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Tribal Sovereignty and Natural Resource Damages

Allan Kanner*

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I. INTRODUCTION

At the very least, tribal sovereignty entails an obligation to exercise available governmental power to protect a tribe's health, safety and natural resources to the greatest extent possible. As the Supreme Court said in *Worcester v. Georgia*, an Indian tribe "does not surrender its independence and right to self-government, by associating with a stronger [power]."¹ An often overlooked and underutilized source of legal power available to tribes exists under federal law and common law to protect natural resources and to restore or receive compensation for damages caused to natural resources.

It is a fundamental concept for most tribes that natural resources and resource services provide not only the substantive basis of all life, but also determine the quality of that life, both for humans and other species. It is important to act when discharges of hazardous substances and other pollutants result in injuries to these natural resources and natural resource services, impairing the important ecological and economic functions that they provide.

Although environmental pollution has spawned a great deal of public and private litigation and related investigations, little of this work has focused on natural resources. Most of this work has dealt with site remediation efforts focusing on how to protect the public from immediate risks of harm. At the same time, we have seen relatively little contemporary litigation by

* Allan Kanner & Associates, P.L.L.C., Senior Lecturing Fellow, Duke Law School, and Adjunct Professor of Law, Tulane Law School, B.A., U. Pennsylvania, 1975; J.D., Harvard Law School, 1979. The ideas expressed in this article are the author's and do not reflect the views of any governmental or tribal clients.

1. 31 U.S. 515, 561 (1832).

governmental entities regarding the restoration of natural resource damages ("NRD"). This will likely change as greater attention turns to achieving a return to ecological baselines.

Tribal governments will likely shape, if not lead, this effort nationally. First, tribes appreciate to a greater degree the interconnection between people and their environment. Second, unlike state governments, which can often be immobilized by special interest lobbying, tribal governments generally avoid this level of counterproductive lobbying.

Below, I will discuss how tribal governments can exercise their important sovereignty rights by using federal claims for natural resource damages. In addition, most tribes may also employ rights under the common law Public Trust doctrine and other theories.²

II. NATURAL RESOURCES AND FEDERAL LAW

A. Overview

Enforcement of NRD liability is both relatively old and relatively new. If you go back to early English common law, the sovereign had a strong legal basis to protect the public trust, including forests, rivers and beaches.³ However, modern environmental laws have not been extensively used to protect natural resources.⁴ Until recently, natural resource damage claims were rarely included in Superfund cases. However, the inclusion of natural resource damage actions in Superfund cases is becoming more routine in some jurisdictions and is expected to become far more so. In the aftermath of the Exxon Valdez oil spill, and the passage of the Oil Pollution Act of 1990,⁵ companies whose operations may lead to natural resource liability now face a new political willingness and stronger laws and regulations to prosecute these claims.

Several federal statutes define natural resources and natural resource damages, authorizing federal, state or local officials to assess and collect damages related to natural resource injury. The most important federal environmental laws pertaining to natural resources damages are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended,⁶ and the Clean Water Act (CWA), as amended,⁷

2. See Allan Kanner, Ryan Casey & Barrett Ristroph, *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 Duke Env'tl. L. & Policy Forum 155 (2003).

3. See e.g. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

4. See e.g. *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 650 (3d Cir. 1988). There has likewise been a revitalization of *parens patriae*. E.g. *Idaho v. Southern Refrigerated Transp., Inc.*, 1991 U.S. Dist. LEXIS 1869, at 12-14 (D. Idaho Jan. 24, 1991) (allowing state *parens* suit as alternative to CERCLA NRD for damage to wildlife and sport fish).

5. *The Oil Pollution Act of 1990*, 33 U.S.C. § 2702(a) (1994 & Supp. IV 1998).

6. See *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 42 U.S.C. § 9607(a) (2000) (providing that responsible parties shall be liable for "damages for injury to,

through the Oil Pollution Act (OPA).⁸ Other federal laws which contain natural resources damages provisions include the Marine Sanctuaries Act⁹ and the Trans-Alaska Pipeline Authorization Act.¹⁰ All these statutes authorize natural resources trustees to recover compensatory damages for injury to, destruction of, or loss of natural resources resulting from the release of a hazardous substance or a discharge of oil into navigable waters.

For most tribes and most situations, the NRD program established under CERCLA will be the most important federal law, and so will be my focus.

B. Putting NRD Claims in Perspective

By way of background, claims for natural resources damages differ from traditional environmental claims for site remediation. Traditional CERCLA or CWA cases are brought by the Environmental Protection Agency ("EPA") or an analogous state agency, for harm or potential harm to human health, and for remedial action. Typically, they are based on discharges that exceed limits set by a permit. Traditional CWA and CERCLA claims do not depend on whether or not there is damage to natural resources, and usually they do not involve restoration of the environment from a discharge. This is true even though in the usual situation, even after a clean-up is completed, residual contamination may present harm to natural resources. For example, if streamside tailings from mining operations leach hazardous substances into a river, the usual clean-up, removal of the tailings, may not fully restore the river. The sediments, fish, and other life downstream from the tailings may remain injured. Additionally, there may be damages from the lost use and other values of an injured resource until it is restored. NRD is about going back to the pre-pollution baseline.

Historically, and leaving NRD for a moment, we have seen two broad categories of environmental and toxic tort litigation. Public law litigation has generally involved either permit violations relative to ongoing operations or site remediation activities. As a result of various public law enactments such as Superfund and the Resource Conservation and Recovery Act, the polluter-pays principle was adopted relative to the cleanup of environmental pollution. However, the primary and immediate goal of such site remediation activities was to avoid the risk of imminent and substantial endangerments to public health and the environment. This limited goal led to the question of "how clean is clean enough?" As you can see, after envi-

destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release").

7. *Federal Water Pollution Control Act*, 33 U.S.C. § 1321 (f)(4)-(5) (2004).

8. 33 U.S.C. § 2702(a) (providing that "each responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil . . . is liable for . . . damages [including damages to natural resources] that result from such an incident").

9. *National Marine Sanctuaries Act of 1988*, 16 U.S.C. § 1443(a)(1) (2004).

10. 43 U.S.C. §§ 1651-1656 (2004).

ronmental investigations identified the who, what, where and when of pollution, much of the site remediation process was taken over by risk assessment.

Risk assessment, in turn, allows for latitude in the negotiations for cleanup levels at any particular site based upon a compromise which is an agency tool rather than a land owner's, or in this instance, a resource owner's standard. This compromise is grounded in that reality that risk assessment studies are not only costly in and of themselves, but also require expensive analysis of the studies performed by or on behalf of the polluters who often attempt to minimize the perception of, or liability for, risk. As a result, such an in-depth approach is often cost prohibitive. Very few cleanups in the common sense understanding of cleanup really occurred. Stated in other terms, risk assessment almost never requires site remediation action that returns a property to its ecological baseline. Instead, "do nothing" or "do little" remediation of natural attenuation, or *in situ* storage predominates.¹¹

Private or toxic tort litigation has focused on damages to public health and property values. In health cases, quantification of dose and exposure has been as important as the quality of the toxicological and epidemiological data. In property cases, the issue has been entirely economic in stigma cases, while modeling has proven important in trespass and nuisance cases. Although some cases have looked at loss of use of our natural resources—e.g. the surface owner's loss of use of public groundwater—private litigation has not really addressed NRD.

The pursuit of natural resource damages will occur on a number of fronts. In America we have a tradition of healthy distrust for centralized government problem-solving. This is expressed in environmental matters through our continuing fidelity to the vital co-existence of a federal system of checks and balances, or federalism which reserves powers to the states and tribes, and our private law system which enables ordinary citizens acting alone or as part of a class to address many environmental liability issues.¹² In addition, many of our public laws have citizen suit provisions,

11. Risk assessment has been used in the United States to determine safe levels which good science tells us are fundamentally unknowable. In Europe and under international law, the precautionary principle is used to take care in the face of uncertainty to the possible harmful consequences of pollution. Commission of The European Communities, *Communication from the Commission on the Precautionary Principle*, COM (2000), 1 Brussels CEC; C. Raffensperger & J. Trickner, *Protecting Public Health and the Environment: Implementing the Precautionary Principle*; W. Bishop, *Risk Assessment v. The Precautionary Principle: Is It Really Either/Or?*, Risk Policy Report, March 20, 2000, pp. 35-38.

12. "[A]n existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication." *Eyssi v. Lawrence*, 618 N.E.2d 1358, 1361 (1993) (quoting *Ferrier v. Daniel O'Connell's Sons*, 413 N.E.2d 690, 698 (1980)). See also *General Elec. Co. v. Department of Env'tl. Protection*, 711 N.E.2d 589, 594 (1999). "Moreover, '[a] statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.'" *Eyssi*, 618 N.E.2d at 1361 (quoting *Riley v. Davison Constr. Co.*, 409 N.E.2d 1279, 1283(1980) (alteration by Riley Court)); *Hopkins v. Medeiros*, 618 N.E.2d at 1361(2000).

though one could argue that the Supreme Court has circumscribed their effectiveness.

Natural resources damages claims under the CWA and CERCLA fill the gap left by traditional environmental and toxic tort suits. Claims can be brought to require responsible parties to pay monetary damages necessary to rehabilitate the damaged environment, costs involved in assessing the damage and in bringing a legal action, and prejudgment interest. However, there is no Superfund to pay for natural resources damages.

CERCLA provides that responsible parties may be held liable for damages for *injury, destruction, or loss of natural resources resulting from a release of hazardous substances, including the reasonable costs of assessing the damages*.¹³ The three key concepts to understand are “natural resources,” “injury” and “damages.” Each is important, but the distinction between an “injury” and “damages” is especially important.

C. Natural Resources

Natural resources under CERCLA include all:

“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, [or] any Indian tribe.”¹⁴

This is a very broad definition. Natural resources are not limited by the ownership of the property on which they are found.

D. Injury

Natural resources damages actions start with the proposition that there has been a significant injury to the environment, be it oily birds, mine tailings in streams, or the like. The agencies profess that the purpose of these claims is not to punish polluters. Rather, responsible parties are asked to pay to restore an area or ecosystem to its “baseline,” which is the state of the area absent the damage caused by the responsible party. One way to show this is to compare the current impact of pollution to a prepollution

13. 42 U.S.C. § 9607 (a)(C) (emphasis added).

14. 42 U.S.C. § 9601(16). Passive uses such as hiking and fishing also fall under the definition of natural resources. *See generally Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 42 U.S.C. § 9607(a) (1994 & Supp. III.1997); *see also The Oil Pollution Act of 1990*, 33 U.S.C. § 2702(a) (1994 & Supp. IV 1998) (providing that each responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil. . .is liable for. . .damages [including damages to natural resources] that result from such an incident”). State law is similar. *Spill Compensation and Control Act*, N.J.S.A. 58:10-23.11b (Natural resources include all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State).

baseline state.¹⁵ Where actual baseline data is unavailable (in part because the polluter long ago irrevocably changed that baseline), scientists can re-construct a baseline.¹⁶

Natural resources injuries ("NRI") are any adverse change or impact of a discharge on a natural resource or impairment of natural resource services, whether direct or indirect, long-term or short-term, and include the partial or complete destruction or loss of the natural resource. Injuries can be ecologically based, such as the contamination of a stream fishery, and/or use based, such as the public's inability to use the stream for fishing. The distinct question is how many fish were lost. An example of an impairment of, or an adverse impact to, a natural resource, would be an injury to a river, and the life therein, caused by an oil spill. Other examples of NRIs include:

- Exceeding the drinking water standards, surface water quality standards or ground water quality standards.
- Exceeding action or tolerance levels in edible portions of organisms (for example, fish advisories).
- Adverse change in the viability of any biological resource.
- The destruction, impairment, or loss of any natural resources or natural resource functions and services.

Natural resource services are the physical and biological functions that natural resources perform. The services are the result of the physical, chemical, or biological functions of the natural resources and include services to other natural resources as well as services which directly benefit humans. Examples of natural resource functions and services include:

- Maintenance of biodiversity and ecosystem functions.
- Moderation of weather extremes and their impacts.
- Cycling and movement of nutrients and energy.
- Detoxification and decomposition of wastes.
- Purification of air and water.

Services help us understand different ways to value NRI. For instance, in the case of the valuation of groundwater:

15. See 43 C.F.R. § 11.14(e) (DOI definition of "baseline"); 15 CFR §990.30 (NOAA's definition).

16. See e.g. Frank B. Cross, *Restoring Restoration for Natural Resource Damages*, 24 U. Tol. L. Rev. 319, 334-35 (1993).

- The strategic value of groundwater (water that is located near “high-value” uses such as urban or prime agricultural areas) as opposed to aquifers located in less strategic locations.
- Aquifers with high-quality water that is not vulnerable to pollution (an aquifer that can be reserved more readily for strategic uses may have a higher inherent “value” than a more vulnerable one).
- The types of uses (aquifers that produce high-value environmental services, such as instream flows, may have a higher inherent value than others where such services are absent).

The regulations under CERCLA provide a general definition of injury applicable to natural resources for purposes of injury determination. The definition is:

a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance.¹⁷

Thus, for there to be an injury to natural resources under this approach, there must be a measurable adverse change in the resource that is detectable by observation or scientific methods. However, actions to prevent or mitigate further or future NRD would be encompassed here. Secondly, the adverse change must be to the chemical or physical quality or to the viability of a resource.¹⁸

Injuries are not limited to loss of services, or to market concepts, or to a particular method of valuation. In a very real sense, the question of valuation of an injury is not sufficient to explain the resulting damages. We need to be mindful of the incredible value of natural resources in every aspect of life¹⁹ and the economy:²⁰

17. 43 C.F.R. § 11.14 (v).

18. 51 Fed. Reg. 27682 (August 1, 1986).

19. E.g. Gifford Pinchot, *Breaking New Ground* (Island Press 1947): “The earth and its resources belong to its people. Without natural resources life itself is impossible. From birth to death, natural resources, transformed for human use, feed, clothe, shelter, and transport us. Upon them we depend for every material necessity, comfort, convenience, and protection in our lives.”

20. “A healthy economy can only exist in symbiosis with a healthy ecology.” Robert Costanza, quoted in John R. E. Bliese, *The Greening of Conservative America*, 241 (Boulder: Westview Press 2001).

“Overall, nature’s services benefit us economically in many ways, providing many kinds of raw materials, purifying air and water, mitigating floods and droughts, generating and preserving soils, detoxifying and decomposing wastes, pollinating crops, cycling nutrients, controlling the vast majority of agricultural pests, protecting coastal shores, shielding from harmful ultraviolet rays, partially stabilizing the climate, moderating weather extremes and their impacts, providing esthetic beauty and opportunities for recreation, and maintaining biodiversity. These services are not marketed, so they do not appear in national accounts or on the books of the businesses that benefit from them.”²¹

We also need to remember that mispricing of water resources has led to exploitation and abuse without regard to sustainability or environmental consequences.

E. Partial Summary Judgment

In most cases, partial summary judgment for liability under CERCLA is relatively easy to establish. CERCLA establishes liability for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.”²² The potentially responsible parties (PRPs) for natural resources damages under CERCLA are the (1) current owner or operator of a vessel or facility, (2) past owner or operator of a facility at the time of the disposal of hazardous substances, (3) generators and others who arrange for the disposal or treatment of hazardous substances, and (4) transporters of hazardous substances for disposal or treatment who selected the disposal or treatment site. Owners, operators, generators and transporters generally will be liable for natural resources damages under CERCLA if there is (1) a release (2) of a hazardous substance (3) from a facility.²³

A hazardous substance under CERCLA is any substance that is designated as hazardous by the EPA, and those substances that are designated or regulated pursuant to other federal environmental statutes, such as the CWA,²⁴ the Resource Conservation and Recovery Act,²⁵ the Clean Air Act,²⁶ and the Toxic Substances Control Act.²⁷ There are presently several hundred identified hazardous substances. Primary products as well as waste products may be hazardous substances. In other words, first, there must

21. Bliese, *supra*, n.20, at 241-242.

22. 42 U.S.C. § 9607(a)(4)(c).

23. 42 U.S.C. § 9607(a).

24. 33 U.S.C. §§ 1251-1387 (2004).

25. 42 U.S.C. §§ 6901-6992k (2004).

26. 42 U.S.C. §§ 7401-7671q (2004).

27. 15 U.S.C. §§ 2601-2692.

have been a statutorily defined discharge of oil or a release of a hazardous substance. Second, one or more of the defined injury standards must have been exceeded.²⁸ Third, the injury must be linked to the discharge or release through a pathway of contamination.²⁹

Figure 1

Elements of Partial Summary Judgment for a NRD Claim Under CERCLA

1. A substance was “released”
2. The substance released was a “hazardous substance”
 - CERCLA defines more than 7000 chemicals and other substances as hazardous
3. The release was from a “facility” or vessel
4. The release caused injury to natural resources
 - natural resources are defined broadly under CERCLA
5. The “injury” to natural resources “resulted from” the release
 - injury-in-fact
 - causation
6. The defendant falls within the four classes of “potentially responsible persons” identified under CERCLA
 - current owners and operations of the facility or vessel
 - past owners and operators of the facility or vessel
 - persons who transported the hazardous substances released
 - persons who arranged for the disposal or treatment of the hazardous substances released

28. 43 C.F.R. § 11.62 (2004).

29. *In re Acushet River and New Bedford harbor*, 722 F. Supp. 893, 897 n.8 (D. Mass. 1989) (release need only be a “contributing factor” to injury); *See also* 43 C.F.R §11.63.

F. Damages

Damage is a legal concept determining what a liable party has to do or pay to make the public or environment whole for the injuries to natural resources. Natural resource damages are defined as compensation for the

“[i]njury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury.”³⁰

Damages are defined by CERCLA to mean “damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this Act.”³¹ CERCLA does not define the terms injury, destruction, or loss. Further, CERCLA does not specify the standard of proof necessary for showing that a particular discharge or release caused a particular injury to a natural resource.

Damages may be recovered for those natural resource injuries and losses that are not fully remedied by response actions. All sums recovered in compensation for natural resources injuries by trustees must be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources.

The measure of damages includes three basic classes of damages: (1) primary restoration, or the cost of any action, or combination of actions, to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and services in a “base line state” that would have existed absent the contamination; (2) compensatory restoration or money for the loss of use of resource or services for the time period of pollution and restoration; and (3) costs associated with conducting the damage assessment.³²

Also, the basic purpose of CERCLA's natural resources damages provision is to require polluters to bear the costs of their polluting activities. Those who benefit financially from commercial activity must internalize the health and environmental costs for that activity into the costs of doing business.³³ The focus is full restoration of the environment, which is often a

30. 42 U.S.C. §§ 9601(6), 9607(a)(4), (c).

31. 42 U.S.C. §9601(6).

32. See Natural Resource Damage Assessments, 43 C.F.R. Part 11 (2001). Section 107 (a)(4)(C) provides that responsible parties may be held liable for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.” However, under section 107(f), a trustee may not recover for natural resource losses occurring before the date of CERCLA's enactment (December 11, 1980), or for losses identified in an environmental impact assessment, which are deemed to be authorized by permit or license. Likewise, under section 107(c), the trustee may not recover in excess of \$50 million unless a showing is made that the release resulted from willful misconduct or willful negligence, or from a violation of federal safety or operating standards.

Under state law, for example New Jersey's, the State Department of Environmental Protection (DEP) is not so limited and may seek monetary damages for NRDs. The department may also pursue a commitment by the responsible party to actually “restore, rehabilitate, [or] replace “the natural resources to their former state. N.J.A.C. 7:26E-1.8.

33. Sen. Rpt. 96-848, at 13 (July 11, 1980).

very expensive proposition. Consequently, in many cases the trustees will apply for very large recoveries.

Restoration is the remedial action that returns the natural resources to pre-discharge conditions. It includes the rehabilitation of injured resources, replacement, or acquisition of natural resources and their services that were lost or impaired. Restoration may also include compensation for the natural resource functions and services lost from the beginning of the injury through to the full recovery of the resource. Examples of restoration include:

Ground water

- non-point source pollution abatement projects
- preservation of land for aquifer recharge

Wetlands and Habitat

- rehabilitation or creation of wetlands/habitat in the appropriate ratios to compensate for the function and services lost

Injured Species

- restoration of appropriate habitat and monitoring of success
- land preservation
- research projects

Lost Public Use

- enhanced public access, information and interpretive centers

Although not directly defined in OPA or CERCLA, the term “restoration” as it applies to compensatory restoration is discussed in the regulations developed under each of these statutes. The OPA regulations, promulgated by the National Oceanic and Atmospheric Administration (NOAA) define restoration as “any action, or combination of actions, to restore, rehabilitate, replace or acquire the equivalent of injured natural resources and services.”³⁴ These same regulations identify “compensatory restoration” as included within restoration generally and define it as “action(s) taken to make the environment and the public whole for services losses that occur from the date of the incident until recovery of the injured natural resources.”³⁵

34. 15 CFR § 990.30.

35. *Id.*

The trustee has considerable discretion in selecting among restoration, replacement or acquiring the equivalent of the NRD.³⁶ The trustee may accumulate damages from different events—say discrete groundwater injuries—to develop an equivalent good—say purchasing forest land to promote future recharge.³⁷ In many cases, the remedy is both better for the environment and more cost-effective.

G. The Natural Resource Damage Assessment Process

There are two types of regulations available for assessment of natural resource damages: (1) standard simplified procedures requiring minimal field investigation (Type A); and (2) protocols for conducting assessments in individual cases (Type B). These regulations were promulgated by the U.S. Department of Interior. A natural resource damage assessment (NRDA) conducted by trustees in accordance with these regulations has the force and effect of a rebuttable presumption in any administrative or judicial proceeding under CERCLA.³⁸ However, CERCLA also allows the trustees to use other methods of assessing and quantifying damages.

Very often governmental entities elect to follow the U.S. Department of Interior Type B method for the NRDA. A Type B Assessment requires a multi-stage administrative process, with opportunities for public and Potentially Responsible Party (“PRP”) participation in the latter stages. The stages of a Type B Assessment are summarized as follows:

(1) Preassessment Phase: This phase provides for notification, coordination, and emergency action. It includes a preassessment screen that is intended to be a rapid review of readily available information. The preassessment screen allows the trustees to make an initial determination of whether a hazardous substance release has affected natural resources and whether the potential injury is significant enough to justify an NRDA.

(2) Assessment Plan Phase: If the trustees decide to proceed with a NRDA, a trustee council may be formed in which one representative is designated as the “lead trustee.” The trustee council will then develop an Assessment Plan, which outlines the methodologies and the processes to apply in the NRDA. The Assessment Plan ensures that the assessment is performed in a planned and systematic manner and that the methodologies chosen demonstrate a

36. 42 U.S.C. §9607(f)(1).

37. *E.g.* 15 C.F.R. §§990.53(c), 990.54(b) (2003).

38. 42 U.S.C. §9607(f)(2)(C).

reasonable cost. PRPs may be invited to participate in the assessment process at this stage.

(3) Type B Assessments: The process for implementing Type B assessments has been divided into the following four phases:

(i) Injury Determination Phase: In this phase, the trustees formally establish that one or more natural resources have been injured as a result of a release of a hazardous substance. The trustees will determine both the pathways through which resources have been exposed to a hazardous substance and the nature of the injury.

(ii) Quantification Phase: The purpose of this phase is to establish the baseline condition of the injured resource, the real and temporal extent of the injury, and estimates of the likelihood and time for recovery.

(iii) Damage Determination Phase: The purpose of this phase is to establish the appropriate compensation expressed as a monetary value for the injuries to natural resources. The regulations include guidance on acceptable cost estimation and valuation methodologies for determining compensation based on the cost of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, and the lost value of the injured resources from the time of injury until the resources recover or are restored.

(iv) Post-assessment Phase: This phase requires a Report of Assessment which documents that the assessment has been carried out according to regulations. It also delineates the manner in which the demand will be presented to PRPs and the steps to be taken when sums are awarded as damages.

H. *Trustees*

DOI regulations define “restoration” in terms of activities undertaken to return an injured resource to baseline for physical, chemical and biological properties in services.³⁹ The regulations discuss compensatory restoration in the context of restoration planning, stating “[w]hen damages for compensable value have been awarded, the [restoration] plan shall also describe

39. 43 CFR §11.14 (II).

how monies will be used to address the services that are lost to the public until restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is completed.”⁴⁰

Federal and state officials may be designated to serve as natural resources trustees under CERCLA and the CWA.⁴¹ CERCLA also recognizes the authority of Indian tribes to commence actions for natural resources damages. Currently, the EPA is not a designated natural resources trustee. Designated trustees include agencies and sub-agencies such as the Department of Interior (DOI), the Army Corps of Engineers, the U.S. Fish and Wildlife Service, the Bureau of Land Management, and where authorized by state statute, various state agencies. There have been as many as fifteen or twenty different natural resources trustees involved in a single claim. This has led to disagreements and “turf wars” among trustees regarding the assessment of damages.

Natural resource trustees are designated to assess natural resource injury and initiate steps toward restoring natural resources and compensating the public for their loss. Federal natural resource trustees include:

- Secretary of Agriculture (responsibilities include federal rangelands, fisheries, and farmland and national forest land);
- Secretary of Commerce (responsibilities include coastal environments, endangered marine species and rivers or tributaries to rivers);
- Secretary of Defense (responsibilities include all lands owned by Department of Defense or the Army, Navy, or Air Force);
- Secretary of Energy (responsibilities include national research and development laboratories, facilities and offices); and
- Secretary of Interior (responsibilities include certain endangered species, certain marine mammals, federally owned minerals, migratory birds, and national parks and monuments).

State natural resource trustees are designated by the state’s governor. Tribal trustees are designated by a tribe.

40. 43 CFR § 11.93 (a).

41. Under Section 311 of CWA, trustees representing the United States or any state are appointed in order to sue for the “costs or expenses incurred by the Federal or State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or hazardous waste in violation” of the Act. 33 U.S.C. § 1321(f) (5).

Significantly, the EPA is not designated as a natural resource trustee. Although the EPA has comprehensive authority to respond to hazardous substance releases, it has limited authority in the federal NRD program. EPA's responsibilities include:

1. Notifying trustees of potential injuries to natural resources at sites where investigations and remediation are ongoing;
2. Coordinating and planning with trustees throughout the investigation and remediation phases; and
3. Encouraging trustees to participate in negotiations with PRPs.⁴²

By way of example, the National Contingency Plan ("NCP") requires that an ecological risk assessment ("ERA") be conducted to evaluate the likelihood of adverse ecological effects occurring as a result of hazardous substances and/or site cleanup activities. An EPA guidance document regarding an ERA requires coordination with natural resource trustees during the ERA process.⁴³

Natural resource trustees' responsibilities include assessing the extent of injury to natural resources and restoring natural resources.⁴⁴ In order to execute these responsibilities, a trustee can negotiate with PRPs to obtain PRP-financed or PRP-conducted assessment and restoration of natural resource injury, sue PRPs for the costs of assessing and restoring the natural resource, or conduct the assessment and restore natural resources and then seek reimbursement from PRPs and, in limited circumstances, from Superfund.⁴⁵

Members of the public have no direct right to sue persons or entities who cause natural resources damages. However, under the citizen suit provisions of both CERCLA and the CWA, trustees who fail to adequately protect the natural resources entrusted to their care may be forced by private citizens to live up to their duties under the Public Trust Doctrine.

I. Defenses

Some have argued that privately owned natural resources should not be subject to these sorts of claims. The 1986 DOI regulations excluded damages to privately owned natural resources from natural resources damages assessments.⁴⁶ The court in *Ohio v. Interior* questioned the validity of this

42. 42 U.S.C. §§ 9604(b), 9622(j)(1).

43. U.S. EPA, *Guidelines for Ecological Risk Assessment* (April 1998) <<http://cfpub.epa.gov/ncea/cfm/recorddisplay.cfm?deid=12460>>.

44. 42 U.S.C. § 9607(f)(2)(A).

45. 42 U.S.C. §§ 9607(a), (f).

46. 51 Fed. Reg. 27674 (August 1, 1986).

exclusion, however.⁴⁷ CERCLA does not prohibit recovery for natural resources that were privately owned since CERCLA speaks of resources "otherwise controlled by" the trustee. The new DOI regulation states that the "rule is available for assessments of all natural resources covered by CERCLA, which under the plain language of the statute includes more than just resources owned by the government."⁴⁸ Thus, it is possible that privately owned natural resources which are heavily regulated or managed may be deemed "controlled" by the government, and thus subject to claims for natural resources damages.

Section 107(f)(1) of CERCLA provides that "there shall be no recovery . . . where such damages and the release of hazardous substance from which such damages regulated have occurred wholly before [December 11, 1980, which is the enactment day of CERCLA]."⁴⁹ This provision has been interpreted to mean that liability is precluded only for damages suffered on or after the enactment of CERCLA.⁵⁰ If damages to natural resources occurred both before and after the enactment of CERCLA, only the post-enactment damages may be recovered.⁵¹ Where the damages are not divisible between pre- and post-enactment releases, both may be recovered.⁵²

Section 107(f)(1) additionally provides that CERCLA's three-year statute of limitations begins to run for natural resource damage actions on the later of (1) the date of discovery of the loss and its connection with the release, (2) the date of promulgation of the natural resources damage assessment final regulations⁵³ or (3) the date of completion of remedial action at a National Priorities List site.⁵⁴

With respect to release or damage authorized by permit as a defense,⁵⁵ there is no liability where the damage to natural resources complained of "were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. . ."⁵⁶ This affirmative defense only excuses liability for natural resources damages resulting from a newly permitted project, and not those resulting from prior activities.⁵⁷ Furthermore, natural resource damages which result from

47. *Ohio v. United States DOI*, 880 F.2d 432 (U.S. App. D.C. 1989).

48. 59 Fed. Reg. 14265 (March 25, 1994).

49. 11 42 U.S.C. § 9607 (f) (1).

50. *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

51. *In re Acushnet River and New Bedford Harbor Proceeding*, 716 F. Supp. 676 (D. Mass. 1989).

52. *Id.*

53. See 59 Fed. Reg. at 14,266. This has not yet occurred.

54. 42 U.S.C. § 9613 (g) (1).

55. 42 U.S.C. § 9607 (f) (1).

56. *Id.*

57. *Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989).

a “federally permitted release” are not recoverable under CERCLA, but may be under other existing laws.⁵⁸

Noteworthy potential defenses to CWA liability are if the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States Government, or an act or omission of a third party.⁵⁹ Similar defenses exist to CERCLA actions.⁶⁰

PRPs may also argue that their activities did not cause the asserted natural resources damage. 42 U.S.C. § 9607 (a) (4) (c) requires that the damages must result from a release of oil or a hazardous substance. The *Ohio v. Interior* court found that CERCLA at best ambiguously addresses the question of whether the causation of injury standard under § 107 (a) (c) must be less demanding than that of the common law.⁶¹ Consequently, the trustee must show that a particular spill or release caused a particular injury.

III. LESSONS LEARNED

Anyone interested in developing an effective state or tribal natural resource damages program must try to understand the problems that have deterred the majority of states from even trying to deal with NRD and has undermined other states programs which have confronted NRD with mixed success.

A major problem with post-Superfund NRD associated with non-acute pollution disasters is that it was conceptualized as secondary to long overdue site remediation issues. Prior to Superfund, natural resource damages were handled in a non-programmatic fashion under the common law Public Trust or *Parens Patriae* doctrines. After the dramatic revelations leading to the passage of Superfund and RCRA,⁶² the priority of state and federal government was the elimination of imminent and substantial dangers to public health and the environment, which placed other related environmental concerns such as NRD on the back burner. Think of it as a sort of environmental triage. Indeed, Superfund expressly embodied this policy by staying NRD restoration actions until the completion of the CERCLA cleanup action. Unfortunately, as the Superfund cleanup process turned into an end rather than a means,⁶³ NRD issues were further delayed.

As a result, at the federal level, actions for natural resource damages have languished. For example, two GAO reports found that natural resource trustees at only sixty-seven sites had reached settlement for dam-

58. 42 U.S.C. § 9607(j).

59. 33 U.S.C. § 1321(f).

60. 42 U.S.C. § 9607(b).

61. 880 F.2d at 472.

62. E.g. Michael Brown, *Laying Waste: The Poisoning of America by Toxic Chemicals* (Pantheon 1980); Samuel Epstein, Lester Brown & Carl Pope, *Hazardous Waste in America* (Sierra Club Books 1982); Louis M. Gibbs, *Love Canal: My Story* (State University of New York Press 1982).

63. See Kanner, *Rethinking Superfund*, NAEP News, Vol. 20, No. 3, p. 19 (1995).

ages, the settlements at the five largest sites totaled \$83.3 million dollars,⁶⁴ while at the sixty-two smaller sites the settlements totaled only \$33.8 million dollars.⁶⁵ In many cases, these were deeply discounted, add-on payments to agreements to perform remedial actions. This seems to be corroborated by the fact that of the monies awarded in these settlements, \$61 million were collected, and only \$8.8 million was ultimately spent on some restoration.⁶⁶ Though the law under CERCLA provides for recovery of damages for injuries to natural resources, very little has been accomplished to restore injured natural resources as government has focused on achieving the threshold health and safety goals of Superfund.

The GAO was addressing the money necessary to do the job of restoration. Money is also needed for enforcement. Given the costs associated with the expert proof necessary in these cases (e.g. environmental risk assessment, economics), many states lack the resources to act. A recent article underscores this issue: "[t]rustees, particularly at the state level, are faced with insufficient resources to conduct the comprehensive assessments necessary to support pending NRD claims."⁶⁷

As indicated, one cannot ignore lack of political will as a reason for NRD inaction by the states or for grossly inadequate NRD settlements. Industry has a very effective lobby on the state level, especially when it comes to limiting appropriations for NRD initiatives and the necessary staff support.

In an interesting development New Jersey implemented statewide site remediation guidelines which target natural resource damages, and their resolution, more aggressively. One of the steps taken occurred roughly three years ago, when the New Jersey Department of Environmental Protection made subtle but significant changes to several definitions in its "Technical Requirements for Site Remediation."⁶⁸ Although subtle, these changes accelerated the environmental cleanup requirements in New Jersey and the

64. General Acct. Off., *Superfund: Outlook & Experience with Natural Resource Damage Settlements* at 2 (Apr. 1999).

65. General Acct. Off., *Status of Selected Federal Natural Resource Damage Settlements* at 1-2 (Nov. 20, 1996).

66. General Acct. Off., *Superfund: Outlook & Experience with Natural Resource Damage Settlements* at 2 (Apr. 1999); General Acct. Off., *Status of Selected Federal Natural Resource Damage Settlements* at 1-2 (Nov. 20, 1996).

67. Dale C. Young, *Natural Resource Damages: Perspectives on Cooperative Assessments & Restoration of Natural Resources*, NAT. ENV. ENF. J. 1, 1 (Apr. 18, 2000).

68. N.J.A.C. 7:26E-1.1 et seq. On April 17, 2000, the Appellate Division ruled against a number of corporations and organizations that sued the state, challenging several aspects of the new NRD regulations. Specifically, in *New Jersey Site Remediation Industry Network v. New Jersey Department of Environmental Protection*, A-5272-97T3, the court rejected the following changes to the NRD regulations: 1. The NRD Regulations violate specific prohibitions in the Hazardous Discharge Site Remediation Act ("HDA"), N.J.S.A. 58:10B-1 et seq., and the Brownfield and Contaminated Site Remediation Act, L. 1997, c. 278 Sec. 1; 2. Contrary to the historical powers of the courts and the provisions of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the NRD regulations overstep the DEP's jurisdiction by improperly displacing the Superior Court's role in adjudication of NRD claims; and 3. The DEP violated the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-1 to -14, when the department added the NRD provisions to its regulations upon their adoption.

potential liability of property owners and operators. These changes required parties that are responsible for remediation of contaminated sites to consider and evaluate natural resource injuries as part of their remedial investigations. Responsible parties must also consider potential injuries to natural resources that could occur during the remedy phase.⁶⁹

IV. CONCLUSION

For most tribes, natural resource damages go beyond mere economic issues and speak to disruptions in the balance between people and the land. This reality requires a higher level of vigilance to prevent and remedy such wrongs. CERCLA provides an important set of tools for this vital undertaking.

69. Obviously, responsible parties could voluntarily address resource damages at anytime prior to the implementation of the technical regulations.

