A. Introduction

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to facilitate the U.S. Environmental Protection Agency’s cleanup of contaminated sites (http://www.epa.gov/superfund/about.htm). CERCLA also empowered federal natural resource trustees, such as the National Oceanic and Atmospheric Administration and the Department of Interior, state natural resource trustees, and Indian tribes to collect natural resource damages (NRDs) from potentially responsible parties (PRPs). Many states have passed legislation analogous to CERCLA, and over thirty states have statutes that allow for the recovery of NRDs.

While CERCLA remediation and litigation continues to be complex and time-consuming with some remaining cutting-edge issues, the program has matured significantly since CERCLA’s enactment in 1980. Indeed, the relative maturity of CERCLA’s remediation scheme has given way to the less understood and less frequently used NRD scheme. As defined by one trustee, NRDs are “the dollar value of the restoration that is necessary to restore the injured resource and to compensate the citizens . . . for the injury to natural resources as a result of a discharge” (http://www.nj.gov/dep/nrr/about/defs.htm). In contrast to CERCLA’s and state statutes’ focus on “remediation” of hazardous substances to protect human health and the environment, NRD provisions target “restoration” of the environment to baseline conditions and compensation of the citizenry for the lost use of injured natural resources.

B. Overview of NRDs

CERCLA imposes liability on PRPs 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). However, NRD liability under CERCLA excludes instances where the release and damages occurred wholly before December 11, 1980, or when the damage is specifically identified as “irreversible and irretrievable” in an environmental impact statement, so long as the PRP complied with all applicable permits at issue. 42 U.S.C. § 9607(f)(1).

Trustees assess NRDs by comparing the impacted natural resource to its baseline condition, which is the condition the resource would have been in “but for” the release of the hazardous substance. Federal NRD regulations contemplate calculation of baseline through a review of reference sites (non-impact areas) and historical data for the site (pre-impact data). See 43 C.F.R. § 11.72. The evaluation of baseline is critical; if baseline is incorrectly calculated, the measure of NRDs will suffer the same fate. In short, NRDs represent the cost necessary to restore the injured natural resource to baseline conditions (which trustees generally consider to be pre-discharge or background conditions), not pristine conditions (although some trustees seek this higher standard).

Typically, trustees pursue three types of NRDs: (1) primary restoration damages: the cost to return the natural resource to its baseline condition (or as close to baseline as realistically possible); (2) compensatory restoration damages: compensation for the value of
natural resource services that were lost or impaired from the onset of the environmental impacts until the return of the natural resource to its baseline condition; and (3) assessment costs: the cost of assessing NRDs.

Primary restoration damages often involve additional remedial efforts at a site to enhance a cleanup beyond risk-based standards in an effort to achieve baseline. During remedy selection, companies should consider the magnitude of any residual NRD claim; if additional remediation can cost-effectively reduce or eliminate NRD claims, it may be worthwhile to implement a more aggressive remedy at the site. Alternatively, and especially if on-site primary restoration cannot practically be performed, companies may seek to restore or enhance natural resources at other locations. Such restoration projects usually generate NRD credits (sometimes with a multiplier), which companies can then use to settle their NRD liability with the trustees. In short, if on-site primary restoration is either technically impracticable or cost-prohibitive, companies should seek to identify restoration projects of interest to the trustees.

Assessing compensatory restoration damages involves identifying and quantifying the human use services, ecological services, and nonuse values that were lost or impaired between the onset of environmental impacts and the return of the natural resource to its baseline condition. Human and ecological services are the functions that a resource provides to humans and ecology (e.g., drinking water or wetland habitat for wildlife). Nonuse values are the benefits a resource offers irrespective of the functions that the resource provides. For example, “existence values” are often associated with unique resources: people benefit merely from knowing that the Grand Canyon exists even if they never visit or enjoy its landscape.

Where lost natural resource services are not easily quantified, trustees often utilize more subjective valuation methods, such as contingent valuation surveys. Contingent valuation includes “all techniques that set up hypothetical markets to directly elicit an individual’s economic valuation of a natural resource.” 43 C.F.R. § 11.83(c)(2)(vii). Although these techniques are recognized in the Department of Interior natural resource damage assessment (NRDA) regulations, contingent valuation surveys are inherently unreliable and very controversial. In particular, contingent valuation techniques often cannot be externally validated; there is generally no way to confirm the accuracy of the survey results.

Importantly, for both primary and compensatory restoration damages, a NRDA must be performed to determine the natural resource injuries and lost services. More often than not, trustees seek to have PRPs participate in a cooperative NRDA, sometimes on a parallel track from the remedial investigation for the site. The goal of a cooperative NRDA is to limit assessment costs by collecting NRD data at the same time as the remedial investigation, and to achieve a consensus between trustees and PRPs as to the data necessary for the NRDA, the nature and extent of natural resource injuries, and the type of restoration projects that may be appropriate to compensate for those injuries. While a cooperative NRDA provides PRPs with input and insight into the NRDA and presents an opportunity for early settlement, the trustees usually retain control over the scope of the assessment. For the trustees, the biggest advantage of a cooperative NRDA is that PRPs fund the assessment—costs the trustees are often unable to commit upfront. Whether a cooperative NRDA is likely to succeed at a particular site is dependent on the specific facts and circumstances. Ultimately, any initiative that makes the NRDA process less adversarial and more consensus driven may be worth exploring, especially if the trustees will agree to a limited assessment. However, in instances where the trustees demand complete control and an unlimited scope, a “cooperative” NRDA may not make sense for the PRPs.

C. Scope of NRD Claims—Trusteeship

Trustees may bring NRD claims to restore any resource managed by, belonging to, or held in trust by the United States, a state, or an Indian tribe, including land, air, surface water, wildlife, fish, groundwater, biota, and drinking water. See 43 C.F.R. § 11.14(z). Importantly, trustees can only assert NRD claims for resources over which they exercise “trusteeship.” In
some instances, trusteeship over a particular natural resource may be shared among the trustees. For example, the federal trustees may have an interest in surface water pertaining to certain aquatic life (e.g., migratory fish) and navigation; the state trustees may have an interest in native fish and recreational aspects; and the tribal trustees may have an interest in cultural aspects. Courts have held that a trustee’s failure to join co-trustees in NRD litigation renders the claims vulnerable to dismissal. See, e.g., Oklahoma v. Tyson Foods, Inc., 258 F.R.D. 472, 483 (N.D. Okla. 2009) (dismissing state’s NRD claims for failure to join Cherokee Nation in suit arising from contamination of Illinois River); but see United States v. Asarco, Inc., 471 F. Supp. 2d 1063, 1068 (D. Idaho 2005) (suggesting that all trustees are not necessary parties to NRD litigation because CERCLA prevents double recovery and successive litigation between the trustees can properly allocate any recovery of NRDs).

The requirement that trustees either identify and coordinate with co-trustees or risk dismissal of their claims has led to many sole trusteeship NRD claims. For example, New Jersey has focused its NRD program on groundwater, which is often considered a state-only natural resource. See also Quapaw v. Blue Tee Corp., No. 03-CV-0846, 2010 WL 3368701, at *4 (N.D. Okla. Aug. 20, 2010) (rejecting defendants’ Tyson Foods argument because tribe narrowed its claim to natural resources “located solely on Tribal lands [that] do not fall within the regulatory authority of the State”).

D. NRD Settlement Strategies

Given the frequency that NRD claims have recently been asserted and the lack of developed case law identifying the limits of NRD liability, many companies have sought to avoid litigation through settlement. Many companies would prefer to provide the communities in which they operate with some natural resource benefit in settling their NRD liability. Protecting open space or restoring degraded areas may be vehicles to achieve this goal. Accordingly, some companies have addressed NRD claims by offering the trustees a restoration project with a nexus to the injured resource (i.e., same watershed), or by preserving land through conservation easements, acquisition and transfer to a land trust, or other measures. In presenting such projects, companies should quantify the natural resource services gained in comparison to the alleged natural resource services lost.

For example, a company may attempt to settle its NRD liability by donating a parcel of land to the trustees. However, before presenting that proposal, the company should retain a natural resource economist to evaluate and quantify the natural resource services provided by the land, including the value of the open space, groundwater recharge, wildlife habitat, wetland habitat, stormwater control, and other such values. In short, the company can donate land whose “natural resource value” far exceeds the real estate price tag, and the trustees can tout their successful settlement for a value far exceeding the amount actually paid by the company. Indeed, trustees may be willing to accept restoration projects that do not focus on the particular natural resource at issue, but instead seek to improve the overall natural resources present in the watershed.

E. Litigating NRD Claims

Despite creative approaches, it is sometimes not possible to reach a consensus on the amount of NRDs needed for settlement. The inability to reach a consensus is becoming increasingly common, especially where overburdened trustees outsource the prosecution of NRD cases to contingency fee counsel, who are less likely to settle the claims for restoration projects without a cash component to cover their fees. Accordingly, in certain circumstances, it may be necessary for companies to litigate NRD claims.

Although NRD litigation remains trustee friendly, certain defense strategies have been implemented in recent years. First, CERCLA (and similar state statutes) requires the trustees to prove an injury to natural resources “resulting from [the] release.” 42 U.S.C. § 9607(a)(4)(C). Existing case law indicates that the trustees must prove causation between the release of a hazardous substance and NRDs. See, e.g., Coeur d’Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1124 (S.D. Idaho 2003) (“As for the NRD
claims, the causation standard is a contributing factor test.”); *N.J. Dep’t of Envtl. Prot. v. Dimant*, No. A-3180-09T2, at *19 (N.J. Super. Ct. App. Div. Mar. 18, 2011) (Under the New Jersey Spill Compensation and Control Act, the plaintiff must prove that the defendant is responsible for a discharge of a hazardous substance that caused the contamination). Consequently, companies can make a strong argument that they are only liable for NRDs caused by their releases—not releases of other parties.

Second, NRD litigation provides companies with an opportunity to tell their story and explain to the court how NRDs are fundamentally unfair. To do so, companies must consider that NRD litigation is not just a battle among technical experts. Instead, companies should emphasize their efforts to prevent environmental impacts, their diligence in identifying any impacts, and their successes in remediating impacts (often at significant expense). In some cases, for example, the company may be able to convince the court that it has been fulfilling its remediation obligations and that awarding NRDs to the trustees would result in a windfall since the resource will be fully restored after the remediation is complete. Presenting this story effectively requires the use of not only litigation experts, but also documentation and fact witnesses to explain the company’s environmental stewardship. Notably, a tension usually exists between the trustees and the regulators overseeing the remediation of the site. While the trustees will frequently argue that the company has not taken steps to restore natural resources, regulators often rightfully believe the remediation they supervised will result in cleanup and restoration, and as governmental employees, they may enjoy more credibility with the court than expert witnesses. In short, companies may successfully argue that they have been fully cooperating with the regulators, who have greater substantive technical experience at the site, and that the trustees are unfairly second-guessing prior remediation decisions.

Third, in defending against compensatory restoration damages, the company must focus on natural resource services and whether any such services were meaningfully lost or impaired due to the release of hazardous substances. Said another way, the company must refute the assumption that injury to a natural resource alone leads to damages. In making this argument, the company can utilize the Department of Interior’s NRDA regulations, recent case law, and scholarly literature by natural resource economists to convey that lost or impaired services are essential to compensatory restoration damages. The company also can draw on fundamental principles of tort law to emphasize that without a compensable loss, there is nothing to compensate.

Where trustees refuse to consider a reasonable settlement, or where contingency fee counsel make settlement impossible, litigation remains an effective option in appropriate cases. Moreover, NRD litigation serves as a reality check on the trustees’ broad interpretation of their own authority and the scope of companies’ potential NRD liability.

**F. Conclusion**

As remediation is being completed at more and more contaminated sites, the trustees are increasingly asserting NRD claims. The successful management of NRD claims requires an understanding of the type of NRDs sought, how those NRDs were calculated, and how those NRDs may be attacked. In evaluating NRD claims, companies should consider whether cooperation with the trustees is strategically beneficial, and if so, how much cooperation is warranted. Companies should also think creatively to develop potential settlement frameworks that may be of interest to the trustees—even if the settlement involves the restoration of other natural resources. Where litigation ensues, companies must focus the court on their remediation efforts and cooperation with regulators, and the necessity for the trustees to prove causation and lost services. While the landscape of NRD claims continues to develop, early strategic consideration of these claims will help companies minimize costs and exposure.

Gary P. Gengel is a partner in the Environment, Land & Resources Department at Latham & Watkins LLP, where his practice focuses on remediation and NRD matters. He can be reached by e-mail at gary.gengel@lw.com or by telephone.
Kegan A. Brown is an associate in the Environment, Land & Resources and Litigation Departments at Latham & Watkins LLP, where his practice focuses on environmental litigation and regulatory matters. He can be reached by e-mail at kegan.brown@lw.com or by telephone at (973) 639-7180.