

DOI Enviro Damage Assessment Proposal May Add Flexibility

By **Brian Ferrasci-O'Malley** (February 15, 2023)

The U.S. Department of the Interior recently announced that it is considering a significant overhaul of the regulations that govern its natural resource damage assessment program.[1]

Natural resource damages, or NRDs, are often a forgotten element of environmental cleanups. But they can demand a significant amount of time and money from potentially responsible parties, or PRPs.

While environmental disasters like the Deepwater Horizon oil spill incident and its subsequent \$8.8 billion NRD settlement grab headlines, most NRD claims are significantly smaller in scale.

However, in part because of inefficiencies in the current regulatory structure for NRD assessments, even a routine NRD claim can take years to complete and result in an unexpectedly large bill for PRPs. That soon could change.

Interior works through its Office of Restoration and Damage Assessment, or ORDA, to administer the NRDA program. Three main statutes authorize Interior's NRD work: the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, also known as the Superfund law;[2] the Oil Pollution Act;[3] and the Clean Water Act.[4]

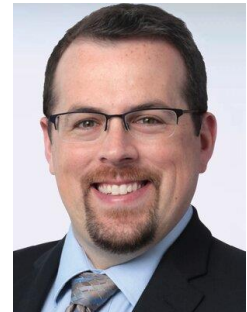
Under these laws and their associated regulations, ORDA oversees and coordinates Interior's case teams as they conduct damage assessments and restoration activities in response to releases of hazardous substances or oil spills that injure the public's natural resources.

CERCLA Section 115 requires Interior to promulgate NRD regulations that establish two different procedures for NRD assessments involving releases of hazardous substances. These are the "standard procedures for simplified assessments requiring minimal field observation," referred to as the Type A rule, and "alternative protocols for conducting assessments in individual cases," referred to as the Type B rule.[5]

On Jan. 19, Interior issued an advance notice of proposed rulemaking proposing to revise the Type A rule, which was last updated in November 1997. Based on what is presented in the notice, Interior is contemplating a broad change of scope for the Type A rule.

The notice suggests an intent to replace the current outdated, restrictive and overly prescribed Type A rule formulas with a more flexible and nimble structure that would apply to a much broader number of NRD claims, and allow for easier negotiated settlements between PRPs, Interior, and the other natural resource trustees such as states and tribes.

This type of reimagined Type A rule could significantly reduce the time and expense involved with NRD claims for both trustees and PRPs, while also allowing Interior to more quickly restore the public's injured natural resources.



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The current Type A rule is only applicable to releases of hazardous substances to two specific aquatic environments — coastal and marine environments, and the Great Lakes — using particular model parameters that are expressly laid out in the regulations. Given that these model parameters were developed in 1987 and 1994, respectively, and that the current Type A rule does not allow for deviation from the parameters, the rule is extremely restrictive, and has rarely been utilized.

In the notice, Interior proposes to reformulate and expand the Type A rule. It suggests trading the current static set of formulas enshrined in the regulations for a procedural structure for negotiated settlements that could employ a range of modeling methods.

Interior explains that a number of "well-established methodologies" to assess natural resource injuries have been developed since the original Type A rule, such as habitat equivalency analysis, resource equivalency analysis and other similar relatively simple models.

In theory, creating such a streamlined and simplified assessment process for a broader range of incidents of smaller scale and scope would reduce transaction costs, and expedite settlement in a broader range of less complex and contentious cases.

Throughout the notice, Interior explains that its goal is finding ways to "reduce transaction costs and expedite restoration." Interior also makes clear that the new Type A rule would be intended for use only in situations where all parties involved — i.e., PRPs and trustees alike — agree to the process.

In order to foster further discussion about what should be in a revised Type A rule, the notice specifically request public comments from interested parties on the following six questions:

1. Which types of simplified assessments should be allowed under a revised Type A rule?
2. Should there be a cap on the size of NRD claims eligible under a new Type A rule?
3. Should the reasonable costs of assessment be included in the total cap for application of the Type A rule?
4. Should PRPs voluntarily participating in a Type A process need to agree to pay the reasonable cost of that process?
5. Is the new Type A rule appropriate for a site with multiple PRPs?
6. How long should a new Type A process last?

These questions implicate a number of the potential concerns surrounding a revised Type A rule. First, there is the concern of how broad a new Type A rule should be. Questions one, two and five all seek information about how much the scope of the new Type A process should expand.

Then there are concerns about costs. Questions two, three and four probe the underlying issue of who pays for NRD assessments, and how much those assessments should cost.

Finally, the questions indicate that Interior is also conscious of the time it currently takes to

complete an NRD claim. Question six suggests the potential for discrete timelines for Type A NRD assessments — which would provide greater certainty to the process, and help PRPs better manage costs.

Interior is accepting comments and suggestions on the notice until March 20. After that time, Interior will review the comments and decide whether to issue a more formal, detailed proposed rule. If Interior decides to proceed with a proposed rule revamping the Type A rule, it could have major benefits for PRPs and trustees alike.

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[1] 88 Fed. Reg. 3373 (Jan. 19, 2023).

[2] 42 U.S.C. §§ 9601, et seq.

[3] 33 U.S.C. §§ 2701, et seq.

[4] 33 U.S.C. §§ 1251, et seq.

[5] See 43 U.S.C. § 9622 (c)(2).