

PHIL WEISER
Attorney General
NATALIE HANLON LEH
Chief Deputy Attorney General
JUNE TAYLOR
Chief Operating Officer
ERIC R. OLSON
Solicitor General



**STATE OF COLORADO
DEPARTMENT OF LAW**

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Natural Resources and
Environment Section

April 16, 2019

M E M O R A N D U M

AGENDA

Colorado Natural Resources Trustees Meeting
April 23, 2019, 9:00 am to 10:00 am
Location: CDPHE Room C1D

Open Session

1. Approval of Minutes from October 9, 2018 Meeting – 5 minutes

Action Item:

- (1) Review and approve minutes from October 9, 2018 meeting

Document:

- (1) Draft Minutes from October 9, 2018 meeting

2. Trustee Introductions and Overview of NRD Program (Staff) – 15 minutes

Action Item:

None

Document:

- (1) Memo from David Banas

3. Manweiler/Fountain Creek (Jennifer Talbert, Susan Newton, Ed Perkins) – 15 minutes

Action Items:

- (1) Review and approve settlement agreement

(2) Review and determine whether to fund Chilcott Diversion Fish Passage Structure restoration project

Documents:

(3) Memo from Jennifer Talbert

(4) Settlement Agreement

(5) Draft resolution concerning Chilcott Diversion Fish Passage Structure restoration project

AGENDA #1

**Colorado Natural Resource Damages Trustees
Meeting Minutes
October 9, 2018**

(Approved: _____)

In Attendance:

TRUSTEES

Cynthia Coffman, Attorney General
Bob Randall, Executive Director, Colorado Department of Natural Resources (DNR)
Martha Rudolph, Director of Environmental Programs, Colorado Department of Public Health and Environment (CDPHE)

STAFF

Laura Chartrand, Deputy Attorney General, Natural Resources and Environment Section (NRE)
David Kreutzer, First Assistant Attorney General, NRE
David Banas, Senior Assistant Attorney General, NRE
Jennifer Robbins, Assistant Attorney General, NRE
Dan Miller, Senior Assistant Attorney General, NRE
Laura Kelly, Paralegal, NRE
Susan Newton, CDPHE
Monica Sheets, CDPHE
Doug Jamison, CDPHE
Ed Perkins, Colorado Parks and Wildlife (CPW)

PUBLIC

Hillary Merritt, The Trust for Public Land
Pat Schuler, City of Aurora
Kate Kramer, Go Wild Northeast Metro Coalition
Laura Archuleta, U.S. Fish and Wildlife Service
David Lukas, U.S. Fish and Wildlife Service
Gordon Robertson, Denver Parks and Recreation
Paul Frohardt, Sand Creek Regional Greenway Partnership
Billy Gascoigne, Ducks Unlimited, Inc.
Matt Reddy, Ducks Unlimited, Inc.
Paula Schulte, City of Thornton

Open Session

Attorney General Cynthia Coffman called the meeting to order at 2:05 p.m. on October 9, 2018. The meeting's purpose was to brief the Trustees on the current status and issues relating to Natural Resource Damages ("NRD") projects and to request direction and/or approval for various actions.

Director Randall moved that the minutes from the March 28, 2018 meeting be approved, Director Rudolph seconded the motion, and the motion was unanimously approved.

Rocky Mountain Arsenal Foundation Fund – 6th and Coal

David Banas noted that the Trustees approved a grant to the City of Aurora in 2012, from the RMA Foundation Fund, to acquire property for the Triple Creek Greenway Corridor. After that time, it was determined that the 6th Avenue Parkway extension needed to go through a corner of the property. Trustee staff has been working over the last several years to compensate the funding partners for the loss in value of the land for the conservation easement (approximately \$197,000).

Pat Schuler from the City of Aurora and Hillary Merritt from The Trust for Public Land (“TPL”) provided an update to the Trustees, which included background and a proposal on how to mitigate the injury to natural resources caused by the road being re-routed. Ms. Schuler explained that due to the costs and detrimental impacts of the original design, they are proposing an alternative route to the north that includes an additional nineteen acres from the south. Ms. Schuler noted that the proposal requires an additional \$285,000 to purchase the south parcel, but the new property could replace the 2.27 acres of damaged property. The new plan makes up for the conservable values lost, and protects a successful eagle’s nest without disturbing trail access. Ms. Schuler added that, in addition to the City of Aurora and TPL, the other two funding partners, Arapahoe County and Great Outdoors Colorado, agreed with this proposal.

Director Randall asked if the new proposal involved any additional NRD funding. Ms. Schuler responded that it would not require any new funding or any other action by the Trustees, but a conservation easement would be put on the property. Director Randall offered for the record that the nineteen acres acquired more than makes up for the 2.27 acres lost in terms of ecological and conservation values.

Rocky Mountain Arsenal Recovery Fund – Sand Creek Regional Greenway Partnership Project

David Banas noted that the Trustees approved a set of projects proposed by the Northeast Greenway Corridor (“NGC”) from the Rocky Mountain Arsenal Recovery Fund in 2014. One such project granted the Sand Creek Regional Greenway Partnership (“SCRGP”) \$921,475 to restore up to twelve identified properties in the metro area. Mr. Banas explained that the SCRGP is not able to do the final analysis and present plans to meet the Trustees’ preconditions and instead, the SCRGP requests that the funds be allocated for projects proposed by Aurora and Denver. He noted the Aurora project would use \$421,000 plus matching funds to restore habitat on eighty-five acres, and the Denver project would use \$500,000 plus matching funds to restore thirty-six acres. Paul Frohardt from SCRGP, Gordon Robertson from Denver Parks and Recreation, and Pat Schuler from Aurora discussed the replacement projects.

Mr. Frohardt noted that the following two projects are consistent with the intent and goals of the original SCRGP project.

1) On behalf of Denver, Mr. Robertson described the proposed Sand Creek restoration project just below I-70, which requests \$500,000 to be used with matching funds from Denver.

2) On behalf of Aurora, Ms. Schuler explained that Aurora is following the same plan for bird habitat restoration that the SCRGP project had anticipated early in the process. She noted that much of the riparian habitat needs to be restored. The proposed resolution requests \$421,475 for bird habitat restoration.

After David Banas clarified the amount of funding in the resolutions, Director Randall moved that both resolutions concerning the previous 2014 grant to SGRGP be approved. Attorney General Coffman seconded the motion, and the motion was unanimously approved.

Suncor

David Banas reported that, since 2015, Trustee staff has been working with U.S. Fish and Wildlife (“USFWS”) to find projects for the approximately \$1.23 million received from Suncor to compensate for the injury to natural resources caused by the discharge of oil from its Commerce City refining facility into Sand Creek in 2011. Solicitation for projects went out in early 2018 and the Trustee staff received three proposals, two of which Trustee staff recommends.

1) Billy Gascoigne from Ducks Unlimited provided some background on the organization and its management practices. Mr. Gascoigne then described the proposal for its request of \$1,197,000 to fund the “Ducks Unlimited Suncor Remediation Proposal” with over \$4,000,000 in matching funds over the next five to six years. The proposal includes three areas of impact: (1) waterfowl replacement and improvement, including collaboration with Canada and Mexico; (2) fifteen projects in key priority areas in Colorado (covering roughly 2,600 acres in the South Platte watershed and San Luis Valley) to enhance wetland habitat; and (3) augmentation of groundwater in the South Platte watershed in coordination with the State Engineer’s Office. David Banas added that these funds are being allocated together with USFWS, so Trustee-approved projects will still be contingent on the federal National Environmental Policy Act process. Director Randall asked how many of the fifteen projects would be located in Colorado and Mr. Gascoigne replied that they are proposing twelve projects in Colorado, one in Canada, and two in Mexico.

2) David Lukas, Refugee Manager at Rocky Flats National Wildlife Refuge (USFWS) and Kate Kramer, Go Wild Northeast Metro Coalition, described the “Restoration/Rehabilitation of Rocky Flats National Wildlife Refuge” project to restore riparian creek beds through the removal of invasive plant species. Together, David Lukas and Kate Kramer discussed the project’s uniqueness because it takes advantage of several partnerships, including the Mile High Youth Corps, which provide opportunities for urban youth from underserved neighborhoods to be part of nature and create pathways for career opportunities.

Director Rudolph moved to approve the resolution to fund USFWS’s “Restoration/Rehabilitation of Rocky Flats National Wildlife Refuge” project in the amount of \$148,000, and the “Ducks Unlimited Suncor Remediation Proposal” in the remaining amount of \$1,082,000. Director Randall seconded the motion, and the motion was unanimously approved.

Small Spills Best Management Practices

David Banas reported that the Small Spills Committee has been working to develop a response policy and presented the “Fish Kill Quick Reference” sheet. The reference sheet will be distributed to Colorado Parks and Wildlife’s (“CPW”) Area Aquatic Biologists, Area Wildlife Managers, and District Wildlife Managers to keep in their vehicles. It will remind those individuals of natural resource damages and provide guidance on reporting. Additionally, Mr. Banas reported that the Committee is developing a decision tree for immediate response to small spills, and a scope of work for standing contracts to respond more quickly to a small spill. He also noted that CPW is coordinating training for staff on responses to small spills and the components of natural resource damages. Director Randall suggested that the Fish Kill Quick Reference sheet include titles with phone numbers instead of individual names, and Attorney General Coffman inquired about how a decision tree would be used.

Money Remaining in NRD Accounts

David Banas explained that CDPHE maintains the funds recovered by the Trustees in the Natural Resource Damage Recovery Fund created by statute. He noted that the statute limits the use of these funds by requiring the Trustees to use the funds consistent with any conditions in the consent decree that awarded those funds. Jennifer Robbins conducted an analysis of dormant funds with CDPHE and determined there is currently less than \$10,000 available. Doug Jamison added that the issue was prompted by old funds that have been in place for as long as twenty-five years and are continually earning interest. Mr. Jamison noted that, if the obligations under a consent decree were met by spending the total settlement amount, the Trustees might want to consider making excess funds due to interest available on a statewide basis for project work. Mr. Banas recommended that staff periodically reevaluate the dormant funds, make a recurring report to the Trustees, and when a significant sum is amassed, recommend how to use the dormant funds.

Director Randall inquired about whether other unspent money subject to limiting consent decrees was identified. Doug Jamison and Jennifer Robbins replied that the consent decrees for Summitville, Suncor, and RMA specify that funds must be spent on-site.

Rocky Mountain Arsenal Foundation Fund – Thornton Project

David Banas stated that the Trustee’s approval for Thornton’s “Big Dry Creek” project, one of the 2012 RMA Foundation Fund projects, was valid for five years and expired in 2017. In 2012, the Trustees approved \$750,000 for Thornton to acquire and restore approximately 130 acres along Big Dry Creek. In the meantime, Thornton acquired the property with other funding, so Trustee staff recommended a new resolution for Thornton to use the NRD funding for restoration. Paula Schulte from the City of Thornton provided details of the project.

Director Rudolph moved to approve the resolution extending the funding for the Thornton project another five years. Attorney General Coffman seconded the motion, and the motion was unanimously approved.

Idarado

Doug Jamison provided an historical summary of the 1992 Idarado Mine Consent Decree and noted that approximately \$250,000 remain dormant in the Idarado NRD Fund. In an effort to spend the remaining funds, Mr. Jamison explained that local stakeholders were asked to submit

proposals. The Trust for Land Restoration (“TLR”) submitted a proposal to purchase fourteen mining claims totaling 104 acres known as the Silver Mountain Mine, mitigate environmental issues on the property, and donate the property to Ouray County with a conservation easement. The total project cost is \$330,000. TLR is requesting \$92,000 from the NRD Fund, and TLR will secure the remaining funds. Trustee staff recommended approval of TLR’s request while they continue to review future projects appropriate for NRD Funds.

Attorney General Coffman asked if there was a public process to solicit proposals. Mr. Jamison explained that there is a public meeting in Ouray every one or two years and, during the last meeting, an informal request for projects was announced. Mr. Jamison confirmed that the Trustees have approved projects for land acquisition and conservation easements in the past. Jennifer Robbins clarified that these mining claims are surface rights and not just mining rights. Mr. Jamison added that the mining claims were never worked extensively, and the purpose of this project is not to reclaim the mines, but to gain open space for the County.

Laura Chartrand inquired about the role of the Division of Mining Reclamation and Safety (“DMRS”) and its funding source. Mr. Jamison replied that DMRS would use its own funding and would not need additional funds from the Trustees. Ms. Chartrand then asked whether the Trustees are required to formally solicit projects before they approve funding. Discussion ensued about the process of an informal request to stakeholders as opposed to a formal solicitation process. While Mr. Jamison noted that it is the Trustee’s general practice to do a formal solicitation of projects, David Kreutzer confirmed that there is no statutory requirement for a public process.

Director Randall moved to approve the resolution to provide funding for TLR’s “Silver Mountain Mine Acquisition” project. Attorney General Coffman seconded the motion, and the motion was unanimously approved.

Rocky Flats

Dan Miller reported that approximately \$12,000 remain in the Rocky Flats NRD Fund after completion of all contracted projects. Trustee staff recommended these funds, up to \$15,000 after interest, be used to supplement the project involving the Mile High Youth Corps at Rocky Flats to eradicate noxious weeds (discussed earlier by David Lukas under Suncor). Mr. Miller added that after all funds from the Rocky Flats NRD Fund are expended, the Fund account would be closed. Director Rudolph asked about accountability to ensure the funds are used properly. Mr. Miller suggested adding a clause to the proposed resolution directing Trustee staff to include the appropriate provisions in the purchase order to clarify the funding purpose.

Director Rudolph moved to approve the resolution transferring the remaining funds in the Rocky Flats NRD Fund to the Mile High Youth Corps with the condition that the procurement document contain appropriate reporting requirements to ensure the funds are spent in accordance with the resolution. Director Randall seconded the motion, and the motion was unanimously approved.

Blue Tee

David Banas updated the Trustees on the multi-state, multi-party CERCLA settlement with the Blue Tee Corporation and Brown Strauss concerning their liability for injuries in the Bonita Peak Mining District (“BPMD”) noting that Colorado will receive \$469,299.70. Mr. Banas explained that the funds would be distributed between NRD damages and CDPHE response costs at a later date. He further noted that the Solicitor General had reviewed and approved the document.

Director Randall noted that Colorado and EPA will receive the same amounts under the Consent Decree and asked if there was a constraint on how the Trustees could use the funds. Mr. Banas replied that he anticipated a Trustee Council would eventually be convened to determine how the funds are used. Doug Jamison provided some background about other sites receiving larger amounts due to Blue Tee having more liability at those sites whereas Blue Tee was one of many operators at BPMD over time. Discussion ensued about specific language for the Trustees’ signature blocks and David Banas agreed to revise the signature page.

In their role as NRD Trustees, Director Rudolph moved to approve the Consent Decree captioned USA, et al. v. Blue Tee, et al., Director Randall seconded the motion, and the motion was unanimously approved.

Fountain Creek Spill

Jennifer Robbins updated the Trustees on settlement discussions with Manweiler Trucking for the August 2016 tanker spill into Fountain Creek. She reported that, in addition to a damage estimate from Industrial Economics, Inc., CPW did its own investigation regarding potential restoration projects that identified construction of a fish passage ramp for the Chilcott Diversion structure. Ms. Robbins added that, in May 2018, Trustee staff met with Manweiler to discuss a potential settlement to move forward in restoration planning, but no agreement was reached.

Executive Session

Deputy Attorney General Laura Chartrand noted one agenda item was subject to attorney-client privilege, and therefore called for an executive session pursuant to C.R.S. § 24-6-402(3)(a)(II). At 3:38 p.m., Director Randall moved to begin the executive session to allow the Trustees to discuss privileged topics concerning the Fountain Creek spill. Director Rudolph seconded the motion, and the motion was unanimously approved. Such discussion, being attorney-client privileged, is authorized under C.R.S. § 24-6-402(3)(a)(II) and C.R.S. § 24-6-402(d.5)(1)(B). The executive session was digitally recorded. No other business was conducted, and no minutes were taken.

At 3:52 p.m., Director Randall moved to end the executive session, Director Rudolph seconded the motion, and the motion was unanimously approved, whereupon executive session was ended.

Open Session

For the record, Deputy Attorney General Chartrand stated that, pursuant to the Open Meetings Law, C.R.S. § 24-6-402(3)(a), the Trustees discussed legal issues in the executive session regarding the Fountain Creek spill. Discussion was limited to that item and no final decisions were made.

Director Rudolph moved to approve the Notice of Intent to Conduct Restoration Planning in the Fountain Creek matter as the next step under OPA regulations, and once notice is provided, to proceed with the assessment. Attorney General Coffman seconded the motion, and the motion was unanimously approved.

At 3:55 p.m., Attorney General Coffman thanked her fellow Trustees and Trustee staff for making her tenure as Chair over the last four years a pleasant experience. She commended the staff for their dedicated service to the State of Colorado, and then moved to adjourn the meeting. Director Rudolph seconded the motion, and the motion was unanimously approved.

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AGENDA #2

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

JUNE TAYLOR
Chief Operating Officer

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Solicitor General



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Phone (720) 508-6000

Natural Resources and
Environment Section

April 12, 2019

M E M O R A N D U M

TO: Colorado Natural Resources Trustees
FROM: David Banas, Senior Assistant Attorney General
RE: Overview of the Colorado Natural Resources Trustees

CERCLA and OPA and NRDs Generally

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA") and the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* ("OPA"), allow states to seek damages to compensate for injuries to a state's natural resources resulting from releases of hazardous substances or spills of petroleum products. These claims are known as "natural resource damages" or "NRDs" – often pronounced "Nerds."

Colorado's NRD Trustees

CERCLA and OPA required the governor of each state to appoint trustees for natural resources in their state. In 1990, Governor Roy Romer (under CERCLA), and in 2006, Governor Bill Owens (under OPA), designated as Colorado's Natural Resources Trustees the following individuals:

- The Executive Director of the Colorado Department of Public Health and Environment
- The Executive Director of the Colorado Department of Natural Resources
- The Colorado Attorney General

These individuals, or their delegates, serve as Colorado's Natural Resources Trustees. The Deputy Attorney General for the Natural Resources and Environment Section serves

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as counsel to the Trustees. Staff of the Trustee agencies implement the Trustees' directives.

Colorado's NRD Program

While no two NRD cases are the same, an NRD case typically involves two phases. First, the Trustees pursue damages from a responsible party, typically resulting in a cash settlement. Second, the Trustees allocate recovered money to fund environmental projects, typically presented to the Trustees by cities, counties, and non-profit groups through a public request for proposal ("RFP") process.

In the past, the Trustees have met anywhere from three to six times a year to determine what claims to pursue and how to spend recovered funds. We propose to streamline and normalize this process by meeting quarterly. Trustee meetings are publicly noticed and open to the public and the Trustees are subject to the Colorado open meetings law, meaning Trustees cannot conduct Trustee business or engage in Trustee discussions outside a noticed public meeting.

The Trustees exercise broad discretion because CERCLA and OPA allow claims for spills of hazardous substances and oil that injure natural resources, and require only that funds must be used to "restore, replace or acquire the equivalent of the injured natural resources." As with most NRD issues, these terms are undefined, scant case law exists, and nationally, different trustees have defined them differently.

NRD cases range in size from a truck rollover that releases diesel into a riparian environment to injuries caused by a Superfund site. One recent case involved releases from the Suncor refinery in Commerce City that resulted in fish and bird mortalities. In that case, we recovered \$1.3 million and we will discuss how to spend that money at the June 24 Trustee meeting.

Typical categories of NRD projects include open space acquisition and river and habitat restoration. The Colorado Trustees have taken a conservative approach to allocating money, only approving projects that include matching funds and only funding the portion of a project that directly benefits the environment. This means the Trustees historically have chosen not to fund project planning, trails through open space acquisitions, or bathrooms or playgrounds on or near urban restoration areas.

Going Forward

At the April 23 Trustee meeting, we will answer any questions you may have. At the June 24 Trustee meeting, we will discuss guidance adopted by your predecessors for allocating funds, a process we are developing for selecting cases to pursue, and address any further legal or process questions you have.

AGENDA #3

**COLORADO NATURAL RESOURCES TRUSTEES
RESOLUTION OF APRIL 23, 2019
CONCERNING THE FOUNTAIN CREEK SPILL**

WHEREAS, the Colorado Natural Resources Trustees (“Trustees”) are responsible for the management and direction of Colorado’s natural resource damages program;

WHEREAS, the Trustees are responsible for administering State funds to restore, replace, or acquire the equivalent of injured natural resources;

WHEREAS, on April 23, 2019, the Trustees approved the settlement for natural resource damages resulting from the August 26, 2016 Fountain Creek Spill for \$345,000.00 with Groendyke Transport, Inc.

WHEREAS, the natural resource damage assessment identified the Chilcott Diversion Fish Passage Structure as a restoration project that would restore the injured natural resources in Fountain Creek.

WHEREAS, the Trustees approved, in concept, the Chiclott Fish Passage Diversion Structure restoration project during the October 8, 2018 meeting.

WHEREAS, the Chilcott Diversion Fish Passage Structure restoration project will provide access to five miles of habitat above the diversion for the Flathead chub and other high plains species, resulting in reconnecting approximately forty miles of unobstructed plains fish habitat along the main stem of Fountain Creek. The Chilcott Diversion Fish Passage Structure restoration project will cost approximately \$550,000 to \$600,000 to engineer, construct, and monitor.

WHEREAS, Colorado Parks and Wildlife (“CPW”) requested the use of all the restoration funds and interest accrued, minus the costs to reimburse the State expenses incurred during the natural resource damage assessment (the “Funds”), to implement the Chilcott Diversion Structure restoration project.

NOW THEREFORE, the Colorado Natural Resource Trustees resolve as follows:

The Trustees do hereby approve the release to CPW of the available funds from the Fountain Creek Spill Settlement plus any and all accrued interest to be applied towards the Chilcott Diversion Fish Passage Structure restoration project in a manner approved by Trustee staff, subject to the following conditions:

Colorado Natural Resources Trustees Resolution #2019-04-23-01

1. This resolution will expire December 31, 2024, and the funds will no longer be available, unless a contract consistent with this resolution is executed by that date.
2. Release of the Funds is contingent on CPW obtaining and contributing the remaining funds necessary to complete the Chilcott Diversion Fish Passage Structure as described in the proposal. Additional funding may be obtained from other state and federal funding sources.
3. Release of the Funds is contingent on compliance with all laws and regulations, including but not limited to: State and Federal laws, local ordinances, permitting and zoning requirements, and water rights requirements.
4. Prior to release of any of the Funds, CPW must submit a signed and dated project proposal subject to the Trustees' staff consistent with the proposal presented in the September 2018 project proposal summary.
5. This approval is contingent on the Trustees' staff approval of the final restoration plan and use of the funds for this sole purpose.

Philip J. Weiser
Colorado Attorney General

Date

Jill Hunsaker Ryan,
Executive Director, CDPHE

Date

Dan Gibbs, Executive Director, DNR

Date