

## RESPONSES TO COMMENTS ON DRAFT ADDENDUM TO NATURAL RESOURCE ASSESSMENT PLAN

### 1. Navigation waterway as a natural resource. [PGE<sup>1</sup>, 1.a; FMC, 1.; Schnitzer, I.A., Reed]

Several commenters indicated that the addition of navigation services to the assessment plan is inappropriate because “navigational services” are not a natural resource under CERCLA. Stated another way, commenters assert that a federally maintained “navigational waterway” or “shipping channel” is not a natural resource under CERCLA.

#### Response:

CERCLA and DOI regulations relating to injury determination and quantification and the calculation of damages provide a sound legal basis for assessing injury to navigational services in the Portland Harbor Natural Resource Damage Assessment (NRDA) process.

The DOI regulations define “injury” in part as “a measurable adverse change, either long- or short-term, in the chemical or physical quality ... of a natural resource resulting either directly or indirectly from exposure to ... a release of a hazardous substance ...” 43 C.F.R. § 11.14(v). The Willamette River in Portland Harbor and its sediments are both “natural resources.” 42 USC § 9601(16); 43 C.F.R. § 11.14(z) (“natural resources” include “land ... water ... and other such resources ...”). “Surface water resources” include “the sediments suspended in water or lying on the bank, bed or shoreline ...” 43 C.F.R. § 11.14(pp). The Willamette River has sustained measurable long-term changes in chemical quality resulting from historical releases of PCBs and other chemicals.

Once injury to a natural resource is determined, the next step is to quantification, which is done by investigating the extent to which the injury has reduced the *services* provided by the natural resource. 43 C.F.R. § 11.71(a). The damage determination phase occurs next. The measure of damages is the cost to restore or replace the injured natural resource and the *services* it provides. 43 C.F.R. § 11.80 (b). The term “services” is defined as the “physical and biological functions performed by the resource including the human uses of those functions.” 43 C.F.R. § 11.14 (nn). Clearly, navigation is a human use of functions provided by the Willamette River surface water resource.

The Trustees will assess whether the alleged injury to the surface water resource and its sediments have led to a loss or impairment of the navigational services provided by the surface water resource.

---

<sup>1</sup> PGE’s letter was supported by Evraz Oregon Steel, UPRR, Legacy Site Services for Arkema, Portland Terminal RR, and TOC Holdings.

## **2. Lost use of a man-made feature cannot be a NRD claim. [Schnitzer, I.B.1]**

The commenter suggested that the lost use to be assessed is not the lost use of natural surface water or sediments, but the lost use of a man-made feature—the dredged portions of the federal navigation channel. The commenter further suggested that such lost use of a man-made feature cannot support an NRD claim under CERCLA.

### **Response:**

The commenter reads CERCLA and the DOI regulations too narrowly. The Willamette River provides a variety of human and ecological services, including commercial and recreational navigation. These latter services are “committed uses” as defined in 43 C.F.R. § 11.14(h) and 43 C.F.R. § 11.84(b). The fact that naturally deposited sediments are periodically removed to allow the continued use of the river does not affect the injury analysis. If it is determined that the river has not been dredged periodically because of the contamination, thereby impairing navigational services, this would constitute damages under both CERCLA and the DOI regulations.

## **3. Discretion to dredge. [PGE, 1.b.; FMC 2; Reed]**

Several commenters asserted that the fact that no one has dredged the river since 1997 does not mean there has been a loss that is compensable as a natural resource damage. The commenters suggested that this is because the decision to dredge and maintain the navigation channel is a discretionary decision by the Army Corps of Engineers, State of Oregon and Port of Portland (Port). To the extent there are increased costs, the legal remedy, the commenter states, is a private cause of action, not a natural resource damage claim. Therefore, losses claimed to have accrued since 1997 when the Corps completed its last dredging cycle are not recoverable as natural resource damages.

### **Response:**

Public statements by the Army Corps of Engineers (Corps) indicate that the regular maintenance activities have not occurred due to the area’s status as a Superfund site pending the U.S. Environmental Protection Agency’s (EPA’s) cleanup decision. This provides adequate information for further evaluation by the Trustees into the specific causes for the Corps’ decision as part of the NRDA. The pertinent question is not whether the Corps, State, or Port has discretion. The question is whether, but for the presence of hazardous substances in the sediments, the Corps would have continued to maintain the navigation channel. In the meantime, it is important to note that dredging at a Superfund site is complex and costly, and the Corps must comply with national policies associated with such activities. The potential significant cost increase of managing contaminated sediments may also be a factor.

Assessing the relationship between hazardous substances and the loss of navigational services from the failure to maintain a channel is not unique to Portland Harbor. At least two other similar situations have occurred at Superfund sites on the East Coast where dredging has not occurred. At those sites, the trustees are assessing whether the injuries to surface water (contaminated sediments) have led to a loss or impairment of navigational services, both past and

future. The first example is the Diamond Alkali Superfund Site on the Passaic River in New Jersey, another federally maintained navigation channel. At that site, the Corps demonstrated a need for dredging in 1999. Problems and increased costs associated with disposal of contaminated sediments have been documented by the trustees, and a further evaluation will be conducted. As stated by the Diamond Alkali trustees:

Certain losses that result from reduced ability to maintain authorized federal shipping channels and an increase in dredging costs resulting from contamination due to problems with disposal of contaminated dredge material are compensable damages under NRDA laws and regulations. As part of this assessment, the Federal Trustees will determine whether injuries to surface water resources led to a loss or impairment of navigational services provided by the Site.

Diamond Alkali Superfund Site, Natural Resource Damage Assessment Plan at 79 (Public Review Draft, Nov. 2007) (available at [http://www.darrp.noaa.gov/northeast/passaic/pdf/PR\\_NRDA\\_Draft\\_Plan\\_11-07.pdf](http://www.darrp.noaa.gov/northeast/passaic/pdf/PR_NRDA_Draft_Plan_11-07.pdf)).

The second example is the Hudson River. Although not a federal navigation channel, the New York State Department of Transportation and New York Canal Corporation assert they would have maintained the channel but for the presence of PCBs and its associated costs for management. The report is available at: <http://www.darrp.noaa.gov/northeast/udson/admin.html>.

The fact that there may be other causes of action in addition to a natural resource damage claim is not a rationale for the Trustees to exclude it from the assessment. The Trustees have statutory authority to assess all potential injuries to natural resources that meet certain threshold criteria and to recover damages resulting from that injury. The Trustees have determined that the potential injury to surface water resources resulting in the loss and impairment of navigational services is such a claim.

#### **4. Increased Dredging Costs [PGE, 2.; FMC, 3, 4]**

Several commenters assert that increased costs of site characterization, monitoring, and dredging activities are not “damages to natural resources.” Rather, the commenters assert that these are only recoverable as response costs for parties who conduct a remedial action. One commenter also stated that these costs are duplicative of remedial action costs.

#### **Response:**

The Trustees are aware of the difference between response costs and natural resource damages and are mindful of the need to keep the two separate. The potential injuries and damages outlined in the navigational services assessment addendum that was provided for public comment are not response costs. 43 C.F.R. § 11.71 describes how the Trustees determine the extent to which natural resource services have been reduced through injury. 43 C.F.R. § 11.83, among other sections, describes how the compensable value of the services lost to the public will be determined. In this case, it appears that contamination of the sediments in the navigation

channel has interfered with necessary navigation dredging and disposal to the point that resource services may have been impaired. The assessment will determine whether this has taken place and, if so, the economic losses. These damages could then be used to offset the increased cost of dredging, allowing it to continue and that use of the resource to resume. All of these increased costs thus relate to the service loss and are not response costs. The commenter's citation to *Ohio v. Department of Interior*, 880 F.2d 432, 460 (D.C. Cir. 1989) is misplaced. The injuries and damages in question do not involve "purely private resources." As discussed elsewhere, they relate to resources under the trusteeship of the United States and the State of Oregon.

## **5. Precedent for Handling Navigational Issues [PGE, 3.]**

Several commenters suggested that the Trustees' proposal for assessing damages associated with navigation services is inconsistent with how Federal resource trustees have handled navigational issues at other sites in the northwest. Instead of handling the issue through the NRDA process, the Trustees should address the issue through the CERCLA process by identifying the navigational depth as an applicable, relevant, and appropriate requirement (ARAR) for this site.

### **Response:**

It is the Trustees' understanding that the navigation channel and authorized depth is being considered by the Lower Willamette Group (LWG) and EPA in the development and selection of remedial alternatives to ensure the navigation use of the river is not impaired. However, this does not provide EPA with authority to impose deeper dredging for navigation purposes beyond that which is necessary to achieve the cleanup standards.

The assessment will take into account the information from the Feasibility Study, EPA's Proposed Plan, and the Record of Decision to determine whether the proposed remedial actions will adequately restore the navigational service to its baseline condition. To the extent it does not, the Trustees will evaluate any residual service loss and the appropriate damages necessary to fully restore those services. This approach, as noted above, is consistent with approaches taken by the Federal Trustees at other Superfund Sites (e.g. Diamond Alkali and Hudson River).

## **6. The chain of causation is too attenuated to support an NRD claim. [Schnitzer I.B.2, Reed]**

Two commenters stated that the chain of causation between the release of hazardous substances and the inability to maintain the navigation channel is too attenuated to support an NRD claim. One commenter further stated that the facts do not support a claim for navigational services. The commenter also suggests that any increased costs of sediment disposal are due to the lack of in-water disposal locations, a circumstance not caused by the contamination according to the commenter.

### **Response:**

The purpose of the Portland Harbor NRDA is to assess natural resource injuries (including the services provided by those resources), to quantify losses and to seek appropriate compensation.

While the Trustees have determined that sufficient information exists of potential injury to surface water resources resulting in a loss of navigational services to assess the potential claim in the Portland Harbor NRDA, no final determination on the merits of the claim has been made. As part of this analysis, the Trustees will consider whether there is a causal link between the release of hazardous substances and the impairment of the ability of federal and state agencies to maintain the navigational use of the river. Included in this analysis will be evaluation of the issues raised by the commenter. For example, the Trustees will examine whether in-water disposal locations would be available but for the release of hazardous substances. The Trustees will also examine whether increased costs of dredge material management will occur due to the contamination in terms up the type of upland disposal required (e.g. landfill disposal or other upland confinement). In addition, it is important to note that any dredging that is performed by the Corps of Engineers to maintain the navigation channel prior to cleanup will be appropriately considered in the assessment.

#### **7. Trustee Identity [Siltronic Corp.; Schnitzer I.B.4]**

One commenter asked for clarification as to which of the Trustees is asserting a navigation service loss claim. Another commenter stated that no Trustee has trusteeship over industrial or commercial navigation in the Portland Harbor navigation channel.

#### **Response:**

Both the United States and the State of Oregon are Trustees over surface water resources in Portland Harbor. The United States' trusteeship is based on its management responsibilities under the Clean Water Act, among other authorities. The State of Oregon is a Trustee of surface water resources because it owns the bed and banks of the river as well as having substantial management and control authorities. While the Governor of Oregon has designated the Oregon Department of Fish & Wildlife (ODFW) as the lead agency for the State on the Trustee Council, ODFW's role is not limited to resources over which that agency has jurisdiction, such as fish and game. Its role on the Trustee Council is to represent all of the State's trustee responsibilities, including surface water. As the State's designated trustee, the scope of ODFW's trusteeship is the same as the State's.

The State of Oregon, acting through ODFW, has retained the Port of Portland to act as its consultant for developing the necessary evidence to support the navigational injury assessment. The Port is not a trustee, nor is the State acting on the Port's behalf in assessing the navigational NRD claim. The State acts on behalf of the public in seeking redress for injuries to the State's natural resources.

#### **8. Damage Assessment [Siltronic Corp, UPRR, FMC 6, K Reed]**

Several commenters asserted that the case, *Montauk Oil Transportation Corp. v. The Steamship Mutual Underwriting Association*, cannot be relied upon by the Trustees as precedent for the damage assessment. That case was about an oil spill that shut down shipping for 9 days, whereas shipping has not been shut down at Portland Harbor. One commenter raised concerns that it would be too difficult to assess damages where shipping has not ceased entirely, and causation

would be too difficult to determine. Other commenters stated the public revenue from lost trade is too speculative.

**Response:**

The purpose of the assessment is to determine whether there has been loss or impairment of navigational services due to the release of hazardous substances to the sediments. Causation will be an element of that evaluation. The Trustees have authority to evaluate damages that may have resulted from the injuries to the natural resources. Navigation services are no exception, particularly given the importance of the Willamette River to the public welfare and economic prosperity for the State and its citizens. The trade generates, directly or indirectly, 18,000 jobs in the greater Portland metropolitan area alone. It is a gateway for exporting goods produced by Oregonians and the region as a whole, having widespread economic importance beyond the Site. The fact that components of the evaluation may be complex is not a reason for the Trustees to exclude it from the assessment. As noted above, similar assessments are being performed at other Superfund Sites, and the Trustees' plan is consistent with those assessments.

**9. No court has ever held that loss of navigational services constitute committed uses under CERCLA. [Schnitzer I.B.3 and C., Reed]**

Several commenters suggested that there is no legal precedent for allowing industrial and commercial navigation services to be compensated as natural resource damages under CERCLA. One commenter suggests that the Hudson River matter is distinguishable because it is the State of New York's obligation under the constitution.

**Response:**

Although CERCLA has been in existence since 1980, the case law is remarkably undeveloped. There are no United States Supreme Court cases, few decisions of the Courts of Appeals and a limited number of district court decisions that actually deal with substantive NRD issues. There are no decisions holding that navigation services cannot constitute committed uses under CERCLA, and there are no decisions holding that losses to navigational services are not compensable under CERCLA as a natural resource damage. It is the view of the Trustees that *Montauk Oil Transportation Corp. v. Steamship Mutual Underwriting Assoc.*, 1996 WL 340000 (SDNY 1996), is relevant here even though the natural resource damages issue there arose under the Clean Water Act rather than CERCLA, and even though the case involved contamination causing a complete closure of a navigational waterway rather than an increase in dredging costs. More broadly, *Montauk Oil* confirms the principle that natural resource trustees may recover natural resource damages that flow from impacts to maritime traffic caused by contamination. It is the only judicial precedent that has considered a navigational NRD claim, and it supports the claim's legitimacy.

Management responsibilities vary by State and not every navigation circumstance at a Superfund Site is identical. There are some similarities, however, to Hudson River. For example, similar to the Hudson River, the management responsibility for maintenance of the channel is the New York Canal Corporation, a public entity with delegated duties from the State of New York.

Similarly, the State of Oregon manages its navigation responsibilities by delegating certain duties to the Port of Portland (Port). As discussed above, the Port has been determined by the Oregon Supreme Court to be an instrumentality of the State performing State functions. Another matter, the Diamond Alkali Superfund Site, is similar to Portland Harbor in that it is a federal navigation channel that has not been maintained. Similar to these other sites, the Trustees here plan to assess the causal link between hazardous substance releases to the sediments and any resulting loss or impaired use of the navigational services. See also response to comment 3 above.

**10. Trustees are also PRPs. [Siltronic]**

One commenter raised concerns that the entities responsible for the management of the resource are also responsible for contamination on which the navigation service loss claim is based. Concerns have been raised about historical placement of dredged material and the relationship of this activity to the navigation service claim.

**Response:**

The concerns are noted and understood. It is also important to note that it is not unusual for public entities to have dual roles at a Superfund Site—as a Trustee and as a potentially responsible party. The Trustee Council is aware of these issues, has considered them, and will continue to do so. All liability for natural resource damages will be considered by the Trustee Council, even if that liable party is also a Trustee.

**11. Lack of detail in the navigational services assessment plan addendum. [Siltronic]**

One commenter noted that the navigational services assessment plan addendum lacked sufficient detail as to how loss or impairment of navigational services and associated damages would be determined. The commenter also questioned how navigational issues would interact with habitat claims.

**Response:**

By their nature, NRDA plans are not as detailed as workplans. Pages 2-3 of the navigational services assessment addendum describe in some detail the potential service losses that may be assessed and the potential resultant damages. The Trustees will develop a workplan describing in more detail the process and methodologies for determining damages in Phase 2.

The commenter suggested that there is an inconsistency between navigational dredging as a baseline factor and the inability to dredge due to contamination as a loss of service of the surface water resource. These are different issues. The Willamette River and its sediments provide a range of ecological and human services. The commercial ship traffic and periodic navigational dredging are part of the baseline condition of the resource. As part of the baseline determination, the Trustees will consider the extent that navigational dredging has reduced the services of the river or its sediments. At the same time, however, the river provides an important human use

service as a waterway for commercial ship traffic. The loss or impairment of this service may also be the subject of a NRD claim. The two issues are neither inconsistent nor incompatible.

**12. Baseline Issues. [FMC 5]**

One commenter raised concerns that damages can only be measured as the cost of directly restoring the injured resource to baseline. The “pristine” pre-release condition of the Willamette River is not an artificially-maintained 40 foot deep channel, but rather a 20-foot deep naturally sedimented river channel.

**Response:**

Baseline is determined on a resource by resource basis. For the purpose of assessing the potential loss of navigational services, baseline is the condition of the Willamette River as a functional channel supporting navigation "but for" the release of hazardous substances. The specifics of baseline are determined as part of the assessment process. That has not yet occurred. The Willamette River has been used as a shipping channel since before Oregon became a State in 1859. The depth required to support those services has changed over time as the vessel size and capacity has changed. The assessment will include an evaluation of baseline as it relates to the navigation services, including the physical presence of the navigational channel. See also response to comment 5 above.

**13. Damages must be used to restore resources. [FMC 7; Schnitzer I.B.5]**

The commenters suggested that any damages recovered by the Trustees for loss of navigational services would not be used to restore, replace or acquire an equivalent natural resource.

**Response:**

The Trustees are aware that all damages recovered must be used only to restore, replace or acquire the equivalent of the injured natural resources and their services. To that end, the Trustees intend to prepare a Restoration Plan, which will determine how such damages would be spent. No such determination has been made, and the draft addendum for inclusion of navigational services in the NRDA does not indicate how any recovered damages would be spent.

**14. The assessment would unduly increase the scope of the NRDA and complicate the process. [Schnitzer II, UPRR, Reed]**

Several commenters felt that assessing the loss of navigational services would unduly increase the scope of the Portland Harbor NRDA and unnecessarily complicate the process. One commenter suggested that the Trustees should forego the navigational assessment because other industries in the Portland Harbor will petition the Trustees to reimburse economic losses they incurred from being unable to use their shipping berths in the harbor.

**Response:**

The inclusion of navigational services in the Portland Harbor NRDA will not interfere with either the schedule or budget for Phase 2 of the NRDA process. The costs of the navigational will be considered unreimbursed assessment costs and treated like any other unreimbursed past cost at the time of settlement.

Contrary to the suggestion made by the commenter that inclusion of this claim in the assessment process will result in similar claims being made by private parties, the claim being assessed would be brought by the United States and the State of Oregon for natural resources under their trusteeship. Claims by private parties have no role in this process.