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# RESTORING NATURAL RESOURCES AFTER AN OIL SPILL

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## 1. Introduction

On April 20, 2010, an explosion and fire erupted on an offshore drilling rig in the Gulf of Mexico called the Deepwater Horizon, causing the rig to sink to the ocean floor. Eleven members of the Deepwater crew lost their lives. In addition, the riser connecting the Deepwater rig to the well head ruptured, causing large amounts of oil to flow into the Gulf of Mexico. When an oil spill disaster--- such as the one originating on the Deepwater Horizon---occurs, the nation's natural resources are often affected. These natural resources can include endangered wildlife, fish, and pristine habitats. Many of the nation's environmental laws, including the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701 *et seq.*, embrace the "polluter pays" principle and thus require that polluters pay for, among other things, damages to natural resources. This paper provides some general information about OPA and natural resources damages (NRD) in the context of oil spills.

## 2. Background

*The Oil Pollution Act.* OPA, passed in 1990 in the wake of the Exxon-Valdez oil spill, imposes liability on certain parties, called "responsible parties" (RPs) under the statute, for removal costs and damages related to discharges or substantial threats of discharge of oil.<sup>1</sup> Removal costs are "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident."<sup>2</sup> Damages include various categories of economic damages (for example, damage to real or personal property, the net cost of increased public services, etc.) and NRD, as well as the costs of assessing those damages.<sup>3</sup>

NRD is specifically defined under OPA as "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage[.]"<sup>4</sup>

Natural resources are defined under OPA 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 (including the resources of the exclusive economic zone), any state or local government or Indian tribe, or any foreign government."<sup>5</sup> The legal process used to assess NRD and determine the appropriate type and amount of restoration is called a Natural Resource Damage Assessment or a "NRDA."<sup>6</sup>

LIKE OTHER ENVIRONMENTAL STATUTES, THE OIL POLLUTION ACT PROVIDES FOR RECOVERY OF NATURAL RESOURCE DAMAGES OR "NRD"

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<sup>1</sup> 33 U.S.C. 2702(a).

<sup>2</sup> 33 U.S.C. 2701(31).

<sup>3</sup> 33 U.S.C. 2701(5), 2702(b)(2).

<sup>4</sup> 33 U.S.C. 2702(b)(2)(A).

<sup>5</sup> 33 U.S.C. 2701(20).

<sup>6</sup> 15 C.F.R. 990.12.

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RP liability for removal costs and damages may be limited or unlimited, depending on a number of factors. For example, for offshore facilities other than deepwater ports, liability for *removal costs* is unlimited, whereas liability for *damages* is limited to \$75 million.<sup>7</sup> This limitation on liability, however, does not apply (making damages unlimited) if any one of the following circumstances are present: the incident was caused by the RPs' gross negligence, willful misconduct, or a violation of an applicable federal safety, construction, or operating regulation; or an RP fails to report an incident as required by law, fails to cooperate as requested in connection with removal activities, or fails to follow an order issued under Section 311(c) or (e) of the Clean Water Act<sup>8</sup> or the Intervention on the High Seas Act.<sup>9</sup>

*The Oil Spill Liability Trust Fund.* While the primary sources of funding for removal costs and damages are the RPs, Congress has also established a separate fund in the U.S. Treasury, called the Oil Spill Liability Trust Fund (OSLTF or Fund), that may be used to pay removal costs and damages, including NRD, resulting from oil spills or substantial threats of oil spills under certain statutorily-prescribed circumstances.<sup>10</sup> The Fund is financed through, among other things, a tax on oil (\$0.08 per barrel), fines, penalties, cost recovery from RPs, and interest accrued on balances in the fund.<sup>11</sup> The OSLTF has a per-incident limitation of \$1 billion, of which no more than \$500 million may be expended on NRD.<sup>12</sup> There are currently proposals pending in Congress to increase the per-incident limits on the OSLTF.

*The Deepwater Horizon Oil Spill Trust.* On June 16, 2010, BP voluntarily agreed to fund a \$20 billion independent trust fund to pay costs and damages associated with the Deepwater Horizon disaster. The trust fund is structured so that if funds are short at any point, claims of individuals and businesses will be paid first, but the funds may also be used for NRD and certain other costs. The fund does not represent a ceiling on BP's liability.

### **3. Protecting Natural Resources in the Oil Spill Response**

When an oil spill occurs, spill responders must quickly organize to contain and clean up the spill. Pre-defined roles established by law and regulation and the use of the Incident Command System/Unified Command ensure that involved agencies and companies rapidly focus on containing and cleaning up the spill. Oil spill responses can involve a large number of organizations due to the potential for widespread and diverse impacts. Government agencies at several levels may have jurisdiction over different aspects of a spill response.

To ensure effective coordination, lead agencies have been designated within the National Response System to coordinate or direct spill response efforts. At the federal level, a Federal On-Scene

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<sup>7</sup> 33 U.S.C. 2704(a)(3). See also id. 2704(a)(1)-(2) (limiting liability of vessels under OPA); id. 2704(a)(4) (limiting liability for onshore facilities and deepwater ports under OPA).

<sup>8</sup> 33 U.S.C. §§ 1321(c), (e)

<sup>9</sup> 33 U.S.C. 2704(c).

<sup>10</sup> 26 U.S.C. 9509(c)(1).

<sup>11</sup> 26 U.S.C. 9509(b).

<sup>12</sup> 26 U.S.C. 9509(c)(2)(A)(i).

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Coordinator (FOOSC), generally provided either by the United States Coast Guard or the Environmental Protection Agency,<sup>13</sup> is the lead federal official for spill response. The FOOSC's responsibilities include coordinating all containment, clean up, and disposal efforts as well as managing resources during an incident, including federal, state, local, and RP efforts. These efforts may include activities to protect natural resources from spill encroachment as well as the physical removal of the oil following encroachment. For example, removal activities may include:

- Identifying natural resources at risk;
- Evaluating measures to protect natural resources at risk;
- Undertaking projects to prevent harm to natural resources, such as moving shorebird or turtle nests to areas not threatened by oiling;
- Using dispersal chemicals to minimize oiling of shoreline areas; and
- Removing the oil from beaches, wetlands, and the surface of the water column.

As explained above, RPs generally are responsible for the costs associated with removal activities. The costs may be paid initially by the RP or by the OSLTF (subject to certain limitations). When the OSLTF initially pays the removal costs, it generally will seek reimbursement from the RPs.

#### **4. Natural Resource Damage Assessment and Restoration**

Whereas removal activities are undertaken to prevent, minimize, or mitigate oil pollution,<sup>14</sup> a NRDA is the process that natural resource trustees use to (a) assess natural resource injuries and lost services caused by an oil spill, (b) determine the appropriate type and amount of restoration needed to compensate the public for natural resource injuries due to an oil spill, and (c) ensure that RPs implement or fund the appropriate restoration activities to compensate the public.

The natural resource trustees are the federal and state agencies designated by the President or Governor to serve as public stewards for natural resources, and, when resources under an Indian tribe's jurisdiction are injured, the designated representatives of the tribe.<sup>15</sup> Trustees are authorized to assess, protect, conserve, and restore natural resources impacted or threatened by an oil spill on behalf of the public. Under OPA, the two main Federal Trustee agencies are the Department of the Interior and the Department of Commerce (through the National Oceanic and Atmospheric Administration (NOAA)).<sup>16</sup> Both of these agencies have their own programs to oversee and manage natural resource damage issues. The Department of the Interior has the Natural Resource Damage Assessment and Restoration Program (NRDAR or the Restoration Program) and NOAA has the Damage Assessment, Remediation, and Restoration Program (DARRP).<sup>17</sup> Both programs get a small amount of annual appropriations to operate basic administrative and assessment activities.

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<sup>13</sup> 40 C.F.R. 300.120(a)(2).

<sup>14</sup> 33 U.S.C. 2701(31).

<sup>15</sup> 33 U.S.C. 2706(b), 2706(c).

<sup>16</sup> Other possible Federal Trustees in the OPA context include the Departments of Agriculture, Defense, and Energy. 40 C.F.R. 300.600.

<sup>17</sup> See <http://www.darrp.noaa.gov/about/index.html> and <http://restoration.doi.gov>.

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NRD assessments under OPA are guided by regulations issued by NOAA. The regulations generally describe three main phases of a NRDA:

*Preassessment:* In the first phase, natural resource trustees determine whether injury to natural resources has occurred or may occur and is likely to be significant enough to justify performing a full assessment. Their work includes collecting time-sensitive data, reviewing scientific literature about the oil and its impact on coastal resources, and determining the extent and severity of injury.<sup>18</sup>

**THE THREE PHASES OF A NRDA:**

- **PREASSESSMENT**
- **INJURY ASSESSMENT AND RESTORATION PLANNING**
- **RESTORATION**

*Injury Assessment and Restoration Planning:* During this phase, the trustees must assess the nature and amount of injuries and develop a restoration plan. Consistent with OPA, the trustees' goals are to return the environment to the conditions that would have existed if the oil spill had not occurred (known as "baseline conditions") and to compensate the public for the diminished value of the injured resources from the time of the injury until the baseline has been restored. Scientific and economic studies are conducted to assess and quantify the injuries and the loss of services. A restoration plan is developed to identify restoration projects.<sup>19</sup> OPA requires that the public be given at least one opportunity to comment on proposed restoration plans.<sup>20</sup> In addition, the NRDA regulations encourage allowing RPs to participate in the assessment and restoration planning (usually while providing funding for the trustees), although the trustees always retain final authority.<sup>21</sup>

*Restoration:* During this phase, the trustees work with the public and RPs to implement, and monitor restoration projects. The RPs pay for assessment and restoration costs. Examples of restoration include replanting wetlands, improving fishing access sites, and restoring river banks.<sup>22</sup>

The length of the NRDA process depends on a number of factors, including the size and scope of the oil spill. The NRDA process may begin during removal activities, but the full scope of the injury cannot be determined until the removal is complete. In some cases, it may take several years from start to finish. For example, the final restoration plan for the 1991 Tenyo Maru oil spill was not finalized until April 2000. While prior to the enactment of OPA, the Exxon Valdez natural resource restoration plan was not finalized until six years after the spill and is still being implemented today. Not all cases take as long. The 1998 Tesoro oil spill was settled in October 2001, and one of its restoration projects was completed in that same year.<sup>23</sup>

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<sup>18</sup> 15 C.F.R. 990.41-990.45.

<sup>19</sup> 15 C.F.R. 990.50-990.56.

<sup>20</sup> 33 U.S.C. 2706(c)(5).

<sup>21</sup> 15 C.F.R. 990.44.

<sup>22</sup> 15 C.F.R. 990.60-990.66.

<sup>23</sup> See Exxon Valdez Oil Spill Restoration Plan, November 1994 (available at [www.evostc.state.ak.us/pdf/restoration/restorationplan.pdf](http://www.evostc.state.ak.us/pdf/restoration/restorationplan.pdf)).

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As explained above, RPs generally are responsible for damages, including NRD, subject to certain statutory limitations that may or may not be applicable in any given circumstance. For those costs that RPs do not pay, the OSLTF is available (subject to certain limitations). Where appropriate, the OSLTF will seek reimbursement from the RPs for damages paid from the Fund. For NRD associated with the Deepwater Horizon disaster, funds in the \$20 billion Oil Spill trust fund may also be available.

## **5. Emergency Restoration**

The OPA regulations also authorize the trustees to undertake emergency restoration projects, where appropriate.<sup>24</sup> Emergency restoration includes actions that are taken by the trustees prior to the completion of the damage assessment and restoration planning process to prevent or reduce continuing natural resource injuries and/or avoid a potential irreversible loss of natural resources.

## **6. Conclusion**

The Deepwater Horizon oil spill is one of the largest oil spills our nation has ever experienced and is expected to present many new challenges. Nonetheless, federal and state entities with natural resource trust responsibilities have already initiated the NRDA process. To guide this process through the preliminary stages, the trustees have formed a Trustee Council to facilitate cooperation and coordination among the participating state and federal agencies. The Council includes representatives from Texas, Louisiana, Mississippi, Alabama, Florida, the Department of Commerce, the Department of the Interior, and the Department of Defense. The effort to protect and restore the nation's vital natural resources is well underway.

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<sup>24</sup> 15 C.F.R. 990.26.