

## NEWS

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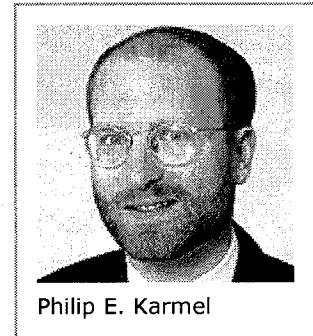
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### Toxic Torts

#### Exploring New Rules for Natural Resource Damage Assessments

By Philip E. Karmel  
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In a rule effective on Nov. 3, 2008, the U.S. Department of the Interior promulgated revisions to its procedures for assessing natural resource damages (NRDs) resulting from the release of hazardous substances into the environment.<sup>1</sup> The statute of limitations for challenging the new rule has now passed without a judicial challenge.

The new rule permits the use of Habitat Equivalency Analysis, which emphasizes the restoration of natural resources instead of economic damages. This approach follows recommendations made to DOI by the Federal Advisory Committee for Natural Resource Damage Assessment and Restoration. This column provides some background on NRDs litigation before discussing the Habitat Equivalency Analysis technique permitted by the new rule.

#### Background on NRDs

The principal statute giving rise to claims for NRDs from the release of hazardous substances is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>2</sup> Under CERCLA, any responsible person may be held liable for cleanup costs incurred at a site due to the release of a hazardous substance into the environment.

The list of responsible parties includes: the current owner and operator of the site from which there has been a release; any person who owned or operated the site at the time of the disposal of a hazardous substance there; any person who arranged for the disposal of a hazardous substance at the site; and any person who selected the site as a disposal location and transported a hazardous substance there.<sup>3</sup> Although the U.S. Supreme Court recently heard argument on the circumstances in which cleanup cost liability may be apportioned among defendants,<sup>4</sup> the lower courts have held that, as a general matter, such liability is strict, retroactive, presumptively joint and several, and limited only by the amount of cleanup costs incurred at the site.<sup>5</sup>

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In addition to bearing liability for cleanup costs, responsible parties are liable for "damages for injury to, destruction of, or loss of natural resources."<sup>6</sup> The "natural resources" at issue in an NRDs suit are "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] Indian tribe."<sup>7</sup>

Although Congress excluded "purely private" property from the definition of natural resources, a resource need not be owned by the government to be a CERCLA "natural resource." Rather, a "substantial degree of government regulation, management or other form of control over property [may] be sufficient" for the NRDs provisions to apply.<sup>8</sup>

The plaintiffs in NRDs cases are referred to as "trustees" for the resources subject to the suit. DOI asserts trusteeship over migratory birds, endangered species and its own lands. The National Oceanic and Atmospheric Administration asserts trusteeship for the coastal and marine environment, including commercial and recreational fisheries, anadromous fish and marine mammals. States and Indian Tribes may also assert trustee status over natural resources within their territories.

According to the statute, natural resource damages suits are for money, not injunctive relief, but settlements frequently require the defendant to engage in restoration activities. Any sums recovered by the trustees in the lawsuit must be used "to restore, replace, or acquire the equivalent of" the injured natural resources.<sup>9</sup>

At sites where a cleanup will occur, a natural resource damages action seeks to recover for the residual harm to natural resources, assessed after the cleanup has been completed or its likely effects on natural resources have been taken into account. Thus, NRDs are the monetized "difference between the natural resource in its pristine condition and the natural resource after the cleanup."<sup>10</sup> The residual harm is generally monetized (reduced to a dollar value) by calculating the cost of restoring the resource to its pre-contaminated condition.<sup>11</sup>

The dollar figure placed on the cost of restoration is the principal component of NRDs in most suits, but the statute does not require that all injured natural resources be restored irrespective of cost and other considerations. Although CERCLA establishes "a distinct preference for restoration cost as the measure of . . . damages,"<sup>12</sup> some other (and lesser) measure of damages may be used where restoration is "excessively costly."<sup>13</sup> An alternative measure of damages to total restoration may also be appropriate where such restoration (such as dredging a fragile riverine ecosystem) would itself cause significant damage to the environment.

In addition to restoration costs, the trustees may recover the monetized lost "use value" of the resource prior to its restoration by estimating the monetary value of the pre-restoration impairment of the resource.<sup>14</sup> Trustees also claim a right to recover lost "non-use value," which is the monetized benefit that people who do not use the resource are said to enjoy simply by knowing that it exists.<sup>15</sup> The trustees may also recover any "reasonable" costs they incur to assess the nature and extent of the NRDs.<sup>16</sup>

To establish a prima facie case of liability for NRDs, a trustee must prove that the defendant is a responsible party (an owner, operator, arranger, or transporter of the kind described above) and there has been "injury to, destruction of, or loss of natural resources . . . resulting from such a release [of a hazardous substance]."<sup>17</sup> "Injury" can be proven by adverse changes in particular species (lower hatching rates, increased tumors, higher mortality).<sup>18</sup> In addition, trustees assert that injury can be proven by the mere presence of carcinogens or toxins in fish, biota or other resources above regulatory or health

advisory levels, such as the Food and Drug Administration's standards for human consumption of seafood or a state health agency's directives to limit or ban consumption of the organism.<sup>19</sup>

Causation - the "resulting from" element of liability - requires the plaintiff to establish that a defendant's hazardous substance release caused the natural resource injury for which damages are sought.<sup>20</sup> One court has held that the plaintiff must make a prima facie showing that the NRDs injury is indivisible to obtain joint and several liability; to escape joint and several liability, the defendant must then prove that the injury may be apportioned.<sup>21</sup> Another court held that the trustee must prove, as to each defendant, that its specific releases were the "sole or substantially contributing" cause of the specific natural resource injuries that are the subject of the trustee's claim.<sup>22</sup>

A related causation issue is that an NRDs assessment undertaken in accordance with DOI's regulations must quantify the extent of NRDs by comparing the injured resource with a baseline defined as "the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred."<sup>23</sup> In some cases, anthropogenic conditions independent of the defendant's discharge or release have adversely affected the resource, arguably resulting in a "baseline" that should reflect such adverse effects, reducing the magnitude of NRDs attributable to defendant's discharge or release.

CERCLA bars recovery for NRDs "where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before" the statute's enactment on Dec. 11, 1980.<sup>24</sup> One court has held that a trustee's claim for NRDs are barred to the extent the damages occurred wholly before this date.<sup>25</sup>

### **The New Rule**

The new regulation enacted in 2008 will govern natural resource damage assessments (NRDAs) prepared by DOI and by trustees who wish to take advantage of the statutory "rebuttal presumption" in favor of assessments prepared in accordance with DOI's regulations.<sup>26</sup>

The new regulation, like the old one, provides that the principal element of a natural resource damage claim is the estimated cost of the restoration of the natural resource. The difference in the new regulation lies in the way that damages are calculated for "interim losses." These are the losses resulting from the contamination of a natural resource (e.g., a fishery or wetlands) prior to its restoration.

DOI's regulations opaquely refer to these interim losses as "compensable value."<sup>27</sup> Under both the old and new DOI regulations, a natural resource trustee is entitled to estimate interim losses and add these damages as an element of its natural resource damages claim. Under the old regulations, these interim losses were valued using economic valuation concepts to measure lost "use value" and "non-use value," as noted above.

For example, if the resource at issue is a recreational fishery that was taken out of service for 25 years as a result of a release of hazardous substances, the trustee may seek to estimate the value of the fishery by estimating the economic value of this resource to anglers as measured by their willingness to incur travel costs and the economic value of the fish that they would have eaten. In addition to estimating this lost "use value," the trustee could seek to measure the lost "non-use value" through a survey that asks people how much they would pay (perhaps \$10) to have had the ecosystem restored during the years preceding restoration of the resource. If the average person on the street would pay \$10, and 20 million people live in the area, the trustee may claim the right to recover \$200 million in lost non-use value as a result of the survey.<sup>28</sup>

The new regulations continue to allow trustees to use these economic valuation techniques to estimate interim losses, but they add a new tool to the trustee's damage-estimation toolbox: Habitat Equivalency Analysis.<sup>29</sup> For example, let's suppose that the fisheries example discussed above (the 25-year loss of a fishery) involved 10 miles of a trout stream. The 25-year loss of 10 miles equals 250 mile-years of lost use which can be discounted forward to the present after taking into account the time value of having something sooner rather than later.

With this time-discounted value of lost mile-years of trout fishing, the trustees can then estimate the cost of, for example, restoring a second trout stream in the area to provide an equivalent amount of time-discounted mile-years of trout fishing. Using this method, the trustees would demand that the defendant pay not only for the cost of restoring the trout stream it contaminated but also the cost of restoring the second trout stream to the extent required to make up for the interim loss of mile-years of trout fishing. The strength of this technique is that by focusing on the restoration cost of the second stream, it allows monetization of the interim loss without ever assigning a monetary value to trout fishing.

Even based on this relatively simple example, it is easy to imagine a host of disputes as to the scientific credibility of natural resource damage estimates. In a case that arose under the National Marine Sanctuaries Act, which also contains an NRDs recovery provision, one court upheld the introduction of Habitat Equivalency Analysis testimony, rejecting the defendant's challenge to its admissibility under *Daubert*.<sup>30</sup>

The DOI regulations seek to address these issues proactively by requiring that trustees evaluate whether a particular valuation method is "feasible and reliable for a particular incident and type of damage" by reference to its appropriateness for a particular application "in light of the nature, degree, and spatial and temporal extent of the injury," whether the methodology enjoys "acceptance by experts in the field," whether the inputs to the model have a "clearly articulated rationale" and whether "cutting edge methodologies" have been "tested or analyzed sufficiently so as to be reasonably reliable under the circumstances."<sup>31</sup>

## Conclusion

By incorporating Habitat Equivalency Analysis as a permitted damage assessment technique, DOI brings its rules up-to-date with the use of this approach in the past for cooperatively performed assessments and settlement negotiations. The rule gives natural resource trustees further leverage in these negotiations because they can now point to the rule as providing for the use of Habitat Equivalency Analysis to measure natural resource damages.

**Philip E. Karmel** is a partner in the New York office of Bryan Cave.

## Endnotes:

1. Natural Resource Damages for Hazardous Substances, 73 Fed. Reg. 57259 (Oct. 2, 2008) (amending 43 C.F.R. Part 11).
2. 42 U.S.C. 9601 et seq.
3. 42 U.S.C. 9607(a).
4. *Burlington No. & Santa Fe R. Co. v. United States*, No. 07-1601 (oral argument Feb. 24, 2009), on cert.

from 502 F.3d 781 (9th Cir. 2008).

5. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993).

6. 42 U.S.C. 9607(a)(4)(C).

7. 42 U.S.C. 9601(16).

8. *Ohio v. DOI*, 880 F.2d 432, 460 (D.C. Cir. 1989).

9. 42 U.S.C. 9607(f)(1).

10. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F.Supp. 1019, 1035 (D. Mass. 1989) ("Acushnet").

11. *Ohio v. DOI*, 880 F.2d at 443 & n.7, 456, 459.

12. *Id.* at 459; *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1218 (D.C. Cir. 1996).

13. *Kennecott Utah Copper Corp.*, 88 F.3d at 1218.

14. *Id.* at 1227; *Ohio v. DOI*, 880 F.2d at 454 n.34; *New Mexico v. GE*, 467 F.3d 1223 (10th Cir. 2006) (denying "loss of use" NRDs on ground that trustee failed to demonstrate impairment in natural resource services).

15. *Ohio v. DOI*, 880 F.2d at 476-78.

16. 42 U.S.C. 9607(a)(4)(C).

17. *Id.*

18. 43 C.F.R. 11.14(v); *Ohio v. DOI*, 880 F.2d at 469.

19. *Acushnet*, 716 F.Supp. 676, 685 (D. Mass. 1989); 43 C.F.R. 11.62(f)(1)(ii)-(iii).

20. *Ohio v. DOI*, 880 F.2d at 470; *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665, 674 (D. Idaho 1986); *Acushnet*, 716 F.Supp. at 687 n.19.

21. *Acushnet*, 722 F. Supp. 893, 897 n.9 (D. Mass. 1989).

22. *United States v. Montrose Chem. of Cal.*, 33 E.R.C. 1207, 1208 (C.D. Cal. 1991).

23. 43 C.F.R. 11.14(e).

24. 42 U.S.C. 9607(f)(1).

25. *Montana v. ARCO*, 266 F. Supp.2d 1238 (D. Mont. 2003); but cf. *Idaho v. Bunker Hill Co.*, 635 F.Supp. at 675 (reading the "wholly before" limitation more narrowly so as not to limit claims alleging continuing natural resource damages); *Acushnet*, 716 F.Supp. at 685-86 (same); *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1120 (D. Minn. 1982) (same).

26. 42 U.S.C. 9613(f)(2)(C).

27. 43 C.F.R. 11.83(c).

28. Ian J. Bateman, ed., "Valuing Environmental Preferences: Theory and Practice of the Contingent Valuation Method in the US, EU, and Developing Countries" (Oxford Univ. Press 2002).

29. 43 C.F.R. 11.83(c).

30. *United States v. Great Lakes Dredge & Dock Co.*, 259 F.3d 1300, 1305-06 (11th Cir. 2001) (rejecting evidentiary challenge under *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993)).

31. 43 C.F.R. 11.83(c).

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