

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
1921 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL. . 1991-92

138

HOUSE AMENDMENT #9 ✓

TO: HCR 29

BY: Leman

Page 1 Line 14

Delete "at least \$700,000,000 within one year"

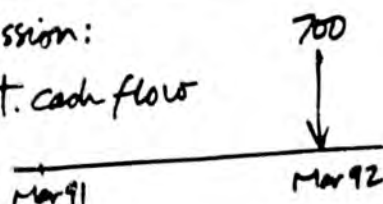
Insert "\$900,000,000 in three equal annual payments within three years"

p. 1, line 16 through p. 2, line 3

Delete entire section

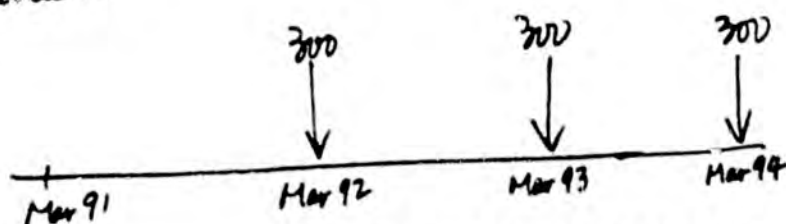
Discussion:

a) ext. cash flow



@ $i = 7\%$, $PV = \$654$ million

b) amended



@ $i = 7\%$, $PV = \$787$ million

$\Delta = +\$133$ million

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

HOUSE AMENDMENT

#10 ✓

TO: HCR 29

BY: Leman

Page 2 Line 23

Delete entire line.

Not offered
Ruled out of order

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

HOUSE AMENDMENT# 11 ✓

TO: HCR 29

BY: Sharp

Page 1 Line 1

Delete after the word settlement
" and suggesting amendments."

Page 1, lines 8 and 9, Delete all after the
word, disapproved through the word made
Page 1, Line 11

Delete "; and be it"

Add "•" after the word written

Page 1, ^{Delete} Line 12 thru 17, ~~delete~~

Page 2 Delete entire page

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

A M E N D M E N T

IN THE HOUSE

BY:

TO: HCR 29

Page 2, line 19, after "clarify":

Delete "the status of"; and

Insert "that"

Page 2, line 20, after "resources":

Insert "are not diminished or extinguished".

A M E N D M E N T

IN THE HOUSE

BY: REP. GRUENBURG

TO: HCR 29

I

Page 1, line 3, after "negotiated":

Delete "a proposed settlement of most of the state's claims arising from the Exxon Valdez oil spill"; and

Insert "an 'Agreement and Consent Decree' and a 'Memorandum of Agreement and Consent Decree', both signed March 12, 1991, and relating to the settlement of State v. Exxon Corporation, et al., No. 89-06852 (Alaska Superior Court, Third Judicial District), and of State v. Exxon Corporation, et al., No. A91-083 (United States District Court, District of Alaska)".

II

Page 1, lines 14-15, after "at least":

Delete all material; and

Insert "\$100,000,000 in settlement of civil claims within 90 days of the date the settlement is approved and, in addition, at least \$600,000,000 in settlement of civil claims within one year thereafter;".

Page 1, lines 14-15:

Delete "of the date the

III

Page 2, line 14:

Delete "and"; and

Page 2, line 15, after "regulations":

Insert ", and that the trust fund shall be subject to oversight and auditing by the General Accounting Office and by the Legislative Budget and Audit Committee"

IV

Page 2, line 23, after "clause.":

Insert "Copies of this resolution shall be sent to the Honorable H. Russel Holland, Chief Judge, United States District Court for the District of Alaska; Jack G. Clarke, Senior Vice-President, Exxon Corporation; Richard Stewart, Assistant Attorney General, Environmental and Natural Resources Division, United States Department of Justice; and to the Honorable Walter J. Hickel, Governor of the State of Alaska."

V

Page 2, line 8:

Delete "civil".

LETTER OF INTENT

It is the intent of the House of Representatives that the constitutionality of the funding mechanisms established in the proposed settlement agreement be determined as expeditiously as possible. To accomplish this the House of Representatives requests that the parties of the federal court on its own motion certify the constitutional questions to the Alaska Supreme Court pursuant to Alaska Appellate Rule 407.

(B) REVISED 5/1

7-LS1330A

Cook

5/1/91

HOUSE CONCURRENT RESOLUTION NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT**

Introduced:

Referred:

A RESOLUTION

1 Relating to the Exxon Valdez oil spill settlement.

2 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **WHEREAS** the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 **WHEREAS** under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 **WHEREAS** the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement has
8 carefully reviewed the proposed settlement, and has concluded that it should be disapproved unless
9 certain changes are made;

10 **BE IT RESOLVED** by the Alaska State Legislature that the proposed settlement is disapproved
11 as written; and be it

12 **FURTHER RESOLVED** that the parties to the proposed settlement are requested to amend the
13 proposed settlement in the following respects:

14 (1) to provide for the payment of at least \$100,000,000 within 90 days of the date the
15 settlement is approved and, in addition, at least \$600,000,000 within one year of the date the settlement
16 is approved;

17 (2) to provide for a plea agreement establishing a criminal fine of at least \$500,000,000,

1 with at least \$100,000,000 of the fine to be remitted on payment of that amount to the State of Alaska
2 as restitution for economic losses incurred by the state as a result of the oil spill, and with at least
3 \$300,000,000 of the fine to be remitted on payment of that amount into the trust fund established in the
4 civil settlement, as restitution for damages to natural resources;

5 (3) to provide that there shall be no deduction from state taxes of any amounts payable
6 under the settlement;

7 (4) to provide for membership of two members of the legislature as ex officio nonvoting
8 members of the trustee board governing the operation of the trust fund established in the civil settlement;

9 (5) to provide that the state's share of the funds recovered in the civil settlement shall
10 be subject to appropriation into the trust fund, and expenditures from the trust fund of the state's share
11 shall be subject to appropriation by the Alaska State Legislature;

12 (6) to provide that if the trust fund is found to be an unconstitutional dedicated fund, the
13 civil settlement shall in all other respects be maintained;

14 (7) to provide that the funding decisions of the trustees of the trust fund shall be made
15 with input from a broad-based citizens' advisory board, that the trustees shall comply with Alaska law
16 regarding open meetings, public records, and adoption of regulations, and that the trust fund shall be
17 subject to oversight and auditing by the general accounting office and the Legislative Budget and Audit
18 Committee;

19 (8) to provide that scientific and economic data obtained by the state shall be released
20 unless the state demonstrates that the data is privileged, and that release of the information would
21 materially and substantially harm the state's case in pending litigation;

22 (9) to clarify the status of third-party claims and claims for damages to archaeological
23 resources;

24 (10) to require the parties to enter good faith negotiations to resolve the claims of third
25 parties; and

26 (11) to delete the "reopener" clause.

27 COPIES of this resolution shall be sent to the Honorable H. Russel Holland, Chief Judge, United
28 States District Court for the District of Alaska; Jack G. Clarke, Senior Vice-President, Exxon
29 Corporation; Richard Stewart, Assistant Attorney General, Environmental and Natural Resources
30 Division, United States Department of Justice; and to the Honorable Walter J. Hickel, Governor of the
31 State of Alaska.



HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:

Referred:

A RESOLUTION

1 Relating to the Exxon Valdez oil spill settlement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement has
8 carefully reviewed the proposed settlement, and has concluded that it should be disapproved unless
9 certain changes are made;

10 BE IT RESOLVED by the Alaska State Legislature that the proposed settlement is disapproved
11 as written; and be it

12 FURTHER RESOLVED that the parties to the proposed settlement are requested to amend the
13 proposed settlement in the following respects:

14 (1) to provide for the payment of at least \$700,000,000 within one year of the date the
15 settlement is approved;

16 (2) to provide for a plea agreement establishing a criminal fine of at least \$500,000,000,
17 with at least \$100,000,000 of the fine to be remitted on payment of that amount to the State of Alaska

1 as restitution for economic losses incurred by the state as a result of the oil spill, and with at least
2 \$300,000,000 of the fine to be remitted on payment of that amount into the trust fund established in the
3 civil settlement, as restitution for damages to natural resources;

4 (3) to provide that there shall be no deduction from state taxes of any amounts payable
5 under the settlement;

6 (4) to provide for membership of two members of the legislature as ex officio nonvoting
7 members of the trustee board governing the operation of the trust fund established in the civil settlement;

8 (5) to provide that the state's share of the funds recovered in the civil settlement shall
9 be subject to appropriation into the trust fund, and expenditures from the trust fund of the state's share
10 shall be subject to appropriation by the Alaska State Legislature;

11 (6) to provide that if the trust fund is found to be an unconstitutional dedicated fund, the
12 civil settlement shall in all other respects be maintained;

13 (7) to provide that the funding decisions of the trustees of the trust fund shall be made
14 with input from a broad-based citizens' advisory board, and that the trustees shall comply with Alaska
15 law regarding open meetings, public records, and adoption of regulations;

16 (8) to provide that scientific and economic data obtained by the state shall be released
17 unless the state demonstrates that the data is privileged, and that release of the information would
18 materially and substantially harm the state's case in pending litigation;

19 (9) to clarify ^{their} the status of third-party claims and claims for damages to archaeological
20 resources; *are not diminished or extinguished*

21 (10) to require the parties to enter good faith negotiations to resolve the claims of third
22 parties; and

23 (11) to delete the "reopener" clause.

Whereas the Attorney General has negotiated a proposed settlement of most of the state's claims arising from the Exxon Valdez oil spill; and

Whereas under the terms of the proposed settlement the legislature has been granted an opportunity to review the settlement and to express its approval or disapproval of it; and

Whereas the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement has carefully reviewed the proposed settlement, and has concluded that it should be disapproved unless certain changes are made; now therefore,

Be it resolved that the House of Representatives disapproves of the proposed settlement as written; and be it further resolved that the parties are requested to amend the proposed settlement in the following respects:

(1) To provide for the payment of at least \$700 million within one year of the date the settlement is approved;

(2) To provide for a criminal fine of at least \$500 million, with at least \$100 million of the fine to be remitted on payment of that amount to the State of Alaska as restitution for economic losses incurred by the State as a result of the oil spill, and with at least \$300 million of the fine to be remitted on payment of that amount into the Trust Fund established in the civil settlement, as restitution for damages to natural resources;

(3) To provide that there shall be no deduction from State taxes of any amounts payable under the settlement;

(4) To provide for membership of two members of the legislature as ex officio non-voting members of the trustee board governing the operation of the Trust Fund established in the civil settlement;

(5) To provide that the State's share of the funds recovered in the civil settlement shall be appropriated into the Trust Fund, and expenditures by the Trust Fund of the State's share shall be subject to appropriation by the Alaska Legislature;

(6) To provide that if the Trust Fund is found to be an unconstitutional dedicated fund, the civil settlement shall in all other respects be maintained;

(7) To provide that the funding decisions of the Trust Fund shall be made with input from a broad-based Citizens Advisory Board, and that the trustees shall comply with Alaska law regarding open meetings, public records, and promulgation of rules and regulations;

(8) To provide that scientific and economic data obtained by the State shall be released unless the State demonstrates that it is privileged, and that release of the information would materially and substantially harm the State's case in pending litigation;

(9) To clarify the status of third party claims and claims for damages to archaeological resources; and

(10) To require the parties to enter good faith negotiations to resolve the claims of third parties.

I. Payment Terms

A. Amount

<u>Civil</u>	<u>Criminal</u>	<u>Total</u>
\$700 million	\$500 million	\$1.2 billion

B. Schedule

1. W/in 90 days: \$100 m. civil, \$500 m. criminal
2. W/in 1 year thereafter: \$600 million civil

C. Other changes and details

1. The civil settlement will be paid as under the present Consent Decree, that is:
\$72 million to State as reimbursement
\$62 million to feds as reimbursement
Cleanup, etc. deducted as in the present agreement; balance to Trust Fund
2. The criminal payments will be:
\$100 million fine to feds
\$100 million restitution to State
\$300 million restitution to Trust Fund
3. Delete reopener clause
4. Exxon agrees not to take a State tax deduction

II. Payment Mechanism

A. Dedicated Fund issue

Severability clause: Exxon must pay even if the Trust Fund is later determined to be an unconstitutional dedicated fund.

B. Appropriations issues

The process must be constitutional:

1. Appropriations into the Trust Fund must be approved by the legislature.
2. Appropriations from the Trust Fund must also be approved by the legislature.

III. Trust Fund Operations/Public Input

- A. Two members of legislature, appointed by presiding officers, to be ex officio non-voting members of trustee board.
- B. Funding decisions to be made w/ public input through broad-based Citizens Advisory Board (legislature must appropriate as stated above).
- C. Subject to Open Meetings Act & Public Records Act.
- D. Subject to GAO & Leg. Budget & Audit oversight and audit.
- E. Establish procedures per rule-making provisions of Alaska Administrative Procedures Act.

IV. Release of Scientific and Economic Data to the Public

- A. Release of information to be subject of separate agreement between legislature and administration.
- B. State may withhold information only if it obtains an in camera protective order by showing:
 - (1) information is privileged pursuant to Public Records Act and Civil Rules of Procedure; and
 - (2) information would materially and substantially harm State's case in pending litigation.

V. Miscellaneous

- A. Clarify status of archaeological claims.
- B. Clarify ambiguity of Paragraph 13 relating to third party claims
- C. Language to be included in Consent Decree requiring the parties to enter good faith negotiations regarding settlement of third party claims and seek to establish procedures for dispute resolution.

HCR

30

House of Representatives



Official Business

P.O. Box V
State Capitol, Rm. 216
Juneau, Alaska 99811
(907) 465-3718

House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

May 1, 1991

Honorable Ben Grussendorf
Speaker of the House
Pouch V
Juneau, Alaska 99811

HCR 30

Dear Mr. Speaker:

THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT
CONSIDERED THE ATTACHED WORK DRAFT (7-LS1323A) ASSIGNED THE NUMBER
HCR 30 BY THE CHIEF CLERK'S OFFICE, WITH THE TITLE:

APPROVING THE PROPOSED EXXON VALDEZ ^{oil spill claims} SETTLEMENT

WITH THE ATTACHED ZERO FISCAL NOTE.

SIGNING DO PASS:

Donna Baines
Gail Phillips

Max Gruenberg, Jr.
Max Gruenberg, Jr., Chairman

OTHER RECOMMENDATIONS:

(Indicate after signature, DNP, NR,
AM)

Max Gruenberg, Jr. DNP
Gene Kukula DNP
Craig Davidson DNP
Mike Savane DNP
Ken Walker DNP
David Douley DNP

no rec. w/
~~*[Signature]*~~

WORK DRAFT

WORK DRAFT

A

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7-LS1323A
Cook
5/1/91

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:
Referred:

A RESOLUTION

1 Approving the proposed Exxon Valdez oil spill claims settlement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the Attorney General has stated in a public meeting that if the legislature fails to
8 approve the proposed settlement the state will take action to terminate the proposal;

9 BE IT RESOLVED by the Alaska State Legislature that it approves the Agreement and Consent
10 Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al., United
11 States District Court, District of Alaska, Civil Action No. A91-083; and be it

12 FURTHER RESOLVED that the Governor is respectfully requested to inform the United States
13 Department of Justice that the legislature has approved the proposed settlement.

HOUSE AMENDMENT

#1

✓
1 Amendment
2 pagesTO: HCE 30BY: BarnesPage 1 Line _____

add new section after line 13

to read - with the following amendment

I. Payment Terms

A. Amount

<u>Civil</u>	<u>Criminal</u>	<u>Total</u>
\$700 million	\$500 million	\$1.2 billion

B. Schedule

1. W/in 90 days: \$100 m. civil, \$500 m. criminal
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\$100 million restitution to State
\$300 million restitution to Trust Fund
3. Delete reopener clause
4. Exxon agrees not to take a State tax deduction

HOUSE AMENDMENT

TO: _____ BY: _____

Page _____ Line _____

D



Language to be included in Consent Decree
requiring the parties to enter good faith
negotiations regarding settlement of third party
claims and seek to establish procedures for
dispute resolution.

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

SCOMM

76:7

ORIGINALS

HOUSE SPECIAL COMMITTEE ON THE EXXON
VALDEZ OIL SPILL CLAIMS SETTLEMENT

MISC. COURT CASES RELATING TO OIL
SPILLS AND ENVIRONMENTAL DAMAGES

STATE OF OHIO, Petitioner,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior,
Respondents,

Public Service Electric and Gas Co., et
al., ASARCO Inc., Intervenor.

NATIONAL WILDLIFE FEDERATION,
et al., Petitioner,

v.

DEPARTMENT OF THE INTERIOR
and United States of America,
Respondents,

Edison Electric Institute, American Mining
Congress, Public Service Electric
and Gas Co., American Petroleum
Institute, ASARCO Inc., Chemical
Manufacturers Association, Intervenor.

STATE OF NEW YORK, Department
of Environmental Conservation, Petitioner,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respondents,

Edison Electric Institute, American Petroleum
Institute, American Mining Congress,
ASARCO Inc., Public Service Electric
and Gas Co., Chemical Manufacturers
Association, Intervenor.

STATE OF COLORADO, Petitioner,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respondents,

Edison Electric Institute, American Mining
Congress, Public Service Electric
and Gas Co., et al., American Petroleum
Institute, ASARCO Inc., Chemical
Manufacturers Association, Intervenor.

STATE OF NEW YORK, et
al., Petitioners,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respondents,

American Mining Congress, Public Service
Electric and Gas Co., et al., American
Petroleum Institute, Edison Electric
Institute, ASARCO Inc., Chemical
Manufacturers Association, Intervenor.

COMMONWEALTH OF
MASSACHUSETTS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respondents,

American Mining Congress, Public Service
Electric and Gas Co., et al., American
Petroleum Institute, Edison Electric
Institute, ASARCO Inc., Chemical
Manufacturers Association, Intervenor.

PEOPLE OF THE STATE OF CALIFORNIA,
ex rel. John K. Van de Kamp,
Attorney General of California, Petitioners,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respondents,

American Mining Congress, Public Service
Electric and Gas Co., et al., American
Petroleum Institute, Edison Electric
Institute, ASARCO Inc., Chemical
Manufacturers Association, Intervenor.

CHEMICAL MANUFACTURERS
ASSOCIATION, Petitioner,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,

Secretary of Department of the Interior
and United States of America,
Respondents.

Edison Electric Institute, ASARCO Inc.,
National Wildlife Federation, et
al., Intervenor.

PUBLIC SERVICE ELECTRIC & GAS
COMPANY, and Dana Corporation,
Petitioners.

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interior
and United States of America, Respon-
dents.

Edison Electric Institute, ASARCO Inc.,
National Wildlife Federation, et
al., Intervenor.

NATIONAL WILDLIFE FEDERATION,
et al., Petitioners,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interi-
or, Respondents.

STATE OF NEW YORK, et
al., Petitioners.

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, Manuel Lujan, Jr.,
Secretary of Department of the Interi-
or, Respondents.

Nos. 86-1529, 86-1575, 86-1580, 86-1585,
86-1587, 86-1590, 86-1591, 86-1594,
86-1597, 88-1291, 88-1366.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 22, 1989.

Decided July 14, 1989.

States, environmental organizations,
chemical industry trade association, manu-
facturing company, and utility company
sought review of regulations promulgated
by the Department of Interior pursuant to
the Comprehensive Environmental Re-
sponse, Compensation, and Liability Act
that governed recovery of money damages

from persons responsible for spills and
leaks of oil and hazardous substances to
compensate for injury such releases might
inflict on natural resources. The Court of
Appeals, Wald, Chief Judge, and Spotts-
wood W. Robinson, III and Mikva, Circuit
Judges, held that: (1) regulation limiting
damages recoverable by government trust-
ees for harmed natural resources to the
lesser of cost of restoring or replacing
equivalent of injured resource or lost use
value of resource was contrary to clearly
expressed intent of Congress and therefore
invalid; (2) record would be remanded to
DOI for clarification of its interpretation of
its own regulations concerning applicability
of CERCLA natural resource damage pro-
visions to privately owned land that was
managed or controlled by federal, state or
local government; and (3) regulation pre-
scribing hierarchy of methodologies by
which lost use value of natural resources
could be measured, that focuses exclusively
on market values for such resources when
market values are available, was not rea-
sonable interpretation of CERCLA.

Ordered accordingly.

1. Health and Environment § 25.5(5.5)

Department of Interior's regulation
providing that damages for despoilment of
natural resources shall be the lesser of
restoration or replacement costs or dimin-
ution of use values was directly contrary to
intent of Congress as expressed in the
Comprehensive Environmental Response,
Compensation, and Liability Act and was
therefore invalid. Comprehensive Environ-
mental Response, Compensation, and Li-
ability Act of 1980, §§ 107(a)(C), (f)(1),
301(c)(2), as amended, 42 U.S.C.A.
§§ 9607(a)(C), (f)(1), 9651(c)(2).

2. Statutes § 223.5(1)

Acquiescence by reenactment rule,
that reenactment of statute without amend-
ment implicitly ratifies agency regulations
issued under statute's auspices, so long as
Congress evidences its awareness of those
regulations, is not applicable to situation in
which regulations violate original statutory
language and Congress' decision not to

ATTORNEY GENERAL

amend relevant statutory provisions evidently stems from belief that provisions have been clear all along.

3. Health and Environment $\S$ 25.15(12)

Record would be remanded to the Department of the Interior for clarification of its interpretation of its own regulations regarding availability of natural resource damages insofar as regulations might extend to lands not owned by government; Comprehensive Environmental Response, Compensation, and Liability Act does not limit definition of natural resources for which damages for injury may be imposed to resources owned by government and regulatory language tracked Act's definition, but regulatory comments appeared to exclude any privately owned property from ambit of natural resource damage provisions, no matter how heavily involved governmental entity might be in managing or otherwise controlling property. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, $\S$ 101(16), 107(a)(C), as amended, 42 U.S.C. A. $\S$ 9601(16), 9607(a)(C).

4. Health and Environment $\S$ 25.5(5.5)

Department of the Interior's regulatory requirement that trustee consider only committed uses in ascertaining uses made of resource would be upheld as interpreted to apply only to calculation of diminution in use values during time required to achieve restoration or replacement of natural resource, for purposes of imposing damages, and as interpreted not to prohibit recovery of cost of restoring or replacing natural resource when that resource has no documented committed use. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, $\S$ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. $\S$ 9607(a)(C), 9651(c)(2).

5. Health and Environment $\S$ 25.5(5.5)

Department of the Interior's regulation prescribing hierarchy of methodologies by which lost use value of natural resources could be measured for purposes of imposing damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was not reason-

able interpretation of the Act to extent regulation established strong presumption in favor of market price and appraisal methodologies, although regulation permitted nonmarket methodologies to be used when market for resource was not reasonably competitive. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, $\S$ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. $\S$ 9607(a)(C), 9651(c)(2).

6. Health and Environment $\S$ 25.5(5.5)

Department of the Interior should consider rule that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured, so long as trustee did not double count, with market valuation serving as one factor to be considered, in determining damages to be imposed for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, $\S$ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. $\S$ 9607(a)(C), 9651(c)(2).

7. Health and Environment $\S$ 25.5(5.5)

Discount rate was properly used to calculate present value of expected future injury in awarding damages for harm to natural resource pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, although possibility that value of particular resource or cost of particular restoration project would increase over time, as function of scarcity, faster than rise in general price level should be taken into account. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, $\S$ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. $\S$ 9607(a)(C), 9651(c)(2).

8. Health and Environment $\S$ 25.5(5.5)

Discount rate of 10% chosen by the Department of the Interior for calculating damages recoverable for expected future harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be upheld. Comprehensive Environmental Re-

sponse, Compensation, and Liability Act of 1980, §§ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. §§ 9607(a)(C), 9651(c)(2).

9. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulation allowing parties potentially responsible for damage to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act to be assigned task of conducting natural resource damage assessment was not improper; CERCLA provision does not preclude government trustee from delegating task of conducting assessment, and assessment was required to follow methods outlined in assessment plan, which had to be drawn up as coordinated effort among all affected government trustees. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

10. Administrative Law and Procedure ⇨453

Health and Environment ⇨25.5(9)

Department of the Interior's establishment of periods in which only parties potentially responsible for damages for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be notified of developments in assessment process and given opportunity to comment was not improper; after assessment plan had been drafted, it had to be made available to public, comments on assessment plan were eventually included in final report on assessment, and involving potentially responsible parties earlier in assessment process was not unreasonable. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

11. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulations limiting definition of "reasonable costs" of assessing natural resource damages for which liability may be imposed on responsible parties pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act to situations in which anticipated cost of assessment is ex-

pected to be less than anticipated damage amount was proper. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(C), as amended, 42 U.S.C.A. § 9607(a)(C).

12. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulation establishing acceptance criteria as framework for determining whether hazardous substance release actually caused injury to particular biological resource for which government trustee is seeking damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be upheld. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. §§ 9607(a)(C), 9651(c)(2).

13. Health and Environment ⇨25.5(5.5)

Department of the Interior reasonably determined that costs of general scientific studies were noncompensable under Comprehensive Environmental Response, Compensation, and Liability Act's provision for recovery of reasonable assessment costs in awarding damages for injury to natural resource. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(C), as amended, 42 U.S.C.A. § 9607(a)(C).

14. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulations requiring states to adopt series of accounting and planning procedures that must be used in handling proceeds from any natural resource damage claims did not exceed rule-making authority granted DOI by the Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c).

15. Health and Environment ⇨25.5(10)

Department of the Interior's failure to provide for punitive damages in damages to be recovered for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was consistent with the Act.

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Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107(c)(3), 301(c), as amended, 42 U.S.C.A. §§ 9607(c)(3), 9651(c).

16. Health and Environment ⇨25.5(5.5)

Department of the Interior's inclusion of contingent valuation as methodology to be employed in assessing damages resulting from harm to natural resource for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act was proper; contingent valuation process includes techniques of setting up hypothetical markets to elicit individual's economic valuation of natural resource, and the methodology qualified as best available procedure for determining damages flowing from destruction of or injury to natural resources if properly applied and structured to eliminate undue upward biases. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c).

17. Constitutional Law ⇨278.1

Health and Environment ⇨25.5(5.5)

Applying rebuttable presumption to natural resource damage assessment arrived at through contingent valuation process, pursuant to Department of the Interior regulations promulgated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was not arbitrary and capricious and would not infringe due process rights of potentially responsible parties. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c); U.S.C.A. Const. Amends. 5, 14.

Petitions for Review of Orders by the United States Department of the Interior.

Erik D. Olson and Gordon Johnson, with whom Eric Glitzenstein, Washington, D.C., Michael Bean, Robert Abrams, Charles R. Dyas, E. Dennis Muchnicki, Columbus, Ohio, Michael R. Hope, James D. Ellman, James M. Shannon, Boston, Mass., Lee P. Breckenridge, Mary E. Hackenbracht, San Francisco, Cal., James E. Tierney, Marcia J.

Cleveland, Mary C. Jacobsen, Kenneth N. Tedford, Hartford, Conn., and Gary Powers were on the brief, for State and Environmental petitioners in nos. 86-1529, et al.

Francine A. Schott, Livingston, N.J., also entered an appearance, for petitioners in no. 86-1580.

Howard A. Kenison and Michael C. Donovan also entered appearances, for petitioners in no. 86-1585.

Susan M. Bernard, Washington, D.C., also entered an appearance, for petitioners in no. 86-1590.

Allene C. Zanger also entered an appearance, for petitioners in no. 86-1591.

John A. Zackrison, with whom Amy R. Sabrin, Jeffrey N. Martin and David F. Zoll, Washington, D.C., were on the joint brief for industry petitioners in 86-1529, et al., and also entered appearances, for intervenor Chemical Mfrs. Ass'n, in nos. 86-1575, 86-1580, 86-1585, 86-1587, 86-1590, 86-1591.

Edward W. Warren and Edmund B. Frost, Washington, D.C., also entered appearances, for petitioners in no. 86-1594.

Lawrence E. Blatnik, Atty., Dept. of Justice, with whom Roger J. Marzulla, Asst. Atty. Gen., Washington, D.C., and Margaret Kane Harrington were on the brief, for respondents in nos. 86-1529, et al.

Christopher Harris and Michael J. Brennan, Washington, D.C., with whom M. Elizabeth Cox, Edward M. Green, G. William Frick, Washington, D.C., Catherine Eshelman, John D. Fognani, Denver, Colo., John A. Zackrison, Jeffrey N. Martin, David F. Zoll, Toni K. Allen and Charles E. Di Leva, Washington, D.C., were on the joint brief, for intervenors.

Eric Glitzenstein, with whom Erik D. Olson, Washington, D.C., and Michael Bean were on the brief, for intervenors Nat. Wildlife Federation, Public Citizen, and Environmental Defense Fund in nos. 86-1529, et al.

Frank H. Morison and John D. Fognani, Denver, Colo., also entered appearances, for intervenor ASARCO, Inc. in nos. 86-

STATE OF OHIO v. U.S. DEPT. OF THE INTERIOR

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Cite as 880 F.2d 432 (D.C. Cir. 1989)

1529, 86-1575, 86-1580, 86-1585, 86-1587, also entered appearances, for intervenor
86-1590, 86-1591, 86-1594 and 86-1597. American Mining Congress in nos. 86-1575,

Edward H. Comer and William L. Fang, 86-1580, 86-1585, 86-1587, 86-1590 and 86-
Washington, D.C., also entered appear- 1591.

ances, for intervenor Edison Elec. Institute Arnold S. Block, Philadelphia, Pa., also
in nos. 86-1575, 86-1580, 86-1585, 86-1587, entered an appearance, for intervenor
86-1590 and 86-1591. American Petroleum Institute in nos. 86-

Douglas E. McAllister, Phoenix, Ariz., 1575, 86-1580, 86-1585, 86-1587, 86-1590,
Roderic T. Dwyer, and M. Elizabeth Cox 86-1591.

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WALD, Chief Judge, and
SPOTTSWOOD W. ROBINSON III and
MIKVA, Circuit Judges:¹

Petitioners are 10 states, three environmental organizations ("State and Environmental Petitioners"), a chemical industry trade association, a manufacturing company and a utility company ("Industry Petitioners"), who seek review of regulations promulgated by the Department of the Interior ("DOI" or "Interior") pursuant to § 301(c)(1)-(3) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or the "Act"), as amended, 42 U.S.C. § 9651(c). The regulations govern the recovery of money damages from persons responsible for spills and leaks of oil and hazardous substances, to compensate for injuries such releases inflict on natural resources.² Damages may be recovered by state and in some cases the federal governments, as trustees for those natural resources.

Petitioners challenge many aspects of those regulations. State and Environmental Petitioners raise ten issues, all of which essentially focus on the regulations' alleged undervaluation of the damages recoverable from parties responsible for hazardous materials spills that despoil natural resources. Industry Petitioners attack the regulations from a different vantage point, claiming they will permit or encourage overstated damages. In addition, three public interest organizations ("Environmental Intervenors") defend the regulations from the attacks of Industry Petitioners, and a collection of corporations and industry groups ("Industry Intervenors") defend the regulations from the attacks of State and Environmental Petitioners.

1. Parts I, II, III, IV, VII, VIII, IX, X, XI and XII were authored by Judge Wald. Part XIII was authored by Judge Robinson. Parts V and VI were authored by Judge Mikva.

We hold that the regulation limiting damages recoverable by government trustees for harmed natural resources to "the lesser of" (a) the cost of restoring or replacing the equivalent of an injured resource, or (b) the lost use value of the resource is directly contrary to the clearly expressed intent of Congress and is therefore invalid. We also hold that the regulation prescribing a hierarchy of methodologies by which the lost-use value of natural resources may be measured, which focuses exclusively on the market values for such resources when market values are available, is not a reasonable interpretation of the statute. We remand the record to DOI for a clarification of its interpretation of its own regulations concerning the applicability of the CERCLA natural resource damage provisions to privately owned land that is managed or controlled by a federal, state or local government. We reject all other challenges to Interior's regulations.

I. BACKGROUND

A. Statutory Background

CERCLA, popularly known as Superfund, was enacted in 1980. Pub.L. No. 96-510, 94 Stat. 2767 (1980). Congress amended it in 1986, in the Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986). Unless otherwise specified, references to CERCLA in this opinion refer to the statute as amended.

CERCLA furnishes the executive branch with the authority to respond to actual and threatened releases of "hazardous substance[s]" and "pollutant[s] or contaminant[s]." § 104(a)(1), 42 U.S.C. § 9604(a)(1). Response actions may include both "removal" (i.e., cleanup of the spilled

2. The natural resource damage regulations are codified at 43 C.F.R. §§ 11.10-11.93 (1987).

substance) and "remedial action" (e.g., dredging, repair of leaking containers, collection of rainfall runoff, relocation of displaced residents). § 101(23)-(25), 42 U.S.C. § 9601(23)-(25). CERCLA established the Superfund as a source of expeditious payment for response actions, although ultimately the liability for response costs is placed on specified classes of responsible parties: past and present owners and operators of vessels and facilities; waste generators or other persons who arranged for disposal, treatment or transport of hazardous substances; and transporters of hazardous substances. §§ 111(a)(1), 107(a), 42 U.S.C. §§ 9611(a)(1), 9607(a). Responsible parties may be required to pay the response costs or, in some cases, to perform the response actions themselves. §§ 106(a), 107(a)(A)-(B), 42 U.S.C. §§ 9606(a), 9607(a)(A)-(B).

The relevant provisions of CERCLA in this case, however, go beyond the mere removal or remedying of spills. CERCLA provides that responsible parties may be held liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." § 107(a)(C), 42 U.S.C. § 9607(a)(C). Liability is to "the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State." § 107(f)(1), 42 U.S.C. § 9607(f)(1).³ The Act provides for the designation of federal and state "trustees" who are authorized to assess natural resource damages and press claims for the recovery of such damages, both under CERCLA and under § 311 of the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act"), 33 U.S.C. § 1321. CERCLA § 107(f)(2), 42 U.S.C. § 9607(f)(2).

Congress conferred on the President (who in turn delegated to Interior) the responsibility for promulgating regulations governing the assessment of damages for natural resource injuries resulting from re-

leases of hazardous substances or oil, for the purposes of CERCLA and the Clean Water Act's § 311(f)(4)-(5) oil and hazardous substance natural resource damages provisions, 33 U.S.C. § 1321(f)(4)-(5). These regulations originally were required to be in place by December 1982. § 301(c), 42 U.S.C. § 9651(c). CERCLA prescribed the creation of two types of procedures for conducting natural resources damages assessments. The regulations were to specify (a) "standard procedures for simplified assessments requiring minimal field observation" (the "Type A" rules), and (b) "alternative protocols for conducting assessments in individual cases" (the "Type B" rules). § 301(c)(2), 42 U.S.C. § 9651(c)(2). Both the Type A and the Type B rules were to "identify the best available procedures to determine such damages." *Id.* The regulations must be reviewed and revised as appropriate every two years. § 301(c)(3), 42 U.S.C. § 9651(c)(3). Under the Act, a trustee seeking damages is not required to resort to the Type A or Type B procedures, but CERCLA as amended provides that any assessment performed in accordance with the prescribed procedure is entitled to a rebuttable presumption of accuracy in a proceeding to recover damages from a responsible party. § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C).

In August 1986, Interior published a final rule containing the Type B regulations for natural resource damage assessments, the subject of this lawsuit. Shortly thereafter, in October 1986, Congress adopted SARA, amending the natural resources damages provisions of CERCLA in several respects. For example, SARA provided that assessments performed by state as well as federal trustees were entitled to a rebuttable presumption, it provided for the recovery of prejudgment interest on damage awards, and it proscribed "double recovery" for natural resources damages. §§ 107(f)(2)(C), 107(a), 107(f)(1), 42 U.S.C. §§ 9607(f)(2)(C), 9607(a), 9607(f)(1). SARA also amended § 301(c) to require Interior to

§ 9607(f)(1).

3. Liability may also be to an Indian tribe for certain resources. § 107(f)(1), 42 U.S.C.

adopt any necessary conforming amendments to its natural resource damage assessment regulations within six months of the effective date of the amendments, "[n]otwithstanding the failure of the President to promulgate the regulations required under this subsection on the required [December 1982] date." § 301(c)(1), 42 U.S.C. § 9651(c)(1).

B. The Natural Resource Damage Assessment Regulations

Interior's response to its assigned task of promulgating regulations for assessing natural resource damages was, to put it charitably, relaxed. In January 1983, after the original statutory deadline had come and gone, Interior issued an advance notice of proposed rulemaking soliciting comments from the public on how to approach the development of the regulations. 48 Fed.Reg. 1,084 (1983). A second advance notice of proposed rulemaking seven months later summarized the comments received in response to the first notice. 48 Fed.Reg. 34,768 (1983). More than a year later, in January 1985, Interior published a notice inviting more public comments and suggesting meetings with interested members of the public. 50 Fed.Reg. 1,550 (1985).

In December 1985, five years after the enactment of CERCLA and three years after the statutory deadline, Interior published a proposed rule setting out (a) regulations concerning the assessment process generally (applicable to both Type A and Type B assessments) and (b) Type B rules in particular. 50 Fed.Reg. 52,126 (1985). A comment period originally set at 45 days was later extended an additional 15 days. 50 Fed.Reg. at 52,126; 51 Fed.Reg. 4,397 (1986).

Ultimately, on August 1, 1986, Interior published a final rule containing general natural resource damage assessment regulations as well as the Type B rules challenged in the present case. 51 Fed.Reg. 27,674 (1986) (codified at 43 C.F.R. §§ 11.10-11.93 (1987)).

The assessment process established by the Type B regulations has four phases.

In the "preassessment phase," a trustee that has become aware of a release of hazardous substances or oil makes an initial determination whether natural resources may have been affected. If further action is deemed warranted, the trustee enters the "assessment plan phase," in which an assessment strategy is mapped out. Next comes the "assessment phase," in which the trustee establishes whether there was in fact an injury to natural resources, quantifies the extent of the injury, and ascertains the appropriate dollar amount of damages caused by the release. Finally, in the "post-assessment phase," the trustee assembles a report documenting the assessment process and presents the responsible party with a demand for payment of damages. See 51 Fed.Reg. at 27,726-27.

The August 1986 regulations were promptly challenged by state governments, environmental groups, industrial corporations and an industry group.

Shortly after the issuance of the August 1986 regulations, Congress amended CERCLA by enacting SARA. As noted above, SARA gave Interior six months in which to conform its natural resource damage assessment rules to the amended statute. In response to SARA, Interior issued revised rules (following notice and comment) in February 1988. 53 Fed.Reg. 5,166 (1988). A state government and an environmental group filed additional challenges to these revised rules, which this court consolidated with the original case.

Interior's formulation of Type A rules (governing simplified damage assessments) was handled in a separate rulemaking proceeding. Following notice and comment, a set of Type A rules was issued as a final rule in March 1987. 52 Fed.Reg. 9,042 (1987). The Type A rules are the subject of a separate petition for review, which was briefed and argued simultaneously with the present case and is decided today in *State of Colorado v. Department of the Interior*, 880 F.2d 481 (D.C.Cir. 1989).

II. STANDARD OF REVIEW

In reviewing an agency's interpretation of a statute, we first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). If so, then both Interior and this court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781; accord *NLRB v. United Food & Comm'l Workers Union Local 23*, 484 U.S. 112, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). This is "Step One" of *Chevron* analysis.

Whether Congress has made its intent clear and unambiguous does not depend on whether a particular phrase of the statutory text standing all alone resolves the matter. Rather, the court must look beyond "the particular statutory language at issue" and examine "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, — U.S. —, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989). Moreover, as the Supreme Court indicated in *Chevron* and has reiterated since then, the reviewing court must "employ[] traditional tools of statutory construction"—including, when appropriate, legislative history—to determine whether Congress "had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2781 n. 9; accord *United Food & Comm'l Workers Union*, 108 S.Ct. at 421; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S.Ct. 1207, 1220-22, 94 L.Ed.2d 434 (1987). If the court, having studied the statutory text, structure and history, is left with the unmistakable conclusion that Congress had an intention on the precise question at issue, "that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2781 n. 9.

If, on the other hand, the statute is ambiguous or is silent on a particular issue, this court must assume that Congress implicitly delegated to the agency the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2783, quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961). In that event, the court must defer to the agency's interpretation of the statute so long as it is reasonable and consistent with the statutory purpose. *Id.* This is "Step Two" of *Chevron* analysis.

We first take up the ten issues raised by State and Environmental Petitioners, followed by the one issue raised by Industry Petitioners.

III. THE "LESSER-OF" RULE

[1] The most significant issue in this case concerns the validity of the regulation providing that damages for despoilment of natural resources shall be "the lesser of: restoration or replacement costs; or diminution of use values." 43 C.F.R. § 11.35(b)(2) (1987) (emphasis added).

State and Environmental Petitioners challenge Interior's "lesser of" rule, insisting that CERCLA requires damages to be at least sufficient to pay the cost in every case of restoring, replacing or acquiring the equivalent of the damaged resource (hereinafter referred to shorthandedly as "restoration"). Because in some—probably a majority of—cases lost-use-value will be lower than the cost of restoration, Interior's rule will result in damages award too small to pay for the costs or restoration. Petitioners point to a section of CERCLA providing that recovered damages must be spent only on restoration as evidence that Congress intended restoration cost-based damages to be the norm. As further proof of such a norm, the same section goes on to state that the measure of damages "shall not be limited by" the sums which can be used for restoration. Petitioners maintain that the "shall not be limited by" language clearly establishes restoration costs as a

"floor" measure of damages. Petitioners also rely on the legislative history of CERCLA and of SARA, claiming that it reinforces the sense of the text and documents Congress' primary emphasis on restoration of natural resources. In particular, they point to a House report on SARA, insisting that it, together with the other statutory indicators, proves conclusively that Congress intended restoration costs to be a minimum measure of damages in natural resource cases.

Interior defends its rule by arguing that CERCLA does not prescribe any floor for damages but instead leaves to Interior the decision of what the measure of damages will be. DOI acknowledges that all recovered damages must be spent on restoration but argues that the amount recovered from the responsible parties need not be sufficient to complete the job. DOI suggests two alternative meanings of the "shall not be limited by" phrase that do not construe it as a damages floor. Finally, DOI argues that the legislative history, like the statutory text, is ambiguous and that Interior's rule for measuring damages is a reasonable one.

Although our resolution of the dispute submerges us in the minutiae of CERCLA text and legislative materials, we initially stress the enormous practical significance of the "lesser of" rule. A hypothetical example will illustrate the point: imagine a hazardous substance spill that kills a rookery of fur seals and destroys a habitat for seabirds at a sealife reserve. The lost use value of the seals and seabird habitat would be measured by the market value of the fur seals' pelts (which would be approximately \$15 each)⁴ plus the selling price per acre of land comparable in value to that on which the spoiled bird habitat was located.⁵ Even if, as likely, that use value turns out to be far less than the cost of restoring the rookery and seabird habitat, it would

nonetheless be the only measure of damages eligible for the presumption of recoverability under the Interior rule.

After examining the language and purpose of CERCLA, as well as its legislative history, we conclude that Interior's "lesser of" rule is directly contrary to the expressed intent of Congress.

A. *The Contours of "the Precise Question at Issue"*

Commencing our *Chevron* analysis, we must first decide exactly what "the precise question at issue" is in the present case. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. Much depends on accurately identifying that issue so as to decide whether Congress has "directly spoken" on it; if so, under *Chevron*'s "Step One" we must give effect to that unambiguously expressed intent. If not, we proceed instead to "Step Two" and determine whether Interior's construction of CERCLA is reasonable and consistent with the statutory purpose.

State and Environmental Petitioners posit that the precise question at issue in this case is what measure of damages must be applied in natural resource damage actions. They argue that Congress *did* address the precise question at issue by deciding that damages must at a minimum encompass the full cost of restoration in every case. See Pet. Br. 18-22. Therefore, petitioners say, this court must strike down the "lesser of" rule on *Chevron* Step One grounds.

Interior also assumes that the precise question at issue here is what measure of damages must be applied in natural resource damage actions. Interior's position, however, is that Congress did *not* definitively address that question. See Resp. Br. 25-27; 51 Fed.Reg. 27,705. To support this view, Interior points out that Congress did not choose a particular measure of damages, opting instead to authorize the President to draft regulations governing

4. See U.S. Dept. of the Interior, "Measuring Damages to Coastal and Marine Natural Resources," vol. I at p. V-37 (mandating \$15 figure for valuation under Type A rules); see also 52 Fed.Reg. 9,092 (1987) (stating that \$15 value is consistent with valuation principles of Type B rules).

5. See Interagency Land Acquisition Conference, "Uniform Appraisal Standards for Federal Land Acquisitions" 9 (1973), Joint Appendix ("J.A.") 273; see also 43 C.F.R. § 11.83(c)(2).

the assessment of damages. § 301(c)(2), 42 U.S.C. § 9651(c)(2) (regulations shall "identify the best available procedures to determine . . . damages" and shall "take into consideration" certain listed factors, among others). Since Congress delegated the matter to the President (who turned it over to DOI), DOI argues that this case is governed by *Chevron* Step Two and that its "lesser of" rule must be upheld if not unreasonable or inconsistent with the statutory purpose.

We find both parties' arguments flawed in one important respect. Both fail to properly describe the "precise question at issue" in the "lesser-of" rule. That question is not what measure of damages should apply in any or all cases which are brought under the Act. As to that larger question, Interior is obviously correct in asserting that Congress delegated to it a considerable measure of discretion in formulating a standard. See § 301(c)(2), 42 U.S.C. § 9651(c)(2). The precise question here is a far more discrete one: whether DOI is entitled to treat use value and restoration cost as having equal presumptive legitimacy as a measure of damages.⁶

Interior's "lesser of" rule operates on the premise that, as the cost of a restora-

tion project goes up relative to the value of the injured resource, at some point it becomes wasteful to require responsible parties to pay the full cost of restoration. See 51 Fed.Reg. at 27,704-05; 50 Fed.Reg. at 52,141. The logic behind the rule is the same logic that prevents an individual from paying \$8,000 to repair a collision-damaged car that was worth only \$5,000 before the collision. Just as a prudent individual would sell the damaged car for scrap and then spend \$5,000 on a used car in similar condition, DOI's rule requires a polluter to pay a sum equal to the diminution in the use value of a resource whenever that sum is less than restoration cost. What is significant about Interior's rule is the point at which it deems restoration "inefficient." Interior chose to draw the line not at the point where restoration becomes practically impossible, nor at the point where the cost of restoration becomes grossly disproportionate to the use value of the resource, but rather at the point where restoration cost exceeds—by any amount, however small—the use value of the resource. Thus, while we agree with DOI that CERCLA permits it to establish a rule exempting responsible parties in some cases from having to pay the full cost of restoration of natural resources,⁷ we also agree with Peti-

6. Although this formulation of the precise question at issue might be viewed as a narrow one, we remind that the *Chevron* Court itself cast the precise question at issue in that case in narrow terms as well. *Chevron* concerned the validity of an EPA regulation that treated all pollution-emitting devices within a given industrial grouping as though they were encased in a single "bubble," for purposes of deciding whether the installation or modification of one such device triggered a statutory requirement that a permit be obtained "for the construction and operation of new or modified major stationary sources." 467 U.S. at 839-40, 104 S.Ct. at 2780. The *Chevron* Court did not ask whether Congress addressed the question of what is a "stationary source[]" within the meaning of the amended Clean Air Act, 42 U.S.C. § 7502(b)(6). Rather, it asked whether "Congress . . . actually ha[d] an intent regarding the applicability of the bubble concept to the permit program." 467 U.S. at 845, 104 S.Ct. at 2783 (emphasis added).

7. This can be inferred from § 301(c)(2) of CERCLA. First, that provision delegates to the President the duty to formulate a measure of damages, which suggests some degree of latitude in deciding what measure shall apply. Sec-

ond, it states that the regulations "shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." § 301(c)(2), 42 U.S.C. § 9651(c)(2). That suggests that DOI is permitted to apply use value in some cases and restoration cost in others (and both in yet others). See also 132 Cong.Rec. H9613 (daily ed. Oct. 8, 1986) (statement of Rep. Jones) ("Where, of course, restoration is technically impossible or the costs thereof are grossly disproportionate to the value of the resources to society as a whole, then other valuation measures, both market and nonmarket, must be used."). Scholars agree that recovery of full restoration cost in every case, no matter how large the sum is, is not required by CERCLA. See Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. Envtl. Aff. L. Rev. 405, 446 (1989); Cross, *Natural Resource Damage Valuation*, 42 Vand.L.Rev. 269, 301, 329 (1989); Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?*, 14 Envtl.L.Rep. 10,304, 10,309-10 (1984). DOI obviously has some latitude in deciding which measure applies in a given case: the rule might for instance hinge on the relationship between

tioners that it does not permit Interior to draw the line on an automatic "which costs less" basis.

Interior's "lesser of" rule squarely rejects the concept of any clearly expressed congressional preference for recovering the full cost of restoration from responsible parties. The challenged regulation treats the two alternative measures of damages, restoration cost and use value, as though the choice between them were a matter of complete indifference from the statutory point of view: thus, in any given case, the rule makes damages turn solely on which ever standard is less expensive. (An analogy would be a government procurement rule that dictated the purchase of the lowest-priced goods, regardless of whether they were domestically made or imported.) If Congress, however, in enacting CERCLA, clearly expressed an intention that DOI's damage measurement rules incorporate a distinct preference for restoration cost over use value, then the "lesser of" rule is inconsistent with that intent. Congress' expressed preference would mean that restoration cost must normally be preferred over use value despite use value being the "lesser" figure, except in unusual situations where the disadvantages or expenses were extreme. (Returning to our analogy, the lowest-price procurement rule would be invalid under *Chevron* Step One if it were promulgated under a statute clearly mandating a preference for domestic goods.) Based on the discussion that follows, we conclude that CERCLA unambiguously mandates a distinct preference for using restoration cost as the measure of damages, and so precludes a "lesser of" rule which totally ignores that preference.

B. Text and Structure of CERCLA

CERCLA provides that parties responsible for hazardous substance releases

restoration cost and use value (e.g., damages are limited to three-times the amount of use value), or it might hinge on the ability of the resource to recover (e.g., use value is the measure whenever restoration is infeasible). DOI has not, however, fashioned its rules along these lines.

8. Although at first glance these two sentences might seem inconsistent, a closer look reveals that the missing link is the absence of the

"shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." § 107(a)(C), 42 U.S.C. § 9607(a)(C). The Regulations promulgated pursuant to § 107(a)(C) are to identify procedures for measuring damages that "shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." § 301(c)(2), 42 U.S.C. § 9651(c)(2). While CERCLA thus empowers DOI to formulate a measure of damages, several other provisions of the Act make it clear that replacement cost and use value are not to be accorded equal presumptive legitimacy in the process.

1. Section 107(f)(1) and the Measure of Damages

The strongest linguistic evidence of Congress' intent to establish a distinct preference for restoration costs as the measure of damages is contained in § 107(f)(1) of CERCLA. That section states that natural resource damages recovered by a government trustee are "for use only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1). It goes on to state: "The measure of damages in any action under [§ 107(a)(C)] shall not be limited by the sums which can be used to restore or replace such resources." *Id.*⁸

a. Limitation on Uses of Recovered Damages

By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at

phrase "or acquire the equivalent" in the latter sentence. This suggests (and the legislative history confirms) that damages recovered in excess of restoration or replacement costs must be spent on acquiring the equivalent of lost resources. See H.R. Rep. No. 253(IV), 99th Cong., 1st Sess. 50 (1985); see also *infra* p. 454 & n. 34.

all. It would be odd indeed for a Congress so insistent that all damages be spent on restoration to allow a "lesser" measure of damages than the cost of restoration in the majority of cases. Only two possible inferences about congressional intent could explain the anomaly: Either Congress intended trustees to commence restoration projects only to abandon them for lack of funds, or Congress expected taxpayers to pick up the rest of the tab. The first theory is contrary to Congress' intent to effect a "make-whole" remedy of complete restoration,⁹ and the second is contrary to a basic purpose of the CERCLA natural resource damage provisions—that polluters bear the costs of their polluting activities.¹⁰ It is far more logical to presume that Congress intended responsible parties to be liable for damages in an amount sufficient to accomplish its restorative aims. Interior's rule, on the other hand, assumes that Congress purposely formulated a statutory scheme that would doom to failure its goals of restoration in a majority of cases.¹¹

In this connection, it should be noted that Interior makes no claim that a "use value" measure will provide enough money to pay

for any of the three uses to which all damages must be assigned: restoration, replacement or acquisition of an equivalent resource. Nor could Interior make such a claim, because its "lesser of" rule not only calculates use value quite differently from restoration or replacement cost but it also fails to link measurement of use value in any way to the cost of acquiring an equivalent resource. For example, Interior could not possibly maintain that recovering \$15 per pelt for the fur seals killed by a hazardous substance release would enable the purchase of an "equivalent" number of fur seals.

b. *The "Shall Not Be Limited By" Language*

The same section of CERCLA that mandates the expenditures of all damages on restoration (again a shorthand reference to all three listed uses of damages) provides that the measure of damages "shall not be limited by" restoration costs. § 107(f)(1), 42 U.S.C. § 9607(f)(1). This provision obviously reflects Congress' apparent concern that its restorative purpose for imposing

internalize the health and environmental costs of that activity into the costs of doing business.

See also *id.* at 31 ("Since S. 1480 is designed to assure that products reflect their true costs, the bill is at its most efficient when such actual costs [imposed by hazardous substance releases] are calculated to the penny."); 126 Cong. Rec. 30941 (1980) ("The guiding principle of those who wrote S. 1480 was that those found responsible for harm caused by chemical contamination should pay the costs of that harm.") (remarks of Sen. Mitchell).

9. See, e.g., 132 Cong. Rec. at H9613 (daily ed. Oct. 8, 1986) ("[The] purpose of the regime, rather, is to make whole the natural resources that suffer injury from releases of hazardous substances.") (remarks of Rep. Jones); 126 Cong. Rec. 30942 (1980) ("[W]e do not want damage to natural resources to await the workings of that [common-law tort litigation] process; we want prompt, full compensation in such cases so we can replant trees in the park...") (remarks of Sen. Mitchell). Under-scoring its intent to accomplish full restoration, Congress in 1980 provided that government trustees could recover restoration costs from Superfund whenever efforts to recover from responsible parties failed (for example, in a secret "midnight dumping" case where the responsible party cannot be determined, or where the responsible party is insolvent). See § 111(c)(2), (b)(2)(A), 42 U.S.C. § 9611(c)(2), (b)(2)(A); see *infra* note 11.

10. See, e.g., S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), 1980 U.S. Code Cong. & Admin. News 6119.

The goal of assuring that those who caused chemical harm bear the costs of that harm is addressed in the reported legislation by the imposition of liability. Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity

11. DOI states that federal or state agencies "are not precluded from supplementing damage funds with other monies to restore, replace, or enhance the injured natural resource." 51 Fed. Reg. 27,705. Those "other monies," however, cannot come from Superfund, as the enactment of SARA in 1986 cut off the availability of Superfund money for restoration of injured natural resources. See SARA § 517(a), Pub.L. No. 99-499, 100 Stat. 1772 (1986), codified at 26 U.S.C. § 9507(c)(1)(A)(ii) (Superfund money to be available "only" to carry out the purposes of, *inter alia*, "section 111(c) of CERCLA ... other than paragraphs (1) and (2) thereof") (emphasis added); *c.f.* CERCLA § 111(c)(2), 42 U.S.C. 9611(c)(2) (providing for Superfund expenditures on restoration of injured resources).

damages not be construed as making restoration cost a damages ceiling.¹² But the explicit command that damages "shall not be limited by" restoration costs also carries in it an implicit assumption that restoration cost will serve as the basic measure of damages in many if not most CERCLA cases. It would be markedly inconsistent with the restorative thrust of the whole section to limit restoration-based damages, as Interior's rule does, to a minuscule number of cases where restoration is cheaper than paying for lost use.¹³

2. Interior's Reading of CERCLA §§ 301 and 107

In the face of § 107's clear preference for restoration as the basic measure of natural resource damages, DOI and Industry Intervenors advance "ambiguities" in the language of §§ 301 and 107, asserting that those ambiguities are sufficient to permit Interior to promulgate the "lesser of" rule under *Chevron* Step Two.

a. The "Take Into Consideration" Language

First, Interior argues that the "take into consideration" language of § 301(c)(2) delegates to Interior the decision of whether and how restoration cost should be taken into consideration. Resp. Br. 25-27; 51 Fed.Reg. 27,705. We have acknowledged that CERCLA does confer on DOI discretion in fashioning the measure of damages; indeed, if § 301(c)(2) were the only instruc-

tion Congress had given, DOI's argument would be a strong one. But the reality is that Interior's discretion is cabined by Congress' determination, as evidenced by the statutory text discussed above, that the measure of damages reflect a preference for restoration cost, at least where restoration is feasible and can be performed at a cost not grossly disproportionate to the use value of the resource. Thus, while DOI is correct in pointing to the "take into consideration" language as hinting at a measure of latitude on the part of DOI, the degree of latitude conferred by Congress is not infinite.

b. The Assessment Costs Language

Industry Intervenors argue that the reference in § 107(a)(C) to including assessment costs in damages awards indicates, by the principle of *expressio unius est exclusio alterius*, that Congress intended only the one narrow departure from common-law damage measurement standards.¹⁴ But this crabbed reading ignores the existence of § 301(c)(2), which states that the factors to be taken into account by the regulations "includ[e] but [are] not limited to" replacement cost and use value. Under the common law, the Industry Intervenors would have us believe, there are no other factors to consider. In light of § 301(c)(2), the *expressio unius* argument, at best a canon for construing statutes in the absence of more definite guidance within the four corners of the act itself, loses force.

nized for damage purposes guarantees that "lost use" will almost always be the chosen measure. Anderson, *supra*, at 442.

12. Interior's regulations provide that, when restoration costs are the "lesser" of the two possible measures, the trustee may recover not only restoration costs but also damages for "the diminution of use values during the period of time required to obtain restoration or replacement." 43 C.F.R. § 11.84(g)(1).

13. Commentators are unanimous in predicting that applying the "lesser of" rule will invariably favor the use value standard. See, e.g., Cross, *supra* note 7, at 307 ("Only about five percent of some resources, such as plants and animals, possess an established economic value."); Anderson, *supra* note 7, at 442; Kenison, Buchholz & Mulligan, *State Actions for Natural Resource Damages: Enforcement of the Public Trust*, 17 *Env'tl.L.Rep.* 10,437-39 (1987). The Anderson article points out that Interior's own strict definition of what "uses" will be recog-

14. Industry Intervenors advance a related argument, to the effect that Congress' choice of the word "damages" in § 107(a)(C) should be read to incorporate the common-law meaning of the term. In the first place, this argument loads a great deal of baggage onto an everyday word which has long since transcended its origins and is now defined in Webster's Dictionary as "compensation in money imposed by law for loss or injury." *Webster's New Collegiate Dictionary* 286 (1977). Moreover, as our examination of CERCLA's legislative history indicates, see *infra* pp. 454-56, Congress' dissatisfaction with the common law provided a central motivation for enacting CERCLA.

We do not think Congress' mere mention of assessment costs in § 107(a)(C) implicitly excludes all other non-common-law components of damages.

c. *The "Shall Not Be Limited By" Language*

Interior and Industry Intervenors propose several alternative readings of the "shall not be limited by" language of § 107(f)(1) in an effort to show that Congress did not unambiguously express a preference for restoration cost as the basic measure of CERCLA natural resource damages. None of their various constructions is plausible, however.

They first contend that the phrase "shall not be limited by" dictates not the measure of damages but the uses to which damages must be put. Industry Intervenors argue that Congress' "primary purpose" in this portion of § 107(f) was "to describe the appropriate uses of the natural resource damages *once they are recovered*, while making sure that section 107(f) did not contradict the scope of recovery set forth in section 107(a)(C)." Ind. Int. Br. 16 (emphasis in original). This is a difficult argument to understand, let alone accept. First, the notion that a sentence beginning with the words, "The measure of damages ... shall ..." refers only to the *uses* of damages rather than the proper *measure* of damages is counterintuitive, especially when the sentence immediately preceding it expressly refers to the *uses* of damages. Second, we fail to see why Congress need be concerned that § 107(f)(1) would "contradict the scope of recovery set forth in" § 107(a)(C). The latter section simply imposes liability for "damages" for injury or loss to natural resources (including assessment costs). Any conflict with subsection (f)(1) is of Industry's own making; it arises only if, as Industry does, one reads a common-law limitation into the word "dam-

ages." See *supra* note 14. The whole argument strikes us as circular. Indeed, the fact that subsection (f)(1) itself explicitly cross-references subsection (a)(C) as the source of liability indicates Congress' conscious design to read the two subsections as compatible and complementary: liability for "damages" is established in subsection (a)(C), while subsection (f)(1) orders DOI not to place a restoration-cost ceiling on the "measure of damages." Industry Intervenors' caution that subsection (f)(1) should not be read "to supplant the measure of damages established in" subsection (a)(C), Ind. Int. Br. 17, is superfluous: subsection (a)(C) does not purport to set a measure of damages, while subsection (f)(1) contains an explicit command regarding "[t]he measure of damages in any action under" subsection (a)(C).¹⁵

Alternatively, DOI and Industry Intervenors propose two readings of the phrase "shall not be limited by," both of which negate restoration costs as the preferred measure of damages.

First, they suggest that the phrase means that damages need not be measured by restoration costs at all; a different measure, *i.e.*, lost use value, is perfectly acceptable under appropriate circumstances. See 51 Fed.Reg. at 27,704-05. This reading, however, seems strained and does not accord with the usual meaning of the phrase "shall not be limited by." Its implausibility is even more obvious from context. The relevant passage reads as follows:

Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources.

15. Industry Intervenors tried rephrasing the point at oral argument, but without success. Counsel argued that the "measure of damages" provision of § 107(f)(1) does not expand on the "categories of recoverable cost" set forth in § 107(a)(C). This of course harks back to the *expressio unius* treatment accorded

§ 107(a)(C)'s mention of assessment costs, which we find unconvincing for reasons already stated. At any rate, § 107(a)(C) makes no mention of "categories of recoverable cost" or anything of the sort. Industry Intervenors' attempt to identify an ambiguity in this aspect of the statute fails.

§ 107(f)(1), 42 U.S.C. § 9607(f)(1). Plainly, the statute lists three legitimate uses of the money (restoration, replacement, or acquisition of an equivalent resource) and then states that the measure of damages shall not be limited by the amount of the first two listed purposes. This context makes it obvious that § 107(f)(1)'s "shall not be limited by" language was not designed to afford DOI the liberty of mandating a lesser measure of damages in all or most cases; rather, the measure of damages must not only be sufficient to cover the intended restoration or replacement uses in the usual case but may in some cases exceed restoration cost by incorporating interim lost use value as well.¹⁶

Interior posits still another reading of the "shall not be limited by" phrase: when restoration cost is used as the basic measure of damages, it is not to be a "ceiling" on damages. Interior's regulations incorporate this view: one regulation provides that, "[i]f restoration or replacement is to form the basis of the measure of damages, the diminution of use values during the period of time required to obtain restoration or replacement may also be included in the measure of damages." 43 C.F.R. § 11.84(g)(1). It seems strange, however, that Congress would single out one alternative measure of damages (restoration costs) and legislate specially to insure that interim use value damages would be added to it, at the same time it was content to let DOI set damages at the lowest amount calculable by any acceptable standard. The absurdity of this reading surfaces when we consider what happens when use value weighs in at a lower cost than restoration, say \$4 million versus \$5 million. Use value is used exclusively, and damages are set at \$4 million. But if restoration should weigh

in at \$3 million, damages can include additional millions for interim lost use, bringing the total beyond the \$4 million figure. See 43 C.F.R. § 11.84(g)(1). Surely Congress had no such mischievous result in mind.

Ultimately, notwithstanding Interior's and Industry's attempts to generate "ambiguities" in the statutory text, § 107(f)(1) of CERCLA evinces a clear congressional intent to make restoration costs the basic measure of damages.

3. Superfund Provisions

CERCLA's Superfund provisions lend additional weight to our conclusion that Interior's "lesser of" rule is not true to the statute. In CERCLA as originally enacted, public trustees could rely on Superfund money to pay for restoration in cases where they could not recover money from the polluters themselves (for example, where the responsible party had become insolvent, or where the responsible party had engaged in secret dumping and thus could not be identified).¹⁷ SARA cut off the availability of Superfund money for natural resource restoration in 1986,¹⁸ but the statutory provisions governing Superfund remain on the books and provide evidence of Congress' intent to require responsible parties to pay restoration costs. Under CERCLA, Superfund monies can be spent to redress harm to natural resources only to (1) assess the extent of the damages, and to (2) finance government trustees' "efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance." § 111(c)(1)-(2), 42 U.S.C. § 9611(c)(1)-(2). The statute, though, bars a trustee from obtaining Superfund money until it has first "exhausted

16. The legislative history makes it clear that amounts recovered in excess of restoration cost are to be spent on acquiring equivalent resources. See *infra* p. 454 & n. 34.

17. See S.Rep. No. 848, *supra* note 10, at 13 (purpose of fund is to finance response actions "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation"); *id.* at 16 (existing statutes are inadequate "to deal with abandoned and inactive sites or with new cases of 'midnight

dumping' onto the ground"); *id.* at 80 (purpose of fund is "to assure prompt payment of valid claims where the claimant has been unable to obtain satisfaction from a liable party"); 126 Cong.Rec. 30932 (1980) (fund to pay cleanup costs and mitigate damages "where a liable party does not clean up or cannot be found") (remarks of Sen. Randolph).

18. See *supra* note 11.

all administrative and judicial remedies to recover the amount of such claim from persons who may be liable" under § 107 as responsible parties. § 111(b)(2)(A), 42 U.S.C. § 9611(b)(2)(A) (emphasis added). Interior's "lesser of" rule, however, means that in the majority of cases, the trustee cannot "recover the amount of such claim" from the responsible parties since use-based damages will be less.¹⁹ So once again, Interior's rule appears to be out of sync with the statutory scheme and with CERCLA's decided emphasis on making polluters pay for restoration of spoiled resources.

4. Settlement Provision

CERCLA's settlement provision provides that a federal trustee may settle a natural resource damages case only "if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged

by [the] release or threatened release of hazardous substances." § 122(j)(2), 42 U.S.C. § 9622(j)(2). Interior's "lesser of" rule is out of step with this settlement provision as well: taken together, they establish a ragged-edged scheme whereby a responsible party can settle only if it pays restoration costs, but those restoration costs will usually be more than it stands to lose by trying the case, if damages are awarded in court under the "lesser of" rule. Normally, a rational polluter would not settle for an amount larger than its potential liability.²⁰ Thus, we should be reluctant to attribute to Congress a Machiavellian intent to allow Interior to undermine its own settlement provision. The fact that Congress insisted on restoration costs as a floor for settlements shows it must have intended a similar measure of damages to operate in the litigation itself.²¹

19. CERCLA's legislative history supports this interpretation. The Senate CERCLA report states:

Monies from the Fund should be available to a State or the appropriate Federal agencies for use to restore, rehabilitate, or acquire the equivalent of such resources which have been injured, lost or destroyed. It should be noted, however, that in a case where the election to pursue an action in court is chosen, the measure of such resource damages shall not be limited to the sums which can be used to restore or replace such resources.

S.Rep. No. 848, *supra* note 10, at 84-85.

Industry intervenors dismiss this passage in the Senate report as "address[ing] a component of the bill that was never passed." Ind.Int.Br. 16. This is untrue. Although subsections (a)(2)(D) and (a)(2)(E) of § 4 of S. 1480 were never passed, the right of state and federal government trustees to recover was expressly authorized "under subsection (a)(2)(C) of this section"—the one subsection of the three that was eventually enacted in CERCLA. S. 1480, § 4(b), reprinted in 1 Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* 488 (Comm. Print 1983) [hereinafter "*Legislative History*"]. The passage in the Senate report addresses subsection (C), not subsections (D) and (E).

20. In bargaining between rational actors, any settlement reached before trial will normally lie between the lower limit of potential liability (\$0, which represents a finding of no liability) and the upper limit of potential liability (under DOL's rule, this will be the "lesser of" use value or restoration cost). Each party will thus achieve its goal of averting the risk of an ad-

verse judgment, because the amount paid by the defendant to the plaintiff will lie somewhere between the two possible extremes that could result from a trial. The amount within that range that the parties will settle on depends partly on their prediction as to the likelihood of a verdict relieving the defendant of liability entirely or awarding damages in an amount smaller than the upper limit of potential liability.

Of course, the foregoing analysis omits transaction costs—such as lawyers' fees and downtime caused by litigation—which the defendant will add to the upper limit of its potential liability when deciding whether to make or accept a particular settlement offer. Given this, it is conceivable that a rational defendant would settle for an amount greater than the maximum potential damages award. Yet this would only happen where the defendant foresaw litigation burdens so enormous that, even after factoring in the likelihood of a verdict relieving him of liability entirely or awarding an amount less than the maximum potential award, acceding to the high settlement amount would be the least costly avenue for the defendant to take.

Interior's "lesser of" rule, on the other hand, envisions a scheme in which a defendant would accept a settlement figure (i.e., restoration cost) vastly greater than the amount it stands to lose at trial (i.e., use value). Given that the difference could often run into millions of dollars, it is difficult to see why Congress would construct such a scenario if it wanted to encourage settlement.

21. Counsel for Interior argues that § 122(j)(2) is not a measure-of-damages provision. This is a debater's point. Section 122(j)(2) is important

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5. Double Recovery Provision

Section § 107(f)(1) provides that there shall be no "double recovery" against a responsible party, for "natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition." 42 U.S.C. § 9607(f)(1). This statutory language is yet another indication that Congress considered "recovery" for "natural resource damages" to "includ[e] the costs of . . . restoration, rehabilitation, or acquisition."

6. CERCLA and the Clean Water Act

The "lesser of" rule is also inconsistent with § 311(f)(4) and (5) of the Clean Water Act, to which Interior's natural resource damage regulations are applicable in accordance with § 301(c)(1) of CERCLA. Section 311 of the Clean Water Act provides that damages recoverable for releases of hazardous substances or oil covered by the CWA "shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed." 33 U.S.C. § 1321(f)(5).²² Thus, the CWA expressly establishes restoration cost as the standard measure of damages.²³

Interior nonetheless takes the position that its "lesser of" rule promulgated under CERCLA trumps the CWA standard. DOI points to § 304(c) of CERCLA, which states that "[i]n any case in which any provision of section 311 of the [CWA] is determined to be in conflict with any provisions of [CERCLA], the provisions of [CERCLA] shall apply." 42 U.S.C. § 9654(c). Interior's position of course assumes a conflict between the two statutes. We perceive none; quite the contrary. The CWA pro-

vides that damages must "include" restoration cost, while CERCLA provides that recovered sums must be spent on restoration and "shall not be limited by" restoration cost. These directives are in harmony: restoration is the basic measure of damages, but damages can exceed restoration cost in some cases. A compatible reading of the two statutes reinforces our view that restoration costs were the intended basis for damages in CERCLA and that there is no authorization for DOI to abandon Congress' strong preference for restoration, clearly expressed in two separate statutes enacted within three years of one another.

C. Legislative History of CERCLA

The text and structure of CERCLA indicate clearly to us that Congress intended restoration costs to be the basic measure of recovery for harm to natural resources. We next examine the legislative history of CERCLA to ascertain if there are any countervailing indications to our conclusion and also to check on Interior's assertions that certain parts of the history are inconsistent with our conclusion and so render the statute ambiguous within the meaning of *Chevron*. Far from finding these arguments persuasive, we conclude that the legislative history of CERCLA—both in its original enactment in 1980 and in its amendment and reenactment in 1986—reinforces our interpretation of the text.

1. The Enactment of CERCLA in 1980

The legislative history of CERCLA confirms that restoration costs were intended to be the presumptive measure of recovery. Senate proponents of the legislation, in the committee report²⁴ and on the Senate

22. Subsections 311(f)(4) and (f)(5) were added to the Federal Water Pollution Control Act in 1977. Pub.L. No. 95-217, § 58(g), 91 Stat. 1566 (1977).

23. See *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 673 (1st Cir.1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981).

24. See S.Rep. No. 848, *supra* note 10, at 84-85 ("Monies from the Fund should be available to a State or the appropriate Federal agencies for use to restore, rehabilitate, or acquire the equivalent of such resources which have been injured, lost or destroyed. It should be noted, however, that in a case where the election to pursue an action under this legislation in court is chosen, the measure of such resource damages shall not be limited to the sums which can be used to restore or replace such resources.") (emphasis added); *id.* at 85 ("It should be noted that the Committee intended that actions to restore, re-

floor,²⁵ repeatedly emphasized that their primary objective in assessing damages for public resources was to achieve restoration.²⁶

The history of the damages provision of CERCLA documents further Congress' intent to broaden government trustees' recovery beyond lost use value. As reported to the Senate floor, CERCLA's forerunner, S. 1480, allowed recovery for, *inter alia*, the following three categories of damages:

(C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss;

(D) any loss of use of any natural resources, without regard to the ownership or management of such resources;

(E) any loss of income or profits or impairment of earning capacity resulting from personal injury or from injury

to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources....

habilitate, or replace natural resources under the provisions of this Act be accomplished in the most cost-effective manner possible." (emphasis added); *id.* ("[N]o restoration action concerning resource damage may take place until a plan outlining the steps to be taken has been developed and adopted....") (emphasis added); *id.* ("The process of developing such a plan will be of great assistance in avoiding unnecessary costs involved in restoring, rehabilitating, or replacing natural resources.") (emphasis added).

25. See, e.g., 126 Cong.Rec. 21377 (1980) ("The most important aspect of this bill from a national viewpoint is the provision of funds for the restoration, rehabilitation and replacement of natural resources.") (remarks of Sen. Gravel) (emphasis added); *id.* at 30941 (responsible parties to be liable for "[l]oss or damage to natural resources... including the cost of restoring injured or destroyed natural resources") (remarks of Sen. Mitchell) (emphasis added); *id.* ("Under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot.") (remarks of Sen. Mitchell) (emphasis added); *id.* at 30942 ("we want prompt, full compensation in such cases so we can replant the trees in the park") (remarks of Sen. Mitchell) (emphasis added); *id.* at 30970 ("The legislation will provide for the restoration of natural resources which have been damaged....") (remarks of Sen. Williams) (emphasis added); *id.* at 30971 ("[t]he provision... for the restoration of damaged natural resources remains in the legislation we are considering today") (remarks of Sen. Chafee) (emphasis added).

S. 1480, 96th Cong., 2d Sess. § 4(a)(2), reprinted in 1 *Legislative History*, supra note 19, at 487-88 (emphasis added). Although (D) and (E), which related to private party recovery, were later dropped from the bill, they evidence a sharp contrast with the language of (C), which governed recovery by public trustees (and which was retained in the enacted version of CERCLA).²⁷ Private parties could recover damages only for lost use values, but public trustees were to be allowed under the language of (C) to recover for the loss of the natural resources themselves, based presumably on some measure other than lost use.²⁸

26. The House concurred in the Senate version of the bill without amendment. 126 Cong.Rec. 31981 (1980).

27. See CERCLA § 107(a)(C), 42 U.S.C. § 9607(a)(C) (establishing liability for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release"). Only government trustees could recover the damages described in subsection (C), both under the original language of the bill, S. 1480, 96th Cong., 2d Sess. § 4(b), reprinted in 1 *Legislative History*, supra note 19, at 488, and under CERCLA as enacted, § 107(f)(1), 42 U.S.C. § 9607(f)(1).

28. Curiously, Industry Intervenor's derive a very different meaning from the history of S. 1480. They argue that the deletion of the "loss of use" language of (D) means there can be no "additional and separate recovery for loss of use." Ind. Int. Br. 15. (Interior also adopted this view at oral argument, although it is inconsistent with Interior's own regulations, which provide for the recovery of both restoration cost and interim lost-use value in some cases. See 43 C.F.R. § 11.84(g)(1).) This argument is flawed by its failure to recognize that (D) and (E) listed lost-use and lost-profit damages separately for a reason: in contrast to the damages available only to government trustees under subparagraph (C), the damages under (D) and (E) were to be made available to private parties. The significance of S. 1480's early formulation lies not in the subsequent deletion of subparagraphs (D) and (E); rather, the existence of (C), (D) and (E) side by side in an early draft of CERCLA shows that Congress always considered sub-

The draft of S. 1480 is even more instructive when viewed alongside the 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), from which the language of S. 1480 appears to have been borrowed. Section 303(a)(2) of OCSLA authorizes damage claims for, *inter alia*, the following:

(C) injury to, or destruction of, natural resources;

(D) loss of use of natural resources;

(E) loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources....

43 U.S.C. § 1813(a)(2)(C)-(E). As was the case with the proposed version of CERCLA, OCSLA makes the damages under paragraph (C) available only to the federal or state governments, while (D) and (E) relate to private party recovery. OCSLA § 303(b), 43 U.S.C. § 1813(b). The legislative history of paragraph (C) of OCSLA makes it clear that restoration costs are the standard of recovery. See H.R. Rep. No. 590, 95th Cong., 1st Sess. 182 (1977), 1978 U.S. Code Cong. & Admin. News 1450, 1588 ("If natural resources are damaged or destroyed by an oil discharge, Federal or State governments may recover the costs and expenses of restoring, repairing, or replacing such resources."); see also H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 131 (1978), 1978 U.S. Code Cong. & Admin. News 1450, 1730.²⁹ Given the similarity between OCSLA and the CERCLA § 107(a)(C) provision for recovery of "damages for injury to, destruction of, or loss of natural resources," Congress' use of restoration as the standard for damages under OCSLA provides further evidence that CERCLA likewise envisions restoration cost as the primary standard of recovery.

Interior, however, advances a supposed "ambiguity" in the legislative history of

paragraph (C)—ultimately enacted into CERCLA—to state a broad measure of damages encompassing, in the majority of cases at least, restoration costs.

29. The regulations under OCSLA, which were promulgated by the Coast Guard, explicitly recognize that damages under 43 U.S.C. § 1813(a)(2)(C) consist of the following:

CERCLA. The 1980 Senate report on CERCLA contains the following statement:

The Committee received testimony indicating that both short- and long-term damages to natural resources resulted from releases of hazardous substances and that standardized techniques for assessing both the biological and economic damages from such releases should be developed. Testimony also indicated that it was appropriate and necessary for the State or in some instances the Federal Government acting as trustee for such resources to seek *restitution for such damages or restoration of such resources*.

S. Rep. No. 848, *supra* note 10, at 84 (emphasis added). Interior argues that the use of the word "or" in the italicized phrase indicates that Congress did not necessarily envision restoration costs as the basic measure of damages. Resp. Br. 29.

We see no basis for Interior's assumption that the word "restitution" is equivalent to "use value." Furthermore, we do not read the statute as mandating that restoration costs are the minimum measure in every natural resource case. We (though not petitioners) acknowledge some degree of latitude on the part of DOI to establish use value as the measure of damages in some class or classes of cases. The precise question before us is whether DOI can use the "lesser of" rule to decide when use value will be the chosen measure and when restoration costs will be chosen instead. The appearance of the word "or" in the Senate report is completely unresponsive to this issue.

2. The Enactment of SARA in 1986

CERCLA's "shall not be limited by" language, its mandate that recovered funds be used solely for restoration activities, and the statements of its sponsors and support-

(1) The cost to restore, rehabilitate, or acquire the equivalent of the natural resource; and

(2) Any additional associated economic loss actually suffered.

33 C.F.R. § 136.217 (1988).

ers during its passage in 1980 all point in one direction: a distinct preference for restoration costs as the normative standard for damages. Congress' enactment of SARA in 1986 also provides strong evidence³⁰ that a restoration measure of damages was the statute's original intent. Of controlling importance in the SARA phase is a House report indicating that, while the "shall not be limited by" language of the original statute would be retained, Interior's demonstrated "confusion" about what that phrase meant³¹ should be resolved in light of Congress' strong emphasis on restoration of resources.³²

While not altering the relevant phrases of § 107(f) in any basic way, SARA

changed the permissible uses for damages from "restore, rehabilitate, or acquire the equivalent" to "restore, replace, or acquire the equivalent," in order to avoid the redundancy of "restore" and "rehabilitate," and to conform the exclusive use clause to the language of the "shall not be limited by" damages clause. See H.R.Rep. No. 253(IV), *supra* note 8, at 50 (emphasis added).³³

In the accompanying Report of the House Committee on Merchant Marine and Fisheries, explicating how the new § 107(f)(1) would work, its sponsors made their intent unmistakable that restoration costs were to be the preferred measure of

30. One commentator has suggested that the 1986 comments "were not contemporaneous with the passage of damage valuation authority and [thus] are postenactment legislative history." Cross, *supra* note 7, at 329-30 n. 329. Yet the 1986 comments are not postenactment in the usual sense of the term. They were voiced during consideration of a measure that amended and reenacted the entire CERCLA statute. More specifically, SARA amended § 107(f)(1), which contains the limitations on the uses of recovered damages and the "shall not be limited by" passage. While one might suggest that SARA left the operative words in place and made changes that are not significant for purposes of measuring damages, see Cross, *supra*, at 330 n. 329, a key House report sets out the SARA sponsors' view that the statute, both as enacted in 1980 and as amended, clearly had restoration as its "primary purpose." H.R.Rep. No. 253(IV), *supra* note 8, at 50. We read the report as indicating that Congress made a conscious decision not to amend the operative language of § 107(f)(1) because it was deemed "clear" all along. *Id.* We think it would be misguided to dismiss that report as mere postenactment history.

31. Although the challenged rules had not yet been published in the Federal Register when the House report was issued in October 1985, Interior had by that time drafted and publicly discussed the "lesser of" rule. See "Type B Technical Information Document: Techniques to Measure Damages to Natural Resources" (Public Review Draft) (1985), J.A. 468, 488-90.

32. Interior disagrees sharply with State and Environmental Petitioners over the degree of importance that should be ascribed to floor statements made by various legislators during consideration of SARA. As Interior points out, more than one House member complained that certain Senators had made floor statements, in support of a conference committee version of SARA, in which they related "what the legisla-

tion might have said or what they wish it said." 132 Cong.Rec. H9563 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell). On this basis, Interior urges us to accord no credence to the views expressed by those vocal critics of the "lesser of" rule. In fact, we rely on other aspects of SARA and its legislative history as establishing the invalidity of the "lesser of" rule.

33. SARA also divided the original single sentence containing the "shall not be limited by" language and the restriction on the uses of recovered damages into three sentences, in order to provide that funds recovered by the federal government need not receive further congressional appropriation before being spent on restoration of injured resources. The language of CERCLA as enacted in 1980 was as follows:

Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of damages shall not be limited by the sums which can be used to restore or replace such resources.

§ 107(f), 42 U.S.C. § 9607(f) (prior to amendment). The language as amended by SARA provides as follows:

Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources.

§ 107(f)(1), 42 U.S.C. § 9607(f)(1).

damages. The committee report indicated that the "shall not be limited by" passage, while "essentially a restatement of the language of" the 1980 version, was aimed at ending what had been a "source of some confusion." H.R.Rep. No. 253(IV), *supra* note 8, at 50. "It is clear from [the] language [of § 107(f)(1)] that the *primary purpose* of the resource damage provisions of CERCLA is the *restoration or replacement of natural resources* damaged by unlawful releases of hazardous substances." *Id.* (emphasis added). Such an unequivocal statement of purpose is irreconcilable with DOI's "lesser of" rule, which would in a majority of cases risk underfunded, half-finished restoration projects.

The same House report went on to explain:

[T]he final clause [dealing with use of damages to acquire a suitable equivalent resource] is necessary because a situation could arise in which the amount of damages caused by a release of hazardous substances is *in excess of the amount that could realistically or productively be used to restore or replace those resources. That is, the total amount of damages may include the costs of restoration and the value of all the lost uses of the damaged resources ... from the time of the release up to the time of restoration. Since the damages contemplated by CERCLA include both, the total amount of damages recoverable would exceed the restoration costs alone.*

34. As the report indicates, Congress intended that trustees in some cases be permitted to recover damages greater than the sum required to restore the resource. The excess would represent interim use value, the value of the lost uses from the time of the spill until the completion of the restoration project. At the same time, Congress required that *all* the funds nonetheless be spent on restoration, replacement or acquisition of an equivalent resource. § 107(f)(1), 42 U.S.C. § 9607(f)(1). Interior apparently has difficulty accepting this premise, see Resp.Br. 33, but it is dictated by the plain terms of CERCLA, and the House Committee on Merchant Marine and Fisheries report indicates that it was part of a conscious design. That report states that the excess over restoration costs must be used to acquire the equivalent of the damaged re-

The Committee therefore intends than [*sic*: probably should be "that"] any excess funds recovered shall be used, in such an instance, for the third purpose spelled out in the language of the amendment, which is to "acquire the equivalent of the damaged resource."

H.R.Rep. No. 253(IV), *supra* note 8, at 50 (emphasis added). The House report thus explicitly assumes that damages "contemplated by CERCLA" will normally include restoration costs at a minimum, plus interim lost-use value in appropriate cases.³⁴ (This House amendment to § 107(f)(1) was adopted by the Conference Committee, H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 204-05 (1986), and Representative Jones, a SARA sponsor, referred to H.R. Rep. No. 253(IV) as a good source of explanation for the SARA amendments. 132 Cong.Rec. H9612 (daily ed. Oct. 8, 1986).) In the face of this passage, the plausibility of the "lesser of" rule, which purposely allows damage recoveries to be set at an amount too small to accomplish restoration (or replacement or acquisition of an equivalent resource), becomes suspect indeed.

Interior's effort to discount the House report fails. Citing the passage quoted above, Interior states: "Although the report recognizes that damages measured might be found to exceed restoration costs, that does not mean that *recovery* should exceed restoration costs." Resp. Br. 33 (emphasis in original). We are at a loss to see how Interior can draw such a distinction between "damages" and "recovery" when the key phrase of the sentence is "damages recoverable."³⁵ In sum, Interi-

source—even though the original resource will eventually be restored. H.R.Rep. No. 253(IV), *supra* note 8, at 50. Perhaps the committee intended the "equivalent" resource to stand in for the injured one while restoration was underway, in light of the fact that some resources such as mature forests might require many years to restore. At any rate, what matters for our purposes is that the statute and its legislative history indicate that Congress intended damages to at least cover restoration costs.

35. Indeed, if the committee did not think that the recovery should exceed restoration costs, one wonders why the report immediately goes on to stipulate how those "excess funds recovered shall be used."

or has not dissuaded us from the view that Congress in its 1986 SARA amendments to CERCLA reiterated its intention to make restoration costs the basic measure of recovery.³⁶

SARA's legislative history also indicates that Congress consciously paralleled CERCLA's provision of Superfund monies for restoration activities and its imposition of liability on responsible parties to defray the expenses of those activities. A House report on SARA explicitly refers to § 111(c)(2)'s provision for using Superfund monies as the model for § 107(f)(1)'s limitation on the uses of recovered damages, noting:

This language [of § 107(f)(1)] is modeled after section 111(c)(2) of CERCLA ... but the money is recovered from the responsible party, not from the fund itself.

H.R.Rep. No. 253(IV), *supra* note 8, at 50.

If CERCLA's damages provision was expressly "modeled after" Superfund's provision allowing claims for restoration costs, the two provisions must incorporate similar theories of recovery. In sum, Interior's rule preventing government trustees from recovering the full cost of restoration clearly runs against the statutory grain.

3. Congress' Rejection of the Premises Underlying the "Lesser-Of" Rule

CERCLA's legislative history undergirds its textual focus on recovering restoration costs as the primary aim of the natural

36. This impression is strengthened by the fact that Congress in 1986 enacted for the first time the settlement provision and the double-recovery provision. As indicated above, those provisions are cast in such a way as to dictate the assumption that Congress intended responsible parties to be liable for restoration costs.

37. We note in passing that the "lesser of" standard does not apply in all non-CERCLA contexts. See, e.g., *Denoyer v. Lamb*, 22 Ohio App. 3d 136, 490 N.E.2d 615, 618-19 (1984) (restoration cost is proper measure where property is used for a residence or for recreation, so long as restoration cost is not "grossly disproportionate" to diminution in market value); *Heninger v. Dunn*, 101 Cal.App.3d 858, 162 Cal.Rptr. 104, 106-09 (1980) (restoration cost is proper measure where owner has a personal reason for

resource damages provisions. Furthermore, it shows that Congress soundly rejected the two basic premises underlying Interior's "lesser of" rule—first, that the common-law measure of damages is appropriate in the natural resource context, and second, that it is economically inefficient to restore a resource whose use value is less than the cost of restoration.

a. CERCLA and the Common-Law Measure of Damages

DOI and Industry Intervenors argue that Congress intended that damages under CERCLA would be calculated according to traditional common-law rules. Accepting for the sake of argument the contention that the "lesser of" rule reflects the common law,³⁷ support for the proposition that Congress adopted common-law damage standards wholesale into CERCLA is slim to nonexistent. DOI contends that Congress meant to adopt traditional methods of damage measurement, "[i]n the absence of clearly expressed Congressional intent to deviate from [the] common law rule." 51 Fed.Reg. at 27,705. The legislative history illustrates, however, that a motivating force behind the CERCLA natural resource damage provisions was Congress' dissatisfaction with the common law.³⁸ Indeed, one wonders why Congress would have passed a new damage provision at all if it were content with the common law.

Nor are we persuaded by Interior's reference to a colloquy on the Senate floor be-

restoring land to its original condition, so long as restoration cost is not unreasonably disproportionate to diminution in market value); *Restatement (Second) of Torts* § 929, comment b (1977).

38. See, e.g., S.Rep. No. 848, *supra* note 10, at 13-14 ("[T]raditional tort law presents substantial barriers to recovery... [C]ompensation ultimately provided to injured parties is generally inadequate."); H.R.Rep. No. 172(1), 96th Cong., 1st Sess. 17 (1979) ("Common law remedies [are] ... inadequate to compensate victims in a fair and expeditious manner"); 126 Cong. Rec. 26347 (1980) ("Existing environmental, common, compensatory, and liability laws are not adequate ... [and] provide little or no relief for cleanup and compensation.") (remarks of Rep. Weiss).

tween Senator Simpson, a vocal opponent of CERCLA in committee who ultimately voted in favor of the bill, and Senator Stafford, a CERCLA sponsor. Senator Simpson stated: "I ... trust that the traditional legal rules for calculating of damages for injury in tort will be observed as part of cost effectiveness," citing as an example the measurement of damages as the lesser of lost use value or restoration cost. 126 Cong.Rec. 30,986 (1980). Interior quotes Senator Stafford as responding: "Yes, the Senator is correct." Resp. Br. 30. In all fairness, Interior's brief indicates by an ellipsis with the customary three dots that material between the query and the answer has been left out. The reality, however, is that in the interim Senator Simpson turned away from the measure-of-damages topic entirely and discussed in over 200 words an entirely unrelated provision of the statute before Senator Stafford said, "Yes, the Senator is correct," in response to a specific point on the unrelated topic. Based on what we read, there was no completed exchange between the two Senators on the subject at hand. In the face of Congress' stated dissatisfaction with the common law, Interior's reliance on this colloquy to justify its adherence to common-law damage measures is misplaced.

b. CERCLA and Economic Efficiency

Alternatively, Interior justifies the "lesser of" rule as being economically efficient. Under DOI's economic efficiency view, making restoration cost the measure of damages would be a waste of money whenever restoration would cost more than the use value of the resource. Its explanation of the proposed rules included the following statement:

[i]f use value is higher than the cost of restoration or replacement, then it would be more rational for society to be compensated for the cost to restore or replace the lost resource than to be compensated for the lost use. Conversely, if

restoration or replacement costs are higher than the value of uses foregone, it is rational for society to compensate individuals for their lost uses rather than the cost to restore or replace the injured natural resource.

50 Fed.Reg. at 52,141. See also 51 Fed. Reg. at 27,704 ("lesser of" rule "promotes a rational allocation of society's assets").

This is nothing more or less than cost-benefit analysis: Interior's rule attempts to optimize social welfare by restoring an injured resource only when the diminution in the resource's value to society is greater in magnitude than the cost of restoring it. And, acknowledgedly, Congress did intend CERCLA's natural resource provisions to operate efficiently. For one thing, the Act requires that the assessment of damages and the restoration of injured resources take place as cost-effectively as possible.³⁹ Moreover, as we have indicated, there is some suggestion in the legislative history that Congress intended recovery not to encompass restoration cost where restoration is infeasible or where its cost is grossly disproportionate to use value. See *supra* note 7.

The fatal flaw of Interior's approach, however, is that it assumes that natural resources are fungible goods, just like any other, and that the value to society generated by a particular resource can be accurately measured in every case—assumptions that Congress apparently rejected. As the foregoing examination of CERCLA's text, structure and legislative history illustrates, Congress saw restoration as the presumptively correct remedy for injury to natural resources. To say that Congress placed a thumb on the scales in favor of restoration is not to say that it forswore the goal of efficiency. "Efficiency," standing alone, simply means that the chosen policy will dictate the result that achieves the greatest value to society. Whether a particular choice is efficient depends on how the various alternatives are valued.

assessments and restoration actions to be accomplished "in the most cost-effective manner possible").

39. See § 107(a)(C), 42 U.S.C. § 9607(a)(C) (assessing liability for "the reasonable costs of assessing such injury, destruction, or loss"); S.Rep. No. 848, *supra* note 10, at 85-86 (damage

Our reading of CERCLA does not attribute to Congress an irrational dislike of "efficiency"; rather, it suggests that Congress was skeptical of the ability of human beings to measure the true "value" of a natural resource.⁴⁰ Indeed, even the common law recognizes that restoration is the proper remedy for injury to property where measurement of damages by some other method will fail to compensate fully for the injury.⁴¹ Congress' refusal to view use value and restoration cost as having equal presumptive legitimacy merely recognizes that natural resources have value that is not readily measured by traditional means.⁴² Congress delegated to Interior the job of deciding at what point the presumption of restoration falls away, but its

repeated emphasis on the primacy of restoration rejected the underlying premise of Interior's rule, which is that restoration is wasteful if its cost exceeds—by even the slightest amount—the diminution in use value of the injured resource.

4. Acquiescence-by-Reenactment Argument

DOI and Industry Intervenors argue finally that Congress' failure to amend the "shall not be limited by" language of § 107(f)(1) in 1986 indicates that Congress acquiesced in Interior's "lesser of" rule. Concededly, Congress, in enacting SARA, amended § 107(f)(1) of CERCLA without changing the "shall not be limited by" phrase, even after Interior published its

40. This skepticism is shared by many scholars. See, e.g., Anderson, *supra* note 7, at 443 ("Direct consumer behavior will not produce prices if resources are not directly traded in markets, which is often the case with resources for which damages under the Superfund may be recovered."); *id.* at 451 ("[T]he difficulty [of a lesser-of rule] is that environmental damage computations and selection of damage assessment methodologies involve great uncertainty. Lost use value is a difficult concept to define even qualitatively, but an even greater problem comes in quantifying the lost use values."); Cross, *supra* note 7, at 307-08, 325; Breen, *supra* note 7, at 10,307 (Estimates of use value as being smaller than restoration cost "may sometimes be the result of the market failing to value important ecological attributes.... [The use value] measure may ignore the 'consumer surplus' involved—the difference between what the user would be willing to pay and the good's price.").

Cross explains how the use of restoration cost as a presumptive measure of damages does not repudiate the goal of economic efficiency:

At first glance, restoration cost appears to be inferior, because it is a cost-based, supply-side measure, rather than a demand-side, value-based measure of natural resource value. For this reason, when natural resource economics advances far enough to provide an adequate demand-side measure, reliance on restoration cost will become inappropriate. At present, however, the economic tools for valuing natural resources are of questionable accuracy.... [Using restoration cost as the measure of damages] acknowledges the current ignorance of economic valuation of resources by adopting a cautious, preservationist approach.

Cross, *supra*, at 331-32. Others agree that restoration cost can generally be estimated more accurately and easily than can the value of an injured resource. See Anderson, *supra*, at 442, 445; Breen, *supra*, at 10,307.

41. See, e.g., *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 502 N.E.2d 532, 536 (1987) (restoration cost is proper measure where diminution in market value is unsatisfactory or unavailable as a measure of damages, as in the case of structural damage to a church); *Weld County Bd. of Comm'rs v. Slovek*, 723 P.2d 1309, 1316-17 (Colo.1986) (court may, in its discretion, award restoration cost where award of diminution in market value would not adequately compensate owner for some personal reason, provided that restoration cost is not "wholly unreasonable" in relation to diminution in value); see also *supra* note 37.

42. Before Interior promulgated its "lesser of" rule, Interior's own staff recognized that the pursuit of economic efficiency does not necessarily mean that restoration should be avoided whenever its costs exceed the economic value of a resource. See J.A. 2061. Recognizing CERCLA's "strong bias towards restoration," a 1985 draft paper on the assessment of natural resource damages argued that in the case of natural resources committed to specific uses by law (such as parks, wilderness areas and wildlife refuges), restoration is "economic[ally] feasible" whenever restoration costs are not "significantly greater than the economic value of the resource." J.A. 2063-64 (emphasis added). This view was incorporated into the proposed rules, which would have established a class of "special resources" to which the "lesser of" rule would not apply; instead, restoration cost would be recoverable so long as restoration were feasible at a cost not "grossly disproportionate to the benefits gained." 50 Fed.Reg. at 52,154. This rule ultimately was rejected in favor of blanket application of the "lesser of" rule to all natural resources. 51 Fed.Reg. at 27,725.

initial formulation of the challenged "lesser of" rule. And there are indeed cases holding that reenactment of a statute without amendment implicitly ratifies the agency regulations issued under its auspices, so long as Congress evidenced its awareness of those regulations. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 1841 n. 66, 72 L.Ed.2d 182 (1982); *IBEW Local No. 474 v. NLRB*, 814 F.2d 697, 711-12 (D.C.Cir.1987). Yet it is also true that the acquiescence-by-reenactment rule loses force where the regulations are found to have violated the clear terms of the statute to begin with. If, as we have concluded, CERCLA itself required the measure of damages to incorporate a distinct preference for restoration costs, and DOI's 1986 regulations ran contrary to that dictate, Congress' amendment of CERCLA later that year without modifying the statutory text in response to DOI's erroneous interpretation is not dispositive. As a general matter, we would be reluctant to hold that the failure to amend an already-clear statutory command generates "ambiguity" where none existed before.

But we need not decide that question as a general matter, because in the present case Congress did, in fact, respond to Interior's erroneous damage measure in a committee report, which expressed dissatisfaction with the "confusion" surrounding § 107(f)(1) and reiterated that the "primary purpose" of CERCLA's natural resource damages provisions was restoration or replacement of natural resources. H.R.Rep. No. 253(IV), *supra* note 8, at 50; see also *supra* pp. 42-46. The report stated unequivocally that damages recoverable under CERCLA "include both" restoration cost and lost use value for the period between the spill and the completion of restoration. *Id.* Although Interior might argue from the report's description of § 107(f)(1) as "the source of some confusion" that the House committee was acknowledging "ambiguity" within the meaning of *Chevron*, the report's vigorous and exasperated effort to put an end to the "confusion" once and for all accords more easily with our understanding (and Congress') that the

1980 version of CERCLA made the matter clear in the first place. Immediately following its "confusion" sentence, the report states that "[b]oth the amendment and the present language of CERCLA" require that recovered sums be spent on restoration, replacement, or acquisition of equivalent resources. *Id.* (emphasis added). The report continues: "It is clear from this language that the primary purpose of the resource damage provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances." *Id.* (emphasis added). Thus, Congress apparently declined to amend the pertinent language of § 107(f)(1) precisely because it deemed the language to have been clear all along. This view of Congress' 1986 mindset is consistent with the fact that no legislator even *proposed* a change in the relevant statutory language. DOI's acquiescence argument would not automatically prevail even if Congress had considered and rejected a SARA bill expressly overruling the "lesser of" regulation. See *Firestone Tire & Rubber Co. v. Bruch*, — U.S. —, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). Here, given that no such bill was ever introduced, the acquiescence argument is weaker still. See 2A C. Sands, *Sutherland on Statutory Construction* § 49.09 at 401 (4th ed. 1984) ("The presumption of acquiescence and adoption can be rebutted by other legislative history.").

[2] Were we to infer congressional approval of Interior's rules because it did not amend the statute to explicitly repudiate them, we would in effect be insisting that a Congress legislatively reiterate an already clear statutory command in order to fend off an impermissible interpretation. As we all know, many statutes are on the books for which no congressional majority could presently be garnered *either* to reenact or to repeal, yet those acts continue as valid law; indeed, a canon of equal worth with the acquiescence-by-reenactment rule is the one disfavoring repeal by implication. We conclude that the acquiescence-by-reenactment rule is not applicable to a situation where the regulations violate the original

statutory language and where Congress' decision not to amend the relevant statutory provisions evidently stems from a belief that the provisions have been clear all along.

D. Conclusion

Our reading of the complex of relevant provisions concerning damages under CERCLA convinces us that Congress established a distinct preference for restoration cost as the measure of recovery in natural resource damage cases. This is not to say that DOI may not establish some class of cases where other considerations—i.e., infeasibility of restoration or grossly disproportionate cost to use value—warrant a different standard. We hold the "lesser of" rule based on comparing costs alone, however, to be an invalid determinant of whether or not to deviate from Congress' preference.

IV. THE PUBLIC OWNERSHIP RULE

[3] The second issue raised by State and Environmental Petitioners is whether the regulations invalidly limit the availability of natural resource damages to cases where the resources harmed (such as land, water, air, fish and wildlife) are owned by federal, state, local or foreign governments, rather than by private parties. The critical language in the DOI regulations mirrors the language of the statute, but State and Environmental Petitioners complain that DOI's comments accompanying the publication of the regulations articulate an understanding of the regulation that is inconsistent with the statute. The issue is further complicated by the statements of DOI counsel at oral argument, which put yet another interpretive gloss on the regulation.

A. The Statute

1. Statutory Language

The critical language is contained in CERCLA's definition of the term "natural

resources." The statute provides that responsible parties shall be liable for "damages for injury to, destruction of, or loss of natural resources." § 107(a)(C), 42 U.S.C. § 9607(a)(C). In the "definitions" sections, the statute provides that "natural resources" are resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States[.] . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." § 101(16), 42 U.S.C. § 9601(16). The difficult questions, obviously, center around the series of phrases: "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" a state or federal or foreign government.

Initially we deal with one argument presented by State and Environmental Petitioners that is without merit. They point to a section of CERCLA providing that liability for harm to natural resources "shall be to the United States Government and to any State for *natural resources within the State* or belong to, managed by, controlled by, or appertaining to such State" and to Indian tribes and their members in some circumstances. § 107(f)(1), 42 U.S.C. § 9607(f)(1) (emphasis added). State and Environmental Petitioners argue on the basis of this section that CERCLA covers injuries to any land, water, air, fish and wildlife that exist "within [a] State"—a reading which, if true, would establish natural resource damage liability for harm to all private as well as public property. This interpretation, however, rips the "within the State" phrase out of its statutory context. "[N]atural resources within the State" incorporates § 101(16)'s definition of "natural resources" as resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the state. Thus it is this series of phrases, and not the "within the State" language, that controls the issue.⁴³

43. One might wonder why CERCLA § 107(f)(1) uses the phrase "within the State" at all, especially since it is followed immediately by the

words "or belonging to, managed by, controlled by, or appertaining to such State." State and Environmental Petitioners advance a theory

Further textual evidence is provided by CERCLA's references to resources held by Indian tribes and their members. CERCLA (as amended by SARA) includes in its definition of "natural resources" those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by . . . any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." § 101(16), 42 U.S.C. § 9601(16) (emphasis added). This addition of the Indian clauses in 1986 expanded but combined the definition of "natural resources" to include some resources under purely private ownership. No such provision would have been necessary if Congress either in 1980 or in 1986 had intended "natural resources" to generally include resources under purely private ownership.

It should be noted, however, that while the statute excludes purely private resources, it clearly does not limit the definition of "natural resources" to resources owned by a government. If that were the meaning of § 101(16), then all the phrases other than "belonging to" would be surplusage. If the words "managed by, held in trust by, appertaining to, or otherwise controlled by" mean anything at all, they must refer to certain types of governmental (federal, state or local) interests in privately-owned property.⁴⁴

2. Legislative History

The legislative history of CERCLA further illustrates that damage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of the statute. Early drafts of CERCLA would have covered private prop-

erty. See H.R. 7020, 96th Cong., 2d Sess. § 5 (1980), reprinted in 2 *Legislative History*, supra note 19, at 40 (damages to include "all damages for personal injury, injury to real or personal property, and economic loss, resulting from such release or threatened release"); H.R. 85, 96th Cong., 1st Sess. § 103(a)(2), reprinted in 2 *Legislative History* at 487 (damages to include "injury to, or destruction of, real or personal property"); S. 1480, 96th Cong., 1st Sess. § 4(a)(2)(A), reprinted in 1 *Legislative History* at 169 (damages to include "any injury to, destruction of, or loss of any real or personal property"). Each of these proposed provisions was rejected and the statute's "natural resources" formulation was adopted instead. Congress quite deliberately excluded purely private property from the ambit of the natural resource damage provisions.

that the phrase "held in trust by" appears only in § 101(16) while the phrase "within the State" appears only in § 107(f)(1). They infer from this that Congress believed the two to be synonymous; i.e., all privately owned land within a state is deemed to be held in trust by that state.

For reasons set out below, we do not believe Congress held such a view. Rather, the expression "within the State" permits a state to recover damages not only for resources owned by, managed by, appertaining to or otherwise controlled by the state government, but also for

B. The Regulations and Accompanying Commentary

The critical language of the DOI regulation, 43 C.F.R. § 11.14(z), precisely mirrors the CERCLA definition of "natural resources." State and Environmental Petitioners challenge, however, the DOI comments accompanying publication of the regulations. These comments—they say—suggest a too-narrow reading of the statutory/regulatory language to prohibit recovery for injury to publicly managed private property.

The preamble to the final rule contained the following two statements:

The Department believes that Congress has defined "natural resources" with sufficient specificity to leave no doubt that resources owned by parties other than Federal, State, local or foreign govern-

resources owned by, managed by, appertaining to or otherwise controlled by a local government or a foreign government—if those resources exist "within the State." This makes sense because the definition of "natural resources" in § 101(16) includes resources appertaining to local and foreign governments, while the liability provision of § 107(f)(1) does not empower those governments to bring actions for damages.

44. See Breen, supra note 7, at 10,305-06.

ments (i.e., privately-owned resources) are not included....

The Department notes, as stated above, that section 101(16) of CERCLA clearly indicates that damage to privately-owned natural resources are not to be included in natural resource damage assessments.

51 Fed.Reg. at 27,696.

Taken at face value, these comments appear to exclude *any* privately owned property from the ambit of the natural resource damage provisions, no matter how heavily involved a governmental entity may be in managing or otherwise controlling the property. This reading of the statute would ignore everything that comes after the words "belonging to." If DOI's position is truly that the statute and the regulation limit recovery for damages to resources where title is held by a governmental entity, it would pose a serious risk of running afoul of CERCLA.

Counsel for DOI has given us strong reason to believe, however, that the statements in the preamble should not be read so literally. At oral argument, counsel stated that the reach of the CERCLA natural resource damage provisions does not hinge solely on ownership—or, for that matter, on the exercise of a formal document transferring the property to a government entity to be held in trust. Rather, a substantial degree of government regulation, management or other form of control over the property would be sufficient to make the CERCLA natural resource damage provisions applicable. (For example, a state law requiring owners of tideland property to permit public access could well bring the land within the ambit of CERCLA's natural resource damage provisions. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 799 n. 12, 98 L.Ed.2d 877 (1988) ("even in some of these States—i.e., even where tidelands are privately held—public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized").) Whether this assertion by DOI counsel or the statements con-

tained in the preamble state the official position of DOI is not altogether clear. Since the DOI regulations themselves track the statutory language precisely, we remand the record to the agency for a clarification of its interpretation of its own regulations insofar as they may extend to lands not *owned* by the government.

V. THE "COMMITTED USE" REQUIREMENT

[4] The regulations provide that "[b]efore estimating damages based on the diminution of use values under § 11.83 of this part, the uses made of the resource services identified in the Quantification phase should be determined." 43 C.F.R. § 11.84(b)(1). In ascertaining the "uses made of a resource," a trustee may consider only "committed uses":

Only committed uses, as that phrase is used in this part, of the resources or services over the recovery period will be used to measure the change from the baseline resulting from injury to a resource. The baseline uses must be reasonably probable, not just in the realm of possibility. Purely speculative uses of the injured resource are precluded from consideration in the estimation of damages.

43 C.F.R. § 11.84(b)(2). A "committed use" is defined as

either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected.

43 C.F.R. § 11.14(h).

Environmental petitioners object that the "committed use" requirement is inconsistent with congressional intent because for many natural resources, it will be difficult for trustees to document currently committed uses. Few existing uses, especially in remote areas, have been surveyed and recorded, and "legal, administrative, budgetary, or financial commitment[s]" may be poorly documented before a discharge occurs.

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We uphold the "committed use" criterion because we interpret it as applying only to the calculation of use values. Because we also invalidate the current version of the "lesser of" rule, the "committed use" requirement is relevant, as the regulations now stand, only to the calculation of diminution in use values during the period required to achieve restoration or replacement, *see* 43 C.F.R. § 11.84(g), with one exception not important here, *see* 43 C.F.R. § 11.62(b)(ii), (iii) (establishing that standards of the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-9, or the Clean Water Act, 33 U.S.C. §§ 1251-1376, can be used to define "injury" to a surface water resource only if the resource is "committed" to a use protected by those statutes). Viewed in this light, the "committed use" standard is an eminently reasonable construction of the statute, because it avoids the need for unreliable, and likely self-serving, speculation regarding future possible uses. Congress directed DOI to select the "best available" methodologies for determining damages, 42 U.S.C. § 9651(c)(2), and a procedure that permitted unduly speculative assessments would not fulfill this intent. Given that the "committed use" concept does not restrict trustees' ability to recover damages except for use values lost during the interim period before restoration is complete, we find that DOI's approach does not unduly restrict recovery of damages for natural resource injuries.

Our decision to uphold the "committed use" requirement is premised on our interpretation of the regulation to mean that a trustee is not prohibited from recovering the costs of restoring or replacing a natural resource, even when that resource has no documented "committed use." This was confirmed by counsel for DOI at oral argument. Although the preamble to the rules contains some stray language to the contrary, *see* 51 Fed.Reg. 27,713, 27,772 (1986), we believe the construction we rely on today is the best interpretation of the regulations. The "committed use" language appears in a section aimed at determining "uses made of a resource" for purposes of "estimating damages based on the diminution of use values," 43 C.F.R. § 11.84(b)(1).

The "committed use" standard immediately follows, in subsection 11.84(b)(2). By their terms and structure the regulations thus provide that proof of a "committed use" is not a prerequisite to recovery of restoration costs. Moreover, imposing such a requirement on calculations of restoration cost would be irrational because a resource can be restored to its *ex ante* condition, or a replacement resource acquired, without the need to determine the precise uses to which that resource had previously been put. DOI's concern about speculative estimates of value is entirely absent when restoration cost, rather than use value, is the focus of damage assessment.

We uphold the "committed use" requirement on this basis.

VI. THE HIERARCHY OF ASSESSMENT METHODS

[5] The regulations establish a rigid hierarchy of permissible methods for determining "use values," limiting recovery to the price commanded by the resource on the open market, unless the trustee finds that "the market for the resource is not reasonably competitive." 43 C.F.R. § 11.83(c)(1). If the trustee makes such a finding, it may "appraise" the market value in accordance with the relevant sections of the "Uniform Appraisal Standards for Federal Land Acquisition," *see* 43 C.F.R. § 11.83(c)(2). Only when neither the market value nor the appraisal method is "appropriate" can other methods of determining use value be employed, *see* 43 C.F.R. § 11.83(d).

Environmental petitioners maintain that Interior's emphasis on market value is an unreasonable interpretation of the statute, under the so-called "second prong" of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984), and we agree. While it is not irrational to look to market price as one factor in determining the use value of a resource, it is unreasonable to view market price as the *exclusive* factor, or even the predominant one. From the bald eagle to the blue whale and snail darter, natural

resources have values that are not fully captured by the market system. See *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 673-74 (1st Cir. 1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981). DOI's own CERCLA 301 Project Team recognized that "most government resources, particularly resources for which natural resource damages would be sought[,] may often have no market." DOI has failed to explain its departure from this view. Indeed, many of the materials in the record on which DOI relied in developing its rules regarding contingent valuation expressed the same idea; it is the incompleteness of market processes that gives rise to the need for contingent valuation techniques. Courts have long stressed that market prices are not to be used as surrogates for value "when the market value has been too difficult to find, or when its application would result in manifest injustice to owner or public," *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950); see also *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1086, 1090, 93 L.Ed. 1392 (1949) (warning against making "a fetish" of market value, "since that may not be the best measure of value in some cases"). As we have previously noted in the context of the "lesser of" rule, see *supra* note 40, market prices are not acceptable as primary measures of the use values of natural resources. See generally Anderson, *Natural Resources Damages, Superfund, and the Courts*, 16 *Env'tl. Aff.* 405, 442-46 (1989). We find that DOI erred by establishing "a strong presumption in favor of market price and appraisal methodologies." 51 Fed.Reg. 27,720 (1986).

We are not satisfied that the problem is solved by the provision in section 11.83(c)(1) permitting nonmarket methodologies to be used when the market for the resource is not "reasonably competitive." There are many resources whose components may be traded in "reasonably competitive" markets, but whose total use values are not fully reflected in the prices they command in those markets. Interior itself provides ample proof of the inadequacy of the "rea-

sonably competitive market" caveat. For example, DOI has noted that "the hierarchy established in the type B regulation" would dictate a use value for fur seals of \$15 per seal, corresponding to the market price for the seal's pelt, see 52 Fed.Reg. 9,092 (1987). Another example of DOI's erroneous equation of market price with use value is its insistence that the sum of the fees charged by the government for the use of a resource, say, for admission to a national park, constitutes "the value to the public of recreational or other public uses of the resource," 43 C.F.R. § 11.83(b)(1), because "these fees are what the government has determined to represent the value of the natural resource and represent an offer by a willing seller," 51 Fed.Reg. 27,719 (1986). This is quite obviously and totally fallacious; there is no necessary connection between the total value to the public of a park and the fees charged as admission, which typically are set not to maximize profits but rather to encourage the public to visit the park, see 16 U.S.C. §§ 460k-3, 460l-6a. In fact, the decision to set entrance fees far below what the traffic would bear is evidence of Congress's strong conviction that parks are priceless national treasures and that access to them ought to be as wide as possible, and not, as DOI would have it, a sign that parks are really not so valuable after all.

Neither the statute nor its legislative history evinces any congressional intent to limit use values to market prices. On the contrary, Congress intended the damage assessment regulations to capture fully all aspects of loss. CERCLA section 301(c)(2) commands Interior to "identify the best available procedures to determine [natural resource] damages, including both direct and indirect injury, destruction or loss." 42 U.S.C. § 9651(c)(2). The Senate CERCLA report stated that assessment procedures should provide trustees "a choice of acceptable damage assessment methodologies to be employed [and should] select the most accurate and credible damage assessment methodologies available." S.Rep. No. 848, 96th Cong., 2d Sess. 85-86 (1980). The

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current rules defeat this intent by arbitrarily limiting use values to market prices.

[6] On remand, DOI should consider a rule that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured, so long as the trustee does not double count. Market valuation can of course serve as one factor to be considered, but by itself it will necessarily be incomplete. In this vein, we instruct DOI that its decision to limit the role of non-consumptive values, such as option and existence values, in the calculation of use values rests on an erroneous construction of the statute. The regulations provide that "[e]stimation of option and existence values shall be used only if the authorized official determines that no use values can be determined," 43 C.F.R. § 11.83(b)(2); see also *id.* at § 11.83(d)(5)(ii). This limitation apparently reflects Interior's crabbed interpretation of CERCLA explained in the preamble to the regulations:

The Department notes that § 11.83(b) has been changed to explicitly state that option and existence values may be estimated in lieu of use values only when use values cannot be determined. Ordinarily, option and existence values would be added to use values. However, section 301(c) of CERCLA mentions only use values. Therefore, the primary emphasis in this section is on the estimation of use values.

51 Fed.Reg. 27,719 (1986).

DOI has erroneously construed the statute. First, section 301(c)(2) requires Interior to "take into consideration factors including, but not limited to . . . use value." 42 U.S.C. § 9651(c)(2) (emphasis added). The statute's command is expressly not limited to use value; if anything, the language implies that DOI is to include in its regulations other factors in addition to use value. Second, even under its reading of section 301(c), DOI has failed to explain why option and existence values should be excluded from the category of recognized use values. Indeed, the CERCLA 301 Project Team draft referred to option and existence values as "non-consumptive use

values" (emphasis added). Option and existence values may represent "passive" use, but they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment. See Cross, *Natural Resource Damage Valuation*, 42 Vand.L. Rev. 269, 285-89 (1989) (noting that surveys reveal that the option and existence value of national parks may be quite large). DOI is entitled to rank methodologies according to its view of their reliability, but it cannot base its complete exclusion of option and existence values on an incorrect reading of the statute.

We hold that the hierarchy of use values is not a reasonable interpretation of the statute.

VII. THE TEN PERCENT DISCOUNT RATE

[7] State and Environmental Petitioners next challenge Interior's decision to use a discount rate to calculate the present value of an expected future injury. Petitioners challenge both the decision to discount a future injury for present value and Interior's choice of a ten percent rate. See 43 C.F.R. § 11.84(e). As petitioners point to no CERCLA provision addressing the precise question in issue, their burden is to show that the imposition of the discount rate was unreasonable or contrary to the statutory purpose.

Petitioners' central argument appears to be that discounting for present value will by its nature "severely undervalue[]" long-term injury to natural resources. But this argument is misplaced: the point of the CERCLA natural resource damage provisions is to make polluters pay the costs of restoring or replacing damaged resources or acquiring their equivalent. If a release of hazardous substances will necessitate a restoration project costing x dollars five years from now, CERCLA requires that the responsible party pay a sum sufficient to cover those costs *at that time*. Due to the inherent time-value of money (coupled with the effects of inflation), an amount significantly less than x dollars invested today will yield CERCLA's required x dollars at the time the restoration costs are

incurred five years from now. Using the proper interest rate as a discount rate, it is possible to calculate how much money must be collected today to equal x dollars in the future. The danger of undervaluation arises from an underestimate of the *future* cost of restoration or from an incorrect discount rate, not from the basic process of discounting itself.

State and Environmental Petitioners' two additional concerns are therefore closer to the target. First, they argue that there is uncertainty as to the correct discount rate. Second, they argue that natural resources will tend to become scarcer over time and hence more valuable; consequently, there is too much uncertainty as to the future cost of restoring or replacing damaged resources to permit an accurate discount rate.

[8] As to the first point, a discount rate by its nature involves a predictive judgment about future rates of interest.⁴⁵ Apart from the truism that the proper discount rate is always a matter of uncertainty, petitioners have given us no reason to substitute our judgment for that of Interior and of the Office of Management and Budget, whose circular provided the ten percent figure chosen. 43 C.F.R. § 11.84(e)(2). While DOI's explanation of its decision to adopt the Office of Management and Budget figure certainly was terse, we decline to step in and undermine what is first and foremost a policy choice.⁴⁶

As to the second point, we agree that Interior should take into account the possibility that the value of a particular resource or the cost of a particular restoration project will increase over time, as a function of scarcity, faster than the rise in the general price level. If such an increase can be reasonably foreseen, it should be

reflected in the estimate of the *future* cost of a restoration project; if the estimated future cost is reasonably accurate, then the application of a discount rate to arrive at a *present* value cannot itself be objectionable. Interior's regulations provide that uncertainties as to the cost of future restoration are to be considered in the assessment process and factored into the analysis.⁴⁷ So long as the trustee performing the assessment takes into account—as the regulations provide it should—the possibility that restoration costs might rise faster than the general price level, State and Environmental Petitioners' arguments against the use of a discount rate are without merit.

VIII. THE ALLEGEDLY PREFERENTIAL TREATMENT OF PRPs

State and Environmental Petitioners allege that Interior's regulations give potentially responsible parties (PRPs)—i.e., those parties who may be held responsible for the release of hazardous substances and be required to pay natural resource damages—"inappropriate, preferential treatment compared to that given States and the public." Pet. Br. 66. Petitioners challenge the rules' provision allowing PRPs to be assigned the task of conducting a natural resource damage assessment. They also challenge the rules' establishment of periods in which only a PRP, and not members of the public, will be notified of developments in the assessment process and be given the opportunity to comment. We consider the two challenges in turn, keeping in mind *Chevron's* command that, unless Congress addressed the precise question in issue, Interior's interpretation of CERCLA must be upheld if it is reason-

45. Ordinary interest rates include an inflation-compensation component which will account for changes in the future cost of natural resource restoration or replacement due solely to a change in the general price level.

46. We note that we are merely deferring to DOI's choice of the 10 percent figure; DOI is free to revise the discount rate at some future time, so long as it sets forth a reasonable justification for doing so.

47. See 43 C.F.R. § 11.84(d) (providing that "significant uncertainties concerning the assumptions made in all phases of the assessment process" should be taken into account and alternative assumptions should be considered for the purpose of arriving at a damages figure); see also 51 Fed.Reg. 27,722 (explaining § 11.84(d)).

able and consistent with the statutory purpose.

A. *Delegation of the Assessment Process to PRPs*

1. *Delegability of Assessment Tasks Generally*

[9] The regulation authorizing assessments by PRPs provides as follows:

At the option of the authorized official and if agreed to by any potentially responsible party or parties acting jointly, the potentially responsible party or any other party under the direction, guidance, and monitoring of the authorized official may implement all or any part of the Assessment Plan finally authorized by the authorized official.

43 C.F.R. 11.32(d).

State and Environmental Petitioners aim a fusillade of challenges against the practice of letting a PRP conduct an assessment; they compare it to appointing the defendant in a tort suit as a special master to decide on the proper amount of damages. Petitioners base their legal argument on statutory language providing that designated state and federal officials "shall assess damages" and that only assessments "made by a Federal or State trustee" are accorded a rebuttable presumption of correctness. § 107(f)(2)(A)-(B); § 107(f)(2)(C).

The § 107 argument is unpersuasive. The "shall assess damages" language does not indicate that a government trustee has no power to delegate the task of conducting the assessment, even when the trustee retains final authority over the assessment methods and oversees the work. Indeed, reading the "shall assess damages" language as narrowly as petitioners do would compel the implausible conclusion that Congress intended to prevent government trustees from hiring subcontractors to undertake the technically demanding tasks associated with an assessment.

As it turns out, the legislative history shows that Congress did consider the precise question at issue. Section 107(f)(2) was added to the statute by SARA in 1986.

Its purpose was described in a House report as follows:

The amendment makes clear that the responsibility to assess damages for injury to natural resources lies with the federal agency designated as the natural resource trustee for those resources.... Of course, by specifying that the federal natural resource trustees shall assess damages, *the Committee does not intend to foreclose their flexibility to reach agreements with potentially responsible parties whereby the parties themselves undertake the assessments.*

H.R.Rep. No. 253(IV), *supra* note 8, at 49 (emphasis added). Thus, the House Committee on Merchant Marine and Fisheries plainly envisioned that a government trustee could delegate to a PRP the job of "undertak[ing]" an assessment. As for the argument that the delegation of assessment tasks to PRPs is "contrary to fundamental principles of fairness and jurisprudence" due to potential conflicts of interest, Pet. Br. 71, the committee apparently considered that danger to be outweighed by the desirability of granting trustees the "flexibility" to delegate assessment tasks when the trustees deem it appropriate to do so. At least one senator disagreed, taking to the Senate floor to denounce Interior's policy of permitting PRPs to conduct damage assessments. See 132 Cong.Rec. S14930 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus). Even if we viewed Senator Baucus' statement as an indication that the evidence of congressional intent on this particular issue is somewhat ambiguous, we would nonetheless uphold Interior's rule as reasonable and not inconsistent with the statutory purpose. A PRP conducts an assessment only if an authorized government official calls on it to do so. 43 C.F.R. § 11.32(d). The assessment must follow the methods outlined in the assessment plan, which must have been drawn up as a coordinated effort among all affected government trustees, state and federal. *Id.* § 11.32(a)(1). The delegation rule is not unreasonable.

2. *Specific Aspects of the Delegation Rule*

State and Environmental Petitioners argue that, even if some delegation is permis-

sible, Interior's rule goes too far. First they point out that, where the harmed natural resources are located on federal property, the appropriate federal agency shall serve as "lead authorized official." 43 C.F.R. § 11.32(a)(1)(ii)(B). That agency will act as final arbiter of disputes among trustees whenever trustees representing different governments or agencies fail to reach a consensus. 43 C.F.R. § 11.32(a)(1)(ii)(A). Thus, the federal agency has the power to delegate assessment tasks to a PRP over the objections of state trustees. We find nothing in such an arrangement unreasonable or contrary to statutory purpose. It is entirely reasonable to appoint a tiebreaker to resolve disagreements among government entities, and the federal agency whose land is most directly affected seems the logical choice.

State and Environmental Petitioners raise yet another point, arguing that the regulations empower trustees to delegate the PRPs not only "ministerial" tasks but also "the authority to make discretionary decisions" about the extent of liability resulting from their own conduct. Pet. Br. 71; see also Reply Br. 32. This fear is largely imaginary. The regulation leaves the decision of which assessment tasks to delegate in the hands of the lead authorized official. Whatever that official decides to delegate, the PRP's assessment work must take place "under the direction, guidance, and monitoring of the authorized official." 43 C.F.R. § 11.32(d). The PRP does not have free rein to conduct any kind of assessment it wishes; rather, it must "implement ... the Assessment Plan finally approved by the authorized official." *Id.* As DOI indicated in its preamble to the rules, "all actions taken by potentially responsible parties to implement an Assessment Plan occur under the ultimate approval and authority of the authorized official acting as trustee." 51 Fed.Reg. at 27,704. The PRP "functions in a strictly ministerial role. The final choice of methodologies rests solely with the authorized official." *Id.* Although petitioners complain that the regulation fails to identify which decisions are ministerial and which are discretionary, we do not perceive that to be a fatal defi-

ciency. The trustee has absolute authority to direct and control the PRP in the assessment function: that should be enough to permit flexibility while still retaining ultimate accountability with a public trustee.

B. Public Notice and Comment

[10] State and Environmental Petitioners challenge another aspect of the DOI rules that allegedly accords preferential treatment to PRPs. At certain stages in the preassessment and assessment plan phases, PRPs receive notice of what the government trustees are doing along with the opportunity to comment on it, while members of the public are denied the same rights of notice and comment at that time. And, although the state trustee of an affected resource enjoys full participation in all stages of the process, other state agencies stand in the same position as the public: they too are denied the notice and comment rights accorded PRPs. Petitioners fail to persuade us, however, that the notice and comment provisions are unreasonable or contrary to the statutory purpose.

Under the regulations, a government trustee first undertakes a "preassessment screen" and then decides whether a full-fledged natural resource assessment is to be performed. At that point, the trustee notifies the PRPs of its intent to perform an assessment, but the regulations do not require that the public or other state agencies be notified. See 43 C.F.R. § 11.32(a)(2)(iii)(A)-(B). Later, after an assessment plan has been drafted, it must be made available to the public; comments on the assessment plan are eventually included in the final report on the assessment. 43 C.F.R. § 11.32(c)(1)-(2). Likewise, any significant modifications to the assessment plan are subject to similar notice and comment regulations. 43 C.F.R. § 11.32(e).

In an effort to show that such limited participation of the public is contrary to the purpose of the statute, petitioners point to a CERCLA provision stating that a trustee can develop a plan for the expenditure of recovered damages only "after adequate public notice and opportunity for hearing

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and consideration of all public comment." § 111(i), 42 U.S.C. § 9611(i). They also point to provisions requiring public comment on remedial actions and Superfund settlements. §§ 117, 122(d)(2), 122(i), 42 U.S.C. §§ 9617, 9622(d)(2), 9622(i). Yet, far from proving their point, the fact that Congress expressly provided for notice and comment in these other contexts suggests that its failure to do so at the preassessment stage was a considered decision. As to the rules' reasonableness, DOI explains that PRPs merit more involvement in the pre-assessment process than does the general public because PRPs have a stake in the cost-effectiveness of the assessment methods chosen. DOI also contends that involvement of PRPs early in the process will tend to promote settlement of natural resource damage claims. Given that the public is notified and its comments are heard once an assessment plan is drafted, we cannot say that Interior's regulations are unreasonable.⁴⁸

IX. LIMITATION ON RECOVERY OF ASSESSMENT COSTS

[11] CERCLA imposes liability on responsible parties for, *inter alia*, the "reasonable costs of assessing" natural resource damages. § 107(a)(C), 42 U.S.C. § 9607(a)(C). The statute does not define the term "reasonable costs." State and Environmental Petitioners challenge a provision in the DOI regulations limiting the definition of "reasonable costs" to situations where "the anticipated cost of the assessment is expected to be less than the anticipated damage amount." 43 C.F.R. § 11.14(ee). Petitioners characterize the rule as "inflexible" and "irrational."

There is no indication that Congress had in mind a particular definition of "reasonable costs." The legislative history of CERCLA indicates, however, that Congress

intended natural resource damage assessments to be "accomplished in the most cost-effective manner possible," that they be "efficient as to both time and cost," and that they be the "most accurate and efficient for accomplishing the mandates of this legislation." S.Rep. No. 848, *supra*, at 85-86. The idea behind Interior's regulation is that it is wasteful to devote more resources to a damage assessment than can be recovered by the trustee for the loss of the resource itself. This principle is a rational one and is consonant with the statutory purpose. Nor is the rule inflexible: a trustee that launches an inexpensive assessment of what is initially thought to be a minor amount of environmental harm is free to expand the assessment if it uncovers evidence showing that the "anticipated damage amount" will be larger than previously believed.⁴⁹ We therefore decline to overturn the rule.

X. THE ACCEPTANCE CRITERIA

State and Environmental Petitioners challenge Interior's regulation establishing a set of "acceptance criteria" as a framework for determining whether a hazardous substance release actually caused injury to the particular biological resource (such as a flock of birds or a school of fish) for which a government trustee is seeking damages.

In order to establish causation under the acceptance criteria, the trustee must show that (i) the "biological response" alleged to have been precipitated by the hazardous substance release is a "commonly documented" response to oil or hazardous substance spills, (ii) oil or hazardous substances are "known to cause" such a response in field studies, (iii) oil or hazardous substances are "known to cause" such a response in controlled experiments, and (iv) the biological response can be measured by

48. Petitioners also argue that the DOI rules create the possibility that there will be one administrative record for those "in the know" and another for the general public. Pet.Br. 75-76. Yet the regulations provide for one record, which must contain documentation of all significant decisions made as well as public comments and responses to those comments. See 43 C.F.R. §§ 11.32(c), 11.32(e), 11.90.

49. Moreover, even if a state trustee spends more on an assessment than 43 C.F.R. § 11.14(ee) permits it to recover, the trustee can nonetheless recover the amount of "reasonable costs" as defined by that rule. Thus, the trustee will have to pick up the tab, unreimbursed, for only the amount in excess of "reasonable costs."

a technique that is practical to perform and has been "adequately documented in scientific literature." 43 C.F.R. § 11.62(f)(2). Additionally, the trustee must show that the biological response identified in accordance with these acceptance criteria actually differs from the condition of similar organisms in a "control area"—i.e., an unpolluted area that is otherwise similar to the polluted area. 43 C.F.R. § 11.62(f)(3).

Petitioners launch a general attack at all of these requirements as being "extraordinarily burdensome" and as requiring "virtually absolute scientific proof" of causation. Pet. Br. 82. They allege, in conclusory terms, that the acceptance criteria require a greater quantum of evidence of causation than the common law requires; this, they say, is both unreasonable and contrary to CERCLA's purpose of liberalizing the traditional causation-of-injury standard. Pet. Br. at 85; Reply Br. 36. Petitioners also complain that, unless a trustee can find already-published scientific studies—field studies as well as controlled experiments—documenting the particular biological response complained of, the trustee must undertake such studies at its own expense, unreimbursed by the parties responsible for the spill. This, petitioners say, is contrary to the command of § 107(a)(C), which provides that responsible parties are liable for the reasonable costs of assessing damages. Pet. Br. 83.

A. The Regulations

Interior's regulations define an actionable "injury" as "a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource," resulting directly or indirectly from an oil spill or hazardous substance release. 43 C.F.R. § 11.14(v). For biological resources, an injury is deemed to have resulted from such a release if the concentration of the substance is sufficient to cause the resource or its offspring to suffer death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, or physi-

cal deformations. *Id.* § 11.62(f)(1).⁵⁰ To determine whether a sufficient showing of causation has been made, the regulations establish the following acceptance criteria, all four of which must be met.

(i) The biological response is often the result of exposure to oil or hazardous substances. This criterion excludes biological responses that are caused predominately by other environmental factors such as disturbance, nutrition, trauma, or weather. The biological response must be a commonly documented response resulting from exposure to oil or hazardous substances.

(ii) Exposure to oil or hazardous substances is known to cause this biological response in free-ranging organisms. This criterion identifies biological responses that have been documented to occur in a natural ecosystem as a result of exposure to oil or hazardous substances. The documentation must include the correlation of the degree of the biological response to the observed exposure concentration of oil or hazardous substances.

(iii) Exposure to oil or hazardous substances is known to cause this biological response in controlled experiments. This criterion provides a quantitative confirmation of a biological response occurring under environmentally realistic exposure levels that may be linked to oil or hazardous substances exposure that has been observed in a natural ecosystem. Biological responses that have been documented only in controlled experimental conditions are insufficient to establish correlation with exposure occurring in a natural ecosystem.

(iv) The biological response measurement is practical to perform and produces scientifically valid results. The biological response measurement must be sufficiently routine such that it is practical to perform the biological response measurement and to obtain scientifically valid results. To meet this criterion, the

⁵⁰ In addition to these "viability" injuries, a biological resource can be deemed injured if the concentration of the hazardous substance in the

organisms exceeds federal food and drug standards or state health standards for edible organisms.

biological response measurement must be adequately documented in scientific literature, must produce reproducible and verifiable results, and must have well defined and accepted statistical criteria for interpreting as well as rejecting results.

43 C.F.R. § 11.62(f)(2). In addition to meeting the acceptance criteria, the trustee must show a "statistically significant difference in the biological response between samples from populations in the assessment area and in the control area." 43 C.F.R. § 11.62(f)(3).

B. Analysis

[12] Petitioners argue that the acceptance criteria are contrary to the statutory command that the standard of proof of causation-of-injury under CERCLA be less strict than that required by the common law. We conclude that CERCLA is ambiguous on this point, and that Interior's reading of the Act—as retaining traditional causation analysis for determining whether a hazardous substance release caused a particular injury—is therefore permissible under *Chevron* Step Two. We also reject petitioners' argument that the acceptance criteria are unreasonable within the meaning of *Chevron*. As to the non-compensability of the costs of general scientific studies under § 107(a)(C), we conclude that the statute is ambiguous and that Interior's construction of it is a permissible one.

1. CERCLA and the Common-Law Causation Standard

The statutory text of CERCLA provides no clues as to whether proof of causation-of-injury should be less strict than that required by the common law. Section 107(a)(C) provides that responsible parties are liable for damages for injury to natural resources "resulting from" a release of hazardous substances or oil. 42 U.S.C. § 9607(a)(C). Section 301(c)(2) offers no further guidance: the regulations under it must specify protocols for determining the type and extent of "both direct and indirect

injury, destruction, or loss." 42 U.S.C. § 9651(c)(2).

The legislative history is ambiguous, as well. The causation-of-injury issue must, of course, be viewed against the backdrop of Congress' general concern for liberalizing the standards of the common law. See, e.g., S.Rep. No. 848, *supra* note 10, at 13-14 ("[T]raditional tort law presents substantial barriers to recovery.... [C]ompensation ultimately provided to injured parties is generally inadequate."); see also *supra* note 38. There is little evidence, however, that Congress specifically intended to ease the standard of proof for showing that a particular spill caused a particular biological injury. The Congressional Research Service report cited by petitioners does discuss causation-of-injury standards as one of the then-existing obstacles to recovery under the common law, but it is largely descriptive, not critical. The report states:

[P]laintiffs in toxic pollution suits may have substantial difficulty in proving that a particular exposure to a pollutant was the cause in fact of an injury. The case studies reinforce the notion that such problems of proof can be significant barriers to recovery.

See Senate Comm. on Environment and Public Works, 96th Cong., 2d Sess., *Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, Missouri, New Jersey, and Texas; A Report Prepared Under the Supervision of the Congressional Research Service of the Library of Congress* 517 (Comm. Print 1980), J.A. 2893. A citation to it in the Senate CERCLA report⁵¹ certainly does not rise to the level of an unambiguous signal that Congress wanted DOI to liberalize the common-law causation standard.

Additional evidence supports the proposition that CERCLA never declared itself on this matter. While debating the passage of CERCLA in 1980, Congress considered two provisions (one ultimately rejected and the

51. The Congressional Research Service study was commissioned by two Senate sponsors of CERCLA and was cited in the Senate Report

accompanying S. 1480. S.Rep. No. 848, *supra* note 10, at 320-21 & n. 4.

Cite as 880 F.2d 432 (D.C. Cir. 1989)

other ultimately enacted) both of which clearly called for liberalization of the traditional common-law causation standards in contexts other than the one at issue in this case.

First, Congress considered and rejected a nontraditional causation standard in relation to a never-enacted provision establishing liability for the medical expenses of persons injured by hazardous substance spills. An early bill contained the following provision:

(c) *Notwithstanding the ordinary requirements for proof of cause in fact or proximate cause of damage, injury, or loss, a person liable under this section for any discharge, release, or disposal of any hazardous substance shall be liable for all medical expenses under [never-enacted] subsection (a)(2)(F) of this section if a reasonable person could conclude that such medical expenses and the injury or disease which caused them are reasonably related to such discharge, release or disposal....*

S. 1480, 96th Cong., 1st Sess. § 4(c), reprinted in 1 *Legislative History, supra* note 19, at 171 (emphasis added). This suggests that, when it wanted to, Congress knew how to reject "the ordinary requirements" for proof of causation.

CERCLA as enacted contains another clear—if somewhat less explicit—rejection of traditional causation standards. Section 107's imposition of liability on the four enumerated classes of responsible parties⁵² does not require in all cases that the defendant have in fact caused the release. *State*

of New York v. Shore Realty Corp., 759 F.2d 1032, 1044-45 (2d Cir.1985). The *Shore Realty* court noted that the language of § 107(a)—which imposes liability on responsible parties connected with a vessel or facility "from which there is a release"—does not itself lay down a causation requirement. 759 F.2d at 1043 n. 16, 1044 & n. 18. The court went on to point out that each of the defenses to liability contained in § 107(b) "carves out from liability an exception based on causation." 759 F.2d at 1044. A defendant can make out a § 107(b) defense by showing that the substance release was caused solely by an act of God, an act of war, or the unforeseeable act or omission of a third person (other than an employee or agent of the defendant or one whose act occurs in connection with a contractual relationship with the defendant). 42 U.S.C. § 9607(b). Reading into § 107(a) a requirement that the defendant caused the substance release would thus render the § 107(b) defenses surplusage. The *Shore Realty* court concluded accordingly that a party who cannot make out a § 107(b) defense cannot avoid liability by arguing that it did not cause the substance release.⁵³ Since Congress made its modification of traditional causation standards clear in the *Shore Realty* context of the causal relation between a responsible party and a hazardous substance release, we find noteworthy its failure to similarly alter the traditional rules concerning the causal relation between a substance release and the biological injuries alleged to have resulted from it.⁵⁴

52. Responsible parties include past and present owners of vessels and facilities; persons who arrange for the disposal, treatment or transport of hazardous substances; and transporters of hazardous substances. § 107(a), 42 U.S.C. § 9607(a).

53. The *Shore Realty* court also found evidence in the legislative history to bolster its conclusion. See 759 F.2d at 1044-45. The *Shore Realty* holding has found wide acceptance in the courts. See, e.g., *United States v. Miami Drum Services*, 25 *Envil.Rep.Cas.* (BNA) 1469, 1986 WL 15327 (S.D.Fla.1986); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1984).

54. Petitioners refuse to acknowledge a difference between these two types of causation. See Reply Br. 37 n. 26 (arguing that "the operative [statutory] language" is the same in both contexts). In this they are mistaken. The *Shore Realty* line of cases involves the causal link between the defendant's acts and the substance release. The operative language is the "from which there is a release" phrase of § 107(a) and the contrasting language of § 107(b), which establishes defenses based on a showing that "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by" an act of God, an act of war, or the unforeseeable acts of an unrelated third party. 42 U.S.C. § 9607(b). The issue in the present case involves the causal link be-

In sum, while we agree with petitioners that Congress expressed dissatisfaction with the common law as a norm in several areas of damage assessment, we conclude that CERCLA is at best ambiguous on the question of whether the causation-of-injury standard under § 107(a)(C) must be less demanding than that of the common law.⁵⁵ Consequently, we uphold Interior's plausible reading of CERCLA as adopting traditional causation standards in this context.

2. The Reasonableness Test

We also reject petitioners' argument that the acceptance criteria are unreasonably stringent. Indeed, it appears that the acceptance criteria will, in some cases, make a government trustee's job of proving causation relatively easy. DOI's listing of the 18 types of biological responses that are deemed to have fulfilled the acceptance criteria will certainly speed recovery in those cases. See 43 C.F.R. § 11.62(f)(4).⁵⁶

We consider Interior's acceptance criteria to be a reasonable choice of a standard method for assessing harm to natural resources and to be generally in accord with congressional intent. See S.Rep. No. 848, *supra* note 10, at 85 (decrying "the absence of a standardized system for assessing [natural resource] damage which is effi-

cient as to both time and cost"). Their strictness may be justified as an attempt to effect Congress' intent that the "best available" methods of assessment be used in a statutory scheme that accords a presumption of correctness to damage assessments conducted in accordance with Interior's rules. §§ 301(c)(2), 107(f)(2)(C), 42 U.S.C. §§ 9651(c)(2), 9607(f)(2)(C). Biological responses for which there currently are inadequate data to satisfy the acceptance criteria are not rendered non-actionable by Interior's rules; the rules merely deprive the government trustee in such a case of § 107(f)(2)(C)'s rebuttable presumption.

"The acceptance criteria do not require absolute scientific certainty." 51 Fed.Reg. 27,710. It is sufficient that the response have been "predominately" caused by a substance release. *Id.* The prior studies and proof need not be on a chemical-specific or species-specific basis; the acceptance criteria can be satisfied by studies linking chemically similar substances to injuries in biologically similar species. See 51 Fed.Reg. 27,710.⁵⁷

Finally, while Interior's rules appear to require that the field and laboratory studies corroborating the site-specific evidence of biological injury have been published in technical journals,⁵⁸ Interior's explanation

tween the substance release and the biological injuries alleged to have resulted from it. The operative language here is that of § 107(a)(C), which establishes liability for "injury to, destruction of, or loss of natural resources ... resulting from such a release." 42 U.S.C. § 9607(a)(C). *Shore Realty* does not address the issue presented in this case.

55. This ambiguity is not resolved in petitioners' favor by a floor comment made by a sponsor of SARA in 1986. See 132 Cong.Rec. S14931 (daily ed. Oct. 3, 1986) (remarks of Sen. Baucus). Although Senator Baucus criticized the acceptance criteria as "inordinately stringent," *id.*, SARA did not amend any of the CERCLA provisions pertaining to the causation-of-injury standard. (Nor is this an instance, as with the "lesser of" rule, where Congress made it clear that its failure to amend the operative language stemmed from its belief that the statutory language was clear all along. Cf. *supra* pp. 452-55.) Given that SARA left the relevant provisions unchanged, and given that the history of CERCLA's original passage in 1980 suggests Congress did not intend to diverge from the common-law causation-of-injury standard, Senator Baucus'

1986 comment does not compel the conclusion that the Act *unambiguously* requires a liberalization of traditional causation analysis.

56. Interior's rules do not limit the acceptance criteria to those 18 types of biological responses. A government trustee is free to develop its own list of biological responses that meet the acceptance criteria.

57. The possibility that scientific studies could make such substitutions and still fulfill the acceptance criteria should allay petitioners' concern that studies could never be performed on endangered species because doing so would involve harming some of the few remaining members of the species.

58. We do find the rules somewhat unclear as to exactly what, if anything, must have been published to be considered reliable under the rules. The acceptance criteria require that "the biological response measurement must be adequately documented in scientific literature." 43 C.F.R. § 11.62(f)(2)(iv). The preamble to the rules states that the acceptance criteria are designed

for that requirement is a reasonable one. In essence, the requirement of "adequate[] document[ation] in scientific literature" ensures that decisionmakers will not be misled by the *post hoc ergo propter hoc* fallacy—the fallacy of assuming that, simply because a biological injury occurred after a spill, it must have been caused by the spill. Interior correctly recognizes that attaching liability to injuries that bear only a speculative causal relationship to a particular substance release would run counter to Congress' desire for a "fair" damage assessment mechanism. S.Rep. No. 848, *supra*, at 85. Requiring that the site-specific evidence be corroborated by field and laboratory studies published in journals guarantees that scientific conclusions will have been aired publicly and will have been subjected to peer criticism before they are relied on in a CERCLA natural resource damages case. While, in our view, the requirement of publication is unusually stringent, we cannot say that it is an unreasonable policy choice. Consequently, we uphold that aspect of the acceptance criteria in accordance with *Chevron's* command.

3. Noncompensability of General Studies

[13] We also reject petitioners' challenge to Interior's contention that the costs of general studies are noncompensable under § 107(a)(C)'s provision for the recovery of reasonable assessment costs. Interior stated in its preamble to the final rules that "it is inappropriate that experimental research studies to advance general scientific understanding be included as a part of a specific natural resource damage claim." 51 Fed.Reg. 27,710. Although petitioners argue that this places an unfair financial burden on state and federal trustees, they do not persuade us that Interior's reading of CERCLA is incorrect or unreasonable.

to reject "biological responses for which a paucity of information exists in the technical literature." 51 Fed.Reg. 27,710. The preamble also states, in relation to the field and laboratory studies required by subparagraphs (ii) and (iii), that "[t]he Department recognizes the technical merit of the peer review process for publication of research findings." *Id.*

Indeed, Congress considered and rejected a provision that would have provided funding for scientific research concerning, *inter alia*, "the effects of hazardous substances on living and nonliving resources." S. 1480, 96th Cong., 2d Sess. § 6(a)(1)(I), reprinted in 1 *Legislative History, supra* note 19, at 524-25. That funding would have come out of Superfund in any event, rather than from the pockets of responsible parties,⁵⁹ but it suffices to note that Congress never enacted that version of S. 1480. Petitioners fail to produce any evidence that Congress intended general research on the biological effects of hazardous substance spills to be compensable under the assessment costs provision of § 107(a)(C).

XI. AUDIT REQUIREMENTS

[14] State and Environmental Petitioners challenge Interior's regulations requiring states to adopt a series of accounting and planning procedures that must be used in handling the proceeds from any natural resource damage claims. See 43 C.F.R. §§ 11.92, 11.93. They argue that DOI exceeded the rulemaking authority granted it in CERCLA, and that the rules usurp state sovereign powers by "micromanag[ing] State accounting and planning procedures." Pet. Br. 86-87.

DOI's rulemaking authority derives from § 301(c) of CERCLA, which provides that officials designated by the president "shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter." 42 U.S.C. § 9651(c). To be valid, the accounting regulations must be "reasonably related to the purposes of the enabling legislation." *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 385 (D.C. Cir. 1989), quoting *Mourning v. Family Publications*

59. S. 1480 was proposed in 1980, long before SARA added the § 111(b)(2) requirement that a trustee exhaust all efforts at obtaining the amount of a Superfund claim from parties who are liable under § 107.

Serr, Inc., 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973). Regulations are in excess of statutory authority "if they 'bear[] no relationship to any recognized concept of' the particular statutory terms at issue." *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 655 (D.C.Cir.1983), quoting *Batterton v. Francis*, 432 U.S. 416, 428, 97 S.Ct. 2399, 2407, 53 L.Ed.2d 448 (1977). Although petitioners argue that the handling of recovered damages is entirely unrelated to "the assessment of damages," we deem the relationship between the two to be sufficiently close to bringing the regulations under the statutory language.

Moreover, the standardization of accounting and planning procedures for recovered damages is a reasonable goal that is entirely consistent with the statutory purpose. CERCLA provides that funds recovered by state trustees can be spent only on restoration, replacement or acquisition of equivalent resources. § 107(f)(1), 42 U.S.C. § 9607(f)(1). Funds cannot be spent until a plan has been developed and adopted by all the affected state and federal authorities. § 111(i), 42 U.S.C. § 9611(i). The legislative history of the 1986 SARA amendments underscores Congress' determination that recovered sums be spent solely on restoration, replacement or acquisition and that expenditures be carefully planned. See H.R.Rep. No. 253(IV), *supra* note 8, at 49-50, 53. State governments can hardly be heard to complain about intrusion into their sovereign spheres when they seek to recover damages under a federal statute that limits the uses to which those damages can be put. DOI's promulgation of accounting and planning requirements is a perfectly sensible means of ensuring that state trustees obey the statutory command.

XII. PUNITIVE DAMAGES

[15] State and Environmental Petitioners challenge the regulations' failure to provide for the recovery of punitive damages. Arguing that CERCLA does not clearly preclude recovery of punitive damages, petitioners apparently reason from

that proposition that Interior must provide for punitive damages. That, of course, misses the point of *Chevron*. Even accepting petitioners' assertion that Congress did not decide whether punitive damages would be available, petitioners would have to show that DOI's exclusion of punitive damages is unreasonable or contrary to the statutory purpose—a showing that would be difficult to make.

The fatal blow to petitioners' position, however, is the evidence that Congress did make a conscious determination that punitive damages would be generally unavailable. CERCLA is replete with indications that Congress intended to provide for compensatory damages only. The most critical indication of this is contained in § 301(c), which provides that the regulations are to identify

the best available procedures to determine such damages, including both direct and indirect injury, destruction or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

42 U.S.C. § 9651(c). There would be no need to establish the "best available procedures" to measure compensatory damages if a rounded-off punitive damages figure could be assessed against a responsible party as well. Further evidence of congressional intent is furnished by the express provision for punitive damages where a responsible party refuses to comply with removal or remedial action orders. See § 107(c)(3), 42 U.S.C. § 9607(c)(3). The fact that Congress provided for punitive damages in that specific context but not in all natural resource damage actions indicates clearly—especially when viewed alongside all the other evidence—that Congress intended the general measure of damages to be compensatory, not punitive. Interior's reading of the statute is correct under the first prong of *Chevron*, and petitioners' challenge fails.

XIII. CONTINGENT VALUATION

A. The Regulatory Background

[16] When a natural resource is injured by a discharge of oil or release of a hazard-

ous substance, an authorized official⁶⁰ assesses the damages resulting.⁶¹ DOI has prescribed methodologies for estimating in any such instance the amount of money to be sought as recompense. Either DOI's restoration methodology⁶² or one of its use methodologies⁶³ must be employed in calculations of damages.⁶⁴ The issue we now address concerns one of the latter.

DOI's natural resource damage assessment regulations define "use value" as the value to the public of recreational or other public uses of the resource, as measured by changes in consumer surplus, any fees or other payments collectable by the government or Indian tribe for a private party's use of the natural resource, and any economic rent accruing to a private party because the government or Indian tribe does not charge a fee or price for the use of the resource.⁶⁵

The regulations provide several approaches to use valuation. When the injured resource is traded in a market, the lost use value is the diminution in market price.⁶⁶ When that is not precisely the case, but similar resources are traded in a market, an appraisal technique may be utilized to determine damages.⁶⁷ When, however, neither of these two situations obtains, non-marketed resource methodologies are avail-

able.⁶⁸ One of these is "contingent valuation" (CV), the subject of controversy here.

The CV process "includes all techniques that set up hypothetical markets to elicit an individual's economic valuation of a natural resource."⁶⁹ CV involves a series of interviews with individuals for the purpose of ascertaining the values they respectively attach to particular changes in particular resources. Among the several formats available to an interviewer in developing the hypothetical scenario embodied in a CV survey are direct questioning, by which the interviewer learns how much the interviewee is willing to pay for the resource; bidding formats, for example, the interviewee is asked whether he or she would pay a given amount for a resource and, depending upon the response, the bid is set higher or lower until a final price is derived; and a "take or leave it" format, in which the interviewee decides whether or not he or she is willing to pay a designated amount of money for the resource.⁷⁰ CV methodology thus enables ascertainment of individually-expressed values for different levels of quality of resources, and dollar values of individuals' changes in well-being.⁷¹ The regulations also sanction resort to CV methodology in determining "option"⁷² and

60. "Authorized official" means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency designated as trustee, or an official designated by an Indian tribe, pursuant to section 126(d) of CERCLA, to perform a natural resource damage assessment." 43 C.F.R. § 11.14(d) (1988). See also CERCLA § 107(f)(2), 42 U.S.C. § 9607(f)(2) (Supp. IV 1986).

61. 43 C.F.R. § 11.80(a)(1) (1988).

62. *Id.* § 11.81.

63. *Id.* § 11.83.

64. *Id.* § 11.80(c).

65. *Id.* § 11.83(b)(1).

66. *Id.* § 11.83(c)(1).

67. *Id.* § 11.83(c)(2).

68. *Id.* § 11.83(d).

69. *Id.* § 11.83(d)(5)(i).

70. Type B Technical Information Document; "Techniques to Measure Damages to Natural Resources," DOI CERCLA 301 Project (1987) at 2-35-2-36, J.A. 850-851 [hereinafter Type B Technical Information Document]. This document was prepared by DOI to accompany the Type B rules. See Natural Resource Damage Assessments, Final Rule, 51 Fed.Reg. 27,720 (1986) [hereinafter Final Rule].

See also R. Bishop & T. Heberlein, *The Contingent Valuation Method* (paper presented at National Workshop on Non-Market Valuations Methods and Their Use in Environmental Planning, University of Canterbury, New Zealand (December 2-5, 1985)) (discussing bidding game, open-ended question, payment-card, dichotomous-choice and contingent ranking formats) at 7-11, J.A. 3017-3022.

71. Type B Technical Information Document, *supra* note 70, at 2-31, 2-32, J.A. 846, 847.

72. Option value is the dollar amount an individual is willing to pay although he or she is not currently using a resource but wishes to reserve the option to use that resource in a certain state of being in the future. Final Rule, *supra* note

"existence" ⁷³ values.⁷⁴

Industry Petitioners' ⁷⁵ complaint is limited to DOI's inclusion of CV in its assessment methodology.⁷⁶ They claim fatal departures from CERCLA on grounds that CV methodology is inharmonious with common law damage assessment principles, and is considerably less than a "best available procedure."⁷⁷ These petitioners further charge that DOI's extension of CERCLA's rebuttable presumption to CV assessments is arbitrary and capricious, and violative of the due process rights of a potentially responsible party. We find none of these challenges persuasive.

B. Consistency With CERCLA

Industry Petitioners point out that at common law there can be no recovery for speculative injuries, and they contend that CV methodology is at odds with that principle. CV methodology, they say, is rife with speculation, amounting to no more than ordinary public opinion polling.

70, 51 Fed.Reg. at 27,692, 27,721. For example, an individual who does not plan to use a beach or visit the Grand Canyon may nevertheless place some value on preservation of the resource in its natural state for personal enjoyment in the event of a later change of mind.

73. Existence value is the dollar amount an individual is willing to pay although he or she does not plan to use the resource, either at present or in the future. The payment is for the knowledge that the resource will continue to exist in a given state of being. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,692, 27,721. Though lacking any interest in personally enjoying the resource, an individual may attach some value to it because he or she may wish to have the resource available for others to enjoy.

74. 43 C.F.R. § 11.84(d)(5)(i) (1988).

75. Industry Petitioners are the Chemical Manufacturers Association, the Dana Corporation, and the Public Service Electric and Gas Company. The Chemical Manufacturers Association consists of 75 national and multinational corporations producing chemicals. The Dana Corporation, a manufacturer, has 44 American subsidiaries and affiliates, and 116 foreign subsidiaries and affiliates. Public Service Electric and Gas Company is a utility licensed to supply electricity and gas in New Jersey, and has two subsidiaries.

76. We have found DOI's current hierarchy of use values inconsistent with CERCLA. See Part

We have already noted our disagreement with the proposition that the strictures of the common law apply to CERCLA.⁷⁸ That much of industry petitioners' argument to the contrary thus fades away. CERCLA does, however, require utilization of the "best available procedures" for determinations of damages flowing from destruction of or injury to natural resources,⁷⁹ and Industry Petitioners insist that CV methodology is too flawed to qualify as such. In their eyes, the CV process is imprecise, is untested, and has a built-in bias and a propensity to produce overestimation.

It cannot be gainsaid that DOI's decision to adopt CV was made intelligently and cautiously. DOI scrutinized a vast array of position papers and discussions addressing the use of CV.⁸⁰ It recognized and acknowledged that CV needs to be "properly structured and professionally applied."⁸¹ It eliminated a feature of CV, as originally proposed, that might have resulted in overly high assessments.⁸² We find DOI's pro-

VI *supra*. This does not affect the manner in which the CV methodology operates, or whether it produces sufficiently accurate results to be included in the regulations.

77. Industry Petitioners also contend that DOI's natural resource damage assessment regulations are invalid to the extent that they authorize resort to CV methodology for purposes of calculating option and existence values. These, they assert, are nonuse values, and as such are not allowable under CERCLA. It suffices to point out that we have already rejected this conclusion. See Part VI *supra*. Option and existence values are non-consumptive values compensable under the terms of CERCLA.

78. See Part III(c)(3)(a) *supra*.

79. CERCLA § 301(c)(2), 42 U.S.C. § 9651(c)(2) (1982).

80. See *infra* note 83.

81. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

82. DOI, in the face of critical comments, "recognize[d] that the application of willingness-to-accept," formerly a factor in option and existence valuation, "can lead to more technical difficulties and uncertainties than willingness-to-pay." Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721. The conclusion was reached that, as studies

mulgation of CV methodology reasonable and consistent with congressional intent, and therefore worthy of deference.

The primary argument of Industry Petitioners is that the possibility of bias is inherent in CV methodology, and disqualifies it as a "best available procedure." In evaluating the utility of CV methodology in assessing damages for impairment of natural resources, DOI surveyed a number of studies which analyzed the methodology, addressed the shortcomings of various questionnaires, and recommended steps needed to fashion reliable CV assessments.⁸³ For example, an early study by the Water Resources Council advised that questions in CV surveys be "carefully designed and pretested,"⁸⁴ a warning DOI was quick to heed.⁸⁵

Industry Petitioners urge, however, that even assuming that questions are artfully drafted and carefully circumscribed, there is such a high degree of variation in size of the groups surveyed, and such a concomitant fluctuation in aggregations of damages, that CV methodology cannot be considered a "best available procedure."⁸⁶ We think this attack on CV methodology is insufficient in a facial challenge to invali-

date CV as an available assessment technique. The extent of damage to natural resources from releases of oil and hazardous substances varies greatly, and though the impact may be widespread and severe, it is in the mission of CERCLA to assess the public loss.⁸⁷ Certainly nothing in CV methodology itself shapes the injury inflicted by an environmental disaster, or influences identification of the population affected thereby. The argument of Industry Petitioners strikes at CERCLA, not CV's implementation, and can appropriately be considered only by Congress.

Similarly, we find wanting Industry Petitioners' protest that CV does not rise to the status of a "best available procedure" because willingness-to-pay—a factor prominent in CV methodology—can lead to overestimates by survey respondents. The premise of this argument is that respondents do not actually pay money, and likely will overstate their willingness-to-pay. One study relied upon by Industry Petitioners⁸⁸ hypothesizes that respondents may "respond in ways that are more indicative of what they would like to see done than how they would behave in an actual mar-

indicated, use of willingness-to-accept—meaning an individual is to be paid to forfeit his interest in a resource, as opposed to the individual himself paying to preserve that interest—yielded disproportionately high dollar assessments. For example, one study showed that actual payments for goose hunting licenses were \$880,000 while willingness-to-sell was \$1,411,000, and willingness-to-pay was only \$293,000. See Bishop & Heberlein, *Measuring Values of Extra Market Goods: Are Indirect Measures Biased?*, 61 *Amer.J.Agric.Econ.* 926 (1979).

83. DOI examined 23 CV studies, in each of which the analysis included the implications of CV use in valuing damaged natural resources. Type B Technical Information Document, *supra* note 70, at 2-40-2-43, J.A. 855-857. DOI also consulted 323 articles and studies relating to natural resource assessments, including many treatises addressing CV methodology, and compiled them in an annotated bibliography. *Id.* at A-3-A-66, J.A. 862-925.

84. Water Resources Council Procedures, 44 Fed. Reg. 72,892, 72,958, Subpart K, App. 2, § (a)(3) (1979).

85. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

86. Industry Petitioners cite a study estimating the combined option and existence values to Texas residents of whooping cranes at \$109,000,000 (13.9 million Texas residents × \$7.13). The estimate rested upon responses to a survey eliciting the amount an individual would pay for a permit to visit the National Wildlife Refuge where the whooping crane winters. Had the survey been nationwide in scope, the estimate would have been \$1.58 billion. Brief for Industry Petitioners at 14 n. 24 (referring to J. Stoll & L. Johnson, *Concepts of Value, Non-market Valuation, and the Case of the Whooping Crane* (Natural Resources Working Paper Series, National Resource Workgroup, Dep't of Agricultural Economics, Texas A & M Univ.) (1984) at 23-24, J.A. 2828-2829).

87. Thus, in the whooping crane scenario referred to by Industry Petitioners, see note 86 *supra*, the intent of CERCLA would be realized, not contravened, by a more expansive survey and a correspondingly higher assessment of damages if people beyond the borders of Texas were affected.

88. Bishop & Heberlein, *supra* note 82, at 926.

ket,"⁸⁹ and also observes that the converse is possible.⁹⁰ The simple and obvious safeguard against overstatement, however, is more sophisticated questioning. Even as matters now stand, the risk of overestimation has not been shown to produce such egregious results as to justify judicial overruling of DOI's careful estimate of the caliber and worth of CV methodology.⁹¹

Industry Petitioners' also challenge the use of CV after an oil leak or a hazardous waste release has occurred. They fear that application of CV methodology in those circumstances is fraught with a significant bias leading to overvaluation of the damaged resources. As a practical matter, it would be prohibitively expensive, if not physically impossible, to solicit individual valuations of each and every natural resource, or even a sizeable number thereof, in order to avoid any upward bias in the event that the resource is later damaged. Moreover, in light of CERCLA's preference for restoration, it would be a terrible waste of time and energy to conduct broad-scale valuation interviewing beforehand. While, depending on whether interviewing occurs before or after damage, the results may differ somewhat, that alone does not reduce CV methodology to something less than a "best available procedure." We have no cause to overturn DOI's considered judgment that CV methodology, when

properly applied, can be structured so as to eliminate undue upward biases.

We sustain DOI in its conclusion that CV methodology is a "best available procedure." As such, its conclusion in the Natural Resource Damage Assessment regulations was entirely proper.

C. *Presumption of Validity of CV Assessments*

[17] Industry Petitioners mount two challenges to the rebuttable presumption that CERCLA confers upon natural resource damage assessments.⁹² They argue that DOI did not respond fully to their comments regarding CV methodology, with the result that attachment of the presumption to a CV assessment would be arbitrary and capricious. They also contend that inclusion of the presumption is an infringement of a potentially responsible party's due process rights.

CERCLA accords a rebuttable presumption to determinations and assessments of damages to natural resources when made "in accordance with [DOI's] regulations."⁹³ The regulations contain a similar provision.⁹⁴ Industry Petitioners charge that DOI did not respond adequately to the criticisms they leveled at CV methodology. They further charge that DOI's justification for the use of CV to measure option

Id. at 33, J.A. 2309. The study further reported that "while contingent valuation appears to be biased even under the best circumstances, the degree of bias does not appear to be sufficient to rule out the results in public decision-making. In our judgment, contingent valuation is a promising approach to the valuation of non-market commodities." *Id.*

89. *Id.* at 927.

90. The study states that if people believe (correctly or incorrectly) that their responses will influence actual fees they may be more concerned about keeping their fees low than revealing their true values to the investigator.

Id. at 927. Another study acknowledges that respondents may have an incentive to overstate, but likewise remarks that an incentive to understate exists equally. See E. Yang, R. Dower & M. Menefee, *The Use of Economic Analysis in Valuing Natural Resource Damages, An Overview*, *Env'tl. Law Inst.* 1, 59 (grant paper) (1983), J.A. 2843, 2851.

91. A third study cited by Industry Petitioners, R. Bishop, T. Heberlein, M. Welsch & R. Baumgartner, *Does Contingent Valuation Work? Results of the Sandhill Experiment* (research paper delivered at Cornell University) (Aug. 5-8, 1984), J.A. 2277, concludes that "although contingent valuation is somewhat inaccurate, we have been surprised at how well it performed."

92. "Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 [the Clean Water Act] made by a Federal or State trustee in accordance with the regulations promulgated under section 9651 of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33." 42 U.S.C. § 9607(f)(2)(C) (Supp. IV 1986).

93. *Id.*

94. 43 C.F.R. § 11.91(c) (1988).

and existence values was insufficient, and that the bestowal of the presumption in these circumstances was arbitrary and capricious.

A leading concern voiced by Industry Petitioners was that CV had never been employed to assess damages for injury to a natural resource, and the untested and hypothetical nature of CV methodology was also disturbing to them. A second concern that these petitioners believe went unaddressed was that DOI had not delineated when or how CV might be utilized, and thus had left potentially responsible parties without guidance on that score. DOI's response is that it dealt with each in a comprehensive and understandable manner.

Agency action is arbitrary or capricious if the agency has

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of a problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference, in view or the product of agency expertise.⁹⁵

And when an agency relies upon an economic model, it is incumbent upon it to "provide a full and analytical defense" of the model.⁹⁶ Use of a predictive model acknowledges implicitly that there are instances in which various factors will affect

the outcome, and the agency must "explain[] the assumptions and methodology it used in preparing the model."⁹⁷ On the other hand, the agency's choice of model and its application must be respected when the record discloses that the agency "examine[d] the relevant data and articulate[d] a reasoned basis for its decision."⁹⁸

In the case before us, CV methodology was thoroughly investigated, comments were analyzed and dealt with, and changes were made to refine the use of CV. The record does not support the claim that DOI's treatment of industry petitioners' comments was arbitrary or capricious.

Industry Petitioners also perceive a lack of guidance by DOI on the ways in which CV methodology may be employed. This critique ignores the fact that the scenarios of natural resource damage are myriad. DOI responded to comments on CV, including those seeking more information on utilization of CV methodology.⁹⁹ As DOI explained, the propriety and form of CV is largely shaped by the nature and extent of the environmental mishap.¹⁰⁰ For example, a representative population for survey purposes cannot be determined prior to damage to a resource; only the scope of an accident will provide the information needed to design a survey covering the population.¹⁰¹ The physical area damaged may also weigh in the determination of whether to conduct in-person, telephone, or mail surveys,¹⁰² though DOI has expressed a pref-

⁹⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443, 458 (1983).

⁹⁶ *Eagle-Picher Indus. v. EPA*, 245 U.S.App.D.C. 179, 195, 759 F.2d 905, 921 (1985) (footnote omitted).

⁹⁷ *Id.* at 195, 759 F.2d at 921 (footnote omitted).

⁹⁸ *NRDC v. Herrington*, 247 U.S.App.D.C. 340, 370, 768 F.2d 1355, 1385 (1985); see also *Eagle-Picher Indus. v. EPA*, *supra* note 96, 245 U.S.App.D.C. at 195-196, 759 F.2d at 921-922; *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S.App.D.C. 201, 203, 705 F.2d 506, 535 (1983); *Sierra Club v. Costle*, 211 U.S.App.D.C. 336, 370-371, 657 F.2d 298, 332-333 (1981); *American Pub. Gas Ass'n v. FPC*, 186 U.S.App.D.C. 23, 54, 567 F.2d 1016, 1037 (1977).

⁹⁹ See Final Rule, *supra* note 70, 51 Fed.Reg. at 27,720-27,722. See also Type B Technical Information Document, *supra* note 70, at iii, J.A. 816.

¹⁰⁰ See Final Rule, *supra* note 70, at 27,720.

¹⁰¹ DOI reasserted on numerous occasions that selections of methodologies and their application pivoted on the scope of injury, which necessitated case-by-case determinations by the authorized official. See Final Rule, *supra* note 70, at 27,720-27,722.

¹⁰² Type B Technical Information Document, *supra* note 70, at 2-39, J.A. 854. At the outset the group comprising a representative population of affected individuals must be chosen. Although in-person interviews were seen as being generally more reliable, telephone and mail surveys may be resorted to equally.

erence for in-person interviews.¹⁰³ In sum, DOI recognized the need for flexibility and a case-by-case approach to surveys, and concluded that CV methodology could be utilized as a "valid, proven technique[]" when properly structured and professionally applied.¹⁰⁴ We find that the regulations provide sufficient guidance concerning the use of CV.

We perceive no greater merit in Industry Petitioners' substantive and procedural due process assaults upon attachment of the rebuttable presumption to CV assessments pursuant to DOI's regulations. The substantive due process challenge has not surmounted the presumption of constitutionality afforded statutes affecting economic regulation. As the Supreme Court has declared,

[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.¹⁰⁵

We see nothing arbitrary or irrational about the rebuttable presumption conferred upon natural resource assessments, including those utilizing CV methodology. On the contrary, the procedures preconditioning damage assessments¹⁰⁶ support the logic of the presumption, without which

would loom the specter of prolonged battles of experts and other heavy burdens on the calendars of adjudicating tribunals.

The procedural due process claim concentrates on the role of the authorized official¹⁰⁷ in damage assessment proceedings. Deeming the official an interested party with discretionary power to exclude potentially responsible parties from the assessment process, Industry Petitioners assert a violation of their procedural due process rights in light of the presumption accorded CV assessments. To be sure, the official is under a duty to assess the injury to natural resources and collect damages therefor, and to that extent he or she is an interested party. We do not agree, however, that potentially responsible parties will be totally excluded from participation in the proceedings forerunning a damage determination.¹⁰⁸ Nor do we agree that the coupling of the rebuttable presumption to a CV damage determination contravenes procedural due process standards.

Industry Petitioners bottom their due process thesis on *United Retail & Wholesale Employees v. Yahn & McDonnell, Inc.*,¹⁰⁹ wherein the Third Circuit invalidated a provision of the Multiemployer Pension Plan Amendments of 1980¹¹⁰ which conferred a rebuttable presumption of validity upon the amount determined by pension fund trustees to be owing by a withdrawing employer. The court found a con-

103. *Id.*

104. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

105. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752, 766 (1976) (citations omitted).

106. See 43 C.F.R. §§ 11.23-11.25 (the preassessment screen: generally, information on the site, preliminary identification of resources potentially at risk); §§ 11.30-11.35 (the assessment plan: generally, content, development, deciding on Type A or Type B assessments, confirmation of exposure, economic methodology determination); §§ 11.61-11.64 (injury determination phase: generally, injury definition, pathway determination, testing and sampling methods); and §§ 11.70-11.73 (quantification phase: generally, service reduction quantification, baseline services determination, resource recoverability analysis).

107. See note 60 *supra*.

108. The regulations provide for notice to potentially responsible parties that the official will perform an assessment, 43 C.F.R. § 11.32(a)(2)(B) (1988); public involvement in reviewing the assessment plan, including involvement by potentially responsible parties, *id.* § 11.32(c)(1); and participation by potentially responsible parties, at the option and under the supervision of the official, in the assessment itself, *id.* § 11.32(d). Potentially responsible parties must thus be indulged significant opportunities for involvement and input into the assessment process.

109. 787 F.2d 128 (3rd Cir.1986), *aff'd without opinion by an equally divided court*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987).

110. 29 U.S.C. § 1401(a)(3)(A) (1982).

lict of interest arising from the fact that "as fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers."¹¹¹ Additionally, the trustees would become personally liable if the plan were not adequately funded, and naturally had an interest in protecting themselves.¹¹² The case before us is quite different. Authorized officials without fault do not become personally liable should damages assessed or recovered turn out to be inadequate, nor do they have any other sort of personal stake in the determination or recovery. The purpose of such an assessment is to ascertain the amount of compensation due the public for an injury to the public's natural resources, and all sums recovered must be devoted to restoration of damaged resources or acquisition of equivalents.¹¹³ We conclude that Industry Petitioners' procedural due process challenge must fail.

XIV. CONCLUSION

DOI's Type B Natural Resource Damage Assessment Regulations are upheld on review as to the following issues: the "committed use" requirement (Part V), the adoption of a ten percent discount rate (Part VII), the treatment of potentially responsible parties (Part VIII), the limitation on recovery of assessment costs (Part IX), the acceptance criteria (Part X), the audit requirements (Part XI), the unavailability of punitive damages (Part XII), and the adoption of contingent valuation methodology (Part XIII). We grant the petition for review with respect to the "lesser of" rule (Part III) and the hierarchy of assessment methods (Part VI). We also remand the public ownership rule (Part IV) for DOI's reasoned consideration and explanation. We instruct DOI to proceed as expeditious-

ly as possible in issuing new regulations in conformance with this opinion.

It is so ordered.



STATE OF COLORADO, Petitioner,

v.

UNITED STATES DEPARTMENT OF the INTERIOR, and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, Chemical Manufacturers Association and American Petroleum Institute, Intervenor.

NATIONAL WILDLIFE FEDERATION, Public Citizen, Inc., and Environmental Defense Fund, Petitioners,

v.

UNITED STATES DEPARTMENT OF the INTERIOR, Chemical Manufacturers Association and American Petroleum Institute, Intervenor.

Nos. 87-1265, 87-1266.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 22, 1989.

Decided July 14, 1989.

State and environmental groups petitioned for judicial review of "type A" rules promulgated by Department of Interior pursuant to CERCLA. The Court of Appeals, Mikva, Circuit Judge, held that: (1) regulations were proper in respect to their scope, and (2) remand was required to permit development of standard procedures

111. *United Retail & Wholesale Employees v. Yahn & McDonnell*, *supra* note 109, 787 F.2d at 138.

112. *Id.* at 139-40. But see *Washington Star Co. v. International Typographical Union Negotiated*

Pension Plan, 235 U.S.App.D.C. 1, 10, 729 F.2d 1502, 1511 (1984).

113. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (Supp. IV 1986).

ATTORNEY GENERAL

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precondition of the sale that the financial world view the transaction as a mere "pooling of interests," and that the Internal Revenue Service view it as a simple change in corporate form. As the *Cincoos* court observed in holding a company liable although its parent's stock was used to purchase the assets of its predecessor:

It is difficult to understand how the transaction delineated by the Agreement can be a mere sale of assets for purposes of a transfer of liability for obligations and at the same time a tax exempt exchange under 26 U.S.C. sec. 368(a) which cannot be a mere purchase of assets.

Cincoos, 400 F.Supp. at 581; see also *In re Master Key Antitrust Litigation*, 1977-1 Trade Cases (CCH) at 71,734 (holding that a transaction was a *de facto* merger for the purposes of imposing antitrust liability on the successor corporation in part because the transaction was structured as a reorganization to take advantage of section 368(a)(1)(C) tax breaks).

In summary, this Court will not enforce Aerovox's attempt to separate the burdens from the benefits of acquiring Belleville. The transaction was structured to provide the maximum continuity possible. Aerovox continued to trade on the goodwill built up by Belleville and remained to its customers and creditors an essentially unchanged company. But for the putative disclaimer of PCB liability, the transaction was indistinguishable from a *de jure* merger.¹⁵ It would be manifest injustice under these circumstances to permit Aerovox to contract away Belleville's liability for PCB contamination. However, as *de facto* merger is an equitable doctrine, the Court believes it is appropriate under the circumstances, so long as no additional burden of proof is placed upon the plaintiffs, to re-

quire that the assets of Belleville must first be looked to to satisfy any damages resulting from the releases of Belleville. That said, the Court leaves until further hearing a decision on the burden each party will bear at trial.



IN RE ACUSHNET RIVER & NEW BEDFORD HARBOR: PROCEEDINGS RE ALLEGED PCB POLLUTION.

Civ. A. No. 83-3882-Y.

United States District Court,

D. Massachusetts.

April 27, 1989.

United States and one defendant in complex environmental litigation petitioned for approval of proposed partial settlement decree involving defendant's liability for injury to natural resources allegedly caused by release of PCBs during its operation of manufacturing plant. Wildlife federation moved to intervene. Nonsettling defendant moved to impose conditions on approval of proposed decree and to hold evidentiary hearing. The District Court, Young, J., held that: (1) wildlife organization was entitled to permissive intervention for limited purposes of arguing legal requirements applicable to any consent decree, appropriate measure of natural resources damages and legal requirements for cleanup; (2) settling defendant was entitled to protection from contribution liability.

15. The foregoing analysis, establishing that this transaction was a *de facto* merger, also establishes that Aerovox, the purchaser corporation, is a mere continuation of Belleville, the seller corporation. Thus, the transaction falls within the continuation exception to the general rule of purchaser nonliability, as well as the *de facto* merger exception.

Indeed, the distinction between the two exceptions seems more apparent than real. Upon examination, the *de facto* merger exception sub-

sumes the continuation exception. See, e.g., *Dryden*, 739 F.2d at 693 (holding that "The key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporations") quoting *Leaves v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir.1977); *Lumbar v. Mag-NA*, 621 F.Supp. 1529, 1535 (S.D.N.Y.1985) (holding that "[f]or a *de facto* merger to occur, there must be continuity of the successor and predecessor corporations").

ty to nonsettlers if settlement was fair, adequate and reasonable; (3) proposed decree could not be approved until federal natural resources trustees agreed to covenant not to sue; and (4) proposed decree did not include "reopener" provision to permit United States to sue settling defendant for presently unknown damages caused by release of PCBs.

Ordered accordingly.

1. Federal Civil Procedure ¶320

In addition to considering whether motion for permissive intervention is timely, federal district court must consider nature and extent of intervenor's interest, whether intervention will unduly delay or prejudice adjudication of rights of original parties, whether applicant will benefit by intervention, whether intervenor's interests are adequately represented by other parties and whether intervenors will significantly contribute to full development of underlying factual issues and just and equitable adjudication of legal questions presented. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

2. Federal Civil Procedure ¶320

Wildlife organization's motion for permissive intervention in environmental litigation dealing with injury to natural resources was not untimely, even though it was brought more than three and one-half years after suit was commenced, where organization believed itself adequately represented by state and federal governments until proposed partial settlement was announced. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

3. Federal Civil Procedure ¶320

Wildlife organization would be permitted to intervene in environmental litigation three and one-half years after suit was commenced where, because of proposed partial settlement agreement, state and federal governments no longer adequately represented organization's interests in matter, given substantial divergence in their views on natural resources damages and cleanup; intervention would not delay matters for existing parties and would provide guidance to court on extremely complex

legal and factual issues. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Health and Environment ¶25.5(10)

Comprehensive Environmental Response, Compensation, and Liability Act defendants are jointly and severally liable. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

5. Contribution ¶8

Federal district court is obligated to interpret contribution provisions of Comprehensive Environmental Response, Compensation and Liability Act to avoid frustration of Act's remedial purpose of encouraging settlement by preventing nonsettlers from seeking contribution from settlers and promoting expeditious resolution of harmful environmental conditions. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 113(f)(2), as amended, 42 U.S.C.A. §§ 9601 et seq., 9613(f)(2).

6. Statutes ¶306

Court should not construe statute so as to render any of it a nullity.

7. Compromise and Settlement ¶15(1)

Sovereigns were not responsible for bearing loss caused by discounted settlement of natural resources damages to one of several joint tortfeasors in suit under Comprehensive Environmental Response, Compensation, and Liability Act, where statute specifically provided that settlor's settlement "reduced" potential liability of nonsettling defendants by amount of settlement only. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(f)(2), as amended, 42 U.S.C.A. § 9613(f)(2).

8. Compromise and Settlement ¶15(1)

Comprehensive Environmental Response, Compensation, and Liability Act does not limit use of covenant not to sue as part of settlement to those instances where potentially responsible party agrees to ful-

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ly restore damaged natural resources, but does require United States to drive hardest bargain it can; thus, partial settlement which required corporation charged with environmental pollution to pay \$2 million in natural resources damages and to undertake appropriate actions necessary to protect and restore natural resources in suit in which natural resources claim would be tried before response costs claim would satisfy congressional intent if and when federal natural resources trustee agreed to covenant not to sue. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(j)(2), as amended, 42 U.S.C.A. § 9622(j)(2).

9. Compromise and Settlement ¶¶7

Lack of reopening clause in settlement of natural resources damages against one defendant, which would have allowed United States to sue defendant for presently unknown damages caused by release of PCBs, violated requirements of Comprehensive Environmental Response, Compensation, and Liability Act as well as intent of Congress and was not in public interest. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(f)(6)(B), as amended, 42 U.S.C.A. § 9622(f)(6)(B).

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Lee Breckenridge, Chief, Nancy Preis, Asst. Attys. Gen., Environmental Protection Div., Dept. of Atty. Gen., Boston, Mass., for Com. of Mass.

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Roger E. Warin, Stephen A. Fennell, Anita G. Raby, Steptoe & Johnson, Washington, D.C., for Highlands Ins. Co.

Wm. Gerald McElroy, Jr., John T. Harding, Jr., Zelle & Larson, Waltham, Mass., for Employers Ins. of Wausau.

James P. Whittara, III, Gaston & Snow, Boston, Mass., for Liberty Mut. Ins. Co.

Bert J. Capone, Deborah S. Griffin, Peabody & Arnold, Boston, Mass., for Home Ins. Co. and Lexington Ins. Group.

Robert F. Corliss, Robert A. Romero, Jr., Corliss & Romero, Boston, Mass., Mary Ann D'Amato, Paul Moran, Mendes & Mount,

New York City, for Underwriters at Lloyd's.

Pamela C. Slater, Allan E. Taylor, Taylor, Anderson & Travers, Boston, Mass., for First State Ins. Co.

Timothy P. Wickstrom, Taahjian, Simasarian & Wickstrom, Worcester, Mass., for Mission Ins. Co.

Calum B. Anderson, Parker, Coulter, Daley & White, Boston, Mass., for Northbrook Excess & Surplus Ins. Co.

Carl K. King, Gayle M. Merling, Goldstein & Manello, Boston, Mass., for EPEC, Inc.

David P. Rosenblatt, Burns & Levinson, Boston, Mass., for Plating Technologies.

Erik D. Olson, Nat. Wildlife Federation, Washington, D.C., for Nat. Wildlife Federation.

MEMORANDUM AND ORDER CONCERNING PARTIAL SETTLEMENT

YOUNG, District Judge.

These partially consolidated cases are presently before the Court for approval of a Partial Consent Decree (the "Proposed Decree") between the plaintiffs, the United States of America and the Commonwealth of Massachusetts (hereinafter, the "sovereigns"), and the defendant AVX Corporation ("AVX").¹ The Proposed Decree attempts to resolve the liability of AVX for injury to natural resources allegedly caused by the release of polychlorinated biphenyls ("PCBs") during its ownership

and operation of a capacitor manufacturing plant adjacent to New Bedford Harbor. The underlying action was brought, *inter alia*, under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. sec. 9607.² In addition, the Natural Wildlife Federation moved to intervene in the underlying action, in part to oppose the Proposed Decree.

1. The Motion of the National Wildlife Federation to Intervene

A settlement agreement of two million dollars (\$2,000,000) and a proposed judgment approving the settlement was filed with this Court on March 4, 1987. Notice of the proposed settlement was published in the Federal Register on March 12, 1987. 52 Fed.Reg. 7671 (March 12, 1987). On March 27, 1987, Aerovox Incorporated ("Aerovox") moved this Court to impose conditions on its approval of the Proposed Decree and to hold an evidentiary hearing.

As a preliminary matter, this Court must determine whether to permit the intervention of the National Wildlife Federation (the "Federation") which seeks, *inter alia*, to contest the Proposed Decree. The Federation seeks to represent the interests of its members who live in the New Bedford Harbor area. The Federation initially sought intervention as of right pursuant to Fed.R.Civ.P. 24(a) and the CERCLA intervention provision, 42 U.S.C. sec. 9612(f). The Federation, setting its sights somewhat lower at the hearing on intervention, now seeks permissive intervention subject

1. Taken together, these partially consolidated cases constitute a substantial complex litigation. As recognized by the American Law Institute Complex Litigation Project, "In massive environmental clean-up litigation what already is a highly complex basic dispute is compounded by the complexity of deciding the applicability of insurance coverage as well as assigning liability among multiple insurers." American Law Inst., Complex Litigation Project 17 (Tent. Draft No. 1, April 14, 1989).

This memorandum continues the discussion of the pre-trial issues raised in these partially consolidated cases. It is intended to be read with the Court's earlier decisions concerning jurisdiction and parties. *Acushnet River and New Bedford Harbor: Proceedings Re Alleged*

PCB Pollution, 675 F.Supp. 22 (D.Mass.1987) ("Acushnet I"), the right to jury trial. *Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 712 F.Supp. 994 (D.Mass. 1989) ("Acushnet II") and successor liability. *Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 712 F.Supp. 1010 (1989) ("Acushnet III").

2. The sovereigns filed amended complaints in early 1984 to include claims for recovery of governmental response costs incurred and to be incurred, for injunctive relief under CERCLA, and for claims under other federal and state environmental statutes and state common law.

Cite as 713 F.Supp. 1019 (D.Mass. 1989)

to certain conditions pursuant to Fed.R. Civ.P. 24(b).³ These conditions are as follows:

(1) The Federation may brief and argue the legal requirements applicable to any proposed consent decree lodged with this Court for consideration and approval.

(2) The Federation may brief and argue the appropriate measure of natural resource damages under CERCLA.

(3) The Federation may brief and argue the legal requirements for cleanup under CERCLA.

(4) The Federation may, with leave of the Court, brief and argue other legal issues in this case.

(5) The Federation may take an appeal from a judgment it views as adverse on issues (1) through (4) above.

(5) The Federation may not participate in discovery, the examination of witnesses, or the taking or contesting of evidence.

[1] Whether to grant permissive intervention is a matter left largely to the discretion of the district court. *E.g.*, *United States Postal System v. Brennan*, 579 F.2d 188, 191-92 (2d Cir.1978) (observing that "[p]ermissive intervention is wholly discretionary with the trial court" whose decision "may only be disturbed for clear abuse of discretion"); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, sec. 1923 at 512-14 (2d ed. 1986). The rule requires that the application to intervene be timely.⁴ In addition, several other factors are to be considered:

3. Rule 24(b)(3) provides in pertinent part:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

4. This Court observes that the timeliness inquiry considers four factors:

1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; 2) the

nature and extent of the intervenor's interest, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, whether the applicant will benefit by the intervention, whether the intervenor's interests are adequately represented by the other parties, and whether the intervenors will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *E.g.*, *Brennan*, 579 F.2d at 191-92; *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977); see also *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 782 F.2d 452, 472 (5th Cir. 1984), cert. denied, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

[2] This Court holds that the application is timely. Although this suit had been filed approximately three and one-half years before the Federation sought to intervene, the Federation believed itself adequately represented by the sovereigns until the proposed settlement was announced. Without at all impugning the motives or conduct of the sovereigns, the Court notes that, upon review of that proposed settlement, the Federation apparently believed the settlement to be a betrayal.⁵ It then moved promptly to intervene. On these facts, this Court refuses to hold the application untimely as matter of law. To do otherwise would promote a sort of prophylactic intervention whereby parties would be com-

prejudice to existing parties due to the applicant's failure to petition for intervention promptly; 3) the prejudice that applicants would suffer if they were not allowed to intervene; and 4) unusual circumstances militating for or against intervention[.]

Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983) (citations omitted); see also *Culbreth v. Dukakis*, 630 F.2d 15, 20-24 (1st Cir.1980). Obviously, there is some overlap between these factors and the factors generally listed below that are considered in granting or denying permissive intervention.

5. Under the *Garrity* analysis, see *supra* note 4, this Court holds that the sudden revelation of a divergence of interests between the sovereigns and the intervenor constitutes an unusual circumstance militating for intervention.

pelled to intervene in matters simply to protect their rights to participate in those matters downstream on the more or less remote chance that a party apparently protecting the intervenors' interests might someday betray them. Such a result would obviously be expensive and inefficient. Permitting parties like the Federation to intervene keeps the number of parties in a dispute at a minimum unless and until a real divergence of interests arises.⁶

This final point addresses another factor in the calculus: the adequacy of representation by another party. The Court holds that the sovereigns no longer adequately represent the Federation's interests in this matter. The sovereigns argue that their ultimate goal and that of the Federation are one and the same: "the restoration of the natural resources of New Bedford Harbor." Plaintiffs' Opposition to Motion of National Wildlife Federation to Intervene at 36 n. 23. Thus, they argue, the differences between themselves and the Federation concern means, not ends. *Id.*

[3] However, such an analysis is a triumph of formalism over reality. The differences in the measure of damages sought by the sovereigns as opposed to the Federation are substantial. The sovereigns apparently believe that "the proper measure of [natural resource] damages is the lesser of the costs of restoring or replacing the injured resources and the resources' lost

use value." Plaintiffs' Reply to Brief of the National Wildlife Federation in Opposition to Proposed Partial Consent Decree at 21 (Docket # 1213) (emphasis in original). The Federation asserts that the correct measure is far more sweeping: the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, plus the lost use value. Reply Brief of the National Wildlife Federation to the Parties' Opposition to NWF's Motion for Permissive Intervention Subject to Certain Conditions at 8 n. 5 (Docket # 1244) (emphasis added). "The exact amount of money damages that the sovereigns recover, one imagines, may well have a profound impact on the ultimate quality of the Harbor. Thus, the substantial divergence of views on the proper measure of damages between the sovereigns and the Federation necessarily renders the former's representation of the latter inadequate."⁷

By permitting intervention in this matter, this Court assuredly will promote the just and equitable adjudication of the legal question before it. Although the conditions the Federation voluntarily places on its intervention prevent it from contributing to the factual development of this case, its legal arguments will undoubtedly round out the considerations before this Court as the above discussion regarding the measure of damages makes clear.

6. The Court further notes that the putative intervenor will be prejudiced if intervention is denied to the extent that it will be unable to appeal the granting of summary judgment or the resolution of any of the legal issues on which it wishes to be heard. The prejudice to existing parties caused by intervention is addressed below.

7. Some of the defendants cite *Moosehead Sanitary District v. E.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir.1979) which established that when a party and a potential intervenor have the same ultimate goal in a litigation, a presumption of adequate representation arises and argues that therefore the Federation's motion should be denied. Opposition of AVX Corporation, et al. to Motion of National Wildlife Federation to Intervene (Docket # 1216) at 15-16. There are two problems with this analysis. First, on its face *Moosehead* considered only intervention of right under Rule 24(a) and thus not the loosened standards of Rule 24(b). *Id.* at 52 n. 5. Second,

Moosehead's requirement of the same ultimate goal is rather manipulable. In the instant case, for example, one may characterize the goals of the Federation and the sovereigns as being one and the same—the remedying of the New Bedford Harbor's pollution—or as divergent—respectively, the restoration of the Harbor's natural resources along with payment for their lost use value versus the recovery of the lesser amount of the restoration of the resources or the lost use value. Given the realities of this litigation—specifically the substantial difference in possible recoveries under these two theories of damages—for the purposes of permissive intervention, this Court holds that there is significant adversity of interests between the sovereigns and the Federation. For the same reason, this Court holds that the Federation satisfies even the heightened showing required by *United Nuclear Corp. v. Carson*, 696 F.2d 141, 144 (1st Cir.1982) to show inadequacy of the government's representation of the public interest.

Moreover, intervention will not cause undue prejudice or delay to the present parties. Analysis of this factor generally focuses on how the untimely entry of an intervenor into the fray may undo the work the parties have already done. With respect to future settlements or future consideration of the appropriate measure of natural resource damages or the legal requirements for cleanup under CERCLA, the Federation's participation in the process cannot undo any such work. No potential settlements are very far advanced as far as this Court knows. Further, the cleanup and natural resource damages issues remain unresolved and thus another view of the law will merely sharpen the debate, not reopen or delay matters. With respect to the Proposed Decree, as a practical matter the Court has already heard and read the Federation's argument. Thus, its input is already part of the calculus and any prejudice or delay from such arguments has already occurred.

True, the right to appeal that the Federation gains by intervention obviously increases the likelihood that any settlement approved by this Court will in fact be appealed. Several considerations, however, mitigate any ill effects of such a possibility. First, should the decree presently before the Court be approved, any appeal would appear to be interlocutory and thus must attend the end of AVX's participation in the case. The two million dollar settlement is to be paid to the sovereigns promptly after approval of the decree and thus the threat of an appeal by the Federation will not delay the money reaching the sovereigns' coffers. Even more significantly, no restoration or replacement of natural resources can begin until after the cleanup is finished. Far from having even begun yet, the cleanup awaits completion of studies by the sovereigns that will determine the most efficacious manner of proceeding. Thus, for aught this Court can see, none of the

settlement money will be spent for years to come in any event.

Admittedly, should the Court of Appeals at some point vacate the instant settlement as improvidently approved, considerable time, effort, and money of the sovereigns and AVX will have been wasted. This Court, however, is still disposed to grant intervention. First, the Court observes with respect and diffidence that, given the broad discretion granted to trial courts to approve such settlements, the risk of reversal on this point seems acceptable in light of the benefits that settlement will confer on these parties. Second, this one settlement constitutes a relatively small part of this entire litigation and the nature of the intervention that the Federation seeks—the right to argue and to appeal with respect to settlements as well as the issues of cleanup and natural resource damages—is quite limited. Viewing the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient to offset the strong arguments for permitting intervention.

One further reason exists to allow intervention. Without intending any criticism of the sovereigns' advocacy, such intervention permits another voice and set of concerns to participate in the resolution of an extremely complex matter, both factually and legally—that necessarily is taking this Court and the parties into the heretofore largely uncharted waters of a relatively new statute. The further guidance of an additional entity, especially one with some expertise in the subject at hand, is therefore not lightly to be shunned. Indeed, as the balance of this opinion will reveal, the Federation's impact in shaping this litigation cannot be denied.

For these reasons, the Court GRANTS the Federation's motion to intervene permissively, subject to the conditions listed above.⁵ One further restriction is imposed

5. The First Circuit's recent decision in *United States v. Metropolitan Dist. Comm'n*, 845 F.2d 2 (1988), cited by the sovereigns, does not require a different result. There, the court affirmed the district court's decision to deny intervention by

a public interest group and several towns contiguous to Massachusetts Bay in a Federal Water Pollution Control Act case. The court specifically found that the trial judge did not abuse his broad discretion by denying intervention on the

which, the Court observes, is more a clarification in line with the Federation's intent than a substantive condition. The Federation may not argue to the jury the conclusions to be drawn from any evidence taken at trial or otherwise address any jury impaneled in this matter.

II. The Proposed Decree

A. The Non-Settlers' Motion.

[4] In October, 1986, Congress passed the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, sec. 101 *et seq.*, 100 Stat. 1618 (1986) ("SARA") amending CERCLA. Among the numerous changes it wrought in CERCLA, SARA added provisions covering settlements of CERCLA claims and, in particular, the question of contribution.⁹ Included was a provision that, for the first time, granted settlers protection from contribution liability to non-settlers. The complete provision, 42 U.S.C. sec. 9613(f)(2), provides:

Settlement.—A person who has resolved its liability to the United States or a State in an administrative or judicially

liability issue. The trial court denied intervention because, *inter alia*, such intervention was untimely. The district court noted that the putative intervenors' interest in the litigation was apparent arguably as far back as June, 1983, *United States v. Metropolitan Dist. Comm'n*, 679 F.Supp. 1154, 1161 (D.Mass.1988), yet they did not seek intervention until October, 1987, more than two years later. (The Federation represents, and no party disputes, that, although the district court opinion in *Metropolitan Dist. Comm'n* is silent on the matter, the trial court docket reveals intervention was not sought until October, 1987.) Unlike the instant case, those intervenors' motions clearly were untimely.

9. The doctrine of contribution allows a settlor who has paid all or a portion of a judgment to seek contribution from other jointly and severally liable parties. At common law, a settlement by the plaintiff with one or more joint tortfeasors does not release the settling defendants from contribution. The common law rule discourages the settlement of cases because the defendant settlor remains potentially liable for contribution. The Uniform Contribution Among Joint Tortfeasors Act, sec. 4, 12 U.L.A. 63 (1975), and most state statutes, including that of Massachusetts, release the settlor from liability for contribution. See e.g., *Mass.Gen.Laws ch. 231B, sec. 4*.

10. *Aarvorn* asserts that SARA's addition of subsection 113(f)(2) to CERCLA was not intended

approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Congress passed this provision to encourage settlement of CERCLA cases. Previously, settlers had no statutory assurance that any settlement that they reached with the EPA would end their liability in a case because non-settlers might later seek contribution from them. In an attempt to offset this disincentive to settle, the Environmental Protection Agency ("EPA") adopted a policy of reducing its judgment against non-settlers to the extent necessary to extinguish the settlor's liability to the non-settlers. See 50 Fed.Reg. 5034, 5039 (Feb. 5, 1985). SARA's contribution provision eliminates the need for such a policy where the settlement is "administrative or judicially approved."¹⁰

to change the EPA's settlement policy, but is simply another protection mechanism for achieving the fair and reasonable apportionment of damages among joint tortfeasors. This Court disagrees. The EPA's policy is best understood as a proper attempt by an agency to fill in the interstices of an incomplete statutory framework that was supplanted by a later clear directive from Congress. That clear directive necessarily trumps the old EPA policy.

Admittedly, the few decided cases do not clearly point this way. The court in *City of New York v. Exxon Corp.*, 697 F.Supp. 677 (S.D.N.Y. 1988) seems to have dismissed but not to have decided the significance of subsection 113(f)(2). The court noted that "section 113(f)(2) apparently compels the non-settlers to absorb the shortfall" between the settlement and the settlor's proportional share. 697 F.Supp. at 681 n. 5. Elsewhere, the court acknowledged that some other courts have applied the Uniform Comparative Fault Act (essentially the EPA's pre-SARA policy) to post-SARA settlements. 697 F.Supp. at 683 n. 9. These latter cases are indeed puzzling to this Court in that they fail even to discuss the language of subsection 113(f)(2). *Lynner Corp. v. Chem. Waste Management, Inc.*, 690 F.Supp. 1409, 1418 (E.D.Pa.1988) (adopting the Uniform Comparative Fault Act approach in a cleanup settlement); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, No. 83 C 1142, 1987 WL 27348 (N.D.Ill.1987) (adopting a similar rule in a cleanup settlement).

The result is a powerful tool—actually a carrot and a stick—placed in the hands of the EPA to obtain settlements. The carrot the EPA can offer potential settlers is that they need no longer fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. In addition to this protection, settlers themselves are enabled to seek contribution against non-settlers. 42 U.S.C. sec. 9612(f)(3)(B). As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlers, being jointly and severally liable,¹¹ must make good the difference. In this respect, the words of the statute are clear: the potential liability of the others is reduced "by the amount of settlement," not by the settlor's proportionate share of any damages ultimately determined to have been caused.¹²

This result is in keeping with Congress' intent to encourage CERCLA settlements and reduce the time and expense of enforcement litigation that necessarily diverts money from cleanup and restoration.¹³ Were the law otherwise, the responsibility of a settlor for damages would need to be

fully litigated by the sovereigns and the non-settlers to determine the settlor's proportional share, thus largely duplicating the aspects—and expense—of the litigation the settlement was designed to avoid.¹⁴

The two non-settlers opposing the Proposed Decree—Aerovox and Belleville Industries, Inc. ("Belleville")—argue correctly that, for AVX to gain contribution protection, this Court must approve the settlement pursuant to 42 U.S.C. sec. 9612(f)(2). Before approving such a settlement, this Court must ascertain "that it is fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress." *City of New York*, 697 F.Supp. at 682 (citation omitted); see also *United States v. Seymour Recycling Corp.*, 554 F.Supp. 1834, 1837 (S.D.Ind.1982) (pre-SARA CERCLA case).

A multiplicity of factors are considered in evaluating whether the Proposed Decree before this Court is fair and reasonable. The protection of the public interest is paramount. *Seymour Recycling Corp.*, 554

Finding these cases unpersuasive, this Court chooses to follow the plain language of the statute and holds that subsection 113(f)(2) of SARA has supplanted the EPA's prior policy.

11. The parties do not dispute, and it is generally the case, that CERCLA defendants are jointly and severally liable. Indeed, the concept of contribution only makes sense in a context of joint and several liability. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ind.1983); Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 Ecology L.Q. 365, 368-69 (1987) (gathering cases). Exceptions to this rule have been made where a violator's actions have had a de minimis effect and where apportionment is readily accomplished, for example where the harms caused are distinct or are otherwise capable of a reasonable and rational division. See Garber, *supra*, at 368-69 & n. 12.

12. Massachusetts law yields the same result. See Mass.Gen.Laws ch. 231B, sec. 4.

13. See *City of New York*, 697 F.Supp. at 683 (noting that the SARA amendments were intended to "expedite effective remedial actions and minimize litigation") (quoting 42 U.S.C. sec. 9622(a)); 132 Cong.Rec. H9564 (daily ed. Oct. 8, 1986) (statement of Rep. Lott) ("I am pleased to report that the idea of encouraging settlements is no longer considered ground breaking

but now is a simple and obvious matter of good policy. Costly protracted litigation threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup."); Garber, 14 Ecology L.Q. at 373-74; Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 Va.L.Rev. 123, 124-26, 135 (1988).

14. Were the law otherwise, the sovereigns would be involved in litigating the exact share of each of the settlers for the overall liability in order to determine the remaining amount to be recovered from the non-settlers, surely a dauntingly difficult, expensive and time-consuming task. It thus might cost the sovereigns more to settle with one party than not to settle since, if the sovereigns do not settle, they can merely prove that all five defendants have polluted and seek recovery from all or any one of them in any proportion the sovereigns choose because the defendants in such a case are generally jointly and severally liable. Admittedly, the non-settlers may bring contribution actions against each other no matter how this provision is interpreted. But the sovereigns need not be party to such litigation under this Court's interpretation of the statute, thus fulfilling Congress' intention to encourage settlement, to save the sovereigns' litigation expenses, and to keep the cost of pollution on the potentially responsible parties.

F.Supp. at 1837. Among the other factors a district court should consider in measuring the fairness and reasonableness of a settlement are:

a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and, the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement.

E.E.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir.1985) (citations omitted), cert. denied, 478 U.S. 1004, 100 S.Ct. 3233, 92 L.Ed.2d 709 (1986); see also *City of New York*, 697 F.Supp. at 692 (employing a similar list of factors).

The district court's opinion in *City of New York* provides additional helpful guidance:

In assessing [the above factors], however, the Court's role is not unlimited. Settlements are to be encouraged and the court does not "have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." [*City of Detroit v. Grinnell Corp.*], 495 F.2d [448] at 458. [2nd Cir.1974] And "where there has been arms length bargaining among the parties (and) sufficient discovery has taken place to enable ... counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case ... there is a presumption in favor of the settlement." *Wellman v. Dickinson*, 497 F.Supp. 824, 830 (S.D.N.Y.1980), aff'd, 647 F.2d 163 (2d Cir.1981), particularly where "a government agency committed to the protection of the public interest" has participated in and endorsed the agreement. *Id.* [;] [*cf. Federal Trade Comm'n v. Standard Financial Mgt. Corp.*, 836 F.2d 404, 408 (1st Cir.1987) (holding that the trial court "should accord some substantial deference to [an] agency's determination that [a] settlement is appropriate" in a deceptive trade practices case) (citation omitted).] Finally, in addition to the general

federal policy favoring settlements, see *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir.1960), the reviewing court must be mindful that Congress, in enacting the 1980 amendments to CERCLA sought to "expedite effective remedial actions and minimize litigation." Section 122(a).

The balance to be struck between the policies favoring settlements and the need to safeguard the public interest in cases of this type was best summarized in *United States v. Corvols Development Corp.*, 454 F.Supp. 1217 (D.N.Y. 1978):

It is not the Court's function to determine whether this is the best possible settlement that could have been obtained but rather the Court's duty is to determine "whether the settlement is within the reaches of the public interest." *Id.* at 1222 (quoting *United States v. Gillette Company*, 406 F.Supp. 713, 716 [D.Mass.1975]).

697 F.Supp. at 692-93.

An analysis of all the above factors reveals that Aerovox and Belleville have failed to overcome the material in the record that favors approving this settlement. With respect to the mandate of Congress, the various discernable intentions of Congress can be gleaned from the cases, statutory language, and legislative history. First, that body adopted CERCLA to provide the government with the authority and mechanisms to combat hazardous substance spills, leaks, and other releases. Hazardous waste disposal poses a serious and increasing threat to the environment. Congress realized that it was imperative "that the Federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal." *Dedham Water Co. v. Cumberland Farms Dairy Inc.*, 806 F.2d 1074, 1081 (1st Cir.1986) (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 [D.Minn. 1982]).

CERCLA was designed "to protect and preserve public health and the environ-

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ment." *Dedham Water*, 805 F.2d at 1081. That Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation. Without question, Congress passed the SARA amendments to encourage settlements for this very reason.¹⁵ Indeed, subsection 113(f), as well as section 122, both added to CERCLA by the SARA amendments, are devoted to facilitating just such arrangements.

[5] Section 4, as noted above, the contribution protection provision in CERCLA subsection 113(f)(2) encourages settlement by preventing non-settlers from seeking contribution from settlers. This Court is obligated to interpret the contribution provisions of CERCLA to avoid frustration of the Act's remedial purpose. *United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H. 1985). An evaluation of the Proposed Decree which overemphasizes the importance of its potential effect on the non-settlers, which Aarvox and Belleville appear to advocate, would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions. This Court, therefore, holds that in measuring whether the Proposed Decree is fair, reasonable, and protective of the public interest the effect on the non-settlers is not determinative, but is merely one factor in the calculus. Such an interpretation of subsection 113(f)(2) promotes the intent of Congress by giving the federal government a powerful tool necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.

15. See *supra* note 13.

16. See *infra* at 1036-38.

17. See *supra* at 1026-27.

18. This case is *United States v. Lovett et al.*, No. 86-180-Y. Of it, this Court has written: The ambitious indictment sought to be tried here is a prime example of the sweeping powers Congress has conferred upon the executive branch (through passage of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sec. 1962). This indictment lists well over twenty predicate acts and involves the

Third, the Proposed Decree between the sovereigns and AVX is consistent with the mandate of Congress. The Court's review of the record assures it that the terms of the Proposed Decree are fair and adequate, that the settlement is reasonable under the facts, and that, with but two exceptions,¹⁶ it protects the public interest. See *Culbreth v. Dukakis*, 680 F.2d 15, 23 (1st Cir.1980); *Seymour Recycling Corp.*, 554 F.Supp. at 1337; *United States v. Hooker Chem. & Plastics Corp.*, 540 F.Supp. 1067, 1072 (W.D.N.Y.1982).

Court approval of the Proposed Decree between the sovereigns and AVX is in the public interest. The voluntary settlement of litigation is high in judicial favor both generally, see, e.g., *Citizens For a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C.Cir.1983), cert. denied, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984), and in CERCLA actions in particular.¹⁷

The settlement of the natural resource damages action between the sovereigns and AVX will save the sovereigns, and subsequently the public, considerable time and money that would otherwise be expended at trial. Settlement provides substantial funds for the rehabilitation of New Bedford Harbor without the risks and costs of lengthy litigation.

The immediate transfer of funds is a significant factor because it gives the sovereigns control over and the interest derived from a substantial amount of money. The start of any trial in the instant matter, already long delayed by a protracted criminal case the Court is trying in Springfield, Massachusetts,¹⁸ remains uncertain. The

presentation of evidence concerning conduct in various locations in Connecticut, Maine, Massachusetts, New York, New Jersey, Ohio, and Pennsylvania. The government's witness list includes 325 names. Thousands of documents and items of tangible evidence are expected to be introduced. The trial itself is estimated to last from six to twelve months. *United States v. Lovett et al.*, No. 86-180-Y, slip op. at 36 (D.Mass. May 4, 1989). The aggregate reimbursement of counsel appointed under the Criminal Justice Act, 18 U.S.C. sec. 3006A, to represent these indigent defendants has exceeded \$800,000 in the pre-trial jury selection phase

first two of several related trials in the instant case, running concurrently, are expected to last three to four months and the substantial expense of such a trial will accord with its length.¹⁹

Moreover, a trial of this claim would be complex, lengthy, expensive and uncertain as an examination of five aspects of this litigation will demonstrate. First, the scope of provable natural resource damages in this matter is hotly disputed by the parties whose divergent approaches would result in widely varying recoveries should any liability be found. Second, it may be difficult to link the harm caused by any PCB release from the AVX facility to the PCB's found elsewhere in the Harbor. AVX began operating its New Bedford Harbor plant in 1938. Years may have passed between the time of the releases and any quantifiable impact upon the Harbor; years more may have passed before any such impact was first discovered. Moreover, at least two types of hazardous PCB waste were allegedly released into the Harbor by the operators of the two different New Bedford plants. Those two plants have been under the management and control of five different corporate owners. Damage caused by the behavior of AVX may be difficult to measure and distinguish from damage caused by other plant operators. Third, and relatedly, the responsibility for the condition of New Bedford Harbor is diffuse in another respect. The sov-

ereigns here seek to recover only for that injury to natural resources caused by PCB contamination, yet the Harbor appears rife with a variety of contaminants. It may prove difficult to distinguish whether some injury is caused by PCB's or by other pollutants. While problems of divisibility of the injury and damages due to PCB contamination may be less a concern to the sovereigns because they may well be able to hold the defendants jointly and severally liable, protracted contribution litigation among any non-settlers may be necessary. Fourth, the unsettled nature of CERCLA law, which the myriad pretrial motions in this matter reflect, argues in favor of this settlement. The inherent uncertainty in such a state of affairs makes settlement desirable for the parties and satisfies the public interest by securing a substantial recovery in the face of unknown and perhaps unknowable odds. Fifth, AVX sold its interest in the plant in 1973, seven years before the passage of CERCLA, and pre-enactment damages to natural resources stemming from pre-enactment releases are not compensable under CERCLA. 42 U.S.C. sec. 9607(f)(1). Thus, whether, and to what extent, the sovereigns will be able to recover for natural resource damages from AVX remains in doubt. In light of these factors and the novelty of this action, this Court rules that the settlement of the natural resource damages claim under section 107 of CERCLA between the sovereigns

of these proceedings." *United States v. Levenson*, 704 F.Supp. 1152, 1165 n. 12 (D.Mass.1989). Trial commenced in this case on January 9, 1989. The aggregate cost of the representation of these indigent defendants stood at \$1,088,932 after three months of trial.

19. This Court, in an earlier pre-trial order, required the sovereigns to proceed separately against each of the alleged polluters in trying their claims for injury to natural resources (though it later consolidated the trials against Bellaville and Aroveton). Due to the exhaustive—and exhausting—pre-trial orders entered herein, the parties have been required to request the admission of each and every fact they seek to establish. With the universe of facts thus established, the individual trials have been limited to four months apiece. The jury proceedings are scheduled to run from 9 a.m. to 1 p.m. on each trial day and the related jury waived trials involving insurance coverage for each of the al-

leged polluters will run concurrently from 2-3 p.m. on the same trial days. The cost to the public of devoting such extensive judicial resources to these cases is not insignificant. In 1987, exclusive of any of the parties' legal costs, it was estimated that one day of trial in a United States District Court costs the public \$10,000-\$15,000. See *Chappes v. Commonwealth of Massachusetts*, 659 F.Supp. 1220, 1226 n. 9 (D.Mass.1987), *reversed on other grounds sub nom.*, *Chappes v. Voss*, 843 F.2d 25 (1st Cir. 1988). Inflation no doubt has rendered this figure conservative. Moreover, the enormous burden of trying cases such as *United States v. Levenson*, see *supra* note 18, and these cases, virtually back-to-back, necessarily means that scarce judicial resources will be unavailable for other litigants, equally deserving, who have waited just as long for justice. These facts highlight the institutional benefits to be gained from prompt, just settlements.