







# Natural Resource Damages Under CERCLA

**BACKGROUND:**

Under section 107(a) and 120(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended, Federal agencies, including DOE, are liable for damages for injury to, destruction of, or loss of natural resources, including the cost of assessing such damage. CERCLA and the National Contingency Plan (NCP) establish DOE as both a CERCLA lead response agency on Departmental facilities and a trustee for natural resources under its jurisdiction. As such, the Department must respond to releases of hazardous substances from DOE's facilities, and is liable for the restoration of natural resources that are lost or injured as a result of such releases or from the response actions.

**STATUTES:**

CERCLA, as amended by the Superfund Amendments and Reauthorization Act (SARA), Sections 101(14), 107 and 120; Resource Conservation and Recovery Act (RCRA), Sections 3004(t)(3), (u), (v) and 3008(h).

**REGULATIONS:**

43 CFR 11, "Natural Resource Damage Assessment;" 40 CFR 300, "National Oil and Hazardous Substances Pollution Contingency Plan;" 55 FR 30798-30884 (July 27, 1990), "Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities; Proposed Rule."

**REFERENCES:**

1. DOE Order 5400.4, *Comprehensive Environmental Response, Compensation and Liability Act Requirements* (10-6-89).
2. Executive Order 12580, *Superfund Implementation*, January 23, 1987.
3. *Natural Resource Trusteeship and Ecological Evaluation for Environmental Restoration at DOE Facilities*, (DOE/EH-0192 June 1991).
4. CERCLA Information Brief, "Natural Resource Damage Assessment: Preassessment Screening and Integration with CERCLA Ecological Evaluations," (EH-231-008/0991, October 1991).
5. *Ohio vs. U.S. Department of Interior* 880 F.2d 432 (D.C. Cir. 1989).

## What are natural resource damages?

CERCLA Section 101 (16) defines natural resources as "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources...." An *injury* to a natural resource is a measurable adverse change in the chemical or physical quality or viability of that resource. *Damages* are assessed on the basis of loss or reduction in quantity and quality of natural resource services. Resource *services* are physical and biological functions performed by the natural resources, including human uses of those services and services to other resources and ecosystems. Examples of resource services include habitat, food, recreation, aesthetic value, drinking water, flood control, and waste assimilation. Damages represent the dollar value or the economic loss resulting from the injury. Damages assessed are *residual* damages (i.e., damages that are not or cannot be addressed by the remedial or corrective action or result from such actions).

## What is a Natural Resource Damage Assessment (NRDA)?

A NRDA is a process whereby a natural resource trustee may pursue compensation on behalf of the public for injury to natural resources resulting from releases of hazardous substances. This process is defined in the

NRDA regulations promulgated by the U.S. Department of Interior (DOI), 43 CFR 11.

The NRDA process applicable to DOE encompasses four phases: (1) the preassessment screen, (2) the assessment plan, (3) the assessment, and (4) the post-assessment.

## Is a NRDA required at my facility?

Not necessarily. A NRDA is primarily used to enforce a claim against a responsible party. DOE's focus should remain on restoring the environment while avoiding unnecessary damage claims. This result may be aided by taking early action to identify, assess, and protect against reductions in the quantity or quality of natural resource services.

DOE's environmental restoration project managers should use the preassessment screen as a threshold to determine if a covered release has occurred and whether the effects justify completion of a NRDA. The screen consists of a general review of existing data using criteria provided in Section 11.25 of 43 CFR 11(e).

The assessment plan is intended to ensure that a NRDA is performed in a planned, systematic, and cost-

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efficient manner. The assessment plan documents what scientific and economic methodologies are to be used and what data are to be collected. The preassessment screen and assessment plan activities can be coordinated with ongoing investigations such as a CERCLA Remedial Investigation/Feasibility Study (RI/FS) or the RCRA Facility Investigation/Corrective Measures Study (RFI/CMS).

## Who participates in the NRDA process?

Only designated Federal trustees, authorized representatives of an affected State, or an affected Indian tribe can recover natural resource damages. Natural resource trusteeship is necessarily a function of facility location or land ownership; but may be determined by resource management responsibility. As a result, multiple trustees could exist for the various natural resources located on (or affected by) releases from a Federal facility.

The U.S. Environmental Protection Agency (EPA) is not a Federal natural resource trustee and may not pursue damage claims for injuries to natural resources under CERCLA Section 107. However, the EPA may assist DOE and other natural resource trustees by identifying certain actions necessary to protect natural resources from any ongoing or potential threats.

## What is DOE's role?

The DOE has dual roles at Departmental facilities. The NCP and Executive Order 12580 named the Secretary of Energy as the Federal natural resource trustee for natural resources located on, over, or under land administered by DOE. DOE is also the CERCLA lead response agency when there is a release or threat of release of a hazardous substance from a Departmental facility.

Although DOE is a designated trustee, the Department may share trustee responsibilities with other Federal trustees, for example, the DOI, as well as the particular State and affected Indian tribes. DOE must notify and coordinate its trustee activities with other "co-trustees" when there is a release or threat of a release of a hazardous substance, pollutant, or contaminant from a DOE site.

## Why should DOE be concerned about NRDA?

Trustees, including DOE, are provided some discretion as to the method and timing of NRDA activities. However, early planning for NRDA activity can provide a number of important advantages.

As a CERCLA lead response agency, DOE is required to assess the ecological threat posed by an actual or possible release of a hazardous substance. The RI/FS process implemented by DOE at its facilities specifically requires an ecological assessment during the baseline and alternatives risk assessment. This assessment can be a constructive link to the natural resource trustee process:

the data generated for a CERCLA RI/FS is also useful for injury determination and quantification of resource service reductions.

Early natural resource surveys, inclusion of resources as potential receptors in site conceptual modelling, and the performance of ecological risk assessments can provide a greater understanding of some potential natural resource injuries (e.g., for biological species and their habitats). Information about potential injuries can therefore be used to plan mitigation measures for the remedial phase. When properly implemented, such measures can reduce or eliminate the potential for unplanned cost growth due to residual damages from the release or the response actions.

Timely considerations of NRDA issues in the National Environmental Policy Act (NEPA) process can also be of strategic importance because CERCLA Section 107 excludes liability for damages that were a result of a discharge or release "when the damages are specifically identified as an irreversible and irretrievable commitment of a natural resource in an environmental impact statement or other comparable environmental analysis." However, special conditions imposed by an applicable license or permit that authorized the commitment of resources may be factored into a decision to exclude the release from liability for damages (other conditions may apply with respect to exclusion of liability for damages to the resources of an Indian tribe).

## How can I get more help?

DOE's Office of Environmental Guidance (EH-23) is ready to offer assistance. EH-23 has developed several guidance documents (see References) and a training workshop, covering DOE's basic requirements and responsibilities, and the integration of the RI/FS ecological risk assessment with NRDA scoping activity. A DOE Natural Resource Damage Assessment Steering Committee meets regularly at Headquarters, with conference call link-up to field organizations. EH-23 can also provide on site assistance ranging from seminars to guidance implementation projects which involve the development of scoping strategies and integrated RI/FS-NRDA work plans.

**Questions of policy or questions requiring policy decisions will not be dealt with in EH-231 Information Briefs unless that policy has already been established through appropriate documentation.**

**Please refer any questions concerning the subject material covered in this Information Brief to John Basciutto, RCRA/CERCLA Division, EH-231, (202) 586-7917.**



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