

Incident

An incident is 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. When a discharge of oil occurs, natural resources and/or services may be injured by the actual discharge of oil or response activities related to the discharge. When there is a substantial threat of a discharge of oil, natural resources and/or services may also be injured.

Injury

OPA authorizes trustees to recover damages for "injury to, destruction of, loss of, or loss of use of" natural resources (sec. 1002(b)(2)(A)). Trustees must establish that injury has resulted from an incident. Under this proposed rule, injury is defined as an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Measurable adverse changes may be projected through use of models or extrapolation techniques.

There are two general bases for determining injury under this proposed rule. Trustees must either determine that: (1) The natural resource was exposed, there is a pathway connecting the incident with the resource, and an adverse change to the natural resource and/or service has occurred; or (2) for injuries resulting from response actions or incidents involving a substantial threat of a discharge, an injury to a natural resource or an impairment of use of a natural resource service has occurred as a result of the incident. Thus, under this proposed rule, injury may result from direct or indirect exposure to oil, as well as from response-related activities, and loss of services is explicitly included in the definition of injury.

Oil

Under OPA section 1001(23), "oil" includes:

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, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of [CERCLA] and which is subject to the provisions of that Act.

If a component of a mixed spill is a hazardous substance under CERCLA, CERCLA and the CERCLA NRDA

regulations apply. The definition of "oil" under OPA does not cover all petroleum-related products. For instance, substances whose properties or behavior are substantially different from oil (e.g., natural gas condensates) are excluded under OPA. However, substances that are relatively similar (e.g., non-petroleum oils such as vegetable oils and animal fats) are covered by OPA. Although the U.S. EPA and U.S. Coast Guard have recognized that animal fats and vegetable oils are substantially less harmful to the environment than petroleum-based oils, the preamble to the recent revisions to the NCP states that "oil of any kind or in any form" clearly suggests the inclusion of non-petroleum oils. 59 FR 47386 (Sept. 15, 1994). This conclusion is also consistent with U.S. Department of Transportation guidance, which states that "oil" includes "petroleum, fuel oil, vegetable oil, animal oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include natural gas condensate." 49 CFR 194.5. While the mechanism of injuries by non-petroleum oils may be different than that of petroleum oils, it is evident, based on current literature, the nature of such injuries are similar (i.e., death) for both types of oils.

According to EPA guidance, "oil" covered by OPA includes: (1) Crude oil and fractions of crude oil including the hazardous substances, such as benzene, toluene, and xylene, which are indigenous to petroleum and its refined products; and (2) hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process, including hazardous substances that have increased in level as a result of the refining process. (U.S. EPA Memorandum on the Petroleum Exclusion Under the Comprehensive Environmental Response, Compensation, and Liability Act, July 31, 1987; BNA, 1988) Hazardous substances added to petroleum that increase in concentration through any process other than refining, or added as a result of contamination of the petroleum during use (including waste oil), would not be excluded from CERCLA. For example, the presence of dioxin in oil used as a dust suppressant on highways would bring a discharge of such a mixture under the jurisdiction of CERCLA, not OPA.

Pathway

Pathways include the medium, mechanism, or route by which the incident has resulted in an injury. For discharges of oil, a pathway is the sequence of events by which: (1) The oil

travelled through various components of an ecosystem and contacted the natural resource of concern; or (2) exposure to oil in one part of an ecosystem was transmitted to the natural resource of concern, without the oil directly contacting the natural resource.

Reasonable Assessment Costs

To evaluate the reasonableness of assessment costs, the incremental increase in assessment information must be reasonably related to the action's incremental cost. The scale of assessment efforts must be appropriate in the judgment of the trustees relative to the need for increased information, which is a highly incident-specific determination. The costs of an assessment or assessment actions that are focused on providing information required to determine restoration requirements must also be judged relative to the extent of injury and expected restoration costs for the incident. Reasonable assessment costs also include the administrative, legal, and enforcement costs necessary to carry out this part. Trustees may recover the reasonable assessment costs they incur under this proposed rule even if they ultimately determine not to pursue restoration, provided they establish jurisdiction under OPA during the Preassessment Phase.

Recovery

Recovery is defined in the proposed rule as the return of injured natural resources and services to baseline. This concept encompasses the inherent tendency for natural resource and/or service attributes to vary over space and time.

Projecting recovery involves determining the likelihood and rate at which natural resources and/or services will return to baseline. The availability and quality of baseline information can influence recovery projections. Trustees should use the best available information that can be gathered through field or laboratory studies, models, the literature, and other sources appropriate to the incident or injury to project recovery.

Restoration

Under this proposed rule, restoration is broadly defined as any action or combination of alternatives or actions to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services.

This proposed rule includes the concepts of primary and compensatory restoration. Primary restoration is human intervention or natural recovery that returns injured natural resources