NATURAL RESOURCE DAMAGES (NRD) LITIGATION UNDER CERCLA

— prepared for —

BAR ASSOCIATION OF ERIE COUNTY

ENVIRONMENTAL LAW UPDATE 2009

May 8, 2009

R. Hugh Stephens, Esq.
Elsa J. Schmidt, Esq.
Stephens & Stephens, LLP
410 Main Street, Third Floor
Buffalo, New York 14202
(716) 852-7590
hstephens@stephensstephens.com

TABLE OF CONTENTS

I. Natural Resource Damage Liability under CERCLA

A. Introduction: Law vs. Equity

Natural resource damages (NRD) represent the final step in the process designed to address the harm to the environment caused by hazardous substances and petroleum. The focus of activity in the area of inactive hazardous sites over the last several decades has been remediation, designed to address threats to human health and the environment. The assessment and collection of natural resource damages by government trustees is a process designed to restore the environment and the human and ecological services it provides, and to compensate for the services lost from the time of the initial release to the time of final restoration.

As the environmental action moves on the continuum from remediation to restoration to compensation, the environmental claim being pursued can no longer automatically be analyzed as the traditional equitable action seeking restitution and indemnification.[1] Increasingly, the claim takes on the attributes of an action at law for money damages, a tort action instead of an action on an indemnification or restitution contract implied in equity.

As potentially responsible parties (PRPs), who are compelled to respond to these claims, and government trustees, who are charged with pursuing them on behalf of the public at large, do battle in the courts, the trustees seek to treat these claims as equitable claims for restitution and indemnity[2] while the PRPs tend to seek to impose upon the trustees the burdens borne by a

---

[1] See, e.g., United States v. Northeastern Pharm. & Chem. Co., Inc., 810 F.2d 726, 749 (8th Cir. 1986) ("When the government seeks recovery of its response costs under CERCLA . . . it is in effect seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances").

[2] See Valerie Ann Lee, et al., The Natural Resource Damage Assessment Deskbook 78 (Environmental Law Institute 2002) ("The trustees have attempted to argue that, similar to actions to recover response costs, [NRD] claims are restitutionary and equitable as sums recovered must be used for restoration, replacement, or the acquisition of equivalent resources"); United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984) (where the Commonwealth's claim damages for injury to natural resources

plaintiff seeking money damages in an action at law.[3]

The resolution of this conflict appears, at least in certain circumstances, to require an examination of the extent to which these largely statutory claims are historically rooted in the common law or represent departures from that history.[4]

---

under Section 107(a)(3)(C) was limited "to the extent that it [the Commonwealth] has spent funds in assessing any injury to natural resources or rehabilitating or restoring injured resources," "[s]uch relief would properly be characterized as equitable," and "the remedies afforded by CERCLA are equitable in nature").

[3] See Brian D. Israel, "Natural Resource Damages," 5-32B Environmental Law Practice Guide § 32B.06 (Michael Gerrard ed., Matthew Bender & Co., Inc. 2008) (citing State v. Lashins Arcade Co., 888 F. Supp. 27 (S.D.N.Y. 1995) ("Here, the claim is, at least to some degree, 'legal' in nature, and the relief sought is money from an individual who is, in reality, no more than a tortfeasor"); United States v. Montrose Chem. Corp., 788 F. Supp. 1485, 1491 (C.D. Cal. 1992) ("An action for natural resource damages under CERCLA 'sounds basically in tort'") (citing In Re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 994, 1000-01 (D. Mass. 1989) (court was "unpersuaded that a money judgment for injury to natural resources should be considered equitable monetary relief," stating "the legal duty found in CERCLA is only 'new' as a matter of federal law. The common law has long recognized a duty not to injure the property of another. On more than one occasion the Supreme Court has thought it 'unmistakeabl[e]' that an action to recover for injury to property is triable to a jury"))).

[4] The distinction between law and equity manifests itself in (1) the distinction between claims for natural resource damages (NRD) and claims for natural resource damages assessment (NRDA) costs (see generally Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011 (E.D. Wash. 2007); see also Ripeness, below), as well as in (2) discussions related to the right to a jury trial in NRD cases (see Brian D. Israel, "Natural Resource Damages," 5-32B Environmental Law Practice Guide § 32B.06 (Michael Gerrard ed., Matthew Bender & Co., Inc. 2008) ("'[a] constitutional right to a jury applies only to statutory causes of action that involve rights and remedies of the sort typically enforced in an action at law'") (citing Montana v. ARCO, No. 83-CV-317, Memorandum and Order at 17-18 (D. Mont. Mar. 3, 1997) (Seventh Amendment "preserves the right to a jury trial '[i]n Suits at common law, where the value in controversy shall exceed twenty dollars'" and "suits at common law" are "suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered")); In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 994, 996 (D. Mass. 1989) (legislature did not explicitly provide a right to trial by jury in its enactment of CERCLA, and "this Court must carefully analyze this case to determine whether the sovereigns' complaints present any legal issues . . . [I]f the answer to this question is 'yes,' those issues must be tried to a jury"); but see United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984) ("Because I have concluded that the remedies afforded by CERCLA are equitable in nature, it follows that no right to a jury trial attaches when a party seeks a declaration of rights and liabilities under that statute")), and in (3) the interpretation of when damages "occur" for purposes of determining the scope of retroactivity of the NRD provisions under Section 107(f)(1); i.e., whether damages "occur" when the property owner or some entity incurs expenses due to the injury to natural resources (see Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372, *27 (S.D. Ala. 2006) ("'damages' occur when expenses are

The PRPs enter this battle armed with the Supreme Court's reminders in Cooper v. Aviall[5] and Bestfoods[6] that statutory language and traditional common law principles cannot lightly be set aside in the interest of a remedial legislative purpose.

B. NRD Liability Provisions

Five (5) federal statutory schemes govern NRD claims:[7]

- **CERCLA**: Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 et seq.)
- **CWA**: Clean Water Act (33 U.S.C. §§ 1251 et seq.)
- **OPA**: Oil Pollution Act (33 U.S.C. §§ 2701 et seq.)
- **MPRSA**: Marine Protection, Research, and Sanctuaries Act (33 U.S.C. §§ 1401 et seq.), and
- **PSRPA**: Park System Resource Protection Act (16 U.S.C. § 19jj)

Section 107(a) of CERCLA describes four classes of parties (often referred to as potentially

---

incurred due to an injury to natural resources") (citing In re Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 683 (D. Mass. 1989) ("'damages' – i.e., monetary quantification of the injury done to the natural resources – 'occur' as a general rule when . . . some entity . . . incurs expenses due to the injury to natural resources – i.e., when the owner seeks to develop the waterfront property. . . . [T]his Court rejects the premise that damages occur when they accrue at common law"))) or whether "[d]amages accrue or occur, including restoration costs, when the underlying injury occurs" (see, e.g., Montana v. Atlantic Richfield Co., 266 F. Supp. 2d 1238, 1242-43 (D. Mont. 2003) ("[It] is a well-settled principle of common law that the right to sue accrues and damages occur, even though the full extent of damages may not be quantified, when the injury takes place. . . . 'Occur' has a well-accepted and ordinary meaning, namely, 'to present itself: come to pass: take place [or] HAPPEN.' . . . [Montana's] argument that restoration cost damage does not 'occur' until either a trustee incurs expenses to restore the resource or restoration costs are quantified by the Court, is unpersuasive"); see also Wholly Before Limitation, below).

[5] Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) ("Each side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed'") (citations omitted).

[6] United States v. Bestfoods, 524 U.S. 51 (1998) ("[I]t is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary.[']. . . Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, . . . nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible").

[7] Certain state statutes may also apply, as well as the common law of negligence, trespass, and public nuisance. The following discussion will focus on NRD under CERCLA.

responsible parties or PRPs) who are strictly liable for, among other things, NRD, including reasonable assessment costs:[8]

- **Current Owners/Operators**: those who currently own or operate a facility,
- **Former Owners/Operators**: those who owned or operated a facility at the time hazardous substances were disposed of there,
- **Arrangers**: those who arranged for the disposal, treatment, or transport for disposal or treatment of hazardous substances at a facility, and
- **Transporters**: those who accepted hazardous substances for transport to a facility chosen by themselves.[9]

"CERCLA treats natural resource damages differently than it treats equitable actions for clean-up costs."[10] The elements of an NRD claim under CERCLA are:

- The property is a "**facility**,"
- A "**release or threatened release**" of a "**hazardous substance**" has occurred from the facility,
- The defendants fall within at least one of the four classes of **PRPs** under Section 107(a),
- Natural resources **within the trusteeship of the plaintiffs** have been **injured**, and
- The injury to natural resources "**resulted from**" the release of a hazardous substance.[11]

Amounts recovered by natural resource trustee(s) as damages are to be used to restore, replace, or acquire the equivalent of the injured, destroyed, or lost natural resource(s).[12]

---

[8] 42 U.S.C. § 9607(a)(4)(C) (PRPs "shall be liable for— . . . (C) 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").

[9] 42 U.S.C. § 9607(a).

[10] Richmond Am. Homes of Colo., Inc. v. United States, 75 Fed. Cl. 376, 394-395 (Fed. Cl. 2007).

[11] See Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1102-1103 (D. Idaho 2003) ("The elements of a natural resource damages claim under CERCLA: [1] each . . . property owned and operated by a defendant is a 'facility;' [2] a 'release' or 'threatened release' of a 'hazardous substance' from the facility has occurred; [3] Defendants fall within at least one of the four classes of responsible parties described in § 9607(a)[;] [4] natural resources within the trusteeship of the Plaintiffs have been injured; and [5] that the injury to natural resources 'resulted from' a release of a hazardous substance").

[12] 42 U.S.C. § 9607(f)(1) ("Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore,

II. NRD Defenses

A. Standing

"Natural resources" include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources" which are controlled by Federal, State, local, foreign, or tribal governments.[13] Because these natural resources are not privately held, actions for damages to these resources are not available to private parties,[14] but are instead available to

---

replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under [42 U.S.C. § 9607(a)(4)(C)] shall not be limited by the sums which can be used to restore or replace such resources"); 43 C.F.R. § 11.14(z) ("'Natural resources' or 'resources' means 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").

[13] 42 U.S.C. § 9601(16) (defining "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").

[14] Quarles v. United States ex rel. BIA, 2005 U.S. Dist. LEXIS 43030 (N.D. Okla. Sept. 28, 2005) ("CERCLA, in particular, 'does not permit private parties to seek recovery for damages to natural resources held in trust by the federal, state or tribal governments nor does it allow public trustees to recover for damages to private property or other "purely private" interests.' . . . 'Purely private resources,' includes private property for which there is no 'government involvement, management, or control'") (citations omitted); Kennecott Utah Copper Corp. v. United States DOI, 88 F.3d 1191 (D.C. Cir. 1996) ("One purpose of the damage assessment process is to fashion a remedy for natural resource injuries that are not compensable through private litigation"); Ohio v. United States DOI, 880 F.2d 432, 460 (D.C. Cir. 1989) ("The legislative history of CERCLA further illustrates that damage to private property – absent any government involvement, management or control – is not covered by the natural resource damage provisions of the statute"); Exxon Corp. v. Hunt, 475 U.S. 355, 375 (1986) (compensation to "third parties for damage resulting from hazardous substance discharges … [is] clearly beyond the scope of CERCLA"); Hook v. Lockheed Martin Corp. (In re Burbank Envtl. Litig.), 42 F. Supp. 2d 976, 980-981 (C.D. Cal. 1998) ("Under CERCLA, only natural resource trustees acting on behalf of the federal government, the state, and certain Indian tribes may bring an action for damages to natural resources. . . . Plaintiffs are private parties bringing this suit, and they do not bring the suit on behalf of the government or Indian tribes. Thus, plaintiffs' claim under CERCLA for natural resource damages is dismissed"); Eastman v. Brunswick Coal & Lumber Co., 1996 U.S. Dist. LEXIS 22108, *27-28 (D. Me. Apr. 19, 1996) ("to the extent the plaintiffs may seek natural resources damages, their claims must be dismissed because such damages are unavailable to private plaintiffs").

federal, state, and tribal governments as trustees acting on behalf of the public.[15] Only these certain specified entities, designated natural resource trustees, have standing to bring claims for past or future natural resource damages.[16]

Trustees are designated based upon their management, ownership, or control of the natural resource at issue:

1. Federal Trustees

Federal trustees, and natural resources under their trusteeship, include:

- **US Department of Commerce (delegated to National Oceanic and Atmospheric Administration (NOAA))**
  - Coastal environments (e.g., salt marshes, tidal flats, estuaries, tidal wetlands); Designated Estuarine Research Reserves or Marine Sanctuaries; Endangered marine species; Marine mammals; Rivers or tributaries to rivers which historically or presently support anadromous fish (i.e., fish that spend a portion of their lifetime in both fresh and salt water (e.g., salmon))
- **US Department of the Interior (DOI) (Fish and Wildlife Service, Bureau of Land Management, Bureau of Indian Affairs, National Park Service, US**

---

[15] 42 U.S.C. § 9607(f)(1) ("In the case of an injury to, destruction of, or loss of natural resources under [42 U.S.C. § 9607(a)(4)(C)], liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation. . . . The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages"); 43 C.F.R. § 11.14(rr) ("Trustee or natural resource trustee means any Federal natural resources management agency designated in the NCP and any State agency designated by the Governor of each State, pursuant to section 107(f)(2)(B) of CERCLA, that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA; or an Indian tribe, that may commence an action under section 126(d) of CERCLA"); 43 C.F.R. § 11.10 (CERCLA and the CWA "provide that natural resource trustees may assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance covered under CERCLA or the CWA and may seek to recover those damages. . . . The assessment procedures set forth in this part are not mandatory. However, they must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(2)(C) of CERCLA").

[16] Borough of Sayreville v. Union Carbide Corp., 923 F. Supp. 671, 681 (D.N.J. 1996) ("A plaintiff who lacks standing to bring an action for natural resource damages recovery also lacks standing to bring an action for declaratory judgment regarding liability for future natural resource damages recovery").

Geological Survey, Bureau of Mines, Bureau of Reclamation, Minerals Management Service)

- Certain anadromous fish; Certain endangered species; Certain marine mammals; Federally-owned minerals; Migratory birds; National Wildlife Refuges and Fish Hatcheries; National Parks and Monuments; Tribal resources (in cases where the US acts on behalf of an Indian Tribe)

- **US Department of Agriculture (USDA) (Forest Service, Natural Resources Conservation Service, Conservation Reserve Program)**
  - National forest land; Federal rangeland; Federally-managed fisheries; Federally-owned or federally-managed farmland; Land enrolled in the Wetlands Reserve Program
- **US Department of Defense (DOD)**
  - All natural resources on all lands owned by DOD or the Army, Navy, Air Force, and Defense Logistics Agency (including military bases, training facilities, research and development facilities, and munitions plants)
- **US Department of Energy (DOE)**
  - Natural resources at or on DOE's natural research and development laboratories, facilities, and offices[17]

2. State Trustees

State trustees[18] act for natural resources within the boundary of the State, or belonging to, managed by, controlled by, or appertaining to the State:

- State forest lands
- State-owned minerals
- State parks and monuments
- State rare, threatened, and endangered species
- State wildlife refuges and fish hatcheries[19]

3. Tribal Trustees

Tribal trustees[20] act on behalf of an Indian Tribe for natural resources belonging to,

---

[17] EPA Programs: Natural Resource Damages: Trust Resources, available online at http://www.epa.gov/superfund/programs/nrd/trust_r.htm (last accessed April 13, 2009).

[18] In New York State, the state trustee is the New York State Department of Environmental Conservation (NYSDEC).

[19] EPA Programs: Natural Resource Damages: Trust Resources, available online at http://www.epa.gov/superfund/programs/nrd/trust_r.htm (last accessed April 13, 2009).

[20] Tribes in New York State include the federally-recognized tribes of the Iroquois Confederacy (i.e., the Tuscarora Nation (Lewiston, NY), Seneca Nation of Indians (Salamanca, NY) (including

managed by, controlled by, or appertaining to the Tribe; held in trust for the benefit of the Tribe; or belonging to a member of the Tribe, if such resources are subject to a trust restriction on alienation:

- Tribal-owned minerals
- Groundwater and surfacewater resources on Tribal lands
- Any other natural resources found on Tribal lands[21]

4. Municipalities as Trustees

In rare instances, municipalities may be designated as natural resource trustees. "A municipality or other political subdivision of a state does not have standing to bring an action to recover natural resource damages unless it has been specifically appointed by the governor of the state to do so.[22]

Cattaraugus, Oil Springs, and Allegany Reservations), Tonawanda Band of Senecas (Basom, NY), Cayuga Nation (Versailles, NY), Oneida Indian Nation of New York (Oneida, NY), Onondaga Nation (Nedrow, NY), and the St. Regis Mohawk Tribe (Akwesasne) (Hogansburg, NY)), as well as two other native communities which are not federally recognized (i.e., the Shinnecock Tribe (Southampton, NY) (state-recognized) and the Unkechaug Indian Nation of Poospatuck Indians (Mastic, NY)).

[21] EPA Programs: Natural Resource Damages: Trust Resources, available online at http://www.epa.gov/superfund/programs/nrd/trust_r.htm (last accessed April 13, 2009).

[22] 42 U.S.C. § 9607(f)(2)(B) ("the Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter"); Borough of Sayreville v. Union Carbide Corp., 923 F. Supp. 671, 681 (D.N.J. 1996) ("Only the Federal government or an authorized representative of a state has standing to bring an action for [NRD] recovery under section 107(a)(4)(C). . . . A municipality or other political subdivision of a state is not an authorized representative unless specifically appointed by the governor of the state"); Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1049-51 (D.N.J. 1993) ("only a 'state official,' specifically appointed by the governor of the state, may be an 'authorized representative' for purposes of bringing an action to recover for [NRD]. SARA thus confirms Congress' intent that Section 107(f) inure only to the benefit of the states and not their political subdivisions. . . . 'The decision to centralize in the Government responsibility for designating state natural resource trustees is consistent with a more general concern, even apart from CERCLA, that the claims of municipalities relating to natural resources, which are typically of regional concern, not be subject to the parochial views of a state's political subdivision. . . . Th[is] . . . determination . . . represents an understandable preference that litigation strategy and settlement decisions be centralized in this developing area to avoid a proliferation of inconsistent approaches by a range of different plaintiffs with counsel of variable quality and experience.' . . . I therefore find that Rockaway lacks standing to bring an action under Section 107(a)(4)(C)"); Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 472-75 (D. Mass. 1991) ("I find

5. Multiple Trustees

The NRD regulations encourage, and in some cases require, trustees to coordinate assessment efforts, including the pre-assessment screen.[23] Cases involving multiple trustees raise issues related to the prohibition of double recovery from a PRP (see below).[24] The allocation of responsibilities (and damages, once collected) among the trustees raises different but related issues.

B. Statute of Limitations

1. Trustees' NRD Claims

There are three events which may trigger the three-year statute of limitations for a

---

that the Town of Bedford is not authorized to maintain an action for natural resource damages under § 9607(a)(4)(C)").

[23] 43 C.F.R. § 11.32(a)(1) ("Coordination. (i) If the authorized official's responsibility is shared with other natural resource trustees as a result of coexisting or contiguous natural resources or concurrent jurisdiction, the authorized official shall ensure that all other known affected natural resource trustees are notified that an Assessment Plan is being developed. This notification shall include the results of the Preassessment Screen Determination. (ii) Authorized officials from different agencies or Indian tribes are encouraged to cooperate and coordinate any assessments that involve coexisting or contiguous natural resources or concurrent jurisdiction. They may arrange to divide responsibility for implementing the assessment in any manner that is agreed to by all of the affected natural resource trustees with the following conditions: [conditions re: "lead authorized official" omitted]. . . (iii) If there is a reasonable basis for dividing the assessment, the natural resource trustee may act independently and pursue separate assessments, actions, or claims so long as the claims do not overlap. In these instances, the natural resource trustees shall coordinate their efforts, particularly those concerning the sharing of data and the development of the Assessment Plans"); see also 42 U.S.C. § 9604(b)(2) ("The President . . . shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees"); 43 C.F.R. § 11.22(b); 43 C.F.R. § 11.23(f).

[24] Tolling agreements are sometimes employed to manage the operation of the statute of limitations in the NRD context. See, e.g., New Mexico v. GE, 467 F.3d 1223, 1234 (10th Cir. 2006) ("Consistent with his duties under CERCLA and the NRTA, in 1999 New Mexico's NRT entered into tolling agreements with several PRPs . . . to delay a CERCLA-based NRD lawsuit while he attempted to negotiate a settlement of the State's NRD claims. . . . The NRT believed tolling agreements were necessary due to CERCLA's three-year statute of limitations on NRD claims") (citing 42 U.S.C. § 9613(g); William H. Hyatt, Jr., Jennifer L. Allaire, & Karyllan Dodson Mack, Natural Resource Damages: New Developments at the State Level, SK057 ALI-ABA 281, 290-960 (2005)).

trustee's cause of action for NRD under CERCLA. Section 113(g)(1)[25] provides, in relevant part:

> [N]o action may be commenced for damages (as defined in [Section 101(6)][26]) under this chapter, unless that action is commenced ***within 3 years after the later of the following***:
>
> (A) ***The date of the discovery of the loss and its connection with the release in question***[; or]
>
> (B) ***The date on which regulations are promulgated under section 301(c)***[27] [i.e., March 20, 1987[28]].
>
> With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under [42 U.S.C. § 9620] . . . , or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced ***within 3 years after the completion of the remedial action*** (excluding [O&M] activities) in lieu of the dates referred to in

---

[25] 42 U.S.C. § 9613(g)(1).

[26] CERCLA Section 101(6) (42 U.S.C. § 9601(6)) defines "damages" as "damages for injury or loss of natural resources as set forth in [42 U.S.C. §§ 9607(a) or 9611(b)]." "Natural resources" are then defined 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 (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. §§ 1801 et seq.]), 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" (42 U.S.C. § 9601(16)).

[27] CERCLA Section 301(c) (42 U.S.C. § 9651(c)) provides, "The President . . . shall study and, not later than two years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from the release of oil or a hazardous substance for the purposes of this chapter and [33 U.S.C. § 1321(f)(4)-(5)]. Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after October 17, 1986").

[28] DOI promulgated Type B assessment regulations on August 1, 1986 and then Type A assessment regulations on March 20, 1987. The Ninth Circuit has held that the statute of limitations at Section 113(g)(1)(B) did not begin to run until both sets of regulations (Type A and Type B) were promulgated, on March 20, 1987. California v. Montrose Chem. Corp., 104 F.3d 1507, 1518, n.8 (9th Cir. 1997) ("The Type A regulations were promulgated in final form on March 20, 1987 - thus completing the promulgation of 'regulations' under § 9651(c) and triggering the running of the statute of limitations under § 9613(g)(1)(B). . . . n8: . . . [T]he statute of limitations did not begin to run until both Type A and B regulations were promulgated"); see also United States v. City of Seattle, 1991 U.S. Dist. LEXIS 21194, *1-5 (W.D. Wash. Jan. 23, 1991) ("[T]he regulatory scheme was not complete until the Type A regulations were promulgated on March 20, 1987. . . . Congress clearly intended for trustees to consider both the Type A and Type B procedures before conducting a damage assessment. . . . Until the Type A regulations were promulgated, resource trustees had only the Type B long form assessment procedure to consider. Congress envisioned that trustees would use discretion in choosing between Type A and Type B procedures; thus the regulations were not complete and the statute of limitations did not begin to run until the promulgation of the Type A regulations gave the trustees that choice").

subparagraph (A) or (B).[29]

a. Date of Discovery of Loss and its Connection with the Release (Section 113(g)(1)(A))

Section 113(g)(1) provides a three-year limitations period, running from either the date of the NRDA regulations (i.e., expiring three years subsequent to March 20, 1987, on March 20, 1990), or "the date of discovery of the loss and its connection with the release in question," whichever is later.[30] The NRDA regulations define "loss" as "a measurable adverse reduction of a chemical or physical quality or viability of a natural resource."[31]

i. Actual or Constructive Knowledge

"'[D]ate of discovery' is nowhere defined in the statute,"[32] and therefore this phrase has been subject to interpretation by the courts. Section 309 sets forth a "federally required commencement date" which triggers the limitations period applicable to toxic tort actions,[33]

---

[29] 42 U.S.C. § 9613(g)(1) (2009) (emphasis added); see also RSR Corp. v. Commercial Metals Co., 496 F.3d 552, 556 (6th Cir. 2007) ("The statutory text [at Section 113(g)(1)]. . . does not set forth a 'general statute of limitations' with exceptions but instead sets forth different limitations periods for different causes of action"); 42 U.S.C. § 9626(d) ("Notwithstanding any other provision of this chapter, no action under this chapter by an Indian tribe shall be barred until the later of the following: (1) The applicable period of limitations has expired. (2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this chapter").

[30] 42 U.S.C. § 9613(g)(1).

[31] 43 C.F.R. § 11.14(x); see also 43 C.F.R. § 11.14(v) ("as used in this part, injury encompasses the phrases 'injury,' 'destruction,' and 'loss'").

[32] Kelley v. United States, 1985 U.S. Dist. LEXIS 16087, 1-2 (W.D. Mich. Sept. 12, 1985).

[33] 42 U.S.C. § 9658(a) ("(1) . . . In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute. (2) . . . Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or

defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[34] However, the NRD discovery accrual rule at CERCLA Section 113(g)(1) uses language different from that of Section 309. Section 113(g)(1) references not "the date the plaintiff knew (or reasonably should have known)" but "the date of discovery."

Few decisions to date have discussed the type of knowledge required for purposes of the "date of discovery" under Section 113(g)(1). In Kelley, the court stated that accrual is triggered when

> the trustee has available, or reasonably should have available, a document or memorandum prepared for the trustee, including such sampling and laboratory analysis as is necessary, which identifies the injured natural resources, the types of injury, and which suggests that the injury may be related to the release of a hazardous substance.[35]

---

contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility"); see also N.Y. C.P.L.R. § 214-c(2) ("Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for . . . injury to property caused by the latent effects of exposure to any substance . . . upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier"); Barnes ex rel. Barnes v. Koppers Inc., 534 F.3d 357, 362 (5th Cir. 2008) ("Section 9658 is a tolling provision that applies to some state-law tort actions stemming from exposure to hazardous substances. Where applicable, § 9658 prevents a state limitations period from commencing until a plaintiff knows or should know of both her injury and its cause").

[34] 42 U.S.C. § 9658(b)(4).

[35] Kelley v. United States, 1985 U.S. Dist. LEXIS 16087, 1-2 (W.D. Mich. Sept. 12, 1985) (Defendants offered, and the Court considered, a proposed EPA regulation at 50 Fed. Reg. 9593, 9602 (Mar. 8, 1985) which defined "date of discovery" in part as "the date on which the trustee became aware of the injury to the natural resource," and the court stated, "For an injury that cannot be visibly observed, this [date of discovery] is the date on which the trustee has available, or reasonably should have available, a document or memorandum prepared for the trustee, including such sampling and laboratory analysis as is necessary, which identifies the injured natural resource, the types of injury, and which suggests that the injury may be related to the release of a hazardous substance") (emphasis added); see also United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1403 (C.D. Cal. 1995) (defendants bear the burden of demonstrating that the plaintiff trustees had "knowledge of the releases, of the loss of resources alleged and the connection between the releases and the loss" prior to three years before the case was filed), rev'd on other grounds, 104 F.3d 1507 n.8 (9th Cir. 1997) ("we do not reach the parties'

In Montrose, the court did not reach the question of whether the discovery provision requires a plaintiff to have actual (subjective) knowledge or contains an implicit (objective) "should have known" standard because it found that the plaintiff trustees had actual knowledge.[36] In finding actual knowledge, the court found it "most telling" that the lead trustee, NOAA, had issued a Site Review almost five years before the date the case was filed, which not only provided a history of operations at the facility, quantified DDT contamination in sediments, and identified the defendant by name as "the most significant" contributor, but also specifically described the natural resources at risk and the loss to the environment from the DDT contamination, and did so in a way which closely resembled the allegations of the complaint.[37]

The trustees in Montrose argued that the date of discovery under Section 113(g)(1)(A) should be the date of the signing of the Preassessment Screen Determination, which documents the first step in the NRD assessment process during which the trustee "initially determines whether there is a reasonable probability that a hazardous substance release may have affected natural resources and whether the potential injury is significant enough to warrant continuing with the damage assessment."[38] The court rejected this argument, in large part because such an

---

arguments regarding the date of discovery of the loss").

[36] United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1403, n.4 (C.D. Cal. 1995), rev'd on other grounds, 104 F.3d 1507, n.8 (9th Cir. 1997) ("we do not reach the parties' arguments regarding the date of discovery of the loss").

[37] United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1403-1404 (C.D. Cal. 1995) ("For example, the [site] review explains: 'Over 120 species of fish exist in the coastal waters adjacent to the Montrose site, and resident populations in the vicinity are likely to suffer detrimental impact from exposure to DDT. . . . Resident bird populations in the coastal area of the site were reduced by the documented DDT discharges, particularly the pelican and cormorant. . . . The long-term persistence of DDT is a serious threat to the local marine fauna in the vicinity of the site"), rev'd on other grounds, 104 F.3d 1507, n.8 (9th Cir. 1997).

[38] United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1406, n.6 (C.D. Cal. 1995) (citing 43 C.F.R. §§ 11.23 - 11.25), rev'd on other grounds, 104 F.3d 1507, n.8 (9th Cir. 1997).

interpretation would allow the trustees to suspend the date of discovery "indefinitely until the authorized official ultimately decides to sign the Preassessment Screen Determination, despite the fact that the agency may have had full knowledge of the harm and its connection with the releases many years prior to that date."[39]

ii. Knowledge of Agency Employees Imputed to Agency

The Court in Montrose also discussed the issue of "who within the government agencies must discover the loss and its connection to defendants' releases for the statute to run under § 9613(g)(1)," and cited the Second Circuit for the proposition that "widespread knowledge among lower echelons can be attributed to the agency when a government employee with knowledge has a duty to transmit that knowledge."[40]

b. "Special Statute": The Completion of the Remedial Action (Excluding O&M Activities)

Section 113(g)(1) further provides that, "with respect to any facility listed on the [NPL], any Federal facility identified under [42 U.S.C. § 9620] . . . , or any vessel or facility at which a remedial action under this chapter is otherwise scheduled," NRD actions must be brought within three years of the completion of the remedial action (excluding O&M activities).[41]

---

[39] United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1406 (C.D. Cal. 1995) (citing 43 C.F.R. §§ 11.23-11.25), rev'd on other grounds, 104 F.3d 1507, n.8 (9th Cir. 1997).

[40] United States v. Montrose Chem. Corp., 883 F. Supp. 1396, 1405 (C.D. Cal. 1995) ("This Court finds that, in this case, sufficient employees within the governmental agencies with a duty to transmit the necessary information possessed the relevant knowledge prior to [three years before the date of filing]") (citing In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. den. sub nom Pinkney v. Dow Chemical Co., 484 U.S. 1004 (1988)), rev'd on other grounds, 104 F.3d 1507, n.8 (9th Cir. 1997).

[41] 42 U.S.C. § 9613(g)(1); see also United States v. Asarco Inc., 28 F. Supp. 2d 1170, 1181 (D. Idaho 1998) ("Under a plain reading of the statute, the phrase 'with respect to' is transitional and applies to all three exceptions in the special statute of limitations (i.e., with respect to NPL listed facilities, with respect to federal facilities and with respect to facilities where remedial actions are otherwise scheduled)"), vacated on other grounds, 214 F.3d 1104 (9th Cir. 2000).

The potential open-ended nature of this provision is especially interesting. "If the loss and connection with the release was discovered [five] years ago and the [trustee] failed to file the NRD action within [the] general statute of limitation of [three] years under [42 U.S.C.] § 9613(g)(1)(A), the EPA could list the site on the NPL at anytime and start a new statute of limitations," assuming the site in question would qualify under the hazard ranking system (HRS) to be listed on the NPL.[42] Further, "[i]t is the policy of the EPA that it may revise NPL site boundaries at any time," "the EPA has concluded that an NPL listing neither describes nor fixes the boundaries of the NPL site," and "the EPA's policy is that further notice-and-comment rulemaking is not required following the initial site designation."[43] EPA "may alter or expand the boundaries of a[n] NPL site if subsequent study reveals a wider-than-expected scope of contamination."[44]

---

[42] United States v. Asarco Inc., 28 F. Supp. 2d 1170, 1181 (D. Idaho 1998) ("The Court finds that the resulting open-ended statute of limitations for facilities listed on the NPL is not an absurd result"), vacated on other grounds, 214 F.3d 1104 (9th Cir. 2000) ("this court lacks jurisdiction to adjudicate the validity of including the Coeur d'Alene Basin within the Bunker Hill site"); see also United States v. Asarco Inc., 430 F.3d 972, 978 (9th Cir. Idaho 2005) ("Defendants subsequently filed a notice with this Court indicating that they were not filing an appeal in the D.C. Circuit, in effect abandoning their formal challenge to the EPA's expansion of the Superfund site boundary lines").

[43] United States v. Asarco Inc., 214 F.3d 1104, 1105-1108 (9th Cir. 2000); see also South Side Landfill, Inc. v. United States, 282 F. Supp. 2d 600, 606-607 (W.D. Mich. 2003) ("By raising the argument that the landfill should not have been placed on the NPL, SSL is essentially asking this Court to review the EPA's decision in that regard. . . . [A]pplication for such review must be made within ninety days from the date of promulgation of the regulation. . . . 'The designation of a hazardous waste site on the NPL is considered rulemaking subject to judicial review under 42 U.S.C. § 9613(a) ["Review of any regulation promulgated under this Act may be had upon application by any interested person only in the [D.C. Circuit]"].' Wash. State Dep't of Transp. v. United States EPA, . . . 917 F.2d 1309, 1311 (D.C. Cir. 1990). This Court therefore lacks jurisdiction to determine whether the landfill was properly listed on the NPL, because the [D.C. Circuit] is the proper forum for such a challenge").

[44] Washington State Dep't of Transp. v. EPA, 917 F.2d 1309, 1311-12 (D.C. Cir. 1990) (citing Eagle-Picher Industries v. EPA, 822 F.2d 132 ("Eagle-Picher III") (1987) (per curiam)); see also United States v. Asarco Inc., 214 F.3d 1104, 1107 (9th Cir. 2000) ("The D.C. Circuit has held that the EPA may at any time reassess site boundaries without engaging in notice and comment rule-making. . . . Washington State DOT held that, in order to revise the boundaries of an NPL listed site, the EPA need only take some action that provides notice of the revision to the affected party. . . . In certain

2. Defendants' NRD Contribution Claims

Under Section 113(g)(3), "[n]o action for contribution for any response costs or damages may be commenced more than 3 years after – (A) the date of judgment in any action under this Act for recovery of such costs or damages, or (B) the date of an administrative order under section 122(g) [42 USCS § 9622(g)] (relating to de minimis settlements) or 122(h) [42 USCS § 9622(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."

C. Ripeness

42 U.S.C. § 9613(g)(1) provides, in relevant part:

> In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced
> (i) prior to ***60 days after*** the Federal or State natural resource trustee provides to the President and the [PRP] ***a notice of intent to file suit***, or
> (ii) before selection of the remedial action if the President is diligently proceeding with a[n] [RI/FS] under [42 U.S.C. §§ 9604(b) or 9620] . . . .
> The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.[45]

1. Notice of Intent to File Suit (Section 113(g)(1)(i))

Section 113(g)(1)(i) provides that a "notice of intent to file suit" must be sent to the President and the PRP sixty (60) days prior to filing an NRD action. "[T]he 60-day notice is required only with respect to facilities listed on the National Priorities List, certain federal

---

circumstances, such notice may be provided by the initial listing of the site itself: if the inclusion of the property at issue is within 'the broad compass of the notice provided by the initial NPL listing,' the affected party should be presumed to be on notice that its property 'could be considered a part' of the NPL site. . . . If the initial listing does not provide sufficient notice to the affected party, however, such notice may be afforded by some other means or event that lets the affected party know that the property at issue 'might be considered part of' the NPL listing").

[45] 42 U.S.C. § 9613(g)(1) (emphasis added).

facilities, and any vessel or facility where a remedial action under CERCLA is scheduled."[46]

2. Selection of the Remedial Action (Section 113(g)(1)(ii))

Section 113(g)(1)(ii) provides that, if the President is "diligently proceeding" with an RI/FS, then the remedial action must be selected prior to filing an NRD action. Generally speaking, natural resource damages are pursued after site remediation.[47] This is because "NRD, even interim and lost use damages, can not be fully measured until the EPA's remedial work is

---

[46] Mathes v. Century Alumina Co., 2008 U.S. Dist. LEXIS 90087, *5-6 (D.V.I. Oct. 31, 2008) ("Defendants contend that the Trustee failed to fulfill the notice requirement of section 113(g)(1) of CERCLA, 42 U.S.C. § 9613(g)(1), which requires that a notice of intent to file suit be sent sixty days prior to filing suit for natural resource damages. The Trustee responds that the notice requirement does not apply in this case. . . . [T]he 60-day notice is required only with respect to facilities listed on the National Priorities List, certain federal facilities, and any vessel or facility where a remedial action under CERCLA is scheduled. Neither the Refinery nor the Alumina Facility falls within the ambit of these three categories. Therefore, notice is not required under the statute").

[47] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *38-39 (N.D. Okla. July 7, 2008) ("natural resource damages claims are treated as residual claims, because these claims are ordinarily filed after the EPA has completed its work at a Superfund site. . . . This Court has not found any authority permitting a natural resources trustee to file a natural resource damages claim under CERCLA while remedial work is underway at a Superfund Site") (citing Utah v. Kennecott Corp., 801 F. Supp. 553, 568 (D. Utah. 1992) ("As a residue of the cleanup action, in effect, they [natural resource damages] are thus generally not settled prior to a cleanup settlement"); Natural Resource Damages Assessments, 51 Fed. Reg. 27674 (Aug. 1, 1986) ("This rule provides that natural resource damages are for injuries residual to those injuries that may be ameliorated in the response action. . . .This concept of natural resource damages as . . . residual should prevent the development of two separate actions to ameliorate the same situation, encourage the inclusion of natural resource concerns in the development of remedial plans, and preserve the priority order of remedial actions intended by the creation of the [NPL]"); H.R. REP. NO. 99-253(III), at 21 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3043 ("The amendment ensures that actions for natural resource damages are filed at the most appropriate time for the particular site involved. Because a remedial action at the site may include restoration, rehabilitation, or replacement of natural resources, an action for natural resource damages for a site on the [NPL] should not take place before the remedy has been selected"); H.R. REP. NO. 99-253(IV), at 53-54 (1985), reprinted in 1986 U.S.C.C.A.N. 3068, 3083-84 ("Actions to recover for damage to natural resources may depend upon the type of remedial action undertaken at a particular site, because the specifics of the remedial action may determine the extent of damage to natural resources that will remain at the site. If the remedial action takes care of most of the natural resource damage at the site, then a separate action for damages may not be necessary. Conversely, if at the conclusion of the remedial action substantial damage remains, then action to recover damages may be warranted. Since the judgment of the necessity for pursuing a damages action must necessarily await the final decision on the remedial action, it is best to ensure that the statute of limitations for bringing such damages actions does not force a premature decision).

completed."[48] Conversely, a "natural resource trustee may proceed with an NRD claim under CERCLA if the EPA was not conducting an RI/FS at the time the claim was filed."[49]

Section 9613(g)(1) bars an NRD claim while the EPA and/or PRPs[50] are 'diligently proceeding' with an RI/FS at a facility, but Section 9613(g)(1) "does not define 'diligently proceeding.'"[51] At least one court has recognized the ordinary dictionary definition of "diligent" (i.e., "characterized by steady, earnest, attentive and energetic application"),[52] but that court also stated that "a simple dictionary definition does not provide sufficient guidance when interpreting

---

[48] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *38 (N.D. Okla. July 7, 2008) ("a trustee may recover natural resource damages for the value of lost use of the damaged resources from the time a hazardous substance is released to the time of restoration") (citing Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 772 (9th Cir. 1994) (NRD are based on the lost use from the time of release to complete restoration of the natural resources); Ohio v. United States DOI, 880 F.2d 432, 454 n.34 (D.C. Cir. 1989)).

[49] Coeur D'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094 (D. Idaho 2003) ("In this case, at the time the lawsuit for natural resource damages was filed, EPA had not made the decision to begin the RI/FS process on the Basin. Accordingly, it would be improper to allow Defendants to use § 9613 as a shield against the natural resource damage claims that were properly filed. Further, as admitted to by the Defendants, the claims for response costs are properly before the Court"); Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *59 (N.D. Okla. July 7, 2008) ("Coeur D'Alene stands for the proposition that a natural resource trustee may proceed with an NRD claim under CERCLA if the EPA was not conducting an RI/FS at the time the claim was filed. However, as the parties do not dispute that an RI/FS was underway at the time the Tribe's CERCLA claim was filed, Coeur D'Alene is inapplicable to the present case").

[50] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476 *56-57 (N.D. Okla. July 7, 2008) ("The phrase 'the President is diligently proceeding with a remedial investigation and feasibility study' includes cases where a potentially responsible party is performing an RI/FS under supervision of the President") (citing H.R. CONF. REP. NO. 99-962, at 223, reprinted in 1986 U.S.C.C.A.N. 3276, 3315-16).

[51] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *47-48 (N.D. Okla. July 7, 2008).

[52] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *50 (N.D. Okla. July 7, 2008) ("The Tribe relies on a dictionary definition of 'diligently' [which] defines 'diligent' as 'characterized by steady, earnest, attentive and energetic application.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 633 (1981). However, the Tribe's reference to a dictionary definition does not provide any guidance on the scope of this Court's review of the EPA's activities at Tar Creek. The issue before the Court is not the common meaning of the word diligent, and defendants are not disputing the dictionary definition").

the statutory language in the context of the overall statutory scheme," and therefore considered the legislative history before it deferred to the EPA and found that the EPA had established its diligence and that the Tribe's NRD claim was premature.[53]

3. Ripeness of Claims for NRD Assessment Costs

Recent cases have discussed whether NRD assessment costs are to be included as "damages" under Section 113(g)(1). "Section 9607(a)(4)(C) permits an appropriate party to collect '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.'"[54] The definition of "damages" does not expressly include NRD assessment costs,[55] but neither are NRD assessment costs expressly addressed by the provisions governing ripeness of response cost

---

[53] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *62-68 (N.D. Okla. July 7, 2008) ("The Court agrees with the Tribe that the word 'diligently' necessarily implies some amount of historical review, because it would be difficult to assess the EPA's present diligence without some discussion of the past. However, the Tribe's fact-intensive argument demonstrates the difficulty that would be presented if courts were required to examine the entire pre-suit history of a Superfund site and weigh this as a deciding factor when determining the EPA's diligence. The Tribe's argument often turns into a critique of the effectiveness of the EPA's actions and essentially asks the Court to substitute its judgment for that of the EPA. CERCLA does not permit courts to make such judgments. . . . While a limited review of the EPA's pre-suit activities may [be] permissible, the Court finds that Congress intended for courts to focus on the EPA's present activities to determine if the EPA is diligently proceeding under § 9613(g)(1). A court should consider the EPA's activities at the time the lawsuit was filed and the EPA's current activities when reviewing the EPA's diligence. In addition, the statutory scheme shows a preference for deferring NRD claims until the completion of remedial work. . . . [T]he evidence shows that the EPA did not ignore th[e] evidence; it simply assessed the risk posed by chat piles and mining waste differently than the Tribe. Although chat piles and mining waste may seem like an obvious health hazard from the Tribe's perspective, the EPA made a conscious decision to prioritize cleanup of other hazards. This Court is not in a position to second-guess the EPA's choices. . . . If the Court were to conclude that the EPA has not proceeded diligently, the Court would essentially be substituting its judgment for the EPA's, and CERCLA shows an express congressional intent to defer to the EPA's decisions concerning cleanup and removal of hazardous substances").

[54] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, *69 (N.D. Okla. July 7, 2008).

[55] 42 U.S.C. § 9601(6) (defining "damages" as "damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title").

recovery claims.[56] CERCLA does not define "costs."[57] In 2007, the Eastern District of Washington in Yakama Nation distinguished NRD assessment costs from NRD,[58] and held that the trustee Yakama Nation's action seeking a declaratory judgment for reasonable past NRD assessment costs may proceed,[59] despite the prematurity of the NRD claim, stating, "§ 9613(g)(1) does not apply to the [claim] for natural resource damage assessment costs" and "it is §

---

[56] 42 U.S.C. § 9613(g)(2) (actions to recover costs associated with removal or remedial actions may be filed "at any time after such costs have been incurred"); see also Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011 (E.D. Wash. 2007) ("[42 U.S.C.] § 9607(a)(4) sets forth three other items for which a person can be held liable under CERCLA. These include: 1) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan, § 9607(a)(4)(A) [n.3: "These are also known as "response costs" incurred for the clean up of a facility. . . ."]; 2) any other necessary costs of response incurred by any other person consistent with the national contingency plan, § 9607(a)(4)(B); and 3) the costs of any health assessment or health effects study carried out under section 9604(i) of this title, § 9607(a)(4)(D)").

[57] Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011 (E.D. Wash. 2007) ("While 42 U.S.C. § 9601 contains a definition of 'damages,' it does not contain a definition of 'costs'").

[58] Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011 (E.D. Wash. 2007) ("Despite the fact that injury assessment costs are included in 42 U.S.C. § 9607(a)(4)(C) along with natural resource damages, this court concludes there is a clear common sense distinction between the two. Simply put, 'costs' are intended to reimburse a party for certain expenses incurred by it, whereas 'damages' are intended to compensate a party for an injury or a loss. In the context of § 9607(a)(4)(C), this means that injury assessment costs reimburse a party for costs incurred in determining the extent of an injury (a damages assessment), whereas damages compensate for the injury (the loss) itself in order to make the party whole") (citing 42 U.S.C. § 9611(b)(2)(B) (defining "natural resource claim" as "any claim for injury to, or destruction of, or loss of, natural resources" and specifying that "[t]he term does not include any claim for the costs of natural resource damage assessment"); 51 Fed. Reg. 27674, Summary (Aug. 1, 1986) ("Natural resource damage assessments are not identical to response or remedial actions (cleanup) addressed by the larger statutory scheme of CERCLA . . . . Assessments are not-intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources")).

[59] Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011, *17-18 (E.D. Wash. 2007) ("Costs for assessment of natural resource injury are neither "response costs or damages." This, however, should not preclude the availability of declaratory relief with respect to such costs. The Declaratory Judgment Act, 28 U.S.C. § 2201-2202, authorizes such relief. If a plaintiff can prove that a defendant is liable for the payment of such costs already incurred, that liability would already be established in a subsequent action to recover additional costs, but of course the costs would still need to be 'reasonable.' The court can discern no reason why declaratory relief should be available for response costs and damages, but not for natural resource damage assessment costs").

9613(g)(2) which pertains to the [claim] seeking injury assessment costs."[60]

The following year, in 2008, Yakama Nation was distinguished by the Northern District of Oklahoma in Quapaw Tribe, on the bases that (1) unlike the Yakama Nation which had incurred significant past NRD assessment costs, the Quapaw Tribe had not yet incurred any NRD assessment costs, (2) unlike the Yakama Nation which sought a declaratory judgment for past costs, the Quapaw Tribe sought a declaratory judgment for future costs only, and (3) a prima facie case for cost recovery requires the allegation that the plaintiff has actually incurred response costs.[61]

D. Double Recovery

There can be no double recovery under CERCLA for NRD. Section 107(f)(1) provides:

> There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource.[62]

---

[60] Confederated Tribes and Bands of the Yakama Nation v. United States of America, 2007 U.S. Dist. LEXIS 65011, 2007 WL 2570437, *15 (E.D. Wa. Sept. 4, 2007) ("§ 9613(g)(2) thrice refers to 'costs' generically, logically encompassing all of the 'costs' that are deemed recoverable under § 9607(a), including response costs specified in § 9607(a)(4)(A) and (B), the costs of assessing natural resource injury, destruction or loss under § 9607(a)(4)(C), and the costs of any health assessment or health effects study carried out under § 9604(I) [footnote omitted]. That § 9613(g)(2) does not pertain merely to 'response costs' is evidenced by that fact that it makes specific reference to 'response costs' where appropriate. In sum then, an action for the recovery of injury assessment costs under § 9607(a)(4)(C) is ripe when such costs are incurred").

[61] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, 72-73 (N.D. Okla. July 7, 2008) ("Even if the Court were to apply Yakama Nation, the Court has reviewed the fourth amended complaint and the Tribe has not alleged that it has actually incurred any assessment costs. Its request for assessment costs is directed to future, rather than past, assessment costs and Yakama Nation does not allow this type of claim. If the Court were to treat the Tribe's claim for assessment costs as an ordinary cost recovery claim under CERCLA, it would still be barred because the fourth amended complaint fails to allege that any assessment costs have actually been incurred. . . . Therefore, the Tribe's fourth amended complaint states a claim for future assessment costs only, and CERCLA does not permit such claims to proceed before the EPA's work is completed. 42 U.S.C. § 9613(g)(2)") (citing Young v. United States, 394 F.3d 858, 862 (10th Cir. 2005) (prima facie case for recovery costs must include allegation that a party has actually incurred response costs)).

[62] 42 U.S.C. § 9607(f)(1).

Double recovery becomes an issue especially in cases of multiple trustees.[63] "CERCLA does not specify which resources are under state trusteeship and which resources are under federal trusteeship."[64] This distinction is left for trustees themselves to make.[65]

The prohibition on double recovery may provide leverage in settlement negotiations with multiple trustees because:

> [One co-trustee] acting individually or collectively with the other co-trustees may go after the responsible party or parties for the full amount of the damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party. If there is a later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees.[66]

In other words, if the trustees disagree as to the appropriate valuation of the damage, a defendant may attempt to benefit from an early settlement with the lower-estimating trustee. For this reason, especially in cases of multiple trustees, it is important for a PRP to specifically identify which resources are covered by the settlement in the settlement documents, because any

---

[63] See, e.g., Kanner, Allan and Mary E. Ziegler, "Understanding and Protecting Natural Resources," 17 Duke Envtl. L. & Pol'y F. 119 (2006) ("For example, . . . a state may share trustee status over natural resources when there has been an injury to migratory birds stemming from the contamination of wetlands. Presumably, the federal government [trustee] may recover damage[s for injury] to the birds, while the state trustee may recover damages for injury to the wetlands. However, due to the principles prohibiting a double recovery for NRD, the two trustees are precluded from both recovering for the birds and the wetlands") (footnotes omitted).

[64] Amy W. Ando et al., "Natural Resource Damage Assessment: Methods and Cases," in WMRC Reports 83 (Illinois Waste Management and Resource Center, July 2004).

[65] Amy W. Ando et al., "Natural Resource Damage Assessment: Methods and Cases," in WMRC Reports 83 (Illinois Waste Management and Resource Center, July 2004) ("multiple trustees may have a claim with respect to a single NRD incident. When this happens, trustees must coordinate their claims as provided in 40 C.F.R. § 300.615").

[66] United States v. Asarco, Inc., 471 F. Supp. 2d 1063, 1068-69, 1116 (D. Idaho 2005); see also Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372 (S.D. Ala. 2006) ("If plaintiffs had each filed separate actions, the risk of double recovery would be real. However, defendants are properly protected here from double recovery as the court, in accordance with § 107(f)(1), will allow plaintiffs to recover the same element of damages only once").

resources not covered may be left open for future settlements with other trustees. A PRP therefore must also understand which trustees have jurisdiction over which resources at issue (see Standing, above).

An example of the inexact nature of NRD assessments can be found at the Lower Fox River in Wisconsin, where the federal trustees (led by the US Fish and Wildlife Service) valued NRD at $176-333 million, while the state trustees (led by the Wisconsin Department of Natural Resources) valued NRD at $55 million.[67] The state trustees (with the lower estimate) were more receptive to early settlement negotiations, but as those negotiations matured, the double recovery bar created the perception of an increased risk to the federal trustees that the state settlement would render certain damages unrecoverable. The federal trustees thereafter joined in settlement negotiations, and the parties reached a universal settlement.

Federal trustees may also be at a disadvantage in certain settlement negotiations related

---

[67] Joan P. Snyder (Stoel Rives, LLP), "Natural Resource Damages Fundamentals," presentation to Oregon Ass'n of Envtl Professionals dated Oct. 9, 2003, www.stoel.com/Files/snyder_NaturalResourceDamages.ppt (last accessed 01.22.08); see also Hupp, R. Craig and Charles M. Denton, "Natural Resources Damages Assessments and Claims in the Great Lakes Basin (Part 2: Analysis of NRD Settlements)," http://www.bodmanllp.com/publications/articles/pdfs/GreatLakesDamageAndClaimsPart2.pdf (last accessed 01/22/08) ("The Restoration and Compensation Determination Plans for the Lower Fox River by the Wisconsin DNR and the U.S. DOI Fish & Wildlife Service diverge dramatically in their dollar estimates. ([n.9] *Revealing the Economic Value*, *supra* at 8, provides a general conceptual review of a Lower Fox River NRD for PCB damages.) The Wisconsin DNR proposal, released in October 2000, estimates the damages at between $72 million and $190 million, whereas the Federal estimate from the same time period is between $200 million and $300 million. ([n.10] Daily Env't Rep (BNA) No 03, at AA-1 (Jan. 4, 2001). Even overlooking the fact that the range of each estimate is at least $100 million, the fact that the Federal NRD Assessment may be as much as four (4) times greater than the State estimate is shocking. According to the Wisconsin DNR criticisms, the difference can in large part be attributed to the Federal 'value equivalency study' involving surveys of residents of the assessment area and available literature, which depended on input from non-users of the Lower Fox River resources and 'stated preferences' of the respondents rather than actual action taken by the persons surveyed. ([n.11] Id.) In essence, while there may not be much disagreement as to the nature of the injuries, translating those injuries into money damages proves problematic at best and speculative at worst"); see also United States v. Fort James Operating Co., 313 F. Supp. 2d 902 (E.D. Wis. 2004).

primarily to state resources, because state trustees have jurisdiction over the more valuable resources.[68] As state NRD programs expand and gain funding, it will become increasingly critical for the federal trustees to cooperate with the state trustees in the NRD process. Of course, there are also sites where the federal trustees have jurisdiction over the more abundant or valuable resources, in which cases the state trustees face pressure to join with the federal trustees or forfeit the opportunity to participate in the proceeds of settlement or litigation where the state is a co-trustee.

E. Wholly Before Limitation

The "wholly before" limitation is found at CERCLA Section 107(f)(1), which states:

> ***There shall be no recovery*** under the authority of [42 U.S.C. § 9607(a)(C)] [re: 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"] ***where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.***[69]

The defendant bears the burden of proof on this defense.[70]

"When releases or damages continue to occur post-enactment, recovery for natural resource damages which occur both pre- and post-enactment is appropriate."[71]

---

[68] This may be especially true in the eastern United States, where federal lands are less abundant.

[69] 42 U.S.C. § 9607(f)(1) (emphasis added); see also 42 U.S.C. § 9611(d)(1) (barring recovery claims against the Superfund for NRD that occurred wholly prior to enactment: "No money in the Fund may be used . . . where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980").

[70] Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372, *26-27 (S.D. Ala. 2006) ("courts have interpreted the provision limiting relief to prospective damages as an exception to the statute and, therefore, held that the burden fell on defendant to prove that the damages are barred by § 107(f)(1)").

[71] Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372, *23-28 (S.D. Ala. 2006) (citing In re Acushnet River & New Bedford Harbor, 716 F. Supp. 676 (D. Mass. 1989); State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 675 (D. Idaho 1986) ("Section 107(f) precludes liability under section 107(a)(4)(C) only where (1) all releases ended before December 11, 1980, and (2) no damages were

1. "Release"

"Release" is defined by CERCLA in relevant part as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."[72]

2. "Injury"

The term "injury" is defined by the DOI regulations pertaining to NRD assessments as

> 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. As used in this part, injury encompasses the phrases 'injury,' 'destruction,' and 'loss.' Injury definitions applicable to specific resources are provided in § 11.62 of this part.[73]

3. "Damages"

CERCLA defines "damages" as "damages for injury or loss of natural resources as set

---

suffered on or after December 11, 1980, as a result of the release. . . . [T]o the extent that both the release and the resultant damage occurred prior to enactment, Section 107(f) bars recovery. To the extent that both the release and the resultant damage occurred post-enactment, there is no bar to recovery. To the extent the release occurred prior to enactment, but the resultant damage occurred post-enactment, Section 107(f) does not bar recovery"); see also United States v. Asarco, Inc., 1999 U.S. Dist. LEXIS 18924 (D. Idaho 1999) ("The Acushnet court held 'where natural resource damages are readily divisible, the [trustees] cannot recover for such damages incurred prior to enactment.' . . . This Court is inclined to agree with the Acushnet court's reasoning. If the monetary quantification of an injury is divisible (pre- and post-enactment), it would be unfair to allow CERCLA to create liability for pre-enactment divisible harm. 'In cases where the natural resource damages are not divisible and the damages or the releases that caused the damages continue post-enactment, the [trustees] can recover for such non-divisible damages in their entirety'"), vacated and remanded on other grounds, 214 F.3d 1104, 1105 (9th Cir. Idaho 2000); Continental Title Co. v. Peoples Gas Light & Coke Co., 959 F. Supp. 893, 899-900 (N.D. Ill. 1997) (discussing legislative history).

[72] 42 U.S.C. § 9601(22).

[73] 43 C.F.R. § 11.14(v); see also Montana v. Atl. Richfield Co., 266 F. Supp. 2d 1238, 1242 (D. Mont. 2003) (citing DOI regulatory definition of "injury" in context of CERCLA Section 107(f)(1)).

forth in section 107(a) or 111(b) of this Act."[74] The Ninth Circuit discussed this "somewhat circular" statutory definition and stated that CERCLA "appears to define 'damages' as 'the monetary quantification stemming from an injury.'"[75] The DOI regulations pertaining to NRD assessments define "damages" as "the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA."[76]

4. "Occurred"

Courts disagree as to the time that damages "occur" for purposes of Section 107(f)(1). Some courts have adopted the view that damages "occur" when the property owner or some entity incurs expenses due to the injury to natural resources,[77] whereas other courts have adopted the view that "[d]amages accrue or occur, including restoration costs, when the underlying injury occurs."[78] Allowing a trustee to determine when damage occurs by tying the definition of

---

[74] 42 U.S.C. § 9601(6).

[75] Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372, *27 (S.D. Ala. 2006) (citing Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1515-16 (9th Cir. 1991)).

[76] 43 C.F.R. § 11.14(l).

[77] Alabama v. Ala. Wood Treating Corp., 2006 U.S. Dist. LEXIS 37372, *27 (S.D. Ala. 2006) ("Defendant, citing Acushnet, asserts that to maintain a claim for injury to natural resources under § 107, plaintiffs must have incurred quantifiable damages. . . . [T]he court is persuaded by the Acushnet line of cases that 'damages' occur when expenses are incurred due to an injury to natural resources") (citing In re Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 683 (D. Mass. 1989) ("The Court . . . holds that 'damages' – i.e., monetary quantification of the injury done to the natural resources – 'occur' as a general rule when the property owner in this example, or some entity as a general rule, incurs expenses due to the injury to natural resources – i.e., when the owner seeks to develop the waterfront property. . . . [T]his Court rejects the premise that damages occur when they accrue at common law")).

[78] See, e.g., Montana v. Atlantic Richfield Co., 266 F. Supp. 2d 1238, 1242-43 (D. Mont. 2003) ("[It] is a well-settled principle of common law that the right to sue accrues and damages occur, even though the full extent of damages may not be quantified, when the injury takes place. . . . 'Occur' has a well-accepted and ordinary meaning, namely, 'to present itself: come to pass: take place [or] HAPPEN.' . . . [Montana's] argument that restoration cost damage does not 'occur' until either a trustee incurs expenses to restore the resource or restoration costs are quantified by the Court, is unpersuasive. If the term 'occurred' was construed as argued by Montana, the 'wholly before' limitation in the statute would

damage to expenses voluntarily incurred by the trustee my stray too far from the traditional interpretation of damage as the costs that flow from injury in the context of a traditional tort action. At the same time, the view that damage and injury cannot occur separately in the NRD context may be similarly unwarranted.

F. $50 Million Cap

Under Section 107(c)(1)(D),[79] there is a $50 million cap on liability for NRD per release or incident involving a release of hazardous substances.[80] The exceptions to this rule are found under Section 107(c)(2), which provides that no such cap exists in cases of willful misconduct, willful negligence, failure or refusal to cooperate with public officials, or violation of safety, construction, or operating standards.[81]

G. No Punitive Damages

---

be rendered meaningless").

[79] 42 U.S.C. § 9607(c)(1)(D) ("Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed – . . . (D) for . . . any facility other than those specified in subparagraph (C) of this paragraph [any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in [49 U.S.C. § 60101(a)]), or rolling stock], the total of all costs of response plus $ 50,000,000 for any damages under this title").

[80] United States v. Montrose, 104 F.3d 1507 (9th Cir. 1997) ("we interpret 'incident involving release' . . . to mean an occurrence or series of occurrences of relatively short duration involving a single release or a series of releases all resulting from or connected to the event or occurrence. Thus a series of events that lead up to a spill of [a] hazardous substance would be considered an incident involving release; however, a series of releases over a long period of time might or might not").

[81] 42 U.S.C. § 9607(c)(2) ("The liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan").

Punitive damages are not generally available in NRD actions.[82]

H. Federally Permitted Release Defense

CERCLA prohibits the recovery of damages in connection with a federally permitted release.[83] "Congress excepted from the strict liability scheme of CERCLA certain releases that are 'federally permitted,' and plaintiffs who seek response costs or damages in connection with such releases must assert their claims under some other provision of law, including common law."[84]

The "federally permitted release defense" is found at Section 107(j), which states, in part, that "[r]ecovery by any person . . . for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section.[85] A defendant claiming

---

[82] Ohio v. United States DOI, 880 F.2d 432 (D.C. Cir. 1989) ("Congress did make a conscious determination that punitive damages would be generally unavailable. CERCLA is replete with indications that Congress intended to provide for compensatory damages only. The most critical indication of this is contained in § 301(c), which provides that the regulations are to identify 'the best available procedures to determine such damages, including both direct and indirect injury, destruction or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.' 42 U.S.C. § 9651(c). There would be no need to establish the 'best available procedures' to measure compensatory damages if a rounded-off punitive damages figure could be assessed against a responsible party as well. . . . Further . . . [t]he fact that Congress provided for punitive damages [where a responsible party refuses to comply with removal or remedial action orders] but not in all natural resource damage actions indicates clearly – especially when viewed alongside all the other evidence – that Congress intended the general measure of damages to be compensatory, not punitive").

[83] Lincoln Props., Ltd. v. Higgins, 1993 U.S. Dist. LEXIS 1251, 1993 WL 217429, No. S-91-760 (E.D. Cal. Jan. 21, 1993) ("Federally permitted releases . . . are not considered hazardous and are therefore not subject to the provisions of CERCLA").

[84] Westfarm Assocs. Ltd. Partnership v. Int'l Fabricare Inst., 1993 U.S. Dist. LEXIS 19952, No. HM-92-9 (D. Md. July 8, 1993), aff'd, 66 F.3d 669 (4th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); http://www.uscg.mil/mlclant/ldiv/cercla.htm ("The only remedy generally provided under CERCLA for a permitted release is under the law relating to the permit issued").

[85] 42 U.S.C. § 9607(j) (2007); 42 U.S.C. § 9601(10) (defining "federally permitted release"); see also Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1230 (E.D. Pa. 1993) ("CERCLA does prohibit the recovery of response costs [for] a federally permitted release"); Westfarm Assocs. Ltd. Partnership v. Int'l Fabricare Inst., 1993 U.S. Dist. LEXIS 19952, No. HM-92-9 (D. Md. July 8, 1993) ("Congress excepted from the strict liability scheme of CERCLA certain releases that are "federally

the federally permitted release defense bears the burden of proving which releases are federally permitted and which are not, as well as proving what portion of the damages are allocable to the federally permitted releases.[86] For example, a plaintiff may recover response costs for releases which "occurred at a time when there was no permit," including the period prior to the issuance of a permit,[87] and "where a defendant establishes that certain releases were 'federally permitted,' a plaintiff may nonetheless recover if it shows that 'non-federally permitted releases contributed to the natural injury.'"[88] Non-federally permitted releases may include releases that were not expressly permitted and/or releases that exceeded the limitations of the permit.[89]

I. Causation/Baseline

The goal of CERCLA's regulatory process for cleaning up hazardous waste sites is to

---

permitted," and plaintiffs who seek response costs or damages in connection with such releases must assert their claims under some other provision of law, including common law"), aff'd, 66 F.3d 669 (4th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); http://www.uscg.mil/mlclant/ldiv/cercla.htm ("The only remedy generally provided under CERCLA for a permitted release is under the law relating to the permit issued").

[86] Lincoln Props., Ltd. v. Higgins, 1993 U.S. Dist. LEXIS 1251 (E.D. Cal. 1993) ("A defendant who claims exemption for the release of hazardous substances bears the burden of proving which releases are federally permitted and what portion of the damages are allocable to the federally permitted releases") (citing United States v. Shell Oil Company, 1992 WL 144296 at *6 (C.D. Cal. Jan. 16, 1992)).

[87] Carson Harbor Village v. Unocal Corp., 287 F. Supp. 2d 1118, 1184 (C.D. Cal. 2003) (citing United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1541 (E.D. Cal. 1993); Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (D. Idaho 1986)); Lincoln Props., Ltd. v. Higgins, 1993 U.S. Dist. LEXIS 1251 (E.D. Cal. 1993) ("Before 1978, San Joaquin County had no federally approved pretreatment program; thus, any pre-1978 releases were not federally permitted") (citing 53 Fed. Reg. 27,275 (1988) ("the absence of a categorical pretreatment standard or a local limit for a specific pollutant precludes coverage for releases of that pollutant under the federally permitted release exception")).

[88] Carson Harbor Village v. Unocal Corp., 287 F. Supp. 2d 1118, 1183-84 (C.D. Cal. 2003) (citing United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1541 (E.D. Cal. 1992) (citing In re Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897 (D. Mass. 1989))).

[89] Carson Harbor Village v. Unocal Corp., 287 F. Supp. 2d 1118, 1184 (C.D. Cal. 2003) (citing United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1541 (E.D. Cal. 1993); Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (D. Idaho 1986)).

restore the environment.[90] The NRD process seeks to restore[91] lost resource services[92] to "baseline"[93] conditions. "Baseline" is distinguishable from "background":

> ***"Natural Background"*** - a "naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena"[94]
>
> "***Background"*** - the natural background, PLUS whatever substances have been added by other human activities, EXCEPT for the particular release in question. EPA defines "background level" as the "concentration of a hazardous substance that provides a defensible reference point with which to evaluate whether or not a release from the site has occurred. The background level should be reflective of the concentration of the hazardous substance in the medium of concern for the environmental setting on or near a site. Background level does not necessarily represent pre-release conditions, nor conditions in the absence of influence from source(s) at the site. Background level may or may not be less than the detection limit, but if it is greater than the detection limit, it should account for variability in local concentrations. Background level need not be established by chemical analysis."[95]
>
> ***"Baseline"*** - the background, PLUS any other physical or human impacts, EXCEPT for the particular release in question, that affect the resource. The NRDA regulations define "baseline" as "the condition or conditions that would have existed at the assessment area

---

[90] Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476, 72-73 (N.D. Okla. July 7, 2008) ("CERCLA is a comprehensive federal regulatory scheme that provides a regulatory process for cleaning up hazardous waste sites with the goal of restoring the environment") (citing New Mexico v. General Electric Co., 467 F.3d 1223, 1244 (10th Cir. 2006)).

[91] 43 C.F.R. § 11.14(ll) ("Restoration or rehabilitation means actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided, when such actions are in addition to response actions completed or anticipated, and when such actions exceed the level of response actions determined appropriate to the site pursuant to the NCP").

[92] 43 C.F.R. § 11.14(nn) ("'Services' means the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource").

[93] 43 C.F.R. § 11.14(e) ("Baseline" refers to "the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred").

[94] See 42 U.S.C. § 9604(a)(3) ("The President shall not provide for a removal or remedial action under this section in response to a release or threat of release . . . of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found").

[95] EPA Glossary of Terms and Acronyms, available online at http://www.epa.gov/superfund/training/hrstrain/htmain/glossal.htm (last accessed April 27, 2009).

had the discharge of oil or release of the hazardous substance under investigation not occurred."[96]

In other words, the NRD process seeks to restore natural resources not to what they historically were in their pristine form (i.e., to natural background conditions), nor to what they would be today based on contamination by other sources but not the release at issue (i.e., to background conditions), but rather to what they would be today, absent the release in question, taking into account a variety of other human and environmental factors (i.e., to baseline conditions). "In order to understand the baseline, therefore, a trustee must consider other environmental and human forces that may have caused the observed injury, as well as how the services would have changed over time."[97] Examples of the type of human activities that affect baseline include the introduction of invasive species and the bulkheading of natural shorelines where those activities lead to a reduction in the population of fish in a river. The NRDA regulations require that trustees determine the baseline condition of the injured resource and then compare that baseline with the injured status of the resource to quantify injury.[98] Environmental factors to be considered in a determination of baseline may include other releases of hazardous substances or petroleum, as well as an "infinite number of other human activities, including stormwater run-off, urban sprawl, pesticide application, development, mobile sources, trespassers, hunting, acid precipitation and global climate change, to name a few possibilities,"[99] as well as any damages caused by non-recoverable releases by the defendant (e.g., permitted releases under the federally

---

[96] 43 C.F.R. § 11.14(e).

[97] Brian D. Israel, "Natural Resource Damages," 5-32B Environmental Law Practice Guide § 32B.05 (Michael Gerrard ed., Matthew Bender & Co., Inc. 2008).

[98] 43 C.F.R. § 11.83.

[99] Brian D. Israel, "Natural Resource Damages," 5-32B Environmental Law Practice Guide § 32B.05 (Michael Gerrard ed., Matthew Bender & Co., Inc. 2008).

permitted release defense[100] and/or pre-enactment releases under the "wholly before" limitation[101]).

Discussions about causation are inextricably joined with discussions about baseline. In most cases, a baseline analysis incorporates and resolves questions about causation.

Trustees would rather simplify and limit the discussion to causation. Trustees may argue that the "resulting from" requirements of Section 107[102] are satisfied by a showing of causation. Trustees maintain that NRD liability, like response cost liability, is joint and several. Some case law supports this position, but, like most issues in this area, it has not been fully examined.[103] "Under strict liability the mental state of the defendant is irrelevant, but the damage for which recovery is sought must still be causally linked to the act of the defendant. . . . [T]he use in Section 107(f) of the word 'resulted' ties the damages to the releases. The proof must include a ***causal link*** between releases and post-enactment damages which flowed therefrom."[104]

---

[100] Brian D. Israel, "Natural Resource Damages," 5-32B Environmental Law Practice Guide § 32B.05 (Michael Gerrard ed., Matthew Bender & Co., Inc. 2008) ("As stated by the NOAA Damage Assessment and Restoration Program, '[b]aseline may differ from pre-release conditions because of non-actionable (permitted) events that would have affected natural resources even if no release occurred'") (citing NOAA Damage Assessment and Restoration Program, Joint Assessment Team Meeting: Baseline (Nov. 18, 2003)).

[101] 42 U.S.C. § 9607(f)(1).

[102] 42 U.S.C. § 9607(f) ("damages for injury to, destruction of, or loss of natural resources . . . ***resulting from*** such a release") (emphasis added); 42 U.S.C. § 9607(a)(4)(C) (PRPs "shall be liable for— . . . (C) 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") (emphasis added).

[103] See New Mexico v. GE, 467 F.3d 1223, 1234 (10th Cir. 2006) ("CERCLA makes PRPs jointly and severally liable not only for all costs of removal and/or remedial action, but also for 'damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss'") (citing 42 U.S.C. § 9607(a)(4)(C)); but see Akzo Coatings v. Aigner Corp., 909 F. Supp. 589, 591 (D. Ind. 1993) ("'While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm'")).

[104] Idaho v. Bunker Hill Co., 635 F. Supp. 665, 675 (D. Idaho 1986) (emphasis added); see also In re Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 687 n.19 (D. Mass. 1989) ("The Court's holding in no way eliminates the burden on the sovereigns to satisfy the burden of its prima facie case by

"CERCLA is ambiguous on the precise question of what standard of proof is required to demonstrate that natural resource injuries were caused by, or 'result from,' a particular release."[105] The NRDA regulations require that trustees determine the baseline condition of the injured resource and then compare that baseline with the injured status of the resource to quantify injury.[106] "As for . . . NRD claims, the causation standard is a ***contributing factor test***. In cases where releases of hazardous substances have been commingled,[107] the Trustees have the burden of proving a release that results in commingled hazardous substance[s] is a 'contributing factor' (more than a *de minimis* amount – to an extent that at least some of the injury would have occurred if only the Defendant's amount of release had occurred)."[108]

Defendants, on the other hand, have a strong argument that "damages resulting from the release" should exclude damages resulting from other releases or causes. Defendants will maintain that, conceptually, a baseline analysis (see below) is inconsistent with joint and several

---

establishing a causal link between releases and injury to natural resources and between those injuries and damages. Rather, once those links are established, the burden then shifts to Aerovox to prove, if it can, that particular natural resource damages occurred prior to enactment and thus fall within the statute's exemption").

[105] Nat'l Ass'n of Mfrs. v. United States Dep't of Interior, 134 F.3d 1095, 1105 (D.C. Cir. 1998).

[106] See Nat'l Ass'n of Mfrs. v. Dep't of Interior, 134 F.3d 1095, 1105 (D.C. Cir. 1998) (holding that computer models are a reliable method for quantifying injury and determining causation: "we find nothing in the relevant provisions of CERCLA that requires greater proof of causation and injury than is provided by DOI's predictive computer submodels").

[107] See also Valerie Ann Lee, et al., The Natural Resource Damage Assessment Deskbook 61 (Environmental Law Institute 2002) ("Responsible parties that are smaller contributors at sites are well advised to brace for a "contributing factor" standard. Such a standard is more likely to be found consistent with the remedial purposes of CERCLA and joint and several liability than a strict approach to causation based on the *Second Restatement*, especially one that would require tying an individual defendant to a particular release and a particular injury from that release. Such strict reading of the common law of causation does not reflect the scientific reality of how waste and pollutants commingle and jointly cause injury and it tends to erode joint and several liability, a centerpiece of the current liability scheme that is made applicable to both cost recovery and natural resource damages").

[108] Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003) (citing Boeing v. Cascade Corp., 207 F.3d 1177 (9th Cir. 2000)).

liability because the defendant is only liable for damages resulting from its own releases. Baseline considerations are more stringent, as they are based on "but for" causation.[109] "'But for' causation is a short way of saying 'the defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.' It is sometimes stated as 'sine qua non' causation, *i.e.*, 'without which not[.]' . . . The . . . term 'causation in fact' has sometimes been used to mean the same thing."[110]

The cooperative assessment approach can be a good way for PRPs to ensure the inclusion of baseline ("but for") considerations. In any event, it is unlikely that trustees will ignore an analysis of baseline, at least because of the litigation risk. Baseline considerations may be an element of the plaintiff trustee's claim, and not an affirmative defense.[111]

III. Natural Resource Damage Assessment (NRDA)

A. Assessment Strategies

There are many methods of quantifying an injury to natural resources, and these methods are still evolving.

1. Statutory Framework

The NRD regulations at 43 C.F.R. Part 11, promulgated by the Department of the

---

[109] See Kennecott Utah Copper Corp. v. United States DOI, 88 F.3d 1191 (D.C. Cir. 1996) ("The regulations thus require at least "but for" causation for indirect costs").

[110] Boeing v. Cascade Corp., 207 F.3d 1177, 1185-86 (9th Cir. 2000) (but describing departure from "but for" causation in cases of causal overdetermination (*i.e.*, where either polluter's conduct would have caused the same response cost to be incurred in the same amount, and the conduct was of substantially equal blameworthiness), where both polluters should be treated as having caused response costs).

[111] See also Kanner, Allan and Mary E. Ziegler, "Understanding and Protecting Natural Resources," 17 Duke Envtl. L. & Pol'y F. 141 (2006) ("While the trustee has the burden of determining baseline under the NRDA regulations, defendants should ensure that the trustee is apprised of all appropriate conditions or factors impacting the resource other than the release of hazardous substances at issue").

Interior, describe methods by which to conduct natural resource damage assessments (NRDA).[112]

DOI is charged with revising the regulations biannually.[113]

> Section 301(c) of CERCLA requires promulgation of regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or release of a hazardous substance. The responsibility for this rulemaking was delegated to the Department of the Interior (DOI) by the President in Executive Order 12580 (January 23, 1987).
>
> DOI's regulations provide a framework and standards for the NRDA process in coastal and marine environments (Type A) and other environments (Type B).[[114]] The Type A process involves the use of a computer model to assess damages, in a standard and simplified manner, that result from chemical or oil discharges in coastal and marine environments. The Type B process is used in situations that require an individual approach. Both Type A and Type B regulations call for the following four sequential phases in the assessment of damages:
>
> **Phase 1: Pre-assessment Screen.** A pre-assessment screen is conducted to determine if additional action is warranted. Trustees must determine whether an injury has occurred and a pathway of exposure exists. The pre-assessment screen is a prerequisite to conducting a formal NRDA.
>
> **Phase 2: Assessment Plan.** Trustees must confirm the exposure of Trust Resources and develop an Assessment Plan to identify how the potential damages will be evaluated. Type A Assessment Plans document that the conditions for use of the Type A procedures are met, provide the site-specific data inputs the Trustee will use to run the computer model, and provide the results of a preliminary application of the model. Type B Assessment Plans to identify the site-specific studies the Trustees

---

[112] 43 C.F.R. § 11.11 ("The purpose of this part is to provide standard and cost effective procedures for assessing natural resource damages"); see also Natural Resources Damage Assessment and Restoration Federal Advisory Committee, Department of the Interior, Final Report 6 (2008) (NRDAR) at 6 ("Natural Resource Damage Assessment and Restoration (NRDAR) is the process used to determine whether public natural resources have been injured, destroyed, or lost as a result of a release of hazardous substances or oil and to identify the actions and funds necessary to restore such resources").

[113] Natural Resource Damages for Hazardous Substances, 73 Fed. Reg. 57,259, 57,260 (Dept. of Interior Oct. 2, 2008) ("CERCLA provides that we review and revise the regulations as appropriate every two years") (citing 42 U.S.C. 9651(c)(3)); 43 C.F.R. § 11.12 ("The regulations and procedures included within this part shall be reviewed and revised as appropriate 2 years from the effective date of these rules and every second anniversary thereafter").

[114] National Ass'n of Mfrs. v. United States DOI, 134 F.3d 1095, 1099 (D.C. Cir. 1998) ("The 'Type A' and 'Type B' titles come from the clauses of subsection 301(c)(2): clause 'A' requires DOI to develop 'standard procedures for simplified assessments' and clause 'B' requires DOI to develop 'alternative protocols for conducting assessments in individual cases'") (citing 42 U.S.C. § 9651(c)(2)).

will conduct and quality control/assurance procedures. Draft Assessment Plans under both Type A and Type B procedures must be available for public review and comment.

Phase 3: Assessment Implementation. The purpose of the Assessment Implementation phase is to gather the data necessary to quantify the injuries and determine damages. The work consists of three steps: (1) injury determination; (2) quantification; and (3) damage determination. Under Type A, these steps are performed through a computer model. Under Type B, the steps are performed through laboratory and field studies. Trustees quantify injuries by identifying the functions or "services" provided by the resource; determining the baseline level of such services; and quantifying the reduction in service levels that result from the impacts.

Phase 4: Post-Assessment. Trustees prepare a Report of Assessment detailing the results of the Assessment Implementation phase. When Trustees use a Type A procedure, the Report will include the printed output of the final model application. A reasonable number of restoration alternatives including natural attenuation are usually proposed. A preferred alternative is selected based on several factors, including technical feasibility, relationship of costs to benefits, and consistency with response actions.[115]

2. Other Assessment Approaches

From a PRP's perspective, the regulatory NRDA process (above) may seem unnecessarily complicated and costly, especially for smaller sites. The regulatory approach is only one method

[115] http://www.epa.gov/superfund/programs/nrd/nrda2.htm. On October 2, 2008, effective November 3, 2008, DOI published its "Final Rule" amending certain parts of the Type A and Type B NRDA regulations. See 73 Fed. Reg. 57259 (Oct. 2, 2008), available online at http://www.nrdonline.com/news/documents/Final%20DOI%20Rule.pdf . The rule amends 43 C.F.R. Part 11 to "emphasize resource restoration over economic damages." Additionally, the amendments revise 43 C.F.R. § 11.80(b) and corresponding sections to clarify baseline restoration (i.e., restoration to "baseline," or to "conditions that would have existed… had the discharge…or release [of hazardous material] … not occurred" (43 C.F.R. § 11.14(e))) and compensable value (i.e., "damages . . . for public losses pending restoration to baseline" (73 Fed. Reg. at 57,260)) as two distinct components of natural resource damage assessments under the "resource and services" approach, in response to Kennecott [Utah Copper Corp. v. United States DOI, 88 F.3d 1191] (D.C. Cir. 1996). Technical corrections appearing in the final rule include deletion of provisions on limitations for estimating options and existence value, in response to Ohio v. Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989). See also Natural Resources Damage Assessment and Restoration Federal Advisory Committee, Department of the Interior, Final Report 6 (2008) (NRDAR) at 6.

of valuation of damages, and it is optional.[116] Other approaches may include Habitat Equivalency

[116] 42 U.S.C. § 9607(f)(2)(C) ("Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33"); 43 C.F.R. § 11.11 ("The purpose of this part is to provide standardized and cost-effective procedures for assessing natural resource damages. The results of an assessment performed by a Federal or State natural resource trustee according to these procedures shall be accorded the evidentiary status of a rebuttable presumption as provided in section 107(f)(2)(C) of CERCLA"); Natural Resource Damage Assessment Plan for the Rocky Mountain Arsenal, Commerce City, Colorado, dated Oct. 24, 2007 (available online at http://www.cdphe.state.co.us/hm/rmaplan/chap1.pdf; last accessed Apr. 20, 2009) at p. 1-5, § 1.6 ("The use of these regulations is optional, but an NRDA performed in accordance with these regulations has the force and effect of a rebuttable presumption in any administrative or judicial proceeding to recover NRDs. A rebuttable presumption means that the opposing party has the burden of producing evidence to overcome or rebut the presumption that the Trustees' assessment should form the basis of the damage award"); Waste Management and Research Center (WMRC) Report, "Natural Resource Damage Assessment: Methods and Cases" (available online at http://www.istc.illinois.edu/info/library_docs/RR/RR-108.pdf; last accessed Apr. 20, 2009) at p. 87 ("Compliance with the DOI NRD regulations is optional with trustees. . . . If the trustee conducts the damage assessment in accordance with the DOI rules, the assessment will be entitled to a "rebuttable presumption" in any legal proceeding. . . . It is unclear what the practical significance of this "rebuttable presumption" is. But it is clear that a trustee that is willing to forego this statutory presumption may use any injury tests and/or methods of damage quantification it chooses, even though the DOI has not adopted them") (citing 40 C.F.R. § 300.615(c)(1)(iv) ("In assessing damages to natural resources, the federal, state, and Indian tribe trustees have the option of following the procedures for natural resource damage assessments located at 43 CFR part 11"); 43 C.F.R. § 11.10 (CERCLA and the CWA "provide that natural resource trustees may assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance covered under CERCLA or the CWA and may seek to recover those damages. . . . The assessment procedures set forth in this part are not mandatory. However, they must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(2)(C) of CERCLA. This part applies to assessments initiated after the effective date of this final rule")).

Analysis (HEA),[117] Acreage Replacement,[118] Preference-Based Valuation,[119] and valuation formulas such as the New Jersey Groundwater Valuation Formula.[120] These alternative approaches provide opportunities to avoid the cost and complication associated with the full-

---

[117] Habitat Equivalency Analysis, or HEA, HEA provides a common language for NRD settlement negotiations, offering compensation through ecological service gains which are equivalent to the ecological service losses. Where ecological service losses are not compensable through money damages, HEA may provide compensation through commensurate ecological service gains. A form of HEA was employed in settlement negotiations related to Commencement Bay and the Hylebos Waterway in Washington State. The mediator in this case used ecological units called "discounted service acre-years" or "DSAYs" (pron. dee-sayz) to scale restoration projects and thereby balance ecological losses and gains. DSAYs were a currency for a type of restoration banking (credits-trading). Preferred habitat was assigned a higher DSAY value, and less preferred habitat was assigned a lower DSAY value, such that a PRP would be forced to produce more of the less desirable habitat in order to equal the restoration value of the more important habitat (resource). The DSAY value judgments were made by the trustee (NOAA). This allowed the trustee to determine where to place emphasis in restoration projects.

[118] In simple acreage replacement, reference sites should be chosen with care. For example, the value of an urban acre in a developed area with high property values and contaminants at high background levels does not equal the value of a rural acre. The value-transfer approach (i.e., borrowing the value of a similar or nearby study) requires that the reference site is similar and that the transferred study is scientifically sound.

[119] Preference-based assessment approaches measure and assign values to changed human behaviors in response to an injury to natural resources. For example, this approach may assign value to switching to bottled water, buying a house in a different area, or taking fewer trips to the beach to swim. This approach is not intended to quantify losses of ecological services, but rather losses of human use services. Data may be gathered through revealed preferences (actual behavior and choices) or stated preferences (surveys). For example, a survey may be conducted to determine how much people would pay to preclude the injury in question. If 50% of people would pay $50.00 to preserve the beach, then the value of the beach would be $25.00. The idea is that people will take trips to the beach until the cost equals the price. This oversimplified approach ignores a variety of other factors that people may consider in providing a value (e.g., travel costs, foregone wages to go to the beach, location of the beach, other spending priorities, etc.). Also, there is a significant potential that this approach may be manipulated by the trustees, because valuation itself tends to draw attention to the injuries and therefore compound them. For example, if a population does not see an urban river as having any human use value, but then the trustees or an NGO gets involved and through extensive media coverage convinces the public that the urban river should have a higher value, people will become more excited about the issue and the valuation of the resource will naturally increase.

[120] NJDEP v. ExxonMobil Corp. ("Ewing Township"), No. MER-L-2933-02 (N.J. Super. Ct. Law Div. Aug. 24, 2007) (bench ruling discrediting NJDEP's Groundwater Valuation formula which considered (1) plume size, (2) annual groundwater recharge rate, (3) conversion factor, (4) duration of injury, and (5) water rate); see also Calculators at http://www.mclaneenv.com/sub_services/nrd_calc.asp, http://www.nj.gov/dep/nrr/nri/gw_injury_calc_200305.pdf.

blown regulatory damage assessment while still cooperating with the trustees, but they may also be less fair, less accurate, and/or more likely to overlook site-specific issues.

Z:\rhs\Environmental Law Committee\NRD Presentation 2009\FINAL 04.30.09.wpd