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Environment Reporter™

NATURAL RESOURCE DAMAGES

This is the second in a series of articles addressing defenses to, and exclusions from, natural resource damage claims asserted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The first article, CERCLA's Novel and Untested Defenses: Acts of God, Acts of War, Acts of Third Parties and Cultural Resource Damages (45 ER 2589, 9/5/14), focused on a few novel and relatively untested defenses. In this second installment of the article series, Paul P. (''Skip'') Spaulding III focuses on a trio of defenses and exemptions to natural resource damage claims that arise from the intersection of CERCLA and other federal environmental laws: the ''irretrievable commitment of resources'' defense, ''federally permitted release'' defense and CERCLA's ''petroleum exclusion'' defense.

CERCLA's Defenses and Exemptions Based on Interactions With Other Federal Environmental Laws

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The depth and breadth of federal environmental law has expanded dramatically in the last 45 years. On the federal level, this trend was kicked off by enactment of the National Environmental Policy Act (NEPA) in 1969[1] and soon was followed by environmental laws regulating different media,[2] different types or locations of resources[3] and different types of pollution issues.[4] Not surprisingly, this expansion has created many overlaps in coverage, which have the potential to cause serious compliance and enforcement issues.

For example, it would be inappropriate for a release authorized under one statute to create liability under another. In some instances, Congress anticipated these duplicative coverage problems and adopted statutory defenses and exemptions to clarify or eliminate such issues. All three of the natural resource damage (NRD) defenses/exemptions addressed in this article arise from congressional attempts to eliminate duplicative liability or specify how overlapping subject areas are to be handled.

This article first will explore the ''irretrievable commitment of resources'' defense that is available when an impact has been addressed in a NEPA environmental document and meets certain other criteria. It then will evaluate the ''federally permitted release'' exclusion, which applies when damages at issue are the result of activities for which permits or authorizations have been obtained under a variety of other environmental laws. Finally, it will examine the ''petroleum exclusion'' under CERCLA and how it applies in the NRD setting and

[1] 42 U.S.C. § § 4321-4347.

[2] *E.g.*, Clean Air Act, 42 U.S.C. § § 7401-7671q (air); Federal Water Pollution Control Act, 33 U.S.C. § § 1251-1376 (water); Safe Drinking Water Act, 42 U.S.C. § § 300f-300j-26 (groundwater).

[3] *E.g.*, Endangered Species Act, 16 U.S.C. § § 1531-1544; Federal Land Policy and Management Act, 43 U.S.C. § § 1701-1787; Coastal Zone Management Act, 16 U.S.C. § § 1451-1464.

[4] *E.g.*, Oil Pollution Act, 33 U.S.C. § § 2701-2761; Solid Waste Disposal Act, 42 U.S.C. § § 6901-6992k; Low-Level Radioactive Waste Policy Act, 42 U.S.C. § § 2021b-2021j.

 ISSN 0013-9211

compare it with the NRD ''petroleum'' coverage provided in other environmental laws.

Natural Resource Damage Background

In general, CERCLA imposes liability for cleanup and response costs on owners and operators of facilities and other defined liable parties for releases of hazardous substances.[5] CERCLA was the first federal environmental law that authorized the recovery of NRD damages.[6] In brief, CERCLA provides that an authorized NRD Trustee can seek the recovery of damages for NRD liability, including for injury to, destruction of or loss of natural resources, as well as the reasonable costs of any NRD assessment.[7]

CERCLA defines ''natural resources'' broadly to include a wide variety of features, species and media: ''land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources. . . .''[8] Authorized NRD Trustees are generally defined as the U.S. government, any state for ''natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State,'' and ''any Indian tribe'' for certain defined natural resources.[9] NRD claims, like other types of CERCLA claims, can be maintained against owners, operators, arrangers and transporters of hazardous substances, so long as the requisite NRD damage will be proven.[10]

NEPA Commitments of Resources

CERCLA bars NRD recovery when a potentially responsible party can demonstrate that an environmental impact statement or comparable environmental analysis for a decision to grant a ''permit or license'' identified an ''irreversible and irretrievable'' commitment of the natural resources at issue.[11] Specifically, this section states:

> That no liability to the United States or State or Indian tribe shall be imposed . . . where the party sought to be charged has demonstrated that the damages to natural resources complained of were *specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license*, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license wasn't inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. (Emphasis added.)

Distilled to its essence, this exemption requires proof of three elements:[12]

1. The natural resource damages complained of specifically were identified in an appropriate environmental document as an irreversible and irretrievable commitment of natural resources.

2. The decision to grant a permit or license authorized such commitment of natural resources.

3. The facility/project was operating within the permit/license terms.

The key exemption language derives from NEPA, although the exemption appears to be broader in scope. NEPA requires a federal agency to prepare what now is called an ''environmental impact statement'' for any ''major Federal actions significantly affecting the quality of the human environment,'' and this detailed statement must address (among other things) ''any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.''[13] NEPA's implementing regulations (adopted by the Council on Environmental Quality) define two major types of NEPA documents: an environmental impact statement (''EIS'') and an environmental assessment (''EA'').[14] Note, however, that the CERCLA exclusion also refers to ''other comparable environment analysis,'' which raises the possibility (not yet tested) that non-NEPA documents also may qualify.

The most significant legislative history regarding the intent of this provision, taken from the Senate Report, includes the following statement: ''In such a case where the specific resource trade-offs are understood and anticipated and in issuing the permit for such releases the agency takes into account this knowledge and allows the trade-off, then no liability under this Act will accrue for resource damage pursuant to those permitted releases.''[15]

The applicable case law is driven by two decisions resulting from an NRD action brought by Idaho against former owners of a mine in the state. Historic mining activities had resulted in the presence of copper, cobalt and iron in a creek drainage system. An EA for a pilot project, and then an EIS for resumption of mine activities, were prepared and these documents described the past activities that had resulted in the continuing harm to the creek system. Ultimately, the mine owners decided not to resume mining. When the mine owners attempted to use the NEPA defense in response to an NRD lawsuit, the district court disallowed the defense because the two documents didn't make a specific find-

[5] In other contexts, CERCLA liability may be imposed for a ''threatened release,'' but the imposition of NRD liability under CERCLA for a ''threatened release'' appears to make no sense.

[6] CERCLA's NRD provisions originally were enacted in 1980 (42 U.S.C. § 9607(a)). Similar NRD liability provisions were later adopted in the Clean Water Act, Oil Pollution Act, National Marine Sanctuaries Act and Park System Resources Protection Act.

[7] 42 U.S.C. § § 9607(a), 9607(f) and 9601(6) and (16).

[8] 42 U.S.C. § 9601(16).

[9] 42 U.S.C. § 9607(f)(1). A companion provision, 42 U.S.C. § 9607(f)(2), specifies how the appropriate Trustees for federal and state NRD claims are to be designated.

[10] The categories of persons potentially liable for CERCLA damages are set forth in 42 U.S.C. § 9607(a).

[11] 42 U.S.C. § 9607(f)(1).

[12] A fourth element is required when there are damages to an Indian tribe. In such cases, for the NRD exemption to apply, the issued permit can't be inconsistent with the U.S.'s fiduciary duties to such tribe. *Id.*

[13] 42 U.S.C. § 4332(2)(C). The implementing regulations also require a discussion of the environmental consequences of alternatives that would result in, among other things, ''any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.'' 40 C.F.R. § 1502.16.

[14] *See* 40 C.F.R. § § 1501.3 and 1508.9 (environmental assessment); 40 C.F.R. § § 1501.4 and 1508.11 (environmental impact statement).

[15] S. Rep. No. 96-848, at 88 (1980).

  ER ISSN 0013-9211

ing that the damages were ''irreversible and irretrievable.''[16] On appeal, the U.S. Court of Appeals for the Ninth Circuit overruled the district court on this point, finding that this specific formulaic language doesn't need to appear in the document but can be satisfied by other clear and unambiguous language that accomplishes the same purpose.[17]

Perhaps most significantly, this appellate decision very narrowly interpreted the NEPA exclusion for site contamination from activities that pre-dated the NEPA document. The appellate court found that this exclusion was designed to ''allow liability to be waived only for pollution caused by the facility [meaning the project that is the subject of the EIS document], not the problems that existed before the facility.''[18] The court stated that ''liability arising from past activities is not automatically extinguished by an authorization in an EIS for a new project'' and the ''EIS process is not a means for absolving an otherwise liable entity from responsibility for damages arising from past activities.''[19]

Although not decided in the NRD context, there is case law addressing the question of when a federal agency makes a sufficient ''irreversible or irretrievable commitment of resources'' to trigger the need to prepare a NEPA document in the first place and thereby require a halt to project-related activities. These decisions are very fact-specific and allow some preliminary activities (such as design work, feasibility tasks and preliminary funding for limited work), but not considerable activity (such as a contractual commitment to undertake the project or any significant ground disturbance) before the NEPA trigger point is reached.[20] In general, these cases acknowledge that a wide range of funding, preparation and ground-disturbing activities can meet the irreversible/irretrievable commitment standard and show some deference to federal agency decisions on when this point is reached.

Unfortunately, given the lack of statutory specificity and the paucity of interpretive case law, the precise scope of this NEPA exemption isn't yet well defined. Important unanswered questions remain. For example, what range of environmental documents are covered by the exemption? Do both an EA and EIS qualify? If no permit or license is involved (e.g., when a federal agency is directly undertaking an action), is a Record of Decision based on a NEPA document sufficient? If a facility violates a term in a permit, does this completely invalidate use of the exemption or does it only affect that particular substance or time period? Resolution of these questions necessarily will await further development of case law.

[16] *State of Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 830-31, 27 ERC 1868 (D. Idaho 1987).

[17] *State of Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396, 30 ERC 1097 (9th Cir. 1989).

[18] *Id.* at 395.

[19] *Id.*

[20] *See, e.g., Los Alamos Study Grp. v. United States Dep't of Energy*, 692 F.3d 1057, 75 ERC 1970, 2012 BL 219245 (10th Cir. 2012); *WildWest Inst. v. Bull*, 547 F.3d 1162, 2008 BL 251474 (9th Cir. 2008); *Metcalf v. Daley*, 214 F.3d 1135, 51 ERC 1428 (9th Cir. 2000); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 27 ERC 1687 (9th Cir. 1988); *Hawaii Cnty. Green Party v. Clinton*, 124 F. Supp. 2d 1173 (D. Haw. 2000).

Federally Permitted Releases

An important exemption—arising from a congressional attempt to harmonize many environmental laws—bars CERCLA NRD liability for damages resulting from a ''federally permitted release.''[21] This term specifically is defined to include releases/discharges resulting from eleven categories of permits or authorizations (or even applications for permits in some instances), including Clean Water Act National Pollutant Discharge Elimination System permits; U.S. Army Corps of Engineers dredge and fill permits; Solid Waste Disposal Act permits; releases of source, special nuclear or byproduct material in compliance with Atomic Energy Act authorizations and orders; injection control authorizations; certain air permits; and the introduction of pollutants into publicly owned treatment works in conformance with pretreatment standards.[22]

There are a few cases addressing the scope of this exemption in the NRD context. One federal court opinion emphasized that natural resource damages aren't recoverable for injury caused by federally permitted releases but narrowly construed the exemption to exclude damage caused by releases that ''were not expressly permitted in the various permits, which exceeded the limitations established by the permits or which occurred during a time period when there were no permits. . . .''[23]

Another court denied a defense summary judgment motion because it lacked sufficient facts to determine if the damages were caused by NPDES point source discharge pollutants (covered by the exclusion) or by nonpoint source discharges.[24] In another case, involving polychlorinated biphenyl contamination in New Bedford Harbor in Massachusetts, the court held that although some or most of the PCBs came from federally permitted releases, if the Trustees could produce evidence that non-federally permitted releases were a ''contributing factor'' to any natural resource injury and the injury was indivisible, the defendant would be held jointly and severally liable unless it could meet the burden of persuasion to demonstrate that the injury is divisible.[25]

Unlike the NEPA exemption discussed above, the ''federally permitted release'' exclusion applies to all types of CERCLA damages, not just NRD claims. As a result, there is a more robust set of cases interpreting the extent of this exemption. These cases, like the NRD cases, generally adopt a narrow reading of the exemption requirements. Once a plaintiff has produced evidence that non-permitted releases contributed to injury, they allocate a heavy burden of proof to a defendant to demonstrate that the exempt releases caused the injury or, alternatively, the cause of the injury is divisible between permitted releases and non-permitted releases. For example, in a case involving a mining company with NPDES permits to discharge metals from copper cementation plants, a court granted summary judgment

[21] 42 U.S.C. § 9607(j).

[22] 42 U.S.C. § 9601(10).

[23] *State of Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674, 24 ERC 1524 (D. Idaho 1986).

[24] *State of Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 27 ERC 1868 (D. Idaho 1987).

[25] *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 888, 893, 897 (D. Mass. 1989).

to the government invalidating the federally permitted release defense because the defendant failed to meet its burden to prove the cause of the injury was divisible.[26] Other courts have recognized that impacts of discharges authorized by a permit, where the permittee is in compliance with the permit, are exempt from CERCLA liability.[27]

In sum, the federally permitted release exemption holds considerable potential in many NRD factual settings because of the broad array of federal (and some state) permits,[28] as well as subject areas, it covers. This provision is designed to protect parties from CERCLA liability for releases authorized under other environmental laws. However, courts likely will take a close look at exactly what substances for what time periods were covered by the permitted releases. There are open questions regarding how broad the exemption coverage will be when there are permit exceedances or how the divisibility tests will be applied when multiple pollutants and time periods are involved. However, given the broad array of permits, authorizations and subject areas excluded from CERCLA coverage on this basis, this is a key potential defense for many parties defending NRD claims.

Petroleum Exclusion

CERCLA contains an exemption from NRD liability commonly referred to as the ''petroleum exclusion.'' This exemption is embedded in CERCLA's definition of ''hazardous substance,'' where it states that this term ''does not include petroleum, including crude oil or any fraction thereof'' unless specifically listed or designated under CERCLA or ''natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).''[29] The EPA interprets CERCLA to exclude coverage for crude oil and fractions of crude oil including the hazardous substances (including benzene) that are indigenous in those petroleum substances, as well as other otherwise ''hazardous substances'' added to or mixed with crude oil during the refining process.[30] In contrast, the EPA views substances added to petroleum or resulting from contamination after refining not to be exempt from CERCLA.[31]

Although there isn't any substantial case law analyzing the petroleum exclusion in the NRD context under CERCLA, there are a few cases that generally recognize its applicability.[32] However, since the petroleum exclusion applies to all damage claims from hazardous substances under CERCLA, not just NRD claims, there is well-developed case law on the applicability, burdens of proof and judgment standards for this exclusion that should apply directly to NRD claims brought under CERCLA.

The case law reflects two potentially significant hurdles that a party asserting the petroleum exclusion must overcome. First, a defendant must demonstrate that all of the petroleum-related substances in question qualify for the exclusion. For example, although some substances that are indigenous components and certain refining process additives are covered by the exclusion even though they are defined as hazardous substances,[33] other hazardous substances that are added to petroleum or result from contamination of the petroleum during use aren't part of the petroleum and thus aren't excluded from CERCLA.[34]

Second, the courts have imposed a heavy burden of proof on a defendant asserting the petroleum exclusion to demonstrate that no non-excluded substances associated with the petroleum have caused the damage asserted by the plaintiff. In general, once a plaintiff proves that a release or threatened release of a hazardous substance has occurred, the defendant then has the burden of demonstrating that the petroleum exclusion applies.[35] Thus, in one case involving a plume of substances emanating from a leaking underground storage tank containing petroleum, the court denied the defendant's summary judgment motion based on the petroleum exclusion because the defendant didn't demonstrate that the petroleum it released wasn't commingled with corrosion products from the oxidation of steel in the tank walls (which wouldn't be covered by the exclu-

[26] *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 36 ERC 1505, 36 ERC 1525 (E.D. Cal. 1992); *accord United States v. Freter*, 31 F.3d 783, 39 ERC 1151 (9th Cir. 1994) (defendant has burden to prove federally permitted release defense in criminal CERCLA prosecution).

[27] *E.g.*, *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 57 ERC 1995 (C.D. Cal. 2003), *aff'd*, *Carson Harbor Vill., Ltd. v. Cnty. of L.A.*, 433 F.3d 1260, 61 ERC 1833 (9th Cir. 2006).

[28] There are a few state law permits or areas (such as certain fluid injections into the ground) explicitly covered in the ''federally permitted release'' definition at 42 U.S.C. § 9601(10). However, certain of the specified federal laws also provide that issuance of permits thereunder can be delegated to the states on certain conditions and these state-issued permits should be covered by the exemption. For example, Section 402 of the Clean Water Act, 33 U.S.C. § 1342, specifically authorizes any state to issue NPDES permits if it has been authorized to do so. Discharges made pursuant to these permits should be covered by the ''federally permitted release'' exemption because the definitional language refers to a permit ''under section 402'' of the Clean Water Act without stating that it is limited to such permits issued by a federal agency.

[29] 42 U.S.C. § 9601(14). This exclusion language is repeated in CERCLA's definition of ''pollutant or contaminant.'' 42 U.S.C. § 9601(33).

[30] It is beyond the scope of this article to analyze the many policy and guidance documents issued by the U.S. Environmental Protection Agency over the years relating to the scope of this exclusion. The general summary above is supported by the EPA's website page located at http://emergencymanagement.supportportal.com/link/portal/23002/23016/Article/35040/Specific-substances-excluded-under-CERCLA-petroleum-exclusion.

[31] *Id.*

[32] *See, e.g., Quarles v. United States*, No. 00CV0913CVEPJC, (N.D. Okla., Sept. 28, 2005).

[33] *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 810, 30 ERC 1065 (9th Cir. 1989) (exclusion applies to leaded gasoline).

[34] *Southern Pacific Transp. Co. v. California*, 790 F. Supp. 983, 986, 34 ERC 1188 (C.D. Cal. 1991); *accord United States v. Western Processing Co., Inc.*, 761 F. Supp. 713, 717, 32 ERC 2029 (W.D. Wash. 1991) (petroleum tank bottom sludge is covered by CERCLA because it contains corrosion products from the oxidation of steel in the tank walls). It also is well accepted that even a *de minimis* amount of a hazardous substance in otherwise excluded petroleum can lead to liability. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720, 36 ERC 1321 (2d Cir. 1993).

[35] *E.g., Johnson v. James Langley Operating Co., Inc.*, 226 F.3d 957, 963 nn. 3 and 4, 51 ERC 1502 (8th Cir. 2000).

  ER ISSN 0013-9211

sion).[36] A steady stream of cases has imposed this proof burden on many CERCLA defendants claiming coverage by the petroleum exclusion.[37]

The exclusion of petroleum from NRD coverage under CERCLA partially is offset by the NRD liability provisions in the Oil Pollution Act (OPA)[38] and Clean Water Act.[39] The OPA is designed to address and respond to oil pollution incidents that cause discharges to navigable waters of the U.S. Specifically, ''each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone'' is liable for certain specified types of damages.[40] These damages include natural resource damages, which are defined as ''[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable cost of assessing the damage. . . .''[41]

Similarly, the Clean Water Act provides that a person will be liable for discharges of ''oil or hazardous substances into or upon the navigable waters of the U.S., adjoining shorelines, or into or upon the waters of the contiguous zone. . . .''[42] The act specifically authorizes recovery of ''any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance'' in violation of the act's prohibition.[43]

The geographic coverage of OPA and Clean Water Act NRD claims is significantly narrower than for CERCLA coverage. In general, CERCLA covers a release or threatened release of a hazardous substance from a facility that results in injury to a natural resource wherever it is located. In contrast, the OPA and Clean Water Act only cover discharges to navigable waters of the U.S. and adjacent shorelines and designated ocean areas. The OPA term ''navigable waters'' is defined as ''the waters of the United States, including the territorial sea.''[44] This is the same formulation used in the Clean Water Act and has been expansively defined to include not just oceans but also a large variety of lakes, rivers, streams, ephemeral discharges, vernal pools and other surface water features.[45] Significantly, the term doesn't include groundwater.

In sum, CERCLA prohibits the recovery of NRD for injuries to natural resources caused by defined petroleum and natural gas substances. However, NRD liability can exist for petroleum if it involves a discharge to defined ''navigable waters'' but not if it causes injury to groundwater or other natural resources that don't qualify as a jurisdictional waters or wetlands under the OPA or Clean Water Act.

Conclusion

The three defenses/exemptions to CERCLA NRD claims addressed in this article arose from congressional attempts to eliminate or harmonize duplicative coverage under various environmental laws or allocate government responsibility and party liability among overlapping legal regimes. Although this goal is laudable, the statutory wording lacks important specifics and the interpretive case law is sparse, particularly for the NEPA commitment of resources and ''federally permitted release'' exemptions. Nonetheless, all of these defenses and exemptions can play prominent roles in the defense of CERCLA NRD actions, particularly for sites where a variety of permitted or NEPA-reviewed activities have occurred over time.

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The opinions in this article do not represent the views of Bloomberg BNA, which welcomes other points of view.

[36] *Marrero Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 597 F. Supp. 2d 272, 289-90, 2009 BL 26243 (D. Puerto Rico 2009).

[37] *See, e.g., Members of the Beede Site Group v. Federal Home Loan Mortgage Corp.*, 968 F. Supp. 2d 455, 77 ERC 1811, 2013 BL 252679 (D.N.H. 2013) (since the normal use of engine oil adds hazardous substances outside the petroleum exclusion and the defendant didn't provide any evidence that the engine oil it deposited at the site didn't contain such contaminants, plaintiff is granted summary judgment); *Dartron Corp. v. Uniroyal Chem. Co., Inc.*, 917 F. Supp. 1173, 1184, 42 ERC 1717 (N.D. Ohio 1996) (a party that couldn't prove its oil didn't contain hazardous substances because it failed to test the oil prior to shipping is liable under CERCLA).

[38] 33 U.S.C. § § 2701-2761.

[39] 33 U.S.C. § § 1251-1387.

[40] 33 U.S.C. § 2702(a).

[41] 33 U.S.C. § 2702(b)(2)(A).

[42] 33 U.S.C. § 1321(b)(1).

[43] 33 U.S.C. § 1321(f)(4).

[44] 33 U.S.C. § 2701(21).

[45] The definition of ''navigable waters'' in the Clean Water Act has been a constant source of legal decisions at all levels of the federal court system over the last 20 years and the subject of countless EPA guidance and policy documents.