

Natural Resource Damage Assessment & Restoration Program

Background

Natural resource injuries may occur at sites as a result of releases of hazardous substances or oil. Trustees use Natural Resource Damage Assessments (NRDA) to assess injury to natural resources held in the public trust. This is the initial step toward estimating natural resource damages and restoring injured resources and services and toward compensating the public for their loss.

Natural Resources

Both the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Oil Pollution Act (OPA) define "natural resources" broadly to include: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources..." Both statutes limit "natural resources" to those resources held in trust for the public, termed "trust resources". While there are slight variations in their definitions, both CERCLA and OPA state that a "natural resource" is a resource "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States, any State, an Indian Tribe, a local government, or a foreign government.

Authority

CERCLA provides a comprehensive group of authorities focused on one main goal: to address any release, or threatened release, of hazardous substances, pollutants, or contaminants that could endanger human health and/or the environment. The response provisions in CERCLA focus on the protection of human health and the environment. The statute also provides authority for assessment and restoration of natural resources that have been injured by a hazardous substance release or response.

OPA was enacted in reaction to the *Exxon Valdez* oil spill and provides authority for oil pollution liability and compensation as well as for the Federal government to direct and manage oil spill cleanups. Similar to CERCLA, OPA contains authorities to allow the assessment and restoration of natural resources that have been contaminated by the discharge, or threatened discharge, of oil.

Natural Resource Trustees

Under both CERCLA and OPA, responsibility for protection of natural resources falls with Federal, State, and Tribal Trustees. This is because no one individual "owns" a natural resource; rather, they are held in trust for the public.

Both CERCLA and OPA provide authority for designated Trustees to act as Natural Resource Trustees on behalf of the public. In both CERCLA and OPA, certain Federal, State, and Indian Tribe officials can be designated as Trustees.

The Director of Ohio EPA has been designated by the Governor (27 July 2007) as the natural resource Trustee for the State of Ohio. The Director as the Trustee for Ohio is authorized under CERCLA and OPA to assess natural resource injuries and recover the resulting damages for discharges of oil and releases of hazardous substances.

To meet these responsibilities, both statutes provide several mechanisms. The Trustees can either:

- Sue in court to obtain compensation from the potentially responsible parties (PRPs) for NRD and the costs of assessment and restoration planning; or
- Conduct assessments or restorations in accordance with certain standards specified by the Federal government and file a claim for reimbursement from the Trust Fund established under OPA; or
- Participate in negotiations with PRPs to obtain PRP-financed or PRP-conducted assessments and restorations of NRD.

Ohio EPA's Division of Environmental Response and Revitalization (DERR) secured approval in October 2005 from the Director Ohio EPA to begin pursuing NRD claims. The NRDA process employed by DERR involves:

- Integrated NRD - The integration of the NRDA into the remedial process (*i.e.*, remedial investigation/feasibility study and remedial design/remedial action); or
- Separate NRD – A negotiated NRDA settlement (between the Trustee(s) and the PRP(s) that may use less formal methods, or a formal NRDA conducted by the trustees using Department of the Interior (DOI), 43 CFR Part 11, to assess NRD under CERCLA.

While DERR encourages both cooperative assessments (between trustees, PRPs and the public) and streamlined damage settlements, it should be noted that the responsibility of developing a damage assessment and an initial proposal for settlement is that of the Trustee(s).

Natural Resource Damage Assessment

One of the primary responsibilities of Trustees under both CERCLA and OPA is to assess the extent of injury to a natural resource(s) and determine appropriate ways of restoring and compensating for that injury. A NRDA is the process of collecting, compiling, and analyzing information to make these determinations. Trustees use the methodologies prescribed by the Department of the Interior (DOI), 43 CFR Part 11, to assess NRD under CERCLA.

The overall intent of the assessment regulations is to determine appropriate restoration and compensation for injuries to natural resources. If a Federal or State Trustee goes into Federal court and sues a potentially responsible party (PRP) for NRD under CERCLA, an assessment done in accordance with the DOI regulations is given the force and effect of a "rebuttable presumption" [CERCLA §107(f)(2)(C).]

Natural Resource Damage Restoration

Under CERCLA, monies recovered from an NRD claim are to be used only for restoration or replacement of the injured natural resource, or for acquisition of an equivalent resource. Restoration actions are principally designed to return injured resources to baseline conditions, but may also compensate the public for the interim loss of injured resources from the onset of injury until baseline conditions are re-established. Restoration activities have been successfully completed at several sites. Natural Resource Trustees, with input from the public, are required to develop and implement plans for the restoration of natural resources.