

**Department of the Interior
Natural Resource Damage Assessment and Restoration
Federal Advisory Committee Meeting
November 29 – 30, 2006**

The fourth meeting of the Department of the Interior's Natural Resource Damage Assessment and Restoration Advisory Committee was held in the auditorium of the DOI-South Building in Washington, D.C. Vice-Chair Charlie Wooley called the meeting to order at 8:53 AM on November 29. He began the meeting by welcoming all the Committee members and the members of the public. He then asked that everyone introduce themselves. After the introductions, the Committee Chair and Designated Federal Officer (DFO), Frank DeLuise, welcomed everyone on behalf of the Secretary, Deputy Secretary, Assistant Secretary for Policy, Management and Budget, and the Deputy Assistant Secretary for Policy and International Affairs.

In accordance with the provisions of Public Law 92-463, the meeting was open to the public from the time it was convened each day until adjournment at the end of each day.

Committee Members Present:

Frank DeLuise	Lisa N. Gover
Charlie Wooley	Shannon D. Work
John Carlucci	William O. Bresnick
Roger Helm	Patricia K. Casano
John Bascietto	Barbara J. Goldsmith
William D. Brighton	Barry M. Hartman
Linda Burlington	J. Craig Potter
Robert W. Ricker	Michael F. Smith
Sharmian White	Ralph G. Stahl, Jr.
Richard D. Seiler	Stephen Kress
Dale C. Young	Jon Mueller

Laurence M. Groner (officially designated alternate for Alex Beehler)
Vicky L. Peters (officially designated alternate for Mark Shurtleff)

Department of the Interior FACA Committee Staff Present:

Steve Glomb, NRDAR Assistant Program Manager for Restoration
David Morrow, NRDAR Assistant Program Manager for Operations
Robin Burr, NRDAR Regional Coordinator, Philadelphia
Barbara Schmalz, NRDAR Restoration Support Unit Field Liaison/Coordinator, Denver

Opening Comments

DFO DeLuise extended appreciation to the Committee members for all their efforts, and summarized the next steps in the process. He reminded the Committee that consensus within the Subcommittees was not essential, as, once the final Subcommittee reports are submitted to the Committee, the full Committee will discuss all Subcommittee proposals. The Committee will then work to reach agreement on the recommendations to forward to

the DOI. A drafting team, made up of seven to eight Committee members, will prepare a draft of the Committee's report to the DOI; the Committee, after a period of time to review the draft report, will meet to discuss any comments and agree upon final recommendations. The drafting team will then prepare the final Committee report, to be submitted to DOI in May 2007.

A Committee member asked whether a Committee member could provide written comments on the current Subcommittee reports to the Subcommittees within the next week. In response, another Committee member raised the concern that this could be counter-productive if comments were contradictory. After some discussion, a Committee member suggested that comments be provided, with the understanding that the comments were for Subcommittee consideration and did not require a change or response; the Committee agreed.

Vice-Chair Wooley briefly reviewed the agenda for the meeting, then introduced the first presentation.

Cultural Services Presentation

Committee members Mr. Shannon Work, Ms. Lisa Gover, Mr. William Bresnick, Ms. Dale Young, and invited guest speaker, National Park Service NRDAR national coordinator Mr. Rick Dawson, provided an overview of the types of services and uses tribal, religious, and/or historical cultural resources provide (see the Cultural Resources Presentation at <http://restoration.doi.gov/faca.html>). Each emphasized that such services and uses are hard to value or quantify monetarily and that, often, their value is very personal.

As part of his presentation, Mr. Work stated that there are two primary influences on cultural development: place and history. The factors that contribute to tribal cultural significance include a generational continuum, religion, subsistence, medicines, other necessities (e.g., shelter, clothing), and language. Ms. Gover added that natural resource services are important in tribal arts and crafts as well as religious, industrial, and commercial ventures. Thus, contamination may affect cultural services even if the resources are not on tribal lands.

Mr. Bresnick, Ms. Young, and Mr. Dawson each added to this presentation by highlighting various cultural resources (e.g., national cemeteries, the Mayflower, Flanders Field, USS Arizona/Pearl Harbor, Plymouth Rock, Walden Woods, state and national parks, civil war battle fields, etc.) and the typical cultural services they provide.

Mr. Work concluded the cultural services presentation by reiterating that history and place are very important culturally and that all cultures have places/things that are important to them because of their historical significance.

Vice-Chair Wooley thanked the speakers for an outstanding session.

Subcommittee 2 – Report and Discussion

Subcommittee question: *Should DOI's regulations provide additional guidance for determining whether direct restoration, rehabilitation, replacement, or acquisition of equivalent resources is the best strategy for addressing natural resource injuries?*

Subcommittee 2 member Mr. William Brighton presented Subcommittee 2's report. He reiterated the primary question the Subcommittee had been assigned, reviewed the pertinent existing guidance, and discussed the eight sub-questions relative to the Subcommittee's recommendation for each (see the Subcommittee 2 power point presentation and draft report at <http://restoration.doi.gov/faca.html>.)

Committee discussion of the Subcommittee's presentation is summarized below by sub-question (SQ):

SQ 1: Committee members were initially divided on whether guidance should specify a preference for on-site restoration. After much discussion, the Committee agreed that, like the environmental analysis completed under the National Environmental Policy Act for all federally proposed actions, a range of alternatives needed to be considered, and that on-site should be one of them.

SQ 2: Committee agreed that such a limitation would focus the assessment too much on one point.

SQ 3: Committee agreed with the concept of "threshold criteria", but did not agree upon exact words (e.g., "reasonable likelihood of success" vs. technically feasible, "reasonable, demonstrable" vs. nexus). The Subcommittee will discuss further and recommend final language in their final report.

SQ 4 and 5: Committee agreed upon additional guidance but did not agree upon the proposed wording changes.

SQ 6: Committee agreed with the Subcommittee. Several Committee members noted the importance of clearly determining what the injury is before outlining restoration options.

SQ 7: Committee agreed with the Subcommittee.

SQ 8: Committee agreed with the Subcommittee, but suggested using the phrase "shall seek to coordinate" rather than "may" in the New Coordination Provision – 2.

Public comments were provided by Mr. Rich Curley (Holland & Hart, Denver, Colorado), who raised five issues. First, he was concerned that the Committee was diverting from the agreement that he thought the Committee had reached at the last Committee meeting (i.e., "if not broken, don't fix it") by proposing regulatory changes or guidance development regarding many issues for which there is little or no evidence that there is a problem or shortcoming. Second, he strongly supported the Committee's position that no preference for onsite restoration be endorsed. Third, regarding the recommendation to focus on restoration early in the process, he cautioned that it was possible to focus on restoration too early, e.g., that at the Preassessment Screen stage injury type, quantity, or causation are still being investigated, and therefore, it would be premature to develop restoration actions at that stage. Fourth, he strongly disagreed with the recommendation that CERCLA remediation and restoration activities be integrated because different procedural and substantive due process protections apply to remediation

and restoration claims. Fifth, he stated that Subcommittee 2 had not provided adequate justification for its proposal that the Type B Rule or guidance should “affirmatively recognize that a project providing cultural services (but not enhancing natural resources) is appropriate where cultural uses were lost.”

Mr. Brighton provided a summary of the issues raised during the Committee discussion and an outline of how the Subcommittee would proceed.

Subcommittee 4 - Report and Discussion

Subcommittee question: *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?*

Subcommittee 4 member, Ms. Sharmian White, presented the power point presentation summarizing the Subcommittee’s report and recommendations (see the Subcommittee 4 power point presentation and draft report at <http://restoration.doi.gov/faca.html>.)

The Committee discussion focused on the ideas of regional restoration planning; integration of the restoration plan with the NEPA compliance document; soliciting restoration ideas from the public, including partnering with various organizations implement the restoration activities, and developing and refining criteria for project submissions; and the use of cooperative assessment to ultimately encourage efficient restoration.

Ms. White summarized the Committee discussion, noting that the Committee was favorable to the idea of regional restoration plans and integration of the restoration planning and NEPA analysis. Feedback was generally favorable regarding soliciting input from the public, provided that such input was solicited at appropriate stages of the process and that appropriate guidelines for submissions were provided to ensure that proposals met regulatory criteria. Continued partnering efforts with various external organizations were encouraged.

Closing Remarks for the Day

DFO DeLuise thanked everyone for their efforts and congratulated the subcommittees on their impressive work. He advised that he was anticipating submitting a final Committee report to DOI by mid-May, and asked that the Committee consider how to schedule their time to meet that deadline.

Vice-Chair Wooley thanked Committee member Ms. Barbara Goldsmith for raising the issue at the previous Committee meeting that lead to the cultural resources presentation. He also thanked everyone for their efforts and participation. The meeting was adjourned for the day at 3:55 pm.

Day 2 – DOI NRDAR FACA Committee Meeting November 30, 2006

Committee Members Present:

In addition to those present on November 29 (listed above),
Alex Beehler
Will Clements

The Committee meeting was reconvened on November 30, 2006, at 8:50 in the auditorium of the DOI-South Building in Washington, D.C. Vice-Chair Charlie Wooley called the meeting to order, welcomed all the Committee members and members of the public, and asked all Committee and public attendees to sign-in. He recommended the meeting participants focus on a meeting adjournment of 4:00 instead of 5:00. He asked all meeting participants to introduce themselves, starting with the Committee members, and then turned the meeting over to Subcommittee 1 for their presentation.

Subcommittee 1 – Report and Discussion

Subcommittee questions: *What are the best available procedures for quantifying natural resource injury on a population, habitat or ecosystem level? What guidance is appropriate for the utilization of these procedures?*

Subcommittee 1 member, Dr. Roger Helm, started the presentation by stating that the presentation is to amplify, not replace, the Subcommittee's Draft Report (see the Subcommittee 1 presentation and draft report at <http://restoration.doi.gov/faca.html>). He then noted the calls and meetings held in 2006 both within the Subcommittee and by the Subcommittee with other leading NRDAR consultants and practitioners. These practitioners were chosen to represent and present the diversity of individuals and organizations conducting NRDAR (i.e., state, federal, and tribal trustees; and industry).

The presentation, like the draft report, attempted to present all sides/views heard. Other Subcommittee 1 members and several Committee members asked questions or interjected points throughout the presentation that provided agreement, clarification, support, or alternate views. Two members of the public (Dr. Thomas Ginn, who is one of the consultants who had been interviewed by Subcommittee 1, and Richard Curley, Jr.) made statements (and provided written comments, which are available at <http://restoration.doi.gov/faca.html>) that recommended additions, revisions, or clarifications to the Subcommittee's 1 report.

During the discussion, many committee members expressed an opinion that the current regulations are dated and in some instances too detailed, though some expressed the view that the existing regulations provide a logical framework for identifying and quantifying injury. Rather than revising the rule, however, the subcommittee recommended as its preferred option that the Department develop and periodically update technical memoranda or technical guidance documents to address scientific and technical issues surrounding the use of a flexible site-specific approach to determine the level of

biological scale appropriate for injury assessment. A suggestion was made to prepare such initial documents using a team representing industry, trustees, academia, and NRDAR practitioners from the private sectors.

Regarding the question of what level of biological scale to assess in order to quantify injury, there was general agreement that this is a site-specific question. Most committee members favor letting it be determined on a site-by-site basis, but some feel that analysis at the individual/organismal level is never appropriate for injury quantification at a complex site. Trustee representatives on the committee pointed out that in cases involving endangered species or tribal cultural resources, analyses at the individual level must be considered.

Much of the discussion on the presentation and the public comments following the presentation focused on the three major issues listed in the presentation's last slide, entitled "Areas of Disagreement." The areas on which the subcommittee did not agree are:

- Whether the Type B Regulations need to be changed in order to provide greater "flexibility" or "practicality" for injury quantification;
- Whether injury quantification at the individual level can be considered a "best available practice" (BAP) for a Type B Assessment; and
- Whether Subcommittee 1 should express a view on HEA/REA regarding their use as damage quantification, not injury quantification, methodologies.

Public comments on the subcommittee 1 discussion covered the following issues or points of emphasis:

- Both Mr. Curley and Dr. Ginn recommended that the Department not change the 43 CRF Part 11 Regulations as they are not broken; they allow flexibility in procedures for quantifying natural resources injury; and they are intended to guide the trustee procedures used in the litigation process, not to facilitate settlement.
- Dr. Ginn and Mr. Curley both recommended that the report should more fully reflect the limitations/weaknesses of using individual level assessments for injury quantification that are identified in the Report's Table 2-1, with much concern voiced on the ability to come to agreement on the magnitude of injury and appropriate amount of damages/restoration especially for cases with a small spatial area of natural resource injury.
- Public comments supported the subcommittee recommendation that the Department develop and periodically update technical memoranda or technical guidance documents.

DFO DeLuise, during the presentation, stressed that the Subcommittee Report should strive to obtain consensus, but if not possible, then clearly lay out all the disagreements, but he questioned the need for a separate section in the Report's Executive Summary with dissenting views. He reminded Committee members in the Committee Report they can express any outstanding concern or issue for which they want consideration. He also responded to the Subcommittee's recommendation to form a team/work group of NRDAR practitioners to prepare technical memoranda or guidance documents on

procedures for injury assessment and quantification that such an approach is something to be considered, but he reminded the Committee that any rulemaking or guidance development would have to be a public process much like that used for conducting the current DOI NRDAR Federal Advisory Committee.

Subcommittee 3 – Report and Discussion

Subcommittee questions: *Should DOI revise the CERCLA NRDAR Regulations to permit flexibility to allow for compensating for interim losses with additional restoration projects (in lieu of monetary damages)? How should project-based interim loss compensation claims be calculated?*

Subcommittee 3 members, John Carlucci and Pat Casano, gave a power point presentation summarizing the Subcommittee's Report and recommendations (see the Subcommittee 3 presentation and draft report at (<http://restoration.doi.gov/faca.html>)). The following discussion focused on whether DOI should revise the CERCLA Regulations (Rule) to allow for compensating interim losses with project-based approaches. The subcommittee did not agree on how imperative it is to change the Rule, but did recommend that if DOI decides to do so, then it should modify 40 CFR §11.83(c)(1) narrowly as follows [new text in italics]: "Compensable value is measured by changes in consumer surplus, . . . and any economic rent accruing to a private party. *Alternatively, compensation can be based upon the cost of a project that most efficiently restores the loss in natural resource services.*"

Mr. Carlucci noted that the current DOI NRDAR Rule does not explicitly discuss use of projects as compensation for interim losses. He noted that rule making would provide the reliability for allowing use of the restoration project-based approach in the DOI CERCLA NRDAR process. Alternate Committee Member Vicky Peters supported the need to allow use of the restoration project-based approach throughout the NRD process and not just for interim lost use compensation. Mr. Carlucci stated that the current rule clearly provides for a restoration based approach in calculating damages for restoration to baseline and that the suggested change would clarify in the regulation the option to use the same approach for interim losses.

Ms. Casano noted that the Report has a new section on Illustrative Methodologies that the Subcommittee has yet to approve, and another on reliability, i.e., Discussion of Criteria, that needs more Subcommittee review. She asked for Committee input or reaction to these sections.

Two members of the public (Dr. William Desvousges, who was asked by Subcommittee 3 to participate in their June 5 and 6 meeting, and Richard Curley, Jr.) made statements (and subsequently provided written comments after the meeting, available at <http://restoration.doi.gov/faca.html>) that recommended additions, revisions, or clarifications to the Subcommittee's Report.

Dr. Desvousges noted the excellent work of the Subcommittee. He recommended the Subcommittee consider the material in the National Research Council 2005 publication, "Valuing Ecosystem Services: Toward Better Environmental Decision-Making," by The National Academies Press, Washington, DC, when preparing the Committee Report. He noted the following statement from page 12 of the Subcommittee Report is overstated: "Standards have been developed that govern when the use of HEA is appropriate and what values should be used in running the algorithm." He has found The National Research Council 2005 publication does not mention HEA for valuing ecological services. He also notes another recent article by Cacela, et al. (2005), "Associating Ecosystem Service Losses with Indicators of Toxicity in Habitat Equivalency Analysis," in *Environment Management*, Vol. 35(3), pp. 343-351, that states: "Interpreting reports about the toxic effects of hazardous substances and estimating the associated actual or potential environmental injuries and applying this knowledge in HEA is still an emerging aspect of the practice ..." (p. 343). He lastly noted that the Report's treatment of Conjoint Analysis should acknowledge the newness of the method for valuing ecological services as there is little published literature to support and explain the use of the method.

Mr. Richard Curley offered three issues for the Subcommittee to consider in preparation of their Report.

1. On use of HEA as a tool, he is underwhelmed as to its use. He finds its use can suffer from "garbage in – garbage out", and stated that while the natural resource trustees seem to put much stock in HEA, responsible parties do not. The responsible parties work around HEA in negotiations to come to settlement. He is concerned that the use of HEA fosters the idea that correlation is equal to causation, and feels that most cases can settle without the use of HEA/REA.
2. He stressed that HEA/REA are for assessing lost interim ecological services and not assessing lost interim human services.
3. He also stated that HEA/REA are not well established, reliable methods for estimating damages as supported by Cacela, et al. (2005), "Associating Ecosystem Service Losses with Indicators of Toxicity in Habitat Equivalency Analysis," in *Environment Management*, Vol. 35(3), pp. 343-351.

After the public comments on Subcommittee 3's presentation, several Subcommittee 3 members and other Committee members made statements supporting the value and use of HEA/REA to help determine and quantify the restoration for hazardous substances releases impacting natural resources, but acknowledged that it does not assess human services. Committee member Barbara Goldsmith recommended incorporating into the Subcommittee's Report any trial history or material from the administrative record for hazardous substances release cases that cite/describe the use of HEA/REA.

The Subcommittee presenters (Casano and Carlucci) summarized the direction from Committee's discussions as follows: revise the Subcommittee's proposed Rule modification to allow use of project-based approaches for both interim lost use and baseline restoration; for determining the restoration and compensation needed to address natural resources damages, clarify the use of the cost of restoration actions rather than

monetary value; and propose criteria for determining the reliability of methods for quantifying interim losses.

Future Meetings and Actions

DFO DeLuise presented an outline of the Committee's remaining activities and meetings, and a tentative schedule for completing these items prior to the expiration of the Committee's Charter, i.e., May 24, 2007. He indicated that he will not ask to extend the Charter. The final subcommittee reports will be due by January 19, 2007. (Note: subsequent to the meeting, DFO DeLuise extended that due date to January 26, 2007.) The reports should strive for consensus, but acknowledge all sides. The reports should include analyses, findings, and recommendations that note areas of consensus, and if not consensus, then options. The DFO will designate a committee report drafting team of seven to eight members with representatives from each of the subcommittees, as well as seeking balance among Federal, State, and Tribal trustee interests, industry, and environmental interests. The drafting team is to develop a framework of issues from the subcommittee reports that will be distributed to the Committee by mid-February. Committee member Brighton suggested that the drafting team also should identify issues that may need further discussion after the expiration of the current Federal Advisory Committee.

The Committee will meet in March to provide further direction to the drafting team, who will then prepare by early April the draft of the final committee report. The Committee will meet mid-April to review the draft. The March Committee meeting will be held in a location to be determined, but located to minimize distractions and interruptions.

Regarding the final committee report, DFO DeLuise noted that the FACA statute and Regulations require that a committee report not be a "rubber stamp" of the subcommittee reports. He wants a single report that is lean and focused, not a merged set of sub-reports. The report should provide a unified set of recommendations with a listing of the dissenting views.

Committee member Ricker asked DFO DeLuise how he will decide whether or not to proceed to Rule revision. Mr. DeLuise stated he will need to look at all the recommendations and the scope of recommended changes before making the final decision on how to proceed, i.e., revise the Rule, not revise the Rule, develop guidance, or some combination of options. Lastly, Committee member Potter noted that the committee report should articulate what is broken and what should be fixed so as to help the DFO and others to decide the scope of work needed to address the issues raised by the Committee.

Adjournment

DFO DeLuise thanked everyone for their work, inputs, and dedication to the task. Vice-Chair Wooley concluded by again thanking all for the good professional discussion and directed thoughts. The meeting was adjourned at 12:15 p.m.

DFO Certification

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.



Feb. 26, 2007

Frank DeLuise
Committee Chair and Designated Federal Officer
DOI NRDAR Federal Advisory Committee

Date