

Superfund and Natural Resource Damages Litigation Committee Newsletter

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MESSAGE FROM THE CO-CHAIRS

**David Rifkind
Ken Mack**
Committee Co-Chairs

After a decade of one ABA Section of Environment, Energy, and Resources' committee that covered both Superfund and Hazardous Waste, it was decided to realign to better reflect the way practitioners have segmented their practices. Thus, this is the maiden voyage of a new committee known as the Superfund and Natural Resource Damages Litigation Committee. Note the emphasis on litigation. As we step into the next phase of Superfund and NRD, we all expect the litigation to continue. This committee is devoted to providing practical information, resources and tools to assist those lawyers whose focus is in the Superfund and NRD areas.

We expect to embark on an ambitious campaign to educate those coming into this area, as well as foster focused discussion and debate among those who are long established in these areas. Finally, we hope to engage both the regulatory agencies and the lawmakers in a dialogue on the proper way to administer, and perhaps correct, the underlying statutes that have been the cause of so much (and perhaps so much unnecessary) litigation in these arenas.

We look forward to your active participation in the committee this year, and for years to come. To get involved, contact David Rifkind at david.rifkind@corporate.ge.com or Ken Mack at kmack@foxrothschild.com.

THE NEWSLETTER AT A GLANCE

Ira Gottlieb
Committee Vice-Chair

It is noticeable to even a casual observer of trends and developments in environmental law that federal and state trustees have expressed a reinvigorated or new level of interest in natural resource damages (NRD). Any discussion of NRD raises a wide variety of cross cutting subjects and issues involving multiple disciplines. This inaugural issue of the Superfund and Natural Resource Damages Litigation Committee Newsletter presents a series of primer articles designed to provide an overview of subjects and issues, as well as a review of recent developments in the law.

The issue includes basic overviews of issues arising from the federal statutes and regulations, practical points to consider under *Daubert* with regard to experts, economic methodologies for valuation of damages, as

Superfund and Natural Resource Damages Litigation Committee Newsletter
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In this issue:

Message from the Co-Chairs
David Rifkind and Ken Mack 1

The Newsletter at a Glance
Ira Gottlieb 1

The Federal NRD Case
Tom Milch..... 2

Valuation Methodologies in Measuring Compensable Value from Injury to Natural Resources: Injury Determined, Now What Is it Worth?
Dov Frishberg, Ph.D. 6

Daubert v. Merrell Dow Pharmaceuticals, Inc. – an Essential Tool in Natural Resource Damages Litigation
Eric G. Lasker 12

Groundwater Damages in New Jersey
Michael L. Rodburg 14

Case Comment: *Coeur d’Alene Tribe v. Asarco Incorporated*
Keith E. Lynott..... 17

Issues Facing NRD Practitioners
Robert W. Lawrence 21

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well as a review of two significant recent court opinions, *Coeur d’Alene Tribe v. ASARCO Inc.* and *Montana v. Atlantic Richfield Company*. The emergence of a vigorous NRD recovery initiative by the State of New Jersey as trustee for groundwater resources is a possible precursor of similar actions by other States. The Newsletter therefore features a timely article concerning the situation in New Jersey and some of the pertinent precedents related alleged injuries and damages to groundwater.

As one author suggests, after more than 20 years of NRD experience many questions remain unanswered, or perhaps more aptly stated, unasked. Although the Newsletter’s space constraints do not permit a more in-depth treatment of the topics, we hope that the articles provide a solid introduction to the topics, facilitate discussion, and are thought provoking and helpful to the bar. As Vice-Chair of the Committee, I welcome your thoughts and comments, as well as suggestions for future issues. Please feel free to contact me at igottlieb@mccarter.com.

THE FEDERAL NRD CASE

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The proper scope and reach of the natural resources damages (NRD) provisions in federal environmental law has long been debated, but the reality of over 20 years of NRD experience is that the program has been largely inconsistent and ineffective in practice. Like the member of a famous family who simply fails to live up to high expectations, it is perhaps inevitable that federal natural resource trustees would be evaluated against the enormous success of EPA and the Department of Justice in wielding remedial authority at a wide range of sites throughout

the country. It is tempting to conclude that the NRD cause of action is simply far more limited than once thought, but the fact is that the jury remains out – even this long after statutory enactment and regulatory rulemaking. In sharp contrast to legal claims relating to remediation of contamination, what we do not yet know about federal NRD law is more than what we do know.

The Relevant Background

There are two principal statutory sources for NRD authority: the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and its oil spill counterpart, the Oil Pollution Control Act of 1990 (OPA). These provisions have been the subject of a series of important rulemakings by two key federal trustees, the Department of the Interior (DOI) and the National Oceanic & Atmospheric Administration (NOAA) of the Department of Commerce. These rules, principally embodying a regulatory framework for assessing natural resources damages, were the subject of lengthy court opinions. The original DOI rules promulgated in 1986 and 1987 were reviewed in *Ohio v. U.S. Department of Interior*, 880 F.2d 432 (D.C. Cir. 1989) and *Colorado v. U.S. Department of Interior*, 880 F.2d 481 (D.C. Cir. 1989). These decisions provide helpful background to the practitioner.

A second generation of rulemaking is also significant. DOI promulgated two different sets of assessment rules in 1994 (59 Fed. Reg. 14285) and 1996 (61 Fed. Reg. 20560), and NOAA issued a final rule early in 1996 (61 Fed. Reg. 440). The DOI rules were essentially upheld in two different cases. See *NAM v. U.S. Dep't of Interior*, 134 F.3d 1095 (D.C. Cir. 1998); *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). The NOAA rule was vacated in part and upheld in part by the D.C. Circuit in *General Electric Co. v. U.S. Department of*

Commerce, 182 F.3d 767 (D.C. Cir. 1997). NOAA subsequently adopted amendments addressing the vacated portions of its rule in 2002 (67 Fed. Reg. 61483). These rules and the reviewing case law together provide a key regulatory framework for federal NRD law.

In contrast to this fairly robust regulatory backdrop, there is a paucity of cases involving the application of federal NRD law to particular circumstances. There are scattered district court decisions on a number of key issues, but a dearth of appellate opinions. Major issues that will shape liability and damage determinations remain unclear.

Difficulties in Implementation

The essential idea behind the NRD provisions is that remediating a release of hazardous substances may not be enough. NRD recovery is supposed to reflect both the costs of restoring the natural resources injured as a result of the contamination at issue and the diminution in their value during the time before they are restored. For example, if the release of a chemical destroys an active fishery, the costs of restoring the fishery, as well as the value of the loss of that fishery, may be recovered on top of the costs of cleaning up the chemical release. Thus, by definition, there is a residual quality to the world of NRD – it is to address what cannot be fully addressed by the remedy at a site.

One would think that, with this mission, a large number of major sites would have been the basis for the application of the NRD rules. But there are a number of factors that have inhibited NRD actions. One is linking the contamination problem to particular trustees. The federal trustees include the secretaries of Defense, Interior, Agriculture, Commerce and Energy pursuant to Presidential Executive Order. See Executive Orders 12580 (52 Fed. Reg. 2923 (Jan. 29, 1987)) and 13016 (61 Fed. Reg. 45871 (Aug. 28, 1996)); see also 40

CFR § 300.600 *et seq.* Since federal trusteeship is derived from a number of overlapping federal statutes, more than one federal trustee will likely be involved at a given site, and overlaps with state and Indian tribe trustees frequently occur as well. Thus, an initial obstacle is the coordination of trustee activities at a given site and the determination of which trustee, if any, will be in the lead.

Indeed, in the early days of CERCLA, EPA did not routinely coordinate with federal or other trustees with respect to sites that may warrant NRD assessment. However, the SARA Amendments required EPA to notify trustees of possible natural resource impacts and to coordinate its investigatory work with the trustees. See CERCLA § 104(b)(2). While there is more coordination now, it is still the case that overlapping trustee authority has inhibited action. For example, at some sites parties have been unable to achieve prompt resolution of NRD issues at the time that remedial issues are being settled with EPA or a state, due to the need for multiple trustee signoffs. Moreover, the overlap of trustee authority underscores the potential importance of differences in how various federal trustees and their state or Indian tribe counterparts value NRD injuries and consider early dollar settlements.

Compounding the coordination problem is the time and cost of NRD assessments, an essential first step in determining injury. For the more complicated site-specific assessments, the necessary field work can be very substantial and take years to complete. A number of federal trustees have had funding challenges, and there have been years in which DOI in particular has sought special Congressional funding for the NRD assessments. It is difficult to point to particular sites at which federal funding limits have constrained investigations, but there is little doubt that funding difficulties have hampered the program.

Of course, timing is further aggravated by the recognition, generally embraced by trustees, that NRD actions should seek to recover for residual harm and therefore taken only after EPA has selected a site remedy. CERCLA recognizes this reality at NPL sites, prohibiting NRD actions if an RI/FS is underway. See 42 U.S.C. § 9613(a)(c)(B)(ii). See also *Coeur d'Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 1094, 1109 (D. Idaho 2003). In that case, the NRD action was permitted because it was deemed ahead of the RI/FS; in (*e.g.*, *Montrose Chemical*) a few other circumstances federal trustees have acted apart from the remedial program.

Causation

The small number of litigated NRD cases leaves many substitution issues in play. Perhaps the single most challenging issue in NRD law is causation – linking the release of a hazardous substance to the claimed injury to the resource. For remediation under CERCLA, the courts have required a minimal connection between the responsible party and the response costs incurred in connection with a release. See, *e.g.*, *Dedham Water Co. v. Cumberland Farms Inc.*, 889 F.2d 1146 (1st Cir. 1989). However, the issue is not yet resolved for NRD actions. On one level, the issue is defining the legal standard. The language in CERCLA, that the liability is for injury to resources “resulting from” a release (Section 107(a)(C)), begs the question. Some courts have rejected the common law standard of “substantial contributing factor” (Restatement of Torts (Second Section 431(1965)) in favor of a less stringent “contributing factor” test. See, *e.g.*, *In re Acushnet River*, 722 F.Supp. 893, 897, n.8 (D. Mass. 1989); *Coeur d'Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 1094, 1124 (D. Idaho 2003).

On another level, however, it is not the wording of the standard, but how causation is proved that presents the knotty issue. DOI

has developed “acceptance” criteria that purport to establish the necessary link. An example is showing that a particular biological response by a resource is “commonly documented” to occur upon exposure to the hazardous substance. See 43 CFR § 11.62(f). Yet at many mining and sediment sites, target circumstances for close NRD review, there may be multiple parties, multiple contaminants and multiple exposure pathways. The link between chemical X and thinning of eggshells, for example, hardly establishes that Company A’s release is what caused the biological response in particular eggshells. Moreover, DOI’s regulations contemplate the use of predictive computer models to establish causation, an approach effectively endorsed by the D.C. Circuit in the *NAM* case. See 134 F.3d at 1005-06. The parameters for trustee proof of causation will be an issue in individual cases which will test the willingness of federal judges to allow trustees to take shortcuts in proving this critical element of their cases.

Other Issues

Space does not permit a discussion of all the other substantive issues that have yet to be decided. However, here are three additional examples of how major legal questions remain unclear:

The statutory provisions (§107(f)(2)(C)) contemplate that a trustee determination conducted in accordance with applicable rules should be entitled to a rebuttable presumption of validity. This point, along with the requirement that funds be used only for resource restoration or replacement, have formed the basis upon which trustees have argued in favor of limited record review of NRD determinations. At the same time, the district courts that have addressed the issue have generally found that defendants in NRD actions are entitled to a jury trial.

See, e.g., *In re Acushnet River*, supra, 712 F. Supp. at 1000. This issue may have enormous practical implications in future cases.

There are a series of complicated statute of limitations questions raised by the NRD statutory provisions. As an example, the statute limits a trustee’s time to file a claim with respect to non-NPL sites to three years after the date the loss in resources is discovered. What that standard means is up in the air. Is it the date the loss was actually discovered or when it should have been discovered? Who is the discovering party for purposes of the provision – the trustee agency as a whole or any government official? How much knowledge constitutes discovery of the loss?

The extent of recoverable damages is also very much in play. “Damages” include both the costs of restoring or replacing injured resources and compensation for loss of the value of the resources during the time of injury. But how to measure that lost value is subject to dispute. For example, NOAA continues to assert that it may use contingent valuation methodology (CVM) to determine use and nonuse values. This survey technique (e.g., “how much are you willing to pay for a pristine wilderness in Northern Maine?”) is subject to considerable controversy.

Federal NRD actions have not been a robust area of litigation. But past may not be prologue here. There remains considerable potential for aggressive trustee action at major sites, resulting in litigation that may provide more insight into the many uncertain issues left unresolved by the statute, the rules and the few cases interpreting them.

**VALUATION METHODOLOGIES IN
MEASURING COMPENSABLE VALUE
FROM INJURY TO NATURAL RESOURCES:
INJURY DETERMINED, NOW
WHAT IS IT WORTH?**

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Standard valuation techniques derive their estimates of economic damages from marketplace values. The injured party is awarded a sum of money which allows them to purchase that which was (wrongfully) injured, lost or denied. In assessing the value of damages to natural resources, aspects of a private marketplace are often absent. First, frequently no private marketplace exists to provide prices by which the injured party could purchase replacement products or services to make them whole. Second, even when it is possible to determine what prices would have prevailed in a private market, the specific product or service is often no longer available for “purchase” after injury occurred (e.g., the water is not fit for drinking, the beach cannot be used to bathe).

Federal regulations answered the challenge of measuring the compensable value of damages to natural resources by prescribing two distinctly different, non-exclusive, approaches. Analytically, the two are at opposite ends of the spectrum in terms of their economic complexity and conceptual novelty, at least to the non-economist.

Restoration and Replacement

The first approach is to measure the compensable value as the funds needed to restore nature to its original state, the so-called “baseline.” Some latitude is granted in that the measured amount may be the cost of (or combinations of the costs of) “restoration, rehabilitation, replacement, and/or acquisition

of equivalent resources.”(CFR § 11.83 (b)). It should be noted that these costs are not easily determined is a matter of physical science and financial techniques. Interestingly, current regulations seem to sidestep those aspects of restoration and replacement that are most prone to complexity and uncertainty (and sometimes, outright disagreement).

Furthermore, for replacement or “acquisition of equivalent resources” there is no clear requirement that in replacing or acquiring an equivalent resource that the benefits flow to the same individuals who suffered the loss (a result called the “redistribution effect” by economists). The only statutory requirement appears to be that, by default, the citizenship subject to the powers of a trustee (e.g., a certain state or Indian tribe) benefit as a group. However in practice considerable efforts are made to align the actual injured individuals with the compensated beneficiaries.

Certain complexities of assessing restoration and replacement costs are prevalent and persistent. One such complexity is the risk emanating from uncertainty about the feasibility and efficiency of alternative technologies for restoring or replacing the injured resources. A related complication is the non-additively of the quantum of economic damages where multiple injuries occurred at a single site. Generally, the subsequent contamination is of lesser impact than if it had been the first, though sometimes the opposite occurs. Also, time is an important factor. Since interest is assessed to compensate for the difference in timing between receipt (of the assessed amount) and expenses (for restoration and replacement), any substantively missed forecast of a project milestone can cause either over or under assessment of the compensatory amount.

Non-restoration and Replacement Costs

When restoration or replacement are not feasible or advisable, or when natural resources benefits are lost while the restoration and replacement is undergoing, the second approach provides a set of methods for assessing the economic value of the loss and providing an estimated amount of compensable value. These methods are planted in concepts and technique that, while well known and highly valued by the trained economist, are largely unknown to others.

The regulations state (CFR § 11.83 (c)):

“...[C]ompensable value is measured by changes in **consumer surplus, economic rent**, and any fees or other payments collectable by a Federal or State agency or an Indian tribe...”

(Emphasis added.)

In economics consumer's surplus is the amount, measured monetarily, that a consumer values a unit of a product or service *above and beyond* the price paid for that unit. Similarly, economic rent is the amount of benefits, measured monetarily, that the producer of a good or service derives from a resource above and beyond the cost involved in production. As a matter of economic theory, the welfare of society is the sum of all consumers' surplus and all producers' rents.

To measure this economic value of the injury to natural resources, the regulations suggests that the “official” use certain methodologies listed therein, although he or she “may choose other methodologies.” As listed in the regulations, these methodologies bear names that are analytically similar to the names used in the context of academic discussion, though they do not necessarily adhere to the intricacies of the present day academic consensus.

The regulations list the methodologies that are most common in practical application and in academic discussion, though those most common in application are not necessarily those drawing the most interest in academic study. An additional, seventh methodology incorporates federal appraisal standards into the list. While not specifically a set of standards or methods designed to measure the damages to natural resources, this methodology is listed with reservations. The seven methodologies are:

Market Price methodology – If there exists a sufficiently competitive market for an injured natural resource or of its service, the compensable value is the reduction in the market price of the natural resource or the services from the natural resources. This technique is based on certain assumptions. It must be the case that the resource belongs to, be managed by, is held in trust by, appertains to, or be otherwise controlled by the government (CFR § 11.14 (z)). Such a resource, however, is not likely to be freely traded in a private marketplace. In fact, two such markets are needed for the calculation; a market for “baseline” resource and a market for the “injured” resource. Even if the baseline resource is traded in a private marketplace, the injured resource is generally not. However, if it can be assumed that the injured resources have no value and the baseline resource is traded in a private market then this method readily applies. However, only if the injured parties can actually proceed and purchase sufficient replacement, baseline-quality, amount of the injured resources with the compensatory amount is it guaranteed that their lost consumers' surplus would be restored to them.

Appraisal methodology – This methodology points the trustees to the methods of the “Uniform Appraisal Standards for Federal Lands Acquisition.” The measure of compensable value under this methodology is

the difference between the appraised value of the borderline condition and the injured condition of the resources as calculated by federally approved methods. To the degree that such valuation is anchored in monetary values observable in a competitive market, this methodology is not truly different or distinct from the aforementioned Market Price methodology. To the extent that the valuation under the Standards relies on non-market estimates, generally, they will diverge from the premise that the assessment is offered as a means to measure consumers' surplus or economic rent.

Factor Income methodology – Under this methodology the compensable value of an injury to a damaged natural resource is the decline in profit due to its unavailability or diminished value in light of its use in commercial production. This methodology is the premier technique for measuring damages to commercial enterprises from an injury to a natural resource. Even with the need to employ certain approximations, the methodology is effective when sufficient data is available. Nonetheless, the methodology depends, among other significant requirements, on the ability to ferret out the effect on profit of the injury to the natural resources from the effect of other changes that regularly experienced by a manufacturer or an industry. At times, such differentiation can prove daunting.

Travel Cost methodology – This methodology measures compensable value according to the value of time expended and related costs incurred by those members of the public traveling to and enjoying the services of a natural resources. Under this methodology the diminution in time traveled and number of visitors is a reflection of the value lost due to injury. This method has considerable didactic appeal and is probably the most widely used by academics to demonstrate the value of a natural resource that is not used or consumed

commercially. Aside from the difficulties in securing sufficient data on travel time and number of visitors, the method is dependent on a reliable estimate of individuals' value of time. Producing a reliable estimate of the value of time to a given set of individuals suffering from the injury to a certain natural resource is not a simple undertaking.

Hedonic Pricing methodology – Its ominous name notwithstanding, this methodology suggests that the injury to a natural resource can be economically quantified by reference to prices and quantities in private markets transactions. Most commonly under this method the economic value of an injury to a natural resource is said to be reflected in the change in value of private assets or products whose attributes include benefits of the injured resources. Thus, value of an injury to a pristine stream is reflected in the change in value of adjacent properties. This methodology is generally the most capable in capturing in full the loss in consumers' surplus and economic rents due to an injury. It can show that some individuals may actual gain from an injury. The net amount determines the compensable values. Also, data required for its application is often readily available from records of actual or comparable transaction and appraisals of property values.

Unit Value methodology – Under this method unit values are reassigned to various types of non-marketed resources or services from non-marketed resources (e.g., a day at a public beach) and the amount of the compensable value is equal to the arithmetic product of lost units or lost units of service due to the injury *times* the unit value. This methodology, where appropriate, produces an estimate of compensable value with limited effort and substantial consistency. However, the unit values themselves, when economically meaningful, are established by application of the other methods discussed herein. Developing a large, relevant and current array

of unit values pertaining to a range of natural resources or natural resources services can be demanding, if not prohibitively burdensome. Thus, unit values are most commonly developed for popular recreational activities that are likely to suffer from hazardous releases, such as fishing or recreational bathing.

Contingent Valuation methodology – This methodology is best known for the controversy it generates and the wide variation in diverging, apparently valid, assessed amounts of compensatory value for the same injury. It is based on the notion that value and diminution in value can be determined through responses elicited from a sample of individuals asked about the value they attach to the resource or injury. It is a method that attempts to assess “existence” value (*i.e.*, the value individuals attach to a natural resource that they do not actually use). In practice, it is difficult to determine when and if the individuals’ responses are meaningful. Even unsophisticated responders may be inclined to bias answers, driven by their perception that certain responses will influence the final result to their benefit or detriment, or reflect on their good standing and sense of social responsibility.

There are both common and distinct advantages and disadvantages to each methodology, particularly when objectives include more than just an interest in measuring loss of consumers’ surplus or economic rent. However, when feasible and properly applied, each can provide a useful estimate of the lower or upper bound of the compensatory value, and sometimes both.

Other Valuation Methods

The regulations explicitly permit the use of other methodologies to measure compensable value provided they are “in accordance with the public’s WTP,” or the public’s “Willingness-

To-Pay.” Equating compensable value with WTP is mentioned for emphasis in other sections of the regulations. It is an important conceptual distinction with substantial implications. The alternative to measurement by WTP is measurement by Willingness-To-Accept (WTA – a monetary amount willingly received for the sale of the right to benefit from the natural resource). Generally, the same resource will have a higher value when measurement is based on WTP as opposed to WTA. The preference for WTP over WTA appears to emanate more from practical consideration than theoretical superiority, but controversies of both theoretical and practical nature persist.

Other disputed conceptual and practical aspects related to the proper measurement of damages to natural resources, while not mentioned in the regulations, continue to haunt this complex subject. However, today few doubt that rigorous application of relevant methods and techniques will in most instances provide a useful estimate.

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New from ABA Publishing and The Section of Environment, Energy, and Resources

Issues of Legal Ethics in the Practice of Environmental Law by Irma S. Russell

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



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The Clean Water Act Handbook, Second Edition

Mark A. Ryan, editor

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.

Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

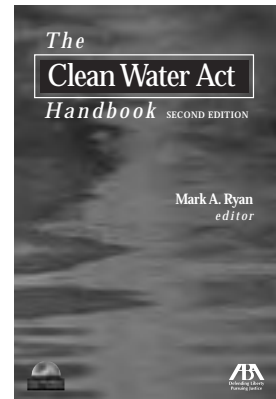
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- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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[*Editor's Note: Mr. Lasker is a partner at Spriggs & Hollingsworth in Washington, D.C. where he specializes in the defense of environmental and toxic tort litigation. The opinions expressed in this article are those of the author and do not necessarily represent the views of the firm's clients. Replies to this commentary are welcome.*]

Since the U.S. Supreme Court's landmark ruling in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), judges have been tasked with the obligation to serve as gatekeepers to keep scientifically unreliable and irrelevant expert testimony out of the court room. While there have to date been few natural resource damages (NRD) cases that have involved adjudicated *Daubert* challenges, the standards set forth in *Daubert* provide a useful tool for counsel defending against the often novel models and methodologies put forth by expert witnesses in NRD litigation. Under *Daubert* and its progeny, much of this testimony should not be admissible, and natural resource damages claims can be significantly pared down, if not defeated altogether, prior to trial. In this article, I provide a brief introduction to the *Daubert* admissibility standards and provide some examples of how these standards can come into play in NRD litigation.

The *Daubert* Admissibility Standards

The trial judge's first step under *Daubert* is to determine whether the expert is qualified by "knowledge, skill, experience, training or education" to render the proffered opinion.

Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001). The mere fact that an expert has general qualifications in a relevant field does not render the expert qualified to testify on all matters arising in a NRD case.

If the trial court finds that a proffered witness has the requisite expertise, it must then determine that the expert testimony, even non-scientific and experience-based expert testimony, is both reliable and relevant. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Expert testimony may not be admitted unless "the reasoning or methodology underlying the testimony is scientifically valid and . . . can properly be applied to the facts in issue." *Daubert*, 509 U.S. at 592. A "key question to be answered" is whether the expert's theory "can be (and has been) tested." *Id.* at 593. Further, the scientific theory must fit the factual issue in the case. "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific for other, unrelated purposes." *Id.* at 591.

While the focus of the court's inquiry should be the expert's reasoning and methodology rather than his conclusions, nothing "requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric v. Joiner*, 522 U.S. 136, 146 (1997).

Application of *Daubert* Admissibility Standards to Natural Resource Damages Litigation

Is the Expert Qualified to Offer the Testimony at Issue?

Attorneys defending NRD claims should carefully assess a proffered expert's

qualifications against their proffered opinions. For example, while a civil engineer may be qualified in designing groundwater remediation systems, they may not have the hydrogeology expertise necessary to testify on the fate and transport of contaminants. See, e.g., *Bahrle v. Exxon Corp.*, 652 A.2d 178, 191-190 (N.J. Super. Ct. App. Div. 1995), *aff'd*, 678 A.2d 225 (N.J. 1996) (hydrogeologist not qualified to testify regarding cause of gasket deterioration in wells).

Further, the Seventh Circuit recently held that an expert hydrologist should not be allowed to testify based on groundwater modeling analysis performed by other employees at his consulting firm. See *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002). The court held that without the independent expert testimony of the assistants “explaining and justifying the discretionary choices they made, [the expert’s] testimony would have rested on air.” *Id.* at 615.

Is the Expert Testimony Scientifically Reliable?

Defense counsel in NRD cases will often have strong arguments for exclusion of expert testimony that relies on speculation or on sophisticated and untested modeling.

For example, numerous courts have excluded expert testimony based solely on the possibility of groundwater contamination. See *Kalamazoo River Study Group v. Rockwell International*, 171 F.3d 1065, 1072 (6th Cir. 1999); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1394 (W.D. Mo. 1994); *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1553 (D. Colo. 1990), *aff'd*, 972 F.2d 305 (10th Cir. 1992). Defense counsel have a particularly strong argument if the modeled predictions are contrary to real world data. In *Ramsey v. Consolidated Rail Corp.*, 111 F. Supp. 2d 1030 (N.D. Ind. 2000), the court excluded a hydrologist’s opinion despite

finding that “[m]uch of [the hydrologist’s] methodology passes the *Daubert* inquiry with flying colors” and that the hydrologist’s flow model “has as much accuracy as anything else in contemporary hydrology as a predictor of the general direction of groundwater flow.” *Ramsey*, 111 F. Supp. 2d at 1036, 1037. The court held that the hydrologist’s analysis could not be deemed admissible in light of its failure to accurately predict the real world data:

In any event, use of the groundwater flow model as a comparatively accurate predictor of the general direction of VOC migration doesn’t support a finding of reliability when the model is used to support an opinion that VOC’s traveled from one point (anywhere on the railyard) to a specific second point (the Ramsey’s well) despite lack of support in years of actual testing.

Id., 111 F. Supp. 2d at 1037. See also *Carroll v. Litton, Sys. Inc.*, (No. B-C-88-253) 1990 WL 312969, at *45 (W.D.N.C. Oct. 29, 1990) (excluding expert’s opinions regarding TCE concentrations where expert’s opinions were contradicted by actual well monitoring data), *aff'd in relevant part*, 47 F.3d 1164 (table), 1995 WL 56862, at *5 (4th Cir.), *cert. denied*, 516 U.S. 816 (1995).

Likewise, courts have been particularly skeptical of contingent valuation models and other hedonic damages approaches often proffered in NRD cases. See *Idaho v. Southern Refrigerated Transport, Inc.*, 1991 WL 22479, *18-*19 (D. Idaho 1991) (excluding contingent valuation study of existence value of injured fish population in NRD case as speculation and conjecture); see also *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (citing consistent line of cases excluding contingent value and hedonic damages studies in personal injury litigation).

Does the Expert Testimony Fit the Facts of the Case?

Finally, defense counsel must consider whether the expert testimony properly “fits” with the issue in the case. For example, plaintiffs’ economic experts may seek to value natural resources based on hypothetical replacement schemes that are not feasible in the real world. Because natural resource damages should be based upon the costs of *possible* alternatives, See 43 C.F.R. § 11.82(b)(1), these opinions do not “fit” and should be excluded. See *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

Similarly, expert opinions based on analogy to other sites should be excluded where the expert has not properly linked those sites to the site at issue. See *In re Voluntary Purchasing Groups, Inc. Litig.*, No. CIV.A.3: 94CV2477H, 2000 WL 1842779, at *3 (N.D. Tex. Dec. 14, 2000) (rejecting expert opinion regarding airborne emissions at plant that was based on analogy and extrapolation from emissions at a different plant); *Bahrle*, 652 A.2d at 189-90 (excluding expert opinion regarding routine gasoline spills that was based on experience at other gas stations and no site-specific analysis).

Likewise, a federal district court in California held that a contingent valuation study proffered in an NRD claim alleging injuries to fish and bird habitats and species did not “fit,” as required by *Daubert*, because of numerous inconsistencies between the survey questions and the actual scientific evidence developed by the trustees own scientists. *United States v. Montrose Chem. Corp.*, No. CV 90-3122-R (C.D. Cal. Apr. 17, 2000), Hrg. Tr. at 1.

Conclusion

As the Supreme Court warned in *Daubert*, “[e]xpert evidence can be both powerful and

quite misleading.” *Daubert*, 509 U.S. at 595. By holding NRD plaintiffs and their experts to *Daubert’s* admissibility requirements, defense counsel can help insure that fact finders are not misled to their client’s detriment.

GROUNDWATER DAMAGES IN NEW JERSEY

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[Editor’s Note: The author acknowledges the research, assistance, and comments of Jay Stewart, Esq., Kristina Pasko, Esq. and Priya Masilamani, Esq.; any errors are solely the responsibility of the author.]

The state of New Jersey has embarked upon an ambitious effort, fueled by the resources of private plaintiffs’ contingency fee lawyers, to collect damages for injury to groundwater resources of the state caused by historic environmental releases and discharges. In the state’s view, any groundwater in any water bearing strata, without regard to its actual use or utility, has been “injured” if it is contaminated in excess of applicable groundwater quality criteria. As a consequence of such injury, the state claims it is entitled to compensation from those “in any way responsible” for the contamination. In its efforts to settle such claims without the necessity of litigation, the state has sought to short-cut the damage determination through a “surrogate” damage formula. The formula quantifies the damages in dollar terms by applying the retail price of water as charged by public utilities to the amount in gallons of annual precipitation that can be expected to infiltrate a groundwater contaminated area during the time-frame that contamination will exceed standards (or 30 years). (As this is written, a new “more robust” formula is due to be unveiled in January 2004.)

A claim by the state for natural resource damages because of contaminated groundwater necessarily invites a search for precedent to guide compensation issues. This article is a portion of a much larger analysis of these issues by the author.

The common law of groundwater did not develop in parallel with that for tidally flowed lands because the science of groundwater movement, the mechanisms of recharge and discharge, and the principles of contaminant impact and migration, until relatively recently, were very poorly understood. Indeed, in 1850, the Connecticut Supreme Court remarked:

“Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. . . . These influences [over the movement of groundwater] are so secret, changeable and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface.” *Roath v. Discoll*, 20 Conn. 532 (1850), cited in *Woodsum v. Pemberton Township*, 172 N.J. Super. 489, 496, 412 A.2d 1064, 1067 (L. Div. 1980), *aff’d* 177 N.J. Super. 639, 427 A.2d 615 (App. Div. 1981).

The American rule for groundwater is attributed to the New York Court of Appeals decision in *Forbell v. City of New York*, 164 N.Y. 522, 58 N.E. 644 (1900), where the court held that it was an unreasonable use to transport groundwater off the overlying land if the extraction of the groundwater caused injury to other overlying landowners. Eva H. Hanks & John L. Hanks, *Law of Water in New Jersey: Groundwater*, 24 Rutgers L. Rev. 621, 636 (1970).

In the Court of Errors and Appeals decision in *Meeker v. City of East Orange*, 77 N.J.L. 623,

74 A. 379 (E. & A. 1909), New Jersey adopted a rule similar to the correlative rights doctrine under which there is no propriety interest in groundwater *per se*, but the uses and rights of all landowners must be accommodated. See *Woodsum*, 172 N.J. Super. at 502, 412 A.2d at 1071. The *Meeker* Court held the law recognized all reasonable uses of groundwater for the benefit of one’s property, limited, however, by consideration of the reasonable use by others of their property:

[The law] does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses.

Id. at 638-39, 74 A. at 384-85.

Five years later, in a case that factually resonates with the issues of today, the Court of Errors and Appeals applied the *Meeker* principles to a classic groundwater contamination case. In *P. Ballantine & Sons v. Public Service Corp.*, 86 N.J.L. 331, 91 A. 95 (1914), the famous brewery lost use of the wells it relied upon to brew beer as a result of tar contamination of the groundwater emanating from the adjacent Public Service coal gas plant adjoining the Passaic River. The court applied *Meeker*, focusing on rights of use, not ownership, and held that a landowner has the right to use groundwater “in a reasonable manner and to a reasonable extent, for his own benefit . . . without undue interference with the rights of other landowners to the like use and enjoyment of

such water.” Id. at 333-34, 74 A. at 96 (emphasis added).

Meeker was revisited in 1980 in *Woodsum*, 172 N.J. Super. at 500, 412 A.2d at 1070. In *Woodsum*, the township developed its property as a water source for public consumption, thereby lowering the water table and rendering the plaintiffs’ private well unusable. The plaintiffs could have deepened their well for a modest cost. Instead, they abandoned their home (which vandals then looted) and brought suit against the municipality, alleging among other things, a “taking” without just compensation. On appeal, the Appellate Division held, assuming without deciding there was a taking, that “plaintiffs would be limited to the traditional measure of damages,” *i.e.* the difference in the value of the property with and without the well. Moreover, the court adopted the view that “[t]he measure of damages does not include any special damages suffered through frustration of the owner’s plans.” The court held that the home owners could have and should have simply deepened their own well and were not entitled to damages beyond that modest cost.

The trial court decision examined *Meeker* in light of 70 years of “[s]ignificant changes in scientific knowledge, demand for water and legislation.” *Woodsum*, 172 N.J. Super at 494-95, 412 A. 2d at 1068. The court concluded:

Today New Jersey is a populous urban state with water needs which are much different than they were in 1909. It is now ever more necessary that private users of subterranean water acknowledge the public interest in that water source, an interest to which the Legislature has given increasing recognition. A reasonable use of such water is one which accommodates that public need.

As to damages, however, the court re-asserted the *Meeker* principle:

In addition to the rule of reasonable use by the complaining owner (as well as his competing user), *Meeker* denies recovery unless there is a material diminution in his flow of underground water. That diminution is not material unless it is so significant that it interferes with the reasonable use of the overlying owner.

Id. at 512, 412 A. 2d at 1076.

Significant by its omission is the fact that *no New Jersey case at common law has ever applied the public trust doctrine to groundwater.* Nor is that surprising. The public trust doctrine has traditionally dealt with the ownership, dominion, control and/or sovereignty over *lands flowed by tidal waters*, held in trust for the public for purposes of navigation, commerce, fishing and recreational values.

New Jersey has codified these common law principles. Under the Spill Act, N.J.S.A. 58:10-23.11a et. seq., the Spill Fund (Fund) is liable to pay for all cleanup and removal costs and all damages caused by a hazardous substance discharge. N.J.S.A. 58:10-23.11g(a). The liability of the Fund is as broad as the liability of dischargers or those in any way responsible for a discharge under the Spill Act. *Compare* N.J.S.A. 58:10-23.11(g) *with* -23.11g(c). The regulations implementing the Fund payment procedures make clear that only damages actually incurred are entitled to compensation:

A claim shall not be eligible for compensation from the Fund unless the claimant has actually suffered the damages which are the subject of the claim. A claim shall be ineligible for compensation from the Fund to the extent that the damages which are the subject of

the claim are contingent or speculative.
N.J.A.C. 7:1J-2.4(a).

Unless there is interference with actual use of the groundwater, the claimant has suffered no actual damage and the claim is contingent and speculative. It is ironic at least for the State to argue that the Fund will only compensate claimants for damages to actual use of the groundwater, but the state can recover damages when groundwater has never been used or considered for use. See *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir.) *cert. den*, 450 U.S. 912 (1981) (holding that damages of restoration costs “should be awarded only to make the trust whole, not to provide a windfall to the public treasury”).

In sum, in New Jersey, groundwater was never a resource embraced by the “public trust” doctrine. Therefore, any extension of the public trust doctrine to groundwater is only by reason of legislative fiat, a topic beyond the scope of this article. The *Woodsum* decision affirms that even in our modern world, the measure of damages is to be based on principles of use-based losses or diminution in property value damages. In other words, in New Jersey the law of groundwater accommodates competing actual users and uses of the resource, and compensates only for actual lost uses, not for “ownership” *per se* or, most pertinently, for non-use “values.” In a proper case, undoubtedly, the state may document and prove compensable damage, but it should be based on actual lost uses and impairment of the functions and services of the groundwater as managed by the state for the benefit of the public in a specific factual setting. Short-cut formulae that ignore these fundamentals do nothing to achieve justice or promote fairness.

CASE COMMENT: COEUR D’ALENE TRIBE V. ASARCO INCORPORATED

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“The liability of certain responsible parties including Hecla [Mining Company] and Asarco [Incorporated] is evident but the Defendants are correct when they argue that there has been an exaggerated overstatement by the Federal Government and the Tribe of the conditions that exist and the source of the alleged injury to natural resources. To put this case in proper perspective, one has to review the history of over 100 years of mining in the Coeur d’Alene Basin, what efforts were made to deal with problems as they become evident, what direction the Courts and the State of Idaho legislature gave to interested parties, what contribution, if any, the Federal Government and [the Coeur d’Alene] Tribe made to the conditions, how urbanization, forest fires and floods also impacted the environment, how settlements between certain parties may have changed the landscape and what are the observations and experiences of the people who live in the Coeur d’Alene Basin today.”

With refreshing candor, Judge Edward J. Lodge thus begins his thoughtful and incisive opinion in *Coeur d’Alene Tribe v. Asarco Incorporated*, 280 F. Supp. 2d 1094, 1101 (D. Idaho 2003), following the liability phase of a CERCLA cost recovery and natural resource damages (NRD) trial against two mining companies. In a wide-ranging tour across the CERCLA landscape, the court addresses an array of critical issues in emerging NRD litigation, including divisibility, retroactivity, trusteeship, injury and causation and the liability of the federal government.

Although asserting that its hands are “often tied” by a statute that was “passed by

politicians who at the time could not have imagined the factual scenario pending before this Court” and acknowledging its duty to construe CERCLA liberally to effectuate legislative objectives, the court observes that “justice and fairness” are required to address the issues presented by the complex factual record. *Id.* at 1102. What follows is a palpably earnest attempt to arrive at a balanced adjudication of the issues before the court. Even if one disagrees – as this observer does – with certain of the court’s rulings, the opinion as a whole makes a valuable contribution to CERCLA jurisprudence. Here are a few of the highlights:

Divisibility

One of the crucial holdings of *Coeur d’Alene* is the court’s acceptance of the divisibility defense proffered by the defendants. Quoting the standard for divisibility set forth in Section 433 (A) of the Restatement (Second) of Torts, the court concludes that the defendants established a “reasonable basis for determining the contribution of each cause to a separate harm’.” *Coeur d’Alene*, 280 F.Supp.2d at 1119-1120 As a result, the court imposes several liability, with shares based on the approximate volume of mine tailings each defendant released into the Basin.

The court states that the question of divisibility is “guided by principles of causation alone and is not an “opportunity for courts to ‘split the difference’ in an attempt to achieve equity.” *Id.* The court rejects the trustees’ contention that a defendant seeking divisibility must show that its waste can be fingerprinted with precision, as “grossly unfair and unjust” and an “unrealistic standard” of proof. *Id.*

Instead, the court finds that the record presented a “reasonable basis” for apportionment, because each generator was contributing tailings, the tailings contained the

same hazardous substances, and the “milling methodologies used in the Basin did not differ significantly from mill to mill . . .” *Id.* The court finds that defendants established a “reasonable relationship between the waste volume, the release of hazardous substances and the harm at the site.” *Id.* The court properly distinguishes the result in *United States v. Monsanto Corporation*, 858 F. 2d 160 (4th Cir. 1988), where a divisibility defense, premised upon volumetric calculations of hazardous substances, was rejected because the defendants failed to establish such a relationship among the volume of releases and resulting harm.

Trusteeship

The nature and scope of the trusteeship of the federal and tribal plaintiffs was particularly significant in *Coeur d’Alene* because the two defendants had already settled with the other trustee – the state of Idaho. In assessing the right of the putative federal and tribal trustees to seek natural resource damages, the court concludes that the “factual predicate of trusteeship” is based on a case-by-case determination of whether a claimant “exercises the hands on day-to-day activity of the various natural resources.” 280 F. Supp. 2d at 1115. The court expressly rejects the contention that statutory authority over a resource, without more, is sufficient. “It is what is done in practice, not the underlying ‘statutory authority,’ that the Courts must look to.” *Id.* at 1116. Moreover, although recognizing that co-trusteeship is typical, the court holds that awards must be based upon each co-trustee’s percentage of “actual management and control” to avoid double recovery and unjust enrichment. *Id.*

Applying these principles, the court rejects certain claims to trusteeship. The “cultural use” of water and soil by Coeur d’Alene Tribe did not give rise to a cognizable claim of trusteeship over such resources. *Id.* at 1107,

1117. Moreover, the court rejects the plaintiffs' arrogation of 100 percent of the trusteeship over resources located on federal and tribal-owned land because the state of Idaho actually exercised some control over these resources. The court leaves until the damages phase the determination of the specific percentages of trusteeship.

Retroactivity

The court is on more tenuous legal ground in its rejection of the defendants' argument that the NRD claim was barred by §107(f)(1), which precludes retroactive application of CERCLA's liability scheme to such claims: "There shall be no recovery [for NRD under §107(a)(C)] where such damages and the release of hazardous substances from which such damages resulted have occurred wholly before the enactment date of this Act [December 11, 1980]." The court's holding is based on two alternative lines of reasoning. First, it finds that, although there were only minimal releases of mine tailings in the Coeur d'Alene Basin after 1968, there were post-enactment "re-releases" that occurred "via the passive form of seepage, leaching and migration due to flowing water." *Coeur d'Alene*, 280 F.Supp.2d at 1112. The court states that "[t]his passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case." *Id.* Second, the court concludes that, even if its ruling on "re-releases" is incorrect, liability for NRD could still be imposed because the record showed that a "significant amount of damages" occurred after the date of enactment, in that the United States and the Tribe incurred costs after that date to study both the injury caused by the mining industry and the means of restoration. *Id.* at 1114. Thus, according to the court, the statutory provision expressly barring retroactive application of the statute in relation to NRD only applies to NRD-related expenses that were incurred pre-enactment.

As to the latter point, the court concludes it is bound by *Aetna Casualty and Guaranty Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991), even though that case fundamentally deals with the availability, under Idaho law, of insurance coverage for environmental claims. In *Pintlar*, an insurer asserted (among other defenses) that its occurrence-based policies, issued prior to 1980, could never afford coverage for claims seeking NRD because, as a result of the operation of §107(f)(1), such claims perforce can only relate to property damage that occurred after 1980. Rejecting this argument, the court concluded that NRD claims can be maintained with regard to pre-enactment injuries, provided the damages sought were incurred post-enactment. The court stated that the term "damages," as used in §107(f)(1), refers not to the existence pre-enactment of "injury" to natural resources, but to the "monetary quantification stemming from an injury." *Id.* at 1515.

The *Pintlar* court followed the reasoning employed in *In Re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676 (D. Mass. 1989). In that case, the court held that the phrase "such damages" in §107(f)(1) does not mean "injury," but instead refers back to the term "damages" in §107(a)(C). According to the court in *Acushnet*, the term "damages" in §107(a)(C) is "self-evidently distinct" from "injury," because the latter term is also used in that section. 716 F.Supp. at 682.

Such close analysis of CERCLA's text reposes far too much confidence in the quality of the draftsmanship that attended the adoption of the statute. Numerous courts, including the *Acushnet* court itself, have animadverted to the highly imprecise use of language in CERCLA. "Like many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA." *Acushnet*, 716 F. Supp. at 681 n.6.

The drafters of CERCLA were especially slipshod in their use of the terms “injury” and “damages.” For example, §111(d)(1), the companion provision to §107(f)(1), provides that the Superfund may not be tapped to pay NRD claims “where the injury, destruction, or loss of natural resources and the release of hazardous substances from which such damages resulted have occurred wholly before December 11, 1980.” Section 111(d)(1) thus undeniably bars payouts from the Superfund on account of pre-enactment injuries to natural resources, regardless of whether the “damages” sought were incurred after enactment. There is no reason to believe that Congress intended different results to obtain in relation to NRD claims depending upon whether a trustee is proceeding under §111 as opposed to §107.

Perhaps more importantly, *Acushnet*, and thus *Pintlar* and *Coeur d’Alene*, render the statutory bar on retroactive NRD recoveries a virtual nullity. It stands to reason that “monetary quantification” of damages to assess, restore or compensate for natural resource injury would not take place in any significant way until after the enactment of the very statute that authorizes the recovery of such damages. Yet, Congress appears to have adopted the bar embodied in §§ 107(f)(1) and 111(d)(1) out of concern about the potential for huge recoveries resulting from retroactive application of CERCLA’s NRD liability provisions.

Judge Lodge would have done well to examine the cogent opinion of Judge Sam E. Haddon in *State of Montana v. Atlantic Richfield Company*, 266 F. Supp. 2d 1238 (D. Montana 2003) (*Arco*), rendered several months earlier. There, the court rejected the state’s claim for NRD on the basis of the §107(f)(1) bar. The court found as a fact that, although “re-releases” of hazardous substances had occurred after Dec. 11, 1980, the state had not produced evidence of “new

or additional” injuries resulting from such “re-releases.” *Arco*, 266 F.Supp.2d at 1241. Moreover, the court concluded as a matter of law that “[d]amages accrue or occur, including restoration costs, when the underlying injury occurs.” *Id.* at 1242. In its accompanying Memorandum, the court concluded that the “plain language” of §107(f)(1) barred retroactive recovery of damages that “occurred” pre-enactment. *Id.* at 1244. It reasoned that acceptance of the state’s position – that damages do not occur until a trustee incurs expenses to restore resources or such costs are quantified by a court – would “render [] meaningless” the “wholly before” limitation. *Id.* Judge Haddon expressly declined to adopt the interpretation given to §107(f)(1) by the court in *Acushnet*.

The denouement of the Coeur d’Alene Basin saga will occur with the damages trial, expected to begin in early 2005. In actuality, some of the conclusions set forth in Judge Lodge’s September 2003 opinion, particularly his determination that environmental conditions in the Basin have been improving since the 1930s, are far more relevant to the assessment of damages than to the adjudication of statutory liability. Accordingly, there is ample reason to expect that, in the damages phase, the court will bring to bear the same equipoise that marked its commendable effort in the liability phase.

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ISSUES FACING NRD PRACTITIONERS

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The author expresses his appreciation and wishes to acknowledge Steve Marlin for his assistance with this article.

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” From *Through the Looking Glass*, by Lewis Carroll. In the world of natural resource damages (NRDs), words can and do mean many things. Trustees and defendants continue to square off over the following two issues.

- When are trustees barred from recovering natural resource damages because the “damage” occurred “wholly before” the enactment of CERCLA?
- What causation standard exists given that trustees may only recover for damages “resulting from” a release?

The “Wholly Before” Limitation

Under CERCLA § 107(f)(1), “there shall be no recovery [for natural resource damages] where such damages *and* the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.” This year, two federal district courts in the Ninth Circuit reached opposite conclusions regarding the applicability of this statutory limitation.

In *Coeur D’Alene Tribe v. Asarco, Inc.*, 2003 U.S. Dist. Lexis 16157 (D. Idaho, Sept. 3, 2003), the United States and the Coeur d’Alene Tribe sought to recover natural resources damages associated with releases

of mine wastes. The defendants argued that no hazardous substance releases had occurred after CERCLA’s enactment in 1980, and that no post enactment damages had occurred because environmental conditions in the Coeur d’Alene Basin had continuously improved. The trustees argued that hazardous substances were continuing to be released and re-released, and that the critical date is when an injury is quantified.

Judge Lodge in *Coeur d’Alene Tribe* ruled that CERCLA’s “wholly before” limitation did not bar the plaintiffs from recovery. The court found that “passive migration caused by leaching from variations in low and high water is a post-enactment release under CERCLA.” *Id.* The court concluded that the “passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a release for purposes of CERCLA in this case.” *Id.* The court then relied on *Aetna Casualty and Surety Con., Inc. v. Pintlar Corp.*, 948 F. 2d 1507 (9th Cir. 1991) and *In Re Acushnet River and New Bedford Harbor Proceedings*, 716 F. Supp. 676, 681 (D. Mass. 1989) to conclude that “damages” for purposes of the “wholly before” limitation are defined as the “monetary quantification stemming from an injury.” The court held that damages occurred post enactment “when the federal government and the Tribe began studying the ‘injury’ caused by the mining industry and how to clean up the injury to natural resources.” *Id.*

The court’s ruling on the “wholly before” limitation does not mean that constitutional retroactivity arguments are dead. Judge Lodge acknowledged that “the Defendants argument that the retroactive application of CERCLA in this case is a taking or in violation of the due process clause of the Constitution as discussed in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed. 2d 451 (1998) is reserved until the dollar amount of damages is determined in the second phase of the trial.” *Id.*

In Montana, Judge Haddon reached the opposite conclusion on CERCLA's "wholly before" limitation. *Montana v. Atlantic Richfield Co.*, 266 F.Supp.2d 1238 (D. Mont. 2003). Montana brought an NRD action against Atlantic Richfield seeking to recover restoration costs at "upland areas" in the Clark Fork River Basin. The court rejected the theory that damages do not occur until expenses are incurred or costs are quantified, *id.*, at 1244, finding that such a theory is "unpersuasive" and would render the "wholly before" limitation in the statute meaningless. *Id.* at 1242-44. Instead, the court held that "damages accrue or occur, including restoration costs, when the underlying injury occurs." *Id.*, at 1242. The court barred the state of Montana's claim for restoration cost damages because such damages occurred wholly before Dec. 11, 1980.

Causation, Joint and Several Liability, Divisibility and Baseline

Under CERCLA § 107(a)(4)(C), NRD trustees must prove injury to natural resources "resulting from" a release of a hazardous substance. This requires proof of a causal link between the defendant's release and the injured resource. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986). The debate between trustees and defendants centers on what "resulting from" means and how much of a causal link is required.

Defendants often contend that trustees must prove that a defendant's release is a substantially contributing cause of the resource injury. For NRD liability to attach at all, the defendant's conduct must be a cause in fact of the specific injury alleged. Trustees typically resist any obligation to trace specific hazardous substances causing injury back to a particular defendant or act of disposal. This is particularly the case where hazardous substances from multiple sources are commingled. Trustees may assert that all that

is necessary is that they tie the commingled release of hazardous substances to the natural resource injury.


In *Coeur d'Alene Tribe*, the court held that "in cases where releases of hazardous substances have been commingled, the Trustees have the burden of proving that a release that results in commingled hazardous substance is a 'contributing factor' [more than a *de minimis* amount – to an extent that at least some of the injury would have occurred if only the Defendant's amount of release had occurred]." *Id.* Other courts that have addressed the causation requirement include *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986)(proof must include a causal link between releases and damages); *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893 (D. Mass. 1989)(government must establish that defendant's releases were a contributing factor to an injury to natural resources.); and *United States v. Montrose Chemical Corp. of California*, 33 Env't Rep. Cas. (BNA) 1207 (C.D. Cal. 1991)(plaintiffs must show that a defendant's release of a hazardous substance was the sole or substantially contributing cause of each alleged injury to natural resources).

The D.C. Circuit has not clarified the issue. In *National Association of Manufacturers v. U.S. Department of the Interior*, 134 F.3d 1095 (D.C. Cir. 1998) the court stated "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." The same court stated in *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1224 (D.C. Cir. 1996) that "While the statutory language requires some causal connection between the element of damages and the injury – the damages must be 'for' an injury 'resulting from a release of oil or a hazardous substance' – Congress has not specified precisely what that causal relationship should be."

Trustees likely will claim that once they have proven a commingled release has caused injury to a resource, each defendant responsible for the type of hazardous substances in the release is jointly and severally liable. Defendants will counter that CERCLA does not mandate the imposition of joint and several liability in an NRD case. Defendants should be prepared to prove that harm is divisible and that a reasonable basis for apportionment of harm exists in order to defeat joint and several liability. The key question is what constitutes a reasonable basis for apportionment in the context of an NRD case. Volumetric, temporal, toxicity based and geographic divisibility all may have their place in proving a reasonable basis for apportionment. See, e.g., *Matter of Bell Petroleum Services, Inc. v. Sequa Corporation*, 3 F.3d 889, 903 (5th Cir. 1993) (“The Restatement suggests that apportionment is appropriate even though the evidence does not establish with certainty the specific amount of harm caused by each defendant. . . Likewise, pollution of a stream by two or more factories may be treated as divisible in terms of degree, and apportioned among the defendants on the basis of evidence of the respective quantities of each.”). *Id.* In *Coeur d’Alene Tribe*, the court concluded that volumetric tailings production provided a sufficiently reasonable basis for apportionment to defeat joint and several liability.

One last causation burden exists for trustees in the context of assessing natural resource damages assessment. The Department of the Interior’s natural resource damage assessment regulations, 43 C.F.R Part 11, require that trustees determine the baseline condition of an injured resource and then compare baseline with the injured resource to quantify injury to the resource. “Baseline” is defined under the DOI NRDA regulations as “the condition or conditions that would have existed at the assessment area *had the*

discharge of oil or release under investigation not occurred.” 43 C.F.R. § 11.14(e). While the trustee has the burden of determining baseline under the NRDA regulations, defendants should ensure that the trustee is apprised of all appropriate conditions or factors impacting the resource other than the release of the hazardous substance at issue.




Superfund and Natural Resource
Damages Litigation
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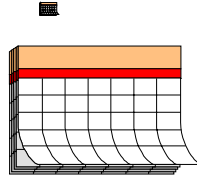
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