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Oil Spills And The Environment: Strategies For Natural Resource Damage Assessments Under The U.S. Oil Pollution Act Of 1990

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Big oil spills make front page news. The 2010 Gulf of Mexico spill, the 2007 San Francisco Bay spill, and 2004 Delaware River spill are recent examples of high visibility events in the United States. The clean up phase tends to capture the public's attention. Less visible (and even less understood), is the equally important assessment of natural resource damages (NRD) and development of measures to restore the resources and make the public whole for the loss of natural resource "services." The Oil Pollution Act of 1990 (OPA), enacted after the 1989 Exxon Valdez spill, mandates a Natural Resource Damage Assessment (NRDA) process and imposes a compensation regime on responsible parties (RPs) who are also strictly liable for cleaning up oil spills. OPA provides a unique, complex legal framework for federal, state and tribal trustees to conduct NRDA's and to direct the restoration of damaged natural resources.

The NRDA process typically ends with a Consent Decree, often years after an incident (while restoration work often continues for many years thereafter). The costs for NRDA's and restoration often exceed the cost of clean up. Ideally, the NRDA process begins immediately after a spill in order to ensure collection of time-sensitive baseline and spill impact data that will inform the NRDA.

We have employed a "cooperative," technically driven strategy that lowers transaction costs and achieves more scientifically sound and economically efficient results. It is our experience that an adversarial approach to dealing with the government (in the context of an OPA NRD claim) does not effectively represent the client's best interests and is not cost-effective.

Strive for a cooperative NRDA. The NRDA process is both a technical and legal process. From the technical perspective, OPA grants the trustees extensive latitude for conducting NRDA's, drawing on: field procedures; laboratory procedures; computer modeling; and literature based assessments. NRDA's are most cost-effectively and strategically driven by science rather than by law. Technical working groups (TWGs), comprised of trustee and RP non-legal, technical experts and consultants, are the most effective forum for addressing the nuances and technical complexities of injury assessment and restoration alternatives. Conducting open technical discussions without lawyers promotes intellectually honest debates about technical/scientific uncertainty, and can greatly facilitate consensus on injury and restoration issues. While TWGs' decisions must ultimately be approved at senior levels within the trustee agencies (and the RP), the outcomes of these technical deliberations form the foundation of the ultimate injury and restoration costs. The TWGs usually make the critical injury calculations from which restoration projects are scaled and ultimately translated into projects that the RP must undertake and/or fund.

Although OPA provides for a "cooperative" NRDA process involving the RP and the trustees, the trustees have superior legal leverage. For example, while trustees must invite the RP to participate in a "cooperative" NRDA, the "[f]inal authority to make determinations regarding injury and restoration rest[sic] solely with the trustees." Trustees also have the authority to "end the participation" of the RP if they, in their sole discretion, determine that the RP is not being sufficiently cooperative. Finally, to the extent disputes arise, "any determination or assessment of damages to natural resources made by the trustees shall have the force and effect of a rebuttable presumption on behalf of the trustees in any administrative or judicial proceeding" Accordingly, the RP is participating in a process that: (1) is fully funded by the RP (trustees can recover their "reasonable assessment costs"); (2) does not provide the RP a "right" to vote; (3) unless challenged in an administrative or judicial proceeding, gives the trustees the final word on all decisions; and (4) extends an evidentiary presumption in favor of the trustees' determinations. The RP, therefore, is effectively "boxed in" with respect to much of its legal influence.

This does not mean that the RP cannot influence the NRDA process. Rather, the RP is best served by exerting its influence primarily at the technical level and not through traditional adversarial legal tactics that may prolong negotiations, increase transaction costs and miss the opportunity to achieve more scientifically sound and economically efficient results.

Pick experienced technical and legal NRDA experts. Consultants with generic science backgrounds are far less successful in cooperative NRDA negotiations than well credentialed consultants with OPA NRDA experience and with specialized expertise in the relevant resource disciplines (e.g., birds, fin- and shellfish, marine mammals). The RPs should focus the debate at the technical level, via the TWGs, where the RP's

influence derives from: (1) data; and (2) science. In practice, the science component is a combination of both "real" and "rhetorical" science. Accordingly, RPs need to retain NRDA consultants who are both good scientists and effective negotiators.

Similarly, while many environmental lawyers are generally conversant in NRD, few have been through a full NRDA cycle, particularly in the OPA context. Experienced NRDA lawyers can significantly reduce transaction costs and provide the RP a more productive (and valuable) seat at the NRDA table.

Obtain timely and extensive spill-related and background media and natural resource data. NRDA claims under OPA cannot be effectively defended without critical (often time-sensitive) field data and the capability to marshal that data in a technically rigorous process. Accordingly, NRDA field teams should be immediately deployed as part of the initial spill response, even in instances where it does not appear that the spill is significant/voluminous (many big spills often start as "just a small sheen" and even a small volume of oil in the wrong place at the wrong time can cause significant ecological harm). RPs, working cooperatively with governmental spill response personnel and trustees, can often combine spill response activities (e.g., Shoreline Cleanup Assessment Team (SCAT) work) with NRD data gathering tasks (e.g., identification of potentially impacted sensitive species and their habitats), so long as they are carried out by trained personnel who can "defend" the data and integrity of the process in a future NRDA as such data will be critical for future NRDA deliberations and, ultimately, damages. While this additional field work may raise front end costs, it can dramatically lower the overall cost of the NRD settlement. In the absence of reliable field data, trustees have the discretion (which they have historically shown they will exercise) to make the kinds of conservative assumptions that can inflate injury and ultimate restoration costs.

Challenge the application of trustee models and the use of the model-derived "synthetic" injury. The calculation of injury to natural resources is often hampered by the lack of (or gaps in) reliable field data. In most oil spills, the critical data needed for realistic injury assessments are ephemeral. If the critical data are not captured from the outset (the first 24-48 hours), and collected with an appreciation for the role/use of the particular data in the NRDA, the trustees may default to computer models to quantify the nature and extent of injury to the impacted resources. Trustees often use proprietary models (such as "exposure/toxicity" or "beached bird" models) to estimate the potential damages, which can grossly overestimate injury and cost RPs multiple millions of dollars. Thus, rebutting modeling results that inflate/create injury is often the key to reducing costs. Reliable and well documented field data should trump modeled ("synthetic") data every time. There are no second chances; RPs are required to compensate for "real" injury, but should avoid paying for inflated injury. RPs are advised to challenge the methodology behind trustee models by retaining their own experts who can effectively peer review and calibrate the trustees' modeling findings using good field data and "parallel" models as appropriate.

Be creative and look for unique, cost-effective restoration solutions. The goal of a NRDA is ecological restoration, not financial compensation to the public/trustees. While (legal and technical) disagreements will arise in the NRDA process, the costs of protracted disagreement should be kept in mind. Although restoration planning and implementation is predominately a trustee function, the RP should remain fully engaged because: (1) the RP is funding the whole process; and, (2) all parties presumably share the common goal of striving to ensure that the bulk of the settlement ends up benefiting the resource directly (and not getting tied up in the administration of the restoration projects). In the end, avoid unnecessary transaction costs where practical, recognizing that, to reach settlement, some differences in injury calculations ("point spreads") can be bridged by restoration scaling and, thus, may be reasonable to accept, while others may not stand the test of technical scrutiny and should be challenged.

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