Recovery of Natural Resource Damages: Emerging Trends
Analyzing EPA, OPA and CERCLA Roles in NRD Assessments and the Implications of Recent Litigation for Future Claims

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1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

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Emerging Trends in Natural Resource Damages

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**Sarah Peterman** is an associate in Farella Braun + Martel’s Environmental Law Department. Ms. Peterman focuses her practice on environmental and natural resources litigation and counseling, including representation of manufacturers, distributors, and property owners, in environmental enforcement actions, cost recovery litigation, citizen suits, complex toxic tort litigation, Prop. 65 litigation, and administrative proceedings. Her litigation experience also includes representing developers and property owners in complex business, real estate and construction litigation.

**Buzz Hines**, a partner in Farella Braun + Martel’s Environmental Law Department and Product Law Department, has practiced environmental law for the last 25 years. He is the former chair of Farella’s Environmental Law Department, and the current chair of the Air Quality and Climate Change group. Buzz represents clients in complex government and private litigation and enforcement actions, including state and federal cost recovery actions, NRD claims, air and water, and hazardous waste actions. A former trial attorney with the Department of Justice Environmental Enforcement Section, Buzz is recognized by Chambers USA 2011 and is listed in *Best Lawyers* and the International *Who’s Who of Environmental Lawyers*. 
Natural resources sound in the nature of biological entities:

Under CERCLA:

“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... [or] any Indian tribe.”

42 USC 9601(16).

Five Federal statutes provide for recovery for NRD:

1. CERCLA, 42 USC 9607
2. Clean Water Act, 33 USC 1321(f)
3. Oil Pollution Act of 1990, 33 USC 2702(a), (b)(2)
5. Park System Resource Protection Act, 16 USC 19jj
NRD Liability Flows to Trustees

“In the case of injury to, destruction of, or loss of natural resources... 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... .”

CERCLA, 42 USC 9607(f)(1)
“[Natural resource damages] ... are calculated by adding

1) the cost of restoring, rehabilitating, replacing or acquiring the equivalent of, the damaged resources,

2) the diminution in value of those natural resources pending restoration, and

3) the reasonable cost of assessing those damages.”

[plus

4) non-use damages]


For the (2) element above – it is more common to think of value of the interim lost use of the natural resource from the time of injury to the time of restoration.
Remember that natural resources are defined by CERCLA as

“...land, fish, wildlife, biota, air, water, ground water, 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, any member of an Indian tribe...”. CERCLA 9601(16).

Case law has accordingly defined trustees to include those mentioned in this definition plus –

• Municipalities if authorized by Governor of State per CERCLA 9607(f)(2)(B).

Trustees do not include private parties.

To prevent double recoveries, where trusteeships overlap, Coeur d’Alene court held that trusteeship is divisible.


See also United States v. Asarco, 28 F. Supp. 2d 1170 (D. Idaho 1998), vacated and remanded 214 F. 3d 1104 (9th Cir. 2000)
NRDAs are administrative processes – differ under each statute

NRDAs not required prior to suit

May be “cooperative” or “unilateral”

Advantages to trustees, including ..... 
- Coordination of multiple trustee claims
- Opportunity to improve quality of evidence
- Control of the timeline to settlement discussions
- Potentially obtaining “the rebuttable presumption”

Advantages to responsible parties, including....
- Opportunity to improve quality of evidence
- Chance to demonstrate strength of defenses
- Lower chance for inflation of assessed damages
- Focus attention away from companion tort claims
U.S. v. M/V Cosco Busan, et al., N. Dist. Cal., Case No. C 07-6045 (SC) (In Admiralty, Judge Samuel Conti)

- Consent Decree lodged in September 2011, Motion to Enter filed in December 2011, and Consent Decree entered as the final judgment of the Court in January 2012.
- Natural resources 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 U.S. (including ‘park system resources’ as defined at 16 U.S.C. § 19jj(d) and marine ‘sanctuary resources’ as defined in 16 U.S.C. §1432(8)) and/or the State of California, and shall also mean the services provided by such resources to other resources or to humans.”
Deepwater Horizon

- NRDA process
- Getting to Baseline
- Summary and update and role of NRDA in resolution of claims
In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010, United Stated District Court, Eastern District of Louisiana, Case No. 2:10-md-02179 (Judge Carl Barbier, Magistrate Sally Sushan).

- First phase of trial is looming.
- Settlement discussions ongoing.

~ Evidentiary battles currently underway ~
Background

• DOE’s Hanford Site encompasses almost 600 square miles in the desert in southeastern Washington State.

• Nine nuclear reactors and processing facilities.

• Plutonium produced from 1944 to 1987
Cleanup

- Plutonium production generated “billions of gallons” of liquid waste and “millions of tons” of solid waste
- Tri-Party Agreement in 1989
- Hanford Natural Resource Trustee Council:
  - DOE, DOI and FWS
  - Oregon and Washington Dept. of Ecology and Fish and Wildlife
  - Nez Perce Tribe
  - Confederated Tribes of the Umatilla Indian Reservation
  - Yakama Nation
  - With participation by EPA and NOAA
2005-2007: NRDA process begins

2008 – 2009: Phase I

2010 – 2012 (estimated): Phase II
Yellowstone River Spill

- July 1, 2011: Rupture of ExxonMobil oil pipeline
- NRD Assessment update

Castro et al. v. ExxonMobil Oil, et al.

- State court toxic tort litigation only (so far)
Overview of NRD issues and assessment re Sugar Creek Valley, in Ohio (Sugar Creek and Tuscarawas River)

- Numerous Administrative Orders by Consent entered into since 1981, and Dover agreed to investigate and remediate areas adjacent to its plant
- January 2010: Dover received notice and invitation to participate in NRD Assessment for the Sugar Creek watershed
- Dover only PRP listed
August 2010: Dover Chemical Corporation sues USFWS and Ohio EPA for declaratory relief:

- That releases from Dover plant entirely re-1980
- That NRD damages barred because no remedy had been selected

Dover Sues to Stop NRD Assessment Process

Defendants USFWS and Ohio EPA filed motion to dismiss

- Barred by 11th Amendment (State immunity)
- Ripeness

Court: Not Persuaded by Dover

- No subject matter jurisdiction
- Not ripe

2011 WL 2461896 (N.D. Ohio, June 17, 2011)
**USVI, St. Croix NRD Litigation**

**Commissioner of the Department Planning and Natural Resources v. Century Alumina Co. (Dist. Virgin Islands, St. Croix Division)**

- 2010 U.S. Dist. LEXIS 70848m July 13, 2010
  - Successful SOL challenge to NRD claims
  - **CERCLA § 113(g)(1):** No NRD actions unless commenced within 3 years after the date of the discovery of the loss and its connection with the release in question...
Successful challenge to Trustee’s “ownership” of natural resource

Three of the defendants, including the Renaissance group, negotiated a global settlement, including the CERCLA NRD claims
Overview of NRD assessment/claimed injuries

For the litigation, end appears to be in sight


- Cited CERCLA’s NRD provisions to resolve whether NJDEP was barred by state SOL from pursuing Exxon Mobil for common law claims

  - **42 U.S.C. § 9613(g)(1)(B):** “With respect to any facility listed on the [NPL]... an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action...”


**NJDEP v. Essex, July 23, 2010 (N.J. Superior Ct.):** dismissed NJDEP’s complaint against Essex Chemical Corporation
For Further Questions

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