

Natural Resource Damage Assessment and Restoration

An Overview of
the Department of the Interior's
Authorities, Responsibilities, and
Practice Challenges

Natural Resource Damages

- Congress -- through federal statutes like CERCLA, the CWA, and OPA -- authorizes State, Tribal, and Federal governmental entities to bring claims (acting as “Trustees” on behalf of the public) for damages to restore or replace natural resources injured or destroyed by releases of hazardous substances or oil.

Common Law Concepts in Natural Resource Damages

Government agencies acting as *trustees* on behalf of the public is derived from common law concepts such as:

- Public Nuisance
- Public Trust Doctrine
- Parens Patriae

Statutory Authority for Natural Resource Damage Claims

- CERCLA (1980) creates a comprehensive scheme for responding to hazardous substance releases, and authorizes Federal, State, and Tribal governments to seek damages for natural resource injury caused by such releases.
- OPA (1990) authorizes a substantially similar liability scheme for discharges of oil into navigable waters.

Regulatory Concepts in Natural Resource Damages

- Section 301 of CERCLA requires the federal government to issue regulations outlining “the best available procedures” for assessing natural resource damages.
- DOI was designated by the President to undertake promulgation of the CERCLA NRDA Regulations.
- CERCLA provides for the review and revision of the NRDA regulations.

Why are We Here?

- Seek advice on significant issues raised in nearly 25 years of NRDAR practice;
- Review specific aspects of our rulemaking responsibility in a public forum;
- Seek consensus opinion on guidance to:
 - increase cost effectiveness;
 - provide greater certainty;
 - restore injure natural resources in a timely manner.

Regulatory Concepts in Natural Resource Damages

The CERCLA NRD Regulations outline two types of assessments:

- Type A Procedures - estimate damages with minimal field analysis, by means of simplified methods such as a computer model.
- Type B Procedures – utilize site specific data when simplified techniques are not appropriate.

CERCLA does not require trustees to follow the regulations to bring a claim, but assessments done in accordance with the regulations are entitled to a rebuttable presumption in any legal or administrative proceeding.

Regulatory Concepts in Natural Resource Damages

- NOAA is responsible for developing NRDA Regulations under OPA.
- Section 1006 of OPA provides that an assessment in accordance with the OPA NRDA Regulations is entitled to a rebuttable presumption in legal or administrative proceedings.

Natural Resources

CERCLA broadly defines “natural resources” to include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.

Trusteeship

- CERCLA provides that State, Tribal, and Federal Trustees represent the public interest in public natural resources within a State, or *managed, controlled*, held in trust by or appertaining to any of the respective governmental entities.
- The CERCLA NRD Regulations encourage trustees to cooperate and coordinate their claims in order to avoid double recoveries.

Liability

- Release or discharges of hazardous substances or oil;
- From a vessel or facility;
- Owned or operated by a responsible party;
- Resulting in injury to natural resources.

*The first three elements are requisites of response (or cleanup liability) – usually conducted by EPA or the Coast Guard. NRD liability is **residual** to any cleanup or response actions undertaken.*

Limitations and Exceptions to NRD Claims

- Losses already cleared by an EIS or federal permit;
- Release and damages occurred “wholly before” the enactment of CERCLA (Dec.1980);
- Per release damage caps;
- Statute of Limitations (“remedial action” vs. “discovery” sites);
- Divisibility from other causes (vs. strict, joint & several liability)

Touchstones for NRDA Claims

Assessment Planning:

- Injury Determination
- Injury Quantification
- Damage Determination
- Restoration Planning and Implementation

Both CERCLA and OPA describe notice of intent to proceed, and an invitation to PRPs to participate in the assessment.

Injury Determination

Defining Injury:

- CERCLA and OPA initially the same “... measurable adverse change ... in the chemical or physical quality or the viability of a natural resource...” (43 CFR 11.14 and 15 CFR Part 990)
- CERCLA (Section 11.62) provides details on various ‘types’ of injury including: discussing the ‘per se’ injuries, 18 defined injuries, and “acceptance criteria” for determining injury for each type of natural resource.

Legal Causation

A pathway from the released substance to the resource(s) potentially injured.

- Evidentiary strength of association of injury with the released substance (temporal relationship, consistency, biological plausibility, dose-response relationship, consideration of alternative explanations, etc.)

Injury Quantification

- Spatial and temporal extent;
- “Service” reduction:
 - “Service” analysis involves identifying/quantifying the functional impairments-to people or to other resources-that result from the injuries.
 - Functional impairments are measured from the “baseline” condition that the resources would be in if the releases in question had not occurred. *This is NOT pristine, and not necessarily what existed at the time of the release.*

Injury Quantification Issue

- Quantifying the effects of a hazardous substance release on a “resource by resource”, “species by species”, and “function by function” basis can sometimes be both costly and inconclusive.
- Accordingly, the CERCLA NRD Regulations allow for quantifying natural resource injury on a “population, habitat, or ecosystem level”.
- Habitat or ecosystem level injury quantification can help eliminate double recovery problems.

Injury Quantification Issue

What are the best available procedures for quantifying natural resource injury on a population, habitat or ecosystem level?

What guidance is appropriate for the utilization of these procedures?

Damage Determination

(Measure of damages common to both CERCLA and OPA)

- The cost of restoring, (rehabilitating), replacing, or acquiring the equivalent of injured resources (baseline or primary restoration);
- The reasonable costs of assessment.

Damage Determination Issue

- The CERCLA NRD Regulations express no preference among direct restoration, rehabilitation, replacement, or acquisition of equivalent resources.
- This can sometimes result in confusion and inconsistency regarding appropriate restoration endpoints.

Damage Determination Issue

Should DOI's Regulations provide additional guidance for determining whether direct restoration, rehabilitation, replacement, or acquisition of equivalent resources is the best strategy for addressing natural resource injuries?

Damage Determination

Interim Loss Damages

- CERCLA NRDA Regulation damages can include the *value* of services lost to the public pending restoration (compensable values);
- OPA NRDA Regulation damages prefer the cost of *actions* taken to compensate for diminution in resource value pending restoration (compensatory restoration).

Damage Determination Issue

- Should DOI revise the CERCLA NRD Regulations to encourage compensating for interim losses with additional restoration projects (in lieu of monetary damages)?
- How should project-based interim loss compensation claims be calculated?

Post NRD Settlement or Award

- Publicly reviewed Restoration Plan
- Restoration Implementation (either by responsible parties, or by trustees – with funds obtained from responsible parties).

Restoration Implementation Issues

- Consensus decisionmaking among multiple Trustees.
- Public participation in restoration planning;
- Timing of Settlements or awards;
- Government contracting and procurement issues;
- Compliance with NEPA and other laws;
- Partnering with other interested entities to implement projects;

Restoration Implementation Issues

- What additional measures should DOI consider to expedite planning and implementation of restoration projects and ensure effective and efficient restoration *after* awards or settlements are secured?

4 Challenging NRDAR Practice Issues:

1. What are the best available procedures for quantifying natural resource injury on a population, habitat or ecosystem level?

What guidance is appropriate for the utilization of these procedures?

4 Challenging NRDAR Practice Issues:

2. Should DOI's Regulations provide additional guidance for determining whether direct restoration, rehabilitation, replacement, or acquisition of equivalent resources is the best strategy for addressing natural resource injuries?

4 Challenging NRDAR Practice Issues:

3. Should DOI revise the CERCLA NRD Regulations to encourage compensating for interim losses with additional restoration projects (in lieu of monetary damages)?

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4. What additional measures should DOI consider to expedite planning and implementation of restoration projects and ensure effective and efficient restoration *after* awards or settlements are secured?