Federal Natural Resource Damage Assessment and Restoration Advisory Committee

Subcommittee 4

November 29-30, 2006

Washington, D.C.

Question #4:

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?

Four Areas of Focus:

- Streamlining the Fulfillment of NEPA Requirements in Restoration Planning
- Regional Restoration Plans
- Cooperative Assessment
- Cooperative Restoration

1. Streamlining the Fulfillment of NEPA Requirements in Restoration Planning

- Review case law on functional equivalency
- Review NEPA and CERCLA NRDAR regulations
- Develop content of a recommendation for the creation of national DOI guidance on integrating NEPA requirements into the CERCLA restoration planning process

Streamlining the Fulfillment of NEPA Requirements in Restoration Planning

ALTERNATIVES FOR COMMITTEE TO CONSIDER:

- Development of Departmental Guidance Asserting that the Procedures Required by the NRDA Regulations and of NEPA are "Functionally Equivalent"

OR

- Amendment of the CERCLA NRDA Regulations or Development of Guidance to Ensure that NEPA and Restoration Planning Procedures are Fully Integrated

Functional Equivalence

"[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. We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled."

Environmental Defense Fund v. EPA, 489 F.2d 1247 (D.C. Cir. 1973)

Functional Equivalence

- Argument: The process described in the NRDA regulations is the "functional equivalent" of the NEPA process, so when followed, a duplicative NEPA analysis should not be required.

- Specifically, the process for developing the Restoration and Compensation Determination Plan (RCDP) and Report of Assessment mirrors the process for developing an EIS pursuant to NEPA.

- (If regulations are not followed, including development of the RCDP and Report of Assessment, then formal NEPA analysis would be required.)

Functional Equivalence

- Five (5) Substantive Issues Required to be Addressed in NEPA EIS:
  - Environmental impact of proposed action;
  - Adverse environmental effects which cannot be avoided should the proposal be implemented;
  - Alternatives to proposed action;
  - Relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;
  - Any irreversible and irretrievable commitments of resources which would be involved in the proposed action

Functional Equivalence

- Key Procedural Requirements of NEPA:
  - Consultation with, and consider comments of other federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved
  - Distribute the statement addressing substantive issues with respect to proposal and alternatives to federal, State, local agencies authorized to develop and enforce environmental standards; President; CEQ; and the public for review and comment and consideration of comments before decisions are made and actions are taken, in order that stakeholder input may inform agency decision making.

Functional Equivalence

- Environmental impact of proposed action;
- Any adverse environmental effects which cannot be avoided should the proposal be implemented;
- Alternatives to the proposed action, including a “no-action” alternative;
- 43 CFR 11.81(a) requirement for RCDP to list a reasonable number of alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources and the related services lost to the public associated with each; select an alternative; give rationale for selection;
- 43 CFR 11.82(c)(2) requirement to consider natural recovery alternative;
- 43 CFR 11.82(d) requirement to evaluate each alternative based on “all relevant considerations,” including [but not limited to] the “expected benefits from the restoration, rehabilitation, replacement and/or acquisition of equivalent resources”; the “potential for additional injury resulting from proposed actions, including long-term and indirect impacts, to the injured resources or other resources”

Functional Equivalence

- Relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity;
- Irreversible and irretrievable commitments of resources which would be involved in proposed action
- 43 CFR 11.82(b)(2) requirement that, in developing each alternative, authorized official 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(d) factors, including "potential for . . . Injury resulting from proposed actions, including long-term and indirect impacts to injured resource or other resources" and "all [other] relevant considerations."

Functional Equivalence

- Consultation with Federal agencies with jurisdiction by law or expertise;
- Take comments of Federal, State, local agencies; President; CEQ; public
- Make environmental information available to public before decisions are made or actions are taken.
- Development of RCDP is required to involve identified PRPs, interested Federal and State agencies and Indian tribes, and the public. Review and comment of draft Plan required for at least 30 days, extensions granted as appropriate. 43 CFR 11.31(c)(4); 11.32(c); 11.81(d)(2)
- Public review of RCDP/Restoration Plan and consideration of comments must be completed before action taken. 43 CFR 11.81(d)(4).
- Any significant modifications to the Restoration Plan based on the RCDP are subject to public review and comment requirements also. 43 CFR 11.93.

Functional Equivalence

- Functional Equivalence is an exception from formal NEPA requirements which was first extended to EPA
- Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) included an in-depth analysis, largely based upon legislative history of NEPA.
  - [T]here is a serious question whether NEPA is applicable to environmentally protective regulatory agencies." 486 F.2d at 381.
  - It is by no means clear . . . That NEPA's impact statement requirement was intended at the time of passage to be applicable to such environmental agencies as the National Air Pollution Control Administration . . . or the Federal Water Quality Administration of the Department of the Interior." Id. at 380.
  - Noted that legislative history of NEPA stated that its provisions were not designed to result in changes in how environmental agencies carry out their authority, but were "designed to assure consideration of environmental matters by all agencies in their planning and decision making – especially those agencies which now have little or no legislative authority to take environmental considerations into account." Id. at 381 (citing to 115 Cong. Rec. 40417, 40418 (1969).

Functional Equivalence

- Some courts have been reluctant to extend the doctrine to agencies other than EPA.
- Some recent legal opinions have shown that some courts are willing to consider functional equivalence arguments asserted by other agencies, and recent trend is for courts to look more closely at the analysis required to be undertaken under the particular statute and/or regulations at issue than to look at the agency's status as "environmental."
  - Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719, 729 n.7 (3rd Cir. 1989): "It is well-established that where one statute requires the "functional equivalent" of NEPA's environmental review process, a second, repetitive review under NEPA need not be undertaken." The court noted that the NRC did not choose to argue functional equivalence in the case and therefore it would not express a holding on the issue.
  - Catron County Bd. Of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) ("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" and considering and rejecting functional equivalence in the context of designation of critical habitat under the Endangered Species Act.)

Functional Equivalence

- Basel Action Network v. Maritime Administration, 285 F. Supp. 2d 58, 62 (D. D.C. 2003) (finding that two reports to Congress issued by the Maritime Administration and filed pursuant to the National Defense Authorization Act were the "functional equivalent" of supplemental EAs under NEPA in light of the applicability of a congressionally mandated program calling for extraordinarily expeditious decision-making.)

- Cape Hatteras Access Pres. Alliance v. U.S. Dept. of the Interior, 344 F. Supp. 2d 108, 134 (D.D.C. 2004) ("When 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" but noting that DOI did not pursue a functional equivalence argument in the matter, which involved the question of whether the designation of critical habitat under the ESA is exempt from NEPA procedures.)

- Fund for Animals v. Hall, 2006 448 F.Supp. 2d 127 (D. D.C. 2006) (Considering functional equivalence in the context of a challenge to a DOI decision to expand hunting in six National Wildlife Refuges and rejecting the notion that the reviews required by the Migratory Bird Hunting Framework and ESA Section 7 consultations were functionally equivalent to a review of cumulative effects under NEPA.)

Functional Equivalence

- While several of the courts in the more recent cases involving agencies other than EPA declined to find functional equivalence, the analysis has focused primarily on the specific procedures at issue under the particular statute and/or regulations. The argument has yet to be asserted in the context of natural resources restoration and the requirements of the NRDA regulations.

- Resources restoration is arguably one of the most "purely environmental" contexts available, thus presenting a potentially favorable test scenario.

Express Integration of NEPA Requirements into the NRDA Regulations

- In the absence of an exemption or categorical exclusion, developing RCDP in the form of an EA or EIS

Integration of NEPA Requirements into NRDA Regulations

- If agency needs to determine whether proposed action would have significant impacts:
  - Draft Restoration Plan/Draft EA made available for public review and comment consistent with agency NEPA regulations
  - FONSI, continue with restoration, no EIS required; or
  - If agency determines from preparation of EA and consideration of comments on it that proposed action is expected to have significant impact; then proceed to Draft Restoration Plan/EIS.

Integration of NEPA Requirements into NRDA Regulations

- If action is expected to have significant impacts:
  - Notice of Intent to Prepare Draft Restoration Plan/Draft EIS;
  - Public involvement in development of Draft Restoration Plan/EIS;
  - Public review and comment in accordance with agency NEPA requirements;
  - Consideration of all comments; preparation and publication of Final Restoration Plan/EIS; solicitation of comments on Final Restoration Plan/EIS;
  - Development and publication of ROD discussing alternatives, impacts of each; measures to avoid or minimize environmental impacts; comments and responses; selecting action.

1. Streamlining the Fulfillment of NEPA Requirements in Restoration Planning

- Functional Equivalence argument is intuitively appealing; could significantly streamline restoration process when NRDA regulations are followed.
  - CON: Would be highly controversial; expect litigation
- NEPA integration is less controversial/risky; more straight-forward.
  - Possible CON: Would be done best through amendment of NRDA regulations.
- Committee should choose a recommendation to finalize.

2. Regional Restoration Plans

DOI Should Develop Departmental Guidance on the Use of Regional Restoration Plans, Including Development of Regional Restoration Plans and the Use of Pre-Existing Resource Management Plans in CERCLA Restoration Planning

Regional Restoration Plans

- Regional restoration plans are not linked to only one site or facility, but are large in scope and could encompass vetted plans. Examples:
  - Species recovery plan
  - State wildlife action plan
  - Tribal resource management plan
  - National Fish Habitat Action Plans
  - North American Waterfowl Management Plan
- DOI should encourage greater use of existing regional resource management plans in CERCLA resource restoration planning in order to take advantage of previous planning efforts and to facilitate achievement of regional goals when possible.

Regional Restoration Plans

- CERCLA NRDA regulations do not mention regional restoration plans
- 2004 Policies and Operating Principles for Natural Resource Restoration Activities issues by DOI National Restoration Program:
  - Regional restoration plans may be developed and used as the basis for combining claims to maximize restoration success in areas where there have been multiple settlements for similar types of injury;
  - Existing regional plans or portions thereof may be incorporated into a restoration plan.
- DOI Restoration Program's Draft Restoration Handbook for the NRDAR Program (June 2002) discusses use of RRPs but has not been finalized or adopted by the Restoration Program, so not viewed as policy.

Regional Restoration Plans

- Recommend updating/adopting Draft Restoration Handbook, specifically expanding upon:
  - Benefits of regional restoration plans, including potential enormous savings of time and money through the use of the fruits of earlier analyses and earlier public input on relevant issues;
  - Fulfilling NEPA/stakeholder involvement requirements in the use of regional restoration plans that have already gone through thorough review by public, Federal, tribal, state, and local authorities.
  - Identification of appropriate regional plans to use in light of injuries/services relevant to the CERCLA NRDAR.
  - Appropriate valuation of projects which contribute to regional restoration goals.

Regional Restoration Plans

- Examples of existing regional restoration planning from FWS Region 3:
  - Saginaw Bay/Saginaw River: Most of the restoration projects enabled by this settlement were either listed in or modeled after activities called for by larger, greater scale plans such as the North American Waterfowl Management Plan; the Saginaw Bay/River Remedial Action Plan, and the Saginaw Bay Watershed Initiative Network.
  - Fox River/Green Bay NRDA Restoration Plan: Restoration is regional in nature, was developed in full consideration of other regional resource management plans such as The Remedial Action Plan for the Lower Fox River and Green Bay; various coastal wetland management plans for Wisconsin, Wisconsin Land Legacy Report;
  - Northwest Indiana Grand Calumet River/Indiana Harbor Canal: Several individual settlements have resulted in several restoration plans used for other nearby, similar cases, to identify, choose, and implement restoration projects. Taking advantage of existing knowledge and eliminating redundancy.
- While some DOI agencies or agency regions are taking advantage of regional restoration plans, DOI and other trustee agencies would benefit from more guidance on the use of pre-existing regional resource plans in CERCLA natural resource restoration planning

Regional Restoration Plans

- OPA regulations are potentially quite helpful :
  - 15 CFR 990.15: "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: "If a [RRP] . . . is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS . . . ."
  - 15 CFR 990.56(a): "Trustees may consider using a [RRP] . . . where such a plan is determined to be the preferred alternative among a range of feasible alternatives . . . . 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."

Regional Restoration Plans

- 15 CFR 990.56(b)(1): . . . .Trustees may select a component of a [RRP] . . . As the preferred alternative, provided that the plan . . . .
  - Was developed with public review and comment or is subject to public review and comment;
  - Will adequately compensate the environment and public for injuries resulting from the incident;
  - Addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and
  - Allows for reasonable scaling relative to the incident.

Regional Restoration Plans

- 15 CFR 990.56(b)(2): . . . [T]he trustees must invite the responsible parties to implement that component of the [RRP], or advance to the trustees the trustees' reasonable estimate of the cost of implementing that component of the [RRP] . . . .

- 15 CFR 990.56(b)(2): If . . . the trustees determined that the scale of the existing plan 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.

- 15 CFR 990.56(b)(3): If trustees intend to use an appropriate component of a [RRP] . . . they must prepare a Notice of Intent to Use a [RRP] . . . . Trustees must make a copy of the notice publicly available. The notice must include, at a minimum:

  - A description of the nature, degree, and spatial and temporal extent of injuries;

  - A description of the relevant component of the Regional Restoration Plan;

  - An explanation of how the conditions set forth in 15 CFR 990.56(b)(1) are met.

3. Cooperative Restoration

In Order to Streamline the Restoration Planning and Implementation Processes, DOI Should Establish a Program to Solicit Restoration Proposals and Develop Criteria for the Selection and Funding of Proposals Consistent with the NRDA Regulations

Cooperative Restoration

- Establishment of a special program focusing on partnerships with states, tribal governments; non-profit organizations; land trusts; local governments; etc., in the implementation of resource restoration actions.

- May include a clearinghouse for partnering opportunities within and outside of DOI to identify and catalogue potential opportunities for partnering in restoration actions on a regional basis.

Cooperative Restoration

- Solicitation of proposals from interested parties for appropriate NRDAR restoration actions could streamline restoration planning and implementation:
  - Development of criteria for submissions consistent with 43 CFR 11.82(c) and (d) for selection of a preferred restoration alternative
  - Process of soliciting, reviewing, and selecting proposals should be robust enough to comply with public involvement requirements.

4. Cooperative Assessment

In order to Facilitate Cooperative Assessment and Restoration, DOI Should Develop 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

Cooperative Assessment

- PRPs and governments' need to protect their respective litigation positions often interferes with assessment of injury.
- DOI should develop strategies aimed at separating questions of injury from questions of fault.
  - Prevent duplicative and conflicting scientific assessments
  - Ultimately decrease time for restoration implementation
- General recognition that strategies must not inappropriately diminish federal, tribal, state powers and authorities

Cooperative Assessment

- MOUs generally, stipulations re facts, documented agreements on experts and dispute resolution procedures.
- Compilation of database of assessment methodologies, procedures, conclusions, observations that have been subject to appropriate review.
- Desire among some subcommittee members to address more issues related to cooperative assessment if time allows.

END