



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

AUG 19 1998

Memorandum

To: Associate Solicitors
Regional Solicitors
Field Solicitors

From: Assistant Solicitor, Branch of Fish, Wildlife, and Environmental Protection,
Division of Conservation and Wildlife

Subject: Expenditure Authority for Natural Resource Damage Assessment and Restoration (NRDAR) Fund and NRDAR Cost Recovery

The purpose of this memorandum is to advise you of the status of this office's recent review of the scope of authorization for expenditures from the NRDAR Fund, and our on-going efforts to develop guidance on NRDAR assessment cost recovery. In particular, the first issue concerns the legal authority to expend NRDAR Fund monies on enforcement activities (e.g., litigation) taken to recover natural resource damages (NRD) claims against responsible parties. This issue has gained increasing significance as the Department has looked for potential funding sources as it has begun litigating NRD cases, while simultaneously seeking to address concerns that the NRDAR Fund be a self-sustaining fund. The second issue relates to the Department's efforts to undertake the steps necessary to make the NRDAR Fund self-sustaining to the extent possible and appropriate, and specifically those steps that the Solicitor's Office should undertake to assist the Department in achieving this goal.

NRDAR Fund and Enforcement Costs

First, in consultation with the Division of General Law, we have concluded that the NRDAR Fund permanent appropriations language is broad enough to provide legal authority to expend monies from the Fund on NRDAR enforcement activities, in addition to assessment and restoration activities. When the NRDAR Fund was first established in the Department of the Interior Fiscal Year 1992 Appropriations Act, the authorizing language referred to expending the appropriation "[t]o conduct natural resource damage assessments and restoration activities by the Department of the Interior." Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990, 994. In the Fiscal Year 1994 Interior Appropriations Act, the language was amended to include a reference to using the Fund to carry out "other legal actions," Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379, 1383, and the NRDAR Fund permanent appropriations language, as codified, now provides as follows:

43 U.S.C. 1474b-1. Natural Resources Damage Assessment and Restoration Fund;
legal settlements

Notwithstanding any other provision of law, any amounts appropriated or credited in fiscal year 1992 and thereafter, may be transferred to any account, including transfers to Federal trustees and payments to non-Federal trustees, to carry out the provisions of negotiated legal settlements or other legal actions for restoration activities and to carry out the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601, et seq.), Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, et seq.), the Oil Pollution Act of 1990 (Public Law 101-380) [33 U.S.C. 2701 et seq.], and the Act of July 27, 1990 (Public Law 101-337) [16 U.S.C. 19jj et seq.] for damage assessment activities: Provided, That sums provided by any party heretofore and hereafter are not limited to monetary payments and may include stocks, bonds or other personal or real property, which may be retained, liquidated or otherwise disposed of by the Secretary and such sums, to remain available until expended, or properties shall be utilized for the restoration of injured resources, and to conduct new damage assessment activities.

We construe the statutory language referring to “other legal actions” to encompass activities, such as enforcement actions, in addition to restoration actions and assessment activities. Otherwise, it would have been sufficient for the statute to refer simply to carrying out the provisions of negotiated legal settlements or “other restoration actions,” and damage assessment activities. Instead, the language refers to “other legal actions for restoration activities,” which we construe as including legal enforcement actions necessary to collect damage claims against responsible parties for the cost of restoration or otherwise to obtain agreements from such parties to restore injured natural resources.

Our interpretation is consistent with the so-called “necessary expense doctrine” long recognized by the Comptroller General. This doctrine provides that where an appropriation is made for a particular object, it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless another appropriation makes more specific provision for such expenditures or unless the expenditures are prohibited by law. See 31 U.S.C. § 1301(a); 6 Comp. Gen. 619, 621 (1927). The expenditure must bear a logical relationship to the appropriation. In this case, the expenditure in question (enforcement actions) are directly and logically related to the object of the appropriation (carrying out “legal actions for restoration activities”), and they are not otherwise specifically provided for. Accordingly, expenditures from the Fund for legal enforcement actions are proper.

Although there is no direct legislative history explaining the addition of the “legal actions” phrase to the permanent appropriations language in 1993, the phrase has frequently been used in the Departmental budget justification for the NRDAR Fund and in Committee Report language to refer to actions to recover natural resource damages from responsible parties. For example, the House Committee on Appropriations Report for the Fiscal Year 1994 Interior Appropriations Bill

noted that natural resource damage assessments “ultimately will lead to the restoration of injured resources, natural resource damages, and reimbursement for reasonable assessment costs from responsible parties through negotiated settlements *or other legal actions*.” H.R. Rep. No. 158, 103d Cong., 1st Sess. 18 (June 24, 1993) (emphasis added). Thus, contemporaneous with the addition of the “legal actions” phrase to the statutory language, the House Appropriations Committee was using the phrase in an apparent reference to the types of actions necessary to obtain NRD recoveries, e.g., enforcement actions, which ultimately lead to natural resource restoration.¹

Although we believe that the NRDAR Fund is available for NRDAR enforcement costs, the Department is still in the process of developing policy to govern the use of the Fund for such purposes. While the NRDAR Fund legally may be used to fund enforcement activities, enforcement costs--unlike assessment costs--are not recoverable under CERCLA. As such, use of the Fund for enforcement activities has a direct negative effect on the ability of the Fund to be a self-sustaining fund available for future damage assessments. Therefore, until further guidance is developed, NRDAR funds should not be used for enforcement activities unless specific authorization for such use has been provided through the NRDAR Program Allocation Process, or if NRDAR funds are available outside that process, by the NRDAR Program Manager. Approvals from the Program Manager should be sought through the bureau or office’s NRDAR Program Work Group representatives.

NRDAR Assessment Cost Recovery

In the Department’s 1999 OMB passback language on the NRDAR Program and specifically the NRDAR Fund, OMB stated:

[T]his account was designed to be self supporting, and OMB expects that it will become so. We will work with the agency and the Department of Justice to put into place a management system for this program and a plan to bring it to self supporting status over the next two years.

While the Department has recovered \$6 million in past assessment costs, over \$35 million has been appropriated for the program and the Department has taken a heightened interest in addressing this issue programmatically. Although there are numerous reasons that help explain the difference in the amount appropriated and the amount recovered, one of the reasons is the need for better cost accounting and record keeping of the time spent on NRDAR matters.

¹ A precise delineation of the scope of enforcement activities for which NRDAR Fund monies are authorized is beyond the scope of this memorandum, but it certainly would include those litigation expenses in NRD cases that are the responsibility of the Department of the Interior.

In response to the issues raised on NRDAR cost recovery, the NRDAR Program Manager has developed a cost recovery team to address the Department's objective of making the NRDAR Fund self-sustaining to the extent possible and appropriate, which includes identifying activities as direct and indirect, determining how to document, track and report costs; the development of a Department-wide indirect cost rate for past assessment costs and future oversight costs for restoration implementation activities; and Departmental guidance and policy to implement cost recovery by involved agencies and offices. The Solicitor's Office will be assisting in this effort and will be focusing on the delineation between recoverable NRDAR assessment costs and non-recoverable NRDAR enforcement costs. These efforts will need to be coordinated with NOAA, which is in the process of addressing the remand from General Electric Co. v. United States Department of Commerce, 128 F.3d 767, 776 (D.C. Cir. 1997), concerning the OPA Rule's definition of assessment costs and what legal costs trustees may recover as assessment costs.

Many attorneys in the Solicitor's Office have successfully recovered Solicitor's Office costs in NRD cases through negotiated settlements by including costs of the Solicitor's Office in the claim. In order to maximize the ability to recover past costs, it is important for all attorneys working on NRD cases to keep track of time and expenses on their individual cases and to include Solicitor's Office assessment costs in the claim. Documentation should be of sufficient detail to determine the type of activity undertaken by the attorney, to assist in determining if the activity is an assessment activity or an enforcement activity, as well as the time spent on the activity. Our office anticipates developing guidance in the future to assist regional and field attorneys in delineating assessment activities and enforcement activities.

One last note: In the past Solicitor's Office recovered monies which are returned to the NRDAR Fund and made available to the Solicitor's Office for other NRD cases have been used by regional and field attorneys for NRD related travel. Regional and field attorneys have provided estimates for NRD travel needs for the remainder of FY 98 and we anticipate providing funding for much of that travel in the next few weeks.

cc: Mat Millenbach, NRDAR Program Manager
Bob Baldauf, DOI Office of Budget
Bruce Nesslage, FWS Division of Budget
Shelly Hall, SOL
Steve Linscheid, SOL
Dan Hamson, NPS
Rick Dawson, NPS
Frank DeLuise, FWS
Pete Escherich, FWS
Dave Morrow, FWS
Paul Meyer, BLM
Dave Rosenberger, OEPC
Steve Specht, OEPC