DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 11

[Docket No. DOI-2022-0016; 23XD1618EN, DS61600000, DMNHQ0000.000000]

RIN 1090-AB26

Natural Resource Damages for Hazardous Substances

AGENCY: Office of Restoration and Damage Assessment, Interior.

ACTION: Final rule.

SUMMARY: This final rule revises the simplified Type A procedures in the regulations for conducting natural resource damage assessments for hazardous substance releases. Additionally, this final rule includes several conforming changes and corrections intended to fix citations, provide for consistent use of terminology, and remove outdated or duplicative rule provisions and definitions. The Department of the Interior (Interior) is removing provisions that it believes are no longer applicable, clarifying other provisions by incorporating language that would implement existing Interior regulatory interpretations, and making other changes and corrections. These revisions also allow for the regulations to meet information collection requirements mandated by the Office of Management and Budget.

DATES: This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. The incorporation by reference of certain material listed in this rule is approved by the Director of the Federal Register as of **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Information collection requirements: If you wish to comment on the information collection requirements in this rule, please note that the Office of Management and

Budget (OMB) is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after publication of this rule in the *Federal Register*. Therefore, comments should be submitted to OMB by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: This rule and supporting documentation are available at *www.regulations.gov*. In the ‘‘Search’’ box enter ‘‘DOI-2022-0016’’.

Information Collection Requirements: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in DATES to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting "Currently under Review – Open for Public Comments" or by using the search function. Please provide a copy of your comments to the Departmental Information Collection Clearance Officer, U.S. Department of the Interior, Jeffrey Parrillo, 1849 C Street, NW Washington, DC 20240; or by email to jeffrey_parrillo@ios.doi.gov. Please reference OMB Control Number 1091-0002 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Emily Joseph, Director, Office of Restoration and Damage Assessment at (202) 208-4438, emily_joseph@ios.doi.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

II. Background

III. Overview of Final Rule

I. Executive Summary

The final rule revises the Type A procedures currently contained in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.* (CERCLA) Natural Resource Damage Assessment regulations to allow natural resource trustees to use a simplified method when conducting damage assessments.

II. Background

The natural resource damage Type A regulations describe how to conduct a natural resource damage assessment for hazardous substance releases under the CERCLA and the Federal Water Pollution Control Act (33 U.S.C. 1251, 1321) (Clean Water Act). CERCLA required the President to promulgate these regulations. 42 U.S.C. 9651(c). The President delegated this rule writing responsibility to Interior. E.O. 12316, as amended by E.O. 12580. The regulations appear at 43 CFR part 11. CERCLA requires that the natural resource damage 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). Both types of procedures are codified at 43 CFR part 11.

A natural resource damage assessment is an evaluation of the need for, and the means of, securing restoration of public natural resources following the release of hazardous substances or oil into the environment. Interior has previously developed two types of natural resource damage assessment regulations: standard procedures for simplified assessments requiring minimal field observations (Type A Rule); and site-specific procedures for detailed assessments in individual cases (Type B Rule). The Type A Rule was last revised in November 1997. It provided for two distinct formulas for modeling damages for natural resource injuries caused by hazardous substance releases to coastal and marine environments and Great Lakes environments, respectively. In accordance with CERCLA, damages calculated in accordance with Type A or Type B procedures are entitled to a "rebuttable presumption" of correctness in any administrative or judicial proceeding. The rebuttable presumption for the Type A procedure under the current version of the rule is limited to damages of $100,000 or less.

In January 2023, Interior published an advance notice of proposed rulemaking (ANPRM) (88 FR 3373), followed by a notice of proposed rulemaking (NPRM) in January 2024 (89 FR 733), to revise the Type A Procedures covering only the natural resource damage assessments for releases of hazardous substances under CERCLA and the Clean Water Act. There are also natural resource damage assessment regulations at 15 CFR part 990 that cover oil spills under the Oil Pollution Act, 33 U.S.C. 2701 *et seq.*, (OPA). The current hazardous substance natural resource damage assessment regulations, this preamble, and the revisions to the regulation use "restoration" as an umbrella term for all types of actions CERCLA and the Clean Water Act authorize to address injured natural resources, including restoration, rehabilitation, replacement, or acquisition of equivalent resources.

Natural resource damage assessments are conducted by government officials designated to act as "trustees" to bring claims on behalf of the public for the restoration of injured natural resources. Trustees are designated by the President, state governors, or Tribes. If trustees determine, through an assessment, that hazardous substance releases have injured natural resources, they may pursue claims for damages against potentially responsible parties. "Damages" include funds needed to plan and implement restoration, compensation for public losses pending restoration, reasonable assessment costs, and any interest accruing after funds are due.

The regulations establish an administrative process for conducting assessments that includes technical criteria for determining whether releases have caused injury, and if so, what funds are needed to implement restoration. The regulations are for the optional use of trustees. Trustees can use the regulations to structure damage assessment work, frame negotiations, and inform restoration planning. If litigation is necessary to resolve the claim, courts will give additional deference – referred to as a "rebuttable presumption" in CERCLA – to assessments performed by trustees in accord with the regulations.

The regulatory revisions reflect several priorities of the current Administration, specifically the focus on deregulation and decreasing costs, providing jobs for the American people, and increasing American Energy Dominance. Executive Order (E.O.) 14192, "Unleashing Prosperity through Deregulation" (90 Fed. Reg. 9065, Feb. 6, 2025), and Secretary's Order 3421, "Achieving Prosperity through Deregulation," direct agencies to identify existing regulations, guidance, paperwork requirements, and other regulatory obligations that can be modified or repealed to ensure that administrative actions do not undermine the national interest and achieve meaningful burden reduction while continuing to meet statutory obligations. This Final Rule modifies the current language for the Type A procedures and is expected to result in more expedited Type A damage assessments being conducted as opposed to the Type B procedures which require more expensive, time-consuming, and intensive field work. Per E.O. 14192 and accompanying OMB guidance M-25-20, the total incremental costs are estimated to be significantly less than zero. With the modification to the CERCLA natural resource damage assessment and restoration (NRDAR) regulations for Type A procedures, it is estimated that the Federal Government will see a total savings of $1.6 million per each Type B assessment that switches to Type A. Additionally, more Type A damage assessments will result in streamlined, quicker, and more cost-effective settlements, allowing for restoration to happen sooner. Switching to more Type A assessments with the higher limit would increase the cost savings.

Secretary's Order 3419, "Delivering Emergency Price Relief for American Families and Defeating the Cost-of-Living Crisis," asks agencies to consider how to create employment opportunities for American workers, including drawing discouraged workers into the labor force. As demonstrated in multiple reports and case studies on Interior's damage assessment and restoration efforts (e.g., https://pubs.usgs.gov/publication/ofr20161016 and https://link.springer.com/article/10.1007/s00267-024-02040-x), restoration implementation employs Americans and supports local economies.

Executive Order 14156, "Declaring a National Energy Emergency" (90 Fed. Reg. 8433, Jan. 29, 2025), and subsequent Secretary's Order 3417, "Addressing the National Energy Emergency," " ask agencies to identify all relevant emergency and other legal authorities available to expedite the completion of all authorized and appropriate infrastructure, energy, environmental, and natural resources projects within their jurisdiction. The use of expedited settlements supports these orders by allowing for less costly, quicker resolution of claims, which is expected to directly benefit the oil and gas industry and likely various mining and transportation industry sectors.

III. Overview of Final Rule

A How the Rule Works

When an incident occurs, all trustees with probable jurisdiction over the injured natural resources must decide whether there are methods to determine damages to fund restoration activities and concur to use the Type A procedures. Damages (excluding reasonable assessment costs) must be less than $5 million, (unless all parties agree to a higher limit) and at least one potentially responsible party (PRP) must voluntarily agree to utilize Type A procedures and sign a Tolling Agreement. Unlike previous iterations of these regulations, the revised Type A procedures are not limited to any specific geographic environment and can be used to evaluate natural resources defined in 43 CFR part 11 in any environment where they occur. Upon finalization of a claim, a Type A report is produced and made available for public comment.

B Major Changes

After Interior reviewed and considered public comments, it made several clarifications and changes in this final rule. The limit on damages for Type A is raised to an initial limit of $5 million. However, if the claim is expected to be higher than $5 million, the Type A procedures may still be used instead of Type B, if all parties agree. Additionally, language is added to clarify that methods can be utilized to evaluate natural resources in all environments.

C Key Issues

Interior reviewed comments submitted on a wide range of issues but received significant comment on a narrow set of issues. The final rule leaves the framework of the existing rule intact. The final rule does not make any substantive changes to legal standards for reliability of assessment data and methodologies. The rest of this section discusses the primary issues addressed by the final rule. References to the OPA regulations are solely for the purpose of providing context and background. For guidance on conducting natural resource damage assessments under OPA, see 15 CFR part 990.

- *Types of environments for which the Type A can be utilized*

The Type A procedures previously limited to coastal, marine, or Great Lakes environments, can be used for all natural resources as set forth in 43 CFR part 11 in any environment where they are found.

- *Specifying when a Type A procedure may be used*

The trustees have decided that methods for replacement of natural resources or resource services (e.g., equivalency analysis, recreational losses, benefits transfer) are available and appropriate for determining damages to fund restoration activities at the site.

- *Increasing the damages amount for which Type A can be used*

The claim that will be resolved using the Type A procedure is expected to be less than $5 million (excluding reasonable assessment costs). This figure will be periodically adjusted for inflation following guidance from OMB. If the claim is expected to be higher than $5 million, the Type A procedures may still be used instead of Type B, if all parties agree.

- *Identifying which scenarios allow for the use of Type A*

At least one potentially responsible party has voluntarily agreed to utilize the Type A, and a tolling agreement for at least one year is in place.

D Summary of Type A Procedures

This portion of the preamble describes the final rule and highlights certain aspects of the rule that may benefit from additional explanation. The Type A procedures provide for a simplified method for conducting damage assessments, which can be used for all natural resources in any environment they are found. The trustees have decided that models for replacement of resources or resource services (e.g., equivalency analysis, recreational losses, benefits transfer) are available and appropriate for determining damages to fund restoration activities at the site. The claim that will be resolved using the Type A procedure is expected to be less than $5 million (excluding reasonable assessment costs) unless all of the parties agree to use Type A in a situation where the claim is expected to be higher. The $5 million figure will be periodically adjusted for inflation following guidance from OMB. At least one PRP has voluntarily agreed to utilize the Type A, and a tolling agreement for at least one year is in place. A Type A Report is provided to the public to comment on the use of the Type A procedure used and includes information on efforts to coordinate with response agencies, other co-trustees, and PRPs. Additionally, the report includes information on data inputs, assumptions, and uncertainties for the models used. Once the Type A report is finalized, a settlement agreement is entered into with the PRPs.

E Conforming Changes and Technical Corrections

The revisions to the Type A procedures in the final rule resulted in some conforming changes and corrections needed for compatibility with the rest of the rule. Specifically, these changes fix citations, provide for consistent use of terminology, and remove or update outdated definitions. Section 11.18(a) has been updated to reference the current editions of the publications cited and removes reference to the models included as part of the previous Type A Procedures.

Section 11.62(f)(4)(i)(B) has been updated to refer to the definition of fish kill investigations in the current publication cited in section 11.18. Section 11.71(1)(5)(iii)(A) has been updated to refer to the definition of fish mortality in the current publication cited in section 11.18.

Section 11.83(c)(2)(ii) has been updated to refer to the definition of appraisal in the current publication cited in section 11.18. Section 11.83(c)(2)(x) has updated the definition of Resource Equivalency Analysis in the table.

Appendices II and III to 43 CFR part 11 have been removed as they referenced the models for the Type A Procedures in the previous rule.

IV Public Comments on the Proposed Rule and Responses to Comments

A Overview

Interior published a NPRM to amend the Type A procedures in 43 CFR part 11 on January 5, 2024 (89 FR 733). The NPRM took into consideration input that Interior received on the ANPRM, which was published on January 19, 2023 (88 FR 3373). The NPRM provided for a 60-day comment period, which closed on March 5, 2024. ORDA published a notice on February 13, 2024, granting a 30-day extension, which extended the comment period to April 5, 2024, and announced the dates for three Tribal consultation sessions (89 FR 10019). During the public comment period for the NPRM, Interior received 26 comments from States, Tribes, industry groups and associations, and the general public. Interior received four comments during the Tribal consultation sessions held on March 26, 27, and 28, 2024. All comments were generally supportive of Interior's efforts to update the regulations.

B Responses to Significant Public Comments on the Proposed Rule

Interior decided to proceed to the final rule stage. Interior made specific changes in response to public comments, including clarifications to address specific concerns. Interior thanks all commenters for their time and contribution to this rulemaking. A summary of the comments received, and Interior's responses and changes made to the final rule as a result of those comments, are provided below.

1 Issue-Specific Responses to Comments

a Overall - Strong Support for the Rule

Generally, all respondents appreciated Interior's work to revise and modernize the Type A Rule. Multiple respondents noted specific positive aspects of these revisions, including:

- Generally increasing flexibility within the Natural Resource Damage Assessment and Restoration (NRDAR) process;
- Removing the geographic restrictions in the rule; and
- Increasing the damages limit for eligible claims.

b Guidance

Several comments requested that Interior develop technical guidance on utilizing the new Type A procedures. Proposed topics for guidance included modeling, Type A Reports, cooperative agreements, the operability of the rebuttable presumption, and other various case scenarios.

Response: Interior agrees that additional guidance on how to use the new Type A procedures may be needed for practitioners and intends to develop appropriate guidance after the rule is finalized and published.

c Scope

Many commenters, both in the public comment and Tribal consultation processes, requested clarity on which environments are included under the updated Type A regulations. Many commenters further expressed that the Type A regulations should not be limited to specific environment types and requested this increased scope be made clear in the final rule.

Response: The Type A procedures originally included models specifically to be applied to coastal, marine and Great Lakes geographic environments. Unlike previous iterations of these regulations, the revised Type A procedures can be used for all types of resources defined under 43 CFR part 11. This is further clarified in the final rule.

Several commenters requested clarifying or omitting the list in 11.36(b) of injury and compensable value categories addressed by the Type A procedures. One commenter suggested explicitly including groundwater and surface water as injury categories.

Response: To avoid any confusion over limits on when the Type A can be used, Interior has removed the list in the previous 11.36(b). Revisions to the Type A procedures do not prevent natural resource trustees from bringing forth claims for which they currently have jurisdiction. Resource injury categories need not be further characterized given definitions already provided under 11.14.

d Cap

A large number of public and Tribal consultation comments gave feedback on the monetary cap for natural resource damages proposed in 11.34(c). While some respondents supported the cap in its proposed form (ranging from $3 to $5 million), several stated it was too low and recommended higher cap values (ranging between $5 to $25 million) that would be periodically adjusted for inflation. Some commenters suggested removing the cap altogether.

Response: Interior partially concurs with these comments and has revised the final rule to allow for a rebuttable presumption in all cases where damages are limited to $5 million, not including reasonable costs of assessment, or in cases where the claim is expected to be higher than $5 million. Interior will adjust this figure for inflation as needed following guidance from OMB.

e Tolling Agreement

Several respondents supported the tolling agreement requirement in 11.34(e). Other commenters found that entering into a tolling agreement should be optional and thus proposed removing the requirement in the final rule. One commenter suggested that instead of requiring a tolling agreement, the Type A regulations should grant another year for completing the NRDAR process if trustees must switch from Type A to Type B procedures.

Response: The tolling agreement requirement remains in place in the final rule in consideration of any potential statute of limitation issues.

f Applicable Models

Many commenters expressed support for broadening and clarifying the valuation methodologies that can be used for damages calculations in Type A assessments. This was important to many commenters because CERCLA provides that damages calculated in accordance with Type A or B procedures are entitled to a rebuttable presumption of correctness in any administrative or judicial proceeding (42 U.S.C. 9607(f)(2)(C)). Additionally, many commenters requested that the language of 11.34(a) be revised to clarify or remove references to "existing" models to allow trustees the flexibility to use models developed in the future. Some commenters suggested instead incorporating by reference the methods listed in 43 CFR 11.83 as appropriate models for assessing damages to natural resources. Others suggested additional guidance be provided in 43 CFR 11.18.

Response: 11.34 has been updated in the final rule to refer to 11.83 as a list of applicable models and factors for evaluation of new methodologies and removes the "existing" language to account for use of models developed in the future. Additionally, technical corrections have been made to 11.18 "Incorporation by reference" and 11.83 "Damage determination phase- use value methodologies" to update the list of applicable models.

g Other issues not captured above

Additional comments were received requesting technical changes to the rule or clarification on how certain parts of the proposed rule will work in practice. These comments addressed topics ranging from the application of the rebuttable presumption and potential double recovery issues under Type A and Type B, to various scenarios involving multiple PRPs, litigation and settlement, compensable value determinations, and different injury categories under 11.36.

Response: The final rule keeps the essential framework of the regulations intact and does not change the fundamentals of the NRDAR process. The final rule is intended to allow for the use of applicable methods in all environments and to raise the cap on the damages limit to a more appropriate level.

2 Section-by-Section Responses to Comments

Finally, a number of commenters suggested specific line edits to the language of the proposed rule.

Response: Interior has considered these line edits as part of the overall comment review process and appreciates the suggestions made.

C Tribal Summary Impact Statement

Consistent with sections 5(b)(2)(B) and 5(c)(2) of Executive Order 13175, and because Interior consulted with Tribal officials in the continental United States prior to publishing this rule, Interior seeks to assist Tribal officials, and the public as a whole, by including in this preamble the three key elements of a Tribal summary impact statement. Specifically, the preamble to this rule (1) describes the extent of Interior's prior consultation with Tribal officials; (2) summarizes the nature of their concerns and Interior's position supporting the need to issue the rule; and (3) states the extent to which Tribal officials' concerns have been met. The ‘‘Public Meetings and Tribal Consultations'' section below describes Interior's prior consultations. Interior discussed these proposed revisions in the monthly meeting the Office of Restoration and Damage Assessment holds with the members of the NRDAR Tribal group and received comments from Tribes via the ANPRM and NPRM process on these proposed revisions as well as during Tribal Consultations.

Tribal natural resource trustees are designated in the National Contingency Plan at 40 CFR 300.610. The Tribal Chairperson, head of the Tribe's governing body, or an individual selected by the Tribe may act as trustee for natural resources belonging to, managed by, controlled by, appertaining to, or held in trust for the benefit of a Tribe. A Tribal Chairperson or head of the Tribal governing body may also designate another person to act as trustee on the Tribe's behalf. There was strong support to revise the rule to increase the limit on damages and to clarify which methods could be used under Type A. This final rule addresses the concerns raised.

V Public Meetings and Tribal Consultations

Interior held information sessions for State, Tribal, and industry partners at respective meetings on the ANPRM and the NPRM. Additionally, Interior hosted three virtual Tribal consultations the week of March 25, 2024, with 15 attendees representing eight different Tribes. Comments received through those consultations were considered with the comments received through regulations.gov and are part of the administrative record for the rulemaking. Transcripts from the Tribal consultations are available in the online docket.

VI Procedural Matters

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the OMB will review all significant rules. OIRA has determined that this final rule is significant.

The regulations we are revising apply only to natural resource trustees by providing technical and procedural guidance for the assessment of natural resource damages under CERCLA and the Clean Water Act. The revisions are not intended to change the balance of legal benefits and responsibilities among any parties or groups, large or small. They do not directly impose any additional cost. In fact, we believe the final rule can help reduce natural resource damage assessment transaction costs by allowing trustees to utilize simpler and more transparent methodologies to assess damages when appropriate. This final rule is considered an E.O. 14192 deregulatory action. We estimate that this rule generates $16.3 million in annualized cost savings at a 7% discount rate, discounted relative to year 2024, over a perpetual time horizon.

With the modification to the CERCLA NRDAR Regulations for Type A procedures, it is estimated that the federal government will save a total of $1.6 million per each Type B assessment that switches to Type A. This is based on the fact that it takes a little over $0.5 million for the assessment activities leading to production/review of documents for Type A assessments, while it takes over $2 million for the assessment activities leading to production/review of documents for Type B assessments — not to mention the fact that Type B assessments take longer. Assuming we were able to switch to more Type A assessments with the higher limit, the cost savings would increase.

Our analysis of our data showed that annual costs are significantly less for a Type A assessment compared to a Type B assessment. Using the best available information and data from the Office of Restoration and Damage Assessment's information management system, Damage Assessment and Restoration Tracking System (DARTS) and publicly available sources on hourly wages, the updated regulations have the potential to result in annual cost savings of up to $1.9 million per Type A assessment, resulting in a savings of approximately $17.4 million per year for nine Type A assessments. These savings are achieved by avoiding new or ongoing activity on Type B assessments that can instead use the Type A procedures. The savings accrue to the public, private sector, state governments, and Tribes. As familiarity with the Type A procedures increases, we see the potential for additional savings. A table showing the aggregate savings over a ten-year period is shown below.

Table 1. Annual Cost Savings to Non-Federal Parties by Switching from Type B to Type A Assessments (Millions 2024$):

Calendar Year	Annual Savings	Discounted Savings (3%)	Discounted Savings (7%)
2024	$17.40	$17.40	$17.40
2025	$17.40	$16.89	$16.26
2026	$17.40	$16.40	$15.20
2027	$17.40	$15.92	$14.20
2028	$17.40	$15.46	$13.27
2029	$17.40	$15.01	$12.41
2030	$17.40	$14.57	$11.59
2031	$17.40	$14.15	$10.84
2032	$17.40	$13.74	$10.13
2033	$17.40	$13.34	$9.46
Totals (2024-2033):	**$174.00**	**$152.88**	**$130.77**

For this estimate we assume that both Type A and Type B assessments would receive the same number of respondents from the public, private sector, and state/Tribal governments, and that each respondent would submit one comment. This results in five total annual responses for both assessment types. Based on the best available data, the total completion time for Type B respondents is nearly three times greater than for Type A respondents, mostly attributable to the difference in hours spent by private sector respondents. Using hourly labor rates from the Bureau of Labor Statistics (BLS) News Release (USDL-24-1172, June 18, 2024, Employer Costs for Employee Compensation—March 2024) the value of annual burden hours is approximately $3.0 million (rounded) for a Type B assessment and $1.0 million for a Type A assessment for a savings of $1.9 million per report.

Work done by Interior economists as part of the required regulatory analysis supported the raising of the limit to $5 million. The analysis demonstrated the number of additional cases that could be considered as Type A under different alternative threshold levels starting at $3 million. Using a dataset from DARTS of 57 settled NRDAR cases from 1992 through 2023, their data evaluation of varying thresholds for an NRDAR case to qualify as a Type A assessment showed the following:

· A threshold of $3M would have resulted in 27 NRDAR cases qualifying as Type A.

· A threshold of $5M would have resulted in 36 NRDAR cases qualifying as Type A (i.e., 27 cases + 9 additional cases for the added $2M threshold).

· The remaining 21 NRDAR cases in the dataset have a median settlement of $12M and an average settlement of $25.7M.

Additional analysis indicated a threshold of $12M would have resulted in 42 NRDAR cases qualifying as Type A (i.e., 36 cases + 6 additional cases for the added $7M threshold).

· Although the universe of cases evolves over time, there may be a diminishing return in the number of cases that could qualify as Type A under a threshold higher than $5M.

· In absolute terms, increasing threshold limits result in more NRDAR cases that could qualify as Type A assessments.

With this analysis conducted, we decided to raise the limit to $5 million. Based on our analysis of past and current cases that could have been considered the Type A procedures under this new rule, we believe 9 new assessments using Type A procedure will occur per year under a $5 million cap. If all parties agree, the Type A procedures may be used even if the claim is expected to be higher. This could result in more cost savings and more assessments being conducted using Type A procedures.

The final rule does not sanction or bar the use of any particular methodology, so long as it meets the acceptance criteria for relevance and cost effectiveness that is set out in the rule. Of course, in litigation, any methodology used would be evaluated by courts to further ensure relevance and reliability.

We also believe that in many cases an early focus on feasible restoration and appropriate restoration actions, rather than on the monetary economic value of public losses, can result in less contention and litigation and faster, more cost-effective restoration. Meanwhile, existing criteria in the rule for evaluating restoration alternatives—including cost effectiveness—remain intact (see 43 CFR 11.82(d)). The likely result will be the encouragement of settlements, less costly and more timely restoration, and reduced transaction costs. To the extent any are affected by the final rule, it is anticipated that all parties will benefit by increasing the focus on restoration in lieu of monetary damages. With the new final rule, it is expected that claims will be resolved sooner, allowing for restoration to occur sooner.

E.O. 13563 directs that regulatory analysis, as practicable and appropriate, should recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these principles. This final rule is consistent with E.O. 13563, including with the direction to undertake retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Regulatory Flexibility Act

We certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601) (see section on E.O. 12866 above for discussion of potential economic effects.) In fact, the use of Type A procedures will help to ensure that claims are able to be resolved more quickly and with less transaction costs. More claims involving small entities could utilize these Type A procedures as opposed to the lengthier Type B procedures.

Small Business Regulatory Enforcement Fairness Act

The Office of Information and Regulatory Affairs (OIRA) within OMB has determined that this rule is not a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(2)).

Unfunded Mandates Reform Act

This rule does not mandate any actions. The existing regulations do not require trustees to conduct assessment or pursue damage claims, and trustees who choose to conduct assessments and pursue damage claims are not required to do so in a manner described in the regulations. The revisions do not change the optional nature of the existing regulations. The revisions themselves do not replace existing procedures, they merely give trustees the option of employing other procedures. Therefore, this rule will not produce a Federal mandate of $200 million or greater in any year.

Takings Analysis under E.O. 12630

A takings implication assessment is not required by E.O. 12630 because no party can be compelled to pay damages for injury to natural resources until they have received "due process" through a legal action in Federal court. This rule merely provides a framework for assessing injury and developing the claim.

Federalism (E.O. 13132)

Federal agencies are required to consult with elected State officials before issuing rules that have "federalism implications" and either impose unfunded mandates or preempt State law. A rule has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The NRDAR regulations are already in compliance with E.O. 13132, and this rule does not alter that status. Specifically, this rule does not require State trustees to take any action; therefore, it does not impose any unfunded mandates. The States already have maximum administrative discretion and the ability to develop their own NRDAR policies and programs, which many have implemented (compliance with sections 2 and 3 of E.O. 13132). The rule has no significant effect on intergovernmental relations because it does not alter the rights and responsibilities of government entities (section 3). The rule does not preempt State law (section 4). If trustees elect to use this rule to assess natural resource damages, there is a consultation requirement with other affected trustees, which is not significantly different from the current rule (section 6). Therefore, a federalism summary impact statement is not required under section 6 of the Executive Order. In the spirit of E.O. 13132, though, State trustees, who are representatives of State-elected officials, were given the opportunity to respond to the proposed revisions as part of the public comment period. In addition, ORDA discussed the revisions with the State NRD Alliance and at our national workshop.

Civil Justice Reform under E.O. 12988

Our Office of the Solicitor has determined that this final rule does not unduly burden the judicial system and meets the requirements of section 3(a) and 3(b)(2) of E.O. 12988. The revisions are intended to provide the option for an early focus on restoration, utilization of simpler and more cost-effective assessment methodologies, and increased opportunities for cooperation among trustees and PRPs. This rule should minimize litigation.

Consultation with Indian Tribes (E.O. 13175 and Departmental policy)

Tribes were given the opportunity to respond to the revisions as part of the public comment period. In addition, we discussed the revisions with our NRDAR Tribal Group on our monthly calls and at our national workshop. We also held three Tribal consultation meetings inviting all Tribes to participate and provide comments on the proposed revisions.

Paperwork Reduction Act (44 USC 3501 *et seq.*)

This final rule has new information collections (ICs) requiring OMB approval. All information collections require approval under the Paperwork Reduction Act of 1995 (PRA; 44 USC 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB has pre-reviewed the information collection requirements contained in 43 CFR part 11 and assigned OMB Control Number 1091-0002. We are now seeking final OMB approval of the ICs in this rule as follows:

(1) *Type A Report (Existing/Modified)*—If a Type A procedure is used, the report already must include the information specified in subpart D (43 CFR 11.90(b)). This rulemaking seeks to clarify the content of the Type A report based on the proposed changes in the sections itemized below. The Type A report must be made available to the public and provide for a comment period of at least 30 days.

Information collected in a Type A Report includes:

(a) The Type A Report is a document to provide the public with notice of, and an opportunity to comment on, the use of the Type A Procedure.

(b) The Type A Report must:

(1) State that the trustee is following this rule and provide a citation to the rule;

(2) Explain the basis for concluding that conditions for pursuing an assessment were met;

(3) Describe any agreements among co-trustees and potentially responsible parties;

(4) Identify ongoing or planned response activities that could affect the natural resources being assessed;

(5) Explain how conditions for using a Type A Procedure listed in 11.34 of this part are met;

(6) Identify and describe the model(s) selected to determine damages to fund restoration activities, including the following;

(i) Data inputs, assumptions, strengths, limitations, and uncertainties

(ii) Possible existing restoration alternatives that make these model assumptions valid for the purpose of restoration;

(iii) Results of the modeling exercise;

(7) Note the establishment of an administrative record for the assessment and explain how to gain access to that record;

(8) Explain how to submit comments and state the deadline for comments; and

(9) Identify a contact person.

Administrative Record for Type A Report includes:

(a) Evidence of efforts to coordinate with response agencies (this need not include any evidence of the substance of discussions, nor documentation of every contact);

(b) Evidence of efforts to consult with other co-trustees (this need not include any evidence of the substance of discussions, nor documentation of every contact) and documentation of any agreements among co-trustees;

(c) The invitation to potentially responsible parties inviting them to participate in the Type A Procedure and documentation of any agreements reached with potentially responsible parties.

(d) Information considered when developing data inputs and assumptions for modeling, including any significant uncertainties concerning the assumptions made and complete citations to any literature used;

(e) A printout of the model(s) sufficient for reproducibility (or a copy of the file used to generate the model(s));

(f) Documentation of any assessment costs incurred, if trustees plan to seek reimbursement of such costs.

(g) Copy of the final Type A Report and each published version of the Type A Report.

Revising Type A Report:

(d) If the trustees decide after their review to select different model(s), or substantially change the model data inputs or assumptions to conduct the Type A Procedure, the trustees must prepare a revised Type A Report that reflects the changes, provides any new information about the modified data inputs and assumptions, and substantively responds to significant comments received during the comment period. Minor changes require a statement of explanation of the changes, explanation of why they are not considered substantial, and discussion of any effects on results to be appended to the original Type A Report.

Revision to Existing IC in Proposed Rulemaking: The information to be included in the modified and/or revised Type A Report will allow for a wider range of models to be used as opposed to the ones currently listed which focus on Coastal and Marine Environments and the Great Lakes Environments exclusively. These changes will allow trustees to use a variety of models and include their results in the Type A Report.

(2) ***Type B Report of Assessment (Existing)***—The completion of an assessment is documented in the Report of Assessment (ROA), which consists of the Preliminary Assessment Screen (PAS), Preliminary Estimate of Damages (PED), Assessment Plan (AP), Restoration and Compensation Determination Plan (RCDP), Restoration Plan (RP; when prepared for settlement), and response to public comments:

- The PAS is a rapid review of readily available information to make a determination as to whether an NRDAR will be carried out (43 CFR 11.23, 11.24 and 11.25).
- The purpose of the PED is to inform the AP to ensure that the choice of the scientific, cost estimating, and valuation methodologies expected to be used in the NRDAR are reasonable cost. The PED typically relies on available information (43 CFR 11.38).
- The AP must identify and document the use of all of the Type A and/or Type B procedures that will be performed, including any proposed injury studies, as well as potential studies to identify early restoration opportunities and potential effectiveness. The AP is published for public comment (43 CFR part 11 subpart C).
- The RCDP provides a reasonable number of possible restoration alternatives, identifies the preferred alternative and the actions required for implementation, and describes the methods and results of the injury determination, injury quantification, and damages determination (monetary or in-kind projects). The RCDP uses literature, site data, study data, and trustees' decision making; it is published for public comment (43 CFR 11.81).
- Although the RP is identified as part of a post-assessment activity, ORDA addressed Departmental and Congressional interest in timely restoration through policy by defining a "restoration-based settlement" to include a legally binding Consent Decree and concurrent final Restoration Plan. Therefore, the RP may be produced before or after settlement, and is published for public comment. The level of effort on a post-settlement RP is assumed to be the same as for settlement. For purposes of this ICR, the RP is

considered to be part of the Type B ROA (43 CFR 11.93; ORDA Restoration Policy).

Title of Collection: Natural Resource Damage Assessments (43 CFR Part 11).

OMB Control Number: 1091-0002.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: Individuals/households, private sector (consultants and potentially responsible parties) and State and Tribal governments.

Total Estimated Number of Annual Respondents: 10.

Total Estimated Number of Annual Responses: 155.

Estimated Completion Time per Response: Varies from 40 hours to 18,627.45 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 513,926.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

On January 5, 2024, we published in the *Federal Register* (89 FR 733) a proposed rule (RIN 1090–AB26) to solicit comments and suggestions from State, Tribal, and Federal natural resource co-trustees, other affected parties, and the interested public on revising the simplified Type A procedures in the regulations for conducting natural resource damage assessment and restoration for hazardous substance releases. In that proposed rule, we solicited comments for 60 days on the information collections in this submission, ending on March 5, 2024. On February 13, 2024, we published in the *Federal Register* (89 FR 10019) an extension of the public comment period for our proposed rule (RIN 1090–AB26). This extension did not change the information collection comment period. We did not receive any comments addressing the information collection requirements in response to that proposed rule.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Comments that you submit in response to this rulemaking are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Written comments and suggestions on the information collection requirements should be submitted by the date specified above in DATES to http://www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. Please provide a copy of your comments to Departmental Information Collection Clearance Officer, U.S. Department of the Interior, Jeffrey Parrillo, 1849 C Street, NW Washington, DC 20240; or by email to DOI-PRA@ios.doi.gov. Please reference OMB Control Number 1091-0002 in the subject line of your comments.

National Environmental Policy Act

We have analyzed this rule pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR part 46), and the Department of the Interior Handbook of National Environmental Policy Act Implementing Procedures (516 DM 1). Federal agencies must prepare an environmental impact statement for a proposed major Federal action, that would have a reasonably foreseeable significant effect on the quality of the human environment. (42 U.S.C. 4332(c)). We have determined that a detailed statement under NEPA is not required because the rule is covered by a categorical exclusion. We find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. We have also considered whether any of the extraordinary circumstances described in 43 CFR 46.215 apply, and we did not identify any extraordinary circumstances that apply to this rulemaking.

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not been designated by the Administrator of OIRA as a significant energy action.

Releases of hazardous substances can adversely affect the supply, distribution, or use of various types of energy. This rulemaking provides simplified procedures to conduct NRDAR activities under CERCLA due to releases of hazardous substances and restore the injured natural resources that may supply energy. A Statement of Energy Effects is not needed.

Clarity of this Regulation

Executive Orders 12866 and 12988 and the Presidential Memorandum of June 1, 1998, direct agencies to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized,

(2) Use the active voice to address readers directly,

(3) Use clear language rather than jargon,

(4) Be divided into short sections and sentences, and

(5) Use lists and tables wherever possible.

VII Incorporation by Reference

The American Fisheries Society publishes fish journals, peer-reviewed technical articles, and books on all aspects of aquatic resource-related subjects including fish biology, ecology, introduced species and economics. Its 2017 book, "Investigation and Monetary Values of Fish and Freshwater Mollusk Kills" (second printing, August 2018) includes widely accepted monetary values of fish and has been used in numerous legal challenges. It is available to borrow from Interior's library or for purchase on the AFS's website: fisheries.org/bookstore/all-titles/special-publications/51035p/.

The Appraisal Foundation publishes the "Uniform Appraisal Standards for Federal Land Acquisitions," commonly known as the "Yellow Book". It is developed by the Interagency Land Acquisition Conference and used in the valuation of real property in federal acquisitions and contains requirements for appraisers. The 2016 version is available to borrow from Interior's library or for purchase on the Appraisal Foundation's website: www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Appraisal_Standards_for_Federal_Land_Acquisitions/TAF/Yellow_Book.aspx?hkey=77e5c6a0-ff07-4aa0-be1b-b7e0f0fa0360.

Interior has concluded that both of these publications are reasonably available as they can both be borrowed from Interior's Library or purchased at their publishers.

List of Subjects in 43 CFR Part 11

Assessment procedures, Hazardous substances, Incorporation by reference, Natural resource damages, Potentially responsible parties, Trustees.

Words of Issuance

For the reasons discussed in the preamble, the Department of the Interior amends 43 CFR part 11 as follows:

PART 11—NATURAL RESOURCE DAMAGE ASSESSMENTS

1. The authority citation for part 11 continues to read as follows:

Authority: 42 U.S.C. 9651(c), as amended.

2. Revise § 11.18 to read as follows:

§ 11.18 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Department of the Interior (DOI) must publish a document in the *Federal Register* and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at DOI and the National Archives and Records Administration (NARA). Contact DOI at: Interior Library, 1849 C Street, NW, MS 1151, Washington, DC 20240; (202) 208-5518; www.doi.gov/library. For information on the availability of this material at NARA, visit www.archives.gov/federalregister/cfr/ibr-locations or email fr.inspection@nara.gov. The material may be obtained from the following sources:

(a) American Fisheries Society (AFS), 425 Barlow Place, Bethesda, MD 20814; phone: 301-897-8616, website: fisheries.org/.

(1) Investigation and Monetary Values of Fish and Freshwater Mollusk Kills. Edited by Robert I. Southwick and Andrew J. Loftus. Special Publication 35. Second printing, August 2018. (AFS Special Publication 35). IBR approved for §§ 11.62 and 11.71.

Note 1 to paragraph (a)(1): AFS Special Publication 35 is available online at: fisheries.org/bookstore/all-titles/special-publications/51035p/.

(2) [Reserved]

(b) The Appraisal Foundation, 1155 15th Street, NW, Suite 1111, Washington, DC 20005; phone: 202.347.7722; email: info@appraisalfoundation.org; website: appraisalfoundation.org/imis/.

(1) Interagency Land Acquisition Conference – Uniform Appraisal Standards for Federal Land Acquisitions. 2016. ISBN: 978-0-09892208-8-0. (Uniform Appraisal Standards for Federal Land Acquisitions 2016). IBR approved for § 11.83.

Note 2 to paragraph (b)(1): Uniform Appraisal Standards for Federal Land Acquisitions 2016 is available online at:

www.justice.gov/d9/enrd/legacy/2015/04/13/uniform-appraisal-standards.pdf

(2) [Reserved]

3. Revise §§ 11.33 through 11.37 to read as follows:

Sec.

* * * * *

11.33 What types of assessment procedures are available?

11.34 When may a trustee use a Type A procedure?

11.35 How does the trustee decide whether to use Type A or Type B procedures?

11.36 May the trustee use both a Type A and Type B procedure for the same release?

11.37 Must the trustee confirm exposure before implementing the Type B Assessment Plan?

* * * * *

§ 11.33 What types of assessment procedures are available?

There are two types of assessment procedures:

(a) Type A procedures are simplified procedures that require minimal field observation which can be used for all types of resources defined under this part (hereafter, all environments). Subpart D of this part describes the Type A procedures.

(b) Type B procedures require more extensive field observation than the Type A procedures. Subpart E of this part describes the Type B procedures.

§ 11.34 When may a trustee use a Type A procedure?

A Trustee may use a Type A procedure for all resource types defined under this part if all of the following are satisfied:

(a) The natural resource trustee has decided that methods for replacement of resources or resource services from the list of applicable models or the factors for evaluation of new methodologies in § 11.83 are appropriate for determining damages to fund restoration activities at the site.

(b) All Federal, State, and Tribal trustees with probable jurisdiction over the injured natural resources who have elected to participate in the claim concur in the use of the Type A procedure in the circumstances presented.

(c) The claim that will be resolved using the Type A procedure is expected to be less than $5 million (excluding reasonable assessment costs). This figure will be periodically adjusted for inflation following guidance from the Office of Management and Budget. In claims which are expected to be higher than $5 million, the Type A procedures may still be used if all parties agree.

(d) At least one potentially responsible party has voluntarily agreed to utilize the Type A procedure. If a claim involves multiple potentially responsible parties, the Type A process may not be appropriate unless resolution of the claim involves all significant potentially responsible parties, or the resolution of the claim represents a final settlement of the claim for injury to specific natural resources at the site.

(e) The potentially responsible party agrees to toll the running of the statutory limitations period for filing the claim for at least one year and to reimburse the trustees for reasonable Type A assessment costs until the claim is resolved or the potentially responsible party gives formal notice of withdrawal from voluntary participation in the Type A procedure.

§ 11.35 How does the trustee decide whether to use Type A or Type B procedures?

(a) If the natural resource trustee determines under § 11.34 that a Type A procedure is available, the trustee must then decide whether to use that procedure or use a Type B procedure. The trustee must make this decision by weighing the difficulty of collecting site-specific data against the suitability of the averaged data and simplifying assumptions in the Type A procedure for the release being assessed. The trustee may use a Type B procedure if they can be performed at a reasonable cost and if the increase in accuracy provided by those procedures outweighs the increase in assessment costs.

(b) If there is no appropriate Type A procedure, the trustee must use a Type B procedure to calculate all damages.

§ 11.36 May the trustee use both a Type A and Type B procedure for the same release?

(a) The natural resource trustee may use both a Type A procedure and Type B procedure for the same release if:

(1) The Type B procedure is cost-effective and can be performed at a reasonable cost;

(2) There is no double recovery; and

(3) The Type B procedure is used only to determine damages for injuries or compensable values that are not addressed by the Type A procedure.

(b) The Type A procedure may be used to address any claim brought by a natural resource trustee.

(c) If a trustee elects to use both a Type A procedure and a Type B procedure, the Assessment Plan must explain how the double recovery will be prevented.

(d) When the trustee uses a Type B procedure for injuries not addressed in a Type A procedure, they must follow all of subpart E of this part (which contains standards for determining and quantifying injury as well as determining damages), § 11.31(c) (which addresses content of the Assessment Plan), and § 11.37 (which addresses confirmation of exposure). When the trustee uses a Type B procedure for compensable values that are not included in a Type A procedure but that result from injuries that are addressed in the Type A procedure, they need not follow all of subpart E and §§ 11.31(c) and 11.37. Instead, the trustee may rely on the injury predictions of the Type A procedure and simply use the valuation methodologies authorized by § 11.83(c) to calculate compensable value. When using valuation methodologies, the trustee must comply with § 11.84.

§ 11.37 Must the trustee confirm exposure before implementing the Type B Assessment Plan?

(a) Before including any Type B methodologies in the Assessment Plan, the trustee must confirm that at least one of the natural resources identified as potentially injured in the preassessment screen has in fact been exposed to the released substance.

(b) Whenever possible, exposure shall be confirmed by using existing data, such as those collected for response actions by the On-Scene Coordinator, or other available studies or surveys of the assessment area.

(c) Where sampling has been done before the completion of the preassessment screen, chemical analyses of such samples may be performed to confirm that exposure has occurred.

(d) Where existing data are unavailable or insufficient to confirm exposure, one or more of the analytical methodologies provided in the Injury Determination phase subpart E of this part may be used.

(e) Type B assessment methodologies shall be included in the Assessment Plan only upon meeting the requirements of this section.

4. Revise subpart D to read as follows:

Subpart D – Using the Type A Procedures

Sec.

Subpart D – Using the Type A Procedures

§ 11.40 How does a trustee use the Type A procedure?

Once a trustee has decided that the Type A procedure is appropriate to resolve a claim and the potentially responsible party has agreed to utilize the Type A procedure, the trustee should notify and invite other affected co-trustees to participate in the Type A procedure. The Type A procedure must be documented in a Type A Report.

§ 11.41 What information is included in a Type A Report?

(a) The Type A Report is a document to provide the public with notice of, and an opportunity to comment on, the use of the Type A procedure.

(b) The Type A Report must:

(1) State that the trustee is following this part and provide a citation to this part;

(2) Explain the basis for concluding that conditions for pursuing an assessment were met;

(3) Describe any agreements among co-trustees and potentially responsible parties;

(4) Identify ongoing or planned response activities that could affect the natural resources being assessed;

(5) Explain how conditions for using a Type A procedure listed in § 11.34 are met;

(6) Identify and describe the model(s) selected to determine damages to fund restoration activities, including the following;

(i) Data inputs, assumptions, strengths, limitations, and uncertainties;

(ii) Possible existing restoration alternatives that make these model assumptions valid for the purpose of restoration; and

(iii) Results of the modeling exercise;

(7) Note the establishment of an administrative record for the assessment and explain how to gain access to that record;

(8) Explain how to submit comments and state the deadline for comments; and

(9) Identify a contact person.

(c) The Type A Report must be made available to the public and provide for a comment period of at least 30 days.

§ 11.42 What documents must be in the administrative record when the Type A Report is published?

(a) Evidence of efforts to coordinate with response agencies (this need not include any evidence of the substance of discussions, nor documentation of every contact);

(b) Evidence of efforts to consult with other co-trustees (this need not include any evidence of the substance of discussions, nor documentation of every contact) and documentation of any agreements among co-trustees;

(c) The invitation to potentially responsible parties inviting them to participate in the Type A procedure and documentation of any agreements reached with potentially responsible parties;

(d) Information considered when developing data inputs and assumptions for modeling, including any significant uncertainties concerning the assumptions made and complete citations to any literature used;

(e) A printout of the model(s) sufficient for reproducibility (or a copy of the file used to generate the model(s));

(f) Documentation of any assessment costs incurred, if trustees plan to seek reimbursement of such costs; and

(g) Copy of the final Type A Report and each published version of the Type A Report.

§ 11.43 What is the process for Type A Report comments?

(a) Comments received during the comment period must be placed in the administrative record and reviewed by the trustees.

(b) If the trustees decide after their review that no changes to the Type A Report are needed, the trustees must publish a notice that:

(1) States that the Type A Report has been finalized; and

(2) Provides substantive responses to significant comments received during the comment period.

(c) If the trustees decide after their review that it is inappropriate to use the Type A procedure, the trustees may decide to use a Type B procedure for the assessment or stop the assessment.

(d) If the trustees decide after their review to select different model(s), or substantially change the model data inputs or assumptions to conduct the Type A procedure, the trustees must prepare a revised Type A Report that reflects the changes, provides any new information about the modified data inputs and assumptions, and substantively responds to significant comments received during the comment period. Minor changes require a statement of explanation of the changes, explanation of why they are not considered substantial, and discussion of any effects on results to be appended to the original Type A Report.

(e) The trustees must provide an additional comment period of at least 30 days for a revised Type A Report.

§ 11.44 How do the trustees conclude the Type A procedure?

(a) After the Type A Report is finalized, trustees may enter into a settlement agreement with potentially responsible parties.

(b) Damages to fund or undertake restoration activities must be utilized following a publicly reviewed Restoration Plan consistent with subpart F of this part.

(c) The public review and comment period for Administrative Settlement Agreements, Consent Decrees, and Restoration Plans may run concurrently with the comment period for the Type A Report, if appropriate.

5. Amend § 11.62 by revising paragraph (f)(4)(i)(B) to read as follows:

§ 11.62 Injury determination phase—injury definition.

* * * * *

(f) * * *

(4) * * *

(i) * * *

(B) *Fish kill investigations*. Injury has occurred when a significant increase in the frequency or numbers of dead or dying fish can be measured in accordance with the procedures for counting dead or dying fish contained in AFS Special Publication 35 (incorporated by reference, see § 11.18).

* * * * *

6. Amend § 11.71 by revising paragraph (l)(5)(iii)(A) to read as follows:

§ 11.71 Quantification phase—service reduction quantification.

* * * * *

(l) * * *

(5) * * *

(iii) * * *

(A) Fish mortality in freshwater areas may be estimated from counts of carcasses, using methods and guidelines for estimating numbers of fish killed contained in AFS Special Publication 35 (incorporated by reference, see § 11.18).

* * * * *

7. Amend § 11.83 by revising paragraphs (c)(2)(ii) and (x) to read as follows:

§ 11.83 Damage determination phase—use value methodologies.

* * * * *

(c) * * *

(2) * * *

Type of Methodology	Description
* * * * * * *	
(ii) Appraisal	The measure of compensable value is the difference between the with- and without-injury appraisal value determined by the comparable sales approach as described in the Uniform Appraisal Standards. Must measure compensable value, to the extent possible, in accordance with Uniform Appraisal Standards for Federal Land Acquisitions 2016 (incorporated by reference, see § 11.18).
* * * * * * *	
(x) Resource Equivalency Analysis	Similar to habitat equivalency analysis. This methodology may be used to compare the effects of restoration actions on specifically identified resources that are injured or destroyed (this includes biomass REA/habitat based resource equivalency method (HaBREM)).[1]
* * * * * * *	

[1] Article describing HaBREM is available online at: https://repository.library.noaa.gov/view/noaa/26291.

* * * * *

Appendices II and III to Part 11 [Removed]

8. Remove appendices II and III to part 11.

Troy W. Finnegan,

Deputy Assistant Secretary, Exercising the Delegated Authority of the Assistant Secretary – Policy, Management and Budget.

[FR Doc. 2026-14052 Filed: 7/10/2026 8:45 am; Publication Date: 7/13/2026]