

NATURAL RESOURCE DAMAGES  
AN OVERVIEW

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## NATURAL RESOURCE DAMAGES AN OVERVIEW

Natural resource damage claims are unique statutory causes of action. As such, the applicable legal standards are heavily dependent upon the exact legislative and regulatory language under which the claims arise. This paper does not attempt to provide a definitive analysis of the applicable law and regulations. Rather, what follows is a general overview of the relevant legal standards. Readers are urged to consult the terms of the statutes and regulations in applying the law to any specific situation.

### A. CERCLA AND OPA PROVIDE THE PRIMARY LEGAL BASES FOR NATURAL RESOURCE DAMAGE CLAIMS

The Superfund statute (the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*, or CERCLA), and the Oil Pollution Act of 1990 (33 U.S.C. §§ 2701\_2761, or OPA), which impose upon responsible parties liability for the costs of cleaning up environmental contamination, also establish liability for damages for injuries to natural resources resulting from the contamination. CERCLA addresses releases or threatened releases of hazardous substances, which are identified primarily by reference to a series of other statutory programs. 42 U.S.C. § 9601(14). OPA covers discharges or threatened discharges of oil, defined as oil of any kind or in any form, except crude petroleum or any of its fractions which are specifically designated as CERCLA hazardous substances. 33 U.S.C. § 2701(23). OPA is further limited to discharges or threatened discharges into or upon navigable waters or adjoining shorelines or the exclusive economic zone. 33 U.S.C. § 2702(a).<sup>1</sup> The technical, administrative and legal process for identifying and quantifying natural resource injuries, calculating the monetary damages arising from the injuries, identifying the parties responsible and collecting the damages is known as natural resource damage assessment or NRDA.

OPA is modeled after CERCLA and relevant provisions of the two statutes are quite similar. While this outline focuses primarily upon NRDA claims under those two statutes, it should be kept in mind that NRDA claims may also be brought under other authorities. OPA did not repeal the predecessor provisions of the Clean Water Act providing for natural resource damage liability and some cases that would not meet the terms of OPA may be brought pursuant to 33 U.S.C. § 1321(f)(4), (5).<sup>2</sup> Another federal statute, the National Marine Sanctuaries Act, 16

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<sup>1</sup> Navigable waters under OPA have been interpreted recently by one court not to include groundwater. Consequently oil discharges that contaminate groundwater have been held not to be covered by OPA. The court also held that the statutory requirement that oil be discharged into or upon the navigable waters excluded OPA's application to discharges to groundwater that allegedly threatened to migrate to navigable waters. *Rice v. Harken Exploration Co.*, 2001 WL 422051 (5th Cir. 2001).

<sup>2</sup>Note, *e.g.*, that OPA provides for liability for a discharge or threat of discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone. 33 U.S.C. § 2702(a). Liability arises under the CWA for discharges of oil or hazardous substances into or upon the water of the contiguous zone, or in connection with activities under the Outer

U.S.C. §§ 1431-1439, provides for liability for damages where injury to a national marine sanctuary natural resource results from any cause not merely pollution incidents. A comparable statutory provision, 16 U.S.C. §§ 1911-1911j-4, provides for liability for damages to resources of the National Park System. In addition, a number of states have enacted laws similar to CERCLA and OPA, that provide an independent basis for pollution-based NRDA claims. *See, e.g.*, the Washington Model Toxics Control Act, Chapter 70.105D RCW, and Water Pollution Control Act, 90.48 RCW; ORS 468B.060; etc.

The U.S. Department of the Interior was delegated the authority to adopt regulations guiding the NRDA process under CERCLA. 43 C.F.R. Part 11. NOAA was directed to draft the NRDA regulations under OPA. 33 U.S.C. § 2706(e)(1). Those regulations, codified at 15 C.F.R. Part 990, were adopted January 15, 1996 (61 Fed. Reg. 439).

B. THE NATURAL RESOURCES COVERED BY THE STATUTES ARE VERY BROADLY DEFINED

CERCLA and OPA both cover a wide variety of types of natural resources, specifically land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources. 42 U.S.C. § 9601(16); 33 U.S.C. § 2701(20). The intent of the two statutes is to address natural resources in which the public has some interest. The definitions in both statutes specify that the covered resources are those belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government, any foreign government, or any federally recognized Indian tribe. 42 U.S.C. § 9601(16); 33 U.S.C. § 2701(20). In addition, CERCLA includes within its coverage such resources belonging to a individual member of an Indian tribe where the resources are subject to a trust restriction on alienation. 42 U.S.C. § 9601(16).

C. LIABILITY IS TRIGGERED BY THE OCCURRENCE OF INJURY TO COVERED NATURAL RESOURCES ARISING IN CONNECTION WITH A RELEASE OF A HAZARDOUS SUBSTANCE OR A DISCHARGE OF OIL

CERCLA liability for natural resource damages is premised upon:

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 ....

42 U.S.C. § 9607(a)(4)(C). OPA makes responsible parties liable for damages ... that result from an oil discharge or threatened discharge, which arise from injury to, destruction of or loss of natural resources, and also adds an express reference to loss of the use of the resources. 33 U.S.C. § 2702(a) and (b)(2)(A). Neither statute defines these terms, however.

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Continental Shelf Lands Act ... or the Deepwater Port Act of 1974 ... or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.... 33 U.S.C. § 1321(b)(1).

Both CERCLA and OPA add to the cleanup liability standard a causal element in defining a NRDA liability claim. The House Report clearly indicates that principles of causation apply to actions under the CERCLA Statute. .... The proof must include a causal link between releases and post-enactment damages which flowed therefrom. *Idaho v. Bunker Hill Co.*, 635 F.Supp.665, 674 (D.Idaho 1986). The causal link between the release/discharge and the natural resource injuries is somewhat relaxed, however. It is only necessary to establish that the injury or loss results from the release or discharge, a standard that on its face appears to include a broad range of consequential and indirect injuries. In contrast, a party seeking to invoke the primary defenses to liability must establish, by a preponderance of the evidence, that the release/discharge and resulting damages were caused solely by the specified factors. 42 U.S.C. § 9607(b); 33 U.S.C. § 2703(a). Few courts have squarely addressed the causation standard for NRDA claims. In ruling on a challenge to the DOI regulations, the D.C. Circuit noted:

Regarding causation, this court has repeatedly held that CERCLA is ambiguous on the precise question of what standard of proof is required to demonstrate that natural resource injuries were caused by, or result[] from, a particular release. .... Similarly, we find nothing in the resulting from language of subsections 107(a)(C) and 301(c)(1), or other provisions of CERCLA, to indicate that the Congress unambiguously intended a particular kind or quantity of causation and injury proof as a prerequisite to recovery of NRD.

*National Association of Manufacturers v. U.S. Dept. of the Interior*, 134 F.3d 1095, 1105 (D.C.Cir. 1998). The D.C. Circuit had previously held that CERCLA is at best ambiguous on the question of whether the causation-of-injury standard for natural resource damage claims is less demanding than that of the common law. *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432, 472 (D.C. Cir. 1989). The District Courts who have ruled on the issue have differed. *Compare In Re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 722 F.Supp. 893, 897 n.8 (D.Mass. 1989) ( *Acushnet River VII* ) (liability is established if the releases are shown to have been a contributing factor to the injury or loss), *with United States v. Montrose Chemical Corp.*, No. 1991 WL 183147 (C.D. Calif., March 29, 1991) (dismissing without prejudice NRDA claim on ground that complaint did not adequately plead as to each defendant that specific releases were the sole or substantially contributing cause of specific resource injuries).

#### D. NATURAL RESOURCE DAMAGE CLAIMS ARE PROSECUTED BY GOVERNMENTAL AGENCIES AND INDIAN TRIBES AS TRUSTEES ON BEHALF OF THE PUBLIC

Actions for natural resource damages under CERCLA and OPA may be brought by the United States, a state or a recognized Indian tribe, any of which may assert a claim arising from injuries to resources belonging to, managed by, held in trust by, appertaining to, or controlled by them. OPA also permits local officials to be named as trustees. 42 U.S.C. § 9607(f)(1); 33 U.S.C. § 2706(a), (b). CERCLA also permits an Indian tribe to pursue a claim regarding resources belonging to a member of the tribe if those resources are subject to a trust restriction on alienation. 42 U.S.C. § 2701(f)(1). In bringing NRD claims, the United States, states and Indian tribes act as trustees on behalf of the public (or tribal members, in the case of an Indian tribe). 42

U.S.C. § 9607(f)(1); 33 U.S.C. § 2706(b)(1).<sup>3</sup>

While CERCLA defines natural resources to include those in which a foreign government has an interest, 42 U.S.C. § 9601(16), it makes no express provision for designation of foreign trustees or actions by foreign governments against responsible parties for natural resource damages.<sup>4</sup> OPA does provide for designation of foreign trustees and allows foreign governments to pursue natural resource damage claims, 33 U.S.C. §§ 2706(a)(4) and (b)(5), but requires the claimant to show that the recovery is authorized by an applicable treaty or executive agreement, or that the Secretary of State, in consultation with the Attorney General and other officials, has certified that the claimant's country provides a comparable remedy for United States claimants. 33 U.S.C. § 2707(a)(1).

E. TRUSTEESHIP RESPONSIBILITY IS DELEGATED WITHIN THE FEDERAL AND STATE GOVERNMENTS TO DIFFERENT AGENCIES, OFTEN IN AN OVERLAPPING MANNER

Trusteeship is delegated by the President, under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), to the Secretary of Commerce, the Secretary of the Interior and the Secretaries for the federal land managing agencies (in addition to the Department of the Interior, principal land managing agencies are the Department of Agriculture, the Department of Defense and the Department of Energy). 42 U.S.C. § 9607(f)(2)(A); 33 U.S.C. § 2706(b)(2); 40 C.F.R. § 300.600(b). Since federal trusteeship arises when a resource belongs to, is managed by, is held in trust by, appertains to, or is controlled by a federal agency, the range of trust resources is as broad as the full scope of a trustee agency's responsibilities under all its statutory authorities related to natural resources and land management. One indication of that breadth is given by the NCP delegation to the Secretary of Commerce:

The Secretary of Commerce shall act as trustee for natural resources managed or controlled by [the Department of Commerce] and for natural resources managed or controlled by other federal agencies and that are found in, under or using waters navigable by deep draft vessels, tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf. However, before the Secretary takes an action with respect to an affected resource under the management or control of another federal agency, he shall, whenever practicable, seek to obtain the concurrence of that other federal agency. Examples of the Secretary's trusteeship include the following natural resources and their supporting ecosystems: marine fishery resources; anadromous fish; endangered species and marine mammals; and the resources of National Marine Sanctuaries and Estuarine Research Reserves.

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<sup>3</sup>While Indian tribes are expressly authorized under CERCLA to bring damages claims, the statute only implies that they act in a trusteeship capacity and does not expressly provide for designating tribal trustees. 42 U.S.C. § 9607(f)(1)). *See, however*, the National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. § 300.610, regarding tribal trusteeship.

<sup>4</sup>*Compare* 42 U.S.C. § 9611(l) regarding foreign claims against the Superfund.

40 C.F.R. § 300.600(b)(1).

The governor of each state designates the officials to act on behalf of the state as trustee. 42 U.S.C. § 9607(f)(2)(B); 33 U.S.C. § 2706(b)(3); *see also*, 40 C.F.R. § 300.605. In practice, the governors have tended to designate one or more officials of either natural resource agencies or environmental control agencies as trustee(s), although in some cases the attorney general has been named as a co-trustee. In Washington, for example, the Department of Ecology is designated the lead state trustee, although Ecology coordinates fairly closely with other state natural resource agencies; in Oregon, trusteeship is shared by the Department of Environmental Quality and the Department of Fish and Wildlife. OPA differs from CERCLA by also authorizing the governor to name a local official as a trustee. 33 U.S.C. § 2706(b)(3).

Since different levels and agencies of different governments may have some degree of management jurisdiction or interest in the same resource during part or all of its life history, multiple entities may assert trusteeship over the same resource in a given case. This is particularly apparent in the case of salmon, for example, where NOAA, the Interior Department, one or more states and one or more Indian tribes may assert trusteeship over a given stock or run. Consequently, both the Interior Department regulations and NOAA's regulations, while making provisions for independent damage assessments by each trustee, make a point of urging the trustees to coordinate and cooperate in a joint assessment process. 43 C.F.R. § 11.32(a)(1); 15 C.F.R. §§ 990.14(a)(1) and (2). The need for coordination is heightened by the limitation in both statutes that there be no double recovery of damages for the same release/discharge and natural resource. 42 U.S.C. § 9607(f)(1); 33 U.S.C. § 2706(d)(3).

F. LIABILITY FOR NATURAL RESOURCE DAMAGES IS IMPOSED GENERALLY UPON THE SAME CLASSES OF PARTIES AS ARE HELD LIABLE FOR CLEAN-UP COSTS

Under CERCLA, liability for natural resource damages as well as clean-up rests with four distinct classes of parties generally described as: 1) the current owner or operator of the hazardous substance-contaminated or releasing facility or discharging vessel; 2) the owner or operator of a facility at a time when the hazardous substances were disposed of at the facility; 3) anyone who arranged for to be disposed of or treated at, or to be transported for disposal or treatment at, a facility or treatment vessel owned or operated by another party; and 4) anyone who transporter hazardous substances for disposal or treatment and who selected the treatment or disposal site. 42 U.S.C. §§ 9607(a)(1)-(4).

Cleanup and damages liability under OPA fall upon each responsible party for a vessel or facility from which a discharge of oil occurs or is threatened. 33 U.S.C. § 2702(a). OPA defines responsible party to include both the owner and operator of the discharging vessel or facility as well as the demise charterer of a discharging vessel. 33 U.S.C. § 2701(32).

CERCLA and OPA differ in their treatment of governmental entities as responsible parties for cleanup and damages. CERCLA liability is imposed upon a person, defined to include the United States government and State and local governments. 42 U.S.C. § 9601(21). OPA, on the other hand, does not apply to discharges from public vessels (vessels owned or bareboat chartered and operated by the United States, the states and their political subdivisions,

and foreign governments), and exempts the United States, the states and their political subdivisions from liability as a responsible party for onshore facilities and offshore facilities where possession and right to use the property have been transferred to another person. 33 U.S.C. § 2702(c)(2); *see* responsible party, vessel, public vessel and person, 33 U.S.C. §§ 2701(32), (37), (29) and (27).

G. NATURAL RESOURCE DAMAGE CLAIMS ARE BASED UPON STRICT LIABILITY AND CAN GIVE RISE TO JOINT AND SEVERAL LIABILITY

Both CERCLA and OPA impose strict liability for natural resource damages upon responsible parties. Neither statute identifies any culpable mental state or standard of care requirement in establishing a liability claim. In fact the standard of care employed becomes an issue only when a responsible party is seeking to establish a third-party defense, or if trustees are attempting to break statutory limitations on liability (see following section).

A joint and several liability regime for natural resource damages would be applicable where it is shown that two or more parties contributed to a single and indivisible harm, as is often the case at hazardous waste sites. In such cases, the burden would fall on the party seeking to limit its liability to prove the basis of any apportionment. *United States v. Hercules Inc.*, No. 99-3684 (8th Cir. 4/10/01); *California v. Montrose Chemical Corp.*, 104 F.3d 1507, 1518 n.9 (9th Cir. 1997); *Acushnet River VII*, 722 F. Supp. at 897 (D.Mass. 1989); *see State of Idaho v. Bunker Hill Co.*, 635 F. Supp. at 676-77.

H. A SERIES OF EXCEPTIONS AND DEFENSES AND LIABILITY LIMITATIONS POTENTIALLY NARROW THE CLASSES OF ACTIONABLE DAMAGE CLAIMS

CERCLA and OPA include a series of defenses, exclusions, and limitations. Both statutes have similar defenses to liability premised upon proof the release was caused solely by an act of God, an act of war, or an act or omission by a third party. 42 U.S.C. § 9607(b); 33 U.S.C. § 2703(a). The third party defense, like other exceptions to the statutes, is fairly limited, excluding from the defense acts or omissions of an employee or agent of the defendant, or one whose acts or omissions occur in connection with a direct or indirect contractual relationship with the defendant (other than one that arises solely from carriage of goods by a common carrier by rail under a published tariff). 42 U.S.C. § 9607(b)(3); 33 U.S.C. § 2703(a)(3). To successfully invoke the third party defense, the defendant must also show by a preponderance of the evidence that he or she exercised due care regarding the hazardous substance or oil, taking into account the characteristics of the hazardous substance or oil, in light of all relevant facts and circumstances, and that he or she took precautions against foreseeable acts or omissions by the third party and their foreseeable consequences. *Id.*

CERCLA also provides two defenses affecting discharges authorized under certain federal permits or licenses, or in some cases a permit issued under a delegated state program. Under 42 U.S.C. § 9607(f)(1), a defense to liability may be had where the defendant demonstrates 1) that the damages (as opposed to the injuries) complained of were specifically identified in an environmental impact statement (or other comparable environmental analysis) as an irreversible and irretrievable commitment of natural resources; 2) that the decision to grant

the relevant permit or license authorized such commitment of natural resources; and 3) that the facility or project involved was otherwise operating within the terms of its permit or license. However, the defense is not available in the case of damages to an Indian tribe where the issuance of the permit or license under which the damages occurred was inconsistent with the United States fiduciary duty to the tribe. *Id.*

The second permit-related defense, codified at 42 U.S.C. § 9607(j), provides that liability for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Federally permitted release is defined to cover releases under the authority of several specific statutory programs regulating the handling, treatment or disposal of some or all of the range of chemicals identified as hazardous substances. 42 U.S.C. § 9601(10). OPA also contains a permitted-release exclusion, exempting from its coverage any discharge permitted by a permit issued under Federal, State or local law. 33 U.S.C. § 2702(c)(1).

A somewhat similar exception applies in the case of the use of certain pesticides. CERCLA precludes recovery for response costs and damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. § 136 *et seq.*]. 42 U.S.C. § 9607(i).

Traditional common law equitable defenses have been held not available to defendants under CERCLA. The court in *United States vs. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1546 (E.D. Cal. 1992), held that the language in section 107(a), 42 U.S.C. § 9607(a), that CERCLA liability is subject only to the defenses set forth in section 107(b), 42 U.S.C. § 9607(b), operates as a restriction on the court's ability to recognize traditional equitable defenses.

Several other exceptions arise under CERCLA as a consequence of limitations or exclusions in definitions of applicable terms. For example, the definition of owner or operator includes an exception for a person, who, without participating in the management of a vessel or facility, holds indicia of ownership to protect his security interest in the vessel or facility. 42 U.S.C. § 9601(20)(A). Likewise sections 9601(20)(E), (F) and (G) provide further detail regarding the potential liability of lenders. The security interest and lender exceptions have generated sufficient debate, litigation, and regulatory attention to warrant their own seminar. Another exemption that arises under this definition applies to a unit of state or local government that acquires ownership or control of the vessel or facility involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign, provided the government has not caused or contributed to the release or threatened release. 42 U.S.C. § 9601(20)(D). The cause or contribute exception suggests that the acquiring government's inaction to prevent a release from an involuntarily acquired facility may vitiate the defense. Note also the exemptions included within the definition of release, 42 U.S.C. § 9601(22).

The above list of exemptions and defenses to the two statutes is not intended to be comprehensive, nor a definitive statement of the law. As with the interpretation of any complex legislation, the literal terms of a statute are the most reliable guide to its coverage.

In addition to exemptions and defenses, CERCLA and OPA contain maximum dollar limits on liability. 42 U.S.C. § 9607(c); 33 U.S.C. § 2704. The statutes base the liability limits upon whether the source of the discharge or release fits one or another class of vessel or facility, and, in the case of a vessel, the vessel's gross tonnage. The liability limits cover both remedial costs and damages. CERCLA's liability cap has been interpreted to apply separately to each party at a multi-party site, rather than to all parties collectively. *California v. Montrose Chemical Corp.*, 104 F.3d at 1520-21. Limitation can be lost (subjecting the responsible party to liability for the full costs of response and damages) as a consequence of certain acts or omissions of the responsible party or one in privity with the responsible party. Thus, for example, CERCLA denies limitation if the release resulted from willful misconduct or willful negligence within the knowledge or privity of the responsible party; if the primary cause of the release was a violation, within the knowledge or privity of the responsible party, of applicable safety, construction, or operating standards or regulations; or, in certain cases, if the responsible party fails or refuses to provide all reasonable cooperation and assistance requested by response authorities. 42 U.S.C. § 9607(c)(2). OPA contains similar provisions, 33 U.S.C. § 2704(c)(1) and (2), and also denies limitation if the responsible party has reason to know of the discharge incident and failed or refused to report the incident as required by law. 33 U.S.C. § 2704(c)(2)(A).

I. THE STATUTE OF LIMITATIONS UNDER BOTH CERCLA AND OPA GENERALLY IS THREE YEARS, WITH A SERIES OF POSSIBLE DATES FROM WHICH THE THREE-YEAR LIMITATION PERIOD MAY BEGIN RUNNING

The CERCLA statute of limitations is generally three years, with a starting date that varies depending upon the circumstances of the release. In the case of a facility listed on the National Priorities List (NPL), any federal facility identified under section 120 of CERCLA, 42 U.S.C. § 9620, or any vessel or facility at which a remedial action under this chapter [CERCLA] is otherwise scheduled, the 3-year statute begins to run at the completion of the remedial action (excluding operation and maintenance activities). 42 U.S.C. § 9613(g)(1). For such a facility or vessel, CERCLA also restricts the earliest point at which a damages action may be brought, requiring 60 days' notice of intent to file suit be given to both the potentially responsible party and the President in the case of facilities listed on the NPL or where CERCLA remedial action is otherwise scheduled. *Id.* Also, if EPA is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or 120, 42 U.S.C. §§ 9604(b) or 9620, a damages action may not be brought before selection of the remedial action. *Id.*

In proceedings involving natural resource damage claims regarding the Bunker Hill Mine site and Coeur d'Alene Basin in northern Idaho, the United States District Court for Idaho elaborated on the effect an NPL listing can have on the CERCLA statute of limitations for NRDA claims:

In applying a plain reading of the statute, the Court finds that there is an open-ended statute of limitations for any facility listed on the NPL. The Court can determine no statutory or regulatory time limit on how long (after the discovery of the loss to the natural resource and its connection to a release) the EPA has to determine that a site should be listed on the NPL. If the trustee fails to file a NRD

action within 3 years of the date of the discovery of the loss and its connection with the release in question under 42 U.S.C. § 9613(g)(A), then the trustee can still timely file a NRD action for the loss if the facility is listed by the EPA on the NPL ....

*United States v. Asarco, Inc.*, 28 F.Supp.2d 1170, 1179 (D.Idaho 1998); *rev d on other grounds* 214 F.3d 1104 (9<sup>th</sup> Cir. 2000).

In the case of releases at facilities that are not on the NPL or at which CERCLA remedial action is not otherwise scheduled, an action for natural resource damages must be brought three years after the later of the date of discovery of the loss and its connection with the release in question, or the date on which the Interior Department NRDA regulations are promulgated. 42 U.S.C. § 9613(g)(1)(A) and (B). The promulgation of regulations prong of the statute of limitations has been held to have begun running in 1987 with the adoption of Interior's Type B regulations. *California v. Montrose Chemical Corp.*, 104 F.3d at 1514; *Kennecott Utah Copper Corp. v. U.S. Dept. of the Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996).

CERCLA's statute of limitations is more generous to Indian tribes. A tribe may bring a damages claim beyond the three-year period provided it is brought within two years after the United States, in its capacity as trustee for the tribe, gives the tribe written notice it will not present a claim or commence an action on the tribe's behalf or fails to present a claim or commence an action on behalf of the tribe within the original three-year period. 42 U.S.C. § 9626(d).

OPA's statute of limitations is also three years. OPA differs from CERCLA, however, by adding a diligence qualifier to the discovery prong of the limitations clause (the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care). 33 U.S.C. § 2717(f)(1)(A). Perhaps more importantly, the statute gives trustees who determine to conduct a formal damage assessment a little breathing room, not beginning the running of the limitations period until the completion of the assessment process. 33 U.S.C. § 2717(f)(1)(B).

One other restriction on CERCLA's application, related to the statute of limitations, is a type of grandfather clause applicable only to natural resource damage claims. Subparagraph (f)(1) of 42 U.S.C. § 9607 precludes recovery of damages and damage assessment costs where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980. Another ruling in the Acushnet River and New Bedford Harbor proceeding, *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676 (D.Mass. 1989) (*Acushnet V*), addressed this provision and its wholly before requirement. The Court noted that natural resource damages occur at the time that some entity incurs expenses or suffers a loss of use or enjoyment of natural resources, due to an injury to the resources. *Id.*, at 683. Consequently, trustees are entitled to recover all damages that occur after December 11, 1980, regardless of when the release from which they resulted occurred. *Id.*, at 684. Where the damages are readily divisible between pre- and post-enactment portions, trustees may recover only the post-enactment portion, with the defendant bearing the burden of proof on divisibility. *Id.*, at 685. Where they are not

divisible, the trustees can recover for the non-divisible damages in their entirety. *Id.*, at 686. *See also*, *State of Idaho v. Bunker Hill Company*, 635 F. Supp. at 675; *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1120 (D.Minn. 1982).

J. NATURAL RESOURCE DAMAGE ACTIONS ARE INTENDED TO RECOVER THE COSTS OF RESTORING THE INJURED RESOURCES AS WELL AS THE LOSSES TO THE PUBLIC ACCRUING BETWEEN THE INITIATION OF THE INJURY AND THE COMPLETION OF THE RECOVERY OR REMEDY; TRUSTEES MAY ALSO RECOVER THE COSTS OF CONDUCTING THE DAMAGE ASSESSMENT

NRDA claims are in part residual in nature, being designed to capture the costs of efforts needed, after remedial action or timely natural recovery, to restore injured resources to a pre-injury baseline. This is reflected in CERCLA's precluding the filing of an action for natural resource damages at an active remediation site before selection of the remedial action. 42 U.S.C. § 9613(g)(1). However, trustees are not limited to recovering only the costs of restoring unremediated/unrecovered resources. CERCLA provides that damages recovered by federal and state trustees are to be used only to restore, replace, or acquire the equivalent of the injured resources, but also stipulates that the measure of damages shall not be limited by the sums which can be used to restore or replace such resources. 42 U.S.C. § 9607(f)(1). This language led the U.S. Court of Appeals for the D.C. Circuit to hold that the measure of damages must not only be sufficient to cover the intended restoration or replacement uses in the usual case but may in some cases exceed restoration cost by incorporating interim lost use value as well. *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d at 448. OPA makes this point explicitly by describing natural resource damages as [d]amages for injury to, destruction of, loss of, or loss of use of, natural resources. 33 U.S.C. § 2702(b)(2)(A).

In addition to damages, trustees are authorized to recover the reasonable costs of assessing the injury and damages. 42 U.S.C. § 9607(a)(4)(C); 33 U.S.C. § 2702(b)(2)(A). Interest on the damages and costs, figured (with certain exceptions) from the date of a written demand, may also be collected as part of a NRDA claim. 42 U.S.C. § 9607(a)(4); 33 U.S.C. § 2705(b)(1). OPA has been interpreted to preclude punitive damage awards formerly potentially available under admiralty and maritime law in oil spill cases. *South Port Marine v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000).

One significant way in which CERCLA and OPA differ is in how the two statutes deal with the issue of insolvent or unreachable PRPs or PRPs unwilling to settle NRDA claims. Both statutes create what is in essence an insurance fund to cover cleanup costs. Under CERCLA, that takes the form of the familiar Superfund, established under the tax code at 26 U.S.C. § 9507; OPA's Oil Spill Liability Trust Fund (OPA Fund) is established by 26 U.S.C. § 9509. The statutes differ in that under OPA, trustees unable to recover natural resource damages and damage assessment costs from responsible parties are authorized to seek reimbursement from the OPA Fund. 33 U.S.C. § 2712(a)(2). When the OPA Fund pays a claim, it then becomes subrogated to the rights of the claimant and can itself pursue reimbursement from responsible parties. 33 U.S.C. § 2712(f). Trustees have no such rights to seek reimbursement of damages or damage assessment costs from the CERCLA Superfund. While the casual observer might point to 42 U.S.C. § 9611(c)(1) and (2), which clearly authorize reimbursement of natural resource

damages and damage assessment costs, which was the status of the law as adopted in 1980, one should not overlook the tax code text regarding the Superfund, which was amended in 1986 to exclude payment of claims under those subparagraphs. 26 U.S.C. § 9507(c)(1)(A)(ii). What the large print gave, the small print took away.

K. REGULATIONS HAVE BEEN ADOPTED UNDER CERCLA AND OPA WHICH, WHEN FOLLOWED BY TRUSTEES IN PERFORMING A DAMAGE ASSESSMENT, GIVE THE ASSESSMENT THE FORCE OF A REBUTTABLE PRESUMPTION

As mentioned above, the Interior Department was delegated the authority by the President to prepare NRDA regulations under CERCLA, while OPA statutorily gave such authority regarding oil spills to the Under Secretary of Commerce for Oceans and Atmosphere (the Administrator of NOAA). 42 U.S.C. § 9651(c); 33 U.S.C. § 2706(e). Trustees need not follow the assessment procedures laid out in the regulations, but any determination of damages made by a federal or state trustee in accordance with the CERCLA regulations, or a federal, state or Indian tribal trustee in accordance with the OPA regulations, is entitled to a rebuttable presumption in any judicial or administrative proceeding under the pertinent statute. 42 U.S.C. § 9607(f)(2)(C); 33 U.S.C. § 2706(e)(2). *National Association of Manufacturers v. U.S. Dept. of the Interior*, 134 F.3d at 1100. Thus, where the circumstances of a release or discharge situation do not neatly fit the assessment methodologies set out in the regulations, the trustees may select alternative means of identifying and valuing injuries, but at the risk of losing the rebuttable presumption for the resulting damages computation.

The force and effect of the presumption so gained has not yet been determined in court. Obviously the presumption would shift to the defendant the burden of producing evidence, entitling trustees to reach the jury or fact finder where the defendant has offered no contrary evidence. Logically the presumption would also shift to the defendant the burden of producing evidence that the injuries and damages were not as the damage assessment would indicate. Fed. R. Evid. 301; *see, Menefee, Recovery for Natural Resource Damages under Superfund: The Role of the Rebuttable Presumption*, 12 *Env'tl. L. Rep. (ELI)* 15,057, 15,061-064 (1982). Nor has it been tested how strictly trustees must follow the appropriate regulations in order to gain the presumption, and whether deviation from a one part of the regulations vitiates the presumption only as to the affected part of the assessment or as regards the entire assessment process. The course of NRDA rulemaking has not run smoothly for either the Interior Department or NOAA, as each attempt to publish regulations has been subject to vigorous challenge. The regulatory history for both the CERCLA and OPA regulations is complex, and ultimately for most observers tedious. For the curious, a brief synopsis of that history follows.

CERCLA directs that its NRDA regulations are to have two components: 1) standardized procedures for simplified assessments requiring minimal data collection ( Type A assessments ), and 2) alternative full-field protocols for conducting individualized assessments ( Type B assessments ). 42 U.S.C. § 9651(c)(2). The Interior Department originally issued regulations for Type A assessments, 43 C.F.R.11.40-11.41, in 1986 (51 Fed. Reg. 27674 (Aug. 1, 1986)), and promulgated the Type B regulations, 43 C.F.R.11.60-11.84, in 1988 (53 Fed. Reg. 5166 (Feb. 22, 1988)). The CERCLA regulations were challenged by several parties, which resulted in the Court of Appeals returning the regulations to the Interior Department for revision.

*State of Ohio v. U.S. Dept. of the Interior; State of Colorado v. U.S. Dept. of the Interior*, 880 F.2d 481 (D.C. Cir. 1989). The Type A regulations were revised and repromulgated at 61 Fed. Reg. 20,560 (May 7, 1996), were challenged and were upheld by the D.C. Circuit in 1998 in *National Association of Manufacturers v. U.S. Dept. of the Interior*.

The Interior Department published revised Type B regulations in 1994, addressing all but one of the issues remanded by the Court in 1989. 59 Fed. Reg. 14262 (March 25, 1994). Those regulations were in turn challenged before the D.C. Circuit, which upheld most of the revisions, with two exceptions. *Kennecott Utah Copper Corp. v. U.S. Dept. of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996). The Court found the rulemaking notice language inconsistent in how it dealt with restoring injured resources and resource services, and consequently invalidated those provisions, effectively reviving the pertinent provisions of the 1986 regulations. *Id.* at 1220. The Court also rejected the Interior Department's position that its revision and reissuance of the regulations restarted the clock on the CERCLA statute of limitations prong based on the issuance of the regulations. *Id.* at 1212-1213.

The Interior Department had proposed in 1994 to further revise the provisions of the regulations dealing with the calculation of non-use or passive-use values (the issue not addressed in the March 1994 rulemaking). 59 Fed. Reg. 23098 (May 4, 1994). Later that year Interior published an advance notice of proposed rulemaking, 59 Fed. Reg. 52749 (October 19, 1994), announcing the start of an overall review of the Type B regulations, in keeping with CERCLA's requirement that the regulations be reviewed on a biennial basis. 42 U.S.C. § 9651(c)(3). In 1996, Interior published another advance notice of proposed rulemaking in which it announced its intention to develop a proposed rule that would address both the biennial review and the lost interim non-use values issue, and would supersede the May 1994 proposed rule. The 1996 notice also solicited comments on a proposal to include in the biennial revision the concepts articulated in OPA regulations adopted by NOAA. 61 Fed. Reg. 37031 (July 16, 1996). As of this writing, Interior has not published the proposed biennial revisions.

NOAA's OPA regulations were first published in proposed form in 1994. 59 Fed. Reg. 1062 (Jan. 7, 1994), and were finally promulgated at 15 C.F.R. Part 990 in January 1996. 61 Fed. Reg. 440 (Jan. 5, 1996). The rules were subsequently challenged, and the D.C. Circuit largely upheld them, remanding for reconsideration and clarification portions of the rules dealing with removal of residual oil and recovery of attorney fees. *General Electric Co. v. U.S. Dept. of Commerce*, 128 F.3d 767 (D.C. Cir. 1997). NOAA is currently revising the remanded provisions.

L. While the Current CERCLA and OPA Regulations Differ in a Number of Respects, They Include a Number of Similar Provisions and Share the Same Goals

Both sets of regulations are designed to guide trustees through the primary steps of a damage assessment: identifying injuries and tying them to covered contaminants; quantifying the effect of the contaminant-related injuries; placing a dollar value on those effects; and planning steps to restore affected resources. The two regulations also provide guidance on interactions among multiple trustees and on how and when to involve responsible parties and members of the public in the damage assessment and restoration planning processes. The details of the

regulations are beyond the scope of this presentation. In addition, due to the fact that Interior regulations are currently undergoing revision, their details and structure are subject to change. However, a brief overview of the regulations' current provisions may be helpful.

In general, the rules divide the assessment process into pre-assessment, assessment and post-assessment phases, with OPA regulations adding a pre-spill planning component. The goal of pre-assessment is to determine whether there have likely been injuries to trust natural resources sufficient to warrant conducting a damage assessment. Answering this question involves resolving issues of trusteeship and jurisdiction and making preliminary judgments regarding availability of evidence; availability, effectiveness and costs of potential assessment methodologies; and availability and feasibility of restoration alternatives. Compare 43 C.F.R. 11.23-11.25 and 15 C.F.R. 990.40-990.45. While not explicit in the CERCLA regulations, since trustees do not have the Superfund to call upon for unrecovered damages or damage assessment costs, one major issue trustees must face in determining whether to pursue a CERCLA damage assessment is the availability of a viable responsible party.

Both sets of regulations provide that the trustees are to notify PRPs of their intent to conduct a damage assessment and to invite the PRPs to participate directly in the damage assessment process. 43 C.F.R. § 11.32(a)(2)(iii)(A); 15 C.F.R. § 990.44(d). The nature and extent of PRP participation is subject to the trustees' discretion, however.

During the assessment phase itself, trustees collect data and conduct studies designed to determine the nature and extent of the natural resource injuries or losses and the natural resource services lost or impaired. The goal is to determine not just what has happened but how much and what can be done to redress the losses. As a natural resource damage claim under CERCLA or OPA is based upon losses due to hazardous substance releases or oil discharges, trustees must attempt to determine the pre-release/pre-discharge baseline for the affected natural resources or natural resource services. Compensable losses and restoration efforts are all aimed at returning injured resources to that baseline and compensating the public for the losses occurring between the beginning of the pollution event and the completion of remedial action or natural recovery. This distinction between restoration of injured resources to baseline on the one hand and compensation for interim losses on the other is highlighted in the NOAA regulations by the concepts of primary restoration and compensatory restoration. See definition of restoration at 15 C.F.R. § 990.30. Both regulations provide that the trustees are to evaluate whether resource injuries may be best addressed passively, through the operation of natural recovery. 43 C.F.R. § 11.73(a)(1); 15 C.F.R. § 990.53(b)(2).

Where trustees have attempted to conduct a damage assessment with some degree of involvement by the responsible party, the question of what type of and how many studies to employ is often fertile grounds for discussion and difference of opinion. The Interior and NOAA regulations currently differ in terms of the specificity of the guidance offered to trustees in selecting and designing such studies. The current CERCLA regulations identify a number of detailed criteria to be followed in conducting studies under a Type B full field assessment. See 43 C.F.R. 11.60-11.84. By contrast, the OPA regulations offer more general guidance, providing that the assessment procedures employed must comply with the following standards:(1) The procedures must be capable of providing assessment information of use in determining the type

and scale of restoration appropriate for a particular injury; (2) The additional cost of a more complex procedure must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure; and (3) The procedure must be reliable and valid for the particular incident. 15 C.F.R. § 990.27(a).

The regulations also currently differ in terms of the aim of the damage assessment process. The CERCLA regulations are geared toward and intended to produce a claim for monetary damages. In the post-assessment phase, the Interior regulations direct the trustees to present to the responsible party a demand for damages and damage assessment costs. 43 C.F.R. § 11.91(a). The OPA regulations have a restoration-based focus, reflected not only in the terminology used (the assessment phase is termed the Restoration Planning Phase 15 C.F.R. Part 990, Subpart E) but in the fact that the process is intended to produce a restoration plan. 15 C.F.R. § 990.55. Trustees are directed to the responsible party a demand that the party either implement the restoration plan or pay the trustees costs to implement the plan. 15 C.F.R. § 990.62.

M. THE GOAL OF NATURAL RESOURCE DAMAGE ASSESSMENT IS TO COMPENSATE THE PUBLIC FOR LOST RESOURCES AND RESOURCE SERVICES BY RESTORING INJURED RESOURCES AND HABITATS

While the regulations may currently offer different approaches, they both seek to achieve restoration of natural resources and habitats sufficient in nature and kind to bring injured resources and resource service levels back to the pre-injury baseline and to compensate for the natural resources and resource services lost in the interim. CERCLA provides that trustees are to use recovered damages only to restore, replace, acquire the equivalent of injured resources. 42 U.S.C. § 9607(f)(1). OPA contains similar language (adding the term rehabilitation). 33 U.S.C. §§ 2706(c)(1)(C), (c)(2)(C), (c)(3)(C), and (f). In practice, the range of restoration actions trustees have employed has varied as widely as the types of habitats and resources affected by hazardous substance discharges and oil spills. Example projects from the Pacific Northwest have included creating and rehabilitating estuarine and freshwater marsh areas by removing fill, amending soils and planting aquatic and riparian plants; erecting fencing to keep cattle out of salmon spawning streams; removing buildings and other structures that shade intertidal habitats; contributing funding to the operation of oiled wildlife rescue and rehabilitation facilities; re-daylighting culverted streams and recontouring streams and adding large woody debris to improve habitat for salmon; and posting signs and providing informational brochures to discourage disturbance of bird nesting habitat. In some cases simply acquiring and preserving existing habitats that might otherwise be developed (i.e., preventing future losses to offset past losses) is the best way to ensure that the natural functions impacted by contamination are restored.