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SUPERFUND

Outlook for and Experience With Natural Resource Damage Settlements





United States
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**Resources, Community, and
Economic Development Division**

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April 16, 1996

The Honorable John H. Chafee
Chairman, Committee on Environment
and Public Works
United States Senate

The Honorable Robert Smith
Chairman, Subcommittee on Superfund,
Waste Control and Risk Assessment
Committee on Environment
and Public Works
United States Senate

The Honorable Michael G. Oxley
Chairman, Subcommittee on Commerce,
Trade and Hazardous Materials
Committee on Commerce
House of Representatives

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), a party responsible for a hazardous substance release is liable for injury to natural resources, such as wildlife and groundwater, resulting from the release. The regulations implementing the act designate certain federal agencies, state governments, and tribal authorities as natural resource trustees and authorize them to make claims against responsible parties for natural resource damages. As of April 1995, relatively few claims had been settled and their amount was small compared with the cost of cleaning up sites, but some recent claims have been quite sizeable. These large claims have heightened concern over the potential for future claims.

Because of your interest in the act's natural resource damage provisions, you asked us to (1) obtain information on the potential for future federal natural resource damage claims, (2) determine what funds federal agencies have collected from natural resource damage settlements and how these funds have been used, and (3) describe the procedures that federal agencies use to determine the amount of damage claims. In responding to your second question, we limited our analysis, as agreed with your offices, to the five largest natural resource damage settlements that represent nearly four-fifths of the total dollars settled through April 1995.

Results in Brief

The Department of the Interior and the Department of Commerce's National Oceanic and Atmospheric Administration, the two principal federal natural resource trustees, estimate that as many as 20 sites may have natural resource damage claims exceeding \$50 million each.¹ They also estimate that up to another 40 sites may have claims totaling between \$5 million and \$50 million each. Agency officials cautioned that these estimates are based on limited data. For example, only 5 of the 20 sites where claims are estimated to exceed \$50 million have been studied sufficiently to estimate the range of the claims with certainty.

Settlements from the five largest natural resource damage cases totaled \$83.8 million as of April 1995. Of this total, \$33.9 million had been collected, and of this amount, \$3.6 million had been spent. Expenditures have gone mostly to reimburse trustees for performing past damage assessments and to pay for preparing natural resource restoration plans. With the exception of one small experimental restoration project, no restoration actions had been taken with the moneys collected as of July 1995. Agency officials stated that restoration had not begun at sites because of continuing litigation, the need to coordinate with the Environmental Protection Agency's cleanup process, and other site-specific reasons. The act stipulates that funds may not be used for restoration until a plan has been developed, reviewed by the public, and adopted by the affected trustees. All five settlements are currently in various stages of the restoration planning process. (See app. I.)

The act does not provide a standard procedure for assessing natural resource damages. The implementing regulations provide for two procedures for assessing damages, but their use is optional. The first procedure is applicable to limited types of injuries, and the second procedure can be costly and time-consuming, requiring extensive site-specific data. The agencies seldom fully implement either method. Agency officials said they use elements of the second procedure to the extent necessary to reach a settlement in a cost-effective manner. The vast majority of the 98 settlements reached as of April 1995 used an abbreviated procedure.

Background

Under CERCLA, the parties responsible for releasing hazardous substances into the environment are liable for their cleanup. The cleanup of hazardous waste sites is administered by the Environmental Protection

¹The \$50 million figure is significant, since some recent CERCLA reauthorization bills propose limiting natural resource damages to that amount.

Agency (EPA) under its Superfund program, which is financed mainly by taxes on corporate income, crude oil, and certain chemicals. EPA places the most dangerous sites on the Superfund National Priorities List (NPL) for cleanup actions. As of September 1995, there were 1,290 sites on the NPL.²

In addition to imposing cleanup obligations, CERCLA makes responsible parties liable for the costs of restoring injuries to natural resources resulting from a hazardous substance release.³ These resources are defined broadly under the law to include land, fish, wildlife, groundwater, and other resources belonging to, managed by, or otherwise controlled by federal or other governmental entities. Only natural resource trustees can file suits under CERCLA against parties responsible for injuring natural resources.

The law and its implementing regulations designate federal, state, and tribal authorities as trustees for natural resources. The Department of the Interior (Interior) and the National Oceanic and Atmospheric Administration (NOAA) are the two principal federal trustees for natural resources.⁴ Other federal agencies, such as the departments of Agriculture, Defense, and Energy, are the trustees for natural resources on the lands that they manage. States have traditionally acted as trustees for groundwater; the lands they own (e.g., state parks and forests); and fish, game, and other wildlife.

Under CERCLA and implementing regulations, Indian tribes have certain responsibilities as natural resource trustees. Although trustees' responsibilities for natural resources are not always exclusive and can overlap, damages cannot be recovered by more than one trustee for injuries to the same resource by the same release. Thus, federal, state, and tribal trustees often coordinate their natural resource damage claims. Superfund money may not be used to restore injuries to natural resources or to conduct natural resource damage assessments. Instead, the trustees may recover monetary compensation (damages) from responsible parties to restore natural resources and to pay for the reasonable costs of assessing any damage to natural resources.

²Natural resource damage claims may be filed under CERCLA for natural resource injuries both at NPL sites and at other hazardous waste sites.

³Natural resource damages can also be recovered under other federal laws, such as the Clean Water Act and the Oil Pollution Act, as well as under certain state laws.

⁴NOAA is the trustee for the nation's coastal and marine environment, including commercial and recreational fisheries, anadromous fish, and marine mammals. Interior is the trustee for resources such as migratory birds and endangered species and for its own lands, including the national parks.

Several factors limit recoveries for natural resource injuries, according to Interior officials. First, injuries must be traced to particular releases of hazardous substances; second, a viable and solvent responsible party must be found; third, the claim must be filed within the statute of limitations;⁵ and fourth, a federal agency must have the financial resources available to assess the damage and develop the information necessary to support a claim. Furthermore, Department of Justice (Justice) officials state that the level of appropriations to fund federal natural resource damage programs is the single most important factor in determining how many sites can be assessed for damages.

For a site being cleaned up under CERCLA, the trustees can seek damages only for injuries that remain after the cleanup has been completed, according to Justice officials. Residual injuries occur when (1) a cleanup leaves significant contamination in the environment or (2) animal populations have been reduced or wildlife habitat has been destroyed and cannot recover quickly without human intervention. The federal trustees estimate that as of May 1995, the total compensation for residual natural resource injuries at all Superfund sites on the National Priorities List has been less than 1 percent of the total cost to clean up the sites.

A natural resource damage claim has three basic components:

- the necessary and reasonable costs of performing the damage assessment;
- the costs of restoring the resource to the condition that would have existed at the time of the injury (restoration costs), taking into consideration the effects over time of natural and human activities unrelated to the release of contamination; and
- the costs associated with the loss of resources or of the benefits/services derived from such resources (e.g., a wetland's provision of habitat for animals and birds or a body of water's provision of commercial or recreational fishing opportunities) from the date of the injury until the full restoration of the resources and/or services (referred to as interim lost values).

According to Interior and NOAA officials, the majority of natural resource damage cases involving federal trustees are settled as part of the cleanup agreement negotiated by EPA. Almost half of the settlements require the

⁵Under CERCLA, the statute of limitations for filing a natural resource damage claim is 3 years from the completion of a cleanup at a Superfund site or at a site owned or operated by the federal government. For all other sites, the statute of limitations is 3 years from the later of the date when damage assessment regulations were promulgated by Interior or the date when the natural resource injury and its connection to a hazardous substance release were discovered.

responsible party to make no separate payment for natural resource damages either because the negotiated cleanup will correct the injury to the natural resource or because no such injuries were found. Justice reports that through the end of April 1995, federal trustees had settled 98 natural resource damage cases for a total of \$106 million.⁶ Of these settlements, 48 required no payment and the remaining 50 involved monetary recoveries ranging from about \$4,000 to \$24 million.

Outlook for Natural Resource Damage Claims

At our request, Interior and NOAA officials developed preliminary estimates of the number of sites where natural resource damage claims involving federal trustees may ultimately reach \$5 million or more.⁷ The agencies estimate that 60 sites may eventually have claims for damages to natural resources that will equal or exceed \$5 million and that up to 20 of these sites may have claims exceeding \$50 million. Sixty sites represents less than 5 percent of the current number of Superfund sites.

Interior and NOAA officials cautioned that their projections are very preliminary and could change for a variety of reasons. Most importantly, as table 1 shows, detailed studies to assess the injuries to natural resources have not even begun at more than half (31) of the 60 sites estimated to have claims of \$5 million or more. Furthermore, most of the sites have not been evaluated to determine whether natural resource losses can be traced to specific releases of hazardous substances and whether the parties responsible for these releases are capable of paying damages—prerequisites to pursuing natural resource damage claims. Another factor affecting agencies' ability to make projections is that many sites will be cleaned up under the Superfund program, so that until EPA determines the scope of its cleanup efforts, the agencies do not know what, if any, residual resource damage will remain to be addressed through a claim.⁸ Finally, the value of these claims may ultimately differ from the initial estimates because the claims may be settled through negotiations with responsible parties. To date, almost all natural resource damage claims have been settled without litigation.

⁶The Blackbird Mine case in Idaho was settled for a value of about \$60 million after we had completed the data collection phase of this review.

⁷These estimates include only claims involving federal trustees. Although states and tribes can make claims without federal trustees, they usually coordinate large (in excess of \$5 million) claims with the federal trustees because of the large up-front costs of assessing damages. The state of Montana has, however, filed a large natural resource damage claim independently of the federal government. This claim, which may exceed \$600 million, covers 127 miles of the upper Clark Fork River basin.

⁸The Superfund Amendments and Reauthorization Act of 1986 prohibits the filing of a natural resource damage claim at a site undergoing cleanup until the remedy for cleaning the site has been selected.

Table 1: Preliminary Estimates of Sites With Known or Potential Federal Natural Resource Damage Claims of \$5 Million or More, by Status of Studies to Assess Damage to Natural Resources

Status ^a of studies to assess damage	Known or potential value of \$5 million to \$50 million	Known or potential value of over \$50 million	Total number of studies
Ongoing	9	5	14
Recently begun	8	7	15
Not started	23	8	31
Total	40	20	60

^aStatus is as of July 1995, when GAO received the data.

Source: GAO's presentation of data from Interior and NOAA.

Restoration Still in the Planning Phase for the Five Largest Sites

Together, the five largest natural resource damage settlements—Elliott Bay in Seattle, Washington; Commencement Bay in Tacoma, Washington; New Bedford Harbor on the Achushnet River in Massachusetts; Montrose located offshore Los Angeles County, California; and the Cantara Loop Train Derailment outside of Dunsmuir, California—totaled \$83.8 million, about four-fifths of the total dollar value of all 98 settlements reached as of April 1995. Through July 1995, about 40 percent of the moneys for the five settlements had been collected from the responsible parties.⁹ Of these collections, about 11 percent had been disbursed either to reimburse trustees for completed damage assessments or to pay for planning natural resource restorations.¹⁰ However, no other restoration actions had been taken with the moneys collected.¹¹

Collections and disbursements are governed by settlement agreements. Although some of the funds collected from responsible parties are paid directly to the trustees to reimburse them for the costs they incurred in performing damage assessments, most of the funds usually reside in court-administered registry accounts until the trustees are ready to use them. Frequently, settlements are structured so that payments may take

⁹The percentage collected varies widely by site—from 100 percent at New Bedford to 0 percent at Cantara Loop.

¹⁰Justice, Interior, and NOAA officials noted that although the top five settlements account for most of the dollar value of settlements, they represent only about 5 percent of the total number of settlements. The officials said that injuries to natural resources have been restored at many of these smaller settlements through the cleanup process.

¹¹At the time of our review, one small restoration project had begun at Commencement Bay. The trustees classified this project as restoration planning, since it is designed to test an experimental option for large-scale restoration projects.

place over a period of years. Additionally, CERCLA requires that all participating parties agree to a restoration plan requiring extensive public review before the restoration can begin.

For each of the five cases, restoration planning was taking place at the time of our review. Settlement dates ranged from December 1991 to March 1994. The reasons that restoration had not yet begun included the need at all sites to develop and obtain public comments on a restoration plan; unexpected cleanup problems at New Bedford, which hampered the planning process; and intervening lawsuits at Cantara Loop, which postponed the disbursement of collected funds.

Table 2 summarizes the amounts collected and disbursed for the five largest settlements as of July 1995. The settlements are arranged by age, from the oldest to the most recent. (App. I describes the status of restoration activities for each settlement.)

Table 2: Collections and Disbursements for the Five Largest Natural Resource Damage Settlements Under CERCLA, as of July 1995

Dollars in millions				
Site's name and location	Value/ date of settlement ^a	Amount collected ^b	Amount disbursed	Purpose of disbursement
Elliott Bay, Seattle, WA	\$24.3/ Dec. 1991	\$3.0	\$0.7	Restoration planning
"Montrose" offshore Los Angeles County, CA	\$12.0/ May 1992	\$8.1	\$1.4	Reimburse past damage assessment costs
New Bedford Harbor, Achushnet River, MA	\$20.2/ Nov. 1992	\$20.2	\$0.5	Restoration planning
Commencement Bay, Tacoma, WA	\$13.3/ Oct. 1993	\$2.6	\$1.0	Damage assessment and restoration planning
Cantara Loop, Dunsmuir, CA	\$14.0 ^c / Mar. 1994	\$0.0	\$0.0	
Total	\$83.8	\$33.9	\$3.6	

Note: Dollars are not adjusted for inflation.

^aIf there was more than one settlement, the date is that of the most recent settlement. Additional settlements are being pursued at some sites.

^bCollections are determined by the settlement agreement and may take place over a period of years.

^cUsing various state and federal laws, California and Justice, on behalf of Interior, the U.S. Department of Agriculture, and EPA, settled with the responsible parties for a total of \$38 million. For consistency with the other settlements, the table shows only the \$14 million settled using the natural resource damage provisions of CERCLA.

Procedures in Regulations to Assess Natural Resource Damages Seldom Fully Implemented

CERCLA does not require the trustees to use a particular standard or method for assessing natural resource damages. It did, however, direct Interior to develop standardized procedures for all trustees to consider in assessing and valuing injuries to natural resources. Accordingly, the regulations include two procedures for valuing natural resource injuries, but the trustees are not required to use these procedures. Because one procedure is limited in scope and the other procedure can be costly and time-consuming to implement, the trustees seldom fully implement either one. Instead, according to Interior and NOAA officials, the trustees most often use an abbreviated procedure that employs readily available site-specific information and scientific literature to quantify damages.

CERCLA's Requirements

CERCLA directs that the assessment process identify the best available procedures to determine damages, including both direct and indirect injuries, and takes into consideration the ability of the ecosystem to recover on its own. CERCLA further states that the measure of injuries need not be limited by the sums required to restore or replace such resources. For example, the value of a particular service or benefit that was lost to the public while the resource was injured may also be calculated and collected.

Procedures Developed in Response to CERCLA's Requirements

In response to CERCLA's requirements, Interior developed two valuation procedures: a simplified assessment process that requires the use of minimal data ("type A") and a detailed process that requires extensive site-specific data ("type B").¹² The use of these damage assessment procedures is optional. If the trustees elect to implement these procedures fully, they are granted a legal presumption of correctness in a court of law that shifts the burden to the defendants to prove otherwise. NOAA officials said that this rebuttable presumption is of limited value, since the trustees still must prove their case. Furthermore, since all but a few cases had been settled without litigation as of December 1995, the trustees have not had to take the time and incur the expense needed to implement these procedures fully. According to NOAA, Interior, and Justice officials, full implementation of the type B procedure is most often not necessary because settlements can be reached without it or it is impractical because of the cost and time involved. According to Interior officials, the trustees use elements of the procedures to the extent necessary to reach a settlement in a cost-effective manner. The type A procedure provides standard methods for conducting simplified natural resource damage assessments through computer modeling. As of December 1995, only one computer model had been developed for the type A procedure. This model can be used only for small incidents of limited duration (e.g., one-time spills) that occur in coastal and marine environments. The model consists of programs to perform mathematical computations and databases containing chemical, biological, and economic information. Although the model requires minimal use of actual field data because it is based on general assumptions, it can be used to assess the injuries to natural resources, quantify these injuries (e.g., the number of fish killed or acres of wetlands contaminated), and determine the damages from many types of discharges or releases. Interior has proposed adding a model for the Great

¹²Federal court rulings in 1989 directed Interior to revise portions of both type A and type B regulations. Interior promulgated most of the type B revisions in 1994 and has proposed revisions to address the use of contingent valuation as a cost estimation method (the remaining type B issue). Interior has also proposed revisions to the type A regulations.

Lakes region to the type A regulations. This model will also be appropriate only for small, one-time incidents.

Federal trustees said they rarely use the type A approach for CERCLA claims because it applies to few CERCLA damage cases. It has greater application for oil spills, which are addressed under a separate law—the Oil Pollution Act. As of July 1995, NOAA, the primary federal trustee for resources in coastal waters, had used this model to quantify damages at only one site. For a detailed description of this case, see appendix II.

The type B procedure provides a set of detailed guidelines for conducting extensive site-specific studies to assess the extent of the injury and to value the damages. This procedure can involve the use of various evaluation methods and techniques. For example, the regulations specify various methods for quantifying interim values for lost use. One such technique is the travel cost analysis, which estimates the costs of the travel and extra time required to go to an alternative site rather than the injured site for a purpose such as fishing. Trustees can also use a technique referred to as the contingent valuation method. This method, which is not often used by federal trustees, employs public opinion surveys to establish a dollar value for natural resources that do not have an established market value. For example, if contamination from past mining had contributed to reducing or destroying the salmon population in a stream, members of the public would be asked what price they would be willing to pay to have that stream restored to a condition that would allow the return of salmon.

Interior and NOAA officials said they seldom use the type B procedure fully because of the expense and time—usually several years—required to perform such studies. Federal officials said that they did not believe that a full type B assessment had ever been performed, but they identified five sites where the procedure had been most fully pursued.¹³ An illustration of the type B procedure appears in appendix III.

Abbreviated Procedure Most Often Used

Federal trustees most often use an abbreviated type B procedure to quantify damages. Under this process, they follow the basic steps of the type B procedure—determining the injuries, quantifying their value, and determining the damages. However, instead of employing the

¹³The five sites where federal trustees have moved toward fully employing the type B procedure to value claims are Montrose, California; Blackbird Mine, Idaho; Coeur D'Alene (Bunker Hill), Idaho; Commencement Bay, Washington; and New Bedford, Massachusetts. Justice officials stated that the most complete type B procedure was developed at Clark Fork, Montana, a state claim.

time-consuming and costly site-specific surveys and analyses required by the type B procedure, they use readily available off-the-shelf literature and other information to value damages using various evaluation techniques.

The abbreviated approach is commonly used when, during a negotiation with EPA, a private party wants to settle its liability for both cleanup costs and natural resource damages at the same time. In such situations, EPA or Justice notifies the trustees of the party's request. The trustees then typically have about 2 to 3 months to assess any injury to natural resources at the site, quantify the government's claim, and, if possible, obtain a mutually satisfactory settlement agreement with the responsible party. To meet this time frame, the trustees use an abbreviated approach that draws on readily available site-specific and other information to quantify the damages.

A 1991 settlement illustrates the use of the abbreviated process in the context of settling a party's liability for natural resource damages as part of the cleanup settlement. In this case, a solvent recovery firm was a responsible party at two different sites, both of which are included on the NPL. The natural resource damage settlement came about after the responsible party asked to resolve its liability for natural resource damages at the same time as it settled its liability for cleanup costs. After being notified of the responsible party's request, a Fish and Wildlife Service field biologist began to review available information about the potential injuries to resources at the sites. The field biologist identified data that had been gathered from the sites as part of the investigation to identify the appropriate cleanup remedies. These data were sufficient to show that injuries had occurred to federal and state trust resources. The biologist combined the data with other readily available information to quantify the damage using a relatively new technique, the habitat equivalency analysis. This analysis calculates the acreage needed to replace the services that were lost when the habitat was injured rather than calculating the dollar value of the loss, as is usually done. Using this method, the field biologist calculated that 17.5 acres of rare dune and swale lands and 31 acres of wetlands were needed to replace the injured resources.

Agency Comments and Our Evaluation

We transmitted copies of a draft of this report to the Secretary of the Interior, the Secretary of Commerce, and the Attorney General for their review and comment. Although the agencies did not disagree with the facts presented in the draft report, they wanted to emphasize information

associated with three issues. Their general comments appear in appendixes V through VII. In addition, the three agencies provided technical and editorial comments, which we incorporated into the report as appropriate. We did not reproduce these comments in the appendixes.

The first issue involves the potential for future natural resource damage claims. Interior stressed in its comments that the projected number of sites having natural resource damage claims in excess of \$5 million represents a maximum number and that the actual number would likely be smaller. We have qualified our description of the estimate to indicate that it represents an upper bound.

The second issue involves the use of the funds collected from natural resource damage settlements. All three agencies said that there are site-specific and legal reasons, beyond the control of the trustees, why restoration has not started at the five largest settlement sites. The agencies pointed out that a small experimental restoration project had begun at Commencement Bay. Interior stated that “restoration planning” is an essential part of the restoration process and, as such, should be reported as a restoration action. We believe it is useful, when describing the status of the program, to distinguish between restoration planning and restoration action. Interior also stated that it is misleading to compare the total collections for the five largest settlements with these settlements’ total value because most of the collections resulted from one settlement. We believe that it is appropriate to present summary figures to indicate the overall status of the five cases, and we have also shown the collections and value for each settlement so that the summary figures can be properly interpreted.

The third issue involves the procedures used by the trustees to develop natural resource damage claims. Both Interior and NOAA said that the settlement process is based on selecting appropriate elements of the assessment procedures provided in the regulations. Evaluating whether the agencies were making “appropriate” selections from the regulations was beyond the scope of our review. Interior said that for relatively minor cases, the type B procedure is not necessarily costly and time-consuming. We have added this qualification to our discussion of the type B procedure.

We conducted our review from July 1995 through February 1996 in accordance with generally accepted government auditing standards. See appendix IV for further discussion of our scope and methodology.

As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the Secretary of the Interior, the Secretary of Commerce, and the Attorney General. We will make copies available to others upon request.

Please call me at (202) 512-6112 if you or your staff have any questions. Major contributors to this report are listed in appendix VIII.

A handwritten signature in black ink, appearing to read 'P. F. Guerrero', with a long horizontal flourish extending to the right.

Peter F. Guerrero
Director, Environmental
Protection Issues

Contents

Letter	1
Appendix I	16
Restoration Status for	Elliott Bay/Seattle, Washington 16
Five Largest	“Montrose” Offshore Los Angeles County, California 18
Settlements	New Bedford Harbor, Massachusetts 20
	Commencement Bay/Tacoma, Washington 22
	Cantara Loop Train Derailment, Dunsmuir, California 24
Appendix II	27
An Application of the	
Type A Procedure	
Appendix III	28
An Application of the	
Type B Procedure	
Appendix IV	29
Objectives, Scope,	
and Methodology	
Appendix V	31
Comments From the	
Department of the	
Interior	
Appendix VI	33
Comments From the	
Department of	
Commerce	

Appendix VII		37
Comments From the		
Department of Justice		
Appendix VIII		42
Major Contributors to		
This Report		
Tables	Table 1: Preliminary Estimates of Sites With Known or Potential Federal Natural Resource Damage Claims of \$5 Million or More, by Status of Studies to Assess Damage to Natural Resources	6
	Table 2: Collections and Disbursements for the Five Largest Natural Resource Damage Settlements Under CERCLA, as of July 1995	8
Figures	Figure I.1: Elliott Bay/Seattle, Washington	17
	Figure I.2: "Montrose" Offshore Los Angeles County, California	19
	Figure I.3: New Bedford Harbor, Massachusetts	21
	Figure I.4: Commencement Bay/Tacoma, Washington	23
	Figure I.5: Cantara Loop, California	25

Abbreviations

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
DDT	Dichloro-diphenyl-trichloro-ethane
EPA	Environmental Protection Agency
GAO	General Accounting Office
NOAA	National Oceanic and Atmospheric Administration
NPL	National Priorities List
PCB	polychlorinated byphenyl
PRP	potentially responsible party

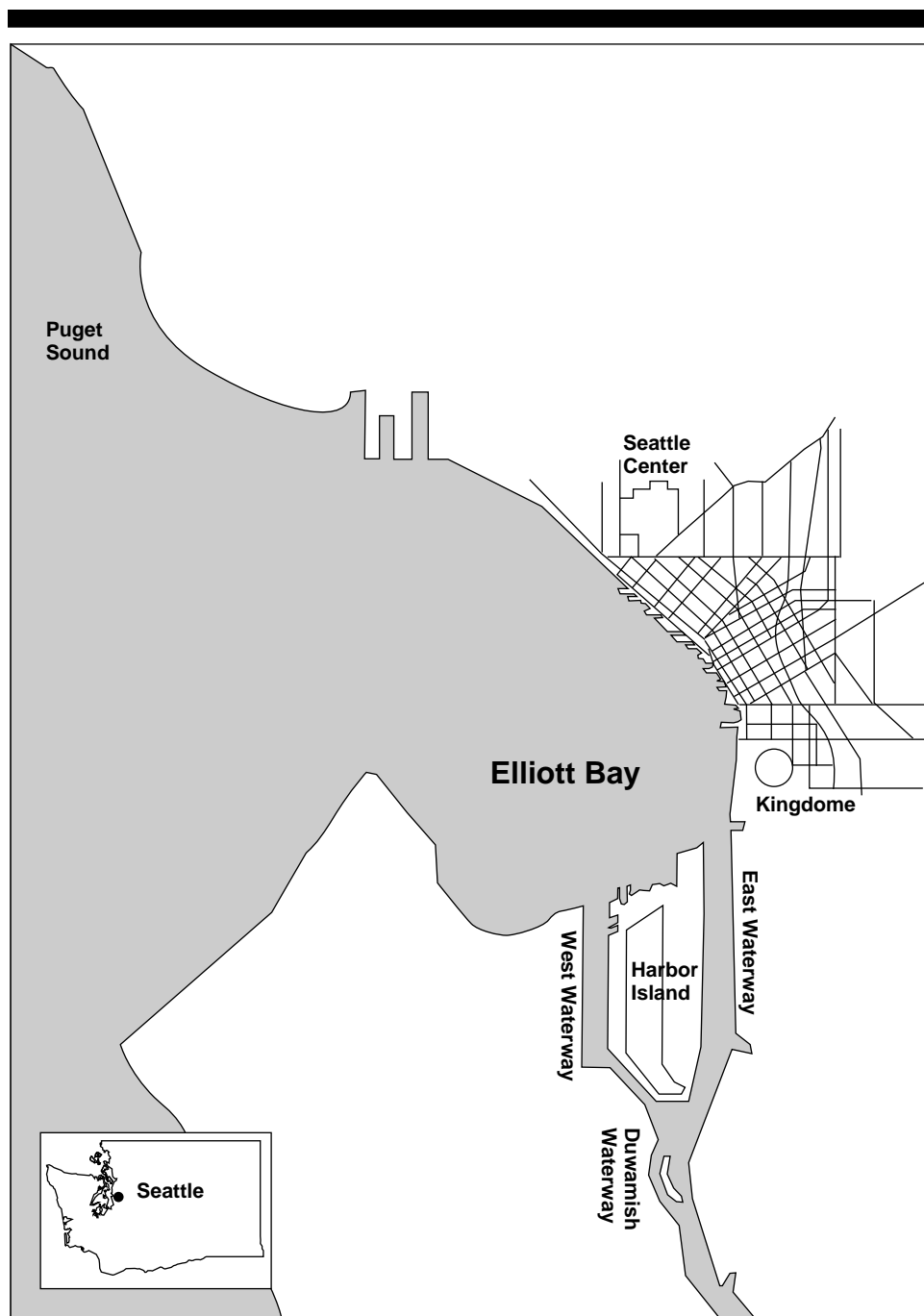
Restoration Status for Five Largest Settlements

Elliott Bay/Seattle, Washington

Elliott Bay is a 21-square-kilometer area in central Puget Sound encompassing the commercial waterfront district of Seattle. (See fig. I.1.) Over the past 150 years, Elliott Bay and the adjoining Duwamish Waterway estuary have been contaminated by many hazardous substances, including chromium, cadmium, copper, lead, zinc, and several toxic and/or carcinogenic organic compounds, such as polychlorinated biphenyls (PCB).¹⁴ These pollutants have extensively contaminated nearshore sediments, reducing the value of the area as a habitat for fish and wildlife. In 1991, the natural resource trustees—including the Department of Commerce’s National Oceanic and Atmospheric Administration (NOAA), the Department of the Interior (Interior), the state of Washington, and area Indian tribes—reached a \$24.3 million legal settlement with the city of Seattle and the municipality of Metropolitan Seattle, both of which had contributed to the contamination. The settlement allocated \$12 million for remediating sediments, \$10 million for developing habitat, \$2 million for controlling pollution sources, and \$250,000 for reimbursing NOAA for damage assessment costs. As of July 1995, \$3 million of the \$24.3 million settlement had been collected. Of this amount, \$0.7 million had been disbursed.

¹⁴PCBs, when released in the environment, decompose very slowly and can accumulate in plant, animal, and human tissue. Laboratory tests show that they cause cancer in rats and mice and have adverse effects on fish and wildlife. PCBs, which were used primarily in electrical equipment, are now generally banned from use in the United States.

Figure I.1: Elliott Bay/Seattle,
Washington

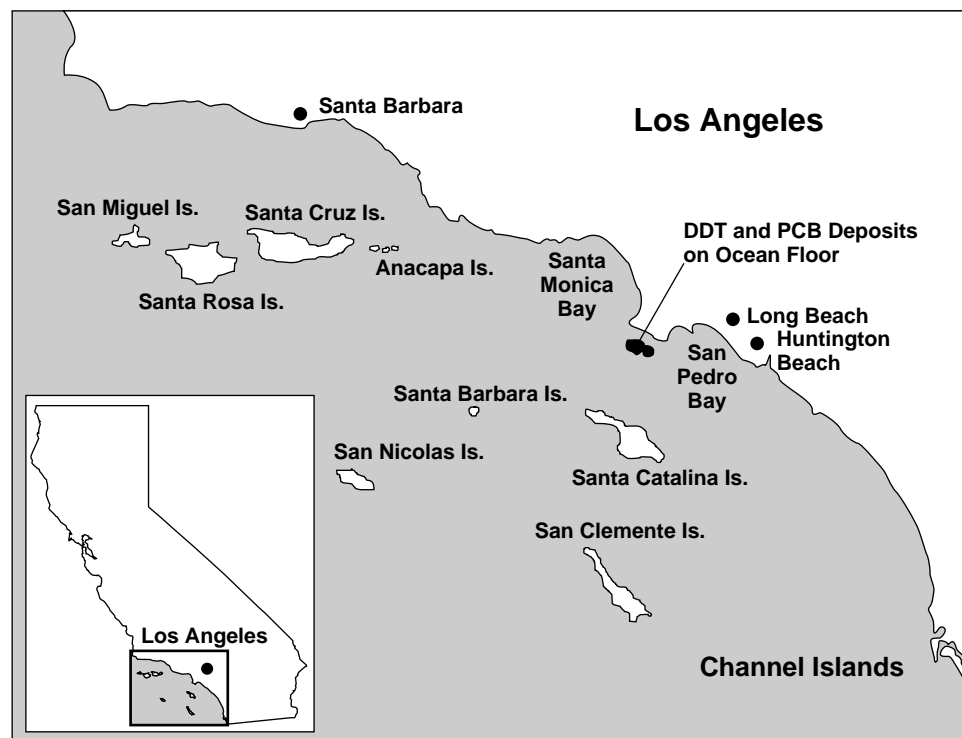


The Panel of Managers—which, in this case, included both the trustees and the responsible parties—developed a restoration plan that was completed in June 1994. This plan requires cleaning up the bay’s contaminated sediments and also studying sediment recontamination patterns to ensure the success of planned habitat development projects. In July 1995, the Elliott Bay Waterfront Recontamination Study was completed. This study will form the basis of an effort to remediate the contaminated sediments. In addition, the panel had screened all possible habitat restoration sites and was acquiring the properties. As of December 1995, the panel was investigating sites for sediment remediation efforts.

“Montrose” Offshore Los Angeles County, California

Approximately 2,000 metric tons of DDT and PCBs were discharged into the southern California marine environment by various industrial companies through the local county sewer system. (See fig. I.2.) The state of California issued a health advisory against the consumption of fish from the area because of dangerous concentrations of DDT and PCBs, and a commercial fishery was closed. In June 1990, the Department of Justice (Justice) filed a claim, collectively referred to as “Montrose,” on behalf of NOAA and Interior against the 10 responsible parties, for injuries to natural resources caused by discharges of DDT and PCBs into the marine environment. In May 1992, the federal and state trustees settled one case with some responsible parties for \$12 million.

Figure I.2: "Montrose" Offshore Los Angeles County, California



In March 1995, a federal court of appeals overturned a second \$42.2 million settlement between the trustees and the Los Angeles County sanitation district and municipalities and sent the settlement back to the federal district court for reconsideration. As of December 1995, this decision was still under litigation.

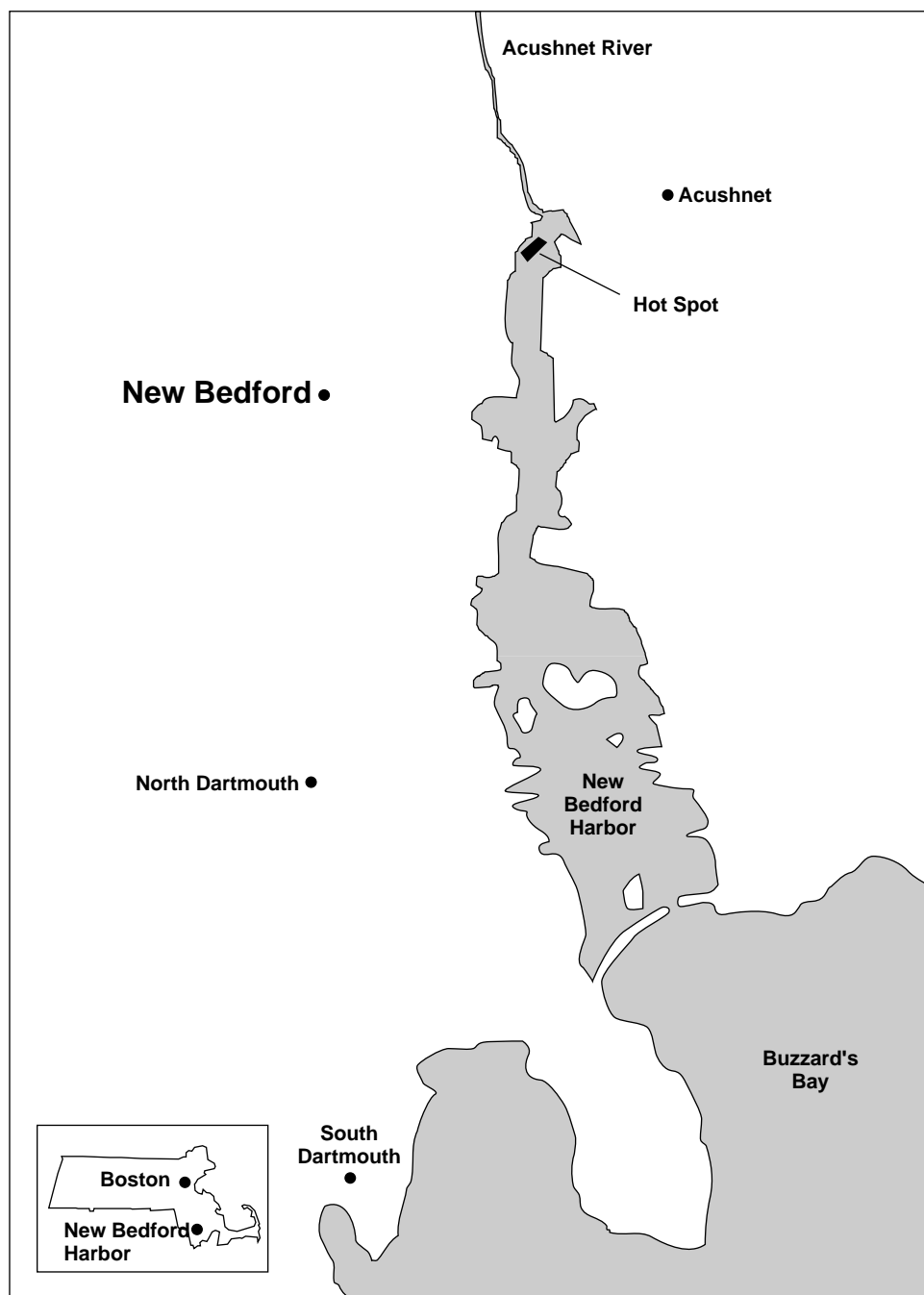
In the meantime, according to Interior officials, the trustees are proceeding with the preliminary restoration plan. They anticipate modifying the plan as remediation actions are completed or more settlements are obtained. According to Justice officials, these future settlements may be substantial.

For the case that has been settled for \$12 million, \$8.1 million has been collected, \$1.4 million of which has been disbursed. The money was used to reimburse some of the trustees' past damage assessment costs.

New Bedford Harbor, Massachusetts

The New Bedford Harbor case was one of the first natural resource damage cases filed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Located on the Achushnet River, near Buzzards Bay, Massachusetts, the harbor has long been used by the fishing, shipping, and manufacturing industries. (See fig. I.3.) After studies during the 1970s found high levels of PCBs and heavy metals in the harbor's fish and shellfish, several fishing areas were closed. By the end of 1992, the federal and state trustees had reached a \$20.2 million settlement with five companies to cover the costs of the natural resource damage assessment and restoration. The companies had also agreed to an \$88 million Superfund cleanup settlement with the Environmental Protection Agency (EPA) and the state. The nature of the natural resource restoration work is contingent upon the scope of the cleanup remedy that EPA selects for the outer harbor. Restoration projects under consideration by the trustees include, but are not limited to, improving anadromous fish runs, reestablishing seagrass beds, creating wetlands, and constructing artificial reefs.

Figure I.3: New Bedford Harbor,
Massachusetts

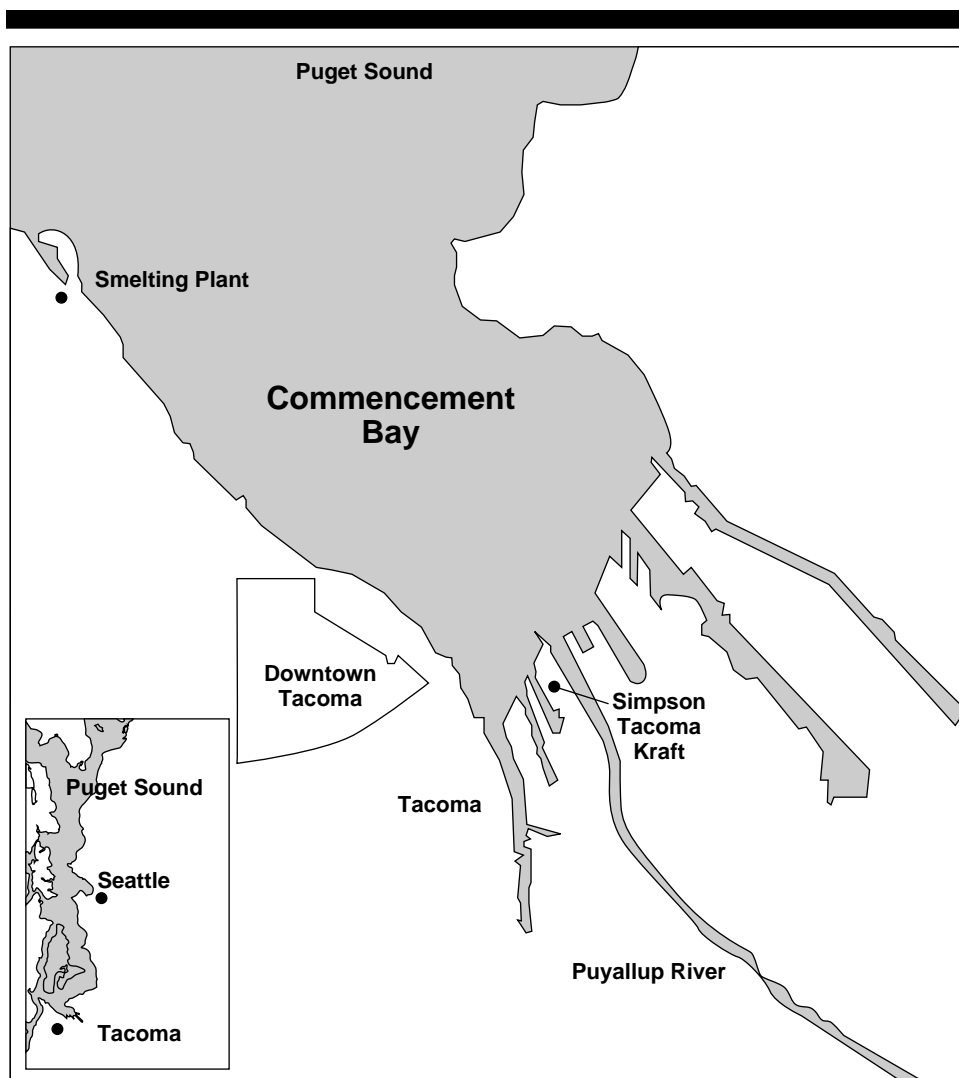


As of July 1995, all of the \$20.2 million settlement had been collected and \$0.5 million had been disbursed for restoration planning. According to NOAA officials, restoration planning has been delayed because of the uncertainty over EPA's cleanup plans. EPA's record of decision for the cleanup and disposal of the most contaminated sediments had to be renegotiated when the community opposed the incineration of contaminated sediments. The community's challenge led to a delay in planning and cleaning the remaining contaminated sediments. Nevertheless, the trustees are going forward with the restoration plan, which they say can be modified if EPA's actions interfere with the trustees' restoration activities. As of December 1995, the trustees had asked the public to suggest ideas for restoration. These ideas are expected to be rank-ordered and included as alternatives in the restoration plan, which the trustees expect to release for public comment by the summer of 1996.

Commencement Bay/Tacoma, Washington

Commencement Bay is an estuarine bay located in the southern part of Puget Sound in Tacoma, Washington. (See fig. I.4.) Industrialization and urban development have severely degraded natural habitats in the bay by introducing a variety of hazardous substances into the surface water and groundwater and the sediments of the bay area. Much of the bay's nearshore area is a federal Superfund site. Federal, state, and tribal trustees negotiated a natural resource damage settlement with the Port of Tacoma (Oct. 1993) and the Simpson Tacoma Kraft Company (Dec. 1991)—both of which contributed to natural resource losses—for a total of about \$13 million. Moneys from the settlement will be used to restore, replace, or acquire equivalent components of the historical ecosystem, including vegetated shallows, mudflats, tidal marshes and creeks, off-channel sloughs and lagoons, naturalized stream channels, and adjacent upland buffer areas.

Figure I.4: Commencement
Bay/Tacoma, Washington



Of the \$13.3 million settlement, \$2.6 million had been collected and about \$1.0 million had been disbursed as of July 1995. The disbursements have been primarily to the trustees to reimburse their expenditures for past damage assessment activities and to develop the baywide restoration plan. In addition, as part of the settlement, one of the responsible parties agreed to conduct a pilot restoration project to convert upland industrial property into wildlife habitat. The results of the pilot project will be used to develop

the baywide restoration plan. Although this project was only 1.5 months old at the time of our visit in July 1995, local Interior officials had already noted a 10-percent increase in wildlife populations.

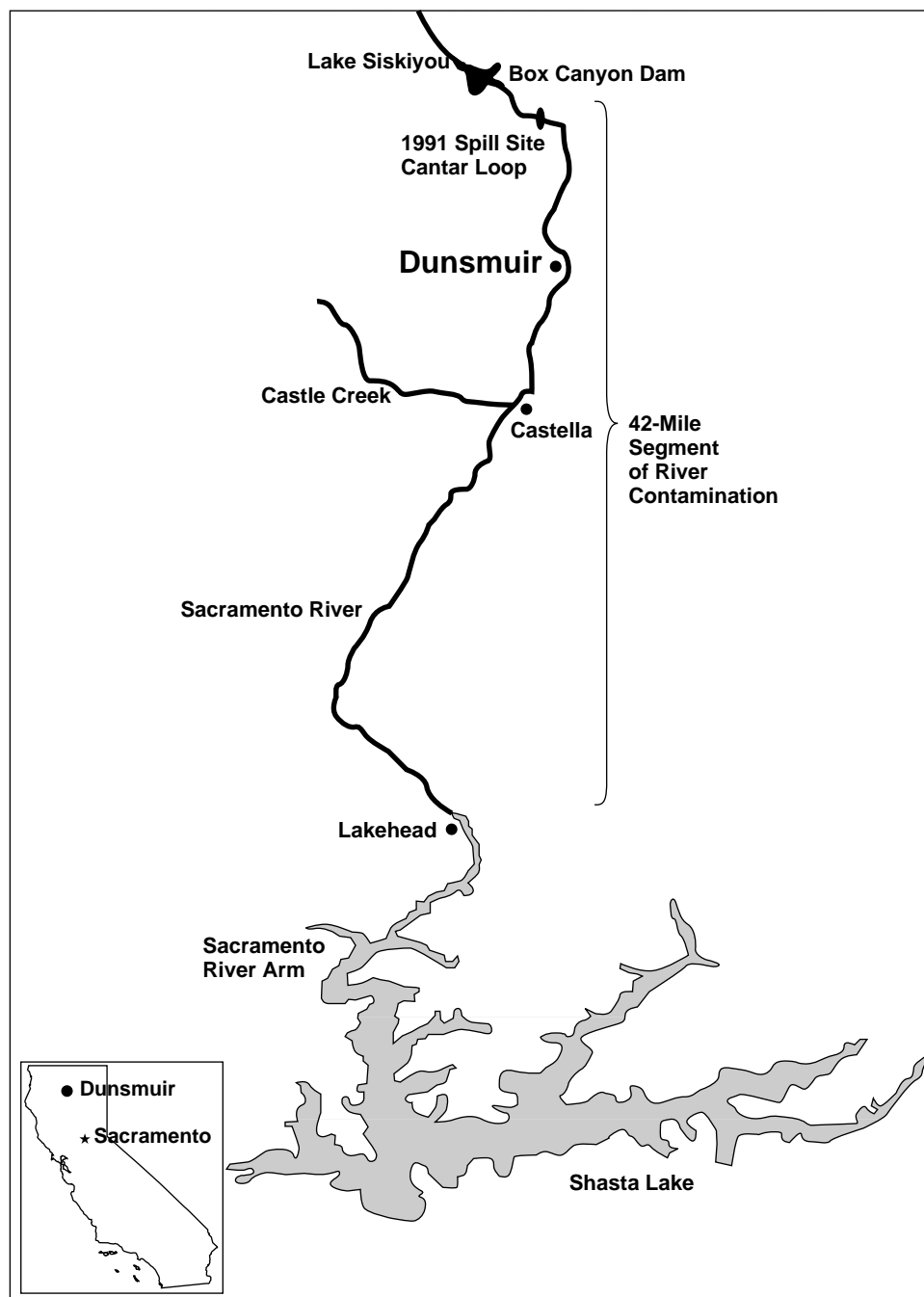
The Commencement Bay trustees are attempting to assess the natural resource damage and plan the restoration while EPA is still cleaning the site. In addition, not all parties have settled. For example, according to a NOAA official, one of the largest potential sources of pollution is a smelting plant that is currently negotiating its responsibility for Superfund cleanup activities with EPA. The cleanup may not be completed for another 5 years. The trustees are continuing to discuss settlements with other responsible parties and reported in December 1995 that they were actively negotiating settlements with three different sets of parties. Justice officials believe that future settlements may be substantial.

Because other natural resource damage settlements are not expected for several more years, the trustees are developing a baywide restoration plan that can be implemented as sediments are remediated and/or funds become available. As of December 1995, this plan was in draft, and the trustees expected to circulate it for public comment in the spring of 1996.

Cantara Loop Train Derailment, Dunsmuir, California

In July 1991, a train derailed on a stretch of track known as the "Cantara Loop" near Dunsmuir, California. (See fig. I.5.) The derailment spilled approximately 19,000 gallons of the herbicide metam sodium into the upper Sacramento River. The spill destroyed all aquatic life along a 42-mile stretch of the river and caused extensive injuries to a native trout fishery as well as to the river's ecosystem. A claim for natural resource damages was filed by the state of California and Justice.

Figure I.5: Cantara Loop, California



The responsible parties settled with California and Justice—on behalf of Interior, the U.S. Department of Agriculture, and EPA—for \$38 million in 1994, using CERCLA and other federal and state laws. According to a senior attorney at Justice overseeing the settlement, the \$38 million included \$14 million under CERCLA's natural resource damage provisions, \$5 million under CERCLA's emergency restoration provisions,¹⁵ and \$19 million under the Clean Water Act, other parts of CERCLA, and various California state laws. The settlement created the Cantara Trustee Council consisting of five voting members—four from California state agencies and one from the Fish and Wildlife Service representing Interior.

According to Justice officials, as of July 1995, none of the \$14 million recovered under CERCLA's natural resource damage provisions had been deposited into the trustee account, and therefore none had been disbursed. Although, according to the official in charge of the restoration in California's Department of Fish and Game, \$16 million of the total \$38 million Cantara Loop settlement had been collected by July 1995, these funds were frozen by the court pending the resolution of an additional lawsuit filed by environmental organizations seeking a greater role in the restoration. In November 1995, the plaintiffs in the suit settled their complaints, and the funds will be made available to the trustees early in 1996.

The Cantara Trustee Council met for the first time in November 1995. According to the Cantara program supervisor with the California Department of Fish and Game, as of December 1995, most elements of the Sacramento River ecosystem are recovering without any further special restoration efforts.¹⁶ In November 1995, the Council announced that it would use the \$14 million to fund grants for restoration projects rather than develop an in-house restoration program. According to terms agreed upon by the Council, projects that directly affect the upper Sacramento River ecosystem will receive a higher weighted score. However, the trustees may use the money to develop natural resource restoration projects in other areas of the state. The Council plans to choose the project(s) in March 1996 and begin implementation in April 1996.

¹⁵After the spill and before the settlement, California used its own budget for emergency monitoring and restoration actions, such as reestablishing the native rainbow trout population. According to the settlement, \$5 million will be deposited in California's Department of Fish and Game's Cantara Restoration and Monitoring Account to reimburse these emergency response efforts.

¹⁶According to the Cantara program supervisor, there were between 7,500 and 8,000 rainbow trout per mile in the upper Sacramento River before the spill. Currently, there are 4,400 trout per mile, up from 3,400 in 1994.

An Application of the Type A Procedure

As of July 1995, NOAA, the primary federal trustee for natural resources in coastal waters, had used the type A procedure once in settling a natural resource damage claim under CERCLA. This case involved a ship's loss of 21 shipping containers, four of which held 25-gallon drums of arsenic trioxide, a highly poisonous metal oxide that is used as an insecticide, herbicide, and wood preservative. A single dose, the size of an aspirin, is lethal to humans.

The incident occurred in January 1992 off the coast of New Jersey in an area that is used for commercial and recreational fishing. Although sampling ultimately showed only background levels of arsenic in the water and sediment, a 16-square-mile area was closed to all fishing activities for 180 days because of the potential for seafood contamination. NOAA, as the federal trustee, concluded that the evidence of injury to its trust resources was not sufficient to warrant a claim for biological injuries. However, the agency determined that it did have a claim for the fishery's closure. To value this claim, NOAA entered data into the type A model about the extent and duration of the fishery's closure. The result was a claim of approximately \$280,000 for the lost harvest of fish and shellfish from this area. NOAA and the responsible party settled the case for \$205,000, which included reimbursement of the assessment's cost.¹⁷

¹⁷The ship's owner also spent approximately \$5 million to search for and try to recover the drums of arsenic trioxide and other materials.

An Application of the Type B Procedure

The complexity of the type B damage assessment procedure is illustrated by the state of Idaho's actions in 1983 at the inactive Blackbird Mine site, located on national forest lands within the state. The federal claims were filed by Justice in 1993 on behalf of NOAA, the Forest Service, and EPA. Copper, cobalt, and other heavy metals from mining activities at this site have extensively contaminated groundwater and surface water, including 26 miles of the Panther Creek, a tributary of the Salmon River. To perform the assessment, the trustees conducted a series of technical and economic studies to determine the extent of the injury to natural resources, quantify the damages, and develop a plan to restore the injured resources. For example, NOAA commissioned an expert study to identify the effects of the mine's contamination on the sediments and small animals in the streambeds of the Panther Creek watershed. Part of this study involved taking samples at 16 sites to show the conditions both upstream and downstream of the contamination. The agency also paid consultants to study injuries to fish. These studies found toxic responses (including death) when salmon were exposed to water quality conditions similar to those found at the site. The trustees settled the case in September 1995. Although this settlement is valued at more than \$60 million dollars, the only cash payment required from the potentially responsible party (PRP) is approximately \$8 million for restoration and reimbursement of past damage assessment costs. The remainder of the settlement is the value of the PRP's in-kind cleanup and restoration work. The largest portion of the in-kind work is the agreement that the PRP will restore the water quality to support all life stages of the salmon by the year 2002—valued at about \$57 million by the trustees.

Objectives, Scope, and Methodology

To determine the number of future federal natural resource damage claims, we interviewed officials at Interior and NOAA. After we discovered that this information was not readily available, Interior offered to survey the agency's regional offices in order to estimate this number. From the survey, Interior developed a list of sites that it believes may have claims ranging from \$5 million to \$50 million and over \$50 million. NOAA and Justice then reviewed this list for possible overlaps and/or omissions. In addition, we interviewed the Chief of the Mining Section in EPA's Office of Solid Waste and representatives of the Western Governors Association, the National Association of Attorneys General, and the Mineral Policy Center.

To obtain information on how settlement dollars are being collected and spent, we focused on the top five CERCLA settlements involving federal agencies, since they accounted for nearly 80 percent of the settlement dollars that Justice had identified as of April 1995.¹⁸ This approach emphasizes larger and possibly more complicated and time-consuming restorations. However, since the information on the smaller settlements resides predominantly with Interior, whose operations are decentralized over numerous field offices, we decided to concentrate our efforts more cost-efficiently on the largest settlements.¹⁹ NOAA, as the lead trustee for four of the five settlements, provided the financial backup records, disbursement request forms, consent decrees, and memorandums of agreement for these settlements. For the fifth settlement, Cantara Loop, which was led by the state of California, the California Department of Fish and Game and the California Attorney General's Office provided information on the status of the settlement and restoration activities. We interviewed both headquarters and field office trustees for the five sites. We visited Elliott Bay in Seattle, and Commencement Bay in Tacoma, Washington. To obtain the most up-to-date information, we contacted the lead trustees in the field at the five sites as late in the data collection phase of this study as possible. Therefore, all restoration activities are reported as of December 1995.

In identifying the approaches the trustees used to develop their natural resource damage claims, we reviewed the regulations for implementing CERCLA as well as other documents for developing damage claims. Interior

¹⁸The compilation of all natural resource damage settlements was a time-consuming, one-time effort on the part of Justice, which required subsequent reviews by NOAA and Interior to reach a consensus. These data are not centrally stored. Therefore, all references to the total number of natural resource damage settlements are current as of April 1995.

¹⁹The financial data are not centrally located and therefore can not be readily updated. All data related to the collection and disbursement of funds are current as of July 1995, when the trustees consolidated the information from various field accounts.

and NOAA briefed us on their methods and explained how they had developed the claims for four sites. We also reviewed the documents related to these cases.

Comments From the Department of the Interior



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

IN REPLY REFER TO:
FWS/AES/DEC

MAR - 5 1996

Mr. Peter F. Guerrero
Director, Environmental Protection Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Guerrero:

We have reviewed the February 15, 1996, draft of the proposed report entitled **SUPERFUND: Outlook for and Experience with Natural Resource Damage Settlements (GAO/RCED-96-71)**. We have appreciated the opportunity to work closely with your auditors on this report, and have the following comments on the draft.

General Comments

There are three general subjects, which recur several places in the report, where the information presented does not clearly convey the actual circumstances: estimates of future sites, use of restoration funds, and the nature of the settlement process. Although each of these areas is improved over previous drafts, they still do not provide an accurate picture.

Estimates of future sites. In our discussions and information provided, DOI has repeatedly emphasized, and it is important to recognize in the report, that the estimated numbers were maximum numbers and that the actual numbers were likely to be somewhat below those estimates, a sense that does not come across clearly in the draft report.

Use of restoration funds. Several places the statement is made, with little qualification or explanation, that trustees have not taken any restoration actions. The summary sections leave the impression that not taking restoration actions is a failure on the part of the trustees. In every one of the five cases cited, there are site-specific and legal reasons, beyond the control of the trustees, for restoration planning being the predominant restoration action. Also, restoration planning is an essential part of the restoration process, and as such is a "restoration action." In addition, in some cases, only partial settlements have been collected, for various reasons, making implementation of the restoration action not possible at this time. One last important element essential to implementation of restoration actions is the opportunity for public review and comments on the restoration. As shown in Table 2, in four of the five major cases, only a small

Mr. Peter F. Guerrero

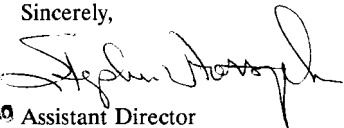
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part of the total settlements or claims have actually been collected, and at New Bedford delays in cleanup preclude immediate restoration. (The settlement column in Table 2 understates some outstanding claims, especially for Montrose, where the two largest parts of the total claim are still in litigation. Further claims are also pending at Elliott Bay and Commencement Bay.) The summary values on page 8-9, and cited on page 2, by treating all five cases together, is not statistically valid because of the small sample size and the disparity between New Bedford and the other cases.

Nature of the settlement process. As we have discussed previously, and has been corrected in some parts of the report but not others, the settlement process is based on appropriately selected elements of the Type B (and sometimes Type A) process, not a "de novo" process for every site. Also, the Type B process is repeatedly characterized as being costly and time-consuming, which fails to recognize that it is a process that is scaled to the site and circumstances. For a relatively minor case, it would not necessarily be costly and time-consuming, as only limited factors would need to be examined. Conversely, for the largest cases, where injuries and damages are massive, it would be appropriate to carry out a much larger scale Type B, as a matter of fairness both to the Potentially Responsible Party and to the public whose resources have been injured. Because of the cost-reasonable provisions of the regulations, we could not carry out a Type B that was excessively costly and time-consuming relative to the injuries and damages for the case at hand.

Specific comments are enclosed. Thank you for the opportunity to review this draft report. If you have questions regarding these comments, please contact the Chief, Division of Environmental Contaminants, U.S. Fish and Wildlife Service at (703) 358-2148.

Sincerely,


Acting Assistant Director
Ecological Services

Enclosure

Now on p. 6.

Comments From the Department of Commerce



THE SECRETARY OF COMMERCE
Washington, D.C. 20230

MAR - 7 1996

Mr. Peter F. Guerrero
Director, Environmental Protection Issues
Resources, Community, and Economic
Development Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Guerrero:

Enclosed is a copy of the Department of Commerce's reply to the General Accounting Office draft report entitled "SUPERFUND: Outlook for and Experience With Natural Resource Damage Settlements."

These comments are prepared in accordance with the Office of Management and Budget Circular A-50.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald H. Brown", is written over the typed name.

Ronald H. Brown

Enclosure

COMMENTS:

The General Accounting Report Office "Superfund: Outlook for and Experience with Natural Resource Damage Settlements" describes the Department of Commerce experience assessing damages for the purpose of restoring natural resource injuries under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹. This topic is complex and the GAO analysis is, of necessity, limited by the completeness of information available and the scope of the review. We appreciate this opportunity to clarify and emphasize some of the important observations generated by the GAO study in three areas: the use of recovered damages, the selection of damage assessment procedures and the time required for restoration. Also, we are providing specific comments and clarifications.

General

Trustees are Using Funds for Restoration. The purpose of assessing injuries and recovering damages is to restore public resources that are harmed by releases of hazardous materials. Congress places this responsibility on natural resource trustees in CERCLA. The GAO report clearly shows that, although restoration progress has been measured, the trustees are diligently pursuing meaningful restoration with funds recovered from polluters. Recovered moneys have not been used for any purposes other than those allowed under CERCLA. Trustees are carefully managing the use of recovered funds through Trustee Councils and Court Registry Accounts to ensure that funds are applied in a way that is consistent with the legislative intent to protect and restore natural resources for future generations of Americans.

Trustees Select a Cost-Effective Assessment Strategy. GAO correctly observes that natural resource trustees rarely complete a damage assessment that follows all parts of the regulations promulgated by the Department of the Interior under CERCLA. This occurs, not because of any defect in the system, but because the existing regulatory provisions are working properly. The Department of Interior regulations provide a good conceptual framework for conducting a damage assessment. But the framers of the regulations understood that every case is unique, and, therefore, made full compliance with the regulations voluntary at the discretion of the Trustees. The Trustees understand that they must prove injury, assess damages, and plan restoration in a

GAO only looked at the CERCLA Natural Resource Damage Assessment program and did not look at the entire NRDA program including efforts under the Oil Pollution Act and National Marine Sanctuaries Act. Further, we recognize that the GAO has focused much of their research on the five largest settlements to date and not on the full range of cases that have been settled.

way that can support a negotiated settlement, and, with sufficient technical rigor to ultimately support litigation if a settlement cannot be reached. At the same time, Trustees must work within limited budgets. The result is that Trustees cooperate to pool fiscal and intellectual resources, and balance the need for technical rigor against the time and money available. A pragmatic application of existing information and targeted studies within the DOI regulatory framework seems to work best in precipitating settlements with Responsible Parties. In this way, the Trustees can attain the legislative objective of restoring injured resources with the lowest possible transaction cost.

Restoration Takes Time. On page 2, GAO reports that as of July 1995 "no restoration actions had taken place with the moneys collected from the five largest natural resource damage cases." The reasons for this are then explained throughout the balance of the report. But it is important to highlight these reasons in one place so that the situation is not misconstrued. On pages 8 and 9, GAO properly alludes to the following factors that can delay restoration progress:

- Due to negotiated payment schedules, restoration funds may not yet have been received by Trustees;
- Only partial settlements may have been achieved and the liability of major Responsible Parties has yet to be resolved;
- Natural resource restoration is sometimes dependent on the EPA remediation schedule;
- Current statute of limitations provisions may force the trustees to file claims before damage assessment and restoration planning are complete;
- All restoration projects must comply with the National Environmental Policy Act and any appropriate permit requirements; and
- Trustees encourage public participation in the restoration planning process.

We request that you highlight the specific points discussed below (which are also presented in the report), to explain the status of restoration work involving the Department of Commerce:

1. Elliott Bay was settled in 1991, but only \$3 million of the \$24.3 million settlement has been collected. A portion of the funds (about half a million dollars) was used by a Panel of Managers, which includes

Now on p. 7

representatives of the Responsible Parties, to conduct a sediment re-contamination study and complete a restoration plan in June of 1994. When the scheduled payments of damages provide the funds for implementing restoration, the Trustees are prepared to move forward.

2. Montrose is a case that involves a number of Responsible Parties with varying levels of liability. The portion of the case that has been settled (\$12 million in May of 1992), represents only a small part of the total natural resource damages that may ultimately be recovered. Due to the limitation in the funding now available relative to the magnitude of the restoration requirements, uncertainties with regard to the legal status of the case, and questions about the future role of EPA in sediment cleanup, the Trustees have decided to use this time to continue evaluating different approaches to restoration while preserving the bulk of recovered moneys in a court registry account for future action.

3. New Bedford Harbor comprehensive restoration cannot be undertaken until the EPA remediation is defined and implemented. Even so, the Trustees have set aside a portion of the recovered damages for off-site replacement of injured resources that can be pursued now. This work can be completed without risk of PCB contamination from the existing site.

4. Commencement Bay represents a complex damage assessment at a Superfund site that has been divided into many subsites, each of which has a different set of responsible parties. Of the \$13.3 million settlement, only \$2.6 million has actually been received by the Trustees under the negotiated payment schedules. The Trustees have completed a bay-wide restoration strategy, and are drafting a document to ensure that restoration will comply with the National Environmental Policy Act. In addition, a small habitat restoration project on the Middle Waterway was started last June.

Comments From the Department of Justice



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General

Washington, D. C. 20530

March 13, 1996

BY FAX and MAIL

Peter F. Guerrero
Director
Environment Protection Issue Area
General Accounting Office
800 K Street N.W., Suite 200
Washington, DC 20001

Re: Department of Justice Comments on Draft GAO Report, "SUPERFUND: Outlook for and Experience with Natural Resource Damage Settlements"

Dear Mr. Guerrero:

We appreciate the opportunity to review and provide these comments on GAO's draft report, which you provided to the Department of Justice ("DOJ") with a cover letter dated February 15, 1996. We request that the following comments and suggestions be taken into account in revising and finalizing the report. We have also had the opportunity to review a set of comments on the report prepared by the Department of Commerce, with which we generally concur. For convenience, we have grouped our separate suggestions into two categories: "major comments" and "editorial/technical comments."

Major Comments

1. Status of claims and restoration at the five sites with the largest NRD recoveries. Our most significant concern is that parts of the discussion of the five largest natural resource damage (NRD) recoveries in the draft report are misleading in suggesting that trustees have received large settlements and have simply elected not to use the recovered funds. Although the draft provides some of the reasons why restoration has not yet begun at these five sites (except for Commencement Bay), it omits several key points. The points which should be added to the report, if it is not to be misleading, are well described in the Department of Commerce comments. In addition, we believe that broad statements on pages 2 and 9 of the draft report to the effect that no restoration has occurred at any of these five sites should be revised and clarified to reflect the status of these cases accurately.

Now on p. 6.

(a) At page 2, second full paragraph, the draft report states "As of July 1995, no restoration actions had been taken with the moneys collected." This statement in the summary section is inaccurate without further explanation. In fact, restoration planning is proceeding at each of these sites given the status of the legal proceedings, the need to coordinate with EPA's remedial efforts, payment schedules that provide for time payments, and circumstances unique to each case. Moreover, as pointed out in the Commerce comments, an initial restoration project is now under way at the Commencement Bay site in Washington, and at another of these five sites, Cantara Loop, the trustees have not yet received any damage payments. Accordingly, we suggest deleting the last three sentences of this paragraph and replacing them with the following:

"At the four major sites where trustees have received damage payments, the trustees are using a portion of the recoveries to fund restoration planning. In addition, at one site (Commencement Bay), the trustees recently began construction of a localized restoration project in one of several affected waterways. Full-scale restoration work has not yet begun at these sites primarily because CERCLA requires the trustees to complete a restoration plan with public participation before starting restoration work. In some of these cases, restoration has also been held up by the need for coordination with EPA's cleanup process (New Bedford Harbor) or continued litigation (Montrose and Cantara Loop)."

We believe these clarifying revisions are thoroughly supported by the descriptions of these cases already in the appendix to the draft report, as supplemented by information provided in the Commerce comments.¹ If you would like further supporting information, we would be glad to provide it.

¹ The draft report notes that at Cantara Loop, the recovered funds have been frozen due to litigation, impeding restoration, and that in New Bedford Harbor, restoration planning is awaiting EPA's selection of a remedy, something that has been unforeseeably delayed. To be accurate, the report should also note that in 2 of the other 3 cases -- Montrose and Commencement Bay -- the settlements to date represent only a small fraction of the amounts the trustees will need to recover to accomplish restoration of the injured natural resources. In Montrose, the trustees are appealing the dismissal of their claims against the defendants that are allegedly responsible for dumping DDT in the area off Los Angeles Harbor, including Montrose Chemical Corporation. At Commencement Bay, the trustees are continuing their program of negotiating a series of settlements with groups of PRPs who are responsible for hazardous substance releases in various parts of this large, complex site.

Now on p. 6.

Now footnote 11.

Now on p. 7.

Now on p. 8.

(b) Similarly, the first full sentence at the **top of page 9** states, "However, no restoration actions have been taken with the moneys collected." This statement should be revised in substantially the same way to convey an accurate picture of the status of these sites. In addition, footnote 10 should be revised to refer to the restoration project recently begun at Commencement Bay, which is described in the Commerce comments. The last sentence of the first full paragraph on page 9 should also be revised to reflect accurately the requirements of Section 111(i) of CERCLA; we suggest the following substitute: "Additionally, CERCLA requires the trustees to develop and adopt a restoration plan with opportunities for participation by the public before they can begin on-the-ground restoration work."

(c) Although the draft report's chart on page 11 mentions the dates of settlement in these five cases, it does not show the dates the monies were actually collected. The chart thus implies that the monies were immediately available to the trustees. As the report acknowledges elsewhere, however, the has not been the case. In each of the cases, the settlements are to be paid over time, and the only case in which the full settlement amount has been paid to date is New Bedford Harbor. We suggest that the report state that the payments in all cases are being made over time.

2. Damages Assessment Methods.

Now on p. 2.

(a) We think the **second full sentence at the top of page 3**, "The agencies seldom fully implement either method," should be clarified to reflect accurately the obstacles to widespread use of the regulations to date, especially the Ohio decision which invalidated critical portions of the rules, and the fact that trustees are applying in whole, or in substantial part, the Type B rules at large sites such as Montrose, and the Couer d'Alene Basin. We suggest the following substitute:

"Use of the rules has been limited in part because key parts of both rules were struck down by the D.C. Circuit in 1989. The agencies have begun to apply the Type B rule, which was re-issued in 1994, at a few large sites, but they have completed few full assessments under either rule."

Now on pp. 8 and 10.

Now on p. 11.

(b) On **pages 12 and 14**, the draft report gives the impression that trustees simply make a calculation that doing a full Type B assessment will take too long, or cost too much, and then decide not to do it. The report later observes, on **page 15**, that trustees frequently have a short time to respond to PRP requests for comprehensive settlements of liability at a site, and that this may drive the decision to use only key elements of the Type B assessment, rather than a lengthy Type B analysis. In fact, this latter observation typifies many cases. The Justice Department April 1995 compilation of NRD recoveries includes 48 cases in which trustees issued covenants not to sue without

requiring any payment from the PRPs.. In most of these cases, trustees conducted a settlement-driven assessment in order to facilitate PRP requests for comprehensive resolution of liability.

Now on pp. 8 and 11.

Consequently, we suggest moving the discussion on page 15 to page 12 to give an accurate and more complete picture of the trustees' assessment decisions. Alternatively, we would suggest inserting a reference to that discussion on page 12, lines 10-12. This could be done by inserting the following, breaking the sentence on lines 10-12 into two separate sentences.

Now on p. 8.

"One procedure is limited in scope and the other procedure can be costly and time-consuming to implement. At many NPL sites, the trustees have had only a few months to respond to a PRP's request to include a damages settlement in a settlement of EPA claims. Consequently, the trustees tailor their use of available procedures to the nature of the request, the site, and the time requirements of the litigation or settlement."

Now on p. 10.

3. **Page 14.** We are concerned by the draft report's highlighting of CVM. The draft report discusses only two economic damages methods, the travel cost analysis and CVM, and omits mention of other, more commonly-used methods of assessing interim losses, such as habitat equivalency analysis. Consequently, the report creates an incorrect impression that CVM is used as much as the travel cost method.

Although CVM is mentioned in the Type B regulations, the regulations do not presently contain guidelines for the use of CVM. In practice, the federal trustees have performed a CVM study in one CERCLA case, Montrose. (State trustees have used CVM in a few other cases, and the United States did participate in, although it did not complete, a CVM study in connection with the Exxon Valdez oil spill.)

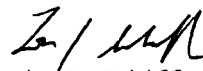
Appendix VII
Comments From the Department of Justice

* * * * *

Once again, we appreciate your allowing us to review this draft report and your careful consideration of our comments and suggestion. You and the GAO team working on this report have worked hard on compiling information about this still relatively new program and presenting it in a readable form. The changes we have suggested are necessary to make the discussion accurate.

If you have questions about these comments or any other followup points, please contact either John Cruden, 514-2718, or Bill Brighton, 514-2244.

Sincerely,



Lois J. Schiffer
Assistant Attorney General

Major Contributors to This Report

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