NRD 101 References
Great Lakes NRD Workshop, Chicago, IL
Nov. 2-3, 2005

(Caveat: Please note that this reference list is not intended to be exhaustive, but merely a starting point for NRD exploration. Further, this list is not endorsed, in whole or in part, by any government or other agency or personnel.)

Executive Orders

- Executive Order 12580, Superfund Implementation, 52 FR 2923 (January 29, 1987)
- Executive Order 13016, Amendment to EO 12580, 61 FR 45871 (August 30, 1996; signed August 28, 1996)
- Executive Order 12777, OPA Implementation, 56 FR 54757 (October 22, 1991)
- Executive Order 13016, Removal Authority for Trustees, 61 FR 170 (August 28, 1996)

Relevant Federal Laws

- Clean Water Act 33 U.S.C. 1251 et seq.
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) 42. U.S.C. 9601 et seq.
- National Environmental Policy Act (NEPA) 42 U.S.C. 4321-4370d; 40 C.F.R. Parts 1500-1508
- National Marine Sanctuaries Act 16 U.S.C. 1431 et seq.
- Oil Pollution Act (OPA) of 1990 33 U.S.C. 2701-2761.
- Park System Resource Protection Act, 16 U.S.C.19jj

Applicable Federal Rules

<u>CERCLA/DOI</u>

- U.S. Department of the Interior, Natural Resource Damage Assessment Regulations, 43 CFR Administrative Process and Type B Procedures: Notice of Final Rulemaking - 51 FR 27674 (8/1/86)
- Type B Revisions-SARA: Notice of Final Rulemaking - 53 FR 5166 (2/22/88)
- Type B Revisions-Ohio v. Interior: Notice of Final Rulemaking - 59 FR 14261 (3/25/94)
- Type B Biennial Review: Advance Notice of Proposed Rulemaking - 59 FR 52749 (10/19/94); Second Advance Notice of Proposed Rulemaking - 61 FR 37031 (July 16, 1996)
- Type A Procedure for Great Lakes Environments: Notice of Final Rulemaking - 61 FR 20559 (5/7/96), incorporates NRDAM/GLE computer model (challenged in National Assoc. of Manufacturers v. U.S. Department of the Interior, No. 96-1268 (D.C. Cir.))

- Type A Procedure for Coastal and Marine Environments (Revised): Notice of Final Rulemaking - 61 FR 20559 (5/7/96)*/**, incorporates NRDAM/CME computer model (challenged in National Assoc. of Manufacturers v. U.S. Department of the Interior, No. 96-1268 (D.C. Cir.))
- Additional Type A Procedures: Notice of Meeting - 60 FR 24604 (5/9/95) PART 11 (1995), as amended at 61 Fed. Reg. 20609, May 7, 1996

NOAA/OPA

- Natural Resource Damage Assessments, 61 *Federal Register* 4, 439 (January 5, 1996), final rule
- Natural Resource Damage Assessments, 67 *Federal Register* 190, 61438 (October 1, 2002), amendments to the final rule

NCP

National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300.600 ff. (as amended, 55 Fed. Reg. 8666, 8857-58 (March 8, 1990))

Guidance Documents

Under the CERCLA Rules

- Type B Technical Information Document: Application of Air Models to Natural Resource Injury Assessment, PB88-100128 (6/87)
- Type B Technical Information Document: Approaches to the Assessment of Injury to Soils Arising from Discharges of Hazardous Substances and Oil, PB88-100144 (6/87)
- Type B Technical Information Document: Injury to Fish and Wildlife Species, PB88-100169 (6/87)
- Type B Technical Information Document: Guidance on Use of Habitat Evaluation Procedures and Habitat Suitability Index Models for CERCLA Applications, PB88-100151 (6/87)
- Type B Technical Information Document: Techniques to Measure Damages to Natural Resources, PB88-100136 (6/87)
- The CERCLA Type A Natural Resource Damages Assessment Model for Great Lakes Environments, Technical Documentation (and NRDAM/GLE model), PB96-501770 (4/96)
- The CERCLA Type A Natural Resource Damages Assessment Model for Coastal and Marine Environments, Technical Documentation (and NRDAM/CME model), PB96-501788 (4/96)

Under the OPA Rules

- Preassesment Phase: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996..
- Injury Assessment: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996.
- Specifications for Use of NRDAM/CME Version 2.4 to Generate Compensation Formulas: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996.
- Primary Restoration: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996.
- Restoration Planning: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996.
- Scaling Compensatory Restoration Actions: Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, the Damage Assessment and Restoration Program, NOAA, August 1996.

Relevant Case Law

- Commonwealth of Puerto Rico v. SS. Zoe Colocotroni, 628 F.2d 657, 673-74 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) – states that damages under state NRD statute as not limited to the common law damages measure of loss of market value, restoration alternatives might include acquisition of comparable lands for public parks or reforestation of a similar proximate site.
- United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985) -- speaks on record review.
- United States v. Jessup, 575 F.2d 378, 383 (1st Cir. 1985) – states its support for the rebuttable presumption having continuing weight throughout the case with the burden of persuasion shifted to the responsible parties.
- Cf. United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 748 (8th Cir. 1986) -- speaks on record review.
- United States v. Western Processing, No. C-83-252M, slip op. at 6 (W.D. Wash. 1986) – -- speaks on record review.
- State of Idaho v. Bunker Hill Company, 635 F. Supp. 665, 674 (D. Idaho 1986) – states that "[T]he use in [CRCLA] Section 107(f) of the word "resulted" ties the damages to the releases (The proof must include a causal link between releases and post-enactment damages which flowed therefrom.", the parameters regarding CERCLA's pre-enactment of damages.

- United States v. Seymour Recycling Corp., 679 F. Supp. 859, 861 (S.D. Ind. 1987) -- speaks on record review.
- Broad Street Market v. United States, 720 F.2d 217, 220 (1st Cir. 1983). Cf. Tull v. United States, 481 U.S. 412, 418 n.4 (1987) -- speaks on record review.
- State of Idaho v. Howmet Turbine Component Co., 814 F.2d 1376, 1378-79 (9th Cir. 1987) – address CERCLA statute of limitations.
- Artesian Water Co. v. New Castle County, 851 F.2d 643, 649 (3d Cir. 1988) – states that private entities that may not bring CERCLA NRD claims, an aquifer is a natural resource whose injury gives the State a cause of action under CERCLA.
- Artesian Water Co. v. New Castle County, 851 F.2d 643, 650 (3d Cir. 1988) – states that "Congress purposely did not impose retroactive liability for [natural resource] losses" under CERCLA Section 107(f)).
- State of Colorado v. Department of the Interior, 880 F.2d 481 (D.C. Cir. 1989) (Type A rule) – states the Court remand of both the Type A and Type B rules to DOI for revisions consistent with its opinion.
- State of Ohio v. U.S. Department of the Interior, 880 F.2d 432, 455 (D.C. Cir. 1989) – states Congess' dissatisfaction with common law, resources need not be owned by the government to be CERCLA "natural resources," the acceptance of the requirement in DOI's Type B damage assessment regulations that the government establish a "pathway" (as a cause of action) between a particular hazardous substance release and the natural resource injury for which damages are sought, the D.C. Circuit's rejection of all industry challenges but invalidated two key components of the rules that had been attacked by states and environmental groups: (1) the "lesser of" rule under which damages were the smaller of restoration costs or lost economic values, and (2) the "hierarchy" of assessment methodologies adopted by DOI, which gave a strong preference to lost market value as the measure of damages, that DOI's decision to make damages assessments using "contingent valuation" methodology eligible for the statutory presumption was neither arbitrary and capricious nor violates the Constitutional due process requirements (in effect rejected a facial challenge to the rebuttable presumption on procedural due process grounds), the DOI rules do not exhaust the permissible methods of damages assessment under CERCLA (that is, a trustee who is willing to forego the statutory presumption may use injury tests or methods of damages quantification not adopted by DOI), Congress intended the CERCLA regulations to capture fully all aspects of the loss.
- Lutz v. Chromatex, 718 F. Supp. 413, 419 (M.D. Pa. 1989) – states that municipalities may not bring NRD claims unless they have been designated as trustees by the State Governor, all drinking water sources are under state trusteeship.
- Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 1019, 1035 (D. Mass. 1989) ("Acushnet IV") – states that natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment, the acceptance of the government's argument that PCB contamination in fish above the "tolerance level" set by the Food and Drug

Administration (FDA) for consumption of seafood constitutes "injury" to fish and aquatic life regardless of whether the health of the fish is impaired, that the causal link required by CERCLA Section 107(a)(4)(C) is established if the defendant's releases are shown to have been a "contributing factor" to the natural resource injury or loss (the standard of proof for causation of damages is less stringent under CERCLA than at common law), the parameters regarding CERCLA's pre-enactment of damages, the Court's thoughts on settlement authority.

- State of Idaho v. Hanna Mining Co., 882 F.2d 392, 395 (9th Cir. 1989) – states that the exception under permits was not intended to excuse liability for activities that occurred before the authorizing permit was issued.
- Werlein v. United States, 746 F.Supp. 887, 910 (D. Minn. 1990) – addresses claim assertion.
- Aetna Casualty & Surety Co. v. Pintlar Corp., 948 F,2d 1507, 1515-16 (9th Cir. 1991) – that that coverage under a pre-1980 insurance policy was triggered by a release of hazardous substances and that post-enactment damages arising from the pre-enactment releases may be recoverable by the government and covered by the policy.
- State of Idaho v. Southern Refrigerated Transport, No. 88-1279, slip op. at 43 (D. Idaho Jan. 25, 1991) – states its support for commercial, existence, and recreation values as appropriate items of damage if proved at trial, that improvements to river habitat to promote increased steelhead trout populations (e.g., fencing to restrict access or the removal of barriers to fish passage, constituted replacement or acquisition of the equivalent of injured resources).
- State of Idaho v. Southern Refrigerated Transport, No. 88-1279, slip op. at 11-12 (D. Idaho Jan. 25, 1991) – states that the State is trustee under CERCLA and common law for all of Idaho's wildlife and sport fish.
- Alaska Sport Fishing Association v. Exxon Corp., 31 F.3d 769, 773 (9th Cir. 1994) – states that Alaska has sovereign interests in natural resources within its boundaries.
- State of Utah v. Kennecott Corp., 801 F. Supp. 553, 568 (D. Utah 1992) – states that natural resource damages are residual to cleanup, its support for option and existence values.
- United States v. City of Seattle, No. C-90-395WD (W.D. Wash.) -- states that trustees may also bring natural resource damage claims with respect to sites where no remedial action would otherwise occur.
- United States v. Mottolo, Civ. No. 83-547-B, slip op. at 2-3 (D.N.H. July 29, 1993) -- states that proof of the elements of response cost liability establishes that defendants are liable for natural resource damages as a matter of law, even without proof of injury to natural resources (To recover damages, however, the government "will still be obligated to establish that there were damages to natural resources, to provide evidence quantifying those damages, and to connect the injuries to defendants' CERCLA liability."
- Kennecott Utah Copper Co. v. Department of the Interior, 88 F.3d 1191, 1219 (D.C. Cir. 1996) – states that response and restoration actions need not be "consistent" and that inconsistency might in fact be necessary "particularly where short-term and long-term considerations dictate seemingly conflicting responses, the D.C. Circuit's

affirmation of nearly all aspects of the revised Type B rule over challenges by industry groups and the State of Montana (e.g., reaffirming the basic holdings of Ohio on the measure of damages and upheld the trustees' discretion to evaluate restoration options using methods not specifically listed in the rule; rejecting Montana's argument that, in selecting among restoration alternatives, trustees must give a preference to direct restoration over replacing or acquiring the equivalent of the injured resources in another location), the only legal consequence of a choice not to follow the regulations is that the statutory presumption is unavailable, the D.C. Circuit's belief that Congress expressed no preference for physically restoring resources over acquiring comparable resources for the public's benefit, support for indirect costs, the Court's thoughts on judicial review of settlements.

- State of Montana v. Atlantic Richfield Co., No. CV-83-317-HLN-TGH (D. Mont. March 3, 1997) – speaks on record review.
- National Association of Manufacturers v. Department of the Interior, 134 F.3d 1095, 1105-1108 (D.C. Cir. 1998) – states the acceptance of DOI's reliance on a predictive model to determine causation of injury in its regulations for simplified damage assessments in small cases (the Type A rules), the D.C. Circuit's support for the Type A rules in their entirety, Congress intended the CERCLA regulations to capture fully all aspects of the loss.
- United States v. ASARCO, No. CV 96-0122-N-EJL (D. Idaho March 31, 1998) – speaks on record review, addresses statute of limitations.
- General Electric Co. V. Department of Commerce, 128 F.3d 767 (1997) – states D.C. Circuit's support for the NOAA rules in all but two relatively minor respects (recovery of attorney fees for enforcement and further oil removal by trustees after the cleanup was declared completed), which were addressed without subsequent challenge in NOAA's amended rule, the conflicting interpretations respecting rebuttable presumption but ruled that it did not need to resolve the issue.
- United States v. Montrose Chemical Co., No. CV-90-3122-AAH (C.D. Cal.) – states that trustees may also bring natural resource damage claims with respect to sites where no remedial action would otherwise occur, liability for response costs, is joint and several unless a defendant can meet its burden of proving divisibility of the harm, the NRD claim did not adequately plead (for each defendant) the specific releases were the sole or a substantial cause of specific natural resource injuries, that the $50 million cap applies separately to each defendant andfor sepearte occurrences, its thoughts on statute of limitations, the Court's thoughts on judicial review of settlements.

EPA Information

- ECO Update: The Role of Natural Resource Trustees in the Superfund Process, Volume 1, Number 3, March 1992 (EPA Publication Number 9345.0-05I; NTIS Order Number PB92-963369)
- CERCLA Coordination with Natural Resource Trustees, July 31, 1997 (OSWER Directive Number 9200.4-22A; NTIS Order Number PB97-963248)

USCG National Pollution Funds Center

- Natural Resource Funding Guidelines. 2002. USCG, National Pollution Funds Center (available on the NPFC web site)

Coordination MOUs

- Memorandum of Understanding Between the National Oceanic and Atmospheric Administration and the U.S. Environmental Protection Agency Concerning the Notification and Coordination of Activities Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, April 1992 (OSWER Directive Number 9295.0-02; NTIS Order Number PB92-963281).

General Publications

- Menefee. 1982. Recovery for Natural Resource Damages Under Superfund: The Role of the Rebuttable Presumption, 12 Envtl. L. Rep. (ELI) 15,057, 15,061-64.
- Landreth & Ward. 1990. Natural Resource Damages: Recovery Under State Law Compared With Federal Laws, 20 Envtl. L. Rep. 10134.
- GAO Report: Outlook for and Experience with Natural Resource Damage Settlements, April 1996 (GAO/RCED-96-71).
- GAO Report: Status of Selected Federal Natural Resource Damage Settlements, November 1996 (GAO/RCED-97-10).
- Whose Job Is It? Cleaning Up & Restoring Contaminated Land, Water, May/June 1999. People Land & Water, Vol. 6, No. 3.
- Lee,V.A. and Bridgen, P.J. 2002. Natural Resource Damage Assessment Deskbook: A Legal and Technical Analysis. Environmental Law Institute, No. 3793.

Useful Web Sites

<u>DOI</u>

- www.doi.gov/oepc (general information)
- www.doi.gov/oepc/nrtr_nrd.html (link to DOI's NRD program and documents, Type A models)
- www.fws.gov/contaminants/Issues/Restoration.cfm (focus on restoration plans, links to specific cases)

<u>NOAA</u>

- www.darp.noaa.gov (general information)
- www.darp.noaa.gov/partner/cap/index.html (information on cooperative NRDs)

<u>EPA</u>

- www.epa.gov/superfund/programs/nrd/index.htm (information relevant to EPA/NRD trustee notification and coordination)
- www.epa.gov/superfund/programs/nrd/links2.htm#state (links to states, state organizations, and Indian Tribal sites)

USCG/National Pollution Funds Center

- www.uscg.mil/hq/npfc/index.htm (information about compensation for removal costs or natural resource damages from an oil spill)

State and Tribal Organizations

- Association of State and Territorial Solid Waste Management Officials (ASTSWMO)
  444 North Capitol St., NW Suite 315
  Washington, DC. 20001
  Tel. (202) 624-5828
  Fax. (202) 624-7875
  www.astswmo.org

- Tribal Association on Solid Waste & Emergency Response (TASWER)
  1001 Connecticut Avenue, Northwest, Ste 400, Washington, D.C. 20036
  Phone: (202) 331-8084 Fax: (202) 331-8068 Email: contact@taswer.org
  [No website]