



United States Department of the Interior

OFFICE OF THE SECRETARY
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Memorandum

To: **Restoration Program Executive Committee**
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David Raff, Bureau of Reclamation
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From: Steve Glomb
Director – Office of Restoration and Damage Assessment

Subject: Update of the Operating Principle for Restoration Activities

This operating principle provides a framework for restoration activities associated with the Department of the Interior (Department) Natural Resource Damage Assessment and Restoration Program (NRDAR or Restoration Program). The policy is intended to address implementation of restoration activities using funds recovered by the Department in settlements or judgments of natural resource damage cases. This policy was originally released in May 2020 but has been updated to make the language in Section 3.4.3 regarding property acquisition consistent with the recently revised NRDAR manual chapters.

Nothing in this document is intended to alter, in any way, the specific statutory or regulatory requirements, obligations, and responsibilities of the Department or to vest any rights or responsibilities in third parties. Additional resources, policies, guidance and case information can be found on the Restoration Program website at www.doi.gov/restoration.

Please direct any questions about this operating principle to Steve Glomb, Director, Office of Restoration and Damage Assessment, at 202-208-4143 or to Mark Huston, Deputy Director, Office of Restoration and Damage Assessment, at 202-208-6528.

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Operating Principle for Restoration Activities

1.0 Background

The mission of the Restoration Program is to restore natural resources and, when appropriate, the lost human and ecological services pending restoration that result from oil spills or hazardous substance releases into the environment. In partnership with other affected state, tribal, and federal trustees, a damage assessment provides the basis for determining the restoration project(s) needed to address the loss of natural resources, their associated services and the public's lost use of these resources.

As authorized by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund¹), the Clean Water Act (CWA²), and the Oil Pollution Act of 1990 (OPA³), injuries to natural resources and associated services that the Department manages or controls are assessed and appropriate restoration projects are identified to support negotiated settlements or legal actions (in rare cases) with potentially responsible parties (PRPs). Cash recoveries from the PRPs are used by the trustees to finance the implementation of restoration projects, including replacing or acquiring the equivalent of the injured, diminished, or lost natural resources and services, pursuant to a publicly reviewed Restoration Plan. Similarly, a PRP may implement restoration of injured resources and services at the direction of the trustees and/or receive NRDAR credit from the trustees for the restoration.

2.0 General Policy

2.1 Program Goal

The goal of the Restoration Program is the timely restoration of injured resources and, when appropriate, the lost human and ecological services pending restoration of those resources to those conditions that would have existed if the release or incident, and resulting injuries in question, had not occurred (baseline⁴). When appropriate, restoration includes compensation for the interim loss of injured resources pending restoration⁵. Restoration implementation is usually undertaken in partnership, consultation, and coordination with relevant co-trustees, subject to the requirements and constraints of each of the co-trustees. Because the goal of the Restoration Program is to restore injured resources, the restoration needs of the injured resource should influence the damage assessment phase, with restoration planning taking place throughout the entire damage assessment process. Restoration planning requires coordination with co-trustees and includes the selection and discussion of restoration alternatives, including the preferred alternative, that are considered due to their nexus to the injury, the inclusion of the

¹ 42 USC § 9601 et seq.

² 33 USC § 1251 et seq.

³ 33 USC § 2701 et seq.

⁴ 43 CFR. § 11.14 (Definitions) - Baseline means the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.

⁵ 43 CFR. §§ 11.83(c); 11.84(g).

National Environmental Policy Act (NEPA) and other environmental considerations, and public participation.

2.2 Role of the Authorized Official

For the Department, NRDAR cases will be managed by an Authorized Official (AO⁶), representing the Secretary, who will work to ensure that all damage assessment activities and restoration planning and implementation are completed in a timely manner, consistent with all relevant regulations and policies, in consultation with all affected Bureaus/Offices and other natural resource trustees, and in coordination with response agencies where appropriate. At any time during the assessment or restoration process, the AO may be re-delegated or reassigned and the re-delegation may be for the entire case, a specific Operable Unit, or for specific assessment or restoration projects.

2.3 NRDAR Claim Components

Given the focus on restoration, the restoration needs of the injured resource(s) should influence the damage assessment phase, with restoration considerations taking place throughout the process of claim development. NRDAR claims should document and include:

- Emergency restoration (if any),
- Primary restoration—costs to restore, replace, and/or acquire the equivalent resources (i.e., direct replacement),
- Interim losses (compensable value)—the amount of money or in-kind projects required to compensate the public and/or tribes for the loss of services over time,
- Past assessment costs, and
- Future costs for restoration planning, implementation, contingencies or adaptive management, and monitoring oversight.

The restoration planning and monitoring costs should be reasonable and appropriate, and commensurate with the restoration implementation costs. Any monitoring should contribute to the restoration. In determining the type and quantity of monitoring, consideration should be given to the total damages, certainty of restoration success, and ability to adapt the project based on the monitoring results⁷.

2.4 Cooperative Process

The restoration process is undertaken in partnership with other affected state, tribal, and federal trustee agencies, and coordinated with assessments of injuries that those entities manage or control. The trustees must invite the responsible parties to participate in the natural resource damage assessments, and the invitation to participate should be extended as soon as practicable following a spill or release. The assessment of injuries and the evaluation of potential restoration projects may be a joint cooperative process or led solely by the trustees, however the final authority to make determinations regarding

⁶ See Departmental Manual Chapter 207 DM 6 – Natural Resource Damage Assessment and Restoration Authorized Official Delegations

⁷ See generally 43 CFR. § 11.15

injury and restoration rests solely with the trustees. Recoveries, in cash or in-kind services, from the responsible parties are then used to implement the restoration of the injured resources pursuant to a publicly reviewed Restoration Plan.

2.5 Administrative Record and DARTS

The AO will ensure that the case manager develops and maintains an Administrative Record to support the NRDAR case, which includes, but is not limited to, memoranda of agreement, decision documents (e.g., Consent Decrees, final Restoration Plans, trustee council resolutions), documentation of public and PRP involvement, and documentation of the completion of restoration projects. The trustee council may create a separate stand-alone Administrative Record (e.g., on a bureau website) or utilize the Office of Restoration and Damage Assessment's (ORDA) information management system - Damage Assessment and Restoration Tracking System (DARTS). However, for any case in which DOI is involved, any important milestone documents or publicly reviewed plans/documents need to be entered into DARTS following the protocols established for this system.

3.0 Restoration

The statutes that authorize natural resource damage claims require trustees to use funds or assets received when a NRDAR claim is settled to restore, replace, or acquire the equivalent of the natural resources and services that have been injured. Restoration planning should take place as early as possible in damage assessment and continue throughout the process of developing the claim. The case manager shall coordinate with the case attorney to ensure that all recovered restoration funds are properly expended, that Restoration Plans are developed and finalized pursuant to applicable law and regulations, and that necessary environmental compliance is performed in a timely manner.

3.1 Restoration Implementation Timeline

Once a settlement or judgment has been entered, restoration planning (if not already completed) and implementation should proceed as expeditiously as possible. If a trustee council has not already been established, a restoration team or restoration trustee council should be formed within three months of the date of the entering of the settlement or judgment. Within six months of the entering of the settlement or judgment, the restoration team or trustee council should develop a Restoration Plan or a restoration strategy that identifies milestones and a timeline for developing a Restoration Plan. For settlements preceding the adoption of this policy, the restoration team should work with the case attorney to formulate a restoration strategy or project management plan within a reasonable timeframe.

Restoration implementation should begin as soon as possible after the final Restoration Plan is finalized. There are a variety of restoration methods and tools that may be applicable as restoration alternatives. Generally, in the Restoration Program, restoration actions may occur at five different times in the NRDAR process:

1. *Restoration in Advance of Potential Impacts*: Projects undertaken before impacts to natural resources occur. These projects may not be established for a particular site but are implemented in case there is a spill or release that injures a resource that is the same as that of the restoration project. A restoration bank is an example.
2. *Emergency restoration*: Projects undertaken during the response or remedial part of the spill or release that are deemed critical to the restoration success of the resource and would likely be lost if the project is delayed or put on hold until the completion of the process.
3. *Early restoration*: Restoration in Advance of Completed Assessment and/or Final Resolution of a Claim- Projects undertaken by the PRPs after impacts to natural resources occur, but before the completion of the natural resource damage assessment or before final resolution of the NRDAR claim.
4. *Restoration-based settlement*: Projects undertaken by the PRPs pursuant to the terms of a legally binding Consent Decree and concurrent final Restoration Plan.
5. *Post cash-out settlement restoration*: Projects undertaken after the trustees have completed an NRDAR settlement and restoration funds have been recovered. Normally a Restoration Plan will need to be developed.

Restoration implementation may be performed using a phased approach that allows necessary adjustments. This is especially important when implementing complex or long-term restorations. Such restorations should be designed in a manner that would allow mid-course changes to be made, as needed, based on appropriate evaluation of monitoring results. A mechanism for modifying or supplementing restoration actions based on monitoring results should be included in the Restoration Plan whether the Restoration Plan is to be implemented by the responsible party as part of the settlement or by the trustees. For example, a contingency provision for additional plantings should be included in the Restoration Plan if plant survival does not meet the performance criteria.

3.2 Emergency Restoration

Emergency restoration involves actions taken prior to the completion of a NRDAR and Restoration Planning process to prevent or reduce continuing natural resource injuries and/or avoid a potential irreversible loss of natural resources or their services⁸.

Emergency restoration is commonly identified by and selected by trustees and involves a lower level of vetting compared to other types of restoration due to the urgency of the process. However, the trustees must provide notice to the PRPs, and if time permits invite their participation in the process. In addition, the trustees must provide notice to the public including the justification for the action, the nature and extent of the action, and the results of the action.

In order to implement an emergency restoration, the trustees must coordinate with the On-Scene Coordinator and these actions may not interfere with or duplicate the response actions. Lastly, emergency restoration actions may not be used to address residual oil.

⁸ 15 CFR §990.26 and 43 CFR § 11.21

3.3 Restoration Plan

As part of the Natural Resource Damage Assessment Process, the trustees develop a Restoration Plan or Plans, either as a basis for the claim, as part of a restoration-based settlement agreement, or after the recovery of damages. The Plan or Plans will then be finalized after public review and the concurrence of the appropriate federal, state, and tribal co-trustees or their designees. The case manager will ensure that all relevant environmental compliance requirements, including requirements under NEPA, are achieved. Compliance with applicable statutes and regulations should be initiated as early as possible and all required compliance (e.g., National Historic Preservation Act, Endangered Species Act) will be completed before restoration projects are implemented (not necessarily at the time of the finalized Restoration Plan). To the extent possible, restoration documents should be integrated to meet the requirements of multiple needs at the same time. When monetary recoveries are received for interim losses, the plan should describe how those monies will be used to fund additional associated restoration work. In addition, the plan should include provisions that establish performance standards (materials and methods), performance criteria, and describe the legal protections (easements, deed restrictions) established for the selected restoration projects. Restoration Plans do not include any construction drawings or engineering plans beyond concept drawings, detailed budgets and line item costs, or contract documents.

3.3.1 Public Participation

A Restoration Plan must be made available to the public for review and comment. The form, timing, level of detail, and nature of public review or involvement for the Restoration Plan may vary depending on applicable legal requirements, relevant regulations, and other case-specific considerations. After public review and responses to public comments received, if any, any changes to the Restoration Plan will be incorporated in the final Restoration Plan. For the Department, the final Restoration Plan is signed by the AO⁹ and then will receive the concurrence of the appropriate federal, state, and tribal trustees or their designees prior to restoration implementation. Note that a significant change to the Restoration Plan, either before finalization or after finalization, will trigger an additional period of public comment and review. “Significant” is a case-specific determination made by the case manager after advice and counsel from the case attorney.

3.3.2 Performance Criteria and Monitoring

A Restoration Plan should establish performance criteria (e.g., measures to evaluate the effectiveness of the restoration) that help assess both the function and the physical appearance of the restored resources. Because unanticipated factors, such as weather events or technical difficulties, may impede the progress of restoration, midcourse corrections in the restoration implementation may necessitate changes to the performance criteria.

⁹ See Departmental Manual Chapter 521 DM 3 – Signature Authority

The inclusion of adaptive management will often be a component of a Restoration Plan as this will provide a framework that the project implementors follow in the event a midcourse correction to the project is required. However, the level of adaptive management criteria necessary will vary by project. If there are few uncertainties as to the success of a project, then only simple corrective actions may be necessary, whereas restoration projects that have a high degree of uncertainty may require more detailed monitoring and an adaptive management framework in order to ensure the success of the project.

3.3.3 Evaluation of Restoration Alternatives

The Restoration Plan should clearly identify, and explain to the public, the relationship between each restoration alternative considered and the resource injuries or service losses the action would address. Restoration alternatives are evaluated according to the criteria outlined in the regulations and include such factors such as technical feasibility, cost effectiveness, and the relationship of the cost to the expected benefit of the restoration¹⁰. A natural recovery (no action) alternative must be included in the Restoration Plan¹¹.

The Department prioritizes the restoration of injured natural resources at or near the area where the injury occurred. This includes actions that restore, rehabilitate, or replace the injured resource as close to the point of injury as possible. If restoration at or near the site of injury is not feasible, restoration actions may occur further away provided the nexus to the injury is well documented.

3.3.4 Regional or Programmatic Restoration Plan Development

In an area where there have been multiple NRDAR settlements for similar types of injury, or where such settlements are anticipated, a regional Restoration Plan or a programmatic Restoration Plan may be developed and used as the basis to implement restoration using recovered funds from multiple cases.

The Council of Environmental Quality NEPA regulations allow for actions that reduce the repetitive language or the size of a document while at the same time maintaining the agency and public regulatory process¹². For example, agencies may adopt all or part of another federal agencies environmental impact statement, tier off an existing environmental impact statement to reduce repetitious discussions, or incorporate information from another document by reference. Therefore, an existing plan (e.g., Regional Restoration Plan, Endangered Species Recovery Plan, Coastal Zone Management Plan, Tribal Resource Management Plan, State Management Plans, or Comprehensive Conservation Plans) or portions thereof, may be incorporated into a NRDAR Restoration Plan.

¹⁰ Restoration criteria - 43 CFR. 11.(d) (for CERCLA cases) or 15 CFR. § 990 (for OPA cases)

¹¹ 15 CFR. §990.53(b)(2)

¹² 40 CFR. 1500.1 et seq.

3.3.5 Combined Restoration Plan

If there are NRDAR cases with similar injuries, a combined Restoration Plan may be written rather than individual Restoration Plans, especially if the goal is to select one restoration project that compensates for the injury from the separate cases. The combined plan should describe the injuries from each case and discuss the selected alternatives that describe the nexus to the injury for each case, and then provide a justification that combining the settlements (or portions of settlements) to implement a restoration project will satisfy the injury.

3.4 Restoration Implementation

When partnerships are used to implement restoration projects, they should be used to enhance or facilitate restoration actions. Bureaus/Offices are encouraged to work in partnership with their internal programs such as the U.S. Fish and Wildlife Service Joint Ventures, Coastal, and Partners for Fish and Wildlife Programs; the National Park Service Challenge Cost Share Program; and other Departmental restoration programs such as the Bureau of Land Management's National Riparian Service Team; or with external natural resource management programs and organizations whose policies are compatible with those of the Restoration Program and other Bureaus/Offices.

3.4.1 Restoration Coordination

Bureaus/Offices should coordinate with the U.S. Environmental Protection Agency, the U.S. Coast Guard, other governmental agencies, and the responsible parties who are conducting remedial/response actions to control, prevent, or minimize residual natural resource injuries due to the response actions. Generally, more comprehensive and effective remedial actions or spill response will reduce the level of residual injuries to natural resources.

The AO and co-trustees should coordinate with cooperative PRPs, if appropriate, and other potential partners such as local, regional and national nongovernmental organizations early in the NRDAR process to help identify potential restoration options.

3.4.2 Project Oversight

A Restoration Plan should include provisions for trustee oversight to ensure restoration projects are conducted as intended. Required oversight activities will depend on the size and the scope of the project and may include reviewing project plans, attending planning meetings, conducting site visits, monitoring restoration results, tracking project budgets, and/or other tasks. The lead implementing trustee for each project should be assigned these oversight duties. Depending on the size of the project, more than one trustee or multiple staff from one trustee agency may provide oversight on a project. Effective communication and coordination are important aspects of oversight and are vital to the success of the restoration effort.

3.4.3 Property Acquisition

If one of the alternatives in the Restoration Plan includes land acquisition, an endowment or stewardship funds may be necessary for a non-profit or land trust to cover the long-term enforcement and management costs for the property. These funds may come from NRDAR restoration funds or from an outside source such as a non-profit partner. While it is the Department's policy to not fund the long-term operation and maintenance of property acquired by a governmental agency, actions to restore, rehabilitate, or enhance the natural resources and their services (i.e., habitat) on the acquired property may be paid for from NRDAR restoration funds. All lands acquired for the Department are subject to departmental pre-acquisition regulations and guidelines. In addition, Congressional action may be required prior to acquisition if the acquisition is to be added to existing federal lands.

3.4.4 Legal Protection

A restoration alternative may include, to the extent it is appropriate, the establishment of legal protection measures (e.g., conservation easements or deed restrictions) to ensure continued resource benefits when a restored resource may be vulnerable to future, foreseeable impacts that could negate the effect of the restoration actions. Neither CERCLA nor OPA require that the acquisition of land or interests in land, or imposition of deed restrictions on property for restoration purposes, be in perpetuity. The trustees therefore have broad discretion in deciding the most appropriate combination of restoration actions and legal protections for any restoration effort.

3.4.5 Use of Recovered Restoration Funds

In order to increase restoration opportunities and provide for additional funding mechanisms, funds deposited into the NRDAR Restoration Fund pursuant to a joint and indivisible recovery by the Department and a non-federal trustee may be treated as non-federal funds as a match for a federal grant. Some restrictions apply but this designation allows for the use of NRDAR settlement funds, as long as they are consistent with the provisions of the Restoration Plan, to be used in concert with existing projects and restoration programs to accomplish the restoration objective¹³.

¹³ See NRDAR Policy "Utilization of Natural Resource Joint Recoveries as "non-federal" Monies for Matching Federal Grants – 1999.

4.0 Restoration Completion

The AO should work with the co-trustees to ensure that restoration actions are completed as specified in the Restoration Plan and/or the Consent Decree. Case managers should provide restoration progress reports annually or as requested to ORDA summarizing the progress in implementing the Restoration Plan. Information from these reports will be used to identify restoration milestones and successes.

Lastly, all information regarding restoration implementation must be entered into the DARTS Restoration Project Details page for the case following the protocols established for DARTS. This will allow both the Department and the Bureaus to track and capture the accomplishments as they are completed.

5.0 Case Closure

The Restoration Program applies the criteria below when deciding to close a case after settlement:

1. DOI involvement in the case has ended, and the restoration activities are deferred to other trustees, or
2. The restoration is complete, no funds remain, and DOI involvement in the case has ended.

The specific steps that are required to close a case are outlined in DARTS.

As restoration implementation is nearing completion, case managers should coordinate with the case attorney to ensure that all remaining restoration funds are properly expended. To close a case, restoration projects should have been completed per the performance criteria identified in the Restoration Plan, provisions for long-term stewardship should be in place, all restoration funds must be expended, and the terms of the Consent Decree or bankruptcy terms and conditions must be met. The trustees should then document the completion of the restoration.