

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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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”
 - Requires trustees to consider a “reasonable number of possible alternatives”
 - Lists 10 factors for consideration in selecting among restoration/replacement/acquisition alternatives
 - No preference for one strategy over another

Q2's Eight Subquestions

1. Should there be a preference for on-site or in-kind restoration (or any other preference among alternative strategies)?

Response: No. But guidance should encourage trustees to assess at least one on-site, and at least one off-site, alternative whenever possible.

Subquestion 2

2. Should the rule include a “grossly disproportionate to value” limitation?

Response: Not on your life.

Subquestion 3

3. Should there be mandatory “threshold criteria” that must be met for a restoration alternative to be considered?

Response: Yes, as in OPA rule, plus one:

- (1) Reasonable likelihood of success;
- (2) Compliance with applicable Federal, State, and tribal laws; *and*
- (3) Reasonable, demonstrable relationship to the injured resources.

Subquestions 4 and 5

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

Response: Yes, *both* rule revisions and non-binding guidance are needed.

Guidance on Human Services Projects

- New threshold criterion and new balancing factor on the relationship of each alternative to injured natural resources will provide the right analytical framework.
- Beyond that, non-binding guidance is preferable.
- Specific need to address projects that provide cultural services (analogy to loss of an endangered species).

Revised Balancing Factors - 1

- (1) The likelihood of success of each alternative.
[From OPA rule; would replace “Technical feasibility, as that term is used in this part.”]
- (2) The relationship of the expected costs of the proposed action 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.

Balancing Factors - 2

(5) The extent to which each alternative will prevent future injury and avoid collateral injury as a result of implementing the alternative.

[Adapted from OPA rule; would replace “Potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources.”]

Balancing Factors - 3

- 6) The extent to which each alternative will accelerate the recovery of services in comparison with the natural recovery period determined in 11.73(a)(1) of this part.
- [Delete current (7), which reads “Ability of the resources to recover without alternative actions.”]
- (7) The relative strength of the relationship between each alternative and the injured natural resources giving rise to the claim.

Balancing Factors -4

(8) The extent to which natural resource services provided by each alternative are sustainable over the long term.

(9) Potential effects of the action on human health and safety.

(10) Consistency with relevant Federal, State, and tribal policies.

[Delete former (10): “Compliance with applicable Federal, State, and tribal laws.”]

Subquestion 6

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

Response: Yes! Both rule revisions and guidance are needed, starting with the PAS and continuing through each stage, in order to:

- foster early project-based settlements;
- identify early action opportunities;
- inform data/study needs in NRDA process;
- facilitate coordination with response planning.

Subquestion 7

7. Should DOI provide further guidance on what constitutes “a reasonable number of possible alternatives”?

Response: No rule change is needed. No magic number or formula exists. Non-binding guidance would be appropriate, as in response to Subquestion 1.

Subquestion 8

8. Should the NRDA process be made more compatible with the “integration” or coordination of response action planning with injury assessment and restoration planning, and if so, how?

Response: Both rule revisions and guidance are needed.

New Coordination Provision - 1

- ___ *Coordination of damage assessment with response action investigations and planning.*
 - i. Whenever practicable, prior to and during a remedial investigation or other investigation to support response action decisions, the affected trustee or trustees shall seek to coordinate with the lead response agency under the NCP to (1) minimize duplication of sampling and other data collection efforts between the response investigations and damage assessment, and (2) help ensure that, to the extent appropriate, data and other information collected for the response investigations will also be useful for injury determination and restoration planning;

New Coordination Provision - 2

- ii. Where appropriate, the affected trustee or trustees may seek to coordinate with the lead response agency under the NCP concerning the selection of response and restoration actions to (1) minimize, or provide mitigation for, any potential adverse impacts of the response actions on natural resources, (2) avoid inconsistency between response and restoration actions to the greatest extent possible, and (3) select the most cost-effective combination of response and restoration actions consistent with the requirements applicable to each decision. Such coordination may occur in any manner agreed by the lead response agency and the trustee or trustees and may include the issuance of a single, integrated decision document selecting both response and restoration actions.