for its review and approval because the changes in this notice are limited to amending the rules of practice to support further implementation of the Office's Trademark Electronic Application System.

Interested persons are requested to send comments regarding these information collections, including suggestions for reduction of this burden to: (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451 (Attn: Mary Hannon).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 7

Administrative practice and procedure, Trademarks.

For the reasons given in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the Office proposes to amend parts 2 and 7 of title 37 as follows:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

1. The authority citation for 37 CFR part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

2. Amend § 2.197 by revising paragraph (a)(2) to read as follows:

§ 2.197 Certificate of mailing or transmission.

(a) * * *

(2) The procedure described in paragraph (a)(1) of this section does not apply to:

(i) Applications for the registration of marks;

(ii) Amendments to allege use under section 1(c) of the Act;

(iii) Statements of use under section 1(d) of the Act;

(iv) Requests for extension of time to file a statement of use under section 1(d) of the Act;

(v) Preliminary amendments;

(vi) Responses to examining attorneys' Office actions;

(vii) Requests for reconsideration after final action;

(viii) Responses to suspension inquiries or letters of suspension;

(ix) Petitions to revive abandoned applications under § 2.66;

(x) Requests for express abandonment of applications;

(xi) Affidavits or declarations of use under section 8 of the Act;

(xii) Renewal applications under section 9 of the Act;

(xiii) Affidavits or declarations of incontestability under section 15 of the Act;

(xiv) Requests for amendment of registrations under section 7(e) of the Act;

(xv) Requests for correction of applicants' mistakes under section 7(h) of the Act;

(xvi) Madrid-related correspondence filed under § 7.11, § 7.14, § 7.21, § 7.23, § 7.24, § 7.28 or § 7.31;

(xvii) Appointments or revocations of attorney or domestic representative;

(xviii) Notices of withdrawal of attorney; and

(xix) Requests to change or correct addresses.

* * * * *

3. Amend § 2.198 by revising paragraphs (a)(1)(v), (vi) and (vii), and adding new paragraphs (a)(1)(viii) through (xix), to read as follows:

§ 2.198 Filing of correspondence by "Express Mail."

(a)(1) * * *

(v) Preliminary amendments;

(vi) Responses to examining attorneys' Office actions;

(vii) Requests for reconsideration after final action;

(viii) Responses to suspension inquiries or letters of suspension;

(ix) Petitions to revive abandoned applications under § 2.66;

(x) Requests for express abandonment of applications;

(xi) Affidavits or declarations of use under section 8 of the Act;

(xii) Renewal applications under section 9 of the Act;

(xiii) Affidavits or declarations of incontestability under section 15 of the Act;

(xiv) Requests for amendment of registrations under section 7(e) of the Act;

(xv) Requests for correction of applicants' mistakes under section 7(h) of the Act;

(xvi) Madrid-related correspondence filed under § 7.11, § 7.14 § 7.21, § 7.28 or § 7.31;

(xvii) Appointments or revocations of attorney or domestic representative;

(xviii) Notices of withdrawal of attorney; and

(xix) Requests to change or correct addresses.

* * * * *

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

4. The authority citation for 37 CFR Part 7 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

5. Amend § 7.4 by revising paragraphs (b)(1) and (2) to read as follows:

§ 7.4 Receipt of correspondence.

* * * * *

(b) * * *

(1) Requests to record changes in the International Register under § 7.23 and § 7.24, and petitions to the Director to review an action of the Office's Madrid Processing Unit, when filed by mail, will be accorded the date of receipt in the Office, unless they are sent by Express Mail pursuant to § 2.198 of this chapter, in which case they will be accorded the date of deposit with the United States Postal Service.

(2) International applications under § 7.11, responses to notices of irregularity under § 7.14, subsequent designations under § 7.21, requests to note replacement under § 7.28, and requests for transformation under § 7.31, when filed by mail, will be accorded the date of receipt in the Office.

* * * * *

Dated: February 22, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–3929 Filed 2–28–08; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF THE INTERIOR

43 CFR Part 11

RIN 1090–AA97

Natural Resource Damages for Hazardous Substances

AGENCY: Department of the Interior.

ACTION: Proposed rulemaking.

SUMMARY: We are proposing to revise certain parts of the natural resource damage assessment regulations for

hazardous substances. The regulations provide procedures that natural resource trustees may use to evaluate the need for, and means of restoring, replacing, or acquiring the equivalent of public natural resources that are injured or destroyed as a result of releases of hazardous substances. This notice seeks comment on the proposed revisions to the regulations in response to the biennial statutory review requirement, two court decisions, and the recommendations of the Department of the Interior's Natural Resource Damage Assessment and Restoration Federal Advisory Committee.

DATES: We will accept comments through May 29, 2008.

ADDRESSES: You may submit comments, identified by the number [insert RIN], by any of the following methods:

—Federal rulemaking portal: *http://www.regulations.gov*. Follow the instruction for submitting comments.

—Mail: Department of the Interior, Natural Resource Damage Assessment and Restoration Program, Mail Stop 3548, 1849 C Street, NW., Washington, DC 20240.

—Hand delivery: Room 3548, 1849 C Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Frank DeLuise at (202) 208–4143.

SUPPLEMENTARY INFORMATION: This preamble is organized as follows:

I. What These Natural Resource Damage Regulations Are About

The regulations describe how to conduct a natural resource damage assessment for hazardous substance releases under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601, 9607) (CERCLA) and the Federal Water Pollution Control Act (33 U.S.C. 1251, 1321) (Clean Water Act). CERCLA required the President to promulgate these regulations. 42 U.S.C. 9651(c). The President delegated this rulemaking responsibility to the Department of the Interior (DOI). E.O. 12316, as amended by E.O. 12580. The regulations appear at 43 CFR part 11.

A natural resource damage assessment is an evaluation of the need for, and the means of securing, restoration of public natural resources following the release of hazardous substances or oil into the environment. The regulations we are proposing to revise only cover natural resource damage assessments for releases of hazardous substances under CERCLA and the Clean Water Act. There are also natural resource damage assessment regulations at 15 CFR part 990 that cover oil spills under the Oil Pollution Act, 33 U.S.C. 2701 (the OPA regulations). The current hazardous substance natural resource damage assessment and restoration regulations, this preamble, and the proposed revisions to the regulations use ''restoration'' as an umbrella term for all types of actions that the natural resource damage provisions of CERCLA and the Clean Water Act authorize to address injured natural resources, including restoration, rehabilitation, replacement, or acquisition of equivalent resources.

Natural resource damage assessments are conducted by government officials designated to act as ''trustees'' to bring claims on behalf of the public for the restoration of injured natural resources. Trustees are designated by the President, state governors, or tribes. If trustees determine, through an assessment, that hazardous substance releases have injured natural resources, they may pursue claims for damages against potentially responsible parties. ''Damages'' include funds needed to plan and implement restoration, compensation for public losses pending restoration, reasonable assessment costs, and any interest accruing after funds are due. See 43 CFR 11.15.

The regulations establish an administrative process for conducting assessments that includes technical criteria for determining whether releases have caused injury, and if so, what actions and funds are needed to implement restoration. The regulations are for the optional use of trustees. Trustees can use the regulations to structure damage assessment work, frame negotiations, and inform restoration planning. If litigation is necessary to resolve the claim, courts will give additional deference—referred to as a ''rebuttable presumption'' in CERCLA—to assessments performed by federal and state trustees in accord with the regulations.

The regulations provide guidance on two different types of assessment procedures identified in CERCLA: ''Type A'' and ''type B'' procedures. Type A procedures are simplified procedures for small cases. The current type A procedures are computer programs, available in a limited range of cases, that model the fate of a released substance in order to project the injuries caused by the release and calculate damages. Type B procedures outline an assessment process and assessment methods that trustees utilize on a case by case basis. We are proposing to revise certain parts of the type B procedures (case by case assessment provisions) in the regulations.

II. Why We Are Proposing To Revise the Regulations

CERCLA provides that we review and revise the regulations as appropriate every two years. 42 U.S.C. 9651(c)(3). The regulations are due for such a review. To assist in this review, in May 2005, DOI convened a Natural Resource Damage Assessment and Restoration (NRDAR) Federal Advisory Committee (advisory committee) to provide recommendations regarding DOI's NRDAR activities, authorities and responsibilities. The advisory committee comprised 30 members, representing a diverse group of interested stakeholders—including state, tribal, and federal trustee agencies, industry groups and potentially responsible party representatives, scientists, economists, and national and local environmental and public interest organizations.

A key recommendation of the advisory committee was that DOI should undertake, without delay, a targeted revision of the regulations to emphasize restoration over economic damages. This proposed revision implements that recommendation, and responds to two court decisions addressing the regulations: State of *Ohio* v. *U.S. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (*Ohio* v. *Interior*); and *Kennecott Utah Copper Corp.* v. *U.S. Department of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996) (*Kennecott* v. *Interior*). Finally, we are proposing a technical revision to resolve an inconsistency on the appropriate timing for the administrative process set out in the rule.

We have considered:

(a) The NRDAR advisory committee report, which was released in May of 2007;

(b) Comments (provided during prior rulemakings, and more informally during public meetings, symposiums, and discussion on natural resource damage assessment and restoration) from members of the private sector, representatives of federal, state, and tribal trustees, public interest groups,

and others who have experience with the existing regulations;

(c) The *Ohio* v. *Interior* opinion;

(d) The *Kennecott* v. *Interior* opinion; and

(e) The OPA regulations.

III. Major Issues Addressed by the Proposed Revisions

Our proposed revisions would largely leave the framework of the existing rule intact. We are not proposing substantive changes to legal standards for reliability of assessment data and methodologies. The NRDAR advisory committee made a number of recommendations to encourage faster, more efficient and more cost-effective resolution of claims. The committee endorsed a tiered approach to implementing its recommendations that would immediately address the option of emphasizing restoration over economic damages in the regulations, while leaving the implementation of a broader range of recommendations—including providing technical guidance documents and streamlining of the restoration planning process—to the future. The rest of this section discusses the major issues addressed by the proposed revisions. The following section references the OPA regulations. These references are solely for the purpose of providing context and background. We are soliciting comments only on the proposed revisions to the CERCLA regulations. For guidance on conducting natural resource damage assessments under OPA, see 15 CFR Part 990.

A. Further Emphasizing Restoration Over Economic Damages

Under the current regulations, trustees utilizing the Type B procedures must base their claim on the cost of implementing a publicly reviewed restoration plan designed to return injured resources to their baseline condition, which is defined as the condition that would have existed had the release not occurred (see 43 CFR 11.80–82). CERCLA and the Clean Water Act authorize trustees to recover damages not only for the cost of restoring injured or destroyed resources to their baseline condition, but also for public losses pending restoration to baseline. The regulations call these interim losses ''compensable values'' (see 43 CFR 11.83(c)). The regulations define compensable value as the amount of money required to compensate the public for the loss in ''services'' provided by the injured resources pending restoration (see 43 CFR 11.83(c)(1)). Services are defined in the current regulations as the physical and biological functions performed by the resources, including the human use of those functions. The current regulations provide that compensable value should be measured by the economic value of public losses arising from the resource injury until restoration can be achieved, which arguably could be read as excluding restoration-based approaches to determining compensable value.

To comply with CERCLA and the Clean Water Act, trustees must spend any compensable value recoveries on restoration actions. Under the current regulations, however, trustees do not need to consider restoration actions to address interim losses until they have already determined and recovered damages. This can be inefficient and confusing. The NRDAR advisory committee recommended that DOI should amend its current regulation to explicitly authorize trustees to use the cost of restoration actions that address service losses to calculate all damages, including interim losses. Providing the option for a ''restoration-based'' approach to all damages better comports with CERCLA's overall restoration objectives. It also promotes an earlier focus on feasible restoration options, which can encourage settlements by providing opportunities for designing creative and cost-effective actions to address losses. We are proposing to revise 43 CFR 11.83(c) to provide trustees with the option of estimating compensable values for losses pending restoration utilizing the cost of implementing projects that restore those lost natural resource services.

Methodologies that compare losses arising from resource injury to gains expected from restoration actions are frequently simpler and more transparent than methodologies used to measure the economic value of losses. Our proposed revisions include four examples of project-based assessment methodologies—conjoint analysis, habitat equivalency analysis, resource equivalency analysis, and random utility models—which have been used successfully to resolve claims under both the CERCLA and the OPA regulations. We are proposing to add a brief description of these restoration-based methodologies to the non-exclusive list of economic valuation methodologies in the current regulation. Our proposed revisions do not sanction or bar the use of any particular methodology, so long as it complies with the ''acceptance criteria'' for relevance that appear in the rule.

The list of proposed methodologies for assessing compensable values remains non-exclusive, allowing for the introduction of new and innovative techniques that may arise. In 43 CFR 11.83(a), the current regulations provide that when choosing among any cost estimation or valuation methodology, trustees should seek to ensure that the methodologies selected are feasible and reliable for a particular incident or type of damage to be measured. To assist trustees in evaluating such feasibility and reliability, we are proposing to provide a list of factors that set out general principles of feasibility and reliability for all methodologies. This includes the cost reasonableness, cost effectiveness, and avoidance of double counting criteria in the current regulations, along with other factors—such as the ability to provide useful restoration information, peer review, and methodological standards—for trustees to consider when evaluating the reliability of all damage assessment methodologies. Each of the listed factors we are proposing may not be applicable in every case, but trustees continue to be required to document their consideration of relevant factors in the Report of Assessment. We solicit comment on providing the option for the use of restoration-based approaches and methodologies to resolve NRDAR claims.

B. Complying With Ohio v. Interior and Responding to Kennecott v. Interior

Several provisions of the current regulations were invalidated by the D.C. Circuit Court of Appeals in *Ohio* v. *Interior* and *Kennecott* v. *Interior*. Some invalidated provisions from the 1986 rule were carried over in the 1994 revisions responding to the *Ohio* v. *Interior* decision. Additionally, the *Kennecott* v. *Interior* decision in 1996 invalidated certain provisions from the 1994 revisions which have not yet been corrected to comply with the decision. We are proposing technical corrections to the CFR in accord with these decisions.

The *Ohio* v. *Interior* decision invalidated the limitation on estimating option and existence value in 43 CFR 11.83(c)(1)(iii). Our revisions will therefore delete this provision from the CFR. The restatement of this limitation in 43 CFR 11.83(c)(2)(vii)(B) will also be deleted from the CFR.

Estimating option and existence value through the use of contingent valuation methodologies remains controversial. We note, however, that our proposed revision's focus on compensating for public losses pending restoration with restoration actions rather than monetary damages for the economic value of the losses would provide options for comparing functional losses from resource injuries to functional gains

expected from restoration actions, which would reduce the need for trustees to seek to recover the monetary value of passive economic losses such as option and existence value.

The *Kennecott* v. *Interior* decision invalidated DOI's attempt to define the date of promulgation of the 1994 revisions to the rule. This was relevant because it affected the three-year statutory limitations for filing a claim at some CERCLA sites. In 43 CFR 11.91(e), DOI defined the date of promulgation as the later of the date when either the Type A or Type B rule was finalized, pursuant to the *Ohio* v. *Interior* decision. The Court of Appeals found this interpretation unreasonable and invalidated the provision, which we will delete from the CFR. Since both the Type A and Type B revisions finalized pursuant to the *Ohio* v. *Interior* decision were finalized more than three years ago, this deletion is merely a technical correction which has no material effect.

The 1994 revisions to the NRDAR rule stated that the measure of natural resource damages under CERCLA was the cost of restoration of ''the injured natural resources and the services those resources provide'' (see 43 CFR 11.80(b)). In the *Kennecott* decision, the Court of Appeals invalidated this language because it was inconsistent with DOI's preamble explanation of the measure of damages, which endorsed the concept of quantifying resource injury and resulting public losses by utilizing a services metric. The court reasoned that creating an apparent dichotomy between restoration of resources and restoration of services implied an abandonment of the services approach that was unexplained. The court therefore invalidated the ''resources and services'' language and ''reinstated'' the services approach, pending further clarification.

Under the current rule, natural resource damages include both the cost of restoring injured resources to their baseline level of services and, when appropriate, compensation for interim service losses pending restoration. Under the current rule, restoration to baseline focuses on the resource condition, while compensable value focuses on compensation for lost services pending the restoration of resources. ''Resources and services'' reflects the distinct emphases for different damage components, but it was not intended as a rejection of a services-based approach. As the proposed revisions make clear, the metric for evaluating natural resource conditions for baseline restoration is the baseline level of services, while the compensable value for losses pending restoration is either the value of the services lost pending restoration or the cost of projects that compensate for services lost pending restoration.

The proposed revision to 43 CFR 11.80(b) clarifies that the measure of damages is the cost of restoring injured natural resources to their baseline level of services, and, at the discretion of the trustees, the compensable value of services lost pending restoration. This clear construct is carried over for conforming changes to 43 CFR 11.81(a)(1) and (2), 43 CFR 11.82(a), (b)(iii), and (c), and 43 CFR 11.83(a).

C. Technical Correction To Provide Consistent Timing Guidelines

The current regulations provide that a Restoration and Compensation Determination Plan (RCDP) which evaluates and selects restoration alternatives may be developed after completion of the injury determination and quantification phases of the assessment (see 43 CFR 11.81(d)(1)). However, an earlier provision of the current regulations provides that the RCDP can be developed ''at any time before'' completion of the injury determination or quantification phases. (See 43 CFR 11.31(c)(4)). Since the evaluation and selection of restoration alternatives can benefit from more definitive injury determination and quantification data, we propose to resolve this inconsistency by correlating 43 CFR 11.31(c)(4) with 43 CFR 11.81(d)(1) to provide that the RCDP may be completed after the injury determination and quantification phases of the assessment.

IV. How We Have Complied With Rulemaking Requirements

Regulatory Planning and Review under E.O. 12866—The Office of Management and Budget has reviewed the proposed revisions. The revisions are a significant regulatory action under E.O. 12866 because the rule will raise novel legal or policy issues. The revisions clarify that trustees have the option of calculating total damages using the cost of restoration actions that compensate for losses, rather than requiring a two-part process where natural resource damages are calculated using the cost of restoration actions, and public losses pending restoration are calculated using the economic value of the loss.

These revisions do not fall under other criteria in E.O. 12866:

a. This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The regulations we are revising apply only to natural resource trustees by providing technical and procedural guidance for the assessment of natural resource damages under CERCLA and the Clean Water Act. The revisions are not intended to change the balance of legal benefits and responsibilities among any parties or groups, large or small. It does not directly impose any additional cost.

In fact, the proposed revisions should assist in reducing natural resource damage assessment transaction costs by allowing trustees to utilize simpler and more transparent methodologies to assess damages when appropriate. The proposed revisions do not sanction or bar the use of any particular methodology, so long as it meets the acceptance criteria for relevance and cost effectiveness that are set out in the rule.

We also believe that in many cases an early focus on feasible restoration and appropriate restoration actions, rather than on the economic value of public losses, can result in less contention and litigation, and faster, more cost-effective restoration. Meanwhile, existing criteria in the rule for evaluating restoration alternatives—including cost effectiveness—remain intact (see 43 CFR 11.82(d)). The likely result will be the encouragement of settlements, less costly and more timely restoration, and reduced transaction costs. To the extent any are affected by the proposed revisions, it is anticipated that all parties will benefit by the increased focus on restoration in lieu of economic damages.

b. The proposed revisions will not create inconsistencies with other agencies' action. The general approach to losses pending restoration set forth in this rule is consistent with the OPA regulations. Both allow for basing damages on the cost of restoration actions to address public losses associated with natural resource injuries.

Regulatory Flexibility Act—We certify that this rule revision will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601) (see section on E.O. 12866 above for discussion of potential economic effects.)

Small Business Regulatory Enforcement Fairness Act—This rule revision is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule revision:

(a) Does not have an annual effect on the economy of $100 million or more (see section on E.O. 12866 above for

discussion of potential economic effects.)

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions (see section on E.O. 12866 above for discussion of potential economic effects.)

(c) Does not have significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises (see section on E.O. 12866 above for discussion of potential economic effects.)

Unfunded Mandates Reform Act—This rule revision does not mandate any actions. The existing regulations do not require trustees to conduct assessment or pursue damage claims, and trustees who choose to conduct assessments and pursue damage claims are not required to do so in a manner described in the regulations. The proposed revisions do not change the optional nature of the existing regulations. The revisions themselves do not replace existing procedures; they merely clarify that trustees have the option of employing other procedures. Therefore, this rule revision will not produce a Federal mandate of $100 million or greater in any year.

Takings Analysis under E.O. 12630—A takings implication assessment is not required by E.O. 12630 because no party can be compelled to pay damages for injury to natural resources until they have received ''due process'' through a legal action in federal court. This rule and the proposed revisions merely provide a framework for assessing injury and developing the claim.

Federalism Analysis under E.O. 12612—E.O. 12612 requires federal agencies to consult with elected state officials before issuing proposed rules that have ''federalism implications'' and either impose unfunded mandates or preempt state law. A rule has federalism implications if it has ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.'' This rule and the proposed revisions do not require state trustees to take any action; therefore it does not impose any unfunded mandates. The rule and the proposed revisions do not preempt state law. The rule and the proposed revisions have no significant effect on intergovernmental relations because they do not alter the rights and responsibilities of government entities. Therefore, a federalism summary impact statement is not required under section 6 of the Order.

Civil Justice Reform under E.O. 12988—Our Office of the Solicitor has determined that the proposed revisions do not unduly burden the judicial system and meet the requirements of section 3(a) and 3(b)(2) of the Order. The proposed revisions are intended to provide the option for an early focus on restoration, utilization of simpler and more cost-effective assessment methodologies, and increased opportunities for cooperation among trustees and potentially responsible parties. This should minimize litigation.

Paperwork Reduction Act—The proposed revisions do not pose ''identical questions'' to, or impose ''identical reporting, record keeping, or disclosure requirements,'' on trustees. Therefore, the proposed revisions do not include an ''information collection'' governed by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act—We have analyzed the proposed revisions in accordance with the criteria of the National Environmental Policy Act, 43 U.S.C. 433 *et seq.* (NEPA). Restoration actions identified through the proposed revisions may sometimes involve major federal actions significantly affecting the quality of the human environment. In those cases, federal trustees will need to comply with NEPA. However, the proposed revisions do not require trustees to take restoration action. Further, if the trustees decide to pursue restoration, they are not required to follow the rule when selecting restoration actions. Finally, the rule and the proposed revisions do not determine the specific restoration actions that trustees can seek. Therefore, the rule and the proposed revisions do not significantly affect the quality of the human environment. Even if the rule revisions were considered to significantly affect the quality of the human environment, they would fall under DOI's categorical exclusion for regulations that are of a procedural nature or have environmental effects too broad or speculative for meaningful analysis and will be subject later to the NEPA process.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 34 CFR Part 11

Natural resources, Environmental protection.

Dated: January 10, 2008.

James E. Cason,

Associate Deputy Secretary.

For the reasons given in the preamble, we propose to amend part 11 of title 43 of the Code of Federal Regulations as follows:

PART 11—NATURAL RESOURCE DAMAGES FOR HAZARDOUS SUBSTANCES

1. The authority citation for part 11 continues to read as follows:

Authority: 42 U.S.C. 9651(c), as amended.

2. In § 11.31, revise paragraph (c)(4) to read as follows:

§ 11.31 What does the Assessment Plan include?

(c) * * *

(4) The Restoration and Compensation Determination Plan developed in accordance with the guidance in § 11.81 of this part. If existing data are not sufficient to develop the Restoration and Compensation Determination Plan as part of the Assessment Plan, the Restoration and Compensation Determination Plan may be developed later, after the completion of the Injury Determination or Quantification phases. If the Restoration and Compensation Determination Plan is published separately, the public review and comment will be conducted pursuant to § 11.81(d) of this part.

* * * * *

3. In § 11.38, revise paragraph (c)(2)(i) to read as follows:

§ 11.38 Assessment Plan—preliminary estimate of damages.

(c) * * *

(2) * * *

(i) The preliminary estimate of compensable value should represent the expected present value of the anticipated compensable value, expressed in constant dollars, accrued through the period for the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources to baseline conditions, i.e., between the occurrence of the discharge or release and the completion of the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured resources to their baseline level of services. The estimate should use the same base year as the preliminary

estimate of costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. The provisions detailed in §§ 11.80 through 11.84 of this part are the basis for the development of this estimate.

* * * * *

4. In § 11.80, revise paragraph (b) to read as follows:

§ 11.80 Damage determination phase—general.

* * * * *

(b) *Purpose.* The purpose of the Damage Determination phase is to establish the amount of money to be sought in compensation for injuries to natural resources resulting from a discharge of oil or release of a hazardous substance. The measure of damages is the cost of restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources to their baseline level of services. Damages may also include, at the discretion of the authorized official, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline.

* * * * *

5. In § 11.81, revise paragraph (a) to read as follows:

§ 11.81 Damage determination phase—restoration and compensation determination plan.

(a) *Requirement.* (1) The authorized official shall develop a Restoration and Compensation Determination Plan that will list a reasonable number of possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources to their baseline level of services, and, where relevant, the compensable value; select one of the alternatives and the actions required to implement that alternative; give the rationale for selecting that alternative; and identify the methodologies that will be used to determine the costs of the selected alternative and, at the discretion of the authorized official, the compensable value of the services lost to the public associated with the selected alternative.

(2) The Restoration and Compensation Determination Plan shall be of sufficient detail to evaluate the possible alternatives for the purpose of selecting the appropriate alternative to use in determining the cost of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources to their baseline level of services, and, where relevant, the compensable value.

* * * * *

6. In § 11.82, revise paragraphs (a), (b)(1)(iii), and (c)(1) to read as follows:

§ 11.82 Damage determination phase—alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(a) *Requirement.* The authorized official shall develop a reasonable number of possible alternatives for the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources to their baseline level of services. For each possible alternative developed, the authorized official will identify an action, or set of actions, to be taken singly or in combination by the trustee agency to achieve the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources to their baseline level of services. The authorized official shall then select from among the possible alternatives the alternative that he determines to be the most appropriate based on the guidance provided in this section.

(b) * * *

(1) * * *

(iii) Possible alternatives are limited to those actions that restore, rehabilitate, replace, and/or acquire the equivalent of the injured resources to their baseline, that is, the condition without a discharge or release as determined in § 11.72 of this part.

* * * * *

(c)(1) The possible alternatives considered by the authorized official that return the injured resources to their baseline level of services could range from: intensive action on the part of the authorized official to return the various resources and services provided by those resources to baseline conditions as quickly as possible; to natural recovery with minimal management actions. Possible alternatives within this range could reflect varying rates of recovery, combination of management actions, and needs for resource replacements or acquisitions.

* * * * *

7. In § 11.83, revise paragraphs (a)(1), (a)(3), and (c) to read as follows:

§ 11.83 Damage determination phase—cost estimating and valuation methodologies.

(a) *General.* (1) This section contains guidance and methodologies for determining: the costs of the selected alternative for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources to their baseline level of services; and the compensable value of the services lost to the public through the completion of the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured resources to baseline.

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(3) Only those methodologies that are feasible and reliable for a particular incident and type of damage to be measured shall be utilized. The authorized official should consider the following factors to evaluate feasibility and reliability of methodologies. Each factor, however, may not be applicable to every case. The authorized official shall document the consideration of relevant factors in the Report of Assessment:

(i) Is the methodology capable of providing information of use in determining the restoration cost or compensable value appropriate for a particular natural resource injury?;

(ii) Can the methodology be implemented at a reasonable cost, as that term is used in this part?;

(iii) Does the methodology avoid double counting or allow any double counting to be estimated and eliminated in the final damage calculation?;

(iv) Is the methodology cost-effective, as that term is used in this part?;

(v) Does the methodology address the particular natural resource injury and associated service loss in light of the nature, degree, and spatial and temporal extent of the injury?;

(vi) Has the methodology been subject to peer review, either through publication or otherwise?;

(vii) Does the methodology enjoy general or widespread acceptance by experts in the field?;

(viii) Is the methodology subject to standards governing its application?;

(ix) Are methodological inputs and assumptions supported by a clearly articulated rationale?;

(x) Are cutting edge methodologies tested or analyzed sufficiently so as to be reasonably reliable under the circumstances?

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(c) *Compensable value.* (1) Compensable value is the amount of money required to compensate the public for the loss in services provided by the injured resources between the time of the discharge or release and the time the resources are fully returned to their baseline conditions. The compensable value can include the economic value of lost services provided by the injured resources, including both public use and nonuse values such as existence and bequest

values. Economic value can be measured by changes in consumer surplus, economic rent, and any fees or other payments collectable by a Federal or State agency or an Indian tribe for a private party's use of the natural resources; and any economic rent accruing to a private party because the Federal or State agency or Indian tribe does not charge a fee or price for the use of the resources. Alternatively, compensable value can be determined utilizing a restoration cost approach, which measures the cost of implementing a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(i) Use value is the economic value of the resources to the public attributable to the direct use of the services provided by the natural resources.

(ii) Nonuse value is the economic value the public derives from natural resources that is independent of any direct use of the services provided.

(iii) Restoration cost is the cost of a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(2) *Valuation methodologies.* The authorized official may choose among the valuation methodologies listed in this section to estimate appropriate compensation for lost services or may choose other methodologies provided that the methodology can satisfy the acceptance criterion in paragraph (c)(3) of this section. Nothing in this section precludes the use of a combination of valuation methodologies so long as the authorized official does not double count or uses techniques that allow any double counting to be estimated and eliminated in the final damage calculation.

Type of methodology	Description
(i) Market price	The authorized official may determine the compensable value of the injured resources using the diminution in the market price of the injured resources or the lost services. May be used only if: (A) The natural resources are traded in the market; and (B) The authorized official determines that the market for the resources, or the services provided by the resources, is reasonably competitive.
(ii) Appraisal	The measure of compensable value is the difference between the with- and without-injury appraisal value determined by the comparable sales approach as described in the Uniform Appraisal Standards. Must measure compensable value, to the extent possible, in accordance with the ''Uniform Appraisal Standards for Federal Land Acquisition,'' Interagency Land Acquisition Conference, Washington, DC, 1973 (incorporated by reference, see § 11.18).
(iii) Factor income (sometimes referred to as the ''reverse value added'' methodology).	May be used only if the injured resources are inputs to a production process, which has as an output a product with a well-defined market price. May be used to determine: (A) The economic rent associated with the use of resources in the production process; and (B) The in-place value of the resources.
(iv) Travel cost	May be used to determine a value for the use of a specific area. Uses an individual's incremental travel costs to an area to model the economic value of the services of that area. Compensable value of the area to the traveler is the difference between the value of the area with and without a discharge or release. Regional travel cost models may be used, if appropriate.
(v) Hedonic pricing	May be used to determine the value of nonmarketed resources by an analysis of private market choices. The demand for nonmarketed natural resources is thereby estimated indirectly by an analysis of commodities that are traded in a market.
(vi) Unit value/benefits transfer.	Unit values are preassigned dollar values for various types of nonmarketed recreational or other experiences by the public. Where feasible, unit values in the region of the affected resources and unit values that closely resemble the recreational or other experience lost with the affected resources may be used.
(vii) Contingent valuation	Includes all techniques that set up hypothetical markets to directly elicit an individual's economic valuation of a natural resource. Can determine: (A) Use values and explicitly determine option and existence values; and (B) Lost use values of injured natural resources.
(viii) Conjoint Analysis	Like contingent valuation, conjoint analysis is a stated preference method. However, instead of seeking to value natural resource service losses in strictly economic terms, conjoint analysis compares natural resource service losses that arise from injury to natural resource service gains produced by restoration projects.
(ix) Habitat Equivalency Analysis.	May be used to compare the natural resource services produced by habitat or resource-based restoration actions to natural resource service losses.
(x) Resource Equivalency Analysis.	Similar to habitat equivalency analysis. This methodology may be used to compare the effects of restoration actions on specifically identified resources that are injured or destroyed.
(xi) Random Utility Model	Can be used to: (A) Compare restoration actions on the basis of equivalent resource services provided; and (B) Calculate the monetary value of lost recreational services to the public.

(3) *Other valuation methodologies.* Other methodologies that measure compensable value in accordance with the public's willingness to pay for the lost service, or with the cost of a project that restores, replaces, or acquires services equivalent to natural resource services lost pending restoration to baseline in a cost-effective manner, are acceptable methodologies to determine compensable value under this part.

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§ 11.91 [Amended]

8. In § 11.91, remove paragraph (e).

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