

§ 11.25

or license authorizes such commitment of natural resources, and that the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe; or

(ii) And the release of a hazardous substance from which such damages resulted have occurred wholly before enactment of CERCLA; or

(iii) Resulted from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135-135k; or

(iv) Resulted from any other federally permitted release, as defined in section 101(10) of CERCLA; or

(v) Resulting from the release or threatened release of recycled oil from a service station dealer described in section 107(a)(3) or (4) of CERCLA if such recycled oil is not mixed with any other hazardous substance and is stored, treated, transported or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

(2) An assessment under this part shall not be continued for potential injuries meeting one or more of the criteria described in paragraph (b)(1) of this section, which are exceptions to liability provided in sections 107(f), (i), and (j) and 114(c) of CERCLA.

(c) *Damages excluded from liability under the CWA.* (1) The authorized official shall determine whether the discharge meets one or more of the exclusions provided in section 311 (a)(2) or (b)(3) of the CWA.

(2) An assessment under this part shall not be continued for potential injuries from discharges meeting one or more of the CWA exclusions provided for in paragraph (c)(1) of this section.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5173, Feb. 22, 1988]

43 CFR Subtitle A (10-1-03 Edition)

§ 11.25 Preassessment screen—preliminary identification of resources potentially at risk.

(a) *Preliminary identification of pathways.* (1) The authorized official shall make a preliminary identification of potential exposure pathways to facilitate identification of resources at risk.

(2) Factors to be considered in this determination should include, as appropriate, the circumstances of the discharge or release, the characteristics of the terrain or body of water involved, weather conditions, and the known physical, chemical, and toxicological properties of the oil or hazardous substance.

(3) Pathways to be considered shall include, as appropriate, direct contact, surface water, ground water, air, food chains, and particulate movement.

(b) *Exposed areas.* An estimate of areas where exposure or effects may have occurred or are likely to occur shall be made. This estimate shall identify:

(1) Areas where it has been or can be observed that the oil or hazardous substance has spread;

(2) Areas to which the oil or hazardous substance has likely spread through pathways; and

(3) Areas of indirect effect, where no oil or hazardous substance has spread, but where biological populations may have been affected as a result of animals moving into or through the site.

(c) *Exposed water estimates.* The area of ground water or surface water that may be or has been exposed may be estimated by using the methods described in appendix I of this part.

(d) *Estimates of concentrations.* An estimate of the concentrations of oil or a hazardous substance in those areas of potential exposure shall be developed.

(e) *Potentially affected resources.* (1) Based upon the estimate of the areas of potential exposure, and the estimate of concentrations in those areas, the authorized official shall identify natural resources for which he may assert trusteeship that are potentially affected by the discharge or release. This preliminary identification should be used to direct further investigations, but it is not intended to preclude consideration of other resources later found to be affected.

(2) A preliminary estimate, based on information readily available from resource managers, of the services of the resources identified as potentially affected shall be made. This estimate will be used in determining which resources to consider if further assessment efforts are justified.

Subpart C—Assessment Plan Phase

§ 11.30 What does the authorized official do if an assessment is warranted?

(a) If the authorized official determines during the Preassessment Phase that an assessment is warranted, the authorized official must develop a plan for the assessment of natural resource damages.

(b) *Purpose.* The purpose of the Assessment Plan is to ensure that the assessment is performed in a planned and systematic manner and that methodologies selected from subpart D for a type A assessment or from subpart E for a type B assessment, including the Injury Determination, Quantification, and Damage Determination phases, can be conducted at a reasonable cost, as that phrase is used in this part.

(c) *Assessment Plan phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the Assessment Plan phase of the damage assessment:

- (i) Methodology identification and screening costs;
- (ii) Potentially responsible party notification costs;
- (iii) Public participation costs;
- (iv) Exposure confirmation analysis costs;
- (v) Preliminary estimate of damages costs; and
- (vi) Any other Assessment Plan costs for activities authorized by §§ 11.30 through 11.38.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site specific efforts taken in the development of an Assessment Plan for a resource for which the agency or Indian tribe is acting as trustee. Such costs shall be supported by appropriate records and

documentation, and shall not reflect regular activities performed by the agency or tribe in management of the natural resource. Activities undertaken as part of the Assessment Plan phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5174, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994; 61 FR 20609, May 7, 1996]

§ 11.31 What does the Assessment Plan include?

(a) *General content and level of detail.*

(1) The Assessment Plan must identify and document the use of all of the type A and/or type B procedures that will be performed.

(2) The Assessment Plan shall be of sufficient detail to serve as a means of evaluating whether the approach used for assessing the damage is likely to be cost-effective and meets the definition of reasonable cost, as those terms are used in this part. The Assessment Plan shall include descriptions of the natural resources and the geographical areas involved. The Assessment Plan shall also include a statement of the authority for asserting trusteeship, or co-trusteeship, for those natural resources considered within the Assessment Plan. The authorized official's statement of the authority for asserting trusteeship shall not have the force and effect of a rebuttable presumption under § 11.91(c) of this part. In addition, for type B assessments, the Assessment Plan shall include the sampling locations within those geographical areas, sample and survey design, numbers and types of samples to be collected, analyses to be performed, preliminary determination of the recovery period, and other such information required to perform the selected methodologies.

(3) The Assessment Plan shall contain information sufficient to demonstrate that the damage assessment has been coordinated to the extent possible with any remedial investigation feasibility study or other investigation performed pursuant to the NCP.

(4) The Assessment Plan shall contain procedures and schedules for sharing data, split samples, and results of analyses, when requested, with any