

Natural Resource Damage Claims On Tap For the Southwest?

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Everyone knows about groundwater cleanups – the alphabet soup of statutes and regulations addressing groundwater plumes, and the prospect of “pump and treat” remediation for a century. But, just when you may have thought that we were all headed toward a rational remediation process based on realistic assessments of risk, a new regulatory twist – natural resource damage claims for lost use of groundwater services – threatens to dwarf prior cleanup costs. And the epicenter of those efforts is in New Mexico.

Claims for contaminations that impair the use of groundwater have long been recognized under a variety of state and

common law theories of trespass, nuisance, negligence and strict liability. MTBE litigation by water providers is one current example. The natural resource damage claims at issue here are different in kind. These claims are being asserted by states on behalf of the public as the ultimate owner of the groundwater resource. The legal basis for this type of natural resource damage claim has existed in federal law for roughly a quarter century, beginning with the 1977 Clean Water Act amendments, followed by the Superfund statute in 1980 and the Oil Pollution Act of 1990.¹ While each of these statutes is primarily designed to provide the federal and state regulatory and resource agencies with an easily

administered vehicle for response to and remediation of chemical and oil releases, they also each include provisions for the recovery of damages for injury to natural resources resulting from such contamination. The recoverable damages include the cost of restoration or replacement of the injured resource and the services it provides, the value of the lost use of that resource pending restoration, and the reasonable costs of assessment of the injury and damage (not including attorney fees).

These claims cannot be brought by private parties, or, indeed, by the EPA; rather they are brought by federal (usually the Fish and Wildlife Service or the National Oceanic and Atmospheric Administration) and state resource and land management agencies, or by Indian tribes, who act as trustees for public resources. The public natural resources are broadly defined to include air, soil, sediment, surface water and groundwater, and biological resources, and include not only those resources owned by a government or tribe, but also those “managed by, held in trust by, otherwise appertaining to, or controlled by” such agencies.²

Why Should We Care?

Prior to 1990, there were few natural resource damage claims. The legal provisions and the science associated with such claims were new, both to the courts and to the agencies with the authority to assert the claims. In addition, the scientific work required to

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establish such claims was expensive and, unlike remedial investigations, those costs were not funded out of the Superfund; they were borne by the agencies out of their normal budget. As a result, few agencies, state or federal, wanted to expend limited funds in pursuing what they saw as risky claims. That situation changed by the early 1990's for federal agencies, which achieved some substantial monetary settlements for injuries to fish, birds and their habitat, and used the recovered assessment costs as seed money for new investigations. However, outside of the oil spill context, state agencies have largely piggybacked on federal agencies in asserting resource damage claims. One notable exception is the State of Montana's claim against ARCO for mining waste along the Clark Fork River, which was settled for more than \$150 million in 1998, a year into the trial of the case (see articles on pages 23-25).

In the mid-1990's, the State of New Mexico decided to take a more aggressive approach, asserting NRDA claims for a uniquely state resource, groundwater. Under the federal natural resource damage assessment regulations, injury to groundwater could be established by demonstrating that the contamination at a site resulted in an exceedance of federal or state water standards, or the Safe Drinking Water Act Maximum Contaminant Levels (MCLs).³ For a state trustee operating with limited investigative resources, it's



Above photos: marsh to be restored as part of settlement of a surface water NRD claim elsewhere.

See Claims, page 31.

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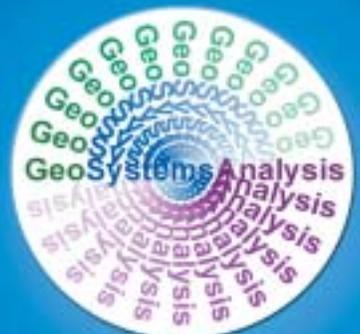
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important to note that the data demonstrating the existence and scope of such an injury usually already exist, developed during the course of the remedial investigation at the site.

New Mexico has now settled two such groundwater claims, for \$210,000 and for \$1 million respectively, at volatile organic compound (VOC) sites in Albuquerque. Using outside counsel retained on a contingent fee arrangement, New Mexico is also nearing trial on its demand for more than \$4 billion for alleged loss of drinking water resources due to VOC and hydrocarbon contamination at the Albuquerque South Valley Site. With thousands of groundwater sites around the country, even limited success in that litigation could prompt a whole new era of state NRD litigation.

Litigate or Cooperate?

In most environmental litigation – certainly in most cases involving EPA – how to resolve a claim is not a serious question. With few defenses to liability, and even less ability to challenge costs, potentially responsible parties regularly bite the bullet and cooperate to minimize both remediation and transaction costs. In NRD cases, the situation is somewhat different. Trustees are typically not involved in the site from the outset, so there is often a good argument for a statute of limitations defense to the residual NRD claim. There may have been a separate settlement for removal costs at

a spill, which, if the settlement does not also preserve the right to later assert a NRD claim, could raise a *res judicata* issue. Moreover, the NRD provisions, unlike the CERCLA response cost provisions, require a demonstration of causation. A potentially responsible party may have spilled, but did the contaminant reach groundwater at all, let alone at a level sufficient to cause injury? They may have put TCE into the contaminated groundwater plume, but if the injury is based on a MCL exceedance for benzene, which comes from another source, are they liable for that NRD claim?

In many cases, there really is no question of causation (for example, there is a single contaminant or a single source) thus the more interesting questions relate to valuing the injury. Given that the groundwater is contaminated, what is that really worth? If the groundwater is in a shallow aquifer not used for drinking water, what is the value of loss? If the groundwater will be remediated to MCLs without ever impairing anyone's water rights, what is the value of the loss? However, the availability of potential legal and factual defenses is a double-edged sword, as it magnifies litigation-related transaction costs, and because the trustees cannot recover attorneys fees, both sides need to be wary of entering that fray. That wariness leads some to consider whether, even where the contamination plume is effectively lost forever due to the nature of the contamination, there might be a less expensive approach – perhaps wellhead

treatment or water conservation – that can more effectively provide real public benefit to the supply of potable water than endless treatment or payment of some artificially constructed “lost use” value?

Given the risks and costs in most NRD cases, whatever the affected resource, the parties have been quietly working out cooperative settlements, coordinating remediation with restoration to minimize any damage claim, and identifying reasonable approaches to address any residual injury. However, the massive demands being asserted in New Mexico suggest that the cooperative approach may not continue. Natural resource damage claims still present a large number of unresolved and critical litigation issues, which present a fertile field for challenges to trustee decision-making and science. It can be expected that the field will be thoroughly plowed, should responsible parties determine that cooperation with trustees is not returning benefits in terms of the reasonable resolution of damage claims. So, Trustees and PRPs, ask yourself, are you prepared to litigate or should you cooperate?

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References

- 1 *Federal Water Pollution Act (“Clean Water Act”), 33 U.S.C. §1321; Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607(f); Oil Pollution Act of 1990, 33 U.S.C. § 2702.*
- 2 *See 42 U.S.C. § 9601(16).*
- 3 *Department of Interior Natural Resource Damage*

SOURCES FOR ADDITIONAL NRDA INFORMATION

The use of water equivalency analysis:

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- National Oceanic and Atmospheric Administration, 1997. *Natural Resource Damage Assessment Guidance Document: Scaling Compensatory Restoration Actions (Oil Pollution Act of 1990).*

Web Sites for Department of Interior Regulations and NRD assessments in general:

- DOI Natural Resource Damage Assessment and Restoration Program: restoration.doi.gov
- CERCLA Natural Resource Damage Assessment Regulations: www.doi.gov/oepec/frlist.html
- NRD-related statutory information: www.epa.gov/superfund/programs/nrd/statute.htm

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