Natural resource damage claims: Strategies for responding to increased federal and state enforcement

By Brian D. Israel

Enforcement data from the federal government and several states suggest that natural resource damage (NRD) claims are increasing. NRD claims—that is, claims by government agencies to restore damaged natural resources and recover monetary compensation for those damages prior to restoration—are difficult to track. This is so because there are numerous trustee agencies within the federal government, most states have their own NRD programs and many settlements require restoration work in lieu of a cash payment.

The U.S. Department of Justice (DOJ) maintains a database called Case Management System (CMS). While far from perfect—CMS does not include federal administrative settlements, restoration done as part of global site remediation or state matters where DOJ is not involved—CMS may be the best public source for tracking NRD trends. Data from a recent Freedom of Information Act request shows that the value of NRD claims was more than $87.5 million in 2005. With the exception of 2001—which included the resolution of a number of unusually large NRD matters—2005 surpasses prior years. 2005 also saw the largest number of individual matters (22) in the years requested.

A recent 50-state survey also suggests substantial NRD activity. Texas, for instance, reported nearly $15 million in NRD settlements in 2005, accounting for nearly half of its total NRD recovery since 1992. South Carolina and Georgia settled in 2006 a large NRD matter for nearly $12 million. New York recently announced a $12 million settlement for restoration of Lake Ontario. New Jersey continues to pursue its Lower Passaic River assessment and groundwater NRD initiative. Several other states report new NRD initiatives. (For the complete 50-state survey, see www.arnoldporter.com/practice.cfm?practice_id=122.)

NRD strategies—to litigate or cooperate?

As NRD enforcement has evolved, government trustees and potentially responsible parties (PRPs) have increasingly sought to work cooperatively to assess natural resource damages. The main feature of this cooperative approach is that the parties work together to assess NRDs while the PRP finances some or all of the cost.

The cooperative approach, however, is not always best for the company. Unlike other environmental claims, the government bears a significant burden of proof to show that the injury resulted from a release or discharge by the defendant. Given the financial stakes in large NRD matters and the evidentiary burdens on the government, the PRP may perceive no rational option other than to contest the claim.

Litigation also allows the PRP to attack aggressively the government's NRD assessment. A common observation by PRPs is that damage assessments are profoundly biased including that: (i) observed injuries are too quickly attributed to the contaminants associated with the PRP, as opposed to baseline conditions or other potential causes; (ii) insufficient credit may be given for recovering resources; (iii) observed losses may be extrapolated to larger areas or populations without sufficient basis; and (iv) conservative assumptions—which may be appropriate in a risk assessment context—may not be appropriate in an NRD assessment context.

Another advantage of litigation (especially for companies with multiple NRD sites) is that it allows the PRP to develop the decisional law. NRD law is relatively immature as compared with other areas of environmental law. There are few interpretations of NRD statutory defenses and other issues, including the retroactivity of NRD claims and the evidentiary burdens on the government.

Finally, litigation may significantly postpone the NRD liability, especially given that NRD litigation is notoriously slow. In some cases, a litigation approach may result in a reduction of the claim. Absent a willing PRP to finance the assessment, the trustees may lack resources to do so. Further, because of the restorative ability of many ecosystems, a delay in the assessment may result in a decrease in the injury. That is, the damage may disappear by the time the government is able to assess it.

The cooperation advantage

Litigation, of course, is expensive, time-consuming, risky and inconvenient. Furthermore, for many companies, litigation is a distraction from solving the problem at hand, namely injured natural resources. If done correctly, cooperation with the government is not an abdication of one's interests.

First, the cooperative approach affords the PRP the opportunity to affect the damage assessment in important and legitimate ways, including ensuring the evaluation of baseline conditions. As noted above, one advantage to litigation is the opportunity to wage a full-fledged attack on the perceived bias found in NRD assessments. To the extent the parties are working together, the cooperative approach should help correct that bias.

Another advantage of the cooperative approach is the enhanced ability of the PRP to propose proactive restoration measures. Ideally, restoration projects can be coordinated with site remediation. In some cases, proposed restoration activities will be interim measures or pilot studies. Proactive measures may even result in full restoration. Regardless, sensible early restoration projects present a tremendous advantage to both parties. For the trustee, the resource is restored more quickly. For the PRP, its ultimate financial exposure is lowered since once the resource is restored, the calculation of interim lost use ceases.

Finally, a cooperative approach allows for active sharing of information. While such interaction entails risk, many PRPs would rather remain informed of the current data. Information sharing also allows the PRP to understand the government's thinking as the assessment progresses, and allows the company to better evaluate its liability.

Brian Israel *is a partner in the Washington office of Arnold & Porter LLP.*

Published in Trends, Volume 38, Number 1, September/October 2006, a publication of the American Bar Association, Section of Environment, Energy, and Resources.

The mechanics of cooperation

While a formal cooperation agreement is not necessary, both PRPs and the government usually prefer such a document. A cooperative NRD agreement should include the following elements:

Statement of principles: A statement of principles includes specific declarations regarding the expectations and methods for the parties to work together in good faith to assess potential injuries to natural resources. While such statements may not be legally enforceable, they establish the framework of cooperation. If the PRP later feels that the trustee is not responsive to its concerns, these statements are often useful in meetings between the parties' respective management. Furthermore, if necessary, the PRP can cite to these provisions if it later decides to terminate the cooperative process.

Funding arrangements: A major premise of the cooperative arrangement is the payment of assessment costs by the PRP. The mechanics of these payments are variable and may include payment in advance, the establishment of an escrow account or reimbursement. In some agreements, the PRP retains the right not to fund any study with which it disagrees. Such a provision may provide an important "off ramp" for the PRP that is less drastic than termination of the agreement. Finally, there should be a dispute mechanism in case the PRP believes that costs were incurred inappropriately.

Tolling/standstill provisions: The government will often require an agreement to toll the statute of limitations during the pendency of the cooperative assessment agreement. In return, the PRP may request an agreement that the trustee will not file a claim.

Termination: Both parties will want the right to terminate the cooperative process at any time. Such provisions are customary. Ironically, the right to terminate is extremely helpful in building mutual trust. Since each party knows that it may terminate at any time, it is more likely to take risks toward consensus building. Similarly, neither party will be cavalier in responding to the concerns of the other for fear that the other could terminate the agreement.

Information sharing: Cooperative agreements usually provide that all data and nonprivileged information will be shared with each party. In addition, some agreements provide that data collected independently will be shared. The parties may commit to notify each other if they intend to commence any study outside the scope of the agreement.

Reservation of rights: The government will seek to reserve its enforcement rights as well as its ultimate decision-making authority. The PRP will seek to reserve all of its defenses. These reservation provisions are customary. The PRP may also seek to preserve its ability to contest the conclusions of the NRD assessment, notwithstanding its agreement to cooperate.

Avoiding cooperation pitfalls

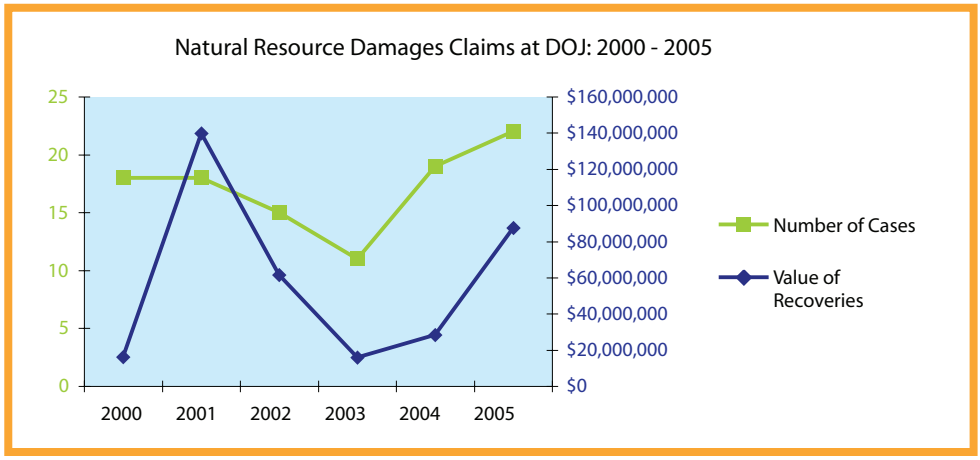
In addition to negotiating a protective agreement, there are a number of steps that the PRP should consider to avoid potential pitfalls of cooperation.

First, the PRP should actively ensure that the administrative record is complete. When an NRD study does not include items that may later become relevant to the PRP's defense, the PRP should memorialize its disagreement so its involvement is not later construed as acquiescence.

Second, to the extent that the government is unwilling to conduct studies that the PRP believes are necessary, the PRP should proceed independently. This problem is most commonly, although not exclusively, present with regard to baseline studies. The trustee is generally focused on understanding the present injury. The PRP must ensure that any impact caused by forces other than its alleged releases is also documented.

Third, the PRP should retain independent experts. The role of these experts is to review assessment plans put forward by the government, develop alternative assessments where appropriate, and continually explore opportunities for proactive restoration. It is a mistake to view the cooperative process as simply a funding mechanism for government scientists.

Finally, the PRP should regularly evaluate its strategy. The cooperative approach makes sense only as long as it is working. A change in strategy may be in order based on the relationship with the government, the results of the assessment studies or developments in the law.



Published in Trends, Volume 38, Number 1, September/October 2006, a publication of the American Bar Association, Section of Environment, Energy, and Resources.