

Natural Resource Damage Liability of the U.S. Department of Energy

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Any party, including the United States, causing injury to, destruction of, or loss of natural resources that are within New Mexico, by releases or threatened releases of hazardous substances or by discharges or threatened discharges of oil, is strictly liable to the State, on behalf of its citizens, for the resulting damages. These damages include: (i) the reasonable costs of assessing the injury; (ii) the interim lost-use value of the natural resources from the time of injury to the time of restoration; and (iii) the costs of restoring, replacing or acquiring the equivalent of the injured natural resources.¹ This process is commonly known as natural resource damage assessment and restoration, or NRDAR.

In October 2005, the State of New Mexico contacted the U.S. Department of Energy (DOE) to request initiation of NRDAR activities at Los Alamos National Laboratory (LANL) and Sandia National Laboratories. In early 2006, the State and Pueblo de San Ildefonso partnered as natural resource trustees to assess natural resource injuries resulting from DOE operations at LANL. Although the parties have been in periodic communication with DOE since then, DOE has not provided funding for the LANL NRDAR process, and no assessment work has yet occurred.

Parties involved at the Hanford Nuclear Reservation located in south central Washington State have been attempting to address NRDAR issues for much longer, since the early 1990s. This article will discuss the Hanford NRDAR process, in particular a novel legal theory that has surfaced there recently, and its potential application to DOE sites in New Mexico. The Hanford Nuclear Reservation consists of 586 square miles that the United States formerly used to produce plutonium for nuclear weapons from 1943 until 1988. Hanford is now closed and environmental remediation efforts are underway to clean up the site.

It is important to understand that environmental response, removal and remediation activities are distinct from NRDAR activities. Remediation of hazardous waste can occur under CERCLA, 42 U.S.C. § 9601 *et seq.* (for closed facilities) or under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (for operating facilities). The focus of remediation activities is mitigating unreasonable risks to human health and the environment through implementation of a remedy.

On the other hand, the NRDAR process is designed to restore natural resources to their baseline (or precontamination) condition. If such restoration is not feasible, then the public must be

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¹ See Federal Water Pollution Control Act, commonly known as Clean Water Act, 33 U.S.C. § 1321(f); Oil Pollution Act of 1990, 33 U.S.C. § 2706; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9607(f), 9620; New Mexico Natural Resources Trustee Act NMSA 1978, §§ 75-7-1 to -5 (1993).

compensated through replacing or acquiring the equivalent of the injured natural resources. The focus is on restoring ecosystem functioning so the natural environment can return to providing its many benefits to the public. The federal government, the states and Indian nations and tribes have legally designated natural resource trustees, who are empowered to pursue compensation claims on behalf of their constituent publics.

Past practice was to wait until remediation was complete before commencing assessment of natural resource injuries, on the theory that, until a remedy is implemented, it cannot be determined how much the functioning of natural resources has been impaired. However, this approach was fraught with difficulties. Frequently, important NRDAR data, such as baseline conditions, were destroyed during the implementation of a remedy. In addition, this sequential approach prevented parties from coordinating and harmonizing remediation and restoration activities. For example, if the remedy required soil excavation and removal, and the restoration required construction of a pond in the area from which the soil was removed, it makes both economic and environmental sense to perform the work in concert.

The National Oceanic and Atmospheric Administration pioneered a new methodology, which has gained widespread acceptance, by which the remediation and NRDAR processes take place in tandem. Because NRDAR injuries are measured temporally, the sooner restoration occurs, the less the overall injury. Another keystone of this new process is its cooperative nature. Instead of initiating litigation to assess injuries, which is likely to create a substantial delay in the actual implementation of restoration projects, the potentially responsible party (PRP) and the legally designated natural resource trustees work together to attempt to resolve the NRDAR claims cooperatively. This cooperative approach makes particular sense when the United States is the PRP, since the United States is also by law a natural resources trustee, and thus sits on both sides of the table.

DOE has published policy documents supporting this cooperative, coordinated approach.² Unfortunately, DOE has been slow to implement these policies. In the case of Hanford, the Yakama Nation, the states of Oregon and Washington and the Nez Perce and Umatilla tribes have been trying unsuccessfully for many years to engage DOE in a cooperative NRDAR process. Although a trustee council was formed in 1993 for the purposes of pursuing a cooperative NRDAR injury assessment, DOE has not provided funding for the council to start assessment activities.³

The Yakama Nation, frustrated with the slow pace of progress, filed suit against DOE in 2002 to recover natural resource damages caused by operations at Hanford.⁴ The U.S. Department of Justice has taken the position that the claim for natural resource damage is not yet ripe. In

² See *Integrating Natural Resource Damage Assessment and Environmental Restoration Activities at DOE Facilities* (Oct. 1993), available at <http://homer.ornl.gov/nuclearsafety/nsea/oepa/guidance/cercla/nrda3.pdf>; Memorandum from Alvin L. Alm, Assistant Sec'y for Env'tl. Mgmt., *Policy on Integration of Natural Resource Concerns into Response Actions* (Sept. 8, 1997) (on file with author).

³ Even DOE admitted, as of mid-1997, "The Trustee Council's progress over the past four years has been careful And [sic] deliberate." <http://www.hanford.gov/?page=295&parent=291> (last visited Apr. 23, 2007).

⁴ *Confederated Tribes and Bands of Yakima Nation v. United States*, Case No. 2:02-cv-03105-LRS (E.D. Wash.).

response, the Yakama Nation amended its complaint to add a new cause of action, which raises a matter of first impression in the federal courts. Last year, the Nez Perce and Umatilla tribes and the states of Oregon and Washington intervened in support of this novel legal theory.

This legal theory is based on an interpretation of CERCLA that would provide distinct causes of action both for recovery of natural resource damages and for a declaratory judgment on liability for natural resource injury assessment costs.⁵ The operative language provides, “In any such action described in this subsection [entitled actions for recovery of costs], the court *shall* enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs of damages.” 42 U.S.C. § 9601(g)(2) (emphasis added). As discussed above, response costs are not relevant to NRDAR actions, so the important term is *damages*. CERCLA provides that the term *damages* includes “damages for injury to, destruction of, or loss of natural resources, *including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.*” 42 U.S.C. § 9607(a)(4)(C) (emphasis added).

Thus, the Hanford plaintiffs and plaintiff-intervenors argue that they are entitled to a declaratory judgment on DOE’s liability for the reasonable costs of assessing natural resource injuries at Hanford. As far as the Hanford parties could determine, federal courts have not addressed this particular issue in prior cases. The district court has set a hearing on the issue for April 26, 2007. As of the submission date of this article, this hearing has not yet occurred.

A ruling in favor of the plaintiffs and plaintiff-intervenors has the potential to fundamentally change the way NRDAR cases are handled. The most common reason that natural resource trustees do not pursue NRDAR claims is lack of financial resources. Judicial recognition of this new cause of action would enable trustees to be more proactive in their pursuit of compensation, because they could seek a determination of PRP liability for assessment costs prior to investing their limited resources in natural resource injury assessments and thereby could be assured of ultimate recoupment of these costs.

In an abrupt reversal of prior policy, DOE announced on April 3, 2007, that it would immediately commence a phased NRDAR process at Hanford.⁶ However, DOE continues to insist that the NRDAR process does not require any additional funding beyond the amounts already earmarked for the remediation process.⁷ Thus, the Yakima Nation has responded with cautious optimism, noting, “the test will be what DOE actually does.”⁸

Despite this policy reversal, the parties to the lawsuit have not reached agreement regarding the existence of a new cause of action for declaratory judgment on PRP liability for natural resource

⁵ Compare 42 U.S.C. § 9601(g)(1) (providing action for natural resource damages) with 42 U.S.C. § 9601(g)(2) (providing actions for recovery of costs).

⁶ Press Release, DOE, *DOE To Conduct Natural Resource Damage Assessment Process at Hanford* (Apr. 3, 2007), available at <http://www.hanford.gov/communication/reporter/attachments/RL/2007/RL-07-0006.pdf>.

⁷ *Id.* (“DOE expects to carry out both the cleanup and the [NRDAR] process within its existing budget request.”).

⁸ Annette Cary, *DOE Agrees To Assess Plant, Animal Damage*, *Tri-City Herald*, Apr. 4, 2007 (quoting Philip Olney, Chairman of Yakama Nation’s Radioactive Hazardous Waste Committee).

injury assessment costs. So, for the time being, the lawsuit will proceed. In this author's personal opinion, it would be a tremendous victory for the public, the environment and future generations if this new cause of action were recognized.

This outcome is particularly appropriate when the United States is the PRP. At DOE facilities, DOE is the PRP, the lead federal agency in charge of remediation and a natural resources trustee. Thus, DOE, unlike private polluters, exercises regulatory oversight and enforcement authority over its own remediation efforts. By controlling the timing of remediation, and then delaying NRDAR activities until after completion of the remedy, DOE can shift its NRDAR liability onto future federal administrations and generations of taxpayers. This ability to manipulate liability, whether or not it is exercised, is inconsistent with the express intent of Congress to make the federal government liable under CERCLA to the same extent as private parties.⁹

New Mexico can learn valuable lessons from the parties' experiences at Hanford, as we embark on the daunting task of assessing natural resource injuries from DOE's historic, current and future operations in New Mexico. The cooperative NRDAR approach has many benefits to offer, but DOE has been slow to realize these benefits. Depending on the outcome of the upcoming Hanford hearing, we may have a new tool in our toolkit to assist us in bringing DOE to the table to assure full, fair and timely compensation for the public.

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⁹ See 42 U.S.C. § 9620(a)(1).