COMMENT

A Decade of Natural Resource Damage Liability: Key Federal Decisions 2004-2014

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I. Introduction

Liability for natural resource damages (NRD) was first authorized when the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980[1] was enacted. Over the years, claims for NRD have also been brought pursuant to a number of other federal statutes, including the Oil Pollution Act (OPA) of 1990[2] and the Clean Water Act (CWA),[3] as well as statutes in over 40 states that contain provisions authorizing the recovery of NRD. In addition, common-law claims such as trespass and nuisance have also been used to seek NRD recoveries. Under federal and state statutes, parties are typically responsible for damages associated with injuries to natural resources resulting from the release of hazardous substances and oil.

The past 30 years have seen a slow appearance and evolution of NRD-related case law. The range of information resulting from the various decisions issued in the past decade may be useful to legal practitioners, particularly relative to defining NRD liability, guiding procedural actions, and resolving liability claims. This Comment focuses on federal judicial opinions that were issued during the period 2004-2014 under CERCLA and OPA, as those are the principal federal statutes under which opinions have been issued. While there have been some state case law developments in the past several years, particularly in the New Jersey superior courts, those decisions are not discussed here.

The Comment first provides some brief context concerning NRD liability under CERCLA and OPA. Next, it highlights and summarizes federal NRD case law developments of the past 10 years at both the district and appellate levels that have addressed the following issues: (1) legislative elements of a federal NRD liability claim; (2) limitations of liability; (3) procedural matters; (4) damages; and (5) settlements.

II. NRD Liability Under Federal Statutes

Liability for NRD may arise at sites from historical contamination, instantaneous oil spills, or accidents involving the release of oil or hazardous substances and is authorized under a variety of federal laws, including CERCLA, CWA, OPA, the National Marine Sanctuaries Act,[4] and the Park System Resource Protection Act.[5] These federal statutes contain specific provisions authorizing the recovery of damages for NRD liability, including the recovery of the injury to, destruction of, or loss of natural resources, as well as the reasonable costs of a damage assessment.[6]

Author's Note: The Ad-Hoc Industry Natural Resource Management Group is comprised of multisector industrial companies and is exclusively focused on the interface between industrial operations and natural resources. It has tracked case law developments concerning NRD and related issues since its founding in 1988. The views expressed in this Comment are those of the authors and do not reflect the views or positions of the Ad-Hoc Industry Natural Resource Management Group or its industrial company members. This Comment is intended to serve as an adjunct to a compilation of case law, HANDBOOK OF THE LAW OF NATURAL RESOURCE DAMAGES, *published by the law firm Heller Ehrman in cooperation with the Ad-Hoc Industry Natural Resource Management Group in 2004. The* HANDBOOK *provided a summary and analysis of the key federal case law developments concerning NRD liability issues under CERCLA from 1980 until 2004.*

1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
2. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.
3. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
4. 16 U.S.C. §§1431-1445.
5. 16 U.S.C. §§19(jj). *See generally* National Oceanic and Atmospheric Administration Damage Assessment, Remediation, and Restoration Program (NOAA DARRP), *About Relevant Laws*, *available at* http://www.darrp.noaa.gov/about/laws.html.
6. 42 U.S.C. §§101(6), 107(a)(4)(C); 42 U.S.C. §§1001(5), 1002(b)(2).

Under these laws, federal, state, local, and tribal officials (natural resource Trustees) may file claims on behalf of the public to recover damages from responsible parties to restore injured, destroyed, or lost natural resources (which can include land, fish, wildlife, biota, air, water, groundwater, and drinking water supplies). Each federal statute also specifies the designated Trustee—the appropriate federal agency and/or department—under each regime, including the U.S. Departments of the Interior (DOI), Commerce, Defense, Agriculture, and Energy. Trustees are typically responsible for filing claims for NRD damages, undertaking the NRD assessment process (the process to determine the extent of the resource injury), assessing the type of restoration required, and implementing natural resource restoration. In certain instances, however, Trustees can also be potentially responsible parties (PRPs) at a given site. For example, the Energy and Defense Departments are named as PRPs at several sites.

In order to assess the extent of NRD at a given site, Trustees perform a natural resource damage assessment (NRDA). Under CERCLA, DOI has promulgated a set of regulations that lay out a framework for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or release of a hazardous substance.[7] The National Oceanic and Atmospheric Administration (NOAA) promulgated similar regulations for NRDA under OPA.[8]

A. Recent Developments Relating to Elements of CERCLA NRD Claims

Courts have ruled on several issues relating to elements of an NRD liability claim under CERCLA, including public suits with municipalities as Trustees, as well as suits by private parties or concerning private property.

1. Municipalities as Trustees

In 2004, the U.S. District Court for the Central District of California held that municipalities can only bring claims as natural resource Trustees if they are specifically authorized to do so under CERCLA §107(f)(2)(B).[9] Although the city of Rialto argued that a California Civil Code provision authorizing municipalities to abate public nuisances authorized them to act as natural resource Trustees, the court ruled that an express designation was required.[10]

2. Suits by Private Parties or Concerning Private Property

The U.S. District Court for the District of the Virgin Islands ruled twice on the definition of private property and natural resources under CERCLA. In 2011, the court was asked to rule on whether the Trustees could recover damages to the natural resources of the Alucroix Channel under CERCLA. In this instance, a private company owned the Channel, and there was a question as to whether the resources of the Channel would fall under the definition of a "natural resource" for the purpose of trustee authority.[11] The issue addressed by the court was whether the privately owned resources included only the land or the land and the water thereon. The court ruled that by the plain language of the deed, the land was wholly privately owned, and that the government could not bring a CERCLA claim for damages on private land wholly within the control of a private party.[12] However, the court did not grant summary judgment to the defendants based on this determination because whether the body of water now covering the land was within Trustee authority was an issue of material fact and not appropriate for summary judgment.[13]

In 2012, the court ruled on the motion of a different defendant in the same case, which sought summary judgment on "whether [the defendant] had an ownership interest in the ground water so as to preclude any claims under CERCLA and the common law counts."[14] The court ruled that Virgin Islands law provided for "expansive authority" by the territory over territorial waters, and no previous ownership interest in the groundwater precluded the territory from so regulating water resources.[15] According to the court, the groundwater was not a "purely private resource"[16] and fell under the CERCLA definition of a natural resource.

B. Recent Developments Relating to Limitations on Liability

Since 2004, courts have ruled on several issues relating to limitations on liability in NRD cases, including statute of limitations, preemption, and extraterritorial application.

7. 42 U.S.C. §301(c). 43 C.F.R. §11.10-11.93.
8. 15 C.F.R. §990.10-990.66.
9. City of Rialto v. U.S. Dep't of Defense, 2004 U.S. Dist. LEXIS 27122 (C.D. Cal. 2004).
10. *Id.* at **34-35.
11. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., 2011 WL 882547 (D.V.I. 2011).
12. *Id.* at *25.
13. *Id.*
14. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., Civil Action No. 05-62 (D.V.I. Sept. 26, 2012).
15. *Id.* slip op. at 17-18.
16. *Id.* slip op. at 24 (*quoting* Ohio v. U.S. Dep't of Interior, 880 F.2d 432, 460 (D.C. Cir. 1989)).

1. Statute of Limitations

While many legal issues surrounding the statute of limitations for NRD claims have not been addressed by courts in the last decade, the District Court for the District of the Virgin Islands ruled on the standard for the general limitations period. In a 2010 decision in *Commissioner of the Department of Planning and Natural Resources v. Century Alumina Co.*, the court used a constructive knowledge standard, holding that the statute of limitations under CERCLA §113(g)(1) begins to run when the Trustee either "discovered or should have discovered any loss to natural resources and its connection to the release in question."[17] In this case, the court found that constructive knowledge could be imputed to the Trustee as to several of the claims, such that the statute of limitations had run by the time the claim was brought. Accordingly, the court dismissed those claims, while preserving others.[18]

2. Preemption

Federal courts have also ruled on preemption issues in recent years. In 2006, the U.S. Court of Appeals for the Tenth Circuit held in *New Mexico v. General Electric Co.* that "CERCLA's comprehensive NRD scheme preempts any State remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource."[19] The court held that New Mexico had no additional claim for trespass under state law separate and apart from the injury to groundwater otherwise part of the same instance and injury.[20]

However, in other rulings, courts have held that CERCLA does not automatically or completely preempt a state-law claim. In *New Jersey Department of Environmental Protection v. Minnesota Mining and Manufacturing Co.*, the U.S. District Court for the District of New Jersey held that CERCLA does not preempt state NRD law if the plaintiffs did not make a claim pursuant to CERCLA in their pleading.[21] The plaintiffs in that case did not challenge the ongoing CERCLA remediation, and no interpretation of federal law was essential to ruling on the plaintiffs' claims.[22]

One court has also ruled on the preemption of state NRD regimes in federal waters. In the multidistrict litigation concerning the 2010 Deepwater Horizon incident, the U.S. District Court for the Eastern District of Louisiana ruled that when a discharge occurs within federal lands or waters, states are preempted from bringing claims under state statutes to recover for damages to state natural resources.[23] The court said that even though state regulations varied in language from the federal regulations, the state's removal costs would be covered by the federal regime.[24] The court further found that the state would also be entitled to recover punitive damages under the federal laws and that the effect of preemption of state statutes denied only the state's ability to receive additional amounts.[25] The court ruled that the federal regime would have to be invoked when releases occur in federal waters. Allowing any state affected by the discharge to bring their own separate claims under their sovereign regimes could violate due process by allowing judgments without notice to the defendants.[26]

3. Extra-Territorial Jurisdiction

Another court also ruled on the extraterritorial application of CERCLA. In 2006, the U.S. Court of Appeals for the Ninth Circuit decided whether a Canada-based company may be liable for a violation under CERCLA where the pollution crossed the international boundary.[27] In this instance, a citizen suit was filed against a Canadian corporation that discharged waste from a location in Canada that was found in a river in the United States. The court found that the "passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA."[28] The court concluded that since the hazardous substances had come to be located in the United States, it was a case of domestic application of CERCLA. The court had personal and subject matter jurisdiction for purposes of NRD.[29] Therefore, the application of CERCLA in this case was not an impermissible extraterritorial application of U.S. law.

C. Recent Developments Relating to Procedural Issues

Over the past 10 years, courts have ruled on procedural issues relating to NRD claims, including notice and timing, presentment, jurisdiction, right to a jury, intervention, and necessary parties.

1. Notice and Timing

Courts ruled on several issues related to notice and timing. In 2008, the District Court for the District of the Virgin Islands issued an opinion regarding the timing requirement for notice pleading.[30] The court held that the Trustee was

17. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., Civil Action No. 05-62 (D.V.I. July 13, 2010) (slip op. at 14).
18. *Id.*
19. New Mexico v. General Elec. Co., 467 F.3d 1223, 1247 (10th Cir. 2006).
20. *Id.*
21. New Jersey Dep't of Envtl. Prot. v. Minnesota Mining & Mfg. Co., 2007 U.S. Dist. LEXIS 49613, 37 ELR 20189 (D.N.J. 2007).
22. *Id.*
23. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179 (E.D. La. Nov. 14, 2011).
24. *Id.* slip op. at 14.
25. *Id.*
26. *Id.* slip op. at 17.
27. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).
28. *Id.* at 1075.
29. *Id.* at 1073.
30. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., 2008 U.S. Dist. LEXIS 90087 (D.V.I. 2008).

not required to give a 60-day notice of intent to sue pursuant to CERCLA because the facility in question was not on the national priorities list (NPL), a federal facility, or a facility where remedial action is scheduled.[31] This ruling, limited to the jurisdiction of the Virgin Islands, permits Trustees to bring NRD claims pursuant to CERCLA without providing a 60-day notice of intent to sue so long as the facility is not one of the types enumerated in CERCLA.

The U.S. District Court for the Northern District of Oklahoma also ruled on timing issues in 2009 in *Quapaw Tribe v. Blue Tee Corp.*, specifically on the timing of NRD claims related to cleanup activities.[32] The court held that as long as the U.S. Environmental Protection Agency (EPA) or other response agency is engaged in cleanup and is moving forward to selecting an appropriate remedy, Trustees cannot bring an NRD claim before the remedial action is selected.[33]

In another *Century Alumina* opinion, the District Court for the District of the Virgin Islands also ruled on related timing.[34] Here, the court denied the government the ability to bring an additional action for recovery of costs after a CERCLA cost recovery action was fully litigated and decided between the same parties and pertaining to the same site.[35] This lawsuit represented a multiple action suit against a number of defendants, but where one action had previously been litigated against a same defendant in regard to a release from the same facility that had been brought in a prior case.[36] The ruling came in response to the government's motion requesting the court to defer ruling on the defendant's motion for summary judgment until further discovery could be obtained.[37] The court held: "Allowing additional discovery in this case on an issue that was litigated to finality in the Cost Recovery Action would serve no purpose. Any belated discovery simply could not undermine the preclusive effect of the [preceding] judgment. . . ."[38]

2. Presentment

Additionally, new case law under OPA raises the issue of presentment. The U.S. District Court for the Eastern District of Louisiana ruled on whether the presentment requirement was a jurisdictional prerequisite or a condition precedent.[39] OPA provides that "all claims for removal costs or damages shall be *presented* first to the responsible party. . . ."[40] The court ruled that based on this language, the presentment requirement of OPA is a mandatory condition precedent. In short, a plaintiff must present their OPA claims to the responsible party prior to any proceeding in court.[41]

3. Jurisdictional Issues

The U.S District Court for the Northern District of Ohio ruled on two jurisdictional issues related to an allegedly responsible party who brought an action, while the Trustees were in the pre-assessment phase, seeking declaratory judgment that it was not liable.[42] The court ruled that the federal government retained sovereign immunity because the declaratory judgment action did not fall under the waiver in the Administrative Procedure Act and because the U.S. Fish and Wildlife Service sending a summation of costs incurred was not a final agency action.[43] The court also ruled that the state of Ohio retained sovereign immunity, and that the action did not fall under the *Ex Parte Young* exception.[44] The court determined that the plaintiff's claims were not ripe, due to the preliminary nature of the agency proceedings.[45]

4. Right to a Jury

One court ruled on the right to a jury for NRD claims brought under OPA. The U.S. District Court of the Southern District of Texas found a right to a jury trial for determination of liability and damages under an NRD claim.[46] The court stated that there is a constitutional right to a jury trial if at least one component of determining damages is legal in nature.[47] The court determined that the inquiry into diminution in value of those natural resources pending restoration is similar to the cause of action when compensating the plaintiff for injury to property in a trespass or nuisance case and would be considered a legal cause of action.[48] The court ruled that in an NRD cause of action, the Seventh Amendment right to a jury trial is triggered by this component of the remedy.[49]

5. Intervention

The Tenth Circuit weighed in on the issue of intervention by an additional Trustee in an ongoing NRD suit.[50] In *Oklahoma v. Tyson Foods, Inc.*, the Cherokee Nation filed a

31. *Id.*
32. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166 (N.D. Okla. 2009).
33. Quapaw Tribe of Okla. v. Blue Tee Corp., 2008 U.S. Dist. LEXIS 51476 (N.D. Okla. 2008).
34. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., 2011 U.S. Dist. LEXIS 137431 (D.V.I. 2011).
35. *Id.* at *26.
36. *Id.* at *11; *see also* Dep't of Planning and Natural Res. v. St. Croix Renaissance Grp., 2011 U.S. Dist. LEXIS 11881 (D.V.I. 2011).
37. *Id.* at *26.
38. *Id.*
39. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Nov. 14, 2011).
40. 33 U.S.C. §2713 (emphasis added).
41. *Id.*
42. Dover Chem. Corp. v. U.S. Fish and Wildlife Service, 2011 WL 2461897 (N.D. Ohio 2011).
43. *Id.*
44. "The holding in *Ex parte Young* permits an action for prospective injunctive relief against a state official who is acting in violation of federal law in performing a discretionary act, in order to prevent the further violation of federal law." *Id.* at *6 (*citing* Ex parte Young, 209 U.S. 123 (1908)).
45. *Id.*
46. United States v. Viking Res., Inc., 607 F. Supp. 2d 808 (S.D. Tex. 2009).
47. *Id.* at 832.
48. *Id.*
49. *Id.*
50. Oklahoma v. Tyson Foods, Inc., 619 F.3d 1223, 40 ELR 20253 (10th Cir. 2010).

motion to intervene, believing that the state of Oklahoma could not properly address their interests. The motion was filed 19 days before trial, and the district court struck the motion as untimely. The Tenth Circuit found that, in light of all of the circumstances regarding undue delay, prejudice to the parties, and prejudice to the Nation, the lower court did not abuse its discretion and affirmed the denial of the Nation's motion to intervene.[51]

6. Necessary Parties

One district court ruled on the subject of whether particular Trustees were necessary parties to proceed with the case. In *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, the Northern District of Oklahoma found that the state of Oklahoma was not a necessary party to the case, because the Quapaw Tribe amended their claims so that there was no overlap between the Tribe's natural resource interest and the state's interest.[52]

D. Recent Developments Related to Damages

In the past 10 years, courts have ruled on damage issues relating to NRD claims, including the required use of damage recoveries, costs of assessment, and attorneys fees.

1. Required Use of Damage Recoveries

In 2006, the Tenth Circuit addressed the subject of the use of damages recovered. The court ruled that a state cannot claim an award of unrestricted money damages for NRD.[53] The court held that, under CERCLA, NRD may be sought only for monies that will be used to restore, replace, or acquire equivalent resources, and cannot be premised on alleged inadequacies of ongoing EPA-approved remediation activities.[54] Any sought damages must be tied squarely to the actual losses of service from the injured resources.[55]

2. Costs of Assessment

In 2007, the U.S. District Court for the Eastern District of Washington addressed the issue of when assessment costs can be recovered. The court interpreted CERCLA to allow the recovery of assessment costs at the time that the costs are incurred.[56] The court also noted that while the claim for assessment costs was ripe at the time the costs were incurred, the full scope of liability would still have to be established, as well as whether the assessment costs incurred were reasonable.[57]

The Eastern District of Wisconsin in *Appleton Papers, Inc. v. George A. Whiting Paper Co.* also addressed NRD assessment costs.[58] There, the plaintiff was trying to recover costs from another responsible party, who argued against the inclusion of certain NRD assessment costs because the results of those assessment activities were not ultimately relied upon by the Trustees. The court rejected this argument and stated that the assessment costs should instead be evaluated based on "whether the assessment was a reasonable effort and expense undertaken at the time and under the circumstances, rather than an ex post facto review of those procedures some fifteen years later."[59]

3. Attorneys Fees

The Tenth Circuit also discussed the issue of attorneys fees in their 2006 ruling. The court specified that NRD recoveries under CERCLA must be used to address natural resource injuries and cannot be used for nonrestoration expenditures such as attorneys fees.[60]

E. Recent Developments Related to Settlements

During the past decade, courts have issued several judicial reviews of settlements. The District Court for the District of the Virgin Islands issued two opinions on proposed consent decrees in *Commissioner v. Century Alumina Co.* In 2008, the court rejected a proposed consent decree based on a lack of information, stating that the Trustee provided "neither a calculated apportionment of liability, nor any other substantive qualitative methodology, that it used in determining the amount that Renaissance would pay in exchange for its discharge from liability" and concluding that "the Court cannot perform its role of assessing whether the proposed Consent Decree is based on a rational determination of comparative fault."[61] In 2012, the court approved a consent decree over the objection of another defendant. The court approved the settlement, finding that it was "based on comparative fault" and that "liability is apportioned according to rational estimates of the harm each party has caused."[62]

III. Conclusion

While the field of NRD law has not yielded a large number of judicial decisions over the 10-year period from 2004

51. *Id.*
52. Quapaw Tribe of Okla. v. Blue Tee Corp., No. 03-CV-0846-CVE-PJC, 40 ELR 20244 (N.D. Okla. Aug. 20, 2010).
53. New Mexico v. General Elec. Co., 467 F.3d 1223 (10th Cir. 2006).
54. *Id.* at 1244.
55. *Id.* at 1245.
56. Confederated Tribes & Bands of the Yakama Nation v. United States, 616 F. Supp. 2d 1094, 1099 (E.D. Wash. 2007).
57. *Id.*
58. 2012 WL 2704920 (E.D. Wis. 2012), on appeal.
59. *Id.* at *13.
60. New Mexico v. General Elec. Co., 467 F.3d 1223, 1248 (10th Cir. 2006).
61. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., Civil Action No. 05-62, slip op. at 10 (D.V.I. Oct. 22, 2008).
62. Commissioner of the Dep't of Planning and Natural Res. v. Century Alumina Co., Civil Action No. 05-62, slip op. at 9 (D.V.I. Feb. 13, 2012) (*quoting* United States v. SEPTA, 235 F.3d 817, 823 (3d Cir. 2000)).

to 2014, the opinions that have been issued provide some additional guidance and instruction for persons working in this area. As the subject field continues to mature, the information presented in this Comment in a 10-year summary of judicial activity may serve as a helpful resource to legal and other practitioners when dealing with this still evolving practice area.