



# NRDA Comparative Law

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Natural Resources Damage Liability and Litigation

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# Overview

- Baseline for comparison – quick review of U.S. framework
  - Torts
  - Elements of CERCLA claim for removal/remediation/restoration
  - Elements of OPA claim
- European Union Environmental Liability Directive
- China's natural resource damage program

# Statutory Elements for NRD Claims



- CERCLA section 107(a)(4)(C):

“Damages 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”

- OPA section 2702(b)(2)(A):

Responsible parties are liable for “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee”

- Also the CWA 33 SC 1321(f)(4)



## Defenses (beyond issues of fact)

- Statutory Defenses under CERCLA and OPA/CWA : acts of God, acts of War, or acts or omissions by third parties (outside contractual relationship)
- Challenges to status as potentially responsible party
- Standing (only trustees can assert)
- Time bar: pre-1980 releases under CERCLA; also limits under OPA section 2717(e) and 2751(d) (date – August 1990)



## Defenses (cont'd)

- Statute of limitations: 3 years after date of discovery of the loss or within three years of completion of remedy (if NPL-listed site); OPA also three years
- Federally permitted releases: under CERCA, but only if in compliance with permit.
- Irretrievable commitment of resources: Under CERCLA, if identified in environmental impact statement (section 107(f)(1)).

# European Union



- Environmental Liability Directive 2004/35/CE (ELD)
  - Prior directives
  - National implementation
- REMEDE (Resource Equivalency Methods for Assessing Environmental Damage in the EU)



## ELD Elements

- Two NRD liability frameworks
  - Owner and operators of particular kinds of facilities are strictly liability for all NRD caused by any incident, release or other event
    - Landfills
    - Wastewater dischargers
    - Pesticides, biocides and dangerous substances (effect of REACH)
  - Any other person or facility not covered above is liability if fault or negligence has damaged particular habitats and/or species protected under the Habitats or Birds Directives



## ELD Elements (cont'd)

- Liability includes
  - Implement and/or pay for appropriate measures to abate and remedy NRD
  - Includes restoration of impaired waterbodies, habitat and lost species
  - The responsible parties must also take preventive measures to avoid NRD
  - Must also notify appropriate governmental authorities as soon as aware of imminent NRD threat



## ELD elements (cont'd)

- Defenses
  - “Force majeure” events such as Acts of War, third party actions
  - Release or event authorized by permit
  - Activities that were not considered “likely to cause environmental damage according to the scientific and technical knowledge” at the time when the original activity or occurrence took place (“state of the art”)
- Time limit: no NRD liability for damages caused by event, emission or incident prior to April 30, 2007.



# REMEDE

- REMEDE is an NRD regulatory initiative to implement new NRD programs under ELD
- Based substantially on U.S. NRD rules and regulatory approaches
  - Similar to HEA
  - Determine and quantify the injury (or debt)
  - Determine and quantify the gains from remediation (credit)
  - Scale the remediation activity
  - Monitor and report
- Must use “baseline conditions” to assess NRD, but defines baseline as “that would be expected to exist but for the incident in question” (compare with U.S.)



## Open questions under ELD

- Any preference for most cost-effective measures? (vs. “feasible”)
  - Conservation easements
- What and how much primary remediation should be done?
- What should the baseline be?
  - (advice to clients with European operations)



## China – a quick comparison

- Environmental Protection Act
  - Tort Liability Law of 209 – strict liability for environmental damage
  - Unclear how it will apply to natural resource damages



**Questions?**

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