Overview of Natural Resources Damage Assessment and Restoration

Lisa L. Williams
U.S. Fish and Wildlife Service

Tribal Natural Resources Damages, Assessment and Restoration Conference
July 19-21, 2011
Topics

• Introduction to NRDAR Concepts
• Relationship to Cleanup
• Scope of Liability
• NRDAR Process
• Cooperative Assessments
• Summary
Things happen...
Purpose and Concepts
NRDAR
What is it?

- A process to determine the appropriate amount and type of restoration needed
- Goal is to “make the public” whole following releases of hazardous substances
- “Trustees” represent the public
- NRDAR success is measured by the amount of appropriate restoration achieved
NRDAR

Purpose

• Trustees must use NRD recoveries to restore, rehabilitate, replace, and acquire the equivalent of injured natural resources and services

• Governments act as trustees "on behalf of the public" -- trustees must use the funds to replenish the common store of natural resources for public use and enjoyment

• Natural resource damages are entirely compensatory; no punitive element
NRDAR

What it is not!

• NRD is not an environmental tort claim (common law)
• Congress intended to go beyond common law remedies because it was dissatisfied with common law
What is Injury?

- An observable or measurable adverse change in a natural resource or impairment of a natural resource service.
- Includes injuries resulting from the actual discharge of a hazardous substance or oil, a substantial threat of a discharge, and/or related response actions.
What Are Services?

- Services are the beneficial outcomes that result from natural resources & ecosystem functions
  - Healthy habitat for fish and wildlife
  - Provision of clean water
  - Harvesting animals or plants
  - Recreation and cultural practices
  - Scenic views
What Are Damages?

• Strictly speaking, money for
  - Restoration based on injuries
  - Costs of assessment
• Regulations focus on implementing restoration projects rather than collecting dollars
What is Restoration?

• **Primary restoration**
  - Return injured resources to what they would have been were it not for the spill (baseline)

• **Compensatory Restoration**
  - To address losses through time
  - Beyond response

• **Assessment cost recovery**
  - Reimburse trustees for time and resources used to develop a claim
Service Losses with Remediation & Restoration

Resource Services

Interim Lost Resource Services

A

Baseline Service Level

Time

Incident Primary Restoration Begins Compensatory Restoration Begins Full Natural Recovery
Laws

- Clean Water Act (CWA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)
- Oil Pollution Act of 1990 (OPA)
- National Marine Sanctuaries Act (NMSA)
- Park System Resource Protection Act (16 USC 19 JJ)
- Applicable State Laws
Regulations

• National Contingency Plan (40 CFR 300)
  - Requires response agencies to notify trustees and coordinate with them
  - Defines trustees: federal, state, tribal, foreign
  - Lists general responsibilities of trustees

• Regulations for NRD under CERCLA
  - Department of Interior (DOI) responsible
  - 43 CFR 11

• Regulations for NRD under OPA
  - Department of Commerce (DOC-NOAA) responsible
  - 15 CFR Part 990
Natural Resources

- Trustees have jurisdiction over public natural resources

- Namely, "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, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe"

- Resources need not be owned by the government to be "natural resources" (e.g. migratory birds)

- Only require a substantial degree of government regulation, management or other form of control over property (e.g., An aquifer is a trust resource whose injury gives the State a cause of action)

- Trusteeships may overlap; no double recovery
Trustees

- **State Governors**
- **Tribes**
  - The tribal chairman or other representative may act as trustee for a tribe [NCP 300.610]
- **Secretaries of Federal Departments**
  - e.g. Commerce, Interior
- **Foreign Governments** (under OPA)
Trustees...

- Coordinate w/response agencies (e.g., EPA) by integrating trustee concerns and science into the cleanup process
- Assess injuries
- Evaluate and scale restoration alternatives for
  - Returning resources to baseline
  - Compensating for interim lost resources and services
- Oversee and/or implement restoration plan
• Private NRD claims are covered under OPA but not CERCLA
• Private claims include:
  - Damages to real or personal property
  - Net loss of taxes, royalties, rents, fees, and other lost revenues by federal or state governments
  - Loss of profits or loss of earning capacity due to injury to natural resources
  - Net cost of public services
Relationship to Cleanup
EPA/USCG, state response agencies, or PRPs may clean up a site partially or completely; cleanup takes time.

NRDA seeks to recover for “residual” loss.

NRDA should take into account:

- The extent and timing of cleanup action proposed or completed:
  - more complete remedy = less future injury = less restoration required
  - the sooner the remedy, less restoration required
- Likely effects of the cleanup action itself on natural resources
Relationship to Cleanup Actions

Damages Are Residual to Cleanup

- Damages are residual to cleanup because a cleanup action may address injured natural resources (restoration to baseline)
- Differing purposes of the cleanup and natural resource restoration:
  - The primary charge for cleanup is to select and implement an action that protects human health and the environment from further harm
  - NRD actions are to make the public whole: past, present and future
- Cleanups will not necessarily eliminate all of the harm resulting from past releases and harm may continue after cleanup construction work is completed (restoration for compensation)
Service Losses with Remediation & Restoration

- Resource Services
- Interim Lost Resource Services
- Baseline Service Level

Incident
Primary Restoration Begins
Compensatory Restoration Begins
Full Natural Recovery

Time
Trustees may also bring NRD claims with respect to sites where no cleanup action would otherwise occur.

Examples:
- Montrose Chemical Co., DDT and PCB contamination in marine sediments off the California coast near Los Angeles.
- City of Seattle, contamination in Elliott Bay.
- Saginaw River and Bay, PCBs in sediments.
Relationship to Cleanup Actions

Cleanup Agencies/Trustees Must Work Together

- Cleanup agencies must notify trustees, coordinate with NRDA investigations, and invite trustee participation in negotiations with PRPs.
- Cleanup agencies and the trustees should coordinate early.
  - Trustees’ information needs and restoration objectives can be considered in cleanup investigations and decision making.
  - Trustees can acquire sufficient information to play a meaningful role in subsequent actions and negotiations.
- Timely coordination benefits cleanup agencies: avoids potential for disruption of settlement negotiations.
- Timely coordination benefits PRPs: allows cost-effective investigations and development of alternatives that coordinate cleanup and restoration.
Relationship to Cleanup Actions
Cleanup Agencies/Trustees Must Work Together

- Coordination of cleanup and restoration avoids “undoing” a cleanup to achieve a restoration goal
- e.g., use of aggressive vegetation to prevent erosion, followed by need to eliminate that vegetation
- e.g., use of armoring to contain waste along riverbank, followed by a need to restore/replace natural riverbank functions and stream hydrology
Relationship to Cleanup and Other Actions
Benefiting the Local Environment

**Cleanup/Response**
Protection of health & environment
PRP, Superfund, OSLTF pays

**NRDA Restoration**
Making public whole
PRP or OSLTF pays

**Community Efforts**
Quality of Life
Taxpayers, grants, private parties pay;
e.g. Great Lakes Legacy Act, AOC RAP groups, foundations
Scope of Liability
Scope of Liability for NRD

Elements of Liability

- Trustees must demonstrate that there has been “injury” to natural resources “resulting from” a “release/discharge”.

- Liability for natural resource damages, like liability for response costs, is joint and several unless a defendant can meet its burden of proving divisibility of the harm.
Scope of Liability for NRD

Meaning of Injury

- Not defined per se in the law. CERCLA only refers to an “injury to, destruction of, or loss of natural resources”.

- Injury is defined in 43 CFR 11 as “a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource”.

- CERCLA regulations allow demonstration of injury either by:
  - Empirical evidence of an adverse change in a particular case (e.g., lower hatching rates, increased incidence of tumors), or
  - Reliance on a prior regulatory determination (e.g. WQC) to identify a threshold above which injury may be expected

- OPA has a comparable definition of injury, requiring proof of injury based on such standards of scientific reliability and validity
Scope of Liability for NRD

Causation

- The “resulting from” language imposes a burden on the government to establish a causal link between a release/discharge and natural resource injury -- the precise nature of the burden remains unsettled.

- Past cases suggested various approaches, such as:
  - Determining a pathway
  - Predictive models
  - Demonstration of contributing factor
  - Koch’s postulates (epidemiology)
Scope of Liability for NRD

Statutory Limitations and Exceptions

“Cap” under CERCLA

- Recovery of NRD for each release or incident involving release is limited (to $50M) unless the release resulted from willful misconduct/negligence or from a violation of federal safety/operating standards

- This may be a significant limitation in cases where the release was a one-time spill or release

- However, it should not affect most cases where hazardous substances were spilled over a long period (e.g., where typically occurrences are considered as multiple releases, separate incidents or incidents attributed to separate PRPs)
Scope of Liability for NRD
Statutory Limitations and Exceptions

Losses Identified in a Permit under CERCLA/OPA

There can be no recovery for natural resource losses that were specifically authorized by permit or identified in an EIS/EA.
Scope of Liability for NRD
Statutory Limitations and Exceptions

The "pre-enactment damages" exception under CERCLA

- No recovery for NRD that occurred wholly before December 11, 1980
  - Trustees are entitled to recover all damages that occur after December 11, 1980, regardless of whether they result from pre-enactment or post-enactment releases

- Where NRD is readily divisible, trustees cannot recover for damages that occurred before December 11, 1980

- Where damages are not divisible and the damages or the releases continue post-enactment, trustees can recover for the non-divisible damages in their entirety (e.g., damages for aesthetic injury may be an example of damages that may be indivisible)

- Damages measured by restoration costs are probably not restricted by this exception.
NRDAR Process
The Big Picture

Oil or Hazardous Substance Release

Response

Restoration
General NRDAR Process

Preassessment → Injury Assessment

Damages Claim ← Restoration Planning

Settlement or Litigation

Restoration Implementation
NRD Process

Regulations Describe Process

- Regulations implementing CERCLA (at 43 CFR 11) and OPA (15 CFR 990) provide rules that guide the NRDA process.
- The rules provide a framework for decision-making, transparent to public and PRPs.
- The rules allow for flexibility in some areas.
- Use of the NRD rules provides trustees with a "rebuttable presumption": the results of the assessment will be presumed to be correct.
- Following the rules is optional.
NRDAR Process
Phases

- OPA:
  - Preassessment
  - Restoration Planning
  - Restoration Implementation

- CERCLA:
  - Preassessment
  - Assessment Plan
  - Assessment
  - Post Assessment
NRDAR Process

Preassessment Phase

- **OPA**
  - Determination of Jurisdiction
  - Determination to Conduct Restoration Planning
  - Data Collection
  - Notice of Intent

- **CERCLA**
  - Notification & Detection
  - Emergency Restorations
  - Data Collection
  - Preassessment Screen
NRDAR Process
Next Steps

• OPA Restoration Planning
• CERCLA Assessment Plan & Assessment
NRDAR Process
OPA Restoration Planning Phase

Injury assessment
- Injury determination
- Injury quantification
- Analysis of natural recovery

Restoration Selection
- Primary restoration
- Compensatory restoration
- Scale restoration actions
- Evaluation of alternatives

Develop Restoration Plan
NRDAR Process

CERCLA Assessment Plan Phase

- Coordination with all Trustees
- Notice of Intent
- Identify type of procedure to assess injury
- Determine how to confirm exposure
- Determine how to develop preliminary estimate of damages
- Public review of plan
NRD Process

CERCLA Assessment Phase

- Injury Determination
- Injury Quantification
- Damage Determination
  - Restoration and Compensation Determination Plan

*Restoration alternatives
NRDAR Process
Biological Injury
NRDAR Process
OPA Restoration Implementation

- Close Administrative Record
- Present a Demand for Damages
  - Responsible party carries out restoration with Trustee oversight
  - Responsible party pays Trustees to complete restoration
- Restoration Implementation
NRDAR Process

CERCLA Post-Assessment Phase

- Report of Assessment and Demand for Damages
- Recover Damages
- Restoration Plan
- Restoration Implementation

How it usually actually happens:
- Negotiation
- Remedial and Restoration Design Coordination
- Global Settlement
Cooperative NRDAR
Coordinating with RPs / PRPs

Emphasis on Restoration and Settlement

- Focus on restoration
- Encourage expedited assessments to:
  - Achieve restoration more quickly
  - Reduce interim losses
  - Reduce costs
Cooperative Assessments
Benefits

Lower costs with focus on restoration

Sound restoration plan developed

Consensus approach to resolving liability

Litigation avoided
Cooperative Assessments
What is Needed for Success

- Coordination with response agencies
- Data sharing
- Framework for cooperative planning
- Framework for objective decision-making
- Public participation
- Funding
NRDAR Summary

- Process to make the public whole through restoration following releases of hazardous substances and/or oil
- Based on CERCLA, OPA, other laws and regulations
- Advantages to coordinating with response, community
- Liability is joint and several
- Liability is limited in certain ways: $50M cap, permitted releases, pre-CERCLA damages
- Processes are slightly different under CERCLA and OPA, but general steps are:
  - preassessment, injury assessment, restoration planning, damages claim, settlement/negotiation, restoration
- Cooperative assessments focus on restoration, employ expedited assessments, seek to reach consensus and settlement