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# Title 43

## NATURAL RESOURCES

### Part XXIX. Oil Spill Prevention and Response

#### Chapter 1. Natural Resource Damage Assessment

##### Subchapter A. General Provisions

###### §101. Declaration and Intent

A. The Louisiana Oil Spill Coordinator in the Office of the Governor adopts these Rules pursuant to the Oil Spill Prevention and Response Act (OSPRA), Louisiana Revised Statutes, §30:2451 et seq. These Rules are applicable in the event that an unauthorized discharge of oil or a substantial threat of an unauthorized discharge of oil to state waters results in injury to natural resources.

B. These Rules shall be interpreted and implemented in a manner consistent with federal law. Any conflict between a provision of these Rules and the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. part 300) and/or the Oil Spill Prevention and Response Act (R.S. 30:2451 et seq.) should be resolved in favor of the cited authorities. Thus, the coordinator and state natural resource trustees are encouraged to cooperate and coordinate their actions with the federal trustees, and in cooperation with the potentially responsible party, to make the environment and the public whole for injuries resulting from unauthorized discharges by assessing natural resource damages for those injuries, presenting a claim for damages (including the reasonable costs of assessing damages), recovering damages, and developing and implementing a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources and services under their trusteeship.

C. The federal trustees are not bound by these Rules and have the right to bring separate claims in addition to any claim made by the state trustees. Even though state and federal trustees may bring a separate claim, double recovery is prohibited. The state trustees may bring a claim for natural resource damages pursuant to their authority under the Oil Pollution Act of 1990 (OPA), 33 U.S.C., §2701 et seq., or under OSPRA, R.S. 30:2451 et seq. The state trustees may use the natural resource damage assessment procedures established under this Rule or under the Rules adopted pursuant to OPA, a combination of procedures drawn from both OPA and OSPRA Rules, or under the OSPRA Rules. The decision as to which assessment procedures will be used shall be documented in the Administrative Record. Whether the state trustees use OPA procedures, OSPRA procedures, or a combination of OSPRA and OPA procedures, they will perform the field investigation as described in §117 of this Chapter.

D. In the action to recover natural resource damages, the coordinator, in consultation with the state natural resource trustees, shall make the determination whether to assess natural resource damages and the amount of damages, and such determination shall create a rebuttable presumption of the amount of such damages.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:500 (March 1999).

###### §103. Applicability

A. This Chapter applies to any unauthorized discharge or substantial threat of an unauthorized discharge of oil that enters or poses a threat to land, coastal waters, or any other waters of Louisiana.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:500 (March 1999).

###### §105. Usage

A. As used in these Rules, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require. Any reference to "days" in this Chapter shall refer to calendar days.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:500 (March 1999).

###### §107. Severability

A. If any section or provision of this Chapter or the application of that section or provision to any person, situation, or circumstance is determined to be invalid by a court of competent jurisdiction for any reason, such adjudication shall not affect any other section or provision of this Chapter, or the application of the adjudicated section or provision to any other person, situation, or circumstance.

B. The Louisiana Oil Spill Coordinator declares that he adopts the valid portions and applications of this Chapter without the invalid sections, and to this end, the provisions of this Chapter are declared to be severable.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:501 (March 1999).

**§109. Definitions**

A. The following words, terms, and phrases, when used in this Chapter, shall have the following meanings, unless the word, term, or phrase is otherwise defined in the text.

*Acquisition of Equivalent* Cthe acquisition of a natural resource that provides services substantially equivalent to those injured as the result of an unauthorized discharge of oil.

*Area Contingency Plan* Cthe contingency plan required by the Federal Water Pollution Control Act [33 U.S.C., §1321(j)(4)].

*Assessment or Natural Resource Damage Assessment* Cthe process of collecting, compiling, and analyzing information through prescribed procedures and/or protocols to determine damages for injuries to natural resources and/or any loss in the services provided by the natural resources resulting from an unauthorized discharge of oil.

*Baseline* Cthe 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.

*Coastal Waters* Cthe waters and bed of the Gulf of Mexico within the jurisdiction of the State of Louisiana, including the arms of the Gulf of Mexico subject to tidal influence, estuaries, and any other waters within the state, if such other waters are navigated by vessels with a capacity to carry 10,000 gallons or more of oil as fuel or cargo.

*Coordinator* Cthe Louisiana Oil Spill Coordinator.

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

*Damages* Cdamages specified in section 1002(b)(2)(A and D) of OPA [33 U.S.C. 2702(b)(2)], and includes the costs of assessing these damages, as defined in section 1001(5) of OPA [33 U.S.C. 2701(5)], effective as of the date of the adoption of this Rule.

*Exposure* Cwhen all or part of a natural resource is or may be in physical contact with oil (resulting from an unauthorized discharge) or with media containing oil or its degradation products. (See above.)

*Federal Fund* Cthe Oil Spill Liability Trust Fund established by the *Internal Revenue Code of 1986*, 26 U.S.C. §9509.

*Federal Trustee(s)* Cofficial(s) of the federal government designated, according to the Oil Pollution Act of 1990 (33 U.S.C. §2701 et seq.), §2706(b)(2), as trustees who may present a claim for and recover damages for injury to natural resources.

*Field Investigation* Can evaluation by one or more representatives of the state natural resource trustees of the area impacted by an unauthorized discharge of oil to determine the actual and potential exposure of natural resources and the impact on natural resources and the

services they provide for the purpose of evaluating which damage assessment methods, if any, should be utilized by state trustees.

*Incident* Cany unauthorized discharge of oil or series of unauthorized discharges of oil, including the threat of unauthorized discharge of oil, having the same origin, involving one or more vessels, facilities, or any combination thereof.

*In Consultation with the Other State Trustee(s)* Cprocess described in Memoranda of Agreement between the Oil Spill Coordinator and the state natural resource trust agencies.

*Injury* Cany observable or measurable adverse change, either long or short term, in the chemical or physical quality or the viability of a natural resource or loss of services (as defined in this Section), resulting either directly or indirectly from an unauthorized discharge of oil, response to an unauthorized discharge of oil, or substantial threat of an unauthorized discharge of oil.

*Lead Administrative Trustee* Cthe state trustee, either the Louisiana Oil Spill Coordinator or his designee, responsible for compiling the administrative record and for coordinating activities of the state trustees in the natural resource damage assessment process.

*Loss or Loss of Services* Cany impairment of a service, as defined in this Section, provided by a natural resource, resulting either directly or indirectly from exposure to an unauthorized discharge of oil.

*National Contingency Plan* Cthe plan prepared and published as revised from time to time, under the Federal Water Pollution Control Act (33 U.S.C. §§ 1321 et seq.) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.).

*Natural Recovery* Cthe process through which injured natural resources and their services return to baseline condition without additional human intervention.

*Natural Resources* Call land, fish, shellfish, fowl, wildlife, biota, vegetation, air, water, groundwater supplies, and other similar resources owned, managed, held in trust, regulated, or otherwise controlled by the State of Louisiana.

*Oil* Coil of any kind or in any form including, but not limited to, crude oil, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C., §9601(14)(A)-(F), effective as of the date of the adoption of this Rule and which is subject to the provisions of that Act.

*OSPRAC* Cthe Oil Spill Prevention and Response Act R.S. 30:2451 et seq.

*On-Scene Coordinator or State On-Scene Coordinator or SOSCC* Cthe Louisiana Oil Spill Coordinator or state official designated by the coordinator to coordinate and direct response actions under the State Oil Spill Contingency Plan pursuant to R.S. 30:2464.

*Pathway*Cthe medium, mechanism, or route by which the incident has resulted in exposure to oil (from an unauthorized discharge) of natural resources. For unauthorized discharges of oil, a pathway is the sequence of events by which:

- a. the oil traveled through various components of an ecosystem and contacted the natural resource of concern; or
- b. exposure to oil in one part of an ecosystem was transmitted to the natural resource of concern, without the oil directly contacting the natural resource.

*Public Use(s)*Cthe services provided by natural resources for human activities; this includes, but is not limited to, cultural, archaeological, transportation, public water supply, industrial water supply, swimming, fishing, harvesting of natural resources, nature viewing, hunting, diving, sailing, boating, hiking, camping, climbing, photographing, drawing, painting, and other human uses.

*Recovery*Cthe return of the injured natural resource and service to baseline conditions.

*Reference Area* or *Reference Resource*Can area or natural resource, unaffected by the relevant incident, and which is comparable in physical, chemical, and biological characteristics or in the level of services provided to the area potentially injured as a result of the relevant incident.

*Rehabilitation*Cthose actions which enhance the recovery of injured natural resources.

*Replacement*Csubstituting natural resources at or near the impacted area to compensate for the loss of natural resources and/or services due to an unauthorized discharge of oil.

*Responsible Party* or *Responsible Parties*C

- a. the owner(s) and/or operator(s) of a vessel or terminal facility from which an unauthorized discharge of oil emanates or threatens to emanate; and
- b. in the case of an abandoned vessel or facility, the party who would have been responsible immediately prior to the abandonment; and
- c. any other person, but not including a person or entity who is rendering care, assistance, or advice in response to an unauthorized discharge or threatened unauthorized discharge of another person, who causes, allows, or permits an unauthorized discharge of oil or threatened unauthorized discharge of oil.

*Restoration*Cany action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services, and may include:

- 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.

*Restoration Plan*Ca plan developed for public review and comment that describes the restoration alternatives to be considered in the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

*Services, Ecological Services, or Natural Resource Services*Cthe processes or functions provided by natural resources for the benefit of other natural resources and/or the public and includes, but is not limited to, water purification, flood control, erosion control, shelter, food supply, and reproductive habitats.

*State Oil Spill Contingency Plan*Cthe plan required by R.S. 30:2456.

*State Natural Resource Trustees*CLouisiana Department of Environmental Quality, Louisiana Department of Natural Resources, Louisiana Department of Wildlife and Fisheries, and/or other agencies of the State of Louisiana designated by the Governor according to the Oil Pollution Act of 1990 as state natural resources trustees.

*State Trustee(s)*Cthe state trustee coordinator (Louisiana Oil Spill Coordinator) and the state natural resource trustees (Louisiana Department of Environmental Quality, Louisiana Department of Natural Resources, Louisiana Department of Wildlife and Fisheries). The definition of state trustees may also include other agencies of the State of Louisiana designated by the Governor according to the Oil Pollution Act of 1990 as state natural resource trustees.

*Trustee(s)*Cthose officials of the federal and state governments, of Indian tribes, and foreign governments, designated under 33 U.S.C. 2706(b) of Oil Pollution Act.

*Unauthorized Discharge of Oil*Cany actual or threatened discharge or oil not authorized by a federal or state permit.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:501 (March 1999).

## **Subchapter B. State Trustee Response, Organization, and Coordination**

### **§111. Notification of an Unauthorized Discharge of Oil**

A. The coordinator shall promptly notify all state natural resource trustees of all reported unauthorized discharges of oil.

B. After observing the characteristics of the unauthorized discharge of oil and the location of the affected natural resources, if the SOSC determines that the quantity or properties of the oil discharged or the natural resources potentially impacted by the oil differ significantly from the initial report, the SOSC shall promptly provide the state trustees with an updated report.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:502 (March 1999).

**§113. Coordination of Trustee Response to an Unauthorized Discharge of Oil**

A. The state trustees shall, through the unified incident command system:

1. assist each other in prioritizing protection of natural resources during any significant unauthorized discharge of oil. The trustees shall be available, throughout the response to the unauthorized discharge of oil, to advise and assist the SOSC regarding the benefits and risks associated with response activities on natural resources;

2. confer on a regular basis, as necessary, in accordance with the National Contingency Plan, Area Contingency Plans, Regional Contingency Plans and the State Oil Spill Contingency Plan;

3. integrate and coordinate assessment activities with ongoing response activities as long as assessment activities do not interfere with those response activities; and

4. exchange information related to the impact of response activities on natural resources. The SOSC shall provide the trustees with an incident report detailing the quality and effectiveness of the responsible party's containment and removal actions and the protection and preservation of natural resources.

B. The SOSC shall advise the state trustees in writing when the impacted area is safely accessible for damage assessment activities. The SOSC shall allow access to the impacted area in accordance with the site safety plan. The SOSC may limit the state trustee activities only if such activities would create an unreasonable interference with response actions.

C. The state natural resource trustees with the assistance of the coordinator shall conduct natural resource damage assessments by:

1. developing and utilizing contingency planning to enhance coordination among all trustees, emergency response agencies, and potentially responsible parties to ensure a consistent and comprehensive response to unauthorized discharges of oil;

2. coordinating and exchanging scientific, technical, economic and legal expertise among the trustees and potentially responsible party;

3. integrating all scientific, technical, economic, and legal issues;

4. executing, when necessary, contracts to procure the services of appropriate experts;

5. providing the opportunity for early participation in the field investigation and assessment process by the potentially responsible parties; and

6. providing opportunity for public review and comment on the administrative record and draft restoration plan.

D. The state trustees shall coordinate with the federal trustees in all phases of the damage assessment and restoration process.

E. The lead administrative trustee shall:

1. coordinate the natural resource damage assessment and organize communication among the trustees and with the potentially responsible party regarding the assessment. The lead administrative trustee shall perform all administrative tasks required to disseminate information to all participants in the assessment and to ensure that the assessment is completed within the time periods, including any extensions granted, provided by R.S. 30:2480. Administrative tasks include:

a. scheduling of meetings of the trustees and potentially responsible party and preparing agendas for those meetings;

b. notifying trustees and potentially responsible party of all pertinent developments on a timely basis;

c. maintaining documents and records of the assessment; and

d. establishing and maintaining the Administrative Record as required by §127 of this Chapter;

2. ensure that disagreements among trustees are expeditiously resolved; and

3. informing the Louisiana Attorney General of state trustee actions during the assessment process.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:502 (March 1999).

**§115. Responsible Party Participation**

A. Pursuant to R.S. 30:2480.C(6)(c), the state trustees are directed to invite the potentially responsible party to participate in natural resource damage assessment as soon as practicable and no later than the delivery of the Notice of Intent (see §123 of this Chapter). The state trustees shall determine the scope of participation by the potentially responsible party consistent with R.S. 30:2480.

1. Responsible parties may assist the state trustees in the identification of natural resources most at risk from the unauthorized discharge of oil, and may assist the trustees in identifying protective measures to be used in responding to unauthorized discharges of oil, and in identifying personnel and organizations likely to participate in response and assessment activities, with appropriate quality control.

2. The lead administrative trustees shall invite the potentially responsible party to participate in the assessment process, the field investigation, the selection of assessment methods, restoration planning, and post-assessment activities. The invitation to participate should be in writing, and a written response by the responsible party is required to confirm the desire to participate. If the responsible party

elects to participate in any part of the assessment process, the state trustees and the responsible party should enter into a written agreement whereby the conditions of their respective participation are defined, including provisions to have a state trustee representative present when the responsible party conducts any activity pertinent to a cooperative NRDA process, and whereby they agree to provide data acquired to the state trustees as described in Subsection B below. This agreement may be drafted concurrently with the commencement of preassessment activities. The coordinator or any other state trustee may limit or terminate the participation of the responsible party in any activity conducted by the affected state trustee when such participation is inconsistent with or in conflict with the responsibilities of the affected state trustees.

B. Upon the written request of the responsible party, the coordinator, lead administrative trustee, or state natural resource trustee shall provide photographs, videos, duplicate or split samples, if possible, and validated data generated or obtained by the specified state trustee(s) during the natural resource damage assessment and the implementation of the resulting restoration plan. Upon the written request of any state trustee(s), the responsible party shall provide photographs, videos, duplicate or split samples, if possible, validated data generated or obtained by the responsible party during the natural resource damage assessment and the implementation of the resulting restoration plan. Conditions for sharing samples and data should be incorporated into the written participation agreement described in A.2 of this Section.

C. Any assessment conducted with the participation of the responsible party shall include any stipulations agreed upon by the responsible party and the state trustees. Stipulations may be proposed by either the responsible party or the state trustees at any time during the assessment. These stipulations may be amended to the written agreement entered into pursuant to paragraph A.2 of this Section. These stipulations are binding in any and all judicial or administrative proceedings concerning the incident in question. The stipulations shall continue, and shall be binding on all parties, after termination of the responsible party's participation or after the termination of a negotiated assessment under §121 of this Chapter. Stipulations must be agreed upon by the state trustees.

D. Whenever the coordinator, in consultation with the state natural resource trustees, decides that the responsible party is interfering with state trustee responsibilities or is causing unreasonable delay in the assessment process, the state trustees may proceed without the participation of the responsible party after reasonable effort has been made to resolve problems at the level at which they occur, or if necessary, after a hearing with arbitration has taken place between the responsible party, the coordinator, and the affected state natural resource trustees. The coordinator shall provide the responsible party with a written statement, which shall be included in the administrative record, describing the factual basis for disallowing further participation by the responsible party. The responsible party may rejoin the

assessment process or participate if the responsible party demonstrates, to the satisfaction of the coordinator, and state natural resource trustees, that the dilatory or disruptive practices will not reoccur.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:503 (March 1999).

## **Subchapter C. Natural Resource Damage Assessments**

### **§117. Field Investigation**

A. A field investigation will be conducted to determine whether a natural resource damage assessment is necessary, and if so, the scope of the natural resource damage assessment. One or more representatives of the state natural resource trustee agencies shall initiate a field investigation within 24 hours after written approval for access to the site by the SOSOC.

B. The state natural resource trustees shall determine the appropriate methods to be used in conducting the field investigation which may include sampling and data collection. The state trustees shall provide an opportunity for the responsible party to participate in all phases of the Natural Resource Damage Assessment process, including field investigations.

C. Information gathered as part of the field investigation, including sampling protocols and data validations, will be part of the administrative record.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:504 (March 1999).

### **§119. Criteria to Be Considered in Determining Injury and/or Loss of Services**

A. The state natural resource trustees may find injury to a natural resource when:

1. the natural resource was directly or indirectly exposed to oil from an unauthorized discharge of oil; and
2. there was a pathway between the natural resource and the unauthorized discharge of oil; and
3. reliable and valid methods indicate adverse effects on natural resources and services resulting from exposure to oil from the unauthorized discharge; or
4. the natural resource and/or service was adversely impacted by response activities either to an actual unauthorized discharge or the substantial threat of an unauthorized discharge of oil.

B. The state natural resource trustees may find a loss of services when:

1. the ability of the natural resource to provide services has been reduced as the result of an unauthorized discharge of oil or response activities associated with the unauthorized discharge or substantial threat of an unauthorized discharge; or

2. the ability of the natural resource to provide public uses has been reduced as the result of an unauthorized discharge of oil or the substantial threat of an unauthorized discharge of oil.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:504 (March 1999).

**§121. Assessment Procedures and Protocols for Determining, Quantifying, and Valuing Natural Resource Injury and Loss of Services**

A. The coordinator, in consultation with the trustees, shall determine within 60 days of the written notification by the on-scene coordinator that the response is complete whether information gathered during the field investigation(s) indicates that a natural resource damage assessment is warranted.

B. The state natural resource trustees may use any appropriate and accepted assessment procedures and methods as long as they consider the unique characteristics and the location of the natural resources affected by the unauthorized discharge or substantial threat of unauthorized discharge of oil, including adverse impacts caused by response activities, if any. The methods shall be designed to ensure that the cost of any restoration, rehabilitation, replacement, or acquisition project shall not be disproportionate to the value of the natural resource before the injury.

C. Any assessment generated by the state natural resource trustees must be reasonable and the costs of conducting the assessment must have a rational and direct connection to the value of and/or level of services provided by the injured resources prior to the unauthorized discharge of oil.

D. In addition, the use of a more complex or expensive method must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure.

E. The procedures must be capable of providing information of use in determining the type and scale of restoration appropriate for the injury.

F. The state natural resource trustees may petition the coordinator for a longer period of time to make the determination by showing that the probability of impact from the unauthorized discharge on the affected natural resources cannot be adequately estimated in 60 days.

G. Only after a field investigation which may include sampling and data collection, the state natural resource trustees shall determine the injury to natural resources as a result of an unauthorized discharge of oil. The state natural resource trustees shall utilize methods that provide appropriate, valid, and reliable measurements of resource injuries associated with the unauthorized discharge of oil. In performing an assessment, the state natural resource trustees shall, to the extent possible, use generally accepted scientific and technical standards and methodologies that have been

demonstrated to produce valid and reliable assessment results. Injury determination, restoration planning, and quantification of restoration costs must be based on a site-specific assessment of the unique characteristics and the location of the natural resources.

H. The range of assessment options includes:

1. Comprehensive Assessment Procedures. A method including sampling, modeling, and other appropriate scientific procedures to make a reasonable and rational determination of injury and cost-effective restoration alternatives to natural resources resulting from an unauthorized discharge of oil and will be used when the coordinator, in consultation with the state natural resource trustees, determines that an expedited or negotiated assessment procedure is not appropriate.

2. Expedited Assessment Procedures may be used:

a. when the following circumstances exist:

i. the unauthorized discharge of oil has caused limited observable mortality; and

ii. the extent of injury can be determined within 12 months following the completion of response actions; and

iii. a restoration plan can be initiated within 12 months of completion of the response actions; or

b. when the quantity of oil discharged is less than 1,000 gallons; or

c. when the coordinator, in consultation with the state natural resource trustees, determines that the expedited damage assessment method is the most cost-effective, technically feasible method for achieving timely restoration of injured natural resources.

3. Negotiated Assessment Procedures. Any assessment method agreed to by the state trustees and the responsible person.

I. If more than one procedure for providing the same type and quality of information is available, the most cost-effective procedure must be used.

J. The coordinator and the state natural resource trustees shall complete the comprehensive assessment procedure within 20 months of the date of written notification by the SOSOC that response is complete. The state natural resource trustees may petition the coordinator for a longer period of time to make the determination by showing that the full impact of the unauthorized discharge on the affected natural resources cannot be determined in 20 months.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:504 (March 1999).

**§123. Notice of Intent to Conduct Restoration Planning**

A. The coordinator, in consultation with the state natural resource trustees, shall determine within 60 days of written notification by the on-scene coordinator that the response is complete whether information gathered during the field

investigation(s) indicates that a natural resource damage assessment is necessary, and determine which assessment procedure is appropriate. The coordinator upon receipt of a petition from the state natural resource trustees may decide that a longer period of time is necessary to make the determinations required above, and shall notify the responsible party in writing of any extensions of this deadline.

B. Under R.S. 30:2480(6)(c), the lead administrative trustee is directed to promote participation of the responsible party in all stages of the assessment. The coordinator and state natural resource trustees shall inform the responsible party as soon as possible that the state trustees are conducting activities associated with an unauthorized discharge of oil. The coordinator, after consultation with the state natural resource trustees, shall provide the responsible party with a written notice of intent to conduct restoration planning at least 10 days prior to commencement of assessment actions.

C. The notice of intent to perform an assessment shall include:

1. a summary of the activities conducted during the field investigation and other state trustee actions to date; and
2. a description of the unauthorized discharge of oil; and
3. an evaluation of the effect of response activities on natural resources.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:505 (March 1999).

**§125. Plans for Restoration, Rehabilitation, Replacement and/or Acquisition of the Equivalent of Injured Natural Resources**

A. The coordinator, in consultation with the state natural resource trustees, shall develop a plan for the restoration, replacement, rehabilitation and/or acquisition of the equivalent natural resources.

B. Each restoration plan shall:

1. include an analysis of alternative restoration plans, including natural recovery;
2. be cost-effective and technically feasible. Technical feasibility means the technology and management skills necessary to implement a restoration plan are known such that the plan has a reasonable chance of successful completion;
3. not have costs disproportionate to the value of the natural resources and/or the services provided by the resources prior to the unauthorized discharge of oil;
4. allow for corrective actions in the execution of the restoration plan;
5. provide for a period of monitoring sufficient to determine the effectiveness of the plan; and

6. prior to initiation of the plan, be subject to public hearing (upon request) and comment period consistent with R.S. 30:2480.I.

C. The restoration plan may be developed simultaneously with other portions of the damage assessment. Restoration plans should be developed as early in the process as practicable and may be developed in phases. Phased restoration plans may be used when trustees determine that:

1. pilot projects are necessary to establish the technical feasibility of the restoration plan;
2. restoration of a particular resource and/or service is not possible without first restoring another resource and/or service upon which the first depends;
3. natural recovery is the chosen alternative for some, but not all, of the injured natural resources; or
4. there is a potential for continuing injury resulting from the unauthorized discharge of oil.

D. The restoration plan may include any combination of:

1. restoration; rehabilitation; replacement and/or acquisition of equivalent natural resources; or
2. natural recovery.

E. The restoration plan shall include criteria for determining when restoration plan is completed, including:

1. performance standards and appropriate measures for their achievement;
2. natural changes occurring in reference areas; and
3. the ability of the natural resources to maintain their viability without further human intervention.

F. If an equivalent regional restoration plan has been developed for the ecosystem encompassing the injured natural resources, the state trustees may use restoration projects identified in that plan for purposes of compensating for the injuries resulting from a particular incident.

G. The coordinator shall issue a certificate of completion to the responsible party when no further actions are necessary to achieve the goals of the restoration plan.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:505 (March 1999).

**Subchapter D. Administration**

**§127. Administrative Record**

A. The administrative record, which must be opened concurrently with issuance of the Notice of Intent to Conduct Restoration Planning (as per §123 of this Rule) shall contain documents relied upon by the state trustees in selecting appropriate assessment procedures and protocols and in developing restoration plans. The purpose of the administrative record is to ensure documentation of the state trustees' decisions.

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B. The administrative record shall be developed and maintained by the lead administrative trustee. All closed administrative records from unauthorized discharges of oil under the jurisdiction of the coordinator, shall be maintained by the coordinator as required by the Louisiana Public Records Act (R.S. 44:1 et seq.).

C. Each administrative record shall contain, at a minimum:

1. all final documents and references to documents used by state trustees in selecting state assessment procedures and protocols, and in developing restoration plans; and

2. all technical, scientific and economic information discovered and relied upon by the state trustees during the assessment; and

3. the Notice of Intent to Conduct Restoration Planning; and

4. the field investigation report and all other information considered in the pre-assessment phase; and

5. a copy of the assessment and the restoration plan as presented to the responsible party; and

6. all correspondence, agreements, and other documents related to the role of the responsible party in the assessment process; and

7. comments received from the public and the state trustees' response to those comments.

D. The following documents and data shall not be included in the administrative record:

1. drafts, unless a final document is not produced and the draft document is material to decisions made, pre-decisional, deliberative inter-agency and intra-agency documents.

2. documents describing analysis of liability or any attorney-client privileged documents or attorney work product documents also shall not be included.

3. any scientific, technical, or economic data that fails to meet all criteria set forth in a quality assurance/quality control plan developed by the state trustees unless there is a scientifically reliable basis for utilizing any of the data.

E. The administrative record is a document subject to the Louisiana Public Records Act.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:506 (March 1999).

### **§129. Recovery of Damages**

A. Upon developing a restoration plan, the coordinator must present a written demand to the responsible party. Delivery of the demand should be made in a manner that establishes the date of receipt by the responsible party. The demand must invite the responsible party to either:

1. implement the final restoration plan subject to state trustee oversight and reimburse the trustees for their response costs and costs associated with the development of the damage assessment and restoration plan; or

2. advance to the trustees a specified sum representing trustee response and assessment costs and all trustee costs associated with implementing the final restoration plan.

B. In an action filed or settled pursuant to the Oil Spill Prevention and Response Act (OSPRA), R.S. 30:2480, the state trustees may recover those costs which are attributable to the performance of the assessment of damages and the development, implementation, and monitoring of the restoration plan, including:

1. the costs of the assessment including, but not limited to:

a. salary, fringe benefits, overhead, transportation, lodging, and state per diem costs;

b. the costs of sampling and analyses of oil and natural resources, including reference areas;

c. the costs of laboratories, contractors, and other experts retained by the trustees in assessing injury and determining damages;

d. the cost of the mediation required by §133 of this Chapter (relating to mediation);

2. the costs of restoration, rehabilitation, replacement and/or acquisition of equivalent resources and/or services to hasten recovery to baseline;

3. the costs of emergency restoration to diminish further injury to natural resources from the time of the initial unauthorized discharge until the time of restoration of the injured natural resources and the services they provide;

4. the cost of restoration, rehabilitation, replacement and/or acquisition of equivalent resources and/or services to provide compensation for losses from the time of the initial unauthorized discharge until the time baseline is achieved;

5. the net loss of taxes, royalties, rents, fees, or net profit share that the state would otherwise have collected in the absence of the unauthorized discharge of oil;

6. all costs that have a rational connection to the assessment and are incurred in the performance of the assessment, and the development, implementation, and monitoring of the restoration plan.

C. The responsible party shall reimburse each state trustee's assessment costs.

D. If a responsible party is entitled to a limitation of natural resource damages liability, then any recovery under R.S. 30:2480, shall be limited as provided in R.S. 30:2479.

E. In the event that the responsible party does not reimburse state natural resource trustees, the state natural resource trustees shall be reimbursed from the Oil Spill Contingency Fund pursuant to Paragraph 3 of this Subsection. If the responsible party fails to pay, the Oil Spill Contingency Fund is liable for all natural resource damages assessed as the result of injuries caused by an unauthorized discharge of oil.

1. State Trustee Costs

a. State trustees may recover from the Oil Spill Contingency Fund all costs incurred responding to an unauthorized discharge of oil and in assessing damages resulting from injuries to natural resources caused by an unauthorized discharge of oil under the jurisdiction of the coordinator.

b. State natural resource trustees must submit directly to the coordinator satisfactory proof of costs incurred. Satisfactory proof of costs is compliance with the procedures prescribed by and according to the Rules of the comptroller of public accounts of the State of Louisiana. The coordinator will recommend that the comptroller make payment to the state natural resource trustees for their assessment costs.

2. In the event the responsible party fails to pay a natural resource damage assessment claim, the state natural resource trustees may present the claim to the Oil Spill Contingency Fund for the costs of actions to restore, rehabilitate, replace and/or acquire the equivalent of injured natural resources and for the costs to diminish injuries to natural resources resulting from an unauthorized discharge of oil pursuant to this Subsection.

3. Oil Spill Contingency Fund Liability and Limitation

a. The Oil Spill Contingency Fund is liable when:

- i. the federal fund denies the claim; or
- ii. the amount of the claim paid by the federal fund is not sufficient to restore, rehabilitate, replace and/or acquire the equivalent of the injured natural resources.

b. If Subparagraph a of this Paragraph applies, then the Oil Spill Contingency Fund shall be liable for further damages for the following:

- i. restoration, rehabilitation, replacement and/or acquisition of the equivalent natural resources; and
- ii. for the diminution of injuries to natural resources for a period of 2 years from the date the federal fund grants or denies the claim.

4. The coordinator shall diligently seek reimbursement to the Oil Spill Contingency Fund. The coordinator shall seek reimbursement from the responsible parties, the federal fund, and any other person who is liable under OSPRA for all expenditures from the Oil Spill Contingency Fund, when the Oil Spill Contingency Fund has paid a natural resource damage assessment claim. When state natural resource trustees have recovered damages from the Oil Spill Contingency Fund, the coordinator shall be subrogated to all rights or causes of action of the state natural resource trustees.

F. The state natural resource trustees shall present the assessment claim to the responsible party via hand delivery or United States Postal Service Return Receipt Requested Certified Mail.

G. Within 60 days of the presentation of an assessment claim by the coordinator or state natural resource trustees, the responsible party shall make full payment or initiate restoration, rehabilitation, replacement, or mitigation of damages unless the assessment is in dispute and referred to mediation pursuant to R.S. 30:2480.G. In the case of successful mediation, payment of the assessment claim shall be made within 60 days of the completion of the mediation unless otherwise agreed.

H. The coordinator shall ensure that there is no double recovery for natural resource damages resulting from an unauthorized discharge of oil.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:506 (March 1999).

**§131. Settlements**

A. A negotiated settlement is a binding agreement in which the responsible party agrees to pay the state trustees a certain amount or to perform certain restoration, rehabilitation, replacement, acquisition. The coordinator, in consideration of the responsible party's agreement in writing, will agree to release the responsible party from further liability for damages to natural resources resulting from an unauthorized discharge of oil. Such release shall not be executed until after the payment is received by the state trustees or until after the restoration, rehabilitation, replacement, acquisition and/or relevant research project is certified complete by the coordinator. Release from liability by the coordinator does not release the responsible party from liability to Federal trustees, or for response costs, unless specifically included in the settlement agreement. The coordinator, in consultation with and with agreement of the state natural resource trustees, may consider, and settle any filed or developing claim on behalf of the state on such terms as are fair, reasonable, and in the public interest.

B. The draft agreement between the state trustees and the responsible party shall be subject to public review and comment as set forth in §135 of this Chapter (relating to public participation) and shall provide:

- 1. that title to real or personal property acquired as compensation for injured natural resources may vest in a public entity only where the terms and conditions for that entity's acceptance of title are met;
- 2. that criteria for certification of project completion are specifically enumerated; and
- 3. for all items necessary to ensure restoration, rehabilitation, replacement and/or acquisition of equivalent natural resources.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:507 (March 1999).

**§133. Mediation**

A. No state trustee or responsible party may invoke the jurisdiction of any court over a disputed natural resource damage assessment claim unless and until the assessment claim has been referred to mediation pursuant to this Section.

B. The mediation process required by R.S. 30:2480.G shall be conducted pursuant to this Subsection.

1. The coordinator, within 10 days of receipt of the written notice that the responsible party is disputing the assessment claim, shall send written notification to all parties of the referral to mediation.

2. Each side is entitled to one mediator. If the state trustees and the responsible party agree on a single person to serve as mediator, then that person shall be the only mediator.

3. Any designated mediator must have completed a minimum of 40 classroom hours of mediation training in a course conducted by an alternative dispute resolution system or other dispute resolution organization. This requirement may be waived for any mediator only with the unanimous consent of all state trustees and all responsible parties. A mediator conducting a mediation under this Section shall act as an impartial third party and be subject to the standards and duties set forth.

4. Before appointment of the mediator is final, any prospective mediator shall submit complete disclosure statements for the approval of all parties, which statements shall include a résumé of experience, together with a declaration describing all past, present, and anticipated future relationships related to the subject matter of the dispute and with all parties and their agents or representatives involved in the dispute.

5. After appointment as a mediator and thereafter throughout the mediation process, the mediator shall not acquire any ownership or any other financial interest in, nor shall be employed by or act as a consultant to, any party to the dispute or the agent or representative of any party to the dispute, and during this period shall not engage in any discussion or make any agreement with any party to the dispute or the agent or representative of any party to the dispute, regarding the acquisition of any ownership or financial interest, employment, or consulting activity after the mediation process is completed. Provided, however, that the parties to the mediation, by unanimous consent, may waive these restrictions specifically, in writing, upon full disclosure of the facts by the mediator.

C. All communications in the mediation shall be confidential and privileged.

D. The mediation shall terminate at the conclusion of the period that the parties agree to mediate, including any agreed

extensions, but not less than one full business day, or upon declaration by any mediator of an impasse.

E. The mediation shall be scheduled so as to conclude within 135 days after the responsible party receives the natural resource damage assessment claim.

F. Within three days following the termination or conclusion of a mediation, the mediator(s) shall provide the coordinator with notice of the completion of the mediation process.

G. The mediation shall take place in Baton Rouge, Louisiana, unless the state trustees and the responsible party agree otherwise.

H. All participants in the mediation process who represent either a state trustee or a responsible party must be vested with the authority to negotiate a mediated settlement agreement on behalf of their respective trustee or responsible party and to recommend to the trustee or responsible party approval of any mediated settlement agreement.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:508 (March 1999).

**§135. Public Participation**

A. The coordinator shall give public notice through the use of the *Louisiana Register*, the official state journal, the official journal of the parish, and at least one newspaper of general circulation serving the impacted area at the time that a Notice of Intent to Conduct Restoration Planning is issued to the responsible party.

B. The coordinator shall provide for a public hearing and comment period consistent with R.S. 30:2480.I following the issuance of an assessment and restoration plan consistent with R.S. 30:2480.I.

C. The coordinator shall not execute any documents which relieve a responsible party from liability for damages resulting from injury to natural resources until the public comment period has expired.

D. When an equivalent resource plan (e.g., Regional Restoration Plan) is proposed for adoption by the state trustees, the coordinator and the state natural resource trustees may conduct, upon the request of any member of the public, a public hearing on the proposed plan.

E. The public hearing shall be convened in or near the area covered by the equivalent resource plan.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2451 et seq.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Oil Spill Coordinator's Office, LR 25:508 (March 1999).

**Chapters 3-7. Reserved**

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