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DEEPWATER HORIZON NATURAL RESOURCE DAMAGES ASSESSMENT: WHERE DOES THE MONEY GO?

Nicholas J. Lund and Niki L. Pace***

I. INTRODUCTION

The effort to assess and remediate the environmental effects of the Deepwater Horizon Spill (the Spill) began while the oil was still gushing and will continue for many years. Recognizing that the Spill would cause profound damage to both the Gulf's natural resources and to the livelihoods of Gulf residents who depend on those natural resources, the federal government undertook a natural resource damage assessment (NRDA) just weeks after the Spill began.¹

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1. The National Oceanic and Atmospheric Administration (NOAA)'s Damage Assessment Remediation and Restoration Program (DARP) began the Preliminary Assessment Phase of the NRDA on April 20, 2010. *NRDA By The Numbers*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2010/12/FINAL-NRDA-by-the-Numbers-for-12-1-10.pdf> (last visited Jan. 20, 2011).

The idea behind natural resource damage provisions is for the responsible party to do what is necessary to make the environment “whole” again, as if the accident never happened.² In what is certain to be the largest NRDA undertaken under any statute, the task of making the Gulf “whole again” will last long after outrage sparked by the Spill has faded from the public mind. Although it will take a long time, it will be important to follow the Deepwater Horizon NRDA process through to its completion to ensure the damaged natural resources are cared for.

This Article examines the last phases of the NRDA process outlined in the Oil Pollution Act of 1990 (OPA).³ After the initial, comprehensive Preassessment phase, NRDA Trustees are responsible for developing a Restoration Plan, collecting money from the responsible parties, and finally, implementing restoration projects. This Article explores the requirements and experiences of the money collection and restoration implementation phases of an OPA NRDA and discusses some of the controversies and uncertainties involved in the collection and distribution of restoration money.

II. NATURAL RESOURCE DAMAGES

The idea that natural resources themselves had value and, if harmed, damages could be recovered for that harm in court was not popular until the environmental movement of the early 1970s. Since then, natural resource damage provisions have expanded in scope, and increased in use, becoming an important part of five federal environmental statutes.⁴ Because fundamental similarities exist in all NRDA provisions, following the development of NRDA from their inception helps frame their intent and direction.

2. 15 C.F.R. § 990.10 (2010); see also Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 853 (1989) (comparing the natural resource damage doctrine to tort law, which seeks to make the victim “whole” again).

3. 33 U.S.C. §§ 2701-2761 (2010).

4. Currently, the Clean Water Act of 1977 (CWA), the Oil Pollution Act of 1990 (OPA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), National Marine Sanctuary Act, and the Park System Resource Protection Act offer NRD recovery. CAROL E. DINKINS, NATURAL RESOURCE DAMAGES LITIGATION 1-5 (2010).

A. The Trans-Alaska Pipeline Authorization Act

The idea of a public cause of action for injury to natural resources—making the polluters pay for their harm—began with the bloom of landmark environmental legislation in the early 1970s. Its earliest roots are found in the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA), which held pipeline right-of-way holders “strictly liable to all damaged parties . . . without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes.”⁵ TAPAA also held transporters of oil liable “for all damages, including clean-up costs, sustained by any person or entity, public or private.”⁶

Though TAPAA was not a pure natural resource damage cause of action because it emphasized the recovery of economic damages, TAPAA did establish a framework for natural resource damage recovery that would become a staple in later iterations. For instance, the statute mandated interim payments, requiring the responsible party to “provide emergency subsistence and other aid to an affected Alaska Native, Native organization, or other person pending expeditious filing of, and determination of, a claim.”⁷ Additionally, TAPAA established a Liability Fund (Fund) to pay for clean-up costs while liability was being determined.⁸ The Fund was originally paid for by a small tax on oil pumped into tanker ships.⁹ Such funds would be a staple of later NRD provisions.

Under TAPAA, injured parties would simply submit a claim containing the circumstances of their injury, a list of the damages, an accounting of the damages incurred and proof of property ownership to the Fund.¹⁰ Unlike subsequent NRD provisions, the valuation of damaged natural resources—a tricky problem even today—was left to the victim rather than a government representative acting as a trustee. From there, the Fund’s representatives would present the claim to the responsible party, who could then settle with the injured party or dispute a claim and submit to arbitration.¹¹ TAPAA did not include an explicit

5. 43 U.S.C. § 1653(a) (1982); *see also* Breen, *supra* note 2, at 855.

6. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153(c)(1), 87 Stat. 567, 586 (1973); *see also* Breen, *supra* note 2, at 855.

7. 43 U.S.C. § 1653(a)(4).

8. 26 U.S.C. § 9509 (2010).

9. Pub. L. No. 93-153(c)(5) (Title II), 87 Stat. at 587.

10. 43 C.F.R. § 29.9(a)-(b) (1977).

11. *Id.* § 29.9(c)(1), 29.9(h).

requirement that sums requested for the loss of natural resources be used to recover those natural resources, which is included in later NRD provisions.

B. The Deepwater Port Act of 1974

The cause of action for the recovery for natural resource damages was expanded in its next appearance, the Deepwater Port Act of 1974 (DPA).¹² The DPA created liability for damages “suffered by any person, or involving . . . the natural resources of the marine environment, or the coastal environment.”¹³ Congress was up front about its desire to protect the natural resources themselves, stating that the purpose behind the statute was to “provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of [deepwater] ports.”¹⁴

The DPA emphasized its environmental awareness and separated itself from TAPAA in a few ways. First, it separated “damages” from “cleanup costs,” allowing recovery for “damages . . . suffered by . . . the natural resources of the marine environment, or the coastal environment of any nation” in addition to the actual costs of cleaning up the spill.¹⁵ Second, the DPA allowed a public official to act as a trustee on behalf of the public in order to recover natural resource damages, and specified that those damages could only be “applied to the restoration and rehabilitation of such natural resources by the appropriate agencies of Federal or State government.”¹⁶ This burgeoning recognition that the environment itself—not just human reliance on it—had worth, paved the way for all subsequent natural resource damages provisions.

C. The Federal Water Pollution Control Act (“Clean Water Act”)

Congress seized the opportunity to expand upon the DPA’s somewhat limited scope in crafting amendments to the Federal Water Pollution Control Act, creating the Clean Water Act of 1977 (CWA). Following the DPA’s lead, the CWA expanded polluters’ liability to include natural resource damages, permitting trustees to recover “any

12. 33 U.S.C. §§ 1501-1524 (1976).

13. *Id.* § 1517(m)(2); *see also* Breen, *supra* note 2, at 856.

14. Deepwater Port Act of 1974, Pub. L. 93-627(2)(a)(2), 88 Stat. 2126, 2126 (1975).

15. *Id.* at 93-627, § 18(m)(2), 88 Stat. 2145 (1975).

16. *Id.* at 93-627, § 18(i)(3), 88 Stat. 2144 (1975); *see also* Breen, *supra* note 2, at 856.

costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of . . . oil or a hazardous substance” spilled into navigable waters.¹⁷

The CWA amendments also installed the requirement that “[s]ums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.”¹⁸ This provision is noteworthy not only because it requires recovered sums to be used solely for natural resource restoration, but because it allows states as well as the Federal government to serve as trustees and bring lawsuits.

D. The Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA)

Enacted in 1980, the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA or Superfund) is the closest blueprint for the statutory scheme being used for the Deepwater Horizon Spill NRDA. CERCLA expanded the reach of NRD statutes far beyond oil spills, establishing liability for “injury to, destruction of, or loss of natural resources” resulting from the release of hazardous substances.¹⁹ CERCLA lists more than 800 chemicals as hazardous if released.²⁰ Further, CERCLA included a broader definition of “natural resources” than previous laws, extending liability to injury to “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources” belonging to or controlled by the United States.²¹ Following the lead of the CWA, CERCLA limits NRD recoveries to the cost of “restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured.”²² The resulting statute “provides the most extensive legal framework for NRD recoveries”²³ and has “virtually dominated environmental law since its enactment.”²⁴

17. 33 U.S.C. § 1321(f)(4) (2006); *see also* Laura Rowley, *NRD Trustees: To What Extent Are They Truly Trustees?*, 28 B.C. ENVTL. AFF. L. REV. 459, 461 (2001).

18. 33 U.S.C. § 1321(f)(5) (2006).

19. Comprehensive Environmental Recovery, Compensation and Liability Act, 42 U.S.C. § 9607(4)(C) (2006).

20. *CERCLA Hazardous Substances*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oem/content/hazsubs/cercsubs.htm> (last visited Jan. 14, 2011).

21. 42 U.S.C. § 9601(16).

22. *Id.* § 9611(c)(2).

23. Rowley, *supra* note 17, at 463.

24. Breen, *supra* note 2, at 860.

In addition to greatly expanding the scope of natural resource damage recovery, CERCLA expanded and clarified a NRDA's final phase: the implementation of restoration projects and the recovery of the environment. The Department of the Interior (DOI), responsible for implementing CERCLA, breaks the NRDA process into three stages: Preassessment (which contains a Preassessment Screen step, sometimes considered a separate stage), Assessment, and Post-Assessment.²⁵ During the Preassessment stage, federal or state trustees (in the model pioneered by the DPA) first conduct a Preassessment Screen consisting of a "rapid review of readily available information" to determine whether or not a NRDA is required.²⁶ If the screen is resolved in the positive, the next step in the Preassessment phase is "notification, coordination and emergency activities."²⁷

The DOI provides two paths for the next phase, Assessment, depending on the severity of the spill or release. Type A assessments regulate procedures for "simplified assessments requiring minimal field observation to determine damages."²⁸ Type B assessments are intended for larger, more complex spills where a determination of "the type and extent of short- and long-term injury and damages" is necessary.²⁹ Reflecting the complexity of the event these assessments are employed for, Type B assessments themselves are split into three parts: Injury Determination, Quantification, and Damage Determination.³⁰

The Injury Determination phase serves to establish the harm and determine causation to the responsible party.³¹ The Quantification phase, a more technical step, seeks to identify the extent of the loss of the resource's services, and provides guidelines for "establishing baseline conditions, estimating recovery periods, and measuring the degree of service reduction stemming from an injury to a natural resource."³² Finally, the Damage Determination phase tackles the difficult job of assigning a dollar value to the injuries established in the Quantification

25. 43 C.F.R. § 11.13(b)-(f) (2010). The U.S. Environmental Protection Agency's NRDA website considers DOI's regulations, including the Preassessment Screen, as its own step. *Natural Resource Damage Assessment*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/superfund/programs/nrd/nrda2.htm> (last visited Jan. 14, 2011).

26. 43 C.F.R. § 11.13(b) (2010).

27. *Id.*

28. *Id.* § 11.14(ss).

29. *Id.* § 11.14(tt).

30. *Id.* § 11.13(e)(1)-(3).

31. *Id.* § 11.13(e)(1).

32. *Id.* § 11.13(e)(2).

phase.³³ This type of natural resource valuation is one of the most controversial and oft-discussed aspects of the NRDA process in any statute.³⁴

The final phase, Post-Assessment, covers the collection of money from the responsible party and the processes of putting those sums towards the restoration of the environment. This phase begins with the trustee creating a Report of Assessment detailing Assessment information and, if using a Type B Assessment, detailed information regarding the Injury Determination, Quantification, and Damage Determination steps.³⁵ Next, the trustee presents the potentially responsible party (PRP) with a written demand for the determined damages.³⁶ The trustee's assessment has the force of a rebuttable presumption, challengeable by the PRP in an administrative hearing.³⁷ The PRP has sixty days to acknowledge receipt before the trustees can file suit.³⁸

Once sums are recovered, they are placed into an account used solely for that purpose.³⁹ Finally, after the natural resources damages claim amount is determined, the trustee must write a Restoration Plan outlining "how the monies will be used to address natural resources, specifically

33. *Id.* § 11.13(e)(3).

34. *See, e.g.,* Melissa Daigle, *The Value of a Pelican: An Overview of the Natural Resource Damage Assessment Under Federal Law and Louisiana Law*, 16 OCEAN & COASTAL L.J. 253 (2011); Ronald M. Pierce, *Valuing the Environment: NOAA's New Regulations Under the Oil Pollution Act of 1990*, 22 PEPP. L. REV. 167 (1994); Susan A. Austin, *The National Oceanic and Atmospheric Administration's Proposed Rules for Natural Resource Damage Assessment Under the Oil Pollution Act*, 18 HARV. ENVTL. L. REV. 549 (1994). The original version of CERCLA came under fire for undervaluing natural resources, requiring trustees to limit natural resource damages to the "lesser of (1) the cost of restoring or replacing the equivalent of the injured resource or (2) the lost use value of the resource." Gina M. Lambert & Anthony R. Chase, *Remedying CERCLA's Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine Into Natural Resource Damage Actions*, 11 VA. ENVTL. L.J. 353, 361 (1992). The Supreme Court found that this "lesser-of" rule was impermissible, determining that Congress intended the DOI to use restoration costs as the measure of recovery. *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 444-59 (D.C. Cir. 1989). DOI regulations now include more guidance for natural resource valuation. *See* 43 C.F.R. § 11.83 (2010).

35. 43 C.F.R. § 11.90 (2010).

36. *Id.* § 11.91(a).

37. *Id.* § 11.91(c).

38. *Id.* § 11.91(d).

39. *Id.* § 11.92(a). The account lies within the U.S. Treasury when the Federal government is the trustee, and in the State treasury where a state is the trustee. *Id.* § 11.92(a)(1)-(2).

what restoration, rehabilitation, replacement, or acquisition of equivalent resources will occur.”⁴⁰

CERCLA laid the groundwork for modern NRD recoveries, and for the first time contemplated restorations for events on the scale of the Exxon-Valdez Spill and the Deepwater Horizon Spill. CERCLA specifically excluded oil from its list of hazardous substances, with authority for that substance landing first with the CWA and then, spurred by the Exxon-Valdez Spill, with the Oil Pollution Act of 1990.⁴¹ The OPA’s NRDA provisions are very similar to those developed for CERCLA, and it is under the OPA that federal and state officials are conducting the NRDA for the Deepwater Horizon Spill.

III. PRELIMINARY PHASES OF NRDA IN THE OIL POLLUTION ACT OF 1990

As mentioned previously, OPA’s NRDA provisions are similar in most respects to those of the CWA and CERCLA. As with those statutes, the OPA permits authorized representatives of Indian tribes and of federal, state, or foreign governments to act as trustees of natural resources.⁴² The OPA builds upon the CWA and CERCLA, though, in allowing the coordination of two or more trustees and permitting the designation of a “Lead Administrative Trustee.”⁴³ The OPA also establishes a liability fund, the Oil Spill Liability Trust Fund (Fund), to handle immediate clean-up costs and NRD assessment costs.⁴⁴

40. *Id.* § 11.93(a).

41. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701-2761 (2010)).

42. 33 U.S.C. § 2706(b)(1) (2010). The Federal Government’s trustees for the Deepwater Horizon Spill are NOAA, DOI, and the Department of Defense. *Resource Restoration Planning Process Begins for BP/Deepwater Horizon Oil Spill*, RESTORETHEGULF.GOV (Sept. 29, 2010, 2:13 PM), <http://www.restorethegulf.gov/release/2010/09/29/resource-restoration-planning-process-begins-bpdeepwater-horizon-oil-spill>. The state trustees are: the Alabama Department of Conservation and Natural Resources and the Geological Survey of Alabama; the Florida Department of Environmental Protection; the Mississippi Department of Environmental Quality; the Louisiana Department of Environment of Wildlife and Fisheries, the Louisiana Department of Natural Resources, the Louisiana Department of Environmental Quality, the Louisiana Oil Spill Coordinator’s Office, and the Louisiana Coastal Protection and Restoration Authority; and, the Texas Parks and Wildlife Department, the Texas Commission on Environmental Quality, and the Texas General Land Office. *Id.*

43. 15 C.F.R. § 990.14(a)(1) (2010); Kevin R. Murray et al., *Natural Resource Damage Trustees: Whose Side Are They Really On?*, 5 ENVTL. LAW. 407, 417 (1999).

44. 26 U.S.C.A. § 9509 (2010). The Fund is stocked by an environmental fee on petroleum as well as by provisions of the OPA, the Federal Water Pollution Control Act,

The OPA holds polluters liable for clean-up costs and an array of damages resulting from the spill of oil. All removal costs incurred by the U.S., a state or an Indian tribe are covered, as are removal costs taken by any person that are consistent with the National Contingency Plan.⁴⁵ The OPA defines “damages” to include injury to natural resources; real or personal property; subsistence use; revenues; profits and earning capacity; and public services.⁴⁶ The OPA sets a cap of \$75 million on liability for offshore facilities like the Deepwater Horizon rig, but BP agreed to waive that cap voluntarily as the scale of the spill was recognized.⁴⁷ Additionally, BP set up a \$20 billion fund using the OPA’s interims-claims process to handle individual spill damages claims, leaving the NRDA collection to the trustees.⁴⁸

While the DOI is responsible for implementing CERCLA, the OPA requires regulations for oil spill NRDA to be crafted by the Commerce Department’s National Oceanic and Atmospheric Administration (NOAA).⁴⁹ Again taking cues from CERCLA, NOAA’s regulations separate the OPA’s NRDA process into three distinct steps: Preassessment, Restoration Planning, and Restoration Implementation.⁵⁰

A. Preassessment

The purpose of the Preassessment phase is to “provide a process by which trustees determine if they have jurisdiction to pursue restoration

the DPA, the Trans-Alaska Pipeline Authorization Act (TAPAA) and the Outer Continental Shelf Lands Act Amendments. *Id.* § 9509(b). Note that the OPA deviates from CERCLA here, which does not allow NRD assessment costs to be reimbursed by Superfund. 42 U.S.C. § 9611(b)(2) (2006); Murray, *supra* note 41, at 416-17.

45. 33 U.S.C. § 2702(b)(1) (2006). The National Contingency Plan, officially known as The National Oil and Hazardous Substances Pollution Contingency Plan, was created in 1968 as a blueprint for responding to oil spills and hazardous substance releases. *National Oil and Hazardous Substances Pollution Contingency Plan Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oem/content/lawsregs/ncpover.htm> (last visited Jan. 22, 2011).

46. 33 U.S.C. § 2702(b)(2) (2006).

47. *Id.* § 2704(a)(3); Tom Hals, *BP Tells Court It Waives Cap On Spill Liability*, REUTERS, Oct. 19, 2010, available at <http://www.reuters.com/article/idUSN1911373420101019>.

48. Laurel Brubaker Calkins & Margaret Cronin Fisk, *BP’s \$20 Billion Fund May Not Stop Spill Lawsuits, Judge Says*, BLOOMBERG, June 18, 2010, available at <http://www.bloomberg.com/news/2010-06-17/bp-s-20-billion-fund-may-not-stop-spill-lawsuits-new-orleans-judge-says.html>.

49. 33 U.S.C. § 2706(e)(1) (2006).

50. 15 C.F.R. § 990.12 (2010).

under OPA and, if so, whether it is appropriate to do so.”⁵¹ Trustees begin the formal process by determining whether an incident has occurred that threatens natural resources under the trusteeship of the trustees.⁵² If it is determined that the incident will cause injuries and that response actions will adequately address the injuries, trustees prepare a Notice of Intent to Conduct Restoration Planning and release it to the public and to potentially responsible parties.⁵³ Reflecting the emphasis on transparency and public participation in the OPA, the administrative record amassed by the trustees is made available to the public to document the basis for the decision to proceed with a NRDA.⁵⁴

B. Restoration Planning

Restoration Planning is the most difficult and time-consuming aspect of an OPA NRDA. It provides a process for trustees to “evaluate and quantify potential injuries . . . and use that information to determine the need for and scale of restoration actions.”⁵⁵ After the formal steps of identifying the nature of the injury and establishing the causation between the release of oil and the injury, the process of collecting data on the injury and on the baseline conditions that existed before the injury begins.⁵⁶ This has been a major undertaking for Deepwater Horizon responders. Since its NRDA response began on April 20, 2010, NOAA has:

[d]ocumented 2,263 visibly oiled dead birds; 2,079 visibly oiled live birds; 18 visibly oiled dead sea turtles; and 456 visibly oiled live sea turtles . . . collected 29,599 environmental samples for analysis . . . conducted 37,183 NRDA analyses . . . logged 34,786 images . . . surveyed about 4,000 linear miles of shoreline . . . [and] deployed several hundred transmitters in wide-ranging species . . . to detect changes in species behavior, reproductive patterns and mortality.⁵⁷

Once the information is collected, trustees must begin restoration determinations. These restoration options include combinations of

51. *Id.* § 990.40.

52. *Id.* § 990.41(a).

53. *Id.* § 990.44.

54. *Id.* § 990.45.

55. *Id.* § 990.50.

56. *Id.* § 990.51. Baseline is “the condition of the natural resources and services that would have existed had the incident not occurred.” *Id.* § 990.30.

57. NRDA BY THE NUMBERS, *supra* note 1.

primary restoration (actions to directly restore the injured resources, including a natural recovery alternative) and compensatory restoration (“restoration activities that provide services of the same type and quality, and of comparable value as those injured”).⁵⁸ Compensatory restoration must be considered if, as in the Spill, the injury involves the loss of natural resource services (i.e. a public beach closed due to oil) pending restoration.⁵⁹ These options may be considered with the aim that, as a package, they would “make the environment and public whole.”⁶⁰

Next, trustees must determine the scale of restoration activities.⁶¹ The process of “scaling” “refers to the process of determining, for identified restoration actions, the size or scale of the actions that would be required” to return the natural resource to baseline conditions and compensate the public.⁶² In other words, an adjustment “for the time it will take replacement services to fully develop.”⁶³ When scaling the restoration projects, trustees must consider a “service-to-service” approach, which provides natural resources and services of the same type and quality and of comparable value as those lost, but may resort to a valuation approach (determined using dollars or units of resource service) if service-to-service is inappropriate.⁶⁴ Restoration actions may be discounted due to natural restoration occurring in the interim or to uncertainty.⁶⁵

Once the trustees lay out a range of restoration alternatives they evaluate them based on six factors: cost, effectiveness, likelihood of success, extent to which the alternative will prevent future harm, multi-resource benefits, and the effects on public health and safety.⁶⁶ The trustees will use these criteria to develop a list of preferred restoration alternatives.⁶⁷ If two or more alternatives are equally preferable, the trustees will select the most cost-effective alternative.⁶⁸ Trustees may

58. 15 C.F.R. § 990.53(c)(2) (2010).

59. James S. Seevers, Jr., *NOAA's New Natural Resource Damage Assessment Scheme: It's Not About Collecting Money*, 53 WASH. & LEE L. REV. 1513, 1540 (1996).

60. 15 C.F.R. § 990.53(a)(2) (2010).

61. *Id.* § 990.53(d).

62. DAMAGE ASSESSMENT AND RESTORATION PROGRAM, NOAA, NATURAL RESOURCE DAMAGE ASSESSMENT GUIDANCE DOCUMENT: SCALING COMPENSATORY RESTORATION ACTIONS (OIL POLLUTION ACT OF 1990) vii (1997), *available at* <http://www.darrp.noaa.gov/library/pdf/scaling.pdf>.

63. Seevers, *supra* note 59, at 1541.

64. 15 C.F.R. § 990.53(d) (2010); Seevers, *supra* note 59, at 1541.

65. 15 C.F.R. § 990.53(d)(4) (2010).

66. *Id.* § 990.54(a).

67. *Id.* § 990.54(b).

68. *Id.*

select a pre-existing Regional Restoration Plan or other existing restoration project if such a plan or project is found to be the preferred alternative.⁶⁹

The final step in the Restoration Planning Phase is the development of a Draft Restoration Plan. OPA regulations are clear that this Plan must be developed with an opportunity for public review and comment.⁷⁰ The Draft Restoration Plan should include: a summary of injury assessment procedures used; a full description of the extent of the injuries resulting from the incident; the goals and objectives of restoration; “the range of restoration alternatives considered, and a discussion of how such alternatives were developed”; an identification of the preferred alternatives; a description of responsible party involvement in the assessment; and “a description of monitoring for documenting restoration effectiveness, including performance criteria.”⁷¹ After public involvement, the trustees develop the Final Restoration Plan.⁷²

IV. RESTORATION IMPLEMENTATION

In the final stage of a NRDA conducted under the OPA, the Trustees present the Final Restoration Plan to the responsible parties, collect the natural resource damages, and begin carrying out restoration projects. As with most large-scale lawsuits, the process is laborious. Years can pass between an incident and the conclusion of restoration activities, even for relatively minor incidents. For example, an NRDA conducted for a September 1998 oil spill in Lake Grand Ecaille, Louisiana, that exposed 1,233 acres of wetlands to oil did not result in a final Restoration Plan until November 2005, and the case did not settle until January 2006, more than seven years after the incident.⁷³ Even when settlement occurs relatively quickly (within four years, typically),

69. *Id.* § 990.56(a).

70. *Id.* § 990.55(a).

71. *Id.* § 990.55(b)(1).

72. *Id.* § 990.55(d).

73. Damage Assessment, Remediation & Restoration Program, *Case: Equinox, LA*, NOAA, <http://www.darrp.noaa.gov/southeast/equinox/index.html> (last visited Jan. 20, 2011). It is important to note that the affected marsh was “fully functioning or recovering to baseline function within six months after the discharge.” FINAL DAMAGE ASSESSMENT AND RESTORATION PLAN AND ENVIRONMENTAL ASSESSMENT: EQUINOX OIL COMPANY CRUDE OIL DISCHARGE, LAKE GRANDE ECAILLE, LOUISIANA, SEPTEMBER 22, 1998, at 5 (2006), available at http://www.darrp.noaa.gov/southeast/equinox/pdf/Equinox_Final_DARP_103105.pdf.

restoration activities may not be completed for a full decade.⁷⁴ The Deepwater Horizon NRDA is certain to far eclipse all previous incidents in scale, complexity, and cost. Creating a Restoration Plan that is able to “make the environment and public whole again” in a reasonable time will be a monumental challenge.

The process is rather straightforward, and begins with the closing of the administrative record.⁷⁵ Trustees cannot add documents to the administrative record after this point unless they: “[a]re offered by interested parties that did not receive . . . notice of the Draft Restoration Plan . . . ; [d]o not duplicate information already contained in the administrative record; and [r]aise significant issues regarding the Final Restoration Plan.”⁷⁶

Trustees must present the responsible parties with a written demand requiring the responsible party to either “implement the Final Restoration Plan subject to trustee oversight and reimburse the trustees” for their costs, or advance to the trustees a sum representing all trustee costs of assessment and restoration.⁷⁷ The demand includes a request for reimbursement of reasonable assessment costs, the costs of any emergency restoration, and interest.⁷⁸ The statute defines “reasonable assessment costs” to include “administrative costs, legal costs, and other costs necessary to carry out [assessments]; monitoring and oversight costs; costs associated with public participation; and indirect costs that are necessary to carry out this part.”⁷⁹

Responsible parties have ninety days to respond in writing either by paying assessment costs or providing binding assurance of payment.⁸⁰ If the responsible parties do not agree to the demand within that time, trustees can either file a judicial action for damages or present the unpaid claim to the Oil Spill Liability Trust Fund.⁸¹

74. Restoration was not completed for the January 1996 spill in North Cape, R.I., until June 2006. Damage Assessment, Remediation & Restoration Program, *Case: North Cape, RI*, NOAA, http://www.darrp.noaa.gov/northeast/north_cape/index.html (last visited Jan. 20, 2011); Department of Environmental Management, State of Rhode Island, *North Cape Oil Spill Trustees and Industry Successfully Complete North Cape Lobster Restoration Program*, RHODEISLAND.GOV (Aug. 10, 2010), <http://www.dem.ri.gov/news/2006/pr/0810061.htm>.

75. 15 C.F.R. § 990.61 (2010).

76. *Id.* § 990.61(a)(1)-(3).

77. *Id.* § 990.62(a)-(b).

78. *Id.* § 990.62(e)(6).

79. *Id.* § 990.30.

80. *Id.* § 990.62(d).

81. *Id.* § 990.64(a).

Recovered funds are placed in a revolving trust account.⁸² When there are multiple trustees, a joint account can be created with enforceable agreements to govern their management.⁸³ The funds may be deposited in an interest-bearing account so long as all accrued interest is used for restoration.⁸⁴ “Trustees must maintain appropriate accounting and reporting procedures for the funds.”⁸⁵ Once a claim is settled, trustees are encouraged to consider several actions to facilitate the implementation of restoration, including the establishment of a trustee committee to coordinate among affected trustees; the development of more detailed implementation workplans; monitoring and oversight of restoration; and restoration evaluation.⁸⁶

The NRDA provisions in the OPA, like all NRDA provisions, are specific in their intent to make natural resource restoration the only goal. However, there is a temptation for trustees to stray from this noble goal. Some argue even further that “[t]he potential [for trustees] to abuse their authority and breach their fiduciary duties . . . is ever present due to a lack of oversight and the substantial deference with which courts tend to accord settlements that trustees reach with PRPs.”⁸⁷ We will explore some of these potential controversies facing the Deepwater Horizon NRDA in the next section.

V. POTENTIAL CONTROVERSIES SURROUNDING RECOVERY AND RESTORATION

The national media attention and public outrage that followed the Spill through the summer of 2010 has already waned. It will likely be years before a Final Restoration Plan is complete and a settlement has been reached. In the meantime, the process of selecting restoration options and developing the Final Restoration Plan will take place largely out of the public eye. The combination of factors involved with the Deepwater Horizon NRDA—the large amount of money involved, the length of time needed to develop a restoration plan, the bureaucracy, and the relative difficulty in weighing environmental projects—creates a situation where the potential exists for trustees to stray from the explicit goal of an OPA NRDA: “the return of the injured natural resources . . . to

82. *Id.* § 990.65(a).

83. *Id.* § 990.65(b).

84. *Id.* § 990.65(c).

85. 15 C.F.R. § 990.65(e).

86. *Id.* § 990.66(a).

87. Murray, *supra* note 43, at 423.

baseline.”⁸⁸ The rest of this Article will be spent exploring potential controversies that may arise as the Deepwater Horizon NRDA moves into its final stage, including: emergency restoration projects, legal costs, the degree of connection between the injured resources and restoration projects, and the disbursement of funds.

A. Emergency Restoration Projects

There is an understandable desire to begin the Spill restoration activities as soon as possible. Unlike a smaller, localized spill, the Deepwater Horizon Spill affected wide swaths of coastline and habitat, potentially threatening entire populations of wildlife. For instance, during bi-annual trips along the Mississippi Flyway, millions of waterfowl and shorebirds rely on coastal marshes in the Gulf Coast for food and shelter. Waiting to take action to either restore marshes and coastal areas or provide other habitat could prove devastating to enormous numbers of birds.

The OPA permits trustees to conduct emergency restoration activities while the NRDA process is still ongoing so long as emergency action is required “to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources.”⁸⁹ Additionally, the statute requires that “[t]he action will not be undertaken by the lead response agency; [t]he action is feasible and likely to succeed,” delaying the action would result in increased damages to natural resources, and “[t]he costs of the action are not unreasonable.”⁹⁰

The trustees must notify responsible parties of any emergency actions, and invite them to participate.⁹¹ Additionally, to “the extent practicable,” trustees must provide the public with notice of the emergency action.⁹² “Within a reasonable time frame after completion” of the emergency action, the trustees must also “provide public notice of the justification for, [the] nature and extent of, and [the] results of the emergency” action.⁹³

Additionally, several environmental restoration and improvement plans already exist for the Gulf, potentially supplying trustees with a

88. 15 C.F.R. § 990.10.

89. 33 U.S.C. § 2712(j)(2) (2006). Note that emergency restoration projects are separate and distinct from “clean-up” or “removal” projects taking place during the immediate aftermath of the incident and not covered by NRDA.

90. 15 C.F.R. § 990.26(a).

91. *Id.* § 990.26(c).

92. *Id.* § 990.26(d).

93. *Id.*

range of pre-developed restoration projects. For example, existing plans for the state of Mississippi include the Mississippi Coastal Improvement Plan (MSCIP), a “\$1.2 billion comprehensive program for coastal Mississippi consisting of structural, non-structural, and environmental project elements” related to hurricane and storm damage reduction and wildlife preservation;⁹⁴ a program created under the Gulf of Mexico Energy Security Act of 2006 (GOMESA) that conducts coastal protection and restoration activities;⁹⁵ and projects from the Gulf of Mexico Alliance (GOMA), a group of Gulf state governors seeking to “improve the health of coastal ecosystems and economies of the Gulf.”⁹⁶ Louisiana is working to “expedite the expenditure of about \$40 million in state and federal Coastal Wetlands Planning Protection and Restoration Act funds” to be put towards barrier island restoration.⁹⁷

The first Gulf restoration project to take place under the OPA’s “emergency restoration” provisions⁹⁸ was announced in December 2010.⁹⁹ Funded initially by MDEQ (Mississippi’s lead NRDA trustee) and carried out by the MS Department of Wildlife, Fisheries & Parks (MDWFP), the project is set to improve 2,500 acres of wetlands at the Howard Miller and Malmaison WMAs near Rolling Fork, Mississippi.¹⁰⁰ It is expected that the mudflats and shallow water habitat will provide foraging and resting habitat for migrating shorebirds and ducks, at a cost of around \$180,000.¹⁰¹ According to MDWFP officials, species such as northern pintail ducks will leave potentially-disturbed habitat in

94. MISSISSIPPI COASTAL IMPROVEMENT PROGRAM (MSCIP), <http://www.mgomc.org/index.php/programs/mississippi-coastal-improvement-program-mscip> (last visited Jan. 26, 2011).

95. Gulf of Mexico Energy Security Act of 2006, Pub. L. 109-432, 120 Stat. 3001 (2006).

96. GULF OF MEXICO ALLIANCE (GOMA), <http://www.mgomc.org/index.php/programs/gulf-of-mexico-alliance-goma> (last visited Jan. 26, 2011).

97. Press Release, Governor Bobby Jindal, Governor Jindal Announces Agreement with BP for Seafood Safety, Coastal Restoration & Tourism Funding (Nov. 1, 2010) available at <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=2&articleID=2550&navID=12>.

98. See 15 C.F.R. § 990.62(e)(6) (2010).

99. Press Release, Miss. Dep’t of Env’tl. Quality, MDEQ Launches Expedited Restoration Project (Dec. 16, 2010), available at <http://www.deq.state.ms.us/newweb/MDEQPres.nsf/28ce80ddea27fe0886256b28006d8a70/47036a903e929300862577fb005a42d9?OpenDocument>

100. See E-mail from Ed Penny, Waterfowl Program Coordinator, Miss. Dep’t of Wildlife, Fisheries and Parks, to author (Jan. 24, 2011, 11:17 EST) (on file with author).

101. *Id.*

southeast Louisiana to utilize newly-flooded habitat in the Mississippi Delta.¹⁰²

There is little precedent in the use of OPA's emergency restoration regulations.¹⁰³ One of the few recent examples is the aftermath of the April 2006 grounding of the T/V *Margara* near Tallaboa, Puerto Rico. There, the 748-foot tanker ran aground three miles offshore, injuring over 8,400 square meters of coral-covered seafloor and threatening to spill its 300,000 barrel load of fuel oil.¹⁰⁴ After the "clean-up" work (i.e. floating the ship and returning it to harbor) was complete, trustees determined that emergency restoration was warranted because "[a]ntifoulant paint remnants with toxic constituents covered some disturbed areas . . . [l]oose and buried reef biota were at risk of imminent loss due to further movement or burial, remobilization of rubble, potential hurricanes in the 2006 season, and a potential coral bleaching event."¹⁰⁵ The public was notified via press release of the trustees' decision to undertake emergency restoration.¹⁰⁶ The process went smoothly, and trustees continually released information on the progress and completion of emergency actions, including a post-hurricane check

102. *Id.* I feel compelled to note that only twenty-three individual ducks, and no northern pintails, were found dead in the wake of the Spill. *Bird Impact Data from DOI-ERDC Database Download 14 Dec. 2010*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/home/dhoilspill/pdfs/Bird%20Data%20Species%20Spreadsheet%2012142010.pdf> (last visited Feb. 2, 2011). That number should be considered low, however, because injured ducks are more difficult to find than other species. Bob Marshall, *Measuring Number of Dead Ducks Caused By Spill Proves Difficulty*, NEW ORLEANS TIMES-PICAYUNE (Oct. 3, 2010), http://www.nola.com/outdoors/index.ssf/2010/10/measuring_number_of_dead_ducks.html.

103. Both of the available examples were ship groundings in Puerto Rico, where emergency action was needed to stabilize broken, but still living, coral fragments. *See generally* PUBLIC NOTICE, NOTICE OF EMERGENCY RESTORATION ACTION: T/V MARGARA INCIDENT – APRIL 27, 2006 1 (2006), *available at* <http://www.marineincidents.com/pr/margara/pdf/MARGARA%20990.26%20Notice%20of%20ER%20-%20Final%20November%205%202006.pdf>.

104. *Id.*

105. *Id.* at 2.

106. Press Release, Commonwealth of Puerto Rico Marine Resources Division, Puerto Rico's DNER and NOAA to Initiate Emergency Restoration of Coral Reef Damaged by Grounding of Oil Tanker (May 15, 2006), *available at* http://www.marineincidents.com/pr/margara/pdf/FINAL%20For_Immediate_Release_may15_DRAFT.pdf.

on restored areas more than a year after the wreck.¹⁰⁷ As of 2011, there has been no Final Restoration Plan.

While the value and importance of emergency restoration projects is not doubted, the process does have the unfortunate effect of excluding the public. Trustees are granted much more discretion when choosing projects under emergency restoration provisions, which exempt such projects from otherwise-required public notice and comment.¹⁰⁸ Unlike the public comment periods required for draft and final Restoration Plans, trustees are only required to provide notice to the public—by any means they see fit—of the planned emergency project.¹⁰⁹ It is not until a reasonable time *after* the project is completed that trustees must provide “public notice of the justification for, nature and extent of, and results of emergency restoration.”¹¹⁰ At that point, of course, the public has no way to prevent an unpopular project from happening.

In addition to the exclusion of public input, oversight of emergency restoration actions is further limited by a relatively low burden of proof on the trustees. Emergency projects are justified in part if they “prevent or reduce *any* continuing danger to natural resources”¹¹¹ and if waiting to develop a Restoration Plan would merely “increas[e] natural resource damages.”¹¹² When responding to an incident as large as the Spill, these low barriers may allow trustees to justify and fund projects with a less direct connection to the natural resources of the Gulf than is typical of an OPA NRDA.

The final concern with conducting emergency restoration actions is that it hinders the ability of trustees to pay for damages that may not yet be apparent. Many of the environmental effects of the Spill, including the long-term impacts of oil dispersants, are not yet known.¹¹³ Spending

107. See *T/V Margara Ground Incident Administrative Record*, MARINEINCIDENTS.COM, http://www.marineincidents.com/pr/margara/admin_record.html (last visited Jan. 25, 2011).

108. Natural Resource Damage Assessments, 67 Fed. Reg. 61,483, 61,484 (Oct. 1, 2002) (to be codified at 15 C.F.R. pt. 990).

109. 15 C.F.R. § 990.26(d) (2010).

110. *Id.*

111. *Id.* § 990.26(a)(1) (emphasis added).

112. *Id.* § 990.26(a)(4).

113. See Bryan Walsh, *Oil Spill: Months Later, Questions Remain Over Chemical Dispersants*, TIME (Jan. 27, 2011, 5:56 PM), <http://ecocentric.blogs.time.com/2011/01/27/oil-spill-months-later-questions-remain-over-chemical-dispersants/> (describing a recent study showing that chemical dispersants in the Gulf did not break down as quickly as scientists expected, and asking whether these dispersants were toxic to marine life); see also Karen A. Bjorndal et al., *Better Science Needed for Restoration in the Gulf of Mexico*, 331 SCI. 537 (2011).

money on emergency restoration projects now depletes funds that may be needed for later projects. With the large amount of money expected for natural resource damages, keeping a close eye on all emergency restoration projects is recommended to ensure the proper use of funds.

B. Degree of Connection Between Injured Resources and Restoration Projects

Sums recovered in an OPA NRDA are only permitted to reimburse costs associated with the assessment of natural resource damages, and to pay for the development and implementation of plans for the “restoration, rehabilitation, replacement, or acquisition of the equivalent” of the injured natural resources.¹¹⁴ The language is deceptively simple. “Restore,” “rehabilitate,” “replace” or “acquire the equivalent of” are not further defined in the OPA or its regulations, and scant case law has not helped much to define the parameters in which trustees must apply recovered sums.

The worry, of course, is that money recovered under a NRDA will be used improperly. It is a concern nearly as old as NRD recovery itself: in an early CWA NRDA case, the First Circuit stated that “[t]he ultimate purpose of [a NRDA] should be to protect the public interest in a healthy functioning environment, and not to provide a windfall to the public treasury.”¹¹⁵ On the extreme end, this means using recovered sums for use unrelated to environmental restoration. On the more realistic end, it means using recovered sums for environmental projects that have little or no connection to the injured resources. Choosing restoration projects may be a tough decision for some trustees, especially in situations where the natural resources have already returned to baseline conditions after the initial clean-up or through natural processes while the Restoration plan was pending. In those circumstances, trustees will at least recover NRD sums for the interim “lost use” of the resources, without a clear place to spend it.

There has been litigation, however, surrounding the similar “restore, rehabilitate, replace or acquire the equivalent of” language in CERCLA. These courts, following the directive of administrative deference established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹¹⁶ allowed trustees wide discretion in determining how to pursue and use NRD sums. In the first of these CERCLA interpretation

114. 33 U.S.C. § 2706(f) (2006) (referencing 33 U.S.C. § 2706(c)(1)(C)).

115. *P.R. v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980).

116. 467 U.S. 837 (1984).

cases, *Ohio v. U.S. Dep't of the Interior*, the D.C. Circuit Court of Appeals found that trustees should seek sums for the restoration of the injured resource rather than their lost use value, unless restoration is physically impossible or the cost is grossly disproportionate to the lost use value.¹¹⁷ This ruling dismantled a previous interpretation, which held that trustees should pursue whichever option cost less: restoration or lost use value.

Courts found that *Chevron* deference also applied to a trustee's determination of whether to use recovered sums for "restoration" or "rehabilitation" or "replacement" or "acquiring the equivalent of" injured resources. In *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, the state of Montana argued that because "restoration" and "rehabilitation" result in a "net benefit" to the public, while "replacement" and "acqui[sition of the] equivalent of [the injured natural] resources simply transfers into public ownership uninjured resources," restoration and rehabilitation should be preferred over replacement and acquisition.¹¹⁸ The D.C. Circuit Court of Appeals found to the contrary, ruling that Congress intended no hierarchy, and that trustees could choose the most appropriate projects they saw fit after considering benefits and costs.¹¹⁹

The "restore, rehabilitate, replace, acquire" language was first discussed in 1980, in the context of the CWA. In *Puerto Rico v. SS Zoe Colocotroni*,¹²⁰ the First Circuit affirmed a trustee's right to pursue the "acquire the equivalent of" strategy, even if that meant projects unconnected with the injured resources, such as "comparable lands for public parks or . . . reforestation of a similar proximate site."¹²¹ Therefore, once deciding to pursue restoration damages, "the trustee can decide, based on cost, whether to seek damages in an amount that can be used to attempt to restore the natural resources to their pre-damaged state, or to acquire the equivalent of the damaged natural resources by buying up land or by other means."¹²²

Though such interpretations have not explicitly been extended to the OPA, the overwhelming similarities in language and intent between the NRDA processes included in the OPA, CERCLA and the CWA make it likely that the CERCLA interpretations will bear strong influence on the

117. *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

118. *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); Rowley, *supra* note 17, at 478.

119. *Kennecott*, 88 F.3d at 1231.

120. 628 F.2d 652, 676 (1980).

121. Rowley, *supra* note 17, at 479-80.

122. *Id.* at 480.

OPA. If so, it means that trustees handling the Deepwater Horizon restoration process will have a lot of leeway in choosing restoration projects, even if they are far removed from the affected coastline. As stated above, the first Deepwater Restoration project is taking place nearly 250 miles north of the Gulf Coast.

The subtlety in the degree of connection between restoration projects and the injured resources can be illustrated by a case study. In April 2000, a leaking underground pipeline supplying the Potomac Electric Power Company (PEPCO) in Aquasco, MD was found to have leaked 140,000 gallons of oil into Swanson Creek, a tributary of the Patuxent River.¹²³ Severe weather quickly spread the oil, eventually fouling seventeen linear miles of shoreline before being contained.¹²⁴ The spill damaged wetlands, beach shorelines, and injured a wide variety of wildlife, killing more than 600 ruddy ducks, 122 diamondback terrapins, and more than 5,000 pounds of fish and shellfish.¹²⁵

Moving more quickly than most NRDAs, PEPCO settled with the state of Maryland in November 2003, agreeing to pay more than \$2.7 million to implement the Restoration Plan.¹²⁶ “Trustee representatives met with the Governor’s advisory committee, other local residents and scientists,” and agreed to restoration projects, which had varying degrees of connection to Swanson Creek and the Patuxent River.¹²⁷ Three of the four “ecological restoration” projects had a direct, physical connection to the Patuxent: the creation of six acres of intertidal wetland on Washington Creek, a tributary of the Patuxent; the creation of a new beach along the river; and the creation of five acres of oyster reef sanctuary in the river.¹²⁸

The fourth and final project took place far from Maryland: the restoration of “ruddy duck nesting habitat by converting marginally productive agricultural land in the Prairie Pothole Region of the

123. *Case: Chalk Point, MD*, NOAA’S DAMAGE ASSESSMENT, REMEDIATION & RESTORATION PROGRAM, http://www.darrp.noaa.gov/northeast/chalk_point/index.html (last visited Feb. 2, 2011).

124. *Id.*

125. Jonathan McKnight & Lisa Pelstring, *Patuxent River Oil Spill Road to Recovery*, MD. DEP’T OF NATURAL RESOURCES, <http://www.dnr.state.md.us/naturalresource/winter2003/oilspill.htm> (last visited Feb. 19, 2011).

126. Consent Decree at VII(A), *United States v. Potomac Electric Power Company* (2002) (No. AW 02CV4013), available at <http://www.gc.noaa.gov/gc-cd/chalkpoint-cd.pdf>.

127. McKnight & Pelstring, *supra* note 125.

128. *Cleanup and Restoration Highlights at Chalk Point, Maryland*, NOAA’S DAMAGE ASSESSMENT, REMEDIATION & RESTORATION PROGRAM, http://www.darrp.noaa.gov/northeast/chalk_point/pdf/Chalk_Point_handout.pdf (last visited Feb. 2, 2011).

midwestern United States into seasonal wetlands and protecting them with conservation easements.”¹²⁹ The spill injured more ruddy ducks than any other bird species, and the trustees determined that midwestern nesting improvements were “the only proposed project that [would] directly restore the injured species.”¹³⁰ This project was chosen despite the fact that it is impossible to tell whether the ducks nesting in the restored habitat would, in fact, winter in Maryland.¹³¹

What this means for Deepwater Horizon restoration projects is that the projects may take place far from the Gulf. For example, the closest nesting habitats for the northern gannet—the third most-frequently injured species with 637 birds—are in Maritime Canada and the North Atlantic.¹³² Similarly, a project restoring the nesting habitat of the common loon (106 injured birds) could take place in northern forests from New England to Alaska.¹³³ The same holds true for any species that was affected by the spill but may breed outside the Gulf, from the hundreds of bird species that use the Gulf as a migratory highway to bottlenose dolphins¹³⁴ and Kemp’s ridley sea turtles.¹³⁵

While spending Deepwater Horizon NRDA money outside of the Gulf may seem contradictory, it is not outside the letter of the statute. NRDA exists to restore damaged natural resources, including migratory wildlife. If the best way to restore, rehabilitate, replace or acquire the equivalent of a migratory bird is to protect its nesting habitat, then

129. *Id.*

130. NOAA, FINAL RESTORATION PLAN AND ENVIRONMENTAL ASSESSMENT FOR THE APRIL 7, 2000 OIL SPILL AT CHALK POINT ON THE PATUXENT RIVER, MARYLAND 56 (2002) available at http://www.darrp.noaa.gov/northeast/chalk_point/pdf/cp2107.pdf.

131. When calculating the proper scale for the project, trustees reduced the site’s productivity estimate by 30 percent to account for ruddy ducks that would overwinter in places other than the Chesapeake. *Id.* at 55. Wintering ruddy ducks can be found along the American coast from Maryland to Washington and as far south as Central America. *All About Birds – Ruddy Duck*, THE CORNELL LAB OF ORNITHOLOGY, http://www.allaboutbirds.org/guide/Ruddy_Duck/id (last visited Feb. 2, 2011).

132. *Bird Impact Data*, *supra* note 100; *All About Birds – Northern Gannet*, THE CORNELL LAB OF ORNITHOLOGY, http://www.allaboutbirds.org/guide/Northern_Gannet/id (last visited Feb. 2, 2011).

133. *All About Birds – Common Loon*, THE CORNELL LAB OF ORNITHOLOGY, http://www.allaboutbirds.org/guide/Common_Loon/id (last visited Feb. 2, 2011).

134. Bottlenose dolphins live in temperate and tropical oceans around the world. *Bottlenose Dolphin*, THE AMERICAN CETACEAN SOCIETY, <http://www.acsonline.org/factpack/btnose.htm> (last visited Apr. 18, 2011).

135. Nearly 95 percent of all Kemp’s Ridley Turtles nest on beaches in the Mexican state of Tamualipas. *Kemp’s Ridley Turtle*, NOAA FISHERIES OFFICE OF PROTECTED RESOURCES, <http://www.nmfs.noaa.gov/pr/species/turtles/kempstridley.htm> (last visited Apr. 18, 2011).

trustees are well within their right to do so, regardless of where that habitat is. Note that Deepwater Horizon trustees will still have plenty of opportunities to protect nesting habitat in oil damaged areas; for instance, the two most-injured species, laughing gull (3,354 birds) and brown pelican (932 birds), both nest in the Gulf.¹³⁶

Further enabling potential abuse by trustees is their ability to settle with PRPs at any time, even before the completion of the assessment.¹³⁷ The political pressure that may exist when a PRP is so important to a local economy, as BP is to that of the Gulf Coast, may result in a settlement lower than the estimated cost of damaged natural resources. Such settlements are difficult to challenge in court.¹³⁸ The OPA is clear, though, that settlements must be “fair, reasonable, and in the public interest, with particular consideration of the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services.”¹³⁹

The public should carefully watch the development of the Deepwater Horizon restoration plan. While it is clear that the overwhelming body of funds will be used to restore natural resources located in the Gulf, the potential exists for enterprising governments to lobby for NRDA money to rehabilitate wildlife in their own states or countries. While this may cause an uproar in Gulf states, it is not contrary to the goals of the OPA. However, making sure that money is spent responsibly and beneficially, for all projects, requires public vigilance and participation.

C. Disbursement of Funds

Yet another challenge presented by the Deepwater Horizon oil spill lies with the sheer geographical scope of the spill. Spanning five state jurisdictions as well as federal waters, this particular spill raises unique considerations of how the NRDA funds, once calculated, should be distributed throughout the affected areas. The OPA does not speak to specific apportionment among the parties, but rather tracks the severity of harm.¹⁴⁰ As previously discussed, trustees have considerable latitude

136. *Bird Impact Data*, *supra* note 100.

137. 15 C.F.R. § 990.25 (2010).

138. *See* Murray et al., *supra* note 43, at 434-35 (claiming that even when challengers are permitted to intervene, the typical judicial posture is to defer to settlements).

139. 15 C.F.R. § 990.25 (2010).

140. As expressed by the amount needed for “restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources.” 33 U.S.C. § 2706(d)(1)(A) (2006).

to fund projects outside the impacted area in certain circumstances.¹⁴¹ However, each state would like to see as much of the NRDA funds as possible return to its state. As a result, the Gulf states have essentially begun competing with each other over NRDA funds.

Even with the NRDA process in the beginning stages, various states are already posturing over what percentage of the funds each state should receive. Strategies vary by state. Initially, all five states were negotiating interim payments for both natural resource and economic damages with BP.¹⁴² However, this process fell apart for Alabama last fall when the state filed a lawsuit against BP and Transocean, seeking both economic and natural resources damages.¹⁴³ Thereafter, BP refused to issue interim payments to Alabama, citing the pending litigation.¹⁴⁴ Louisiana, on the other hand, received millions of dollars from BP for restoration projects in late 2010.¹⁴⁵ More recently, Louisiana has requested an emergency payment for oyster bed restoration designed to provide Louisiana oystermen with immediate relief.¹⁴⁶ Mississippi and Florida have pursued negotiations and interim funding, although both states have intimated their willingness to pursue litigation if necessary.¹⁴⁷ Like Louisiana, Mississippi recently began work on an emergency restoration project aimed at duck habitat restoration in Rolling Fork, Mississippi.¹⁴⁸ Likely, these interim restoration payments will correspondingly offset any final restoration payment by BP.

In addition to state competition for restoration funds, several environmental groups are seeking restoration funding for Gulf wildlife

141. See *supra* pp. 10-12.

142. Donna Leinwand, *States Tally Oil Spill Toll to Send BP Their Bills*, USA TODAY, Sept. 29, 2010, http://www.usatoday.com/news/nation/2010-09-29-gulfstateclaims29_ST_N.htm.

143. Complaint, *State of Alabama v. BP*, No. 1:2010-cv-00331 (S.D. Ala. June 28, 2010).

144. Jeff Amy, *BP Refuses to Pay Alabama's Oil Spill Claim, Citing Lawsuit*, ALABAMA PRESS-REGISTER, Sept. 16, 2010, http://blog.al.com/live/2010/09/bp_refuses_to_pay_alabamas_oil.html.

145. *BP to Give State \$218 Million for Coastal Restoration, Seafood Testing, Tourism*, TIMES-PICAYUNE (New Orleans), Nov. 1, 2010, http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/11/gov_jindal_announces_millions.html (\$140 million for barrier island and coastal restoration efforts).

146. *State Presses BP for Damaged-Oyster Money*, SUN HERALD (Biloxi, Miss.), Feb. 10, 2011, <http://www.sunherald.com/2011/02/10/2853092/state-presses-bp-for-damaged-oyster.html>.

147. Leinwand, *supra* note 142.

148. See *supra* pp. 8-9.

through an Endangered Species Act (ESA) lawsuit filed against BP.¹⁴⁹ While this litigation is brought under the ESA, much of the requested relief mirrors that which NRDA is designed to address.¹⁵⁰ Specifically, litigants seek, among other things, “restoration of ecosystem components” and “a permanent endowment dedicated to the long-term restoration.”¹⁵¹ If these litigants are successful, the correlation between NRDA funding and funds established through this litigation will remain unclear. Arguably, the sought-after relief is, in many ways, duplicative to restoration through the NRDA process, which is expressly prohibited by the OPA.¹⁵²

D. Legal Costs

Navigating the NRDA process for State Trustees can be a potentially unwieldy and consuming process. For a variety of reasons, a state may retain outside legal counsel with specialized expertise to represent its interests in the process.¹⁵³ As set forth below, the OPA allows states to recoup legal costs incurred during the NRDA process.¹⁵⁴ But what happens when a state contracts with outside counsel on a contingency fee basis?

Through regulation, legal costs under the OPA are defined as “the costs of attorney actions performed for the purpose of assessment or developing a restoration plan” in accordance with the NRDA process.¹⁵⁵ When attorneys’ actions fall within specified criteria, those actions “are deemed assessment costs.”¹⁵⁶ For attorneys’ fees to constitute

149. Complaint, *Defenders of Wildlife v. BP*, No. 2:10-cv-03879 (E.D. La. Sept. 10, 2010).

150. *Id.*

151. *Id.* at 19.

152. 33 U.S.C. § 2706(d)(3) (2006) (there shall be no double recovery under the OPA for natural resources damages).

153. For instance, Alabama initially retained outside counsel to handle its lawsuit for economic and natural resources damages. More recently, however, the Alabama Attorney General has dismissed outside counsel and assumed the role of lead counsel. One of his stated reasons for this action was to save Alabama taxpayers legal costs, saying in an interview with Reuters Legal: “I’m not going to give any law firm 15-20 percent of the money due the people of the state of Alabama.” See *Alabama Attorney General Fires Law Firms Handling BP Case*, WESTLAW NEWS & INSIGHT, Jan. 27, 2011, http://westlawnews.thomson.com/National_Litigation/News/2011/01_-_January/Alabama_attorney_general_fires_law_firms_handling_BP_case/.

154. 15 C.F.R. § 990.30 (2010).

155. *Id.*

156. *Id.*

assessment costs, the attorneys' actions must 1) comprise assessment or restoration planning activities under OPA section 1006(c); 2) occur before litigation is filed on behalf of a trustee to recover damages; and 3) be performed by an attorney working on behalf of a trustee agency rather than a prosecutorial agency.¹⁵⁷ If the action fails to meet all three criteria, a trustee must justify "why the action was not performed for the primary purpose of furthering litigation in order to support a characterization of the action as an assessment action."¹⁵⁸ Common assessment actions include, but are not limited to, advising trustees on the requirements of the OPA, preparing public notices and maintaining administrative records, and preparing binding agreements between the parties.¹⁵⁹ In other words, outside counsel's actions incurred in the furtherance of litigation, particularly on behalf of an attorney general, cannot be recovered as assessment costs under NRDA.

As noted by others in the context of the CERCLA, "contingent fee [natural resource damage] cases raise novel legal issues."¹⁶⁰ Like the OPA, CERCLA allows for the recovery of natural resource damages.¹⁶¹ Once recovered, CERCLA expressly requires that funds be available "for use only to restore, replace, or acquire the equivalent of such natural resources."¹⁶² The OPA similarly restricts the use of NRDA funds to costs incurred in the damage assessment itself, in the development of a restoration plan, and in the implementation of corresponding activities to achieve "restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources."¹⁶³ The question becomes whether paying outside firms on a contingency basis violates the restrictions on use of NRDA funds.

Courts have yet to consider this question in the context of the OPA, but states employing this arrangement under CERCLA have generated substantial controversy.¹⁶⁴ Criticisms include assertions that the

157. *Id.*

158. *Id.*

159. *Id.*

160. Peter L. Gray, *The Rise of Natural Resource Damage Claims States and Plaintiffs' Attorneys Leading the Charge*, 9 No. 2 ABA ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL. 3 (2007).

161. 42 U.S.C. § 9607(f) (2006). Under CERCLA, natural resources are defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, any foreign government, any Indian tribe . . ." 42 U.S.C. § 9601(16) (2006).

162. 42 U.S.C. § 9607(f)(1) (2006).

163. 33 U.S.C. § 2706(c), (f) (2006).

164. Gray, *supra* note 160, at 4.

arrangement violates the public trust doctrine and state fiduciary duties.¹⁶⁵ Even where state law permits contingency fee arrangements, judicial interpretations under CERCLA suggest that the OPA preempts any state statutory authorization for contingency fee payments.¹⁶⁶ Considering similar language under CERCLA, the Tenth Circuit held that the statutory natural resource damage scheme “preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource.”¹⁶⁷ The court expressly rejected the use of natural resource damage monies for the payment of attorneys’ fees.¹⁶⁸ The court did, however, suggest that use of monies received specifically as awards of state law claims, such as negligence and nuisance, would not be preempted, but only to the extent that those monies were separate from natural resource damage monies.¹⁶⁹ If the Tenth Circuit’s analysis is applied to OPA NRDA litigation, states may wish to reconsider employing outside counsel on contingency fee arrangements.

VI. CONCLUSION

There is little doubt that the OPA’s NRDA provisions will play a major role in helping natural resources injured by the Spill return to health. The development of NRDA provisions is remarkable because they provide damages to the resources themselves—victims that are otherwise unable to advocate for themselves. However, including natural resource damage provisions in the statute is only the first step in ensuring that natural resources are restored. As the owners and beneficiaries of natural resources, the public must remain involved and vigilant throughout the NRDA process to ensure that the money is being used properly, with particular attention paid to the use of emergency funds, the degree of connection between the injured resources and restoration projects, the disbursement of funds, and legal fees. If proper care is paid, there is no reason that the Deepwater Horizon NRDA cannot reduce the environmental effects of that terrible spill to memories.

165. *Id.*

166. *Id.*

167. *New Mexico v. Gen. Electric Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006); *see also* Gray, *supra* note 160, at 7.

168. *Gen. Electric*, 467 F.3d at 1248.

169. *Id.*