United States Department of the Interior

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Memorandum

To: Mat Millenbach, Program Manager
Natural Resource Damage Assessment and Restoration Program

From: Charles P. Raynor, Assistant Solicitor
Branch of Fish, Wildlife, and Environmental Protection

Subject: Duration of Easements and Deed Restrictions Implemented as Restoration Actions

You have requested our opinion whether easements acquired or deed restrictions imposed as part of restoration under CERCLA[1] or OPA[2] must be for a duration in perpetuity, or whether trustees have flexibility in determining the duration based on site-specific considerations. Restoration actions under both CERCLA and OPA include actions to restore, rehabilitate, replace, or acquire the equivalent of the natural resources injured by hazardous substance releases or discharges or threats of discharge of oil. In some cases, trustees conclude that acquisition of land (e.g., as replacement habitat) is an appropriate restoration action. In addition to acquisition of unencumbered fee title, acquisition may take the form of acquiring a protective easement interest in property, or having a trustee or a third party acquire property in fee, subject to deed restrictions requiring that the property be managed for conservation purposes.

In response to your specific question, neither CERCLA nor OPA requires that acquisition of land or interests in land, or imposition of deed restrictions on property, for restoration purposes must be in perpetuity. Instead, the appropriate duration of an easement or deed restriction is a function of scaling these forms of restoration to satisfy one or both of the objectives of these statutes to return injured resources to their baseline condition and provide compensation for interim losses. Baseline is the condition or conditions of the natural resources, as measured by services, that would have existed had the discharge or substantial threat of discharge of oil, or release of hazardous substances, not occurred. See 43 C.F.R. § 11.14(e); 15 C.F.R. § 990.30. Appropriate compensation for interim losses generally is determined either by scaling compensatory restoration projects, see 15 C.F.R. Part 990, or calculating compensable value, see 43 C.F.R. Part 11, to be used on restoration activities.

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[1] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq.

[2] Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.

In general, in scaling an acquisition alternative, the amount of acreage to be subject to the easement or restriction, the level of natural resources service productivity, and the duration of the restriction will all be interrelated factors in determining what is appropriate for returning to baseline conditions and/or compensating for interim losses. For example, a larger amount of acreage protected for a shorter duration may provide services equivalent to those provided by a smaller amount of acreage protected for a longer duration. As another example, an injury for which return to baseline conditions will occur relatively quickly, and for which there are few interim losses, may make an easement for a limited duration appropriate. On the other hand, a larger scale or more complex injury, with a longer recovery period, could justify acquisition for a longer duration or even in perpetuity–particularly if there are significant uncertainties surrounding the projected period for successful recovery of the injured resources and significant interim losses.

Trustees have broad discretion in deciding the most appropriate combination of restoration actions for any given case, based on site-specific circumstances. Policy considerations (e.g., no net loss of wetlands) or other statutory mandates may be relevant factors in deciding between two appropriately scaled acquisition alternatives, one which includes restrictions in perpetuity and the other which does not. Although neither CERCLA nor OPA contain specific requirements regarding the duration of ownership for acquired replacement resources or the duration of conservation restrictions in deeds, it is important that trustees who are considering acquisition of property as a restoration action fully consider their own legal authorities, requirements, or restrictions for acquiring and holding interests in property. Acquisition by a trustee may have management consequences and requirements beyond those determined by CERCLA and OPA, which could weigh in favor or against an acquisition in perpetuity. For example, acquisition may result in the inclusion of property or a property interest in a parks or refuge system, which may in turn have its own set of legal requirements. Whether those separate legal requirements could affect the flexibility of a trustee to hold such property for a limited duration is beyond the scope of this opinion.

Finally, whenever another trustee or a third party will hold the easement or property subject to deed restrictions, it is important that the arrangement be structured in such a way that the Department has legal mechanisms in place to enforce the easement or deed restrictions.