

## § 990.15

## 15 CFR Ch. IX (1–1–11 Edition)

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

issues and options. Potentially responsible parties, as well as all other members of the public interested in and capable of participating in assessments, should be included in pre-incident planning to the fullest extent practicable.

(b) *Regional Restoration Plans.* Where practicable, incident-specific restoration plan development is preferred, however, trustees may develop Regional Restoration Plans. These plans may be used to support a claim under § 990.56 of this part. Regional restoration planning may consist of compiling databases that identify, on a regional or watershed basis, or otherwise as appropriate, existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents.

### Subpart B—Authorities

#### § 990.20 Relationship to the CERCLA natural resource damage assessment regulations.

(a) *General.* Regulations for assessing natural resource damages resulting from hazardous substance releases under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 *et seq.*, and the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1321 *et seq.*, are codified at 43 CFR part 11. The CERCLA regulations originally applied to natural resource damages resulting from oil discharges as well as hazardous substance releases. This part supersedes 43 CFR part 11 with regard to oil discharges covered by OPA.

(b) *Assessments commenced before February 5, 1996.* If trustees commenced a natural resource damage assessment for an oil discharge under 43 CFR part 11 prior to February 5, 1996 they may complete the assessment in compliance with 43 CFR part 11, or they may elect to use this part, and obtain a rebuttable presumption.

(c) *Oil and hazardous substance mixtures.* For natural resource damages resulting from a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 CFR part 11 in order to obtain a rebuttable presumption.

#### § 990.21 Relationship to the NCP.

This part 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. Response actions and the coordination with damage assessment activities are conducted pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300.

#### § 990.22 Prohibition on double recovery.

When taking actions under this part, trustees are subject to the prohibition on double recovery, as provided in 33 U.S.C. 2706(d)(3) of OPA.

#### § 990.23 Compliance with NEPA and the CEQ regulations.

(a) *General.* The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 CFR chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. Thus, when a federal trustee proposes to take restoration actions under this part, it must integrate this part with NEPA, the CEQ regulations, and NEPA regulations promulgated by that federal trustee agency. Where state NEPA-equivalent laws may apply to state trustees, state trustees must consider the extent to which they must integrate this part with their NEPA-equivalent laws. The requirements and process described in this section relate only to NEPA and federal trustees.

(b) *NEPA requirements for federal trustees.* NEPA becomes applicable when federal trustees propose to take restoration actions, which begins with the development of a Draft Restoration Plan under § 990.55 of this part. Depending upon the circumstances of the incident, federal trustees may need to consider early involvement of the public in restoration planning in order to meet their NEPA compliance requirements.

(c) *NEPA process for federal trustees.* Although the steps in the NEPA process may vary among different federal trustees, the process will generally involve the need to develop restoration