

## § 990.12

## 15 CFR Ch. IX (1–1–10 Edition)

of, respectively, the tribe or its members and the foreign government. This part may be used by these officials in conducting natural resource damage assessments when natural resources and/or services are injured as a result of an incident involving an actual or substantial threat of a discharge of oil. This part is not intended to affect the recoverability of natural resource damages when recoveries are sought other than in accordance with this part.

### § 990.12 Overview.

This part describes three phases of a natural resource damage assessment. The Preassessment Phase, during which trustees determine whether to pursue restoration, is described in subpart D of this part. The Restoration Planning Phase, during which trustees evaluate information on potential injuries and use that information to determine the need for, type of, and scale of restoration, is described in subpart E of this part. The Restoration Implementation Phase, during which trustees ensure implementation of restoration, is described in subpart F of this part.

### § 990.13 Rebuttable presumption.

Any determination or assessment of damages to natural resources made by a Federal, State, or Indian trustee in accordance with this part shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under OPA.

### § 990.14 Coordination.

(a) *Trustees.* (1) If an incident affects the interests of multiple trustees, the trustees should act jointly under this part to ensure that full restoration is achieved without double recovery of damages. For joint assessments, trustees must designate one or more Lead Administrative Trustee(s) to act as coordinators.

(2) If there is a reasonable basis for dividing the natural resource damage assessment, trustees may act independently under this part, so long as there is no double recovery of damages.

(3) Trustees may develop pre-incident or incident-specific memoranda of understanding to coordinate their activities.

(b) *Response agencies.* Trustees must coordinate their activities conducted concurrently with response operations with response agencies consistent with the NCP and any pre-incident plans developed under § 990.15(a) of this part. Trustees may develop pre-incident memoranda of understanding to coordinate their activities with response agencies.

(c) *Responsible parties—(1) Invitation.* Trustees must invite the responsible parties to participate in the natural resource damage assessment described in this part. The invitation to participate should be in writing, and a written response by the responsible parties is required to confirm the desire to participate.

(2) *Timing.* The invitation to participate should be extended to known responsible parties as soon as practicable, but not later than the delivery of the “Notice of Intent to Conduct Restoration Planning,” under § 990.44 of this part, to the responsible party.

(3) *Agreements.* Trustees and responsible parties should consider entering into binding agreements to facilitate their interactions and resolve any disputes during the assessment. To maximize cost-effectiveness and cooperation, trustees and responsible parties should attempt to develop a set of agreed-upon facts concerning the incident and/or assessment.

(4) *Nature and extent of participation.* If the responsible parties accept the invitation to participate, the scope of that participation must be determined by the trustees, in light of the considerations in paragraph (c)(5) of this section. At a minimum, participation will include notice of trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment. Increased levels of participation by responsible parties may be developed at the mutual agreement of the trustees and the responsible parties. Trustees will objectively consider all written comments provided by the responsible parties, as well as any other recommendations or proposals that the responsible parties submit in writing to the Lead Administrative Trustee. Submissions by the responsible parties

will be included in the administrative record. Final authority to make determinations regarding injury and restoration rest solely with the trustees. Trustees may end participation by responsible parties who, during the conduct of the assessment, in the sole judgment of the trustees, cause interference with the trustees' ability to fulfill their responsibilities under OPA and this part.

(5) *Considerations.* In determining the nature and extent of participation by the responsible parties or their representatives, trustees may consider such factors as:

- (i) Whether the responsible parties have been identified;
- (ii) The willingness of responsible parties to participate in the assessment;
- (iii) The willingness of responsible parties to fund assessment activities;
- (iv) The willingness and ability of responsible parties to conduct assessment activities in a technically sound and timely manner and to be bound by the results of jointly agreed upon studies;
- (v) The degree of cooperation of the responsible parties in the response to the incident; and
- (vi) The actions of the responsible parties in prior assessments.

(6) *Request for alternative assessment procedures.* (i) The participating responsible parties may request that trustees use assessment procedures other than those selected by the trustees if the responsible parties:

- (A) Identify the proposed procedures to be used that meet the requirements of § 990.27 of this part, and provide reasons supporting the technical adequacy and appropriateness of such procedures for the incident and associated injuries;
- (B) Advance to the trustees the trustees' reasonable estimate of the cost of using the proposed procedures; and
- (C) Agree not to challenge the results of the proposed procedures. The request from the responsible parties may be made at any time, but no later than, fourteen (14) days of being notified of the trustees' proposed assessment procedures for the incident or the injury.
  - (ii) Trustees may reject the responsible parties' proposed assessment pro-

cedures if, in the sole judgment of the trustees, the proposed assessment procedures:

- (A) Are not technically feasible;
- (B) Are not scientifically or technically sound;
- (C) Would inadequately address the natural resources and services of concern;
- (D) Could not be completed within a reasonable time frame; or
- (E) Do not meet the requirements of § 990.27 of this part.

(7) *Disclosure.* Trustees must document in the administrative record and Restoration Plan the invitation to the responsible parties to participate, and briefly describe the nature and extent of the responsible parties' participation. If the responsible parties' participation is terminated during the assessment, trustees must provide a brief explanation of this decision in the administrative record and Restoration Plan.

(d) *Public.* Trustees must provide opportunities for public involvement after the trustees' decision to develop restoration plans or issuance of any notices to that effect, as provided in § 990.55 of this part. Trustees may also provide opportunities for public involvement at any time prior to this decision if such involvement may enhance trustees' decisionmaking or avoid delays in restoration.

#### **§ 990.15 Considerations to facilitate restoration.**

In addition to the procedures provided in subparts D through F of this part, trustees may take other actions to further the goal of expediting restoration of injured natural resources and services, including:

- (a) *Pre-incident planning.* Trustees may engage in pre-incident planning activities. Pre-incident plans may identify natural resource damage assessment teams, establish trustee notification systems, identify support services, identify natural resources and services at risk, identify area and regional response agencies and officials, identify available baseline information, establish data management systems, and identify assessment funding