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The Changing Landscape of Liability for Natural Resource Damages

By John G. Nevius, Esq., P.E.

Many jurisdictions have announced plans to more actively pursue natural resource damages from potentially responsible parties (PRPs) deemed liable under the Comprehensive Environmental Response, Compensation, and Liability Act, also known as CERCLA or Superfund. Recent case law developments have changed the landscape when it comes to assessing the scope of this CERCLA/natural resource damages liability and how to pay for it. Natural resource damages are defined as “the dollar value of the appropriate degree of restoration necessary to assess, restore, rehabilitate, replace or otherwise compensate for the injury to [land, fish, wild life, biota, air, water] as a result of a discharge.” Natural resource damages also may be exacerbated by the spreading out of a discharge due to events such as Superstorm Sandy said to be associated with climate change.

Businesses that allegedly caused natural resource damages may be exposed to significant liabilities — some of them decades old, inherited from predecessor companies. At the

same time, pre-1985 liability insurance policies — particularly even earlier policies containing fewer potentially applicable exclusions — may provide coverage to offset the costs of natural resource damages, even where environmental coverage actions previously have been brought and resolved. Natural resource damages differ from CERCLA “response costs” incurred to address more immediate environmental crises. The semantic distinction between costs and damages has been used by the insurance industry to argue against coverage for response costs as opposed to “resource damages.” This distinction, however, may also allow policyholders to argue successfully that prior coverage settlements address only environmental cleanup or response “costs” and do not operate to preclude previously untapped or additional coverage for natural resource damages going forward.

Apportionment of CERCLA Liability, Causation and Insurance Implications

When authorities identify multiple PRPs at a site, a point frequently at issue is whether

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liability will be “apportioned” or “allocated.” A U.S. District Court recently explained the difference in *Yankee Gas Services v. UGI Utilities, Inc.*, “To apportion is to request separate checks, with each party paying only for his own meal. To allocate is to take an unitemized bill and ask everyone to pay what is fair.” While allocation and apportionment are conceptually distinct, they often reach the same result. The key difference is that those faced with allocation remain jointly and severally liable and must generally complete substantial portions of the cleanup before seeking contribution. Apportionment, on the other hand, may offer a defense to conducting further work.

Under the 2009 *Burlington Northern* case, certain PRPs may be able to apportion their environmental liability where the facts provide a reasonable basis for division according to the respective contributions to the harm alleged. However, subsequent cases have clarified or limited apportionment where it has been asserted as a defense to further cleanup liability. Alternatively, jointly and severally liable, PRPs without sufficient facts to support apportionment may be able to take advantage of traditional equitable principles to instead allocate their natural resource damages liability.

In *Burlington Northern*, the court cited traditional tort principles in finding that “when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself caused.” However, “where two or more persons cause a single and indivisible harm, each is subject to [joint and several] liability for the entire harm.” See Restatement (Second) of Torts § 433A.

In part relying on this precedent three years later, in *USA v. NCR Corp.* (2012), NCR unilaterally ceased cleanup activities after unsuccessfully seeking contribution from others, arguing that it had paid more than its apportioned share. The NCR court employed a two-part test: 1) the harm must be “theoretically capable of apportionment,” and 2) where apportionment may be possible, the court must

determine precisely how to apportion damages (a question of fact).

The court then rejected NCR’s apportionment theory — volumetric contribution — as a defense because the contaminants at issue were in sediments and must be addressed via soil dredging. Dredging is not based upon volumetric contributions, but rather involves the same cost and volumes of soil regardless of whether the water was lightly or heavily contaminated. NCR was not able to satisfy its two-part burden to prove otherwise, in part because “the need for cleanup . . . is not linearly correlated to the amount of [contaminants] that each [PRP] discharged.” In other words, how the contamination was caused and was to be addressed were not consistent with NCR’s apportionment theory.

Similarly, another federal district court recently dismissed an apportionment defense because the entirety of the harm had not yet been addressed. In *Pakootas v. Teck Cominco Metals, Inc.*, the affirmative defense of apportionment was held premature where plaintiffs, both Native American tribes and the state, claimed substantial response costs and natural resource damages. The NCR and *Pakootas* decisions place significant limitations on an apportionment defense to joint-and-several CERCLA liability.

Ironically, this so-called concurrent-causation principle where the facts on causation cannot support apportionment has been used to find insurance coverage where a covered and an uncovered cause of loss converge. The classic example is when two forest fires, one caused accidentally and the other by arson, merge and destroy property. In cases such as these, the tie goes to the policyholder, i.e., the inability to apportion tips in favor of coverage. The recent proliferation of so-called anti-concurrent causation clauses in property insurance explicitly reversing this contract-interpretation rule has unexpectedly left many policyholders without coverage, especially after events like Superstorm Sandy. Just as with CERCLA apportionment, however, where the facts can demonstrate a factual basis for separating out causes, a policyholder PRP should be given a chance to make its case.

Obtaining Insurance Coverage for Natural Resource Damages

Three factors typically will determine whether insurance coverage for natural resource damages is available. First, the timing of the actual occurrence giving rise to property damage likely must have taken place before 1985, when the so-called “absolute pollution exclusion” became a standard provision.

Second, the timing of a policyholder’s notification of a covered occurrence almost inevitably will be an issue. Insurance companies likely will argue that the policyholder should have foreseen an action for natural resource damages and that they are directly linked to other earlier events and/or environmental response costs already incurred — and possibly covered. The counterargument is that insurance companies likely have suffered no prejudice. Natural resource damages merely reflect an after-the-fact assessment of existing generalized harm. Reflexive denial of natural

resource damages coverage claims is typical and is a pattern of insurance industry behavior that makes it difficult to legitimately argue prejudice.

Third, the specifics of how natural resource damages are apportioned or allocated scientifically and legally will give rise to coverage issues and arguably implicate some sort of policy fine print. Accordingly, policyholders should expect a fight when seeking coverage for natural resource damages, but should not be deterred. Companies hit with a suit seeking damages for natural resource damages (or more likely a trustee demand letter) should immediately notify their brokers and liability insurance companies and begin investigating legitimate bases for apportionment or allocation, including the nature and migration of the contaminants at issue. The more one knows about how the contamination at issue arose, generally the better the options for managing the liability.▲

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