

7714

G-000-900.21

**NATURAL RESOURCE TRUSTEE TELECONFERENCE MEETING NOTES
FROM MARCH 21, 1996 MEETING**

06/19/96

**NRT
10
MINUTES**

NRT

FERNALD ENVIRONMENTAL MANAGEMENT PROJECT
FERNALD, OHIO

FERMCO CONTRACT
DE-AC24-92OR21972
PAGE 1 OF 4

MEETING NOTES

SUBJECT: NATURAL RESOURCE TRUSTEE TELECONFERENCE
MEETING DATE: March 21, 1996
LOCATION: FERMCO Fernald Office
ISSUE DATE: June 19, 1996 File Record Storage Copy 104.11.5

DISTRIBUTION: + Attendees ++ Part-time * Author of Notes

<u>DOE</u>	<u>DOI</u>	xx <u>FERMCO</u>
Stephanie Bogart	+ Don Henne	Greg Jones
Jay Jalovec		++ Terry Hagen
Ed Skintik	<u>USEFWS</u>	Renee Holmes
Rod Warner	+ Bill Kurey	+ John Homer
+ Pete Yerace		* + Jenny Mailander <i>o/f/llw</i>
	<u>USEPA</u>	++ Steve Oberjohn
<u>OEPA</u>	Barb Mazur	+ Craig Straub
+ Tim Hull		+ Alicia Taylor
+ Tom Schneider		Sue Walpole
		Keith Wilkerson
		+ Eric Woods
		+ Pete Yerace, DOE
		PEIC, FINAL DRAFT ONLY

This meeting was held to discuss resolving Natural Resource Trustee (NRT) issues by integrating NRT concerns with remediation activities for the Fernald site. One aspect of this goal includes incorporating the State of Ohio's natural resource damage claim within any type of NRT resolution.

The majority of the meeting focused on discussing the four primary areas that the Trustees need to consider when evaluating how to resolve NRT issues. These areas were identified by FERMCO's review of natural resource damage assessment (NRDA) laws and regulations, other NRT agreements and restoration plans, and case law. The areas discussed were the NRT agreement, natural resource impact evaluation and valuation, the future, and public involvement.

Discussion on these primary areas included the following:

- The Fernald NRTs' main obligation is to protect Fernald natural resources (by acquiring, replacing, or restoring the equivalent impacted resources) on behalf of the

MEETING NOTES - Continued

public. The NRTs have been meeting for the past year evaluating Fernald natural resource data and identifying and discussing various issues related to the NRT obligations. Based on these discussions, the NRTs agree that their emphasis must be on restoring natural resources and that a formal NRDA is not in the best interests of the resources, the public, or the NRTs.

- The NRTs will need some formal agreement document (e.g., a Memorandum of Understanding) identifying the terms of their agreement regarding resolution of NRT issues for the Fernald site.
- Such an agreement (and fulfilling the terms of the agreement) would satisfy the State of Ohio's natural resource damage claim against DOE. The State and DOE will also consider documenting this by amending the Stipulated Amended Consent Decree between Ohio and DOE. Each of the NRTs will begin discussing this with their respective legal counsels.
- To express the NRTs' consensus, the NRTs will initially issue a joint letter to U.S. Environmental Protection Agency (EPA) notifying them of the NRTs' intent to integrate resolution of the NRT issues for the Fernald site with the remediation process. This integration entails utilizing existing natural resource impact information provided within the five operable units' Remedial Investigation (RI) reports, Feasibility Studies (FS), Records of Decision (RODs), and other site information (e.g., remedial design) relating to natural resources.
- FERMCO will compile the existing impact information in the form of an annotated outline. This preliminary information will assist the NRTs in understanding the extent of the known or anticipated natural resource impacts. Ultimately, this information will be further developed in the form of an impact assessment report to support restoration planning.
- The NRTs will need some mechanism to account for and deal with: new impacts that may occur as a result of remediation, but are not anticipated within the FS and ROD documents; anticipated impacts that have been identified in the FS and ROD documents but that do not occur; and any new impacts not previously identified. The NRTs agreed that monitoring during remediation activities would be a good mechanism to track for natural resource impacts. FERMCO will investigate the potential for utilizing the Integrated Environmental Monitoring Plan related to natural resources at Fernald.
- After reviewing the impact assessment information, the NRTs will need to consider a remediation and restoration plan to fulfill the NRT obligations. The remediation portion of the plan will describe and evaluate the selected remedial activities for the Fernald site to determine the extent to which the activities resolve NRT concerns.

MEETING NOTES - Continued

The "restoration" portion will identify restoration activities needed in addition to the remediation to account for any residual impacts and the length of time of the past and remaining impacts. Don Henne explained that the term "restoration plan" is a NRDA term of art and suggested that we may want to use a term that ties the Fernald NRT activities to remediation. This plan would be provided to the public for review and comment.

- The NRTs agree that it is essential to inform the public of NRT activities. FERMCO emphasized the increased importance of this public involvement aspect considering all of the press reports regarding the Fernald site.
- The Fernald Citizen's Task Force (FCTF) has formed a Natural and Cultural Resource Subcommittee. The FCTF developed a draft list of recommendations for the NRTs identifying natural resource priorities at the Fernald site. FERMCO will check on the status of the draft recommendations to see when a final recommendation is expected. FERMCO also agreed to find out the timing for the sub committee's meetings, so that the NRTs could attend should they desire.
- FERMCO hired a convener on behalf of DOE to establish the Community Reuse Organization (CRO). The press release issued by the convener, Maria Kreppel, stated that the group is being formed to address economic development opportunities related to remediation of the Fernald site. The press release also stated that the CRO would be making specific land use recommendations. The NRTs agreed that a meeting should be scheduled with Ms. Kreppel to discuss the CRO's charter and the NRTs, and how the two groups might interact. FERMCO agreed to schedule this meeting. FERMCO will schedule a meeting with Ms. Kreppel.
- A fact sheet identifying the NRTs and their responsibilities was included in the Fernald Report. Each of the NRTs had reviewed and approved the fact sheet. FERMCO will develop a second fact sheet for the public further describing the approach being taken by the NRTs. The fact sheet will also identify different opportunities for public involvement.
- FERMCO will check the Public Environmental Information Center (PEIC) to verify that the administrative record file on NRT issues is still open. FERMCO will also confirm that the NRT information in the reading room is current.
- FERMCO provided updates on cultural resources and wetlands at the site.

MEETING NOTES - Continued

<i>Action Items</i>	<i>Due Date</i>
FERMCO to draft and distribute meeting summary establishing Action Item Due Dates	March 29, 1996
FERMCO to draft annotated outline of existing natural resource impact information	April 26, 1996
FERMCO to draft a joint NRT letter to EPA for NRT review	April 12, 1996
FERMCO to contact the CRO convener and set up meeting (Contact has been made; meeting is currently being scheduled)	March 26, 1996
FERMCO to develop and distribute fact sheet with proposed avenues for public participation to NRTs	T.B.D
FERMCO to check the PEIC AR and reading room on NRT issues	April 12, 1996
FERMCO to investigate the Integrated Environmental Monitoring Report	May 15, 1996
The NRTs will begin discussing the results of the meeting with their respective legal counsels	On going

JKM:jes

Democrats float NRD counterproposal*** SENATE REPUBLICANS WEIGH NEW CHANGES TO NRD PROVISIONS**

At presstime, key Republicans on the Senate Environment & Public Works Committee were weighing possible additional changes to the natural resource damage (NRD) title in the latest draft version of their Superfund reform bill in an effort to gain bipartisan support, GOP sources say.

Possible changes to the controversial title were outlined to members at a May 8 meeting, but details of the proposed changes remain sketchy and staff accounts of the meeting vary.

However, the GOP lawmakers' efforts have raised concerns from a host of the other Republican committee members, who, according to their staff, continue to fear that the Republicans would be giving up too much in an effort to gain Democratic support. "It is safe to say there is general unhappiness with [Committee Chairman John] Chafee (R-I) and [Superfund Subcommittee Chairman Bob] Smith (R-NH), but no one is willing to lead the charge" against the bill moving forward, one source said.

GOP sources say that Republican members of the panel were briefed on potential changes by two key committee staffers at the members-only meeting May 8. Sources said the meeting was aimed at determining members' "bottom line."

The sources generally agreed that Chafee and Smith sought commitments from their Republican colleagues that they would be willing to support the two New England lawmakers in their efforts to "try to get Democrats to support the bill."

The staff sources say their members, who were not all necessarily present for the entire meeting, were willing to give vague commitments to Smith and Chafee that they would continue to support efforts to reform Superfund. But sources say the members were apparently unwilling to give commitments to support a specific proposal until they had seen the proposal in writing.

"We will continue to negotiate so that we will have broad bipartisan support," a Smith aide said early this week, "but there is a big gap between members and it will require a lot of work to get there."

The Smith aide, who was present in the meeting, also disputed other GOP staff account of the meeting, but declined to provide details. "We have not been focusing on NRD. We are trying to obtain broad bipartisan support for this bill," he said.

Smith and Chafee have been struggling for weeks to come up with an NRD proposal that is acceptable to both their Republican colleagues, Senate Democrats and the Clinton administration. But GOP sources indicate that Smith and Chafee are no closer to reaching that goal.

Democrats plan seeks baseline restoration

As Republicans continue to struggle to overcome long-standing tensions within their own caucus, Democrats and the Clinton administration recently floated their long-awaited "comprehensive" counterproposal laying out the terms of

continued on page 9

*** GAO SET TO RELEASE LONG-AWAITED STUDY ON PRIVATE SECTOR NRD COSTS**

At presstime, the General Accounting Office (GAO) was scheduled to release a long-awaited study on private sector natural resource damages (NRD) liability later this week. The report is due for release May 15, GAO sources say.

Sources say the report will address three questions: What are the future estimates of private sector NRD claims? How have recovered claims been spent? and, What are the processes used to derive the estimate of the cost of damaged natural resources?

The report is scheduled for release amid a heated debate between administration and industry officials over the potential scope of NRD claims at federal facilities (*see related story*). Industry officials have charged that the White House is underestimating its potential liability at DOE sites, but is not applying a similar reading to private facilities.

The GAO report was sent to the House Commerce and Transportation & Infrastructure Committees as well as the Senate Environment Committee April 15, but has been embargoed for public release for 30 days. A GAO source says the report has generated a significant amount of interest from industry and lawmakers — including interest from lawmakers who had not requested the report. The source, however, declined to name those additional lawmakers.

In a report GAO issued last spring, Justice Department officials speculated that the number of future private cases is likely to be limited by a shortage of enforcement resources and the difficulty of establishing responsibility for the damages.

Meanwhile, analysts at Resources for the Future (RFF), a Washington, DC-based think tank, are scheduled to release a study May 22 endorsing the findings of a controversial federal study that upheld the use of contingent valuation methodology (CVM) — a controversial survey method used to calculate the non-use value of natural resources. The RFF study, which endorses the guidelines laid out by a panel of experts in a 1993 report issued on behalf of the National Oceanic & Atmospheric Administration, was conducted largely by Ray Kopp, who also conducted a CVM study for trustees in a claim against Montrose Chemical Co. for NRD in Santa Monica Bay, CA.

BARTON STRONGLY DOUBTS PASSAGE OF SUPERFUND THIS YEAR

A key House Commerce Committee lawmaker warned chemical industry lobbyists last week that they should not expect passage of "any kind" of Superfund reform bill this year, despite new measures from House and Senate Budget Committees that boosted potential Superfund funding.

"The odds are three-to-one against a bill of any kind," Rep. Joe Barton (R-TX) told a forum sponsored by the Chemical Manufacturers Association (CMA) May 9. "We're kind of at a stalemate," he said. Barton is the chairman of the panel's oversight & investigation subcommittee, a key post that carries subpoena authority.

"I just don't see that there is going to be a political meeting of the minds on this issue," he added. Barton also dismissed the likelihood of a limited Superfund reform bill, or a rifle-shot type approach. "Even that is unlikely," he said.

Barton said that he and other conservative House lawmakers were still seeking repeal of retroactive liability for pre-1987 disposal, despite a recent proposal from other Commerce Committee lawmakers that significantly limited the scope of any liability repeal. "No bill is better than a bad bill," he said in response to questions.

However, Barton said that he and other conservatives did not want to support a liability repeal measure that would be underfunded. Barton said he would defer to Rep. Mike Oxley (R-OH), chairman of the Commerce, trade and hazardous materials subcommittee, on liability issues. "I'm going to listen to him real close," he said.

Barton's statements prompted strong reaction from a key House Commerce Committee GOP staffer, who dismissed Barton's statements. "Mr. Barton is not really doing Superfund reform. Mr. Oxley is," he said.

SENATE GOP WEIGHS NRD CHANGES . . . Story from page 3

acceptable reforms to the NRD provisions of Superfund law.

The counterproposal includes a detailed amendment to the current Republican Superfund bill, S.1285, as well as a description of additional changes that Democrats say they will propose in the near future.

"Taken together, these proposals accept the basic paradigm embodied in S.1285 and respond to concerns that have been raised by the minority about the potential impact of S.1285. This proposal will ensure effective reform of the NRD program while guarding the public interest in natural resource protection and restoration," the Democrats said in their April 23 proposal. *A copy of the document and the proposed Democratic amendment are reprinted below.*

Democrats have also provided their GOP colleagues with a more detailed outline of their April 23 proposal, dated May 3, sources said.

Smith and Chafee staff would not comment on the Democratic proposal. But several other GOP sources were critical of the Democrats proposal calling it "a step back from current law and totally unacceptable." One Senate GOP source said many Republican staff did not feel the Democratic offer was made in good faith. Industry sources familiar with the Democratic proposal voiced identical concerns.

In general, the Democratic proposal is consistent with recent Clinton administration policy that shifts the basis of the program to focus on restoring resources to their "baseline" conditions. Restoring resources to baseline conditions would bring the resource back to its condition prior to the injuring release, rather than focusing on estimating the value of the damages and seeking compensation, sources said. That policy was embodied in a final rule released earlier this year by the National Oceanic & Atmospheric (NOAA), but which is currently being challenged by six industry trade associations and companies in federal court. Environmentalists have recently filed court documents in support of the NOAA rule (*see related story*). A host of states and state organization support both the Democratic proposal and the NOAA rule.

Release of the plan is also consistent with the position taken by the Clinton administration last year that it was willing to "identify concerns underlying" industry proposals to scale-back the scope of the program, and "where possible" identify mutually acceptable solutions for Congress to consider (*Superfund Report - Special Report, May 3, 1995, p.1*).

In all, the Democratic plan proposes seven key changes to any future NRD program. These changes include:

- Limiting damage claims for compensatory restoration, otherwise known as lost-use values;
- Increasing coordination between remedial and restoration actions for actions that are not in "direct conflict";
- Mandating the use of simplified assessments;
- Eliminating current law provisions for a rebuttable presumption, replacing it with a new standard of review based on the trustee's administrative record subject to an arbitrary and capricious standard;
- Providing contribution protection for settling parties;
- Broadening trustees ability to bring NRD claims; and,
- Clarifying the current statute of limitations for sites not listed on the National Priorities List (NPL).

continued on next page

The plan also includes a significant change to the GOP-proposed transitional rule that would come into play should any changes to the NRD program be included in a comprehensive Superfund reform bill. Such a change would likely fully protect existing NRD claims in such high-profile cases as the \$713 million claim brought by the state of Montana against the Atlantic Richfield Company for damages to the Clark Fork Basin and a similarly large claim against several mining companies in the Coeur d'Alene basin in Idaho. Montana's Republican Governor Marc Racicot, last month urged Chafee to provide a "grandfather clause" that would not affect Montana's claim (*Superfund Report*, May 1, p5).

The Democrats have also developed an amendment to the GOP's latest NRD title of their bill, Title VII, that would implement many of the proposed changes outlined in the April 22 description. That amendment shows a significant overhaul of the GOP's proposal, including an elimination of the Republican's prohibition on claims for non-use values; re-writing several GOP definitions for terms that would otherwise have the effect of limiting trustees' liability claims; expanding the definition of "natural resources" to broaden trustees' rights to seek recoveries.

Industry spokesmen blasts Democratic plan

Informed industry officials last week blasted the Democratic proposal, warning that, if adopted, it would make the current NRD program worse than it already is. "It is absolutely worse than current law," one industry source familiar with

continued on page 28

House, Senate staff to be briefed on reform ideas

RESTORE COMMON LAW PRINCIPLES FOR SUPERFUND, POLICY ANALYST SAYS

Common law — which governed hazardous waste liability cases prior to the creation of Superfund — should be restored to create a more efficient and effective cleanup program, a Montana-based policy analyst suggests in new report. If restoring common law is not feasible, Congress at the very least should restore judicial review of cleanups, finance Superfund solely with congressional appropriations rather than special taxes, and revise EPA's risk assessment procedures, the report says.

The report, titled *Superfund: The Shortcut That Failed*, suggests that "a return to common law would work as well as any principled approach can, given the uncertainty about the harms inflicted by hazardous waste." The report was written by Richard Stroup, senior policy analyst with the Political Economy Research Center — a free market think-tank in Bozeman, MT.

Stroup, in a May 8 telephone interview said that he will be meeting with House and Senate staff next week to brief them on his paper. The crux of the paper contends that the common law approach "should not have been abandoned in 1980 when Superfund was enacted."

Stroup says "Congress replaced common law-concepts with nearly unchecked bureaucratic control. Congress allowed the EPA to judge liability and prescribe remedies without requiring evidence, and to recover costs from those accused of pollution. . . . So long as the EPA follows the procedures it wrote for itself, its orders are the law." According to Stroup, "The risks and harms from hazardous waste disposal sites are local, and, typically, only a few defendants are likely to actually cause harm or pose excessive risk." While Stroup says there were several reasons the common law approach was dropped — including the demand for proof, inconsistency, protection of private parties, not the public, costly litigation, and uncertainty and technical complexity — "the shortcut Superfund took around the problems with the common law has caused more problems than it cured."

Stroup says common law remedies could be supplemented by an "emergency removals" program similar to the removal program EPA operates under the current Superfund program. But such a program should be run by the states not the federal government, Stroup argues, "because the harms and the benefits of any site will nearly always be local, not national in scope. If those in the jurisdiction receiving the benefits choose not to remediate, there is little reason why federal taxpayers should do so."

But Stroup says while returning to common law is ideal, there are several smaller, less drastic steps that EPA could take to reflect such a system. First, the burden of proof should be on those demanding remediation, he says. "Companies or individuals should not be required to pay for cleanups unless their actions violated the rights of others."

Stroup also suggests eliminating the three taxes that fund the Superfund program, contending that "They are not based on current or past pollution, and compliance is extremely costly relative to the revenues received." Also, judicial review of cleanups prior to remediation should be restored. EPA should be required to show that "an unacceptable risk exists before starting remediation," he says. Current law bars parties from seeking judicial review of a cleanup before the cleanup is complete.

The issue of pre-enforcement review is part of the ongoing heated Superfund reauthorization debate. Current proposals pending in Congress contain provisions that would partially eliminate the judicial bar on pre-enforcement review. The Clinton administration, however, continues to oppose those provisions.

Signing off on Colorado voluntary cleanup program but . . .**EPA REGION VIII MAINTAINS OVERSIGHT ON STATE VOLUNTARY CLEANUP SITES**

Colorado and Region VIII signed an agreement in April that provides participants in Colorado's voluntary cleanup program a release from future liability. However, Region VIII has placed specific requirements on the Colorado program and maintains oversight at national priority list-caliber sites in exchange for granting indemnity from EPA action.

The agreement differs markedly from agreements signed in Region V, and under negotiation in Regions VI and X, that preclude any EPA oversight at NPL-caliber sites participating in state voluntary cleanup programs.

The memoranda of agreement (MOA), articulates a release from any enforcement or liability action in the future on behalf of the state or EPA if a participant in the voluntary cleanup program completes a cleanup according to state standards.

According to state and regional sources, the specific requirements Region VIII placed on NPL-sites in the Colorado voluntary cleanup program include:

- The site owner has the prerogative to attempt to gain EPA indemnity from further action. If the site owner wants EPA indemnity, EPA must review and approve all cleanup plans associated with the site.
- The site owner/participant must provide sufficient public notice to nearby stakeholders that the cleanup is taking place.
- "The state has to review the cleanup report" a state source says. Contractors can not evaluate completed cleanups of NPL-caliber sites.

A debate between state cleanup officials, regional representatives, and EPA headquarters over the NPL-caliber issue has held up for months the release of a long-awaited EPA headquarters guidance document for the agreements. Headquarters has insisted on maintaining oversight at the NPL-caliber sites while the states vehemently oppose Regional oversight into the state voluntary cleanup programs (*Superfund Report*, March 6, p20).

A state source says that the region's oversight at NPL-caliber sites is the result of headquarter's stance on NPL-caliber sites and reflects "negotiations between the region and HQ."

A regional source refutes this claim, saying that the decision to maintain some oversight "did not come from HQ." Instead, the source says that the region was concerned with several weak aspects of Colorado's cleanup program. The source says that Colorado has "no provisions" for community involvement, and that at best, Colorado's "history with site assessment has been somewhat varied." The source says that allowing sites to pass through Colorado's voluntary cleanup program without any oversight "might allow the system to be abused" by some companies. The source adds that given the weaknesses, the regional administrators are concerned about "being lambasted five years down the road" for releasing liability at a heavily polluted site that might not get properly cleaned up.

One state source recognizes the region's predicament, and says "I give EPA a lot of credit" for entering into the agreement. The source adds that "EPA just wants to know about the sites they care about." The source characterizes the regional involvement as "a trade-off," and says that industry will probably want indemnity guarantees from EPA "unless it is too burdensome" in terms of time or money.

According to state and regional sources, under the MOA, non-NPL caliber sites automatically receive indemnity from further state or EPA action if a site is cleaned up according to state standards.

State sources explain that lending institutions and potential land purchasers have pushed for the indemnity agreements. The states say that participants want guarantees from the states that if they perform a voluntary cleanup, neither the state nor EPA will pursue any further enforcement actions against a participant once a cleanup is complete. The states say that the guarantee can help encourage participants to clean up sites.

State, regional, and headquarters sources agree that the debate is largely innocuous, because the large majority of sites participating in state voluntary cleanup programs are not NPL-caliber anyway.

Natural Resource Damages

* MURKOWSKI REVEALS GAO FINDINGS OF \$15.8 BILLION FOR DOE NRD LIABILITY

Senate Energy Committee Chairman Frank Murkowski (R-AK) said in a letter last week that a long-awaited General Accounting Office (GAO) study of the Energy Department's potential natural resource damage liability may be as high as \$15.8 billion and as low as \$2.4 billion.

Those estimates, however, revealed in a May 9 letter to Energy Secretary Hazel O'Leary, come as Senate GOP staff and industry officials are slamming a recently released White House study which found that at most, DOE faces somewhere between \$143 million - \$522 million in NRD liability, a significantly smaller estimate than GAO.

"I realize there is a significant difference of opinion as to whether and how the current laws and regulations pertaining to NRD should be amended. However, irrespective of that outcome, I believe it is imperative that responsible govern-

ment officials accurately portray the consequences of the law so that sound budget and policy decisions can be made now and in the future," Murkowski said.

In an effort to determine which estimate DOE plans to use in its future financial statements, Murkowski is asking O'Leary whether DOE plans to list its potential NRD liabilities in future versions of its financial statements, and if so, which estimates it plans to include in those statements.

Murkowski's letter comes as a key industry spokesman for reforming Superfund's NRD program is blasting a recent White House study of the Energy Department's potential NRD liability — charging that it contains "extraordinarily low estimates" of DOE's potential liability and highlights a "double standard" in the administration's opposition to industry proposals to limit to the scope of the program.

Richard Stewart, a high-profile spokesman for industry proponents of NRD reform, charged in May 3 letter to Sen. Frank Lautenberg (D-NJ) that the White House's April 23 study, conducted by Council on Environmental Quality (CEQ) Chair Kathleen McGinty, does not apply NRD liability provisions of current law to federal facilities in the same way natural resource trustees have done with private facilities. Lautenberg, the ranking minority member on the Superfund subcommittee, requested Stewart's comments at an April 24 hearing. *Stewart's analysis of the CEQ study is reprinted below.*

"In short, the Administration can not have it both ways. Consistency requires that it either support reform, in accordance with the McGinty letter, in the existing NRD rules and practice governing private PRP liabilities, or that it apply the existing NRD rules and practice to DOE and concede that its potential NRD liabilities are in fact enormous," according to Stewart's May 3 letter.

One administration official rejected Stewart's argument as mistaken, but another informed government source said industry's attack was "not a surprise." He said that Senate Republicans are currently seeking answers to a host of questions raised by the study, including the administration's rationalization for their methodologies and whether those are "inconsistent" with other positions taken by the administration. Responses to those questions are expected soon, he said.

The dispute over DOE's liability has lurked as a difficult issue for the administration, ever since then-Assistant Energy Secretary Tom Grumbly told a Senate panel at a 1995 hearing that the agency faced massive potential NRD liability. Under pressure from the White House, Grumbly then retracted those remarks, while CEQ convened a panel to study DOE's liability.

The McGinty study, sent to Senate Environment & Public Works Committee Chairman John Chafee (R-RI), found that DOE's "total potential NRD liability" was between \$159 million to \$611 million. Only a small amount of that potential liability — between \$47.7 million to \$183 million — would be incurred before 1995, the study said.

The study argued that DOE's potential liability was limited because, as a trustee for resources on its own facilities, DOE could address much of the resource injuries through remedial processes. "This potential liability is limited, as a practical matter, by DOE's policy of addressing natural resource injuries during the remedial process," the study said.

But Stewart argued that if the CEQ analysis were to be applied to private facilities, then it is inconsistent for the administration not to support a host of limits to NRD liability, such as limits to lost-use and non-use recoveries, all supported by industry groups and GOP lawmakers. Such liability did not form part of the administration's calculation of DOE's NRD liability. Until now, the administration has strongly opposed such limits being added to the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) and officials have given no indication that they are willing to back down.

"The other explanation for the inconsistencies . . . is that the administration is espousing a double standard under which private [Potentially Responsible Parties (PRPs)] are subject to massive and draconian NRD liabilities while DOE and other federal facilities are governed by a different set of rules and subject to far lower liabilities," he said.

"Any such double standard is wholly contrary to [Superfund law], legally indefensible and blatantly unfair. If DOE NRD liabilities were estimated using the same principles of NRD liability applied by the administration to private PRPs, DOE NRD liabilities would be astronomically greater," he added.

In his analysis, Stewart charged that the administration has failed to apply current NRD liability principles to DOE's facilities. Among other things, Stewart charged that the White House study failed to consider potential liability for different kinds of lost-use and non-use values; used assumptions based on remediation and restoration of industrial facilities — not the highly-contaminated nuclear facilities, such as Hanford and Oak Ridge; made assumptions about the levels of required restoration inconsistent with Superfund and other environmental laws; and used assumptions about the cost-effectiveness of restoration measures that are not currently contained in Interior Department regulations.

Stewart, who once led federal attorneys to recover \$1 billion in NRD resulting from the Exxon Valdez spill but now backs industry efforts to limit such recoveries, also charged that the McGinty study is methodologically unsound. "It is impossible to respond fully to Ms. McGinty's letter because so many of the factual and methodological assumptions underlying its analysis and conclusions are unexplained, undocumented, or unfounded," he said.

Administration sources strongly rejected this claim. One administration official, who was not familiar with the letter, strongly challenged the industry attack, promising that the White House would respond. The official charged that Stewart was mistaken.

The official pointed out that DOE facilities are listed on the National Priorities List (NPL) fence-line-to-fence-line, and therefore much of the large-scale natural resource injury is dealt with during the remedial phase of the cleanup. On the other hand, he said, only small portions of private sector sites are listed on the NPL, resulting in significant remediation requirements to damaged natural resources that may not be part of the listed site's remediation.

Industry Analysis of White House Study on DOE's NRD Liability

Attachment

Deficiencies in McGinty Letter Estimates of NRD Liabilities

1. Failure to Apply Current NRD Liability Principles.

As noted in greater detail in the above letter, the McGinty letter analysis of DOE NRD liabilities fails to apply the principles of NRD liability currently asserted by trustees against private PRPs. As a result of this failure, the McGinty letter estimates fail to include many elements of NRD liability at DOE sites, including lost non-use recoveries, lost use recoveries, the additional costs of restoration measures not based on committed uses, recoveries by states and tribal trustees based on site contaminations, and other elements of liability discussed in the above letter. As a result of these failures, DOE NRD liabilities are grossly underestimated.

2. Incomplete Site-by-Site Analysis.

The number of DOE sites facing potential NRD liability is limited. The letter states that there are only 18 DOE sites on the NPL.² Obviously the appropriate way to estimate DOE NRD liabilities is through site-by-site analysis.

A portion of the letter is based on site-by-site analysis of DOE sites on the NPL. Thus the letter states (p.6) that after a review of the significance of resource injury, the extent of off-site resource injury, and other site-specific variables, it was concluded that only 35% of DOE NPL sites (or six sites) face post-cleanup NRD claims. Remarkably, however, the letter fails to identify the six sites thus identified, or the 12 sites excluded. It also fails to provide the factual bases for concluding that there will be no NRD liability at fully two-thirds of DOE NPL sites. Without knowing the identity of these sites, or the site-specific reasons for excluding 12 out of 18 NPL sites, it is impossible to evaluate the McGinty letter's conclusions regarding DOE NRD liabilities.

When it comes to projecting the amount of NRD liabilities, the McGinty letter inexplicably abandons any and all site-by-site analysis. Instead, it projects the amount of NRD at the six selected NPL sites and at non-NPL sites by the use of average ratios extrapolated from a databased of non-DOE sites that are entirely different in character from and wholly unrepresentative of DOE sites. As explained more fully below, this use of unrepresentative averages is irretrievably flawed in many respects. Any attempt to estimate DOE NRD liabilities by extrapolation from the entire universe of non-DOE sites is unsound and unnecessary. The extent and character of the contamination and the remedial options available at many DOE sites are unique. With only 18 DOE sites on the NPL, a case-by-case analysis of NRD liabilities at these sites would be practicable and would obviously be far more accurate than any other approach. The McGinty letter fails to provide any explanation or justification for using a site-by-site analysis to exclude two-thirds of NPL DOE sites from consideration, and then abandoning site-by-site analysis in estimating the amount of DOE NRD liabilities.

3. Use of Inappropriate and Misleading Averages and Unrepresentative Data to Project DOE NRD Liabilities.

Rather than estimating DOE NRD liabilities through site-by-site analysis, the McGinty letter extrapolates from a Department of Justice (DOJ) databased of settled CERCLA claims at non-DOE sites. For these sites, the letter identifies the average of recoveries denominated as NRD to recoveries denominated as cleanup costs. For all sites in the non-DOE database, this ratio was .0062. For sites in the data base for which some NRD recovery was obtained, the ratio was .0682. These ratios were then multiplied times projected

remediation costs at DOE sites, obtaining projected DOE NRD liabilities ranging from only \$159 to \$611 million. This methodology is totally flawed in numerous respects. As a result, the McGinty letter grossly understates DOE NRD liabilities by orders of magnitude:

a. As explained above, site-by-site analysis is the only means of yielding accurate and reliable estimates of DOE NRD liabilities.

b. The DOJ database of non-DOE sites is wholly unrepresentative of DOE sites:

- DOE sites are among the most seriously contaminated of all sites. The DOJ database consists of large numbers of small sites or sites that are not heavily contaminated. Most of these sites have not given rise to any NRD recoveries, even at those where NRD covenants not to sue have been given. At the small percentage of DOJ sites where NRD recoveries have been obtained, recoveries have generally been very modest. DOE sites are far larger and far more heavily contaminated than most of these sites.

- The DOJ database is also unrepresentative of DOE sites because it includes only those sites where claims have been settled or otherwise resolved. It excludes many of the largest non-DOE sites, such as Clark Fort, Coeur d' Alene and Fox River, where trustees are currently seeking NRD running to hundreds of millions of dollars. These sites are far more representative of potential liabilities at DOE sites than the sites in the DOJ data base.

- As the McGinty letter acknowledges, remediation at DOE sites is often technologically infeasible. This problem stems from the mixed radioactive/chemically hazardous character of many DOE wastes and other factors. As a result, remediation at DOE sites is less likely to prevent ongoing resource injury than at comparable large, heavily contaminated non-DOE sites, resulting in commensurably higher NRD at DOE sites. As the McGinty letter also acknowledges, remediation at DOE sites is likely to take considerably longer than at non-DOE sites, which will also result in greater NRD liabilities.

c. Because the DOJ database of settlements is wholly unrepresentative of DOE sites, the .0062 and .0682 NRD/Cleanup ratios derived by the McGinty letter from the DOJ database can not be used in estimating DOE liabilities. At large, heavily contaminated private sites where trustees' pursue their flawed theories of NRD liability, the ratio between NRD claims and cleanup costs range from 1:1 to 2:1, or greater. Ratios in this range would be more appropriate for DOE sites, but may still understate DOE NRD liabilities because of the technical difficulties in remediating NRD sites.

d. The McGinty letter multiplies its NRD/cleanup ratios times its projection of DOE cleanup costs. The cleanup costs projected by the McGinty letter for all DOE sites is \$25.5 billion. This figure is only one-twelfth the \$300 billion in DOE cleanup costs projected by GAO. The McGinty letter fails to explain or justify this astonishing discrepancy in projected clean up costs.

e. If cleanup ratios based on experience at analogous non-DOE sites were applied against the \$300 billion DOE cleanup costs projected by GAO, DOE NRD liabilities would run to the hundreds of billions of dollars.

4. Failure to account for Restoration Costs Included in DOE "Cleanup" Costs.

The McGinty letter states that because DOE wears "two hats" — it is both the remediation authority and the federal natural

resource trustee at DOE sites -- it includes restoration objectives in the design and selection of cleanup remedies. Accordingly, a substantial portion of DOE "cleanup" costs -- projected by GAO at \$300 billion -- is in fact spent for restoration objectives. But the McGinty letter makes no effort to separate out or estimate this hidden component of DOE NRD liabilities. It counts as NRD liabilities only certain items over and above the natural resource restoration component of DOE "cleanup" costs, such as state and tribal NRD recoveries and resource injuries caused by remediation activities. In order to provide a true accounting of DOE NRD liabilities on a basis comparable to that used for private sites, only the costs of cleanup measures to prevent ongoing harm to health and the environment should be counted as cleanup, and additional measures to promote restoration should be counted by NRD. Since the McGinty letter fails to provide any information on the extent of these hidden NRD liabilities, it is difficult to predict what they might be, but they could easily run to tens of billions of dollars.

5. Additional deficiencies.

The analysis in the McGinty letter also contains the following additional deficiencies:

a. The analysis fails to explain or document its assumption that cleanup and restoration will be based on reinstatement of "baseline" conditions based on established resource uses, whereas trustees currently have and exercise authority under the DOI regulations to base NRD based on the extravagant costs of replicating pre-industrial "greenfields" conditions.

b. The analysis fails to explain or document its assumption that state or tribal trustees will not be able to assert claims for on-site natural resource injuries. For example, under current practice, many states would assert the right to bring an NRD action addressing groundwater contamination regardless of whether it located on federal property (or even private property). In addition, under current practice, (endorsed by the Administration), states and tribal trustees may assert NRD jurisdiction over wide range of natural resources which they do not own or hold in trust. For example, injury to migratory animals located within federal enclave could give rise to a state or tribal NRD claim on the ground that the trustee has "management" authority over the animals. In addition,

injury to non-migratory natural resources within federal enclave could give rise to an NRD claim on the grounds that the resource somehow "appertains" to the state or tribal authority.

c. The analysis fails to explain or document its assumption that states or tribes will be unable to assert trusteeship over off-site resources injured by releases from a DOE facility.

d. The analysis fails to explain or document its assumption that state or tribal trustees will not be interested in pursuing available NRD claims at DOE sites.

e. The analysis fails to explain or document the assertion that because clean up costs at highly contaminated DOE sites will be high compared to non-DOE sites, NRD will be relatively lower at DOE sites than at non-DOE sites. Logic suggests the contrary - if cleanup costs are high at DOE sites because of heavy contamination, so will NRD -- including nonuse and past and future nonuse losses and off-site impacts over the decades between disposal and remediation.

f. The analysis at page 9 of the McGinty letter identifying potential high and low ranges of NRD at DOE sites is counterintuitive and unsupported under trustee theories of NRD liability. The letter indicates that if an "iron fence" remedial goal is selected, NRD will be low compared to a three times greater potential NRD if a "greenfields" remedial goals is pursued. However, based on current trustee theories of NRD liability, the more plausible result would be that an "iron fence" remedial approach would produce the highest NRD, because it would leave greater residual contamination warranting either additional on-site restoration beyond cleanup levels or acquisition of substantial new replacement resources. In addition, there would be a much greater time period of lost "ecological functions" pending permanent on-site restoration, which would warrant the acquisition of additional natural resources over and above what is necessary to restore or replace the originally injured resource. By contrast, a "greenfields" approach would be expected to return the site to conditions where it would not take as long for natural recovery of affirmative restoration of residual resource injury, or where there would be less required for acquisition (though the costs of this activity would still be submitted -- see subsection "e" above). Further, the amount and duration of reduced ecological functions would not be as great.

ENVIRONMENTALISTS, INDUSTRY SEEK TO INTERVENE IN FEDERAL COURT REVIEW

Environmentalists last week sought to intervene in support of a contentious natural resource damage assessment rule currently being challenged by industry officials in a federal appeals court, despite their earlier comments that the rule did not go far enough in protecting the environment.

In papers filed in U.S. Appeals Court for the D.C. Circuit May 7, lawyers for the Natural Resources Defense Council (NRDC) acknowledged their previous opposition to the National Oceanic & Atmospheric Administration's (NOAA) rule, and argued that this will allow the group to make "very different" arguments in support of the rule, in contrast to industry interveners who oppose the rule.

"In many respects, NRDC has asserted that NOAA's proposals were inadequate. Indeed, NRDC continues to believe that the rule is not sufficiently protective of the environment. Consequently, NRDC is likely to make very different arguments in opposition to petitioner's arguments and in support of the validity of the rule," the group said.

Two industry groups, the American Forest & Paper Association and the International Group of P&I Clubs, also sought to intervene in the case. Both of these groups sought to intervene in support of the industry petitions for review.

Led by General Electric, six companies and trade associations have filed petitions seeking court review of the rule, which was issued by NOAA under authority of the Oil Pollution Act. Clinton administration officials have said the rule sets new policy in natural resource damage assessments, by shifting the emphasis of NRD to restoration rather than valuation. They have promised a similar shift in the Superfund NRD program as well.