

**U.S. Code**

**TITLE 33 - NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 40 - OIL POLLUTION  
SUBCHAPTER I - OIL POLLUTION LIABILITY AND COMPENSATION  
(selected provisions)**

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**2702. Elements of liability**

(a) In general. Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.

(b) Covered removal costs and damages

(1) Removal costs. The removal costs referred to in subsection (a) of this section are -

- (A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 1321 of this title, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and
- (B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) Damages. The damages referred to in subsection (a) of this section are the following:

- (A) Natural resources. Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States Trustee, a State Trustee, an Indian tribe Trustee, or a foreign Trustee.
- (B) Real or personal property. Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.
- (C) Subsistence use. Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
- (D) Revenues. Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
- (E) Profits and earning capacity. Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

- (F) Public services. Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.
- (c) Excluded discharges. This subchapter does not apply to any discharge -
- (1) permitted by a permit issued under Federal, State, or local law;
  - (2) from a public vessel; or
  - (3) from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.).
- (d) Liability of third parties
- (1) In general
    - (A) Third party treated as responsible party. Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) of this title (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this subchapter.
    - (B) Subrogation of responsible party. If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party -
      - (i) in accordance with section 2713 of this title, shall pay removal costs and damages to any claimant; and
      - (ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.
  - (2) Limitation applied
    - (A) Owner or operator of vessel or facility. If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of this title as applied with respect to the vessel or facility.
    - (B) Other cases. In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

## **2706. Natural resources**

- (a) Liability. In the case of natural resource damages under section 2702(b)(2)(A) of this title, liability shall be -
- (1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;
  - (2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 2707 of this title applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) Designation of Trustees

(1) In general. The President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as Trustee of natural resources to present a claim for and to recover damages to the natural resources.

(2) Federal Trustees. The President shall designate the Federal officials who shall act on behalf of the public as Trustees for natural resources under this Act.

(3) State Trustees. The Governor of each State shall designate State and local officials who may act on behalf of the public as Trustee for natural resources under this Act and shall notify the President of the designation.

(4) Indian tribe Trustees. The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as Trustee for natural resources under this Act and shall notify the President of the designation.

(5) Foreign Trustees. The head of any foreign government may designate the Trustee who shall act on behalf of that government as Trustee for natural resources under this Act.

(c) Functions of Trustees

(1) Federal Trustees. The Federal officials designated under subsection (b)(2) of this section -

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the natural resources under their Trusteeship;

(B) may, upon request of and reimbursement from a State or Indian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's Trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their Trusteeship.

(2) State Trustees. The State and local officials designated under subsection (b)(3) of this section -

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this Act for the natural resources under their Trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their Trusteeship.

(3) Indian tribe Trustees. The tribal officials designated under subsection (b)(4) of this section -

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this Act for the natural resources under their Trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their Trusteeship.

(4) Foreign Trustees. The Trustees designated under subsection (b)(5) of this section -

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this Act for the natural resources under their Trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their Trusteeship.

(5) Notice and opportunity to be heard. Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

(d) Measure of damages

(1) In general. The measure of natural resource damages under section 2702(b)(2)(A) of this title is -

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) Determine costs with respect to plans. Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c) of this section.

(3) No double recovery. There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

(e) Damage assessment regulations

(1) Regulations. The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after August 18, 1990, shall promulgate regulations for the assessment of natural resource damages under section 2702(b)(2)(A) of this title resulting from a discharge of oil for the purpose of this Act.

(2) Rebuttable presumption. Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) of this section by a Federal, State, or Indian Trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the Trustee in any administrative or judicial proceeding under this Act.

(f) Use of recovered sums. Sums recovered under this Act by a Federal, State, Indian, or foreign Trustee for natural resource damages under section 2702(b)(2)(A) of this title shall be retained by the Trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the Trustee under

subsection (c) of this section with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) Compliance. Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any right which any person may have to seek relief under any other provision of law.

### **2712. Uses of Fund**

(a) Uses generally. The Fund shall be available to the President for -

(1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan -

(A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d) of this section;

(2) the payment of costs incurred by Federal, State, or Indian tribe Trustees in carrying out their functions under section 2706 of this title for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act (including, but not limited to, sections 1004(d)(2), 1006(e), 4107, 4110, 4111, 4112, 4117, 5006, 8103, and title VII) and subsections (b), (c), (d), (j), and (l) of section 1321 of this title with respect to prevention, removal, and enforcement related to oil discharges, provided that -

(A) not more than \$25,000,000 in each fiscal year shall be available to the Secretary for operating expenses incurred by the Coast Guard;

(B) not more than \$30,000,000 each year through the end of fiscal year 1992 shall be available to establish the National Response System under section 1321(j) of this title, including the purchase and prepositioning of oil spill removal equipment; and

(C) not more than \$27,250,000 in each fiscal year shall be available to carry out subchapter IV of this chapter.

- (b) Defense to liability for Fund. The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant.
- (c) Obligation of Fund by Federal officials. The President may promulgate regulations designating one or more Federal officials who may obligate money in accordance with subsection (a) of this section.
- (d) Access to Fund by State officials
- (1) Immediate removal. In accordance with regulations promulgated under this section, the President, upon the request of the Governor of a State or pursuant to an agreement with a State under paragraph (2), may obligate the Fund for payment in an amount not to exceed \$250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.
- (2) Agreements
- (A) In general. The President shall enter into an agreement with the Governor of any interested State to establish procedures under which the Governor or a designated State official may receive payments from the Fund for removal costs pursuant to paragraph (1).
- (B) Terms. Agreements under this paragraph -
- (i) may include such terms and conditions as may be agreed upon by the President and the Governor of a State;
- (ii) shall provide for political subdivisions of the State to receive payments for reasonable removal costs; and
- (iii) may authorize advance payments from the Fund to facilitate removal efforts.
- (e) Regulations. The President shall -
- (1) not later than 6 months after August 18, 1990, publish proposed regulations detailing the manner in which the authority to obligate the Fund and to enter into agreements under this subsection shall be exercised; and
- (2) not later than 3 months after the close of the comment period for such proposed regulations, promulgate final regulations for that purpose.
- (f) Rights of subrogation. Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.
- (g) Audits. The Comptroller General shall audit all payments, obligations, reimbursements, and other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the Congress an interim report one year after August 18, 1990. The Comptroller General shall thereafter audit the Fund as is appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.
- (h) Period of limitations for claims
- (1) Removal costs. No claim may be presented under this subchapter for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) Damages. No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 2702(b)(2)(A) of this title, if later, the date of completion of the natural resources damage assessment under section 2706(e) of this title.

(3) Minors and incompetents. The time limitations contained in this subsection shall not begin to run -

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for the incompetent.

(i) Limitation on payment for same costs. In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a) of this section, no other claim may be paid from the Fund for the same removal costs or damages.

(j) Obligation in accordance with plan

(1) In general. Except as provided in paragraph (2), amounts may be obligated from the Fund for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a plan adopted under section 2706(c) of this title.

(2) Exception. Paragraph (1) shall not apply in a situation requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action.

(k) Preference for private persons in area affected by discharge

(1) In general. In the expenditure of Federal funds for removal of oil, including for distribution of supplies, construction, and other reasonable and appropriate activities, under a contract or agreement with a private person, preference shall be given, to the extent feasible and practicable, to private persons residing or doing business primarily in the area affected by the discharge of oil.

(2) Limitation. This subsection shall not be considered to restrict the use of Department of Defense resources.

### **2713. Claims procedure**

(a) Presentation. Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title.

(b) Presentation to Fund

(1) In general. Claims for removal costs or damages may be presented first to the Fund -

(A) if the President has advertised or otherwise notified claimants in accordance with section 2714(c) of this title;

(B) by a responsible party who may assert a claim under section 2708 of this title;

(C) by the Governor of a State for removal costs incurred by that State; or  
(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 2712(a) of this title.

- (2) Limitation on presenting claim. No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.
- (c) Election. If a claim is presented in accordance with subsection (a) of this section and -
- (1) each person to whom the claim is presented denies all liability for the claim, or
  - (2) the claim is not settled by any person by payment within 90 days after the date upon which
    - (A) the claim was presented, or
    - (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.
- (d) Uncompensated damages. If a claim is presented in accordance with this section and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.
- (e) Procedure for claims against Fund. The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund.



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TITLE 15  
**COMMERCE AND FOREIGN TRADE CHAPTER IX**  
**NATIONAL OCEANIC AND ATMOSPHERIC**  
**ADMINISTRATION,**  
**DEPARTMENT OF COMMERCE PART 990**

**NATURAL RESOURCE DAMAGE ASSESSMENTS**

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Authority: 33 U.S.C. 2701 et seq. Source: 61 FR 500, Jan. 5, 1996, unless otherwise noted.

Subpart A--Introduction

Sec. 990.10 Purpose. The goal of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 et seq., is to make the environment and public whole for injuries to **natural** resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident). This goal is achieved through the return of the injured **natural** resources and services to baseline and compensation for interim losses of such **natural** resources and services from the date of the incident until recovery. The purpose of this part is to promote expeditious and cost-effective restoration of **natural** resources and services injured as a result of an incident. To fulfill this purpose, this part provides a **natural resource damage** assessment process for developing a plan for restoration of the injured **natural** resources and services and pursuing implementation or funding of the plan by responsible parties. This part also provides an administrative process for involving interested parties in the assessment, a range of assessment procedures for identifying and evaluating injuries to **natural** resources and services, and a means for

selecting restoration actions from a reasonable range of alternatives.

Sec. 990.11 Scope. The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 et seq., provides for the designation of federal, state, and, if designated by the Governor of the state, local officials to act on behalf of the public as trustees for **natural** resources and for the designation of Indian tribe and foreign officials to act as trustees for **natural** resources on behalf of, respectively, the tribe or its members and the foreign government. This part may be used by these officials in conducting **natural resource damage assessments** when **natural** resources and/or services are injured as a result of an incident involving an actual or substantial threat of a discharge of oil. This part is not intended to affect the recoverability of **natural resource** damages when recoveries are sought other than in accordance with this part.

Sec. 990.12 Overview. This part describes three phases of a **natural resource damage** assessment. The Preassessment Phase, during which trustees determine whether to pursue restoration, is described in subpart D of this part. The Restoration Planning Phase, during which trustees evaluate information on potential injuries and use that information to determine the need for, type of, and scale of restoration, is described in subpart E of this part. The Restoration Implementation Phase, during which trustees ensure implementation of restoration, is described in subpart F of this part.

Sec. 990.13 Rebuttable presumption. Any determination or assessment of damages to **natural** resources made by a Federal, State, or Indian trustee in accordance with this part shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under OPA.

Sec. 990.14 Coordination. (a) Trustees. (1) If an incident affects the interests of multiple trustees, the trustees should act jointly under this part to ensure that full restoration is achieved without double recovery of damages. For joint **assessments**, trustees must designate one or more Lead Administrative Trustee(s) to act as coordinators. (2) If there is a reasonable basis for dividing the **natural resource damage** assessment, trustees may act independently under this part, so long as there is no double recovery of damages. (3) Trustees may develop pre-incident or incident-

specific memoranda of understanding to coordinate their activities. (b) Response agencies. Trustees must coordinate their activities conducted concurrently with response operations with response agencies consistent with the NCP and any pre-incident plans developed under Sec. 990.15(a) of this part. Trustees may develop pre-incident memoranda of understanding to coordinate their activities with response agencies. (c) Responsible parties--(1) Invitation. Trustees must invite the responsible parties to participate in the **natural resource damage** assessment described in this part. The invitation to participate should be in writing, and a written response by the responsible parties is required to confirm the desire to participate. (2) Timing. The invitation to participate should be extended to known responsible parties as soon as practicable, but not later than the delivery of the ``Notice of Intent to Conduct Restoration Planning,'' under Sec. 990.44 of this part, to the responsible party. (3) Agreements. Trustees and responsible parties should consider entering into binding agreements to facilitate their interactions and resolve any disputes during the assessment. To maximize cost-effectiveness and cooperation, trustees and responsible parties should attempt to develop a set of agreed-upon facts concerning the incident and/or assessment. (4) Nature and extent of participation. If the responsible parties accept the invitation to participate, the scope of that participation must be determined by the trustees, in light of the considerations in paragraph (c)(5) of this section. At a minimum, participation will include notice of trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment. Increased levels of participation by responsible parties may be developed at the mutual agreement of the trustees and the responsible parties. Trustees will objectively consider all written comments provided by the responsible parties, as well as any other recommendations or proposals that the responsible parties submit in writing to the Lead Administrative Trustee. Submissions by the responsible parties will be included in the administrative record. Final authority to make determinations regarding injury and restoration rest solely with the trustees. Trustees may end participation by responsible parties who, during the conduct of the assessment, in the sole judgment of the trustees, cause interference with the trustees' ability to fulfill their responsibilities under OPA and this part. (5)

Considerations. In determining the nature and extent of participation by the responsible parties or their representatives, trustees may consider such factors as: (i) Whether the responsible parties have been identified; (ii) The willingness of responsible parties to participate in the assessment; (iii) The willingness of responsible parties to fund assessment activities; (iv) The willingness and ability of responsible parties to conduct assessment activities in a technically sound and timely manner and to be bound by the results of jointly agreed upon studies; (v) The degree of cooperation of the responsible parties in the response to the incident; and (vi) The actions of the responsible parties in prior **assessments**.

(6) Request for alternative assessment procedures. (i) The participating responsible parties may request that trustees use assessment procedures other than those selected by the trustees if the responsible parties: (A) Identify the proposed procedures to be used that meet the requirements of Sec. 990.27 of this part, and provide reasons supporting the technical adequacy and appropriateness of such procedures for the incident and associated injuries; (B) Advance to the trustees the trustees' reasonable estimate of the cost of using the proposed procedures; and (C) Agree not to challenge the results of the proposed procedures. The request from the responsible parties may be made at any time, but no later than, fourteen (14) days of being notified of the trustees' proposed assessment procedures for the incident or the injury. (ii) Trustees may reject the responsible parties' proposed assessment procedures if, in the sole judgment of the trustees, the proposed assessment procedures: (A) Are not technically feasible; (B) Are not scientifically or technically sound; (C) Would inadequately address the **natural** resources and services of concern; (D) Could not be completed within a reasonable time frame; or (E) Do not meet the requirements of Sec. 990.27 of this part.

(7) Disclosure. Trustees must document in the administrative record and Restoration Plan the invitation to the responsible parties to participate, and briefly describe the nature and extent of the responsible parties' participation. If the responsible parties' participation is terminated during the assessment, trustees must provide a brief explanation of this decision in the administrative record and Restoration Plan. (d) Public. Trustees must provide opportunities for public involvement after the trustees' decision to develop restoration plans or issuance of any notices to that effect, as provided in Sec. 990.55 of this part. Trustees may also provide

opportunities for public involvement at any time prior to this decision if such involvement may enhance trustees' decisionmaking or avoid delays in restoration.

Sec. 990.15 Considerations to facilitate restoration. In addition to the procedures provided in subparts D through F of this part, trustees may take other actions to further the goal of expediting restoration of injured **natural** resources and services, including: (a) Pre-incident planning. Trustees may engage in pre-incident planning activities. Pre-incident plans may identify **natural resource damage** assessment teams, establish trustee notification systems, identify support services, identify **natural** resources and services at risk, identify area and regional response agencies and officials, identify available baseline information, establish data management systems, and identify assessment funding issues and options. Potentially responsible parties, as well as all other members of the public interested in and capable of participating in **assessments**, should be included in pre-incident planning to the fullest extent practicable. (b) Regional Restoration Plans. Where practicable, incident-specific restoration plan development is preferred, however, trustees may develop Regional Restoration Plans. These plans may be used to support a claim under Sec. 990.56 of this part. Regional restoration planning may consist of compiling databases that identify, on a regional or watershed basis, or otherwise as appropriate, existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents.

#### Subpart B--Authorities

Sec. 990.20 Relationship to the CERCLA **natural resource damage** assessment regulations. (a) General. Regulations for assessing **natural resource** damages resulting from hazardous substance releases under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 et seq., and the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1321 et seq., are codified at 43 CFR part 11. The CERCLA regulations originally applied to **natural resource** damages resulting from oil discharges as well as hazardous substance releases. This part supersedes 43 CFR part 11 with regard to oil discharges covered by OPA. (b) **Assessments** commenced before February 5, 1996. If trustees commenced a **natural resource damage** assessment for an oil

discharge under 43 CFR part 11 prior to February 5, 1996 they may complete the assessment in compliance with 43 CFR part 11, or they may elect to use this part, and obtain a rebuttable presumption. (c) Oil and hazardous substance mixtures. For **natural resource** damages resulting from a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 CFR part 11 in order to obtain a rebuttable presumption.

Sec. 990.21 Relationship to the NCP. This part provides procedures by which trustees may determine appropriate restoration of injured **natural** resources and services, where such injuries are not fully addressed by response actions. Response actions and the coordination with **damage** assessment activities are conducted pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300.

Sec. 990.22 Prohibition on double recovery. When taking actions under this part, trustees are subject to the prohibition on double recovery, as provided in 33 U.S.C. 2706(d)(3) of OPA

Sec. 990.23 Compliance with NEPA and the CEQ regulations. (a) General. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 CFR chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. Thus, when a federal trustee proposes to take restoration actions under this part, it must integrate this part with NEPA, the CEQ regulations, and NEPA regulations promulgated by that federal trustee agency. Where state NEPA-equivalent laws may apply to state trustees, state trustees must consider the extent to which they must integrate this part with their NEPA-equivalent laws. The requirements and process described in this section relate only to NEPA and federal trustees. (b) NEPA requirements for federal trustees. NEPA becomes applicable when federal trustees propose to take restoration actions, which begins with the development of a Draft Restoration Plan under Sec. 990.55 of this part. Depending upon the circumstances of the incident, federal trustees may need to consider early involvement of the public in restoration planning in order to meet their NEPA compliance requirements. (c) NEPA process for federal trustees. Although the steps in the NEPA process may vary among different federal trustees, the



process will generally involve the need to develop restoration plans in the form of an Environmental Assessment or Environmental Impact Statement, depending upon the trustee agency's own NEPA regulations. (1) Environmental Assessment. (i) Purpose. The purpose of an Environmental Assessment (EA) is to determine whether a proposed restoration action will have a significant (as defined under NEPA and Sec. 1508.27 of the CEQ regulations) impact on the quality of the human environment, in which case an Environmental Impact Statement (EIS) evaluating the impact is required. In the alternative, where the impact will not be significant, federal trustees must issue a Finding of No Significant Impact (FONSI) as part of the restoration plans developed under this part. If significant impacts to the human environment are anticipated, the determination to proceed with an EIS may be made as a result, or in lieu, of the development of the EA. (ii) General steps. (A) If the trustees decide to pursue an EA, the trustees may issue a Notice of Intent to Prepare a Draft Restoration Plan/EA, or proceed directly to developing a Draft Restoration Plan/EA. (B) The Draft Restoration Plan/EA must be made available for public review before concluding a FONSI or proceeding with an EIS. (C) If a FONSI is concluded, the restoration planning process should be no different than under Sec. 990.55 of this part, except that the Draft Restoration Plan/EA will include the FONSI analysis. (D) The time period for public review on the Draft Restoration Plan/ EA must be consistent with the federal trustee agency's NEPA requirements, but should generally be no less than thirty (30) calendar days. (E) The Final Restoration Plan/EA must consider all public comments on the Draft Restoration Plan/EA and FONSI. (F) The means by which a federal trustee requests, considers, and responds to public comments on the Draft Restoration Plan/EA and FONSI must also be consistent with the federal agency's NEPA requirements. (2) Environmental Impact Statement. (i) Purpose. The purpose of an Environmental Impact Statement (EIS) is to involve the public and facilitate the decisionmaking process in the federal trustees' analysis of alternative approaches to restoring injured **natural** resources and services, where the impacts of such restoration are expected to have significant impacts on the quality of the human environment. (ii) General steps. (A) If trustees determine that restoration actions are likely to have a significant (as defined under NEPA and Sec. 1508.27 of the CEQ regulations) impact on the environment, they must issue a Notice of Intent to Prepare

a Draft Restoration Plan/EIS. The notice must be published in the Federal Register. (B) The notice must be followed by formal public involvement in the development of the Draft Restoration Plan/EIS. (C) The Draft Restoration Plan/EIS must be made available for public review for a minimum of forty-five (45) calendar days. The Draft Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register. (D) The Final Restoration Plan/EIS must consider all public comments on the Draft Restoration Plan/EIS, and incorporate any changes made to the Draft Restoration Plan/EIS in response to public comments. (E) The Final Restoration Plan/EIS must be made publicly available for a minimum of thirty (30) calendar days before a decision is made on the federal trustees' proposed restoration actions (Record of Decision). The Final Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register. (F) The means by which a federal trustee agency requests, considers, and responds to public comments on the Final Restoration Plan/EIS must also be consistent with the federal agency's NEPA requirements. (G) After appropriate public review on the Final Restoration Plan/ EIS is completed, a Record of Decision (ROD) is issued. The ROD summarizes the trustees' decisionmaking process after consideration of any public comments relative to the proposed restoration actions, identifies all restoration alternatives (including the preferred alternative(s)), and their environmental [[Page 354]] consequences, and states whether all practicable means to avoid or minimize environmental harm were adopted (e.g., monitoring and corrective actions). The ROD may be incorporated with other decision documents prepared by the trustees. The means by which the ROD is made publicly available must be consistent with the federal trustee agency's NEPA requirements. (d) Relationship to Regional Restoration Plans or an existing restoration project. If a Regional Restoration Plan or existing restoration project is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS, as described in Secs. 1502.20 and 1508.28 of the CEQ regulations.

Sec. 990.24 Compliance with other applicable laws and regulations. (a) Worker health and safety. When taking actions under this part, trustees must comply with applicable worker health and safety considerations specified in the NCP for response actions. (b) **Natural Resources** protection. When acting under this part, trustees

must ensure compliance with any applicable consultation, permitting, or review requirements, including but not limited to: the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq.; the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq.; the Migratory Bird Treaty Act, 16 U.S.C. 703 et seq.; the National Marine Sanctuaries Act, 16 U.S.C. 1431 et seq.; the National Historic Preservation Act, 12 U.S.C. 470 et seq.; the Marine Mammal Protection Act, 16 U.S.C. 1361 et seq.; and the Archaeological Resources Protection Act, 16 U.S.C. 470 et seq.

Sec. 990.25 Settlement. Trustees may settle claims for **natural resource** damages under this part at any time, provided that the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest, with particular consideration of the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured **natural** resources and services. Sums recovered in settlement of such claims, other than reimbursement of trustee costs, may only be expended in accordance with a restoration plan, which may be set forth in whole or in part in a consent decree or other settlement agreement, which is made available for public review.

Sec. 990.26 Emergency restoration. (a) Trustees may take emergency restoration action before completing the process established under this part, provided that: (1) The action is needed to minimize continuing or prevent additional injury; (2) The action is feasible and likely to minimize continuing or prevent additional injury; and (3) The costs of the action are not unreasonable. (b) If response actions are still underway, trustees, through their Regional Response Team member or designee, must coordinate with the On- Scene Coordinator (OSC) before taking any emergency restoration actions. Any emergency restoration actions proposed by trustees should not interfere with on-going response actions. Trustees must explain to response agencies through the OSC prior to implementation of emergency restoration actions their reasons for believing that proposed emergency restoration actions will not interfere with on-going response actions. (c) Trustees must provide notice to identified responsible parties of any emergency restoration actions and, to the extent time permits, invite their participation in the conduct of those actions as provided in Sec. 990.14(c) of this part. (d) Trustees must provide notice to the public, to the extent

practicable, of these planned emergency restoration actions. Trustees must also provide public notice of the justification for, nature and extent of, and results of emergency restoration actions within a reasonable time frame after completion of such actions. The means by which this notice is provided is left to the discretion of the trustee.

Sec. 990.27 Use of assessment procedures. (a) Standards for assessment procedures. Any procedures used pursuant to this part must comply with all of the [[Page 355]] following standards if they are to be in accordance with this part: (1) The procedure must be capable of providing assessment information of use in determining the type and scale of restoration appropriate for a particular injury; (2) The additional cost of a more complex procedure must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure; and (3) The procedure must be reliable and valid for the particular incident. (b) Assessment procedures available. (1) The range of assessment procedures available to trustees includes, but is not limited to: (i) Procedures conducted in the field; (ii) Procedures conducted in the laboratory; (iii) Model-based procedures, including type A procedures identified in 43 CFR part 11, subpart D, and compensation formulas/schedules; and (iv) Literature-based procedures. (2) Trustees may use the assessment procedures in paragraph (b)(1) of this section alone, or in any combination, provided that the standards in paragraph (a) of this section are met, and there is no double recovery. (c) Selecting assessment procedures. (1) When selecting assessment procedures, trustees must consider, at a minimum: (i) The range of procedures available under paragraph (b) of this section; (ii) The time and cost necessary to implement the procedures; (iii) The potential nature, degree, and spatial and temporal extent of the injury; (iv) The potential restoration actions for the injury; and (v) The relevance and adequacy of information generated by the procedures to meet information requirements of restoration planning. (2) If a range of assessment procedures providing the same type and quality of information is available, the most cost-effective procedure must be used.

Subpart C—Definitions

Sec. 990.30 Definitions. For the purpose of this rule, the term:

Baseline means the condition of the **natural** resources and services that would have existed had the incident not occurred. Baseline data may be estimated using historical data, reference data, control data, or data on incremental changes (e.g., number of dead animals), alone or in combination, as appropriate.

Cost-effective means the least costly activity among two or more activities that provide the same or a comparable level of benefits, in the judgment of the trustees

CEQ regulations means the Council on Environmental Quality regulations implementing NEPA, 40 CFR chapter V.

Damages means damages specified in section 1002(b) of OPA (33 U.S.C. 1002(b)), and includes the costs of assessing these damages, as defined in section 1001(5) of OPA (33 U.S.C. 2701(5)).

Discharge means any emission (other than **natural** seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping, as defined in section 1001(7) of OPA (33 U.S.C. 2701(7)).

Exclusive Economic Zone means the zone established by Presidential Proclamation 5030 of March 10, 1983 (3 CFR, 1984 Comp, p. 22), including the ocean waters of the areas referred to as ``eastern special areas'' in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, as defined in section 1001(8) of OPA (33 U.S.C. 2701(8)).

Exposure means direct or indirect contact with the discharged oil. Facility means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes, as defined in section 1001(9) of OPA (33 U.S.C. 2701(9)).

Fund means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), as defined in section 1001(11) of OPA (33 U.S.C. 2701(11)).

Incident means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone, as defined in section 1001(14) of OPA (33 U.S.C. 2701(14)).

Indian tribe (or tribal) means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe, as defined in section 1001(15) of OPA (33 U.S.C. 2701(15)).

Injury means an observable or measurable adverse change in a **natural resource** or impairment of a **natural resource** service. Injury may occur directly or indirectly to a **natural resource** and/or service. Injury incorporates the terms ``destruction,'' ``loss,'' and ``loss of use'' as provided in OPA.

Lead Administrative Trustee(s) (or LAT) means the trustee(s) who is selected by all participating trustees whose **natural** resources or services are injured by an incident, for the purpose of coordinating **natural resource damage** assessment activities. The LAT(s) should also facilitate communication between the OSC and other **natural resource** trustees regarding their activities during the response phase.

NCP means the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan) codified at 40 CFR part 300, which addresses the identification, investigation, study, and response to incidents, as defined in section 1001(19) of OPA (33 U.S.C. 2701(19)).

**Natural resource damage** assessment (or assessment) means the process of collecting and analyzing information to

evaluate the nature and extent of injuries resulting from an incident, and determine the restoration actions needed to bring injured **natural** resources and services back to baseline and make the environment and public whole for interim losses.

**Natural** resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the Exclusive Economic Zone), any state or local government or Indian tribe, or any foreign government, as defined in section 1001(20) of OPA (33 U.S.C. 2701(20)).

Navigable waters means the waters of the United States, including the territorial sea, as defined in section 1001(21) of OPA (33 U.S.C. 2701(21)).

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321 et seq. Oil means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil. However, the term does not include petroleum, including crude oil or any fraction thereof, that is specifically listed or designated as a hazardous substance under 42 U.S.C. 9601(14)(A) through (F), as defined in section 1001(23) of OPA (33 U.S.C. 2701(23)).

On-Scene Coordinator (or OSC) means the official designated by the U.S. Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct response actions under the NCP, or the government official designated by the lead response agency to coordinate and direct response actions under the NCP.

OPA means the Oil Pollution Act of 1990, 33 U.S.C. 2701 et seq.

Pathway means any link that connects the incident to a **natural resource** and/or service, and is associated with an actual discharge of oil.

Person means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body, as defined in section 1001(27) of OPA (33 U.S.C. 2701(27)).

Public vessel means a vessel owned or bareboat chartered and operated by the United States, or by a state or

political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce, as defined in section 1001(29) of OPA (33 U.S.C. 2701(29)).

Reasonable assessment costs means, for **assessments** conducted under this part, assessment costs that are incurred by trustees in accordance with this part. In cases where assessment costs are incurred but trustees do not pursue restoration, trustees may recover their reasonable assessment costs provided that they have determined that assessment actions undertaken were premised on the likelihood of injury and need for restoration. Reasonable assessment costs also include: administrative, legal, and enforcement costs necessary to carry out this part; monitoring and oversight costs; and costs associated with public participation.

Recovery means the return of injured **natural** resources and services to baseline.

Response (or remove or removal) means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate **damage** to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches, as defined in section 1001(30) of OPA (33 U.S.C. 2701(30)).

Responsible party means: (a) Vessels. In the case of a vessel, any person owning, operating, or demise chartering the vessel. (b) Onshore facilities. In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a federal agency, state, municipality, commission, or political subdivision of a state, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit. (c) Offshore facilities. In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable state law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a federal agency, state, municipality, commission, or political subdivision of a



state, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit. (d) Deepwater ports. In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee. (e) Pipelines. In the case of a pipeline, any person owning or operating the pipeline. (f) Abandonment. In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility, as defined in section 1001(32) of OPA (33 U.S.C. 2701(32)).

Restoration means any action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured **natural** resources and services. Restoration includes: (a) Primary restoration, which is any action, including **natural** recovery, that returns injured **natural** resources and services to baseline; and (b) Compensatory restoration, which is any action taken to compensate for interim losses of **natural** resources and services that occur from the date of the incident until recovery.

Services (or **natural resource** services) means the functions performed by a **natural resource** for the benefit of another **natural resource** and/or the public.

Trustees (or **natural resource** trustees) means those officials of the federal and state governments, of Indian tribes, and of foreign governments, designated under 33 U.S.C. 2706(b) of OPA.

United States and State means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States, as defined in section 1001(36) of OPA (33 U.S.C. 2701(36)).

Value means the maximum amount of goods, services, or money an individual is willing to give up to obtain a specific good or service, or the minimum amount of goods, services, or money an individual is willing to accept to forgo a specific good or service. The total value of a **natural resource** or service includes the value individuals derive from direct use of the **natural resource**, for example, swimming, boating, hunting, or birdwatching, as well as the

value individuals derive from knowing a **natural resource** will be available for future generations.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel, as defined in section 1001(37) of OPA (33 U.S.C. 2701(37)).

#### Subpart D--Preassessment Phase

Sec. 990.40 Purpose. The purpose of this subpart is to provide a process by which trustees determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so.

Sec. 990.41 Determination of jurisdiction. (a) Determination of jurisdiction. Upon learning of an incident, trustees must determine whether there is jurisdiction to pursue restoration under OPA. To make this determination, trustees must decide if: (1) An incident has occurred, as defined in Sec. 990.30 of this part; (2) The incident is not: (i) Permitted under a permit issued under federal, state, or local law; or (ii) From a public vessel; or (iii) From an onshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. 1651, et seq.; and (3) **Natural** resources under the trusteeship of the trustee may have been, or may be, injured as a result of the incident. (b) Proceeding with preassessment. If the conditions listed in paragraph (a) of this section are met, trustees may proceed under this part. If one of the conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. Trustees may recover all reasonable assessment costs incurred up to this point provided that conditions in paragraphs (a)(1) and (a)(2) of this section were met and actions were taken with the reasonable belief that **natural** resources or services under their trusteeship might have been injured as a result of the incident.

Sec. 990.42 Determination to conduct restoration planning. (a) Determination on restoration planning. If trustees determine that there is jurisdiction to pursue restoration under OPA, trustees must determine whether: (1) Injuries have resulted, or are likely to result, from the incident; (2) Response actions have not adequately addressed, or are not expected to address, the injuries resulting from the incident; and (3) Feasible primary and/or compensatory restoration actions exist to address the potential

injuries. (b) Proceeding with preassessment. If the conditions listed in paragraph (a) of this section are met, trustees may proceed under Sec. 990.44 of this part. If one of these conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. However, trustees may recover all reasonable assessment costs incurred up to this point.

Sec. 990.43 Data collection. Trustees may conduct data collection and analyses that are reasonably related to Preassessment Phase activities. Data collection and analysis during the Preassessment Phase must be coordinated with response actions such that collection and analysis does not interfere with response actions. Trustees may collect and analyze the following types of data during the Preassessment Phase: (a) Data reasonably expected to be necessary to make a determination of jurisdiction under Sec. 990.41 of this part, or a determination to conduct restoration planning under Sec. 990.42 of this part; (b) Ephemeral data; and (c) Information needed to design or implement anticipated assessment procedures under subpart E of this part.

Sec. 990.44 Notice of Intent to Conduct Restoration Planning. (a) General. If trustees determine that all the conditions under Sec. 990.42(a) of this part are met and trustees decide to proceed with the **natural resource damage** assessment, they must prepare a Notice of Intent to Conduct Restoration Planning. (b) Contents of the notice. The Notice of Intent to Conduct Restoration Planning must include a discussion of the trustees' analyses under Secs. 990.41 and 990.42 of this part. Depending on information available at this point, the notice may include the trustees' proposed strategy to assess injury and determine the type and scale of restoration. The contents of a notice may vary, but will typically discuss: (1) The facts of the incident; (2) Trustee authority to proceed with the assessment; (3) **Natural** resources and services that are, or are likely to be, injured as a result of the incident; (4) Potential restoration actions relevant to the expected injuries; and (5) If determined at the time, potential assessment procedures to evaluate the injuries and define the appropriate type and scale of restoration for the injured **natural** resources and services. (c) Public availability of the notice. Trustees must make a copy of the Notice of Intent to Conduct Restoration Planning publicly available. The means by which the notice is made

publicly available and whether public comments are solicited on the notice will depend on the nature and extent of the incident and various information requirements, and is left to the discretion of the trustees. (d) Delivery of the notice to the responsible parties. Trustees must send a copy of the notice to the responsible parties, to the extent known, in such a way as will establish the date of receipt, and invite responsible parties' participation in the conduct of restoration planning. Consistent with Sec. 990.14(c) of this part, the determination of the timing, nature, and extent of responsible party participation will be determined by the trustees on an incident-specific basis.

Sec. 990.45 Administrative record. (a) If trustees decide to proceed with restoration planning, they must open a publicly available administrative record to document the basis for their decisions pertaining to restoration. The administrative record should be opened concurrently with the publication of the Notice of Intent to Conduct Restoration Planning. Depending on the nature and extent of the incident and assessment, the administrative record should include documents relied upon during the assessment, such as: (1) Any notice, draft and final restoration plans, and public comments; (2) Any relevant data, investigation reports, scientific studies, work plans, quality assurance plans, and literature; and (3) Any agreements, not otherwise privileged, among the participating trustees or with the responsible parties. (b) Federal trustees should maintain the administrative record in a manner consistent with the Administrative Procedure Act, 5 U.S.C. 551- 59, 701-06.

#### Subpart E--Restoration Planning Phase

Sec. 990.50 Purpose. The purpose of this subpart is to provide a process by which trustees evaluate and quantify potential injuries (injury assessment), and use that information to determine the need for and scale of restoration actions (restoration selection).

Sec. 990.51 Injury assessment--injury determination. (a) General. After issuing a Notice of Intent to Conduct Restoration Planning under Sec. 990.44 of this part, trustees must determine if injuries to **natural** resources and/or services have resulted from the incident. (b) Determining injury. To make the determination of injury, trustees must evaluate if: (1) The definition of injury has been met, as defined in Sec. 990.30 of this part; and

(2)(i) An injured **natural resource** has been exposed to the discharged oil, and a pathway can be established from the discharge to the exposed **natural resource**; or (ii) An injury to a **natural resource** or impairment of a **natural resource** service has occurred as a result of response actions or a substantial threat of a discharge of oil. (c) Identifying injury. Trustees must determine whether an injury has occurred and, if so, identify the nature of the injury. Potential categories of injury include, but are not limited to, adverse changes in: survival, growth, and reproduction; health, physiology and biological condition; behavior; community composition; ecological processes and functions; physical and chemical habitat quality or structure; and public services. (d) Establishing exposure and pathway. Except for injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil, trustees must establish whether **natural** resources were exposed, either directly or indirectly, to the discharged oil from the incident, and estimate the amount or concentration and spatial and temporal extent of the exposure. Trustees must also determine whether there is a pathway linking the incident to the injuries. Pathways may include, but are not limited to, the sequence of events by which the discharged oil was transported from the incident and either came into direct physical contact with a **natural resource**, or caused an indirect injury. (e) Injuries resulting from response actions or incidents involving a substantial threat of a discharge. For injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil, trustees must determine whether an injury or an impairment of a **natural resource** service has occurred as a result of the incident. (f) Selection of injuries to include in the assessment. When selecting potential injuries to assess, trustees should consider factors such as: (1) The **natural** resources and services of concern; (2) The procedures available to evaluate and quantify injury, and associated time and cost requirements; (3) The evidence indicating exposure; (4) The pathway from the incident to the **natural resource** and/or service of concern; (5) The adverse change or impairment that constitutes injury; (6) The evidence indicating injury; (7) The mechanism by which injury occurred; (8) The potential degree, and spatial and temporal extent of the injury; (9) The potential **natural** recovery period; and (10) The kinds of primary and/or compensatory restoration actions that are feasible.

Sec. 990.52 Injury assessment--quantification. (a) General. In addition to determining whether injuries have resulted from the incident, trustees must quantify the degree, and spatial and temporal extent of such injuries relative to baseline. (b) Quantification approaches. Trustees may quantify injuries in terms of: (1) The degree, and spatial and temporal extent of the injury to a **natural resource**; (2) The degree, and spatial and temporal extent of injury to a **natural resource**, with subsequent translation of that adverse change to a reduction in services provided by the **natural resource**; or (3) The amount of services lost as a result of the incident. (c) **Natural** recovery. To quantify injury, trustees must estimate, quantitatively or qualitatively, the time for **natural** recovery without restoration, but including any response actions. The analysis of **natural** recovery may consider such factors as: (1) The nature, degree, and spatial and temporal extent of injury; (2) The sensitivity and vulnerability of the injured **natural resource** and/or service; (3) The reproductive and recruitment potential; (4) The resistance and resilience (stability) of the affected environment; (5) The **natural** variability; and (6) The physical/chemical processes of the affected environment.

Sec. 990.53 Restoration selection--developing restoration alternatives. (a) General. (1) If the information on injury determination and quantification under Secs. 990.51 and 990.52 of this part and its relevance to restoration justify restoration, trustees may proceed with the Restoration Planning Phase. Otherwise, trustees may not take additional action under this part. However, trustees may recover all reasonable assessment costs incurred up to this point. (2) Trustees must consider a reasonable range of restoration alternatives before selecting their preferred alternative(s). Each restoration alternative is comprised of primary and/or compensatory restoration components that address one or more specific injury(ies) associated with the incident. Each alternative must be designed so that, as a package of one or more actions, the alternative would make the environment and public whole. Only those alternatives considered technically feasible and in accordance with applicable laws, regulations, or permits may be considered further under this part. (b) Primary restoration-- (1) General. For each alternative, trustees must consider primary restoration actions, including a **natural** recovery alternative. (2) **Natural** recovery. Trustees must consider a **natural** recovery alternative in

which no human intervention would be taken to directly restore injured **natural** resources and services to baseline.

(3) Active primary restoration actions. Trustees must consider an alternative comprised of actions to directly restore the **natural** resources and services to baseline on an accelerated time frame. When identifying such active primary restoration actions, trustees may consider actions that: (i) Remove conditions that would prevent or limit the effectiveness of any restoration action (e.g., residual sources of contamination); (ii) May be necessary to return the physical, chemical, and/or biological conditions necessary to allow recovery or restoration of the injured **natural** resources (e.g., replacing substrate or vegetation, or modifying hydrologic conditions); or (iii) Return key **natural** resources and services, and would be an effective approach to achieving or accelerating a return to baseline (e.g., replacing essential species, habitats, or public services that would facilitate the replacement of other, dependent **natural resource** or service components).

(c) Compensatory restoration-- (1) General. For each alternative, trustees must also consider compensatory restoration actions to compensate for the interim loss of **natural** resources and services pending recovery. (2)

Compensatory restoration actions. To the extent practicable, when evaluating compensatory restoration actions, trustees must consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those injured. If, in the judgment of the trustees, compensatory actions of the same type and quality and comparable value cannot provide a reasonable range of alternatives, trustees should identify actions that provide **natural** resources and services of comparable type and quality as those provided by the injured **natural** resources. Where the injured and replacement **natural** resources and services are not of comparable value, the scaling process will involve valuation of lost and replacement services. (d) Scaling

restoration actions-- (1) General. After trustees have identified the types of restoration actions that will be considered, they must determine the scale of those actions that will make the environment and public whole. For primary restoration actions, scaling generally applies to actions involving replacement and/or acquisition of equivalent of **natural** resources and/or services. (2)

**Resource-to-resource** and service-to-service scaling approaches. When determining the scale of restoration actions that provide **natural** resources and/or services of

the same type and quality, and of comparable value as those lost, trustees must consider the use of a **resource-to-resource** or service-to-service scaling approach. Under this approach, trustees determine the scale of restoration actions that will provide **natural** resources and/or services equal in quantity to those lost. (3) Valuation scaling approach. (i) Where trustees have determined that neither **resource-to-resource** nor service-to-service scaling is appropriate, trustees may use the valuation scaling approach. Under the valuation scaling approach, trustees determine the amount of **natural** resources and/or services that must be provided to produce the same value lost to the public. Trustees must explicitly measure the value of injured **natural** resources and/or services, and then determine the scale of the restoration action necessary to produce **natural** resources and/or services of equivalent value to the public. (ii) If, in the judgment of the trustees, valuation of the lost services is practicable, but valuation of the replacement **natural** resources and/or services cannot be performed within a reasonable time frame or at a reasonable cost, as determined by Sec. 990.27(a)(2) of this part, trustees may estimate the dollar value of the lost services and select the scale of the restoration action that has a cost equivalent to the lost value. The responsible parties may request that trustees value the **natural** resources and services provided by the restoration action following the process described in Sec. 990.14(c) of this part. (4) Discounting and uncertainty. When scaling a restoration action, trustees must evaluate the uncertainties associated with the projected consequences of the restoration action, and must discount all service quantities and/or values to the date the demand is presented to the responsible parties. Where feasible, trustees should use risk-adjusted measures of losses due to injury and of gains from the restoration action, in conjunction with a riskless discount rate representing the consumer rate of time preference. If the streams of losses and gains cannot be adequately adjusted for risks, then trustees may use a discount rate that incorporates a suitable risk adjustment to the riskless rate.

Sec. 990.54 Restoration selection--evaluation of alternatives. (a) Evaluation standards. Once trustees have developed a reasonable range of restoration alternatives under Sec. 990.53 of this part, they must evaluate the proposed alternatives based on, at a minimum: (1) The cost to carry out the alternative; (2) The extent to which each



alternative is expected to meet the trustees' goals and objectives in returning the injured **natural** resources and services to baseline and/or compensating for interim losses; (3) The likelihood of success of each alternative; (4) The extent to which each alternative will prevent future injury as a result of the incident, and avoid collateral injury as a result of implementing the alternative; (5) The extent to which each alternative benefits more than one **natural resource** and/or service; and (6) The effect of each alternative on public health and safety. (b) Preferred restoration alternatives. Based on an evaluation of the factors under paragraph (a) of this section, trustees must select a preferred restoration alternative(s). If the trustees conclude that two or more alternatives are equally preferable based on these factors, the trustees must select the most cost-effective alternative. (c) Pilot projects. Where additional information is needed to identify and evaluate the feasibility and likelihood of success of restoration alternatives, trustees may implement restoration pilot projects. Pilot projects should only be undertaken when, in the judgment of the trustees, these projects are likely to provide the information, described in paragraph (a) of this section, at a reasonable cost and in a reasonable time frame.

Sec. 990.55 Restoration selection--developing restoration plans. (a) General. OPA requires that damages be based upon a plan developed with opportunity for public review and comment. To meet this requirement, trustees must, at a minimum, develop a Draft and Final Restoration Plan, with an opportunity for public review of and comment on the draft plan. (b) Draft Restoration Plan. (1) The Draft Restoration Plan should include: (i) A summary of injury assessment procedures used; (ii) A description of the nature, degree, and spatial and temporal extent of injuries resulting from the incident; (iii) The goals and objectives of restoration; (iv) The range of restoration alternatives considered, and a discussion of how such alternatives were developed under Sec. 990.53 of this part, and evaluated under Sec. 990.54 of this part; (v) Identification of the trustees' tentative preferred alternative(s); (vi) A description of past and proposed involvement of the responsible parties in the assessment; and (vii) A description of monitoring for documenting restoration effectiveness, including performance criteria that will be used to determine the success of restoration or need for

interim corrective action. (2) When developing the Draft Restoration Plan, trustees must establish restoration objectives that are specific to the injuries. These objectives should clearly specify the desired outcome, and the performance criteria by which successful restoration will be judged. Performance criteria may include structural, functional, temporal, and/ or other demonstrable factors. Trustees must, at a minimum, determine what criteria will: (i) Constitute success, such that responsible parties are relieved of responsibility for further restoration actions; or (ii) Necessitate corrective actions in order to comply with the terms of a restoration plan or settlement agreement. (3) The monitoring component to the Draft Restoration Plan should address such factors as duration and frequency of monitoring needed to gauge progress and success, level of sampling needed to detect success or the need for corrective action, and whether monitoring of a reference or control site is needed to determine progress and success. Reasonable monitoring and oversight costs cover those activities necessary to gauge the progress, performance, and success of the restoration actions developed under the plan. (c) Public review and comment. The nature of public review and comment on the Draft and Final Restoration Plans will depend on the nature of the incident and any applicable federal trustee NEPA requirements, as described in Secs. 990.14(d) and 990.23 of this part. (d) Final Restoration Plan. Trustees must develop a Final Restoration Plan that includes the information specified in paragraph (a) of this section, responses to public comments, if applicable, and an indication of any changes made to the Draft Restoration Plan.

Sec. 990.56 Restoration selection--use of a Regional Restoration Plan or existing restoration project. (a) General. Trustees may consider using a Regional Restoration Plan or existing restoration project where such a plan or project is determined to be the preferred alternative among a range of feasible restoration alternatives for an incident, as determined under Sec. 990.54 of this part. Such plans or projects must be capable of fulfilling OPA's intent for the trustees to restore, rehabilitate, replace, or acquire the equivalent of the injured **natural** resources and services and compensate for interim losses. (b) Existing plans or projects--(1) Considerations. Trustees may select a component of a Regional Restoration Plan or an existing restoration project as the preferred alternative,

provided that the plan or project: (i) Was developed with public review and comment or is subject to public review and comment under this part; (ii) Will adequately compensate the environment and public for injuries resulting from the incident; (iii) Addresses, and is currently relevant to, the same or comparable **natural** resources and services as those identified as having been injured; and (iv) Allows for reasonable scaling relative to the incident. (2) Demand. (i) If the conditions of paragraph (b)(1) of this section are met, the trustees must invite the responsible parties to implement that component of the Regional Restoration Plan or existing restoration project, or advance to the trustees the trustees' reasonable estimate of the cost of implementing that component of the Regional Restoration Plan or existing restoration project. (ii) If the conditions of paragraph (b)(1) of this section are met, but the trustees determine that the scale of the existing plan or project is greater than the scale of compensation required by the incident, trustees may only request funding from the responsible parties equivalent to the scale of the restoration determined to be appropriate for the incident of concern. Trustees may pool such partial recoveries until adequate funding is available to successfully implement the existing plan or project. (3) Notice of Intent To Use a Regional Restoration Plan or Existing Restoration Project. If trustees intend to use an appropriate component of a Regional Restoration Plan or existing restoration project, they must prepare a Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project. Trustees must make a copy of the notice publicly available. The notice must include, at a minimum: (i) A description of the nature, degree, and spatial and temporal extent of injuries; and (ii) A description of the relevant component of the Regional Restoration Plan or existing restoration project; and (iii) An explanation of how the conditions set forth in paragraph (b)(1) of this section are met.

#### Subpart F--Restoration Implementation Phase

Sec. 990.60 Purpose. The purpose of this subpart is to provide a process for implementing restoration.

Sec. 990.61 Administrative record. (a) Closing the administrative record for restoration planning. Within a reasonable time after the trustees have completed restoration planning, as provided in Secs. 990.55 and 990.56 of this part, they must close the administrative

record. Trustees may not add documents to the administrative record once it is closed, except where such documents: (1) Are offered by interested parties that did not receive actual or constructive notice of the Draft Restoration Plan and the opportunity to comment on the plan; (2) Do not duplicate information already contained in the administrative record; and (3) Raise significant issues regarding the Final Restoration Plan. (b) Opening an administrative record for restoration implementation. Trustees may open an administrative record for implementation of restoration, as provided in Sec. 990.45 of this part. The costs associated with the administrative record are part of the costs of restoration. Ordinarily, the administrative record for implementation of restoration should document, at a minimum, all Restoration Implementation Phase decisions, actions, and expenditures, including any modifications made to the Final Restoration Plan.

Sec. 990.62 Presenting a demand. (a) General. After closing the administrative record for restoration planning, trustees must present a written demand to the responsible parties. Delivery of the demand should be made in a manner that establishes the date of receipt by the responsible parties. (b) When a Final Restoration Plan has been developed. Except as provided in paragraph (c) of this section and in Sec. 990.14(c) of this part, the demand must invite the responsible parties to either: (1) Implement the Final Restoration Plan subject to trustee oversight and reimburse the trustees for their assessment and oversight costs; or (2) Advance to the trustees a specified sum representing trustee assessment costs and all trustee costs associated with implementing the Final Restoration Plan, discounted as provided in Sec. 990.63(a) of this part. (c) Regional Restoration Plan or existing restoration project. When the trustees use a Regional Restoration Plan or an existing restoration project under Sec. 990.56 of this part, the demand will invite the responsible parties to implement a component of a Regional Restoration Plan or existing restoration project, or advance the trustees' estimate of damages based on the scale of the restoration determined to be appropriate for the incident of concern, which may be the entire project or a portion thereof. (d) Response to demand. The responsible parties must respond within ninety (90) calendar days in writing by paying or providing binding assurance they will reimburse trustees' assessment costs and implement the plan or pay assessment

costs and the trustees' estimate of the costs of implementation. (e) Additional contents of demand. The demand must also include: (1) Identification of the incident from which the claim arises; (2) Identification of the trustee(s) asserting the claim and a statement of the statutory basis for trusteeship; (3) A brief description of the injuries for which the claim is being brought; (4) An index to the administrative record; (5) The Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project; and (6) A request for reimbursement of: (i) Reasonable assessment costs, as defined in Sec. 990.30 of this part and discounted as provided in Sec. 990.63(b) of this part; (ii) The cost, if any, of conducting emergency restoration under Sec. 990.26 of this part, discounted as provided in Sec. 990.63(b) of this part; and (iii) Interest on the amounts recoverable, as provided in section 1005 of OPA (33 U.S.C. 2705), which allows for prejudgment and post-judgment interest to be paid at a commercial paper rate, starting from thirty (30) calendar days from the date a demand is presented until the date the claim is paid.

Sec. 990.63 Discounting and compounding. (a) Estimated future restoration costs. When determining estimated future costs of implementing a Final Restoration Plan, trustees must discount such future costs back to the date the demand is presented Trustees may use a discount rate that represents the yield on recoveries available to trustees. The price indices used to project future inflation should reflect the major components of the restoration costs. (b) Past assessment and emergency restoration costs. When calculating the present value of assessment and emergency restoration costs already incurred, trustees must compound the costs forward to the date the demand is presented. To perform the compounding, trustees may use the actual U.S. Treasury borrowing rate on marketable securities of comparable maturity to the period of analysis. For costs incurred by state or tribal trustees, trustees may compound using parallel state or tribal borrowing rates. (c) Trustees are referred to Appendices B and C of OMB Circular A-94 for information about U.S. Treasury rates of various maturities and guidance in calculation procedures. Copies of Appendix C, which is regularly updated, and of the Circular are available from the OMB Publications Office (202-395-7332).

Sec. 990.64 Unsatisfied demands. (a) If the responsible parties do not agree to the demand within ninety (90) calendar days after trustees present the demand, the trustees may either file a judicial action for damages or seek an appropriation from the Oil Spill Liability Trust Fund, as provided in section 1012(a)(2) of OPA (33 U.S.C. 2712(a)(2)). (b) Judicial actions and claims must be filed within three (3) years after the Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project is made publicly available, in accordance with 33 U.S.C. 2717(f)(1)(B) and 2712(h)(2).

Sec. 990.65 Opening an account for recovered damages. (a) General. Sums recovered by trustees in satisfaction of a **natural resource damage** claim must be placed in a revolving trust account. Sums recovered for past assessment costs and emergency restoration costs may be used to reimburse the trustees. All other sums must be used to implement the Final Restoration Plan or all or an appropriate component of a Regional Restoration Plan or an existing restoration project. b) Joint trustee recoveries. (1) General. Trustees may establish a joint account for damages recovered pursuant to joint assessment activities, such as an account under the registry of the applicable federal court. (2) Management. Trustees may develop enforceable agreements to govern management of joint accounts, including agreed-upon criteria and procedures, and personnel for authorizing expenditures out of such joint accounts. (c) Interest-bearing accounts. Trustees may place recoveries in interest-bearing revolving trust accounts, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)). Interest earned on such accounts may only be used for restoration. (d) Escrow accounts. Trustees may establish escrow accounts or other investment accounts. (e) Records. Trustees must maintain appropriate accounting and reporting procedures to document expenditures from accounts established under this section. (f) Oil Spill Liability Trust Fund. Any sums remaining in an account established under this section that are not used either to reimburse trustees for past assessment and emergency restoration costs or to implement restoration must be deposited in the Oil Spill Liability Trust Fund, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)).

Sec. 990.66 Additional considerations. (a) Upon settlement of a claim, trustees should consider the following actions to facilitate implementation of restoration: (1) Establish

a trustee committee and/or memorandum of understanding or other agreement to coordinate among affected trustees, as provided in Sec. 990.14(a)(3) of this part; (2) Develop more detailed workplans to implement restoration; (3) Monitor and oversee restoration; and (4) Evaluate restoration success and the need for corrective action. (b) The reasonable costs of such actions are included as restoration costs.

**Code of Federal Regulations**

**TITLE 33--NAVIGATION AND NAVIGABLE WATERS  
CHAPTER I--COAST GUARD, DEPARTMENT OF TRANSPORTATION  
(CONTINUED)**

**PART 136--OIL SPILL LIABILITY TRUST FUND; CLAIMS PROCEDURES;  
DESIGNATION OF SOURCE; AND ADVERTISEMENT**

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Authority: 33 U.S.C. 2713, 2714; E.O. 12777, 3 CFR, 1991 Comp., p. 351; 49 CFR 1.46.

Source: CGD 91-035, 57 FR 36316, Aug. 12, 1992, unless otherwise noted.

### Subpart A--General

#### Sec. 136.1 Purpose and applicability.

- (a) This part prescribes regulations for—
  - (1) Presentation, filing, processing, settlement, and adjudication of claims authorized to be presented to the Oil Spill Liability Trust Fund (the Fund) under section 1013 of the Oil Pollution Act of 1990 (the Act) (33 U.S.C. 2713) for certain uncompensated removal costs or uncompensated damages resulting from the discharge, or substantial threat of discharge, of oil from a vessel or facility into or upon the navigable waters, adjoining shorelines, or the exclusive economic zone;
  - (2) Designation of the source of the incident, notification to the responsible party of the designation, and advertisement of the designation and claims procedures; and
  - (3) Other related matters.
- (b) This part applies to claims resulting from incidents occurring after August 18, 1990.
- (c) Nothing in this part—
  - (1) Preempts the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
    - (i) The discharge of oil or other pollution by oil within such State; or
    - (ii) Any removal activities in connection with such a discharge; or
  - (2) Affects or modifies in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law; or
  - (3) Affects the authority of any State—
    - (i) To establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or
    - (ii) To require any person to contribute to such a fund; or
  - (4) Affects the authority of the United States or any State or political subdivision thereof to impose additional liability or additional requirements relating to a discharge, or substantial threat of a discharge, of oil.

#### Sec. 136.3 Information.

Anyone desiring to file a claim against the Fund may obtain general information on the procedure for filing a claim from the Director, National Pollution Funds Center, suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804, (703) 235-4756.

#### Sec. 136.5 Definitions.

- (a) As used in this part, the following terms have the same meaning as set forth in sections 1001 and 1007(c) of the Act (33 U.S.C. 2701 and 2707(c)): Claim, claimant, damages, discharge, exclusive economic zone, facility, foreign claimant, foreign offshore unit, Fund, guarantor, incident, National Contingency Plan, natural resources, navigable waters, offshore facility, oil, onshore facility, owner or operator, person, removal costs, responsible party, State, United States, and vessel.
- (b) As used in this part—
  - Act means title I of the Oil Pollution Act of 1990 (Pub. L. 101-380; 33 U.S.C. 2701 through 719).
  - Director, NPFC, means the person in charge of the U.S. Coast Guard National Pollution Funds Center or that person's authorized representative.
  - FOSC means the Federal On-Scene Coordinator designated under the National Contingency Plan or that person's authorized representative.
  - NPFC means the U.S. Coast Guard National Pollution Funds Center, suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804.

Sec. 136.7 Foreign claimants.

In addition to other applicable limitations on presenting claims to the Fund, claims by foreign claimants to recover removal costs or damages may be presented only when the requirements of section 1007 of the Act (33 U.S.C. 2707) are met.

Sec. 136.9 Falsification of claims.

Persons submitting false claims or making false statements in connection with claims under his part may be subject to prosecution under Federal law, including but not limited to 18 U.S.C. 287 and 1001. In addition, persons submitting written documentation in support of claims under this part which they know, or should know, is false or omits a material fact may be subject to a civil penalty for each claim. If any payment is made on the claim, the claimant may also be subject to an assessment of up to twice the amount claimed. These civil sanctions may be imposed under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, as implemented in 49 CFR part 31.

[CGD 91-035, 57 FR 36316, Aug. 12, 1992, as amended by CGD 96-052, 62 FR 16703, Apr. 8, 1997]

Subpart B--General Procedure

Sec. 136.101 Time limitations on claims.

- (a) Except as provided under section 1012(h)(3) of the Act (33 U.S.C. 2712(h)(3)) (minors and incompetents), the Fund will consider a claim only if presented in writing to the Director, NPFC, within the following time limits:
  - (1) For damages, within three years after-
    - (i) The date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care.

- (ii) In the case of natural resources damages under section 1002(b)(2)(A) of the Act (33 U.S.C. 2702(b)(2)(A)), the date under paragraph (a)(1)(i) of this section, or within three years from the date of completion of the natural resources damage assessment under section 1006(e) of the Act (33 U.S.C. 2706(e)), whichever is later.
- (2) For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOOSC determines that the removal actions which form the basis for the costs being claimed are completed, whichever is earlier.
- (b) Unless the Director, NPFC, directs in writing that the claim be submitted elsewhere, a claim is deemed presented on the date the claim is actually received at the National Pollution Funds Center, suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804. If the Director, NPFC, directs that the claim be presented elsewhere, the claim is deemed presented on the date the claim is actually received at the address in the directive.

[CGD 91-035, 57 FR 36316, Aug. 12, 1992; 57 FR 41104, Sept. 9, 1992]

Sec. 136.103 Order of presentment.

- (a) Except as provided in paragraph (b) of this section, all claims for removal costs or damages must be presented first to the responsible party or guarantor of the source designated under Sec. 136.305.
- (b) Claims for removal costs or damages may be presented first to the Fund only—
  - (1) By any claimant, if the Director, NPFC, has advertised, or otherwise notified claimants in writing, in accordance with Sec. 136.309(e);
  - (2) By a responsible party who may assert a claim under section 1008 of the Act (33 U.S.C. 2708);
  - (3) By the Governor of a State for removal costs incurred by that State; or
  - (4) By a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a) of the Act (33 U.S.C. 712(a)).
- (c) If a claim is presented in accordance with paragraph (a) of this section and—
  - (1) Each person to whom the claim is presented denies all liability for the claim; or
  - (2) The claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to Sec. 136.309(d), whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.
- (d) No claim of a person against the Fund will be approved or certified for payment during the pendency of an action by the person in court to recover costs which are the subject of the claim.

[CGD 91-035, 57 FR 36316, Aug. 12, 1992; 57 FR 41104, Sept. 9, 1992]

Sec. 136.105 General requirements for a claim.

- (a) The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.
- (b) Each claim must be in writing for a sum certain for compensation for each category of uncompensated damages or removal costs (as described in Subpart C of this part) resulting from an incident. If at any time during the pendency of a claim against the Fund the claimant receives any compensation for the claimed amounts, the claimant shall immediately amend the claim.
- (c) Each claim must be signed in ink by the claimant certifying to the best of the claimant's knowledge and belief that the claim accurately reflects all material facts.
- (d) In addition to the other requirements of this section, any claim presented by a legal representative of the claimant must also be signed by the legal representative and--
  - (1) Be presented in the name of the claimant;
  - (2) Show the title or legal capacity of the representative; and
  - (3) Provide proof of authority to act for the claimant.
- (e) Each claim must include at least the following, as applicable:
  - (1) The full name, street and mailing addresses of residence and business, and telephone numbers of the claimant.
  - (2) The date, time, and place of the incident giving rise to the claim.
  - (3) The identity of the vessel, facility, or other entity causing or suspected to have caused the removal costs or damages claimed and the basis for such identity or belief.
  - (4) A general description of the nature and extent of the impact of the incident, the costs associated with removal actions, and damages claimed, by category as delineated in Subpart C of this part, including, for any property, equipment, or similar item damaged, the full name, street and mailing address, and telephone number of the actual owner, if other than the claimant.
  - (5) An explanation of how and when the removal costs or damages were caused by, or resulted from, an incident.
  - (6) Evidence to support the claim.
  - (7) A description of the actions taken by the claimant, or other person on the claimant's behalf, to avoid or minimize removal costs or damages claimed.
  - (8) The reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with preparation of the claim.
  - (9) To the extent known or reasonably identifiable by the claimant, the full name, street and mailing address, and telephone number of each witness to the incident, to the discharge, or to the removal costs or damages claimed, along with a brief description of that person's knowledge.
  - (10) A copy of written communications and the substance of verbal communications, if any, between the claimant and the responsible party or guarantor of the source designated under Sec. 136.305 and a statement indicating that the claim was presented to the responsible party or guarantor,

the date it was presented, that it was denied or remains not settled and, if known, the reason why it was denied or remains not settled.

- (11) If the claimant has insurance which may cover the removal costs or damages claimed, the information required under Sec. 136.111.
- (12) A statement by the claimant that no action has been commenced in court against the responsible party or guarantor of the source designated under Sec. 136.305 or, if an action has been commenced, a statement identifying the claimant's attorney and the attorney's address and phone number, the civil action number, and the court in which the action is pending.
- (13) In the discretion of the Director, NPFC, any other information deemed relevant and necessary to properly process the claim for payment.

#### Sec. 136.107 Subrogated claims.

- (a) The claims of subrogor (e.g., insured) and subrogee (e.g., insurer) for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants.
- (b) A fully subrogated claim is payable only to the subrogee.
- (c) A subrogee must support a claim in the same manner as any other claimant.

#### Sec. 136.109 Removal costs and multiple items of damages.

- (a) A claimant must specify all of the claimant's known removal costs or damages arising out of a single incident when submitting a claim.
- (b) Removal costs and each separate category of damages (as described in subpart C of this part) must be separately listed with a sum certain attributed to each type and category listed.
- (c) At the sole discretion of the Director, NPFC, removal costs and each separate category of damages may be treated separately for settlement purposes.

#### Sec. 136.111 Insurance.

- (a) A claimant shall provide the following information concerning any insurance which may cover the removal costs or damages for which compensation is claimed:
  - (1) The name and address of each insurer.
  - (2) The kind and amount of coverage.
  - (3) The policy number.
  - (4) Whether a claim has been or will be presented to an insurer and, if so, the amount of the claim and the name of the insurer.
  - (5) Whether any insurer has paid the claim in full or in part or has indicated whether or not payment will be made.
- (b) If requested by the Director, NPFC, the claimant shall provide a copy of the following material:

- (1) All insurance policies or indemnification agreements.
  - (2) All written communications, and a summary of all oral communications, with any insurer or indemnifier.
- (c) A claimant shall advise the Director, NPFC, of any changes in the information provided under this section.

Sec. 136.113 Other compensation.

A claimant must include an accounting, including the source and value, of all other compensation received, applied for, or potentially available as a consequence of the incident out of which the claim arises including, but not limited to, monetary payments, goods or services, or other benefits.

Sec. 136.115 Settlement and notice to claimant.

- (a) Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person.
- (b) Claimant's failure to accept an offer of settlement within 60 days after the date the offer was mailed to the claimant automatically voids the offer. The Director, NPFC, reserves the right to revoke an offer at any time.
- (c) A claimant will be notified in writing sent by certified or registered mail whenever a claim against the Fund is denied. The failure of the Director, NPFC, to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim.
- (d) The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier. Reconsideration may only be requested once for each claim denied. The Director, NPFC will provide the claimant seeking reconsideration with written notification of the decision within 90 days after receipt of the request for reconsideration. This written decision is final. The failure of the Director, NPFC, to make final disposition of a reconsideration within 90 days after

it is received shall, at the option of the claimant any time thereafter, be deemed a final denial of the reconsideration.

### Subpart C--Procedures for Particular Claims

#### Removal Costs

Sec. 136.201 Authorized claimants.

A claim for removal costs may be presented by any claimant.

Sec. 136.203 Proof.

In addition to the requirements of Subparts A and B of this part, a claimant must establish--

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.

Sec. 136.205 Compensation allowable.

The amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC.

#### Natural Resources

Sec. 136.207 Authorized claimants.

- (a) Claims for uncompensated natural resource damages may be presented by an appropriate natural resources Trustee. However, in order to facilitate the processing of these claims with respect to a single incident where multiple Trustees are involved and to prevent double recovery, the affected Trustees should select a lead administrative Trustee who will present consolidated claims on behalf of the Trustees.
- (b) A Trustee may present a claim for the reasonable cost of assessing natural resources damages separately from a claim for the cost of developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources damaged.

Sec. 136.209 Proof.



In addition to the requirements of subparts A and B of this part, a Trustee must do the following:

- (a) Submit the assessment and restoration plans which form the basis of the claim.
- (b) Provide documented costs and cost estimates for the claim. Final cost estimates for conducting damage assessments or implementing a restoration plan may form the basis for a claim against the Fund for an uncompensated natural resources damage claim.
- (c) Identify all Trustees who may be potential claimants for the same natural resources damaged.
- (d) Certify the accuracy and integrity of any claim submitted to the Fund, and certify that any actions taken or proposed were or will be conducted in accordance with the Act and consistent with all applicable laws and regulations.
- (e) Certify whether the assessment was conducted in accordance with applicable provisions of the natural resources damage assessment regulations promulgated under section 1006(e)(1) of the Act (33 U.S.C. 2706(e)(1)). Identify any other or additional damage assessment regulations or methodology utilized.
- (f) Certify that, to the best of the Trustee's knowledge and belief, no other Trustee has the right to present a claim for the same natural resources damages and that payment of any subpart of the claim presented would not constitute a double recovery for the same natural resources damages.

Sec. 136.211 Compensation allowable.

- (a) The amount of compensation allowable is the reasonable cost of assessing damages, and the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources.
- (b) In addition to any other provision of law respecting the use of sums recovered for natural resources damages, Trustees shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid.

## Real or Personal Property

### Sec. 136.213 Authorized claimants.

- (a) A claim for injury to, or economic losses resulting from the destruction of, real or personal property may be presented only by a claimant either owning or leasing the property.
- (b) Any claim for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property must be included as subpart of the claim under this section and must include the proof required under Sec. 136.233.

### Sec. 136.215 Proof.

- (a) In addition to the requirements of subparts A and B of this part, a claimant must establish—
  - (1) An ownership or leasehold interest in the property;
  - (2) That the property was injured or destroyed;
  - (3) The cost of repair or replacement; and
  - (4) The value of the property both before and after injury occurred.
- (b) In addition, for each claim for economic loss resulting from destruction of real or personal property, the claimant must establish—
  - (1) That the property was not available for use and, if it had been, the value of that use;
  - (2) Whether or not substitute property was available and, if used, the costs thereof; and
  - (3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

### Sec. 136.217 Compensation allowable.

- (a) The amount of compensation allowable for damaged property is the lesser of—
  - (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
  - (2) The difference between value of the property before and after the damage; or
  - (3) The replacement value.
- (b) Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost,

whichever is less. Compensation for loss of use of noncommercial property is not allowable.

- (c) Compensation for a claim for loss of profits or impairment of earning capacity under Sec. 136.213(b) is limited to that allowable under Sec. 136.235.

### Subsistence Use

#### Sec. 136.219 Authorized claimants.

- (a) A claim for loss of subsistence use of natural resources may be presented only by a claimant who actually uses, for subsistence, the natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
- (b) A claim for loss of profits or impairment of earning capacity due to loss of subsistence use of natural resources must be included as part of the claim under this section and must include the proof required under Sec. 136.233.

#### Sec. 136.221 Proof.

In addition to the requirements of subparts A and B of this part, a claimant must provide—

- (a) The identification of each specific natural resource for which compensation for loss of subsistence use is claimed;
- (b) A description of the actual subsistence use made of each specific natural resource by the claimant;
- (c) A description of how and to what extent the claimant's subsistence use was affected by the injury to or loss of each specific natural resource;
- (d) A description of each effort made by the claimant to mitigate the claimant's loss of subsistence use; and
- (e) A description of each alternative source or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence.

#### Sec. 136.223 Compensation allowable.

- (a) The amount of compensation allowable is the reasonable replacement cost of the subsistence loss suffered by the claimant if, during the period of time for which the loss of subsistence is claimed, there was no alternative source or means of subsistence available.
- (b) The amount of compensation allowable under paragraph (a) of this section must be reduced by—
  - (1) All compensation made available to the claimant to compensate for subsistence loss;

- (2) All income which was derived by utilizing the time which otherwise would have been used to obtain natural resources for subsistence use; and
  - (3) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.
- (c) Compensation for a claim for loss of profits or impairment of earning capacity under Sec. 136.219(b) is limited to that allowable under Sec. 136.235.

### Government Revenues

#### Sec. 136.225 Authorized claimants.

A claim for net loss of revenue due to the injury, destruction, or loss of real property, personal property, or natural resources may be presented only by an appropriate claimant sustaining the loss. As used in this section and Sec. 136.277, "revenue" means taxes, royalties, rents, fees, and net profit shares.

#### Sec. 136.227 Proof.

In addition to the requirements of Subparts A and B, a claimant must establish-

- (a) The identification and description of the economic loss for which compensation is claimed, including the applicable authority, property affected, method of assessment, rate, and method and dates of collection;
- (b) That the loss of revenue was due to the injury to, destruction of, or loss of real or personal property or natural resources;
- (c) The total assessment or revenue collected for comparable revenue periods; and
- (d) The net loss of revenue.

#### Sec. 136.229 Compensation allowable.

The amount of compensation allowable is the total net revenue actually lost.

### Profits and Earning Capacity

#### Sec. 136.231 Authorized claimants.

- (a) A claim for loss of profits or impairment of earning capacity due to the injury to, destruction of, or loss of real or personal property or natural resources may be presented by a claimant sustaining the loss or impairment. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income.
- (b) A claim for loss of profits or impairment of earning capacity that also involves a claim for injury to, or economic losses resulting from destruction of, real or personal property must be claimed under Sec. 136.213.
- (c) A claim for loss of profits or impairment of earning capacity that also involves a claim for loss of subsistence use of natural resources must be claimed under Sec. 136.219.

Sec. 136.233 Proof.

In addition to the requirements of subparts A and B of this part, a claimant must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

Sec. 136.235 Compensation allowable.

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for-

- a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.

Government Public Services

Sec. 136.237 Authorized claimants.

A claim for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil may be presented only by a State or a political subdivision of a State incurring the costs.

Sec. 136.239 Proof.

In addition to the requirements of subparts A and B of this part, a claimant must establish--

- (a) The nature of the specific public services provided and the need for those services;
- (b) That the services occurred during or after removal activities;
- (c) That the services were provided as a result of a discharge of oil and would not otherwise have been provided; and
- (d) The net cost for the services and the methods used to compute those costs.

Sec. 136.241 Compensation allowable.

The amount of compensation allowable is the net cost of the increased or additional service provided by the State or political subdivision.

Subpart D--Designation of Source and Advertisement

General

Sec. 136.301 Purpose.

This subpart prescribes the requirements concerning designation of the source or sources of the discharge or threat of discharge and advertisement of these designations, including the procedures by which claims may be presented to the responsible party or guarantor.

Sec. 136.303 Definitions.

As used in this subpart-

advertisements, that are reasonably calculated to advise the public how to present a claim. but not limited to paid  
Designated source means a source designated under Sec. 136.305.

Designation of Source

Sec. 136.305 Notice of designation.

- (a) When information of an incident is received, the source or sources of the discharge or threat are designated, where possible and appropriate. If the designated source is a vessel or facility, the responsible party and the guarantor, if known, are notified by telephone, telefax, or other rapid means of that designation. The designation will be confirmed by a written Notice of Designation.

- (b) A Notice of Designation normally contains, to the extent known-
  - (1) The name of the vessel or facility designated as the source;
  - (2) The location, date, and time of the incident;
  - (3) The type of quantity of oil involved;
  - (4) The date of the designation;
  - (5) The procedures for accepting or denying the designation; and
  - (6) The name, address, telephone number, and, if available, telefax number of the responsible Federal official to whom further communication regarding the incident, advertisement of the incident, or denial of designation should be directed.

Sec. 136.307 Denial of designation.

- (a) Within five days after receiving a Notice of Designation under Sec. 136.305, the responsible party or guarantor may deny the designation.
- (b) A denial of designation must—
  - (1) Be in writing;
  - (2) Identify the Notice of Designation;
  - (3) Give the reasons for the denial and provide a copy of all supporting documents; and
  - (4) Be submitted to the official named in the Notice of Designation.
- (c) A denial is deemed received on the date the denial is actually received by the official named in the Notice of Designation.

Advertisement

Sec. 136.309 Advertisement determinations.

- (a) The Director, NPFC, determines for each incident the type, geographic scope, frequency, and duration of advertisement required.
- (b) In making the determination specified in paragraph (a) of this section, the Director, NPFC, may consider-
  - (1) The nature and extent of economic losses that have occurred or are likely to occur;
  - (2) The potential claimants who are likely to incur economic losses;
  - (3) The geographical area that is or will likely be affected;
  - (4) The most effective method of reasonably notifying potential claimants of the designation and procedures of submitting claims; and
  - (5) Relevant information or recommendations, if any, submitted by, or on behalf of, the responsible party or guarantor of the designated source.
- (c) The Director, NPFC, provides the specific requirements for advertisement for each incident to the responsible party or guarantor of the designated source.

- (d) If a responsible party or guarantor has not denied designation in accordance with Sec. 136.307, the party or guarantor shall advertise, in accordance with the requirements of this subpart, the designation and the procedures by which claims may be presented. The advertisement must begin not later than 15 days after the date of the designation made under Sec. 136.305.
- (e) If there is no designation under Sec. 136.305, if the source of the discharge or threat is a public vessel, or if the responsible party and guarantor of the source designated have denied the designation or failed to meet the requirements for advertisement in this section, the Director, NPFC, may advertise procedures for presenting claims.

#### Sec. 136.311 Types of advertisement.

Advertisement required by the Director, NPFC, will normally include one or more of the following:

- (a) Paid advertisements in a newspaper or newspapers having general circulation in the area designated by the Director, NPFC.
- (b) Notice posted in marinas, marine supply stores, bait and tackle shops, and other appropriate business establishments or public facilities in the area designated by the Director, NPFC.
- (c) News releases to newspapers, radio stations, television stations, and cable services having general circulation in the area designated by the Director, NPFC.
- (d) Other means approved by the Director, NPFC, under the circumstances of each case.

#### Sec. 136.313 Content of advertisement.

Each advertisement required by this subpart may be required to contain the following information or to indicate where this information may be contained:

- (a) Location, date, and time of the incident.
- (b) Geographical area affected, as determined by the FOSC or Director, NPFC.
- (c) Type and quantity of oil involved.
- (d) Name or other description of the source designated by the FOSC or Director, NPFC.
- (e) Name of the responsible party and guarantor of the designated source.
- (f) Name, address, telephone number, office hours, and work days of the person or persons to whom claims are to be presented and from whom claim information can be obtained.
- (g) The procedures by which a claim may be presented.
- (h) Other information required by the Director, NPFC, under the circumstances of each case.



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