

Missouri Trustee Council

DECISION MEMO

Southeast Missouri Lead Mining District: Request for Proposals, Natural Resource Damage Restoration Projects for Riparian, Wetland, and Floodplain Habitat within Big and Black River Watersheds

This Decision Memo relates to the natural resource damage assessment and restoration process undertaken by the State of Missouri and the U.S. Department of the Interior (collectively “Trustees”) in the Southeast Missouri Lead Mining District pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601-9675) and implementing regulations (43 C.F.R. Part 11). The natural resource Trustees recovered monetary damages from the American Smelting and Refining Company (ASARCO, LLC) to settle certain legal claims concerning injuries to natural resources and their services.

On October 1, 2014, monies recovered from a Natural Resource Damage Assessment and Restoration (NRDAR) settlement were made available for public proposals via a request for proposals (RFP) by the Missouri Trustee Council in accordance with the Southeast Missouri Ozarks Regional Restoration Plan (SEMORRP). For purposes of this project, the Missouri Trustee Council is comprised of the Missouri Department of Natural Resources and U.S. Department of the Interior represented by the U.S. Fish and Wildlife Service. The SEMORRP provides a process framework that governs the approach for restoration project identification, evaluation, selection and implementation. The Trustees followed the SEMORRP process to evaluate and select the restoration projects presented within this Decision Memo.

The RFP (attached) sought applicants to implement successful programs and projects of compensatory environmental restoration within tributaries of the Big and Black River watersheds. The selected riparian, wetland, and floodplain habitat programs and projects will compensate for natural resources injured by the release of hazardous substances associated with the historical mining activities of the ASARCO, LLC. Injured natural resources include migratory songbirds and their supporting habitats, natural vegetative communities, aquatic biological communities as well as stream and river sediments.

A. Announcement of Selected Projects

The Trustees are pleased to announce the selection of two successful project proposals under the RFP and hereby officially award the following restoration funds:

Project Proponent	Overall Project Description	Specific Projects Selected for Funding	Award Amount
<p>The Nature Conservancy Missouri Department of Conservation The Ozark Regional Land Trust</p>	<p>A combination of restoration projects including riparian corridor fence-outs, alternative cattle water supplies, reinforced stream crossings, streambank stabilization, and perpetual conservation easements in the Huzzah and Courtois Creek watersheds.</p>	<p>Project 1: Riparian Buffer Revegetation Project 2: Riparian Buffer Livestock Fencing Project 3: Alternative Livestock Watering System Project 4: Reinforced Stream Crossings Project 5: Streambank Stabilization Project 9: Private Land Easements</p> <p>Actual projects will be identified by the Nature Conservancy and partners, and approved by the Trustee Council for implementation as the projects arise.</p> <p>See attached, <i>“Implementing Agricultural Practices, Stream Restoration, and Land Protection in the Southeast Missouri Ozarks”</i> project proposal for specific project information.</p>	<p>\$500,000</p>
<p>Soil and Water Conservation District Program</p>	<p>A combination of restoration projects to include riparian corridor fence-outs and re-vegetation, alternative cattle water supplies, and other standard soil and water conservation district practices which benefit injured natural resources in the upper Big and Black River watersheds.</p>	<p>Targeted riparian and floodplain habitat restoration projects in the upper Big and Black River watersheds using specific conservation practices.</p> <p>Actual projects will be identified by the Soil and Water Conservation Districts and approved by the Trustee Council for implementation as the projects arise.</p> <p>See attached, <i>“Proposal in Response to Request for Proposals for Natural Resource Damage Restoration Projects for Riparian, Wetland, and Floodplain Habitat with Big and Black River Watersheds in the Southeast Missouri Mining District”</i> project proposal for specific conservation practice information.</p>	<p>\$250,000</p>

Additional Regulatory Requirements and Permitting

Both selected project proponents agree to comply with all applicable regulatory and statutory provisions, including the procurement of permits, as necessary.

Further Reading

The project proponents' successful proposals, with sensitive information redacted, will be posted to the Trustees' websites along with this document. Additional environmental compliance documents including Endangered Species Act, National and State Historic Preservation Act, and National Environmental Policy Act, among others, will also be posted, as appropriate.

The Trustees' websites are located at:

<http://dnr.mo.gov/env/hwp/sfund/nrda.htm>

<http://www.fws.gov/midwest/es/ec/nrda/SEMONRDA/index.html>

Look for further updates and announcements on the Trustees' websites for future RFPs, completed restoration project information, and other information regarding NRDAR in southeast Missouri.

B. Timeline of Trustee Actions Regarding the Request for Proposals

October 1st, 2014: Trustees inform the public through press releases of the upcoming RFP availability.

October 15, 2014: Trustees conduct a public meeting in Park Hills, MO to disperse information about the RFP and publicly answer questions.

October 15—December 15, 2014: Open period for submission of proposals under the RFP. Trustees accept public comments on the RFP.

December 15, 2014: Open period for proposal submission closes. Two complete proposals are received by the Trustees.

December 15, 2014-March, 2015: Trustees review proposal submissions and confer with project proponents. Environmental compliance packages are created and reviewed.

May 2015: Final restoration funding decisions are announced.

C. Trustees' Response to Comments Received on the Request for Proposals

This responsiveness summary presents comments that were received on the "Request for Proposals, Natural Resource Damage Restoration Projects for Riparian, Wetland, and Floodplain Habitat within Big and Black River Watersheds, Southeast Missouri Lead Mining District" and provides responses to the comments on behalf of both the federal and state Trustees.

The Trustees appreciate the time and effort expended by the commenters to the RFP. We also appreciate that the Proposed Action is well received among state and local governments, as well as non-profit groups.

Comment 1: The RFP is inconsistent with the ASARCO Settlement Agreement in a number of ways, including the total amount of funds to be expended under the RFP, the types of restoration actions to be undertaken with the ASARCO Restoration Funds, the location of such restoration and how potentially responsible parties will receive “credit” to reduce their natural resource damages liability.

Response: The federal and State Trustees address each of these arguments in more detail, below, and are confident that the Restoration RFP is consistent with the ASARCO settlement and their legal authorities to act on behalf of the public to compensate for the loss of natural resources and their associated services.

Comment 2: The RFP is attempting to spend \$4 million in funds specifically allocated to the Sweetwater Mine/Mill and Glover Smelter in areas outside of these two properties.

Response: As stated in the “Funds Available” section of the Riparian Restoration RFP (page 2), “Up to \$1,000,000 is available for restoration programs and projects proposed under this RFP.” Therefore, the assertion that the RFP is “attempting to spend \$4 million in funds” is misinformed. For purposes of the Restoration RFP, five hundred thousand dollars (\$500,000) from the Big River: ASARCO account and five hundred thousand dollars (\$500,000) from the West Fork: ASARCO account is being made available for project funding. The Trustees have reviewed the submitted projects using criteria established in the SEMORRP to determine whether a submitted project qualifies for funding. As part of the RFP process, the potential exists for less than \$1 million to be spent, depending on the selection of submitted proposals however no more funds are authorized to be spent under the Restoration RFP.

Comment 3: ASARCO NRD monies received under the Settlement Agreement, including all interest earned on such funds, are to be used for "restoration activities at or in connection with each Site". The RFP, however, states that the funds are to be used for "compensatory restoration" projects in areas that are "not contaminated." It is quite clear from the RFP when it describes such potential projects as bank stabilization and runoff filtration, fencing cattle from areas, and obtaining "healthy riparian forest" that it is encouraging the public to propose projects to improve habitat rather than "restoration" of any contaminated area. Indeed, by prohibiting projects from being in any "contaminated" area, the projects, by definition, are not restoration as that term was used in the Settlement Agreement. Simply calling these projects "compensatory restoration" does not make them "restoration" projects as authorized in the Settlement Agreement.

Response: The term “restoration” in the NRDAR context encompasses several different types of restoration activities. For example, under Section 107(f) of CERCLA, Trustees are authorized to use the recovered funds “only to restore, replace, or acquire the equivalent of such natural resources” meaning those natural resources that have been injured. CERCLA continues “the measure of damages in any action under subparagraph (C) of subsection (a) of this section shall

not be limited by the sums which can be used to restore or replace such resources.” Section 111 of CERCLA, entitled “Restoration, etc., of natural resources” provides that “[recovered] funds may not be used under this chapter for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected [Trustees]...after adequate public notice and opportunity for hearing and consideration of all public comment.” In practice, these plans are titled “Restoration Plans” and may incorporate all authorized restoration actions: restoration, rehabilitation, replacement or acquisition of the equivalent of any natural resources. See 43 C.F.R. § 11.93 – Post Assessment Phase- restoration plan.

The term “compensatory restoration” stems from the concept of “compensable value” of services lost pending restoration of natural resources, and is an authorized measure of damages in the CERCLA NRDAR regulations. See 43 C.F.R. §§ 11.81(a)(1) and (2). “Compensable value” is defined as “the amount of money required to compensate the public for the loss in services provided by the injured resources between the time of the...release and the time the resources are fully returned to their baseline conditions, or until the resources are replaced and/or equivalent natural resources are acquired.” 43 C.F.R. § 11.83(c). The term “compensatory restoration” is defined in the SEMORRP, which was made available for public comment prior to finalization. Compensatory Restoration refers to Acquisition of Equivalent Resources or Replacement and to “any action taken to offset the interim losses of natural resources from the date of the event until recovery.” (SEMORRP p. 5-6). The natural resources damages claim in the ASARCO bankruptcy for the SEMOLMD included compensable value as its measure of damages, along with primary restoration. (See, e.g., Testimony of Michael Donlan, July 27, 2007, Paragraphs 13 and 14). Compensatory restoration is consistent with the definition of restoration as used in the ASARCO Settlement Agreement.

The meaning of the term “restoration” in the ASARCO Settlement Agreement which settled claims for natural resource damages, includes all authorized restoration actions: restoration, rehabilitation, replacement or acquisition of the equivalent of any natural resources. Therefore, the Restoration RFP is consistent with the ASARCO Settlement Agreement.

Comment 4: The expenditure of recovered restoration funds should occur only on contaminated areas, not on non-contaminated areas.

Response: This confusion appears to originate from the misunderstanding of the meaning of restoration. Under CERCLA there is no requirement that recovered restoration funds be spent on-site. Rather, the requirement is that the restoration actions compensate the public for the loss of natural resources and/or their services resulting from a release of hazardous substances at a facility (or “Site”). In other words, the link is the natural resource and/or their services, not necessarily the location.¹ For example, “acquisition of the equivalent or replacement” is defined as “the substitution for an injured resource with a resource that provides the same or substantially similar services.” 43 C.F.R. §§ 11.14(a) and (ii). The regulatory definitions are consistent with

¹ This requirement is described in the RFP “The Trustees have prioritized restoration goals within the Big and Black River watersheds in a tiered approach as a means of ensuring funds are expended with a clear nexus to the injury.”

the plain meanings of “*acquisition*” which is “to come into possession or ownership of” and “*replace*” which is “to be used instead of”. (Merriam Webster online, www.m-w.com, last accessed December 23, 20140).

Section 11.82 of the CERCLA NRDAR regulations provides a list of factors to consider when selecting a restoration project, one of which is “technical feasibility.” Restoration projects are designed to provide additional natural resources and/or their services for an amount of time, which will ensure that the public is compensated for the losses suffered. Uncertainty about the duration of a restoration project may deem it to be technically infeasible. For example, in locations where there are ongoing operations or where response actions are planned but not yet decided, a restoration project may be at risk either through re-contamination or destruction. The risk of having a restoration project end prematurely counsels against pursuing restoration on-site in these circumstances. Yet, the Trustees have a responsibility to the public to return injured resources and/or their associated services using recovered funds. Consistent with society’s timeframe, the restoration should occur in the more immediate future, not the distant future.

Additionally, as identified in Comment 3 above, the restoration funds are to be used for “restoration activities at or *in connection with* each Site.” (emphasis added). Consistent with the statutory authority, the ASARCO settlement authorizes recovered funds to be spent on restoration activity off-site provided that it would provide benefits to the natural resources and their services injured at each Site. As discussed above, the ASARCO Restoration Funds being drawn on by the Restoration RFP are for the West Fork Site, located within the Black River watershed, and the Big River Site, which is located in the Big River watershed. The actions contemplated in the Trustees’ RFP (e.g., improvement of the condition of riparian habitat and/or acquisition of healthy riparian forest and wetland areas) will serve to return lost resources and their services similar to those injured at the Big River and West Fork Sites (e.g., improved and /or more habitat and prey sources for migratory birds, and improvements to water and sediment quality in the affected watersheds). The geographic proximity of the Priority Areas identified in the RFP—the same watershed—helps to ensure that equivalent resources and services are being restored. In addition, actions taken in the headwaters of the Big and Black Rivers will have cascading beneficial effects downstream in the near-term.

Comment 5: Tier 1 Priority area lies almost entirely within the Furnace Creek Superfund Site which makes this area contaminated.

Response: Prior to defining the Tier 1 area, the Trustees reviewed available data from the Environmental Protection Agency (Black and Veatch 2013; Tetra Tech 2010) and Trustee injury determination reports (Pavlowsky et al. 2010; Roberts et al. 2009; Allert et al. 2010; Besser et al. 2009) to ascertain whether the area is contaminated. Available data did not suggest that there was widespread soil or sediment contamination outside of known, discrete historic mining areas and therefore, the Tier 1 area is appropriate for restoration projects.

Comment 6: The RFP affects other rights that potentially responsible parties have under the ASARCO Settlement Agreement. Paragraph 10 provides that the amount of cash actually received by the agencies and the State “shall be credited by each such agency or the State to its account for a particular site which credit shall reduce the liability to such agency or the State of

non-settling potentially responsible parties (or responsible parties that have only partially settled their liability) for the particular site by the amount of credit". It is not clear how responsible parties can receive a "credit" to reduce their liability.

Response: If other responsible parties are determined to have liability for natural resource damages at the same four sites owned and operated by ASARCO: West Fork Mine/Mill, Sweetwater Mine/Mill, Glover Smelter, and the Big River Mine Tailings/St. Joe Minerals Corp./Federal Mine Tailings Site, their liability will be reduced by the amount of cash received by the Trustees from the ASARCO settlement. This is consistent with Paragraph 10 of the Settlement Agreement and does not preclude the Trustees from achieving restoration and compensating the public for the loss of natural resources as quickly as possible.

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REFERENCES CITED

- Allert, A.L., DiStefano R.J., Fairchild, J.F., Schmitt, C.J., and Brumbaugh, W.G. 2010. Effects of mining-derived metals on riffle-dwelling crayfish and in-situ toxicity to juvenile *Oreonectes hylas* and *Oreonectes luteus* in the Big River of southeast Missouri, USA. U.S. Geological Survey Administrative report submitted to the U.S. Fish and Wildlife Service, Columbia Ecological Services Office, Region 3, Environmental Contaminants Division, Columbia, Mo.
- Besser, J.M., Brumbaugh, W.G., Hardesty, D.K., Hughes, J.P., and Ingersoll, C.G., 2009. Assessment of metal-contaminated sediments from the Southeast Missouri (SEMO) mining district using sediment toxicity tests with amphipods and freshwater mussels: U.S. Geological Survey Administrative report submitted to the U.S. Fish and Wildlife Service, Columbia Ecological Services Office, Region 3, Environmental Contaminants Division, Columbia, Mo.
- Black & Veatch. 2013. Draft Remedial Investigation Report – Furnace Creek Site. Prepared for U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. 199 pp. + Appendices.
- Pavlosky, R. T., Owen, M.R., Martin, D.J. 2010. Distribution, geochemistry, and storage of mining sediment in the channel and floodplain deposits of the Big River system in St. Francois, Washington, and Jefferson Counties, Missouri. The Ozarks Environmental and Water Resources Institute. Administrative report submitted to the U.S. Fish and Wildlife Service, Columbia Ecological Services Office, Region 3, Environmental Contaminants Division, Columbia, Mo.
- Roberts, A.D., Mosby, D., Weber, J., Besser, J., Hundley, J., McMurray, S. and Faiman, S., 2009. An assessment of freshwater mussel (Bivalvia: Margaritiferidae and Unionidae) populations and heavy metal sediment contamination in the Big River Missouri. U.S. Fish and Wildlife Service Administrative report submitted to the U.S. Fish and Wildlife Service, Columbia Ecological Services Office, Region 3, Environmental Contaminants Division, Columbia, Mo.
- Tetra Tech, 2010. Site inspection report Washington County lead district – Furnace Creek site CERCLIS i.d. # mon000705842, Washington County, Missouri. Prepared For U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101. 28 pp. + Appendices.