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HOT TOPICS IN DOWNSTREAM LITIGATION

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This article discusses important issues in downstream litigation, specifically MTBE cases, ethanol cases, and the Natural Resource Damages ("NRD"). We begin with an overview of litigation involving MTBE, then move on to a discussion of ethanol cases and finally conclude with a basic discussion of general principles of NRD.

MTBE LITIGATION

What is MTBE and why was it used?

MTBE (methyl tertiary-butyl ether) is a chemical compound that is manufactured by the chemical reaction of methanol and isobutylene. It was almost exclusively used as a fuel additive in motor gasoline and is one of a group of chemicals known as "oxygenates" because they raise the oxygen content of gasoline.[1] MTBE is a colorless, flammable liquid with an odor some have described as similar to turpentine. It has relatively high water solubility, meaning that it will readily dissolve in water.

As the United States Environmental Protection Agency (the "EPA") has explained, MTBE's use in gasoline began in low levels in the late 1970's to replace lead as an octane enhancer. *See* http://www.epa.gov/mtbe/gas.htm. Octane, which is a measure of how much gasoline can be compressed before it spontaneously ignites, is important to prevent "knocking" or "pinging" in an engine.

Beginning in 1992, MTBE was added to gasoline in higher concentrations to fulfill the "oxygenate" requirements set by Congress in the 1990 Clean Air Act Amendments (the "CAAA"). *Id.* Raising the oxygen content of gasoline allows it to burn more cleanly, which

[1] Prior to certain advancements in surgical procedures, MTBE was successfully used to treat gall bladder stones. *See* A. Hellstern, et al., *Gall Stone Dissolution with [MTBE]: How to Avoid Complications*, at 922-25 (1990), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1378624/pdf/gut00602-0102.pdf.

reduces harmful tailpipe emissions. In addition, the oxygen dilutes or replaces other gasoline components like benzene, a known carcinogen. *Id*. This oxygenated gasoline was referred to as "Reformulated Gasoline" or RFG. RFG improved the air for millions of Americans and reduced smog-forming pollutants (volatile organic compounds and nitrogen oxides) and toxins (such as benzene). *Id*. At the time of the CAAA's passage, Congress and the EPA were aware that MTBE would be the primary oxygenate used to comply with the oxygenate requirement,[2] largely because of concerns with the alternatives, including supply and logistical problems (*e.g.*, ethanol could not be shipped through existing pipelines). *See* http://www.epa.gov/mtbe/gas.htm. In 2005, Congress passed the Energy Policy Act which removed the oxygenate requirement for RFG. MTBE has not been used in significant quantities in the United States since then, and its use has been banned in certain states.

The Nature and Structure of MTBE Litigation

Throughout the United States, laws are on the books requiring those who spill gasoline to clean it up—and pay for it.[3] If the spiller does not pay, he can be sued. This common-sense approach to cleaning up gasoline spills makes sense and has worked effectively for decades. In the case of MTBE, however, litigation of a different variety emerged, driven largely by enterprising trial lawyers. Below, we recount some of the notable MTBE cases filed, the allegations, and theories of liability. As is evident from this discussion, the types of cases and theories of liability have evolved over time.

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[2] *See*, *e.g.*, 136 Cong. Rec. S 6383-84 (1990) ("EPA predicts that the amendment will be met almost exclusively by MTBE, a methanol derivative") (remarks of Sen. Daschle); 136 Cong. Rec. S 17514 ("The requirements for reformulated gasoline will also encourage the use of oxygen-containing additives like ethanol and MTBE") (remarks of Sen. Heinz); 136 Cong. Rec. S 16954 (1990) (RFG "will encourage the use of oxygen-containing additives like ethanol and MTBE") (remarks of Sen. Chafee).

[3] *See, e.g.*, N.Y. Navigation Law § 181; Va. Code § 62.1-44.34:9.

***City of New York v. Amerada Hess Corp., et al.*, 04 CV 3417 (S.D.N.Y.) (SAS).**

The City of New York sued ExxonMobil and other oil companies over alleged MTBE leakage into water wells in Queens, NY, including wells known as the Station Six Wells. Thus, this was a "*site-specific*" case. These wells were not operative, but the City alleged that it planned to use them in the future in the event of a drought. The City asserted claims for, *inter alia*, negligence, trespass, public nuisance, private nuisance, failure to warn, and design defect. Notably, the groundwater at issue was not being used as a source of drinking water because it was not potable due to, among other things, unrelated contamination of perchloroethylene, or PCE, a chemical used in dry-cleaning clothes (the City's claim rested solely on alleged loss of *future* drinking water services). And, the jury found that the MTBE levels would peak in 2033 at 10ppb—in other words, the levels would never exceed the relevant safe drinking water standard under NY state law. So, in summary, the City was suing over predicted *future* MTBE contamination of *unused* groundwater wells already so heavily polluted from other sources that the water could never be used without building a treatment plant—a plant which the City only had a "good faith intent" to build in the next *15-20 years*. Even then, the "injury" could only occur if the City used the wells enough that they would pull in groundwater impacted by MTBE spills—which itself turns on a host of unpredictable factors, including the weather. And even then, the amount of MTBE would not exceed New York's drinking water standard.

Moreover, the court permitted the City to use market-share and a newly created "commingled product" theory to prove causation. In doing so, the court eliminated the City's burden of proving identification and cause-in-fact and replaced those standard liability requirements with plaintiff-friendly theories that did not rely on a direct connection between defendant's conduct and the alleged injury. For example, the court permitted the jury to find the defendant liable for a spill in a borough of New York *City*, based on its overall share of the

wholesale market in the entire *State* of New York, so long as defendant's gasoline was delivered through the same supply channels. The court thus permitted this statewide market share to be considered circumstantial evidence sufficient to establish a "substantial factor" in causing the City's alleged injury. This extremely lenient standard permitted the jury to find in the City's favor—despite the lack of evidence of actual causation and the extremely attenuated nature of the City's injury.

***State of New Hampshire v. Amerada Hess Corp., et al.*, 03-C-550 (Merrimack County Superior Court).**

The New Hampshire litigation was not a site-specific case, but rather a "*state-wide*" case brought by the State of New Hampshire as a sovereign on behalf of all of the State's residents. The State asserted claims for, *inter alia*, strict product liability based on defective design and failure to warn, public nuisance, trespass, and negligence. The State sought hundreds of millions of dollars in damages to test and monitor every single one of the 250,000 private well and public drinking water systems in the state. The State even included claims to remediate spill sites that the State's Department of Environmental Services had already "closed" because the cleanup criteria were met.

Moreover, the court permitted the State to demonstrate injury and causation entirely based on state-wide injury and state-wide market-share theories. Rather than requiring the State to prove that individual defendants caused unsafe MTBE levels at individual wells, the trial court permitted the State to introduce evidence of the statistical *possibility* of "*future* injury" to wells throughout the state and apportion injury based on state-wide market share. By combining these state-wide theories of injury and market-share, the court not only eliminated the State's burden of proving the identification and cause-in-fact requirements, but also went one step further than *City of New York* by eliminating the individualized injury requirement. This permitted the jury

to find liability without evidence that individual defendants had *any* market-share in localities where spills actually occurred—let alone evidence that individual defendants actually caused the spills. The case is currently on appeal to the New Hampshire Supreme Court.

***New Jersey Department of Environmental Protection v. Amerada Hess Corp., et al.*, [MER-L-1622-07] (Superior Court, Law Division – Mercer County).**

The pending New Jersey case is a natural resource damages case seeking, *inter alia*, compensation for the lost value and benefits of the waters of the State—above and beyond cleanup costs and fines. Specifically, the State seeks "natural resource damages for the recovery of all past and future costs to investigate, remediate and restore natural resources damaged by the discharge of MTBE." We discuss these "natural resource damage" lawsuits later in this article. The complaint asserted counts sounding in strict product liability based on design defect and failure to warn, public nuisance, trespass, and negligence.

***Town of Brewster (Mass.), et al. v. Atlantic Richfield Company, et al.*, No. 13-cv-07247; *Town of Hinesburg (Vt.) v. Atlantic Richfield Company, et al.*, No. 13-cv-07271; *City of Manning (Ia.) v. Ashland Inc., et al.*, No. 13-cv-07272; *City of Portageville (Mo.) v. Ashland, Inc., et al.*, No. 13-cv-07299.**

The most recently filed cases are brought by municipalities and local water districts. They generally involve very low level detections of MTBE and are primarily focused on seeking funds to monitor MTBE levels in the future. They are akin to "medical monitoring" claims.

Why MTBE Cases Are Attractive to Plaintiffs' Counsel

It is not difficult to see why plaintiffs' lawyers have eagerly pursued MTBE lawsuits. Perhaps most significantly, MTBE cases allow trial lawyers to play on jurors' fears and emotions. The "parade of horribles" starts with the argument that the jurors' drinking water is possibly "contaminated"—the water that we all cook, clean, and bathe with. This "contamination," it is then argued, can cause an array of problems—from unpleasant taste and odor all the way to cancer. In addition to the emotional pull, you, of course, have "deep

pocketed" oil company defendants on the opposite side of the "v"—defendants who plaintiffs' counsel will seek to vilify at every turn as only interested in profit (at the expense of health and safety). Moreover, as the MTBE litigations have played out over the years, there is now a fairly well-developed "story" or "blueprint" for plaintiffs' lawyers to employ—largely based on revisionist history as discussed below. This "history" includes an argument that the oil companies knew all about the "parade of horribles" with MTBE, but downplayed the risks to everyone, including the EPA and federal and state governments. Thus, as can be seen from the recent local water district/municipality lawsuits, it is easy for lawyers to file new cases and simply "glom on" to the storyline. And, as discussed above, courts have been willing to entertain theories of liability, such as market-share and commingling, that all but dispense with traditional principles of causation and reduce plaintiffs' burden of proof.

Why MTBE Cases Are Premised On Revisionist History And Flawed Principles

While it is true that if oil companies spill gasoline—with or without MTBE—they should pay to clean it up, the MTBE cases have not been litigated as "spiller" cases. Instead, the cases have proceeded on a theory that MTBE simply should never have been used in gasoline in the first place. But such a theory of liability ignores the *history* of how and why MTBE came to be used in gasoline to begin with. While the facts are that Congress and EPA knew and expected MTBE to be used in gasoline—with knowledge of potential risks to groundwater—plaintiffs' counsel have painted a picture whereby oil companies chose to use MTBE in gasoline simply to make money (knowing the environmental risks) and that the federal government was "duped" into approving the use of MTBE. But that is simply not the case—as just a brief "history lesson" demonstrates:

- 1986 - Officials from the Maine Department of Environmental Protection (Marcel Moreau and Peter Garrett) publish a paper—"*MTBE as a Groundwater Contaminant*" that is presented at the National Well Water Association /

American Petroleum Institute Conference on Petroleum Hydrocarbons and Organic Chemicals in Groundwater in Houston, Texas. The paper describes MTBE's fate and transport characteristics in groundwater, including MTBE's relatively high solubility and tendency to migrate through groundwater at the head of a gasoline plume. EPA received this paper and even cited it in the Federal Register. *See* P. Garrett, et al., *Methyl Tertiary Butyl Ether as a Groundwater Contaminant*, NWWA—API 227-38 (November 1986); Testing Consent Order on Methyl Tert-Butyl Ether and Response to Interagency Comm., 40 C.F.R. § 799 (1988), *available at* http://www.epa.gov/opptintr/chemtest/pubs/sun91.pdf.

- 1987 – An EPA official prepares a memorandum stating that "Concern about MTBE in drinking water surfaced after the ITC report . . . this problem could rapidly mushroom due to leaking underground storage tanks at service stations . . . . The tendency for MTBE to separate from the gasoline mixture into ground water could lead to wide spread drinking water contamination." *See* Memorandum from Beth Anderson, Project Manager, Test Rules Development Branch (1987).

- 1988 - EPA's Office of Underground Storage Tanks publishes a handbook called CLEANUP OF RELEASES FROM PETROLEUM USTS: SELECTED TECHNOLOGIES. The publication, which was a handbook for cleanup engineers of technologies to remove gasoline and its components from soil and groundwater, noted, among other things, that "MTBE is extremely soluble in water; about 24 times more soluble than benzene (43,000 mg/L vs. 1,780 mg/L). Because of its high solubility, MTBE is easily transported by groundwater away from a spill site." The handbook can be viewed on the National Service Center for Environmental Publications website at http://www.epa.gov/nscep/index.html.

- 1988 – EPA states in Federal Register that "EPA has an additional concern about MTBE contamination of ground water. Although only a few cases of ground water contamination are currently documented, the rapid growth in production, transport, and use of MTBE will probably contribute to an increase in incidents of contamination . . . . MTBE is relatively water soluble (40,000 to 51,260 mg/L) compared to other gasoline components. This solubility, coupled with the fact that an estimated 35 percent of the approximately 638,000 non-farm underground motor fuel tanks would not pass the EPA tightness test, indicates the potential ground water contamination problem. *See* 53 Fed. Reg. 10391 (1988), *available at* http://www.epa.gov/opptintr/chemtest/pubs/sun91.pdf.

- 1988 – EPA adds MTBE to Drinking Water Priority List. *See* 53 Fed. Reg. 1892 (1988). The Federal Register notice states that EPA "has recently identified MTBE as a high-risk chemical for contamination for drinking water supplies and their sources." It goes on to state that "MTBE is used widely as a gasoline component and as such is stored, transported, and used all over the country. MTBE has been detected in a number of groundwaters, probably as a result of leaking underground storage tanks, disposal facilities, or spills." It continues that "Manufacturers of MTBE have initiated a battery of toxicological evaluations for

> MTBE. Because of the potential for widespread contamination, EPA is listing MTBE on the first DWPL." *Id.*

Thus, there can be no legitimate dispute that the federal government authorized MTBE to be used as an oxygenate in gasoline with full knowledge of the potential risks to groundwater.

In addition, courts have permitted damages theories to be presented based on speculative models and flawed assumptions with respect to the presence and persistence of MTBE. The models are *predictions* and *prognostications* based on what *might* happen *decades* in the future under wildly unrealistic scenarios. For example, the State of New Hampshire relied on a model suggesting that each of New Hampshire's predicted 250,000 private wells needs to be tested over and over again for the presence of MTBE for the next 20 years. Why? Because the MTBE is supposedly "lurking" underground and might find its way into a well—anywhere throughout the State—at any time. In other words, plaintiffs' models operate on absurd assumptions that a spill at a gas station in, say, Corpus Christi, might impact a well in Amarillo—even 20 years later. Allowing models like this to be presented to a jury on a state-wide basis makes the concepts of "injury" and causation so elastic that they lose meaning altogether. What's more, courts have been willing to entertain damages even where MTBE detections are at levels well below state-adopted safety thresholds. In other words, in the real world outside the courtroom, the water is perfectly safe to drink. But in the courtroom, the water is unsafe.

Moreover, as we have seen recently with respect to New Hampshire's lawsuit, there is ample evidence showing that plaintiffs do not intend to use the money obtained through MTBE litigation to actually remediate MTBE. Instead, the legislature is seeking to use the money to fill budget gaps. *See*, *e.g.*, Bob Sanders, *N.H.'s MTBE Settlement Cache: $136m and Counting*, N.H. BUS. REV., March 21, 2013, http://www.nhbr.com/March-22-2013/NHs-MTBE-settlement-cache-136m-and-counting/. Indeed, the State of New Hampshire vigorously opposed any efforts

to place the proceeds of its lawsuit into a trust that would ensure they could only be used for MTBE cleanup, despite telling the jury that it would use the money for that purpose.

A Potential Path Forward

While there may be no way to "undo" the cost and expense oil companies have had to shell out defending MTBE lawsuits, there is a potential path forward. In short, appellate courts need to step in and correct some of the erroneous rulings throughout these cases—such as dispensing with traditional tort principles of injury and causation. Moreover, courts should order that any monies from MTBE litigation be placed in a reversionary trust that requires the funds to be monitored and used only for their intended purpose—alleged MTBE cleanup. In essence, the appellate courts should ensure that the tort system is not converted into a bank account or lottery ticket for trial lawyers and local and state governments. Lastly, all of the MTBE cases come down to an argument that the oil companies should not have used MTBE. But, at the end of the day, the fact is that the oil companies used MTBE in the quantities plaintiffs claim caused harm because of an oxygenate *mandate* imposed by Congress—a mandate that the oil industry actually opposed. To face liability under state tort law in the face of a federal mandate is the essence of preemption—and appellate courts should recognize as much.

ETHANOL LITIGATION

Introduction

Although much of the U.S. economy has seen impressive growth these past two years, few market segments can match the increased demand and production that the renewable fuel industry has been experiencing for almost a decade. America's renewable fuel boom was sparked by the MTBE phase outs of the early-2000s; smoldered until passage of the Energy Policy Act of 2005, which created the federal Renewable Fuel Standard ("RFS") program; and

has exploded ever since. This explosion largely results from the RFS program requiring ever-increasing amounts of renewable fuels to be blended into the nation's fuel supply every year. To that end, every day in the U.S. vast volumes of ethanol, biodiesel and other renewable fuels are manufactured, transported, handled, stored, distributed, and dispensed for use in tens of millions of personal, commercial and recreational vehicles and small engine equipment devices. It could be a Ford, Honda, Audi or Kia automobile; a fire truck, school bus, ambulance or tractor-trailer; a motorcycle, motorboat, snowmobile or ATV; or a lawn mower, hedge trimmer, snowblower or chainsaw. If it involves an internal combustion engine, there is a good chance that it now also involves a renewable fuel.

No renewable fuel product has experienced greater market penetration than ethanol, which is blended into a large percentage of the gasoline now sold in the United States. The use of ethanol in gasoline is not without controversy. Indeed, few products have ever attracted such a vocal and diverse range of critics as ethanol. The myriad "problems" that these critics attribute to the use of ethanol in gasoline – *e.g.*, higher grain and food prices; increased hazardous air emissions from motor vehicles; reduced fuel mileage; engine and component incompatibility and damage – may or may not exist. What certainly does not exist, at least not yet, are waves of ethanol-fueled litigation lapping up the front steps of American courtrooms.

But successful products and industries have a way of attracting investors … and plaintiffs lawyers. Because litigation often is a lagging indicator of the risk factors attendant to an industry, early identification of litigation risk can be a valuable way to reduce long-term legal exposures and financial losses. With impressive growth rates that are unlikely to materially retreat over the next several years, ethanol producers and distributors would be wise to focus now on the litigation risks (and the plaintiffs' lawyers) that may be lurking just over the horizon.

A Brief Look Back at MTBE

The pitfall that may be "just over the horizon" often can be discerned by looking at what one has tripped over before. With that in mind, our discussion of ethanol litigation begins with an entirely different fuel additive: MTBE.

In 1996, almost nine out of every ten gallons of reformulated gasoline used in the U.S. contained MTBE (89% v. 11%). Less than a decade later, and just *before* the RFS program was created in 2005, ethanol had displaced MTBE in more than half (53%) of all gasoline.[4] This massive shift in fuel additives did not occur because ethanol was a more effective oxygenate than MTBE (it was not). And it did not occur because ethanol was less expensive, more widely available, or easier to transport, store and use (it was none of these compared to MTBE).

The shift occurred because a few enterprising plaintiffs lawyers figured out a way to transform what had been run-of-the-mill MTBE leak cases (principally against service station operators) into multi-million dollar, mass tort lawsuits against the country's largest gasoline refiners – most of whom were not even alleged to have spilled a drop of gasoline. And while many factors contributed to that transformation, the most significant was the trial bar's success in asserting a claim that had seldom been seen in cases involving motor vehicle fuel or alleged environmental contamination: *strict products liability*.

Tort litigation can often is described by reference to a timeline of sorts. Early claims are said to be "immature torts," while later claims, on longstanding dockets like asbestos or MTBE, often can be described as "mature." As a docket, MTBE litigation began in the late-1990s with individual homeowner litigants, typically represented by small firms or local lawyers, asserting statutory and common law claims (*e.g.*, state spill act; negligence, nuisance, trespass) against

[4] U.S. EPA (2008) Fuel Trends Report: Gasoline 1995-2005.

small, local defendants (*e.g.*, service station owner or operator) alleged to have actually spilled or leaked gasoline that resulted in actual contamination of plaintiff's water supply. Although later cases would see the plaintiff homeowners pooled into putative class actions (all denied certification), the early, immature MTBE cases basically were spill cases for actual damages.

But those early cases required a lot of work by the plaintiffs' lawyers and, with small plaintiffs and low (but actual) damages, yielded little in the way of returns. So, beginning in around 1993, several enterprising plaintiffs' firms unveiled a new approach that allowed them to skip the small property owner plaintiffs and service station defendants and, instead, take aim at the large gasoline refiners directly. That approach was strict products liability. Plaintiffs now argued not about whether a gasoline spill had occurred, but rather about the gasoline itself: *i.e.*, that simply because it was made with MTBE it was a "defective product" for which the manufacturer should be held liable. Specifically, plaintiffs contended that gasoline with MTBE was defective because safer fuel additives existed (ironically, ethanol was the plaintiffs' unanimous choice), and because defendants allegedly had failed to warn plaintiffs, regulators and the general public about the alleged environmental and public health risks of blending MTBE into gasoline. By focusing on the product itself, plaintiffs not only were able to divorce their claims from the limitations created by having to prove an actual spill or leak, they were able to exponentially increase the alleged damages and – importantly – access far "deeper pockets" from whom to recover for those putative damages.[5]

[5] Obviously, there were many more factual and legal developments that helped move the early MTBE spill cases along to massive product liability lawsuits: *e.g.*, recognition of the commingled product theory as an alternative causation theory; adoption of market share as a proxy for proof of actual damages; and acceptance of future impacts as a "present injury" for purposes of legal standing and the statute of limitations.

Ethanol litigation currently sits at the "immature," infancy stage of what may (or may not) eventually become a longstanding tort docket akin to MTBE. Few cases have been brought; the plaintiffs have been individuals; and, so far, the large tort firms have stayed away. But the conditions for ethanol to generate mass tort litigation may be there. Not one, or two, but at least three large industries (automakers; ethanol producers; gasoline refiners) are potential defendants. There is a far wider swath of potential plaintiffs – not just groundwater users as in the MTBE cases but, for example, automobile owners and anyone operating a boat, off-road vehicle, etc. And unlike MTBE, which was widely embraced but used only in certain parts of the country, ethanol is derided by many diverse groups but used almost everywhere in the United States.

What litigation, if any, eventually materializes would be conjecture. But this much seems certain from what we have already seen in the MTBE arena: any litigation that comes to pass is very likely to include product liability as a centerpiece claim.

Ethanol Products Liability

1. Gasoline Manufacturers

Products liability are a favorite of the plaintiff's bar, particularly given the success trial lawyers have had pursuing such claims against the oil and gas industry for its use of MTBE in gasoline. Basically, a "product liability" claim contends that the product (*e.g.*, gasoline formulated with MTBE) was defective because it was designed or manufactured in a way that caused foreseeable injury to a user or bystander, or because the manufacturer failed to adequately warn about such a foreseeable injury. If the long-running MTBE product liability docket is any indication, today's accounts about ethanol's adverse impacts to fuel storage systems, vehicles,

users, the environment, would suggest a good possibility of a similar "ethanol product liability docket" materializing in the future.

Not that the plaintiffs' bar has not tried already. In *Kelecseny v. Chevron U.S.A., Inc.*,[6] a putative class of Florida boat owners sued Chevron, ExxonMobil, BP and Shell (among others) for damages allegedly caused by ethanol-blended gasoline.[7] The plaintiff class members claimed that gasoline containing ethanol was defectively designed because it had damaged (or would in the future damage) certain boat fuel tanks and fuel systems, and that the defendant fuel manufacturers had failed to warn consumers about the alleged corrosive properties of ethanol blended gasoline which could cause such damage.[8] The federal district court judge never got to the merits of those claims because class certification was denied (lack of numerosity and commonality) and the matter settled shortly thereafter.[9]

Fuel manufacturers faced almost identical product liability claims from a putative class of California boat owners in *Turner v. Chevron.*[10] As in *Kelecseny*, plaintiffs in *Turner* alleged that the use of ethanol in gasoline had damaged certain boat engines. As in *Kelecseny*, the Central District of California never got to the merits of plaintiffs' claims – albeit for an entirely different reason. Finding that ethanol was required to be blended into California motor vehicle gasoline to comply with both federal and state law, the district judge in *Turner* concluded that "[b]ecause Plaintiff's products liability (defect) claim is in direct conflict with both state law (requiring the

[6] Complaint, *Kelecseny v. Chevron U.S.A., Inc.*, No. 008CV61294, 2008 WL 4404178 (S.D.Fla. Aug. 12, 2008).
[7] *Id.* at ¶¶ 6–11.
[8] *Id.* at ¶¶ 36–41.
[9] *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 673 (S.D. Fla. 2009).
[10] *Turner v. Chevron, U.S.A., Inc.*, No. CV 08–2267 ODW (SSx), 2008 WL 4570271 (C.D. Cal. Oct. 14, 2008).

use of ethanol) and federal law (requiring either ethanol or MTBE), . . . [p]laintiff's claim is preempted."[11] Defendants' motion to dismiss was granted in its entirety.

While the *Kelecseny* and *Turner* outcomes seem to have deterred would-be ethanol product liability litigants for more than five years, with millions of motor vehicle and small engine owners across the country now using gasoline blended with ethanol – in rapidly growing numbers, and at annually higher concentration levels that may not be suitable for certain makes or models of equipment – it would be hardly surprising to see product liability claims resurrected in future litigation involving ethanol gasoline. As in *Kelecseny* and *Turner*, such claims could allege that the presence of ethanol in gasoline caused putative damage to engines or other components. Or, a plaintiff might claim that ethanol-blended gasoline is "defective" because it allegedly reduces the mile-per-gallon ("mpg") that is achievable by the plaintiff's particular model or class of vehicle. Or because it is allegedly less effective at reducing tailpipe emissions and, therefore, contributes to poor air quality or global warming. Or because it allegedly compromises service station underground storage tanks, lines or dispensers – violating state or local registrations; voiding station insurance policies; and increasing the risk of fuel leaks to the environment.[12] The potential plaintiffs, defendants and fact patterns are limited only by the creativity of the plaintiffs' trial bar – which knows few limits.

Regardless of the fact pattern alleged, the question is whether future plaintiffs will take "design defect," "failure to warn," or both, as their product liability angle of attack. A plaintiff

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[11] *Id.* at *2.

[12] Because studies indicate the ethanol dissipates in the subsurface environment quickly (and for several reasons), its potential to adversely affect soil and groundwater likely is minimal. But leaks from USTs release not just ethanol, but gasoline and all of its other constituents. A product liability litigant conceivably might argue that gasoline with ethanol is "defectively designed" because it compromises USTs more readily than other available gasoline formulations, with the resulting "damage" taking the form of increased impacts to subsurface soil and groundwater from benzene or other gasoline components.

claiming "design defect" will face two principal hurdles. First, "design defect" requires the plaintiff to prove that a safer, feasible alternative was available to the manufacturer-defendant. As the district court concluded in *Turner*, the federal government's RFS program (and analogous state programs) essentially are ethanol mandates on fuel manufacturers – meaning there is no "feasible" alternative to ethanol as a matter of law. Second, federal and state ethanol mandates walk a product liability plaintiff straight into the preemption defense. The doctrine of preemption basically says that a defendant cannot be held liable, on any legal theory or claim, for damages caused simply by defendant doing something that was required by federal or state law. In *Turner*, the district court correctly concluded that federal and state mandates requiring ethanol to be blended into gasoline precluded plaintiffs – even those that might have had actual damages caused by the gasoline – from seeking to hold the fuel manufacturers liable for design defect.

"Failure to warn" is the better, and more likely, play for future product liability plaintiffs. Even the absence of a safer, feasible alternative may not excuse a fuel manufacturer from giving adequate warnings. Likewise, it remains unclear if the preemption doctrine would bar a product liability claim based on "failure to warn." Most federal and state rules mandating the use of ethanol say nothing about the warnings that must be given to fuel distributors, handlers, sellers, purchasers and users (although federal regulations are pending that may, and should, address the warnings issue).

2. Ethanol Producers

Several gasoline refiners own and/or operate ethanol production facilities and should be aware of a potential product liability risk that, while it sounds a bit far-fetched, has quietly slipped onto the radar of certain plaintiffs' lawyers.

Ethanol plants generally make and sell two products: ethanol and a byproduct known as distillers dried grain (DDG). DDG is commonly sold to farmers as livestock feed.

The risk is "seeded" with the corn that is used to make ethanol. Incoming corn can be diseased with mycotoxins – toxic materials produced by a fungus that has attached itself to the corn. Ethanol producers have an incentive to detect and eliminate such mycotoxins (usually by scrapping the corn itself) because their presence can reduce the efficiency of ethanol production. But if the mycotoxins are not detected, and if the corn is used to produce ethanol, the production process itself actually *increases* the mycotoxin concentrations that end up in the ethanol and DDG. Mycotoxins in ethanol used to create renewable motor vehicle fuel are not problematic because renewable motor vehicle fuel is not consumed by people or animals. But DDG is consumed – its primary purpose is as an animal feed – and the presence of mycotoxins in DDG can have devastating effects on cattle and other livestock: lameness, slowed growth rates and, in some cases, death.

There have been several documented cases of mycotoxin-tainted DDG causing significant losses to cattle ranchers and other livestock producers. Similarly, there reportedly have been several cases of animal deaths or injuries allegedly caused by DDG derived from strains of corn genetically modified to increase output in renewable fuel production processes. Ethanol producers, including any refiners operating their own ethanol production facilities, may face the risk of a product liability lawsuit if livestock is harmed because it was fed mycotoxin-tainted DDG or DDG derived from genetically modified corn. To help reduce the risk of a products liability suit,[13] renewable fuel producers should keep a record of the grains they are

[13] Products liability theories are usually accompanied by other common law theories of liability such as negligence and public nuisance. Renewable fuel producers continue to face a number of nuisance-related legal challenges from environmental groups and residents in the producer's

using to create a particular renewable fuel, as well as the other proprietary enzymes used in each production process. Supplier certification that feedstock grains have been tested and found free of mycotoxins also is a best practice that all ethanol producers should consider adopting.

* * *

Although there is little one can do to deter a plaintiff's lawyer intent on suing, the MTBE experience provides some valuable lessons about the steps potential defendants can take now to make the trial bar's job more difficult, and to increase the chance of successfully defending against product liability causes of action, in future ethanol litigation.

A "failure to warn" claim can be defended with the right facts and record. Gasoline manufacturers should ensure that the information they possess about ethanol's putative risks – *e.g.*, possible engine damage; lower fuel economy; higher food costs; increased air emissions; etc. – has been shared with U.S. EPA and other federal and state regulatory authorities. Likewise, gasoline manufacturers, distributors and retailers should ensure that all ethanol gasoline risks that may be even remotely relevant to consumers are disclosed to consumers. EPA's proposed pump labels only go so far. Additional pump labels detailing potential loss in fuel economy, or that ethanol is a suspected human carcinogen, or that its use in off-road vehicles or small equipment could result in property damage or personal injury, might be a good business practice. Notices directing the pump customer to additional information available in the

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geographic area. Following a federal lawsuit brought by local residents in the District of Minnesota, the Gopher State Ethanol Plant was required to strengthen its pollution controls and limit the emission of odors to nearby areas. Press Release, "U.S. Files Amended Consent Decree in Response to Public Comments, U.S. Department of Justice" (May 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/May/03_enrd_310.htm. The plant agreed to limit "wet cake" production (a by-product of ethanol production used for animal feed) and installed wet cake scrubbers in order to settle charges of Clean Air Act violations. *Id*. Between the years 2002 and 2003, twelve ethanol producers in Minnesota alone were forced to settle complaints from the Department of Justice. *Id*.

store, or on the internet, also would be useful facts to have for future ethanol claims. Bottom line: get the information to regulators and into the public domain.

Regulatory Challenges and Litigation

While ethanol litigation remains in its infancy, legal challenges to various aspects of the RFS program and EPA's implementing regulations – including the agency's determinations of annual RVOs – has been underway for several years. A detailed discussion of these challenges is beyond the scope of this paper, so only a few of the more significant matter are included here.

Three separate industry groups[14] challenged EPA's authority to issue the partial waivers that approved mid-level ethanol blends (up to 15% by volume, or E15) for use in some motor vehicles and engines. *Grocery Mfrs.. Ass'n., et al. v. EPA,*693 F.3d 169 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 288 (2013). In a controversial decision, the D.C. Circuit (Judges Sentelle, Kavanaugh and Tatel) avoided the merits and instead dismissed the case based on petitioner's lack of Article III standing and a determination that prudential standing was jurisdictional and could not be waived. Notably, Judge Sentelle, joined by Judge Tatel, found that the Petroleum Group lacked standing because the use of E15 was voluntary under EPA's waiver – a conclusion many in the refining industry might dispute. In a heated dissent, Judge Kavanaugh – looking more broadly at the RFS program requirements – argued that Congress' increasing ethanol mandates effectively compel Petroleum Group members to make E15.

EPA's persistent inability to timely finalize annual RVO requirements, as well as the data and methodology it relies on to set those requirements (particularly the cellulosic biofuel

[14] The Engine-Products Group represented those manufacturing engines and related products. The Petroleum Group represented those producing or handling petroleum and renewable fuels. The Food Group represented the livestock industry and those who sell foods using corn as part of their processes.

requirement), has been the subject of several legal challenges. The American Petroleum Institute (API) succeeded in striking down the agency's 2012 cellulosic mandate, with the D.C. Circuit concluding that "because EPA's methodology for making its cellulosic biofuel projection did not take neutral aim at accuracy, it was an unreasonable exercise of agency discretion." *API v. EPA*, 706 F.3d 474 (D.C. Cir. 2013). Basically, the agency no longer is permitted to use annual RVOs as a blunt instrument for compelling capital expansion of a particular industry.

Likewise, in *Monroe Energy v. EPA*,[15] petitioners API, American Fuel & Petrochemical Manufacturers (AFPM), and Monroe Energy, are challenging EPA's almost eight-month delay in issuing final RVO numbers for 2013; the agency's reliance on data produced after the close of the public comment period; and, once again, the methodology EPA has used to set the cellulosic biofuel standard. Petitioner Monroe Energy also is challenging the agency's total RVO requirement on the grounds that it requires more renewable fuel than the U.S. economy can consume, thus forcing obligated parties to purchase Renewable Identification Numbers (RINS) in a secondary market where RIN supplies are limited. The matter is in active briefing before the D.C. Circuit.

And in *AFPM v. EPA*, No. 12-1249 (D.C. Circuit), API and AFPM are challenging EPA's denial of several petitions for waiver of the cellulosic biofuel requirements for 2011, a year when virtually no cellulosic biofuel was produced or available to the U.S. market. In light of the D.C. Circuit's decision in *API v. EPA*, in April 2013 the agency requested a voluntary remand to reconsider its 2011 cellulosic RVO. The agency since has announced that it "intends to address the 2011 standard as part of the rulemaking for the 2014 [RVOs]," suggesting that it

[15] *Monroe Energy v. EPA*, No. 13-1265 (D.C. Cir.), *consolidated with* Nos. 12-1268 and 13-1267.

may reset the 2011 cellulosic mandate to zero and issue refunds to those parties who purchased credits for that reporting year.

Federal preemption and dormant Commerce Clause are the key issues in *Rocky Mountain Farmers Union v. Goldstene*, No. 12-15131 and No. 15135 (E.D. Cal.), a consolidated matter now pending before the U.S. Court of Appeals for the Ninth Circuit. Petitioners in *Rocky Mountain*, including trade organizations representing both the petroleum refining and renewable fuel industries, contend that California's Low Carbon Fuel Standard (LCFS) is invalid under the Commerce Clause because it discriminates against crude oil and ethanol produced outside California and also because it is preempted by the federal RFS. A federal district court agreed in 2011, finding the LCFS unconstitutional; but a divided 9th Circuit panel reversed and remanded in September 2013. AFPM's petition for rehearing *en banc* was denied on January 22, 2014.

Finally, in *API v. Cooper,* petitioners API and AFPM are challenging a 2008 North Carolina statute which requires fuel suppliers to sell both gasoline blended with ethanol and unblended gasoline. Petitioners contend that the North Carolina statute is preempted by the federal RFS, the Lanham Act (trademark protection), the Petroleum Marketing Practices Act (PMPA), and the Commerce Clause. In June 2013, the U.S. Court of Appeals for the Fourth Circuit upheld the district court's decision dismissing the PMPA and RFS preemption claims, and remanded the Lanham Act claim for a determination whether splash blending impacts refiners' ability to ensure quality for their branded products. *API, AFPM v. Roy A. Cooper, III*, 2013 U.S. App. LEXIS 11386; 2013 WL 2443148 (4th Cir. 2013). The case is set for bench trial next month.

BASIC QUESTIONS AND ANSWERS ABOUT NATURAL RESOURCE DAMAGES

Introduction

Stewardship of natural resources may be traced back as far as *Magna Carta* and the Public Trust Doctrine found in the common law, and to even earlier roots in antiquity.[16] Today, in the United States, the protection of natural resources, the assessment of resource injuries and the bases for damages claims are codified into federal and state legislation and regulations, as well as provided for in the common law. The passage of the Clean Water Act in 1972, and then the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980, heralded the era of modern government trustee approaches for assessing and determining damages to natural resources.

Following the 1989 Exxon Valdez accident at Bligh Reef in Prince William Sound, Alaska, Congress passed the Oil Pollution Act ("OPA") of 1990, which shored up the government's ability to prevent and respond to oil spills as well as adding additional bases for

[16] *See, e.g., Idaho v. Couer d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S. Ct. 2028 (1997) (ownership over navigable waters uniquely implicates sovereign interests and arises from ancient doctrines (*citing* Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841)); *Arnold v. Mundy*, 6 N.J.L. 1, *11-*12, 10 Am. Dec. 356, 1 Halst. 1 (1821) (noting peoples' natural rights to common liberties such as fisheries preserved since *Magna Carta*, which restored the principles of the ancient law, and that the sovereign's interest in the ports, the bays, the coasts of the sea, including both the water and the land under the water, is for the sake of order and protection, and not for his own use, but for the use of the citizen); *Roath v. Driscoll*, 20 Conn. 532 (1850) (water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth and is capable of common protection); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (in its *parens patriae* "capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.")

potential Natural Resource Damages ("NRD" or "NRDs") claims caused by oil spills.[17] In the last decade, some State Trustees have focused efforts on NRD claims for alleged groundwater resource injuries.[18] Recently, downstream damage claims related to releases from underground storage tanks to groundwater, drinking water and other water wells have been the subject of concern for the oil and gas industry. Some of these claims are driven by allegations related to the release of petroleum and fuel additives such as Methyl Tertiary Butyl Ether ("MTBE").[19] At the other end of the spectrum, are massive damage claims arising from rare catastrophic events

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[17] Although beyond the scope of this article, the reader should be aware that while OPA provides for liability caused by oil spills and discharges, and substantial threats of discharges, CERCLA contains a petroleum exclusion, which generally has been interpreted to limit its application to discharges of petroleum mixed with other hazardous substances prior to release. *See* CERCLA §101(14), 42 U.S.C. §9601(14) (the definition of a hazardous substance excludes "petroleum, including crude oil, or any fraction thereof which is not specifically listed or designated as a hazardous substance"). The application of CERCLA's petroleum exclusion has been the subject of numerous court opinions. *See generally*, *Cose v. Getty Oil Co*., 4 F.3d 700, 704 (9th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992); *S. Pac. Transp. Co. v. California*, 790 F. Supp. 983, 986 (C.D. Cal. 1991); *Marrero Hernandez v. Esso Standard Oil Co*., 597 F. Supp. 2d 272 (D.P.R. 2009); *City of New York v. Exxon Corp.*, 774 F. Supp. 734 (S.D.N.Y. 1990), as well as guidance by the United States Environmental Protection Agency ("USEPA"). *See* USEPA, *Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* (1987) (OSWER Directive 9838.1), *available at* http://www2.epa.gov/enforcement/guidance-scope-cercla-petroleum-exclusion (last visited Jan. 18, 2014). Petroleum releases are, however, covered by other federal statutes, such as the Clean Water Act and generally the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq*., as well as various state environmental statutes.

[18] *See* Edward F. McTiernan, et al., *An Overview of New Jersey's Natural Resource Damage Program*, Bus. Wk. (Nov. 15, 2004); *see also* http://www.dec.ny.gov/regulations/2411.html (New York's NRD program) (last visited January 14, 2014); and http://www.nj.gov/dep/nrr/ (New Jersey's NRD program) (last visited January, 18, 2014). New Jersey's efforts to litigate groundwater NRD claims suffered some setbacks in 2012. *See New Jersey Dep't of Envtl. Protection v. Essex Chem. Corp.*, 2012 WL 913042 (N.J. App. Div. 2012) (appellate court rejects arguments that trial court was required to accord State's experts any special deference particularly where their opinions were based on economic rather than environmental factors and the State failed to establish a basis for using Resource Equivalency Analysis).

[19] *See generally In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 725 F.3d 65 (2d Cir. 2013), *petition for cert. filed* (Jan. 13, 2014) (No. 13-842) (Court discusses damages for loss of potential future drinking water use).

caused by such things as accidental blowouts at subsea production wells or massive tanker spills. And, in yet another iteration of creative claims, some have tried to assert public nuisance-type actions related to air emissions that are the alleged cause climate change, but have met no success.[20]

Historically, presently and in the future, natural resources have been, are and will be a matter of great public concern, government regulation and, unfortunately, the subject of lawsuits. This article is intended to answer some basic questions for those who may be unfamiliar with the general principles of NRD assessments and claims by government trustees. It introduces in a Question and Answer-type format some of the key NRD-related concepts, including: (1) What is NRD; (2) Which government agencies are trustees over natural resources; (3) How is NRD calculated; (4) What are the legal bases for some NRD claims; (5) What are some strategies and defenses for potential NRD claims; and, finally (6) A few words about the NRD cooperative assessment process with trustees. This part of the article is intended as general primer on NRD.[21] Following this basic discussion of NRD is a more detailed look at some claims the oil and gas industry has faced and a basic discussion of some issues it may face in the future.

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[20] *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533, 180 L. Ed. 2d 435 (2011); *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) (native villagers action against energy producers alleging that they are substantial contributors to global warming and are responsible for numerous resource injuries, including rights to use and enjoy public and private property, was preempted by the Clean Air Act and actions by USEPA). *See also* "Natural Resource Damages for Climate Change …," J. Wylie Donald, Ira Gottlieb, *et al.*, Environmental Claims Journal: Vol. 20:4, at 256-272, and Vol. 21:1, 2-28.

[21] For a more detailed discussion of the NRD topics generally addressed in this article and other related subjects, *see* Ira Gottlieb, *et al.*, "A Practical Guide to Litigating Natural Resource Damages Claims" *Environmental Litigation: Law and Strategy* (Cary R. Perlman, Ed. ABA 2009).

(1) Question: What Are NRDs?

Short Answer: The actual and measurable loss of resource services.

NRDs aim to compensate the public for the injury, destruction, or loss of natural resources that result from contamination.[22] They are an additional liability over and above removal, response and remediation costs. Claims for NRD are different from those specifically related to cleanup.

Consider a basic illustration: A ship runs aground and an oil spill occurs into a bay that washes up on the shoreline. A responsible party (*e.g.,* a vessel owner) would be required, under federal and state statutes, to pay for the cleanup for such a spill (*i.e.,* removal of slicks and sludge from the sea surface or beaches). But the responsible party may also be faced with liability for any losses to natural resource services (*i.e.,* NRDs) that are caused by the spill. For example, if the oil spill results the death of fish and waterfowl, the temporary loss of their habitat, or the closure of the bay to fishing or boating, or to the closure of beaches, this may result in compensable NRDs for those losses caused by the spill itself. In another context, a release of petroleum from an underground storage tank may result in NRD claims for lost groundwater resources or other natural resource service losses.[23]

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[22] While CERCLA limits damages to those mentioned above, OPA outlines six categories of damages for which a responsible party is liable under Section 1002(a), 33 USC §2702(a). These are damages to: natural resources; real or personal property; subsistence use; revenues; profits and earning capacity; and public services.

[23] Groundwater natural resource services generally include drinking and other water well (*e.g.,* irrigation) services; prevention of surface subsidence; and discharge services to receiving water bodies, such as brooks, streams, ponds and lakes. Trustees have sometimes asserted groundwater claims for alleged losses of passive services, such as for existence and option values these resources provide (*i.e.,* the public's knowledge that the resource is available even if it is not generally in use). *See generally* Richard W. Dunford, Ph.D, "Estimating Groundwater Damages," (Paper Presented to the Environmental Law Section of the Colorado Bar Ass'n, January 21, 2004). Health effects from allegedly contaminated water are treated differently than damages to the resource services.

Understanding NRDs requires a short review of some basic terms: for example, natural resources; natural resource services; natural resource injuries; and baseline conditions.

A. "Natural resources" are what you may expect. They include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources …."[24]

B. "Natural resource services" are the physical, chemical and biological processes that natural resources perform for the benefit of the ecology and/or the public (thus including human uses of those services).[25] Ecological services may include, for example, habitat; food sources; soil stabilization; flood control; and discharge of water to streams and other water bodies. Human use services may include recreation, fishing, aesthetic value, and drinking water and other well water services.

C. "Natural resource injuries" are generally defined as any adverse change or impact of a discharge into or on a natural resource or impairment of natural resource services, whether direct or indirect, long-term or short-term. Natural resource injuries include a partial or complete destruction, loss, or loss of use of the natural resource.[26] Some examples are (among others): (i) contaminant concentrations in groundwater over regulatory standards; (ii) contaminant concentrations in the environment that cause death or disease in flora or fauna, or impair habitat; and (ii) contaminant concentrations in soil that inhibit carbon mineralization resulting from a reduction in soil microbial populations.[27]

D. "Baseline" is the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance not occurred.[28] Baseline data

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[24] OPA, 33 USC §2701(20); *see also* CERCLA 42 U.S.C. §9601(16).
[25] *See* 43 C.F.R. §11.14; 15 C.F.R. §990.30.
[26] *See* 43 C.F.R. §11.14; 15 C.F.R. §990.30.
[27] *See, e.g.*, 42 C.F.R. §11.62.
[28] *See* 43 C.F.R. §11.14(e); 15 C.F.R. §990.30

may be estimated using historical data, reference data, control data, or data on incremental changes (*e.g.*, number of dead animals), alone or in combination, as appropriate.[29]

NRDs can be measured as essentially the dollar or other value of the restoration and/or replacement of natural resources needed to compensate for the loss of an injured resource back to baseline conditions and to further compensate the public for the injury and damage to natural resources as a result of a discharge. This could include compensation for the "interim" losses, *i.e.*, the services lost or off-line between the discharge causing contamination and the time the services were restored to baseline conditions.[30] One court stated that "natural resources damages are viewed as the difference between the natural resource in its pristine [or baseline] condition and the natural resource after the cleanup, together with the [past or future] lost use value and the costs of assessment."[31]

(2) Question: Which Government Agencies Are Responsible for Pursuing NRD Claims?

Short Answer: Generally, various designated federal, state and tribal designees, and sometimes foreign governments, but not private parties, or USEPA.

Only authorized natural resource "trustees" can recover, on behalf of the public, for damages to those resources under their stewardship.[32] While private parties may not bring NRD claims under CERCLA, they can seek contribution and have the right to pursue claims under OPA for damages to real or personal property, subsistence use losses, losses of revenue, lost profits and earning capacity.[33] And, while USEPA is responsible for oversight of remedial

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[29] *See* 15 C.F.R. §990.30.

[30] *See* 15 C.F.R. §990.30.

[31] *In Re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1035 (D. Mass. 1989). (emphasis added.)

[32] *See* 42 U.S.C. §9607(f)(1); 33 U.S.C. §2706(a).

investigations, removal and cleanup of spills and releases of hazardous substances, it is not a natural resource trustee.

NRD claims are assessed and pursued by designated natural resource trustees.[34] These trustees generally include federal agencies such as the Department of Commerce through the National Oceanic Atmospheric Administration and the Department of Interior through the United States Fish & Wildlife Service.[35] CERCLA and OPA provide that a trustee is a federal, state, or Indian tribal official appointed by the President (or a state governor or the governing body of any Indian tribe) to act on behalf of the public as a trustee for natural resources. State government designated representatives (usually selected by governors), such as state environmental or conservation agencies, may also be trustees, particularly for groundwater resources, as well as

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[33] *Id.*; 33 U.S.C. §2702(b)(2); *see also Ohio v. Dep't of Interior*, 880 F.2d 432, 451 (D.C. Cir. 1989); *National Ass'n of Mfrs. v. Dep't of Interior*, 134 F.3d 1095, 1113 (D.C. Cir. 1998); *Alaska Sports Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 774 (9th Cir.1994); *City of Portland v. Boeing,* 179 F. Supp. 2d 1190, 1202-04 (City not an NRD trustee authorized to bring claims).

[34] Under CERCLA §107(f)(2)(A), 42 U.S.C. §9607(f)(2)(A), the President is required to designate Federal officials who are to act on behalf of the public as Trustees for natural resources under Federal trusteeship. Section 300.600 of the National Contingency Plan (40 C.F.R. §300.600) designates the Secretaries of the following Departments to act as Trustees for the natural resources:

- Department of Agriculture;
- Department of Commerce;
- Department of Defense;
- Department of Energy;
- Department of the Interior; and
- Other agencies authorized to manage or protect natural resources.

Additionally, under CERCLA §107(f)(2)(B), state governors must designate state officials who may act on behalf of the public as trustees for natural resources. Under OPA §1006(b)(1)-(5), the President or the authorized representative of any State, Indian Tribe, or foreign government, shall act on behalf of the public, Indian Tribe, or foreign country as trustee of natural resources "to present a claim for and to recover damages to the natural resources." 33 U.S.C. §2706(b).

[35] *Id.*

recognized tribal governments, and in some circumstances foreign governments.[36] Generally, private persons cannot pursue NRD.[37]

Federal statutes do not identify which natural resources are subject to federal or state or tribal trusteeship. There can be, and often is, multiple and sometimes overlapping co-trustees involved in any one case. For example, a navigable waterway covering a relatively large region may be under the stewardship of multiple "co-trustees" (federal, state and/or tribal), with each having a potential NRD claim against the responsible party(ies) for the same or different resources. However, CERCLA and OPA contain provisions guarding against double recovery. CERCLA provides:

> There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource.

42 U.S.C. §9607(f)(1).

OPA provides:

> There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource

33 U.S.C. §2706(d)(3).

Thus, even if two (or more) trustees assert jurisdiction over a natural resource, these provisions foreclose trustees from making a responsible party pay multiple times for injuries that occur during an incident to the same natural resource.[38]

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[36] *Id.*

[37] *See, supra,* note 17.

[38] Not surprisingly, courts reject the notion of double recoveries in the NRD context. *See United States v. Asarco Inc.,* 471 F. Supp. 2d 1063, 1067–69 (D. Idaho 2005).

(3) *Question: How Are NRDs Calculated?*

Short Answer: Generally, by use of a NRD assessment found in regulations.

NRDs may be calculated by performing a natural resource damages assessment ("NRDA"). There are two sets of federal regulations addressing the NRDA process: (i) Department of Interior ("DOI") regulations promulgated under CERCLA;[39] and (ii) National Oceanic and Atmospheric Administration ("NOAA") regulations promulgated under the OPA.[40] If natural resources are injured by a discharge or release of hazardous substances or oil, the DOI regulations are used.[41] The NOAA regulations are applicable in assessing damages which may result from discharges of oil.[42] Various assessment models and frameworks have been developed to value past and future impacts on natural resources.[43]

These regulations establish the procedures to identify methods to restore injured natural resources to baseline conditions. This includes identifying any natural resource injuries that have occurred – *i.e.*, identifying the natural resource services provided by the resource; determining the baseline level of such services; and quantifying the reduction in service levels that result from the contamination. Then, a primary restoration action maybe selected to return injured resources to baseline conditions (*e.g.*, replanting flora or repopulating fauna). A compensatory restoration action may also be selected to compensate for the interim loss of services that

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[39] 43 C.F.R. Part 11.

[40] 15 C.F.R. Part 990.

[41] *See* 43 C.F.R. §11.10.

[42] *See* 15 C.F.R. §990.10.

[43] Two such examples are Habitat Equivalency Analysis ("HEA") and Resource Equivalency Analysis ("REA"). For a brief discussion of these methodologies, *see* Joan P. Snyder and William Devousges, "Habitat and Resource Equivalency Analyses in Restoration Compensation and Restoration Decision Making," Natural Resources & Environment (ABA Section of Environment, Energy, and Resources, Vol. 28, No. 1, Summer 2013) 3. *See also* "NOAA Habitat Equivalency Analysis: An Overview," (1995), http://www.darrp.noaa.gov/library/pdf/heaoverv.pdf.

occurred until baseline conditions are restored (*e.g.*, planting flora or populating more fauna). NRDs may be measured in discounted service acre years,[44] or by some other metric of lost service value, but ultimately a responsible party will be asked to pay the cost to restore lost services.

(4) Question: What Are The Legal Bases For Some NRD Claims?
Short Answer: Environmental statutes, regulations and the common law.

Federal environmental statutes allow for the assessment for and recovery of NRD from responsible parties. For example, OPA provides that "each responsible party for a vessel or a facility from which oil is discharged … is liable for the removal costs and damages … that result from such incident."[45] Covered damages include "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage …. "[46] Similarly, CERCLA provides that responsible parties are liable, not only for costs of removal or remedial action, but also for "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."[47] Although parties face strict liability for cleanup costs under these statutes, trustees must establish causation of injuries and damages to prove NRDs.[48] This can be a challenging task. The statutory language of both CERCLA and OPA liability require proof of causation.[49] OPA states that "each responsible party … is liable for the removal costs

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[44] *See, supra,* note 26.

[45] 33 U.S.C. §2702(a) (emphasis added).

[46] 33 U.S.C. §2702(a).

[47] 42 U.S.C. §9607(a)(4)(C).

[48] *See Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986); *see also* CERCLA §107(a)(4)(C), 42 U.S.C. §9607(a)(4)(C); OPA §1002, 33 U.S.C. §2702; FWPCA §311(f)(4), 33 U.S.C. §1321(f)(4).

[49] *Id.*

and damages … that result from such incident."[50] CERCLA states that responsible parties are liable for "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."[51]

Other federal statutes that authorize the recovery of NRD include the Clean Water Act,[52] Marine Protection, Research & Sanctuaries Act,[53] and Park System Resources Protection Act.[54] In addition, common law claims for NRD may also exist, as in claims sounding in nuisance, trespass, or negligence.

(5) Question: What are Some Strategies and Defenses for Potential NRD Claims?

Short Answer: Learning the facts, hiring the right professionals, and determining what lines of evidence support your positions.

Defending against an NRD claim is similar to defending against any environmental claim. It can be time-intensive, fact-intensive, costly and an uphill battle. Getting started early with the right team can make a long-term difference. Necessary prerequisites to mounting a successful defense include:

- Understanding the circumstances and conditions that gave rise to the release of contaminants that caused alleged NRDs, including existing (baseline) conditions at the time of the event giving rise to alleged liabilities;
- Learning the details of the event giving rise to potential liability, or the historical and operational facts related to the facility at issue, including those of other facilities that may be sources of releases or discharges into the environment;

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[50] 33 U.S.C. §2702(a) (emphasis added).

[51] 42 U.S.C. §9607(a)(4)(C); 33 U.S.C. §2702(a). *See also Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003).

[52] 33 U.S.C. §1321(f).

[53] 16 U.S.C. §1443.

[54] 16 U.S.C. §19.

- Understanding the facts related to the current and historical uses of the natural resources allegedly impacted and the nature of the impacts (*i.e.*, understanding baseline conditions);
- Hiring environmental and resource economic experts to assist in the assessment of injuries and with causation issues (among others). One key area where experts may play a large role, for example, is in the analysis of baseline conditions. Historical conditions, releases or discharges, including those spanning decades from numerous sources in heavily industrialized areas, could significantly affect the baseline determination.

The following is brief synopsis of some potential defenses:

A. Baseline

Trustees have the burden of proof to establish baseline conditions,[55] so this is not truly a defense. It is, however, important to get this analysis done accurately and to require trustees to do so correctly. All injury quantification and damage calculations will start with this fundamental determination. Establishment of the correct baseline will have substantial implications for injury quantification, damage estimates and for restoration needs. The determination of baseline may be heavily data and fact driven, and subject to much expert debate. Thus, it's important to pay careful attention to this issue at the outset of any assessment.

B. Divisibility of Harm

In some circumstances involving multiple sources of contamination there may be a reasonable basis for apportionment of damages, leaving a party responsible for only a portion of the costs.[56] Possible reasonable bases for apportionment include differences in the nature of contaminants found at a site or location, relative amounts of contaminants discharged, the

[55] *See, e.g.,* 43 C.F.R. §11.72(b)(3); 43 C.F.R. §11.14(ll); and, 15 C.F.R. §990.10.

[56] *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).

relative time period over which a particular party's discharges occurred, and the geographic area of the contaminants released by a particular party. Of course, when a party is the sole source of a discharge apportionment may not be possible, although a party should be mindful of historic and atmospheric conditions that may be contributing causes to the damage.

C. Pre-enactment Releases

CERCLA contains a prohibition against retroactive recovery for NRD:

> There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such [natural resource] damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

42 U.S.C. §9607(f)(1).

Courts have reached different conclusions about whether, for this provision to apply, the damages that must occur "wholly before December 11, 1980," include costs incurred by a trustee in performing the NRDA and the continuation of damage subsequent to that date.[57] Although this defense seems to provide fertile ground for debate, it has not proven to be a sturdy defense.

D. Permitted Releases

CERCLA and OPA limit liability for damages caused by permitted discharges.[58] The purpose of these provisions is to protect from liability those who hold certain discharge permits (such as National Pollutant Discharge Elimination System permits). While the defense presents a seeming opportunity to bar certain damage claims, in practice it is difficult to demonstrate the

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[57] *See In re Acushnet River & New Bedford Harbor Proc.*, 716 F. Supp. 676, 681-83 (D. Mass. 1989) (noting that damages include quantification stemming from an injury); *Montana v. Atlantic Richfield Co.*, 266 F. Supp. 2d 1238 (D. Mont. 2003) (finding that damages accrue when the injury to the resources occurs regardless of when damages are assessed or quantified).

[58] *See* 42 U.S.C. §9607(j) (limiting liability for damages resulting from a federally permitted release); 42 U.S.C. §9601(10) (defining federally permitted release); 33 U.S.C. §2702(c) (excluding discharges permitted by a permit issued under Federal, State, or local law).

difference between unpermitted releases and those that may have been within permit parameters.[59]

E. Statutes Of Limitations

Consideration should be given to whether a trustee's claim for NRD is time-barred under the applicable statutes of limitations. Under OPA, an NRD action is time-barred unless the action is brought within 3 years after the date of completion of the NRDA.[60] A CERCLA NRD claim must be filed within three years of "[t]he date of the discovery of the loss and its connection with the release in question."[61]

F. Some Other Defenses

Other statutory defenses include that liability does not lie when a responsible party can establish that the release was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party who is not related to the responsible party (or any combination of these).[62] The responsible party has the burden to prove (by the preponderance of the evidence) that it exercised due care with respect to the contamination and took precaution against foreseeable acts or omissions of third parties.[63]

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[59] *See In re Acushnet River & New Bedford Harbor Proc.*, 722 F. Supp. 893, 901 (D. Mass. 1989).

[60] *See* 33 U.S.C. §2717(f)(1)(B).

[61] 42 U.S.C. §9613(g)(1).

[62] 42 U.S.C. §9607(b); 33 U.S.C. §1321(f); 33 U.S.C. § 2703(a).

[63] 42 U.S.C. §9607(b); 33 U.S.C. §2703(a).

(6) A Few Word About the Cooperative Assessment Process with Trustees

Trustees may attempt to engage parties in a cooperative NRD assessment process. Unlike Superfund remedial investigations an feasibility studies, where responsible parties take the lead on investigations, subject to USEPA oversight, in the NRD world the trustees will often control the assessment of injuries and damages and do the necessary studies with their own consultants. This process can sometimes be complicated by the fact that several trustees may be involved in the assessment process. Nonetheless, the trustees (sometimes acting through a joint-trustees' council) will seek to engage responsible parties in a cooperative process and obtain upfront funding for their assessment work. According to NOAA, the goal of cooperative assessment is "to promote participation between industry and government (in concert with the public) to facilitate the restoration of natural resources and their services injured or lost by hazardous substance releases and oil spills"[64]

In some situations the cooperative assessment process may make sense (*e.g.,* where a discrete and limited release has occurred, responsibility is clear and the nature and extent of injuries may be relatively easily understood). Other situations may present a more complex set of circumstances requiring consideration of a variety of factors. In such circumstances the pros and cons of cooperative assessment should be carefully considered and balanced before moving in one direction or another.

Possible benefits to consider include:

- A seat at the assessment table with the trustees to discuss data needs, the collection of data and its meaning;
- Input on planning and development of assessment activities;

[64] NOAA, Damage Assessment, Remediation & Restoration Program, "Cooperative Assessment Process,", *available at* http://www.darrp.noaa.gov/partner/cap/ (last visited Jan. 20, 2014).

- Parallel tracking of NRDA and cleanup activities;
- Reduction of costs, efficiency in assessment activities and savings of time; and
- Facilitating early restoration based settlements.

Possible detriments to consider include:

- Limited meaningful input into the actual assessment of injuries and damages;
- Upfront funding may lead to unnecessary studies and less cost savings;
- Incurring extra and duplicative costs;
- A cooperative assessment process may not be fixed or guided by any regulatory requirements; and,
- There may be unintended admissions or consequences if cooperation ends and litigation occurs.

Cooperative assessments may not be the best alternative for all NRD cases, but they can be a viable and effective choice for certain ones. The ultimate decision on whether to participate in a cooperative assessment must be made on an event or site-specific basis, preferably after some preliminary discussions between the trustees and responsible parties on the key factors for successful cooperative assessment and the memorialization of those factors into a binding memorandum of agreement.

CONCLUSION

Taken together, these three "hot topics" write different chapters in a single story about litigation against the oil and gas industry generally, and downstream products in particular. The MTBE battles begun years ago finally show signs of waning, but as those clashes slowly fade into the past a new threat may lie just beyond the horizon: litigation over America's newest renewable fuel products. And as that storyline develops, the threat of NRD litigation remains omnipotent – a spark that could reignite the powder keg of MTBE litigation;, add an entirely new

set of teeth to future ethanol cases; or simply spin off on its own in response to an event or product unforeseeable today.

Whether and how the story ends cannot be known, but the ability to influence how the next chapters are written rests with the oil and gas industry. Yesterday's experiences are today's lessons and tomorrow's strategies. Industry members would do well by themselves going forward to understand, track and learn from these three topics today.