

Guidance on Selecting Restoration Alternatives

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DOI Federal Advisory Committee on
NRD

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 Existing Guidance

- CERCLA
 - Use collected damages “only to restore, replace or acquire the equivalent of such resources” 40 U.S.C. § 9607 (f) (1)
- 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

Type B CERLA Regulations

10 Factors (43 CFR 11.82(d))

- (1) Technical feasibility, as that term is used in this part;
- (2) The relationship of expected costs of the proposed actions to the expected benefits from the restoration, rehabilitation, replacement and/or acquisition of equivalent resources;
- (3) Cost-effectiveness, as that term is used in this part;
- (4) The results of any actual or planned response actions;
- (5) Potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources;

CERLA Regulations 10 Factors (con't)

- (6) The natural recovery period determined in Sec. 11.73(a)(1) of this part;
- (7) Ability of the resources to recover with or without alternative actions;
- (8) Potential effects of the action on human health and safety;
- (9) Consistency with relevant Federal, State, and tribal policies;
- (10) Compliance with applicable Federal, State, and tribal laws.

The Issue

- Have there been problems in practice?
- Are there unnecessary constraints in the existing guidance?
- Have good opportunities been missed under the existing guidance?
- Would more definitive guidance be beneficial to the process?

Q2 Subcommittee Considered 8 Subquestions

1. Should there be a preference for on-site or in-kind restoration (or any other preference among alternative strategies)?
2. Should there be a “grossly disproportionate to value” limitation?
3. Should there be mandatory “threshold criteria” that must be met for a restoration alternatives to be considered?

Q2 Subcommittee Considered 8 Subquestions

4. Is more guidance needed on the appropriateness of projects that provide “services” (such as recreation) without enhancing natural resources?
5. Are there other revisions that should be suggested to the existing criteria?

Q2 Subcommittee Considered 8 Subquestions (cont'd)

6. Do we need to foster an earlier focus on restoration? If so, how?

7. What role, if any, should pre-existing regional restoration plans play?

Q2 Subcommittee Considered 8 Subquestions (cont'd)

8. How (if it is worthwhile at all) can the NRDA process be made more compatible with the “integration” or coordination of response action planning with injury assessment and restoration planning?

Two Suggested Ground Rules for Possible Revisions of Rule

- Add to or change existing criteria only to address a specific omission or other deficiency
- Look first to OPA rule for potential revised criteria and craft new language only when nothing in that rule addresses the identified deficiency

Suggested Revisions

Subquestion 1: Preference for Direct Restoration

Rule–change (or guidance) requiring consideration of on-site/in-kind restoration alternative, in addition to the “no action” alternative required by the correct rule.

Suggested Revisions (cont'd)

Subquestion 2: Mandatory Threshold Criteria

- Revise rule to make technical feasibility, compliance with the law, and reasonable nexus to the injured resources mandatory threshold criteria (the first two as under the OPA rule).

Subquestion 3: Grossly Disproportionate Test

- No action recommended

Subquestion 4: Compensation for Lost Services

- Perceived need to limit how far trustees may stray from ecological restoration or enhancement
- New criterion requiring reasonable nexus with injured resources (recommended under subquestion 2), or requiring trustees to assess the degree of nexus, are possible solutions
- However, affirmatively recognize that a project providing cultural services (but not enhancing natural resources) is appropriate where cultural uses are lost

Suggested Revisions (cont'd)

Subquestion 5: Other Possible Revision to Criteria

- A. Written, public guidance needed regardless of whether criteria are revised

Subquestion 5 – page 2

B. Possible Rule Changes

- To focus on nexus with injury, add: “The extent to which the alternative is expected to meet the trustees’ goals and objectives in returning the injured natural resources and services to baseline and/or compensating for interim losses.” (from OPA Rule)
- To favor permanence, add: “The extent to which each alternative will provide long-term benefits to the ecosystem and the public.”
- To make public input a substantive, as well as procedural, factor, add: “Public acceptance and/or valuation of the alternative in the affected community(ies).”

Subquestion 5 – page 3

C. Suggested Technical Revisions

- Replace criteria (6) and (7) in the current Type B rule with the following: “the extent to which the alternative will accelerate the recovery of injured resources or services and the magnitude of interim lost services during the recovery period.”
- Delete criterion (9) (consistency with federal, state, or tribal policies) because it is unnecessary and difficult to apply.

Subquestion 5 – page 4

- Add within criterion (1) (“Technical feasibility, as that term is used in this part”) the clause “, and likelihood of success.”
- Replace criterion (5) in the existing Type B rule with similar criterion from the OPA rule (“The extent to which each alternative will prevent future injury as a result of the incident, and avoid collateral injury as a result of implementing the alternative[.]”).

Suggested Revisions (cont'd)

Subquestion 6: Regional Restoration Plans

- Add provision for use of Regional Restoration Plans or other existing restoration projects, similar to that in the OPA Rule.

Subquestion 7: Early Focus Restoration

- Explicitly provide an option for responsible parties to work with the Trustees for the purpose of scoping out and taking early restoration actions.

Subquestion 8: Facility Integration of Response of Restoration

- Make PAS explicitly *iterative* to incorporate response data.