

GREEN COASTS

A Partnership between Government and Industry To Restore Natural Resources

Overview

The National Oceanic and Atmospheric Administration (NOAA) is considering a partnership between industry and government to restore natural resources harmed by the release of chronic contaminants. This initiative, known as "Green Coasts," is intended to provide PRPs the opportunity and incentives to identify, assess and restore natural resource injuries while ensuring trustee oversight of all PRP work. After satisfactory completion of this process, PRPs would be given relief of liability for natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, the Superfund Act) or the Oil Pollution Act of 1990 (OPA).

The goals of Green Coasts are to:

- Restore injured natural resources that might not otherwise be addressed;
- Streamline the NRDAR process without compromising the fundamental standards for liability;
- Encourage PRP initiative and innovative approaches to natural resource restoration; and
- Strengthen government partnerships with PRPs and other stakeholders.

This document does not establish any official agency position. In its current form, it is merely intended to provide the stakeholders with material for an open discussion of the issues.

If stakeholder meetings demonstrate the viability of the Green Coasts concept, NOAA intends to pilot test the approach.

Background

Natural resource trustees (trustees) are authorized to act on behalf of the public to protect and restore resources adversely affected by hazardous substances or oil, as provided under CERCLA, the Clean Water Act, and the Oil Pollution Act (OPA). In addition, NOAA has trustee authority under the National Marines Sanctuaries Act, which also covers additional types of injuries, including injuries from groundings. In particular, trustees under these statutory authorities can pursue the protection and restoration of injured resources in coordination with the spill response and hazardous site cleanup processes and through the formal NRDAR process for both spills and contaminated sites.

The current NRDAR regulatory framework encourages a cooperative working relationship between trustees and PRPs to restore injured natural resources. NOAA is looking for ways to more effectively encourage this cooperation by institutionalizing experience on cooperative assessments.

What Green Coasts Could Be

Green Coasts is intended to provide an additional approach to resolving NRDAR liability under CERCLA and OPA. It will be a program in which PRPs participate as partners in a process in return for the opportunity to exert more control over timing, scope and cost. Green Coasts is motivated by a desire to expedite restoration and designed to benefit from experience gained in various compliance and cleanup programs across the country.

Green Coasts is not intended to replace or diminish existing trustee programs or responsibilities, and would not apply to any on-going cases. Nor is it intended to compromise the authority of government agencies, or circumvent or replace the site cleanup processes.

Operating Principles for Cooperation

In the context of an NRDAR, a cooperative assessment is one that directly involves the PRP in the identification, assessment and restoration of natural resource injuries associated with PRP activities. Cooperation can vary, ranging:

- From the trustees' funding and implementing all assessment and restoration work and sharing the relevant information with the PRPs;
- To the trustees and PRPs jointly funding and implementing all assessment and restoration work;
- To the PRPs' funding and implementing all assessment and restoration work and funding trustee oversight.

Green Coasts attempts to achieve a high degree of meaningful, mutually beneficial cooperation that balances the potentially competing interests of trustees and PRPs.

The following operating principles are considered fundamental to a cooperative partnership effort. For a cooperative partnership to work, it must:

- Be cost-effective;
- Be flexible;
- Be open, fair and balanced;
- Be based upon appropriate scientific information;
- Assure full and timely restoration of injured natural resources and services;
- Acknowledge the needs of all parties – PRPs, trustees and the public;
- Have buy-in by all interested parties, allowing for consensus decisions to the extent possible, recognizing that trustees have a legal responsibility to make final decisions; and

- Include provisions for either PRPs or trustees to terminate the process if it is not working.

What sites would be considered under Green Coasts?

Green Coasts will focus on hazardous substance sites where:

- Trustees have jurisdiction for natural resource damage action;
- Cleanup has been, or will be, adequately addressed such that restoration is possible; and
- Other programs or actions do not address restoration.

These determinations will be made by the participating trustees involved in a particular site.

Issues to be Discussed by Stakeholders

I. Green Coasts Incentives – What incentives would attract PRPs and trustees to this process?

Some incentives might include:

- Maximize restoration results and minimize process/litigation;
- Reduce uncertainties;
- Reduce costs/time/funding;
- Enhance partnerships;
- Provide guidelines/maintain oversight; and
- Improve information flow.

What other incentives might be considered for the Green Coasts process and pilot efforts?

What incentives would prompt parties to identify and conduct pilot efforts that would test the Green Coasts process?

II. How would the Green Coasts process work best?

How would a PRP signal to the trustees that it wants to participate in Green Coasts? What information would the trustees need in order to evaluate a PRP's interests?

- What requirements should a PRP fulfill to participate in Green Coasts? Factors that may be important to the success of a project might include subscribing to a program framework, capability to perform assessment and restoration, knowledge and experience in cooperative NRDARs, in-house technical capabilities, and a positive environmental track record and corporate policy.

- How should the application process work? What elements in the application process should be considered?
For instance, the application process may need to address identification of interest by the PRPs, statute of limitations issues, commitment by the PRPs to the process and to fund the process, consultation with the trustees to determine site eligibility, and ultimate review and acceptance of submitted applications.
- What elements should be considered in the application that would provide adequate information and facilitate streamlined consideration?
Such an application might include general information such as identification of all PRPs (if the program were to include multiple PRP sites), PRP background and the status of response actions, site history, description of potential injury and restoration alternatives, description of public concerns, points of contact for the PRP, etc.
- How should trustees consider such an application?
Trustees might want to determine trustee jurisdiction, whether the application falls within the scope of Green Coasts, verify involvement of other PRPs; determine whether the proposed PRP actions are practical; notify and determine interest of potential or known trustees and other potentially affected government agencies; determine if the PRP's application will be accepted, etc.

Under what type of agreement would the parties proceed?

- What types of issues should be covered by such a document?
Important issues might include commitment to the program, funding, tolling agreements, sharing and using information, public involvement, joint working groups, dispute resolution, project-specific liability release, etc.
- Could a standard document be developed in order to bring consistency to the program?

What types of circumstances would justify termination and how would that termination take effect?

- Since Green Coasts would be a voluntary program, should either party be able to terminate the process for any reason?
- If there were a simple disagreement among the parties, what process would work best to resolve the dispute?
- What would happen to the non-disputed provisions of an agreement?
- In circumstances where there are multiple parties, what would happen with parties not part of the dispute?
- What safeguards are needed to preserve the value of work progress upon termination?

III. What are the needs of the parties and how can those needs be met?

PRPs may want more control in the NRDAR process. What other needs might be important to PRPs?

Trustees are obligated to achieve restoration that meets the needs of the environment and the public. Trustees will also need protection from statute of limitations concerns while considering and working on the sites, as well as up front funding to participate. How can these and other needs be met?

The public may want, in addition to full and appropriate restoration, involvement and accountability. What other concerns may the public have? What measures can be taken to meet these needs and concerns?

Some considerations that may help meet needs and address concerns of various stakeholders:

- Coordination/Communication: What types of steps can be taken to ensure effective coordination and communication? How will PRP's coordinate among themselves when there are multiple PRP's involved at a site? What steps can trustees take to coordinate among themselves, since most sites will involve at least two, or more, co-trustees?
- Information/Data Sharing: How can the parties ensure timely sharing of all relevant information? How should the parties address data collection and analysis efforts? What oversight role would trustees have to ensure the public's confidence in such data and analyses? What would happen to data already collected if the process terminated?
- Public Involvement/Information: How can the parties ensure that the process will be an open one that allows for public involvement? What provisions should be made for making timely and easily understood information available to the public?
- Decisionmaking: How will decisions be made? How will these decisions be documented so that the decisions and their underlying bases are made available to the public? What type of dispute resolution can be invoked?
- Defensibility of Work: What standards should be set for methods and procedures to be used in this process? To what level of detail must the various decisions leading to restoration be supported? What is the extent of oversight that trustees should have, yet still allow PRP's reasonable control over the assessment/restoration planning and implementation process? How does one ensure the quality and scope of work that is to be conducted by contractors or consultants?

- Role of PRPs: To what extent can the process avoid compromising the position of the PRPs in other venues while cooperating to a great extent in this process? What guarantees can the PRPs be given that completion of their work on a site ends their liabilities for work conducted, recognizing any standard protections that trustees could be expected to require for work not completed to specifications or unknown facts? What mechanisms will be used by PRPs to monitor trustees' costs?
- Role of Trustees: What type of funding provisions can be made for trustees' participation in this process? If the process is prematurely terminated, what steps can trustees take? How can trustees be protected from statute of limitation issues when they agree to participate in this process?
- Role of the Public: How can we ensure that the public is fully informed of actions and has an opportunity to have input into this process? How do we ensure accessibility of such information? How can we ensure that there is compliance with such statutes as NEPA? How and when will NEPA be integrated into the process?

Next Steps for Green Coasts

NOAA will produce for comment a proposed description of a Green Coasts framework addressing many of the questions posed above and during these stakeholder meetings.

Pilot projects, involving one to three sites, should be considered to gain experience with regional site differences and various partners and refine the Green Coasts concept and program. How would we ensure the success of the pilot projects? Some factors to consider in choosing a pilot site might include:

- Well-defined contamination footprint;
- Complete, well-assessed and -documented response;
- Clear nexus between contamination and injury;
- Availability of restoration with a nexus to the injury;
- High probability of restoration success;
- Limited human health concerns;
- Single PRP; and
- PRP who is willing to share information on the pilot with other parties.

What other factors might we consider?

Should a working group be formed, made up of interested parties, to help in the pilot projects and strengthen the Green Coasts project and implementation?