

# Natural Resources Damages

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# Agenda

- Outline the basic legal frameworks, players and concepts of NRD claims – Bill Jackson
- Federal approach – Mary Baker
- NRD damages, valuation and economics – David Allen
- Key legal issues and disputes – John Gilmour
- Questions/Discussion
- Hypothetical and preparation for NRD Workshop – Tom Tanaka

# Emergence of Significant Natural Resources Damages Claims



- 1989 Exxon Valdez
- 11 million gallons of crude into Prince William Sound
- Huge ecological impacts
- Huge clean-up costs
- Exxon settled Natural Resources Damages for almost \$1 Billion

# Paradigm Shift?

- As a result, many expected a crush of NRD
- NOAA/DARP: Obtained more than \$300 million for coastal restoration projects since 1990, but NRD did not materialize as “the next big thing”
- NOAA and DOI continue to do an admirable job of assessing damages to natural resources
  - Funding issues
  - Increased emphasis on States
- States and Tribes becoming much more active

# Significance of NRD to Ports



- Confluence of commerce and environment
- Industrial facilities, shipping, and terminals coexist with natural resources
- Industry naturally builds up around ports, railroads & transportation hubs
- Rivers, bays, lakes, oceans (and tributaries, wetlands and groundwater that feed them) become the highway for commerce

## Ports' Natural Resources

- Port's natural resources are also held in public trust
- Includes the ecosystem, plants, animals and organisms
- Ports are particularly susceptible to environmental remediation and NRD claims



# Ports' Exposures and Rights

- Contaminated urban/industrialized waterways can require huge remediation efforts/costs
- Necessary focus on sediments and waterways
- Ports have unique status and damages (contamination impacts ports' business)
- Look to Port's rights and standing (legislative solutions)
- Ports must assert their rights and defend against generator claims in contribution
- NRD Claims can be truly significant in terms of exposure and business impacts

# Natural Resources Trustees

- Federal Trustees
  - Department of Interior (terrestrial resources)
  - Department of Commerce/NOAA (marine resources)
- States
- Tribes
- Overlapping jurisdiction and trusteeship
- Know who you are dealing with and their objectives





# 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., New Jersey Spill Act)
- Common law/Public Trust Doctrine

# CERCLA Liability

- Section 107 – General Liability Provision
- Liability for unauthorized releases of hazardous substances from a site to the environment
- Trustee bringing an NRD Claim under CERCLA must prove:
  - Release
  - Hazardous Substance
  - From a vessel or facility
  - By a Responsible Party
- Responsible Parties are
  - Past/present owners or operators
  - Generators of Hazardous Substances
  - Transporters of Hazardous Substances

# CERCLA Liability

- Ports can be exposed as owners/operators of facilities and/or submerged lands, generators or possibly transporters
- 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”

# Oil Pollution Act

- 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.

# 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 to a Resource

- Terms “injury, destruction or loss” are 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. *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

## Different than Cleanup/Remedial Claims

- Cleanup/response is primary
- Risk based
- Human health & environment
- Superfund and other State/federal schemes
- More legal authority/case law
- More accepted for cleanup

# NRD Claims



- Federal Scheme: residual to cleanup/response
- Focus on natural resources
- Brought by natural resource trustees
- Damages for actual injuries
- Can cover cleanup-like actions to break pathways; but restoration is more comprehensive



# NRD Claims

- 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: strict, joint and several liability
- Arguments for several liability and divisibility of the harm

# 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 can 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
  - Other compensable values (including interim loss of use of the resource and lost “non-use” values)
  - Assessment Costs

# Damage 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

# Conclusion

- Public Trust/NRD may be coming of age
- Science and law both moving forward rapidly across the country
- Importance of State and Tribes
- Damages can be significant
- Ports must engage Trustees early and treat these matters with utmost significance

