Recent developments in Natural Resource Damages claims

BY DORESSIA L. HUTTON AND AVERIL EDWARDS

Several federal statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA) address impacts to natural resources. Under CERCLA and OPA, the federal government, states, and Indian tribes are authorized to act as natural resource trustees (Trustees) on behalf of the public to assess natural resource damages (NRDs) and develop and implement plans for the restoration of natural resources. 42 U.S.C. § 9607(f); 33 U.S.C. § 2706(c). A Natural Resource Damage Assessment (Assessment) is performed by Trustees to identify the extent of injuries to natural resources, lost human uses, the type and amount of restoration required, and to implement the restoration of injured natural resources.

The CERCLA regulations require Assessments to be conducted in a four-phased approach: (1) Preassessment, (2) Assessment Plan, (3) Assessment Implementation, and (4) Post-Assessment. 43 C.F.R. § 11.13. Under OPA regulations, the Assessment process is to be done in three phases: Preassessment, Restoration Planning, and Restoration Implementation. 15 C.F.R. § 990.12. Under the Preassessment phases of both regulations, Trustees determine whether they may pursue restoration or assessment of NRDs. 15 C.F.R. § 990.40; 43 C.F.R. § 11.23. The CERCLA regulations require a determination that a discharge of oil or a release of a hazardous substance has occurred, natural resources have been or are likely to have been adversely affected, the discharge or release is sufficient to potentially cause injury to natural resources, data sufficient to pursue an assessment are readily available or likely to be obtained at a reasonable cost, and any response actions will not sufficiently remedy the injuries. 43 C.F.R. § 11.23(e). Similarly, OPA regulations require a determination that an unpermitted discharge of oil to navigable waters from a privately owned vessel may have injured natural resources. 15 C.F.R. § 990.41(a). If these jurisdictional requirements are met, Trustees must then determine whether injuries have or are likely to result, whether response actions will adequately address the injuries, and whether feasible restoration actions exist to address the potential injuries. § 990.42.

For Assessments conducted under CERCLA, Trustees must develop an Assessment Plan that identifies and documents the approach used to assess NRDs and provides the public an opportunity to comment. 43 C.F.R. §§ 11.31(a), .32(c). Trustees follow Type A or B assessment procedures. Type A procedures are simplified assessments that incorporate computer modeling to assess damages to coastal, marine, or Great Lakes environments but are only available for specific releases and environmental conditions. § 11.34. Type B procedures require more extensive field observation and must be used if the requirements for Type A procedures are not met. Even if Type A procedures apply, Type B may be used where it can be performed at a reasonable cost and the increase in accuracy outweighs the increase in costs. § 11.35. Type B assessments consist of three steps: Injury Determination, Quantification, and Damage Determination. § 11.60. In the final Post-Assessment phase, Trustees prepare a Report of Assessment, present a demand for payment of damages and assessment costs, and prepare a Restoration Plan. §§ 11.90, .91, .93.

Under OPA regulations, Restoration Planning consists of injury assessment and restoration selection. Trustees must first evaluate and quantify potential injuries to natural resources and use that information to determine the need for and scale of restoration actions. 15 C.F.R. § 990.50. Trustees must then issue a Final Restoration Plan that incorporates public comments. § 990.55. The final phase is Restoration Implementation, in which the Trustees ask responsible parties to either implement the Final Restoration Plan under Trustee oversight and provide reimbursement for assessment and oversight costs or pay for all costs of assessment and restoration. § 990.62(b).

Recent developments

Trustees performing the Assessment for the Deepwater Horizon oil spill are currently performing the injury assessment. The National Oceanic and Atmospheric Administration (NOAA) is the lead Trustee along with the Department of the Interior, the Department of Defense, and all five Gulf Coast states. On September 2, 2010, Trustees issued a notice of intent to conduct restoration planning. 75 Fed. Reg. 60,800, 60,801 (Oct. 1, 2010). On February 11, 2011, NOAA issued a notice of the initiation of a restoration scoping process and preparation of a programmatic environmental impact statement (Statement). 76 Fed. Reg. 9,327 (Feb. 17, 2011). Under the restoration scoping process, Trustees will evaluate the types of restoration that may be necessary to offset potential impacts from the spill to habitat, wildlife, and human use of natural resources. Since the injury assessment is ongoing, the restoration scoping process is being performed to guide the Trustees on broad restoration types that will be evaluated as part of the Statement and used to inform the selection of restoration alternatives. The public comment period on the restoration scoping process closed on May 18, 2011, but the public will still have the opportunity to comment on the more specific restoration plan that will be developed as part of the Assessment process.

On April 21, 2011, Trustees announced that BP agreed to provide $1 billion toward early restoration projects in the Gulf of Mexico. The Trustees plan to use these funds for projects such as rebuilding coastal marshes, replenishing damaged beaches, conserving sensitive areas for ocean habitat for injured wildlife, and restoring barrier islands and wetlands that provide natural protection from storms. These projects will be subject to public comment, plus environmental review, as required by law. The full Assessment will continue. In making the damage assessment, Trustees will take into account any benefits realized by the early restoration projects.

On April 6, 2011, a proposed consent decree addressing the natural resource damages in the Commencement Bay Environment in Washington was lodged with the United States District Court. Trustees and two defendants lodged the consent decree before the completion of the Assessment.
Investigations conducted by the Environmental Protection Agency (EPA) and Trustees detected hazardous substances in the sediments, soils, and groundwater. Trustees began assessing natural resources damages in October 1991 after making the required jurisdictional findings. See Consent Decree at p 3. Trustees filed a complaint seeking recovery of damages for injury to, destruction of, and loss of natural resources resulting from releases of hazardous substances. The natural resources include fish, shellfish, invertebrates, birds, marine sediments, and resources of cultural significance. The defendants are alleged to have owned or operated real property or facilities from which stormwater, surface water runoff, wastewater, other process discharges, and/or groundwater have flowed to the Commencement Bay Environment.

Trustees agreed to settle their claims against two defendants for the amounts as follows: (1) 139 discounted ecological service acre-years (the term used to describe both the scale of the injuries and the amount of habitat restoration the Trustees are seeking to compensate for the injuries) which amount to $7,802,081.29, (2) $700,000 of Trustees’ unreimbursed damage assessment costs, and (3) $300,000 toward Trustees’ long-term habitat oversight and stewardship activities.

A settlement agreement between the United States, Indiana, New York, and St. Regis Mohawk Tribe and Motors Liquidation Company F/K/A General Motors was lodged in bankruptcy court on March 31, 2011. The claimants will receive allowed general unsecured claims exceeding $11.5 million for restoration of wildlife, habitat, and other natural resources at two sites and past assessment costs at an additional three sites. According to the news release, because the allowed claims will be paid in stocks and warrants it is anticipated that the claimants will receive less than the face amount of the allowed claims.

On June 1, 2010, the Natural Resource Damage Assessment Plan for the Portland Harbor Superfund Site was issued by the Trustee Council. The Trustee Council followed a phased approach to conduct the Assessment: Development of the Assessment Plan, Implementation of the Settlement-Oriented Work Plan, Completion of the Assessment, and Recovery of Damages from non-settling Potentially Responsible Parties (PRPs). A settlement-oriented assessment, including a NRD specific allocation and restoration planning, is being conducted so PRPs can settle their liability at or near the time EPA issues the Record of Decision.

Responding to NRD claims

NRD claims have the potential for substantial damages to be recovered in a single case. The cases that have the largest settlements involve catastrophic oil spills such as the Exxon Valdez, which involved a $900 million settlement, and the Deepwater Horizon, where final settlement has not yet been reached but BP has already committed $1 billion towards early restoration.

While various NRD settlements continue to be reached by the federal government and states, there does not seem to be a current significant resurgence of new NRD litigation. For example, in the 2000s, the New Jersey Department of Environmental Protection embarked upon a major initiative to address more than 4,000 potential NRD claims. www.nj.gov/dep/commissioner/policy/pdir2003-07.htm. The New Jersey Attorney General filed approximately 120 NRD cases from 2002 to 2007. www.nj.gov/oag/newsreleases07/pr20070629a.html. While New Jersey has not undertaken another major initiative to file new NRD lawsuits in recent years, the state continues to settle previously filed cases. This may be due, in part, to the significant expenses that must be incurred by Trustees to perform Assessments and recent decisions denying NRD claims. See, e.g., New Mexico v. Gen. Elec. Co., 467 F.3d. 1223, 1242 (10th Cir. 2006).

Regardless of the number of lawsuits being filed, because the potential for substantial damages, how PRPs respond to NRD claims is of critical importance. One of the most important steps in defending an NRD claim is for PRPs to realistically assess liability. An accurate assessment and quantification of NRDs will prove useful in settlement negotiations or litigation. Second, PRPs should evaluate whether any defenses may apply. Both CERCLA and OPA set forth statutory defenses, including damages caused by acts of God, war, or unrelated third parties. Double recovery for NRDs is also prohibited. After assessing NRD liability, PRPs will be in a better position to assess the value of any settlement proposals received or whether to litigate.

PRPs should also consider partnering with Trustees in the Assessment. By doing so, PRPs can ensure the accuracy and integrity of the Assessment. PRPs should then use the information developed during the Assessment to support their position. For severe injuries to natural resources, PRPs should consider conducting early restoration projects. These projects can reduce continuing damages while the Assessment is performed and lower the final injury and damage determination.

Finally, as soon as the possibility of an NRD claim is raised, PRPs should evaluate current and historic insurance policies and provide notice under all potentially applicable policies.

Doressia L. Hutton is a partner in the Chicago office of Winston & Strawn LLP and can be reached at dhutton@winston.com. Averil Edwards is an associate in Winston & Strawn’s Chicago office and can be reached at aedwards@winston.com.