

GROFF MURPHY
LAWYERS

Steve Parkinson

E-Mail: sparkinson@groffmurphy.com

April 28, 2010

Erin Madden
Cascadia Law PC
2716 SE 23rd Ave
Portland, OR 97214

Re: *Draft Addendum to Assessment Plan
Portland Harbor Superfund Site*

Dear Erin:

Legacy Site Services LLC, as agent for Arkema Inc., opposes inclusion of navigational services in the Assessment Plan for the reasons set forth in Loren Dunn's letter on behalf of Portland General Electric Company.

Sincerely,

GROFF MURPHY, PLLC



Steve Parkinson

SP:ln

10942 0012 nd293603

Jennifer Hughes

From: Erin Madden [erin.madden@gmail.com]
Sent: Monday, May 03, 2010 8:32 AM
To: Jennifer Hughes; Donald Pyle
Subject: Fwd: Calbag's Comments on Navigational Services Injury Assessment: Portland Harbor Superfund Site

more comments

Erin Madden
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Begin forwarded message:

From: "Blount, David" <DBlount@landye-bennett.com>
Date: May 1, 2010 6:09:47 PM PDT
To: "Erin Madden (erin.madden@gmail.com)" <erin.madden@gmail.com>
Subject: Calbag's Comments on Navigational Services Injury Assessment: Portland Harbor Superfund Site

Dear Erin,

This email responds to the Portland Harbor Trustees' request for comments on their draft Addendum to the NRDA Plan. In particular, our client Calbag joins PGE's comments on the Addendum via Loren Dunn's April 27 2010 letter to you. We continue to look forward to further discussion of these issues. Thank you again for your courtesies throughout this process. Sincerely, David Blount

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April 30, 2010

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VIA U.S. MAIL AND ELECTRONIC MAIL

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Re: Comments on Navigational Services Injury Assessment

Dear Erin:

I am writing on behalf of Evraz Inc. NA in response to the Portland Harbor Natural Resource Trustees' request for comments on their Draft Addendum to the Natural Resource Damage Assessment Plan. Evraz is in agreement with the comments submitted by Portland General Electric Company (PGE), and it urges the Trustee Council not to pursue an assessment of a "navigational service injury."

Thank you for the opportunity to comment.

Very truly yours,

A handwritten signature in cursive script that reads "Joan Snyder".

Joan P. Snyder

cc: Debbie Silva
Loren Dunn

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a professional limited liability company

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DID: (206) 676-7004
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April 30, 2010

*Via email (erin.madden@gmail.com)
and U.S. Mail*

Erin Madden
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Portland, OR 97202

**Re: Comments on the Natural Resource Damage Assessment Plan –
Draft Addendum for Public Review Dated April 1, 2010**

Dear Ms. Madden:

On behalf of FMC Corporation (“FMC”), I am submitting these comments on the Portland Harbor Natural Resource Trustee Council’s (“Trustee Council”) proposal to include navigational services as an element of its Injury Assessment. As described in the Natural Resource Damage Assessment Plan – Draft Addendum for Public Review dated April 1, 2010, relating to the Portland Harbor Superfund Site, the Trustee Council proposes under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) to include two categories of navigational service-related injuries in its Natural Resource Damage (“NRD”) Injury Assessment: (i) damages related to difficulties navigating a shipping channel that was not dredged after 1997 due to contaminated sediments; and (ii) damages related to increased dredging costs. FMC strongly objects to the inclusion of navigational services in the NRD Injury Assessment, for the following reasons:

1. The navigational services claim is premised upon the lack of dredging after 1997 and the associated “injuries” to navigational services resulting from reduced shipping channel depths. A shipping channel of sufficient depth to accommodate deep-draft commercial traffic is not a natural resource, as that term is defined in 42 U.S.C. § 9601(16). Thus, navigational service is not a class of damages that CERCLA authorizes as part of an NRD claim.

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2. No act of any potentially responsible party (“PRP”) made it impossible to dredge. The Draft Addendum states that the U.S. Army Corps of Engineers announced it had decided to suspend dredging in 1997. The U.S. Army Corps of Engineers is responsible for the consequences of that decision. To the extent it claims that dredging was more expensive, it could have brought a private claim to recover alleged dredging cost increases for managing and disposing contaminated sediment. The existence of a private cause of action takes such claims outside the scope of the NRD statutory scheme.
3. Increased operational costs, increased dredging costs, and lost revenues of shipping companies and others, such as the Port of Portland, are private injuries and outside the scope of NRD recovery. *Ohio v. Dept of Interior*, 880 F.2d 432, 460 (D.C. Cir. 1989).
4. In addition to being private injuries, the claims for sediment characterization, management, and monitoring to be carried out in connection future dredging are duplicative of remedial action costs.
5. The proper measurement of NRD is the difference between the natural resource in its pristine condition and its condition after the cleanup. *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1035 (D. Mass. 1989). Damages may be measured as the cost of directly restoring the injured resource to “baseline,” defined as the physical, chemical, and biological condition of the resource absent the release. 43 C.F.R. §§ 11.14(e). Even if navigational services could be deemed a “natural resource,” the “pristine,” pre-release condition of the Willamette River would not be the artificially-maintained 40 foot deep shipping channel, but rather the approximately 20-foot deep naturally sedimented river channel.
6. Public revenue allegedly lost from decreased trade is too speculative and too remote to attribute to presence of contamination. There is substantial evidence that the 40-foot dredged depth of Portland Harbor is inadequate to compete with deeper, more accessible ports on the West Coast. Furthermore, there is no identified and no reliable means of determining the baseline. The assessment plan makes no provisions for accounting for economic downturn, weather and climactic conditions, upstream impacts and other reasons apart from the PRPs’ alleged releases for decreased deep-draft shipping traffic at Portland Harbor.

Erin Madden
April 30, 2010
Page 3

7. Recovered natural resource damages can only be used to restore, replace, or acquire equivalent natural resources. 42 U.S.C. § 9607(f)(1). Dredging to enlarge a river channel beyond its natural depth is not an authorized use of NRD proceeds.
8. No legal precedent authorizes a navigational service NRD claim. The Hudson River NRD claim for navigation services has not yet ripened for legal challenge. The Champlain Canal is distinguishable from Portland Harbor because New York State's legal obligation to maintain the channel for public use originates in that State's constitution. No equivalent constitutional obligation exists in the State of Oregon.

FMC appreciates the opportunity to submit these comments. We look forward to receiving a copy of the Trustee Council's responses to all of the comments submitted on the Draft Addendum. If you have any questions regarding these comments during the response period, please feel free to contact me at maureenm@summitlaw.com or 206-676-7004.

Sincerely,

SUMMIT LAW GROUP PLLC



Maureen L. Mitchell

cc: John F. Stillmun, FMC Corporation
David M. Heineck, Summit Law Group PLLC

Jennifer Hughes

From: Erin Madden [erin.madden@gmail.com]
Sent: Monday, May 03, 2010 8:32 AM
To: Donald Pyle; Jennifer Hughes
Subject: Fwd: NRD Trustees' Request for Comments on Draft Addendum to the NRDA Plan: Portland Harbor

more comments

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Begin forwarded message:

From: "Blount, David" <DBlount@landye-bennett.com>
Date: May 1, 2010 6:04:46 PM PDT
To: "Erin Madden (erin.madden@gmail.com)" <erin.madden@gmail.com>
Subject: NRD Trustees' Request for Comments on Draft Addendum to the NRDA Plan: Portland Harbor

Dear Erin,

Please consider this email as Gould's Comments on the Portland Harbor NRD Trustees' request for comments on their Draft Addendum to the NRDA Plan. In particular, Gould wishes to join the comments of PGE on the subject sent on April 27, 2010 by Lauren Dunn on behalf of PGE. Thank you for your courtesies and we look forward to further discussion of these issues. Sincerely, David Blount

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April 30, 2010

VIA EMAIL AND U.S. MAIL

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RE: Comments on Draft Addendum to Portland Harbor Superfund Site Natural Resource Damage Assessment Plan Regarding Navigational Services

Dear Ms. Madden:

The undersigned represent seven interested parties (collectively, “**our Clients**”) with respect to the Portland Harbor Superfund Site (“**Site**”). Our Clients are active participants in the Portland Harbor Superfund Site Participation and Common Interest Group, which as you know is involved in an alternative dispute resolution process related to the Site. Our Clients share an interest in the natural resource damage assessment and restoration (“**NRDA**”) process which the Portland Harbor Natural Resource Trustee Council (“**Trustee Council**”) is conducting. We are submitting these comments on our Clients’ behalf in response to the Draft Addendum dated April 1, 2010 (“**Addendum**”), to the Portland Harbor Superfund Site Natural Resource Damage Assessment Plan dated November 23, 2009, including appendices (“**NRDA Plan**”).

While we commend the Trustee Council’s efforts to prepare a comprehensive NRDA that includes appropriate natural resource injuries, the proposal in the Addendum to include in the NRDA a quantification of losses of navigational services for the Site is ill advised. Loss of navigational services is not compensable as natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* (“**CERCLA**”). Rather, to the extent such losses are compensable at all they are only capable of being recovered through third-party claims. Even if loss of navigational services were compensable as natural resource damages, the undisputed facts regarding the Site do not substantiate the claimed injury. As a further practical matter, quantifying this category of claimed damage would be extremely complex and require diversion of significant time and resources by the Trustee Council that otherwise could be directed at assessing the components of natural resource damage outlined in the NRDA Plan. Thus, for the reasons explained in these comments we urge the Trustee Council to withdraw the Addendum and proceed with the NRDA as outlined in the NRDA Plan.

I. Loss of navigational services is not compensable through the NRDA process.

We have identified no court decisions allowing losses of navigational services to be compensated as natural resource damages under the provision of CERCLA. In fact only one court (a federal district court), in an unreported decision having no precedential value, has held

that losses to navigational services are compensable under the Clean Water Act, 33 U.S.C. § 1321(f)(4). *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (In re Montauk Oil Transp. Corp.)*, 1996 WL 340000 (S.D.N.Y. June 19, 1996). However, the law and the facts of *Montauk* are inapplicable to the Site. In *Montauk*, a vessel leaked large amounts of heating oil, causing the U.S. Coast Guard to close the affected waterway to all vessel traffic for nine days. The court determined that the United States had established a claim for loss of navigational services. *Id.*

The claim for loss of navigational services described in the Addendum bears no resemblance to *Montauk*. With respect to the Site, the State of Oregon is asserting a claim to loss of services from a federal navigational channel used by private shippers for the delivery and receipt of goods. This raises significant issues of standing under CERCLA. Moreover, *Montauk* involved an entirely different statute (the Clean Water Act), and the district court specifically noted the potentially significant textual differences between the relevant natural resource damage provisions of the Clean Water Act and CERCLA. Finally, the nature of the injury in *Montauk* was completely different. In *Montauk* the waterway was completely closed to all vessel traffic for public health and safety reasons. With respect to the Site, it is undisputed that the lower Willamette River has remained continuously open to vessel traffic despite the voluntary election by the U.S. Army Corps of Engineers (“Corps”) not to continue dredging as a result of the Site’s listing on the National Priorities List (“NPL”). Thus, use of the channel by vessel traffic has never been interrupted by the presence of hazardous substances.

The Hudson River is much more analogous to the Site and serves to illustrate the legal difficulty with the proposed claim. Under the NRDA rules, there are five distinct categories of natural resources: “Surface water resources, ground water resources, air resources, geologic resources, and biological resources.” 43 C.F.R. § 11.14(z). It is axiomatic that, to be compensable, an injured resource must fall within one of these broad groups. Interestingly, the trustee council for the Hudson River, which to our knowledge is the only other major site where losses to navigational services have been claimed as natural resource injuries under CERCLA, clearly classified navigational services as being provided by surface water resources. N.Y. State Dep’t of Envtl. Conservation *et al.*, *Injuries to Hudson River Surface Water Resources Resulting in the Loss of Navigational Services* (July 31, 2006), available at http://www.dec.ny.gov/docs/wildlife_pdf/hrnavinjury.pdf (last visited Apr. 29, 2010).

However, with respect to the Site, the Trustee Council has classified navigational services as arising from geologic resources, namely Willamette River sediments. Addendum at 2 (attributing “navigational service loss” to “delayed dredging and accumulation of contaminated sediments”). The factual similarity between the Site and the Hudson River, where multiple long-term commercial and industrial uses caused contamination of the waterway and its sediments by polychlorinated biphenyls, highlights the ambiguity surrounding the claim for loss of navigational services. The legal basis for this claim is tenuous at best; natural resource trustees cannot even consistently classify this claim as arising from injuries to surface water or geologic resources.

Beyond this definitional difficulty is a fundamental legal flaw: as explained in more detail below, the Trustee Council cannot establish any causal link between injuries to the natural

resources at the Site and the alleged loss of navigational services. This deficiency is legally fatal to the claim. Thus, if the Trustee Council adopts the Addendum, its finite resources and schedule will be misdirected away from its assessment of recognized categories of natural resource damage. Furthermore, adopting a navigation services loss claim could result in a morass of litigation over this issue and could substantially hinder the Trustee Council's efforts to reach successful voluntary settlements with potentially responsible parties ("PRPs") at the Site.

II. The facts do not support a claim for loss of navigational services.

The Addendum alleges that the State of Oregon, acting through the Port of Portland ("Port"), which is a PRP at the Site, incurred injuries to navigational services in the form of increased costs of testing, dredging and disposing of sediments from the Willamette River's federally-approved navigation channel. However, these allegations are not factually or technically supported. The claim for loss for navigational services should be excluded from the NRDA Plan because these allegations are not factually or technically supported, as illustrated by the following:

- The Corps has expressly stated that its decision to suspend maintenance dredging activities in the Willamette River was due to the Site's NPL listing. Addendum at 2. The Site was contaminated long before its listing, and the Corps had no difficulty with dredging contaminated sediments for many years prior to EPA's decision to list the Site. Therefore, it was the listing of the Site and not the contamination that caused the Corps to make an *internal policy decision* to cease dredging. No regulatory or judicial authority ever closed the Willamette River or ordered the Corps to cease its dredging activities.
- At any time, the Corps could have lifted its self-imposed moratorium and conducted maintenance dredging.
- In accordance with this internal policy decision, the Corps has not even applied for authority or permission to dredge. Consequently, it has not incurred any increased dredging costs resulting from contamination at the Site. Likewise the Port has not incurred any increased costs to dispose of contaminated sediments because none in fact were dredged. Hypothetical and speculative damages are not compensable under CERCLA.
- Because maintenance dredging of the federal navigation channel has not occurred since 1997, the Trustee Council lacks any data substantiating an actual, quantifiable injury rather than a purely hypothetical, speculative one. As noted above, CERCLA does not allow recovery of damages for injuries that are hypothetical or speculative in nature.
- The Corps has confirmed that its decision to suspend maintenance dredging at the Site was based on the need for EPA to resolve legal and technical issues regarding dredging within the boundaries of a Superfund site. See Donald L. Erickson, *Willamette River DMMP Suspension Notice* (Corps Sept. 10, 2008), available at <http://www.portlandharborcag.info/node/30> (last visited Apr. 29, 2010).

- The Port could have conducted maintenance dredging at any time despite the Corps's unwillingness to do so. However, subsequent to EPA's listing of the Site on the NPL the Port simply acquiesced in the Corps's decision and never attempted to dredge the federal navigation channel.
- The Corps's 2006 Dredged Material Management Plan ("DMMP") Sediment Characterization Report documents that the Corps and the Port (as the nonfederal sponsor) have known since 1998 that contaminated sediments require upland disposal due to the unavailability of in-water disposal sites. However, the DMMP also stated that the majority of the sediment, including that between River Miles 8 and 10.1, was found acceptable for unconfined open-water disposal. Tetra Tech, *Lower Willamette River Federal Navigation Channel Dredge Material Management Plan Sediment Characterization Report* (Corps Jan. 2006), available at http://www.nwp.usace.army.mil/ec/docs/Reports/Willamette/willamette_DMMP_06.pdf (last visited Apr. 29, 2010). Consequently, it is not contamination of sediments that prevents disposal at an unconfined open-water disposal site, but the fact that there is no available open-water disposal site.
- The principle reason for any increased costs of sediment disposal is the lack of any current in-water disposal location. An open water flow lane for disposal had existed in the Columbia River but was closed by Multnomah County more than a decade ago, and no other in-water disposal location has been proposed. Thus increased costs of disposal, if any, would not be caused by contamination of sediments, but by the lack of an in-water disposal location. As outlined below, the record documents that, if sediments had been dredged from the Site, the vast majority would have qualified for in-water disposal.
- Bioassay results from the DMMP Sediment Characterization Report documented that, with the exception of one localized area in the Site, the sediments within the federal navigation channel did not contain contaminant levels that would cause unacceptable toxicological impacts, and therefore they would be eligible for in-water disposal. For this reason, the rationale used in the Hudson River NRDA navigational use claim (increased cost due to required upland disposal) is entirely inapplicable at the Site, as upland disposal of the Site's sediments would have been required even in the absence of any contamination.
- In addition, while the majority of the pollutants detected in the tissue of the benthic organisms used for the DMMP Sediment Characterization Report were generally bioaccumulating at greater tissue burdens than the tissue concentrations of the reference samples, all of the tissue residue results were well below the applicable toxicity threshold levels developed to determine the suitability of the test sediment for open water disposal.
- Increased operational costs to private businesses in the shipping industry, as described in the Addendum, are not recoverable by the Trustee Council as natural resource damages under CERCLA. Moreover, the assertion in the Addendum that shippers must wait for

appropriate tides to time transit in and out of the Site is a commonplace industry practice and is not a detriment to operations associated with lack of maintenance dredging.

- The State does not provide data to support the claim in the Addendum of “public revenue” loss. The State presents no quantifiable method to determine diverted ship traffic, overall behavioral shifts in private shippers, the cause(s) of the claimed changes in business practices or the mechanism by which these alleged changes resulted in loss of public revenue. Contrary to the Port’s claim that it has incurred loss of navigational services, the Site continues to be an active harbor for the import and export of goods.
- Asserting that lack of dredging is injurious to natural resources is counterintuitive, and in fact would result in a double recovery of damages. A long history of dredging of the lower Willamette and Columbia Rivers has eradicated the majority of the ecologically rich shallow-water habitat, significantly altering the natural ecosystem and causing destruction of benthic organisms and habitat necessary for juvenile salmon and other biological resources to thrive.
- In addition to the direct destruction dredging has on a riverine environment, it is well-established in published literature that dredging causes indirect harm to natural resources. For example, increased deep-draft ship traffic resulting from an artificially deepened channel can impact juvenile salmon through increased entrainment in ship ballast uptake and wake stranding and avoidance requirements. Thus the alleged claim for navigational service losses is based on the Corps’s and the Port’s decision not to engage in an activity that undeniably destroys significant habitat and other natural resources. This contradiction makes it unlikely that this alleged claim will gain public acceptance.
- Historic maintenance dredging of the federal navigation channel in the lower Willamette River has occurred only between River Miles 8 and 10, because other Willamette River locations in the Site have not required maintenance dredging. As a result, even if the alleged claim for loss of navigational services were cognizable under applicable law, the Trustee Council would be unable to recover any such damages for areas outside this two-mile reach. Notably, the Port’s primary shipping terminals are located below River Mile 8, and therefore the Port could not have been injured by any forgone dredging between River Miles 8 and 10.
- Finally, even if the Trustee Council could overcome all of these hurdles and identify a compensable injury, the process for quantifying that injury would be so complex and so disparate from the remainder of the NRDA that it is unlikely such a claim would yield a positive net present value; i.e., it likely would cost more in time and money to substantiate than the claim would be worth. Moreover, the Trustee Council has much at risk; when “an assessment determines that there is, in fact, no injury, the natural resource trustee may not recover assessment costs.” 43 C.F.R. § 11.15(c).

In light of the questionable legal and factual bases for the proposal in the Addendum, we respectfully request that the Trustee Council withdraw the Addendum. Thank you for the opportunity to submit these comments.

Sincerely,

ACF INDUSTRIES LLC


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**BAE SYSTEMS SAN DIEGO SHIP
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CONSOLIDATED METCO, INC.


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**SHAVER TRANSPORTATION
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Jennifer Hughes

From: Erin Madden [erin.madden@gmail.com]
Sent: Monday, May 03, 2010 11:29 AM
To: Jennifer Hughes
Subject: Fwd: Comments on Navigational Services Injury Assessment - Portland Harbor

one more

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Begin forwarded message:

From: "Max Miller" <max.miller@tonkon.com>
Date: May 3, 2010 11:28:39 AM PDT
To: "Erin Madden" <erin.madden@gmail.com>
Subject: Re: Comments on Navigational Services Injury Assessment - Portland Harbor

Erin

Gunderson LLC has reviewed the letter sent by Loren Dunn on behalf of PGE regarding the proposed Navigational Services Injury Assessment and concurs with the views expressed in that letter.

Max M. Miller, Jr.
Chair, Environmental/Natural Resources Practice Group,
Co-chair, Sustainability Practice Group,
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April 30, 2010

VIA E-MAIL TO:
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Cascadia Law P.C.
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Portland, OR 97202

Re: Comment on Draft Addendum to Natural Resource Damage Assessment

Dear Erin:

This letter is submitted on behalf of my client, NW Natural, as a comment to the Draft Addendum to the Natural Resource Damage Assessment Plan prepared by the Portland Harbor Natural Resource Trustees. NW Natural opposes the proposal in the Draft Addendum for the reasons set forth in Portland General Electric Company's April 29, 2010 letter to you on this issue.

NW Natural concurs with PGE's comment that a federally operated and maintained navigational waterway cannot constitute a "natural resource," as that term is defined by statute.¹ Further, NW Natural believes that the Trustees' claim for navigational services loss does not constitute an "injury" compensable by natural resource damages pursuant to the regulations governing natural resource damage assessments.²

Please contact me if you have any inquiries about this comment, or if you require further information.

Sincerely,

Patricia Dost

¹ 42 U.S.C. § 9601(16). The term "natural resources," for purposes of a natural resource damage assessment, is similarly defined by regulation at 43 C.F.R. § 11.14(z).

² See 43 C.F.R. § 11.62(b)(1).



RIDDELL WILLIAMS P.S.

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April 29, 2010

VIA U.S. MAIL AND ELECTRONIC MAIL

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Re: **Comments on Navigational Services Injury Assessment**

Dear Erin:

This letter is in response to the Portland Harbor Natural Resource Trustees' request for comments on their Draft Addendum to the Natural Resource Damage Assessment Plan. We are forwarding these comments to you on behalf of Portland General Electric Company (PGE).

In short, PGE urges that the Trustees refrain from performing the work identified in the Draft Addendum. PGE supports the preservation and enhancement of Portland Harbor as a working harbor and waterway. But, PGE does not agree that "navigational services" are a natural resource for which the Trustees have a claim under CERCLA.

The Trustees have identified two ways in which "navigational services" have been impaired. In neither instance is there a basis for a claim of natural resource damages under CERCLA or state law.

1. Ability to Navigate.

a. A Federally Created and Maintained Navigational Waterway is not a "Natural Resource".

Commercial navigational services in the Lower Willamette are an artifact of human activity. As the Trustees have indicated, navigation of this type depends on continuous Federal dredging to keep the river open. Federally operated and maintained navigational waterways are not within the scope of the definition of "Natural Resources"

under CERCLA, any more than are highways, airports, or other avenues of interstate commerce.

The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources....

42 USC 9601 (16) (emphasis added). A navigational waterway is not in the category of "other such resources".

b. The PRPs Are Not Liable for a Corps of Engineers Policy Decision.

The Addendum indicates that the Trustees are considering assessing "losses" claimed to have accrued since 1997 when the Corps of Engineers suspended its dredging activities in the Harbor.

PGE understands that the Corps ceased regular dredging activity in the Harbor because of a Federal policy decision by the Corps. The Corps may have decided to suspend dredging because it did not wish to accept any risk of liability for handling contaminated sediments from the Harbor. Or, it may have declined to meet its obligation to maintain the navigational channel because of expected additional costs of dredging and disposal of contaminated materials.

In either instance, however, the intervening cause of any reduction in navigation was the Corps' discretionary policy decision to avoid its maintenance dredging obligations, and not the presence of contamination in the sediments. The Corps could have, at any time, decided to proceed with its regular maintenance of the navigational channel. Whatever the reason for the Corps' decision, the Trustees are not authorized to recover for economic losses resulting from a policy decision of a branch of the Federal government.

Similarly, the Port or the State of Oregon could have decided to step in and conduct maintenance dredging when the Corps ceased its activities. Nothing prohibited either party from doing so. And, if the Port or the State had any concern about lost shipping commerce, either could have stepped up and performed the dredging, mitigating any losses.

It may well have been the case that the Port, the State, and / or the Corps would have incurred additional costs for dredging and / or disposal had they continued regular dredging. However, there is a remedy for such additional costs. Those costs would have been recoverable as response costs under CERCLA section 9607, assuming that they met the required criteria for consistency with the National Contingency Plan.

2. Increased Dredging Costs.

The Trustees are also apparently intending to assess damages for a broad category of activities associated with dredging, including costs of site characterization, monitoring,

and dredging activities. Again, these costs are not damages to natural resources. They may be response costs that could be recovered as part of site remediation, depending on who incurs them, and how they are incurred. But, such costs should be recovered by the parties who conduct the remedial action. The Trustees do not have claims for such costs.

3. Precedent for Handling Navigational Issues.

The Trustees proposal to assess damages for navigational injuries is substantially at variance with how EPA and Federal resource trustees have handled navigational issues at other sites in the northwest. We would point specifically to the Foss Waterway remedy, in Commencement Bay, as an important contrary example. At the Foss, the Corps ceased maintenance dredging in the late 1970s. The Corps' stated reason was concern over adverse water quality impacts that would potentially occur if dredging was undertaken. The Corps did not prohibit others from performing such dredging. But, no parties came forward to fill the void - - not the City, not the State, not the Port.

At the City of Tacoma's request, however, the Federal navigational channel depth requirements were identified as an Applicable, Relevant, and Appropriate Requirement (ARAR) for the site. As a result, the site remedy was required to conform to Federal navigational depths throughout most of the waterway, so as to provide for continued navigation. Only one part of the remedy allowed a variation from navigational depths. And, in that instance, an act of Congress was required to approve the remedy.

The result of applying the navigational depth ARAR was a significant increase in the costs of the Foss remedy. In many areas of the waterway, where simple capping could have been a very viable remedy, the PRPs were required to dredge instead. This activity, and the extra costs associated with it, however, was properly treated as part of the remedial action. It was not a natural resource damage, and the Trustees, who are now in the process of settling their claims on the Foss waterway, did not make any claim for navigational injury.

The remedy for the Portland Harbor site has not yet been proposed, let alone selected. PGE recommends that, if the Trustees have concerns about navigational issues, the proper way to deal with those concerns would be to focus on ensuring the suitability of the proposed remedy. Pursuing a damages claim would not.

Conclusion.

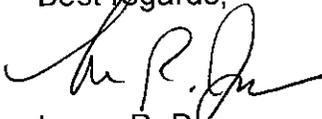
PGE does not believe that there is any evidence of lost "navigational services". Even if there have been lost navigational services, those losses have resulted from policy / economic decisions by the Corps, the State of Oregon, and the Port. Those losses are not the result of damages to natural resources. To the extent that the State and / or the Port wish to ensure that navigational depths are preserved as part of the remedy, their

Erin Madden, Esq.
April 29, 2010
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proper avenue for relief is through EPA's remedial action process, and not through a damages claim under CERCLA or state law.

Please let us know if you have any questions about these comments, or if we may be of further assistance.

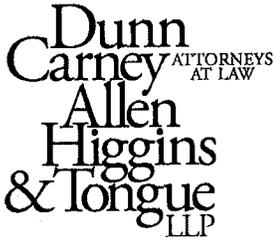
Best regards,



Loren R. Dunn
of

RIDDELL WILLIAMS P.S.
Counsel to Portland General Electric Company

cc: Richard George
Arya Behbehani
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April 30, 2010

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Erin Madden
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Re: Comments re Draft Addendum to NRD Assessment Plan dated
April 1, 2010
Our File No. POR 51-7

Dear Erin:

This letter is a response to the Natural Resource Trustee Council’s request for comments on the Draft Addendum to the Portland harbor Superfund Site Natural Resource Damage Assessment Plan. On behalf of my client, Portland Terminal Railroad Company (PTRR), I concur with the comments submitted by Loren Dunn on behalf of Portland General Electric Company (PGE). In short, PTRR does not believe there is evidence of lost “navigational services.” Even if such losses exist, they are not the result of damages to natural resources. Further, the appropriate avenue for relief, if any, related to ensuring the preservation of navigational depths is through EPA’s remedial action process.

PTRR appreciates the opportunity to provide comments and the Trustee Council’s consideration thereof.

Sincerely yours,

Kate L. Moore

KLM:
Cc: Elizabeth Howard
Russell Hullihan

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April 30, 2010

Via Email and U.S. Mail

Erin Madden
Cascadia Law P.C.
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**Re: Comments on the Draft Addendum to the Portland Harbor
Superfund Site Natural Resource Damage Assessment Plan**

Dear Ms. Madden:

I write on behalf of Schnitzer Steel Industries, Inc. and Schnitzer Investment Corp. (collectively, "Schnitzer") regarding the Draft Addendum to the Natural Resource Damage Assessment Plan ("Draft NRDA Addendum") prepared for the Portland Harbor Natural Resource Trustee Council ("Trustee Council"), which proposes to add navigational services to the Trustee Council's NRDA. Schnitzer opposes the proposal in the Draft NRDA Addendum for the reasons discussed below.

The proposal to expand the NRDA to assess alleged industrial and commercial navigational losses would require a substantial effort and mark a dramatic departure from the intended purpose of the NRDA process. If adopted, this proposal originally requested by the Port of Portland ("Port"), a potentially responsible party at Portland Harbor, would shift the focus from potential impacts to the Willamette River, sediments, native fish, wildlife and Tribal uses and divert resources toward the goal of increasing industrial activity by some of the very same sources alleged to have damaged Portland Harbor's natural resources. While Schnitzer supports efforts to maintain Portland Harbor as a working, commercial harbor, the NRDA process is not the appropriate mechanism for the Port to fund its dredging operation to remove naturally-accumulated sediments or to seek compensation for its shipping industry constituents at the expense of other operators.

The proposal in the Draft NRDA Addendum also raises significant legal questions. As discussed at the April 23, 2010 meeting hosted by the Trustee Council, it does not appear that any court has ever awarded natural resource damages under the Comprehensive, Environmental Response, Compensation and Liability Act ("CERCLA") for navigational losses. The only case identified to date allowing damages for navigational impacts is an unpublished 1996 decision from New York, which is not a CERCLA case and is distinguishable on several key grounds as discussed below. Even if lost revenues and increased operational expenses for industrial and commercial navigation were "natural resources damages" compensable under CERCLA,

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the Trustee Council does not include any agency with trusteeship over these services. At the April 23rd meeting, the Port and State of Oregon therefore advanced an attenuated argument that the Oregon Department of Fish & Wildlife, as a member of the Trustee Council, is authorized to seek damages and restoration projects on behalf of the Port and its customers and constituents. As discussed below, this assertion is at odds with the language and purpose of CERCLA's natural resource damage provisions and would be subject to challenge in federal court.

The Port's proposal to use the Trustee Council's NRDA as a test case for transforming CERCLA into a vehicle for funding industrial operations virtually guarantees that the NRDA process will be mired in legal disputes over a myriad of novel legal questions. Schnitzer therefore opposes the proposal described in the Draft NRDA Addendum and requests that the Trustee Council reject this proposed expansion of the NRDA.

I. THE PROPOSAL TO EXPAND THE NRDA TO ASSESS AND FACILITATE INDUSTRIAL AND COMMERCIAL NAVIGATION RAISES SIGNIFICANT LEGAL QUESTIONS

The Draft NRDA Addendum proposes to expand the NRDA to include "navigational service loss," which is described as potential lost revenue and increased operational costs resulting from an interference with industrial and commercial navigation. These alleged impacts, however, are not appropriate for inclusion in an NRDA and not recoverable either as "natural resource damages" or "lost uses" of a natural resource under CERCLA.

A. The Purported Impacts to Industrial and Commercial Navigation Are Not Natural Resource Damages

Claims for natural resource damages arise under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a). This provision imposes liability on certain categories of parties for "damages for injury to, destruction of, or loss of natural resources..." 42 U.S.C. § 9607(a). CERCLA defines "natural resources" as follows:

The term "natural resources" means land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States... 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.

42 U.S.C. § 9601(16).

Such claims for natural resource damage cannot be pursued by members of the public generally, but only by federal or State agencies or Tribes that own, manage, control or otherwise have trusteeship over the natural resource at issue. *See* 42 U.S.C. § 9607(f)(1). Sums recovered by the United States or a State under these provisions “can be used only to restore, replace or acquire the equivalent of such natural resources” by the United States or State, respectively. *Id.*

The navigational services described in the Draft NRDA Addendum do not fall within CERCLA’s definition of natural resources. In fact, these services are not *natural* but instead constitute industrial and commercial activities. As the Draft NRDA Addendum makes clear, the purported harms to be assessed include “damages from restricted navigational access by deep draft vessels to Port and Portland and private marine terminals, increased operational costs as shippers change their operation,” and potential increased costs for dredging the navigational channel. Draft NRDA Addendum, pp. 2-3. The Draft NRDA Addendum acknowledges that these navigational services are “commercial” activities, describing the significance of these operations for the “export of grains, minerals, and fertilizers” and the “import of automobiles and other freight. *Id.*, p. 1. Accordingly, these alleged impacts cannot be assessed as direct damages to natural resources. *See* 42 U.S.C. §§ 9601(16) and 9607(f)(1).

B. The Purported Impacts to Industrial and Commercial Navigation Are Not Compensable as a Lost Use of a Natural Resource

Based on the discussion at the April 23rd meeting, it appears that the Port is proposing that navigational impacts be assessed as a “lost use” of a natural resource. Under federal law, lost uses are compensable only if: (1) the use at issue was the use of a natural resource; (2) the loss “resulted from” a release or threatened release of hazardous substances; (3) the use qualifies as a “committed use;” (4) the claim is pursued by a designated entity with trusteeship over the resources and services at issue; and (5) the sums recovered are used only to restore, replace or acquire equivalent natural resources. *See* 42 U.S.C. § 9607(a) 9607(f)(1) and (2); and 43 C.F.R. §§ 11.14(h) and 11.84(b). The proposal outlined in the Draft NRDA Addendum does not meet these criteria.

1. Industrial and Commercial Navigation of the Federal Navigation Channel Does Not Constitute a Use of a Natural Resource

During the April 23rd meeting, the Port and State asserted that the natural resource at issue for the loss of navigational services is the surface water of the Willamette River. However, the surface water has not been lost as a result of

any release, nor is there any indication in the Draft NRD Addendum that the presence of any substance in the water itself is impeding navigation.

Rather, the Draft NRDA Addendum acknowledges that navigation has actually been impeded by the *natural* accumulation of sediment in the federal navigation channel due to the interruption of the Port's industrial dredging operation. Draft NRDA Addendum, p. 2 (“[d]ue to natural sedimentation, the federally-approved navigation channel... requires periodic dredging to make the channel deep enough to accommodate commercial shipping vessels,” emphasis added). Accordingly, the actual cause of any navigation losses is the recent *restoration* of natural sediment accumulation patterns.

The dredged portions of the federal navigation channel, however, are not a natural resource. The channel exists due to the dredging operation that *alters* the natural accumulation of sediments to facilitate industrial and commercial activity. While the sediments may be a natural resource, the Port does not use those sediments but rather dredges them out of their natural location to make way for deep-draft vessels. Since the only navigation that is impeded is that which is unable to function under a natural sediment accumulation pattern, the actual “lost use” at issue is not the lost use of natural surface water or sediments, but lost use of the a man-made feature -- the dredged portions of the federal navigation channel. Such lost uses of a man-made feature cannot support a claim under CERCLA. *See* 42 U.S.C. § 9607(a).

2. The Purported Impacts to Industrial and Commercial Navigation Are Too Attenuated From Any Natural Resource Damage

Even if the movement of deep-draft ships in the dredged portions of the federal navigation channel constituted a use of a natural resource, the purported chain of causation is too attenuated to support a claim for natural resource damages.

The alleged chain of causation described in the Draft NRDA Addendum and at the April 23rd meeting is attenuated at best with multiple intervening causes: first, hazardous substances were released to the sediments; second, the U.S. Environmental Protection Agency (“EPA”) designated Portland Harbor a federal Superfund site; third, this designation purportedly posed complications for the dredging program; fourth, the U.S. Army Corps of Engineers decided to suspend the dredging program; fifth, without the Port's industrial dredging operation, sediments continued to accumulate naturally in dredged portions of the federal navigation channel; sixth, this restoration of natural sediment accumulation allegedly increased costs for industrial and commercial shippers and may create future costs for the Port.

Even if each step in this chain can be proven, the degree of attenuation significantly undermines the validity of the claim. *See Montauk Oil Transportation Corp. v. Steamship Mutual Underwriting Assoc.*, 1996 WL 340000 (S.D.N.Y. 1996) (claims for loss of navigational services require a causal link between the release of hazardous substances and harm to the surface waters); *see also* 43 C.F.R. § 11.62 (specifies when an injury to surface water resources occurs). This attenuated causation theory would also lead to the perverse result under which CERCLA could be used to help fund industrial dredging to prevent the restoration of natural sediment accumulation to make way for shipping companies to increase their operations that allegedly contributed to the sediment impacts at issue.

3. No Court Has Ever Held that Industrial and Commercial Navigation Services Constitute “Committed Uses” Under CERCLA and Related Regulations

For a lost use of a natural resource to be compensable under CERCLA, it must also constitute a “committed use” under federal regulations. *See* 43. C.F.R. §§ 11.14(h) and 11.84(b). A committed use is defined as a “current public use; or planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the . . . release of a hazardous substance is detected.” *See* 43. C.F.R. §§ 11.14(h) and 11.84(b). Public uses previously found to constitute a “committed use” include Tribal uses, recreational boating, fishing, swimming and nature studying. *See, e.g., Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994); *National Ass'n of Mfrs. v. United States DOI*, 134 F.3d 1095 (D.C. Cir. 1998); *GE v. United States*, 128 F.3d 767 (D.C. Cir. 1997). As noted above, it does not appear that any court has held that industrial or commercial navigation primarily by private, for-profit companies qualifies as a “public use” of a waterway compensable under CERCLA.¹ Accordingly, it may be necessary for the Trustee Council to attempt to make new law if it decides to expand its NRDA to assess and facilitate industrial and commercial navigation at Portland Harbor.

¹ While one court held that navigational impacts may support a claim under the Clean Water Act (“CWA”) under certain circumstances, that case is distinguishable on numerous grounds and does not support the proposal at issue here as discussed in Part I.C below.

4. **No Trustee Has Trusteeship Over Industrial or Commercial Navigation in the Federal Navigation Channel**

As noted above, claims for natural resource damages can be asserted only by federal or State agencies or Tribes that own, manage, control or otherwise have trusteeship over the natural resource at issue. *See* 42 U.S.C. § 9607(f)(1). The public entities that may be deemed to have control and management over industrial and commercial navigation in the federal navigation channel are the U.S. Army Corps of Engineers and the Port of Portland as its local sponsor. Neither of these entities are members of the Trustee Council.

At the April 23rd meeting, the Port and State therefore offered an attenuated argument under which the Oregon Department of Fish and Wildlife will purport to act on behalf of the Port to seek damages and restoration projects for the Port and its industrial customers and constituents in the shipping industry. Under this theory, the State apparently intends to argue that the Oregon Department of Fish and Wildlife is *not* actually a Trustee. Rather, the entire State of Oregon, including all its departments and agencies, are jointly acting as a Trustee.² They then argue that the State, as a whole, can act on behalf of the Port in its role on the Trustee Council based on the theory that the Port is actually an “instrumentality of the State.”

This theory is far fetched. First, the only State agency designated to act as a Trustee is the Oregon Department of Fish and Wildlife. *See* June 2001 Memorandum of Understanding for the Portland Harbor Superfund Site (executed by Lindsay A. Ball, Director Oregon Department of Fish and Wildlife). It therefore appears that the State intends to rely on its hybrid interpretation of a “unitary executive” theory to argue that any act by any department of the State is an act by the State as a whole. This position, however, conflicts with, and is pre-empted by, the plain language of Section 107(f) of CERLCA, which requires that “[t]he Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources.” 42 U.S.C. § 107(f)(2)(B). Having designated the Oregon Department of Fish and Wildlife, it is unclear how the State can now argue that all of its departments and agencies are jointly serving on the Trustee Council. Moreover, given the widespread implications of a potential decision rejecting the State’s interpretation of the “unitary executive” theory, it is unclear why the State would chose to use the Trustee Council’s NRDA as a test case for this complex legal issue.

² The State agencies that purportedly serve in this “shadow Trustee” role apparently include the Oregon Department of States Lands, itself a potentially responsible party at Portland Harbor.

For their proposal to prevail, the Port and State would also need to prove their assertion that the Port is “an instrumentality of the State” such that the State can stand in the shoes of the Port on the Trustee Council. Since the Port is a distinct entity governed by its own Commission, it appears that the Port and State intend to argue that the State has delegated certain authority to the Port and that the Port is therefore acting “on behalf of the State” when it performs certain functions at Portland Harbor. This is a strange argument for the State to make, particularly given the scope of the Port’s liability for its actions at Portland Harbor.³ Moreover, the mere fact that the Port may operate under authority delegated by the State cannot support a claim that the State can act for the Port on the Trustee Council. *See* 42 U.S.C. § 107(f)(2)(B).⁴

5. The Sums Sought Under the Draft NRDA Addendum Would Not be Used to Restore, Replace or Acquire an Equivalent Natural Resource

Any natural resource damages recovered by the United States or a State under CERCLA “can be used only to restore, replace or acquire the equivalent of such natural resources” by the United States or State, respectively. *See* 42 U.S.C. § 9607(f)(1). The damages sought in the Draft NRDA Addendum would not meet this statutory criteria.

As noted above, the Draft NRDA Addendum proposes to redress alleged navigational impacts by seeking damages for “decreased access to Portland Harbor” by private shippers and “incremental costs for planning and implementing dredging and dredge material disposal.” *See* Draft NRDA Addendum, p. 3. During the April 23rd meeting, the Port and State explained that a significant portion of the money recovered if this proposal is implemented would be given to the Port to help fund its industrial dredging operation to remove naturally-accumulated sediment from the federal navigation channel.

³ It is unclear if the State actually intends to pursue this argument to its conclusion by sharing jointly and severally in the costs and liability that will be assigned to the Port in connection with the CERCLA investigation, remediation and restoration projects at Portland Harbor.

⁴ The Port and State also stated at the April 23rd meeting that the Port will be retained by the State as a consultant in connection with the assessment of the purported navigational harm. Under this plan, two potentially responsible parties, one of which has no role on the Trustee Council, propose to assess purported impacts to the Port’s own operations to shift those costs onto other parties. It would not be proper or appropriate, however, for the Trustee Council to cede this authority by allowing a non-trustee potentially responsible party to assess alleged impacts to its own economic interests.

Accordingly, rather than funding the restoration of a natural resource, it appears that any sums recovered under this proposal would be devoted to redressing alleged lost revenue and increased costs of shipping companies and funding future dredging and removal of sediments to facilitate industrial and commercial operations. This proposed use of funds would violate CERCLA's express statutory language. *See* 42 U.S.C. § 9607(f)(1).

C. The Only Case Identified to Date as Allowing Recovery of Navigational Harms Is Distinguishable and Does Not Support the Proposal in the Draft NRDA Addendum

The only case identified to date allowing claims for lost use based on navigational harms is an unpublished decision from New York deemed not appropriate for publication entitled *Montauk Oil Transportation Corp. v. Steamship Mutual Underwriting Assoc.*, 1996 WL 340000 (S.D.N.Y. 1996) ("*Montauk*"). As discussed below, the *Montauk* case is distinguishable on several grounds and does not support the proposal in the Draft NRDA Addendum.

In *Montauk*, a barge operator spilled over 100,000 gallons of heating oil into a waterway, causing the Coast Guard to close the waterway for nine days to remove the oil from the surface of the water. The United States sued the operator under the CWA for damages, including lost use of the waterway during the nine-day period that it was removing the oil. In assessing the claim, the court noted that it was filed under the CWA, which was enacted for the "purpose of restoring, and maintaining the integrity of the Nation's navigable waters" among other goals. *Id.*, p. 2. The court also found that the spill constituted a "measurable, adverse change in [the waterway's] chemical or physical quality, or its viability" under CWA regulations. *Id.*, pp. 3-4. While the court noted that the United States can sue "*only* to restore or rehabilitate natural resources or to acquire equivalent natural resources," it concluded that the nine-day closure was necessary for the United States' cleanup effort such that it could be considered a "cost or expense incurred by the Federal Government" in restoring the natural resource. *Id.*, pp. 1-2 (emphasis in original). The court clarified, however, that the claim was limited to "damages based on the lost use of the surface waters... for the nine days that it was closed by the Coast Guard" during its restoration and cleanup effort. *Id.*, p. 3.

Even if a future court were able to consider this unpublished decision, the holding does not support the proposal in the Draft NRDA Addendum for several reasons:

First, unlike the CWA claim in *Montauk*, any claims here would be based on CERCLA, which was not enacted to facilitate navigation but to "facilitate the prompt cleanup of hazardous waste sites." *Washington State Department of Transp. v. Washington Natural Gas Co.*, 51 F.3d 1489 (9th Cir. 1995).

Second, the court in *Montauk* expressly noted that the use at issue was a use of the surface water itself, which constitutes a natural resource. *Montauk*, pp. 1-2. Here, there is no allegation that contaminants in the surface water are impeding navigation. Rather, the use at issue is the use of the dredged portions of the federal navigation channel, which are man-made features that do *not* constitute a natural resource, as discussed above.

Third, the court in *Montauk* premised its holding in part on its finding that the nine-day closure of the waterway was necessary for the Coast Guard to restore the natural resource and clean up the oil, which allowed the court to reach the creative conclusion that these losses constituted a “cost or expense incurred by the Federal Government” in restoring the natural resource. *Id.*, pp. 1-2. Here, there is basis for arguing that any lost navigational uses described in the Draft NRDA Addendum were necessitated by a U.S. Government restoration project.

Fourth, in *Montauk*, the work at issue was the Coast Guard’s efforts to clean up the oil to restore the water quality of the surface water. Here, the Port’s dredging operation is not a restoration project at all, but rather work intended to *alter* natural sediment patterns by removing naturally-accumulated sediments to facilitate industrial and commercial activities.

Fifth, since the claim in *Montauk* was filed under the CWA, there is no indication that any party challenged the United States’ “trusteeship” over the surface water at issue. Here, no member of the Trustee Council has trusteeship over navigation in the federal navigation channel as noted above.

Sixth, while the costs of the nine-day closure in *Montauk* could be construed as ancillary to the Coast Guard’s cleanup work, the alleged lost navigational uses here are undefined as to time and scope and threaten to expand the NRDA process dramatically as discussed below.

Accordingly, if the Trustee Council decides to proceed with the proposal described in the Draft NRDA Addendum, it will find little, if any, support in any existing case law and will be required to make new law for this proposal to survive a legal challenge.

II. EXPANDING THE NRDA TO FACILITATE INDUSTRIAL AND COMMERCIAL NAVIGATION WILL UNDULY INCREASE THE SCOPE OF THE PROJECT AND SHIFT THE FOCUS FROM RESTORING NATURAL RESOURCES TO INCREASING INDUSTRIAL ACTIVITIES BY SELECT OPERATORS

The proposal outlined in the Draft NRDA Addendum would constitute a substantial undertaking that would shift the focus of the Trustee Council’s

NRDA. Despite the slim size of the four-page Draft NRDA Addendum, the proposed work could quickly eat into the Trustee Council's resources and obscure the NRDA effort as controversies erupt regarding the legal, political, economic and public policy questions involved.

The potential scope of the Draft NRDA Addendum is staggering.⁵ The alleged costs and damages to be assessed would include both decreased access to Portland Harbor and the incremental increase in the Port's industrial dredging operation. *See* Draft NRDA Addendum, p. 3. While the proposal does not describe any methodology for resolving the complex issues presented, it identifies broad categories to be assessed including: (i) "[d]amages from restricted navigational access;" (ii) "associated loss of public revenue;" (iii) "[i]ncreased operational costs as shippers change their operation;" (iv) "vessels waiting for tidal windows;" (v) "vessels undertaking lightering operations at the mouth of the Willamette River;" (vi) increased costs of characterizing sediments in proposed dredged areas;" (vii) "increased dredging costs due to the need for different dredging and sediment handling methods," etc.; (viii) "increased costs for expanded post-dredge monitoring; and (ix) "increased dredge material disposal costs" of various types. *See Id.*, pp. 2-3.

The economic implications of this proposed assessment could be far-reaching, directly affecting the economic and political interests of a multitude of private industries, trade groups and political factions. Given the money at issue, it is unrealistic to assume that the inevitable fight over the scope, methodology, criteria, performance and results of this work will be quick or easy. The Port may wish to believe that it can focus the inquiry on its own alleged costs thereby capturing most of the benefits and cash for itself. However, once the Trustee Council starts down the road of assessing and facilitating the industrial development of Portland Harbor, it necessarily will place itself at the center of these economic, legal and political battles, taking the role of arbiter over competing economic interests.

If the Trustee Council pursues this approach, it may be beset with proposals and claims from companies and factions competing for reimbursement or "restoration projects" to advance their economic interests in their industrial and commercial uses of Portland Harbor. Certainly, Schnitzer would feel compelled to seek redress or restoration projects to address the lost navigational use of certain of its berths at its metal recycling facility at International Terminals. Any effort by the Port to take all of the benefits of

⁵ As noted at page 1 of the Draft NRDA Addendum, the annual value of international deep-draft shipping alone at Portland Harbor is nearly \$17 billion.

Erin Madden
April 30, 2010
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this project for itself would be vigorously opposed at every level, including the U.S. District Court for the District of Oregon.

The Trustee Council should not allow the Port, itself a potentially responsible party for contamination at Portland Harbor, to hijack the NRDA process to advance its own economic interests and those of its customers and constituents at the expense of other operators and the legitimate goals of the NRDA process.

* * * * *

For the foregoing reasons, Schnitzer opposes the proposal set forth in the Draft NRDA Addendum and requests that the Trustee Council not incorporate these provisions into the NRDA. We look forward to the Trustee Council's response to these comments. In the meantime, please contact me if you wish to discuss these issues further.

Sincerely,



Greg A. Christianson

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April 30, 2010

Ms. Erin Madden, Chair
Portland Harbor Natural Resource Trustee Council
2716 Southeast 23rd Avenue
Portland, Oregon 97202-1275

Re: Draft Addendum to Natural Resource Damage Assessment Plan
Our File 023.1899

Dear Erin:

We have reviewed the Portland Harbor Natural Resource Trustee Council's (the Trustees) Portland Harbor Superfund Site Natural Resource Damage Assessment Plan – Draft Addendum (NRDA Plan Addendum), and herein present a number of comments on behalf of Siltronic Corporation. I have enclosed a letter presenting a set of technical comments prepared by our consultant, Mr. Greg Challenger of Polaris Applied Sciences. In addition, I offer the following observations.

The NRDA Plan Addendum outlines the basis for a prospective damages claim for navigational service loss resulting from the suspension in 1997 of dredging of sediment to maintain the navigation channel in the lower reaches of the Willamette River. In explaining the basis for such a claim, the NRDA Plan Addendum explains:

“The State is responsible for management of surface water resources, including navigational services under multiple statutes and State Agencies. The U.S. Army Corps of Engineers (Corps) directs maintenance of the navigation channel, and the State, through the Port of Portland, conducts ongoing maintenance and provides upland disposal for dredge materials.”

While it appears that this quoted statement attempts to identify the interests to be protected, the identity of the Trustee(s) who might be making such a claim remains unclear. This issue was

discussed during the meeting held by the Trustees on April 23, 2010, however, we believe a more explicit answer should be presented in writing.

During the April 23rd meeting, several parties questioned whether there is legal precedent for such a navigational service loss claim. Katherine Pease, NOAA's general counsel, identified one U.S. District Court case that upheld the validity of such a claim under the Clean Water Act, and later graciously forwarded a copy of that decision. We note in reviewing that case, *Montauk Oil Transportation Corp. v. The Steamship Mutual Underwriting Association*, 1996 WL 340000 (SDNY), that it is an unreported case and of limited precedential value. Moreover, the facts presented in that opinion clearly distinguish it from the novel theory presented in the NRDA Plan Addendum. The complete inability to utilize a channel for shipping pending cleanup of an oil slick is markedly different than the putative navigational impact associated with lack of dredging within an industrial harbor that has remained active throughout the Superfund response. The NRDA Plan Addendum postulates that damages *could* include "loss of revenue when shipping entities chose to use other ports" and "increased operational costs as shippers change their operation to accommodate reduced draft, maneuverability, etc.," but fails to explain how causation for such damages might be demonstrated or damages quantified. The first item would require investigation and differentiation among multiple reasons for reduced shipping in the Portland Harbor, and the latter would not seem to have caused any loss of public revenue.

We are also concerned that the very entities identified as being responsible for management of surface water resources, and presumably Trustees of those resources, are themselves responsible for contamination on which the navigational service loss claim is grounded. There is significant historical evidence documenting the placement of dredged river sediments onto upland properties. Much of that historical placement appears to have entailed hydraulic dredging that allowed water and suspended sediment to return to the river through breaches in berms constructed along the shoreline. Aerial photographs show such plumes of re-suspended sediment extending back into the river. If riparian property owners are to be held liable for natural resource damages that include the proposed navigational loss claims, it is ironic that claims for such damages would be made by the entities responsible, at least in part, for placement of contaminated sediments onto and/or adjacent to those properties. In addition to owner or operator status, there is support for the theory that governmental entities that moved hazardous substances in the course of dredging activities, permitted others to conduct such dredging, and who deposited dredged materials where they could cause further contamination can themselves be held liable as arrangers under CERCLA Section 107. *See, e.g., United States of America v. Washington State Department of Transportation*, 665 F. Supp. 2d 1223 (WD Wa. 2009). We ask that you consider the equities implicated in bringing such a navigational claim on behalf of entities that share the liability.

Ms. Erin Madden
April 30, 2010
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Thank you for the opportunity to provide comments. We look forward to further discussing the cooperative natural resource damage assessment process with the Trustees.

Very truly yours,

A handwritten signature in black ink that reads "Alan Gladstone". The signature is written in a cursive style with a large initial "A".

Alan Gladstone

AG/gmt

Enclosure

cc/enc: Mr. Tom McCue, Siltronic Corporation

Mr. Christopher L. Reive, Jordan Schrader Ramis



12525 131st Ct. N.E. Kirkland, Washington 98034 (425) 823-4841 fax (425) 823-3805

April 29, 2010

Alan Gladstone
Davis Rothwell Earle & Xochihua
U.S. Bancorp Tower
111 SW 5th Avenue, Suite 2700
Portland, Oregon 97204

Re: Portland Harbor NRDA

Dear Alan:

We offer the following comments on the PORTLAND HARBOR SUPERFUND SITE NATURAL RESOURCE DAMAGE ASSESSMENT PLAN: *DRAFT ADDENDUM FOR PUBLIC REVIEW, Inclusion of Navigational Services in the Portland Harbor Superfund Site Natural Resource Damage Assessment* (April 1, 2010). As these comments are in response to the Portland Harbor Natural Resource Trustee Council's Draft Plan Addendum, please feel free to submit this letter to the Trustees on behalf of Siltronic Corporation.

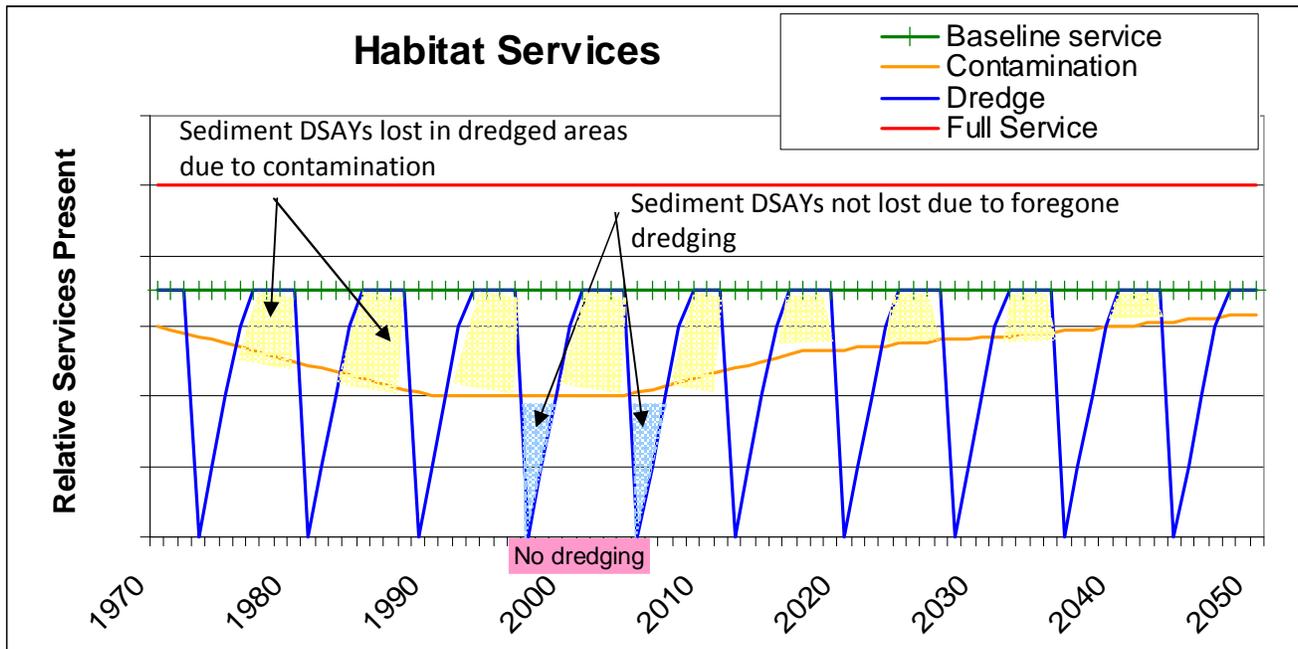
The Trustees indicated they will consider past, interim, and future service losses and damages associated with navigational activities, including dredging between 1980 and completion of cleanup/restoration/recovery and beyond. Costs due to increased contamination disposal fees are relatively straightforward. However, there is no indication how the alleged decrease in navigational services and associated damages will be determined, which may be especially challenging against the background of a global recession that has driven down shipping traffic in most ports. The plan mentions a 2009 report where safety concerns were raised by the Columbia River Pilots. We are unable to determine how safety concerns will translate to actual impediments, delays or lost services resulting in damages. Moreover, the Trustees' ability to identify and quantify navigation service losses caused by delayed dredging and accumulation of sediment, as such potential loss categories are outlined on page 2 of the Plan Addendum, must rely on speculation. Even if a dollar value could be estimated reliably, we have to wonder what is suitable restoration to make the public whole for decreased navigational services?

As discussed in the April 23, 2010 meeting with the Trustees, the navigational issues also interact with habitat claims. STRATUS discussed the different habitat baseline conditions under consideration. The past sediment habitat baseline condition for the river includes the historical condition in the absence of adverse habitat effects from physical disturbance or chemical contaminants and assumes a maximum service available. Physical impacts to the waterfront and riverbed in the absence of contaminants regulated under CERCLA is the more recent and relevant baseline for the Portland Harbor Natural Resource Damage Assessment. The question at hand for habitat service losses is: "What is the service loss differential between: (a) the river sediments with historical physical disturbance and other adverse affects outside the scope of CERCLA, and (b) the river bed with the presence of contaminants

regulated under CERCLA?” While the shoreline losses from physical disturbance and man-made structures has largely occurred prior to the NRDA investigation timeline, some instream impacts to sediment habitats from permitted physical actions remain a regular program and backdrop to the Portland Harbor NRDA. Portions of the river bed sediment habitat had continued to experience periodic physical impacts from dredging through 1997 and afterward until sediment community recovery could occur.

The measure of damages under CERCLA is in part the diminution in value of the natural resources pending recovery of the resource to baseline but-for the injury. Normal dredging would have continued to disrupt sediment habitats every few years but for the contamination. Baseline is defined as “the condition or conditions that have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.” (43 CFR Subpart A, 11.14(e)). If the contamination had not occurred, it is likely that injury to some river sediments would have been greater because they would have been periodically dredged since 1997 and removed for disposal as opposed to potentially subject to contamination.

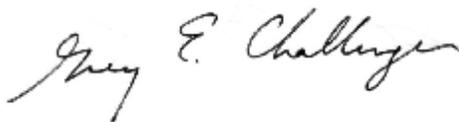
We represent the condition graphically below in a hypothetical HEA. The green line represents the CERCLA baseline level of sediment services present in undredged portions of the river. The blue line represents the regularly dredged areas of sediment that are disturbed followed by recovery. The amber line represents an overlay of a hypothetical loss of sediment services due to contamination. For historically undredged (undisturbed) portions of the river bottom, the loss of DSAYS from contamination in this example is the cumulative sum between the green and amber lines. For dredged portions of the river, the loss of DSAYS is only the area between the blue line and the amber line above the amber line. If several dredge cycles are lost due to the incident, the area below the amber line and above the blue line in the time period of no dredging would be DSAYS not lost (gained) due to the “incident” or contamination.



Regardless of whether damages for lost navigation services are pursued or can be quantified, the consideration of dredge effects as a layer in the assessment of lost DSAYs for sediment habitat services should be part of the baseline assessment. The lack of dredging as a result of the incident also means that substantial sediment DSAYs have not been lost as a result of the contamination. This could be estimated using two layers for sediment habitat types; dredged and undredged, each with corresponding service loss areas based on the chemical analytical data and service loss assumptions for ranges of contamination.

In general, the navigational service loss assessment plan addendum offers little information regarding the approach for assessment. The only records the Trustees indicate are available relate to planning and implementing dredge disposal, a portion of the potential claim. While it is possible that shippers have been delayed or have chosen to use other ports, the plan does not address determination of causation and how a loss of public revenue will be quantified.

Best regards,



Greg E. Challenger, M.S.
Principal Marine Scientist/Professional Wetland Scientist
Polaris Applied Sciences, Inc.
12525 131st Ct NE
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April 30, 2010

VIA E-MAIL TO:
erin.madden@gmail.com

Erin Madden, Esq.
Cascadia Law P.C.
2716 SE 23rd Ave.
Portland, OR 97202

Re: Comment on Draft Addendum to Natural Resource Damage Assessment

Dear Erin:

This letter is submitted on behalf of my client, TOC Holdings Co., as a comment to the Draft Addendum to the Natural Resource Damage Assessment Plan prepared by the Portland Harbor Natural Resource Trustees. TOC Holdings Co. opposes the proposal in the Draft Addendum for the reasons set forth in Portland General Electric Company's April 29, 2010 letter to you on this issue.

TOC Holdings Co. concurs with PGE's comment that a federally operated and maintained navigational waterway cannot constitute a "natural resource," as that term is defined by statute.¹ Further, TOC Holdings Co. believes that the Trustees' claim for navigational services loss does not constitute an "injury" compensable by natural resource damages pursuant to the regulations governing natural resource damage assessments.²

Please contact me if you have any inquiries about this comment, or if you require further information.

Sincerely,

Patricia Dost

¹ 42 U.S.C. § 9601(16). The term "natural resources," for purposes of a natural resource damage assessment, is similarly defined by regulation at 43 C.F.R. § 11.14(z).

² See 43 C.F.R. § 11.62(b)(1).

April 30, 2010

Erin Madden
Cascadia Law P.C.
2716 SE 23rd Ave.
Portland, OR 97202

**Re: Union Pacific Railroad Company
Comments on Navigational Services Injury Addendum**

Dear Erin:

On behalf of Union Pacific Railroad Company, we are commenting on the navigational injury addendum to the Trustee Council's Phase 2 Natural Resource Damage Assessment Plan. We largely agree with many of the comments in the letter authored by Loren Dunn. We also note that the recent case provided to us by the Trustee Council (the *Cibro Savannah* decision) involved complete inaccessibility to surface waters, which is not a problem at Portland Harbor. Additionally, the complexity of assessing navigational injury and the premature nature of some of the alleged damages suggests that including navigational injury in Phase 2 would burden the process unnecessarily. If navigational injury claims were viable, they could be addressed outside of the Phase 2 process. Finally, if the navigational injury seeks to include economic damages that have resulted from reduced navigation, we note that many private parties, including Union Pacific, may have suffered similar economic detriment.

Very truly yours,

SALTER JOYCE ZIKER, PLLC



William F. Joyce

WFJ/maz

cc: William J. Jackson

Jennifer Hughes

From: Erin Madden [erin.madden@gmail.com]
Sent: Tuesday, May 18, 2010 11:13 AM
To: Jennifer Hughes
Subject: Fwd: Navigation Claim Comments

another comment on the navigation claim. FYI

Erin Madden
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Begin forwarded message:

From: "Ashworth, John" <John.Ashworth@bullivant.com>
Date: May 18, 2010 10:59:18 AM PDT
To: "Erin Madden" <erin.madden@gmail.com>
Subject: RE: Navigation Claim Comments

Erin, BNSF generally agrees with the comments submitted which question the viability of a navigational injury claim and address the difficulties and expenses, for all concerned, of pursuing such a claim now. However, in particular we urge the trustees to consider UPRR's explicit suggestion of addressing the navigational claims "outside of the Phase 2 process."

Thanks, John.

John P. Ashworth
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 *Please consider the environment before printing this e-mail.* 

From: Jennifer Hughes [mailto:JHughes@parametrix.com]

Sent: Tuesday, May 11, 2010 1:56 PM

To: Jim McKenna; Debbie Deetz Silva; Lynne Perry; David Blount; John Houlihan; Steve Parkinson; Cynthia Betz; Karen Traeger; Rick Applegate; Stephanie Payne; Mark Lewis; Loren Dunn; Elizabeth Howard; Joan Snyder; Patty Dost; Michael Thorp; Bill Joyce; Ashworth, John; Max Miller; Kathy Lincoln; John Dugdale; Ira Gottlieb; Jan Betz; Jennifer Gates; Tod Gold; Krista Koehl; Mary Donahue; Jim Benedict; Bill Jackson; Nanci Klinger; Greg Christianson; Jim Kincaid; Arya Behbehani-Divers; diane.lloyd@doj.state.or.us

Cc: Rob Wolotira; Katherine Pease; Michael Karnosh; Robert Neely; Rick Kepler; Megan Callahan-Grant; Genevieve Angle; Tom Downey; Julie Weis; Jennifer Hughes; Ted Buerger; Brian Cunningham; Jeremy Buck; Donald Pyle; Norman Meade; Mary Baker; Matt Johnson; Kim D'Aquila; Audie Huber; Robert Taylor; Jennifer Peers; Barry Stein; JD Williams; David Allen; David Chapman; Lisa Bluelake; Erin Madden

Subject: Navigation Claim Comments

Hello,

I've attached a PDF that includes all of the comments received on the Navigation Claim addendum to the Draft Assessment Plan. The comments are in alphabetical order by company name. If you need to view the documents in another form, please contact me.

Thank you!

Jen

Parametrix

inspired people . inspired solutions . making a difference

Jennifer Hughes
Environmental and Land Use Planner
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phone: 503.416.6185
fax: 503.233.4825

mail.bullivant.com made the following annotations

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