
Revisions to the CERCLA Damage Assessment Regulations

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Natural Resource
Damage Assessment & Restoration Program

Restoration Program

Overview

- CERCLA damage assessment regulations
 - 43 CFR Part 11
 - Revisions promulgated October 2, 2008
 - Revisions were not challenged in court
 - This presentation will cover
 - FACA Committee
 - Restoration-Based Methods
 - Other Conforming Changes
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FACA Committee

- Convened by DOI in May 2005
 - Purpose
 - Provide recommendations regarding DOI's NRDAR activities, authorities, and responsibilities
 - Composition
 - Federal, State, and Tribal trustee agencies
 - Industry groups and PRPs
 - Scientists and economists
 - Environmental and public interest groups
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FACA Committee

- Key recommendation
 - Make targeted revisions to the CERCLA damage assessment regulations
 - Include “restoration-based” methods to determine compensable value
 - Do not sanction or bar any particular method
 - Establish general principles of reliability
 - Do not change regulation’s current focus on
 - Baseline
 - Causation
 - Services (ecological and human)
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Restoration-Based Methods

- Type B procedure revisions
 - Emphasize resource restoration over economic damages
 - Expand the definition of compensable value
 - Include restoration-based methods
 - Include feasibility and reliability factors
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Restoration-Based Methods

- Compensable Value

- The amount of money required to compensate the public for:

- *“The loss in services provided by the injured resources between the time of the discharge or release and the time the resources are fully returned to their baseline conditions, or until the resources are replaced and/or equivalent natural resources are acquired”*
 - Services: physical and biological functions performed by resources, including providing human use
 - Interim lost use
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Restoration-Based Methods

- Compensable Value (*cont.*)
 - Old regulations: measure using economic valuation
 - Includes methods that measure “consumer surplus”
 - Arguably excludes restoration-based methods such as the service-to-service approach in the OPA regulations
 - Trustees are required to spend compensable value recoveries on restoration actions
 - But under old regulations, trustees were not required to consider restoration actions to determine compensable value
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Restoration-Based Methods

- Compensable Value (*cont.*)
 - New revisions: two approaches to determination
 - Economic value, or
 - Restoration cost
 - No hierarchy of preference
 - Better comports with CERCLA's overall restoration objective
 - Promotes early focus on feasible restoration actions
 - Provides opportunities to design creative, cost-effective restoration actions
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Restoration-Based Methods

- Compensable Value (*cont.*)
 - Economic value approach
 - Consumer surplus of lost services (use and non-use values)
 - Economic rent of injured resources
 - Government fees for resource use
 - These methods **measure** consumer surplus
 - Travel cost
 - Random utility maximization
 - Contingent valuation
 - Conjoint analysis
 - Others that measure consumer surplus
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Restoration-Based Methods

- Compensable Value (*cont.*)
 - Restoration cost approach
 - Cost to implement projects that restore lost services
 - These methods **scale** restoration projects and then estimate their implementation costs
 - Random utility maximization
 - Conjoint analysis
 - Habitat equivalency analysis
 - Resource equivalency analysis
 - Others that estimate the cost to restore in a cost-effective manner
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Restoration-Based Methods

- Unchanged: Acceptance criteria for compensable value methods
 - Feasibility and reliability
 - Reasonable cost
 - Avoidance of double counting
 - Cost effectiveness
 - ***All of these criteria remain mandatory***
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Restoration-Based Methods

- New: Feasibility and reliability factors to assist trustees in evaluating acceptance criteria
 - Is the method capable of providing useful information for a particular injury?
 - Does the method address the nature, degree, and spatial and temporal extent of the injury?
 - Has the method been peer reviewed?
 - Is the method generally accepted by experts in the field?
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Restoration-Based Methods

- Feasibility and reliability factors (*cont.*)
 - Is the method subject to standards?
 - Are the method's assumptions and inputs supported?
 - Are cutting edge methods tested or analyzed for reliability?
 - ***Not all of these factors need apply in every case***
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Other Conforming Changes

- Complying with *Ohio v. Interior*
 - Deleted the limitation on estimating option and existence value (i.e., non-use values)
 - Responding to *Kennecott v. Interior*
 - Deleted the definition of the date of promulgation (1994) for statute of limitations purposes
 - Clarified that the metric for evaluating baseline conditions is the level of services provided
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Other Conforming Changes

- Timing guidance for the RCDP
 - Clarified that the RCDP may be completed after the injury determination and quantification phases of the assessment



Summary

- The new revisions
 - Are the result of broad public input (FACA Committee)
 - Promote better restoration planning
 - Take care of needed “housekeeping”
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