Administration (NOAA) to act as the Department of Commerce natural resource trustee. To facilitate coordination between NOAA and EPA, NOAA has placed Coastal Resource Coordinators in all of the coastal EPA Regional Offices.

Secretary of the Interior

The Secretary of the Interior acts as trustee for natural resources managed or protected by the Department of the Interior (DOI).

Examples of the Secretary's trusteeship include migratory birds; certain anadromous fish, endangered species, and marine mammals; federally owned minerals; and certain federally managed water resources. The Secretary [is also] 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.⁶

DOI has delegated Regional Environmental Officers from the Office of the Secretary as the principal trustee contacts for their agency. The Regional Environmental Officer coordinates with the following DOI bureaus on trustee concerns: the U.S. Geological Survey, Bureau of Mines, National Park Service, Minerals Management Service, Bureau of Reclamation, Bureau of Land Management, Fish and Wildlife Service, Bureau of Indian Affairs, Office of Surface Mining Reclamation and Enforcement, and the Office of the Solicitor.

In addition to fulfilling the Secretary's duties as natural resource trustee, DOI is charged under CERCLA with promulgating regulations for the assessment of natural resource damages from releases of hazardous substances. These regulations, found at 43 CFR Part 11, are currently undergoing amendment.

Secretaries for Land-Managing Agencies

The NCP designates as trustees the Secretaries of Departments that manage federally owned or administered lands. The trusteeship applies to all "natural resources located on, over, or under" these lands. These land-managing agencies are co-trustees with the Department of the Interior, Department of Commerce, and/or possibly the State or Indian tribe for most of the living natural resources. In addition to the Secretary of the Interior, discussed above, these trustees include the Secretaries of Agriculture, Defense, and Energy.

DOI is the largest Federal land-management agency. Its land-management functions are carried out by the Bureau of Land Management (public lands), National Park

Service (parks and monuments), Fish and Wildlife Service (wildlife refuges), and the Bureau of Reclamation (water projects). The Secretary of Agriculture, through the USDA Forest Service, has jurisdiction over large tracts of land (the National Forests) in all areas of the country. The Secretary of Defense has trusteeship over all lands owned or managed by the Department of Defense, including facilities operated by the Navy, Army, Air Force, and Defense Logistics Agency. The Secretary of Energy is trustee for all lands owned or managed by the Department of Energy.

Where Federal facilities contain uncontrolled hazardous waste sites, the agency managing the property may be held accountable as both the responsible party and the natural resource trustee. Usually, however, the agency will be co-trustee with another Federal agency, and some of the potentially affected resources may also be under the trusteeship of a State or an Indian tribe. When the hazardous wastes are not on Federal property, the land-managing agency's trustee role may be exercised if contaminants from the site threaten resources on Federal land. This could happen if, for example, a hazardous waste site was located upstream of a Federal facility and the stream transported contaminants onto the Federal property.

State Trustees

According to CERCLA and the NCP, a State may act as trustee for natural resources within the boundaries of the State or for those resources belonging to, controlled by, or appertaining to the State. Each State governor is required under CERCLA to designate State officials who will act as trustees. Usually, that official heads the agency responsible for environmental protection or resource conservation. A complete list of State-designated trustees is available from EPA headquarters, DOI, and NOAA. If there is any doubt as to who the State trustees are for a specific site, the site manager should contact one of these offices or their counterpart State agency.

Indian Tribes

The tribal chairman, the head of the governing body of an Indian tribe, or a person selected by the chairman or the head of the governing body, may act as trustee on behalf of the tribe. This individual is trustee for the natural resources belonging to, managed by, controlled by, or appertaining to the tribe. At the tribe's request, the DOI Bureau of Indian Affairs may act as trustee on the tribe's behalf. If there is any doubt as to whether there is an Indian tribal trustee for a specific site, or who the trustee is, the site manager should contact the DOI Regional Environmental Officer.

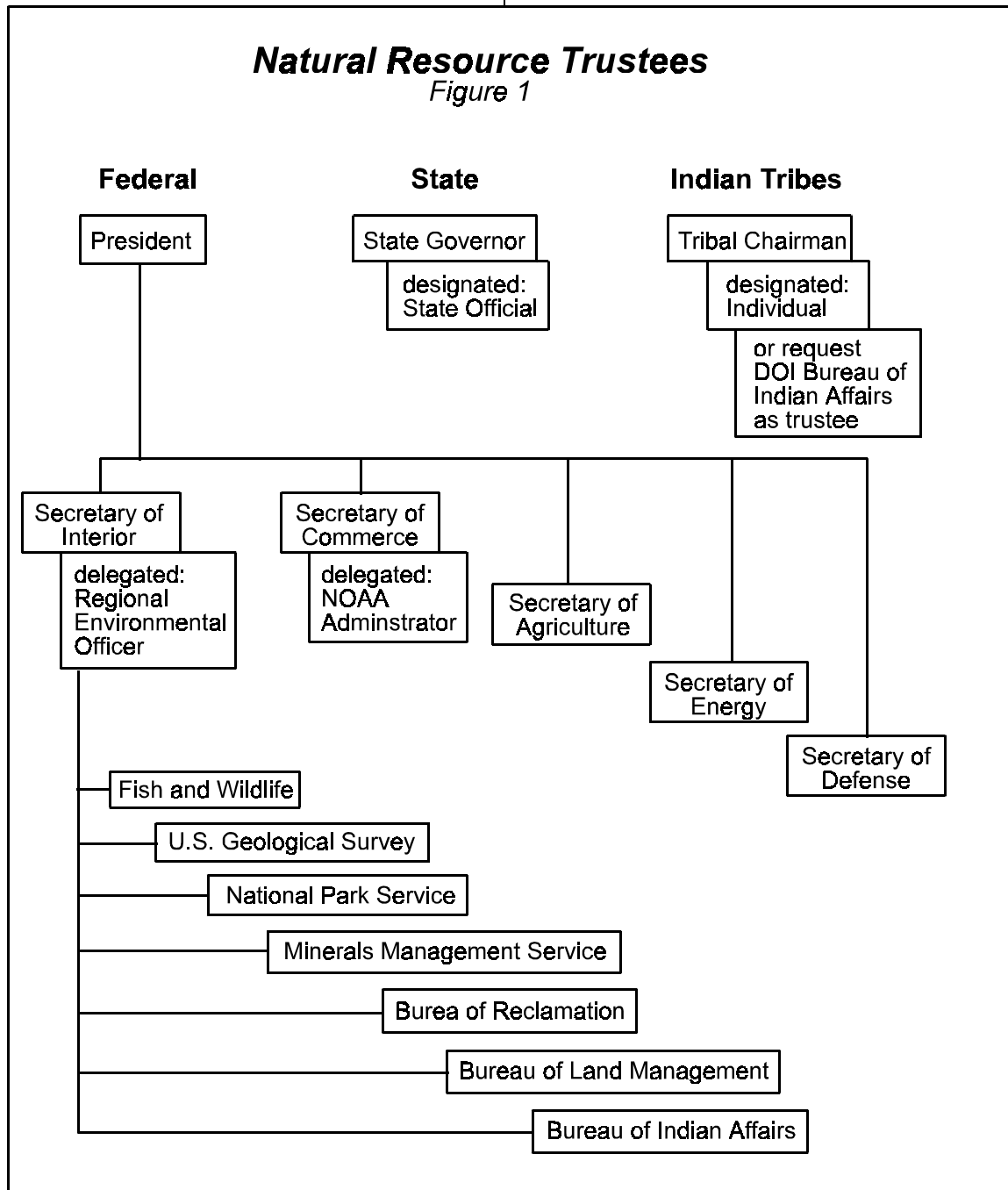
⁵ 40 CFR 300.600.

⁶ 40 CFR 300.600.

Natural resources include “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.”

What Is A Trust Resource?

CERCLA Section 101 (16) defines trust resources to include:...land, fish, wildlife, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone defined by the Magnuson Fishery Conservation and Management Act of 1976), any state or local government, any foreign government, any Indian tribe, or if such resources are subject to a trust restriction on alienation, any member of



an Indian tribe.

Trust resources include both species and places. Fish, wildlife, migratory birds, and marine mammals are all mentioned in CERCLA and the NCP as trust resources, as are Natural Marine Sanctuaries and Estuarine Research Reserves. DOI protects not only endangered species but also National Parks and Monuments. The Departments of Agriculture, Defense, and Energy are trustees for natural resources that occur on their lands. In some cases, federal agencies can be co-trustees for a particular natural resource. Federal and State agencies also are frequently co-trustees for natural resources.

Living Resources

In designating the Secretaries of Commerce and Interior as natural resource trustees, the NCP gives examples of the types of resources that fall under the Secretaries' trusteeship. Included among these are marine fishery resources, anadromous fish, endangered species, migratory birds, and marine animals. In specifying marine fishery resources as trust resources, the NCP adds the phrase "and their supporting ecosystems." This acknowledges the fact that protecting a living resource entails not only preventing or mitigating contamination of the protected species itself but also ensuring the continued availability and quality of that species' habitat and food sources.

CERCLA and the NCP use the comprehensive term "biota" and the specific term "fish [and] wildlife" to define the living resources covered under Federal trusteeship. **The NCP cites more specific types of resources such as anadromous fish, endangered species, and marine mammals only as examples of trust resources, not as a definitive list.** The clear implication of these references is that the definition of what is a trust resource is left to the trustee. To an extent, trustees' responsibilities may be defined by the various statutes that they are charged with enforcing or implementing, including the management of land under their control. Within the bounds of those statutes and land-management responsibilities, trustees may interpret their CERCLA mandate to include whatever biota "and their supporting ecosystems" that the trustees consider appropriate. With regard to specific sites, the EPA site manager should let the trustee agencies determine whether trust resources are present and potentially affected by a site.

Land, Air, Water, and Mineral Resources

In addition to living resources, CERCLA and NCP list "land, ...air, water, ground water, drinking water supplies, and other resources" as responsibilities of natural resource trustees. These could include, for example, minerals controlled by the Department of the Interior's Bureau of Land Management, rivers protected under the Wild and Scenic Rivers Act, coastal zone areas regulated or administered by NOAA under the Coastal Zone

Management Act, and air quality over a National Park. It is also important to remember that the phrase "supporting ecosystem," as used in the NCP, implies that protection of biotic resources often entails actions aimed at nonliving components of the environment. In fact, it is often difficult to separate living from nonliving components, especially when soil, sediments, and surface water are involved. As with living resources, the determination is best left to the appropriate Federal, State, or Indian tribal representative as to whether a given nonliving resource is a trustee responsibility.

Natural resource trustees have a broad mandate to protect and restore resources under their jurisdiction. Therefore, the responsibilities of the trustees are not restricted to any single point in the Superfund process.

Trustee Functions

Natural resource trustees have a broad mandate to protect and restore resources under their jurisdiction. Therefore, the responsibilities of the trustees are not restricted to any single point in the Superfund process. CERCLA Section 104(b)(2) calls for coordination between EPA and trustees on "assessments, investigations, and planning"; in other words, at virtually all stages of the process. This requirement applies to both the removal and remedial actions, and to enforcement and Fund-lead sites. Trustees' primary responsibilities include:

- Preliminary Natural Resource Survey (PNRS)
- Technical Assistance
- Natural Resource Damage Assessment (NRDA)
- Covenant Not to Sue

Preliminary Natural Resource Survey (PNRS)

In accordance with the NCP §300.615(c)(1), and through Memoranda of Understanding between EPA and both DOI and NOAA, EPA can request a representative of one of these agencies to conduct a PNRS or another form of preliminary site survey. The request usually originates with the RPM, but it also may come through a designated EPA Natural Resource Coordinator, or a Section or Branch Chief.

A PNRS consists of a site survey and a brief report identifying the natural resources, habitat types, endangered or threatened species, and any potential adverse effects or

injury to trust resources. **The PNRS, which may be funded by EPA, is an effective, low-cost screening tool to determine if trust resources are involved at a site.** It may be conducted at any stage of the remedial process, from pre-listing to pre-Record of Decision (ROD).

The earlier the PNRS information is available, the more likely it can be used to ensure that remedial alternatives are selected which effectively protect natural resources of concern to trustees. If the PNRS is conducted before RI scoping, it may provide information useful for sampling design and other aspects of the RI/FS ecological assessment. If conducted after completion of the RI and during the evaluation of remedial alternatives for the FS, and PNRS may help the trustees develop their position on a covenant not to sue. Site managers should consult with trustee representatives in their Region to determine the most appropriate time(s) for performing the PNRS.

Technical Assistance

While not a trustee responsibility under CERCLA, several trustee agencies offer technical assistance at Superfund sites. As well as furthering EPA's ecological assessments, such activities support the trustee's larger role in safeguarding natural resources. Advice and technical assistance from trustee representatives can take many forms. In most EPA Regional Offices, one or more trustee representatives serve on Biological Technical Assistance Groups (BTAGs),⁷ which provide review and advice on ecological issues in the assessment and remediation of sites. Usually, trustee representatives are also available for individual consultation on technical issues. Through Interagency Agreements, trustee agencies often perform specific tasks relating to ecological assessment of a site, such as field surveys, toxicity testing, and detailed examination of field-collected testing organisms. FWS staff or NOAA Coastal Resource Coordinators in coastal EPA Regional Offices may also act as a source of technical assistance for ecological assessments in wetland and aquatic habitats.

It is important to understand that technical assistance does not in any way commit a trustee to a covenant not to sue. Furthermore, review of site activities by trustees serving on the BTAG is not a substitute for notification of the trustees.

⁷ These groups are sometimes known by different names, depending on the Region, and not all Regions have established BTAGs. Readers should check with the appropriate Superfund manager for the name of the BTAG coordinator or other sources of technical assistance in their Region. A more complete description of BTAG structure and function is available in *The Role of BTAGs in the Ecological Assessment (ECO Update Vol. 1, No. 1)*.

Natural resource damages are monetary payments “for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss...”

Natural Resource Damage Assessment

If remedial actions are judged insufficient to protect and restore natural resources injured by releases from a Superfund site, or if the use of a natural resource is lost or curtailed, natural resource trustees may seek to collect damages from responsible parties. **Natural resource damages** are monetary payments “for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.”⁸ These payments are considered compensation, not punitive damages, and are intended to cover the past injury and residual costs or losses *beyond* whatever restoration can be achieved through remediation. Only responsible party funds can be used to pay natural resource damages; Superfund monies cannot be used for this purpose.

EPA site managers must recognize that **the natural resource damage assessment process is the responsibility of the trustee agencies, not of EPA.** In addition, EPA is *not* required to collect or fund the collection of all the information needed to carry out a natural resource damage assessment. In fact, EPA cannot collect information solely for the purpose of a natural resource damage assessment. However, it is equally important to remember that CERCLA and the NCP require prompt notification of, and close coordination with, the trustees. Coordination entails timely exchange of information between EPA and the trustees to ensure the technical adequacy of EPA's selected remedy with respect to natural resources. **Selection of remedial alternatives that adequately protect and restore natural resources will in most cases reduce the likelihood of expensive and time-consuming natural resource damage proceedings, which could delay negotiated settlements.**

The Natural Resource Damage Assessment (NRDA) process:

- Determines whether injury to, or loss of, trust resources has occurred;

⁸ CERCLA Section 107(a)(4)(D).

- Ascertains the magnitude of the injury or loss;
- Calculates the dollar value of the injury, loss, and/or cost of restoration; and
- Develops a restoration plan.

EPA can facilitate the restoration of natural resource damage issues during the RI/FS by coordinating with trustees to ensure that data useful to both EPA and the trustees are collected. When properly designed, the ecological assessment portion of the RI/FS may help to determine whether:

- A discharge or release has occurred,
- Trust resources have been affected,
- Injury has occurred or is likely, and
- Planned remedial responses will or will not be sufficient to protect or restore the resources.

Collection of this information serves the CERCLA requirement that EPA undertake investigations to identify the extent of danger to the environment from the release of contaminants. It also serves the additional requirement in CERCLA Section 104(b)(2) that EPA coordinate assessments, investigations, and planning with Federal and State trustees. A well-designed ecological assessment, then, is part of the process of determining the extent and degree of contamination. It is an essential part of the decision making process as to the need for and scope of any remedial action. In addition, it can provide the natural resource trustees with information to use during their evaluation of possible injuries to trust resources.

Covenant Not to Sue

A trustee may choose to sue a responsible party for the monetary damages calculated in the NRDA plus the cost of conducting the assessment. Although this decision is wholly that of the trustee, EPA's interest in the issue can be significant if negotiations with responsible parties are contemplated or in progress.

CERCLA Section 122(j) requires EPA to notify Federal trustees of any negotiations regarding the release of hazardous substances that may have resulted in natural resource injury, while Section 122(j)(1) calls on EPA to *encourage* Federal trustees to participate in negotiations with responsible parties. In those cases where trustees believe that they will need more information than EPA proposes to collect as part of the ecological assessment, they can negotiate with the responsible parties at the same time as EPA negotiates for the RI/FS. Note that EPA does not have the authority to negotiate on behalf of the trustees. In addition, if in the settlement process the responsible party requests a **covenant not to sue** for natural resource injuries, only the natural resource trustee or trustees, through the Department of Justice, can grant such a covenant.

CERCLA Section 122(j)(2) provides the link between remedial action decisions and the covenant not to sue:

The Federal natural resource trustee may agree to such a covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

In other words, trustee concurrence with a settlement—and, if appropriate, granting a covenant not to sue—is most likely to be facilitated if the selected remedial action will protect and restore trust resources. However, it should be noted that a covenant is *not* necessary for every Operable Unit at a site, so long as the Consent Decree for the Remedial Design/Remedial Action (RD/RA) retains the standard Reservation of Rights. The covenant is needed if the PRP refuses to accept the Reservation and requires a covenant not to sue as a condition of settlement. In these circumstances, only the trustees can agree to the covenant.

The trustee's first priority is to see that remedies are selected which protect and restore trust resources.

How To Work With Trustees

As mentioned above, natural resource damages are considered residual damages. The trustee's first priority is to see that remedies are selected which protect and restore trust resources. To be reasonably confident of obtaining a covenant not to sue, a site manager should remain mindful of four important responsibilities during the remedial process:

- Adherence to the notification and coordination provisions of CERCLA, the NCP, and any Memoranda of Understanding between EPA and the respective trustee;
- Consultation with the BTAG or its equivalent in the design and implementation of the ecological assessment portion of the RI/FS;
- Consultation with trustees on recommendations for remedial alternatives; and
- Compliance with environmental applicable or relevant and appropriate requirements (ARARs).

Notification

When to Notify

CERCLA Section 104(b)(2) requires EPA to promptly notify natural resource trustees of the potential for injuries resulting from releases under investigation. Section 122(j) requires notification regarding pending negotiations with potentially responsible parties. In practice, site managers should treat notification as a process rather than a one-time event. As the Superfund process unfolds at a site, the RPM will become aware of which trustees may have an interest in the site (see the following section, Whom to Notify). Site managers should plan on notifying trustees of such key events as:

- Site discovery,
- Preliminary Assessment/Site Inspection,
- Proposal of site for inclusion on the National Priorities List,
- Initiation of RI/FS negotiations,
- Receipt of the draft and final RI/FS workplans,
- Receipt of the draft RI/FS or any relevant interim product such as the ecological assessment portion of the RI/FS,
- Final RI/FS,
- Completion of the draft ROD,
- Final ROD,
- Initiation of RD/RA negotiations, and
- Receipt of the draft and final RD/RA workplans.

Notification should be in the form of a letter indicating what activity is taking place or what product is available. It could include copies of relevant documents for review, an invitation to attend a meeting or a request for specific action (such as review of a document).

Whenever trustees are expected to take some action, it is important that notification take place early enough to allow the trustee to respond in a timely manner, and that a date is stated by which comments or actions are required. **Notification should be viewed not only as compliance with statutory requirements, but as insurance toward keeping projects on time and within budget.**

Whom to Notify

As discussed earlier, trusteeship has been delegated to five Federal Departments: Interior, Commerce; Agriculture, Defense, and Energy. The site manager will need to decide which trustees to notify regarding a specific site, based on where the site is located, what habitats or Federally managed lands are potentially exposed, and what species are potentially exposed.

The descriptions of each Department's trusteeship, also discussed earlier in the Bulletin, can be used as a sort of checklist as to whom to notify. However, since no checklist can be exhaustive, the general rule should be: **When in doubt, notify.** If the site is not relevant to a particular agency's trusteeship, the trustee representative will inform the site manager and no further notification will be needed. The site manager should request that the trustee provide a written response as to their interest, or lack of interest, in a site.

A second general rule is, **Always notify the Department of Interior trustee representative and, if there is one in your Region, the NOAA Coastal Resource Coordinator.** These two agencies have responsibility in a wide variety of Superfund sites. For example, since migratory birds can utilize almost any terrestrial or aquatic habitat, DOI may be a trustee at almost any site. In addition, an aquatic habitat that is no longer fished may still come under the jurisdiction of a natural resource trustee. Also, as described earlier in this bulletin, the trusteeships of the two Departments overlap considerably (e.g., anadromous fish, marine mammals, and endangered species). DOI, NOAA, and State/tribal representatives will be the best judges as to whose trust resources are at issue with regard to a particular site.

If there is any reason to suspect that the site may affect National Forests, the site managers should notify the USDA trustee representative. If property controlled by the U.S. Army, Navy, Air Force, or Defense Logistics Agency is potentially exposed to contaminants, the Department of Defense trustee representative should be notified. If the site contaminants might affect lands or resources controlled by the Department of Energy, that agency's trustee representative should be notified. EPA Headquarters, DOI, or NOAA can assist in identifying the appropriate individuals in each of these agencies for notification purposes.

CERCLA also requires Notification State trustees, and in addition the site manager should notify Indian trustees where a site potentially affects natural resources on Indian lands. Often, Federal trust resources are a co-trusteeship with the States and Indian tribes. Most States have designated threatened or endangered species that do not appear on the Federal list. Trusteeship for other resources may be limited to the State if their geographic distribution or special value places them entirely within the State's boundaries or jurisdiction. The site manager should contact appropriate State liaisons to determine what State trustee agencies to notify regarding a site. As discussed earlier, EPA Headquarters, DOI, NOAA all maintain a list of State trustees, which may be helpful in identifying appropriate offices for notification. The DOI representative also should be able to help site managers contact Indian tribal trustees or the Bureau of Indian Affairs if tribal trust resources are potentially affected.

Coordination

Coordination involves a two-way communication between EPA and the trustee. The specific reasons for information exchange and coordination with natural resource trustees are to:

- Assist the site manager in determining the technical adequacy of ecological investigations,
- Assist the trustee in evaluating the actual or potential injury to trust resources, and
- Identify remedial alternatives that include appropriate actions to protect and restore natural resources (and thus minimize the need to recover residual damages).

Although coordination with trustees is a requirement, site managers should also view it as an opportunity. Operating through the BTAG or directly with the trustees, the site manager can obtain expert advice and review of work plans, data, and reports. This can be invaluable for selecting environmentally protective remedies that allow projects to proceed on schedule. It is important to emphasize that ecological studies conducted as part of the RI/FS are not intended as preliminary work toward a Natural Resource Damage Assessment. Nonetheless, a properly designed ecological assessment may go a long way toward resolving questions that might otherwise require lengthy NRDA-related proceedings and delay or prevent a comprehensive settlement with responsible parties.

At a minimum, the site manager should meet the coordination requirements of CERCLA by soliciting review comments from trustees on:

- The draft and final RI/FS work plans,
- The draft RI and FS,
- The final RI and FS,
- The Proposed Plan for remediation,
- The draft ROD,
- The final ROD, and
- The RD/RA.

Trustee involvement is especially valuable at certain points in the Superfund process, such as the scoping phase of the RI/FS and the review of the ROD. The portions of the ROD dealing with site characterization and risk assessment particularly benefit from trustee input. While EPA considered trustee input in deciding on remedial action, selection of the remedy is the sole responsibility of EPA.

It is important that site managers emphasize to trustees that any comments must be provided within EPA timeframes to prevent the possibility of the RPM missing management commitments and delaying remediation.

Trustees should also be aware that they risk the chance of forfeiting this right to comment if reviews are not made in a timely manner.

Site managers may also wish to consult with trustees at other stages of the remedial process. Trustee representatives may be able to provide technical advice or services on specific issues before the review step requires a more formal response.

At any stage of the Superfund process where notifying trustees is advisable, the site manager should plan on contracting all trustees who have been notified at an earlier stage of the remedial process and who have expressed an interest in reviewing the above documents. If the trustees are members of the BTAG, coordination can take place through that organization. However, **not all trustees are represented on BTAGs**. If other Federal, State, or Indian trustees have been notified and have indicated that resources under their trusteeship may be affected, the site manager should provide copies of all relevant documents to those trustees as well as to those on the BTAG. **Ensuring that coordination requirements have been met is the responsibility of the site manager, not of the trustee.** The site manager should document all coordination efforts with the trustees.

Coordination with natural resource trustees does not mean that EPA must comply with all trustee representatives' suggestions or recommendations regarding a site. EPA and the trustees have different, although complimentary, responsibilities with respect to site assessment. The ecological assessment portion of the RI/FS is intended to determine if remedial action is necessary and, if so, which remedial action is likely to be most protective of environmental receptors. The ecological assessment need not be designed to gather data appropriate for a natural resource damage assessment, even though it may end up being useful for that purpose. Trustee representatives are generally aware of the differences in the objectives and data needs between RI/FS ecological assessment and the NRDA.

If there is a question as to the purpose of studies recommended by natural resource trustees, the site manager should consult with the BTAG or other technical support personnel within EPA to determine what information is needed to meet the objectives of the RI/FS. Wherever possible, the site manager should seek to obtain a consensus of experts, including trustee representatives, before proceeding with any plan to assess ecological effects at a site.

Compliance with ARARs

Many trustees derive their authority from their agencies' statutory mandates to protect or manage the nation's natural resources. As such, trustee representatives are often well versed in the requirements of Federal laws pertaining to their trust resources, which may be ARARs for a particular site. By consulting with trustee

representatives, a site manager can obtain valuable advice on which laws and regulations apply to a site. Compliance with such requirements in the RD/RA may meet some or all of the trustees' concerns and thus reduce the likelihood of natural resource damage proceedings.

CERCLA and NCP provide for prompt notification of, and coordination with, trustees to ensure that remedial actions are selected that protect and restore natural resources.

Conclusion

The role of the natural resource trustee is integral to the CERCLA process of assessing and remediating uncontrolled hazardous waste sites to protect human health and the environment. CERCLA and NCP provide for prompt notification of, and coordination with, trustees to ensure that remedial actions are selected that protect and restore natural resources. Trustee representatives can provide valuable advice, comments, and technical support during the remedial process, to help ensure that projects remain on schedule and within budget. Although trustee and EPA responsibilities differ, cooperation and coordination are essential to the eventual success of the remediation effort.