



“It Ain’t Over Till It’s Over”
or
What Brownfield Developers Need to
Know About NRD

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Natural Resources Definitions

◆ Natural Resources :

- Land, fish, wildlife, air, water, groundwater, drinking water, etc.
- Owned, managed, held in trust, or otherwise controlled by U.S., States, Tribes

◆ Natural Resource Damages :

- Injury to, destruction of, or loss of Natural Resources
- Cost of restoring to baseline condition, compensation for interim loss, and cost of damage assessment



Federal Trustees

- ◆ Department of Agriculture (USDA);
- ◆ Department of Commerce (DOC);
- ◆ Department of Defense (DOD);
- ◆ Department of Energy (DOE);
- ◆ Department of the Interior (DOI);
- ◆ Tribal Trustee



State Trustees

- ◆ State Trustee for natural resources within State or controlled by State
 - Waterfront property
 - Submerged land
 - Inland streams
 - Wetlands
 - State Parks and Wildlife Areas
- ◆ May not have statute of limitations
- ◆ 36 states have NRD authority



CERCLA

- ◆ Trustees authorized to recover NRD resulting from releases of hazardous substances
- ◆ Distinguished from remediation liability
 - Cost of restoring or replacing resources
 - Compensation for loss of value of resource
- ◆ No NRD for pre-December 11, 1980 releases
 - Passive migration
- ◆ Trustee has burden to establish causation
 - Multiple parties
 - Multiple contaminants
 - Multiple releases over time



CERCLA Cont'd

- ◆ Defendants can raise divisibility issues
- ◆ Beware of Double Recoveries (e.g., dredging sediments)
- ◆ Multiple trustees may prevent prompt resolution of NRD claims
- ◆ Superfund may not be used to pay for NRD
- ◆ CERCLA settlements usually contain reservation of rights for NRD



CERCLA Statute of Limitations

- ◆ Non-NPL Sites- claims within 3 years of discovery of the loss and its connection with the release
- ◆ For NPL sites, within 3 years of completion of remedy



Oil Pollution Act of 1990

- ◆ Discharges of petroleum to water
- ◆ No secured creditor exemption for discharges of oil from facilities or vessels
- ◆ The Oil Spill Liability Trust Fund may be used in certain circumstances



OPA Statute of Limitations

- ◆ NRD Claim 3 years:
 - from date of loss and connection to discharge is reasonably discoverable using due care, or
 - following completion of NRD assessment
- ◆ No action may be commenced 3 years after:
 - Date of NRD judgment
 - Judicially-approved NRD settlement
- ◆ Subrogation claim 3 yrs of payment



Settlement History

- ◆ Few NRD settlements before 1990s
- ◆ Now 15-20 settlements per year.
- ◆ Amount of NRD settlements has doubled every three to four years since 1990.
- ◆ Average settlement of \$100 million from 1998 to 2001
 - NRD cost estimate does not include NRD payouts to state or other non-federal trustees.
 - remediation costs for his time period range \$1-\$2 billion per year.



Settlement History Cont'd

- ◆ NRD costs can vary significantly depending on the type of site
- ◆ Approximately half of the total NRD settlements associated with six sites
- ◆ Sites With Largest NRD Claims
 - mining/smelter sites
 - Contaminated sediments



Sites that May Have NRD Issues :

- ◆ Gas Stations and Dry cleaners near public drinking water supplies
- ◆ Septic Fields and Dry wells
- ◆ Sites Discharging to Wetlands
- ◆ Contaminated Waterfront Property
- ◆ Brownfield Sites
- ◆ Sites with Groundwater Contamination



NRD Concerns for Brownfields

- ◆ Risk-based cleanups allowing residual contamination may increase NRD
- ◆ Brownfield Process May Document Extent of Damage to Resources
- ◆ NFA May exclude NRD
- ◆ State Trustee often not included
- ◆ State Secured Creditor Exemption May Not Apply to NRD or type of contaminant



Brownfield Concerns Cont'd

- ◆ Does Indemnity Address NRD?
- ◆ If assuming cleanup obligations of seller, who has obligation to satisfy NRD claim (e.g., NJ does not issue NFAs until NRD settled)



Suggestions for Minimizing NRD Impacts

- ◆ Determine NRD Impacts during due diligence
- ◆ Underlying agreement should contain NRD reps and warranties
- ◆ Seller/Borrower should to disclose NRD claims in agreements
- ◆ Consider NRD as a separate event of default
- ◆ Involve trustee if potential NRD
- ◆ Determine if state statute can be used to resolve NRD



Suggestions

- ◆ Do Not Foreclose on Property Until Evaluate Potential NRD Impacts
- ◆ Insurance May be Available (Not in NJ)
- ◆ Verify NRD potential before syndicating loans or securitization
- ◆ Exit Strategy
 - Sale of property in event of default
 - Assignment of insurance policy
 - Seller right of first refusal
 - Seller rights under policy
 - Seller performance of remedy



Conclusion

- ◆ IT AINT OVER TILL ITS OVER