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RESOURCES, COMMUNITY,
AND ECONOMIC DEVELOPMENT
DIVISION

B-216105

September 4, 1984

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Toxic
and Environmental Oversight
Committee on Environment and Public Works
United States Senate



Dear Senator Baucus:

Subject: Natural Resource Damage Claims and Assessment
Regulations Under Superfund (GAO/RCED-84-196)

On December 9, 1983, you requested that we review the implementation of the natural resource damage claims provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (commonly referred to as Superfund). Under the act, federal and state trustees of natural resources (e.g., land, fish, wildlife, air, water, groundwater, and drinking water supplies) may submit claims against Superfund for reimbursement for injury to, or destruction or loss of, natural resources caused by releases of hazardous substances. You were concerned that the Environmental Protection Agency's (EPA's) and the Department of the Interior's delays in implementing the natural resource damage claims and assessment provisions of Superfund had caused confusion and uncertainty among potential claimants, and as a result, some claimants would not meet the specified statutory time period for presenting some claims.

On June 15 and July 25, 1984, we briefed your office on the results of our work. Also, on July 25, the Senate passed H.R. 2867, entitled Solid Waste Disposal Act Amendments of 1984. Section 33(b) of this bill, added by an amendment cosponsored by Senators Bradley, Lautenberg, Abdnor, and yourself, amends Superfund and extends the deadline for filing natural resource damage claims by federal and state trustees to 3 years from the date the Department of the Interior publishes final damage assessment regulations.

Because of the Senate action, we agreed, at the request of your office, to provide the information obtained to date on the results of our work. This report discusses applicable provisions and responsibilities under Superfund legislation, EPA's and Interior's delays in promulgating regulations, states' views on EPA's action to invalidate states' natural resource damage

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claims submitted to EPA, the impact of Interior's delays in promulgating regulations, state lawsuits filed against EPA and Interior, and recent actions to promulgate Superfund regulations.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our review were to (1) examine the reasons for EPA's and Interior's delays in promulgating regulations to implement the natural resource damage claims and assessment provisions of the act and (2) determine the impact these delays may have had on potential claims against the fund. To accomplish this objective, we reviewed the act and its legislative history, drafts and notices of proposed EPA and Interior regulations, and appropriate EPA and Interior memoranda. We also held discussions with EPA officials from the Office of Emergency and Remedial Response and the Office of General Counsel, Department of Interior officials from the Office of Environmental Project Review, and Department of Justice officials from the Land and Natural Resources Division.

We discussed the problems and impact of delays in promulgating regulations with state offices responsible for filing either natural resource damage lawsuits or claims. We talked with officials from the states of Colorado, Idaho, Louisiana, Montana, New Jersey, New Mexico, and South Dakota. We selected Louisiana, Montana, and New Mexico because they had filed lawsuits against EPA and Interior as a result of the agencies' delays in promulgating appropriate regulations. We reviewed the lawsuits that were filed by these states. The remaining four states, Colorado, Idaho, New Jersey, and South Dakota, were selected because they had submitted claims against the fund for natural resource damages. We met with representatives from environmental groups, including the Environmental Defense Fund, the National Wildlife Federation, and the Public Citizen, and obtained their views on the EPA and Interior delays in promulgating the regulations.

Because the Senate passed H.R. 2867, your office requested that we terminate our work and report on the information developed to date. Our work, conducted from May to August 1984, was done in accordance with generally accepted government auditing standards, except that, as requested by your office, we did not obtain official agency comments on this report.

RESPONSIBILITIES UNDER SUPERFUND

The Comprehensive Environmental Response, Compensation, and Liability Act (Public Law 96-510) authorizes the President to clean up hazardous waste sites. EPA has the lead role in implementing the Superfund program. The act provides for a \$1.6 billion trust fund to be accumulated between fiscal years 1981 and 1985, with \$1.38 billion (86 percent) coming from fees collected from the chemical and oil industries and \$220 million (14 percent) coming from general revenue appropriations. Monies from the fund may be used to clean up releases of hazardous substances (to

include taking action to protect human health and the environment) and to pay certain claims resulting from releases.

Among those claims are claims for injury to, or destruction or loss of, natural resources due to an actual or threatened release of hazardous substances, pollutants, or contaminants. Natural resource damage claims can be asserted only by the federal government as trustee for natural resources over which the United States has sovereign rights, and by states as trustees for natural resources within their boundaries belonging to, managed by, controlled by, or relating to the state.

In addition to permitting claims for damage to natural resources, section 111 permits trustees to assert claims for the costs of restoring, rehabilitating, or replacing natural resources damaged by releases of hazardous substances and for the cost of assessing damages. The money in the fund cannot be used to pay claims for those costs where the release of the hazardous substance which caused the damage, and the damage itself, had occurred wholly before December 11, 1980. The act limits the amount of money available for natural resource damage claims to no more than 15 percent of the monies available from the fund.

Section 111(i) bars the use of these fund monies for natural resource restoration until a plan for the use of such monies has been developed and adopted by affected federal agencies and states. EPA has interpreted this section to require EPA's prior approval ("preauthorization") of the plan before claims may be asserted against the fund.

Section 112(d) of the act provides that natural resource damage claims must be presented within 3 years from the date of the discovery of the loss or the date of enactment of Superfund (Dec. 11, 1980), whichever is later. Because "discovery" has not yet been defined by EPA or the courts, a question has arisen as to whether claims for damages discovered prior to December 11, 1980, had to be presented to EPA or the courts by December 11, 1983.

EPA'S AND INTERIOR'S DELAYS IN ISSUING REGULATIONS

Section 112 of the act requires the President to establish claims forms and procedures for filing natural resource damage claims. He delegated this authority to EPA by Executive Order 12316.¹ As of August 1984, EPA has not published any proposed or final regulations. In addition, the President, by Executive Order 12316, delegated to Interior his authority under section 301(c) to develop and promulgate regulations, by December 1982, on

¹The President signed Executive Order 12316 on Aug. 14, 1981, delegating to various federal agencies the responsibilities and authorities vested in him by the Superfund act.

conducting natural resource damage assessments. As of August 1984, Interior has not proposed or developed these regulations. Together, the purpose of these EPA and Interior regulations is to establish a mechanism for federal and state trustees of natural resources to seek compensation for damages to and restoration of natural resources resulting from releases of hazardous substances. The Chief of EPA's Policy Analysis Branch cited the need to implement other higher priority program requirements and a lack of resources as reasons for the delay. In addition, Interior's Director of the Office of Environmental Project Review cited an inherent difficulty in developing assessment regulations as another reason for their delay.

The Chief of EPA's Policy Analysis Branch gave several reasons for the delay in issuing the claims procedure regulations. He noted that implementation of Superfund's mandate to take emergency and remedial actions to protect human health and the environment has taken priority over restoration of natural resources. Also, in his view, frequent changes in EPA's senior management during the past 3 years have caused delays in establishing overall guidance for developing the regulations. He said that the current Assistant Administrator for Solid Waste and Emergency Response, however, has taken action to develop the regulations by providing overall guidance and the needed resources.

The Director, Office of Environmental Project Review in the Department of Interior, believes that while developing the damage assessment regulations was a low priority, the lack of resources has been a major obstacle. No Superfund money has been allocated for regulation development because of a June 1982 decision by EPA's Office of General Counsel which stated that the act prohibits using the fund for administrative expenses relating to studies and regulations, including Interior's regulations. However, Interior requested and received appropriated funds and technical staff in fiscal year 1984 to develop the regulations.

The Director cited several reasons for Interior's delay in obtaining appropriated funds. First, Executive Order 12316 was not issued until August 14, 1981, after President Reagan revoked President Carter's Executive Order 12286 of January 19, 1981, and developed his own order reassigning agency responsibilities for Superfund. President Carter had delegated the responsibility for developing the regulations to Interior, the National Oceanic and Atmospheric Administration, and the heads of various other federal agencies which are designated natural resource trustees. In August 1982, Interior's Office of Environmental Project Review (OEPR) was assigned the task of developing the damage assessment regulations. This was the first time an Interior office was assigned the task. Not until fiscal year 1984 did OEPR request and receive \$200,000 and 4 staffyears to develop the regulations. This effort will be funded at the same level for fiscal year 1985.

The Director, OEPR, also cited the inherent difficulty of developing the regulations and the lack of information as causes for the delay. The act provides that the regulations will address two types of damage assessment procedures. According to the Director, the first type (type A) will be standardized procedures for simplified assessments of small releases of hazardous substances requiring minimal field observation, including basic information about the quantity and type of hazardous material released and the habitat involved in order to determine the dollar amount for damages. Both the Chief of EPA's Policy Analysis Branch and Interior's Director, OEPR, believe that regulations for type A assessments will be the most difficult to develop because little is known about the impact hazardous substances have on natural habitats. The Director, OEPR, believes that any methodology developed for this assessment type will be susceptible to legal challenge.

The second type of assessment procedures, type B, will provide for a case-by-case determination of damage. The law states that the regulations will provide for alternative methods for conducting assessments in individual cases to determine the type and extent of injury, destruction, or loss. According to the Director, type B procedures would be for major or significant releases of hazardous substances requiring complex or methodical assessments and extensive field surveys. Because the type B procedures will call for individual evaluations, the OEPR Director believes that regulations for these procedures could be developed and promulgated before the type A assessment regulations. However, he noted that time and research will be needed to develop regulations for both types of procedures. He estimated that it may take at least 2 years to issue regulations for the type B assessments. He told us that he could not provide an estimate for how long it would take to complete regulations for type A assessments.

In developing their respective regulations, EPA and Interior are now working to resolve certain basic issues. For example, Interior is now considering whether state or federal officials will be responsible for implementing the regulations once promulgated. Likewise, there remains the question of which agency, EPA or Interior, should be responsible for preapproving plans for restoring or rehabilitating natural resources.

STATES' REACTIONS TO EPA'S INVALIDATION OF DAMAGE CLAIMS

In December 1983, the states of Colorado, Idaho, New Jersey, and South Dakota submitted 57 claims to EPA to recover \$2.7 billion from the fund for natural resource damages. These states were concerned about the pending December 11, 1983, statute of limitations deadline for presenting these claims of natural resource damage. In January 1984, EPA advised the states that the claims were not valid. EPA determined that the Superfund act establishes two preconditions with which states must comply before

EPA can accept their claims. These preconditions, according to EPA, are: (1) appropriate presentation of the claim to the responsible party, as required by section 112(a) of the act, 60 days before submission to EPA and (2) development and adoption of a restoration plan, as required by section 111(i) of the act, with preauthorization from EPA prior to presenting the claim to the fund. EPA found that with respect to the 57 claims filed in December 1983, these four states had not met either statutory precondition.

Officials in seven states we contacted disagreed with EPA's basis for invalidating the 57 claims. They stated that EPA's interpretation of the act was unforeseeable. As such, they believe the regulations should have been issued to help guide the states in filing their claims. Because of the lack of guidance, however, four states submitted claims based on their own interpretation of the act. Following EPA's denial of these claims, the states of New Jersey, Louisiana, and New Mexico filed suit to require EPA and Interior to issue the regulations. Officials in the seven states believe that EPA actions were inconsistent with EPA's obligations under the act when EPA failed to issue the procedures and forms the act required and then denied the claims submitted.

Officials in six states (Colorado, Idaho, Louisiana, New Mexico, Montana, and South Dakota) disagreed with EPA's interpretation of the first precondition for filing valid claims. Attorneys in these states' Attorney General's offices agreed that the law requires that the claims be presented to the private responsible party, but they disagreed with EPA's interpretation of the act that 60 days must elapse before a claim can be validly submitted to EPA. The states believe that presentation of the claim to the responsible party stops the statute of limitations from running, and consequently, these attorneys said that the claim can be submitted to EPA at any time following initial presentation of the claim to the private party. In its complaint against EPA, New Jersey acknowledged that the act requires states to present claims first to private parties and to allow the private party 60 days to satisfy the claim before submitting the claim to EPA. However, New Jersey argued that, with respect to the 26 claims it filed, it had notified the responsible parties 60 days before submitting the claim to EPA.

Regarding the second precondition for filing valid claims, attorneys from seven states told us that the act does not require the development and submission of a preauthorized plan as a prerequisite for filing the claim. They agree that such a plan is required before restoration can begin, but they said that the state must be granted the claim money in order to develop the plan. EPA, they said, has placed the "cart before the horse" by requiring development of the plan before paying the claims. According to these state attorneys, if the courts determine that EPA can legally require the states to submit preauthorized plans, then the agency should have notified the states before the

deadline for filing claims had passed and provided regulations and guidance on how the plan was to be developed and preauthorized. This was not done, however, and the states believe it was unreasonable for EPA to deny their claims after the filing deadline had passed, based on a requirement which they could not have reasonably foreseen.

Without EPA's or Interior's regulations prescribing claim procedures and damage assessments, the states are hesitant to resubmit their claims or invest the money to develop restoration plans. They hope that the problem will be resolved by the Congress, by EPA issuing its final regulations, or through court decisions in one of the two lawsuits now pending against EPA and Interior.

Three of the seven states, Louisiana, New Mexico, and Montana, did not file claims against Superfund. Attorneys in Louisiana and New Mexico said that they did not believe they had to file claims with EPA prior to the statutory deadline because the statute of limitations stopped running when the notification letters were sent out to the responsible parties. These two states have joined in a lawsuit with several environmental groups to require EPA and Interior to issue their respective regulations.

The Special Assistant Attorney General for Montana's Department of Health and Environmental Sciences told us that the state has taken the position that natural resource damage claims can be "discovered" only after some type of remedial investigation, feasibility study, and assessment has been completed. However, because this interpretation of section 112(d) has never been officially accepted, the Governor of Montana has stated that the December 11, 1983, statute of limitations deadline raises questions about the states' ability to pursue claims for natural resource damage discovered before the passage of the act in 1980. Montana had filed suit against EPA and Interior in the federal district court in Montana, but discontinued its suit in light of the suit by Louisiana and New Mexico.

IMPACT OF INTERIOR'S DELAYS ON FEDERAL AND STATE LITIGATION

The Chief of the Environmental Enforcement Section of the Department of Justice and attorneys from the states have stated that they believe the Department of Interior's delays in promulgating the natural resource damage assessment regulations will have a detrimental effect on present and future litigation. Some of these officials believe that the evidentiary advantage of a

"rebuttable presumption"² provided by section 111(h)(2) of the Superfund act, which is dependent on the promulgation of the damage assessment regulations, is a necessary device for proving damages to the courts. In addition, damage assessment regulations are needed to provide some degree of uniformity and consistency in developing damage assessments.

The Chief of the Environmental Enforcement Section noted that the delay in promulgating the regulations may be an obstacle in the federal government's litigation against private responsible parties under the act. At the present time Justice has seven such cases in litigation. Without the regulations and its rebuttable presumption advantage, the federal government, according to the Chief, will need to develop a methodology to measure resource damages and will need to prove the reasonableness of the damage assessment to the court. This process, he believes, will be costly, time consuming, and could affect the government's ability to recover fully for all the damage incurred.

Attorneys in all seven of the states contacted believe that Interior's failure to issue and implement the assessment regulations will be a serious obstacle to the states' present and future litigation. These state attorneys believe that the act designates federal agents to perform resource damage assessments. They also believe that their states do not have the special expertise or the funding to develop and perform the damage assessments. Further, these state attorneys believe that one of the purposes of the act's regulatory requirement was to provide for a uniform process for determining the economic worth of damage to natural resources. Colorado's Special Assistant Attorney General for Environmental Affairs believes it is not efficient in terms of time or money for each state to develop its own methodologies for assessing damage. On this basis, the Colorado State Attorney General's office has requested from the court a postponement for submitting damage figures in those suits against private responsible parties made under the act.

STATES SUE EPA AND THE DEPARTMENT
OF INTERIOR TO PROMULGATE REGULATIONS

On April 26, 1984, the state of New Jersey filed a civil action in the U.S. District Court for the District of New Jersey to require EPA to recognize as valid and to process the claims for damage to natural resources filed by the state of New Jersey on

²Section 111(h)(2) provides that any determination or assessment of damages pursuant to Interior's regulations shall have the force and effect of a rebuttable presumption; i.e., in an action against a responsible party, if the state or federal government shows that the determination and assessment of damages were made pursuant to Interior's regulations, a court will accept that determination as fact unless the responsible party provides evidence sufficient for the court to reasonably conclude differently.

December 10, 1983. These claims were rejected by EPA on January 27, 1984. As an alternative, New Jersey asked the court to relax the act's statute of limitations and to provide it the opportunity to refile the damage claims previously submitted because EPA improperly rejected the state's claims without providing any notice or opportunity for comment as to the standards for filing a valid claim. New Jersey also asked the court to require EPA to promulgate rules concerning the filing and processing of claims for natural resource damages and to require Interior to adopt regulations for the assessment of natural resource damages.

On June 13, 1984, the states of New Mexico and Louisiana and three environmental interest groups--the Environmental Defense Fund, the National Wildlife Federation, and the Public Citizen--filed a complaint in the U.S. District Court for the District of Columbia seeking an order directing the Department of the Interior and EPA to issue their respective regulations. According to the complaint, Interior's failure to promulgate regulations regarding the proper means to identify and assess damages to natural resources violates the act's requirement that such regulations be issued no later than December 11, 1982. Likewise, the complaint alleges that EPA's failure to promulgate regulations regarding the proper procedures to be employed by states making claims against the fund violated the act.

Because there are no damage assessment regulations and no claims procedures regulations, the states of New Mexico and Louisiana assert in the complaint that they have been hindered in their efforts to

--fully identify, assess, and quantify damages to natural resources and

--press successful claims to obtain funds to restore, rehabilitate, or replace natural resource damages.

Louisiana, New Mexico, and the environmental groups have asked the court to direct Interior and EPA to propose their respective rules within 60 days from the date of the court order and to issue final rules within 180 days from the date of the proposals. These two cases are pending.

EPA AND INTERIOR INITIATE ACTIONS
TO PROMULGATE REGULATIONS

EPA and Interior have recently acted to expedite the development of their respective regulations. In June 1984, both agencies formed a work group to coordinate efforts during development of regulations on natural resource damage claims and assessments. The work group was formed to prevent overlaps and jurisdictional disputes that could occur during development of the regulations.

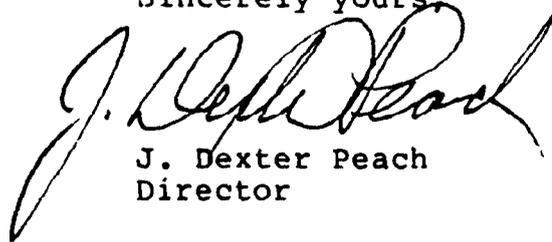
Also in June 1984, EPA circulated draft proposed claims regulations for comment among other federal agencies, including the Departments of the Interior, Defense, Commerce, Transportation, Agriculture, and Justice. EPA is reviewing and considering comments received for incorporation into the proposed rules. On July 26, 1984, EPA met with representatives of these agencies to discuss and attempt to resolve the comments.

In July 1984, EPA assisted Interior in expediting natural resource damage assessment regulations by providing contractor support, which will be reimbursed by Interior through an inter-agency agreement. EPA approved the contract on July 6, 1984. The contractor is developing a damage assessment regulations work plan for Interior which is scheduled to be completed September 30, 1984.

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As arranged with your office, we plan no further distribution of this report until 30 days from the date of its issuance. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,



J. Dexter Peach
Director