

C. Detailed Workplans

Depending on the incident, detailed workplans for accomplishing restoration goals and objectives may or may not have been developed during the Restoration Planning Phase. Clearly, as many details to outline the restoration expectations, performance criteria, timelines, criteria for success, etc., should be included in the Final Restoration Plan and in agreements with the responsible parties as are practicable to determine prior to restoration implementation. Performance criteria are essential for meaningful trustee monitoring and oversight of restoration projects.

D. Monitoring and Oversight

Reasonable monitoring costs are included in recoverable damages. A well-designed and executed monitoring plan is required to assess progress toward the stated goals and objectives of a restoration plan. Reasonable monitoring costs cover those activities necessary to gauge the progress, performance, and success of the restoration actions, and not to generate purely scientific information.

E. Restoration Success and Corrective Actions

Restoration plans, particularly those including agreements for responsible parties to implement restoration, must identify criteria against which success and completion of restoration actions will be judged. Thus, trustees should, at a minimum, determine: (a) What criteria will constitute success, such that responsible parties are relieved of responsibility for further restoration actions; and (b) what criteria will necessitate corrective actions in order to comply with the terms of a restoration or settlement agreement. For example, in the intertidal marsh creation example used above, success may be defined as survival of planted marsh grass at a rate of 80% vegetative cover two years after completion of planting.

In some cases, pilot studies will lessen the need for corrective measures. In other cases, settlement agreements can include reopeners to deal with specific points of uncertainty, for instance, for significant injuries that could not be determined and/or quantified at the time of a settlement. Another possibility is for the responsible parties to deposit an agreed-upon amount of money in an escrow account to cover future corrective actions that could not be fully anticipated at the time of the settlement. These funds would then be used for future actions once defined, or revert to

the responsible parties if not needed. In most cases, trustees should consider including a mechanism to deliberate the need for and type of corrective actions in a settlement agreement where the types of contingencies that suggest the need for corrective actions cannot be completely foreseen.

In all cases, the scope and scale of corrective actions must be determined relative to the restoration goals and objectives set out in the Final Restoration Plan. In addition, trustees must recognize that circumstances well beyond the control of any of the parties may not be the basis of requiring corrective actions, such as natural occurrences that would meet an "Act of God" standard.

General Summary of and Response to Comments on the January 1994 Proposed Rule

NOAA received numerous comments on the January 1994 proposed rule. NOAA appreciates the time and effort expended by the commenters. Commenters raised many thought-provoking points that have led NOAA to reconsider the overall approach of the rule. The bulk of the comments fell into eight general categories.

First, NOAA received many comments about the need to keep natural resource damage assessments focused on the ultimate goal of expeditious restoration rather than the abstract study of injuries, calculation of monetary damage figures, or time-consuming and expensive litigation. Today's proposed rule is designed to place even greater emphasis on early restoration planning.

Second, many commenters addressed the standards for calculating compensable value in the January 1994 proposed rule. Today's proposed rule eliminates the need for the determination of compensable values as a separate component of a damage claim. The proposed rule does not render the value of natural resources irrelevant; however, it does fundamentally change the role of valuation in assessments. Valuation is now used to determine the scale of appropriate restoration actions rather than a monetary damage figure.

Third, commenters raised concerns about coordination among trustees and with responsible parties and the level of trustee discretion afforded under the proposed January 1994 rule. Today's proposed rule provides for a public planning process designed to ensure that all interested parties have an opportunity for involvement and that the trustees' decisionmaking process is subject to public scrutiny. The proposed

rule also redefines "reasonable assessment costs" to provide greater clarification of when trustees' assessment activities are appropriate.

Fourth, NOAA received voluminous comments on the various assessment procedures. In regard to the compensation formulas, as discussed in Appendix C to this preamble, NOAA has decided to reserve the compensation formulas for now. Some commenters expressed confusion over the distinction between expedited and comprehensive damage assessments. The proposed rule no longer categorizes assessments as expedited or comprehensive and instead authorizes trustees to determine appropriate assessment methods on an incident-specific basis from a range of procedures including simplified methods to complex field studies.

Fifth, other commenters raised concerns about use of Regional Restoration Plans. The proposed rule provides additional guidance on when and how Regional Restoration Plans may be used.

Sixth, NOAA received many comments on the standards for determining injury. Under today's proposed rule, the definition of "injury" has been modified to require demonstration of a measurable or observable adverse change. The proposed rule also provides new guidance on determining injury, including guidance on selecting injury studies that provide information that is relevant for restoration planning.

Seventh, NOAA received mixed comments on the provisions in the January 1994 proposed rule concerning administrative record review. This proposed rule continues to require development of an open administrative record containing documents relied upon by trustees in assessing and selecting restoration actions appropriate for particular incidents, including relevant comments and submissions received from responsible parties and other interested persons. Although this proposed rule is silent on the standard of review, NOAA continues to expect that courts will perform review on the administrative record.

Finally, many commenters expressed concern about the volume of guidance on preassessment activities contained in the January 1994 proposed rule. Today's proposed rule includes a streamlined Preassessment Phase.

Due to the extent of the changes in today's proposed rule, many of which render earlier comments inapplicable, NOAA is not providing a detailed treatment of all comments received. Instead, the proposed rule and preamble embody the response to the comments