

DEPARTMENT OF THE INTERIOR**Office of the Secretary****43 CFR Part 11**

RIN 1090-AA29 and 1090-AA43

Natural Resource Damages Assessments—Type B Procedures**AGENCY:** Department of the Interior.**ACTION:** Advance notice of proposed rulemaking.

SUMMARY: The Department of the Interior is revising the regulations for assessing natural resource damages resulting from a release or discharge of a hazardous substance in compliance with a statutory biennial review requirement and a court remand. The regulations provide procedures that Federal, State, and Tribal natural resource trustees may use to develop plans for restoring injured natural resources and to determine appropriate compensation due from potentially responsible parties. The regulations include an administrative process for conducting assessments as well as two types of technical procedures for the actual quantification of injuries and damages. "Type A" procedures are standard procedures for simplified assessments requiring minimal field observation in cases of minor discharges or releases in certain environments. "Type B" procedures are procedures for detailed assessments in other cases. This document solicits comment on potential revisions to the administrative process and the type B procedures in light of recently promulgated natural resource damage assessment regulations for oil discharges.

DATES: Comments will be accepted through September 16, 1996.**ADDRESSES:** Comments should be sent in duplicate to the Office of Environmental Policy and Compliance, ATTN: NRDA Rule—Type B, Mail Stop 2340, Department of the Interior, 1849 C Street NW, Washington, DC 20240.**FOR FURTHER INFORMATION CONTACT:** Mary C. Morton at (202) 208-3302.**SUPPLEMENTARY INFORMATION:**

Statutory Authority

This document solicits comment on the revision of regulations for assessing natural resource damages for releases or discharges of hazardous substances. The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*) (CERCLA) provides that certain categories of persons, known as potentially responsible parties (PRPs), are liable for

natural resource damages when a release of a hazardous substance has resulted in injury to, destruction of, or loss of natural resources. 42 U.S.C. 9607(a). Natural resource damages fund restoration, replacement, or acquisition of the equivalent of the injured natural resources. 42 U.S.C. 9607(f)(1).

Only those Federal, State, and Tribal officials designated as natural resource trustees may recover natural resource damages. CERCLA defines "State" to include:

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 over which the United States has jurisdiction. 42 U.S.C. 9601(27).

Trustees may recover damages for those natural resource injuries that are not fully remedied by response actions as well as the public interim losses from the date of the release until the injured natural resources have fully recovered or been restored. Trustees may also recover the reasonable costs of assessing natural resource damages.

CERCLA requires the President to promulgate regulations for the assessment of natural resource damages under CERCLA and the Clean Water Act (33 U.S.C. 1251 *et seq.*) (CWA). 42 U.S.C. 9651(c)(1). CWA provides authority for Federal and State trustees to recover natural resource damages resulting from discharges of hazardous substances into navigable waters. 33 U.S.C. 1321(f)(4) and (5).

The regulations must identify the "best available" procedures for assessing natural resource damages. 42 U.S.C. 9651(c)(2). CERCLA requires that the natural resource damages assessment regulations include two types of assessment procedures. "Type A" procedures are "standard procedures for simplified assessments requiring minimal field observation." 42 U.S.C. 9651(c)(2)(A). "Type B" procedures are "alternative protocols for conducting assessments in individual cases." 42 U.S.C. 9651(c)(2)(B). If trustees and PRPs fail to reach settlement, Federal and State trustees who performed their assessments in accordance with the natural resource damage assessment regulations will receive a rebuttable presumption in litigation of their claims. 42 U.S.C. 9607(f)(2)(C). The President delegated the responsibility for promulgating the natural resource damages assessment regulations to the Department of the Interior (the Department). E.O. 12316, as amended by E.O. 12580.

Hazardous Substance Regulations

The Department has issued regulations that provide an administrative process for conducting natural resource damages assessments as well as technical type A and type B procedures for the actual quantification of injuries and damages resulting from hazardous substance releases and discharges. The Department recently published a final rule containing two type A procedures—one for minor releases and discharges in coastal and marine environments and the other for minor releases and discharges in the Great Lakes. 61 FR 20560 (May 7, 1996). In *State of Ohio v. United States Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (*Ohio v. Interior*), the U.S. Court of Appeals for the D.C. Circuit vacated and remanded portions of the original administrative process and the type B procedures that were issued in 1986. On March 25, 1994, the Department published a final rule in response to the *Ohio v. Interior* remand. 59 FR 14261. This final rule is currently being challenged in *Kennecott Utah Copper Corp. v. United States Department of the Interior*, No. 93-1700 and consolidated cases (D.C. Cir.).

The March 25, 1994, rule addressed all but one issue in the *Ohio v. Interior* remand—the calculation of damages for interim lost nonuse values. The Department's regulations currently provide that trustees can recover from PRPs the cost of implementing a publicly reviewed plan for restoring, rehabilitating, replacing, and/or acquiring the equivalent of the natural resources injured by a hazardous substance release or discharge. The regulations also authorize trustees to recover the economic values lost by the public pending restoration or recovery of the injured resources. These values are known as "compensable values" and may include "use" and "nonuse" values, if they can be reliably calculated. Trustees must eventually determine how to spend damages recovered for compensable values on restoration actions but only after the assessment has been completed and the funds have been recovered.

On May 4, 1994, the Department published a notice of proposed rulemaking concerning the reliability of calculating nonuse values using the contingent valuation methodology. 59 FR 23097. The Department then published an advance notice of proposed rulemaking announcing the start of an overall review of the administrative process and the type B procedures. 59 FR 52749 (Oct. 19, 1994). The Department must review the

hazardous substance natural resource damages assessment regulations, and revise them as appropriate, every two years. 42 U.S.C. 9651(c)(3).

The Department now intends to develop a proposed rule that will address both the biennial review and the remaining aspect of the *Ohio v. Interior* remand and that will supersede the May 4, 1994, proposed rule. This document solicits comment on inclusion in this upcoming proposed rule of the concepts of the recently promulgated oil natural resource damages assessment regulations.

New Oil Regulations

On January 5, 1996, the National Oceanic and Atmospheric Administration (NOAA) published a final rule under the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.) for assessing natural resource damages caused by oil spills. 61 FR 439. The oil regulations adopt a new approach to several aspects of natural resource damages assessment. One particularly significant and promising feature of the oil regulations is the adoption of a new method of measuring damages based on unified restoration planning. The oil regulations extend the hazardous substance regulations' emphasis on restoration to all elements of a natural resource damages claim, including compensation for interim loss of injured natural resources and resource services.

Under the oil regulations, a natural resource damages claim is based on a unified restoration plan developed during the assessment that incorporates both "primary" restoration actions to return injured resources and services to the condition that would have existed if the discharge had not occurred and "compensatory" restoration actions to compensate the public for interim loss of resource services.

The oil regulations fundamentally change the role of economic valuation in developing claims for interim loss of injured natural resources and resource services. Unlike the current hazardous substance regulations, the new oil regulations require trustees to determine compensation for interim losses based on the cost of appropriately scaled compensatory restoration actions, rather than economic values per se.

The Department has indicated that during the biennial review it will work to ensure the maximum consistency appropriate between the hazardous substance regulations and the oil regulations. 59 FR 52752. The Department believes that the unified restoration planning approach in the oil regulations is one appropriate option for biennial reforms to the hazardous

substance regulations designed to expedite restoration, reduce litigation, and encourage cooperative efforts among trustees and PRPs.

The Department also believes that resolution of the *Ohio v. Interior* remand concerning the calculation of nonuse values should be considered within the same context as the overall biennial review of the hazardous substance regulations. As NOAA has stated in connection with its new method of measuring damages, "[t]he possible use of contingent valuation (CV) and other stated-preference methods of valuation to determine what scale of compensatory restoration provides an equivalent value to the lost services avoids many problems identified by commenters regarding the use of CV to calculate a dollar value for the damages." 61 FR 442.

Issues for Comment

To assist in the development of a proposed rule, the Department is soliciting comment on how the hazardous substance regulations should be revised to ensure maximum appropriate consistency with the oil regulations and comply with *Ohio v. Interior*. The Department is particularly interested in comments on revising the hazardous substance regulations to incorporate the new method for measuring damages in the oil regulations. The Department also solicits comment on revising the hazardous substance regulations to reflect the more streamlined approach to injury assessment contained in the oil regulations. Whereas the current hazardous substance regulations contain relatively detailed standards and procedures for all aspects of injury determination and quantification, the oil regulations provide a general framework of decision criteria within which trustees determine on a case-by-case basis how best to assess injury. The Department solicits comment on the suitability of the new approaches in the oil regulations for the hazardous substance regulations, in light of the differences between oil spills and hazardous waste sites.

Dated: July 10, 1996.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

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DEPARTMENT OF AGRICULTURE

48 CFR Parts 401 Through 453

RIN 0599-AA00

Agriculture Acquisition Regulation; Revision

AGENCY: Procurement and Property Management, Department of Agriculture.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice invites written comments on a proposed amendment to the Agriculture Acquisition Regulation (AGAR). We are revising the AGAR to reflect changes in acquisition law and regulations since the AGAR's last major revision in 1988, to update organizational references throughout the AGAR, and to streamline the AGAR as part of the President's Regulatory Reform Initiative.

DATES: Comments must be submitted on or before September 16, 1996.

ADDRESSES: Requests for a copy of the proposed rule should be sent to U.S. Department of Agriculture, Procurement and Property Management, Procurement Policy Division, STOP 9303, 1400 Independence Avenue SW., Washington, DC 20250-9303. The Procurement Policy Division has also posted a copy of the proposed rule on the Internet for review at WWW.USDA.GOV/DA/PROCURE/AGAR.HTM. Submit written comments to the Procurement Policy Division at the mailing address listed above, through the Internet at 00.00-POST.JDARAGAN@SIES.AG.GOV (alternate: JDARAGAN@USDA.GOV), or via fax at (202) 720-8972.

FOR FURTHER INFORMATION CONTACT: Joseph J. Daragan, U.S. Department of Agriculture, Procurement and Property Management, STOP 9303, 1400 Independence Avenue SW., Washington, DC 20250-9303, (202) 720-5729.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Procedural Requirements
 - A. Executive Order 12866.
 - B. Regulatory Flexibility Act.
 - C. Paperwork Reduction Act.
- III. Public Comments

I. Background

The AGAR implements the Federal Acquisition Regulation (FAR), where further implementation is needed, and supplements the FAR when coverage is needed for subject matter not covered by the FAR. The AGAR is being revised as part of the National Performance Review (NPR) program to eliminate necessary