

To Restore, Replace or Acquire ... That is the Question

March 2, 2006

DOI Federal Advisory Committee

Q2 Subcommittee Report

The Question

- ❖ Should DOI's regulations provide additional guidance for determining whether direct restoration, rehabilitation, replacement, or acquisition of equivalent resources is the best strategy for addressing natural resource injuries?
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The Guidance

❖ CERCLA

- ◆ Use collected damages “to restore, replace or acquire the equivalent of such resources”

❖ DOI Rule

- ◆ Allows restoration to return resources to “baseline,” replacement, or acquisition of equivalent resources “that provide the same or substantially similar services”
 - ◆ Lists 10 factors for consideration in selecting among restoration/replacement/acquisition alternatives
 - ◆ Deliberately provides no preference for one strategy over another
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The Guidance (con't)

- ❖ CERLA Regulations 10 Factors (43 CFR 11.82(d))
 - ◆ Technical feasibility, as that term is used in this part;
 - ◆ The relationship of expected costs of the proposed actions to the expected benefits from the restoration, rehabilitation, replacement and/or acquisition of equivalent resources;
 - ◆ Cost-effectiveness, as that term is used in this part;
 - ◆ The results of any actual or planned response actions;
 - ◆ Potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources;
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The Guidance (con't)

- ❖ CERLA Regulations 10 Factors (con't)
 - ◆ The natural recovery period determined in *Sec. 11.73(a)(1)* of this part;
 - ◆ Ability of the resources to recover with or without alternative actions;
 - ◆ Potential effects of the action on human health and safety;
 - ◆ Consistency with relevant Federal, State, and tribal policies;
 - ◆ Compliance with applicable Federal, State, and tribal laws.
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The Issue

- ❖ What is the underlying issue?
 - ❖ Are there unnecessary constraints in the existing guidance?
 - ❖ Are there opportunities missed by using the existing guidance?
 - ❖ Would more definitive guidance be beneficial to the process?
 - ❖ Need for case studies, real world examples.
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Proposed Scope of Inquiry

- ❖ Criteria for selecting among alternatives
 - ◆ Are the 10 criteria the right ones?
 - ◆ Should there be tiers, i.e. a set of mandatory threshold criteria plus discretionary factors?
 - ◆ Should there be preferences such as for on-site over off-site alternatives?
 - ◆ Should a “grossly disproportionate to value” limitation be included?
 - ◆ Is additional guidance needed on when it is appropriate to provide compensatory services and what types of compensatory projects are allowed?
 - ◆ How should pre-existing regional plans be considered?
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Proposed Scope (con't)

- ❖ Earlier focus on restoration
 - ◆ Should the rules be revised to facilitate integration of restoration planning with remedial decision making?
 - ◆ Should assessments include an early step to identify potential restoration opportunities?
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The Process

❖ Current actions:

- ◆ Compiling direct & related guidance
- ◆ Looking for relevant cases examples

❖ Further recommendations:

- ◆ Make references available on Website
 - ◆ Include State representative on subcommittee
 - ◆ Survey NRDA practitioners to seek additional insights & case experiences
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Feedback

- ☯ Does the Committee have further insights into the real or perceived **issue**?
 - ☯ Is the expanded **scope** appropriate?
 - ☯ Are there any concerns or suggestions about the **process** for addressing this question?
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