2002–19–10 Air Tractor, Inc.: Amendment 39–12890; Docket No. 2002–CE–03–AD.

(a) *What airplanes are affected by this AD?* This AD affects the following airplane models and serial numbers that are certificated in any category.

Model	Serial No.
AT–402	All serial numbers beginning with 402–0694.
AT–402A	All serial numbers beginning with 402A–0738.
AT–402B	All serial numbers beginning with 402B–0966.
AT–602	All serial numbers.
AT–802	All serial numbers.
AT–802A	All serial numbers.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent failure of the empennage caused by cracks. Such failure could result in loss of control of the airplane.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) Inspect the upper longeron and upper diagonal tube on the left hand side of the fuselage frame, just forward of the vertical fin front spar attachment, for cracks.	Initially inspect within the next 100 hours time-in-service (TIS) after November 15, 2002 (the effective date of this AD) and thereafter at intervals not to exceed 100 hours TIS.	In accordance with Snow Engineering Co. Service Letter #195, dated February 4, 2000, and the applicable maintenance manual.
(2) If cracks are found during any inspection required in paragraph (d)(1) of this AD, accomplish the following: (i) Obtain a repair scheme from the manufacturer through the FAA at the address specified in paragrpah (f) of this AD; and (ii) Incorporate this repair scheme.	Obtain and incorporate the repair scheme prior to further flight after inspection in which the cracks are found. Continue to inspect as specified in paragraph (d)(1) of this AD.	In accordance the with the repair scheme obtained from Air Tractor, Incorporated, P.O. Box 485, Olney, Texas 76374. Obtain this repair scheme through the FAA at the address specified in paragraph (f) of this AD.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Fort Worth Aircraft Certification Office (ACO), approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Fort Worth ACO.

Note: This AD applies to each airplane identified in paragraph (a) of this AD, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Andrew D. McAnaul, Aerospace Engineer, FAA, Fort Worth Airplane Certification Office, 2601 Meacham Boulevard, Fort Worth, Texas 76193–0150; telephone: (817) 222–5156; facsimile: (817) 222–5960.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with Snow Engineering Co. Service Letter #195, dated February 4, 2000. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You may get copies from Air Tractor, Incorporated, P.O. Box 485, Olney, Texas 76374. You may view copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) *When does this amendment become effective?* This amendment becomes effective on November 15, 2002.

Issued in Kansas City, Missouri, on September 18, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–24404 Filed 9–30–02; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 990

[Docket No. 990608154–2213–02]

RIN 0648–AM80

Natural Resource Damage Assessments

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

ACTION: Final rule.

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 (OPA). The final regulations were challenged, pursuant to section 1017(a) of OPA. On November 18, 1997, the United States 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)). On July 31, 2001, NOAA published proposed amendments to the final regulations to address the remanded issues and to propose some clarifying and technical amendments in other parts of the regulation. This final rule addresses the remanded issues and comments received.

EFFECTIVE DATE: October 31, 2002.

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 (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. 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, plus assessment costs. These final regulations were challenged pursuant to section 1017(a) of OPA. On November 18, 1997, the United States 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 also proposed clarifying and technical amendments in other parts of the regulations.

Discussion

I. Court's Mandate to Clarify Removal Language

A. Discussion

In *General Electric Co., 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 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 regulations. NOAA did not intend to propose shared ''removal authority,'' as defined by OPA. Removal authority is exclusively provided to the U.S. Environmental Protection Agency (EPA) and the U.S. Coast Guard (Coast Guard) under the Clean Water Act, 33 U.S.C. 1321 (CWA), Executive Order 12777 (56 FR 54757, Oct. 22, 1991), and the 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 that the regulations authorize trustees to eliminate or reduce exposure of natural resources to oil resulting from an incident, but only if such action is selected in accordance with standards and procedures for restoration 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 response and trustee agencies. Further, recognition of the trustees' authority to address residual oil through selection of a restoration action would not be granting trustees the authority to second guess response agencies because selection of restoration actions is based upon different information and criteria than are used by the response agencies 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 prevent, 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), *see also* OPA section 1001(30) (33 U.S.C. 2701(30)), the NCP, 40 CFR Part 300 at 300.5.

While ''removal'' involves taking whatever actions are needed to prevent or reduce damage caused by a threat of or actual spill, natural resource damage assessment and restoration involve an investigation and planning process that is aimed at returning the environment to baseline conditions, *i.e.,* the state it would have been in had the incident not occurred, by implementing restoration approaches as provided under OPA. Although not defined under OPA, restoration is defined in the Final Regulation 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 factors provided in the Final Regulation 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 of natural resources to oil.

Another area causing potential confusion with removal actions is the Final Regulation provisions on emergency restoration in § 990.26. Section 990.26 of the Final Regulation 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 proposed amendments to § 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 resulting from the incident that would result from delaying the emergency restoration action. This provision was 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, NOAA proposed to amend § 990.26(a) to 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.

NOAA also proposed to amend § 990.26(b) to provide that, if response actions are still underway, trustees must coordinate with the OSC before implementing any emergency restoration action. The amendments provided that trustees may take such action only if that action will not interfere with or duplicate the ongoing response action. Finally, the amendments also provided 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 specified in the NCP.

Given the fact that the parenthetical language of § 990.53(b)(3) of the Final Regulation caused confusion on this issue, NOAA proposed that subsection be amended to delete the parenthetical language, ''*e.g.,* residual sources of contamination.'' For the same reason, NOAA replaced the term ''remove'' with the term ''address'' in § 990.53(b)(3).

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

In its opinion in *General Electric Co., et al.,* v. *Commerce*, the Court posed a number of specific questions for NOAA to address. The preamble to the proposed amendments published on July 31, 2001, at 66 FR 39466–39467, answered these questions upon consultation with the Coast Guard and EPA. Although the questions were addressed in the preamble, NOAA believes that the language bears repeating. Therefore, the questions from the Court and their answers are given here to clarify the relationship 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 CWA, OPA, and the NCP addresses actions taken by the lead response agency necessary to ''prevent, minimize or mitigate'' damage to the public health or welfare, including the environment. 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 may be 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 prevent, minimize or mitigate harm versus action to restore injured natural resources and services to baseline conditions.

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 the reduction or elimination of 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 but human intervention occurs, 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 the CWA may include actual removal or containment of oil, or other actions ''necessary to prevent, 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. 1321(a)(8),(c),(e). As discussed above, the lead response agency's goals include preventing or reducing harm to the public health or welfare, including 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 prevent, minimize or mitigate 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 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 the 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 amending 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. 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 OSC 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 conditions 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. Response to Comments

1. 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. Twelve separate parties responded to the request for comments. Comments were received from five industry representatives, four from state trustee representatives, one from EPA, and two from individual members of the public. Comments received are summarized and addressed below.

Comment: One commenter, a private cleanup contractor, described a ''unique design'' of skimmer used by his 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.

Response: NOAA takes note of the cleanup approach suggested by the first commenter. NOAA does not agree with the second commenter that addressing residual oil is needless work. NOAA also points out that one of the

considerations trustees must address in selecting a restoration project is whether that project will inflict additional harm upon the environment.

Comment: 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 the agency 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 the agency would have the authority to request responsible parties to conduct this type of residual removal as part of a restoration plan. A second trustee representative commented on a specific case example involving residual oil in which trustees were heavily involved in the response planning and decisionmaking. 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. 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.

Response: NOAA takes note of these comments.

Comment: Another trustee representative stated its agreement with NOAA's proposed amendments that trustees have legal authority to remove residual oil as part of a restoration plan. 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 an example where oil unaccounted for by response efforts was discovered later in sediments of a protected natural area. Finally, this commenter urged NOAA to respond in the amended Final Regulation to all of the D.C. Circuit's questions posed in remanding this issue.

Response: NOAA agrees with the commenter that addressing residual oil is sometimes necessary and unavoidable as a restoration action. NOAA also points to the responses to the Court's questions above in section I.B. of this preamble.

Comment: EPA commented that it agrees 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. EPA suggested that incidents supporting the need for removal of residual oil should be few if the coordination and consultation process works.

Response: NOAA takes note of this comment and agrees with EPA on this issue.

Comment: 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 stated that NOAA should 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. 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 response agency.

Response: NOAA notes that trustees acting pursuant to the Final Regulation will not attempt to usurp the role of the lead response agency. NOAA also refers the commenter to the response to the Court's questions given above in section I.B. of this preamble.

Comment: 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 response agency pursuant to section 1011 of OPA. These commenters suggested that the OPA, CWA, and 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 on the removal of residual oil, which 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.

Response: NOAA agrees with the commenter that the response agencies have exclusive authority to determine when removal is complete. However, NOAA does not agree that the trustees' interests are limited to consultation with the lead response agency. NOAA notes that, in consultation with the Coast Guard and EPA, it has responded to the Court's questions above in Section I.B. of this preamble. NOAA points out that § 990.53(b)(3)(i) does not and should not address which trustees may use these provisions nor does it undermine Congressional intent.

Comment: 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. 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.

Response: NOAA notes and appreciates the offer of support from these commenters. In response to the comment on cost-effectiveness, for emergency restoration actions, § 990.26(a)(5) specifically requires that the costs of the action not be unreasonable. For non-emergency restoration conducted pursuant to a publicly-reviewed restoration plan, § 990.54(a) provides standards for evaluating a range of restoration alternatives and § 990.54(b) includes a cost-effectiveness requirement.

Comment: A fourth commenter representing an industry association also stated that the Final 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. 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.

Response: Again, NOAA notes that it is not attempting to create removal authority for trustees. NOAA does agree that trustees should work where possible through the consultation process with the lead response agency to address removal of oil that might impede restoration. However, NOAA points out that § 990.53(b)(3)(i) is necessary to allow restoration to succeed where residual oil not subject to the removal process will impede restoration.

Comment: The fifth 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 amendments to restore lost ecological functions or services. These commenters urged that NOAA revise the Final 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.

Response: NOAA notes and appreciates the support of these commenters. In response to the comment on cost-effectiveness, as noted earlier, for emergency restoration actions, § 990.26(a)(5) specifically requires that the costs of the action not be unreasonable. For non-emergency restoration conducted pursuant to a publicly-reviewed restoration plan, § 990.54(a) provides standards for evaluating a range of restoration alternatives and § 990.54(b) includes a cost-effectiveness requirement. NOAA does not believe that the physical removal of residual oil by trustees constitutes a type of restoration that must be evaluated any differently from the other types of restoration actions, except for the safeguards that the Final Regulation puts in place for emergency restoration actions that address residual oil. Nor did the commenters provide a basis for treating this type of restoration action differently from all others and subjecting it to a special and determinative cost-effectiveness criteria. However, NOAA would not attempt to limit or restrict trustee actions by only addressing threats to restoration success in situations involving ''loss of services'' to the public, since the Final Regulation currently provides the flexibility to the trustees in making restoration decisions. NOAA agrees that trustees should coordinate closely with the lead response agency to try to address the removal of all oil deemed necessary.

2. On July 31, 2001, NOAA published proposed amendments to the Final Regulation to address the remanded issues, including the issue of residual oil. 66 FR 39464. Only four comments were received on the proposed amendments regarding the issue of addressing residual oil: three comments from industry representatives and one comment from a coalition of State officials. The comments from industry representatives are similar and are therefore summarized and addressed as one set of comments.

Comment: One major area of concern from industry representatives is that trustees do not have the authority to ''remove'' residual oil. The commenters maintain that the removal authority under OPA and the NCP, in particular, is clear and sufficiently broad to address any impediments to restoration resulting from residual oil. In support of preserving the statutory status quo, the commenters cite to Congressional and statutory language that unambiguously distinguish removal and restorations authority in terms of goals, scope, and provisions regarding liability and claims. (See, definition of ''removal'' authority at OPA section 1001(30), CWA sections 311(c) & (d), and NCP § 300.5.; on Congressional intent at H. Conf. Rep. No. 653, 101st Cong., 2d Sess. (1990), at 146; on liability provision at OPA sections 1002(b)(1) & (b)(2)(A); on claims at OPA sections 1017(f)(1)(b) & (f)(2) and the Oil Spill Liability Trust Fund claims procedures.) The commenters further cite the distinct roles and responsibilities between the response agencies and trustees as evidence of statutory intent to maintain removal of residual oil under the direction of the OSC, not the trustees. (See the President's responsibility at CWA section 311(c)(1), as amended by OPA section 4201; President's has delegated responsibilities to EPA at Executive Order 12777, 56 FR 54757 (Oct. 22,1991); and duties of lead response agencies at 40 CFR Part 300.) One commenter suggested that cleanup resources may be unavailable to the OSC if trustees are using these resources for removal of ''residual oil.''

The commenters state that NOAA's proposed amendments to the Final Regulation are an attempt to provide removal authority to trustees under the guise of restoration. The commenters claim that NOAA does not have the authority to grant itself such authority, that the granting of residual oil removal authority to trustees would be inconsistent with the statutory language under OPA and the NCP. The commenters further argue that NOAA has not adequately explained the standards and protections for its ''new-found'' removal authority, and how this claimed authority would relate to the authority granted to the OSC under the statute. The commenters also noted that there is no requirement that the additional removal of oil by trustees be cost-effective or demonstrate a net environmental benefit.

A second substantive issue of the commenters is that, if trustees are granted residual oil removal authority, the regulations will disrupt the decisionmaking process and operational scheme defined under the NCP to remove residual oil (NCP Subparts B-D). Under NOAA's proposed amendments, the commenters indicate that trustees might be able to take removal actions contrary to OSC decisions and prior trustee positions respecting removal actions while the OSC would have no say in trustee residual oil removal actions. The commenters note that the principal difference in NOAA's proposed amendments is the identity of the decisionmaker, not the decision. The commenters indicate that the current procedural safeguards under the NCP work. Changing the NCP would compromise removal decisions and serve as a disincentive to industry to cooperate and coordinate with response agencies. The commenters also stated that there should be no time line imposed upon the OSC's decision regarding oil removal. The commenters

cited the Tampa Bay case as one example of the trustees second-guessing the OSC. One commenter stated that allowing trustees to conduct additional oil removal may increase the liability of the responsible party. If this additional oil removal is not part of the established response process, then these costs may not be reimbursable to the responsible party if the liability limit is exceeded.

The commenters argue that the U.S. Court of Appeals for the District of Columbia Circuit should dismiss NOAA's arguments that trustees have the right to conduct removal of residual oil under the ''guise of restoration.'' The commenters argument is based upon their belief that NOAA did not adequately respond to the Court's questions, that NOAA failed to address the commenters' concerns in a prior **Federal Register** notice, and that NOAA is unclear regarding the position of the Federal lead response agencies (the Coast Guard and EPA) regarding NOAA's proposed amendments. The commenters recommend that the proposed amendments to NOAA's Final Regulation be revised in such a way that would not allow trustees to have the authority to address residual oil during emergency restoration or other resource restoration activities.

Response: The proposed amendments did not grant authority to trustees to conduct removal under the ''guise of restoration.'' NOAA has clearly stated in the proposed amendments that it does not intend, nor was it intended in the Final Regulation, to grant ''removal authority'' to trustees as provided to the response agencies under OPA and the NCP (66 FR 39465 and 39471, thus, for instance, the change in terminology from ''removal'' to ''address'' § 990.53(b)(3)(i)). However, NOAA firmly believes that Congress did not intend to limit the ability for trustees to conduct restoration in an efficient or effective manner. As a result, the regulations authorize trustees to address residual oil if such action clears the way to cost-effective restoration. As mentioned earlier, § 990.54(b) includes a cost-effectiveness requirement.

Limiting the ability of trustees to initiate restoration as suggested by the commenters, could result either in more and costlier restoration, or in the inability of trustees to exercise any options to address residual oil that may serve as an impediment to restoration. NOAA believes that such alternative actions do not serve any member of the public and that trustees should have authority to evaluate a broad range of restoration alternatives.

The proposed amendments maintained the opportunity for trustees ''to eliminate or reduce exposure to oil resulting from an incident'' (66 FR at 39464, col. 3), if such action represents a preferred restoration alternative under the provisions of the regulations. Trustees have the authority to take limited ''emergency'' restoration actions consistent with that granted under OPA section 1012(j) and tort law. (66 FR at 39465, col 2.) While the commenters may perceive such restoration actions as ''removal'' actions that may be taken arbitrarily or in conflict with OSC decisions, they are not, nor would the trustee actions monopolize response resources. NOAA stated in its proposed amendments that restoration actions, including emergency actions as defined by OPA section 1012(j), must be consistent with the standards and procedures set forth under OPA (OPA section 1006), the Final Regulation (*e.g.*, 15 CFR 990.54(a)), and the proposed amendments to the Final Regulation. Emergency restoration actions must also abide by the consultative requirements of the NCP and the determination of the OSC to reconsider or re-open a removal action or otherwise defer such action for restoration under trustee rules. (NCP Subpart D.) The trustee authorities described in the regulations are limited to restoration decisions made using restoration criteria, not the distinctly different decision framework used by the OSC to prevent, minimize or mitigate damage to human health, welfare, and the environment. Contrary to the arguments of the commenters, the decision truly is different, not just a function of the decision maker.

As to the argument that the costs of addressing residual oil will not be recoverable if the responsible party exceeds liability limits, NOAA points out that such costs would be recoverable to the responsible party as restoration costs.

The commenters cite the Tampa Bay example as a case where the trustees are alleged to have second-guessed the OSC. The commenters assertions misrepresent the facts of this case. In the Tampa Bay case, emergency restoration actions were taken only after extensive consultation with the OSC and the potentially responsible parties. Emergency restoration actions were determined necessary by the trustees upon the discovery of conditions that would have potentially resulted in the need for more and costlier restoration if no action were taken. This discovery was made possible through monitoring after the completion of removal actions. Given the circumstances at hand, the OSC determined it was best to defer further action to the trustees. (*See,* in particular, Sections 4.7 and Appendix D of the Tampa Bay Damage Assessment and Restoration Plan/Environmental Assessment for the August 10, 1993, Tampa Bay oil spill, Volume 1—Ecological Injuries, Final, June 1997 in the Tampa Bay Administrative Record; and the paper on Tampa Bay in the NRDA Lessons Learned Workshop, May 11–12, 2000, New Orleans, LA. Both documents are available at *http://www.darp.noaa.gov/publica.htm.)*

Under the safeguards highlighted in the proposed amendments and as demonstrated in the Tampa Bay example, NOAA does not envision that the decisionmaking framework and procedural guidelines in the NCP will be undermined. Like EPA, NOAA believes that circumstances where trustees will wish to address residual oil will be few in number (see EPA Letter to NOAA, March 30, 1998, re: Reconsideration of Final Rule—Assessment of Natural Resource Damages (15 CFR Part 990); Request for Comments (63 FR 6846–6847, Feb. 11, 1998)), and that adequate controls are in place to ensure trustee coordination with the OSC.

NOAA believes it has answered the Court's concerns. Further, NOAA believes it has provided ample opportunity for all commenters to provide input on the Court's questions. Finally, NOAA believes it has adequately addressed the commenters' concerns.

On the issue of whether the lead Federal response agencies (the Coast Guard and EPA) concurred with NOAA's position in the proposed amendments, the Court asked that such concurrence be obtained in the event that NOAA was claiming ''removal residual authority'' per se (*see* discussion on *Removal Authority* in the United States Court of Appeals for the District of Columbia Circuit, November 18, 1997). Since NOAA is not claiming such authority, it could be argued that no such concurrence is necessary. However, NOAA agrees that ''emergency'' restoration actions do require close coordination with the response agencies.

In sum, NOAA believes that the language provided in the proposed amendments is adequate. NOAA believes that the proposed language on restoration under §§ 990.26 and 990.53(b)(3)(i) affords the scope and protections needed to conduct actions consistent with removal and restoration authorities.

Comment: The one set of comments representing trustee interests found the proposed amendments constructive and sound, and recommended that these amendments be retained in the in the

Final Regulation. The commenters note that the proposed amendments adequately and accurately address the Court's questions. The commenters support NOAA's position that effective restoration may require the trustees to eliminate or reduce exposure to oil.

The commenters specifically support NOAA's proposed amendments at § 990.26(a) and (b) regarding emergency restoration. However, the commenters felt that NOAA should address the ''timeliness'' in the implementation of emergency restoration actions in the proposed amendments. (NOAA asked for input on adding an explicit element, ''at this time,'' to § 990.26(b)(2) regarding the OSC's determination that residual oil does not merit further response, 66 FR 39465.) The commenters indicate that the OSC may be distracted on other more critical response issues (*e.g.*, human health and safety) to make timely conclusions respecting the completion of a removal action. Such delays may require additional, costlier restoration. Thus, the commenters support the inclusion of the phrase ''at that time'' in NOAA's amendments as a reasonable solution.

Response: NOAA concurs with the commenters' observation that the proposed amendments to § 990.26(a) and (b) will facilitate the coordination of emergency restoration and removal actions. However, adding the phrase ''at that time'' to § 990.26(b)(2) might appear to undermine the OSC's authority. Modifying the NCP language respecting the OSC's responsibilities for removal actions is left to EPA (in consultation with other members of the National Response Team) as provided under section 1 of Executive Order 12777, 58 FR 54757. Removal of discharges is delegated to EPA and the Coast Guard under section 3 of the same Executive Order. Therefore, NOAA is declining to add such a time element relative to removal actions.

D. Conclusion

NOAA believes that the amendments sufficiently address the issue of residual oil remanded from the Court. This language was carefully crafted through extensive consultation with the Coast Guard and EPA. Therefore, NOAA is not persuaded that changes are needed. The amendments are incorporated in the Final Regulation.

II. Trustee Legal Costs

A. Discussion

The Court's decision on recovery of attorneys' costs as assessment costs discussed three issues. First, the Court noted that NOAA agreed 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 proposed to amend to the definition of ''Reasonable assessment costs'' in § 990.30 by removing the word ''enforcement'' from the definition. (*General Electric Co., 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 proposed amendments to § 990.30 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 amendments of July 31, 2001, focused 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 development of a restoration plan, that could only be performed by attorneys, constitute reasonable assessment costs, the proposed amendment provided that trustees must consider the following criteria:

- Whether the action comprised all or part of an action specified either in this part or 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 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.

The preamble to the amendments proposed on July 31, 2001, provided examples of common or routine assessment actions that may be most appropriately performed by trustee attorneys 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.

Response to Comments

On July 31, 2001, NOAA published proposed amendments to the Final Regulation to address the remanded issues, including the issue of trustee legal costs. 66 FR 39464. Only four comments were received on the proposed amendments: one comment from a coalition of State officials and three comments from industry representatives. These comments are summarized and addressed below. No comments were received on the issue of trustee legal costs in response to the February 11, 1998, request for public comments since that notice only dealt with the issue of residual oil (63 FR 6846).

Comment: The State officials and one industry commenter suggested that NOAA clarify the examples of trustee attorney actions given in the amendments proposed on July 31, 2001, and include these examples in the text of the Final Regulation.

Response: NOAA has provided more clarity to the examples and has included that language in the Final Regulation. Readers should note, however, that

these examples are included simply as some of the various activities trustee agency attorneys might perform during the assessment and should not be taken as an exhaustive list of those activities that are authorized.

Comment: One industry commenter stated that the criteria in the proposed amendments are insufficiently detailed to exclude the recovery of attorney costs that would not appropriately be considered assessment costs. The commenter noted that NOAA did not draw a sufficiently bright line to exclude litigation nor other attorney costs that are incurred for essentially legal functions rather than damage assessment functions. The commenter also suggested that actions such as preparing binding agreements with potentially responsible parties or other agencies, such as study or funding agreements, are not essential to the performance of an assessment and are therefore not recoverable. The commenter stated that such agreements are substitutes for litigation and should be excluded from the definition of recoverable legal costs.

Response: NOAA believes that the criteria in the proposed amendments do provide clear guidance to define which attorney actions may be included as assessment activities. NOAA points out that such actions as preparing study and funding agreements are, in fact, essential to successful assessment work, particularly in the case of cooperative assessments where the parties want clear guidance on the bounds of the assessment. Instead of seeing such work as a substitute for litigation, NOAA believes such activities are essential to a successful assessment.

Comment: This same commenter noted that an attorney may review assessment documents solely for the purpose of preparing the documents to be used in litigation. The commenter stated that this review cannot be performed adequately by a non-attorney and is directly related to litigation preparation. The commenter requested that NOAA should add a criterion to exclude all litigation preparation costs.

Response: Review of an assessment document by an attorney during the course of an assessment may not be conducted for the sole purpose of preparing for litigation. If the assessment does not result in litigation at some future date it would likely be impossible to determine the ''motives'' of reviewers of documents. In addition, if litigation is avoided, the commenters' concern disappears. NOAA believes the current regulatory language gives clear guidance on how to define attorney actions performed for the purpose of assessment or development of a restoration plan so that a determination can be made as to which legal costs may be recoverable as reasonable assessment costs.

Comment: This same commenter also suggested that NOAA add the word ''costs'' after the word ''legal'' in the definition of ''reasonable assessment costs'' in § 990.30 of the final regulation.

Response: NOAA has added the word ''costs'' after both the word ''administrative'' and ''legal'' in § 990.30.

Comment: Finally, some commenters pointed out that a trustee potentially could recover attorney costs that fail the criteria, so long as the trustee explains why the attorney work ''was not performed for the primary purpose of litigation.'' The commenters stated that this language would allow recovery of costs if the secondary purpose of the action were to further litigation. These commenters suggested that NOAA should clarify the definition of ''legal costs'' to provide that any costs of attorney work that are intended in any manner to prepare for or assist in litigation or similar activities are not recoverable. One commenter suggested that NOAA should clarify that attorney costs, to be recoverable, must be for actions specified under section 1006(c) of OPA. Another commenter suggested that the language of § 990.30 definition of legal costs be revised by replacing subparagraph (2) with language requiring that costs must meet the criteria in subparagraph (1), thereby not allowing any costs that do not meet the three criteria.

Response: NOAA does not believe it is necessary to revise the final regulation to provide more clarity. The language allowing legal costs for actions ''not performed for the primary purpose of litigation'' was the phrase used by the Court and is included in the final regulation to avoid rigid adherence to the criteria in situations where assessment actions might not fit clearly within the three criteria listed, yet would still qualify as reasonable assessment costs. Responsible parties will still have the opportunity to challenge any costs they believe are not appropriate legal costs to include in reasonable assessment costs. NOAA points out that § 990.30 definition of ''legal costs,'' in subparagraph (1)(i), already requires that actions be conducted pursuant to section 1006(c) of OPA.

Conclusion

After considering the comments received on the July 31, 2001, proposed rule, NOAA has made the following changes to the regulatory language on attorneys' costs:

(1) Section 990.30 definition of legal costs has been revised in this final rule by adding a new subparagraph (3), which includes a non-exhaustive list of examples of attorney actions performed for the purpose of assessment or developing a restoration plan, in accordance with this rule.

(2) Section 990.30 definition of ''reasonable assessment costs'' has been revised in this final rule to insert the word ''costs'' after the words ''administrative'' and ''legal.''

III. Other Technical Clarifications

The amendments proposed on July 31, 2001, included technical and clarifying amendments to the Final Regulation. NOAA stated that it was not opening up the entirety of 15 CFR 990, but only those specific sections or subsections proposed. No comments were received on the technical and clarifying amendments. Therefore, the final regulation incorporates the following revisions:

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 (Trust Fund). On September 25, 1997, the Office of Legal Counsel for the U.S. Department of Justice (DOJ) determined that OPA does not require trustees to seek appropriations for uncompensated claims for damages. Instead, the U.S. DOJ found that damage claims could be presented to and paid by the Trust Fund without further appropriations. Thus, NOAA is amending the Final Regulation to reflect this legal determination. Therefore, under the final regulation, 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 U.S. Department of the Interior's (DOI) regulations for natural resource damage assessments under the Comprehensive Environmental Response, Compensation, and Liability Act (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. Cir. 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 an indirect cost rate to situations where the costs of estimating indirect costs outweigh the benefits, and where the assumptions used in calculating the indirect cost rate have been documented.

The preamble to NOAA's Final Regulation indicated that indirect costs were recoverable assessment costs, but the Final Regulation did not include specific guidelines for determining indirect costs for either assessment or restoration costs. Based upon the ruling in Kennecott, NOAA is making technical clarifications to the Final Regulation to define the scope of indirect costs that are recoverable as ''reasonable assessment costs'' and as ''restoration costs.'' The Final Regulation 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 Final Regulation contains similar procedural safeguards that apply to selecting a methodology to determine indirect costs as those in the DOI regulation. Section 990.27 of the Final Regulation 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 that are demonstrated to be reliable, valid, and cost-effective. Also, § 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 Final 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 is adding a new subsection (f) to § 990.62 of the Final 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 Final Regulation.

D. Cost Estimating Procedures, § 990.62(g)

NOAA is also providing 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. Therefore, NOAA is adding a new subsection (g) to § 990.62 of the Final Regulation to require that, when estimating costs to implement a restoration plan, trustees must use methods consistent with generally accepted cost estimating principles and with the requirements of § 990.27 of the Final Regulation.

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

The National Oceanic and Atmospheric Administration has determined that the amendments to the Final Regulation do 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 the amendments to the Final Regulation will not have a significant economic effect on a substantial number of small entities. The amendments to the Final Regulation are 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 amendments to the Final Regulation are 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 amendments, 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 not significant under Executive Order 12866. The amendments to the Final Regulation provide 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, Restoration, Water pollution control, Waterways.

Dated: September 9, 2002.

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, subchapter E, is 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.

(3) Examples of common or routine assessment actions that may be most appropriately performed by trustee attorneys, in accordance with this part, include, but are not limited to:

(i) Providing written and oral advice on the requirements of OPA, this part, and other applicable laws;

(ii) 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;

(iii) Developing and managing administrative records;

(iv) Preparing binding agreements with potentially responsible parties in the context of the assessment, including study agreements, funding agreements, and restoration agreements;

(v) Preparing co-trustee cooperative agreements;

(vi) Preparing formal trustee determinations required under this part; and

(vii) Procuring title searches, title insurance, and/or conservation easements when property agreements are part of restoration packages.

* * * * *

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 costs, legal costs, 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)).

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