DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 990

[Docket No: 990608154–9154–01]

RIN 0648–A036

Natural Resource Damage Assessments

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

ACTION: Proposed rule: Amendments.

SUMMARY: On January 5, 1996, the National Oceanic and Atmospheric Administration (NOAA) promulgated final regulations for the assessment of natural resource damages pursuant to section 1006(e)(1) of the Oil Pollution Act of 1990. The final regulations were challenged, pursuant to section 1017(a) of OPA. On November 18, 1997, the U.S. Court of Appeals for the District of Columbia Circuit issued a ruling on the final regulations (*General Electric Co., et al.,* v. *Commerce,* 128 F.3d 767 (D.C. Cir. 1997)). This proposed rule addresses the issues remanded to NOAA by that ruling, and includes some clarifying and technical amendments in other parts of the regulation.

DATES: Written comments must be received no later than September 29, 2001.

ADDRESSES: Written comments are to be submitted to: Eli Reinharz, c/o Office of General Counsel/Natural Resources, 1315 East-West Highway, Room #15132, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Eli Reinharz, 301–713–3038, ext. 193; (FAX: 301–713–4387; e-mail: eli.reinharz@noaa.gov) or Linda Burlington, 301–713–1332 (FAX: 301–713–1229; e-mail: Linda.B.Burlington@noaa.gov).

SUPPLEMENTARY INFORMATION: In the event of a discharge or substantial threat of a discharge of oil (incident), the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides that federal, state, Indian tribal, and/or foreign natural resource trustees assess natural resource damages and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the injured natural resources and their services under their trusteeship. Congress directed the National Oceanic and Atmospheric Administration (NOAA) to promulgate regulations for the assessment of natural resource damages resulting from an incident (OPA section 1006(e)(1)). NOAA promulgated final regulations on January 5, 1996 (*see* 61 FR 440), codified at 15 CFR Part 990.

Under these OPA regulations, trustees conduct natural resource damage assessments in the open, with responsible parties and the public involved in the planning process to achieve restoration more quickly, decrease transaction costs, and avoid litigation. These restoration plans form the basis of claims for natural resource damages. Under the natural resource damage assessment regulation, trustees then present a demand comprised of the final restoration plan to responsible parties for funding or implementation.

General Electric and other industry groups challenged the final regulations pursuant to section 1017(a) of OPA. On November 18, 1997, the U.S. Court of Appeals for the District of Columbia Circuit issued a ruling on the final regulations (*General Electric Co., et al.,* v. *Commerce,* 128 F.3d 767 (D.C. Cir. 1997)). The Court remanded to NOAA for further agency decisionmaking: (1) Authorization for the removal of residual oil; and (2) the scope of authorization for recovery of legal costs. NOAA is also proposing clarifying and technical amendments in other parts of the regulations. NOAA invites comments on the issues or comments in these proposed amendments.

Discussion

I. Court's Mandate to Clarify Removal Language

A. Discussion

In *General Electric, et al.,* v. *Commerce,* the Court asked NOAA to explain the change in language regarding the removal of residual oil between the Final Regulation and its preamble for natural resource damage assessments and the previous Proposed Rule. The Court also raised a series of questions on the relationship and coordination between response and restoration authorities.

The Proposed Rule required trustees to identify and consider a reasonable range of restoration alternatives, including a primary restoration component in each alternative. 60 FR 39832. Concerning the types of primary restoration alternatives that could be considered, § 990.55(b)(2)(i) of the Proposed Rule provided that: ''trustees must consider whether: (i) Conditions exist that would limit the effectiveness of primary restoration actions (e.g., residual sources of contamination); * * *'' Id. The corresponding section (990.53(b)(3)) of the Final Regulation provides that:

(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) * * *

61 FR 507. The language in the preamble to the Final Regulation was nearly the same as that of the Proposed Rule.

The Court ruled that the Proposed Rule did not authorize trustees to actually ''remove'' oil and that the provision in the Final Regulation, which did authorize such ''removal,'' could not be upheld because NOAA failed to explain this change in language.

NOAA did not intend any substantive change by the edits in language between the proposed and final regulation. NOAA did not intend to propose shared ''removal authority,'' as defined by OPA. Removal authority is exclusively provided to EPA and CG under the Clean Water Act, 33 U.S.C. 1251 (CWA) and National Oil and Hazardous Substances Pollution Contingency Plan 40 CFR Part 300 (1994) (NCP). Removal of oil will be conducted under the authority of the On-Scene Coordinator (OSC). The OSC's authority will be carried out in accordance with the NCP.

However, NOAA has always intended to authorize trustees to eliminate or reduce exposure to oil resulting from an incident, but only if such action is selected in accordance with standards and procedures set forth in the Final Regulation. NOAA acknowledges that the Proposed Rule may not have expressed this intent clearly. As a result, NOAA maintains that trustees must have the authority to eliminate or reduce the impediments to restoration, including residual oil, to bring about effective restoration, rather than be limited to merely considering such impediments, as erroneously suggested by the Proposed Rule (*see,* e.g., 61 FR 452).

The court expressed concern that giving trustees the authority to remove residual oil would be inconsistent with OPA because it would allow trustees to second guess and encroach upon response agencies that have exclusive removal authority. NOAA did not intend to grant shared removal authority between trustee and response agencies. Further, recognizing the trustees' authority to address residual oil through selecting a restoration action would not be granting trustees the authority to second guess response decisions

because selection of a restoration alternative is based upon different information and criteria than are used by the response agency in making removal decisions.

''Removal'' is a term of art under the applicable statutes and regulations. ''Removal'' is defined as:

* * * 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;

CWA, 33 U.S.C. 1321(a)(8), OPA section 1001(30) (33 U.S.C. 2701(30), *see also* NCP, 40 CFR Part 300 at 300.5). The term does not encompass all possible actions to remove oil, only those actions necessary to ''minimize or mitigate'' additional harm.

In contrast, natural resource damage assessment and restoration involve an investigation and planning process that is aimed at returning the environment to baseline, i.e., the state it would have been in had the incident not occurred, by implementing restoration approaches provided under OPA.

Although not defined under OPA, the Final Regulation defines restoration to encompass ''any action that returns injured natural resources and services to baseline'' and ''any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.'' 15 CFR 990.30. Restoration actions may only be taken in accordance with the provisions in the Final Regulation governing their identification, evaluation, selection, and documentation. For example, trustees evaluate restoration alternatives using standards provided in the rule including the: cost to carry out the alternative; 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; likelihood of success of each alternative; 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; extent to which each alternative benefits more than one natural resource and/or service; and effect of each alternative on public health and safety (15 CFR 990.54(a)). Nothing in the statute or its legislative history suggests that trustees are prohibited from undertaking restoration actions that involve eliminating or reducing exposure to oil.

Another area causing potential confusion with removal actions is the final rule provisions on emergency restoration in § 990.26. Section 990.26 of the final rule currently states that trustees may conduct emergency restoration when: ''(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.'' Since that language may tend to confuse restoration and removal, NOAA is proposing to amend § 990.26 to clarify that the purpose is not to undertake any additional ''removal'' action, but that the intent of the emergency restoration provisions is to comport with the statutory language of section 1012(j) of OPA, which exempts emergency restoration from public notice and comment when it is needed ''to avoid irreversible loss of natural resources, or to prevent or reduce any continuing danger to natural resources or similar need for emergency action,'' and to mitigate the ultimate natural resource damages that would result from delaying the emergency restoration action resulting from the incident. This provision is consistent both with the language and purposes of OPA and with the tort law concept that persons who are seeking damages for an injury may take reasonable steps to mitigate damages, even before the claim has been asserted or adjudicated, by repairing some or all of the injury. Therefore, § 990.26(a) would read:

(a) Trustees may undertake emergency restoration before completing the process established in this part provided that:

(1) The action is needed to avoid irreversible loss of natural resources, or to prevent or reduce any continuing danger to natural resources or similar need for emergency action;

(2) The action will not be undertaken by the lead response agency;

(3) The action is feasible and likely to succeed;

(4) Delay of the action to complete the restoration planning process established in this part likely would result in increased natural resource damages; and

(5) The costs of the action are not unreasonable.

Section 990.26(b) is also modified to provide that, if response actions are still underway, trustees must coordinate with the OSC before implementing any emergency restoration action. The rule provides that trustees may take such action only if that action will not interfere with or duplicate the ongoing response action. Finally, the rule also provides that emergency restoration addressing residual oil can proceed only if the response action is complete or if the OSC has determined that the residual oil identified by the trustee as part of a proposed emergency restoration action does not merit further response. This coordination shall take place through the procedures laid out in the NCP.

NOAA is specifically seeking comment on this proposed amendment. NOAA is also seeking comment on whether to modify the existing language with the proposed amendment. NOAA seeks comment on whether the proposed rule language adequately recognizes the distinct authorities of both the response agency and Trustees, while allowing sufficient flexibility on the part of the OSC and the Trustees to exercise their respective responsibilities in time-critical situations in a way that ensures coordination and consistency, and maximizes effective and efficient response and restoration. NOAA specifically seeks comment whether it would be appropriate to add an explicit time element to the OSC's determination that residual oil does not merit further response, i.e., to allow an OSC determination that no further response action with respect to the identified oil is merited ''at this time.'' Such language could provide OSCs with greater discretion and flexibility to clear proposed trustee emergency restoration actions addressing residual oil, without the OSC having to make a final determination that no further response actions will ever be merited with respect to that oil. NOAA solicits comment on whether such a modification to the proposed rule language would be appropriate. NOAA also solicits comment on whether there have been actual circumstances involving proposed emergency restoration actions under which the existing rule language has been problematic for OSCs, Trustees, or Responsible Parties, or under which the proposed rule language, with or without an explicit time element, would have been problematic.

Given the fact that the parenthetical language of § 990.53(b)(3) of the Final regulation caused confusion on this issue, NOAA is amending that subsection to delete the parenthetical language (''e.g., residual sources of contamination).'' For the same reason, the term ''remove'' was replaced by the term ''address'' in § 990.53(b)(3). NOAA also seeks comment on the language of the Final Regulation and on any procedural confusion that language might cause.

B. The Court's Specific Questions on the Interrelationship of Response and Restoration Authority Concerning Removal of Oil

Although NOAA is not attempting to confer shared ''removal authority'' with this rulemaking, answers to the questions posed by the court are provided to clarify the relationships between response and restoration.

1. What Is the Interrelationship Between Trustees' Residual Removal Authority and the Primary Removal Authority of EPA and the Coast Guard?

As previously stated, NOAA did not intend to confer upon trustees shared ''residual removal authority'' by this rulemaking. Rather, NOAA and the lead federal response agencies maintain that trustees may implement an action to eliminate or reduce exposure to oil in the environment if that action comprises an appropriate part of a restoration plan developed in accordance with the Final Regulation. Thus, it is inappropriate to characterize the trustees' action as an exercise of ''residual removal authority.''

OPA section 1006(c) directs trustees to assess natural resource damages, and to develop and implement a plan for restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship, after providing for public review and comment on such plans. 33 U.S.C. 2706(c)(1). OPA does not define ''restoration,'' but the Final Regulation describes this authority as encompassing ''any action * * * that returns injured natural resources and services to baseline'' and ''any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.'' 15 CFR 990.30, 61 FR 505.

In contrast, removal as defined under the Clean Water Act, OPA, and the NCP addresses actions taken by the lead response agency necessary to ''minimize or mitigate'' damage to the environment. Not all actions to reduce exposure to or recover oil are covered under the statutory term of ''remove.'' The Final Regulation acknowledges that removal actions may reduce or eliminate the need for subsequent natural resource damage assessment and restoration activities (see, e.g., 61 FR 443, col. 2: Coordination among trustees and response agencies can result in reducing or eliminating natural resource or service injuries residual to the cleanup;'' 61 FR 444, col. 3: ''This rule 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;'' 61 FR 461, col. 2: ''NOAA agrees that restoration actions by trustees are intended to supplement the initial response and cleanup activities of response agencies.''). The Final Regulation also acknowledges that response actions are limited in scope and may not alleviate restoration concerns (61 FR 449, col. 1).

Thus, NOAA and the federal response agencies interpret OPA as granting complementary authority to response agencies and trustees. Response and restoration authorities are respectively distinguished primarily by the need for action to minimize or mitigate harm versus action to restore injured natural resources and services to baseline.

2. Under What Circumstances Will Trustees Exercise Their Authority To Remove Oil?

The trustees have no authority to undertake a ''removal'' action *per se*, but may select a restoration alternative that involves reducing or eliminating exposure to residual oil. The Final Regulation authorizes trustees to eliminate or reduce exposure to residual oil when such action has been selected in accordance with the restoration planning process in the OPA regulation. That is, the trustees could eliminate or reduce exposure to residual oil when they have developed a reasonable range of restoration alternatives that might include removal of residual oil, among other options, evaluate those restoration alternatives using the selection criteria in the OPA regulation, and select an alternative that includes removal of residual oil as the most appropriate restoration alternative for the injuries resulting from the incident. In cases where trustees do consider a restoration alternative involving reducing or eliminating exposure to residual oil, the reasonable range of alternatives should include not only a natural recovery alternative, but also an alternative in which the residual oil is left untouched yet there is other human intervention, such as off-site acquisition or enhancement of substitute habitat, to address the injured resources.

3. How Does the Standard Governing the Lead Agency's Removal Authority Differ From the Standard Governing Trustee Removal of Oil?

The lead response agency's removal authority under OPA may include actual removal or containment of oil, or other actions ''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.'' 33 U.S.C. 2701(30). As discussed above, the lead response agency's goals include preventing or reducing harm to the environment that would result from exposure to oil. The objective of the lead response agency is to remove as much oil as is needed to minimize or mitigate additional harm. In contrast, the trustee's authority to eliminate or reduce exposure to residual oil is derived exclusively from restoration authority under OPA. As such, the trustee's authority is limited to those instances where residual oil would prevent or limit the effectiveness of restoration, as stated in § 990.53(b)(3) of the Final Regulation.

4. What Precisely Is a Trustee's Role in Primary Removal, and What Is the Role of EPA and the Coast Guard, if any, With Respect to a Trustee's Residual Authority?

The trustee's role in a removal action is defined in section 1011 of OPA, which provides that: ''The President shall consult with the affected trustees designated under section 2706 of this title on the appropriate removal action to be taken in connection with any discharge of oil.'' 33 U.S.C. 2711. During this consultation, the trustee may advise the lead response agency on removal actions that could be taken to prevent, reduce, or eliminate impacts to natural resources. Removal decisions made by the lead response agency are intended to minimize or mitigate additional harm to the environment. Although these decisions may affect the nature and extent of trustee restoration actions, the decisions are not based upon the trustee goals of restoring the environment to baseline conditions and compensating for loss of natural resources.

Generally, response agencies do not have a role in restoration actions by trustees. However, the Final Regulation does allow ''emergency restoration,'' under § 990.26. Under § 990.26 (a), emergency restoration is allowed where: ''(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.'' NOAA is proposing to amend the provisions of § 990.26(a) to clarify that the purpose of trustees conducting emergency restoration is to reduce the ultimate damages resulting from the incident as discussed in section I.A. If emergency restoration is considered while response actions are still underway, § 990.26(b) requires that the trustee coordinate with the lead response agency's On Scene Coordinator before taking any

emergency restoration action and demonstrate that the emergency restoration action will not duplicate or interfere with any on-going response actions.

5. May Trustees Remove Residual Oil Even if EPA or the Coast Guard has Considered and Rejected a Trustee's Position During the Consultation Process? What Happens if a Trustee Originally Agrees With the Extent of Primary Removal, but Later Changes its Mind?

NOAA believes that the lead response agency's rejection of a trustee's request for removing oil under the consultation provisions of section 1011 of OPA should neither bar nor precipitate such actions as part of a restoration plan developed in accordance with the Final Regulation. The response agency's refusal of a trustee's request in no way constitutes a conclusion regarding whether such an undertaking is appropriate as natural resource restoration. The response agency may make a determination, based upon available information, that removal is not necessary to prevent further impact to human health, welfare, or the environment. Subsequently the trustees, based upon information and analysis developed during the damage assessment process, may select a restoration alternative that involves elimination or reduction of residual oil. These determinations are not in conflict, and both are proper.

The trustee's concurrence with the response agency's decision to leave oil in the environment during the response phase does not preclude the trustee's consideration of removal of residual oil if such action is deemed appropriate based upon information gained during the damage assessment process to reinstate baseline or compensate for lost services.

6. Do Coast Guard and EPA Agree That Trustees May Conduct Removal of Oil? Do the Lead Response Agencies Concur as to How They Will Coordinate Removal Activities on a Case-by-Case Basis?

The Court indicated that such agreement is most likely needed by a reviewing court.

The Federal response agencies agree that actions to eliminate or reduce exposure to oil need not occur solely under their response authorities, and can legitimately be conducted as a restoration action under OPA, consistent with the Final Regulation. The Federal response agencies also agree that coordination of removal activities in all cases will occur as specified within the NCP.

C. Summary of Comments Received

On February 11, 1998, NOAA published a request for public comments concerning the authorization for the removal of residual oil by trustees as part of a natural resource restoration action. 63 FR 6846. Specifically, NOAA invited commenters to submit information on both case-specific and other consultation experiences with the Coast Guard, EPA, or state response agencies relating to removal actions taken either during or following the response phase of an incident. NOAA also requested reports of any standards, circumstances, and outcomes of incidents where trustees considered additional removal actions beyond those proposed by the lead response agency. Comments received are summarized below. The comments were taken into account in formulating the proposed rule amendments.

Twelve separate parties responded to the call for comments. Five commenters submitted their comments on behalf of industry. Of the remaining seven comments, four were from state trustee representatives, one from U.S. EPA, and two from individual members of the public.

One commenter, a private cleanup contractor, described a ''unique design'' of skimmer used by the company as an environmentally friendly approach to removal of residual oil.

The second individual commenter advocated that trustees not be allowed to ask for more cleanup than that performed by the response agency, in order to avoid needless work and the potential to cause more environmental harm than that avoided by the additional work. The commenter also provided comments on various environmental problems caused by oil spills, the societal dependence on oil consumption, and agreement with the regulation's requirement for incident-specific plans in lieu of monetary damages calculated by models.

One trustee representative relayed experiences from a unique situation involving residual oil, in which oily sand was piled up into ''tar dunes'' in front of vegetated zones of beaches by response personnel. The decision was characterized as a joint decision among response and trustee personnel, based in part on the desire to minimize removal of sand from the beaches, and on uncertainty whether the dunes would cause any additional injury to natural resources. The trustee stated that in hindsight they would always recommend that oily sand be removed from beaches and replaced with clean sand from an appropriate source. In addition, this trustee was of the opinion that they would have the authority to request responsible parties to conduct this type of residual removal as part of a restoration plan.

A second trustee commenter reported on a specific case example involving residual oil. In this instance, trustees were heavily involved in the response planning and decision-making from early on in the spill. The decision to leave residual oil in the environment in this instance was made with the agreement of the trustees, because additional removal would have killed individuals of an endangered species.

A third trustee commenter stated its agreement with NOAA's original conclusion that trustees have legal authority to remove residual oil as part of a restoration plan. The commenter stated that OPA does not contain a bright-line distinction between removal and restoration actions, noting OPA's definition of removal actions as including actions to ''minimize or mitigate damage'' to natural resources such as fish, shellfish, and wildlife. The commenter suggested that Congress obviously intended a degree of overlap between removal and restoration. The commenter stated that removal of residual oil is often necessary and even unavoidable as a restoration action, citing to one case example where oil unaccounted for by response efforts was discovered later in sediments of a protected natural area. This commenter also noted that situations involving slow, continuous discharges of oil—such as discharges from contaminated sediments—can be just as harmful to natural resources as catastrophic discharges, and that response agencies are far less likely to respond to the non-catastrophic circumstances. Finally, this commenter urged NOAA to respond in the revised final regulation to all of the D.C. Circuit's questions posed in remanding this issue.

Another trustee commenter reported on an experience in which removal of residual oil long after an incident was paid for out of restoration funds paid by a responsible party and held by trustees in a trust account.

U.S. EPA commented that they agree that trustees have authority to remove residual oil as part of implementation of a publicly-reviewed restoration plan. EPA also noted, however, that federal response agencies and trustees must consult and coordinate during an incident to ensure protection and restoration of potentially injured natural resources due to an oil spill. Although the final decision as to the scope and

completion of response activities is placed with the federal OSC, EPA stated that trustees may request that lead agencies conduct specific removal actions, including requesting that a removal action be re-opened to address residual oil under certain circumstances. EPA suggested that incidents supporting the need for removal of residual oil should be few if the coordination and consultation process works.

One group of industry representatives stated that trustees should not be authorized to undertake response actions, including removal of residual oil beyond that directed by the lead response agency in consultation with trustees. The commenters characterized NOAA's remanded regulation provision as a unilateral attempt to grant trustees additional power and authority, and stressed the need for NOAA to answer all of the D.C. Circuit's questions concerning the interrelationship of response and restoration authority. These commenters suggested drawing strong and clear distinctions between response and trustee authorities, roles and responsibilities. The commenters stated that tremendous problems arise respecting releases when trustees attempt to ''take over, circumvent, or reopen the analysis and selection of response action alternatives and cleanup criteria required under the [NCP],'' including inefficiency, confusion, delay, and increased costs, among other things. Citing to numerous sections of the NCP and EPA's July 31, 1997 OSWER Directive No. 9200.4–22A, the commenters characterized the proper role of resource restoration as supplemental to, and consistent with, response actions and criteria selected by the lead agency.

A second group of industry commenters also concluded that EPA and the Coast Guard have exclusive authority to determine when removal is complete, and that trustees' interests are protected by, and limited to, consultation with the lead agency pursuant to section 1011 of OPA. These commenters suggested that OPA, the CWA, and the NCP all draw clear lines between ''removal'' and ''restoration,'' citing as support the different liability provisions and different statutes of limitations for removal costs and for natural resource damages in OPA. These commenters also suggested that the remanded regulation provision, because it could be used solely by state or tribal trustees, undermines Congress' intent that removal under OPA always be conducted under the supervision of federal authorities. These commenters urged NOAA to remove § 990.53(b)(3)(i) from the regulation.

A third group of commenters representing industry concerns noted that oil spill cleanup is critically important, in part, because it may also achieve restoration and eliminate the need for further compensation to the public. These commenters stressed that ''too many cooks'' can hamper the effectiveness of response actions in achieving this and other goals, and suggested that this was one reason why Congress limited trustees' role during response to a consultative one. The commenters noted potential problems with recovering response costs from the Oil Spill Liability Trust Fund when these costs exceed the liability limits. The commenters also expressed concern about removal actions taken by trustees and consistency with the NCP. However, these commenters stated that they would support removal of residual oil by trustees in instances where it is necessary to assist natural recovery of injured resources, so long as such action is the most cost-effective restoration action, and that the claim for the costs of such action is developed in accordance with established damage assessment and restoration planning procedures.

A fourth commenter representing an industry association also stated that the regulation should reflect the clear legal distinction drawn by Congress in OPA between removal of oil and restoration of natural resources. This commenter stated that NOAA should not attempt to authorize any removal authority for trustees. Reasons cited for this position included negative public policy, increasing transaction costs to rival the Superfund program, and open-ended removal liability. However, this commenter also recognized that removal of oil can comprise an effective restoration action, and that in reality there is no existence of a time certain at which removal stops and restoration begins. Citing the purpose of OPA's requirement that response agencies consult with trustees, this commenter advocated that natural resource damage assessment activities proceed apace with response in such a fashion that the removal completion decision can take into account the need to remove more oil in order to achieve effective restoration. This commenter also requested that NOAA resolve this remanded issue with formal rulemaking.

The final group of industry commenters also stated that they would support trustee authority to remove residual oil if it is the most cost-effective restoration alternative, in certain circumstances. Specifically, these commenters urged NOAA to revise the regulation such that an injury to a natural resource for which trustees could seek restoration, including by removal of residual oil, be defined as a loss of a service that the resource provided to the public. Appropriate restoration would be limited to reinstatement of these services and could include elimination of oil from the environment if this action achieved reinstatement of services. The commenters argued that OPA's grant of authority to response agencies to abate threats to the environment overlaps with authorities NOAA granted to trustees under the regulation to restore lost ecological functions or services. The commenters suggested that trustee removal of residual oil, when it is not performed to reinstate a public service, represents second-guessing of the lead agency's determination that threats to the environment have been abated, even with oil remaining in the environment. These commenters urged that NOAA revise the regulation to eliminate the potential for any overlap between response and restoration authorities and actions. These commenters also urged that trustees work closely with removal agencies to identify in a timely manner whether additional removal is likely to be proposed as a restoration alternative, so that all removal can be carried out simultaneously.

II. Trustee Legal Costs

The court's decision on recovery of attorneys' costs as assessment costs discussed three issues. First, the court noted that NOAA agrees that attorneys' costs incurred in pursuing litigation of a natural resource damages claim are not recoverable as assessment costs. In response to this point, NOAA proposes to amend the definition of ''Reasonable assessment costs'' in § 990.30 of the Final Regulation to remove the word ''enforcement'' from the definition. (*General Electric et al.* v. *Commerce*, at 776.)

Second, the court noted that the parties in the case agreed that ''trustees may recover assessment costs attributable to tasks that lawyers happen to perform but which others, such as engineers or private investigators, could have performed.'' (*Id.*) No amendment to the Final Regulation is necessary to address this point.

Finally, the court declined to resolve the question of ''whether trustees may recover costs stemming from legal work not directly in furtherance of litigation (*e.g.*, pre-litigation legal opinions, title searches) that only lawyers could have performed.'' (*Id.*) Instead, the court directed NOAA ''to draw the precise

line between recoverable and non-recoverable legal costs.'' (*Id.*) In response to this direction from the court, NOAA proposes to amend § 990.30 of the Final Regulation to add a definition of ''legal costs'' that provides criteria for determining the scope of attorney activities that may be included in a trustee's claim for assessment costs.

The proposed amendment focuses on the explicit actions that trustees are authorized to perform under the Final Regulation or under OPA. When determining whether the costs of actions, performed for the purpose of assessment or developing a restoration plan, that could only be performed by attorneys constitute reasonable assessment costs trustees must consider the following criteria:

- Whether the action comprised all or part of an action specified either in OPA section 1006(c);
- Whether the action was performed prior to, or in the absence of, the filing of litigation by or on behalf of the trustee in question to recover damages; and
- Whether the action was performed by an attorney who was working for or on behalf of the trustee agency, as opposed to a prosecutorial agency.

The first criterion demonstrates that the action was directly in furtherance of natural resource damage assessment and restoration. The second and third criteria demonstrate that the action was not primarily in furtherance of litigation. If all of the above criteria are answered affirmatively, the costs associated with performance of the action by the attorney are assessment costs.

If all of the above criteria are met, the costs associated with attorneys' actions are deemed assessment costs. If the criteria are not met, the trustee must explain why the action is an assessment action rather than an action performed for the primary purpose of furthering litigation. For example, if a responsible party declares bankruptcy at some point before a natural resource damage assessment is completed, a trustee may need to file a proof of claim in a bankruptcy court to preserve the natural resource damage claim. Although the cost of filing the proof of claim in the bankruptcy court may not be recoverable as an assessment cost, any attorneys costs in the continuing assessment itself would still be recoverable.

The proposed amendment is consistent with OPA as there is nothing in the statute or its legislative history to suggest that trustees are required to assess injuries and develop restoration plans without any involvement of attorneys. There are numerous examples of common or routine assessment actions that may be most appropriately performed by trustee attorneys. Within NOAA's natural resource damage assessment and restoration program, and perhaps other trustee agencies, attorneys are responsible for such actions including, but not limited to:

- Providing written and oral advice on the requirements of OPA, these regulations, and other applicable laws;
- Preparing public notices, including the Notice of Intent to Conduct Restoration Planning issued to responsible parties and the Notice of Availability of Draft Restoration Plans;
- Developing and managing administrative records;
- Preparing binding agreements with potentially responsible parties in the context of the assessment, including study agreements, funding agreements, and restoration agreements;
- Preparing co-trustee cooperative agreements;
- Preparing formal trustee determinations required under the Regulation;
- Determining requirements for compliance with other applicable laws; and
- Procuring title searches, title insurance, and/or conservation easements when property agreements are part of restoration packages.

NOAA is proposing to define the types of attorneys' costs that would be included in the recovery of assessment costs under the rule. The court noted that trustees may recover assessment costs attributable to tasks that lawyers happen to perform but which others, such as engineers or private investigators, could have performed. In addition, NOAA is clarifying in the proposal that costs of actions that could only be performed by attorneys also constitute assessment costs. NOAA is seeking comments on this approach.

III. Other Technical Clarifications

NOAA is proposing a series of technical clarifications to incorporate developments in applicable law that occurred subsequent to publication of the Final Regulation, or to adjust language that may be inconsistent with OPA. NOAA is not opening up the entirety of 15 CFR part 990, but only these specific sections or subsections listed below.

A. Unsatisfied Demands for Damages, § 990.64(a).

Section 990.64(a) of the Final Regulation provides that where trustees' demands to implement or pay for restoration were denied by responsible parties, trustees could elect to file a judicial action for damages or seek an appropriation from the Oil Spill Liability Trust Fund. On September 25, 1997, the Office of Legal Counsel for the U.S. Department of Justice determined that OPA does not require trustees to seek appropriations for uncompensated claims for damages. Instead, the U.S. Department of Justice found that damage claims could be presented to and paid by the Trust Fund without further appropriations. Thus, NOAA is proposing an amendment to the Regulation to reflect this legal determination. Therefore, under the proposed rule, trustees have the option to seek recovery from the Trust Fund for uncompensated damages without further appropriations under section 1012(a)(4) of OPA, or seek an appropriation from the Trust Fund under section 1012(a)(2) of OPA.

B. Indirect Costs, § 990.30

Subsequent to publication of the Final Regulation, the D.C. Circuit Court of Appeals upheld provisions in the Department of the Interior's (DOI) regulations for natural resource damage assessments under CERCLA that authorize recovery of indirect costs associated with restoration plans. *Kennecott Utah Copper Corp.* v. *U.S. Dept. of the Interior,* 88 F.3d 1191 (D.C. Dir. 1996). The Court found that DOI's provision met CERCLA's damages causation requirement because indirect costs were limited to those that were ''necessary'' to ''support'' implementation of a selected restoration option. *Kennecott* at 1224. The Court upheld recoverability of indirect costs of restoration in part due to the existence of procedural safeguards in DOI's regulation that help ensure the accuracy of such costs. These safeguards include describing selection of cost estimation methods in a publicly reviewable administrative record and restoration plan, and demonstrating that the method avoids double counting, and is feasible, reliable, cost-effective, and can be conducted at a reasonable cost. Finally, the Court held that requirements provided in DOI's regulation for calculation and application of an indirect cost rate sufficiently restrained trustee discretion, in that the regulation limits use of a rate to situations where the costs of estimating indirect costs outweigh the benefits, and where the assumptions used in calculating the rate have been documented.

The preamble to NOAA's Final Regulation indicated that indirect costs were recoverable assessment costs, but

the Regulation did not include specific guidelines for determining indirect costs for either assessment or restoration costs. Based upon the ruling in *Kennecott,* NOAA proposes technical clarifications to the Regulation to define the scope of indirect costs that are recoverable as ''reasonable assessment costs'' and as ''restoration costs.'' The Rule incorporates the definition of indirect costs provided by the Office of Management and Budget (*see,* ''Managerial Cost Accounting Concepts and Standards for the Federal Government,'' Statement of Federal Financial Accounting Standards No. 4 (SFFAS 4), Executive Office of the President, Office of Management and Budget, July 1, 1995). The Rule contains similar procedural safeguards that apply to selecting a methodology to determine indirect costs as the CERCLA rule. Section 990.27 lists standards for all methods that might be used in an assessment, including methods that might be used to calculate indirect costs, i.e., cost calculation methods must be demonstrated to be reliable, valid, and cost-effective. Also, section 990.45 provides that relevant data on methods used should be included in the administrative record for the assessment. When using an indirect cost rate in lieu of calculating indirect costs on a case-specific bases, the basis of the indirect cost rate also should be documented in the administrative record.

C. Cost Accounting Procedures, § 990.62(f)

Although various sections of the Regulation require selection of reliable and valid methods and require trustees to avoid double counting, NOAA believes that these requirements should be explicitly stated for purposes of cost accounting, providing added assurances that costs are accurate and appropriate. Therefore, NOAA proposes to add a new subsection (f) to § 990.62 of the Regulation to require that, when determining assessment and restoration costs incurred by trustees, trustees must use methods consistent with generally accepted accounting principles and with the requirements of § 990.27 of the Regulation.

D. Cost Estimating Procedures, § 990.62(g)

NOAA is also proposing that trustees must use methods consistent with generally accepted cost estimating practices and the requirements of § 990.27 of this part when estimating costs to implement a restoration plan.

National Environmental Policy Act, Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

The National Oceanic and Atmospheric Administration has determined that this Rule does not constitute a major federal action significantly affecting the quality of the human environment. Therefore, no further analysis pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) has been prepared. The Assistant General Counsel for Legislation and Regulation, in accordance with the Regulatory Flexibility Act, certifies to the Chief Counsel for Advocacy, Small Business Administration, that this proposed rule will not have a significant economic effect on a substantial number of small entities. The Rule is intended to make more specific, and easier to apply, the standards set out in OPA for assessing damages for injury to natural resources as a result of actual or threatened discharges of oil. The Rule is not intended to change the balance of legal benefits and responsibilities among any parties or groups, large or small. To the extent any are affected by the Rule, it is anticipated that all will benefit by increased ease of application of law in this area.

It has been determined that this document is a significant rule under Executive Order 12866. The Rule provides optional procedures for the assessment of damages to natural resources. It does not directly impose any additional cost.

It has been determined that this Rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 15 CFR Part 990

Coastal zone, Environmental protection, Natural resources, Oil pollution, Water pollution control, Waterways.

Dated: July 20, 2001.

Jamison S. Hawkins,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

Under the authority of the Oil Pollution Act of 1990, 33 U.S.C. 2706(a), and for the reasons set out in this preamble, title 15 of the Code of Federal Regulations, chapter IX is proposed to be amended as set forth below.

SUBCHAPTER E—OIL POLLUTION ACT REGULATIONS

PART 990—NATURAL RESOURCE DAMAGE ASSESSMENTS

1. The authority citation for part 990 continues to read as follows:

Authority: 33 U.S.C. 2701 *et seq.*

2. In § 990.26, revise paragraphs (a) and (b) to read as follows:

§ 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 avoid irreversible loss of natural resources, or to prevent or reduce any continuing danger to natural resources or similar need for emergency action;

(2) The action will not be undertaken by the lead response agency;

(3) The action is feasible and likely to succeed;

(4) Delay of the action to complete the restoration planning process established in this part likely would result in increased natural resource damages; and

(5) The costs of the action are not unreasonable.

(b) If response actions are still underway, trustees must coordinate with the On-Scene Coordinator (OSC), consistent with the NCP, to ensure that emergency restoration actions will not interfere with or duplicate ongoing response actions. Emergency restoration may not address residual oil unless:

(1) The OSC's response is complete; or

(2) The OSC has determined that the residual oil identified by the trustee as part of a proposed emergency restoration action does not merit further response.

* * * * *

3. In § 990.30, add new definitions in alphabetical order and revise the definition of ''Reasonable assessment costs'' to read as follows:

§ 990.30 Definitions.

* * * * *

Indirect costs means expenses that are jointly or commonly incurred to produce two or more products or services. In contrast to direct costs, indirect costs are not specifically identifiable with any of the products or services, but are necessary for the organization to function and produce the products or services. An indirect cost rate, developed in accordance with generally accepted accounting principles, may be used to allocate indirect costs to specific assessment and restoration activities. Both direct and

indirect costs contribute to the full cost of the assessment and restoration, as provided in this part.

* * * * *

Legal costs means the costs of attorney actions performed for the purpose of assessment or developing a restoration plan, in accordance with this part.

(1) When making a determination of the nature of attorneys' actions for purposes of this definition, trustees must consider whether:

(i) The action comprised all or part of an action specified either in this part or in OPA section 1006(c);

(ii) The action was performed prior to, or in the absence of, the filing of ligation by or on behalf of the trustee in question to recover damages; and

(iii) The action was performed by an attorney who was working for or on behalf of the trustee agency, as opposed to a prosecutorial agency.

(2) If all of the criteria in paragraph (1) of this definition are met, the costs associated with attorney's actions are deemed assessment costs. If the criteria are not met, the trustee must explain why the action was not performed for the primary purpose of furthering litigation in order to support a characterization of the action as an assessment action.

* * * * *

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 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 other costs necessary to carry out this part; monitoring and oversight costs; costs associated with public participation; and indirect costs that are necessary to carry out this part.

* * * * *

4. In § 990.53, revise paragraph (b)(3)(i) to read as follows:

§ 990.53 Restoration selection-developing restoration alternatives.

* * * * *

(b) * * *

(3) * * *

(i) Address conditions that would prevent or limit the effectiveness of any restoration action;

* * * * *

5. In § 990.62, revise paragraph (b)(2) and add new paragraphs (f) and (g) to read as follows:

§ 990.62 Presenting a demand.

* * * * *

(b) * * *

(2) Advance to the trustees a specified sum representing all trustee direct and indirect costs of assessment and restoration, discounted as provided in § 990.63(a) of this part.

* * * * *

(f) *Cost accounting procedures.* Trustees must use methods consistent with generally accepted accounting principles and the requirements of § 990.27 of this part in determining past assessment and restoration costs incurred by trustees. When cost accounting for these costs, trustees must compound these costs using the guidance in § 990.63(b) of this part.

(g) *Cost estimating procedures.* Trustees must use methods consistent with generally accepted cost estimating principles and meet the standards of § 990.27 of this part in estimating future costs that will be incurred to implement a restoration plan. Trustees also must apply discounting methodologies in estimating costs using the guidance in § 990.63(a) of this part.

6. In § 990.64, revise paragraph (a) to read as follows:

§ 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 present the uncompensated claim for damages to the Oil Spill Liability Trust Fund, as provided in section 1012(a)(4) of OPA (33 U.S.C. 2712(a)(4)) 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)).

* * * * *

[FR Doc. 01–18962 Filed 7–30–01; 8:45 am]

BILLING CODE 3510–JE–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD117–3070; FRL–7021–2]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; RACT for the Control VOC Emissions from Iron and Steel Production Installations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Maryland. The intended effect of this action is to propose approval of this revision, which establishes reasonably available control technology (RACT) for the control of emissions of volatile organic compounds (VOCs) from iron and steel production installations in Maryland. The Maryland Department of the Environment submitted the SIP revision on January 8, 2001. The revision applies to integrated steel mills in Maryland and provides for limits on emissions of VOCs from these facilities. Currently, there is only one integrated steel mill in Maryland, the Bethlehem Steel Corporation located at Sparrows Point in Baltimore County. Volatile organic compounds are a precursor of ground-level ozone, commonly known as smog. EPA is proposing to approve this revision in accordance with the Clean Air Act (CAA).

DATES: Written comments must be received on or before August 30, 2001.

ADDRESSES: Written comments may be mailed to David L. Arnold, Chief, Air Quality Programs and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland, 21224. We recommend that you contact Catherine Magliocchetti, Chemical Engineer, at (215) 814–2174 if you wish to visit the Region III office to review the docket.

FOR FURTHER INFORMATION CONTACT: Catherine L. Magliocchetti, Chemical Engineer, at (215) 814–2174, or by e-mail at magliocchetti.catherine@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' are used to refer to the Environmental Protection Agency (EPA). This notice is organized as follows:

I. What is EPA Approving in this Action?
II. Why Did Maryland Submit a Regulation to Require RACT for the Control VOC Emissions from Iron and Steel Production Installations to EPA as a SIP Revision?
III. Who is Affected by Maryland's RACT Regulation to Control VOCs from Iron and Steel Production?
IV. What Does the Maryland Regulation Require as RACT to Control VOCs from Iron and Steel Production Installations?