

C O M M E N T S

# WHAT'S HAPPENING WITH MANAGEMENT OF NATURAL RESOURCES?

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Since passage of the early natural resource protection laws and regulations in the United States decades ago, legal, technical, and economic practitioners have been challenged with understanding the ever-changing and ever-evolving environmental law and policy landscape. In fact, the catch phrase “natural resources”—covering air, water, land, biota, and species—often does not resonate as quickly as pollution, climate change, and so forth. Over the past 30+ years, there have been huge changes in how natural resource issues are viewed and approached, including how they are termed. Today, with the increased focus on climate impacts, so-called forever chemicals, biodiversity, environmental justice, increased demand for transparency, sustainability, and more, we see major changes in how these issues are managed in both public and private sectors.

Riveting changes have advanced the position of natural resources and related matters of conservation and biodiversity across domestic and international agendas, in corporate, government, and public interest agendas, and in the lives of everyday citizens. The need to prevent further ecosystem degradation, halt biodiversity loss, combat climate impacts, ensure food security, ensure access to clean water and air, and overall ensure a sustainable future seems to have finally hit home with diverse parties working toward like goals. As such, government, industry, non-profit organizations, local communities, and others must

*Authors' Note: This Comment covers current trends and expectations relative to management of natural resources and opportunities moving forward for multi-stakeholder parties. The impetus for it includes current law and policy developments in the United States and globally, as well as a seminal Natural Resources Symposium specialty program convened by the Ad-Hoc Industry Natural Resource Management Group at The George Washington University Law School in fall 2023. The program examined—in real time—the influences, needs, and perspectives attendant to natural resource policies and practice and associated opportunities for companies, government, environmental groups, and others. Two keynote addresses offered keen insights*

adapt to new perspectives and approaches in navigating the complex paradigm of natural resource management and environmental protection—from broad societal needs to site-specific concerns.

This Comment dives deeper into these concepts in order to review how the natural resource practice arena has transitioned from a “liability and enforcement” regime to a “protect and restore natural resources” regime, ever mindful of the related services, both human and ecological, provided by natural resources.

All of this occurs in a current societal backdrop with two major paths: (1) governmental action spurred by worldwide attention to climate change and pledges of methane reductions and the influence of the United Nations Sustainable Development Goals (SDGs); and (2) the often private sector-led initiatives aimed at holistic paths to sustainability, which in turn provide unique new opportunities for natural resource management and optimization by companies, governments, and others. Retooled objectives, strategy decisions, international demands, and financial investment at the macroscale level are all driving changing behaviors—corporate, government, societal, and individual. Environmental conservation and protection of the planet are at the center of many of these actions. As a result, actions, even at the microscale level relative to case- and/or site-specific matters, must also adjust to these new imperatives.

*and new ways of thinking about natural resources. The first, by Roger Martella, group vice president and chief sustainability officer of General Electric (GE) and GE Vernova, highlighted that we are in a transformational time punctuated by a “new era of action.” The second, by Dr. Phillip Levin, director of the National Nature Assessment (NNA), being conducted by the U.S. Global Change Research Program in the White House Office of Science and Technology Policy, described extensive work being undertaken via the first NNA and how “nature” connects with every part of our lives, including natural resource management, economic interests, human health and well-being, safety and security, and climate and equity.*

## I. “Natural Resources” Defined

The contemporary concept of “natural resources” is complex and multifaceted. There may be discrepancy in public understanding of the term “natural resources” versus more immediate concerns like pollution and climate change. Definitions of “natural resources” can range from very finite, specific categories of resources to broader, more diffuse concepts (e.g., biodiversity) that may not be easily understandable. Lately, people often refer to natural resources under a simpler labeling: nature.

In the United States, there are multiple examples of key federal statutes that define “natural resources,” including those that contain express provisions for damages, when natural resources and/or the services they provide are “injured” as a result of the release of hazardous substances or oil. Under the Comprehensive Environmental Response, Compensation, and Liability Act<sup>1</sup> (CERCLA or Superfund), “natural resources” are defined broadly as:

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 (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 *et seq.*], 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.<sup>2</sup>

Under the Oil Pollution Act (OPA),<sup>3</sup> natural resources include:

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 (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.<sup>4</sup>

Both of these definitions are expansive and encompass a wide range of environmental factors, but specifically reflect the intention of these laws to address and remediate harm to various natural resources resulting from hazardous substance releases or a release of oil. Further, the U.S. Department of the Interior Restoration Program provides a definition of “natural resource services” to “include services to other natural resources, such as providing food, shelter or nesting, as well as services directly benefiting humans and the human use of those services, such as fishing and other recreational activities.”<sup>5</sup>

In the European Union (EU), natural resources are considered within the broader constructs of nature and biodiversity. In 2020, the EU announced its EU Biodiversity Strategy for 2030—“Bringing nature back into our lives”—in response to an increased need for action. The EU Biodiversity Strategy for 2030, tied directly to the EU’s Green Deal, focuses on the broader concept of biodiversity conservation, setting ambitious targets to halt the loss of biodiversity and restore ecosystems without specifically identifying certain natural resources or categories. Rather, it aims to protect and restore nature, with a particular emphasis on improving the health of ecosystems and ensuring the sustainability of natural resources. The various definitions of “natural resources” can often be challenging to various stakeholders, particularly when determining liability for damages and who is responsible.

## II. Natural Resource Liability (Who’s Responsible)

In 1972, the Organisation for Economic Co-operation and Development adopted the polluter-pays principle (PPP). Stating that polluters should bear the expenses of carrying out the pollution prevention and control measures introduced by public authorities in order to ensure that the environment is in an acceptable state, it has largely formed the underpinnings of environmental and natural resources policy in the United States and globally. Moreover, the principle is also part of a broader set of principles intended to guide sustainable development worldwide. Then, in 1992, the United Nations further emphasized the importance of natural resources in the Rio Declaration, which recognized protection of the environment and the right to enjoy nature as one of its 27 universal principles.

There are several key liability regimes around the world that hold parties responsible for natural resource-related liability. As already noted, in the United States, natural resource liability was defined under the set of laws passed in the 1970s and 1980s that hold responsible parties liable for damages to natural resources as a result of the release of hazardous materials and/or oil. In an effort to better define the level of damages compensable, the U.S. Departments of the Interior and Commerce (National Oceanic and Atmospheric Administration) established regulations governing the assessment of natural resource damages and the services they provide.<sup>6</sup>

In the EU, the European Parliament adopted the Environmental Liability Directive (ELD) in April 2004, which focuses primarily on the prevention of environmental damage. The ELD, which embodies concepts similar to the regimes under U.S. law and implements the PPP, made Member States responsible for ensuring that “damage to water, land and biodiversity is either prevented, by taking appropriate measures in cases of imminent threats, or effectively remedied by restoring the previous condition if

1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

2. 42 U.S.C. §9601(16).

3. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.

4. 33 U.S.C. §2701(20).

5. U.S. Department of the Interior Restoration Program, *Natural Resources and Services*, <https://www.doi.gov/restoration/primer/resources> (last visited Jan. 26, 2024).

6. 43 C.F.R. §11; 15 C.F.R. §990.

the damage has already been done.”<sup>7</sup> In the instance of the ELD, environmental liability is limited to “environmental damage,” which is defined as significant damage to protected species and habitats, water, or soil. At an international scale, the United Nations Environment Programme adopted a set of guidelines in 2010 for development of domestic legislation on liability, response action, and compensation for damage caused by activities dangerous to the environment, and affirmed that the guidelines were voluntary and were not intended to set a specific precedent for the development of international law.

### III. Transformative Changes Occurring and Predicted

Over the past 30+ years, the landscape of natural resource policies and practices has undergone significant transformations. A case in point is the evolution witnessed by the Ad-Hoc Industry Natural Resource Management Group, which began its 36th year in January 2024. Founded in 1988 by six companies—3M Company, Atlantic Richfield Company (now BP), American Smelting and Refining Company, GE, Phelps Dodge (now Freeport McMoRan), and U.S. Steel Corporation—together with one of the present authors (Goldsmith) as the Ad-Hoc Industry Natural Resource *Damage* Group, “Damage” was replaced with “Management” during the 2012 United Nations Corporate Sustainability Forum held in Rio de Janeiro, Brazil. This put a fresh emphasis on the way in which natural resource solutions could be optimized.

The group remains unique to this day in its focus on the intersection of natural resources and diverse industrial, transportation, and energy activities and related legal, scientific, and economic issues. Together with U.S. federal government and industry trade group partners, it has produced a set of best practice approaches and resource materials that can be used in site-specific situations—all pertinent to building and advancing the state of the art related to natural resource practice. Most recently, a suite of best practice approach frameworks on per- and poly-fluoroalkyl substances (PFAS), climate, remediation, and emergency response have been developed, shared, and vetted with the multi-stakeholder community and are to be further explored via four planned workshops in 2024.

### IV. Natural Resources Now Residing Within a Broad Societal Rubric

Public concern about natural resources and related environmental issues, including loss of biodiversity, has increased in recent years, and climate change has become an everyday topic of discussion and call to action. The COVID-19 pandemic, in particular, played a significant role in elevating attention to climate impacts, chemical constituents, biodiversity, environmental justice, transparency, and sustainability. Most recent changes impacting how natural

resources are being managed can be attributed to several influences, including consideration of natural resources in the context of broader societal needs and goals; government policies and initiatives; actions undertaken by the private sector; and an evolution of how natural resource liability claims in site-specific instances are resolved.

In 2015, the United Nations established its 17 SDGs, which include goals related to poverty reduction, food security, clean water, affordable and clean energy, climate action, life below water, life on land, and more. These goals provide a framework to manage natural resource responsibility and sustainability for current and future generations. The United Nations convened its 28th Conference of the Parties to the United Nations Framework Convention on Climate Change in Dubai, United Arab Emirates, in December 2023. The collection of approximately 200 countries took stock of where the world stands concerning the implementation of the Paris Agreement and achieving the goal to limit global warming to 1.5 degrees Celsius.

Although the meeting received mixed reviews as to its “success,” the gathering showed how climate and its impact on natural resources touches every aspect of society—from a local level to a national and global scale—and every stakeholder group—from private citizens to government leaders. In addition, the World Economic Forum’s annual meeting (Davos 2024), brought together business, academic, and policy leaders to discuss the most pressing global challenges and potential collaborative solutions, including the interdependence of business and nature.

Natural resources are integral to the public in a variety of ways, including economic development, human health and well-being, cultural and recreational services, food security, biodiversity protection and conservation, climate change mitigation and adaptation, energy security, and social equity—and new ways of managing and conserving natural resources are being evaluated. Nature is critical to national economics and sustainable life. However, little is known as to the full extent of what is actually happening to natural resources in real time, and the U.S. NNA will seek to answer some of these tough questions.<sup>8</sup>

### V. Government Action Brings Greater Attention to Natural Resource Issues

In the United States, the Joseph Biden Administration has taken significant strides to incorporate natural resource and environmental protection matters into federal policy. A key policy act undertaken by the Administration was signing of the Inflation Reduction Act in August 2022, which signified the United States’ most ambitious climate-related action in history and provided financial support to investment in clean energy. Then in November 2022, the Biden Administration released its Nature-Based Solutions

7. Council Directive 2004/35/CE, 2004 O.J. (L 143) 56.

8. Phillip Levin, National Nature Assessment—What It Means for Business and Others, Address at the Ad-Hoc Industry Natural Resource Management Group’s Natural Resources Symposium Redux Program: Influences, Perspectives, Needs One Year Later (Nov. 15, 2023).

Roadmap, which provided “an outline of strategic recommendations to put America on a path that will unlock the full potential of nature-based solutions to address climate change, nature loss, and inequity. This marks the first time the U.S. has developed a strategy to scale up nature-based solutions.”<sup>9</sup>

Prior to these actions, on Earth Day (April 22) 2022, Executive Order No. 14072, Strengthening the Nation’s Forests, Communities, and Local Economies, was issued and launched the country’s first NNA. Today, the NNA is underway, led by the U.S. Global Change Research Program, to further define and understand what is happening to the nation’s natural resources and nature. As described in the August 4, 2023, *Federal Register* notice, the NNA will assess “the status, observed trends, and future projections of America’s lands, waters, wildlife, biodiversity, and ecosystems and the benefits they provide, including connections to the economy, public health, equity, climate mitigation and adaptation, and national security.”<sup>10</sup>

In the EU, there have also been significant developments relative to natural resource protection and enhancement policies and initiatives. The EU Green Deal, a package of policy initiatives, created a comprehensive road map for making the EU’s economy sustainable while also acknowledging the importance of mainstreaming biodiversity objectives into various sectors, such as agriculture, fisheries, and forestry. In addition, the Green Deal has the ultimate goal of having the EU reach climate neutrality by 2050 through the EU Climate Law, which requires EU competent authorities in each Member State to take necessary actions to meet this target. Relative to biodiversity, the EU’s biodiversity strategy for 2030 provides a comprehensive plan to protect nature and reverse degradation of natural resources and ecosystems. The strategy contains specific commitments and actions that are required to be undertaken by 2030.

Relative to environmental damage and natural resource liability, the European Commission is undertaking a fitness check of the PPP—following from a finding by the European Court of Auditors that the PPP is reflected and implemented to varying degrees in EU environmental policies and its coverage and implementation is therefore incomplete. It is the first time that a principle has been subjected to a fitness check. The European Commission is also in the midst of its second evaluation of the ELD to determine its effectiveness, efficiency, relevancy, coherence, and added value. Analyses of the PPP and ELD remain ongoing. That said, both of these evaluations are examples of the potential for change affecting how natural resources are regulated and managed, which in turn have profound

implications for the public at large, including most specifically small, medium, and large companies.

Internationally, the United Nations Climate Change Conferences continue to be a key gathering of nations from around the world to discuss issues pertinent to minimizing the impact of climate change, including transitioning to clean energy; centering nature, people, lives, and livelihoods; and other topics. These activities essentially attest to the pervasiveness of natural resources and increasingly more as a quality-of-life issue (the right to clean water, air, and so forth) and related equity and justice considerations.

It is not only government initiatives that are spurring action relative to how mitigation, conservation, protection, and restoration of natural resources are being considered. Industrial companies around the globe representing various sectors—from mining to oil and gas to manufacturing to pharmaceuticals and more—are taking proactive steps to prioritize natural resource issues in the context of corporate operations and priorities. Most visible are the sustainability policies present on most corporate websites.

## VI. A “New Era” of Private-Sector Action Is Underway

The days of private companies treating environmental and natural resources as an enforcement-related issue are fast diminishing. Today, companies are examining and incorporating environmental, social, and governance (ESG) criteria into their goals, strategies, and performance metrics. Assessments of social and environmental impacts are part of “doing business” and specific actions to address or minimize those impacts are being identified—with climate being a leading priority. As reported in November 2023, more than 1,000 of the world’s largest companies have targets to reduce emissions to net zero by 2050.<sup>11</sup> Increasing disclosure requirements, including the U.S. Securities and Exchange Commission’s proposed rule requiring certain climate-related information be disclosed in annual reports and the EU’s Corporate Sustainability Reporting Directive strengthening the rules concerning environmental and social information reported by companies, are setting the tone of greater public accountability of companies and increasing transparency.

Companies have become—and need to be—lead actors when it comes to proactively addressing and protecting natural resource and climate-related matters.<sup>12</sup> By using “purpose” as a driver and working with governments as “enablers,” the private sector is uniquely positioned to help solve these complex problems while also focusing on succeeding as a business. Building on the idea of partnerships,

9. Fact Sheet, White House, Biden-Harris Administration Announces Roadmap for Nature-Based Solutions to Fight Climate Change, Strengthen Communities, and Support Local Economies (Nov. 8, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/08/fact-sheet-biden>.

10. Draft Prospectus for the First National Nature Assessment, 88 Fed. Reg. 51853, 51853 (Aug. 4, 2023).

11. Simon Jessop, *Just 4% of the Top Companies Meet UN Climate Target Guidelines, Study Says*, REUTERS (Nov. 5, 2023), <https://www.reuters.com/sustainability/just-4-top-companies-meet-un-climate-target-guidelines-study-2023-11-06/>.

12. Roger Martella, *Companies Keeping Up With Change: Evolution and Reinvention to Meet Today’s Priorities*, Keynote Address at the Ad-Hoc Industry Natural Resource Management Group’s Natural Resources Symposium Redux Program: Influences, Perspectives, Needs One Year Later (Nov. 15, 2023).

the private sector is also recognizing the benefit of collaboration—both within the industrial community and with other stakeholder groups. Consortia and private-public partnerships are allowing increased innovation and creativity when managing natural resource matters.

For example, the First Movers Coalition was initiated by the U.S. State Department and the World Economic Forum to form a coalition of companies in key sectors (aviation, shipping, steel, and trucking) focused on creating and utilizing clean technologies to reduce global emissions. The Nature Positive Initiative, launched in November 2023 and representing conservation organizations, institutes, and business and financial institutes, aims to undertake work to halt nature loss, as well as ensure more nature is available by 2030 than in 2020. Further, organizations such as The Nature Conservancy, Environmental Defense Fund, National Fish and Wildlife Foundation, World Wildlife Fund, and many others have established corporate partnership programs with the intent to advance common objectives and drive transformation as to how natural resources and nature is preserved, protected, and restored. This multi-stakeholder approach allows for the sharing of knowledge, resources, and expanded reach pursuant to greater impact and influence for change.

## VII. Path Forward

This Comment has shown the importance of protecting natural resources (aka nature) in everyday life and the continuing evolution of private- and public-sector policies and practices—from high-level save-the-planet initiatives to very site-specific actions to conserve and restore natural resources. We expect natural resource policies and practice will continue to evolve in response to both global environmental challenges and localized, site-specific natural resource needs. For example, climate change and adaptation to enhance natural resource resilience and mitigate environmental risks will continue to remain front and center. Governments at the national, state, and local levels are likely to increase regulatory activity though private-sector solutions will continue to predominate in fulfilling needs.

Litigation will remain a tool for national and local government to remedy natural resource harms—particularly

those associated with climate change, PFAS, and other contaminants that might fall outside current statutes—though the use of the courts to define policy is subject to differing opinions. There will be increased attention to environmental justice via policies to address the disproportionate impacts on marginalized communities in order to work toward a more equitable distribution of environmental benefits. Growing pressure on private companies to adopt sustainable practices, and to disclose actions and associated metrics—whether voluntarily or pursuant to regulatory requirements—relative to resource extraction, waste management, and emissions, will also continue.

With these expectations come a variety of opportunities, for the private sector and its stakeholder partners. To better protect natural resources, proactive, preventative measures to avoid impacting and/or degrading natural resources—versus reactive actions to remedy or restore resources and services—can minimize risk and financial requirements. As seen in recent trends in U.S. natural resource settlements, there are new ways of resolving liability by focusing on natural resource restoration versus monetary damages, which can help minimize the need for litigation and allow natural resources to be returned to public use sooner.

Similarly, incorporating natural resource damage liability issues, whether resolution or prevention, within the context of sustainability and the SDGs will be essential for companies seeking to align their operations with global sustainability frameworks. Ongoing investment and engagement in public-private partnerships will enhance structures that can promote open and transparent dialogue among diverse parties and encourage joint investment in environmental enhancement and conservation projects of mutual interest. Like the work being done by the Ad-Hoc Industry Natural Resource Management Group, development and sharing of best practices and lessons learned for managing and optimizing natural resources as they relate to various issues can allow for faster decisionmaking, offer a more cohesive process, help to encourage a reasonable, balanced, and predictable practice arena, and identify solutions that are more efficient and cost effective for various parties.

In conclusion, there is a key role for collaboration, transparency, and innovation in shaping the future of the natural resource practice arena, all of which may trend to better environmental law and policy, now and for the ages.