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Chapter 11

Natural Resource Damages: Liability Implications for the Mining and Energy Industries

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Synopsis

§ 11.01. Introduction	346
§ 11.02. Natural Resource Damages: A Regulatory	
Overview	347
[1] — Federal Regulatory Framework	347
[2] — The Statutory Purpose of the NRDA Process	
Under CERCLA and OPA	349
[3] — Conducting Natural Resource Damage	
Assessments Under OPA	350
[a] — The Pre-assessment Phase	351
[b] — The Restoration Planning Phase	351
[c] — The Use of Habitat Equivalency Analysis	
During Restoration Planning.....	355
[d] — The Restoration Implementation Phase	357
[4] — Conducting Natural Resource Damage	
Assessments Under CERCLA	357
[a] — Pre-assessment Phase	358
[b] — Assessment Plan Phase.....	359
[c] — Type A and Type B Assessments	359
[d] — Assessment Implementation.....	360
[e] — Post-Assessment.....	362
[5] — Relationship of NRDA to Other Laws	
and Regulations	362

[a] — Surface Mining Control and Reclamation Act	362
[b] — The National Environmental Policy Act	363
[c] — State Natural Resource Laws	364
§ 11.03. Significant Implications of Natural Resource	
Damage Litigation	366
[1] — High Stakes Litigation: A Settlement	
Overview.....	366
[a] — Montrose Chemical	367
[b] — Bunker Hill and the Coeur d'Alene River	369
[c] — Chemical Leaman Tank Lines	370
[d] — Clark Fork River, Montana	371
[e] — North Cape, Rhode Island	372
[f] — Blackbird Mine, Idaho	372
[g] — Fox River, Green Bay.....	373
§ 11.04. Conclusions	374

§ 11.01. Introduction.

Natural Resource Damages represent a significant concern to companies engaged in the energy and mining industries. Those that are involved in releases of contaminants to the environment are well aware of liabilities for clean up. However, they should be equally aware of additional liabilities for restoration of the environment to pre-spill conditions. The companies responsible for such releases can soon find themselves embroiled in a cumbersome and exhaustive regulatory process that can result in millions of dollars in expense to compensate for “losses” to the environment. This compensation for “lost value resources” is also known as natural resource damages.

Section 2 of this chapter begins with an overview of the developing federal statutory and regulatory authority regarding Natural Resource Damage Assessment (NRDA), including some of the key concepts on which these programs are based and how the program is implemented on a federal and state level. Section 3 provides a historical overview of the NRDA process, with emphasis on some of the leading cases and damages awards. Finally, in Section 4, we provide a number of practical conclusions to guide parties responsible for releases of contaminants through the Natural Resource Damage Assessment process and identify some practical

steps that can be taken to reduce the likelihood of incurring significant natural resource damage liability.

§ 11.02. Natural Resource Damages: A Regulatory Overview.

[1] — Federal Regulatory Framework.

The concept of natural resource damages stems from an intermingling of federal statutes and regulatory programs. Two federal statutes, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ and the Oil Pollution Act² provide natural resource trustees³ with the authority to assess damages for losses or injury to natural resources from the discharge of oil or other hazardous materials. Each federal statute provides a different agency with slightly different jurisdiction over various sites where damage to natural resources has occurred.

CERCLA regulatory authority focuses on the release, or threatened release, of hazardous substances, pollutants, and contaminants that could impact human health or the environment. The statute authorizes the natural resource trustees to assess damages to natural resources and restore those natural resources that have been injured by the release of a hazardous substance. The earliest landmark natural resource damage cases were filed under CERCLA.⁴ The first of these was filed in 1983 when the National Oceanic Atmospheric Administration (NOAA) sued several corporations

¹ Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

² Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*

³ Section 107(f)(1) of CERCLA and section § 1006(c) of OPA authorize the United States, States, and Indian Tribes to act on behalf of the public as Trustees for the natural resources under their respective trusteeships. Additionally, foreign governments are also authorized to act as Trustees for the natural resources under their trusteeship by OPA in section 1006(b)(5).

⁴ Gina M. Lambert, Anthony R. Chase, “Remedying CERCLA’s Natural Resource Damages Provision: Incorporation of The Public Trust Doctrine into Natural Resource Damage Actions,” *Virginia Env’tl. L. J.*, Spring 1992, 365-369.