DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

NATURAL RESOURCE DAMAGES UNDER CERCLA, OPA, AND CWA

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American Corporate Counsel Association
2000 Annual Meeting, Washington, D.C.
October 2-4, 2000

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I. Nature and Scope of Claim

A. General. Natural resource damage claims under CERCLA, OPA, and CWA are statutory causes of action, not necessarily constrained by common law precedents. *See State of Ohio v. United States Department of the Interior*, 880 F.2d 432, 455 (D.C. Cir. 1989).

B. Damages Claim. A natural resource damages claim arises from (i) injury to, destruction of, or loss of (ii) natural resources (iii) resulting from a release [of a hazardous substance] or a discharge of oil. CERCLA § 107(a)(4)(C); OPA § 1002(b)(2). A natural resource damages claim is distinguishable from remedial, response or cleanup actions undertaken by EPA under CERCLA, the Coast Guard under OPA, or another federal or state agency. Remedial, response and cleanup actions *abate* the problem and protect human health and the environment from *further* harm. Natural resource damage actions *compensate* the public for past injury, interim injury until abatement actions are completed, and residual harm to natural resources remaining after abatement. However, the evolving emphasis on restoration, particularly the NOAA regulations, blurs the lines.

C. Natural resources. CERCLA § 101(16) and OPA § 1001(20) broadly define "natural resources" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources, ..."

1. In addition to including the "defenseless creatures," these definitions are very broad and may include resources which are presumed to be entirely addressed by abatement actions such as drinking water, groundwater supplies, waterways, and even air. In *re: Montauk Oil Transportation Corp.*, No. 90 Civ. 5702 (KMW) (S.D.N.Y. June 18, 1996), the court concluded that trustee could recover under CWA for loss of maritime vessels' use of public waterway closed by Coast Guard because of oil spill; in a Sept. 17, 1996 opinion, the *Montauk* court held that lost use of water body is damage recoverable under the N.Y. oil spill statute.

2. Congress deliberately excluded "purely private" property from the definition of natural resources in CERCLA. *State of Ohio v. DOI*, 880 F.2d at 460. *See Artesian Water Co. v. New Castle County*, 851 F.2d at 649 (private entities may not bring CERCLA natural resource damage claims); *Lutz v. Chromatex*, 718 F.Supp. 413, 419 (M.D.Pa. 1989); *Satsky v. Paramount Communica tions, Inc.*, 7 F.3d 1464 (10th Cir. 1993), *reversing* 778 F.Supp. 505 (D.Colo. 1991); *see Montauk, supra* (June 18, 1996). However, natural resources need not be owned by the government to be CERCLA "natural resources." *State of Ohio v. DOI*, 880 F.2d at 460. "Rather, a substantial degree of government regulation, management or other form of control over property would be sufficient" to make the CERCLA natural resource damages provisions apply. *Id.* at 461. *See also United States v. Montrose Chem. Corp. of California*, 835 F.Supp. 534, 538-539 (C.D.Cal. 1993), *reversed in part on other grounds*, 104 F.3d 1507 (9th Cir. 1997), where defendant argued that U.S. cannot sue for NRD within three miles of shore because underwater lands are owned by the state; special master ruled that U.S. could sue, and district court affirmed but on procedural ground alone.

3. Natural resource damage claims can only be brought by State or federal government "trustees" of natural resources, acting on behalf of the public, by designated trustees of Indian tribes, and, at least under OPA, by foreign governments. CERCLA § 107(f)(1); OPA § 1002(b)(2)(A); *see also Alaska Sport Fishing Assn. v. Exxon Corp.*,34 F.3d 769 (9th Cir. 1994).

II. Relationship to Remedial Action

A. Damages Are Residual to Cleanup. A natural resource damages action brought under CERCLA, *i.e.*, not in the context of an oil spill, usually seeks to recover for residual harm to natural resources, assessed after any remedial action which EPA (or any another appropriate agency with cleanup authority) has selected and has completed or after the likely effects of the remedial action on natural resources have been taken into account. *Cf.* OPA § 1002(b). *See In Re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F.Supp. 1019, 1035 (D.Mass. 1989) ("*Acushnet IV*") ("[C]ustomarily, natural source damages are viewed as the difference between the natural resource in its pristine condition and the natural resource *after the cleanup*, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, [damages] are thus not generally settled prior to a cleanup settlement.") (emphasis added).

B. Remedy not required to bring claim. Natural resource damage actions under CERCLA are not restricted to residual claims made after a remedial action has been completed. Natural resource damage actions can and have been brought in situations which do not involve remedial actions. *E.g., United States v. Montrose*, No. CV 90-3122-AAH (C.D.Cal.), concerning DDT and PCB contamination in marine sediments off the California coast from Los Angeles, and *United States v. City of Seattle*, No. C 90-395WD (W.D.Wash.), concerning contamination in Elliott Bay.

C. Federal Trustees have limited authority to issue an order under CERCLA § 106, 42 U.S.C. § 9606, with respect to a release or threatened release affecting natural resources under their jurisdiction but only with the concurrence of US EPA. E.O. 13016, amending E.O. 12580, 61 Fed.Reg. 45871 (Aug. 28, 1996). However, the federal

trustees may not use Superfund monies to implement an ordered response action in lieu of the payment by the person who does not comply with the order. *Id.*

III. Scope of Liability for Natural Resource Damages

Elements of Liability under CERCLA.

1. General. To establish a *prima facie* case of liability for natural resource damages, a trustee must prove (1) the elements of liability for response cost recovery under Section 107 of CERCLA, and (2) that there has been "injury to, destruction of, or loss of natural resources resulting from such a release [of a hazardous substance]." CERCLA § 107(a)(4)(C).

2. In *Acushnet* the court granted the government's motion in limine to exclude defendants' evidence regarding the effects of PCBs on fish and aquatic life, implicitly accepting the argument that "injury" to fish and aquatic life occurred when the organisms were contaminated with PCBs in excess of the "tolerance level" set by the Food and Drug Administration (FDA) for consumption of seafood. *In Re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 716 F.Supp. 676, 685 (D.Mass. 1989)("*Acushnet V*").

3. The Department of the Interior's damages assessment regulations (discussed generally below) define "injury" as "a measurable adverse change, either long-or short-term, in the chemical or physical quality or the viability of a natural resource. . .." 43 C.F.R. § 11.14(v). The regulations allow proof of injury either (1) by empirical evidence of an adverse change in a particular case (*e.g.*, lower hatching rates or increased incidence of tumors) or (2) by reliance on a prior regulatory determination, such as water quality standards or the FDA tolerance limits discussed in *Acushnet V*, which in effect makes the presence of a hazardous substance in excess of a prescribed level injury per se.

B. Special-Statutory Restrictions on Natural Resource Damage Claims.

1. Per release limitation. Recovery "for each release. . . or incident involving release . . ." is limited to $50 million absent willful negligence or violation of federal safety or operating standards. CERCLA § 107(c)(1)(D), (c)(2); *see also* OPA § 1004(a). In *State of California v. Montrose Chem. Corp. of California*, 104 F.3d 1507 (9th Cir. 1997), the Circuit reversed the district court's imposition of a $50 million cap on recovery, concluding that the $50 million cap was *per* owner or operator, not a collective cap, *id.* at 1519; the court also rejected the lower court's holding that "incident" should mean "contaminated site," therefore concluding that a series of releases over time from a site might not constitute a single incident, *id.* at 1521.

2. Losses identified in an Environmental Impact Statement ("EIS"). There can be no recovery for natural resource losses that were specifically identified in an EIS or environmental assessment and that were then authorized by permit. CERCLA § 107(f)(l). The Ninth Circuit held that this exception was not intended to excuse liability for activities that occurred before the authorizing permit was issued. *State of Idaho v. Hannah Mining Co.*, 882 F.2d 392, 395 (9th Cir. 1989).

3. The "wholly before" exception. There can be no recovery "where such

damages and the release of a hazardous substance from which such damages resulted have occurred *wholly* before December 11, 1980 " CERCLA § 107(f)(l) (emphasis added). At a minimum, the trustees are entitled to recover all damages that "occur" after December 11, 1980, regardless of whether they result from pre-enactment or post-enactment releases (*Acushnet V*, 716 F.Supp. at 684). Where damages are not divisible and the damages or the releases continue postenactment, trustees can recover for the non-divisible pre- and post-enactment damages in their entirety (*id.*, at 686). The Court cited damages for "aesthetic injury" as an example of damages that may be indivisible. *Id.*

IV. Statute of Limitations

A. CERCLA Statute of Limitations.

1. Revival of Claims. SARA revived all natural resource damages claims that may have expired under CERCLA's original statute of limitations. *State of Idaho v. Howmet Turbine Component Co*, 814 F.2d 1376, 1378-79 (9th Cir. 1987).

2. Limitations Period for NPL Sites and Federal Facilities.

a. CERCLA § 113(g)(1) establishes a special limitations period for damages claims "with respect to" NPL sites, Federal facilities, and other sites where a remedial action under CERCLA is "otherwise scheduled." For such sites, trustees may bring claims up to 3 years after completion of the remedial action (excluding operation and maintenance activities). *Id.*

b. No damages claim with respect to any of these three types of sites may be brought until the remedy for the site has been selected, so long as the President is "diligently proceeding" with a RI/FS. Trustees must also give sixty days' prior notice of intent to file such suits to the President and the potential defendants. *Id.*

c. In *United States v. ASARCO Inc.*, 28 F.Supp.2d 1170, 1178-81 (D.Idaho 1998), *vacated and remanded*, 214 F.3d 1104 (9th Cir. 2000), the district court concluded that the NPL exception applies only to NRD claims within the geographical boundaries of the site as listed on the NPL. However, if EPA decides to list the areas outside the boundaries on the NPL or expands the borders of the already listed site (but adhering to the proper procedures when doing so), NRD claims otherwise precluded by the limitations clause for non-NPL sites will be revived. The 9th Circuit vacated the district court's grant of summary judgment, remanded and imposed a temporary stay of proceedings to allow the defendants to file a petition for review in the D.C. Circuit, concluding that issues involving the boundaries of a site can only be heard in the United Court of Appeals for the District of Columbia Circuit, citing 42 U.S.C. § 9613(a).

3. Limitations Rule for Other Facilities.

a. The general limitations period for natural resource damage claims with respect to facilities other than NPL sites and federal facilities is now 3 years from the later of (a) the date of discovery of the loss of natural resources and of its connection to the release in question or (b) the date of promulgation of damage assessment regulations under CERCLA § 301(c). CERCLA § 113 (g)(1).

b. In *Kennecott Utah Copper Corp. v. United States Dept. of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), court held that DOI's interpretation of § 113(g)(1)(B) in its 1994 NRD assessment regulations, 43 CFR § 11.91(e), was unreasonable and that the date upon which the regulations were promulgated "was, at the latest, the date on which the Type A regulations were published in the Federal Register in [March 20,] 1987." *Id.* at 1213.

c. In *State of California v. Montrose Chem. Corp. of California*, 104 F.3d 1507 (9th Cir. 1997), the court held that an action filed within three years of March 20, 1987 was timely. The court did not reach the district court's construction of the "discovery" prong of the limitations statute because of its holding. The district court had held that discovery occurs when there is "widespread knowledge among important members of the trustee agencies regarding the alleged losses and their connection with the releases." *United States v. Montrose Chem. Corp. of California*, 883 F.Supp. 1396, 1405 (C.D.Cal. 1995), *rev. sub nom. State of California v. Montauk, supra*, 104 F.3d 1507.

4. Effect of statute of limitation provision is limited because an action for contribution or subrogation still may be brought by a liable PRP against another PRP within three years after the date of judgment/settlement of a CERCLA action or payment of a subrogated claim, and thus PRPs not named in a government action may still face liability for partial payment of natural resource damages at a site. CERCLA §§ 113(g)(3)-(4).

B. OPA Statute of Limitations.

l. Statute of three years for institution of an action to collect natural resource damages begins running on the later of (i) "the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care," or (ii) "the date of completion of the natural resources damage assessment under section 1006(c)" of OPA. OPA § 1017(f)(1)(B). No explicit date is given for when a trustee must conduct an assessment. *See* OPA § 1006.

2. As in CERCLA, contribution and subrogation actions need not be brought until three years after entry of judgment or payment of a claim, so liability of unnamed liable parties may continue well past the date the governments case initially was filed against other parties. OPA § 1017(f)(3)-(4).

V. The Proper Measure of Damages.

A. Statutory Guidance.

l. CERCLA. CERCLA does not expressly set forth a standard or methodology for assessing natural resource damages. It does, however, contain some guidance on the subject: Section 301(c)(2) requires the damage assessment regulations 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 the ability of the ecosystem to recover.*" (emphasis added.); Section 107(f)(1) requires natural resource trustees to use all sums recovered as damages to restore, replace, or acquire the equivalent of the injured resources; Section 107(f)(1) further states that "[t]he measure of damages in any action [for natural resource damages] *shall not be limited by the sums which can be used to restore or replace such resources.*" (Emphasis added.)

2. OPA. OPA § 1006(d) explicitly defines the measure of damages for natural resource injury as (a) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; (b) the diminution in value of the injured natural resources pending restoration; plus (c) the reasonable cost of assessing the damages.

B. Damages Measurement

1. Under *Ohio* and the DOI regulations, the minimum measure of damages is generally the costs of restoring natural resources to their "pre-release" condition or of replacing the injured resources with equivalent resources.

2. In *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, *supra*, court held that DOI did not have to adopt a "grossly disproportionate" exception to restoration cost rule. 88 F.3d at 1218.

3. Restoration or replacement of the injured resources may not be enough to make the public whole. First, complete restoration or replacement may be infeasible in some cases, and there will be continuing injury either because some contamination remains or because the effects of the contamination (*e.g.*, deaths of animals or other biota) cannot be remedied within a short time. Second, even if full restoration is possible, the public will have suffered loss of enjoyment of the injured resources from the time the injury occurred to the time restoration is complete.

4. To compensate the public for such interim loss of enjoyment or continuing injury, the damages recoverable under CERCLA may include, in addition to the costs of restoration or replacement, (1) lost use values (benefits derived from current and expected

future uses of the resources), and (2) lost non-use values (benefits that people derive from knowledge of the existence of certain resources, also known as by such labels as existence, option, and bequest values). *See generally State of Ohio v. DOI*, 880 F.2d at 454 n.34, 458, 476- 78. *See also Kennecott*, 88 F.3d at 1226-8 (governments can collect lost use interim damages under CWA); *Alaska Sport Fishing Assn.*, *supra*, 34 F.3d at 772.

VI. Damage Assessment Process

A. The DOI Regulations.

l. CERCLA § 301(c) required the President to promulgate two types of regulations for the assessment of natural resource damages: (A) standard simplified procedures requiring minimal field investigation ("Type A regulations"), and (B) protocols for conducting assessments in individual cases ("Type B regulations"). 43 C.F.R. Part 11. A trustee may use those regulations to assess damages.

2. In challenges to the first set of regulations, the D.C. Circuit upheld most portions of the regulations, but invalidated two key components: (1) the "lesser of" rule for measurement of damages and (2) the "hierarchy" of assessment methodologies adopted by DOI, which gave a strong preference to lost market value as the measure of damages. *State of Ohio v. DOI*, *supra* (Type B regulations); *State of Colorado v. Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989) (Type A regulations). The Court remanded both the Type A and Type B regulations to DOI for revisions consistent with its opinion.

3. In March 1994, DOI promulgated proposed revisions to the Type B damages assessment regulations, conforming them to *State of Ohio v. DOI*. *See* 59 Fed.Reg. 14262 (March 25, 1994). The Type B revised regulations survived

challenge except for provisions on the statute of limitations period and a portion involving the terms "resources and services." *Kennecott*, 88 F.3d at 1209-13, 1220.

4. In May 1996, DOI promulgated the revised Type A regulations. 61 Fed.Reg. 20560 (May 7, 1996). These withstood challenge in their entirety. *National Assn. of Mfrs. v. United States Dept. of Interior*, 134 F.3d 1095 (D.C. Cir. 1998). The Type A regulations incorporate a model which can be used for releases in marine and estuarine environments and the Great Lakes.

B. Statutory Presumption of Correctness. A damages assessment conducted by either a federal trustee or a state trustee in accordance with the DOI regulations has "the force and effect of a rebuttable presumption . . . in any administrative or judicial proceeding under this Act or section 311 of the (Clean Water Act]." CERCLA § 107(f)(2)(C).

C. Optional Nature of DOI Regulations.

1. Use of the damages assessment regulations is strictly optional with the trustees. *See* 40 C.F.R. § 300.615(c)(4). The only legal consequence of a choice not to follow the regulations is that the statutory presumption is unavailable.

2. The DOI regulations also do not purport to exhaust the permissible methods of damages assessment under CERCLA. Thus, a trustee who is willing to forego the statutory presumption may use injury tests or methods of damages quantification not adopted by DOI. *See Ohio v. DOI*, 880 F.2d at 472 ("Biological responses for which there currently are inadequate data to satisfy the [DOI regulations'] acceptance criteria are not

rendered non-actionable by Interior's rules . . ..").

D. OPA. Damage assessment rules under OPA were promulgated by NOAA in 1996. 61 Fed.Reg. 500 (Jan. 5, 1996), adding 15 C.F.R. Part 990. The emphasis on the NOAA rule is restoration, with the regulations having a slightly different emphasis than the DOI rules.

1. In *General Electric Co.*, *supra*, 128 F.3d 767, the D.C. Circuit rejected a challenge to the NOAA regulations except in two respects. The court held that the rebuttable presumption did not violate the due process clause, 128 F.3d at 771-2; that NOAA could allow a trustee to use contingent valuation methodology to calculate damages and can collect damages based on passive-use values, *id.* at 772-75, 778; that monitoring costs are recoverable, *id.* at 776; that a trustee could calculate the value of replacement services and select the scale of the restoration action that has a cost equivalent to the lost value when valuing replacement services or resources is impractical, *id.* at 777; and that the rule does not grant trustees "uncontrolled discretion" in violation of the due process clause when allowing a trustee to select the assessment methodologies they will utilize, *id.* at 778-9.

2. The court remanded the removal authority dispute. The court also asked NOAA to determine where the line should be drawn between recoverable and nonrecoverable legal costs. *Id.* at 775-6. NOAA has begun to address the remanded matters. 63 Fed.Reg. 6846 (Feb. 11, 1998) (request for comments).

VII. Settlement Authority

A. The Role of the Trustees.

**1. Sole authority rests with trustee. Because the CERCLA claim for damages to resources subject to federal control belongs to the designated federal trustee, the trustee must be a party to any agreement with the federal governmen *i.e.*, the Justice Departmen or EPA cannot settle or waive it without the trustee's agreement in a CERCLA action. *See* CERCLA § 122(j)(2); *see also Acushnet River & Bedford Harbor: Proceeding Re Alleged PCB*

***Pollution*, 712 F.Supp. 1019, 1036-37 (D.Mass. 1989) (CERCLA §122(j) expressly applies when there is joint settlement of remedial claims and natural resource damage claims, and compliance is required in order to effectuate Congress's intent even when the natural resource damage claim is settled separately)**

2. OPA. While not as explicit as CERCLA, in OPA Congress appears to have intended that the trustees address natural

resource damages and not another branch of the federal governmen such as the Coast Guard which usually is in charge of response activities. OPA § 1006(b)(2) (President "shall designate the Federal officials who *shall* act on behalf of the public as trustees . . .." [emphasis supplied]).

B. In *United States v. Montrose Chem. Corp. of California*, 50 F.3d 741 (9th Cir. 1995), the court vacated the district court's approval of a consent decree settling NRD because the lower court did not have before it "an estimate of the projected total natural resource damages at issue . . .." *Id.* at 743. The court said that on remand, the lower court should also determine the proportional

relationships between the amount to be paid by the settlers and total potential damages and evaluate the fairness of that relationship in light of the settlers' degree of liability; examine whether the liability is joint and several or divisible; and factor in "reasonable discounts" for litigation risk. *Id.* at 747.

C. While the district court must have sufficient information to determine the proportional relationships, it need not know the exact amount each defendant is paying. It is sufficient that the parties disclose the settlement shares and the bases for the settlement allocation on a class-wise basis. EPA's practice of negotiating with a group and then permitting the group to divide the burden of settlement among themselves is proper. *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1086-89 (1st Cir. 1994); *United States v. Kramer*, 19 F.Supp.2d 273, 282-3 (D.N.J. 1998).

D. In *United States v. AMTRAK*, 48 E.R.C. 1692, 1999 U.S.Dist. LEXIS 4781 (E.D.Pa. 1999), the district court approved a settlement with certain defendants which included their agreement to pay NRD. The court accepted an estimate of damages

contained in three declarations submitted to the court by the United States, and approved payment of 16% because the estimates were not final, were reasonable and were sufficient for settlement purposes. The court also noted that there were significant litigation risks associated with NRD claims.