



# Happy Birthday Superfund! Past, Present and Future

## CERCLA Natural Resource Damages

MSBA Environmental, Natural Resources and  
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# NATURAL RESOURCE DAMAGES

## We Will Cover:

Liability Framework

Importance of Definitions

Trustees – Scope of Coverage

Defenses and Statute of Limitations




NRD Assessment Process

Damages

# ARE NRDs THE SLEEPING GIANT PRPs FEAR?



# WHAT'S TO FEAR?

- Strict, Joint and Several Liability 
  - PRP's are easily identified 
  - Trustees obtain rebuttable presumption on appropriate measure of damages 
- Liability can be apportioned but very high burden to meet
  - Injury to natural resources must be causally connected to (PRP's action or release in general)
  - Little case law on the weight of the rebuttable presumption

## Statutory Sources of NRDs

- **CERCLA**
- **OPA**
- **CWA**
- **MERLA**

### Goal of NRDs is to:

1. Restore habitats and resources to the condition they would have been had the hazardous substance not been released; and
2. Compensate the public for the loss of their use or enjoyment of natural resources

# CERCLA NRD PROVISIONS

CERCLA provides that **responsible parties** shall be liable for “**damages** for **injury** to, destruction of, or loss of **natural resources**, including the reasonable costs of assessing such injury, destruction or loss **resulting** from such a **release**.” CERCLA § 107(a)(C), 42 U.S.C. § 9607(a)(C).

**Trustees** may recover for loss of **natural resources** of “the United States Government and to any State for natural resources within the State or belonging to, **managed by**, controlled by, or appertaining to such State.... .” CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

**Trustees** include Indian tribes who may recover for loss of **natural resources** belonging to , **managed by**, controlled by, appertaining to or **held in trust** for the benefit of the tribe. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

# LIABILITY SCHEME

- **Must be a release of a hazardous substance to the environment – injuring a natural resource**
- **4 categories of RPs**  
*(current and past owners and operators, arrangers and transporters)*



# LIABILITY SCHEME

- **Strict, Joint and Several Liability**  
*(unless RP can prove the harm is divisible)*
- **Causation** - Damages to ..... or loss resulting from such a release
- Right to **Jury Trial???**





# LIABILITY SCHEME

- **Only Trustees can bring a NRD Claim**
  - **EPA is not a Trustee**
- **Trustees benefit from a **rebuttable presumption** if they follow assessment regulations.** *CERCLA § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C).*

# CERCLA

## Natural Resource Damages

### Important Definitions



# NATURAL RESOURCES



**INCLUDING THEIR  
HABITATS**



## NATURAL RESOURCES DEFINED AS:

- Land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources. *CERCLA 42 USC § 9601(16)*
- DOI regulations further define natural resources as including their **supporting ecosystems** *(40 CFR 300.605, .600)*
- Purely privately owned property is excluded

# NATURAL RESOURCE DAMAGES

## DAMAGES

- What a RP pays to make the public and environment whole for the injuries to natural resources



vs

## INJURY

- Adverse impact on natural resources resulting from a release of hazardous substances
- Also includes reduction in services provided by the natural resources to both humans and other natural resources

# TRUSTEES

- Trustees have two basic responsibility for restoring injured natural resources.
  - Assessment of injury to natural resources; and
  - Restoration of natural resources injured or services lost due to a release or discharge



# TRUSTEES

AGENCY	MANAGEMENT AREAS	TRUST RESOURCES
DOC: NOAA	Coastal areas, tidal wetlands, rivers that support anadromous fish (salmon)	Marine mammals and fish, salmon, coral reefs, mangroves
DOI: BLM, USFWS, NPS, USGS	National parks, wilderness areas, federal lands, tribal resources	Migratory birds, inland habitats, marine mammals
USDA	Federal range lands and fisheries, National Forestland	All natural resources located on USDA managed land
DOD	Military bases and training facilities, land owned or managed by DOD	All natural resources located on DOD managed land
STATE AGENCIES: DNR & MPCA	Co-Trustees to recover loss of natural resources of the state (Ex. Order #99-17, July 21, 1999)	All mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources.

# DEFENSES & STATUTE OF LIMITATIONS

## Defenses:

- Act of God; Act of War
  - Act or Omission of Third Party
  - Purely Private Property
  - Damages and release of HS took place before Dec. 11, 1980
  - Federally Permitted Release
- 

## Statute of Limitations:

- 3 years from date of discovery of loss and its connection to the release
- If site is on the NPL – 3 years from completion of the remedial action (*Can revive a claim*)



# NRD RESTORATIONS

- Monies recovered from an NRD claim are to be used **only for**:
  1. Restoration or replacement of the injured natural resource, or
  2. Acquisition of an equivalent resource

*CERCLA §107(f)(1).*

# NRD RESTORATIONS

NRDs ARE DESIGNED TO:



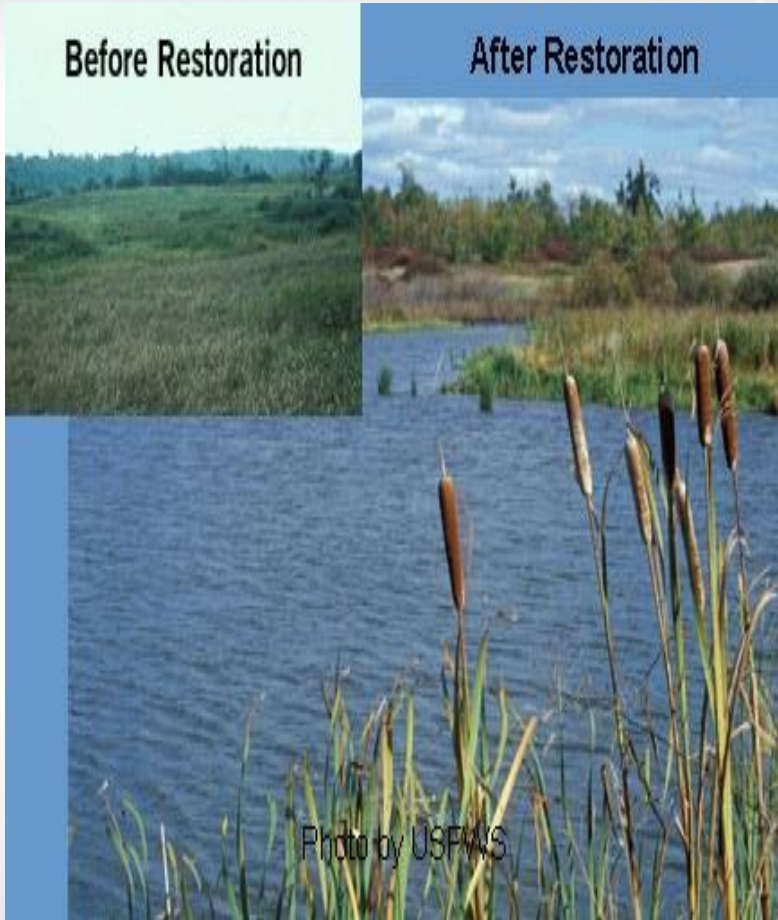
- **Return resources to baseline conditions**

- **Compensate the public for the interim loss of injured resources from the onset of injury until baseline conditions are re-established**

# NRD Assessment Elements

Before Restoration

After Restoration



- Pre-Assessment
- Injury Determination and Quantification
- Damage Assessment, and
- Restoration Implementation

# DAMAGES

## **The measure of damages is the cost of:**

1. Restoring injured resources to their baseline condition,
2. Compensation for the interim loss of injured resources pending recovery, and
3. The reasonable cost of a damage assessment

*43 CFR Part 11; 15 CFR Part 990.*



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