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REMARKS

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ABA NRDA REGULATIONS WORKSHOP

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(with edits by
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INTRODUCTION

Good morning. Carol (Dinkins), thank you for the opportunity to join you today. Having done Superfund work in private practice, I certainly appreciated Dick's comments. (Scientist/laywer waste story).

However, my interest in Natural Resource Damages Assessment has been heightened by the incident that occurred four minutes after midnight on Good Friday, March 24, 1989.

When the Exxon Valdez struck Bligh Reef in Prince William Sound, Alaska, and spilled nearly 11 million gallons of North Slope crude oil into one of the most pristine marine environments in the country, it shook us as a nation from our rather complacent view that we were prepared to respond to catastrophic environmental disasters.

In the weeks that followed, the spill spread throughout the Sound and Gulf of Alaska. Who can forget the images of dead and dying sea otters and sea birds, their coats and feathers soaked in black oil? Who can forget the volunteers struggling to save injured animals or blotting oil from beaches with paper towels?

The spill was the largest in U.S. history and the first in sub-arctic waters. The oil slick spread over 3,000 square miles. It will unquestionably be the largest natural resource damage claim made under our Natural Resource Damages laws.

By the end of summer, cleanup workers counted over 36,000 dead birds and over 1,000 dead otters. Most considered the counts conservative due to the difficulty of recovering dead bodies.

Birds and animals scavenging on oil-contaminated carcasses also suffered: Over 100 bald eagles were among the dead birds counted.

The oil also threatened microscopic marine plants and animals (phytoplankton and zooplankton) that form the base of the food chain.

The people who live and work in the region were devastated. Native Americans who continue to rely on subsistence fishing and hunting risked eating contaminated fish and saw their burial grounds disturbed as cleanup workers swarmed over previously undisturbed beaches.

Alaska's commercial fishing industry was virtually brought to a halt by the spill last year.

Those who rely on tourism were forced to cancel their charters and tours.

And across the country, people felt a sense of helplessness and anger over the devastation of one of America's remaining wilderness areas. President Bush called the incident "an environmental tragedy."

This case will likely be the most renowned and visible natural resource damage case, so I believe it's useful to keep in mind the questions the incident has generated: How do you actually assess the natural resource damages for environmental losses? How do you attempt to compensate for the losses? How do you try to restore the complex ecology of the biological and human communities that are affected?

BRIEF HISTORY OF THE NRDA REGULATIONS

Dick Stewart has just given you an overview of the basic legal framework of the Natural Resource Damage Assessment regulations and some tips on how to approach those cases. I would like to briefly recap the history of the regulations' development and examine how they're working in the context of the Exxon Valdez case.

As you know, the Comprehensive Environmental Response Compensation and Liability Act, CERCLA, was enacted on December 11, 1980.

~~Under~~ CERCLA Section 107 (f) and the Federal Water Pollution Control Act (Clean Water Act) Section 311 (f), provide for ~~authorized~~ federal and state officials to act as ~~are considered~~ trustees of natural resources for injury, loss or damage of and ~~have the power~~ to pursue recovery of damages ~~to those~~ such resources. For example, in the case of the Exxon Valdez, the Departments of Interior (U.S. Fish and Wildlife Service), Agriculture (U.S. Forest Service) and Commerce (National Oceanic and Atmospheric Administration), and the State of Alaska serve as natural resource trustees. ~~I'd like to make an important point here~~. To seek a claim for damages under CERCLA or CWA, the plaintiff must first establish that a release occurred; secondly, that natural resources were damaged, and, finally, that the damages resulted from the release.

The President was charged under CERCLA with promulgation of Natural Resource Damage Assessment regulations governing CERCLA and Clean Water Act (CWA) releases of hazardous substances or

oil. He delegated responsibility for promulgation of these regulations to the Department of the Interior on August 14, 1981. CERCLA set a deadline of December 11, 1982, for promulgation of those regulations.

DOI issued an Advance Notice of Proposed Rulemaking in the Federal Register (46 FR 42237) on January 10, 1983, and a second notice on August 1, 1983 (48 FR 34768).

In December of that year, the State of Montana filed suit against DOI for failure to promulgate the regulations. That suit was voluntarily withdrawn. However, two new cases, one by the State of New Jersey and the New Jersey Department of Environmental Protection, and a second by the New Mexico Health and Environment Department, the State of Louisiana, Public Citizen??, the National Wildlife Federation and the Environmental Defense Fund soon followed. The court ruled on December 12, 1984, in the "State of New Jersey et al. v. Ruckelshaus et al., Cir. No. 84-1668 (D.C.N.J.), that DOI had failed to promulgate the regulations in a timely fashion. Under a consent order entered on February 5, 1985, Interior agreed to publish regulations as expeditiously as possible.

Final regulations for "Type B" procedures--protocols for conducting assessments in individual cases typically involving larger releases and potential damages--were published on August 1, 1986 (FR 51 27674). Final regulations for "Type A" procedures--standard procedures for simplified assessments requiring minimal field observation--were published March 20, 1987 (FR 52 9042).

The Superfund Amendments and Reauthorization Act (SARA) of 1986, passed by Congress and signed by the President on October 17, 1986, required Interior to amend those regulations to conform with changes enacted by SARA. The final rule amending DOI's regulations was published February 22, 1988 (FR 53 5166).

One important change--and one that has affected federal and state trustees' abilities to file natural resource damage claims--is that SARA amended CERCLA to preclude trustees from using Superfund monies to conduct damage assessments. (26 U.S.C. Section 9507(c)).

Shortly after Interior issued the NRDA regulations, 10 states, three environmental groups, a chemical trade association, a manufacturing company and an electric utility petitioned for judicial review of the rules: The petitions were combined into two cases: "Ohio v. United States Department of the Interior" (880 F.2d 432,) involving the Type B regulations, and a companion case, "Colorado v. United States Department of the Interior" (880 F.2d 481), addressing the Type A regulations. The District of Columbia Circuit Court of Appeals issued its opinion on July 14, 1989, remanding portions of the regulations to DOI, while upholding other portions.

The court, most significantly, struck down the "lesser of" rule which limited damages to the cost of restoration of the damaged resources or their lost use value, whichever is less.

Also significantly, the court upheld Interior's "contingent valuation" technique in which broad samples of the population are

surveyed to determine how much they would be willing to pay to have the option to view a natural resource they are not now using or to know that the resource exists, for themselves and for future generations. This technique is gaining wider acceptance in economic circles as a valid method to establish damages for the "nonuse" values of natural resources--where market value is an incomplete or inappropriate measure.

Following the court's decision, Interior announced in an August 10, 1989, press release, it would not challenge the court's ruling. The department has pledged to revise the rules as quickly as possible. I understand Interior hopes to promulgate proposed revisions to the Type B regulations sometime this summer. I am sure Marty Suuberg, the next speaker, will be able to tell you more about that.

I'd like to offer just one more perspective on the history of CERCLA and the NRDA regulations. That involves the statute of limitations. CERCLA initially set a three-year deadline--December 11, 1983, on filing claims. SARA, however, extended the statute of limitations to three years from the date of discovery of damages and their relationship to the release of a hazardous substance, or to three years from the date of the promulgation of the final NRDA regulations, whichever is later. For facilities listed on the National Priorities List, for identified federal facilities and for other vessels of facilities for which CERCLA remedial action is scheduled, the statute of limitations for filing a natural resource damage claim is within three years

after completion of the remedial action. (CERCLA Section 113(g)(1), 42 U.S.C. Section 9613(g)(1)).

One issue not resolved is which date should be considered as the date the Interior regulations were promulgated, since Type B regulations were issued August 1, 1986; Type A regulations on March 20, 1987, final amendments on February 22, 1988, and since portions of the regulations have been remanded to DOI.

EPA is ~~trying to~~ working closely with the Department of Justice and natural resource trustees to ensure the best opportunities to file timely claims.

## EPA AND THE NRDA PROCESS

With that overview of the regulations' history, I'd like to talk a little more about EPA's role in the Natural Resource Damage Assessment process.

The Environmental Protection Agency, as you know, is not officially a natural resource trustee, but the agency is involved in the NRDA process in several ways.

The President has delegated responsibility to EPA with regard to promulgating the duties of natural resource trustees in responding to oil spills and releases of hazardous substances under the National Contingency Plan. This is something we've done since the early 1970s.

A second area of involvement occurs in the Superfund settlement context. Under Section 122 of CERCLA, EPA notifies appropriate natural resource trustees of ongoing negotiations before reaching a settlement agreement with a responsible party.

EPA also is involved in responses to releases of hazardous substances in a number of ways: sometimes as On-Scene Coordinator of emergency response and cleanup and always as a member--along with other federal, state and local agencies--of the National Response Team and Regional Response Teams.

EPA AND THE EXXON VALDEZ OIL SPILL

In the case of the Exxon Valdez oil spill, President Bush designated EPA to coordinate the long-term restoration of Prince William Sound and the Gulf of Alaska. Since EPA's duties in this role are not clearly defined by statute or regulation, EPA has worked with federal and state agencies which are designated as natural resource trustees to develop a role that is meaningful and beneficial to the trustees and to the ultimate goal of restoration of the Sound and the Gulf. I've previously listed the federal and state trustees in the Exxon Valdez case.

I'd like to tell you a little bit about what we've learned as we've worked with federal and state trustees on restoration.

A trustee council in Alaska--with representatives appointed by the trustees--is beginning a second year of damage assessment studies. The process has been a lengthy one--difficult for the trustees to finance and difficult for the trustees to determine which studies should be continued and for how long. The full effect on salmon, for example, will be impossible to determine until the fry hatched last year return from the open ocean to spawn several years from now.

This is not a CERCLA case! Petroleum exclusion

Congress enacted CERCLA to encourage speedy settlements for damages. Yet the process has failed to result in a simple path to an appropriate settlement.

Another factor hindering damage assessment is the need to keep information confidential. Due to the indictment of Exxon on criminal charges by the U.S. Department of Justice on behalf of

the trustees and due to the possibility of other litigation, state and federal agencies have not publicly released the findings of the first year's damage assessment studies. Scientists, environmental groups, citizens--and even those of us in state and federal government--are concerned by the need to keep this information confidential. While we recognize it is imperative to guard the information we have collected to develop a strong case for a claim for damages against Exxon for the natural resources that have been lost, injured or destroyed, we, nonetheless, would prefer to be able to share freely information about the health of the Sound and the Gulf. Public input into the process and free exchange among scientists are vital to the development of an appropriate restoration plan.

On March 26th and 27th of this year--one year after the oil spill--we did hold a restoration symposium in Anchorage to discuss restoration alternatives with the public. We subsequently held open meetings in communities affected by the spill, again to outline various options and to receive public comment.

Technical workshops for experts and peer reviewers, also held this spring, were closed to the public so participants could review damage assessment studies.

The length of the process and the difficulty of involving the public are just two of the issues we have faced in this case. The issue of determining the value of natural resources in an area as remote as Alaska is another concern. Beyond the market value of certain resources such as salmon and herring, we must

establish the nonuse values of many resources, and of the value of the ecosystem as a whole. Interior's "contingent valuation" procedures ~~could possibly~~ should be useful in this regard.

Finally, as with many cases, we face the difficulty of coordinating among so many agencies. The task has been particularly sensitive for us at EPA in the Exxon Valdez incident because ~~we are operating outside of~~ our specific role is not contained in statutes and regulations. However, I am pleased to say that after initial uncertainties on how we should proceed, all of the involved agencies seem to be reaching accord on the important matters before us.

sounds ultra vires

We anticipate that EPA will coordinate the development of the restoration plan during the next few months, while the trustees will be responsible for carrying out actual restoration projects for their specific resources. ~~once we reach a settlement with Exxon.~~ That may not happen. Inappropriate to speculate on it!

Although ~~CERCLA states that~~ natural resource trustees are not required to follow Interior's NRDA regulations, trustees who choose to follow the assessment process have the weight of a "rebuttable presumption" in bringing a claim. ~~(CERCLA Section 107 (f)(2)(C)).~~ That is, their damage assessment is presumed correct, unless the defendant can prove otherwise. ~~We have, therefore, chosen to follow the process closely.~~ Not definitively!

SHELL OIL CASE

~~But~~ What if ~~we had chosen~~ the Gov't chooses not to follow the NRDA regulations? I'd like to look at a case settled recently in which trustees did not follow these regulations.

On April 22 and 23, 1988, Shell Oil spilled at least 400,000 gallons of crude oil from a storage tank at its Martinez Refinery into the San Francisco Bay delta estuary and surrounding wetlands. The spill coated over 150 acres of wetlands and polluted about 50 miles of shoreline. The spill also caused slicks over much of the Carquinez Strait, Suisun Bay and San Pablo Bay and limited fishing and recreation. Hundreds of birds and many mammals died.

Quite a few agencies were involved in the aftermath of the incident: From the federal government, Justice, EPA, Interior, NOAA, the Coast Guard and the Navy. From the State of California, the Attorney General's office, Regional Water Quality Control Board, Fish and Game, State Lands, Parks and Recreation and the Bay Conservation and Development Commission. From local government, the Solano County and Contra Costa County District Attorney's offices, the cities of Benicia and Martinez and the East Bay Regional Park District.

While the agencies all had separate causes of action under a range of federal, state and local authorities, they chose to form a coalition to settle the whole case. At the time, the fate of Interior's regulations was still before the court. The agencies chose to proceed under state regulations to seek damages based on

restoration costs. Under a consent degree lodged in court on November 29, 1989, Shell agreed to pay nearly $20 million ($19,750,000), of which a record of almost $11 million ($10,838,000) is designated for a Natural Resource Damages Trustees Fund. (See U.S. Department of Justice press release, Nov. 29, 1989, "Record Settlement Leveled Against Shell Oil.") While this settlement was based on the Clean Water Act, it establishes a favorable precedent for CERCLA natural resource claims as well.

Not only did the case result in a record settlement based on restoration costs, it also was settled within a little more than a year of the incident. Moreover, during the 45-day comment period following the date the decree was lodged, only four comments were received. One was favorable, and the other three recommended somewhat different ways to spend the money. None challenged the settlement, and the parties made no changes to the decree.

The agencies, moreover, were able to involve the public early in the process, holding public hearings in Martinez and Benicia in September 1988 and distributing fact sheets to hundreds of interested parties. The agencies also conducted special meetings with elected officials and environmental groups.

The process worked well. Very well.

## CONCLUSION

What conclusions can we reach--from this case, from the Exxon Valdez, from the long history of CERCLA and the NRDA regulations?

First, that the issue of natural resource damages is likely to become one of greater importance following the release of hazardous substances. We may expect the number of natural resource damage claims to increase, just as claims for remediation and cleanup in Superfund cases have proliferated over the past decade. To date, although a few claims have been filed, there has not yet been a trial anywhere in the U.S. that has resulted in a natural resource damage claim under the Act. (See "Natural Resource Damage Litigation under CERCLA," by Colorado Attorney General Duane Woodard and Attorney Michael R. Hope, The **Harvard Environmental Law Review**, Volume 14, 1990, Number 1.) That is sure to change.

Secondly, not only does CERCLA provide for "restoration, replacement or acquisition of equivalent natural resources," but the courts have upheld restoration costs as valid components of natural resource damage claims.

Finally, we have a great opportunity to build on the foundations of the NRDA process to make it one that works, not just some of the time and in some cases, but all of the time, in all cases.

The Exxon Valdez incident has reminded us of our responsibility as stewards of our environment. It has underscored

the issues we face in developing a meaningful natural resource damage assessment process. The process can work. And this administration is committed to making it work.

I'd like to close by reminding all of us in the legal profession that the ultimate goal of natural resource damages litigation is restoration. Litigation is one component in the process leading to restoration. We must not allow any part of the process--from the focus of damage assessment studies to release of information about those studies--to be driven unnecessarily by litigation. A strong claim--~~and a settlement that provides money for restoration--are~~ necessary to reach the goal of restoration. The dictionary defines "restitution" as "a legal action serving to cause restoration."

Let our legal actions always serve to cause, not hamper, that goal.

Thank you.

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