



Natural Resource Damage Liability

Three Key Concepts Towards Understanding How to Manage Natural Resource Damage Liability Under the Oil Pollution Act of 1990

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The Oil Pollution Act of 1990 (OPA) defines the liabilities that are potentially incurred by a Responsible Party (RP) — these are:

- Removal costs
- Natural Resources damage
- Real or Personal Property damage
- Loss of Subsistence Use
- Government Revenues
- Profits and Earning Capacity, and
- Public Services

While there are volumes written on the subject of liabilities under OPA, our Thought Leadership series will be focusing on some key points that we believe are critical to assisting our clients in preparing to manage liabilities under OPA. This paper will focus on three points about Natural Resource Damages (NRD) that will hopefully help you be better prepared to respond to an oil spill in US waters.

NATURAL RESOURCE DAMAGES ARE A LEGAL LIABILITY

While science should guide the assessment of natural resource damages and the types of restoration that can successfully compensate the public for those damages, it is important to understand that the process is led by the natural resource trustees as defined by OPA. This process may — or may not — include participation by the RP. Under OPA, there are two parts to the “natural resources” definition. First, natural resources are defined

broadly to include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other such resources. Second, the resource must belong to, be managed by, held in trust by, appertain to or otherwise be controlled by the United States, any State, an Indian Tribe, a local government or a foreign government who act on behalf of the public. While the RP is liable for natural resources damages (including the cost of performing the assessment), the Trustees are the party(ies) that determine NRD and restoration of same. [NOTE: Under OPA, damages to natural resources on private lands may also be a liability under the real and personal property damage provision.]

Key Point #1: The Trustees are afforded the rebuttable presumption for these liabilities.

This means that if Trustees perform a Natural Resource Damage Assessment (NRDA) in accordance with the regulations, the results of the assessment will be presumed to be correct. If the RP disagrees with the findings (including the costs), the RP would have to disprove the findings, effectively placing the burden of proof on the RP. The Trustees are encouraged to invite the RP to participate, which is commonly referred to as a “cooperative assessment”. While we generally recommend cooperating with the Trustees from the very beginning, understanding that the Trustees enjoy a rebuttable presumption under the law requires us to consider the burden of proving them wrong if their assessment is technically flawed or overinflated. I strongly recommend developing a coordinated strategy between your legal advisors and your technical teams so you can have the depth of expertise to manage both a cooperative assessment as well as a robust technical legal defense. Critical to developing this strategy is pre-determining who and how legal privilege over scientific data and analysis will be managed.

THE NATURAL RESOURCE DAMAGE ASSESSMENT IS NOT A RESPONSE ACTION

NRDA is NOT part of the response. The response to an incident is led by the Federal On-Scene Coordinator (FOSC), who is a representative of the U.S. Coast Guard for spills on navigable waterways (the EPA for inland spills). While it is imperative to coordinate NRDA field activities with any ongoing response actions (particularly the NRDA teams must abide by the response safety requirements), it is important to recognize that the data collected for response purposes and the data needs of the NRDA can be quite different. Let’s take for example shoreline oiling – the science of response is used to determine where and how to clean up, and to answer (eventually) the question “how clean is clean?” to determine the end of response actions. NRDA determines the injury caused by the incident, including those caused by cleanup actions.

Key Point #2: The presence of oil in-and-of-itself does not prove damage; instead, there must be harm to natural resources, which includes “injury to, destruction of, loss of, or loss of use” of said resources.

It is important to note that the types of data collected by the response (most notably SCAT, which is oiling data collected by Shoreline Cleanup Assessment Teams) provides an excellent oiling history to guide the FOSC on cleanup options; however, this data generally does not meet the QA/QC or even technical accuracy to prove injury in a court of law. As a side bar, I have observed that NRDA has been included in many company’s response plan exercises. I would strongly advise against this and for a number of reasons. First and foremost, OPA 90 response preparedness exercises are under the primary oversight/jurisdiction of the US Coast Guard (USCG). However, the USCG is **not** a natural resource trustee, and while coordination between response and NRDA activities is critical to ensuring safe field operations, it is not recommended to exercise NRDA activities without the input and participation of the trustees. We will talk about coordination between response agencies and trustees in a future Thought Leadership paper.

THE IMPORTANCE OF DATA

NRDAs can take several years to complete. Most trustee agencies have multiple NRDAs that they are trying to progress. One of the complicating factors underlying the science of NRDA is the lack of baseline data. Put simply, in order to determine injury, recovery, and interim loss use of the impacted resources, you have to know the baseline to which the resource must be returned. In highly industrialized areas, the baseline may include oil injury that precludes the oil impact of your incident.

Key Point #3: Know your oil, and know as much as you can about the pre-spill baseline conditions!

Particularly if the baseline includes previous oiling events, you will need to be able to discern “your oil” from that of previous incidents. The ability to fingerprint oils was greatly advanced during the response to the Deepwater Horizon incident. Remember, the trustee's NRD claim is considered right unless you can prove them wrong. However, proving the trustee wrong can be an arduous and very costly task. I look forward to our next NRDA discussion in our Thought Leadership series where we will look at some of the types of natural resource damages, and what it takes to “prove the negative” in an NRDA case.

For more information, please refer to www.globalrisksolutions.com.