

In regard to the development of a restoration plan, NOAA believes that effective public participation enhances the probability that appropriate restoration actions will be implemented. Solicitation of comments from members of the scientific community, including natural resource injury, restoration, and economic experts, as part of a public participation program may supplement expert peer review of trustee strategies, plans, and tentative decisions. This type of public participation would also satisfy NEPA's requirement that the public be involved in assessing the environmental consequences of major federal actions. NOAA also believes that Restoration Plans developed under this proposed rule serve as Environmental Impact Statements (EIS) for purposes of NEPA. Examples of restoration plans that follow the NEPA EIS format are listed in the bibliography at the end of this preamble.

Cooperative participation by responsible parties in the restoration planning process is consistent with the goals of an open process. Thus, NOAA believes that responsible parties should be invited to participate in the NRDA process, where such participation will not impede fulfilling the trustees' mandate to restore expeditiously injured natural resources and services.

DISCUSSION

Subpart A—Introduction

I. Purpose

The purpose of this proposed rule is to promote expeditious restoration of natural resources and services injured as a result of an incident. To fulfill this purpose, this proposed rule provides an administrative process for involving interested parties, a range of assessment procedures for identifying and evaluating injuries to natural resources and/or services, and a process for selecting appropriate restoration actions from a range of alternatives.

II. Scope

This proposed rule is available for use by designated federal, state, Indian tribal, and foreign natural resource trustees to determine appropriate actions to restore natural resources and services injured by a discharge, or substantial threat of a discharge, of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone.

The Secretaries of the Interior, Commerce, Agriculture, Defense, and Energy are the primary federal natural resources trustees. The roles and responsibilities of the various federal departments regarding NRDA vary

according to their resource management responsibilities and the susceptibility of these natural resources and/or services to injury. Designation of federal trustees and broad guidelines describing trustee functions are addressed in subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300.600. For state trustees, most governors have delegated trustee responsibilities to specific state agencies, as provided under OPA.

III. Effect of Using These Regulations

Assessments performed by federal, state, or Indian tribal trustees in accordance with these regulations receive the evidentiary status of a rebuttable presumption provided by OPA section 1006(e)(2). In brief, this presumption means that the responsible parties have the burden of proving that the trustees' claim and determinations are incorrect. This presumption applies to all assessment procedures developed under this proposed rule. However, where trustees use procedures that are determined not to be in accordance with this proposed rule, trustees will not obtain a rebuttable presumption for that portion of the assessment. Assessments performed by foreign trustees in accordance with these regulations are not entitled to a rebuttable presumption.

IV. Coordination

A. General

Coordination among all parties affected by an incident is crucial to an efficient and effective assessment. Coordination, from pre-incident planning through joint and cooperative assessment, restoration planning and implementation, can assist in decreasing the time until restoration is implemented, preventing double recovery of damages, and ensuring that assessment costs are reasonable. More detailed discussion of some aspects of coordination appears in Appendix B at the end of this preamble.

B. Coordination Among Trustees

This proposed rule encourages trustees with shared or overlapping natural resource management and protection jurisdiction to coordinate their NRDA activities, including coordination in pre-incident planning. Coordination among trustees will avoid duplicative claims for damages, address shared trust resource concerns, and result in more effective funding of assessment work. Trustees must designate a Lead Administrative Trustee for each joint assessment under this proposed rule and the NCP. This rule encourages trustees to consider

cooperation agreements such as memoranda of understanding, to structure both non-incident and incident-specific activities. Trustees may act independently when there is a reasonable basis for dividing NRDA responsibilities, so long as there is no double recovery of damages for the same incident and natural resource. However, independent assessments may not be in the best interests of the trustees, the responsible party, or in achieving prompt restoration of injured resources.

C. Coordination With Response Agencies

Coordination among trustees and response agencies can result in reducing or eliminating natural resource and/or service injuries residual to the cleanup. "Response" or "cleanup" refers to those actions taken under the NCP to protect public health and welfare or the environment when there is a discharge or a substantial threat of a discharge of oil, including actions to contain or remove discharged oil from water and shorelines.

D. Coordination With Responsible Parties

Active and early involvement of responsible parties may eliminate some of the problems trustees have encountered immediately following an incident, such as lack of funding, personnel and equipment. In addition, a joint trustee-responsible party assessment may be more cost-effective and avoid duplicate studies. Therefore, the proposed rule requires the trustees to invite the responsible parties to participate in the NRDA process.

The proposed rule leaves determination of the timing and extent of responsible party participation to the judgment of the trustees on an incident-specific basis. While active responsible party involvement is the preferred method of conducting assessments, it may not be appropriate for trustees to delay assessment activities while negotiating the terms of responsible party involvement.

In making a determination to allow responsible party participation in the assessment, trustees should consider factors including, but not limited to: (1) Whether responsible parties have been identified; (2) the willingness of responsible parties to participate in the assessment; (3) the willingness of responsible parties to fund assessment costs of the trustees; and (4) the willingness and ability of responsible parties to conduct assessment activities in a technically sound and timely manner.