

GUIDANCE

COLORADO NATURAL RESOURCE DAMAGES RESTORATION PROJECT SELECTION PROCESS AND ADMINISTRATION OF THE COLORADO NATURAL RESOURCE DAMAGE RECOVERY FUND

Approved by the Colorado Natural Resources Trustees on November 17, 2014.

I. Introduction

Colorado may recover monetary compensation for injuries to its natural resources through legal claims brought under CERCLA¹ and OPA². This compensation is known as Natural Resource Damages, or NRDs. CERCLA and OPA require the NRD recoveries be used to restore, replace, or acquire the equivalent of the injured natural resources. This guidance is intended to assist state employees in selecting NRD Restoration Projects for recommendation to the Trustees and to administer the funds recovered for natural resource damages. This guidance is also intended to inform interested citizens about the process.

This guidance sets forth a general procedure, which may vary depending upon site-specific factors. The policies and procedures herein are not intended to and cannot create rights, substantive or procedural, enforceable by any person or party for any purpose. The Trustees and their representatives and staff reserve the right to vary from this policy. The Trustees also reserve the right to change this policy at any time.

¹ In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. §§ 1601 - 9675 (CERCLA §§ 101 – 405)), otherwise known as CERCLA or Superfund. While it is best known for providing for clean-up of hazardous substances following an unauthorized release, CERCLA also gives state governments the authority to seek compensation for resulting injuries to state natural resources.

² The Federal Water Pollution Prevention and Control Act, commonly known as the Clean Water Act (CWA), included compensable reimbursement for costs and expenses incurred by the State for the restoration or replacement of natural resources injured or destroyed as a result of a discharge of oil or a hazardous substance. In 2006, the Oil Pollution Act (OPA, 33 U.S.C.A. §§ 2701 – 2762), amended the CWA to provide compensation for injuries to state natural resources resulting from the release of oil or petroleum into state waters.

II. Key Players

a. Trustees.

Under CERCLA and OPA, Colorado may bring claims for Natural Resource Damages through its governor-designated trustees.³ In 1990, Governor Roy Romer designated the following officers as NRD Trustees (Trustees) for actions under CERCLA⁴:

1. Attorney General of the State of Colorado
2. Executive Director of the Colorado Department of Public Health and Environment
3. Executive Director of the Colorado Department of Natural Resources

In 2006, Governor Bill Owens designated the same officers to serve as trustees under OPA.⁵

The Trustees establish policy and direction for the NRD program. The Trustees are responsible for making final decisions related to funding from the NRD Recovery Fund (“Fund”) including the approval or disapproval of Restoration Projects submitted in response to a Solicitation for Project Proposals (SPP). The Trustees remain the final authority on site actions, such as approval of Fund expenditures and restoration decisions. The Trustees may delegate their responsibilities.

b. Trustee Representatives.

Each Colorado NRD trustee agency will designate one point of contact for its Trustee, who will coordinate NRDs efforts within the agency. These contacts are designated the Trustee’s Representatives. These Trustee Representatives meet periodically to review the overall NRDs Program. In addition, in consultation with their respective Trustees, the three Trustee Representatives will collectively decide which potential NRDs claims to seek the Trustees’ approval to pursue. The Trustee’s Representatives assign a Project Manager to specific NRDs claims.

c. Project Managers.

Project Managers are agency employees assigned by their agency’s Trustee Representative, responsible for the day-to-day management of each case. Project Managers have two main responsibilities: First, to represent the Trustees during the solicitation for project proposals and, in coordination with the Trustee Representatives, make recommendations to the Trustees regarding the eligible project proposals for the

³ 42 U.S.C.A. 9607(f)(2)(B), 33 U.S.C.A. 2706(b)(3).

⁴ January 19, 1990 letter from Governor Roy Romer to Robert F. Stewart, U.S. Department of Interior.

⁵ January 31, 2006 letter from Governor Bill Owens to Jan Lane, United States Coast Guard.

Trustees to approve; Second, to provide project management and act as the point of contact throughout the NRD process.⁶

i. *Project Managers Responsibilities Related to the Work Group.*

Project Managers are responsible for establishing a Work Group (defined below), providing notice to local government(s) and other interested parties of the existence of the Work Group, its purpose, and requesting a designated contact person or office, steering the Work Group through drafting a SPP, publishing the SPP, and holding public meetings.

ii. *Project Manager Responsibilities Related to the Project Proposals.*

In conjunction with the Work Group, Project Managers are responsible for defining restoration goals for the site; coordinating with contracts administration staff to ensure the solicitation and procurement process is consistent with Colorado Department of Public Health and Environment (“CDPHE”) policy and procedures; shaping and facilitating the project selection process including the development of the project’s scoring matrix; providing a description of the injuries; and advertising for restoration projects.

Project Managers also determine the procedure for evaluating the proposals in accordance with this guidance. Techniques vary but usually include project presentations from the applicants, site visits, evaluation of written project descriptions/qualifications and oral presentations using a screening/selection matrix, interviews of applicants, and review of public comment. Ultimately, the Project Managers are responsible for shaping the application and selection process.

iii. *Project Manager Responsibilities to the Trustees.*

Through Trustee Representatives, the Project Managers keep the Trustees apprised of the NRD selection process. Trustee Representatives are responsible for making a recommendation of eligible and appropriate NRD Restoration Projects based on the Project Managers’ evaluation.

d. *The Work Group.*

The role of the Work Group is to assist the Project Managers regarding the selection of appropriate restoration projects. The Work Group is usually comprised of representatives of local interests, including members of local governments, citizen groups that have been

⁶ At some sites, a federal or tribal trustee may also have made a claim and recovered damages for injuries to its natural resources, possibly in a joint effort with Colorado. The Trustees should determine whether joining with a non-Colorado trustee group, usually called the “site council” in federal cases, will serve Colorado’s interests.

involved with the original Superfund site and cleanup, etc., or other interested parties. The Work Group may seek assistance from other agencies with an interest in the site, or persons with useful expertise. Members of the Work Group typically act as a liaison to their communities: keeping them apprised of progress and bringing any community concerns to the Project Managers.

Once established, the Work Group assists the Project Managers by providing input about environmental restoration needs within the community, helping define the nature of the project(s) to be solicited, discussing needs for the SPP, helping to draft the SPP document, assisting with the distribution of the SPP in the community, and attending public meetings. Work Group members also are involved in the project evaluation process, attend presentations from the project proponents, attend site visits, and provide feedback to the Project Managers regarding community needs and preferences for project selection.

The Work Group assists the Project Managers in evaluating the project proposals and ultimately assists the Project Managers in formulating a recommendation for the Trustees when the evaluation process is complete.

e. Project Proponent.

Project Proponents are the recipients of the NRD Fund disbursements. Project Proponents respond to the SPP and bid for and implement selected NRD Restoration Projects.

Typically, the Work Group considers proposals from governmental entities or not-for-profit Internal Revenue Code 501(c)(3) corporations. Generally, project design, engineering and planning costs are not eligible for funding from the NRD Funds, so whether the Project Proponent is a non-governmental organization or a government entity, Proponents must have access to other funding sources to cover these costs. Projects proposed by parties responsible for the injury to natural resources at the site are generally not eligible to serve as Project Proponents, but if they do submit a project, it will receive extra scrutiny to ensure there is no conflict of interest. Project Proponents must have the financial and technical capability to successfully complete a restoration project, and must have experience with project management and contracting.

III. Work Group Duties

a. Restoration Project Identification.

Under the leadership and auspices of the Project Managers, the Work Group defines the type of project that should be considered for application of the NRD settlement (in accordance with Trustee policy, any settlement agreement or court order, and within the scope of what is defined and allowable by CERCLA and OPA). The Work Group's participation and input is important for the Project Managers because local interests often

have a clearer perspective about environmental restoration needs in the affected community.

While shaping a vision for the project(s), the Work Group should take into account the eligibility requirements (listed below) established by CERCLA, OPA, and the Trustees.

Eligibility criteria for NRD projects are:

1. project must restore, replace or acquire the equivalent of the natural resources injured;
2. be located in the vicinity of the injured resources or demonstrate a geographical or ecological nexus to the injured natural resources;
3. comply with all applicable Federal, State, and local laws, including local ordinances and zoning;
4. not pose a threat to the health and safety of the public;
5. not interfere with ongoing response actions at the site, including ongoing environmental monitoring;
6. include alternate funding sources for operation and maintenance of the completed project⁷;
7. meet any site-specific requirements established by the Work Group or the Trustees; and
8. projects involving acquisition of property for open space should include a commitment to grant a conservation easement or other mechanism that will allow the Trustees to ensure that the project provides continued natural resource restoration. If a grant of conservation easement is proposed, the proponent must include a draft of the conservation easement with the proponent's application.

The Trustee's Representatives should make the final decision regarding any significant deviations from the above criteria. A sample Solicitation for Project Proposals ("SPP") is included as an Appendix to this document.

b. Solicitation for Project Proposals

Once the Work Group, led by the Project Managers, has established a general vision for the project(s), the Project Managers draft the SPP to identify the desired projects in the community that needs funding. Drafting the SPP should be coordinated with the State Contracts Officer and also with the State Public Affairs Coordinator. In addition to the eligibility requirements listed above, the following elements should be included in the SPP:

1. description of the site;
2. description of injured natural resources;
3. explanation of litigation or settlement and amount of money available;
4. restoration goals;

⁷ NRD funding is not available for operation and maintenance costs.

5. scope and criteria for evaluating proposals (as detailed in Part III, above);
6. requirements for project proposals, including:
 - i. location of project;
 - ii. description of injured natural resources that will benefit from the proposed project;
 - iii. description of any other natural resources that will benefit from the proposed project;
 - iv. criteria for judging the project's effectiveness;
 - v. a description of any long-term maintenance or operation the project will require and identification of a funding source;
 - vi. a description of proponent's ability to successfully implement the proposal;
 - vii. budget, which includes an itemization of the amount of funds needed to complete the proposed project and the amount of money being requested from the Fund;
 - viii. an explanation of matching funds being sought; and
 - ix. the time-frame for the project to begin and be completed;
7. proposal process and schedule, including dates for:
 - i. release of SPP;
 - ii. public information meeting;
 - iii. proposal submission, possibly preceded by screening level proposal;
 - iv. public comment period;
 - v. final proposal submission; and
 - vi. anticipated Trustee decision date

The Project Managers publish the SPP. Typically, this is done by the CDPHE Project Manager through CDPHE's public affairs coordinator. Project Managers and the public affairs coordinator should notify press representatives for their respective agencies of the publication of the SPP. The Work Group members will also notify local and other community groups, as appropriate, that have indicated an interest in the SPP's release and will often hold a public meeting to describe the nature of the funding source and the projects desired, describe the process for selection of projects, and give the public an opportunity for early input. A mailing list for the project may be developed from the public meeting attendees.

c. Scoring Matrix.

In addition to identifying a vision for the project, and drafting and publishing the SPP, the Work Group and/or the Project Managers may develop a site-specific project scoring matrix for ranking all project proposals that are determined to have met the eligibility requirements, using both the eligibility requirements listed above, any additional elements, and some or all of the following:

1. applicant's ability to obtain matching funds from other funding sources;
2. technical feasibility and procedural viability of the project, based on the applicant's technical and management abilities;

3. the likelihood that the project can be successfully completed in an acceptable period of time;
4. project benefits versus the expected costs;
5. long-term project benefits versus any short-term injuries to the environment caused by implementing the project;
6. feasibility of the project's long-term operation, maintenance, and sustainability plan;
7. consistency of the project with existing state, regional and local resource management and development plans;
8. the likelihood the project will benefit more than one resource or service;
9. the likelihood the project can be reasonably monitored and have benefits that can be measured and verified;
10. whether the project provides actual resource improvements rather than only conservation of open space, unless development threats are imminent or the conservation opportunity is of an advantageous scale or timing;
11. the cost-effectiveness of the project relative to other projects that would benefit the same natural resource(s);
12. the degree to which project utilizes multiple approaches (restoration, replacement and acquisition);
13. the degree to which the project involves multiple partners and is collaborative; and
14. the likelihood of the project being funded through other mechanisms, or whether implementation of the project would free funding sources to finance other restoration projects.

In some cases, the Project Managers may decide to seek approval of the project matrix from the Trustees prior to issuing a Solicitation for Project Proposals.

d. Matching Funds

Project proponents should provide at least a 50% match for projects considered for NRD funding. For example, if a proponent asks for \$1,000,000.00 for a project, it should provide a match of \$500,000.00. The match must be described in the proponent's proposal. At least half of the match should be for NRD-related work and any non-NRD related matching funds must not undermine the NRD component of the project.

The match may be a combination of in-kind services and actual dollar costs for activities related to the project. The procurement of design and engineering work not covered by NRD funding but secured by another source of funding may be included as the non-NRD component of match dollars. Likewise, improvements to the site that cannot be funded by NRD dollars may be included as part of the non-NRD portion of the match.

Proposals should have a match breakout separating NRD-related match money from non-NRD-related match money. When in-kind services serve as a portion of the match, the proposal should specifically state how the value of the in-kind services was derived using

either a calculation based on Federal Emergency Management Agency labor cost index or by stating which part of the project budget will be performed via in-kind services.

In scoring the projects, the Work Group will typically give preferential consideration to those projects with better match conditions.

e. Evaluation and Selection of NRD Restoration Project Proposals.

Once the deadline published in the SPP has been reached and the projects submitted to the Project Managers, the Work Group turns its attention to evaluating the received proposals. Typically, at this stage, the Project Managers and the Work Group schedule presentations with Project Proponents whose projects meet the eligibility requirements and do not present a conflict of interest. Project Managers will schedule site visits if feasible, and encourage the Work Group members to participate. Project presentations and pre-selection site visits are encouraged because they often provide a great deal of information and perspective that is not always ascertainable from a proposal. If there are too many proposals, it may be necessary to screen projects in advance to develop a 'short list'.

The Project Managers should present proposals for public comment. This is often accomplished by placing copies on CDPHE's website for 30 days and notifying interested parties.

Once the Work Group or the Project Managers have completed all presentations, site visits, and all public comments have been received, the Project Managers and if available the Work Group, evaluate the proposals using the site-specific project matrix established for the site if any and either select a project(s) or prepare a preferred list of proposals for presentation to the Trustees. At that time, the Project Managers, may request more information from proponents of a project to complete the evaluation.

If a member of the Work Group also represents the interests of an entity that has submitted a project proposal, or the Work Group member submits a proposal, that Work Group member may participate on the Work Group in the evaluation of the project proposals, unless the Project Managers collectively determine such participation would substantially adversely affect the evaluation process.

The Project Managers may need to contact the site's Responsible Parties under the Consent Decree or Court Order to evaluate any effect the project proposals may have on cleanup activities. In all cases, the Project Managers, together with the Work Group must determine if a proposal has a proponent who can satisfactorily complete the project. Ultimately, the project may be selected from the scoring matrix results if any and other relevant factors, as directed by the Project Managers in coordination with the Trustee Representative.

Project Proponents who are not selected should be notified by telephone and letter or email.

IV. Approval of the Restoration Project(s)

The Project Managers (usually the Project Manager representing the AGO) will prepare a Project Recommendation Memorandum for the Trustees. Depending on the amount of funds available for a site, the memorandum will either recommend certain projects, or present restoration alternatives that employ a collection of projects.⁸ Generally, the Project selected for recommended approval will be presented by the Project Proponent to the Trustees at a NRD Trustee's Meeting. It is advisable for the Work Group members to be present as well, to answer questions and provide feedback to the Trustees.

The Trustees will review the Project Recommendation Memorandum as well as any other information presented at a publically noticed Trustee meeting and by a majority vote, approve or disapprove a restoration project. Approval of a selected NRD restoration project will be memorialized through a written resolution of the Trustees.

V. Funding and Performance

a. Funding from the Natural Resource Damage Recovery Fund.

Funding for NRD projects can only be disbursed through a contract between the Project Proponent (Proponent) and the State. All NRD projects are paid through a cost reimbursement model, which means contractor invoices are paid on a regular basis after submittal⁹. Because the Hazardous Materials and Waste Division ("HMWMD") of CDPHE manages the Fund, contracts must be established through the CDPHE contracting office. Once the Trustees approve the NRD Restoration Project, the CDPHE Project Manager, along with oversight from the AGO and DNR Project Managers, if necessary, is responsible for the contracting process.

The following steps ensure that money is available to implement the approved NRD projects as directed by the Trustees.

1. HMWMD Remediation Program Manager (the Trustee Representative for CDPHE) must have already obtained the necessary legislative spending authority, as part of the CDPHE's annual legislative budget process. This should be done prior to commencing the Work Group effort.
2. The CDPHE Project Manager provides the Contracts Officer a Contracts Authorization Request Form (CAR Form) and initiates the contracting process by contacting HMWMD's contracts officer. The Remediation Program Fiscal Manager must confirm funding availability by identifying a grant budget line (GBL) and signing the CAR.

⁸ The Trustee Staff may publish the memorandum for public review before approving a restoration plan.

⁹ The exception to this is a land purchase, in which case, the funds are wired at closing.

3. HMWMD Contracts Officer establishes contracts with the party receiving the money for the restoration project according to State and CDPHE contracting requirements and processes.
4. The CDPHE Project Manager oversees the projects, receives the invoices, reviews, approves each expenditure, and ranks the contractor through the State's Contract Monitoring System (CMS).
5. Remediation Program Fiscal Manager monitors the balance of the NRD recovery funds by site.

b. Background Information Regarding Annual Appropriations Process

The State Legislature annually appropriates the amount of money State agencies can spend, including the amount from specific funds such as the Natural Resources Damage Recovery Fund. HMWMD operates under a strict timeline to ensure money from the Fund is available, or appropriated, for NRD projects. NRD appropriations are typically considered "capital construction expenditures," which means the authorization to spend the funds is valid for three years.¹⁰

In late June or early July, CDPHE requests authority from the legislature to spend the amount needed from the Fund for each site in the following fiscal year. HMWMD's request is first considered by the Capital Development Committee, which will make its recommendation to the Joint Budget Committee (JBC) for its consideration in February. If the JBC approves, it will recommend the appropriation to the full legislature. Upon legislative approval, the request will be included in the budget submitted to the governor in May. Assuming the governor approves the budget, the money will then be available in July, which is a year after HMWMD makes its request.

To successfully manage the Fund within this system, HMWMD fiscal managers request legislative appropriation for new sites as soon as a settlement or litigation is complete. HMWMD may or may not request spending authority for all the money in the Fund for a particular site during that budget cycle.

¹⁰ It is possible, in extraordinary situations, to make a supplemental budget request, such as when there is an emergency, a technical error in a previous appropriation having a substantial effect on the program, or new information that results in substantial changes in funding needs. Staff should never rely on this possibility, because CDPHE is reluctant to use this mechanism and it is unlikely the JBC would approve the expenditure. That said, supplemental requests are usually made in October or November and affect current year appropriations.

c. Project Implementation and Fund Disbursement

i. *Before Work Begins.*

The agency administering the NRD Fund (typically CDPHE) will be responsible for monitoring work, approving invoices, and assuring completion of each project. A staff member of that implementing agency will typically be the Project Manager and the point of contact for the assigned project.

All contracts must follow CDPHE procurement, contracting, contract monitoring system (CMS), and disbursement processes, as identified by the State Controller. It is recommended the Project Manager receive training on procurement, contract management and the CMS. Contracts are initiated through a CAR (Contractual Agreement Request Form) available on HMWMD's intranet. The Trustee Resolution approving the expenditure needed for the project is provided to the Contracts Officer as an attachment to the CAR.

The Trustee's Representative or Project Manager will coordinate with the CDPHE contracts officer prior to the solicitation phase. The contract solicitation and delivery mechanisms are variable and must be tailored to the site-specific needs of each project, typically requiring several meetings between the CDPHE contracts office and the Project Manager.

ii. *After Work Begins.*

Proponents will implement their projects in accordance with the budgets and schedules submitted in their proposals. Significant changes to projects must be approved by the Trustees, and must still meet the criteria for project selection. In addition, significant changes approved by the Trustees may require amendment of the contract. Consultation with the CDPHE contracts officer will be necessary to determine if a contract amendment is required.

As projects are implemented, the Project Manager will ensure the project is completed according to the proposal and the contract, approve contractor invoices, and document activities for the project.

iii. *Fund Disbursement.*

Before payment, the CDPHE Project Manager must approve all invoices submitted for reimbursement of the cost of a project using the Invoice Checklist Form, available on the CDPHE Intranet. This may be through periodic approval of reimbursements, such as for sub-contractors, throughout implementation of a project, or one reimbursement after a project is completed, as defined in the CAR. The CDPHE Project Manager is responsible for tracking invoices and monitoring the budget. In the case of land acquisition, the contracts officer can arrange for funds to be available at closing. Except for land acquisition, all payments to a Proponent will be after it has incurred costs for the project.

To be reimbursed, a Proponent must submit invoices according to the process outlined in its contract for reimbursement.

iv. Project Completion.

The Trustee's Representative or Project Manager will determine when a project is complete. Projects are considered complete when the project Proponent has completed all activities described in the proposal and met all the requirements of the contract. The Project Manager should not approve final payment under the contract until the Proponent has fulfilled all contract requirements, including submission of any required Completion Reports and/or As-built drawings.

v. Project Files.

The CDPHE Trustee Representative or Project Manager is responsible for maintaining a site NRD file. The file should include copies of proposals approved for funding, Trustee Resolution, contract documents, invoices and other project-related documentation/correspondence. The file, either project or contract, should include all the procurement documentation (e.g., notices, SPP, project matrix, proposals received, scoring documentation, notice of award, etc.).

vi. Monitoring.

Trustee Representatives will require a project monitoring component where appropriate. Monitoring may include interim and final restoration goal evaluation based on performance standards determined by Trustee's Representatives. If monitoring is required, the Project Manager is responsible for ensuring the monitoring takes place and that the Proponent submits any required reports or data. Such reports and data should be placed in the site file and copies should be provided to the other Trustee Representatives. If monitoring data indicates a project has failed or is in need of maintenance, the Project Manager should inform the other Trustee Representatives and should contact the Project Proponent for resolution of any identified problems.