

# The Gorilla in the Closet: Natural Resource Damages

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# Deepwater Horizon

April 20, 2010



# Deepwater Horizon

## Consent Decree – April 4, 2016

- ✓ \$5.5 billion civil penalty (plus interest)
- ✓ \$8.1 billion in natural resource damages
- ✓ \$700 million for adaptive management and unknown harm
- ✓ \$600 million for other claims, including NRDA costs
- ✓ \$4.9 billion to Gulf States in parallel settlement

Largest single entity settlement in federal enforcement history.



# Overview of Natural Resource Damages



- **Theory of most environmental laws:**  
Prevent environmental harm or clean it up.
- **Theory of natural resource damage laws:**  
Cleaning up contamination does not fully address the harm.
- **Public trust doctrine:**  
Natural resource damage claims limited to “trustee” of the resource.

# What Are Natural Resources?



## ➤ Five Federal statutes provide for recovery for NRD:

1. CERCLA , 42 USC 9607(f)
2. Clean Water Act, 33 USC 1321(f)
3. Oil Pollution Act of 1990, 33 USC 2702(a), (b)(2)
4. National Marine Sanctuaries Act, 16 USC 1443(a)(1)
5. Park System Resource Protection Act, 16 USC 191j

## ➤ Natural resources focus on biological resources:

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)



## 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)





# Nature of NRD Claims

- **Industrial sites/chronic releases**
- **Spills and acute releases**
- **Impacted media, wildlife or biota**
- **Restoration or replacement**
- **Interim or permanent loss of use**



## What are the Damages?

“[Natural resource] damages are calculated by adding

- (1) the cost of restoring [to baseline], rehabilitating, replacing or acquiring the equivalent of, the damaged resources,
- (2) the diminution in value [or loss of use] of those natural resources pending restoration, and
- (3) the reasonable cost of assessing those damages.”



*United States v. Viking Resources, Inc.*

607 F. Supp. 2d 808, 830-831 (S.D. Tx. 2009)

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.



# Natural Resource Damage Assessments

## Under DOI (CERCLA NRD) Regulations – Four Phases:

1. Pre-assessment Screening Phase - 43 CFR §§ 11.20 et seq.
2. Assessment Planning Phase - 43 CFR §§ 11.30 et seq.
3. Assessment Phase - Type A - 43 CFR §§ 11.40 et seq.  
or  
Assessment Phase - Type B - 43 CFR §§ 11.60 et. seq.
4. Post-Assessment Phase - 43 CFR §§ 11.90 et seq.



# Overview of Natural Resource Damage Assessments (“NRDAs”)

- 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

# Hot Issues Concerning Assessments

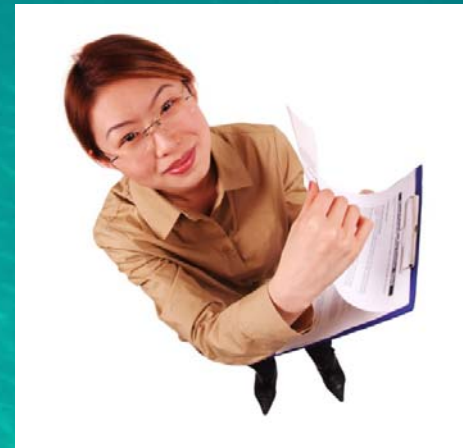


- Transparency in the Process
  - Building an Administrative Record
    - Managing Public Expectations



# NRD REGIMES: The Rebuttable Presumption

- Found in DOI Regulations, [43 CFR § 11.90](#)
- Effect – damage assessment and determination rebuttably presumed correct under CERCLA and CWA
- **Essential Requirements**
  - ...performed by Federal or State official (not other trustees)
  - ...in accordance with Part 11 of 43 CFR
  - ...supported by a complete administrative record
- **Often contemplated – seldom if ever used**



# Understanding the NRD Process



- (1) **Restoration** – the dollar cost to restore to baseline, or to rehabilitate or replace;
- (2) **Diminution/interim loss of use** – the use value and the non-use values; and/or
- (3) **Cost of assessing** – costs to trustees to respond to release and assess the damages.

43 CFR §§ 11.80-84

# Restoration and Loss of Use

## Restoration

- Valuation of cost to restore, rehabilitate, replace or acquire equivalent resources shall include direct and indirect costs;

## Interim Loss of Use

- Trustees may recover damages for the public's lost use (consumptive) and non-use (non-consumptive) values, provided such can be readily calculated.
- Non-use damage calculation seeks to value the resource outside its usefulness to people.





# Calculating the NRD

## Methodologies must:

- Be feasible and reliable;
- Be reasonable in cost;
- Avoid double recovery; and
- Be cost-effective.

43 CFR § 11.83



# NRD REGIMES: 20 Defenses to NRD Claims

1. Conflict Preemption
2. Petroleum exclusion (as to CERCLA only)
3. Releases and damages wholly before December 11, 1980 – CERCLA 9607(f)(1)
4. Claim Premature – before EPA Selection of Final Remedy – CERCLA 9613(g)
5. Impermissible Attack on a CERCLA Remedy – CERCLA 9613(h)
6. Lack of standing to sue on behalf of injuries to private party rights
7. No punitive damages – *Ohio v. Dept. of Interior*, 880 F.2d 432 (D.C. Cir. 1989)
8. The baseline defense – liability only for loss of service but for defendant's release
9. Failure to Follow Applicable NRDA Regulations
10. No attorneys fees under CERCLA (CWA? OPA?) NRD
11. No 60 day Notice/ Intent to Sue – NPL Sites/CERCLA Remedy – CERCLA 9613(g)
12. The applicable statutes of limitation – see, e.g. CERCLA 9613(g)
  - \* non NPL sites - 3 yrs from CERCLA regs or discovery of loss and its connection with the release
  - \* NPL sites - 3 yrs from after completion of remedy (x O+M)
13. No double recovery – CERCLA 9607(f)(1)
14. Acts of God, war, act or omission of third party – CERCLA 9607(b)(3)
15. Federally permitted release – CERCLA 9607(j)
16. Identified irreversible and irretrievable commitment of resources – CERCLA 9607(f)(1)
17. Statutory cap on damages (response costs + \$50MM) – CERCLA 9607(c)(1)(D)
18. No Cause/No Injury/No Quantification/No Proper Damage Determination
19. No recovery for damage to cultural resources; loss of cultural services due to natural resource damages
20. Equitable defenses





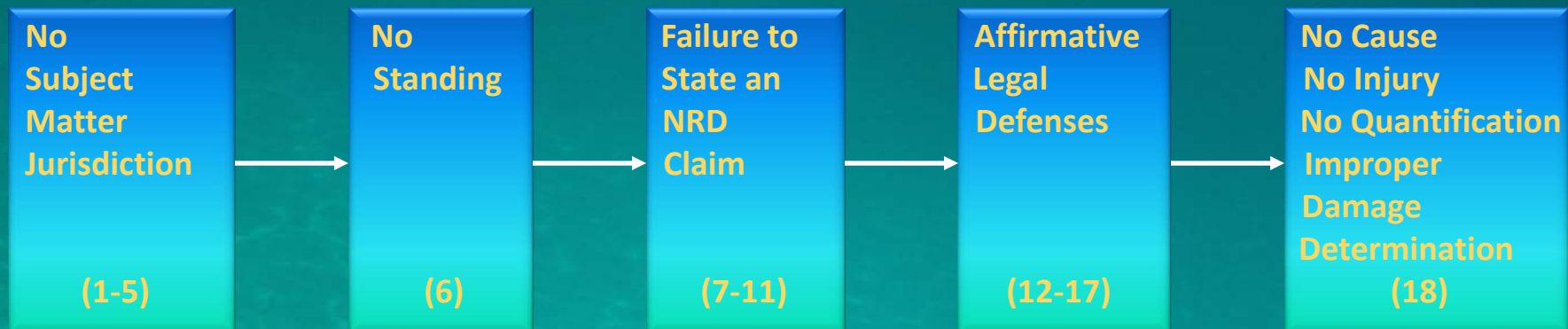
## Natural Resource Damages – Case Law

- *In re Acushnet River PCB Litigation*, 716 F. Supp. 676 (D. MA 1989), *Coeur d'Alene Tribe v. ASARCO*, 280 F. Supp. 2d 1094 (D. ID 2003), limiting “wholly before” defense; *but cf. Montana v. ARCO*, 266 F. Supp. 2d 1238 (D. MT 2003).
- *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. ID 1986), finding “federally permitted release” defense to be limited to matters expressly addressed by permit and within the permit limitations.
- *Idaho v. Hanna Mining*, 882 F.2d 392 (9th Cir. 1989), finding “irreversible and irretrievable commitment” defense requires no formulaic EIS recital but is limited to defense of activities and injuries occurring after permit or approval.
- *General Electric v. New Mexico*, 322 F. Supp. 2d 1237 (D. N.M. 2004), *aff'd* 467 F.3d 1223 (10th Cir. 2006), defense judgment where recovery was limited to restoring aquifer that had been replaced with alternative water supply and state law claims were preempted by CERCLA.





# NRD REGIMES: Schematic of Defenses



- By Motion to Dismiss
- By Motion to Strike
- By Motion for Judgment on the Pleadings
- By Motion for Partial/Complete Summary Judgment
- At Pretrial Conference
- By Motion *In Limine*
- By FRE 702/*Daubert* Motion
- By Motion for Judgment as a Matter of Law
- By Post Trial Motions
- By Appeal

# Archeological/Cultural Resource Damages?



## Recoverable under some statutes:

- Cultural Resource Damages may be recoverable as NRD under NMSA and PSRPA.
- Cultural Resource Damages are not recoverable as NRD under CERCLA, OPA and the CWA.

# NMSA and PSRPA Allow Recovery of Cultural Resource Damages

➤ **NMSA defines a protected resource as**

“any living or *nonliving* resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, *cultural*, archeological, scientific, or aesthetic value of the sanctuary.”

16 USC 3202



➤ **PSRPA defines a covered resources as**



“any living or *non-living* resource that is located within the boundaries of a unit of the National Park System... .”  
16 USC 19jj(d)

The National Park Service’s Damage Assessment and Restoration Handbook confirms that “[r]esources covered by PSRPA include natural and cultural resources... .”

<http://www.nps.gov/policy/DOrders/DO-14Handbook.pdf>

➤ **CERCLA, CWA and OPA are different.**



# Cultural Resources Are Not Natural Resources Under CERCLA, OPA and CWA

- CERCLA, OPA, and the CWA define “natural resources” as does CERCLA – only in the context of water, air, geologic, and biological entities, without reference to cultural resources.

CERCLA, 42 USC 9601(16); OPA, 33 USC 2701(20);

CWA, 43 CFR 11.14(z)



- Unlike NMSA and PSRPA, “natural resources” as defined in CERCLA, OPA and the CWA specifically exclude reference to “cultural” or “non-living” resources.

# DOI Confirmation: No NRD Recovery Under CERCLA

DOI's 1994 regulations for NRD assessments  
under the CWA and CERCLA:

“As was explained in the July 22, 1993 Federal Register notice, the Department acknowledges the confusion that has arisen as a result of multiple uses and meanings of the term ‘resource’ under different statutes. ‘Archaeological’ and other ‘cultural’ resources are not ‘land, fish, wildlife, biota, air, water, ground water, drinking water supplies, [or] other such resources.’ Therefore, ‘archaeological’ and ‘cultural’ resources do not constitute ‘natural’ resources under CERCLA.”



Not the end of the story.

# DOI Suggests an Alternative: CERCLA NRD Recovery for Injuries to Cultural Services



## DOI's 1994 guidance continued:

“[A]lthough archaeological and cultural resources, as defined in other statutes, are not treated as ‘natural’ resources under CERCLA, the rule does allow trustee officials to include **the loss of archaeological and other cultural services provided by a natural resource** in a natural resource damage assessment.”



## What Does This Mean?

- DOI: CERCLA's NRD scheme does not allow recovery for injuries to cultural resources, but does provide for recovery of damages for the loss of cultural services provided by an injured natural resource.
- DOI offered the following example:



“[I]f land constituting a CERCLA-defined natural resource contains archaeological artifacts, then that land might provide the service of supporting archaeological research. If an injury to the land causes a reduction in the level of service (archaeological research) that could be performed, trustee officials could recover damages for the lost service.”

DOI concluded:

“Further clarification is beyond the scope of this rulemaking.”

Natural Resource Damage Assessment  
75 Fed. Reg. 14,267, 14,269 (March 23, 2010)



## Other Agencies Not Convinced

- In its Damage Assessment and Restoration Handbook, NPS compared NRD assessments under CERCLA, OPA and PSRPA:



“OPA and CERCLA authorities cover natural resources and associated services, including physical and ecological services as well as human use services. In addition to natural resources and associated services, PSRPA authority also extends to cultural resources (e.g., historic sites, structures, objects, and landscapes) and physical facilities (e.g., signage, buildings, docks and roads), and their associated services.”

<http://www.nps.gov/policy/DOrders/DO-14Handbook.pdf>



## Courts Similarly Unconvinced

### [Kennecott Utah Copper Corp. v. U.S. Dept. of Interior, 88 F.3d 1191 \(1996\)](#)

- Certain “industry petitioners” challenged the 1994 DOI regulations for NRD assessments – in particular, DOI’s authority to permit CERCLA NRD recovery for the loss of cultural and archaeological services provided by a natural resource, since archaeological and cultural resources are conspicuously absent from CERCLA’s definition of natural resources.
- The issue was not ripe for review, but the court appeared unpersuaded by DOI’s attempt to distinguish between cultural resource damages and damages for lost cultural services provided by a natural resource.
- In characterizing its analysis of DOI’s instructions in the 1994 regulations, the court said, “[f]or now, we hold only that the question whether a trustee may recover under CERCLA for injury to archaeological and cultural resources is not ripe.” *Id.* at 1223.



## Courts Similarly Unconvinced

### [Coeur D'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094 \(D. Idaho 2003\)](#)

- Here, the U.S., Idaho and Tribe brought a CERCLA action against various mining companies (and others) related to contamination in the Coeur D'Alene Basin. After concluding that releases of mining waste in the Basin caused injury to natural resources, the court likewise determined that “[c]ultural uses of water and soil by Tribe are not recoverable as natural resource damages.” *Id.* at 1107.
- The court held that damages to cultural services supported by the injured natural resources were not recoverable under CERCLA.
- The court was also not persuaded by the Tribe’s claims that certain of the natural resources “appertained” to it: “While the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource ‘belong or be connected as a rightful part or attribute’ for purposes of trusteeship analysis.” *Id.* at 1117.





# Cultural Resource Damages or Damages for Injuries to Cultural Services



- According to practitioners, courts and lawmakers, DOI's framework is a distinction without a difference.
- CERCLA's NRD and assessment provisions: no references to "cultural resources" or "cultural services."
- No federal or state cases located holding that injuries to "cultural resources" or "cultural services" are recoverable as NRD under CERCLA.
- Until Congress amends CERCLA, cultural resource damages, regardless of whether framed as damages for lost cultural services provided by an injured natural resource, are not recoverable.



## NRD REGIMES: Standing to Bring NRD Claim

- 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.

*Coeur d’Alene Tribe v. Asarco*, 280 F. Supp. 2d 1094 (D. Idaho 2003)  
See also *United States v. Asarco*, 28 F. Supp. 2d 1170 (D. Idaho 1998)  
vacated and remanded 214 F. 3d 1104 (9th Cir. 2000)

# Future of NRD Claims?





## For Further Questions



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