

# INTRODUCTION TO NATURAL RESOURCE DAMAGES

THE LEGAL FRAMEWORK, CLAIMS & DAMAGES

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# Natural Resource Damages

- Fundamentals of NRD
- Who can bring these claims?
- Who are the Trustees?
- What are natural resources?
- What is an injury?
- What is being compensated or sought?
- What kinds of damages?

# ***The basics of NRD***



# The Environmental Backdrop

- In 1970s, perception that States not doing enough to clean up contaminated sites despite passage of Clean Water Act in 1972
- In 1980, U.S. Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- In addition to providing claims for the recovery of remediation costs, CERCLA provides basis for the recovery of natural resource damages (NRD)

# Did not see significant NRD cases until...



# Emergence of Significant NRD Cases

- In 1989, Exxon Valdez ran aground in Prince William Sound, Alaska
- Discharged between 11-31 million gallons of crude oil
- Impacted over 1,300 miles of shoreline, and 11,000 square miles of ocean
- Exxon spent over \$2 Billion in remediation
- Exxon settled NRD for another \$1 Billion
- Spill was impetus for Oil Pollution Act in 1990

# Remediation vs. Restoration

- Remediation
  - Primary response
  - Risk based
  - Look at human health and ecological factors
- Restoration
  - Secondary response / Residual to remediation
  - Focus on natural resources
  - Look at baseline (pre-discharge condition)
  - In addition to, not included in, remediation

# NRD in Context – Remediation

- Prince William Sound Remediation – \$2 Billion spent on efforts to:
  - Wash rocks and shoreline
  - Clean oiled animals
  - Contain oil spill
  - Siphon oil from water
  - Other activities to recover discharged oil





# NRD in Context – Restoration

- Prince William Sound Restoration - \$1 Billion to fund projects including:
  - Restore & compensate for impacted species (e.g., whales, otters, fish, birds, clams) [Ecological Services]
  - Restore & compensate for impacted industries (e.g., commercial fishing, tourism) [Economic Services]
  - Restore & compensate for impacted services (e.g., recreation, hunting, recreational fishing) [Human Use Services]
  - None of the foregoing addressed by remediation

# Catastrophic events

- Valdez was not supposed to happen again
- Deepwater Horizon in the Gulf
- Pipeline in Yellowstone River in Montana
- Pipeline in Mayflower, Arkansas
- Catastrophic events, like oil spills, easier to address from political and legal standpoints
- Generally true for both remediation & restoration

# Legacy Contamination

- Legacy contamination more difficult
- Typically very complex
- Determine who are Responsible Parties
  - Site history
  - Corporate transactions / reorganizations
  - Bankruptcies
- Willpower to pursue those Responsible Parties
- Fortitude to endure investigative & legal processes

# Examples of Legacy Sites

- Chemical facilities
- Gasoline facilities
- Manufacturing facilities
- Mining sites
- Energy facilities
- Military facilities
- Legacy sites no less important than catastrophic release sites

# ***Who can bring NRD Claims***

# Natural Resource Trustees

- Federal and state statutes permit NRD claims to be brought only by Natural Resource Trustees
- Trustees include:
  - Federal Government
    - ◆ Dept. of Interior/Fish & Wildlife (terrestrial resources)
    - ◆ Dept. of Commerce/NOAA (marine resources)
    - ◆ Certain other federal agencies (DOE/DOD)
  - States
  - Native American Tribes
- Many resources have overlapping jurisdiction and trustees

# Natural Resource Trustees

- While Federal Trustees rely exclusively on federal law (and its corresponding limitations), State Trustees have additional legal resources (state law, common law, and multiple capacities to bring suit) in their arsenal.
- States are not constrained regarding when they may bring NRD claims as are feds.
- State Trustee may proceed with NRD claim under State law (statutory or common law) where federal Trustee is precluded by CERCLA.
- May cause friction between Trustees where all do not join in action or agree on result.

# ***Legal bases for NRD claims***



# Legal Authority for NRD Claims

- Trustees have authority to assert NRD Claims under federal environmental statutes
  - CERCLA (hazardous substances)
  - OPA (petroleum products)
  - Clean Water Act
  - Others of limited application
- State laws (e.g., NJ Spill Act, MT CECRA)
- Common law/Public Trust Doctrine

# Elements of NRD Claim

- Claims exist where a *release* of a hazardous substance or oil results in an actual *adverse effect* on the *resource* or on the *services* provided by that resource to the public
- Injury above *baseline*
- *Actual* damages
- Environmental statutes: provide for *strict, joint and several* liability
- Arguments for several liability and divisibility of harm

# CERCLA Liability

- PRPs can be liable as owner of a facility, operator of a facility, generator of hazardous substance, arranger for disposal and/or transporter
- Liability under CERCLA extends to typical Removal and Remediation costs
- Liability also extends to “damages for injury to, destruction of, or loss of natural resources resulting from a release of hazardous substances”  
– NRD

# OPA Liability

- OPA establishes liability for natural resources damages resulting from releases of petroleum
- OPA applies to discharge of oil “into or upon navigable waters or adjoining shorelines....”
- OPA provides for the recovery of damages for “injury to, destruction of, loss of or loss of use of natural resources, including the reasonable costs of assessing the damage....”  
33 U.S.C. § 2702(b)(2)(A).
- OPA applies to discharges of oil and resulting damage occurring after August 18, 1990.

# ***Natural Resources***

# What are Natural Resources?

CERCLA and DOI natural resource damage assessment rules define natural resources to include:

“Land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States ..., any State or local government, any foreign government, and Indian Tribe...”

42 U.S.C. § 9601(16); *see also* 43 C.F.R. § 11.14(2).



***Injury***

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# What is Injury?

- Terms “injury, destruction or loss” not defined in CERCLA
- DOI regulations: injury is a measurable, adverse change (either long- or short-term), in the chemical or physical quality or viability of a natural resource
- E.g., injury to fish & aquatic organisms existed because PCB exceeded tolerance levels set by FDA. In re Acushnet River, 716 F. Supp. 676 (D. Mass. 1989)
- Injury that results in a change in baseline conditions (*i.e.*, conditions but for the release). 43 C.F.R. § 11.14(e).
- Identification vs. quantification



***Damages***

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# Natural Resource Damages

- Trustees may seek to recover damages for the injury to the resource caused by the effects of contamination and the effects of the remedial actions taken at the site
- Damages include:
  - Cost of restoration and/or replacement (actions taken with respect to the same resource or type of resource)
  - Acquisition of an equivalent resource (actions taken to replace the equivalent of the services to humans/environment provided by those resources)

# What damages may be sought?

- The cost or value to make the public whole for their losses of natural resources caused by the release of hazardous substances and/or petroleum products
- The cost or value to “restore, rehabilitate, replace, or acquire the equivalent” of the injured natural resource and their services.



# Measure of damages

- Can be very contentious/controversial
- Damages include three broad elements:
  - Cost of restoration, replacement or acquisition of equivalent resources (*i.e.*, primary restoration)
  - Other compensable values (including interim loss of use of the resource and lost “non-use” values) (*i.e.*, compensatory restoration)
  - Assessment Costs

# Damages calculations

- Difficulties in calculating damages to resources
  - Lack of information on baseline
  - Valuing resources that do not have an obvious economic value
- Equivalency Analysis
  - “resource to resource” and “service to service” valuations
  - Can be criticized as technically indefensible
- Contingent valuation/surveys
  - Ability to capture a much greater suite of values and damages
  - Difficult and contentious

# QUESTIONS?

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