

memorandum

DATE: November 22, 1996

REPLY TO

ATTN OF: Office of Environmental Policy and Assistance(EH-413):Bascietto:6-7917

SUBJECT: **Consolidated Departmental Response to Advance Notice of Proposed Rulemaking for CERCLA "Type B" Natural Resource Damage Assessment (NRDA) Procedures**

TO: Distribution

PURPOSE

To notify Program Offices and Field Organizations of the availability of the consolidated Departmental response to the subject Advance Notice of Proposed Rulemaking (ANPRM) issued by the Department of Interior (DOI) (61 FR 37031; July 16, 1996).

BACKGROUND

In October 1994, the DOI announced that it intended to work to ensure maximum consistency appropriate between the hazardous substances regulations under CERCLA and the oil pollution regulations under the Oil Pollution Act of 1990 (OPA). The final NRDA regulations under OPA were published by the National Oceanic and Atmospheric Administration on January 5, 1996 (61 FR 439). The OPA rule adopted a method of measuring natural resource damages based on unified restoration planning. The rule emphasizes restoration and extends the concept to all elements of a natural resource damages claim, including compensation for interim loss of injured natural resources and services. The subject ANPRM proposes a similar unified restoration planning approach for measuring natural resource damages under CERCLA.

On July 19, 1996, the Office of Environmental Policy and Assistance (EH-41) provided DOE elements with a copy of the ANPRM and requested comments for consideration in the development of a consolidated Departmental response.¹

AREAS OF COMMENT

The consolidated Departmental response reflects comments from 8 field organizations, 4 program offices, an internal EH-413 analysis, input from the DOE Natural Resources Trustees Steering Committee, and focused on the following major issues:

- Appropriateness of using the National Oceanic and Atmospheric Administration (NOAA) method for measuring damages from oil spills to measure damages from hazardous substance releases;
- Suitability of using the NOAA streamlined approach for assessing injuries from oil spills to assess injuries from hazardous substance releases;

¹ See EH-41 memorandum dated July 19, 1996, subject: *Advanced Notice of Proposed Rulemaking on Natural Resource Damage Assessments under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*.

- Calculation the nonuse damages.
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**ACCESS &
ADDITIONAL
INFORMATION**

The consolidated Departmental response submitted to the DOI is available through the Internet on the EH-41 World Wide Website for viewing and/or downloading at <http://www.eh.doe.gov/oepa> under the "WHAT'S NEW" and "DOE COMMENTS" sections.

If you have questions regarding the ANPRM and the consolidated Departmental response, in particular or NRDA, in general, please contact John Bascietto of my staff by...

- calling (202) 586-7917
 - faxing messages to (202) 586-3915
 - communicating electronically, via Internet, to john.bascietto@eh.doe.gov
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Thomas T. Traceski
Director, RCRA/CERCLA Division
Office of Environmental Policy and Assistance



Department of Energy

Washington, DC 20585

September 13, 1996

Office of Environmental Policy
and Compliance
ATTN: NRDA Rule--Type B
Mail Stop 2340
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Madam or Sir:

Re: 61 FR 37031, "Natural Resource Damages Assessments--Type B Procedures"

On July 16, 1996, the Department of Interior (DOI) published the subject Federal Register Advance Notice of Proposed Rulemaking soliciting comment on potential revisions to the regulations for assessing natural resource damages resulting from releases of hazardous substances (43 CFR 11). The Department of Energy (DOE) has reviewed the notice and appreciates the opportunity to provide the enclosed comments.

The enclosed comments combine viewpoints and issues identified by DOE field and program offices, and are presented for DOI's consideration in developing the notice of proposed rulemaking for Natural Resource Damages Assessments--Type B Procedures.

Sincerely

A handwritten signature in black ink, appearing to read "Raymond F. Pelletier".

Raymond F. Pelletier
Director
Office of Environmental Policy
and Assistance

Enclosure

cc: Mary C. Morton, DOI



UNITED STATES DEPARTMENT OF ENERGY

**COMMENTS ON ADVANCE NOTICE OF PROPOSED RULEMAKING
NATURAL RESOURCE DAMAGE ASSESSMENTS--TYPE B PROCEDURES**

**U.S. DEPARTMENT OF THE INTERIOR
FEDERAL REGISTER NOTICE (61 FR 37031-37032; July 16, 1996)**

UNITED STATES DEPARTMENT OF ENERGY
COMMENTS ON ADVANCE NOTICE OF PROPOSED RULEMAKING FOR
NATURAL RESOURCE DAMAGE ASSESSMENTS--TYPE B PROCEDURES

U.S. DEPARTMENT OF THE INTERIOR
FEDERAL REGISTER NOTICE (61 FR 37031-37032; July 16, 1996)

GENERAL COMMENTS

This document provides general comments from the U.S. Department of Energy (DOE) on the U.S. Department of the Interior (DOI) Advance Notice of Proposed Rulemaking (ANPRM) for Type B natural resource damage assessments (NRDA), which appeared in the Federal Register on July 16, 1996. DOE will provide more detailed comments on the Notice of Proposed Rulemaking once it is issued.

The DOI ANPRM solicited comments on four issues:

- o the appropriateness of using the National Oceanic and Atmospheric Administration's (NOAA's) method for measuring damages from oil spills to measure damages from hazardous substance releases
- o the appropriateness of using NOAA's streamlined approach for assessing injuries from oil spills to assess injuries from hazardous substance releases
- o the suitability of the new approaches in NOAA's NRDA regulations for oil spills to DOI's NRDA regulations for hazardous substance releases, and
- o the calculation the nonuse damages.

DOE provides comments on each of these issues below. Additionally, DOE provides comment on an issue not specifically raised in the DOI ANPRM, namely the importance of integrating natural resource damage considerations as a risk management issue, into the evaluation and selection of remedial actions under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).

NOAA's Method of Measuring Damages

DOE agrees that recovery should be limited to damages for those natural resource injuries that are not fully remedied by response actions as well as public interim losses. NOAA's final rule for assessing natural resource damages equates compensation for interim losses to the cost of appropriately scaled compensatory restoration actions, rather than economic values per se. DOE supports this new method of measuring natural resource damages, except when compensatory restoration costs are grossly disproportionate to the economic value of the interim losses. In such situations, responsible parties (RPs), including government agencies

such as DOE, may have to pay far more for compensatory restoration than the value of the damages resulting from the natural resource injuries.

The NOAA final rule does not provide any guidance on the use of any methods for measuring damages. DOE believes that such guidance is needed in order to enhance the ability of trustees to receive a rebuttable presumption for their estimate of damages. This guidance should provide minimum performance standards in order to give both trustees and RPs some basic benchmarks for evaluating the validity and reliability of the resulting damage estimates. The absence of such benchmarks increases the likelihood of invalid and unreliable estimates. This is particularly important since the NOAA rule allows the use of any reliable method suitable for calculating interim lost value (60 FR 39816).

The NOAA final rule does not require the selection of the restoration alternative(s) that makes the public and the environment whole at the least cost.¹ DOE believes that such flexibility is needed in order for trustees to avoid selecting inefficient restoration alternatives. Otherwise, trustees and RPs may spend more on restoration actions than is necessary to make the public and the environment whole.

NOAA's Approach to Injury Assessment

The DOI NRDA regulations make a clear distinction between injuries, which are adverse changes in the chemical or physical quality or viability of natural resources, and service losses, which are reductions in the functions performed by natural resources, including human uses. Then, damages are determined by valuing the service losses. The NOAA final rule blurs the distinction between injuries and service losses by defining injuries to include a loss of use of natural resources. Although DOE supports restoring of the service provided by the resource, DOE does not support defining services losses as injuries, since the goal of restoration should be to restore the services foregone as a result of the injuries attributable to the hazardous substance release, not necessarily restoring the injured natural resources per se.

The NOAA final rule allows considerable flexibility in the determination of injuries. DOE supports reasonable flexibility in injury determination, but believes that uniform injury standards are necessary in the DOI process. While the lack of such standards clearly presents a technical problem, RPs who are faced with having to perform restoration actions in more than one state may have to consider that a natural resource injury in one state may not be an injury in another state. Such inconsistencies could hamper efforts to conduct or rebut natural resource damage assessments by such parties.

¹ The NOAA final rule has a cost-effectiveness provision, which requires the selection of the lowest cost alternative among alternatives that provide the same benefits. However, the NOAA final rule has no such requirement for selecting among alternatives that provide different benefits (e.g., alternatives that make the public whole over a longer or shorter time frame).

Applicability of NOAA's Approach to Hazardous Substance Releases

DOE believes that the emphasis on primary and compensatory restoration costs in the NOAA final rule is equally applicable to hazardous substance releases. The goal of damage assessments for both oil spills and hazardous substance releases should be to make the public and the environment whole through restoring the services foregone as a result of such incidents. The shift in emphasis in the NOAA final rule from compensable values for interim service losses to the cost of restoration actions to compensate the public for such losses is appropriate for hazardous substance releases, as long as such costs are not grossly disproportionate to the compensable values.

One of the potentially important distinctions between oil spills and hazardous substance releases is that the latter may involve injuries that began many years in the past and may continue many years into the future, whereas the injuries from oil spills usually involve more recent and/or shorter time periods. Furthermore, oil spills usually involve one release of one substance from one source (e.g., a spill on a given date of crude oil from a specific barge), whereas applications of the DOI NRDA regulations may involve multiple releases of multiple hazardous substances by multiple parties. Thus, the determination of baseline service levels (i.e., service levels that would have existed in the absence of the release) is often more complex for hazardous substance releases than oil spills. Accordingly, DOE recommends more emphasis on the determination and role of baseline services than provided by the NOAA final rule. In particular, the NOAA final rule does not explicitly incorporate the concept of baseline services into determinations of service reductions. DOE recommends making the role of baseline services in measuring service reductions a basic requirement of the Type B procedures.

Calculation of Nonuse Damages

DOE has previously voiced caution with respect to the use of contingent valuation (CV) in the Department's comments on NOAA's NRDA regulations for oil spills. The Department's call for caution stemmed from the fact that the method may not always reliably measure nonuse damages (i.e., damages experienced by individuals who do not use the injured natural resources and/or who may not have any knowledge of the natural resource or its injuries). Furthermore, DOE has concerns with the expressed belief that the use of CV for scaling replacement services avoids several fundamental problems with the methodology.

The Department is not aware of evidence from the economics literature that the upward biases in CV are proportional when applied to different types of natural resource services. In fact, the well-documented insensitivity of many CV results to the scope of natural resource injuries indicates that the biases in CV may not be proportional. Thus, there may be no basis for the conclusion that CV's upward biases are irrelevant because these biases cancel when the lost and replacement services are both valued using this technique. Additionally, the upward biases in CV may support more expensive restoration actions than would be justified by a more reliable method.

Integrating the CERCLA and NRDA Processes

An substantial component of natural resource damages from hazardous substance releases is based on the residual injuries following the implementation of remedial actions selected in the CERCLA process. Additionally, some remedial actions may actually increase natural resource damages. For example, draining and dredging woodlands to remove hazardous substances in the sediments may result in larger natural resource damages than a no-action alternative. Thus, the choice of remedial actions has a potentially important impact on the magnitude of natural resource damages. Consequently, DOE recommends integrating the CERCLA and NRDA processes to the greatest extent possible. Trustees should not only be involved in consultations on studies and investigations, but should also notify the RPs as to which potential restoration actions might be required prior to remedy selection in order to minimize the potential for inconsistency and duplication.

Integrating the CERCLA and NRDA processes could take several forms. First, the data collections required for the Remedial Investigation phase of the CERCLA process could be expanded to obtain the data needed for the NRDA process. For example, recreational fishing data could be collected for NRDA purposes in the same survey acquiring the data needed to evaluate the human health risks of consuming fish containing a hazardous substance for CERCLA purposes. This combined data collection would cost less than having separate data collections for the two processes.

Additionally, natural resource damages should be considered when estimating the cost of the remedial actions in the Feasibility Studies phase of the CERCLA process. Since natural resource damages are based in part on residual injuries following remediation, remedial action costs and natural resource damages could, under the right conditions, be inversely related. In other words, a relatively expensive remedial action may result in much lower natural resource damages than a less expensive remedial action. The appropriate goal would then be to select remedial actions that minimize the sum of their implementation costs and the associated natural resource damages. Alternatively, the natural resource damage impacts of various remedial actions could be evaluated in more qualitative ways to help avoid selecting remedial actions that result in large natural resource damages.²

In conclusion, DOE recommends that DOI modify the NRDA process to link with and build upon the data and procedures in the CERCLA process to the greatest possible extent. This coordination will reduce the cost and time needed to complete the two processes, as well as reducing the combined cost of remedial actions and their associated natural resource damages. DOE has attached an article published in the Federal Facilities Environmental Journal that describes more fully the concept of integrating the NRDA and CERCLA processes. DOE has also conducted further work on this concept in a demonstration project at the Savannah River Site. DOE is willing to work with DOI in developing provisions of its NRDA regulations to achieve more integration of the NRDA and CERCLA processes

Attachment

² The DOE has tested the feasibility of one approach to integrating natural resource values into a planned response action during a technical assistance project performed at one of the Department's NPL sites. The approach is documented in "Natural Resource Damage Assessment Implementation Project: Savannah River Site", U.S. Department of Energy, Office of Environmental Policy and Assistance, RCRA/CERCLA Division, EH-413, Washington, DC., DOE/EH-0510, October, 1995.