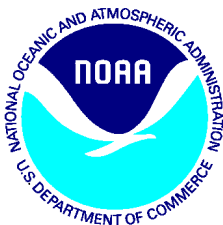
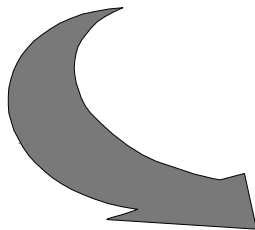
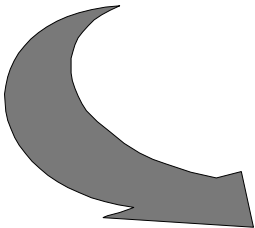


Restoration Planning

Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990



Damage Assessment
and Restoration Program



August 1996



RESTORATION PLANNING

GUIDANCE DOCUMENT FOR
NATURAL RESOURCE DAMAGE ASSESSMENT
UNDER THE OIL POLLUTION ACT OF 1990

Prepared for the:

Damage Assessment and Restoration Program
National Oceanic and Atmospheric Administration
1305 East West Highway, SSMC #4
Silver Spring, Maryland 20910

Prepared by:

Eli Reinharz
Damage Assessment Center
National Oceanic and Atmospheric Administration
1305 East West Highway, SSMC #4
Silver Spring, Maryland 20910

and

Linda B. Burlington
General Counsel Natural Resources
National Oceanic and Atmospheric Administration
1315 East West Highway, SSMC #3
Silver Spring, Maryland 20910

August 1996

DISCLAIMER

This guidance document is intended to be used as a tool to develop restoration plans for Natural Resource Damage Assessments (NRDA) under the Oil Pollution Act of 1990 (OPA). This document is not regulatory in nature. Trustees are not required to use this document in order to receive a rebuttable presumption for NRDA's under OPA.

NOAA would appreciate any suggestions on how this document could be made more practical and useful. Readers are encouraged to send comments and recommendations to:

Eli Reinharz, Ecologist
Damage Assessment Center
National Oceanic and Atmospheric Administration
1305 East-West Highway
SSMC #4, N\ORCA\X1
Silver Spring, Maryland 20910
(301) 713-3038 ext. 193, phone
(301) 713-4387, fax
ereinharz@spur.nos.noaa.gov, e-mail address

TABLE OF CONTENTS

| | |
|---|------------------|
| LIST OF EXHIBITS..... | v |
| ACKNOWLEDGMENTS | vi |
| PREFACE | vii |
| LIST OF ACRONYMS..... | viii |
| INTRODUCTION..... | CHAPTER 1 |
| 1.1 Background..... | 1-1 |
| 1.2 Relation to the National Environmental Policy Act (NEPA)..... | 1-2 |
| 1.3 Purpose and Scope of this Document..... | 1-2 |
| 1.4 Intended Audience..... | 1-3 |
| 1.5 The NRDA Process..... | 1-3 |
| 1.5.1 Preassessment Phase..... | 1-3 |
| 1.5.2 Restoration Planning Phase..... | 1-5 |
| 1.5.2.1 Injury Assessment..... | 1-5 |
| 1.5.2.2 Restoration Selection..... | 1-5 |
| 1.5.3 Restoration Implementation Phase..... | 1-7 |
| 1.6 Basic Terms and Definitions | 1-8 |
| 1.6.1 Baseline..... | 1-8 |
| 1.6.2 Incident | 1-8 |
| 1.6.3 Injury | 1-9 |
| 1.6.4 Natural Resources and Services | 1-10 |
| 1.6.5 Recovery..... | 1-10 |
| 1.6.6 Restoration..... | 1-11 |

TABLE OF CONTENTS (continued)

DEVELOPING RESTORATION PLANS UNDER OPA..... CHAPTER 2

| | |
|---|------|
| 2.1 Framework for Developing Restoration Plans | 2-1 |
| 2.2 Restoration Planning Process under OPA | 2-1 |
| 2.3 NEPA Planning Process | 2-4 |
| 2.3.1 NEPA Application..... | 2-4 |
| 2.3.2 Environmental Assessment (EA)..... | 2-4 |
| 2.3.3 Environmental Impact Statement (EIS)..... | 2-6 |
| 2.4 Combining OPA and NEPA Planning Processes..... | 2-7 |
| 2.4.1 Restoration Planning and the EA | 2-7 |
| 2.4.2 Restoration Planning and the EIS..... | 2-9 |
| 2.5 Regional Restoration Plans or Existing Restoration Projects | 2-10 |
| 2.6 Trustee Coordination..... | 2-11 |

TABLE OF CONTENTS (continued)

GENERAL OUTLINE FOR RESTORATION PLANS..... CHAPTER 3

| | |
|---|------|
| 3.1 Notice of Intent | 3-1 |
| 3.2 Draft Planning Documents..... | 3-2 |
| 3.2.1 Cover (Fact) Sheet | 3-5 |
| 3.2.2 Executive Summary..... | 3-6 |
| 3.2.3 Table of Contents | 3-7 |
| 3.2.4 Introduction - Purpose of and Need for Restoration..... | 3-8 |
| 3.2.5 Injury Assessment - Affected Environment | 3-12 |
| 3.2.6 Discussion of Restoration Alternatives, including the Preferred Alternative(s) | 3-14 |
| 3.2.7 List of Preparers..... | 3-20 |
| 3.2.8 Discussion of Responsible Part (or other) Involvement | 3-20 |
| 3.2.9 Index..... | 3-20 |
| 3.2.10 Appendices..... | 3-21 |
| 3.3 Notice of Availability..... | 3-23 |
| 3.4 Final Restoration Plan/Environmental Assessment/ Environmental Impact Statement | 3-23 |
| 3.5 Demand/Record of Decision..... | 3-26 |
| 3.6 Notification of Availability of Final Documents, ROD..... | 3-26 |

TABLE OF CONTENTS (continued)

APPENDICES

| | | |
|------------|-------------------------------------|-----|
| Appendix A | OPA Regulations | A-i |
| Appendix B | NEPA Regulations..... | B-i |
| Appendix C | Related Guidance Documents | C |
| Appendix D | Trustee Agency Decisionmaking | D-i |
| Appendix E | Example NOI and NOA | E-i |
| Appendix F | Public Involvement | F-i |
| Appendix G | Sample Cover (Fact) Sheet | G |

LIST OF EXHIBITS

| | | |
|-------------|---|------|
| Exhibit 1.1 | NRDA process under the OPA regulations | 1-4 |
| Exhibit 2.1 | Restoration plan development..... | 2-8 |
| Exhibit 3.1 | Parallel requirements for Draft Restoration Plans under the OPA regulations and Environmental Assessment and Environmental Impact Statement under the NEPA regulations | 3-3 |
| Exhibit 3.2 | Requirements under the OPA and NEPA regulations concerning public actions | 3-25 |
| Exhibit 3.3 | Decision documentation | 3-27 |

ACKNOWLEDGMENTS

The authors gratefully acknowledge the invaluable assistance of those individuals who participated in the development of this document. Special thanks and appreciation to:

| | |
|-------------------|---|
| Bill Archambault | NOAA, Office of Policy and Strategic Planning |
| Larry Freeman | Shipley Associates |
| Doug Helton | NOAA, Damage Assessment Center |
| Brian Julius | NOAA, Damage Assessment Center |
| John Kern | NOAA, Damage Assessment Center |
| Carol-Ann Manen | NOAA, Damage Assessment Center |
| Marguerite Matera | NOAA, Office of General Counsel Natural Resources, Northeast Regional Office |
| Cheryl Scannell | NOAA, Office of General Counsel Natural Resources, Southeast Regional Office |
| Gail Siani | NOAA, Office of General Counsel Natural Resources, Northwest Regional Office |
| Donna Wieting | NOAA, Office of Policy and Strategic Planning |

PREFACE

We have come to understand the importance of preserving the quality of our environment while promoting technological advancement and economic prosperity. The need to carefully and fairly evaluate public actions relative to the quality of our environment was initially recognized with the passage of the National Environmental Policy Act (NEPA). Since then, other substantive laws have echoed this message, including the Oil Pollution Act of 1990.

NEPA is the first comprehensive, systematic, and open procedural planning process for actions to be taken by Federal government agencies. Evaluation pervades the NEPA planning process. This planning process includes identifying a proposed action and alternatives to the proposed action and assessing the environmental consequences of the proposed action and the alternatives in light of public involvement. NEPA's judicial history, its incorporation into other substantive Federal laws and regulations, and general adoption by various State governments in one form or another makes this planning process credible.

NEPA has been integrated into the final Natural Resource Damage Assessment (NRDA) regulations developed under the Oil Pollution Act of 1990 (OPA). Although NEPA is solely a Federal trustee requirement, the analyses and determinations required under the NRDA regulations of OPA are structured to fully facilitate the ability for all agencies to consider the environmental consequences of their proposed restoration actions.

This document focuses on restoration planning for NRDAs under OPA, as outlined in the NRDA regulations under OPA. In following the restoration planning process in the NRDA regulations under OPA and the guidance developed in this document, trustees will also ensure consistency with NEPA.

LIST OF ACRONYMS

| | |
|--------|--|
| CEQ | Council on Environmental Quality |
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended |
| DEIS | Draft Environmental Impact Statement |
| DRP | Draft Restoration Plan |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| FEIS | Draft Environmental Impact Statement |
| FONSI | Finding of No Significant Impact |
| FRP | Final Restoration Plan |
| LAT | Lead Administrative Trustee |
| NEPA | National Environmental Policy Act |
| NOA | Notice of Availability |
| NOAA | National Oceanic and Atmospheric Administration |
| NOI | Notice of Intent |
| NRDA | Natural Resource Damage Assessment |
| OPA | Oil Pollution Act of 1990 |
| ROD | Record of Decision |
| RP | Responsible Party |
| SEPA | State Environmental Policy Act |

1.1 Background

A major goal of the Oil Pollution Act of 1990 (OPA)¹ is to make the environment and public whole for injury to or loss of natural resources and services as a result of a discharge or substantial threat of a discharge of oil (referred to as an “incident”). This goal is achieved through returning injured natural resources and services to the condition they would have been in if the incident had not occurred (otherwise referred to as “baseline” conditions), and compensating for interim losses from the date of the incident until recovery of such natural resources and services through the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and/or services.

The U.S. Department of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), issued final regulations providing an approach that public officials (trustees) may use when conducting Natural Resource Damage Assessments (NRDA) under OPA.² These NRDA regulations (the OPA regulations) describe a process by which trustees may:

- Identify injuries to natural resources and services resulting from an incident;
- Provide for the return of injured natural resources and services to baseline conditions and compensation for interim lost services; and
- Encourage and facilitate public involvement in the restoration process.

The OPA regulations are included in Appendix A of this document for reference. The preamble discussion of the OPA regulations, along with a summary of and response to public comments received on the proposed regulations, is published at 61 Fed. Reg. 440 (January 5, 1996).

¹ 33 U.S.C. §§ 2701 *et seq.*

² The OPA regulations are codified at 15 CFR part 990 and became effective February 5, 1996.

1.2 Relation to the National Environmental Policy Act (NEPA)

Under OPA, damages for injuries to natural resources and services resulting from an oil spill incident must be based on a restoration plan developed with opportunity for public review and comment.³ To meet this requirement, the OPA regulations require that trustees provide the public with an opportunity to review and comment on a draft restoration plan before final restoration actions are selected.

The restoration planning process under the OPA regulations is patterned after the National Environmental Policy Act (NEPA).⁴ NEPA is the statute that has allowed Federal agencies to incorporate environmental effects on the human environment in their decisionmaking. The Council on Environmental (CEQ) regulations (or the NEPA regulations)⁵ serve to implement NEPA and describe the NEPA planning process in detail. The NEPA regulations are found in Appendix B of this document.

The principal reason for using the NEPA planning process as the template for restoration planning under OPA is two-fold. First, the NEPA planning process follows the fundamental principles of any sound decisionmaking procedure by openly evaluating all relevant information and involving all interested parties. The NEPA planning process is not intended to be burdensome by creating additional paperwork. Instead, given its inherent flexibility, the NEPA planning process will expedite decisionmaking, reduce transactions costs, and avoid litigation. Second, evaluation of restoration alternatives designed to reach an environmentally beneficial decision is at the heart of both OPA and NEPA.

1.3 Purpose and Scope of this Document

The NEPA regulations state that:

“Federal agencies shall to the fullest extent possible...[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.”
NEPA regulations at § 1500.2(c)

The purpose of this document is to provide trustees with general guidance to develop restoration plans under OPA that comply with NEPA’s procedural requirements. The focus of this document is to more fully describe the processes and products required for restoration planning under the OPA regulations.

³ OPA § 1006(c)(5).

⁴ 42 U.S.C §§ 4321 *et seq.*

⁵ The CEQ regulations implementing NEPA or NEPA regulations (40 CFR part 1500 *et seq.*) were promulgated on November 29, 1978 (43 Federal Register §§ 55,978 *et seq.*).

In the process of implementing the guidance detailed in this document, trustees may need to refer to other relevant NRDA-related guidance. Appendix C lists these related guidance materials.

1.4 Intended Audience

The primary users of this document are expected to be:

- Federal trustees who intend to conduct restoration planning under OPA and who must also comply with NEPA;
- State trustees who intend to conduct restoration planning under OPA and who must comply with their NEPA-equivalent laws, known as State Environmental Policy Acts or SEPA; and
- Other trustee agencies who seek guidance on the process of restoration planning under OPA, although not obligated to any NEPA or NEPA-equivalent compliance requirements.

When developing a site-specific restoration plan, trustees should consider their own agency NEPA requirements.

1.5 The NRDA Process

The NRDA process shown in Exhibit 1.1 in the OPA regulations includes three phases outlined below: Preassessment; Restoration Planning; and Restoration Implementation.

1.5.1 Preassessment Phase

The purpose of the Preassessment Phase is to determine if trustees have the jurisdiction to pursue restoration under OPA, and, if so, whether it is appropriate to do so. This preliminary phase begins when the trustees are notified of the incident by response agencies or other persons.

Once notified of an incident, trustees must first determine the threshold criteria that provide their authority to initiate the NRDA process, such as applicability of OPA and potential for injury to natural resources under their trusteeship. Based on early available information, trustees make a preliminary determination whether natural resources or services have been injured. Through coordination with response agencies, trustees next determine whether response actions will eliminate the threat of ongoing injury. If injuries are expected to continue, and feasible restoration alternatives exist to address such injuries, trustees may proceed with the NRDA process.

NATURAL RESOURCE DAMAGE ASSESSMENT
Oil Pollution Act of 1990
Overview of Process

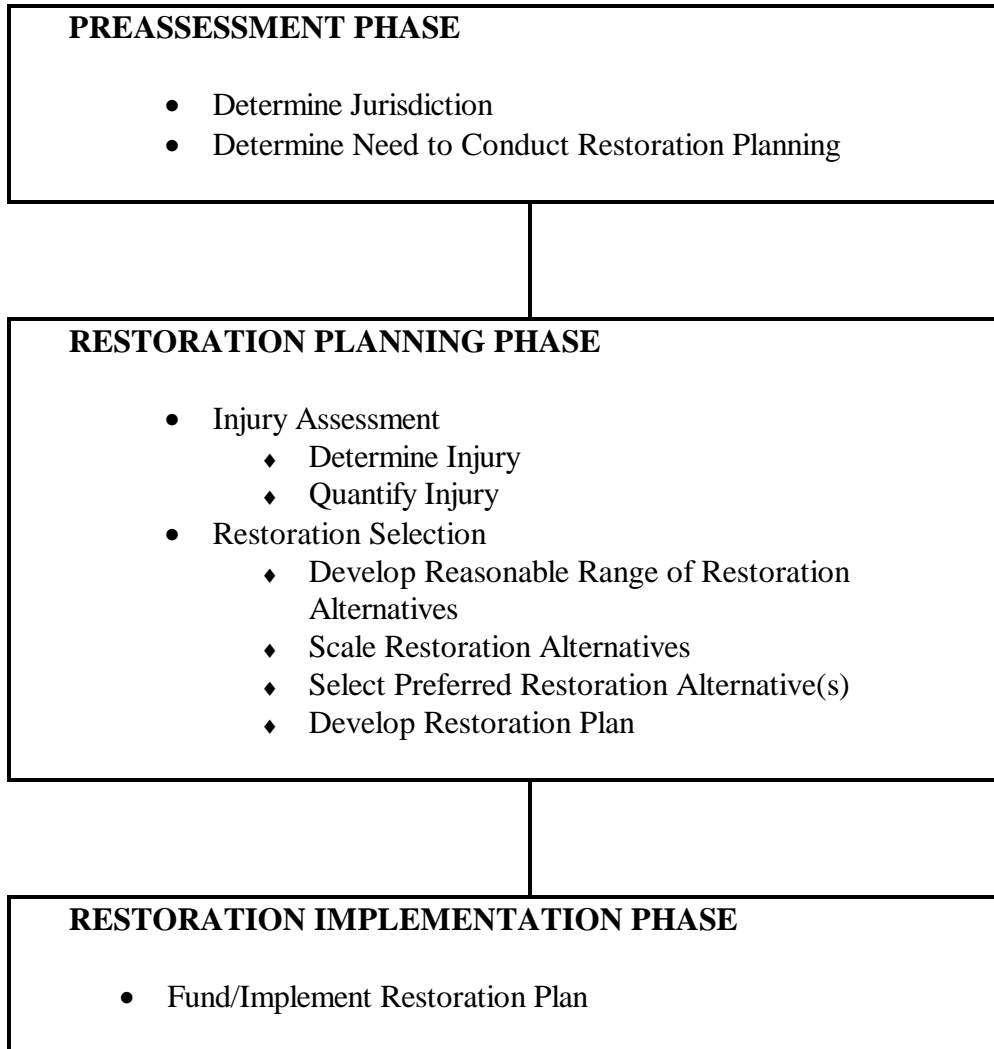


Exhibit 1.1 NRDA process under the OPA regulations.

1.5.2 Restoration Planning Phase

The purpose of the Restoration Planning Phase is to evaluate potential injuries to natural resources and services and use that information to determine the need for and scale of restoration actions. The Restoration Planning Phase provides the link between injury and restoration. The Restoration Planning Phase has two basic components: injury assessment and restoration selection.

1.5.2.1 Injury Assessment

The goal of injury assessment is to determine the nature, degree, and extent of any injuries to natural resources and services. This information is necessary to provide a technical basis for evaluating the need for, type of, and scale of restoration actions. Under the OPA regulations, injury is defined as an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Trustees determine whether there is:

- Exposure, a pathway, and an adverse change to a natural resource or service as a result of an actual discharge; or
- An injury to a natural resource or impairment of a natural resource service as a result of response actions or a substantial threat of a discharge.

To proceed with restoration planning, trustees also quantify the degree, and spatial and temporal extent of injuries. Injuries are quantified by comparing the condition of the injured natural resources or services to baseline, as necessary.

1.5.2.2 Restoration Selection

(a) Developing Restoration Alternatives

Once injury assessment is complete or nearly complete, trustees develop a plan for restoring the injured natural resources and services. Under the OPA regulations, trustees must identify a reasonable range of restoration alternatives, evaluate and select the preferred alternative(s), and develop a Draft and Final Restoration Plan. Acceptable restoration actions include any of the actions authorized under OPA (restoration, rehabilitation, replacement, or acquisition of the equivalent) or some combination of those actions

Restoration actions under the OPA regulations are either primary or compensatory. Primary restoration is action taken to return injured natural resources and services to baseline, including natural recovery. Compensatory restoration is action taken to compensate for the interim losses of natural resources and/or services pending recovery. Each restoration alternative considered will contain primary and/or compensatory restoration actions that address one or more specific injuries associated with the incident. The type and scale of compensatory restoration may depend on the nature of the primary restoration action, and the level and rate of recovery of the injured natural resources and/or services given the primary restoration action.

When identifying the compensatory restoration components of the restoration alternatives, trustees must first consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those lost. If compensatory actions of the same type and quality and comparable value cannot provide a reasonable range of alternatives, trustees then consider other compensatory restoration actions that will provide services of at least comparable type and quality as those lost.

(b) Scaling Restoration Actions

To ensure that a restoration action appropriately addresses the injuries resulting from an incident, trustees must determine what scale of restoration is required to return injured natural resources to baseline levels and compensate for interim losses. The approaches that may be used to determine the appropriate scale of a restoration action are the resource-to-resource (or service-to-service approach) and the valuation approach. Under the resource-to-resource or service-to-service approach to scaling, trustees determine the appropriate quantity of replacement natural resources and/or services to compensate for the amount of injured natural resources or services.

Where trustees must consider actions that provide natural resources and/or services that are of a different type, quality, or value than the injured natural resources and/or services, or where resource-to-resource (or service-to-service) scaling is inappropriate, trustees may use the valuation approach to scaling, in which the value of services to be returned is compared to the value of services lost. Responsible parties (RPs) are liable for the cost of implementing the restoration action that would generate the equivalent value, not for the calculated interim loss in value. An exception to this principle occurs when valuation of the lost services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time frame or at a reasonable cost. In this case, trustees may estimate the dollar value of the lost services and select the scale of the restoration action that has the cost equivalent to the lost value.

(c) Selecting a Preferred Restoration Alternative

The identified restoration alternatives are evaluated based on a number of factors that include:

- 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.

Trustees must select the most cost-effective of two or more equally preferable alternatives.

(d) Developing a Restoration Plan

A Draft Restoration Plan will be made available for review and comment by the public, including, where possible, appropriate members of the scientific community. The Draft Restoration Plan will describe the trustees' preassessment activities, as well as injury assessment activities and results, evaluate restoration alternatives, and identify the preferred restoration alternative(s). After reviewing public comments on the Draft Restoration Plan, trustees develop a Final Restoration Plan. The Final Restoration Plan will become the basis of a claim for damages.

1.5.3 Restoration Implementation Phase

The Final Restoration Plan is presented to the RPs to implement or fund the trustees' costs of implementing the Plan, therefore providing the opportunity for settlement of the damage claim without litigation. Should the RPs decide to decline to settle the claim, OPA authorizes trustees to bring a civil action for damages in federal court or to seek an appropriation from the Oil Spill Liability Trust Fund (FUND) for such damages.

1.6 Basic Terms and Definitions

Legal and regulatory language often differ from conventional usage. This section defines and describes a number of important terms used in this document. Additional definitions can be found in Appendix A (OPA regulations at § 990.30) and Appendix B (NEPA regulations at § 1508).

1.6.1 Baseline

"*Baseline* means the condition of the natural resources and services that would have existed had the incident not occurred. Baseline data may be estimated using historical data, reference data, control data, or data on incremental changes (e.g., number of dead animals), alone or in combination, as appropriate." (OPA regulations at § 990.30)

Under NEPA, the base for determining and comparing the effects of alternatives to a proposed project is the *no action* alternative. The *no action* alternative under NEPA is normally considered the current condition or current condition projected to the future without implementing the proposed project. This differs from the concept of *baseline* under OPA, which requires restoration of the environment (i.e., natural resources and services) to pre-incident conditions. Thus, if under the OPA regulations the trustees determine that injury has occurred, that feasible restoration alternatives exist, and that restoration should be pursued, the trustees have essentially negated the applicability of the NEPA *no action* alternative.

1.6.2 Incident

"*Incident* means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone, as defined in section 1001(14) of OPA (33 U.S.C. 2701(14))." (OPA regulations at § 990.30)

When a discharge of oil occurs, natural resources and/or services may be injured by the actual discharge of oil, or response activities related to the discharge. When there is a substantial threat of a discharge of oil, natural resources and/or services may also be injured by the threat or response actions related to the threat.

1.6.3 Injury

“*Injury* means an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service. Injury incorporates the terms “destruction,” “loss,” and “loss of use” as provided in OPA.” (OPA regulations at § 990.30)

Section 1002(b)(2)(A) of OPA authorizes natural resource trustees to assess damages for “injury to, destruction of, loss of, or loss of use of” natural resources. The definition of *injury* incorporates these terms. The definition also includes the injuries resulting from the actual discharge of oil, a substantial threat of a discharge of oil, and/or related response actions.

Injury can include adverse changes in the chemical or physical quality, or viability of a natural resource (i.e., direct, indirect, delayed, or sublethal effects). Potential categories of injuries include adverse changes in:

- Survival, growth, and reproduction;
- Health, physiology and biological condition;
- Behavior;
- Community composition;
- Ecological processes and functions;
- Physical and chemical habitat quality or structure; and
- Services to the public.

Although injury is often thought of in terms of adverse changes in biota, the definition of injury under the OPA regulations is broader. Injuries to non -living natural resources (e.g., oiled sand on a recreational beach), as well as injuries to natural resource services (e.g., lost use associated with a fisheries closure to prevent harvest of tainted fish, even though the fish themselves may not be injured) may be considered.

1.6.4 Natural Resources and Services

“*Natural resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the Exclusive Economic Zone), any State or local government or Indian tribe, or any foreign government, as defined in section 1001(20) of OPA (33 U.S.C. 2701(20)).” (OPA regulations at § 990.30)

Natural resources provide various services to other natural resources and to humans, and loss of services is included in the definition of injury under the OPA regulations.

“*Services (or natural resource services)* means the functions performed by a natural resource for the benefit of another natural resource and/or the public.” (OPA regulations § 990.30)

Natural resource services may be classified as follows:

- Ecological services - the physical, chemical, or biological functions that one natural resource provides for another. Examples include provision of food, protection from predation, and nesting habitat, among others; and
- Human services - the human uses of natural resources or functions of natural resources that provide value to the public. Examples include fishing, hunting, nature photography, and education, among others.

In considering both natural resources and services, trustees are addressing the physical and biological environment, and the relationship of people with that environment.

1.6.5 Recovery

“*Recovery* means the return of injured natural resources and services to baseline.” (OPA regulations at § 990.30)

The concept of recovery acknowledges the inherent tendency for natural resource and service attributes to vary over space and time. Projecting recovery involves determining the likelihood and rate at which natural resources and/or services will return to baseline. The availability and quality of baseline information can influence recovery projections. Trustees should use the best available baseline information that can be gathered relative to the incident and associated injuries.

1.6.6 Restoration

"*Restoration* means any action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services. Restoration includes: (a) Primary restoration, which is any action, including natural recovery, that returns injured natural resources and services to baseline; and (b) Compensatory restoration, which is any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery." (OPA regulations at § 990.30)

Section 1006(c) of OPA requires natural resource trustees to develop and implement a plan for the "restoration, rehabilitation, replacement, or acquisition of the equivalent," of the natural resources under their stewardship. The OPA regulations have addressed this requirement by defining restoration to encompass all the preceding terms.

The OPA regulations also include the concepts of primary and compensatory restoration. Primary restoration is any action that returns injured resources and services to baseline conditions, including natural recovery. Natural recovery refers to the taking of no human intervention to directly restore the injured natural resources and services. Depending on the injury of concern, primary restoration actions may include actions to actively accelerate recovery or simply to remove conditions that would make recovery unlikely. For each injury (or loss), trustees must consider compensatory restoration actions to compensate for the interim loss of natural resources and services pending recovery.

2.1 Framework for Developing Restoration Plans

Given the varied circumstances of oil spills, a restoration plan should, to the extent practicable, be tailored to the particular incident. This chapter describes the framework for developing restoration plans under the OPA regulations that comply with NEPA.

Trustees should clearly understand that in the development of restoration plans, best professional judgment must be exercised. Sound judgment requires that a clear decisionmaking process is in place to initiate restoration actions. Trustees should ensure that a decisionmaking process for restoration planning and implementation exists for their agencies to facilitate this framework. Refer to Appendix D for additional guidance on trustee agency decisionmaking relative to restoration actions.

This chapter describes the procedural steps for developing restoration plans that comply with the requirements of both OPA and NEPA. Chapter 3 details the contents of such plans.

2.2 Restoration Planning Process under OPA

The OPA regulations describe a process for developing and implementing restoration plans. The major steps in developing restoration plans under OPA are listed below:

- Determine if restoration planning can and should be conducted;
- Issue the Notice of Intent to Conduct Restoration Planning (NOI);
- Invite responsible party(ies) (RP(s)) participate;
- Conduct injury assessment, restoration selection, and restoration scaling;
- Develop the Draft Restoration Plan (DRP);
- Issue the Notice of Availability (NOA) of DRP;
- Provide for public review;
- Prepare the Final Restoration Plan (FRP);

- Prepare and issue the Demand to the RP(s); and
- Implement the FRP.

The first step in this process calls for trustees to determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so. If injuries to natural resources and/or services have or are expected to occur and feasible restoration alternatives exist to address such injuries, trustees may proceed with the restoration planning process. If trustees do proceed with the restoration planning process, they must publish a Notice of Intent to Conduct Restoration Planning (NOI/RP).¹

The trustees then evaluate potential injuries to natural resources and/or services and use that information to determine the need for and scale of restoration actions. Trustees must identify a reasonable range of restoration alternatives, evaluate and select the preferred alternative(s), and develop a Draft and Final Restoration Plan (DRP and FRP).²

Because OPA, like NEPA, requires that there be an opportunity for public review and comment,³ trustees must make the DRP available for review and comment by the public. The DRP, or a notice of its availability (NOA), should be published to allow this public review. This review of the DRP provides a vehicle for informing the affected and interested public of the results of the trustees' analyses and decisions. Public review can also supplement expert peer review when comments are solicited from various scientific experts or similarly experienced persons.

When developing the DRP, trustees must establish restoration objectives that are specific to the injuries addressed. These objectives should clearly specify the desired outcome. As appropriate, trustees should indicate the performance criteria by which successful restoration will be judged. At a minimum, trustees must determine what criteria will constitute successful completion of a RP's obligations in implementing restoration.⁴

¹ OPA regulations 15 CFR Subpart D - Preassessment Phase.

² OPA regulations 15 CFR Subpart E - Restoration Planning Phase.

³ OPA statute at § 1006(c).

⁴ OPA regulations at § 990.55(b).

After reviewing public comments on the DRP, trustees must develop a Final Restoration Plan (FRP).⁵ In response to the comments, the trustees may need to:

- Modify the restoration alternatives being considered;
- Develop and evaluate alternatives that were not given consideration by the trustees;
- Supplement, improve, or modify the analyses;
- Make factual corrections; and/or
- Explain why the comments do not justify further trustee response, cite the reasons to support the trustee position, and possibly indicate the circumstances that would trigger reappraisal or further response.

The FRP will become the basis of the demand for damages. After the Final Restoration Plan is developed, the trustees prepare a *demand*, which is the document that serves as a Record of Decision. Upon settlement of a claim based on the FRP, trustees must implement the final plan or oversee implementation of the final plan by the RP.

To facilitate implementation of the FRP, trustees should:

- Establish mechanisms to coordinate the implementation process;
- Develop workplans to implement restoration actions relative to the Final Restoration Plan;
- Develop a plan to monitor the success of restoration actions; and
- Evaluate the need for corrective actions.⁶

⁵ OPA regulations at § 990.55(d).

⁶ OPA regulations at § 990.66.

2.3 NEPA Planning Process

2.3.1 NEPA Application

NEPA comes into play when Federal trustees propose to take restoration actions that may *significantly affect the quality of the human environment*.⁷ NEPA provides for the identification of categories of actions that are excluded from NEPA application - the *categorical exclusions*.⁸ These exclusions generally apply to the types of actions that, individually or cumulatively, are not expected to have a significant effect on the quality of the human environment (e.g., actions with limited degree, geographic extent, and duration).

It is within the discretion of individual Federal agencies to determine which, if any, of their actions qualify for categorical exclusions. Each trustee must comply with his own individual agency guidelines when dealing with such exclusions.

When NEPA is applicable, Federal trustees should develop a DRP that will also serve as an Environmental Assessment or Environmental Impact Statement.

2.3.2 Environmental Assessment (EA)

Under NEPA, Federal agencies determine whether a proposed restoration action will have a significant effect upon the quality of the human environment. Generally, where it is uncertain that an action will have a significant effect, Federal agencies will begin the NEPA planning process with an Environmental Assessment (EA). The EA will serve to indicate and document whether the preferred alternative(s) is likely to have a significant effect.

This determination is generally conducted through the following EA process:

- Develop an Environmental Assessment (EA);
- Issue the Notice of Availability of Environmental Assessment (NOA);
- Provide for Public Review of Environmental Assessment; and

⁷ OPA regulations at § 990.23(a) and (b). *Human environment* means "...the natural and physical environment and the relationship of people with that environment" (NEPA regulations at § 1508.14). *Affect* means to "...have an effect on," the term *effect* referring to restoration actions on the human environment that have both beneficial and detrimental results (NEPA regulations at §§ 1508.3 and 1508.8). *Significance*, as used in this document, takes into account the context and intensity (severity) of the effects of the restoration action on the human environment NEPA regulations at § 1508.27).

⁸ NEPA regulations at §§ 1507.3 and 1508.4.

- Make a Determination of a:
 - ◆ Finding of No Significant Impact (FONSI); or
 - ◆ Likely Significant Effect - Begin Environmental Impact Statement (EIS) Process

There is no requirement that Federal agencies provide a Notice of Intent to Prepare an Environmental Assessment. However, once an EA is developed indicating the restoration alternatives considered and those preferred, Federal agencies should prepare a Notice of Availability of an Environmental Assessment (NOA). The EA is then available for public review and comment.

The time period for public review on the EA must be consistent with the trustee agency's NEPA requirements. Many Federal agencies either require, or strongly encourage, a thirty (30) calendar day public review period for an EA. However, under the NEPA regulations, an agency must make the EA available for public review for thirty (30) calendar days if the proposed action is, or is closely similar to, an action that normally requires an EIS, or if the nature of the proposed action is without precedent.⁹

After reviewing any comments received, the Federal agencies must then determine whether there is likely to be a significant effect on the human environment from the preferred restoration alternative(s).¹⁰ Where an effect is not expected to be significant, a Finding of No Significant Impact (FONSI) will be required. In this case, the EA will serve to indicate and document whether the preferred alternative(s) is likely to have a significant effect on the quality of the human environment. Where an effect is not expected to be significant, a FONSI should be documented with a brief explanation of the reasons for this action. Depending on particular agency requirements, the FONSI need not be published.

Where the EA indicates that the proposed restoration action is likely to result in a significant effect, an Environmental Impact Statement (EIS) will be required. In this case, the EA provides the foundation for an EIS.

⁹ NEPA regulations at § 1501.4(e)(2).

¹⁰ The NEPA regulations and individual agency regulations implementing NEPA contain factors to consider in making the determination of *significance*. Under NEPA, restoration alternatives are evaluated prior to implementation.

2.3.3 Environmental Impact Statement (EIS)

An Environmental Impact Statement (EIS) is required where the EA indicates the preferred restoration alternative(s) is likely to have a significant effect on the quality of the human environment. However, in some instances, a significant effect may be anticipated early in the planing process. In such instances, an EIS may be initiated without first conducting an EA.

The EIS is developed through the following process:

- Determine the Likelihood of Significant Effect;
- Publish the Notice of Intent to Prepare an Environmental Impact Statement (NOI/EIS);
- Develop the Draft Environmental Impact Statement (DEIS);
- Publish the Notice of Availability of DEIS (NOA for DEIS);
- Consider Public Comments Received and Make Necessary Changes to DEIS;
- Prepare the Final Environmental Impact Statement (FEIS);
- Publish the Notice of Availability of EIS (NOA for FEIS); and
- Prepare the Record of Decision.

Where Federal agencies determine that an action is likely to have a significant effect on the quality of the human environment, they must issue a Notice of Intent to Prepare a Draft Environmental Impact Statement (NOI/EIS). This NOI must be published in the Federal Register.¹¹

Once the DEIS is developed, it must be made available for public review for a minimum of forty-five (45) calendar days. The DEIS, or a Notice of its Availability (NOA), must be published in the Federal Register. Agencies should notify the public commensurate with the nature and extent of the potential effects on the human environment, consistent with NEPA and the Federal agency's NEPA requirements. The public comment period begins with the date of the publication of the NOA in the Federal Register.

¹¹ NEPA regulations at § 1501.7.

In preparing the FEIS, the Federal agencies must consider all public comments on the DEIS and incorporate any changes made to the DEIS in response to public comments. The Federal agencies must publish a NOA for the FEIS. No decision may be made concerning the proposed action until ninety (90) calendar days after publication of the NOA of the DEIS or until thirty (30) days after the NOA of the EIS, whichever is later.¹²

Once the EIS is final, Federal agencies must prepare a Record of Decision (ROD)¹³ for inclusion in the Administrative Record. The ROD summarizes the trustees' decisionmaking process. The ROD must be made publicly available, consistent with the Federal trustees' NEPA requirements.

2.4 Combining OPA and NEPA Planning Processes

2.4.1 Restoration Planning and the EA

The OPA regulations lay out a public planning process for restoration. The OPA regulations were specifically designed to complement and work with the NEPA planning process.¹⁴ The NEPA regulations also state that "Federal agencies shall to the fullest extent possible . . . [i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively."¹⁵ Therefore, to ensure procedural compliance and efficient planning activities, trustees should consider combining the two planning processes. Since many of the elements of restoration planning under OPA are consistent with NEPA planning elements, the two can be combined as illustrated in Exhibit 2.1.

For most NRDA actions performed under OPA where it is uncertain whether an action will cause a significant effect on the quality of the human environment, trustees will begin restoration planning with the development of an EA. Therefore, although no Notice of Intent to Prepare an EA (NOI/EA under NEPA) is required by NEPA, trustees will expedite the planning process if the Notice of Intent to Conduct Restoration Planning (NOI/RP under the OPA regulations) also includes the statement that the DRP is intended to serve the purposes of an EA.¹⁶

¹² NEPA regulations at § 1506.10(b).

¹³ NEPA regulations at § 1505.2.

¹⁴ OPA regulations at § 990.23.

¹⁵ NEPA regulations at § 1500.2(c).

¹⁶ The content of the NOI is discussed in Chapter 3.

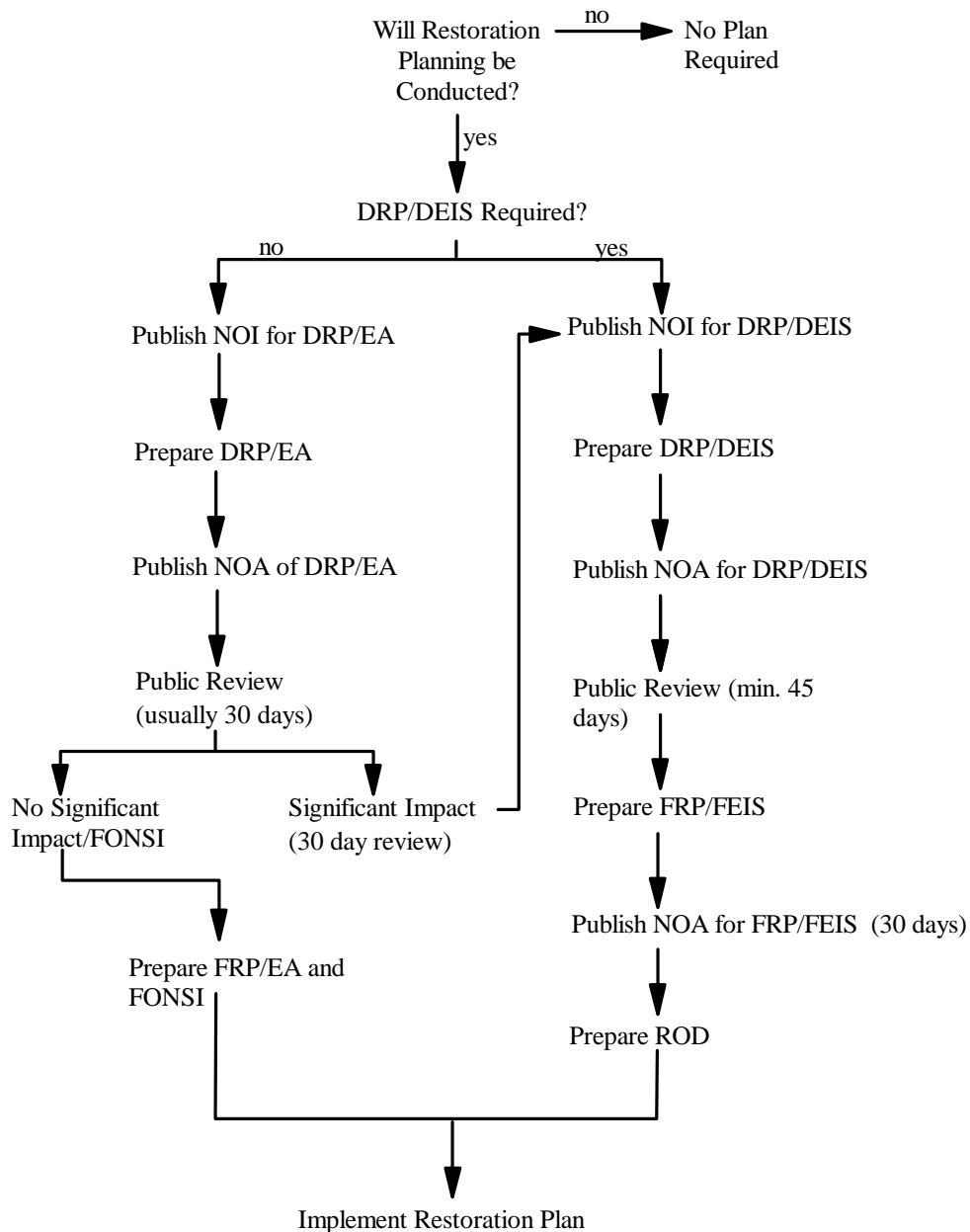


Exhibit 2.1 Restoration plan development. (NOI = Notice of Intent, NOA = Notice of Availability, DRP = Draft Restoration Plan, FRP = Final Restoration Plan, EA = Environmental Assessment, DEIS = Environmental Impact Statement, FEIS = Final Environmental Impact Statement, FONSI = Finding of No Significant Impact, ROD = Record of Decision)

When trustees develop the DRP, the EA should be included in the DRP.¹⁷ Once the combined DRP/EA is prepared, trustees will publish a Notice of Availability (NOA) for the DRP/EA to begin the public review. The time period for public review on the DRP/EA must be consistent with the trustee agency's NEPA requirements and those of the OPA regulations. The OPA regulations provide for a thirty-day review of the DRP. Many Federal agencies either require or strongly encourage a thirty-day public review of an EA also. Therefore, to comply with the various required or suggested review periods, the DRP/EA must be available for public review and comment for a minimum of thirty (30) calendar days.

Based upon this review and the agency's analysis, a determination of the significance of effects is made. If no significant effect is expected, the Federal agency then prepares the FRP and a FONSI. Although the NEPA regulations do not require an EA to address public comments, the OPA regulations do require that trustees must adequately consider all public comments on the DRP. The means by which a trustee agency requests, considers, and responds to public comments on the DRP is at the discretion of the trustee.¹⁸ However, the DRP/EA must also be consistent with the trustee agency's NEPA requirements.

The FONSI may include a summary of the FRP/EA, or simply be attached to the FRP/EA. Although public review is not required for a FONSI, public availability of the FONSI is mandatory.¹⁹

2.4.2 Restoration Planning and the EIS

For some incidents under OPA, trustees may determine, either initially or through the EA, that a restoration action is likely to have a significant effect on the quality of the human environment. In such instances, trustees must also publish a Notice of Intent to Prepare An Environmental Impact Statement (NOI/EIS under NEPA). For the sake of efficiency, the information in this NOI/EIS should be included in the Notice of Intent to Conduct Restoration Planning (NOI/RP under the OPA regulations). This combined Notice must be published in the Federal Register since this is a NEPA requirement for a NOI/EIS for preparation of an EIS.

Once the DRP/DEIS is developed, it must be made available for public review for a minimum of forty-five (45) calendar days. The DRP/DEIS, or a notice of its availability (NOA), must be published in the Federal Register. However, public review is not merely limited to a Federal Register notice. Trustees should notify the public commensurate with the nature and extent of the incident and potential environmental effects of the restoration actions on the human environment, consistent with NEPA and the Federal agency's NEPA requirements.

¹⁷ A common format is also described in Chapter 3.

¹⁸ OPA regulations at § 990.55.

¹⁹ NEPA regulations at § 1501.4(e)(1).

The FRP/EIS must consider all public comments on the DRP/DEIS and incorporate any changes made to the DRP/DEIS in response to public comments. No decision may be made concerning the proposed action until thirty (30) calendar days after the NOA of the FRP/FEIS or ninety (90) calendar days after publication of the NOA of the DRP/DEIS, whichever is later.²⁰

Under the OPA regulations, once the FRP is developed, the trustees must present a written demand to the RP(s) requesting implementation or funding of the FRP.²¹ Under the NEPA regulations, when the final decision is made on the EIS, the Federal agencies must document that decisionmaking in the Record of Decision (ROD). This ROD should be referenced in the Demand required by the OPA regulations.

2.5 Regional Restoration Plans or Existing Restoration Projects

The impact of small incidents may represent a significant concern for trustees, particularly where small incidents may have cumulative impacts. To achieve OPA's mandate to restore injured natural resources and services regardless of the type and scale of those injuries, trustees are encouraged to identify existing Regional Restoration Plans or other existing restoration projects that may be applicable in the event of an incident. Regional restoration planning may consist of compiling databases that identify existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents. Plans or projects developed on a regional basis (e.g., ecosystem, landscape, watershed, or any other basis) appropriate so long as natural resources and/or services comparable to those expected to be injured by an incident are addressed in the plans.

If a Regional Restoration Plan or existing restoration project, or some component of the Plan or project, is proposed for use, Federal trustees may be able to link or *tier* their NEPA analysis to an existing EIS.²² The Regional Restoration Plan or project may only be selected as the preferred alternative(s) after considering a range of restoration alternatives and evaluating all these restoration alternatives according to the criteria listed under the OPA regulations.²³

²⁰ NEPA regulations at § 1506.10(b).

²¹ OPA regulations at § 990.62.

²² Linking or *tiering* to an existing EIS may be possible when there is a sufficient foundation in support of the proposed restoration plan. See NEPA regulations at §§ 1502.4, 1502.20, and 1508.28.

²³ OPA regulations at § 990.54(a).

Trustees may use all or part of a Regional Restoration Plan or existing restoration project where it:

- Was developed with, or is subject to, public review and comment;
- Will adequately compensate the environment and public for injuries resulting from the incident;
- Addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and
- Allows for reasonable scaling (i.e., determining the areal and temporal extent needed for restoration actions) relative to the incident

Where a Regional Restoration Plan or existing restoration project is considered as the foundation for the tiering process, trustees must describe the relevance between it and the proposed restoration alternatives. Under such circumstances, trustees must issue a Notice of Intent (NOI/RRP) to Use a Regional Restoration Plan or Existing Restoration Project that must be made publicly available.²⁴

2.6 Trustee Coordination

Each restoration plan should have an identified trustee to facilitate its preparation, similar to the *lead agency* under NEPA. Where more than one agency is involved, a determination of the Lead Administrative Trustee (LAT) is made by the trustees involved, whether a Federal, state, or tribal LAT. The remaining agencies are co-trustees (similar to *cooperating agencies* under NEPA). The trustees determine who is responsible for developing the various components of the restoration plan.²⁵ Working relationships must be resolved on a case-by-case basis, understandings for which may be detailed in pre-incident or incident-specific agreements (e.g., Memorandum of Understanding). Such coordination will help to ensure that full restoration is achieved without double recovery of damages.

²⁴ OPA regulations at § 990.56(b).

²⁵ OPA regulations at § 990.14(a) and NEPA regulations at §§ 1501.5 and 1501.6.

3.1 Notice of Intent

The OPA regulations require trustees to issue a Notice of Intent to Conduct Restoration Planning once they have made the determination to proceed with restoration planning under OPA. Although there is no NEPA requirement for issuing such a notice when agencies decide to conduct an Environmental Assessment (EA), there is the requirement that federal agencies publish, in the Federal Register, a Notice of Intent to Prepare an Environmental Impact Statement (EIS). These Notices have slightly different purposes, but the goal of notifying the public of the agencies' intent is the same.

Since the OPA regulations require trustees to publish a Notice of Intent and the NEPA regulations require a Notice of Intent for an EIS, trustees should use a format that combines the required elements of each into one notice (Notice). For most incidents under OPA, trustees should publish a Notice of Intent to Conduct Restoration Planning/Environmental Assessment (NOI/EA). Where it is clear from the outset that an EIS will be required or where an EA shows the need for an EIS, trustees will, instead, publish a Notice of Intent to Conduct Restoration Planning/ Environmental Impact Statement (NOI/EIS).

The combined Notice, whether at an EA level or EIS level, should conform to the following format and content to the extent practicable:

- Brief statement of the facts of the incident;
- Brief discussion of the Determination of Jurisdiction - trustee authority to proceed (OPA regulations § 990.41);
- Brief discussion of the Determination to Proceed with Restoration Planning (OPA Regulations § 990.42):
 - ◆ Natural resources and services that are, or are likely to be, injured as a result of the incident;
 - ◆ Potential restoration actions relevant to expected injuries; and
 - ◆ If known, potential assessment procedures for evaluating injuries and defining appropriate type and scale of restoration - *optional*.

- Information on the availability of the Administrative Record (OPA regulations § 990.45); and
- Name, address, and phone and fax numbers of contact person(s) (adding e-mail address where applicable).

The Notice may be published in the public media of local distribution or in the Federal Register (required when the Notice is for an EIS). Generally, the type of publication for the Notice should be commensurate with the nature and extent of the incident and potential effects of the restoration actions on the quality of the human environment.

3.2 Draft Planning Documents

The OPA regulations set out certain requirements for what should be considered and included in restoration plans under OPA.¹ Generally, Draft Restoration Plans (DRP) must contain sufficient information to allow meaningful public review. The NEPA regulations also require that certain items be included in Environmental Assessments (EA)² and Draft Environmental Impact Statements (DEIS).³ However, Exhibit 3.1, which lists the required elements of each of these documents, demonstrates the similarities among the three planning documents. Therefore, when developing restoration plans under OPA that also comply with NEPA, the elements discussed in this section should be included. Since, for most instances, trustees will be performing an EA at the same time the DRP is being developed, the list of elements below is tailored toward producing a DRP/EA. However, some elements required only in a DEIS are included in this list because they add to the presentation of material in an efficient and clear manner. Trustees should make every effort to ensure that a DRP/EA or DRP/DEIS is brief and can be clearly and readily understood by the public.⁴

The following list of elements should not be considered a strict template. The format of the restoration plan may need to be tailored to the nature and extent of the incident. However, regardless of the format, each element should be presented in the document to ensure compliance with both OPA and NEPA. The elements for a DRP are discussed below.

¹ OPA regulations at § 990.55(b).

² NEPA regulations at § 1508.9.

³ NEPA regulations at § 1502.10.

⁴ NEPA regulations at §§ 1502.7, 1502.8, and 1502.21.

| Draft Restoration Plan - OPA Regulations at § 990.55(b) | Environmental Assessment - NEPA Regulations at § 1508.9 | Draft Environmental Impact Statement - NEPA Regulations at § 1502.10 |
|---|--|--|
| | | <ul style="list-style-type: none"> • Cover sheet |
| <ul style="list-style-type: none"> • Summary of injury assessment procedures | | <ul style="list-style-type: none"> • Summary |
| | <ul style="list-style-type: none"> • Table of Contents | <ul style="list-style-type: none"> • Table of Contents |
| <ul style="list-style-type: none"> • Description of nature, degree, and spatial and temporal extent of injuries | <ul style="list-style-type: none"> • Affected environment | <ul style="list-style-type: none"> • Affected environment |
| <ul style="list-style-type: none"> • Goals and objectives of restoration | <ul style="list-style-type: none"> • Purpose of and need for restoration action | <ul style="list-style-type: none"> • Purpose of and need for restoration action |
| <ul style="list-style-type: none"> • Range of restoration alternatives considered with discussion of how developed and evaluated • Identification of preferred alternative(s) | <ul style="list-style-type: none"> • Restoration alternatives, including the preferred alternative(s) • Environmental consequences (effects) | <ul style="list-style-type: none"> • Restoration alternatives, including the preferred alternative(s) • Environmental consequences (effects) |
| <ul style="list-style-type: none"> • Description of responsible party involvement in NRDA | <ul style="list-style-type: none"> • List of agencies and persons consulted | <ul style="list-style-type: none"> • List of preparers • List of agencies, organizations, and persons who received copies |
| <ul style="list-style-type: none"> • Description of monitoring for success of restoration | | <ul style="list-style-type: none"> • Appendices (if any) |
| | | <ul style="list-style-type: none"> • Index |

Exhibit 3.1 Parallel requirements for Draft Restoration Plans under the OPA regulations and Environmental Assessment and Environmental Impact Statements under the NEPA regulations.

Contents of Draft Restoration Plans (EA, DEIS)

- Cover (Fact) Sheet (*see* section 3.2.1)
- Executive Summary (*see* section 3.2.2)
- Table of Contents (*see* section 3.2.3)
- Introduction - Purpose of and Need for Restoration (*see* section 3.2.4)
- Discussion of Injury Assessment - Affected Environment (*see* section 3.2.5)
- Discussion of Restoration Alternatives, Including the Preferred Alternative(s)⁵ (*see* section 3.2.6)
- List of Preparers (*see* section 3.2.7)
- Discussion of Responsible Parties (or Other) Involvement (*see* section 3.2.8)⁶
- Index - for longer documents (*see* section 3.2.9)
- Appendices (*see* section 3.2.10)
 - ◆ Monitoring Plan
 - ◆ Other appendices as appropriate

⁵ This element may be broken up into more than one chapter, with the discussions expanded, for a DEIS.

⁶ For an EIS under NEPA regulations at § 1502.10(i), this element will include a “List of Agencies, Organizations, and Persons to Whom Copies of this Statement are Sent.”

3.2.1 Cover (Fact) Sheet⁷

The Cover Sheet represents a fact sheet on the DRP/EA or DRP/DEIS. The Cover Sheet should include specific information, including, but not limited to, the:

- Title of the restoration plan;
- Name(s) of lead or co-lead administrative trustee;
- Name(s) of co-trustees;
- Brief abstract of the restoration plan (generally only a paragraph, but no more than two paragraphs);
- Name, address, and phone and fax numbers of contact person(s), e-mail address where applicable;⁸
- Date by which comments must be received on the restoration plan; and
- Date of current restoration plan.

An example of a Cover Sheet is provided in Appendix G.

⁷ NEPA regulations at § 1502.11.

⁸ More than one person may be listed as a contact for a restoration plan. Where more than one person is listed as a contact and each person has distinct responsibilities for various aspects of the restoration plan, they and their responsibilities should be clearly defined here. For instance, one person may be overseeing NRDA issues and another person responding to NEPA compliance concerns.

3.2.2 Executive Summary⁹

The Executive Summary should adequately and accurately summarize the information contained in the DRP/EA or DRP/DEIS. In some cases, the Executive Summary is a useful summary document when distribution of the entire DRP/EA or DRP/DEIS is not necessary or impracticable. The Executive Summary parallels the structure of the restoration planning document. The Executive Summary may be organized using the same section headings as the main chapters of the restoration planning document to facilitate cross-referencing. If the Executive Summary is to be distributed separately from the restoration planning document, it should be detailed enough to stand on its own (from 5 to 15 pages). Therefore, it should include any graphics or other materials that facilitate effective communication of the information in the DRP/EA or DRP/DEIS. Otherwise, the Executive Summary should be brief (from 2 to 5 pages).

Generally, the Executive Summary will include a(n):

- Summary of the purpose of and need for restoration action (e.g., goals and objectives relative to the nature of the incident and natural resource and service injuries);
- Explanation of the decision(s) the trustees must make (FONSI or need for EIS) (e.g., selection of the preferred restoration alternative(s), FONSI, need for an EIS);
- Identification and description of the restoration alternatives considered, including the preferred alternative(s);¹⁰
- Rationale for the selection of the preferred restoration alternative(s), including a description of the expected environmental effects of implementing the restoration alternative(s)); and
- General issues or concerns raised, by the public or others.

⁹ NEPA regulations at § 1502.12.

¹⁰ The *preferred alternative(s)* is the alternative(s) the trustees propose and wish to select, that is considered beneficial to both the environment and public under OPA.

3.2.3 Table of Contents

A Table of Contents is not required for a DRP/EA, however, it is required for a DRP/DEIS. Even if not required for the DRP/EA, trustees should consider a Table of Contents for all long DRP/EA documents.

The Table of Contents should contain:

- Major elements of the body of the DRP/EA or DRP/DEIS;
- Descriptive headings taken from the body of the restoration plan; and
- A numbering system that is the same as that in the major portions of the restoration plan.

3.2.4 Introduction - Purpose of and Need for Restoration¹¹

The Introduction should lay the groundwork for restoration action. The Introduction should be brief and understandable to the general reader. Further technical details regarding restoration action will be presented in subsequent sections. The Introduction should summarize the trustees' intent and responsibility to develop a restoration plan and indicate that the development of this restoration plan represents the proposed restoration action(s) specifically profiled in the trustees' preferred restoration alternative(s). The Introduction should include the elements described below.

Summary of incident: The Introduction should provide a description of the incident that will serve to explain the need to develop a restoration plan.

This section should describe, among other things:

- The basic information on the incident, such as the date, time, and location of the incident; the physical details of the incident (e.g., collision, grounding, blowout, etc.) and whether there was a discharge and/or substantial threat of a discharge of oil; and identification of the responsible party(ies) (RP(s)) involved in the incident;
- Any environmental conditions that had an effect on the incident (e.g., climatic, weather, and water conditions, or the land-water morphology, etc.) and a description of the effect these environmental conditions had on the nature and extent of the incident;
- The results of the incident, in general terms, as they affect the type of natural resources and services found in and around the affected area; and
- Response actions taken to address the incident, their general effectiveness, and the response agencies involved.

¹¹ NEPA regulations at § 1502.13.

Summary of the purpose of and need for restoration: The Introduction should explain the purpose of (goal) and need for restoration plan development.

The purpose and need statement should:

- State the goal for restoration as it relates specifically to the incident;
- Explain how the incident-specific goal relates to the general goal of restoration under OPA;¹²
- Indicate how the scope of the restoration plan fulfills the incident-specific and general goals;
- Summarize the issues associated with the restoration plan¹³ and indicate where those issues are addressed in the restoration plan; and
- Identify the trustees' roles under this restoration plan (e.g., Lead Administrative Trustee, co-trustees).

¹² OPA regulations at § 990.10 and NEPA regulations at § 1506.5.

¹³ These issues or concerns will likely include, but may not be limited to, the general evaluation criteria under the OPA regulations at § 990.54(a). Specific public issues and concerns will likely need to be categorized to evaluate efficiently and effectively the effects of the restoration alternatives on the human environment.

Public Involvement: Meaningful public involvement is required in the development of the restoration plan. Therefore, trustees must make opportunities available for the public to be involved in the restoration planning process.

The discussion on public involvement should:

- State the purpose and need to involve the public in restoration planning;
- Summarize the public involvement process.¹⁴ Trustees should indicate the form of public involvement (e.g., hearing, notice, etc.), extent of public involvement (e.g., timing and frequency), and the forum for communicating with the public (e.g., local, regional, or national newspapers, Federal Register, direct contacts to known interested persons). See Appendix F for further guidance on developing a public involvement plan for more complex incidents;
- Indicate the availability of an Administrative Record and its purpose and contents as a source of further information;¹⁵ and
- Indicate the contact person(s) to whom all public concerns and comments may be addressed concerning the restoration plan, including access to the Administrative Record.

¹⁴ OPA regulations at § 990.55(c).

¹⁵ OPA regulations at § 990.45. Guidance on establishing an Administrative Record can be found in Appendix I of the Preassessment Phase Guidance Document, cited in Appendix C of this document.

Compliance with Other Authorities: The Introduction should identify other Federal, state, local, and tribal laws, regulations, treaties, programs, plans, and policies potentially applicable to the restoration plan. The compliance requirements under these authorities may have a direct bearing on the progress and success in the development of the restoration plan.

The discussion should:

- Indicate the need to comply with any other applicable requirements;¹⁶
- Identify the potentially applicable authorities that may affect restoration action under the restoration plan (e.g., Federal/state NEPA statutes, Endangered Species Act, Coastal Zone Management Act, etc.); and
- Identify the scope of (i.e., governs protection of aquatic life, oversees construction work in wetlands, etc.), agency(ies) responsible for (e.g., Federal or state trustees, others), nature of (e.g., project-specific, coordination with other plans, review at Federal or state level, etc.), and type of and need for (e.g., permits, licenses, entitlements, etc.) compliance under the various authorities.

¹⁶

OPA regulations at §§ 990.23 and 990.24 and NEPA regulations at § 1502.25.

3.2.5 Injury Assessment - Affected Environment¹⁷

The purpose of Injury Assessment is to evaluate the nature and extent of the injuries resulting from the incident relative to baseline conditions. These baseline conditions are used to evaluate the restoration alternatives considered. The description of injury should be adequate to understand the restoration alternatives considered. Any ancillary information on injury (e.g., Preassessment Phase activities, emergency restoration actions, history of the area, anecdotal descriptions of natural resource life and service histories, etc.) may be *incorporated by reference*¹⁸ or through an attachment. The discussion of Injury Assessment - Affected Environment should include the elements described below.

Overview of the Affected Environment: As in the description of the incident (the *Background of the Incident* in section 3.2.4), it is important to complete the framework within which the incident occurred (i.e. the environmental setting of the incident).

This description should briefly:

- Provide a summary of the physical setting in which the incident occurred (e.g., regional context, areal extent, etc.), with a description of the components of the environment that are relevant to the ensuing discussion of injuries and restoration alternatives considered;
- Highlight the important natural resources and services in the affected environment (e.g., key natural resources and services, protected or specially designated habitats, endangered and threatened species, economically important services, etc.); and
- Summarize the significance of the natural resources and services highlighted and their distribution within the affected environment.

¹⁷ OPA regulations at § 990.50 and NEPA regulations at §1502.15.

¹⁸ Under the NEPA regulations at § 1502.21, trustees can *incorporate by reference* material that is relied upon in the restoration plan to reduce paperwork and avoid delays as long as this material is reasonably available to the public.

Natural Resources and Services Considered: A wide range of natural resources and services may be associated with the incident. However, not all of these injured natural resources and services will be capable of restoration. Determinations made in the Preassessment Phase and Injury Assessment component of the Restoration Planning Phase should have narrowed the list of natural resources and services to those that were injured and could be effectively restored. The natural resources and services to be restored under the restoration plan should be adequately and clearly described in this section.

The description should include:

- An overview of key Preassessment Phase factors and findings on injury, exposure, and pathway, as appropriate;¹⁹
- A summary of the approach to injury assessment, clearly outlining the objectives used to assess injury, defining the scope of injury assessment (i.e., natural resources and services considered as well as those not considered further, with reasons supporting such decisions), and identifying the injury assessment procedures used;²⁰
- Documentation of the trustees' assessment of injury. Trustees should document injuries specific to the natural resources and/or services of concern based on and consistent with the definition of injury under the OPA regulations (i.e., nature and degree of injury),²¹ as well as the key factors and findings in the injury assessment needed to scale restoration actions (i.e., spatial and temporal extent of injury);²² and
- Documentation of the trustees' assessment of the relevance of restoration to the identified injuries. Trustees should document the estimated natural recovery²³ for injured natural resources and services and any existing feasible restoration actions.

¹⁹ Refer to the Notice of Intent to Conduct Restoration Planning (OPA regulations at § 990.44).

²⁰ OPA regulations at § 990.27.

²¹ OPA regulations at § 990.51.

²² OPA regulations at § 990.52.

²³ OPA regulations at § 990.52(c). Trustees must estimate the time for recovery, naturally and/or through active restoration, in order to quantify injury. Although it is desirable to produce quantitative recovery estimates, this may not be practicable for many injuries. Therefore, where quantitative procedures are lacking, inadequate, or unnecessarily costly to precisely estimate recovery times, trustees may use appropriate qualitative procedures to develop estimates where needed.

3.2.6 Discussion of Restoration Alternatives, Including the Preferred Alternative(s)²⁴

The purpose of this section of the restoration plan is to describe the restoration alternatives considered, evaluate the restoration alternatives according to the standards under the OPA regulations,²⁵ and document the selection of the preferred restoration alternative(s). For purposes of compliance with NEPA, trustees must include an analysis of effects of each restoration alternative on the quality of the human environment. For some incidents, this may be accomplished simply by evaluating the standards under the OPA regulations.

The discussion should present the restoration alternatives being considered and clearly define the differences between the restoration alternatives (i.e., in a comparative form) to provide a clear basis for choice among the restoration alternatives. For a DRP/DEIS, detailed discussions of environmental effects are generally addressed as a separate chapter.

This section should explain how the restoration alternatives considered under this restoration plan are structured. The discussion may be organized by:

- Restoration alternatives (i.e., each restoration alternative may be designed to address multiple natural resource and/or service injuries); or
- Natural resources and services (i.e., multiple restoration alternatives may be designed to address individual natural resources or services).

²⁴ *Alternatives Including the Proposed Action* under the NEPA regulations at § 1502.14. Trustees should consider the modified title above to avoid confusion between OPA and NEPA.

²⁵ OPA regulations at § 990.54(a).

The discussion of restoration alternatives should include the elements described below.

Reasonable Range of Restoration Alternatives: If the information on injury developed during the Injury Assessment component of the Restoration Planning Phase is sufficient to justify restoration, trustees must evaluate a *reasonable range* of restoration alternatives. These restoration alternatives must be designed so that, as a package of one or more actions, the restoration alternative would make the environment and public whole. However, only restoration alternatives considered technically feasible and in accordance with applicable laws, regulations, or permits may be considered.²⁶ Trustees should identify briefly the standards or criteria used to select the restoration alternatives being considered (e.g., information on injury, relevance to restoration, etc.)²⁷ and indicate how the restoration alternatives developed represent a *reasonable range* of restoration alternatives. The identification of restoration alternatives considered, as well as those considered but eliminated from further consideration, will attest to the fact that a reasonable range of alternatives was evaluated relative to the incident.

Description of Restoration Alternatives Considered: Trustees must identify each of the restoration alternatives considered in the restoration plan. Under the OPA regulations, each restoration alternative includes primary and/or compensatory restoration actions. Natural recovery is considered under the primary restoration action and must be one of the alternatives considered.²⁸

²⁶ OPA regulations at § 990.53(a).

²⁷ OPA regulations at § 990.53.

²⁸ OPA regulations at § 990.53(b)(2).

This section should:

- Define the restoration alternative considered and its component restoration actions (primary and/or compensatory)²⁹ relative to the natural resources and/or services or injuries of concern;³⁰
- If the restoration alternative is taken from a Regional Restoration Plan or existing restoration project, cite the specific section of the regional plan or existing project³¹ and describe the adequacy and relationship of the restoration alternative in the regional plan or existing project to the incident of concern;³²
- Define the objective(s)³³ of this restoration alternative relative to the incident-specific goal (as stated in the Purpose of and Need for Restoration section);
- Summarize the management requirements (e.g., administrative, logistical, technical, etc.) necessary to implement this restoration alternative. This summary would include the need to conduct pilot studies to define the potential success of the restoration alternative.³⁴ Trustees may include this information in an appendix and simply make reference to the appendix (e.g., within the monitoring plan); and
- Identify the restoration alternatives considered, but not analyzed in detail. As with natural resource and service injuries, it is important to document the restoration alternatives that do not merit additional consideration in the planning process. This listing demonstrates that trustees have not overlooked other restoration opportunities. This section should also briefly provide the reason(s) for not considering those restoration alternatives (e.g., addressed through other mitigation actions, jurisdictional issues, etc.).

²⁹ OPA regulations at § 990.53.

³⁰ The title of each restoration alternative and its components should be descriptive.

³¹ OPA regulations at § 990.56(a).

³² OPA regulations at § 990.56(b)(1). If trustees intend to use a restoration alternative from a Regional Restoration Plan or existing restoration project, they will need to issue a Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project (see OPA regulations at § 990.56(b)(3)).

³³ Objectives refer to the means by which the goal will be achieved.

³⁴ OPA regulations at § 990.54(c).

Comparison and Evaluation of the Restoration Alternatives: In this section, trustees should summarize the environmental effects of the restoration alternatives on the human environment. For a DRP/DEIS, more detailed discussions on environmental effects should be addressed in a separate chapter (those points that would be separated out will be noted in the following discussion). For a DRP/EA, this section contains the comparison and evaluation of the restoration alternatives.

This section is key to distinguishing between the restoration alternatives, therefore, it should be readable and accessible. To minimize extensive narrative descriptions, trustees are encouraged to provide this information in the form of a comparative matrix.

The comparative matrix and associated discussion should:

- Indicate the restoration alternatives considered in the comparison of effects;
- Indicate the standards/criteria used to evaluate the restoration alternatives being considered;³⁵ and
- Highlight the key factors and findings distinguishing the various restoration alternatives relative to the evaluation criteria/standards.

In developing the comparative matrix, trustees should make the information as quantifiable as practicable (e.g., habitat acres affected, number of biological natural resources affected, etc.), using narrative phrases to qualify numeric estimates (as needed), using qualifiers (e.g., negligible, low, moderate, high, etc.) if numeric quantification is not possible, and defining qualifiers used.

³⁵ OPA regulations at § 990.54(a). Also refer to the *Restoration Evaluation Process* discussion in section 3.2.7.

Trustees must evaluate the restoration alternatives developed and considered based upon certain factors. At a minimum, trustees must base this evaluation on the standards provided under the OPA regulations,³⁶ which include the:

- Cost to carry out the restoration alternatives;
- Extent to which each restoration 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 restoration alternative;
- Extent to which each restoration alternative will prevent future injury as a result of the incident and avoid collateral injury as a result of implementing the alternatives;
- Extent to which each restoration alternative benefits more than one natural resource and/or service; and
- Effect of each restoration alternative on public health and safety.

The effects provided by following the OPA regulations are quite comprehensive and would cover the usual NEPA categories of direct, indirect, and cumulative effects. However, where trustees determine that additional factors (i.e., effects) need to be considered under other applicable authorities (e.g., effects on endangered species and their habitat), they may include such factors.

In order to address the NEPA *effects analysis*, the evaluation of restoration alternatives should describe the full range of potential effects considered³⁷ specific to the natural resource and/or service of concern and document the key projections of the effects on the human environment (i.e., nature, degree, and spatial and temporal extent of potential effects).³⁸ To facilitate a clear understanding of the potential effects and restoration scaling, trustees should compare the information on potential effects with baseline conditions.

³⁶ OPA regulations at § 990.54(a).

³⁷ The effects of the alternative and associated actions on all natural resources and services must be addressed (e.g., direct, indirect, short term, long term, beneficial, adverse, irreversible and irretrievable, cumulative, etc.).

³⁸ OPA regulations at §§ 990.51(c) and 990.52(b).

For a DRP/DEIS, trustees should consider including this discussion in a separate chapter and possibly augmenting the restoration plan by:

- Clearly define the evaluation standards/criteria in the context of the incident;
- Describe the rationale for including the various evaluation standards/criteria relative to the restoration planning process;
- Define the assumptions and constraints for each evaluation standard/criterion; and
- Describe how the evaluation standards/criteria will be applied relative to the restoration alternatives (e.g., approach, objectives, procedures, etc.).

Selection of the Preferred Restoration Alternative(s): Trustees must indicate their preferred restoration alternative(s) based upon the comparison and evaluation described above. Where two or more restoration alternatives are equally preferable, trustees must select the most cost-effective alternative.³⁹

This section should:

- Indicate the trustees' preferred restoration alternative(s);
- Explain the factors considered in choosing the preferred restoration alternative(s);
- Describe the overall implications relative to the preferred restoration alternative(s) (e.g., environmental, economic, social, etc.); and
- Describe the general requirements necessary to implement the preferred restoration alternative(s).

For a DRP/DEIS, this discussion should be expanded to reflect the broader scope of issues and considerations.

³⁹ OPA regulations at § 990.54(b).

3.2.7 List of Preparers⁴⁰

Trustees should list the persons (with title and agency name) preparing the restoration plan. For a DRP/EA, information on the background or qualifications of preparers may be contained in the Administrative Record or in an Appendix. For a longer document, such as a DRP/DEIS, this section may also:

- Identify the chapters or sections of the restoration plan developed by specific persons or agencies;
- Distinguish between core team contributors and specialists who supplied backup studies or data; and
- Provide information on background and/or qualifications of the preparers.

3.2.8 Discussion of Responsible Party (or other) Involvement⁴¹

The OPA regulations require that the restoration plan describe past and proposed involvement of the responsible parties in the NRDA.⁴² In addition, for a DRP/EA, trustees must list agencies and persons consulted in the development of the restoration plan. For a DRP/DEIS, if trustees actively circulate the restoration plan, supplements to the restoration plan, or the summary of the restoration plan, the trustees must also maintain a list of persons who were provided a copy of the restoration plan. This list of persons who were consulted or who received a copy of the restoration plan may be included in the Administrative Record, with reference to the list in the restoration plan.

3.2.9 Index

An Index is not required for a DRP/EA. However, an Index is recommended for longer DRP/EA documents and is required for a DRP/DEIS.⁴³ The Index, if included, should be detailed and incorporate references to natural resources and services, sites, or other topics in the restoration plan.

⁴⁰ NEPA regulations at § 1502.17.

⁴¹ NEPA regulations at § 1502.10(i) requires a *List of Agencies and Persons Consulted* for an EA and *List of Agencies, Organizations, and Persons to Whom Copies of this Statement are Sent* for an EIS.

⁴² OPA regulations at § 990.55(b)(1)(vi).

⁴³ NEPA regulations at § 1502.10(j).

3.2.10 Appendices⁴⁴

Appendices should be limited to material that is essential to reviewing the restoration plan. For example, Appendices should not contain information that is pulled from the Administrative Record files. Instead, Appendices should include such items as study reports, data, or other plans prepared specifically for and relied upon in the restoration plan. Some of these appendices are suggested for a restoration plan under the OPA regulations.

Monitoring Plan: A description of a monitoring program for determining success of restoration is a suggested component of a restoration plan under the OPA regulations.⁴⁵ For an EIS under NEPA, a monitoring program is a required component of the Record of Decision, which is developed after the trustees make a final decision on restoration actions described in the DRP/DEIS.⁴⁶

A monitoring plan should provide the general requirements necessary for ensuring restoration compliance and success and should:

- Determine and describe the restoration actions considered appropriate for measuring the progress, performance, and success of the restoration plan;
- Identify who will be responsible for the restoration actions (i.e., implementation and oversight) and the costs associated with these restoration actions; and
- Indicate any provisions for corrective actions relative to restoration success.

Bibliography - Optional: Neither the OPA nor NEPA regulations require a Bibliography in restoration plans. However, all factual information in the plan must be appropriately referenced.⁴⁷ In a longer or more complex restoration plan, these references should appear in an alphabetical list in a Bibliography.

⁴⁴ NEPA regulations at § 1502.18.

⁴⁵ OPA regulations at § 990.55(b).

⁴⁶ NEPA regulations at § 1505.2.

⁴⁷ NEPA regulations at § 1502.24.

Where trustees refer to specific facts that stem from another source within the restoration plan, trustees should cite that source and document the source in the Bibliography. Trustees are encouraged to rely on primary, peer-reviewed sources, rather than secondary sources.

The Bibliography should:

- Include a list of all technical references and background studies used by the trustees in preparing the restoration plan. Each reference must be as complete as possible (e.g., author(s), date of publication, full title, publisher, etc.). When an agency is required to prepare a document, that agency should be listed as the author, rather than an outside entity such as a contractor;
- Ensure that all references listed in the Bibliography are generally available to the public or, if not generally available, are at least included in the Administrative Record; and
- Ensure consistency between the references in the Bibliography and parenthetical citations in the text of the restoration plan.

Either as part of the Bibliography or some other part of the restoration plan, trustees should list those documents or components of documents that are *incorporated by reference*⁴⁸ in the restoration plan.

Glossary and Acronyms: A glossary of terms is not a required element of a DRP/EA or DRP/DEIS. However, where there are critical terms and concepts that need to be understood by reviewers, trustees should consider including a Glossary as an appendix to the restoration plan. For the same reason, a List of Acronyms might be useful. Trustees should include terms or concepts that are unfamiliar to the general public and should consider including appropriate definitions of terms from the OPA and NEPA regulations as part of the glossary.

Maps, Photographs: Maps and other visual aids such as photographs are not required elements of a restoration plan, but might provide appropriate orientation, perspective, and understanding of the incident and proposed restoration alternatives. Maps and other visual aids should be appropriately detailed and specific to the incident and restoration plan.

⁴⁸ Refer to footnote 18.

3.3 Notice of Availability

Where trustees decide to issue a Notice of Availability (NOA), rather than publishing the DRP/EA or DRP/EIS,⁴⁹ the NOA should include, at a minimum:

- A statement indicating the public availability of the DRP/EA or DRP/DEIS;
- A summary of the DRP/EA or DRP/DEIS, with a brief description of the restoration project;
- The date by which comments are to be received on the DRP/EA or DRP/DEIS; and
- The contact person(s) to whom comments should be addressed, as identified on the Cover Sheet of the restoration plan.

3.4 Final Restoration Plan/Environmental Assessment/Environmental Impact Statement

After trustees receive and analyze comments on a DRP/EA or DRP/DEIS, several actions are possible in response to those comments. Exhibit 3.2 details the requirements under the OPA and NEPA regulations concerning these actions. The OPA regulations provide that trustees must adequately consider all public comments on the Draft Restoration Plan.⁵⁰ Where an analysis determines that there will be no significant effect on the human environment, the Final Restoration Plan/Environmental Assessment (FRP/EA) will respond to public comments, if applicable, and explain the Finding of No Significant Impact (FONSI) on the human environment. Therefore, to combine the requirements of both OPA and NEPA, a FRP/EA will contain:

- Information from the DRP/EA on injuries and restoration alternatives;
- Statement of the trustee agency's decision on the preferred restoration alternative(s);
- Response to public comments, if applicable;

⁴⁹ See discussion in Chapter 2, section 2.2.

⁵⁰ This standard applies under OPA § 1006(c)(5) for all restoration plans and is required by the OPA regulations at § 990.23(c). Under the NEPA regulations at §§ 1501.4(e), 1503.1(a)(3), and 1506.6, Federal agencies must address all substantive comments for EISs, but not for EAs.

- Indication of any changes made to the DRP/EA;
- Brief explanation of why a restoration action will not have a significant effect on the human environment; and
- Notation of any other environmental documents related to the restoration plan that are being or have been prepared.

For DRP/DEISs, the same basic elements are required, but may have additional requirements (*see* Exhibit 3.3). Therefore, a final restoration plan (FRP/EIS) should contain:

- Information from the DRP/DEIS;
- Statement of the trustee agency's decision on the preferred restoration alternative(s);
- Explanation of the trustee agency's response to comments, including a statement of any reasonable opposing view which was not adequately discussed in the DEIS;
- Explanation of any modification of restoration alternatives, including the preferred restoration alternative(s);
- Statement of supplement, improvement, or modification of the trustee agency's analysis;⁵¹
- Indication of any minor changes made to the DRP/DEIS;⁵² and
- Attachment consisting of substantive comments received (or summary thereof).

⁵¹ *See* NEPA regulations at § 1502.9 for supplemental EIS.

⁵² *See* NEPA regulations at § 1503.4(a).

Exhibit 3.2 Requirements under the OPA and NEPA regulations concerning public actions.

| OPA Regulations Final Restoration Plan (§ 990.55(d)) | NEPA Regulations Final Environmental Assessment (§ 1501.4(e)) | NEPA Regulations Final Environmental Impact Statement § 1502.9 |
|--|---|---|
| <ul style="list-style-type: none"> ● Information in Draft Restoration Plan ● Response to comments, if applicable ● Indication of any changes made to Draft Restoration Plan | <ul style="list-style-type: none"> ● Finding of No Significant Impact ● Brief explanation why an action will not have a significant effect on the human environment ● Include Environmental Assessment or summary of it ● Statement of any other environmental documents related to it that are being or have been proposed | <ul style="list-style-type: none"> ● Response to comments ● Statement of any reasonable opposing view which was not adequately discussed in draft statement and agency's response to the issues raised <p>§ 990.1503.4(a) - Possible Responses:</p> <ul style="list-style-type: none"> ● Modification of alternatives, including the proposed action ● Development and evaluation of alternatives not previously given serious consideration by the agency ● Supplementing, improving, or modifying agency's analysis ● Factual corrections ● Explanation of why comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response <p>§ 1503.4(b):</p> <ul style="list-style-type: none"> ● All substantive comments received on DEIS (or summaries of those comments) should be attached whether or not the comment is thought to merit individual discussion by the agency in the text of the statement <p>§ 1503.4(c):</p> <ul style="list-style-type: none"> ● If changes in response to comments are minor and confined to factual corrections or statements of why the comments do not warrant further agency response, agencies may write them on errata sheets and attach them to the statement instead of rewriting the DEIS ● If changes require preparation of a supplemental EIS, see § 1502.9(c) |

3.5 Demand/Record of Decision

Once trustees have prepared the Final Restoration Plan, they must present a demand to the RP(s), which requests implementation or funding of the Final Restoration Plan.⁵³ If the Restoration Plan is also an EIS, the agency must also prepare a Record of Decision (ROD), which summarizes and documents the agency's decisionmaking process.⁵⁴ Exhibit 3.3 lists the requirements for contents of the demand under the OPA regulations and the ROD for EIS under the NEPA regulations. Trustees should be aware that a ROD is **not** required for an EA.

3.6 Notification of Availability of Final Documents, ROD

Although the OPA regulations state that the Final Restoration Plan and Demand should be publicly available, there are no requirements specified in the rule as to how these documents will be made publicly available. However, the NEPA regulations require that all EISs (Draft and Final) must be filed with the Environmental Protection Agency (EPA) and that EPA shall publish a Notice in the Federal Register each week of EISs filed during the preceding week.⁵⁵ Should trustees decide to provide a Notice of Availability (NOA) for a FRP/FONSI or FRP/EIS in addition to the Notice published by EPA, the trustees' NOA should be consistent with the NOA for a DRP/EA and DRP/DEIS, described in Section 3.3 of this chapter, with slight modifications. Therefore, when trustees decide to issue a NOA for final documents, the NOA should include:

- A statement indicating the public availability of the FRP/FONSI or FRP/FEIS;
- A summary of the FRP/FONSI or FRP/FEIS, with a brief description of the project; and
- The contact person(s) for distribution of or questions on that FRP/FONSI or FRP/EIS.

⁵³ OPA regulations at § 990.52.

⁵⁴ NEPA regulations at § 1505.2.

⁵⁵ NEPA regulations at §§ 1506.9 and 1506.10(a). 3-26

| OPA Regulations: Demand (§990.62) | NEPA Regulations Record of Decision (§ 1505.2) |
|---|--|
| <ul style="list-style-type: none"> ● Invitation to RP to implement or fund restoration ● Identification of incident from which claim arises ● Identification of trustee(s) asserting claim and a statement of statutory basis for trusteeship ● Brief description of the injuries for which claim is being brought ● Index to Administrative Record ● Request for reimbursement of costs, plus interest | <ul style="list-style-type: none"> ● Statement of decision ● Identification of all alternatives that were considered to be environmentally preferable (optional for agency to discuss preferences among alternatives based upon relevant factors including economic and technical considerations and agency statutory missions) ● Identification and discussion of all such factors, including any essential considerations of national policy which were balanced by the agency in making its decision and statement of how these considerations entered into its decision ● Statement of whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not ● Description of monitoring and enforcement program that shall be adopted and summarized where applicable for any mitigation (see § 1505.3) |

Exhibit 3.3 Decision documentation.

Table of Contents

| | |
|--|-------------|
| Subpart A—Introduction | A-1 |
| Sec. | |
| 990.10 Purpose | A-1 |
| 990.11 Scope | A-1 |
| 990.12 Overview | A-1 |
| 990.13 Rebuttable presumption. | A-2 |
| 990.14 Coordination. | A-2 |
| 990.15 Considerations to facilitate restoration. | A-4 |
| Subpart B—Authorities | A-5 |
| Sec. | |
| 990.20 Relationship to the CERCLA natural resource damage assessment regulations. | A-5 |
| 990.21 Relationship to the NCP | A-5 |
| 990.22 Prohibition on double recovery | A-5 |
| 990.23 Compliance with NEPA and the CEQ regulations | A-6 |
| 990.24 Compliance with other applicable laws and regulations | A-8 |
| 990.25 Settlement | A-8 |
| 990.26 Emergency restoration | A-8 |
| 990.27 Use of assessment procedures. | A-9 |
| Subpart C—Definitions | A-10 |
| Sec. | |
| 990.30 Definitions | A-10 |

Table of Contents (continued)

Subpart D—Preassessment Phase A-14

Sec.

| | |
|---|------|
| 990.40 Purpose | A-14 |
| 990.41 Determination of jurisdiction..... | A-14 |
| 990.42 Determination to conduct restoration planning..... | A-14 |
| 990.43 Data collection | A-15 |
| 990.44 Notice of Intent to Conduct Restoration Planning | A-15 |
| 990.45 Administrative record | A-16 |

Subpart E—Restoration Planning Phase A-17

Sec.

| | |
|--|------|
| 990.50 Purpose | A-17 |
| 990.51 Injury assessment—injury determination | A-17 |
| 990.52 Injury assessment—quantification | A-18 |
| 990.53 Restoration selection—developing restoration alternatives | A-18 |
| 990.54 Restoration selection—evaluation of alternatives | A-20 |
| 990.55 Restoration selection—developing restoration plans..... | A-21 |
| 990.56 Restoration selection—use of a Regional Restoration Plan or existing restoration project | A-22 |

Subpart F—Restoration Implementation Phase..... A-24

Sec.

| | |
|---|------|
| 990.60 Purpose | A-24 |
| 990.61 Administrative record. | A-24 |
| 990.62 Presenting a demand | A-24 |
| 990.63 Discounting and compounding..... | A-25 |
| 990.64 Unsatisfied demands | A-26 |
| 990.65 Opening an account for recovered damages | A-26 |
| 990.66 Additional considerations..... | A-27 |

Subpart A—Introduction

§ 990.10 Purpose.

The goal of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident). This goal is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery. The purpose of this part is to promote expeditious and cost-effective restoration of natural resources and services injured as a result of an incident. To fulfill this purpose, this part provides a natural resource damage assessment process for developing a plan for restoration of the injured natural resources and services and pursuing implementation or funding of the plan by responsible parties. This part also provides an administrative process for involving interested parties in the assessment, a range of assessment procedures for identifying and evaluating injuries to natural resources and services, and a means for selecting restoration actions from a reasonable range of alternatives.

§ 990.11 Scope.

The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides for the designation of Federal, state, and, if designated by the Governor of the state, local officials to act on behalf of the public as trustees for natural resources and for the designation of Indian tribe and foreign officials to act as trustees for natural resources on behalf 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.

(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 procedures 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 plans in the form of an Environmental Assessment or Environmental Impact Statement, depending upon the trustee agency's own NEPA regulations.

(1) *Environmental Assessment.* (i) *Purpose.* The purpose of an Environmental Assessment (EA) is to determine whether a proposed restoration action will have a significant (as defined under NEPA and § 1508.27 of the CEQ regulations) impact on the quality of the human environment, in which case an Environmental Impact Statement (EIS) evaluating the impact is required. In the alternative, where the impact will not be significant, federal trustees must issue a Finding of No Significant Impact (FONSI) as part of the restoration plans developed under this part. If significant impacts to the human environment are anticipated, the determination to proceed with an EIS may be made as a result, or in lieu, of the development of the EA.

(ii) *General steps.* (A) If the trustees decide to pursue an EA, the trustees may issue a Notice of Intent to Prepare a Draft Restoration Plan/EA, or proceed directly to developing a Draft Restoration Plan/EA.

(B) The Draft Restoration Plan/EA must be made available for public review before concluding a FONSI or proceeding with an EIS.

(C) If a FONSI is concluded, the restoration planning process should be no different than under § 990.55 of this part, except that the Draft Restoration Plan/EA will include the FONSI analysis.

(D) The time period for public review on the Draft Restoration Plan/EA must be consistent with the federal trustee agency's NEPA requirements, but should generally be no less than thirty (30) calendar days.

(E) The Final Restoration Plan/EA must consider all public comments on the Draft Restoration Plan/EA and FONSI.

(F) The means by which a federal trustee requests, considers, and responds to public comments on the Draft Restoration Plan/EA and FONSI must also be consistent with the federal agency's NEPA requirements.

(2) *Environmental Impact Statement.* (i) *Purpose.* The purpose of an Environmental Impact Statement (EIS) is to involve the public and facilitate the decisionmaking process in the federal trustees' analysis of alternative approaches to restoring injured natural resources and services, where the impacts of such restoration are expected to have significant impacts on the quality of the human environment.

(ii) *General steps.* (A) If trustees determine that restoration actions are likely to have a significant (as defined under NEPA and § 1508.27 of the CEQ regulations) impact on the environment, they must issue a Notice of Intent to Prepare a Draft Restoration Plan/EIS. The notice must be published in the Federal Register.

(B) The notice must be followed by formal public involvement in the development of the Draft Restoration Plan/EIS.

(C) The Draft Restoration Plan/EIS must be made available for public review for a minimum of forty-five (45) calendar days. The Draft Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register.

(D) The Final Restoration Plan/EIS must consider all public comments on the Draft Restoration Plan/EIS, and incorporate any changes made to the Draft Restoration Plan/EIS in response to public comments.

(E) The Final Restoration Plan/EIS must be made publicly available for a minimum of thirty (30) calendar days before a decision is made on the federal trustees' proposed restoration actions (Record of Decision). The Final Restoration Plan/EIS, or a notice of its availability, must be published in the Federal Register.

(F) The means by which a federal trustee agency requests, considers, and responds to public comments on the Final Restoration Plan/EIS must also be consistent with the federal agency's NEPA requirements.

(G) After appropriate public review on the Final Restoration Plan/EIS is completed, a Record of Decision (ROD) is issued. The ROD summarizes the trustees' decisionmaking process after consideration of any public comments relative to the proposed restoration actions, identifies all restoration alternatives (including the preferred alternative(s)), and their environmental consequences, and states whether all practicable means to avoid or minimize environmental harm were adopted (e.g., monitoring and corrective actions). The ROD may be incorporated with other decision documents prepared by the trustees. The means by which the ROD is made publicly

(d) *Relationship to Regional Restoration Plans or an existing restoration project.* If a available must be consistent with the federal trustee agency's NEPA requirements. (Regional Restoration Plan or existing restoration project is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS, as described in §§ 1502.20 and 1508.28 of the CEQ regulations.

§ 990.24 Compliance with other applicable laws and regulations.

(a) *Worker health and safety.* When taking actions under this part, trustees must comply with applicable worker health and safety considerations specified in the NCP for response actions.

(b) *Natural Resources protection.* When acting under this part, trustees must ensure compliance with any applicable consultation, permitting, or review requirements, including but not limited to: the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; the National Marine Sanctuaries Act, 16 U.S.C. 1431 *et seq.*; the National Historic Preservation Act, 12 U.S.C. 470 *et seq.*; the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*; and the Archaeological Resources Protection Act, 16 U.S.C. 470 *et seq.*

§ 990.25 Settlement.

Trustees may settle claims for natural resource damages under this part at any time, provided that the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest, with particular consideration of the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services. Sums recovered in settlement of such claims, other than reimbursement of trustee costs, may only be expended in accordance with a restoration plan, which may be set forth in whole or in part in a consent decree or other settlement agreement, which is made available for public review.

§ 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 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.

(b) If response actions are still underway, trustees, through their Regional Response Team member or designee, must coordinate with the On-Scene Coordinator (OSC) before taking any emergency restoration actions. Any emergency restoration actions proposed by trustees should not interfere with on-going response actions. Trustees must explain to response agencies through the OSC prior to implementation of emergency restoration actions their reasons for believing that proposed emergency restoration actions will not interfere with on-going response actions.

(c) Trustees must provide notice to identified responsible parties of any emergency restoration actions and, to the extent time permits, invite their participation in the conduct of those actions as provided in § 990.14(c) of this part.

(d) Trustees must provide notice to the public, to the extent practicable, of these planned emergency restoration actions. Trustees must also provide public notice of the justification for, nature and extent of, and results of emergency restoration actions within a reasonable time frame after completion of such actions. The means by which this notice is provided is left to the discretion of the trustee.

§ 990.27 Use of assessment procedures.

(a) *Standards for assessment procedures.* Any procedures used pursuant to this part must comply with all of the following standards if they are to be in accordance with this part:

(1) The procedure must be capable of providing assessment information of use in determining the type and scale of restoration appropriate for a particular injury;

(2) The additional cost of a more complex procedure must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure; and

(3) The procedure must be reliable and valid for the particular incident.

(b) *Assessment procedures available.* (1) The range of assessment procedures available to trustees includes, but is not limited to:

(i) Procedures conducted in the field;

(ii) Procedures conducted in the laboratory;

(iii) Model-based procedures, including type A procedures identified in 43 CFR part 11, subpart D, and compensation formulas/schedules; and

(iv) Literature-based procedures.

(2) Trustees may use the assessment procedures in paragraph (b)(1) of this section alone, or in any combination, provided that the standards in paragraph (a) of this section are met, and there is no double recovery.

(c) *Selecting assessment procedures.* (1) When selecting assessment procedures, trustees must consider, at a minimum:

(i) The range of procedures available under paragraph (b) of this section;

(ii) The time and cost necessary to implement the procedures;

(iii) The potential nature, degree, and spatial and temporal extent of the injury;

(iv) The potential restoration actions for the injury; and

(v) The relevance and adequacy of information generated by the procedures to meet information requirements of restoration planning.

(2) If a range of assessment procedures providing the same type and quality of information is available, the most cost-effective procedure must be used.

Subpart C—Definitions

§ 990.30 Definitions.

For the purpose of this rule, the term:

Baseline means the condition of the natural resources and services that would have existed had the incident not occurred. Baseline data may be estimated using historical data, reference data, control data, or data on incremental changes (e.g., number of dead animals), alone or in combination, as appropriate.

Cost-effective means the least costly activity among two or more activities that provide the same or a comparable level of benefits, in the judgment of the trustees.

CEQ regulations means the Council on Environmental Quality regulations implementing NEPA, 40 CFR chapter V.

Damages means damages specified in section 1002(b) of OPA (33 U.S.C. 1002(b)), and includes the costs of assessing these damages, as defined in section 1001(5) of OPA (33 U.S.C. 2701(5)).

Discharge means any emission (other than natural seepage), Intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping, as defined in section 1001(7) of OPA (33 U.S.C. 2701(7)).

Exclusive Economic Zone means the zone established by Presidential Proclamation 5030 of March 10, 1983 (3 CFR, 1984 Comp., p. 22), including the ocean waters of the areas referred to as “eastern special areas” in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, as defined in section 1001(8) of OPA (33 U.S.C. 2701(8)).

Exposure means direct or indirect contact with the discharged oil.

Facility means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes, as defined in section 1001(9) of OPA (33 U.S.C. 2701(9)).

Fund means the *Oil Spill Liability Trust Fund*, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), as defined in section 1001(11) of OPA (33 U.S.C. 2701(11)).

Incident means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone, as defined in section 1001(14) of OPA (33 U.S.C. 2701(14)).

Indian tribe (or tribal) means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe, as defined in section 1001(15) of OPA (33 U.S.C. 2701(15)).

Injury means an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service. Injury incorporates the terms “destruction,” “loss,” and “loss of use” as provided in OPA.

Lead Administrative Trustee(s) (or LAT) means the trustee(s) who is selected by all participating trustees whose natural resources or services are injured by an incident, for the purpose of coordinating natural resource damage assessment activities. The LAT(s) should also facilitate communication between the OSC and other natural resource trustees regarding their activities during the response phase.

NCP means the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan) codified at 40 CFR part 300, which addresses the identification, investigation, study, and response to incidents, as defined in section 1001(19) of OPA (33 U.S.C. 2701(19)).

Natural resource damage assessment (or assessment) means the process of collecting and analyzing information to evaluate the nature and extent of injuries resulting from an incident, and determine the restoration actions needed to bring injured natural resources and services back to baseline and make the environment and public whole for interim losses.

Natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the Exclusive Economic Zone), any state or local government or Indian tribe, or any foreign government, as defined in section 1001(20) of OPA (33 U.S.C. 2701(20)).

Navigable waters means the waters of the United States, including the territorial sea, as defined in section 1001(21) of OPA (33 U.S.C. 2701(21)).

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321 et seq.

Oil means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil. However, the term does not include petroleum, including crude oil or any fraction thereof, that is specifically listed or designated as a hazardous substance under 42 U.S.C. 9601(14)(A) through (F), as defined in section 1001(23) of OPA (33 U.S.C. 2701(23)).

On-Scene Coordinator (or OSC) means the official designated by the U.S. Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct response actions under the NCP, or the government official designated by the lead response agency to coordinate and direct response actions under the NCP.

OPA means the Oil Pollution Act of 1990, 33 U.S.C. 2701 et seq.

Pathway means any link that connects the incident to a natural resource and/or service, and is associated with an actual discharge of oil.

Person means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body, as defined in section 1001(27) of OPA (33 U.S.C. 2701(27)).

Public vessel means a vessel owned or bareboat chartered and operated by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce, as defined in section 1001(29) of OPA (33 U.S.C. 2701(29)).

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 that they have determined that assessment actions undertaken were premised on the likelihood of injury and need for restoration. Reasonable assessment costs also include: administrative, legal, and enforcement costs necessary to carry out this part; monitoring and oversight costs; and costs associated with public participation.

Recovery means the return of injured natural resources and services to baseline.

Response (or *remove* or *removal*) means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches, as defined in section 1001(30) of OPA (33 U.S.C. 2701(30)).

Responsible party means:

(a) *Vessels*. In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(b) *Onshore facilities*. In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a federal agency, state, municipality, commission, or political subdivision of a state, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(c) *Offshore facilities*. In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable state law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a federal agency, state, municipality, commission, or political subdivision of a state, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(d) *Deepwater ports*. In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(e) *Pipelines*. In the case of a pipeline, any person owning or operating the pipeline.

(f) *Abandonment*. In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility, as defined in section 1001(32) of OPA (33 U.S.C. 2701(32)).

Restoration means any action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services. Restoration includes:

(a) *Primary restoration*, which is any action, including natural recovery, that returns injured natural resources and services to baseline; and

(b) *Compensatory restoration*, which is any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.

Services (or *natural resource services*) means the functions performed by a natural resource for the benefit of another natural resource and/or the public.

Trustees (or *natural resource trustees*) means those officials of the federal and state governments, of Indian tribes, and of foreign governments, designated under 33 U.S.C. 2706(b) of OPA.

United States and *State* means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States, as defined in section 1001(36) of OPA (33 U.S.C. 2701(36)).

Value means the maximum amount of goods, services, or money an individual is willing to give up to obtain a specific good or service, or the minimum amount of goods, services, or money an individual is willing to accept to forgo a specific good or service. The total value of a natural resource or service includes the value individuals derive from direct use of the natural resource, for example, swimming, boating, hunting, or birdwatching, as well as the value individuals derive from knowing a natural resource will be available for future generations.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel, as defined in section 1001(37) of OPA (33 U.S.C. 2701(37)).

Subpart D—Preassessment Phase

§ 990.40 Purpose.

The purpose of this subpart is to provide a process by which trustees determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so.

§ 990.41 Determination of jurisdiction.

(a) *Determination of jurisdiction.* Upon learning of an incident, trustees must determine whether there is jurisdiction to pursue restoration under OPA. To make this determination, trustees must decide if:

- (1) An incident has occurred, as defined in § 990.30 of this part;
- (2) The incident is not:
 - (i) Permitted under a permit issued under federal, state, or local law; or
 - (ii) From a public vessel; or
 - (iii) From an onshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. 1651, *et seq.*; and
- (3) Natural resources under the trusteeship of the trustee may have been, or may be, injured as a result of the incident.

(b) *Proceeding with preassessment.* If the conditions listed in paragraph (a) of this section are met, trustees may proceed under this part. If one of the conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. Trustees may recover all reasonable assessment costs incurred up to this point provided that conditions in paragraphs (a)(1) and (a)(2) of this section were met and actions were taken with the reasonable belief that natural resources or services under their trusteeship might have been injured as a result of the incident.

§ 990.42 Determination to conduct restoration planning.

(a) *Determination on restoration planning.* If trustees determine that there is jurisdiction to pursue restoration under OPA, trustees must determine whether:

- (1) Injuries have resulted, or are likely to result, from the incident;
- (2) Response actions have not adequately addressed, or are not expected to address, the injuries resulting from the incident; and
- (3) Feasible primary and/or compensatory restoration actions exist to address the potential injuries.

(b) *Proceeding with preassessment.* If the conditions listed in paragraph (a) of this section are met, trustees may proceed under § 990.44 of this part. If one of these conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. However, trustees may recover all reasonable assessment costs incurred up to this point.

§ 990.43 Data collection.

Trustees may conduct data collection and analyses that are reasonably related to Preassessment Phase activities. Data collection and analysis during the Preassessment Phase must be coordinated with response actions such that collection and analysis does not interfere with response actions. Trustees may collect and analyze the following types of data during the Preassessment Phase:

- (a) Data reasonably expected to be necessary to make a determination of jurisdiction under § 990.41 of this part, or a determination to conduct restoration planning under § 990.42 of this part;
- (b) Ephemeral data; and
- (c) Information needed to design or implement anticipated assessment procedures under subpart E of this part.

§ 990.44 Notice of Intent to Conduct Restoration Planning.

(a) *General.* If trustees determine that all the conditions under § 990.42(a) of this part are met and trustees decide to proceed with the natural resource damage assessment, they must prepare a Notice of Intent to Conduct Restoration Planning.

(b) *Contents of the notice.* The Notice of Intent to Conduct Restoration Planning must include a discussion of the trustees' analyses under §§ 990.41 and 990.42 of this part. Depending on information available at this point, the notice may include the trustees' proposed strategy to assess injury and determine the type and scale of restoration. The contents of a notice may vary, but will typically discuss:

- (1) The facts of the incident;
- (2) Trustee authority to proceed with the assessment;
- (3) Natural resources and services that are, or are likely to be, injured as a result of the incident;
- (4) Potential restoration actions relevant to the expected injuries; and
- (5) If determined at the time, potential assessment procedures to evaluate the injuries and define the appropriate type and scale of restoration for the injured natural resources and services.

(c) *Public availability of the notice.* Trustees must make a copy of the Notice of Intent to Conduct Restoration Planning publicly available. The means by which the notice is made publicly available and whether public comments are solicited on the notice will depend on the nature and extent of the incident and various information requirements, and is left to the discretion of the trustees.

(d) *Delivery of the notice to the responsible parties.* Trustees must send a copy of the notice to the responsible parties, to the extent known, in such a way as will establish the date of receipt, and invite responsible parties' participation in the conduct of restoration planning. Consistent with § 990.14(c) of this part, the determination of the timing, nature, and extent of responsible party participation will be determined by the trustees on an incident-specific basis.

§ 990.45 Administrative record.

(a) If trustees decide to proceed with restoration planning, they must open a publicly available administrative record to document the basis for their decisions pertaining to restoration. The administrative record should be opened concurrently with the publication of the Notice of Intent to Conduct Restoration Planning. Depending on the nature and extent of the incident and assessment, the administrative record should include documents relied upon during the assessment, such as:

- (1) Any notice, draft and final restoration plans, and public comments;
 - (2) Any relevant data, investigation reports, scientific studies, work plans, quality assurance plans, and literature; and
 - (3) Any agreements, not otherwise privileged, among the participating trustees or with the responsible parties.
- (b) Federal trustees should maintain the administrative record in a manner consistent with the Administrative Procedure Act, 5 U.S.C. 551-59, 701-06.

Subpart E—Restoration Planning Phase

§ 990.50 Purpose.

The purpose of this subpart is to provide a process by which trustees evaluate and quantify potential injuries (injury assessment), and use that information to determine the need for and scale of restoration actions (restoration selection).

§ 990.51 Injury assessment—injury determination.

(a) *General.* After issuing a Notice of Intent to Conduct Restoration Planning under § 990.44 of this part, trustees must determine if injuries to natural resources and/or services have resulted from the incident.

(b) *Determining injury.* To make the determination of injury, trustees must evaluate if:

(1) The definition of injury has been met, as defined in § 990.30 of this part; and
(2)(i) An injured natural resource has been exposed to the discharged oil, and a pathway can be established from the discharge to the exposed natural resource; or

(ii) An injury to a natural resource or impairment of a natural resource service has occurred as a result of response actions or a substantial threat of a discharge of oil.

(c) *Identifying injury.* Trustees must determine whether an injury has occurred and, if so, identify the nature of the injury. Potential categories of injury include, but are not limited to, adverse changes in: survival, growth, and reproduction; health, physiology and biological condition; behavior; community composition; ecological processes and functions; physical and chemical habitat quality or structure; and public services.

(d) *Establishing exposure and pathway.* Except for injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil, trustees must establish whether natural resources were exposed, either directly or indirectly, to the discharged oil from the incident, and estimate the amount or concentration and spatial and temporal extent of the exposure. Trustees must also determine whether there is a pathway linking the incident to the injuries. Pathways may include, but are not limited to, the sequence of events by which the discharged oil was transported from the incident and either came into direct physical contact with a natural resource, or caused an indirect injury.

(e) *Injuries resulting from response actions or incidents involving a substantial threat of a discharge.* For injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil, trustees must determine whether an injury or an impairment of a natural resource service has occurred as a result of the incident.

(f) *Selection of injuries to include in the assessment.* When selecting potential injuries to assess, trustees should consider factors such as:

- (1) The natural resources and services of concern;
- (2) The procedures available to evaluate and quantify injury and associated time and cost requirements;
- (3) The evidence indicating exposure;
- (4) The pathway from the incident to the natural resource and/or service of concern;
- (5) The adverse change or impairment that constitutes injury;
- (6) The evidence indicating injury;
- (7) The mechanism by which injury occurred;
- (8) The potential degree, and spatial and temporal extent of the injury;
- (9) The potential natural recovery period; and
- (10) The kinds of primary and/or compensatory restoration actions that are feasible.

§ 990.52 Injury assessment—quantification.

(a) *General.* In addition to determining whether injuries have resulted from the incident, trustees must quantify the degree, and spatial and temporal extent of such injuries relative to baseline.

(b) *Quantification approaches.* Trustees may quantify injuries in terms of:

- (1) The degree, and spatial and temporal extent of the injury to a natural resource;
- (2) The degree, and spatial and temporal extent of injury to a natural resource, with subsequent translation of that adverse change to a reduction in services provided by the natural resource; or
- (3) The amount of services lost as a result of the incident.

(c) *Natural recovery.* To quantify injury, trustees must estimate, quantitatively or qualitatively, the time for natural recovery without restoration, but including any response actions. The analysis of natural recovery may consider such factors as:

- (1) The nature, degree, and spatial and temporal extent of injury;
- (2) The sensitivity and vulnerability of the injured natural resource and/or service;
- (3) The reproductive and recruitment potential;
- (4) The resistance and resilience (stability) of the affected environment;
- (5) The natural variability; and
- (6) The physical/chemical processes of the affected environment.

§ 990.53 Restoration selection—developing restoration alternatives.

(a) *General.* (1) If the information on injury determination and quantification under §§ 990.51 and 990.52 of this part and its relevance to restoration justify restoration, trustees may proceed with the Restoration Planning Phase. Otherwise, trustees may not take additional action under this part. However, trustees may recover all reasonable assessment costs incurred up to this point.

(2) Trustees must consider a reasonable range of restoration alternatives before selecting their preferred alternative(s). Each restoration alternative is comprised of primary and/or compensatory restoration components that address one or more specific injury(ies) associated with the incident. Each alternative must be designed so that, as a package of one or more actions, the alternative would make the environment and public whole. Only those alternatives considered technically feasible and in accordance with applicable laws, regulations, or permits may be considered further under this part.

(b) *Primary restoration.* (1) *General.* For each alternative, trustees must consider primary restoration actions, including a natural recovery alternative.

(2) *Natural recovery.* Trustees must consider a natural recovery alternative in which no human intervention would be taken to directly restore injured natural resources and services to baseline.

(3) *Active primary restoration actions.* Trustees must consider an alternative comprised of actions to directly restore the natural resources and services to baseline on an accelerated time frame. When identifying such active primary restoration actions, trustees may consider actions that:

(i) Remove conditions that would prevent or limit the effectiveness of any restoration action (e.g., residual sources of contamination);

(ii) May be necessary to return the physical, chemical, and/or biological conditions necessary to allow recovery or restoration of the injured natural resources (e.g., replacing substrate or vegetation, or modifying hydrologic conditions); or

(iii) Return key natural resources and services, and would be an effective approach to achieving or accelerating a return to baseline (e.g., replacing essential species, habitats, or public services that would facilitate the replacement of other, dependent natural resource or service components).

(c) *Compensatory restoration.* (1) *General.* For each alternative, trustees must also consider compensatory restoration actions to compensate for the interim loss of natural resources and services pending recovery.

(2) *Compensatory restoration actions.* To the extent practicable, when evaluating compensatory restoration actions, trustees must consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those injured. If, in the judgment of the trustees, compensatory actions of the same type and quality and comparable value cannot provide a reasonable range of alternatives, trustees should identify actions that provide natural resources and services of comparable type and quality as those provided by the injured natural resources. Where the injured and replacement natural resources and services are not of comparable value, the scaling process will involve valuation of lost and replacement services.

(d) *Scaling restoration actions.* (1) *General.* After trustees have identified the types of restoration actions that will be considered, they must determine the scale of those actions that will make the environment and public whole. For primary restoration actions, scaling generally applies to actions involving replacement and/or acquisition of equivalent of natural resources and/or services.

(2) *Resource-to-resource and service-to-service scaling approaches.* When determining the scale of restoration actions that provide natural resources and/or services of the same type and quality, and of comparable value as those lost, trustees must consider the use of a resource-to-resource or service-to-service scaling approach. Under this approach, trustees determine the scale of restoration actions that will provide natural resources and/or services equal in quantity to those lost.

(3) *Valuation scaling approach.* (i) Where trustees have determined that neither resource-to-resource nor service-to-service scaling is appropriate, trustees may use the valuation scaling approach. Under the valuation scaling approach, trustees determine the amount of natural resources and/or services that must be provided to produce the same value lost to the public. Trustees must explicitly measure the value of injured natural resources and/or services, and then determine the scale of the restoration action necessary to produce natural resources and/or services of equivalent value to the public.

(ii) If, in the judgment of the trustees, valuation of the lost services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time frame or at a reasonable cost, as determined by § 990.27(a)(2) of this part, trustees may estimate the dollar value of the lost services and select the scale of the restoration action that has a cost equivalent to the lost value. The responsible parties may request that trustees value the natural resources and services provided by the restoration action following the process described in § 990.14(c) of this part.

(4) *Discounting and uncertainty.* When scaling a restoration action, trustees must evaluate the uncertainties associated with the projected consequences of the restoration action, and must discount all service quantities and/or values to the date the demand is presented to the responsible parties. Where feasible, trustees should use risk-adjusted measures of losses due to injury and of gains from the restoration action, in conjunction with a riskless discount rate representing the consumer rate of time preference. If the streams of losses and gains cannot be adequately adjusted for risks, then trustees may use a discount rate that incorporates a suitable risk adjustment to the riskless rate.

§ 990.54 Restoration selection—evaluation of alternatives.

(a) *Evaluation standards.* Once trustees have developed a reasonable range of restoration alternatives under § 990.53 of this part, they must evaluate the proposed alternatives based on, at a minimum:

- (1) The cost to carry out the alternative;
- (2) The 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;
- (3) The likelihood of success of each alternative;
- (4) The 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;

(5) The extent to which each alternative benefits more than one natural resource and/or service; and

(6) The effect of each alternative on public health and safety.

(b) *Preferred restoration alternatives.* Based on an evaluation of the factors under paragraph (a) of this section, trustees must select a preferred restoration alternative(s). If the trustees conclude that two or more alternatives are equally preferable based on these factors, the trustees must select the most cost-effective alternative.

(c) *Pilot projects.* Where additional information is needed to identify and evaluate the feasibility and likelihood of success of restoration alternatives, trustees may implement restoration pilot projects. Pilot projects should only be undertaken when, in the judgment of the trustees, these projects are likely to provide the information, described in paragraph (a) of this section, at a reasonable cost and in a reasonable time frame.

§ 990.55 Restoration selection—developing restoration plans.

(a) *General.* OPA requires that damages be based upon a plan developed with opportunity for public review and comment. To meet this requirement, trustees must, at a minimum, develop a Draft and Final Restoration Plan, with an opportunity for public review of and comment on the draft plan.

(b) *Draft Restoration Plan.* (1) The Draft Restoration Plan should include:

(i) A summary of injury assessment procedures used;

(ii) A description of the nature, degree, and spatial and temporal extent of injuries resulting from the incident;

(iii) The goals and objectives of restoration;

(iv) The range of restoration alternatives considered, and a discussion of how such alternatives were developed under Sec. 990.53 of this part, and evaluated under § 990.54 of this part;

(v) Identification of the trustees' tentative preferred alternative(s);

(vi) A description of past and proposed involvement of the responsible parties in the assessment; and

(vii) A description of monitoring for documenting restoration effectiveness, including performance criteria that will be used to determine the success of restoration or need for interim corrective action.

(2) When developing the Draft Restoration Plan, trustees must establish restoration objectives that are specific to the injuries. These objectives should clearly specify the desired outcome, and the performance criteria by which successful restoration will be judged. Performance criteria may include structural, functional, temporal, and/or other demonstrable factors. Trustees must, at a minimum, determine what criteria will:

(i) Constitute success, such that responsible parties are relieved of responsibility for further restoration actions; or

(ii) Necessitate corrective actions in order to comply with the terms of a restoration plan or settlement agreement.

(3) The monitoring component to the Draft Restoration Plan should address such factors as duration and frequency of monitoring needed to gauge progress and success, level of sampling needed to detect success or the need for corrective action, and whether monitoring of a reference or control site is needed to determine progress and success. Reasonable monitoring and oversight costs cover those activities necessary to gauge the progress, performance, and success of the restoration actions developed under the plan.

(c) *Public review and comment.* The nature of public review and comment on the Draft and Final Restoration Plans will depend on the nature of the incident and any applicable federal trustee NEPA requirements, as described in §§ 990.14(d) and 990.23 of this part.

(d) *Final Restoration Plan.* Trustees must develop a Final Restoration Plan that includes the information specified in paragraph (a) of this section, responses to public comments, if applicable, and an indication of any changes made to the Draft Restoration Plan.

Sec. 990.56 Restoration selection—use of a Regional Restoration Plan or existing restoration project.

(a) *General.* Trustees may consider using a Regional Restoration Plan or existing restoration project where such a plan or project is determined to be the preferred alternative among a range of feasible restoration alternatives for an incident, as determined under § 990.54 of this part. Such plans or projects must be capable of fulfilling OPA's intent for the trustees to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and services and compensate for interim losses.

(b) *Existing plans or projects.* (1) *Considerations.* Trustees may select a component of a Regional Restoration Plan or an existing restoration project as the preferred alternative, provided that the plan or project:

(i) Was developed with public review and comment or is subject to public review and comment under this part;

(ii) Will adequately compensate the environment and public for injuries resulting from the incident;

(iii) Addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and

(iv) Allows for reasonable scaling relative to the incident.

(2) *Demand.* (i) If the conditions of paragraph (b)(1) of this section are met, the trustees must invite the responsible parties to implement that component of the Regional Restoration Plan or existing restoration project, or advance to the trustees the trustees' reasonable estimate of the cost of implementing that component of the Regional Restoration Plan or existing restoration project.

(ii) If the conditions of paragraph (b)(1) of this section are met, but the trustees determine that the scale of the existing plan or project is greater than the scale of compensation required by the incident, trustees may only request funding from the responsible parties equivalent to the scale of the restoration determined to be appropriate for the incident of concern. Trustees may pool such partial recoveries until adequate funding is available to successfully implement the existing plan or project.

(3) *Notice of Intent To Use a Regional Restoration Plan or Existing Restoration Project* If trustees intend to use an appropriate component of a Regional Restoration Plan or existing restoration project, they must prepare a Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project. Trustees must make a copy of the notice publicly available. The notice must include, at a minimum:

- (i) A description of the nature, degree, and spatial and temporal extent of injuries; and
- (ii) A description of the relevant component of the Regional Restoration Plan or existing restoration project; and
- (iii) An explanation of how the conditions set forth in paragraph (b)(1) of this section are met.

Subpart F—Restoration Implementation Phase

Sec. 990.60 Purpose.

The purpose of this subpart is to provide a process for implementing restoration.

§ 990.61 Administrative record.

(a) *Closing the administrative record for restoration planning.* Within a reasonable time after the trustees have completed restoration planning, as provided in §§ 990.55 and 990.56 of this part, they must close the administrative record. Trustees may not add documents to the administrative record once it is closed, except where such documents:

- (1) Are offered by interested parties that did not receive actual or constructive notice of the Draft Restoration Plan and the opportunity to comment on the plan;
- (2) Do not duplicate information already contained in the administrative record; and
- (3) Raise significant issues regarding the Final Restoration Plan.

(b) *Opening an administrative record for restoration implementation.* Trustees may open an administrative record for implementation of restoration, as provided in Sec. 990.45 of this part. The costs associated with the administrative record are part of the costs of restoration. Ordinarily, the administrative record for implementation of restoration should document, at a minimum, all Restoration Implementation Phase decisions, actions, and expenditures, including any modifications made to the Final Restoration Plan.

§ 990.62 Presenting a demand.

(a) *General.* After closing the administrative record for restoration planning, trustees must present a written demand to the responsible parties. Delivery of the demand should be made in a manner that establishes the date of receipt by the responsible parties.

(b) *When a Final Restoration Plan has been developed.* Except as provided in paragraph (c) of this section and in Sec. 990.14(c) of this part, the demand must invite the responsible parties to either:

- (1) Implement the Final Restoration Plan subject to trustee oversight and reimburse the trustees for their assessment and oversight costs; or
- (2) Advance to the trustees a specified sum representing trustee assessment costs and all trustee costs associated with implementing the Final Restoration Plan, discounted as provided in § 990.63(a) of this part.

(c) *Regional Restoration Plan or existing restoration project.* When the trustees use a Regional Restoration Plan or an existing restoration project under Sec. 990.56 of this part, the demand will invite the responsible parties to implement a component of a Regional Restoration Plan or existing restoration project, or advance the trustees' estimate of damages based on the scale of the restoration determined to be appropriate for the incident of concern, which may be the entire project or a portion thereof.

(d) *Response to demand.* The responsible parties must respond within ninety (90) calendar days in writing by paying or providing binding assurance they will reimburse trustees' assessment costs and implement the plan or pay assessment costs and the trustees' estimate of the costs of implementation.

(e) *Additional contents of demand.* The demand must also include:

- (1) Identification of the incident from which the claim arises;
- (2) Identification of the trustee(s) asserting the claim and a statement of the statutory basis for trusteeship;
- (3) A brief description of the injuries for which the claim is being brought;
- (4) An index to the administrative record;
- (5) The Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project; and
- (6) A request for reimbursement of:
 - (i) Reasonable assessment costs, as defined in § 990.30 of this part and discounted as provided in Sec. 990.63(b) of this part;
 - (ii) The cost, if any, of conducting emergency restoration under § 990.26 of this part, discounted as provided in Sec. 990.63(b) of this part; and
 - (iii) Interest on the amounts recoverable, as provided in section 1005 of OPA (33 U.S.C. 2705), which allows for prejudgment and post-judgment interest to be paid at a commercial paper rate, starting from thirty (30) calendar days from the date a demand is presented until the date the claim is paid.

§ 990.63 Discounting and compounding.

(a) *Estimated future restoration costs.* When determining estimated future costs of implementing a Final Restoration Plan, trustees must discount such future costs back to the date the demand is presented. Trustees may use a discount rate that represents the yield on recoveries available to trustees. The price indices used to project future inflation should reflect the major components of the restoration costs.

(b) *Past assessment and emergency restoration costs.* When calculating the present value of assessment and emergency restoration costs already incurred, trustees must compound the costs forward to the date the demand is presented. To perform the compounding, trustees may use the actual U.S. Treasury borrowing rate on marketable securities of comparable maturity to the period of analysis. For costs incurred by state or tribal trustees, trustees may compound using parallel state or tribal borrowing rates.

(c) Trustees are referred to Appendices B and C of OMB Circular A-94 for information about U.S. Treasury rates of various maturities and guidance in calculation procedures. Copies of Appendix C, which is regularly updated, and of the Circular are available from the OMB Publications Office (202-395-7332).

§ 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 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)).

(b) Judicial actions and claims must be filed within three (3) years after the Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project is made publicly available, in accordance with 33 U.S.C. 2717(f)(1)(B) and 2712(h)(2).

§ 990.65 Opening an account for recovered damages.

(a) *General.* Sums recovered by trustees in satisfaction of a natural resource damage claim must be placed in a revolving trust account. Sums recovered for past assessment costs and emergency restoration costs may be used to reimburse the trustees. All other sums must be used to implement the Final Restoration Plan or all or an appropriate component of a Regional Restoration Plan or an existing restoration project.

(b) *Joint trustee recoveries.* (1) *General.* Trustees may establish a joint account for damages recovered pursuant to joint assessment activities, such as an account under the registry of the applicable federal court.

(2) *Management.* Trustees may develop enforceable agreements to govern management of joint accounts, including agreed-upon criteria and procedures, and personnel for authorizing expenditures out of such joint accounts.

(c) *Interest-bearing accounts.* Trustees may place recoveries in interest-bearing revolving trust accounts, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)). Interest earned on such accounts may only be used for restoration.

(d) *Escrow accounts.* Trustees may establish escrow accounts or other investment accounts.

(e) *Records.* Trustees must maintain appropriate accounting and reporting procedures to document expenditures from accounts established under this section.

(f) *Oil Spill Liability Trust Fund.* Any sums remaining in an account established under this section that are not used either to reimburse trustees for past assessment and emergency restoration costs or to implement restoration must be deposited in the Oil Spill Liability Trust Fund, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)).

§ 990.66 Additional considerations.

(a) Upon settlement of a claim, trustees should consider the following actions to facilitate implementation of restoration:

- (1) Establish a trustee committee and/or memorandum of understanding or other agreement to coordinate among affected trustees, as provided in § 990.14(a)(3) of this part;
 - (2) Develop more detailed workplans to implement restoration;
 - (3) Monitor and oversee restoration; and
 - (4) Evaluate restoration success and the need for corrective action.
- (b) The reasonable costs of such actions are included as restoration costs.

Table of Contents**Part 1500-Purpose, Policy, and Mandate..... B-1**

Sec.

| | |
|--------------------------------|-----|
| 1500.1 Purpose | B-1 |
| 1500.2 Policy | B-1 |
| 1500.3 Mandate | B-2 |
| 1500.4 Reducing paperwork..... | B-2 |
| 1500.5 Reducing delay. | B-3 |
| 1500.6 Agency authority. | B-4 |

Part 1501-NEPA and Agency Planning..... B-5

Sec.

| | |
|--|------|
| 1501.1 Purpose | B-5 |
| 1501.2 Apply NEPA early in the process | B-5 |
| 1501.3 When to prepare an environmental assessment | B-6 |
| 1501.4 Whether to prepare an environmental impact statement..... | B-6 |
| 1501.5 Lead agencies. | B-7 |
| 1501.6 Cooperating agencies..... | B-8 |
| 1501.7 Scoping | B-9 |
| 1501.8 Time limits..... | B-10 |

Table of Contents (continued)

Part 1502-Environmental Impact Statement B-11

Sec.

| | |
|---|------|
| 1502.1 Purpose | B-11 |
| 1502.2 Implementation..... | B-11 |
| 1502.3 Statutory requirements for statements..... | B-12 |
| 1502.4 Major Federal actions requiring the preparation of environmental impact statements..... | B-12 |
| 1502.5 Timing..... | B-13 |
| 1502.6 Interdisciplinary preparation..... | B-13 |
| 1502.7 Page limits..... | B-13 |
| 1502.8 Writing..... | B-13 |
| 1502.9 Draft, final, and supplemental statements | B-14 |
| 1502.10 Recommended format..... | B-14 |
| 1502.11 Cover sheet | B-15 |
| 1502.12 Summary | B-15 |
| 1502.13 Purpose and need..... | B-15 |
| 1502.14 Alternatives including the proposed action | B-16 |
| 1502.15 Affected environment..... | B-16 |
| 1502.16 Environmental consequences | B-17 |
| 1502.17 List of preparers | B-17 |
| 1502.18 Appendix..... | B-18 |
| 1502.19 Circulation of the environmental impact statement | B-18 |
| 1502.20 Tiering..... | B-18 |
| 1502.21 Incorporation by reference | B-19 |
| 1502.22 Incomplete or unavailable information..... | B-19 |
| 1502.23 Cost-benefit analysis | B-19 |
| 1502.24 Methodology and scientific accuracy..... | B-20 |
| 1502.25 Environmental review and consultation requirements. | B-20 |

Part 1503-Commenting..... B-21

Sec.

| | |
|-------------------------------------|------|
| 1503.1 Inviting comments | B-21 |
| 1503.2 Duty to comment..... | B-21 |
| 1503.3 Specificity of comments..... | B-21 |
| 1503.4 Response to comments | B-22 |

Table of Contents (continued)

Part 1504-Predecision Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory B-23

Sec.

| | |
|---|------|
| 1504.1 Purpose | B-23 |
| 1504.2 Criteria for referral..... | B-23 |
| 1504.3 Procedure for referrals and response | B-23 |

Part 1505-NEPA and Agency Decisionmaking B-26

Sec.

| | |
|--|------|
| 1505.1 Agency decisionmaking procedures | B-26 |
| 1505.2 Record of decision in cases requiring environmental impact statements | B-26 |
| 1505.3 Implementing the decision..... | B-27 |

Part 1506-Other Requirements of NEPA..... B-28

Sec.

| | |
|---|------|
| 1506.1 Limitations on actions during NEPA process. | B-28 |
| 1506.2 Elimination of duplication with State and local procedures. | B-28 |
| 1506.3 Adoption | B-29 |
| 1506.4 Combining documents | B-29 |
| 1506.5 Agency responsibility..... | B-30 |
| 1506.6 Public involvement..... | B-30 |
| 1506.7 Further guidance..... | B-32 |
| 1506.8 Proposals for legislation..... | B-32 |
| 1506.9 Filing requirements | B-33 |
| 1506.10 Timing of agency action..... | B-33 |
| 1506.11 Emergencies | B-34 |
| 1506.12 Effective date..... | B-34 |

Part 1507-Agency Compliance B-35

Sec.

| | |
|--|------|
| 1507.1 Compliance..... | B-35 |
| 1507.2 Agency capability to comply | B-35 |
| 1507.3 Agency procedures | B-36 |

Table of Contents (continued)

Part 1508-Terminology and Index..... B-37

| | |
|--|------|
| Sec. | |
| 1508.1 Terminology..... | B-37 |
| 1508.2 Act..... | B-37 |
| 1508.3 Affecting | B-37 |
| 1508.4 Categorical exclusion..... | B-37 |
| 1508.5 Cooperating agency..... | B-37 |
| 1508.6 Council..... | B-37 |
| 1508.7 Cumulative impact..... | B-38 |
| 1508.8 Effects..... | B-38 |
| 1508.9 Environmental assessment..... | B-38 |
| 1508.10 Environmental document | B-38 |
| 1508.11 Environmental impact statement | B-39 |
| 1508.12 Federal agency..... | B-39 |
| 1508.13 Finding of no significant impact | B-39 |
| 1508.14 Human environment..... | B-39 |
| 1508.15 Jurisdiction by law. | B-39 |
| 1508.16 Lead agency | B-39 |
| 1508.17 Legislation..... | B-40 |
| 1508.18 Major Federal action..... | B-40 |
| 1508.19 Matter | B-41 |
| 1508.20 Mitigation..... | B-41 |
| 1508.21 NEPA process | B-41 |
| 1508.22 Notice of intent..... | B-41 |
| 1508.23 Proposal | B-42 |
| 1508.24 Referring agency..... | B-42 |
| 1508.25 Scope | B-42 |
| 1508.26 Special expertise | B-43 |
| 1508.27 Significantly..... | B-43 |
| 1508.28 Tiering..... | B-44 |

Part 1500-Purpose, Policy, and Mandate

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork-even excellent paperwork-but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point., and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12).and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (I 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 1502 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

Part 1501-NEPA and Agency Planning

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

- (1) Normally requires an environmental impact statement, or
- (2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

- (1) Proposes or is involved in the same action; or
- (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

- (1) Magnitude of agency's involvement.
- (2) Project approval/disapproval authority.
- (3) Expertise concerning the nation's environmental effects.
- (4) Duration of agency's involvement.
- (5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

- (1) A precise description of the nature and extent of the proposed action.
- (2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: Provided, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

Part 1502-Environmental Impact Statement

1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing program and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan action and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

- (a) Environmental impact statements shall be analytic rather than encyclopedic.
- (b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.
- (c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.
- (d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(l) of the Act and other environmental laws and policies.
- (e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.
- (f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).
- (g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposals shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

- (f) Affected environment.
- (g) Environmental consequences (especially sections 102(2)(C) (i), (ii), (iv), and (v) of the Act).
- (h) List of preparers.
- (i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.
- (j) Index.
- (k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

- (a) A list of the responsible agencies including the lead agency and any cooperating agencies.
- (b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.
- (c) The name, address, and telephone number of the person at the agency who can supply further information.
- (d) A designation of the statement as a draft, final, or draft or final supplement.
- (e) A one paragraph abstract of the statement.
- (f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency,

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C) (i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

- (a) Direct effects and their significance (§ 1508.8).
- (b) Indirect effects and their significance (§ 1508.8).
- (c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See 1506.2(d).)
- (d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.
- (e) Energy requirements and conservation potential of various alternatives and mitigation measures.
- (f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.
- (g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.
- (h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

- (a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).
- (b) Normally consist of material which substantiates any analysis fundamental to the impact statement.
- (c) Normally be analytic and relevant to the decision to be made.
- (d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

- (a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.
- (b) The applicant, if any.
- (c) Any person, organization, or agency requesting the entire environmental impact statement.
- (d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requester only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

Part 1503-Commenting

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

- (1) Modify alternatives including the proposed action.
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
- (3) Supplement, improve, or modify its analyses.
- (4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (i 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

Part 1504-Predecision Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

- (a) Possible violation of national environmental standards or policies.
- (b) Severity.
- (c) Geographical scope.
- (d) Duration.
- (e) Importance as precedents.
- (f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f) (2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

Part 1505-NEPA and Agency Decisionmaking

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(l).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all-such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

- (a) Include appropriate conditions in grants permits or other approvals.
- (b) Condition funding of actions on mitigation.
- (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
- (d) Upon request, make available to the public the results of relevant monitoring.

Part 1506-Other Requirements of NEPA

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement, and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support all application for Federal, State or local permits. or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).
- (4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under Part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the Intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) Environmental impact statements. Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to Prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to Potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing

(2) A request of or a hearing by another agency with Jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process,

(2) The legislative statement shall be prepared in the same manner as a draft statement. but shall be considered the "detailed statement" required by statute; Provided, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10,

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

- (iv) The agency decides to prepare draft and final statements.
- (c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW, Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in Paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30 day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rule-making under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under sec. 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need redone by reason of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

Part 1507-Agency Compliance

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

Part 1508-Terminology and Index

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

- (a) Means a concise public document for which a Federal agency is responsible that serves to:
 - (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

- (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

- (3) Facilitate preparation of a statement when one is necessary.

- (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment),

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with the environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

- (a) Actions (other than unconnected single actions) which may be:
 - (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they,
 - (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
 - (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement,
 - (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.
- (b) Alternatives, which include:
 - (1) No action alternative.
 - (2) Other reasonable courses of actions.
 - (3) Mitigation measures (not in the proposed action).
- (c) Impacts, which may be: (1) Direct; (2) indirect, (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interest, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

In support of the NRDA regulations under OPA and for the purpose of facilitating the NRDA process under OPA, NOAA has produced a number of related guidance documents, in addition to this document on restoration plans. All of these documents are currently available in final form.

NOAA. 1996. Preassessment Phase, Guidance Document for Natural Resource Damage Assessment under the Oil Pollution Act of 1990. National Oceanic and Atmospheric Administration, Damage Assessment and Restoration Program, Silver Spring, MD.

NOAA. 1996. Injury Assessment, Guidance Document for Natural Resource Damage Assessment under the Oil Pollution Act of 1990. National Oceanic and Atmospheric Administration, Damage Assessment and Restoration Program, Silver Spring, MD.

NOAA. 1996. Specifications for Use of the NRDAM/CME Version 2.4 to Generate Compensation Formulas, Guidance Document for Natural Resource Damage Assessment under the Oil Pollution Act of 1990. National Oceanic and Atmospheric Administration, Damage Assessment and Restoration Program, Silver Spring, MD.

NOAA. 1996. Primary Restoration, Guidance Document for Natural Resource Damage Assessment under the Oil Pollution Act of 1990. National Oceanic and Atmospheric Administration, Damage Assessment and Restoration Program, Silver Spring, MD.

Table of Contents

| | |
|---|-----|
| D.1 General..... | D-1 |
| D.2 Trustee Agency’s Restoration Decisionmaking Process | D-1 |
| D.3 Identifying the Decisionmakers | D-2 |
| D.4 Keeping the Decisionmakers Informed | D-2 |
| D.5 Decision Example | D-3 |
| D.6 Decision Factors | D-4 |

D.1 General

Most trustee agencies have internal decisionmaking processes in place. Trustees should determine whether any modifications or existing processes is needed to facilitate restoration-related decisions. If necessary, trustees may need to establish a distinct decisionmaking process for restoration actions. This appendix is intended to provide guidance to trustees in reviewing or developing a restoration decisionmaking process. This guidance is to supplement, not replace, existing processes.

D.2 Trustee Agency's Restoration Decisionmaking Process

Trustees should identify the decisionmaking process in their agency to ensure that it:

- Identifies the principle decisionmakers in the agency for all restoration-related activities;
- Identifies the decisionmakers for a particular type of incident and restoration project;
- Establishes the responsibilities of the decisionmakers in directing the incident and restoration project;
- Defines how best to interact with the various decisionmakers;
- Defines how to interact with other trustees agencies and their decisionmakers;
- Defines how to interact with the public;
- Defines what specific information the various decisionmakers need to know.
- Defines what specific information the decisionmakers need to provide the trustee team members before restoration action begins; and
- Identifies designees to act on behalf of the decisionmakers at certain levels.

D.3 Identifying the Decisionmakers

Trustees should identify the decisionmakers at the outset of restoration planning. The trustees should determine who, within their agency, has the final signing authority to, for example:

- Approve or disapprove the proposed restoration actions;
- Make a decision on a categorical exclusion or other exemption; and
- Sign the FONSI or ROD.

Trustees should also identify all other parties who might have authority delegated to them to make intermediate decisions, such as deciding on:

- Technical and scientific issues;
- Type and level of documentation;
- Type and amount of public involvement;
- Composition of the restoration planning team; and
- Funding.

D.4 Keeping the Decisionmakers Informed

Throughout the restoration planning process, the trustee's agency decisionmakers must be kept informed. This may be best achieved through face-to-face meetings, telephone calls, facsimiles, and/or memoranda. If the decisionmaker is kept informed, he can tell along the way whether the analysis and documentation for restoration planning will provide the type and quality of information for an informed and objective decision.

D.5 Decision Example

The actual decisionmaking for restoration planning may vary from agency to agency and from project to project, but generally proceeds as follows:

- The trustees complete the analysis with appropriate public involvement, enter this analysis in the Administrative Record, and provide the restoration plan documents and other supporting materials to the decisionmakers;
- The trustees brief the decisionmakers and recommend a course of action, usually in the form of a draft decision document:
 - ◆ FONSI for an EA; explaining why the restoration action(s) is not significant enough to pursue an EIS and why the restoration alternative(s) are being proposed; or
 - ◆ ROD for an EIS; explaining why the restoration action(s) is significant and why the restoration alternative(s) is being proposed;
- The decisionmakers decide on a course of action, including the possibility of revising the draft decision document;
- The lead trustee team member or public affairs officer notifies the public of the final decision; and
- The trustees implement the selected restoration alternative(s), assuming the decision was to implement the project.

The NEPA regulations do not identify a formal document for recording the rationale for the selected restoration alternative(s) developed through an EA. However, most agencies document the rationale in a brief decision memorandum, sometimes called a Decision Notice or Decision Record.

D.6 Decision Factors

There are a host of decisionmaking factors that may play into restoration planning, including:

- Technical;
- Economic;
- Environmental;
- Project objectives and performance criteria;
- Scheduling constraints and opportunities;
- Budgeting constraints and opportunities;
- Administrative policy and traditions;
- Needs of the affected or interested public; and
- Political factors.

These items are all legitimate factors that should be appropriately considered in the decisionmaking process.

Table of Contents

| | |
|---|-----|
| E.1 Example Notice of Intent (NOI)..... | E-1 |
| E.2 Example Notice of Availability (NOA)..... | E-5 |

E.1 Example Notice of Intent (NOI)

National Oceanic and Atmospheric Administration (U.S. Department of Commerce) and U.S. Fish and Wildlife Service (U.S. Department of the Interior)

INTENT TO PREPARE DRAFT RESTORATION PLAN AND PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, COMMENCEMENT BAY RESTORATION PLAN, PIERCE COUNTY, WASHINGTON

LEAD AGENCIES: National Oceanic and Atmospheric Administration and U.S. Fish and Wildlife Service

ACTION: Notice of Intent

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (NEPA), as implemented by the Council of Environmental Quality regulations (40 CFR Parts 1500-1508), the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service announce their intent to prepare a draft Restoration Plan (RP) and Programmatic Environmental Impact Statement (EIS) for the Commencement Bay Natural Resource Damage Assessment (CB/NRDA). The National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service will be joint lead agencies for this RP/EIS.

DATES: The lead and cooperating agencies and tribes invite and encourage agencies and the public to provide written comments on the proposed RP/EIS throughout the scoping process to ensure that all relevant environmental issues are considered. Persons or organizations wishing to submit scoping comments should do so no later than October 14, 1994.

ADDRESSES: Written comments on the scope of the RP/EIS, questions about the RP/EIS, requests for inclusion on the RP/EIS mailing list and requests for copies of any documents associated with the draft RP/EIS should be directed to: Commencement Bay EIS, CENPS-EN-PL-ER, U.S. Army Corps of Engineers, P.O. Box 3755, Seattle, Washington 98124-2255, ATTN: Patrick Cagney, project manager.

FOR FURTHER INFORMATION CONTACT: Patrick Cagney, project manager, Seattle District, U.S. Army Corps of Engineers, telephone (206) 764-3642; telefax (206) 764-4470.

SUPPLEMENTARY INFORMATION:

Background

The CB/NRDA is being conducted by federal and state agencies and tribal governments identified as Natural Resource Trustees for the Commencement Bay environment pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq. (CERCLA), the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (OPA), and other applicable law. The Trustees will be developing a RP/EIS to help guide restoration actions associated with the CB/NRDA. The RP/EIS will develop a set of preferred restoration alternatives and a restoration management plan and will evaluate the environmental impacts of the proposed plan. The Programmatic EIS will also incorporate and build upon existing information developed in the Commencement Bay Cumulative Impact Study (CB/CIS) (published 6/93) and information and policies developed through the CB/NRDA restoration planning process. While this RP/EIS will be a document prepared under NEPA guidelines, it is anticipated that the RP/EIS will also meet the requirements of the Washington State Environmental Policy Act, Chapter 43.21C RCW (SEPA).

The goal of the RP/EIS is to develop a restoration management plan that will benefit the natural resources of Commencement Bay that have been injured as a result of the release of hazardous substances or the discharge of oil. There are two objectives associated with this goal that will help address the injured trust resources. The first is to provide within the immediate Commencement Bay environment a diversity of sustainable habitat types using a landscape perspective to directly benefit the injured resources. The second objective, within the larger study area, is to provide additional or alternative resource and habitat restoration or replacement opportunities, or to acquire the equivalent of the affected resources or habitats for those injured resources that will require additional efforts to achieve or promote restoration. Because the planning, selection, design, construction, monitoring and funding of specific restoration measures will unfold over a period of many years, a tiered EIS process has been selected for environmental compliance.

Alternatives

A preliminary list of alternatives is being developed and will be described in initial scoping documents sent to all agencies, organizations, and individuals on the RP/EIS mailing list, along with a listing of significant issues identified by agencies and public comment. The scoping document will include a brief discussion regarding the basis for the study, information concerning the alternative areas evaluated for restoration, restoration alternative strategies, and the programmatic nature of the study at each of the alternative areas. This information would be supplemented with graphics delineating the areas of interest and alternative configurations.

EIS Content

The draft RP/EIS will document restoration planning at a programmatic level consistent with the results of scoping. Restoration planning will focus upon the "key resources" identified through the CB/NRDA process as having been injured due to releases of hazardous substances or discharges of oil. Beginning with the information developed through the CB/NRDA restoration planning process and the CB/CIS, the draft RP/EIS will identify habitat types and functions significant for important life stages of one or more groups of key resources or of representative individual key resource species.

The RP/EIS will effectively serve as a menu of restoration alternatives to function as a framework for managing the Commencement Bay NRDA Restoration Program.

The Alternative section will be based on the following:

- Alternatives (includes discussion and establishment of the baseline condition, no action, and future without condition)
- Types of restoration
- Alternative sites (characteristics/constraints)
- Alternative restoration scenarios (putting alternative types together with alternative sites)

The RP/EIS will also include other elements and address other concerns as needed to complete a fully responsive NEPA and SEPA document. The format recommended by CEQ regulations (40 CFR 1502.10 et seq.) and SEPA Rules (WAC 197-11-430) will be followed as appropriate.

Cooperating Agencies

Several agencies have been identified as cooperating agencies. They are: the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, the Washington Department of Ecology, the U.S. Army Corps of Engineers, and the Environmental Protection Agency. The Seattle District Corps of Engineers has been designated by the lead agencies as being the primary agent preparing the RP/EIS.

Study Area

The study area for the RP/EIS includes Commencement Bay (that portion of Puget Sound enclosed within a line extending from Brown's Point to Point Defiance); the watershed of Commencement Bay and its main tributaries (the Puyallup/Carbon River, the White River, Hylebos Creek, Wapato Creek, Puget Creek); and Puget Sound coastal areas adjacent to Commencement Bay (southern Vashon and Maury Islands, Dumas Bay). Within the study area, the RP/EIS will focus on those areas that serve as habitat for or otherwise support the natural resources of Commencement Bay potentially injured as a result of releases of CERCLA hazardous substances and discharges of oil.

Request for Comments

Your views as to the scope and content of the environmental information needed for the RP/EIS are important to the preparation of the study report. To be most helpful, the scoping comments should clearly describe specific environmental issues or topics which the commenter believes the document should address. This Notice of Intent will be mailed to Federal, State, and local agencies, organizations, groups and individuals identified during the CB/NRDA process.

Scoping meetings will be scheduled to provide the public with an opportunity to engage in discussions regarding the RP/EIS. The times and locations of the scoping meetings will be announced at a later date. Notices will be sent to all agencies, organizations, and individuals on the RP/EIS mailing list.

The lead agencies expect to complete preparation of the RP/EIS and have review copies of it available by March 1995.

E.2 Example Notice of Availability (NOA)

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

August 1993 Tampa Bay Oil Spill: Notice of Availability and Request for Comments on a Draft Damage Assessment and Restoration Plan¹

AGENCIES: National Oceanic and Atmospheric Administration (NOAA), Commerce, United States Department of the Interior (DOI), and Department of Environmental Protection, State of Florida

ACTION: Notice of availability of a draft damage assessment and restoration plan and of a 45-day period for public comment on the plan.

SUMMARY: Notice is given that the draft document entitled "Draft Damage Assessment and Restoration Plan for the 1993 Tampa Bay Oil Spill, Volume I - Ecological Injuries" is available for public review and comment. The document represents the first part (Volume I) of the draft damage assessment and restoration plan (Draft DARP) being developed by the State and Federal natural resource trustees to assess natural resource damages for the injury, loss, destruction and lost use of natural resources that resulted from the oil spill in Tampa Bay, Florida, following the August 10, 1993 collision of certain vessels in Tampa Bay. Volume I presents the methods proposed for use to restore and compensate for natural resources injuries and losses of an ecological nature. Volume I of the Draft DARP is consistent with Section 1006 of the Oil Pollution Act of 1990 (OPA), Chapter 376 of the Florida Statutes and the guidance provided by the Natural Resource Damage Assessment regulations at 43 CFR Part 11 (1994), as amended. Public review of this draft plan, as announced by this notice, is consistent with Section 1006 of OPA and 43 CFR 11.32(c) of those regulations.

DATES: Comments must be submitted in writing on or before [45 days from publication in the Federal Register].

¹ This restoration plan would now be referred to as the Draft Restoration Plan/EA. Circle, Rm. 214, Tampa, FL 33619. Volume I is also available for public review at the St. Petersburg Public Library, Main Library Reference Dept., 3745 9th Ave N., St. Petersburg FL during normal library hours. Written comments on the plan should be sent to either Jim Jeanson of the NOAA Damage Assessment Center or to Jane Urquhart-Donnelly of the DEP Office of Coastal Protection at the same addresses as listed above.

ADDRESSES: Requests for copies of Volume I of the Draft DARP should be sent to Jim Jeansonne of the National Oceanic and Atmospheric Administration (NOAA) Damage Assessment Center, 9721 Executive Center Drive N., Suite 134, St. Petersburg, FL 33702, or Jane Urquhart-Donnelly of the Florida Department of Environmental Protection (DEP), Office of Coastal Protection, 8407 Laurel Fair

FOR FURTHER INFORMATION CONTACT: Jim Jeansonne of the NOAA Damage Assessment Center, (813) 570-5391 or Jane Urquhart-Donnelly, (813) 744-6462.

SUPPLEMENTARY INFORMATION: On August 10, 1993, at approximately 5:45 a.m., the tank barge "OCEAN 255" and the tank barge "B-155" collided with the freighter "BALSA 37" just south of Mullet Key near the entrance of Tampa Bay, Florida. The OCEAN 255 caught fire upon impact and burned for approximately 18 hours. During that period, approximately 32,000 gallons of Jet A fuel, diesel, and gasoline were discharged from the OCEAN 255 into lower Tampa Bay. The B-155 was also damaged by the collision and discharged approximately 330,000 gallons of #6 fuel oil in the same vicinity. A number of different natural resources were eventually exposed to oil as a result of these discharges, including mangroves, seagrasses, salt marshes, birds, sea turtles, shellfish beds, bottom sediments, sandy shorelines and the estuarine water column, with a variety of direct injuries and lost uses of natural resources documented to have resulted from such exposure.

The incident is subject to the authority of OPA, 33 U.S.C. 2701-2761 (OPA), the Federal Water Pollution Control Act, 33 U.S.C. 1321 *et seq.* (FWPCA) and the Florida Pollutant Discharge and Control Act, Fla. Stat. 376.121. NOAA, the U. S. Department of the Interior, and the Florida Department of Environmental Protection are trustees for natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, OPA, the FWPCA, subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR 300.600-300.615, and, in the case of the Florida Department of Environmental Protection, the Florida Pollutant Discharge and Control Act, Fla Stat. 376.121 (1994), and in the case of the Federal trustees, Executive Order 12777.

These State and Federal agencies (the co-trustees) previously determined that natural resources and resource services subject to their trust authority were injured or lost as a result of the August 1993 oil spill and that the injuries and losses were sufficient to warrant proceeding with an assessment of natural resource damages under the above authorities. That determination is documented in the "Preassessment Screen and Determination for August 10, 1993 Tampa Bay, Florida Oil Spill", of November 2, 1993. Volume I of the Draft DARP presents the assessment and restoration plan developed by the co-trustees to address the direct injuries to natural resources and the interim losses of ecological resource services caused by the spill. Volume I evaluates restoration alternatives for each category of ecological injury or loss and defines compensation for resource injuries based on necessary or appropriate restoration actions, wherever possible. Further, the draft plan contemplates the use of simplified, cost-effective procedures and methods to document and quantify resource injuries and losses, as feasible and appropriate to specific resource injuries or losses. Accordingly, proposed

methods and procedures include the use of relevant scientific literature, scientifically based models, and focused injury determination or quantification studies, alone or in combination, depending on the specific injury or loss category.

The August 1993 oil spill also disrupted publicly important human uses of natural resources, however, assessment methods and restoration plans addressing public compensation for those lost natural resource uses will be outlined in the second part (Volume II) of the Draft DARP, currently being developed by the co-trustees.

Interested members of the public are invited to request a copy of Volume I of the Draft DARP from and to submit written comments on the plan to either Jim Jeanson of NOAA's Damage Assessment Center, or to Jane Urquhart-Donnelly, at the same addresses given above. All written comments will be considered by NOAA, the Department of the Interior, and the Florida Department of Environmental Protection in finalizing the assessment and restoration plan for the ecological injuries and losses and will be included in the Report of Assessment issued at the conclusion of the assessment process.

Table of Contents

| | |
|---|-----|
| F.1 Introduction | F-1 |
| F.2 Public Involvement Framework | F-2 |
| F.3 Approach to Public Involvement..... | F-5 |
| F.4 Example of a Public Involvement (Participation) Work Plan | F-9 |

F.1 Introduction

Section 1006(c)(5) of OPA requires that restoration plans be developed and implemented only after adequate public notice and consideration of all public comments. The development of an effective public involvement (or participation) program or plan enhances the probability that a restoration plan will be produced, made available, and become acceptable to all affected and interested parties.

A public involvement program or plan is desirable for two reasons:

- It makes the public a partner to the process; and
- The public often has useful suggestions for items to be incorporated or stressed in the restoration plan.

Public review of restoration plans is integral to the restoration planning process not only in OPA, but also in NEPA. Benefits of public involvement include:

- Confirming trustee determinations regarding restoration actions that will make the environment and public whole;
- Ensuring that appropriate assessment procedures for determining restoration actions for a given incident are followed; and
- Reducing transaction costs.

These benefits are realized by listening to and addressing public views and expectations and resolving conflicts as they arise, not after-the-fact. Since the public often has information of value to the restoration planning process, its involvement will facilitate restoration.

The public involvement process has evolved over the years. In the past, the public did not always play a key part in the restoration planning process. Today, a larger segment of the public is requiring a more active role in the restoration decisionmaking process.

Frequently, the public lacks familiarity with highly scientific and technical topics. Therefore, public involvement programs or plans should:

- Provide a wide segment of the public with the information it needs to participate in planning and decisionmaking; and
- Provide this informed public with adequate opportunities and mechanisms for involvement throughout project planning.

Better methods and materials must continue to be developed so that one can respond to the evolving needs of both trustees and the public. Approaches that will do this are presented in this appendix.

F.2 Public Involvement Framework

Trustees agencies should develop appropriate procedures to involve the public in restoration planning. Federal agencies have adopted procedures to comply with the NEPA regulations for public involvement.

One of the most comprehensive and typical public involvement procedures are those developed by the USEPA (40 CFR Part 25, 46 Fed. Reg. 5740), which identify the key components of public involvement and may be referred to in developing or refining trustee public involvement procedures for highly complex, long-term efforts. For example, the USEPA procedures present information on how to use public hearings, public meetings, and advisory groups as mechanisms of a public involvement program or plan.

Some specific procedures that may be used to achieve public involvement are briefly noted below. These elements should be used to the extent appropriate given the nature and extent of the planning effort.

(a) Identification of parties who may be interested in, or affected by, a proposed restoration plan

The scoping process described in the NEPA regulations could be used to identify these parties.¹ Trustees should develop a *contact list* and use this list to send interested parties notices of hearings, meetings, field trips, or the release of project reports.

¹ NEPA regulations at § 1501.7.

(b) *Outreach*

Trustees should provide policy, program, and technical information to interested parties as early as possible in the restoration planning process. This information should be made available at places that are easily accessible to the interested parties. Efforts should be made to ensure that the public understands the scientific and technical aspects of the planning process. This understanding could be achieved through the publication of fact sheets or technical summaries, surveys or interviews of community members, public service announcements, news releases, and other educational activities such as workshops and field trips. When announcing public meetings or hearings, agency officials should provide adequate advance notice.

(c) *Dialogue*

Consultation with interested parties should be considered before trustee decisions are finalized. Techniques for increasing dialogue between agency officials and the public include, but are not limited to, citizen advisory committees, workshops, conferences, small group meetings, and toll-free information lines. Any advisory committee formed should present a balance of interests in its membership.

(d) *Feedback*

Trustees must consider all public comments or concerns. Where appropriate, trustee feedback should specify the effect that any public comments or concerns had on proposed restoration actions.

Trustees are encouraged to develop public involvement work plans. These plans should specify key decisions that are subject to public involvement, staff and budget resources for public involvement activities, potentially affected parties, and a schedule for public involvement activities. The work plans should also consider identifying the procedures for conducting the four functions outlined above: identification, outreach, dialogue, and feedback. An example of a detailed work plan is found at the end of this appendix.

Trustees should strive to develop open public involvement that will result in a working relationship. This relationship is established by:

- Public Notices

A list should be developed of those persons and organizations interested in, or possibly affected by, proposed restoration actions. Those on the list should receive timely and periodic notification of the availability of materials and early advance notification of public hearings or meetings, where appropriate.

- Public Consultation

Public consultation and the exchange of views between trustees and affected and interested persons and organizations may take several forms including public hearings and meetings and advisory groups, as well as less formal consultation mechanisms (e.g., task forces, workshops, and informal personal communication with individuals or groups). Merely conferring with the public after a trustee agency decision is not helpful. Therefore, information should be distributed in a timely manner during the decisionmaking process. Public agencies should encourage full presentation of the issues at an early stage so that responsive decisions can be made.

- ◆ Public Hearings/Meetings.

Notice of public hearings/meetings must be well publicized and mailed to interested and/or affected parties of record. The timing of this notice will depend on each trustee agency's NEPA, SEPA, or other applicable requirements. The notice should include matters to be discussed and may be accompanied by a discussion of the trustee agency's recommendations for major issues (if any), information on the availability of a bibliography of relevant materials (if deemed appropriate), and procedures for obtaining further information. Relevant data, reports, etc., must be available prior to the hearing/meeting. Hearing locations and times must facilitate attendance and a complete record of the hearings must be available for public review.

Prior to convening a public hearing/meeting, trustees may wish to first assess the nature and intensity of public concerns for a particular restoration project. This may be accomplished by having discussions with various representatives of the public, providing them with a brief case history of the incident and restoration project, and soliciting recommendations for public involvement activities that the trustees should undertake to address public concerns. The underlying rationale for this approach is to avoid or minimize conflicts and thereby develop a more effective public involvement program or plan.

- ◆ Advisory Groups.

Advisory groups may be required for certain restoration projects. Advisory groups are formed to foster constructive interchange and enhance the prospect of community understanding of agency action. Membership of the group should represent a balance of interested and affected parties.

F.3 Approach to Public Involvement

In the development of a public involvement program or plan for a restoration plan, the following questions should be answered:

- Who is the public affected by the proposed restoration action?
- Where do we find the public?
- What do we need from the public?
- How can mechanisms be provided for input?
- When in the NRDA is input needed?

Answers that have evolved to these questions follow.

Who Is the Public Affected by the Proposed Action?

The public is not a homogenous group. Audience segments of the public can be identified in terms of demographic and geographic characteristics (e.g., interest groups, employment categories, income levels, social groups, or locations). A given number of the public may be included in more than one impacted audience segment. Each segment will have somewhat different concerns and the function of public involvement is to uncover those differences at an early date and provide a forum for their resolution, where possible.

Where Do We Find the Public?

There are several different methods to locate different segments of the affected public. A mix of several of these approaches for public participation tends to be optimal.

(a) Self-Identification

A citizen or group may inject itself into the planning process via petition, appeal, public hearing, election, suit, protest demonstration, or publicity. More informal self-identification may be made by correspondence or telephone calls.

(b) Group Identification

Trustees may make contact with the public defined by geographic location, interests, or social class. Interest groups can be located by consulting lists of associations. Often these lists are maintained by various government agencies, university departments, professional associations, or good government groups such as the League of Women Voters. In addition, commercial firms which sell specialized mailing lists can be contracted. Clipping files at local newspapers and libraries are another source of names. Social groups may be located via the public or private agencies which serve them.

(c) Third Party Identification

Third party identification is much like group identification, except that it is done by a third party. Possible third parties are:

- A volunteer citizens committee;
- A professional consultant; and
- The national association of an interest group.

The same techniques for locating specific members of the public are used by both group and third party identification efforts.

In addition to involving persons already on record as having an interest in the planning process, an effort should be made to locate new names. To encourage self-identification, the following techniques may be used:

- Newspaper advertisements;
- Radio and TV spots;
- Public service announcements;
- Establishment of a toll-free hot line; and
- Distribution of brochures and other public information materials at sites where interest groups or social groups are likely to congregate.

To encourage third party identification, a snowball interview technique can be used. The individual responsible for public involvement begins by interviewing a group of persons known to have an interest and asks them to identify others whom they expect would have an interest. These persons are subsequently interviewed, and the process continues until no new names are forthcoming.

It may be desirable to subscribe to and clip appropriate local papers as another source of information from the public. This provides a valuable insight to local issues and allows monitoring of the success of publicity and public involvement measures. New names for mailing lists can also be located from these sources.

What Do We Need from the Public?

There are two major objectives when soliciting public input. The first is a short-term objective and consists of information that often includes local perception of issues, confirmation of background facts and figures, review of study findings, and reaction to alternative courses of action. The second long-term objective is the building of positive attitudes toward the restoration plan being undertaken and its missions.

How Can Mechanisms Be Provided for Input?

The public affected by the outcome of a restoration action or project may not be well informed about the mission of the trustee agency, the purpose of the study, and how it fits into the particular context under consideration. In addition, members of the public may have had little experience with public involvement exercises, and may need help in overcoming language, cultural, or economic barriers. Mechanisms appropriate for input should accomplish two ends, public education and information gathering.

(a) Public Education. Mechanisms may include:

- Dissemination of pamphlets, newsletters, and newspaper special supplements;
- Planning a display booth at a high-traffic public location;
- Press release or feature story in local media;
- Participation in TV or radio forums, such as those presented by educational stations or general purpose talk shows; and

- Central depository of interim NRDA findings (e.g., at local libraries, or other convenient site).

(b) Information Gathering. Mechanisms may include:

- Public meeting/public hearing;
- Workshop;
- Telephone hotline;
- Opinion surveys; and
- Speakers bureau.

Each mechanism has significant advantages and disadvantages that should be evaluated in relation to time, funding, personalities involved, number of participants, and the level of communications skills of those undertaking the information gathering.

Where in the NRDA Is Input Needed?

The earlier in a restoration planning process that public input is solicited, the greater the likelihood that the process will be completed on schedule and within budget. Therefore, an adequate budget should be allocated for the planning process. Effort invested in initial problem definition with local officials and other affected parties usually produces substantial benefits in a clearer understanding of restoration project needs and avoidance of unnecessary costs or misguided efforts.

Public input should be encouraged in both a formal and informal manner. Specific forums should be provided for input. The trustees should be in touch with those segments of the public who are most interested in active participation during the development and review phases of the restoration plan. Specific forums could take the form of citizen review committee meetings, public meetings, or workshops. Project milestones that lend themselves to such forums include the completion of the Notice of Intent to Conduct Restoration Planning and the Draft Restoration Plan.

F.4 Example of a Public Involvement (Participation) Work Plan

The example below represents a public involvement (participation) plan for Hypothetical Bay; a CERCLA case. Although reference is made to CERCLA and hazardous substances, trustees should view this example in light of how it can best be adapted under the OPA context.

PUBLIC PARTICIPATION PLAN FOR HYPOTHETICAL BAY-WIDE NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION PLANNING

A. INTRODUCTION

1. THE HYPOTHETICAL BAY-WIDE NATURAL RESOURCE DAMAGE ASSESSMENT (NRDA)

Federal and state agencies and tribal governments in cooperation with other interested parties have started a process in Hypothetical Bay aimed at the restoration of natural resources injured as a result of the releases of hazardous substances into the Bay. This process is called the Hypothetical Bay-wide natural resource damage assessment and restoration process, and is commonly referred to as the "Hypothetical Bay-wide NRDA." The federal and state agencies and tribal governments who are conducting the Hypothetical Bay-wide NRDA are called Natural Resource Trustees. The Hypothetical Bay-wide NRDA is taking place under the federal Superfund law (the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or CERCLA) and other applicable laws. CERCLA also authorizes the hazardous pollutant cleanup actions that the U.S. Environmental Protection Agency (EPA) is currently undertaking in Hypothetical Bay.

The Hypothetical Bay-wide NRDA involves two main elements:

- The damage assessment aimed at determining the injury to or loss of Hypothetical Bay natural resources resulting from releases of hazardous substances, assessing monetary damages for those injuries and losses, collecting the damages from responsible parties, and using those funds for implementing natural resource restoration projects; and
- The restoration effort aimed at restoring or replacing the injured natural resources or acquiring their equivalent, funded by the responsible parties.

The first step in the Hypothetical Bay-wide NRDA process is the preparation of a Damage Assessment Plan. The purpose of the Assessment Plan is to identify (1) the natural resources injured, and (2) the scientific and economic methods that the Trustees will use to determine the extent of injury resulting from releases of hazardous substances, and (3) to place a monetary value on those injuries. Restoration planning, in part, will proceed parallel with damage assessment planning to ensure that habitat restoration opportunities in the Bay are identified and, if appropriate, acted upon before the damage assessment is complete. The goal is to prepare and implement an effective and timely natural resource damage assessment and restoration plan for Hypothetical Bay.

2. RESPONSIBILITY FOR DAMAGE ASSESSMENT AND RESTORATION PLANNING

The Natural Resource Trustees are responsible for carrying out the Hypothetical Bay-wide NRDA. These Trustees represent the interests of the public in assessing damage to and restoring the public's natural resources. In Hypothetical Bay, the federal Trustees are the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Department of the Interior (DOI), which includes the U.S. Fish and Wildlife Service (FWS) and the Bureau of Indian Affairs (BIA). The Washington State Department of Ecology (Ecology) is the lead trustee for the State of Washington, which is also represented by the Washington State Departments of Fisheries, Wildlife, and Natural Resources (DNR). Tribal Trustees are the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe. Under an agreement among the Trustees, NOAA is named as the overall lead Trustee.

3. RESPONSIBILITY FOR DEVELOPING AND IMPLEMENTING THE PUBLIC PARTICIPATION PLAN

The Trustee Council formed a Public Participation Panel in November 1991 to prepare this public participation plan. This panel includes members of the Trustee Council (Trustees and PRPs), representatives of community organizations, local governments, and EPA.

The Trustee Council is responsible for implementing the plan. The Trustee Council will assign responsibilities for implementation of specific tasks to Trustee Council members, technical panel members or other parties, as appropriate.

Dissemination of public information regarding the NRDA process will be coordinated among the Trustees and other parties to insure that the public receives an accurate and consistent description of the intent and progress of the NRDA process. In general, NOAA as lead Trustee, in coordination with the other Trustee members of the Trustee Council, will assume responsibility for certain public information and involvement processes. After review by the other Trustees, and other members of the Trustee Council as appropriate, NOAA will generally issue news releases, notices and documents for public review, forward materials to document "repositories" (places where documents are maintained for public review), coordinate joint activities, and serve as a point of contact and clearinghouse of information for other agencies and the public. By agreement among the parties, other Trustees may assume some of these responsibilities. The U.S. Fish and Wildlife Service will establish and maintain a mailing list. Each Trustee will designate a person to respond to requests from the news media. By agreement among the Trustees, NOAA may serve as a spokesperson on behalf of the Trustees regarding the NRDA process.

The Public Participation Panel will continue to meet on a periodic basis to monitor implementation of the public participation plan and make appropriate recommendations to the Trustee Council. At the direction of the Trustee Council, the Panel will also assist with preparation and distribution of public information documents and assist with implementation of public information and participation activities. As necessary, the Panel will draft suggested revisions to the plan for Trustee Council review and approval.

At Trustee Council meetings, the Public Participation Panel chairperson (and/or co-chairperson) will report on public participation activities, will request reports from other panel chairpersons on public participation activities led by those Panels, and will provide recommendations for changes or new proposed activities made by members of the Public Participation Panel.

4. PURPOSE OF THE PUBLIC PARTICIPATION PLAN

Trustee Council members recognize and agree that public participation in the Hypothetical Bay-wide NRDA is both desirable and necessary, and that regular communication with the public is an important part of preparing and implementing the damage assessment and restoration plan. The goals of this public participation plan are to:

- Encourage public interest and participation in the NRDA process;
- Keep the public informed of the damage assessment and restoration planning process; and

- Involve the public in identifying injuries to natural resources, and in the development of the restoration plan for injured Hypothetical Bay natural resources.
- This public participation plan takes an active approach to allow for early, regular and meaningful public participation. The public participation provisions of the CERCLA regulations offer opportunities for the public to become involved. This plan provides a menu of supplemental public participation activities which goes beyond the regulatory provisions for public participation to involve the public on an active, ongoing basis throughout the damage assessment and restoration planning process.

A supplemental public participation plan will be prepared at the end of the planning process to address public participation opportunities in conducting the damage assessment and restoration effort.

B. INTERESTED AUDIENCES

This public participation plan is intended to reach those persons or groups who have an interest in the restoration of the Hypothetical Bay environment. Seven audiences have currently been identified as having such an interest. Each of these groups should be kept informed of and offered the opportunity to become involved in the Hypothetical Bay-wide NRDA.

The Trustee Council recognizes that there is considerable diversity within each of the audiences identified below and that they do not necessarily speak with one voice. People from each group who directly participate in the Hypothetical Bay-wide NRDA process are not being asked to represent or speak on behalf of that group or to support or "sign off" on the damage assessment and restoration plans, but rather to share their perspective in looking at the issues and in finding creative ways to solve problems, if possible.

(a) Local Community Groups

Over 60 local community groups and organizations are identified in the Hypothetical Bay area. As evidenced in the results from Tacoma's recent Community Summits, many of these groups feel it is extremely important to formulate strategies for cleaning up the environment with community needs and values in mind. Working with local community groups and organizations, via interactive meetings and contributions to their newsletters, is an important way to inform the public on Hypothetical Bay-wide NRDA planning and involve them in planning decisions.

(b) Environmental Groups

Many environmental groups are expected to be interested in the Hypothetical Bay-wide NRDA process because of its potential for addressing current environmental problems in Hypothetical Bay, as well as its potential to serve as a model or precedent for NRDA processes in other urban estuaries.

(c) Recreational Groups

A variety of sport fishery groups are likely interested in improving the quality and quantity of edible fish and shellfish in Hypothetical Bay. Other recreational groups may be interested in providing more public access to the Bay, as well as encouraging water-oriented recreational use in the Bay, such as kayaking and canoeing, bird watching, etc.

(d) Business and Labor Community Groups

Because of the importance of Hypothetical Bay in the local economy, business and labor groups are likely to be interested in what effect the Hypothetical Bay-wide NRDA process will have on the long-term commercial use of the Bay. Business groups are also likely to be concerned about the economic costs to be borne by large and small businesses considered responsible for injuries to natural resources.

(e) Locally Elected Officials and Local Governmental Agencies and Committees

The challenges and regulatory complexities of cleaning up and restoring Hypothetical Bay require coordination among many tribal, federal, state and local agencies. Locally elected officials and local governmental agencies need to be kept informed of the NRDA process, so they can be responsive to constituents and provide the necessary coordination. For example, the City of Tacoma has set up several advisory bodies for environmental matters, including the Environmental Commission, the Urban Waterfront Committee, and the Environmental Concerns Implementation Group.

(f) General Public

People who are interested in the cleanup and restoration of Hypothetical Bay, or in other aspects of the Hypothetical Bay-wide NRDA process may not be involved in any of the above audiences. To encourage public participation, the general public should be kept informed about the NRDA process.

(g) Media

The news media offer a way to inform the public in a community with many thousands of people. Neighborhood media, as well as media with metropolitan and state-wide audiences, need to be kept up-to-speed on the process. News, editorial, and advertising (for notices) can all help to involve the public in planning and decision making.

C. PUBLIC PARTICIPATION ACTIVITIES

1. TWO ELEMENTS TO THE HYPOTHETICAL BAY-WIDE NRDA PLANNING PROCESS

The public participation activities that will occur under this plan cover the two main elements of the Hypothetical Bay-wide NRDA planning process: (1) the damage assessment, and (2) the restoration effort. However, these two main elements are not distinct, and damage assessment and restoration activities are intricately linked together.

(a) The Damage Assessment Planning Process

The damage assessment planning process is aimed at developing a plan for identifying the natural resources of concern and the scientific and economic methods that the Trustees will use to determine the extent of injury resulting from releases of hazardous substances and for placing a monetary value on those injuries. A technical panel has been established to determine the elements and criteria necessary to the development of the Plan. Tasks associated with the damage assessment planning process may include the following:

- Identifying natural resources which have been damaged;
- Evaluating the adequacy of existing damage data;
- Collecting scoping data;
- Identifying any further studies and economic measures of damages which may be necessary;
- Issuing a draft assessment plan after peer review;
- Public review of the draft assessment plan; and
- Adopting a final assessment plan.

(b) The Restoration Planning Process

The restoration planning process is aimed at developing a methodology for restoring habitat and species injured by the releases of hazardous substances. The restoration plan will identify among other things (1) priority habitats and species, (2) priority restoration sites, (3) suitable restoration options, and (4) costs to implement the proposed restoration (e.g. construction, long-term monitoring, and contingency costs). Restoration options allowed under the law include rehabilitation (e.g., revegetation), replacement (e.g., through fish hatcheries), and acquisition of equivalent resources. A technical panel has been established to determine the elements and criteria necessary to the development of the Plan. Tasks associated with the restoration planning process may include the following:

- Developing restoration goals;
- Identifying potentially suitable types of habitat and restoration sites;
- Compiling and reviewing existing data, and developing data, as needed, on habitat types that are beneficial to resources injured by releases of hazardous substances;
- Compiling and reviewing existing data, and developing data, as needed, on functional values of habitat types;
- Identifying performance criteria based on habitat function to determine success of restoration projects;
- Identifying contingency processes should a project not achieve its performance criteria or goals;
- Identifying potential projects or types of projects at each candidate site and estimating costs of each project; and
- Developing monitoring plans to evaluate if projects meet their identified performance criteria or goals.

Because of the dependency of restoration planning upon information to be developed in the injury determination and quantification process, the restoration plan may not be finalized until the damage assessment is complete.

2. TWO TYPES OF PUBLIC PARTICIPATION ACTIVITIES

The public participation activities that will occur under this plan for the different planning elements are described in two parts: (a) formal notice, commenting and related activities; and (b) supplemental public participation activities.

As discussed previously (see A.3 above), responsibility for conducting these activities lies with the Trustee Council, with the assistance of the Public Participation Panel and participation of the technical panels as appropriate. Public meetings under the formal notice and comment process will be sponsored by the Trustees.

(a) Formal Notice, Commenting and Related Activities

This part identifies the times in the planning and decisionmaking process when the public can review and comment on documents that are officially available in draft or final form. These activities are identified under the U.S. Department of the Interior's NRDA regulations, as supplemented by the Trustee Council. Although use of the regulations is optional, at this time the Trustees have indicated their intent to use Interior's NRDA regulations.

Notice of Intent to Perform an Assessment -- Notice inviting the participation of potentially responsible parties (PRPs) in developing the type and scope of the assessment and in the performance of the assessment.

- Notice to all PRPs was mailed in December, 1991; and
- A PRP meeting was held by the Trustees on February 3, 1992 to answer questions the PRPs had on the process.

Draft Damage Assessment Plan -- Notice inviting the public to review and comment on the draft Assessment Plan and any significant modifications proposed to be included in the final Assessment Plan. Written or oral comments on the draft Assessment Plan to the Trustees are provided for at least 30 calendar days.

- A public meeting will be held early in the comment period to explain the draft Assessment Plan.
- A second public meeting will be held toward the end of the comment period to provide an opportunity for public comment on the draft Assessment Plan.

- Draft Restoration Plan -- Notice inviting the public to comment on the draft Restoration Plan and any significant modifications proposed to be included in the final Restoration Plan. Written or oral comments on the draft Restoration Plan to the Trustees are provided for at least 30 calendar days.
- A public meeting will be held early in the comment period to explain the draft Restoration Plan.
- A second public meeting will be held toward the end of the comment period to provide an opportunity for public comment on the draft Restoration Plan.

(b) Supplemental Public Participation Activities

This section describes ways to educate, inform and involve the public on a regular and meaningful basis before decisions are made and the official draft and final damage assessment and restoration plans are issued. The Trustee Council is committed to conducting these supplemental activities to ensure regular and meaningful public participation throughout the damage assessment and restoration process. The Trustee Council's ability to conduct these supplemental activities, and the frequency at which they are conducted, depend on available resources. Therefore, it may not be possible to undertake all of the additional public participation activities described below. Joint participation in the activities of other interested groups and agencies working in the Hypothetical Bay area will be an alternative means to provide a forum for the public to become involved in the Hypothetical Bay-wide NRDA process.

Introduce the Public to the Hypothetical Bay-wide NRDA Process and Invite Their Participation.

- Mass mailing. To contact potentially interested individuals and groups. Preparation of a fact sheet, introductory NRDA documents, and notice of a public meeting for incorporation into interested groups' newsletters, with a form (mail back "coupon") to be filled out and mailed back to indicate interest in being included on a mailing list.
- News releases to print, television and radio media to provide notice of general meeting.

General meeting to provide an overview of the NRDA process, share available information on the status of Hypothetical Bay resources, and discuss ways in which the public can get involved in the damage assessment and restoration process.

Continued Outreach to the Public and Interested Groups, Local Governmental Agencies, and the Media

- Fact sheets - periodically as appropriate.
- Newsletters - periodically as appropriate.
- Background documents, technical reports and review documents - available by request and at repositories.
- Meetings - periodically, at critical junctures in the planning process.
- Informal briefings and presentations - periodically, to provide an interactive forum for the exchange of ideas and information with interested groups.
- Speakers bureau - to provide presentations to interested groups upon request. Depending on available resources, supplemented with a slide/video program.
- Field trips and site visits - as resources allow.
- Media contact person - to keep the media informed at each juncture of the process.
- Workshops - periodically throughout the planning process, e.g., before critical junctures in damage assessment and restoration planning, as resources permit. Participation in workshops sponsored by EPA's technical groups, and other community groups, such as the CBCAC and Citizens for a Healthy Bay.
- Panels - as appropriate, include as members of the Public Participation Panel or as participants in the working committees of the Restoration Panel individuals with a particular interest or expertise in public participation or restoration planning.
- Photographic record - periodically throughout restoration project development and monitoring.

D. RESOURCES FOR ADDITIONAL INFORMATION

For further information, please contact:

Robert A. Taylor, General Counsel Damage Assessment and Restoration Center, National Oceanic and Atmospheric Administration, 7600 Sand Point Way N.E., Seattle, WA 98115; (206) 526-6604.

Kate Benkert, U.S. Fish and Wildlife Service, 3704 Griffin Lane S.E., Suite 102, Olympia, WA 98501-2192; (206) 753-9440.

Fred Gardner, Washington Department of Ecology, Toxic Cleanup Program, Mail Stop 7600, Olympia, WA 98504-8711; (206) 438-3018.

Bill Sullivan, Puyallup Tribe of Indians, Environmental Programs, 2002 East 28th Street, Tacoma, WA 98404; (206) 597-6200.

Rod Malcom, Muckleshoot Indian Tribe, Fisheries Department, 40405 Auburn-Enumclaw Road, Auburn, WA 98002; (206) 825-7030.

Media Contact: Hal Alabaster, Public Affairs Northwest, National Oceanic and Atmospheric Administration, 7600 Sand Point Way N.E., Seattle, WA 98115; (206) 526-6046. (Alternate: Doug Zimmer, U.S. Fish and Wildlife Service, 3704 Griffin Lane S.E., Suite 102, Olympia, WA 98501-2192; (206) 753-9440).

Public Liaison: To be assigned.

Repositories:

- (a) Tacoma Public Library
Main Branch
1102 Tacoma Ave.
Tacoma, Washington 98402
Gary Reese, Manager, Special Collections
(206) 591-5622
- (b) Citizens for a Healthy Bay
771 Broadway
Tacoma, Washington 98402
(206) 383-2429

(c) NOAA Library-Seattle
Library and Information Services
7600 Sand Point Way N.E., Bldg. 3
Seattle, Washington 98115
Attn: Maureen Woods/Donna Reisdorff
(206) 526-6241

E. SCHEDULE FOR PUBLIC PARTICIPATION ACTIVITIES

A core public participation program is being developed. Upon approval of the Trustee Council, the core program will be described in Appendix A. Additional or more frequent public participation activities will be undertaken as available resources allow.

| | |
|---|---|
| <i>FACT SHEET</i> | |
| Draft Restoration Plan/Environmental Assessment for the South Baltic Bay | |
| Lead Trustee Agency: | National Oceanic and Atmospheric Administration Baltic Bay Region |
| Cooperating Trustee Agencies): | U.S Department of the Interior State X Department of Fish and Game State Y Public Lands and Parks Department |
| Abstract: | [summary of incident and plan - no more than two paragraphs] |
| Contact Person: | John Doe Restoration Project Manager South Baltic Bay Restoration Office 113 Herring Lane, Room 102 Baltic Bay, AX 00000 Phone: (000) 000-0000 FAX: (000) 000-0001 E-mail: Jdoe@www.balbay.com |
| Comments: | Comments are due no later than October 16, 1996. Comments should be sent to John Doe at the above address. |
| Copies: | Copies of the South Baltic Bay Draft Restoration Plan/Environmental Assessment are available from John Doe, listed above |
| September 1, 1996 | |