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Minimizing Liability for Federal and State Natural Resource Damage Claims: Defenses and Strategies

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The Comprehensive Environmental Response, Compensation and Liability Act[1] ("CERCLA" or "Superfund") was enacted nearly 25 years ago, and most environmental professionals are familiar with it — or, at least, part of it. The part that has received nearly all of the attention over the past quarter century is the so-called "remedial" part of the statute — which creates "strict, joint and several" liability for property owners, waste generators, and transporters and requires them to pay "response" costs.

Less well known are the CERCLA provisions imposing liability on these same parties for "natural resource damages" ("NRD").[2] Sometimes described as Superfund's "sleeping giant,"[3] the NRD provisions in CERCLA have been addressed in only a relative handful of published opinions. Over the last two to three years, however, with the state of New Jersey leading the charge, there has been a dramatic increase in NRD claims. This article summarizes the existing state of the law much of which has been made "out west" in cases involving the mining industry and at multiparty sites around harbors and bays.

I. NATURE OF THE CLAIM

NRD claims are not claims brought by the Environmental Protection Agency ("EPA"). They are brought by "Trustees" — federal, state, and tribal governments or branches of government whose mission is to protect natural resources — public lands, surface water, groundwater, and species of all varieties, from songbirds to sheep to salmon.

One can think of an NRD claim as the claim that is left over <u>after</u> a contaminated site has been remediated. Remediating a site — something EPA does — generally does not restore property to its pre-contaminated state. A deed restriction prohibiting the withdrawal of groundwater may satisfy an agency's concerns about protecting human health, but it does not restore water quality. Trustees use NRD claims to <u>restore</u> natural resources, and/or to recover damages for diminution in the value of the resource injured.

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[1] 42 U.S.C. § 9601, *et seq.*

[2] A number of excellent monographs have been written on natural resource damages. Two that are particularly useful are Michael R. Thorp, *Handbook of the Law of Natural Resources* (2004, available from the Law Firm of Heller Ehrman), and Valerie Lee and P. J. Bridgen, *Natural Resource Damage Assessment Deskbook: A Legal and Technical Analysis* (2002, Environmental Law Institute). The author gratefully acknowledges the work of Mr. Thorp and Ms. Lee, which he called upon in writing this article. Any errors or omissions are my own.

[3] *Natural Resource Damages: A Legal, Economic and Policy Analysis at 1* (Richard B. Stewart, ed., Nat'l Legal Center for Public Interest 1995); *see also* B. Marten and C. McFarland, *Liability for Natural Resource Damage Claims*, 22 BNA Environmental Reporter No. 12, 670 (July 19, 1991).

As an example, suppose there is a diminished fish run in a river, and that the reduction in the run is attributed to releases from outfalls from industrial plants along the river. Suppose that EPA's goal, as set forth in its Record of Decision ("ROD"), is to clean up river sediments and upland sources of releases to the river. Imagine that EPA requires soil removal and a groundwater pump-and-treat system at the industrial plants, together with sediment remediation in the river, in order to accomplish that goal. In this situation, the remediation strategy of the EPA is accomplished. However, the cleanup is unlikely, by itself, to restore the ecosystem or assure a healthy fishery. That might take creation of new habitat, land use changes or even a new fish hatchery.

Likewise, if groundwater is contaminated, the remedial action may be to install an impermeable cap, to reduce water infiltration to contaminated soils, and to facilitate gradual improvement of groundwater quality. While this might satisfy EPA's goal of protecting public health, it does not restore groundwater to its baseline condition or compensate water users for the loss of potable drinking water.

II. ELEMENTS OF AN NRD CLAIM

A. Statutory Authority

There are several federal environmental statutes that provide for recovery of natural resource damages, but the three principal statutes Trustees tend to use are: (1) CERCLA, (2) the Clean Water Act ("CWA"), and (3) the Oil Pollution Control Act ("OPA").[4] Regulations for assessing NRD injuries have been promulgated by: (1) the U.S. Department of the Interior ("DOI"), and (2) the National Oceanic & Atmospheric Association ("NOAA").[5] These statutes and regulations have state law counterparts in many states, which may give rise to a separate cause of action.[6]

B. Standing

The plaintiffs in an NRD claim, called "Trustees," are the agencies who own, manage or otherwise control resources allegedly injured by a discharge of hazardous substances or oil. They include federal and state land management and resource agencies, such as the DOI, the Department of Agriculture, NOAA, and their state equivalents. EPA is not a Trustee agency and is not a party to NRD suits. Indian tribes can act as Trustees, and have brought a number of significant NRD claims. Cities can only serve as Trustees if authorized by the governor of a

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[4] There are also NRD provisions in the National Marine Sanctuaries Act, the Deepwater Ports Act, and the Park System Resources Protection Act.

[5] The DOI rules were initially issued in 1986 and 1987, and significantly revised in 1994 (59 Fed. Reg. 14285) and 1996 (61 Fed. Reg. 20560). The NOAA rules were adopted in 1996, subsequently vacated in part by a federal court (*General Electric Co. v. U.S. Department of Commerce*, 182 F. 3d 767 (D.C. Cir. 1997) and subsequently repromulgated in 2002 (67 Fed. Reg. 61483).

[6] For example, the NRD claim asserted by the state of New Jersey for the Lower Passaic River is brought under that state's Spill Compensation and Control Act, N.J. S.A. 58:10-23.11 (*et seq.*).

state.[7] Private parties cannot be Trustees, and do not have a contribution cause of action under the NRD provisions of CERCLA or the OPA. Cities and private parties — such as water utilities — may, however, seek to restore injured resources, including drinking water supplies, under the remedial action provisions of CERCLA and under tort law theories.

Trustee agencies can only recover damages for injury to resources that they own, control or manage. Trustee agencies routinely make broad claims of right to recover for damages to injured resources arguably within their regulatory authority. This leads to overlapping claims, often allocated among government agencies out of the view of NRD defendants. The NRD statute does not allow for an informal allocation of rights. In order to recover damages for resources injured, each governmental Trustee seeking damages must show that the injured resource is one "belonging to, managed by, controlled by, or appertaining to <u>such</u>" Trustee.

For one shining moment, it appeared that the Courts would force trustee plaintiffs to sort out their resource claims among each other. In a 2003 decision, Judge Lodge of the federal district court in Idaho held that the question of Trusteeship "is to be determined on a case-by-case basis depending on who the resource belongs to, who it is managed by, who controls the same, and how the resource appertains to other resources."[8] The Court went on to address the provision in CERCLA prohibiting double recovery, and concluded that where two or more Trustees claimed an interest in a particular injured resource, their right to recovery would have to be proven by each at trial, and apportioned among them by the Court. He held — at the time — that the "only feasible way to compensate the 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." The Court went on to hold that federal and tribal Trustees could not recover for injury to resources owned or controlled by the state of Idaho, with whom defendants had already settled, thereby limiting — potentially significantly — the amount of their damages.

Having gone to great lengths to tell the Trustees to sort out their claims among themselves, the Court — surprisingly — reversed itself, <u>sua sponte</u>, two years later. 2005 WS 1630516 (July 11, 2005). In a August, 2005 decision, Judge Lodge found "after completing further research that it may have been in error with its prior ruling" on Trustee standing. In reversing its previous ruling the Court held that "its reliance on traditional tort concepts in allocating trusteeship was misplaced." It found that the "language of the statute dictates that a co-trustee acting individually or collectively with the other co-trustees may go after the responsible party or parties for the full amount of the damage, less any amount that has already been paid as a result of a settlement to another trustee by a

[7] CERCLA § 107(f)(2)(B); *see*, e.g., *City of Indianapolis v. Union Carbide,* 2003 WL 22327832 (S.D. Ind. 2003).

[8] *Coeur d'Alene Tribe* v. *ASARCO*, Inc., 280 F. Supp. 1094 (D. Idaho 2003) (hereafter "*Coeur d'Alene* " decision).

responsible party. If there is later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible part of parties." Id.

While Trustees may be pleased with Judge Lodge's reversal, it is, in this writer's opinion, an unfortunate decision for **both** the Trustees and NRD defendants. By allowing <u>any</u> Trustee to sue for <u>any</u> damages, the Court has put NRD defendants in the position of having little reason to settle with one Trustee (such as a state) without the participation of all Trustees. Getting all potential Trustees — including state, federal and tribal Trustees — to the table at one time is no easy task. Judge Lodge's decisions may make settlement harder and NRD defendants more litigious.

C. <u>Standard of Liability</u>

1. Strict Liability

In remedial action litigation, it is well settled that liability is strict, joint and several. The strict liability standard appears to apply equally to NRD and response action cases. The government does not have to establish the breach of a regulation or standard of care, but only that the defendant falls within the category of liable parties under CERCLA § 107.[9]

2. Joint and Several Liability

Joint and several liability is a different matter. A defendant to an NRD claim may avoid the imposition of joint and several liability, if it can show that the natural resource injury was caused by someone or something other than defendant's release. This is because the NRD statute requires the Trustees to show that the injury "resulted from" the defendant's release.

The *Coeur d'Alene* Court squarely rejected the government's position that NRD liability is joint and several. It held that the defendants could avoid the imposition of joint and several liability, if they could establish a "reasonable basis" to apportion harm among Potentially Responsible Parties ("PRPs").[10] The burden of establishing divisible harm falls on the defendants. In the *Coeur d'Alene* case, the defendants were able to satisfy the Court that there was a "reasonable relationship between the waste volume, the release of hazardous substances and the harm at the site." The Court went on to allocate liability among the two defendants based on the volume of mine tailings they had generated.

[9] *Id*. at 1108.

[10] *Id*. at 1119.

D. <u>Causation</u>

The standard of causation is also different in an NRD action. Unlike in remedial actions, government plaintiffs in an NRD action must establish a nexus between injury observed and the defendant's release.

> "[t]he use in Section 107(f) of the word 'resulted' ties the damages to the releases. <u>The proof must include a causal link between releases and post-enactment damages which flowed there from</u>."[11]

The quantum of proof needed to establish that "causal link," is the subject of continuing debate.

Trustees argue that courts should adopt a low threshold — merely requiring a showing that the release was a "contributing factor" to the injury. Defense counsel, on the other hand, argue for the more stringent "substantially contributing factor" test. The courts are split. The less stringent "contributing factor" test was adopted in *In re: Acushnet River & New Bedford Harbor Proceedings,* 722 F. Supp. 893, 897 (D. Mass. 1989). The more stringent "substantial contributing factor" test was adopted in *U.S. v. Montrose Chemical Corp.* (C.D. Cal. 1991).

The *Coeur d'Alene* case adopted the "contributing factor" standard advocated by the Trustees. It said that the government had to prove "that at least some of the injury would have occurred if only the defendant's amount of release had occurred."[12]

The NRD regulations contain "acceptance criteria" that allow an injury to be proven by reference to scientific literature, as opposed to case-specific studies. If a certain biological response is documented in the literature to result from a certain exposure, then the injury is "deemed" to be proved. In practice, however, both the parties to an NRD action, and the courts use criteria other than the NRD regulations to establish causation. The Court in the *Coeur d'Alene* decision stated that:

> "While the Court will grant due deference to the agency's decisions, the Court does not find it is bound to such definition . . . ."

The Court then went on to use criteria other than the regulations to evaluate whether the defendant's releases of mining wastes caused injury to soils, sediments, fish, wildlife, and other resources. The <u>quantification</u> of the damages caused by the mining companies was left to a second trial, scheduled for 2006 or later.

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[11] *Idaho v. Bunker Hill*, 635 F. Supp. 665, 674 (D. Idaho 1986).

[12] *Coeur d'Alene*, at 1124.

E. **Damages**

As discussed above, in a response action claim, plaintiffs are seeking "response" costs — the costs of investigating and remediating a hazardous substance release. In an NRD claim, by contrast, the Trustees are seeking the costs of restoring (to their baseline condition) natural resources injured or destroyed by a release caused by the defendant. The Trustees typically conduct a natural resource "assessment" in order to quantify the injury, following the DOI or NOAA regulations. Based on the assessment, the Trustees typically seek to recover damages for: (1) the cost of the assessment, (2) the interim loss (diminution in value) of the resource between the time of the injury and the time the resource is restored to its baseline condition, and (3) the actual cost of physically restoring the injured resource. If the injured resource cannot be restored (as often is the case), the Trustees may seek the cost of acquiring resources having an equivalent value.

The mechanisms by which a chemical release does — or does not — harm a bird or a fish, and the economic value placed on that injury is an exercise that only an academic would love, and they generally do. Quantification of damages is a two-step process. First, biologists and other scientists attempt to determine what type of lethal and sub-lethal (e.g., reproductive) injury resulted from a release. This is exceedingly difficult, especially where there are multiple defendants and non-chemical factors (such as development or weather) that may have contributed to the injury observed. Once the scientists are done with their work, natural resource economists attempt to assign an economic value to the injury. This requires answering questions like, "what is a salmon worth?" and "what is a higher risk of reproductive failure in a peregrine falcon worth?" There is no generally accepted way to answer these questions. Instead, natural resource economists have developed a number of "surrogate" damage formulas with names like "hedonic pricing," "contingent valuation," and "travel cost pricing." The fact that there is no single generally accepted economic model for valuing natural resource damages adds uncertainties to both sides in litigation.

Since the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), judges have been required to determine whether expert testimony offered in a case is "scientifically reliable" enough to be admitted as evidence. We know of no *Daubert* challenges yet in the context of NRD litigation, but they are sure to come. The government continues to insist on using novel economic theories, such as contingent valuation, which defense counsel continue to attack as unreliable. Defense counsel will likely have strong arguments for excluding testimony that relies on such sophisticated but untested methodologies.[13]

The complexity of assessing and valuing natural resource damages has led Trustees to look for "shortcuts." In oil spill litigation, for example, it is common for the government to use an NRD table. The table determines damages by assigning values to the toxicity of the oil spilled, the sensitivity of the receiving waters, and

[13] *See*, e.g., *Idaho v. Southern Refrigerated Transport, Inc.*, 1991 W.L. 22479 (D. Idaho 1991) (excluding contingent valuation study as speculative).

the number of gallons spilled. While NRD tables add certainty, they may place too high, or too low, a value on the injury sustained.

1. Statute of Limitations

There are three separate federal statutes of limitations for NRD claims, and the applicable statute depends on who is bringing the claim, whether the claim relates to a Superfund site, and whether the claim is against the Superfund.

a. General Statute of Limitations

The general rule, contained in § 113(g)(1) of CERCLA, is that an NRD action must be commenced within three (3) years of the later of: (1) the date of discovery of the loss and its connection with the release in question, or (2) the date on which the NRD regulations were promulgated. The date on which the regulations were promulgated has been determined to be March 20, 1987, and is not generally in dispute.[14] The "date of discovery of the loss and its connection with the release" is a factual question, and requires a review of the Trustees' knowledge. At least one court has adopted a continuous trigger approach to allow a longer statutory period. In *State of New York v. General Electric Co.,* the Court held that § 113(g)(1) would not bar the Trustees' action because the "injurious activity had not yet abated." On the other hand, in *U.S. v. Montrose Chemical Corp.*, the Court made a factual finding that the discovery prong of the statute had run because the Trustees knew of the releases and their connection with the injury to natural resources more than three (3) years prior to filing suit.[15]

b. The NRD Statute at Superfund Sites

At a Superfund site, the Trustees have a different statute of limitations. At National Priorities List ("NPL") sites, the Trustees must commence an action no later than three (3) years after completion of the remedial action (excluding operation and maintenance).[16] Moreover, if EPA is "diligently proceeding" with a Remedial Investigation/Feasibility Study ("RI/FS"), the Trustees cannot bring their NRD claim before selection of the remedy. In effect, at NPL sites, this gives the Trustees a window of time — after issuance of an ROD and up to three (3) years after completion of the remedy — to bring a claim.

This "window" is important, because many NPL sites are not through the remedy selection phase, and at many, construction of the remedy is completed. At many Superfund sites, therefore, the statute of limitations has already run — or is about to.

Some have argued, however, that there really is no effective statute of limitations barring the government from bringing NRD actions, because

[14] *State of California v. Montrose Chemical Corp.,* 104 F.3d 1507 (9th Cir. 1997).

[15] *U.S. Montrose Chemical Corp.,* 883 F. Supp. 1396 (C.D. Cal. 1995) reversed on other grounds, 104 F.3d 1507(9th Cir. 1997).

[16] 42 USC § 9613(g)(1).

even if the period has run, Congress could enact legislation extending it. Indeed, they did so in 1986 when Congress enacted the SARA amendments.[17] Moreover, at sites not on the NPL, the government can revive an expired claim by adding a site to the NPL, or by expanding the site boundaries.[18]

c. Indian Tribes

A Tribe is given an additional two (2) years beyond the period applicable to the United States in situations where the United States declines to bring a claim on the Tribe's behalf.

d. State Statutes of Limitations

Where an NRD claim is brought under state law, the applicable statute of limitations will be found in the state statute. Some states — notably New Jersey — have been creative in enacting legislation extending the applicable deadline, as the United States did in 1986 when it enacted CERCLA.[19]

2. Pre-Enactment Releases and/or Damages

Under 42 U.S.C. § 9607(f)(1), no recovery is allowed where the <u>damages and the release</u> of hazardous substances occurred wholly before December 11, 1980, the effective date of the CERCLA statute. This contrasts with the response provisions of CERCLA, which have been interpreted to allow EPA to recover the costs of responding to releases that occurred before the statute was passed.

A handful of cases have interpreted this "pre-enactment" defense. In May 2003, a Federal District Court in Montana handed defendants in NRD cases a significant victory when it held that the plain language of the statute precluded NRD claims where the contamination occurred prior to CERCLA's enactment. *Montana v. ARCO,* No. CV-83-317-H-SEH, Background Statement, Findings of Fact, Conclusions of Law, Mem. and Order (May 13, 2003) at 10. In issuing this decision, the Court rejected the reasoning from *In re: Acushnet River & New Bedford Harbor Proceedings*, 725 F. Supp. 1264 (D. Mass. 1989), which had allowed plaintiffs to recover for damages that arose after 1980, if those damages were not <u>quantified</u> until after CERCLA's enactment.

However, a contrary decision was issued a few months later in the *Coeur d'Alene* decision, in the adjoining state of Idaho. In the *Coeur d'Alene* case, federal and tribal Trustees were seeking damages from releases of mine tailings held in impoundments before 1968. The tailings impoundments were not used after 1968 — 12 years before CERCLA's enactment in 1980. While acknowledging that releases of hazardous substances from the impoundments after 1968 were

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[17] *State of Idaho v. Hownet Turbine Component Co.,* 814 F.2d 1376 (9th Cir. 1987).

[18] *Coeur d'Alene,* 214 F.3d 1104, 1107 (9th Cir. 2000).

[19] *See* New Jersey Assembly Bill 2444 (January 19, 2005).

"minimal," the court — in what was essentially a theory of "continuing releases" — found that there had been "re-releases" of mine tailings since the enactment of CERCLA. Separately, it also accepted the argument made in the *Acushnet* case that the defense did not apply because the natural resource damages were not quantified until after CERCLA was enacted.

Unlike the Court in *Montana*, the *Coeur d'Alene* decision focused on the time when the Trustees' damages arose, rather than when the releases that caused those damages occurred. Judge Lodge first agreed with the Trustees that, although the mine tailings were first placed in the river before CERCLA's enactment, they continued to migrate into river sediments, soils and groundwater, causing post-enactment "re-releases." He also agreed with the *Acushnet* Court that damages "occur" at the time that the Trustees incur expenses due to the injury to natural resources, irrespective of when the release took place. He found that the damages from pre-1980 releases were not quantified until after 1980. Because (1) the damages occurred post-enactment (even if the releases did not), and (2) the damages were not quantified until after CERCLA's enactment, Judge Lodge held that the pre-enactment defense did not apply to the facts of the *Coeur d'Alene* case.

3. Prohibition Against Double Recovery

As noted above, CERCLA prohibits double recovery of natural resource damages. Any recovery by one Trustee must be deducted from damages claimed by another Trustee for the same resource. Note, however, that multiple Trustees could, at least in theory, claim different damages stemming from the same injury. For example, a state Trustee could claim damages for a loss of recreational value, while a Tribe could claim a loss of cultural value.

There also could be a potential double recovery as between a Trustee and the EPA. EPA remedial actions are directed to protecting not only human health, but also "the environment." Restoration of the environment can be, and often is, built into the remedy for a Superfund site — for example, recreating habitat or cleaning up soils to residential standards. When a defendant has already been directed to implement these cleanup actions in a ROD, restoration of the environment may have already been achieved. Requiring the defendant to do "more" is, in essence, a double recovery. To avoid this type of overlap, Trustees need to work closely with EPA to be sure that restoration planning is necessary after remediation is completed.

4. Federally Permitted Release Defense

CERCLA excludes from the statutory liability scheme any response costs or natural resource damages that stem from a federally permitted release.[20] This exception is intended to protect dischargers from liability for release specifically authorized under federal and state programs, including:

[20] 42 U.S.C. § 9607(j); 42 U.S.C. § 9601(6).

- Discharges authorized by a National Pollutant Discharge Elimination System permit;
- Discharges in compliance with a Clean Water Act Section 404 permit for dredged or fill materials;
- Releases in compliance with a Resource Conservation and Recovery Act hazardous waste management facility final permit; and
- The introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in, and in compliance with, pretreatment standards and a pretreatment program submitted to EPA for approval under the Clean Water Act.[21]

Releases authorized under federally approved state programs also fall within the defense.[22]

EPA has taken the position that only those releases expressly specified in the statute qualify as "federally permitted" releases,[23] meaning that damage from contaminants not expressly specified are not exempted.

a. Releases Exceeding Permit Limits

To qualify for the "federally permitted release" defense, a party must show that its release was "in compliance" with its permit. At least one court has held that releases exceeding permit limits are not exempted.[24] Releases that violate the operating, monitoring, or reporting requirements of a permit still qualify for the defense, so long as the nature and quantity of the substance released is within permit limits.[25]

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[21] 42 U.S. § 9601(10).

[22] *See* S. Rep. No. 848, 96th Cong. 2d Sess. 47 (1980); *see also* 53 Fed. Reg. 27768 (1988) (regulations proposed by EPA to implement the federally permitted release defense).

[23] 53 Fed. Reg. 27,268, 27,270 (July 19, 1988). The purpose of these regulations, which would amend 40 C.F.R. Parts 117, 302, and 355, is to clarify the federally permitted release exemption from CERCLA release reporting and liability provisions. These regulations are expected to be promulgated in Spring 1991. Telephone interview with Hubert Watters, U.S. Environmental Protection Agency (October 1, 1990); *see also* 54 Fed. Reg. 29,306 (July 11, 1989) (clarifying certain aspects of proposed scope of the CERCLA exemption for releases permitted under the Clean Air Act).

[24] *Idaho v. Bunker Hill,* 635 F. Supp. 655, 674 [24 ERC 1524] (DC Idaho 1986) (to extent that damage was caused by releases not expressly permitted in various permits, that exceeded permit limits, or that occurred during time period not covered by permit, state could seek recovery for those damages under CERCLA); *see also* S. Rep. No. 848, 96th Cong., 2d Sess. 48 (1980) (indicating that exclusion does not apply to unpermitted accidental releases).

[25] 53 Fed. Reg. 27,268, 27,268-70 (July 19, 1988).

5. Identified Commitment of Natural Resources

CERCLA provides another defense against natural resource damage claims where the damage was "specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis . . . ."[26]

Thus, for example, the government could not recover for damage to a riverbed where that damage was specifically identified and approved in a project EIS. The party asserting this defense must show that the project is operating within the terms of the permit or license.[27]

The only court that has interpreted this defense gave it a narrow reading, stating that it does not apply to damages other than those identified in the EIS, such as from earlier development. A mine owner was denied the defense where there was historical damage at a mine site and the EIS was prepared in conjunction with a proposed reopening of the mine.[28]

The defense applies to resource commitments made in a document "comparable" to an EIS. Arguably, this would include natural resources committed in a ROD at a Superfund site. One can argue, for example, that the government cannot recover for damage to a habitat that is capped or filled as part of a remedial action, if the area to be capped or filled is identified and committed in the ROD as part of the remedial action.

II. CONCLUSION

The stakes are high in natural resource damage litigation, but many of the cases brought by the Trustees have been, and are likely to continue to be, litigated in the courts. PRPs see that the government faces difficulties in demonstrating actual injury to natural resources and in proving causation and other elements of their claims. PRPs will want to test their defenses, particularly now that many of those defenses have been favorably interpreted in the *Coeur d'Alene* and *Montana* decisions.

PRPs at CERCLA sites should develop a strategy early on for responding to a natural resource damage claim. The first step is to make a preliminary assessment of the strength of the Trustees' case. If a viable claim appears to exist, PRPs may want to consider conducting the assessment themselves, but only on acceptable terms which allow the PRPs to co-manage the assessment process.

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[26] 42 U.S.C. § 9607(f)(1).

[27] *Id.*

[28] *Idaho v. Hanna Mining Co.,* 882 F.2d 392, 395 [30 ERC 1097] (CA 9 1989).