

January 2, 2007

Steve Glomb  
U.S. Department of the Interior  
Restoration Program  
1849 C Street, NW  
Mail Stop 4449 MIB  
Washington, DC 20240

**Re: Comments on FACA Subcommittee #1, 2 and 3 Draft Reports and Presentations**

Dear Mr. Glomb:

I write to provide in written form the comments I delivered in person at the DOI Federal Advisory Committee meeting in Washington, DC on November 29th and 30th, 2006. My comments at the meeting and in this letter focus on the draft reports submitted prior to the meeting by Subcommittees #1, 2 and 3 and the presentations made by those Subcommittees on November 29th and 30th. I appreciate the opportunity to comment both in person at the meeting and in writing.

With respect to Subcommittee #1, I noted at the Washington meeting, as I did at the July FACA meeting in Denver, that it is important for Subcommittee #1 to recognize that DOI's Type B natural resource damages assessment rule (the "Type B Rule" or "the Rule"), is intended to guide trustee assessments for use in a litigation context. In fact, FACA member William Brighton acknowledged at the July meeting in Denver that the Type B Rule is intended to guide trustee NRDA's for possible use in litigation, and not primarily to facilitate settlements. That conclusion is also evidenced by Congress' provision in Section 107(F)(2)(C) of CERCLA that assessments conducted in accordance with the rule are to be accorded a rebuttable presumption in litigation. Because assessments conducted in accordance with the Rule are to be afforded a rebuttable presumption in litigation, the Rule **must** require the collection of litigation quality data in every assessment conducted pursuant to the Rule. In light of the Type B Rule's clear purpose, much of the discussion within the current draft of the SC #1 report about revising the Rule to facilitate settlement focuses on the wrong issue.

The current draft of SC #1's report also fails to adequately acknowledge that there are significant limitations upon quantification of injury at the individual organism level. Some of those limitations are referred to in a paper co-authored by a member of SC #1 which states, in part, that: "Injuries to individual organisms may be relatively easy to document, but are generally not as relevant ecologically as injuries sustained at the population level and above and



thus do not generally effect the services provided by the resource. In most cases services are provided by populations, communities or ecosystems, not by individual organisms.” Barnhouse, L.W. and Stahl, R.G. “Quantifying Natural Resource Injuries and Ecological Service Reductions: Challenges and Opportunities” *Environmental Management* Vol. 30, No. 1, (2002) at p. 3.

Similarly, SC #1’s report also does not reference the work of one of its own scientist members entitled “Population is the Appropriate Biological Unit of Interest for a Species Specific Risk Assessment.” Landis, W.G., SETAC website at [www.setac.org/erag/era\\_pop\\_discourse3.htm](http://www.setac.org/erag/era_pop_discourse3.htm). In that paper, Mr. Landis correctly noted that “A population focus places the individuals into the ecological context necessary for making predictions about the future dynamics and distribution of a species. The appropriate scale of a risk assessment investigation requires an understanding of the spatial and dynamic properties of the population.” Landis W.G. at p. 3 of 4. That same member of SC #1 wrote in another paper entitled “Uncertainty in the Extrapolation from Individual Effects to Impacts upon Landscapes” that “To extrapolate the effects of a toxicant to an ecological structure, the spatial and historical contexts being considered at a landscape scale must be known.” *Human Ecological Risk Assessment*, Vol. 8, No. 1, 2002 at p. 196.

Yet another of SC #1’s scientist members stated in a paper entitled “Integrating Effects of Contaminants Across Levels of Biological Organization: An Overview” that

Despite the greater mechanistic understanding and endpoint-response specificity, effects at lower levels of organization have serious limitations. In particular, the ecological significance of biochemical responses is generally unknown. This is especially true for residue levels and metabolites, which are excellent indicators of exposure, but the direct linkage to ecological effects is often tenuous. Because protection of biological integrity generally requires that we protect higher levels of biological organization, (e.g., populations and communities), demonstrating biochemical and physiological responses may not be sufficient. Indeed, because of uncertainties associated with single species toxicity testing, mortality (an individual response) observed in laboratory experiments may have little relevance for natural populations in the field. Consequently some researchers have argued that responses at higher levels of organization measured in the field are more ecologically relevant than affects at lower levels (Cairns, 1983). Clements, W.H., *Journal of Aquatic Ecosystem Stress and Recovery* 7, pp. 113-114 (2000).

SC #1 does not adequately acknowledge such scientific issues in its discussion of the use of an individual organism approach to injury quantification.



With respect to Subcommittee #2, there are five issues I would like to raise. First, although SC #2 deserves credit for the substantial breadth and depth of its report, the report proposes to revise the Type B Rule or create new guidance with respect to many issues for which there is little or no evidence that there is a problem or shortcoming in the existing Rule. Given the resource limits faced by trustees, affected communities, and potentially responsible parties alike, the FACA should limit its recommendations for any rule changes or guidance to those measures that are truly needed. Such a restrained approach is especially warranted given the considerable expense for all interested parties of the rulemaking process and the litigation that has followed upon past Type B Rule revisions.

Second, I strongly support SC #2's position that there should not be a preference for onsite restoration measures. I believe that SC #2 is correct that the criteria for selection of a restoration alternative under the rule should not favor one type of restoration over another. Given the enormous variability in the site specific injuries and restoration scenarios that trustees and other interested parties face, a preference for one type of, or location for, restoration is ill-advised. Instead, neutral criteria that do not favor one category of restoration alternatives over another -- such as the relationship between the expected benefits and costs, cost effectiveness and technical feasibility of a restoration alternative that are in the Type B Rule -- are appropriate.

Third, I disagree with SC #2's proposal to include new language in the Type B Rule that would encourage/require trustees to focus upon the development of restoration alternatives early in the assessment process. For instance, SC #2 suggests that a new Section 11.25(f) be added to the Rule to provide that: "To the extent practicable, a preliminary identification of potential restoration projects or project types, based on information readily available, shall be made. These projects should be considered as appropriate to guide further assessment activities and restoration planning." SC #2 11/13/06 draft report at p. 21.

I am concerned with this proposal for several reasons. In many Superfund cases, trustees will not have determined or quantified injury (including causation) at the preassessment screen stage. Given how little trustees typically know about the type, quantity and cause of natural resource injuries at the preassessment screen stage of an assessment, it usually will be premature to identify restoration alternatives at such an early stage. If trustees do identify restoration alternatives in the preassessment screen or at some other point early in the assessment process absent such knowledge, trustees are likely to raise the public's expectations about what might be recovered as a result of the assessment. If such restoration alternatives and/or expectations are not justified by information developed in later phases of the assessment, then it may become substantially more difficult for the trustees to settle given the public's inflated expectations. Given that there is nothing in the Rule that prevents trustees from considering restoration alternatives at an early stage, and the Rule is not mandatory, the proposed change is unnecessary.

Fourth, I strongly disagree with SC #2's recommendation that CERCLA remediation and restoration be integrated. There are a number of elements of SC #2's integration proposal that

are of concern because they threaten to deprive PRPs of the greater due process that they are entitled to with respect to natural resource damages claims. For example, natural resource damages claims must be adjudicated in advance by an Article 3 judge, whereas courts have, to date, interpreted CERCLA as allowing EPA in certain circumstances to unilaterally order PRPs to undertake remedial actions without any prior judicial hearing. Thus, if CERCLA remedial actions and natural resource restoration alternatives are selected in a unified decision document, as suggested by SC #2, PRPs might be deprived of their due process rights because different procedural and substantive due process protections apply to remediation and restoration claims. That is a recipe for more, not less, litigation.

Fifth, SC #2 has not provided adequate justification for its proposal that the Type B Rule or guidance should “affirmatively recognize that a project providing cultural services (but not enhancing natural resources) is appropriate where cultural uses were lost.” That proposal arguably conflicts with SC #2’s criteria #1, which requires consideration of on-site restoration in all cases, threshold criteria #3 (a “demonstrable, reasonable relationship to the injuries giving rise to the claim”), and its balancing criteria #7 which concerns the “relative strength of the relationship between each alternative and the injured natural resources giving rise to the claim.” SC #2 should provide some reasoned explanation for why DOI should “affirmatively recognize” that projects providing cultural services but not enhancing natural resources are appropriate given the other criteria SC #2 has identified. Absent such an explanation, DOI should not accept SC #2’s proposal.

With respect to SC #3, I have three comments. First, much has been made in the context of SC #3 and outside the FACA of how HEA has facilitated the settlement of many cases. However, I am not aware of any study or systematic analysis that has objectively evaluated whether HEA or other restoration-based approaches have resulted in cases settling faster or resulted in cases settling that would otherwise have been litigated. The widely recognized fact is that most CERCLA NRD claims settle, as do most other types of civil claims. Therefore, the fact that most cases involving HEA have settled is not, in and of itself, conclusive evidence that HEA facilitates settlements.

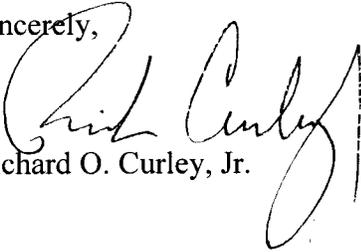
Second, it is also important that the SC #3 report or subsequent full committee report acknowledge that HEA/REA are not designed to be used to measure lost interim human services. I appreciate the fact that when I raised this issue at the meeting on November 30th, Committee Member Mr. Ricker of NOAA confirmed that HEA is intended to measure lost interim ecological services, not lost human services, and no Committee member disagreed with that statement.

Finally, the SC #3 report also should be revised to acknowledge that HEA/REA are not well established, reliable methods for estimating damages. That conclusion is supported by the fact that two trustee representatives and three prominent trustee consultants recently wrote that

HEA is still an emerging aspect of the practice, and novel, case specific algorithms for interpreting exposure data might be employed (e.g., Penn and Tomassi 2002). There are no standard methods for translating knowledge about toxicity into HEA formulations because the understanding of toxicity might be based on experimental and observational studies of toxic responses that include a wide variety of organisms and different types of toxic responses. Cacela D. , Lipton J., Beltman D., Hauser J., and Wolotira R., "Associating Ecosystem Service Losses with Indicators of Toxicity in Habitat Equivalency Analysis," Environmental Management, Vol. 35 No. 3, (2005) p.343.

As currently written, the SC #3 report ignores the substantial literature that supports the conclusion that HEA/REA, as well as conjoint analysis, are not reliable, well-established methods. Thanks again for the opportunity to comment.

Sincerely,

  
Richard O. Curley, Jr.

ROC:sle