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PHast Track

DOI Issues Final Rule Amending Natural Resource Damages Regulations

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On July 13, the U.S. Department of the Interior (DOI) released its [final rule](#) promulgating revisions to its Type A regulations for natural resource damage (NRD) assessments. The finalized rule implements long overdue amendments — many of which were [proposed over two years ago](#) in January 2024 — allowing for modern assessment techniques to now be used for conducting a simplified type of NRD assessment that has been rarely utilized since its inception under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*

Pursuant to [CERCLA](#), regulations governing two types of NRD assessments [were promulgated](#) for the “assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance”: (1) Type A, which called for simplified procedures that “required minimal field observation”; and (2) Type B, which required alternative protocols for conducting NRD assessments to “determine the type and extent of short- and long-term injury, destruction, or loss.” These regulations are applicable to NRD claims under both CERCLA and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* However, the actual process of conducting an NRD assessment is often problematic, resulting in assessments that are both notoriously long and resource intensive. Type A assessments, while intended to govern a simplified NRD assessment process, apply to a discrete type of NRD case with very specific conditions, and thus are rarely used. Instead, Type B assessments are the norm, especially in larger NRD cases involving prolonged site contamination and multiple potentially responsible parties (PRPs), but they require extensive — and often very expensive — site-specific data collection necessary to determine the extent of resource injury and damages.¹

During the summer of 2018, when deregulation became a central focus for the first Trump administration, a colleague and I published [an article](#) discussing ways to streamline and standardize NRD assessments, offering suggestions to improve the process that would benefit all parties involved — NRD trustees, PRPs and the public. Specifically, we proposed a construct whereby the Type A regulations could be amended to allow for the use of equivalency models for settlements as long as the PRPs agreed. In exchange, the NRD trustees would have the benefit of the statutory rebuttable presumption. We said at the time:

In sum, our proposal is this: Modify the Type A NRD regulations to include equivalency models and PRP cooperation. If the Trustees include both elements, they will enjoy the statutory rebuttable presumption, the PRPs will resolve their liabilities faster, transaction costs will be nearly eliminated, and environmental restoration will occur years, or decades, sooner.

The amended framework offered by DOI in both its 2024 notice of proposed rulemaking and now its final rule largely follows those recommendations.

Key Changes to the Type A Procedures

Environmental Type. As noted above, the former Type A regulations were narrowly constrained by the conditions in which they could be utilized; specifically, they were limited to NRD cases in coastal, marine or Great Lakes environments. The amended rule now allows for the Type A procedures to be used for all natural resources in any environment.

Methodologies Allowed. Related to the formerly constrained environments for which Type A procedures were allowed were the methodologies for assessing an NRD claim: standardized computer models that required minimal field observation. The Type A amendments, however, now allow trustees and PRPs to rely on other well-known methods — including models frequently used in Type B assessments — for damage determination and restoration valuation, such as equivalency analyses, recreational losses and benefits transfers.

Limits on Damages. NRD assessments under Type A were previously limited to NRD claims no greater than \$100,000 in damages. The 2024 proposed rule had amended the limit to \$3 million. Now, the final amended rule allows the trustees to maintain a rebuttable presumption for NRD claims that are expected to be less than \$5 million, not including reasonable costs of the assessment, and noting that that figure will be periodically adjusted for inflation following guidance to be provided by the Office of Management and Budget. Further, if an NRD claim is expected to be greater than \$5 million, the Type A procedures may still be used if all parties agree to doing so.

When Use of the Type A Procedures Is Allowed. Conditions allowing the use of the Type A procedures have been revised to require that at least one PRP implicated in an NRD claim has voluntarily agreed to utilize them. Additionally, the PRP agrees to toll the statute of limitations for at least one year.

Information Used in a Type A Report. Once a trustee and a PRP decide to use the Type A procedures, it needs to be documented in a Type A Report that is made available to the public for a comment period of at least 30 days. The specific information to be included in the Type A Report is laid out in the final rule and includes, but is not limited to: the basis for relying on the Type A procedures; agreements among the involved parties; the model(s) used for the damages determination; data inputs, assumptions, strengths, limitations and uncertainties; possible restoration alternatives; and the results of the modeling exercise.

Impacts of Amending the Type A Procedures

DOI's modifications to the Type A regulations will positively benefit all parties involved in, or impacted by, NRD claims. First, the amendments set forth by the final rule are estimated to save the government up to \$1.6 million for each Type B assessment that is replaced by the Type A procedures. It is also estimated that the revised regulations will save approximately \$17.4 million per year for nine Type A assessments — savings that will accrue to all non-federal parties, i.e., the public, private sector, and state and tribal governments. Second, broadening the ability to use the much more simplified Type A regulations will allow for less litigation, a faster resolution of liabilities and quicker restoration, all with the added benefit of cost-effectiveness and cost savings.

The final rule implementing these Type A procedure amendments becomes effective on Aug. 12. If you are involved in an NRD matter and are interested in learning more about how these updated procedures could be useful for your case, please reach out to the authors for further information and guidance.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:

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¹ For an in-depth discussion of Type B NRD assessment procedures, see *Brian D. Israel et al., Chapter 4 - NRD Assessments: Regulatory Framework*, in *NATURAL RESOURCE DAMAGES: A GUIDE TO LITIGATING AND RESOLVING NRD CASES* (2019).