Powerful Defenses and Exclusions to CERCLA Natural Resource Damages Claims

This article provides an analysis of four key defenses associated with natural resource damages suits under the Comprehensive Environmental Response, Compensation, and Liability Act: the "wholly before" 1980 defense; the statute of limitations; lack of standing for trustees to recover for injuries to private resources caused by releases of hazardous substances and, conversely, for private parties to recover for injuries to natural resources; and the failure of a trustee to provide notice of intent to sue.

231.2711 Introduction*

Since its enactment on Dec. 11, 1980, the Comprehensive Environmental Response, Compensation, and Liability Act has been used to identify, address and resolve some of the most complex environmental issues associated with contaminated sites throughout the U.S. While cost recovery and contribution actions under Sections 107(a) and 113(f) of CERCLA seem to get the most attention, the "quieter" side of CERCLA, Section 107(f), provides for recovery of damages to "natural resources."[1]

By some counts, there are up to 20 potential defenses and exclusions to natural resource damages (NRD) claims that can be asserted under CERCLA. Unlike the multitude of responsible parties who may assert cost recovery and contribution actions, claims to recover natural resource damages can only be asserted by "trustees," which include federal and state stewards of the natural resources.[2]

CERCLA, perhaps the most powerful environmental statute in the U.S. today, establishes a strict, joint, several and potentially retroactive liability scheme. Specifically, the natural resources liability provision of CERCLA, Section 107(a)(4)(C), provides that responsible parties shall be liable 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."[3]

Where natural resources have been injured, Section 107(f)(1) provides that such liability shall be to the U.S., states and Indian tribes for those resources that are owned by, held in trust by, appertain to or otherwise under the control of the trustees. This article will address four key defenses associated with NRD suits brought under CERCLA Section 107(f) including: (1) the "wholly before 1980" defense; (2) the statute of limitations; (3) lack of standing for trustees to recover for injuries to private resources caused by releases of hazardous substances and, conversely, for private parties to recover for injuries to natural resources; and (4) the failure of a trustee to provide notice of intent to sue.

(a) Defenses[4] to Liability

(1) "Wholly Before" Dec. 11, 1980

Section 107(f)(1) provides a prominent exclusion from NRD liability based upon the time that a release of hazardous substances and damages occur:

> There shall be no recovery . . . [for CERCLA NRD] where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.[5]

This "wholly before" defense has been the subject of several important cases because many sites targeted by trustees contain historic contamination that was released into the environment well before Dec. 11, 1980 (sometimes referred to as the "enactment date"). Before addressing the case law, it is important to note that this NRD exclusion requires that both the "release"[6] and "damages for injury or loss of natural resources"[7] occurred wholly before the enactment date.

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[1] The term "natural resources" is broadly defined to include resources such as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies..." 42 U.S.C. § 9601(16). These natural resources are held in trust for the public.

[2] The president designates federal officials who act on behalf of the public as trustees for natural resources, and the governor of each state designates the state officials who may act as trustees. 42 U.S.C. § 9607(f)(2)(A) and (B).

[3] *Id.* at § 9607(a)(4)(C).

[4] We use the term "defenses" in this article to include both legal defenses and exclusions.

[5] 42 U.S.C. § 9607(f)(1).

[6] The term "release" under CERCLA has an extremely broad definition and includes "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" any hazardous substances. *Id.* at § 9601(22). The term "release" sets out several exclusions as well.

[7] *Id.* at § 9601(6).

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CERCLA defines the term "release" broadly to include a wide variety of discharges, spills, leaching and disposal activities.[8] Moreover, natural resource damages are defined as "damages for injury or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss resulting from such a release."[9] However, this definition isn't particularly helpful in the context of the wholly before defense as it does little to explicate the timing issue with respect to the "release" or "injury" and corresponding "damages." Further, as discussed below, several courts also have expanded this concept by creating liability for what have been called "re-releases."

The two early leading cases rejecting the wholly before defense are *In re Acushnet and New Bedford Harbor Proceedings*, ("*Acushnet*") and *Coeur d'Alene Tribe v. Asarco Incorporated* ("*Coeur d'Alene*").[10]

Acushnet involved PCB contamination of the New Bedford Harbor in Massachusetts. The district court found that "damages" weren't the same as an "injury"—rather, that "damages" in the NRD context means "the monetary quantification stemming from an injury."[11] In the *Acushnet* court's view, damages occurred when the property owner or other entity incurred expenses due to the injury to the natural resources, and in this case when the owner sought to develop the waterfront of New Bedford Harbor.[12]

Although the court acknowledged that damages caused by pre-enactment releases aren't recoverable if they don't continue after 1980, it held that incremental damages caused after the enactment date are recoverable regardless of whether the original releases occurred before the enactment date.[13] Based on this analysis, the court found that even though almost all of the original PCB releases occurred before the enactment date, there were releases from rusting capacitors after Dec. 11, 1980, that were indivisible from earlier releases, and therefore led to liability for all the releases.[14] Further, the *Acushnet* court ruled that the burden of demonstrating application of the wholly before defense lies with the NRD defendant.[15] Thus, where the relevant releases and/or damages straddle the 1980 divide, *Acushnet* provides that trustees can recover for any nondivisible damages in their entirety, or to the extent damages are divisible, for those damages occurring after the enactment date.[16]

The other leading case in this area, *Coeur d'Alene,*[17] involved an NRD action against mining companies resulting from approximately 100 years of mining impacts in an Idaho river basin. The court made several findings that were favorable for the use of the wholly before defense, including that direct discharges of mineral tailings to waterways ended before the enactment date; releases from tailings ponds, waste rock piles and adits were minimal since that date; and environmental conditions had improved since the 1930s.

Nonetheless, the court also found there were small amounts of post-CERCLA-enactment releases. More significantly, it found that passive migration of contaminants (with no further human contact) caused by leaching of pre-enactment tailings constituted a "re-release" of hazardous substances that occurred post-enactment and thus could be the subject of liability.[18] The court also adopted the "damages" analyses of *Acushnet* and other courts, and held that "a significant amount of the damages occurred post-enactment when the federal government and the Tribe began studying the 'injury' caused by the mining industry and how to clean up the injury to the natural resources."[19]

A contrary analysis of the wholly before defense was articulated in *Montana v. Atlantic Richfield Co.*[20] There, Montana brought an NRD action based on mining and mineral processing activities by ARCO and its predecessors in the Clark Fork River Basin. The court found that all smelter operations had ceased before the enactment date, but that "some re-releases" occurred due to winds re-depositing hazardous substances that originally were in the soil. However, the court found no evidence of new or

[8] *Id.* at § 9601(22).
[9] *Id.* at § 9607(a)(4)(C).
[10] *In Re Acushnet & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 30 ERC 1845 (D. Mass. 1989); *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 57 ERC 1610 (D. Idaho 2003).
[11] *Acushnet* at 681-82. In a later insurance case, the Ninth Circuit appeared to adopt the *Acushnet* court's view that "damages" is the "monetary quantification stemming from an injury" and criticized the lower court's equating of injury and damages. *See*, *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1515, 34 ERC 1604 (9th Cir. 1991).
[12] *Acushnet* at 683.
[13] *Id.* at 679.
[14] *Id.* at 685.
[15] *Id.* at 687.
[16] *Id.* at 685 (emphasis added).
[17] 280 F. Supp. 2d 1094, 57 ERC 1610.
[18] *Id.* at 1112-13.
[19] *Id.* at 1113.
[20] 266 F. Supp. 2d 1238, 56 ERC 1905 (D. Mont. 2003).

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additional injuries from any releases, pre- or post-enactment.

Montana urged the court to adopt the *Acushnet* analysis of the wholly before defense and argued that NRD does not occur until a trustee incurs expenses to restore the resource or restoration costs are quantified by the court. However, the court found this interpretation unpersuasive. Instead, the court determined that "damages occur, even though the full extent of damages may not be quantified, when the injury takes place."[21] Based on this analysis, the court held that the NRD recovery was completely barred by the wholly before defense.[22]

One case that provides some additional gloss on the wholly before defense is the decision in *United States v. Shell Oil Co.*[23] The *Shell* court addressed the concept of "stable sites" in connection with a CERCLA action arising from hazardous waste contamination at the Rocky Mountain Arsenal in Colorado. While the court found that CERCLA generally authorizes the recovery of CERCLA response costs incurred before or after the enactment date, it construed the wholly before exclusion to preclude recovery where (i) both the release and damages occurred prior to the enactment date, and (ii) the sites qualify as "stable sites"—"that is, the environment, though damaged, will not deteriorate further."[24]

The court opined "in a world with unlimited funds, such damaged resources could be reclaimed, but Congress apparently decided to utilize the limited resources of the [Superfund] created by CERCLA to clean up the thousands of sites, such as the Rocky Mountain Arsenal, which are not stable."[25] Ultimately, in *Shell Oil*, the court found the Arsenal sites were "not stable" and presented an imminent danger to public health and the environment. Therefore, cost recovery under CERCLA Section 107(a) was not barred by the wholly before exclusion.[26]

In the absence of circuit court or U.S. Supreme Court guidance interpreting the wholly before exclusion, parties would be well advised to collect historical records, data and information that can demonstrate not only when releases actually occurred, but also when each of the effects of the releases to the environment occurred, and whether and when any expenses were incurred relating to each of the effects of the injury.

In addition, parties and practitioners should consider the possibility of re-releases of hazardous substances (such as by aerial deposition or re-suspension of sediment), whether such re-releases resulted in new injury, and whether such re-releases or the injuries therefrom, if any, may have occurred before or after Dec. 11, 1980. The *Montana* court's holding establishing an earlier "trigger" for the running of the statute of limitations provides strong support to potentially responsible parties (PRPs) to make greater use of the "wholly before" defense.

(2) Statute of Limitations

Prior to the 1986 Superfund Amendments and Reauthorization Act (SARA), CERCLA did not include a specific statute of limitations for NRD claims. Congress remedied this omission with the addition of Section 113(g), which imposes limitation periods for all CERCLA NRD actions, except those brought by tribes or against the superfund.[27] Under current law, NRD claims must be filed within three years after the later of either (i) the date of discovery of the loss and its connection with the release in question, or (ii) the date that the NRD regulations were promulgated or Dec. 11, 1980.[28] Given that the regulations were promulgated over two decades ago (rendering this second prong moot), for all intents and purposes the limitation period is the "date of discovery of the loss and its connection with the release."

The key factual question in these statute of limitations claims is what is the date of the "discovery" of the loss and what is its connection with the release in question. Determining the date of discovery of the loss may be a significant challenge because there are no regulations or guidelines about what level of information must be known or reasonably knowable before the "discovery" has occurred. In one of the more recent NRD cases out of the Virgin Islands, the court used a constructive knowledge standard and held that under Section 113(g)(1), the statute begins to run when the trustee either "discovered or should

[21] *Id.* at 1243.
[22] *Id.* at 1242.
[23] 605 F. Supp. 1064, 22 ERC 1473 (D. Colo. 1985).
[24] *Id.* at 1076.
[25] *Id.* at 1064.
[26] *Id.* at 1076-77. A few months after the District Court decision was issued in *Shell Oil*, the Eighth Circuit issued a decision that endorsed and quoted from this "stable site" analysis. *See*, *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 25 ERC 1385 (8th Cir. 1986).

[27] 42 U.S.C. § 9613(g)(1). *See also*, *Idaho v. Howmet Turbine Component Co.*, 814 F.2d 1376, 25 ERC 1864 (9th Cir. 1987) (discussing the applicable statute of limitation period).
[28] 42 U.S.C. § 9613(g)(1)(A)—(B). Case law has established that the date of promulgation of the referenced regulations is December 11, 1980. *See*, *e.g*, *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 42 ERC 2089 (D.C. Cir. 1996).

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have discovered any loss to natural resources and its connection to the release in question."[29]

Whether a court applies a strict "actual knowledge" or a constructive "should have known" standard, it will be critical for a defendant to gather information on when a release was disclosed to the public or a trustee. Similarly, defendants should search for information as to when the trustee or the public became aware of the injury to a natural resource and whether that awareness should have put the trustee on notice that the injury may have been caused by a release of hazardous substances.

Section 113(g)(1) provides for a different and longer limitations period for: (i) a facility on the National Priorities List ("NPL Site"); (ii) a federal facility under CERCLA Section 120; and (iii) any facility or vessel at which remedial action is underway or otherwise scheduled. For such sites, any CERCLA or NRD claim must be commenced within three years "after the completion of the remedial action (excluding operation and maintenance activities)..."[30] The critical information a defendant should gather here relates to the actual date that the remedial work was completed and the date that the Environmental Protection Agency or other relevant agency formally declared that the remedial work was done.

Although it isn't clear which of the two dates a court would apply in evaluating this defense, if we assume the actual date of completion and the date "completion" is formally declared are different, then it would be in a defendant's interest to argue that the statute started running on the actual date of completion because that would be the earlier of the two dates. However, a counterargument could be made that the statute shouldn't commence running until an agency makes a formal declaration of completion because that would put a trustee on notice, whereas the actual date of completion might not be publicly disclosed.

In addition, certain trustees of natural resources enjoy a longer period in which to bring NRD claims under CERCLA. Section 126(d)(2) provides that no action by an Indian tribe can be barred until the later of the expiration of the applicable period, or two years after the U.S., as trustee for the tribe, gives written notice to the tribe that it won't present a claim.[31] Thus, in addition to the records a defendant should gather relevant to the statute of limitations periods discussed above, where one or more tribes is a trustee, a defendant should look for records in which the EPA notified the tribe in writing that it won't seek NRDs with respect to a particular injury.

(3) No Recovery by Private Parties or for Injuries to Purely Private Resources

Private parties may not recover NRDs. CERCLA provides that only trustees may recover NRDs. However, trustees may not recover damages for injuries to purely private resources.

One of the earliest cases to define the contours of private party claims under CERCLA concerned groundwater that was subject to withdrawal by a private water utility.[32] The utility (Artesian) sought to recover damages for its loss of the ability to withdraw up to 3.85 million gallons per day (MGD) of groundwater after the state of Delaware curtailed its withdrawals to 2.0 MGD as a result of contamination of groundwater in the vicinity of Artesian's well field.[33] The court determined that Artesian's loss of use claim was essentially an NRD claim and that groundwater was a "natural resource" under CERCLA belonging to the state of Delaware.[34] The court thus rejected Artesian's claim because CERCLA doesn't authorize private parties to assert claims for damages for injuries to a natural resource belonging to the state.[35]

Whereas *Artesian* addressed whether a private party could recover NRDs for injuries to resources held in trust, *Ohio v. Department of Interior*[36] addressed the fundamental issue of whether NRDs are available for injuries to resources owned by private parties. The case involved a challenge to the Department of Interior's (DOI) 1986 (as amended in 1988) regulations specifying protocols for conducting "Type B" NRD assessments.[37] Among other things, petitioners argued that the regulations limiting damages to natural resources owned by federal, state, local or foreign governments impermissibly excluded

[29] *Comm'r of Dept. of Planning and Natural Res. v. Century Alumina Co.*, Civil Action No. 05-62 (D. V.I. July 13, 2010). *See also*, *Montrose v. California,* 883 F. Supp. 1396, 1405, 42 ERC 1144 (C.D. Cal. 1995).

[30] 42 U.S.C. § 9613(g)(1).

[31] *Id.* at § 9626(d).

[32] *Artesian Water Co. vs. New Castle County*, 851 F.2d 643, 27 ERC 2064 (3d Cir. 1988).

[33] *Id.* at 645, 647-48.

[34] *Id.* at 649-50.

[35] *Id.*; *see also*, *Lutz v. Chromatex*, 718 F. Supp. 413, 419, 29 ERC 2045 (M.D. Pa. 1989) (dismissing a claim by private parties for the loss of use of their drinking water wells because claim was for NRDs under CERCLA).

[36] 880 F.2d 432, 30 ERC 1001 (D.C. Cir. 1989).

[37] *Id.* at 440.

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recovery for injuries to natural resources owned by private parties.[38] Petitioners claimed that Section 107(f)(1) of CERCLA established liability for NRDs for injuries to "natural resources within a state," *i.e.*, geographically within a state's boundaries, including privately owned resources.

The court rejected this argument on several grounds, including because "natural resources" are defined under Section 101(16) of CERCLA as 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, [or] any Indian tribe. . ."[39] The court also examined CERCLA's legislative history, which indicated that Congress considered and rejected formulations of "natural resources" that would have covered private property.[40]

The *Ohio* court also noted that, based on the definition of "natural resources" in Section 101(16), NRD liability may attach to privately held resources where the federal or state government has sufficient management or control of the resource.[41] But, "damage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of the statute."[42]

The court remanded the administrative record to DOI to clarify whether the regulations extended liability to privately owned resources in which there was "a substantial degree of government regulation, management or other form of control over the property."[43] And when DOI issued new NRD regulations in 1994, the agency clarified that privately owned resources could constitute a natural resource under CERCLA if the resource was sufficiently related to the government trustee through management, trust or control, while noting that each situation would have to be addressed on a case-by-case basis[44]

The U.S. Court of Appeals for the D.C. Circuit revisited DOI's NRD regulations in *National Association of Manufacturers v. U.S. Department of Interior*.[45] Here, the court addressed a challenge to DOI's "Type A" NRD assessment procedures. Specifically, the Association challenged a portion of the regulations providing guidance to determine the amount of lost economic rent for fishing and hunting, on the basis that such are "private" injuries because commercial ventures utilizing those resources had not previously been charged the "full value of their entitlement to fish and hunt" before.[46]

The court rejected this argument, stating that "[t]he fact that commercial hunting and fishing operations are not presently paying something (or at least more) for the privilege to exploit public fish and game stocks does not mean that they have converted the stocks into private property. Rather, the public custodians of the resources have determined that the public interest is best served by refraining from charging commercial enterprises for harvesting the public fish and game stocks."[47] Thus, this case further cemented the principle that NRDs are not recoverable for injuries to "purely private" resources.

More recently, the District Court of the Virgin Islands has evaluated claims that certain resources were purely private and therefore exempt from NRD liability in two decisions concerning a lawsuit brought by the trustee for the Virgin Islands against the past and present owners of industrial property on which alumina and oil refineries operated.[48] The trustee's claims concerned injuries to the surface water, groundwater and submerged lands on or underlying property that Harvey Alumina Virgin Islands, Inc. (Harvey), purchased from the government of the Virgin Islands in 1962.

In *Century Alumina I*, the court addressed whether the trustee could recover NRDs for injuries

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[38] *Id.* at 459.

[39] *Id.* at 459 (citing 42 U.S.C. § 9601(16)).

[40] *Id*. at 460.

[41] *Id*.

[42] *Id*.

[43] *Id.* at 461. The *Ohio* court's holding was followed in *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469-70, 38 ERC 1685 (10th Cir. 1993), in which a CERCLA claim for NRDs for injuries to privately held property was rejected by the court.

[44] The DOI's full statement is as follows:

> Not only is development of a definition of the privately owned resources covered by the regulations not required by *Ohio v. Interior*, it is also impractical. The question of whether a trustee official can assess damages for a particular natural resource is governed by CERCLA. However, CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control. These relationships are created by other Federal, State, local, and tribal laws. In light of the diversity of these other laws, the Department believes that the determination of whether a particular privately owned resource constitutes a natural resource under CERCLA is best addressed on a case-by-case basis.

Natural Resource Damage Assessments, 59 Fed. Reg. 14,262, 14,268 (Mar. 25, 1994).

[45] 134 F.3d 1095, 45 ERC 1929 (D.C. Cir. 1998).

[46] *Id.* at 1113.

[47] *Id.* at 1114.

[48] *See, e.g., Comm'r of Dept. of Planning & Natural Res. v. Century Alumina Co.*, Civil Action No. 05-62 (D. V.I., March 11, 2011) ("*Century Alumina I*"); *Comm'r of Dept. of Planning & Natural Res. v. Century Alumina Co.*, Civil Action No. 05-62 (D. V.I., May 24, 2012) ("*Century Alumina II*").

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to the water and underlying land in the Allocroix Channel. On summary judgment, a defendant argued that the trustee couldn't recover damages to the natural resources of the Channel because the defendant owned the Channel such that it was "not a natural resource 'belonging to' or 'managed by, held in trust by, appertaining to, or otherwise controlled by' " the Virgin Islands.[49]

The court analyzed the history of property conveyances associated with the Channel to determine whether the water and/or land in the Channel were private resources or natural resources. The court ruled that Harvey only acquired the rights to land in the Channel, but not the water on and above the land in the Channel.[50] As such, the court held that the trustee couldn't recover NRDs for injuries to the land in the Channel that Harvey acquired, because that was a purely private resource.[51] However, the court denied the defendant's motion for summary judgment on its claim of ownership over the water in the Channel, leaving open the resolution of the trustee's claim for NRDs for injuries to the water.[52]

In the subsequent *Century Alumina II* decision, the court addressed whether the Virgin Islands could recover NRDs for injuries to groundwater resources. Lockheed, a defendant and former owner of the alumina refinery, sought summary judgment on the grounds that it wasn't liable under CERCLA for injuries to groundwater because the groundwater beneath the alumina refinery was privately owned. According to Lockheed, the Virgin Islands had conveyed all rights to the land and the groundwater beneath the surface when it conveyed the parcel to Harvey, the original owner of the property.[53]

To determine whether the groundwater was a private resource or a "natural resource" under CERCLA, the court followed DOI's guidance in the 1994 NRD assessment regulations to determine "whether and to what extent the water beneath the alumina property is groundwater 'belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by' . . . the Virgin Islands' natural resources trustee."[54] The court determined that the water pollution control laws passed by the Virgin Islands were a reasonable exercise of its police powers that applied to groundwater and authorized the agency serving as the natural resource trustee to regulate groundwater pollution.[55]

It further held that the law didn't impermissibly interfere with the property rights granted to Lockheed's predecessor because the law didn't impair Lockheed's right to use the groundwater and because Lockheed wasn't granted to the right to pollute the groundwater.[56] Based on the limited rights conveyed to Lockheed and the Virgin Islands' significant level of management over groundwater quality, the court held that the groundwater was a natural resource under CERCLA.[57]

Similar issues arise when courts must decide how to apportion a damages award for injuries to a particular natural resource where multiple governments and tribes could be considered to be co-trustees over the resource. In *Coeur d'Alene*,[58] the court stated that to recover NRDs, the governmental or tribal entity must first have "exercised trusteeship over the natural resource."[59] This is a question of both law and fact that "depend[s] on who the resource belongs to, who it is managed by, who controls the same, and how the resource appertains to other resources."[60] "It is a question of what is done in practice, not the underlying 'statutory authority,' that courts must look to."[61] The court held that "the only feasible way compensate co-trustees and avoid a double recovery or unjust enrichment to one trustee at the expense of another is to award damages in the ratio or percentage of actual management and control that is exercised by each of the various co-trustees."[62]

These cases provide guidance on the factors that courts will utilize to determine if a privately owned resource is sufficiently related to a government trustee through management, trust or control to be considered a "natural resource" under CERCLA. One factor is the degree of government regulation of the resource. A trustee's claim for an NRD award is strengthened where the resource is subject to government regulation as a matter of common law principles or specific statutory authority. Another factor is the nature of the private ownership interest. Does the private owner have absolute dominion over the resource alleged to have been injured, or is the owner's right limited to use but not pollution of the re-

[49] *Century Alumina I*.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Century Alumina II*.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] 280 F. Supp. 2d 1094, 57 ERC 1610.
[59] *Id.* at 1115.
[60] *Id.*
[61] *Id.* at 1116.
[62] *Id.*

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source? A defendant should gather information, such as a grant deed, that specifies the property interest that the owner took title to.

(4) No Notice of Intent to Sue

CERCLA Section 113(g)(1)(i) requires that a trustee provide 60-days notice to the EPA and the PRP(s) before filing an NRD claim with respect to three classes of facilities: (i) any facility listed on the NPL; (ii) any federal facility; and (iii) any vessel or facility at which a remedial action is "otherwise scheduled."[63] The DOI regulations reiterate the 60-day notice requirement.[64]

The 60-day notice requirement for NRD claims was added to CERCLA as part of the SARA amendments in 1986 to resolve an ambiguity regarding the application of Section 112(a). A person making a claim against the fund is required by Section 112(a) to provide PRPs with 60 days notice before filing the claim. Prior to the enaction of Section 113(g)(1)(i), in a number of cases PRP defendants argued they were entitled to receive 60-days notice under Section 112(a) before any claims were filed against them under Section 107, including claims for NRDs.

Some courts held that Section 112(a) was a prerequisite to filing a claim against the fund but not a PRP,[65] while at least one court held that failure to provide a PRP with 60-days notice was a jurisdictional bar warranting dismissal of the Section 107 claim.[66] SARA's creation of a specific 60-day notice requirement applicable to claims for NRD filed by a trustee against a PRP under Section 113(g)(1)(i) clarified that the 60-day notice requirement in Section 112(a) pertains solely to claims against the fund.

Case law on the 60-day notice requirement in Section 113(g)(1)(i) is limited. The only case to address the notice requirement directly was one of the many decisions out of the District Court of the Virgin Islands.[67] There, defendants alleged that the trustee failed to provide EPA with a notice of intent to sue 60 days prior to filing suit.[68] The court rejected this argument because neither the refinery nor the alumina facility were among the three classes of facilities identified in Section 113(g)(1).[69] As such, the 60-day notice requirement didn't apply.[70]

The threshold factual question with respect to this defense is whether the facility is one of the three types listed in the statute. Whether the facility is listed on the NPL should be straightforward to determine. As to whether a facility is a "federal facility," the key facts relate to whether the facility is or was owned or operated by a department, agency or instrumentality of the U.S.[71]

For any other type of facility, the information to document relates to whether a remedial action has been scheduled at that facility.[72] Although it is not clear when a remedial action is "otherwise scheduled," relevant information a defendant should consider gathering include the date that the Record of Decision for the Remedial Investigation/Feasibility Study was published, dates that the Remedial Design/Remedial Action process started, when the related work plans were completed, and the first time that the start-date for the remedial action at the facility was identified in a record. Related to the foregoing, it is important to gather information as to when the trustee was on notice, or should have been on notice, that the events causing the remedial action to be scheduled occurred.

On the assumption that a defendant can meet its burden to demonstrate that the facility is one of the three listed in Section 113(g)(1), the next key fact to document is whether the trustee provided notice to

[63] *See* 42 U.S.C. § 9613(g)(1), which provides in part:

> With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled . . . [no] action for damages under this chapter with respect to such a vessel or facility [may] be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit. . . .

[64] *See* 43 C.F.R. § 11.91(d) ("The authorized official should allow at least 60 days from receipt of the demand by the potentially responsible party, with reasonable extensions granted as appropriate, for the potentially responsible party to acknowledge and respond to the demand, prior to filing suit. In cases governed by Section 113(g) of CERCLA, the authorized official may include a notice of intent to file suit and must allow at least 60 days from receipt of the demand by the potentially responsible party, with reasonable extensions granted as appropriate, for the potentially responsible party to acknowledge and respond to the demand, prior to filing suit.").

[65] *See*, *Idaho v. Howmet Turbine Component Co.*, 814 F.2d 1376, 1379-80, 25 ERC 1864 (9th Cir. 1987); *In re Acushnet River & New Bedford Harbor*, 675 F. Supp 22, 26-27, 26 ERC 2088 (D. Mass. 1987).

[66] *See*, *State of Idaho v. Bunker Hill Co.*, 634 F. Supp. 800, 24 ERC 1533 (D. Id. 1986).

[67] *Comm'r of Dept. of Planning and Natural Res. v. Century Alumina Co.*, Civil Action No. 05-62 (D. V.I., Oct. 31, 2008).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] 42 U.S.C. § 9620(a)(1).

[72] A "remedial action" is a long-term cleanup designed to prevent or minimize the release of hazardous substances and to reduce the risk and danger to public health or the environment. *Id.* at § 9601(24).

[§231.2711(a)(4)]

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the EPA of its intent to file an NRD claim with respect to the facility, and if so, when.

(b) Conclusion

The law interpreting the existence and breadth of exclusions and defenses to CERCLA NRD claims is still relatively underdeveloped. Each of the four defenses discussed in this article, (1) the "wholly before 1980" defense; (2) the statute of limitations defense; (3) the lack of standing for trustees to recover for injuries to purely private resources or for private parties to recover for injuries to natural resources; and (4) the failure of a trustee to provide notice of intent to sue, could be brought to bear to thwart or substantially limit an NRD claim, depending on the facts of the case.

Of the four defenses, whether the trustee provided 60 days notice of intent to sue seems to be the most straightforward, although it may be of infrequent application and rarely utilized given its narrow scope. The other three defenses are more fact-specific, and are therefore likely to be grist for future judicial decisions.

If the *Century Alumina* cases are a harbinger of things to come, opportunities to rely on the statute of limitations "date of discovery" defense will be expanded as other courts adopt the "should have known" standard. Conversely, defendants should be concerned if future decisions lower the bar on the degree of government management or control necessary to transform a private resource into a natural resource susceptible to NRD claims.

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