

U.S. Department of the Interior

**Natural Resource Damage Assessment and
Restoration Advisory Committee**

Final Report of Subcommittee 4

January 26, 2007

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EXECUTIVE SUMMARY

In 2005, DOI established a Federal Natural Resource Damage Assessment and Restoration Advisory Committee (Advisory Committee) to provide advice and recommendations on issues related to DOI's authorities, responsibilities, and activities under the natural resource damage provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Oil Pollution Act (OPA) and the Clean Water Act (CWA). Each Advisory Committee member was assigned by the Advisory Committee Chair to participate on one of four Subcommittees, and each Subcommittee was asked to make recommendations to the full Committee regarding one of four questions put before the Committee. The fourth question posed was:

What additional measures should DOI consider to expedite planning and implementation of restoration projects and to ensure effective and efficient restoration after awards or settlements are secured?

The Subcommittee that was assigned this question participated in regularly scheduled conference calls (either biweekly or weekly) and came together for one face-to-face work session in Phoenix, Arizona. Members of the Subcommittee also received feedback from the full Advisory Committee on the Subcommittee's direction, ideas, and analysis during Advisory Committee meetings held in March, July, and November of 2006. After considering the before-mentioned statutes; the CERCLA and the OPA natural resource damage assessment and restoration regulations; relevant agency policies and directives; judicial decisions; academic journals; practitioner's notes and articles; feedback from the full Advisory Committee; presentations made by practitioners, tribal representatives, trustees, and members of the public at Advisory Committee meetings; members' own experiences with natural resource damage assessment and restoration; and other materials which are made available as part of the record of the Subcommittee's deliberations, the Subcommittee members have reached consensus on the following four recommendations to DOI related to the question presented:

- 1. DOI Should Amend the CERCLA NRDA Regulations to Ensure that National Environmental Policy Act (NEPA) and Restoration Planning Processes are Fully Integrated.**
- 2. DOI Should Develop Departmental Guidance To Address the Use of Pre-Existing Regional Resource Management Plans in Restoration Planning.**
- 3. DOI Should Develop a Guidance-Based Initiative to Facilitate Cooperative Restoration.**
- 4. DOI Should Develop Guidance on Cooperative Assessment Which Includes, Among Other Items, Procedures to Maximize the Separation of the Scientific Assessment of Injury from the Development of Legal Positions of the Various Parties Involved in Assessment and Restoration Planning.**

RECOMMENDATION I:

DOI Should Amend the CERCLA NRDA Regulations to Ensure that National Environmental Policy Act (NEPA) and Restoration Planning Processes are Fully Integrated.

I. Need for Change

The Subcommittee members agreed that the manner in which DOI complies with the requirements of the National Environmental Policy Act (NEPA) in restoration planning impacts significantly the efficiency and expediency of restoration planning and implementation efforts.

Currently, NEPA compliance is handled differently by different DOI agencies and further by different regions within the agencies. In some cases, NEPA analysis has taken place during restoration planning and is fairly integrated into the restoration planning process.¹ However, in other cases, agency restoration planning is followed by handoff of the restoration plan to a separate NEPA staff, which then undertakes a NEPA analysis. The latter process may result in significant and unnecessary delays in restoration implementation. The Subcommittee believes that there is a need for DOI to develop procedures that ensure that the fulfillment of NEPA requirements in restoration planning is handled efficiently.

II. Discussion

A. Background: The Requirements of NEPA

NEPA requires federal agencies, in a systematic fashion, to take environmental considerations into account in their decision-making, via the use of procedures which “encourage and facilitate public involvement in decisions which affect the quality of the human environment” and which “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.”²

More specifically, agencies are required to prepare a detailed statement (EIS) on any proposal for a major federal action significantly affecting the quality of the human environment. An EIS should analyze five key issues: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided

¹ For example, restoration planning procedures for the Lower Fox River and Green Bay Area were integrated with NEPA analysis.

² 40 C.F.R. § 1500.2.

should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

From a procedural standpoint, NEPA requires agencies to consult with and obtain the comments of other federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved. Agencies are also required to make copies of the statement, comments, and the views of federal, State, and local agencies authorized to develop and enforce environmental standards, available for review and comment by the President, the Council on Environmental Quality and the public. Generally, NEPA requires that the appropriate environmental information be made available to public officials and citizens "before decisions are made and before actions are taken."³

B. The Processes Required by NEPA and the CERCLA NRDA Regulations are Functionally Equivalent.

The Subcommittee members observed that many of the requirements of the CERCLA NRDA regulations and of NEPA are practically identical, so much so in fact that Subcommittee members came to the conclusion that a reasonable argument could be made that following the procedures contemplated by the NRDA regulations alone satisfies the key NEPA requirements such that separate NEPA analysis should not be required, pursuant to "functional equivalence" legal doctrine.

"Functional equivalence" doctrine in the NEPA context was expressed as follows in a leading case: "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."⁴ In the past, some courts expressed a reluctance to extend the functional equivalence doctrine to agencies other than EPA.⁵ More recently several courts have expressed a willingness to consider functional equivalence arguments posited by other agencies.⁶

³ 40 C.F.R. § 1500.1(b).

⁴ *Environmental Defense Fund v. United States Environmental Protection Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

⁵ *See, e.g., Jones v. Gordon*, 621 F.Supp. 7, 13 (D. Alaska 1985), *aff'd in part, rev'd in part*, 792 F.2d 821 (9th Cir. 1986) (stating that the doctrine had to date been limited to the EPA, "whose sole responsibility is to protect the environment," and noting that "[t]he EIS exception found in this rule is extremely narrow and has no application in the NMFS, an agency with a far different mandate than the EPA"); *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (noting that the doctrine has "generally been limited to environmental agencies" and finding the Forest Service not to be one in the context of a timber management dispute because "[i]ts duties include both promotion of conservation of renewable timber resources and a duty to ensure that there is a sustained yield of those resource available" and "the Forest Service must balance environmental and economic needs in managing the nation's timber supply.")

The Subcommittee identified the development of the Restoration and Compensation Determination Plan (RCDP) required by the CERCLA NRDA regulations as the activity which generally fulfills NEPA's requirements. The RCDP is contemplated as part of the Assessment Plan in the regulations, though it may be released separately as long as it is subjected to the same scrutiny by interested Federal and State authorities, potentially responsible parties, and members of the public as is the Assessment Plan. The RCDP, comments on it received by the public and affected Federal and State agencies and Indian tribes, and responses to these comments are also included in the Report of Assessment. Under the CERCLA NRDA regulations, the Restoration Plan is developed based upon the RCDP.

The following figure compares the requirements of NEPA with the requirements of the CERCLA NRDA regulations:

⁶ See, e.g., *Fund for Animals v. Hall*, 448 F. Supp. 2d 127 (D. D.C. 2006) (noting that “an agency may be exempt from conducting a NEPA environmental review if a statute provides “procedurally and substantively” for the “functional equivalent” of compliance with NEPA and considering whether FWS’s use of the Migratory Bird Hunting Frameworks and ESA Section 7 consultation requirements were the functional equivalent of a NEPA environmental review); *Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of Interior*, 344 F. Supp. 2d 108 (D. D.C. 2004) (noting that “[w]hen the government acts pursuant to a second statute, NEPA’s [environmental impact] statement requirement must give way, under the law in this Circuit, . . . where the second statute ensures functional equivalence with NEPA (citing *EDF*), but noting that the agency did not pursue a functional equivalency argument in the matter); *Basel Action Network v. Maritime Admin.*, 285 F.Supp. 2d 58 (D.D.C. 2003) (finding that two reports to Congress issued by the Maritime Administration were the “functional equivalent” of supplemental EAs under NEPA and fulfilled NEPA requirements to prepare supplemental EAs for proposals at issue.); *Catron County Bd. Of Comm’rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996) (noting that “NEPA compliance has . . . been excused by some courts where the particular action being undertaken is subject to rules and regulations that essentially duplicate the NEPA inquiry,” though finding that functional equivalence did not apply with respect to designation of critical habitat under the ESA given the focus of the ESA, its legislative history, and its “cursory directive that the Secretary is to take into account “economic and other relevant impacts” of designation.”).

There is also language in some of the earlier cases involving EPA that would support use of functional equivalence arguments by agencies other than EPA. See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 380 (D.C. Cir. 1973) (“It is by no means clear . . . that NEPA’s impact statement requirement was intended at time of passage of NEPA to be applicable to such environmental agencies as the National Air Pollution Control Administration of the Department of Health, Education and Welfare or the Federal Water Quality Administration of the Department of the Interior.”)

NEPA/CEQ Regulations Require:	CERCLA/NRDA Regulations Require:
Unless a categorical exclusion applies or there is a Finding of No Significant Impact (FONSI) after Environmental Assessment (EA), detailed Environmental Impact Statement (EIS) covering:	Development of a Restoration and Compensation Determination Plan 43 CFR 11.80(c). Requirements include:
<p>(1) Environmental impact of proposals for major federal action significantly affecting the quality of the human environment;</p> <p>(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;</p> <p>(3) Alternatives to the proposal, including a “no-action” alternative</p>	<p>The Restoration and Compensation Determination Plan “will list a reasonable number of possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources and the related services lost to the public associated with each; select one of the alternatives and the actions required to implement that alternative; give the rationale for selecting that alternative” 43 CFR § 11.81 (a)</p> <p>An alternative considering natural recovery with minimal management actions . . . shall be one of the possible alternatives considered. 43 CFR 11.82 (c)(2).</p> <p>When selecting the alternative to pursue, the authorized official shall evaluate each of the possible alternatives based on “all relevant considerations,” including . . . the “expected benefits from the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources”; the “potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources” 43 CFR § 11.82(d)</p>
(4) The relationship between the short-term uses of man’s environment and the maintenance and enhancement of long-term productivity	In developing each of the possible alternatives, the authorized official shall list the proposed actions that would restore, rehabilitate, replace, and/or acquire the equivalent of the services provided by the injured natural resource that have been lost, and the period of time over which these services would continue to be lost.” 43 CFR 11.82(b)(2)
(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposal should it be implemented	See above § 11.82(d) factors, including requirements to consider “all relevant considerations” including “potential for . . . injury resulting from proposed actions, including long-term and indirect impacts, to the injured resource or other resources.”

<p>(6) Prior to making the statement, the responsible Federal official must consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved;</p> <p>(7) Copies of the statement and the comments and views of the appropriate Federal, State, and local agencies authorized to develop and enforce environmental standards must be made available to the President, the CEQ and to the public as provided by 5 USC § 552 and shall accompany the proposal through the existing agency review process. § 102</p>	<p>Development of Restoration and Compensation Determination Plan is required to involve identified PRPs, interested Federal and State agencies and Indian tribes, and the public, whether included as part of Assessment Plan or released separately. This includes consultation in development of draft Assessment Plan and review and comment of draft Plan and (or including) RCDP for at least 30 days, extensions granted as appropriate.</p> <p>43 CFR §§ 11.31(c)(4); 11.32(c); 11.81(d)(2).</p>
<p>(8) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. 40 CFR § 1500.1(b). The agency must invite the public to comment on draft statement. 40 CFR § 1503.1.</p>	<p>“Appropriate public review of the [RCDP] must be completed before the authorized official performs the methodologies listed in the Restoration and Compensation Determination Plan.” 43 CFR § 11.81(d)(4). See also §§ 11.31(c)(4); 11.32(c); 11.81(d)(2), noted above.</p> <p>The Restoration Plan is developed based upon the Restoration and Compensation Determination Plan. Any significant modifications to the Restoration Plan must be made available for review by any responsible party, any affected natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of the public for a period of at least 30 days, with reasonable extensions granted as appropriate, before tasks called for in the modified plan are begun. 43 CFR § 11.93</p>

The Subcommittee believes that restoration planning conducted in accordance with the CERCLA NRDA regulations ensures full and adequate consideration of environmental issues, and involves sufficient safeguards to ensure the fulfillment of the purpose and policies behind NEPA. However, the Subcommittee chose not to recommend that DOI formally assert that restoration plans completed in accordance with the CERCLA NRDA regulations are the functional equivalent of NEPA analyses because the controversy which might follow such an assertion could be avoided by taking another approach.

C. Integration of NEPA and Restoration Planning Processes

The NEPA regulations require Federal agencies, “to the fullest extent possible,” to integrate the requirements of NEPA with other planning, environmental review, and consultation requirements required by law or by agency practice “so that all such procedures run concurrently rather than consecutively.”⁷ This call for integration is

⁷ 40 C.F.R. §§ 1500.2 (c).

repeatedly emphasized throughout the regulations.⁸ Additionally, the NEPA regulations provide that “any document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.”⁹

Since the requirements of the NRDA regulations substantially overlap with the requirements of NEPA, an option for streamlining NEPA processes in restoration planning and implementation would be to integrate NEPA requirements expressly into the restoration planning process such that completion of restoration planning pursuant to the requirements of the CERCLA NRDA regulations would also mean fulfillment of NEPA requirements. This alternative would probably be accomplished most effectively by amending the regulations in a manner similar to the way in which the National Oceanic and Atmospheric Administration (NOAA) developed the provisions of its Oil Pollution Act (OPA) NRDA regulations that cover NEPA compliance. The relevant provisions of the OPA regulations are reproduced below:

15 CFR § 990.23 Compliance with NEPA and the CEQ regulations.

(a) General. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 CFR chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. Thus, when a federal trustee proposes to take restoration actions under this part, it must integrate this part with NEPA, the CEQ regulations, and NEPA regulations promulgated by that federal trustee agency. Where state NEPA-equivalent laws may apply to state trustees, state trustees must consider the extent to which they must integrate this part with their NEPA-equivalent laws. The requirements and process described in this section relate only to NEPA and federal trustees.

(b) NEPA requirements for federal trustees. NEPA becomes applicable when federal trustees propose to take restoration actions, which begins with the development of a Draft Restoration Plan under § 990.55 of this part. Depending upon the circumstances of the incident, federal trustees may need to consider early involvement of the public in restoration planning in order to meet their NEPA compliance requirements.

(c) NEPA process for federal trustees. Although the steps in the NEPA process may vary among different federal trustees, the process will generally involve the need to develop restoration plans in the form of an Environmental Assessment or Environmental Impact Statement, depending upon the trustee agency's own NEPA regulations.

⁸ See e.g., 40 C.F.R. §§ 1500.4(k) (to promote paperwork reduction); 1500.5(a) and 1500.5(g) (to reduce delay); 1501.1(a); 1501.2; 1501.7(a)(6) (scoping); 1502.25(a) (environmental review and consultation requirements).

⁹ 40 C.F.R. § 1506.4.

(1) Environmental Assessment. (i) Purpose. The purpose of an Environmental Assessment (EA) is to determine whether a proposed restoration action will have a significant (as defined under NEPA and § 1508.27 of the CEQ regulations) impact on the quality of the human environment, in which case an Environmental Impact Statement (EIS) evaluating the impact is required. In the alternative, where the impact will not be significant, federal trustees must issue a Finding of No Significant Impact (FONSI) as part of the restoration plans developed under this part. If significant impacts to the human environment are anticipated, the determination to proceed with an EIS may be made as a result, or in lieu, of the development of the EA.

(ii) General steps. (A) If the trustees decide to pursue an EA, the trustees may issue a Notice of Intent to Prepare a Draft Restoration Plan/EA, or proceed directly to developing a Draft Restoration Plan/EA.

(B) The Draft Restoration Plan/EA must be made available for public review before concluding a FONSI or proceeding with an EIS.

(C) If a FONSI is concluded, the restoration planning process should be no different than under § 990.55 of this part, except that the Draft Restoration Plan/EA will include the FONSI analysis.

(D) The time period for public review on the Draft Restoration Plan/EA must be consistent with the federal trustee agency's NEPA requirements, but should generally be no less than thirty (30) calendar days.

(E) The Final Restoration Plan/EA must consider all public comments on the Draft Restoration Plan/EA and FONSI.

(F) The means by which a federal trustee requests, considers, and responds to public comments on the Draft Restoration Plan/EA and FONSI must also be consistent with the federal agency's NEPA requirements.

(2) Environmental Impact Statement. (i) Purpose. The purpose of an Environmental Impact Statement (EIS) is to involve the public and facilitate the decisionmaking process in the federal trustees' analysis of alternative approaches to restoring injured natural resources and services, where the impacts of such restoration are expected to have significant impacts on the quality of the human environment.

(ii) General steps. (A) If trustees determine that restoration actions are likely to have a significant (as defined under NEPA and § 1508.27 of the CEQ regulations) impact on the environment, they must issue a Notice of Intent to Prepare a Draft Restoration Plan/EIS. The notice must be published in the Federal Register.

(B) The notice must be followed by formal public involvement in the development of the Draft Restoration Plan/EIS.

(C) The Draft Restoration Plan/EIS must be made available for public review for a minimum of forty-five (45) calendar days. The Draft Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register.

(D) The Final Restoration Plan/EIS must consider all public comments on the Draft Restoration Plan/EIS, and incorporate any changes made to the Draft Restoration Plan/EIS in response to public comments.

(E) The Final Restoration Plan/EIS must be made publicly available for a minimum of thirty (30) calendar days before a decision is made on the federal trustees' proposed restoration actions (Record of Decision). The Final Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register.

(F) The means by which a federal trustee agency requests, considers, and responds to public comments on the Final Restoration Plan/EIS must also be consistent with the federal agency's NEPA requirements.

(G) After appropriate public review on the Final Restoration Plan/EIS is completed, a Record of Decision (ROD) is issued. The ROD summarizes the trustees' decisionmaking process after consideration of any public comments relative to the proposed restoration actions, identifies all restoration alternatives (including the preferred alternative(s)), and their environmental consequences, and states whether all practicable means to avoid or minimize environmental harm were adopted (e.g., monitoring and corrective actions). The ROD may be incorporated with other decision documents prepared by the trustees. The means by which the ROD is made publicly available must be consistent with the federal trustee agency's NEPA requirements.

(d) Relationship to Regional Restoration Plans or an existing restoration project. If a Regional Restoration Plan or existing restoration project is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS, as described in §§ 1502.20 and 1508.28 of the CEQ regulations.

DOI should amend the CERCLA NRDA regulations in a similar fashion, so that draft restoration plans are developed consistent with DOI's NEPA regulations, and NEPA's consultation and public involvement procedures are fulfilled. Given the similarity between NEPA's requirements and the requirements of the CERCLA NRDA regulations, amending the CERCLA NRDA regulations in this manner should not prove unduly burdensome.

RECOMMENDATION II:

DOI Should Develop Departmental Guidance to Address the Use of Pre-Existing Regional Resource Management Plans in Restoration Planning.

I. Need for Change

CERCLA intends that restoration actions make the environment and public whole for natural resource and/or service injuries resulting from a release of a hazardous substance. Although the site-specific development of restoration plans is preferred for most cases, such site-specific plan development may be impractical and costly, or in some cases a regional perspective would be most beneficial for the resource at issue. If NRDA-specific regional restoration plans were available, they would be useful and helpful to reduce planning time and redundancy, but development of NRDA-specific regional restoration plans could be very time-consuming and expensive.

There are many regional-scale natural resource management planning documents already available which could be relevant for use in CERCLA restoration projects. Trustees should be encouraged to identify existing regional restoration plans or other existing restoration projects that may be relevant in a particular case. These plans or projects may be appropriate as long as natural resources and/or services comparable to those injured and expected to be restored are addressed in the plans.

II. Discussion

There are many resource management plans of regional scale which outline environmental quality concerns and causes, and which describe a preferred end-state for the environment. Many plans include outlines of specific resource management actions. Regional restoration plans are not just linked to one site or facility, they are large in scope and would possibly encompass vetted plans such as the North American Waterfowl Management Plan; National Fish Habitat Action Plans; the Great Lakes Regional Collaboration Strategy; a species recovery plan, state wildlife action plans, tribal resource management plans, etc. CERCLA settlement-specific restoration planning should include reviews of these regional plans in order to consider if the restoration projects, enabled by the settlement, could contribute to the goals of these various plans while also accomplishing the restoration goals envisioned in the CERCLA claim. Existing regional-scale management plans should be incorporated into CERCLA settlement restoration plans to the extent practicable so that the CERCLA restoration projects can take full advantage of the previous planning efforts, and thus achieve a higher degree of efficiency and relevance.

In 2004, the Program Manager for DOI's NRDAR Program issued Policies and Operating Principles for Natural Resource Restoration Activities, which stated:

In an area where there have been multiple settlements for similar types of injury, or where such settlements are anticipated, a regional restoration plan may be developed and used as the basis for combining claims to maximize restoration success. An existing plan (e.g., regional, endangered species recovery, Coastal Zone Management, Tribal Resource Management Plan, etc.) or portions thereof, may be incorporated into a restoration plan.

Additionally, the DOI Restoration Program's draft "Restoration Handbook for the Natural Resource Damage Assessment and Restoration Program" (June, 2002), which was prepared by the Fish and Wildlife Service (FWS) on behalf of the National NRDA program discusses use of regional restoration plans, but this handbook has not been finalized or adopted by the Restoration Program, and so is used as a guide only, and is not viewed as definitive or as policy.

Section A.3.2 of the Draft Restoration Handbook, "Restoration Plans Based on Preexisting Plan" states, in reference to the NEPA requirements for restoration planning: "In situations where a regional or other (restoration) plan already exists and may have already undergone NEPA review, the RP [restoration plan] may extensively cite these pre-existing documents." The purpose of reliance on these preexisting plans is to add rigor to the NRDA planning process and to reduce redundancy.

Also, in Section H.3 "Regional Plans" the Draft Restoration Handbook provides:

Natural resource trustees may consider using projects defined in existing regional RPs as described in OPA NRDA Rule . . . , or other planning documents when the impacts occurred in some geographically defined area. Trustees may also develop their own regional RPs. It is particularly beneficial to use new or existing plans in areas where a number of small damage recoveries, involving similar injuries, have accumulated or are likely to occur within an area

These regional restoration plans are generally prepared based on watershed, bay complex, or landscape-defined boundaries. If the existing plans or projects have undergone environmental analyses (e.g., EIS, EA), trustees may tier restoration planning off the existing planning document. Benefits are further realized if design work and permit acquisition have already been completed. When a component of a regional restoration plan or other planning document is investigated as a restoration alternative, the same types of relationships to the natural resource injuries/losses the public may have suffered until the resources can be restored, and the scale of those injuries/losses, must be demonstrated in the restoration plan being prepared, and necessary NEPA analyses must be done if not already completed.

Section H.3 of the Draft Restoration Handbook concludes "Benefits of using the results of existing planning efforts include the time and money saved by using past scoping efforts and public involvement, as well as completed environmental analyses (e.g., requirements of NEPA, if addressed) and increased opportunities for partnerships and broad support of restoration efforts. Existing regional or other plans can be extensively referenced and incorporated into the restoration plan to eliminate the need for repetition of effort. However, all public review and comment requirements of the restoration plan under development must still take place, restoration actions selected must have a relationship to the site/spill-specific injuries (if feasible), and new cost estimates must be developed."

In light of four years of experience gained by DOI, NOAA, other federal trustee agencies, and the States, the Draft Restoration Handbook should be reviewed and revised, then updated and released, with the realization that such documents can never be static. (If the Handbook is released as guidance, the Subcommittee recommends that the Handbook's discussion of NEPA be made generally consistent with the recommendation regarding streamlining fulfillment of NEPA requirements in restoration planning that is chosen by the Committee.)

The NOAA OPA regulations are potentially very relevant on the topic of regional restoration plans. The Draft Restoration Handbook cited above was written in consideration of the concepts introduced in the OPA regulations. Title 15, Code of Federal Regulations section 990.56 of the OPA regulations states that trustees may select all or part of an existing plan or project as the preferred alternative for restoration so long as the plan or project: (i) was developed with public review and comment or is subject to public review and comment; (ii) will adequately compensate the environment and public for injuries resulting from the incident; (iii) addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and (iv) allows for reasonable scaling relative to the incident. DOI could amend the CERCLA NRDA regulations to include a similar provision. However, the Subcommittee observed that regional resource plans are currently being used in CERCLA restoration planning, so the Subcommittee is not certain that amending the regulations is necessary. The Subcommittee does see the need for additional guidance and encouragement of the use of such existing information.

FWS Region 3 provides an example of the use of regional restoration plans in NRD restoration planning. Region 3 has approximately 50 settlements and each has either a separate restoration plan, or uses a similar restoration plan to describe and justify selection of restoration projects. The restoration plans used in the Region consider the context of the restoration within otherwise non-NRDA specific regional natural resource management plans. Where regional plans exist, Region 3 tries to develop projects that are either called for by the larger plan, supportive of them, or otherwise consistent in focus. Some examples include:

- 1) Northwest Indiana Grand Calumet River/Indiana Harbor Canal: Numerous individual settlements have resulted in several restoration plans which are then used for other

nearby, very similar cases, to identify, choose, and implement restoration projects. This was done to take advantage of pre-existing plans and to eliminate redundancy in planning.

2) Saginaw Bay/Saginaw River: Most, if not all, of the restoration projects enabled by this settlement were either listed in, or modeled after, activities called for by larger, more general greater-scale plans. Notable among these larger plans which were relied upon are: The North American Waterfowl Management Plan, the Saginaw Bay/River Remedial Action Plan, and the Saginaw Bay Watershed Initiative Network.

3) Fox River/Green Bay NRDA Restoration Plan: Because this NRDA encompassed a large area of assessment, the restoration is regional, or near-regional, in nature, and was developed in full consideration, with State and Tribal partners, of other regional natural resource management plans such as: The Remedial Action Plan for the Lower Fox River and Green Bay; the various coastal wetland management plans for Wisconsin, and the Wisconsin Land Legacy Report.

In using Regional Restoration Plans, DOI must ensure that the use of a regional restoration plan or other existing proposed restoration project does not violate the statutory requirement that natural resource damages must be used solely to restore, rehabilitate, replace, or acquire the equivalent of natural resources injured and services lost. The use of regional restoration plans or parts thereof which are focused on accomplishing other ends would be contrary to the requirements of CERCLA and the NRDA regulations.

Whether an existing plan or project represents appropriate restoration, rehabilitation, replacement, or acquisition of the equivalent injured or lost resources or services will depend on the nature of the site and the restoration plan or project. The use of possible restoration actions in an existing plan or project should be evaluated within the range of restoration alternatives that trustees are required to consider, including natural recovery. Regional restoration plans should be developed in such a way that trustees are able to justify linking the injuries from a particular case with a specific restoration project or set of projects within the plan. This may be facilitated by describing the types of anticipated injuries to specific natural resources within a region, and describing these injuries in terms of the types and importance of functions and services, ecological and human use.

The concept of using existing ("pre-existing") plans seems intuitively obvious. Pre-existing plans can range from simple databases of projects to complex, region-wide plans. Such plans can identify potential restoration projects, screen known potential restoration projects (perhaps even identify projects with various resource types), or develop potential projects through the engineering and design phase.

Some DOI agencies or agency regions are taking advantage of regional restoration plans, but DOI and other trustee agencies would benefit from more guidance and/or direction on the use of pre-existing regional restoration plans in CERCLA natural

resource restoration planning, whether through amendment of the CERCLA NRDA regulations or through issuance of specific guidance on regional restoration planning, or both.

OPA Regulations on Regional Restoration Planning

15 CFR 990.15 Considerations to facilitate restoration.

(b) Regional Restoration Plans. Where practicable, incident-specific restoration plan development is preferred, however, trustees may develop Regional Restoration Plans. These plans may be used to support a claim under § 990.56 of this part. Regional restoration planning may consist of compiling databases that identify, on a regional or watershed basis, or otherwise as appropriate, existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents.

15 CFR 990.23 Compliance with NEPA and the CEQ regulations.

(d) Relationship to Regional Restoration Plans or an existing restoration project. If a Regional Restoration Plan or existing restoration project is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS, as described in §§ 1502.20 and 1508.28 of the CEQ regulations.

15 CFR 990.56 Restoration selection – use of a Regional Restoration Plan or existing restoration project.

(a) General. Trustees may consider using a Regional Restoration Plan or existing restoration project where such a plan or project is determined to be the preferred alternative among a range of feasible restoration alternatives for an incident, as determined under § 990.54 of this part. Such plans or projects must be capable of fulfilling OPA's intent for the trustees to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and services and compensate for interim losses.

(b) Existing plans or projects -- (1) Considerations. Trustees may select a component of a Regional Restoration Plan or an existing restoration project as the preferred alternative, provided that the plan or project:

(i) Was developed with public review and comment or is subject to public review and comment under this part;

(ii) Will adequately compensate the environment and public for injuries resulting from the incident;

(iii) Addresses, and is currently relevant to, the same or comparable

natural resources and services as those identified as having been injured; and

(iv) Allows for reasonable scaling relative to the incident.

(2) Demand. (i) If the conditions of paragraph (b)(1) of this section are met, the trustees must invite the responsible parties to implement that component of the Regional Restoration Plan or existing restoration project, or advance to the trustees the trustees' reasonable estimate of the cost of implementing that component of the Regional Restoration Plan or existing restoration project.

(ii) If the conditions of paragraph (b)(1) of this section are met, but the trustees determine that the scale of the existing plan or project is greater than the scale of compensation required by the incident, trustees may only request funding from the responsible parties equivalent to the scale of the restoration determined to be appropriate for the incident of concern. Trustees may pool such partial recoveries until adequate funding is available to successfully implement the existing plan or project.

(3) Notice of Intent To Use a Regional Restoration Plan or Existing Restoration Project. If trustees intend to use an appropriate component of a Regional Restoration Plan or existing restoration project, they must prepare a Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project. Trustees must make a copy of the notice publicly available. The notice must include, at a minimum:

(i) A description of the nature, degree, and spatial and temporal extent of injuries; and

(ii) A description of the relevant component of the Regional Restoration Plan or existing restoration project; and

(iii) An explanation of how the conditions set forth in paragraph (b)(1) of this section are met.

RECOMMENDATION III:

DOI Should Develop a Guidance-Based Initiative to Facilitate Cooperative Restoration.

The current focus on cooperative conservation should be logically extended to NRDA restoration activities. DOI should establish a guidance-based initiative to increase opportunities for partnerships with states, tribal governments, non-profit organizations, land trusts, local governments and private entities, as appropriate, in the implementation of resource restoration actions. This might include establishing a clearinghouse for partnering opportunities within and outside of DOI which identifies and catalogues potential opportunities for partnering in restoration actions on a regional basis. This might be performed in conjunction with regional restoration planning efforts.

DOI should maximize opportunities to use restoration funds to leverage potential funding sources to implement appropriate restoration actions. The NRDAR program should establish and maintain close coordination and communication with other programs which administer funding programs for restoration projects, and where possible, establish a priority preference for NRDAR actions within the guidance for these programs. All available funding opportunities for NRDAR restoration actions should be identified and NRDAR program needs and goals should be effectively communicated within each of these funding programs. A routine training, notification and coordination process could be established between DOI cooperative programs and NRDAR staff. Where practical, NRDAR staff might be trained to draft successful funding proposals to facilitate winning restoration funds from external funding sources.

In circumstances where there is a state or tribal partner involved in an NRDAR recovery, the NRDAR funds should, whenever possible, be considered a legitimate non-federal match for the partnership funds. The contracting requirements and cooperative agreement processes used by the bureaus/DOI related to NRDAR should be streamlined and evaluated for opportunities to remove unnecessary administrative requirements.

DOI should work with other trustees to develop guidelines to use to solicit proposals from interested parties/public for appropriate NRDAR restoration actions in those situations where cash settlements have been secured and must be applied to an appropriate case-specific restoration action(s). This should include the identification of procedures and mechanisms that will ensure that the selection and funding of proposals will be consistent with the existing regulations under 43 CFR 11.82 (c) and (d) for selection of a preferred restoration alternative, and that will ensure that there is an appropriate nexus between the restoration action and the resource injury. Ideally, proposals received from a given solicitation, when combined with a “no-action” alternative, could constitute a “reasonable range of restoration alternatives”. The process of soliciting proposals from the public should be robust, however it would not preclude the required public review and comment of restoration planning documents. In this manner restoration planning documents and the effort to produce them could be

streamlined, pulling virtually all needed information from the pool of projects received and the criteria under which they were evaluated.

DOI should encourage third party implementation of NRDAR restoration with focused DOI/Trustee oversight and management, to include implementation by responsible parties and non-profit conservation organizations. The Department should identify and remove/minimize restrictions and barriers which may prevent states, local governments, universities, non-profit organizations, and private sector entities from implementing NRDAR restoration. DOI should identify those circumstances under which it would allow its state and tribal co-trustee counterparts to assume direct responsibility for the contracting and implementation of NRDAR restoration actions.

To facilitate third party implementation of NRDAR restoration, DOI should develop practical and cost-effective procedures for oversight and management of restoration actions, to include reasonable and flexible monitoring protocols, performance criteria, thresholds for corrective actions and timelines for given types of restoration actions. These guidelines could be readily incorporated on a case-specific basis into requirements associated with funding of third party implemented restoration actions or into settlement documents of potentially responsible party implemented restoration.

Restoration planning should be initiated as early as possible, to include early public input and information exchange on potential restoration options. Aside from a given NRDA action, potential restoration actions should be identified and catalogued. This might include existing management plans for state and federal refuges and wildlife management areas, as well as local habitat/conservation plans. This might take the form of regional restoration plans, discussed in Recommendation II.

DOI should identify ways to reduce administrative burdens, streamline contracting requirements, limit or remove procedural obstacles and lower transaction costs in the implementation of restoration actions. A formal cooperative restoration initiative as described above could achieve many of these goals.

RECOMMENDATION IV:

DOI Should Develop Guidance on Cooperative Assessment Which Includes, Among Other Items, Procedures to Maximize the Separation of the Scientific Assessment of Injury from the Development of Legal Positions of the Various Parties Involved in Assessment and Restoration Planning.

I. Need for Change

The Subcommittee believes that ultimately, an efficient and effective cooperative assessment process has a substantial impact upon the efficiency and efficacy of restoration planning and implementation. Establishing cooperative assessment procedures that stakeholders can accept goes a long way toward a smooth transition to restoration planning and implementation.

In some cases under the NRDA regulations, there have been conflicts between the scientific assessment of injuries and remedies and prosecutorial and civil litigation processes. PRPs and Governments are caught between economic and political interests by the need and desire to protect their respective litigation positions. As a result, scientific assessments of harm may be done under a cloak of privilege that results in significant waste of resources, stilted results, bad decisions, and delay in restoration. DOI should develop strategies aimed at separating the questions of injury from the question of fault.

II. Discussion

The use of jointly acceptable science expertise may identify and assess concerns and remedies to be applied by all parties. Cooperative assessment among the Trustees and between Agencies could reduce costs, strengthen expertise, and reduce repetition and redundancy across sites. Transparent cooperative assessments should reduce the cost and time required for assessment and leave more available for remedies. Cooperative assessments could enhance the development of consensus in the selection of remedies and improve the cost effectiveness of the application of remediation funds to restoration.

That said, cooperative assessment may be perceived as running contrary to the natural political tendencies of the respective participants. The parties will need to develop confidence and trust of the other participants. The process also may be perceived as a reduction of individual agency authority or prerogative. Prosecutors or potential litigants might perceive a loss of advantage over their opponent. Finally, cooperative assessment means reduced opportunities for scientists or remediation specialists to participate on a site, with an attendant reduction in business opportunities. All in all, however, the Subcommittee perceives the potential benefits of overcoming the current logjams as outweighing the negatives.

Developing strategies to separate questions of injury from the question of fault would decrease time for restoration implementation and prevent duplicative and conflicting scientific results. DOI should review existing cooperative assessment agreements that have been negotiated in some CERCLA and OPA NRD cases to see what has worked well and what has not, and should encourage increased use of appropriate agreements in the recommended guidance.¹⁰

¹⁰ For example, see the Former Indian Refinery Natural Resource Damage Assessment Funding and Participation Agreement, which provides for the ability of the parties to develop approved Cooperative Studies, the results of which are binding in future judicial or administrative proceedings, and also allows parties to undertake Independent Studies, subject to certain advance notice requirements and the opportunity of other parties to invoke dispute resolution (and thus have the opportunity to try to come to agreement on an acceptable Cooperative Study instead) before Independent Studies may commence.

There are also several potentially helpful documents available for review on NOAA's Damage Assessment, Remediation and Restoration Program website, including NOAA's 2003 Cooperative Assessment Project (CAP) Framework and CAP Compendium of Additional Ideas and Example Documents. See <http://www.darrp.noaa.gov/partner/cap/relate.html>.