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New Enforcement Initiatives Focus on Natural Resource Damages

INTRODUCTION

For years, companies caught up in enforcement actions aimed at cleaning up facilities contaminated with hazardous substances have dreaded the day when claims for natural resource damages ("NRD") might be asserted with respect to the same facilities. That day appears to be at hand. Increasing indications are that a wave of enforcement activity is likely to begin as early as the first quarter of 2003, led by states seeking to replenish their depleted treasuries by recovering NRD from industry. New Mexico and New Jersey have already retained private counsel to pursue such claims. Moreover, the amounts of NRD claims could easily rival or exceed the enormous response costs that industry has already incurred in the cleanup program. Companies would be well advised to prepare to defend themselves against these claims, to avoid or minimize their liability, and to maximize their insurance coverage. The focus of this Alert is on NRD claims and defenses against such claims. A companion Alert will be sent to you shortly, focusing on insurance coverage for NRD.

WHAT ARE NATURAL RESOURCES AND WHO OWNS THEM?

"Natural resources," in the broadest sense, consist of the air we breathe, the water we drink, the land we live on, and all plant, fish and wildlife. Historically, under the parens patriae doctrine, government held all natural resources in trust for the benefit of the public.[1] The two principal federal statutes governing NRD claims[2] define "natural resources" held in trust for the public in similarly broad terms. For example, Section 101(16) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," commonly known as the Superfund statute), 42 U.S.C.§ 9601(16), defines "natural resources" as "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, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." *See also* The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701(20), the other principal federal statute concerned with NRD.

Under Section 107(f)(2) of CERCLA, trustees, acting on behalf of the public to protect natural resources, have been designated by the federal government and by state and tribal governments. In the case of the federal government, the Secretaries of Agriculture, Commerce, Defense, Energy and Interior have been designated as trustees.[3] In connection with federal claims for NRD, industry is most likely to encounter the National Oceanic and Atmospheric Administration ("NOAA"), part of the Department of Commerce, as trustee for marine and coastal resources, or various agencies of the Department of the Interior ("DOI"), as trustee for federal lands.[4]

States have typically designated an official, or an agency of state government, to act as trustee for natural resources located within the borders of the state. For example, New Jersey has designated its Department of Environmental Protection (NJDEP) as trustee for all natural resources located within the state.

Significantly, although the Environmental Protection Agency ("EPA") administers the cleanup program under CERCLA, it is not a trustee of federal natural resources. Instead, EPA has a coordination role in support of NRD claims by the federal trust-

1 *See, e.g, State v. New Jersey Cent. Power & Light Co.,* 125 N.J. Super. 97, 103 (1973), *aff'd,* 133 N.J. Super. 375 (App. Div. 1975), *rev'd on other grounds,* 68 N.J. 161 (1976) ("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus").

2 *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a) (1994 & Supp. III 1997); The Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994 & Supp. IV 1998).

3 Exec. Order No. 12580, 3 C.F.R. 193 (1987).

4 *Id.*

ees.[5] For example, EPA coordinates assessment, investigation and planning of NRD claims with the trustees and notifies the trustees of settlement negotiations with potentially responsible parties, encouraging their participation.[6]

The trustees are responsible for assessing the extent of injury to natural resources under their trusteeship and for restoring natural resources injured or services lost due to the offending release or discharge. To execute these responsibilities, the trustees may sue in court to recover the value of lost or damaged natural resources as well as the costs of NRD assessment and restoration planning, targeting the same "covered persons" potentially liable for response costs under CERCLA. In New Jersey, by contrast, the trustee may recover NRD administratively, without suing in court.[7]

It is apparent that the jurisdiction of the federal, state and tribal trustees may overlap with respect to particular natural resources. For example, both NOAA and a state may claim trusteeship of waters within the borders of the state. CERCLA and OPA recognize this potential and provide that there can be no double recovery for damages to a natural resource.[8]

With one exception, claims for natural resource damages must be made in the name of the trustees. The exception is that, under certain circumstances, the OPA authorizes such claims on behalf of private parties.[9] The overwhelming thrust of the upcoming enforcement initiative, however, is expected to involve claims by federal and state trustees for the recovery of natural resource damages.

WHAT ARE NATURAL RESOURCE DAMAGES AND HOW ARE THEY MEASURED?

Section 101(6) of CERCLA defines the term "damages" as "damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title." When a natural resource is injured, destroyed or lost by a release of CERCLA hazardous substances (which by definition, largely exclude "petroleum"), Sections 107(a)(4)(C) and (f)(1) of CERCLA authorize the federal, state and tribal trustees to recover "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." Thus, the concept of "injury" to a natural resource includes not only physical insult to the resource, but also loss of the resource, including loss of its use. In similar fashion, Section 1002(b)(2) of the OPA authorizes trustees to recover for injury caused by releases of oil.

"Injury" occurs when a natural resource is degraded from its pristine condition to the point where it is contaminated with hazardous substances in excess of some established standard. For example, ground water contaminated by a release of hazardous substances in excess of Maximum Contaminant Levels ("MCLs") established under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26, has suffered an injury entitling the trustee to recover NRD. Residual "injury" may also occur when a remedial activity fails to restore the resource to meet applicable standards. Thus, if a pump-and-treat ground water remedy fails to restore the ground water to MCLs, a residual injury may occur.

Under both CERCLA and the OPA, the trustees may collect NRD from the same "covered persons" who are responsible for response costs under Section 107(a)(1)-(4) of CERCLA, the current and certain former owners and operators of facilities and persons who arranged for the disposal of hazardous substances at those facilities. Thus, companies who found themselves liable for response costs under CERCLA (or under the RCRA corrective action, voluntary cleanup or similar programs) are likely to be liable as well for any NRD at the same facilities. Under Section 107(f)(1) of CERCLA, monies recovered as NRD "shall be retained by the trustee, without further appropriation, for use only to restore, replace or acquire the equivalent of such natural resources," and presumably not for other purposes (such as counsel fees). By contrast, recoveries under the OPA in excess of those needed to compensate for NRD can be retained in the Oil Spill Liability Trust Fund. Although the Hazardous Substances Superfund created under CERCLA will rarely be available to compensate for NRD, the Oil Spill Liability Trust Fund created under the OPA generally will be. Under CERCLA, there is a $50 million limitation on NRD recoveries for each release.

Measurement of NRD has proven to be highly controversial and has generated most of the litigation associated with natural resources. The measure of NRD is defined by regulation:

> The measure of damages is the cost of restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured resources and the services those resources provide. Damages may also include, at the discretion of the authorized official, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of the resources and their services to baseline.[10]

NRD includes direct costs, such as compensation of employee time and the cost of materials acquired for the performance of the selected restoration alternative, and indirect costs, such as overhead. Various cost estimating methodologies are listed in the regulations, including, for example, the "valuation" and "res-

5 *See, e.g.*, 42 U.S.C. §§ 9604(b)(2), 9622(j)(1).
6 *See* 42 U.S.C. § 9604(b)(2).
7 *See New Jersey Site Remediation Industry v. New Jersey Dep't of Envtl. Protection*, Docket No. A-5272-97T3, slip. op. (App. Div., April 17, 2000) (per curiam) (on file with author).
8 *See* 42 U.S.C. § 9607(f)(1); 33 U.S.C. § 2706(d)(3).
9 33 U.S.C. § 2702(d)(1)(A).
10 43 C.F.R. § 11.80.

toration" approaches.[11] The "valuation" approach uses market and non-market data to value the lost resource; whereas, the "restoration" approach focuses on the cost of restoring the resource.

Section 301(c) of CERCLA directed the President to promulgate regulations for the assessment of NRD caused by the release of hazardous substances, the first step in the damage recovery process. By Executive Order 12580 (January 23, 1987), the President delegated that responsibility to DOI. Section 1006(e)(1) of the OPA authorized NOAA to develop NRD assessment regulations for injuries caused by discharges of oil that did not otherwise constitute a CERCLA hazardous substance.

DOI promulgated NRD assessment regulations under CERCLA which were challenged, partially overturned by the Court of Appeals for the D.C. Circuit,[12] and re-promulgated in final form for Type A assessments (covering coastal and marine environments) in May 1996 (43 C.F.R. Part 11, Subpart D) and for Type B assessments (covering all other environments) in March 1994 (43 C.F.R. Part 11, Subpart E). NOAA issued its assessment regulations in January 1996 (15 C.F.R. Part 990). In all cases, assessments (which are roughly analogous to RI/FSs in the cleanup program) are performed in phases, (a) to determine whether an injury has occurred and a pathway of exposure exists, warranting further action, (b) to confirm the injury and pathway of exposure and develop an assessment plan, (c) to gather data to quantify the injury and damages and (d) to identify and evaluate a reasonable number of restoration alternatives. The DOI and NOAA assessment procedures are not mandatory, but if they are used, the trustees become entitled to a rebuttable presumption that the results of the assessment are correct.[13] Even though the DOI regulations were drafted for use under CERCLA and the NOAA regulations were drafted for use under the OPA, the trustees may use either approach and still have the benefit of the rebuttable presumption.

In practice, both the "valuation" and "restoration" approaches have been used to quantify NRD. In the Exxon Valdez litigation,[14] arising out of the Alaska oil spill, the state trustee, using the "valuation" approach, sought to recover the value of lost fish harvests resulting from the oil spill, relying on market data to establish the value of the lost fish. The jury returned what appeared to be a $286.8 million compromise verdict, representing the exact midpoint between the valuations proposed by the plaintiff and defendant. By contrast, in a companion case,[15] the tribal trustee, also using the "valuation" approach, sought to use non-market based studies to establish a greater claim because the market valuations were believed to be inadequate to redress the harm suffered by the tribe. When the non-market studies were excluded by the court, the case settled.

In the American Trader litigation,[16] arising out of an oil spill near Huntington Beach, California, the trustee, using the "restoration" approach, sought to use contingent valuation techniques to establish the value of lost use of contaminated beaches. Competing experts attempted to value a day at the beach, using conflicting survey data. The expert valuations varied from $5 to $28 per day. The jury ultimately found that the value to a person of a day at a Southern California beach was $13.19.[17]

The "restoration" approach was also used in a case called Fisher I,[18] in which federal trustees sued for NRD to a marine sanctuary from a treasure-hunting operation. Since restoration in the same area as the sanctuary was not possible, the trustee used an economic technique known as "habitat equivalency analysis," in which a compensatory project results in "total resource services gained through restoration equals total resource services lost due to the injury."[19]

Increasingly, trustees are reaching settlements with potentially responsible persons as part of the resolution of claims for response costs. According to NJDEP, its receipt of NRD settlement funds exceeded $11 million in 2002, more than in the six prior years combined.[20] Reliable information suggests that NJDEP may file as many as 50 to 80 claims for NRD during the first calendar quarter of 2003.

HOW CAN YOU DEFEND YOURSELF AGAINST NATURAL RESOURCE DAMAGES CLAIMS?

Even though liability for NRD under CERCLA is subject to the same strict, joint and several liability standard as for response costs, and even though that liability, like liability for response costs, is "[n]otwithstanding any other provision or rule of law, and subject only to the [narrow] defenses set forth

11 43 C.F.R. § 11.83.

12 *State of Ohio v. United States Dept. of Interior, et al.*, 880 F.2d 432 (D.C. Cir. 1989) (upholding in part and invalidating in part the DOI's regulations, but specifically endorsing the use of "contingent valuation" economic theory, in which surveys are used to create a hypothetical market for a lost or damaged natural resource, to measure NRD. An example would be the value of a day at the beach, or, even more abstractly, the value of knowing that the beach is there. *See* American Trader discussed *infra*.)

13 *See* 42 U.S.C. § 9607(f)(2)(C); 33 U.S.C. § 2706(e)(2).

14 For discussion regarding the Exxon Valdez case, *see* Dale B. Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 Envtl. L. 57 (Winter 2002). Approximately $1 billion of the $1.125 billion dollar settlement achieved by the United States is understood to be earmarked for natural resource damages.

15 *Id*.

16 *California v. BP America*, Case No. 64 63 39, slip op. (Cal. Super. Ct., Dec 8, 1997); For discussion regarding the American Trader case, *see* Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 Envtl. L. 57.

17 *Id.*

18 *United States v. Fisher (Fisher I)*, 22 F.3d 262 (11th Cir. 1994); For discussion regarding the *Fisher* case, *see* Thompson, 32 Envtl. L. 57.

19 *United States v. Fisher (Fisher II)*, 977 F. Supp. 1193, 1198 (S.D. Fla. 1997), *aff'd*, 174 F.3d 1201 (11th Cir. 1999).

20 *McGreevey Vows to Make Polluters Pay*, www.PressofAtlanticCity.com (Sept. 27, 2002); Press Release, New Jersey Department of Environmental Protection, *New Jersey Settles $3 Million Case for East Hanover Ground Water Contamination Site*, (Nov. 19, 2002).

in [Section 107(b)]" of CERCLA, companies may have ways of protecting themselves against NRD liability. Given the prospect of such claims in the near future, companies should be planning to do so.

The first step in planning for NRD claims is to identify the facilities that may cause such claims to arise. Common sense suggests that the most seriously contaminated sites (*e.g.*, sites highly ranked on the NPL) are likely to give rise to the earlier NRD claims, simply because those sites will tend to attract the most attention. Examples of other categories of likely target sites include sites cleaned up to less restrictive standards, arguably leaving residual NRD when the cleanup is completed, and sites that have impacted surface waterways. Companies should consider reviewing their inventories of contaminated sites to single out those with potential NRD claims.

Once that list has been compiled, potential defenses can be analyzed to avoid or minimize potential NRD liability. Examples of such defenses include the statute of limitations, divisibility of harm and lack of causation.[21] Companies will likely have the burden of proving these defenses, so a pro-active approach to gathering data and historical information in support of such arguments will be a worthwhile investment.

Even if NRD claims are asserted, companies may find themselves in a more favorable position than in the defense of response cost claims. A court must make findings and conclusions that, in the cleanup program, are made by the enforcing administrative agency.[22] The trustees do not benefit from review of agency action limited to the administrative record on the narrow arbitrary and capricious standard of review; moreover, companies may be entitled to a jury trial.[23]

CONCLUSION

Given the increasing probability that substantial claims for NRD will be asserted by federal and state trustees in the near term future, companies should be preparing to defend themselves, first by understanding the NRD liability regime, and then by marshalling evidence to assert the limited defenses which may be available to avoid or minimize NRD liability.

WATCH FOR DEVELOPMENTS

Since NRD will likely become a subject of increasing interest among companies, this alert will be updated periodically as developments occur. You may wish to save this alert and watch for updates as they are sent to you.

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21 *See, e.g.*, 42 U.S.C. § 9613(g)(1) (statute of limitations provision). In addition, Section 107(a)(4)(C) provides that "covered persons" are liable for NRD "resulting from" a release of hazardous substances, introducing a causation requirement not present in the liability scheme for response costs. The scope of that requirement is unsettled; need the release of a hazardous substance be a "sole or substantial contribution" to the NRD, or just a "contributing factor" to the NRD? *Compare United States v. Montrose Chemical Corp. of Cal.*, 33 ERC 1207, 1208 (C.D.Cal. 1991), *with In re Achushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 722 F.Supp. 893 (D.Mass. 1989). Proof of the absence of causation can be very fact intensive (*see, e.g*, Timothy J. Iannuzzi *et al*., *A Common Tragedy: History of an Urban River*, (Amherst Scientific Publishers) (2002)) and is therefore a good candidate for early preparation efforts.

22 *But see* Technical Requirements for Site Remediation, N.J. Admin. Code, tit. 7, ch. 26E (authorizing the State of New Jersey to collect NRD as an integral part of the administrative cleanup process). Even though the trustees do not benefit from the arbitrary and capricious standard of review on the administrative record, they do benefit from a rebuttable presumption that NRD assessments they perform in accordance with the DOI or NOAA regulations are correct. *See, e.g.*, 42 U.S.C. § 9607(f)(2)(C) (CERCLA's rebuttable presumption provision).

23 Although the law is well settled that claims for reimbursement of response costs are not subject to a jury trial, the cases are divided on whether there is a right to a jury trial in NRD claims. *Compare New York v. Lashins Arcade Co*., 881 F. Supp. 101, 102-3 (S.D.N.Y. 1995) (upholding right to jury trial), *with United States v. Wade*, 653 F. Supp. 11, 13 (E.D.Pa. 1984).

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