

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 15 CFR Part 990

RIN 0648-AE13

## Natural Resource Damage Assessments

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Section 1006(e)(1) the Oil Pollution Act of 1990 (OPA) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to promulgate regulations for the assessment of natural resource damages resulting from a discharge or substantial threat of a discharge of oil. By today's Notice, the National Oceanic and Atmospheric Administration (NOAA) is seeking comments concerning the proposed rule.

The proposed rule is for the use of authorized federal, state, Indian tribal, and foreign officials, referred to in OPA as "trustees." Natural resource damage assessments are not identical to response or remedial actions addressed by the larger statutory scheme of OPA. Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for making the public whole for injury to natural resources and/or services.

Reviewers of this proposed rule should be aware that NOAA is subject to a consent decree that requires NOAA to submit a final rule to the **Federal Register** by the end of December 1995 (*Natural Resources Defense Council v. United States Coast Guard*, No. CV-94-4892, Order for Partial Settlement (E.D.N.Y. June 26, 1995). Due to the short timeframe for development of a final rule, reviewers should not expect any extensions of the comment period.

**DATES:** Written comments should be received no later than October 2, 1995.

**ADDRESSES:** Written comments are to be submitted to Linda Burlington or Eli Reinharz, c/o NOAA/GCNR, 1315 East-West Highway, SSMC #3, Room 15132, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Linda Burlington (telephone (301) 713-1217) or Eli Reinharz (telephone (301) 713-3038, ext. 193), Office of General Counsel Natural Resources, FAX (301) 713-1229.

**SUPPLEMENTARY INFORMATION:** The Oil Pollution Act of 1990 (OPA), 33 U.S.C.

2701 *et seq.*, provides for the prevention of, liability for, removal of, and compensation for the discharge, or substantial threat of discharge, of oil into or upon the navigable waters of the United States, adjoining shorelines, or the Exclusive Economic Zone (an incident). Section 1006(b) of OPA provides for the designation of federal, state, Indian tribal, and foreign natural resource trustees to determine if injury to, destruction of, loss of, or loss of use of natural resources and/or services has resulted from an incident, assess natural resource damages, present a claim for damages (including the reasonable costs of assessing damages), recover damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources and/or services under their trusteeship.

Section 1006(e)(1) of OPA requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to promulgate regulations for the assessment of natural resource damages resulting from incidents. By today's Notice, NOAA is seeking comments concerning the proposed rule. The proposed rule is for use by designated trustees.

On January 7, 1994, NOAA published a proposed rule for assessing natural resource damages under OPA (59 FR 1061). NOAA received numerous comments on the January 1994 proposed rule. Based on these comments, NOAA is considering a fundamental restructuring of the rule to provide even greater emphasis upon restoration. To ensure that all interested parties have adequate opportunity to review and comment on this restructuring, NOAA is repropounding the rule.

There are several significant differences between today's proposed rule and the January 1994 proposed rule. First, today's proposed rule eliminates the need for the determination of "compensable values" as a separate component of a natural resource damage claim. However, this approach does not make the value of natural resources irrelevant. Value still plays an important role in designing restoration actions that will truly make the public and environment whole for the types of natural resource injuries and service losses resulting from an incident. Second, the proposed rule emphasizes that trustees will be seeking, on behalf of the public, restoration of what was lost—natural resources and/or services provided, both human and ecological. Third, the proposed rule brings selection of restoration actions

clearly into the public planning process. The public process outlined in the proposed rule affords federal agencies compliance with the requirements of the National Environmental Policy Act and accomplishes the goal of public involvement that was sought in the January 1994 proposed rule. Finally, the proposed rule authorizes trustees to determine appropriate assessment methods on an incident-specific basis, from a range of procedures including simplified methods to complex field studies. The proposed rule removes the distinction between categories of approaches termed "expedited" or "comprehensive," and provides guidance for choosing appropriate methods based on the incident and the particular natural resource injuries or service losses of concern. This proposed rule does, however, require that assessment methods be reliable and valid in the particular context, and that the methods be cost-effective.

Prior to issuing a proposed rule, NOAA published eight **Federal Register** Notices requesting information and comments on approaches to developing natural resource damage assessment procedures. 55 FR 53478 (December 28, 1990), 56 FR 8307 (February 28, 1991), 57 FR 8964 (March 13, 1992), 57 FR 14524 (April 21, 1992), 57 FR 23067 (June 1, 1992), 57 FR 44347 (September 25, 1992), 57 FR 56292 (November 27, 1992), and 58 FR 4601 (January 15, 1993). NOAA conducted a public meeting on March 20, 1991, for additional public participation into the process and held four regional workshops during 1991 in Rockville, Maryland; Houston, Texas; San Francisco, California; and Chicago, Illinois, to learn of regional concerns in coastal and inland waters. One workshop held in Alexandria, Virginia, in November, 1991, provided a forum for early discussions of various economic issues likely to be raised during the rulemaking process. In addition, on August 12, 1992, NOAA held a public hearing on the issue of whether constructed market methodologies, including contingent valuation (CV), can be used to calculate reliably passive use values for natural resources, and if so, under what circumstances and under what guidance. On January 15, 1993, NOAA published in full the report of the panel commissioned by NOAA to evaluate the reliability of CV in calculating passive use values for natural resources. 58 FR 4601.

NOAA published the proposed OPA rule on January 7, 1994 (59 FR 1061). The proposed rule contained a statement of issues of interest to