

REMARKS

The Past, Present, and Future of Natural Resource Damages Claims

JOHN C. CRUDEN AND MATTHEW R. OAKES*

On January 5, 2014, John Cruden was confirmed by the U.S. Senate as the U.S. Department of Justice's Assistant Attorney General for the Environment and Natural Resources Division. These remarks are based on Mr. Cruden's keynote address to the Fourth Annual Advanced Conference on Natural Resource Damages held in Washington, D.C. on March 12 and 13, 2015.

INTRODUCTION

My daughter Kristen is a first grade teacher. On Kristen's classroom wall is a set of rules: raise your hand if you want to go to the bathroom, show respect, and listen when others are talking—that kind of thing. One of Kristen's rules is “if you make a mess, clean it up.” We could dispense with a lot of our environmental laws if we adopted Kristen's rule. If you make a mess, clean it up—that principle is at the core of our approach to keeping the water and the soil clean and to managing business and industrial waste. But is that approach enough? Is dredging a contaminated river enough when it may take decades to bring the water quality back to acceptable levels? The answer, at least in some instances, is “no.”

The goal of most environmental laws is to protect the public health and the environment.¹ The major environmental statutes of the early 1970s, however,

* We acknowledge the contributions of Mark Barash and William Brighton. Their many years of experience and insights in the natural resource damages (“NRD”) field helped to frame and develop many of the ideas presented here. John Cruden is the Assistant Attorney General for the Environment and Natural Resources Division (“ENRD”) of the United States Department of Justice. Prior to being sworn in as Assistant Attorney General, John served as the President of the Environmental Law Institute from 2011 to 2015, the Chief of the Environmental Enforcement Section of ENRD from 1991 to 1995, and was a career Deputy Assistant Attorney General of ENRD from 1995 to 2011. Matthew Oakes is a Trial Attorney in the Law and Policy Section of ENRD and an Adjunct Professor at the University of Maryland School of Law. © 2016, John C. Cruden and Matthew R. Oakes.

1. See 33 U.S.C. § 1251(a) (2012) (Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”); 42 U.S.C. § 4321 (2012) (The purposes of

center on command-and-control regulation.² Command-and-control is not focused on the resource itself; instead, our early environmental regulations focused on pollution, both its effects and how to prevent it.³ As in Kristen's rule, the focus of traditional environmental law is cleaning up the mess.

Cleaning up the mess, however, does not make a resource whole, and does not remedy all of the harm associated with the underlying pollution. Tort law, for example, recognizes a much wider range of damages and a much wider range of remedies than traditional environmental laws do. If someone loses a leg in a car accident, most people would not think it was enough for the responsible party to just cover medical bills—to try to remedy the harmful impact of the tort. Our laws allow compensation for pain and suffering, lost work, and compensatory and punitive damages that make up for a range of tangible and intangible injuries.⁴ Where traditional environmental law tends to focus on the contaminant, tort law focuses on the injured party. More specifically, the purpose of allowing damages in tort law is to make the injured party whole.⁵

Throughout most of the fabric of our environmental laws, the focus is on a cleanup or prevention of environmental harm.⁶ Natural resource damage (“NRD”)

the National Environmental Policy Act are to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”); *id.* § 6902(b) (The primary purpose of the Resource Conservation and Recovery Act is to reduce generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste that is generated “so as to minimize the present and future threat to human health and the environment.”); *id.* § 7401(b)(1) (One purpose of the Clean Air Act is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”).

2. See, e.g., Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998).

3. See, e.g., Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 275 (“Command-and-control regulation refers to a system of pollution control based on uniform standards of performance for sources of pollution. Most typically, regulators adopt standards that specify for a particular category of sources how much of a given pollutant a source is permitted to emit over a given unit of time.”).

4. See *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 437 n.11 (2001) (“Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time As the types of compensatory damages available to plaintiffs have broadened . . . the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.” (internal citation omitted)).

5. See *Whitney Transfer Co. v. McFarland*, 138 S.W.2d 972, 976 (Ky. 1940) (“It is the purpose, policy, and provision of the law that the wrongdoer shall be liable for the whole damage caused by his wrongful act.”) (citation omitted); *Bellard v. Am. Cent. Ins.*, 2007-1335, p. 19 (La. 4/18/08); 980 So. 2d 654, 668 (La. 2008) (“The purpose of tort damages is to make the victim whole.”); *Schickling v. Aspinall*, 369 S.E.2d 172, 174 (Va. 1988) (Under tort law “a plaintiff is entitled to compensation sufficient to make him whole”).

6. The suite of modern environmental laws has its roots in tort law, early resource conservation laws, and early municipal efforts to curb urban pollution and noise pollution—often these laws had a different focus. See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 23–24, 36–37, 47–66 (2006). With respect to the suite of modern, agency-based environmental laws, however, courts have often recognized the polluter pays principle. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (CERCLA “imposes the

claims are different. NRD claims allow a “trustee” to hold responsible parties liable for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.”⁷ In the NRD world, cleaning up your mess is not enough. These claims focus on replacing a damaged resource itself, rather than on pecuniary compensation for the market value of the resource or the costs of a cleanup.⁸ In this sense, claims for natural resource damages are unique in the world of environmental law.

NRD claims combine aspects of tort, trust, and administrative law, and evolve from the public trust doctrine, a doctrine developed under Roman law. The Roman “public trust” concept protected certain natural resources, including the air, running water, and the sea, as being open to everyone and reserved for the people.⁹ Thus, under the public trust doctrine, some resources are so important that we must protect them even if those resources are found on private land. This leads to a notion of a “trustee.” Trustees include states, the federal government, and Indian tribes. Only trustees can bring NRD claims.¹⁰ The public trust responsibility held by trustees is quite broad, and is a fundamentally different type of claim compared to those brought under other environmental statutes.

More than sixty years ago, Aldo Leopold wrote that “[t]here is yet no ethic dealing with man’s relation to land and to the animals and plants which grow upon it The land-relation is still strictly economic, entailing privileges but not obligations.”¹¹ In law school, when we were preparing for our first-year property law exam, we learned to think of property as a bundle of sticks, with each stick representing an individual right.¹² Leopold was saying that the notions now engrafted into our concept of natural resource damages did not exist as one

costs of the cleanup on those responsible for the contamination”), *overruled on other grounds* by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (“Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.”). The concept of risk regulation and prevention is also woven through environmental laws. *See generally* Phillip M. Kannan, *The Precautionary Principle: More than a Cameo Appearance in United States Environmental Law?*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 409 (2007).

7. *See, e.g.*, 42 U.S.C. § 9607(a)(4)(C) (2012). Though we quote the CERCLA definition of NRD claims here, similar, but distinct formulations of an NRD claim exist in several statutes. *See infra* Part I.

8. *See Utah v. Kennecott Corp.*, 801 F. Supp. 553, 566–67 (D. Utah 1992) (NRD assessments may not focus exclusively on the market values for such resources).

9. The Roman origins of common ownership are described by Richard J. Lazarus in *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 635 (1986).

10. *See generally* 33 U.S.C. § 1321 (2012) (defining Clean Water Act trustees); 42 U.S.C. § 9607(f)(1) (defining CERCLA trustees).

11. ALDO LEOPOLD, *The Land Ethic*, in *A SAND COUNTY ALMANAC: WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER* 171 (Curt Meine ed., Library of Am. 2013).

12. The idea that property is analogous to ownership of a “bundle of sticks” is often attributed to Justice Benjamin Cardozo. *See United States v. Craft*, 535 U.S. 274, 278 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.” (citing BENJAMIN CARDOZO, *PARADOXES OF LEGAL SCIENCE* 129 (2000) (1928))).

of the sticks. The evolution of NRD helps to fill that void by adding an ecological approach. Put another way, the sticks that form our property bundle cannot be constituted in a way that completely alienates our ability to protect resources for the common good.

NRD claims are a step toward Leopold's ideal, and this duty to maintain the integrity of the land is consistent with our national ethos. The concept of America itself is tied to the land, and creating a layer of protection for America's land fits with that ethos. In the "Star Spangled Banner" we "sing our love for and obligation to the land of the free and the home of the brave."¹³ Woody Guthrie recognized the same thing, singing that "this land is your land, this land is my land."¹⁴ In "America the Beautiful" we invoke the "purple mountain majesties—Above the fruited plain!"¹⁵ In the Gettysburg Address, President Abraham Lincoln consecrated the "hallowed ground" of battle.¹⁶ According to President Franklin D. Roosevelt, "[t]he nation that destroys its soil, destroys itself."¹⁷ Our nation's great poets wrote about the land and the resources on it: Walt Whitman wrote about leaves of grass¹⁸ and Robert Frost, in "The Gift Outright" said that "[t]he land was ours before we were the land's."¹⁹ Henry David Thoreau famously "went to the woods" because he wished to live deliberately and to learn what nature had to teach.²⁰ In other words, our country, at its core, is defined in a way that is tied to the land. The land where we live, which we control, and which we have an obligation to protect and preserve, has long been recognized in the national consciousness.²¹ This history naturally leads to and supports the NRD structure that extends a public trust-type protection to certain natural resources.

Congress began incorporating the concept of "making the environment whole" into environmental law beginning in 1977, by including natural resource damage claims in several statutes. These statutes included the Clean Water Act in 1977, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980 and 1986, the Marine Protection, Research, and Sanctuaries Act ("MPRSA") in 1988, and the Park System Resources Protection Act

13. Aldo Leopold pointed out this connection in *The Land Ethic*. LEOPOLD, *supra* note 11. See FRANCIS SCOTT KEY, *THE STAR SPANGLED BANNER* (1814).

14. WOODY GUTHRIE, *THIS LAND IS YOUR LAND* (1944).

15. KATHARINE LEE BATES, *AMERICA THE BEAUTIFUL* (1910).

16. See ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania*, in *SPEECHES & WRITINGS 1859-1865*, at 536, 536 (Don E. Fehrenbacher ed., Library of Am. 1989) (1863).

17. FRANKLIN D. ROOSEVELT, *Letter to Governor James V. Allred, Austin, Texas*, in 2 FRANKLIN D. ROOSEVELT AND CONSERVATION 1911-1945, at 26, 26 (Edgar B. Nixon ed., 1957) (1937).

18. WALT WHITMAN, *Leaves of Grass*, in *COMPLETE POETRY AND COLLECTED PROSE* 1, 1 (Justin Kaplan ed., Library of Am. 1996) (1855).

19. ROBERT FROST, *The Gift Outright*, in *THE ROAD NOT TAKEN* 262, 262 (1943).

20. HENRY DAVID THOREAU, *Where I Lived, and What I Lived For*, in *WALDEN: A FULLY ANNOTATED EDITION* 78, 78 (Jeffrey S. Cramer ed., Yale Univ. Press 2004) (1854).

21. See generally Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J.L. & PUB. POL'Y 407, 419-21 (2002).

(“PSRPA”) and the Oil Pollution Act (“OPA”) in 1990.²² Thus, to the extent that environmental disasters harm the environment and harm the public, natural resource damage claims, in the tradition of tort law, seek to make the public and the environment whole. These claims are complicated because they graft science—sometimes cutting-edge science—with law, economics, and even philosophy²³ into a package used to achieve a goal and to meet Leopold’s challenge to regulate the common good.

With that in mind, there are three concepts I either advocate for, endorse, or acknowledge. First, I will acknowledge the significant and increasing role of states and tribes. Second, I will endorse the use of cooperative assessments. Third, I will advocate for early restoration efforts.

I. BRIEF HISTORY OF NRD CLAIMS

NRD is not a comprehensive remedy for all types of harm to natural resources, but it does apply broadly to releases of hazardous substances²⁴ or oil,²⁵ and to any harm to the resources of national parks²⁶ or marine sanctuaries²⁷.²⁸ I briefly

22. See William D. Brighton, *Natural Resource Damages Under CERCLA*, in ALI-ABA COURSE OF STUDY: HAZARDOUS SUBSTANCES, SITE REMEDIATION & ENFORCEMENT 331, 333 (2006), Westlaw SM028 ALI-ABA 331.

23. See Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 941–42 (1994) (“If the values lost are incommensurable with the money received, why should we award damages at all? We should award damages because ignoring nonuse values in the assessment of NRDs may have a philosophical and psychological impact as well as an economic one. In a system in which the currency that conveys value is money, not only does the exclusion of nonuse values assign them an economic value of zero but it also indicates that the legal and political system fails to recognize them at all. Especially in a society as litigious as the United States, the absence of nonuse values from the legal decision-making and compensation process may diminish them in the mind of society, thereby reducing the overall value that we derive from the environment. Awarding trustees of natural resources damages for the full range of nonuse values recognizes the importance that individuals place on the preservation of pristine areas. It affirms that those values—and those places—are an important part of our national psyche.” (internal citations omitted)).

24. CERCLA is the primary statute that deals with the release of a hazardous substance. See 42 U.S.C. § 9601(6) (2012) (defining “damages” under CERCLA to include “damages for injury or loss of natural resources”); *id.* § 9601(16) (defining “natural resources”); *id.* § 9607(a)(4)(C) (a person can be held liable under CERCLA 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 release of a hazardous substance); *id.* § 9607(f) (describing nature and role of NRD trustees).

25. OPA creates an NRD remedy for the release of oil. See 33 U.S.C. § 2701(20) (2012) (defining “natural resources”); *id.* § 2702(b)(2)(A) (defining damages to include natural resources); *id.* §§ 2702(a), 2706(a) (creating liability of natural resource damages resulting from the release of oil); *id.* §§ 2706, 2711 (describing the nature and role of NRD trustees).

26. The National Park System Resources Protection Act covers injuries to all natural resources located within the national park system. See 16 U.S.C. § 19jj-1(a) (2012) (repealed and recodified at 54 U.S.C. § 100721(1) (defining damages); *id.* § 100722 (setting out the scope of liability)).

27. The Marine Protection, Research, and Sanctuaries Act creates an NRD claim against any person who destroys, causes the loss of, or injures any marine sanctuary resource. See 16 U.S.C. § 1443(a).

28. In addition to the preceding authorities cited *supra* in notes 24–27, the Clean Water Act makes it unlawful to, without a permit, discharge oil or any hazardous substances in “harmful quantities” to navigable waters of the United States or adjoining shorelines or the contiguous zone. 33 U.S.C. § 1321(b)(3).

outline the history of the primary NRD claims to highlight why and how they developed.

The principal federal natural resource damage authorities are CERCLA, the Clean Water Act, the Oil Pollution Act, the Marine Protection, Research, and Sanctuaries Act, and the National Park System Resources Protection Act.²⁹ The earliest of these authorities was the Clean Water Act, which in 1977 included an NRD claim for state trustees in its enforcement model.³⁰ The Clean Water Act claim was limited, however, to pollutants entering waters of the United States.³¹ In 1980, CERCLA increased the scope of an NRD response from just United States' waters to any release of a wide range of hazardous substances contaminating any part of the environment, and increased the scope of recovery to include assessment costs.³² In other words, Clean Water Act claims were limited to situations where water was contaminated. CERCLA claims were available wherever a CERCLA "hazardous substance" caused environmental harm.

In 1990 the Marine Protection, Research, and Sanctuaries Act was amended to create liability for natural resource damages and damages for "lost use" were made explicit for the first time.³³ Additionally, previous NRD claims imposed liability based on the source of the harm—a hazardous substance release or an oil spill. A claim under the MPRSA is different. If a sanctuary resource is destroyed or injured, the MPRSA allows for recovery no matter how or by whom the damage is caused.³⁴ That structure was mirrored in the Park System Resources Protection Act, which covers resources within our national park system.³⁵

Even though they had existed for years, NRD claims were rarely brought in the 1980s.³⁶ That changed with the confluence of two events: (1) the promulgation of the Department of the Interior's ("DOI") regulations for conducting a natural resource damage assessment in 1986-1987³⁷—regulations that were partially

29. *Supra* notes 24–28.

30. *See* 33 U.S.C. § 1321(f)(4), (5).

31. The Clean Water Act prohibits unpermitted discharges of pollutants into waters of the United States. *See* 33 U.S.C. §§ 1251-1387; *see* *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985).

32. *Supra* note 24.

33. 16 U.S.C. § 1443(a). The "lost use" concept refers to the level of damages caused by a resource being made unavailable, or less available, for a period of time. This is a particularly difficult concept to simplify, but is sometimes reduced to natural resources being measured in terms of baseline of services that a resource provides, the number of salmon annually swimming in a river, for example, compared to the scope of available services available after the release of a pollutant. *See generally* KEVIN M. WARD & JOHN W. DUFFIELD, *NATURAL RESOURCE DAMAGES: LAW AND ECONOMICS* § 7.6 at 137 (1992).

34. 16 U.S.C. § 1443(a)(3).

35. *Supra* note 26.

36. To illustrate this point, if you search the "allfeds" database in Westlaw for "natural resource damages" in the same sentence as "claim!" only twelve cases match the search criteria in the years 1980-1988.

37. The Department of the Interior published a final rule containing general natural resource damage assessment regulations and regulations for conducting assessments in individual cases ("type B" rules) on August 1, 1986. *Natural Resource Damage Assessments*, 51 Fed. Reg. 27,674 (Aug. 1, 1986) (codified at 43 C.F.R. pt. 11). These final rules were revised in February 1988 following the August 1986 congressional

upheld in 1989 by the D.C. Circuit in *Ohio v. U.S. Dep't of the Interior*—and (2) the *Exxon Valdez* oil spill in March 1989.³⁸ The potentially huge dollar number associated with natural resource damages related to a high-profile oil spill, combined with a standardized assessment procedure, greatly increased the public profile of NRD claims and the awareness of these claims among trustees themselves.³⁹ This spill also directly led Congress to pass the Oil Pollution Act of 1990, which contains the most recent NRD remedy enacted into law.⁴⁰ Over the last several decades, the frequency and scope of NRD claims have steadily increased, along with the growing roles of state and tribal trustees.

II. THE INCREASING ROLE OF STATE AND TRIBAL TRUSTEES

I have been at the Department of Justice for a long time, and I was here when the first NRD cases—*Exxon Valdez*,⁴¹ *Montrose Chemical*,⁴² *Bunker Hill*,⁴³

amendment of CERCLA. Natural Resource Damage Assessments, 53 Fed. Reg. 5166 (Feb. 22, 1988) (codified at 43 C.F.R. pt. 11). Interior also published separate regulations that applied to simplified assessments requiring minimal field observation (“type A” rules) in March of 1987. Natural Resource Damage Assessments, 52 Fed. Reg. 9042 (Mar. 20, 1987) (codified at 43 C.F.R. pt. 11). Those type A rules were also challenged, and were remanded by the D.C. Circuit in *Colorado v. U.S. Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989). In late 1996 the D.C. Circuit upheld nearly all aspects of a revised set of type B rules. See *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996). In 2008 DOI promulgated a revised set of Type B rules.

38. On March 24, 1989, the *Exxon Valdez* ruptured its tank on a reef in Alaska's Prince William Sound, causing what was, at the time, the largest oil spill in history. See TR. COUNCIL, STATE/FEDERAL NATURAL RESOURCE DAMAGE ASSESSMENT PLAN FOR THE EXXON VALDEZ OIL SPILL, PUBLIC REVIEW DRAFT 1 (1989).

39. As an example of this increased profile, as of April 21, 2015, the “Journals and Law Reviews” database in Westlaw lists eighty-two articles with the phrase “natural resource damages” in the title. Only two of these were published prior to spring of 1989.

40. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762 (2012). See also Gaia J. Larsen, *Skewed Incentives: How Offshore Drilling Policies Fail to Induce Innovation to Reduce Social and Environmental Costs*, 31 STAN. ENVTL. L.J. 139, 155 (2012) (recognizing that the Oil Pollution Act was largely the result of the *Exxon-Valdez* spill).

41. The *Exxon Valdez* case resulted in numerous court proceedings, some of which are cited by the Supreme Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

42. In 1990 the United States and the State of California brought CERCLA claims, including NRD claims, against Montrose Chemical Corporation and related companies for harms caused by the release of an estimated 5,500,000 pounds of dichlorodiphenyltrichloroethane and polychlorinated biphenyls. See *California v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507 (9th Cir. 1997).

43. The Bunker Hill Mining and Metallurgical Complex Superfund Site in Northern Idaho is a severely contaminated Superfund Site, and the U.S. Environmental Protection Agency (“EPA”) issued an Interim Record of Decision Amendment (“RODA”) for the site in August of 2012 that contains lengthy historic information regarding the Bunker Hill site. The site is contaminated by generations of silver, lead, and zinc mining and production, which resulted in cadmium, lead, zinc, and other metals leaching into the surface waters and groundwater of the area. See Clifford J. Villa, *Superfund vs. Mega-sites: The Coeur d'Alene River Basin Story*, 28 COLUM. J. ENVTL. L. 255, 259–60 (2003). EPA and the State of Idaho joined the Coeur d'Alene Tribe's lawsuit against a number of mining companies and in 2003, after a lengthy trial, the federal district court held that the trustees' natural resource damage claim was ripe for review. See *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1109 (D. Idaho 2003), *modified in part on other grounds sub nom.* *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1067–69 (D. Idaho 2005).

Clark Fork⁴⁴—were litigated. These cases were related to mega-sites, and the resulting decisions formed the foundation of modern NRD law.

The federal government was prominently involved in each of those foundational cases, but the federal government, as a trustee, is no longer involved in making all of NRD law. The role of the state and tribal trustees in the NRD world has expanded in recent years, and this expansion has resulted in a much more robust set of protections for our nation's natural resources.

Over the past decades many states have played critical roles in the development of NRD cases, and state programs have continued to evolve. New York State, for example, has an extensive program, as do California, Texas, and Washington State.⁴⁵ This explosion of activity is a change from a decade ago—maybe even a few years ago. As an environmental lawyer, I endorse this. I believe the people closest to a polluting event ought to care the most. To have states with financing and developed programs focusing on NRD issues is significant.

Additionally, states can work to fill holes left in federal legislation. For example, CERCLA is the largest and most developed NRD program, but it still has gaps. One notable example is the petroleum exclusion in CERCLA.⁴⁶ There are a number of states—New York⁴⁷ and New Jersey,⁴⁸ to name two—that have statutes that fill some of the gaps in the federal NRD programs. Because of these gap-filling statutes, states can have a wider scope of options available than a federal trustee. States and tribes are also increasingly likely to bring their own cases.⁴⁹ The trend of increasing state and tribal participation should be recognized as a welcome development, and those of you in private practice are now seeing states, not just the federal government, sign demand letters. I recognize the significant and increasing role of states and tribes.

44. The Upper Clark Fork Basin is a collection Superfund sites that were damaged by pollutants released from historic tailings discharges from milling operations and smelter emissions. The state of Montana filed claims against Atlantic Richfield Company in 1983 seeking to recover over \$765 million in damages. See generally *Montana v. Atl. Richfield Co.*, 266 F. Supp. 2d 1238 (D. Mont. 2003); Barbara J. Goldsmith & Michael R. Thorp, *Digging Up NRD: Issues in the Application of CERCLA's Natural Resource Damages (NRD) Provisions to Historic Mining Sites*, 50 ROCKY MTN. MIN. L. INST. §§ 15.01, 15.04(2) (2004).

45. See Brian D. Israel & Jessica Brody, *State-by-State Guide to NRD Programs in All 50 States*, in ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 32B.12 (Michael B. Gerrard ed., 2013).

46. CERCLA regulates the discharge of "hazardous substances," and that term is defined in section 101(14) of the statute. 42 U.S.C. § 9601(14). That definition, however, expressly excludes petroleum, stating "[t]he term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)." *Id.*

47. See New York Oil Spill Prevention, Control, and Compensation Act, N.Y. NAV. LAW §§ 170-197 (McKinney 1985).

48. See Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 to -.11z (West, Westlaw through L.2015, c. 238 and J.R. No. 13).

49. See Israel & Brody, *supra* note 45 (discussing state participation in NRD claims).

An example of California's efforts in the NRD arena is the response to the *Cosco Busan* oil spill. On November 7, 2007, the *Cosco Busan*, a cargo vessel, hit the San Francisco-Oakland Bay Bridge and released over 53,000 gallons of heavy fuel oil into the San Francisco Bay.⁵⁰ California Governor Arnold Schwarzenegger declared a state of emergency, making additional state funding and personnel available to assess and clean up the environmental damage.⁵¹ Over the course of the next five years, co-trustees, including the California Department of Fish and Game, the California State Lands Commission, the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service, worked together to assess damages, propose restoration plans, and develop settlement proposals.⁵² On September 19, 2011, the trustees issued a press release publicizing a \$36.8 million settlement to restore natural resources in areas affected by the spill.⁵³ These funds were a portion of a larger settlement with the management company that controlled the *Cosco Busan*.⁵⁴

An important aspect of the co-trustee relationship is the independent ability of trustees to assert claims. Part of the appropriate coordination between co-trustees is determining where each trustee will focus its resources. At many sites it is not necessary or appropriate for multiple trustees to be involved at every stage of the NRD process; a single trustee should take the lead. Because of this dynamic and because states and tribes often have much greater familiarity with their local resources, it is vitally important that they be engaged and involved in the NRD process.

I encourage states and tribes to be actively involved, to initiate actions, and to coordinate with federal trustees. Examples of such coordination involve conducting periodic docket reviews with co-trustees, engaging in discussions to assess what sites and resources should have the highest priority, and agreeing to assign particular cases to particular trustees.

III. THE BENEFITS OF COOPERATIVE ASSESSMENTS

An NRD assessment is the process of assessing and quantifying natural resource damage—including estimates of the value of resources that are extremely difficult to quantify. What is the value of clean air, or a pristine forest, or

50. CAL. DEP'T OF FISH & GAME ET AL., *COSCO BUSAN OIL SPILL, FINAL DAMAGE ASSESSMENT AND RESTORATION PLAN/ENVIRONMENTAL ASSESSMENT* 14 (2012).

51. Carolyn Marshall, *Oil Spill Spreads in San Francisco Bay*, N.Y. TIMES, Nov. 10, 2007, at A9.

52. See CAL. DEP'T OF FISH & GAME ET AL., *supra* note 50, at 1; see also *Cosco Busan*, CAL. DEP'T OF FISH & WILDLIFE, <https://www.wildlife.ca.gov/OSPR/NRDA/cosco-busan> (last updated Feb. 10, 2016).

53. Press Release, California Department of Fish & Game et al., \$36.8 Million Natural Resource Damages Settlement to Restore Natural Resources and Improve Recreational Opportunities in Areas Affected by Cosco Busan Oil Spill (Sept. 19, 2011) (on file with Georgetown Environmental Law Review).

54. *Id.*

a sea turtle? In a sense, these resources are priceless,⁵⁵ but nonetheless the harm to such resources must be assessed in order for NRD claims to have tangible boundaries. Such assessments can take many forms, and I will not focus on those many forms here.⁵⁶ Instead, I will address the assessment process itself and encourage both responsible parties and trustees to employ cooperative assessment practices.

A cooperative assessment is an NRD assessment in which the trustees and a responsible party are jointly involved in conducting one or more phases of the process of assessing the damage to a natural resource.⁵⁷ Cooperative assessments are encouraged in NRD implementing regulations,⁵⁸ and have proven to be useful tools in resolving all or part of NRD claims while avoiding unnecessary litigation. I am adding my own voice to this regulatory support, and I will explain why cooperative assessments are a good practice not only for the federal government, but for everyone.

Every cooperative assessment I have been involved in, both as a plaintiff and defendant, has been different.⁵⁹ Regardless of the United States' role in the case, I have found cooperative assessments to be both a powerful tool and a good way to reach a resolution.

Some of the reasons for this are obvious. Cooperative assessments are more efficient because trustees and responsible parties can avoid duplicating efforts when assessing damages. But other reasons are less obvious. Years ago the General Accounting Office ("GAO") conducted a study of NRD settlements,

55. See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002).

56. Natural resource damage assessment regulations have been promulgated both by the Department of the Interior, 43 C.F.R. §§ 11.10-.93 (2015), and by the National Oceanic and Atmospheric Administration, 15 C.F.R. §§ 990.20-.66 (2015).

57. U.S. FISH & WILDLIFE SERV., WEST COAST JOINT ASSESSMENT TEAM, RECOMMENDATIONS FOR CONDUCTING COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT 1-1, 1.1 § 1.2 (2007).

58. See 15 C.F.R. § 990.14(c) (Under OPA, "[t]rustees must invite the responsible parties to participate in the natural resource damage assessment"); 40 C.F.R. § 300.615 (2015); 43 C.F.R. § 11.32(a)(2)(iii)(A) (authorizing cooperative assessments in the CERCLA context).

59. The United States' role as NRD plaintiff is established in many of the cases mentioned here. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); Complaint ¶¶ 2, 53, 65-66, 86, *United States v. BP Expl. & Prod. Inc.*, No. 2:10-cv-04536, 2010 WL 5094310 (E.D. La. Dec. 15, 2010); Complaint ¶¶ 1, 26-38, *United States v. NCR Corp.*, No. 1:10-cv-00910, 2010 WL 4306044 (E.D. Wis. Oct. 14, 2010). The United States has also frequently been a defendant to NRD claims. For example, Rocky Mountain Arsenal was a chemical weapons manufacturing facility located near Denver, Colorado. See Press Release, Colo. Att'y Gen., *Colorado Settles Rocky Mountain Arsenal Suit* (May 29, 2008), Factiva Doc. INDFED0020080602e45t0000a; Philip Shabecoff, *Settlement Is Set in Vast Cleanup of Toxic Waste*, N.Y. TIMES (Feb. 2, 1988) <http://www.nytimes.com/1988/02/02/us/settlement-is-set-in-vast-cleanup-of-toxic-waste.html>. The State of Colorado filed NRD claims against the United States, and those claims were settled through a Consent Decree that was entered on February 27, 2009. Consent Decree Between the United States of America and the State of Colorado, *Colorado v. United States*, Civil Action No. 83-C-2386 (D. Colo. Feb. 27, 2009).

reviewing roughly the first one hundred NRD settlements.⁶⁰ Settlements in that era tended to involve a lot of money.⁶¹ Money came in to the individual trustee and then projects were divvied out afterward—that was the extent of the process.⁶² In the same era, the standard CERCLA consent decree contained language specifying that it did not resolve NRD claims.⁶³ This approach was very common, and left the issue of NRD to be dealt with later, creating contingent liability for the defendant.⁶⁴ There were, however, instances where the trustee entered into a covenant not to sue for NRD. In those cases individual responsible parties and trustees worked together at the beginning of the process, and were able to ensure that restoration goals were included in the remedial process.⁶⁵ For example, if a business is engaged in a typical CERCLA cleanup in a river, it is smart to add habitat restoration and vegetation along both banks of the river early in the remedial process, rather than waiting until later. If your river remediation involves dredging, very often additional dredging is the right solution for NRD. If you take these steps on the front end as opposed to the back end, you can save a lot of time and money because you only have to mobilize to take action at the site once and you can minimize the amount of time the resource remains damaged.⁶⁶

Even early on it was clear that trustees could achieve significant recovery without recovering significant amounts of money. How does that happen? It happens in cases where trustees have knowledge about the scope of the damage. Trustees gain that knowledge the same way responsible parties do, by studying the site. How can the interested parties ensure that appropriate studies take place? The first step is to ensure that the trustees and responsible parties are inclined to

60. U.S. GEN. ACCOUNTING OFF., REPORT TO CHAIRMAN OF COMMITTEE ON COMMERCE, H.R. NO. GAO/RCED-97-10, SUPERFUND: STATUS OF SELECTED FEDERAL NATURAL RESOURCE DAMAGE SETTLEMENTS 2 (1996); *see also* U.S. GEN. ACCOUNTING OFF., REPORT TO CONGRESS, NO. GAO/RCED-96-71, SUPERFUND: OUTLOOK FOR AND EXPERIENCE WITH NATURAL RESOURCE DAMAGE SETTLEMENTS (1996) [hereinafter EXPERIENCE].

61. *See* EXPERIENCE, *supra* note 60, 8 tbl.2 (listing dollar values of five largest NRD settlements under CERCLA, as of July 1995).

62. *Id.* at 2.

63. *Id.* at 4–5 (“Almost half of the settlements require the responsible party to make no separate payment for natural resource damages either because the negotiated cleanup will correct the injury to the natural resource or because no such injuries were found. Justice reports that through the end of April 1995, federal trustees had settled 98 natural resource damage cases for a total of \$106 million. Of these settlements, 48 required no payment and the remaining 50 involved monetary recoveries ranging from about \$4,000 to \$24 million.”).

64. *Id.*; *see, e.g.*, *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 343 (D.N.J. 1999) (recognizing a reservation of NRD claims); *Arkansas ex rel. Bryant v. Dow Chem. Co.*, 981 F. Supp. 1170, 1173 (E.D. Ark. 1997) (same).

65. “Restoration” and “remedial action” are important distinctions in the NRD context. One example of a “remedial action” can be found in CERCLA, where such an action is defined as a remedy taken in the event of a release of a hazardous substance that is intended to minimize the release. *See* 42 U.S.C. § 9601(24) (CERCLA definition of “remedial action”). The term “restoration” refers to the process of returning a damaged natural resource to its pre-injured state. *See, e.g.*, 43 C.F.R. § 11.80(b) (CERCLA regulatory definition setting out the purpose of an NRD damage determination).

66. This is relevant because lost use of the resource is a factor in the valuation of an NRD claim. *See* 43 C.F.R. § 11.80(b) (authorizing Trustees to recover compensation for lost services).

approach the assessment in a similar way. This takes funding, and funding is particularly important in an NRD setting because there is no NRD Superfund.⁶⁷ Often this means that early participation by the trustees must be supported by responsible parties. The process of studying the resource damage, however, also serves to educate all of the involved parties. Where a responsible party anticipates that adding to the remedial activity will minimize the need for future restoration, it is in everyone's best interest to facilitate a cooperative process.

Entering into a cooperative assessment involves risks on both sides due to the necessary investment of time, money, and staff resources into such a commitment. These risks, however, are generally worth taking and are exactly the type of measured risk that businesses routinely face. Further, this measured risk can be minimized where parties leave open the option of going a different route if cooperation proves unproductive. A cooperative assessment may address every injury to natural resources, but it may also be more limited in scope, assessing only specific categories of resources or focusing solely on the identification of restoration options or comparison of various approaches to restoration or valuation.

There are other benefits to cooperative assessments. Lawyers are prominently involved in the NRD process. It will not shock anyone to know that often scientific experts get along better than lawyers do. And sometimes lawyers can be educated by the scientists who are studying a damaged resource. That dialogue—the process of discussing the issue in a technical setting rather than an adversarial setting—can often lead to a settlement that is good for the environment and all the parties involved.

Something else that should not be minimized is that the cooperative process actually forces the trustees to get together. Tribal trustees and trustees from different state and federal agencies need to cooperate, and trustees have overlapping obligations. Though various NRD provisions provide for overlapping trusteeship, the statutes do not explain where the dividing line is between the governments' respective interests in natural resources.⁶⁸

67. The Superfund is the multi-billion dollar general fund for hazardous waste management under CERCLA. 42 U.S.C. § 9611 (2012). Any site listed on the National Priorities List under CERCLA § 9605(a)(8)(B) is subject to EPA-funded cleanup activity. These EPA cleanups are financed by the Superfund. *See* 26 U.S.C. § 9507 (2012). Congress closed off the use of Superfund money for restoration of injured natural resources through language added in the Superfund Amendments and Reauthorization Act amendments in 1986. *Id.* § 9507(c)(1)(A)(ii) (Superfund money is available “only” to carry out the purposes of, “section 111(c) of CERCLA . . . other than paragraphs (1) and (2) thereof”); *cf.* CERCLA § 111(c)(2), 42 U.S.C. § 9611(c)(2) (allowing a natural resource claim to be paid from the Superfund where the President determines that a claimant has exhausted other remedies); *see also* *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 445 n.11 (D.C. Cir. 1989) (recognizing the impact of the 1986 amendments on the Superfund's availability in NRD cases). Not only is the CERCLA Superfund unavailable for CERCLA cleanups, there is no comparable NRD Superfund available under any other NRD statute.

68. *See, e.g.*, 42 U.S.C. § 9607(f)(1) (“In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to

Responsible parties naturally seek closure—they want to achieve finality, or at least something as close to finality as possible. Finality, however, is particularly hard to achieve at a site with significant NRD issues. This is partially due to technical concerns—contaminants migrate, rivers flow, and air emissions may disperse widely. Difficulties can also arise, however, because multiple trustees may have overlapping claims in a setting where each trustee's responsibility is not clearly set out. This issue is something that the trustees can, and should, minimize through cooperation and coordination. A coordinated trustee group can offer closure, or something close to it.

Cooperation between co-trustees can benefit a responsible party in terms of finality, but the same cooperative process also provides tangible benefits for the trustees and for the natural resources they protect. Trustees typically have different areas of expertise and have access to different sets of information, including information about the location of sensitive species and habitats.⁶⁹ Coordination at the early stages of an impact to a natural resource provides trustees early access to information needed to assess injury, and can create efficiencies.⁷⁰ The coordination involved with an early cooperative assessment can induce a group of trustees to work together earlier, and this early coordination is good for everyone.

For reasons of efficiency and economy, and because of the ecological advantages, it helps to consider cooperative assessments early in the process while remedial activity is still underway. For all of these reasons, I support cooperative assessments as a way forward. There are significantly more cooperative assessments now than there have been historically.⁷¹ In the past there was a time when the Department of Justice did not encourage cooperative assessments out of concerns that a cooperative process could corrupt our science or undermine our litigation position, and there are still lingering issues expressed on that front. In spite of that, however, if you talk to every single federal trustee right now, they support cooperative assessments.

such state”).

69. U.S. ENVTL. PROT. AGENCY, CERCLA COORDINATION WITH NATURAL RESOURCE TRUSTEES, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE DIRECTIVE 9200.4-22A, at 2 (1997).

70. The overlap of trustee jurisdictions can also create serious risks if federal and state trustees act separately. If co-trustees assess different damages to the same resource, differences in methods or results can be used against both assessments. Additionally, where one trustee settles a claim or obtains a judgment, there will usually be uncertainty about which claims have been extinguished and which claims survive. *See* Coeur d'Alene Tribe v. ASARCO, Inc., 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003) (concluding that trusteeship should be “apportioned” based on the trustees’ relative amounts of resource management activities). This ruling was modified on reconsideration. *See* United States v. ASARCO, Inc., 471 F. Supp. 2d 1063 (D. Idaho 2005) (*sua sponte* reconsideration adopting position that co-trustees have undivided interests whose scope is primarily an issue of law). Where NRD claims are asserted jointly, such problems are avoided.

71. *See, e.g.*, ST. LAWRENCE ENV'T TR. COUNCIL, COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT (2012); AD-HOC INDUS. NAT. RES. MGMT. GRP., INDUS./TR. STANDING COMM., COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENT GUIDING PRINCIPLES AND SAMPLING PROVISIONS 31 tbl.A (2013) (listing 17 cooperative NRD Assessment agreements entered into between 2003 and 2013).

IV. THE DEVELOPMENT OF AN EARLY RESTORATION PROGRAM

A related, but distinct, approach to efficiently resolving NRD claims is early restoration. Early restoration is the process of restoration planning and the implementation of restoration projects before a damage assessment is complete.⁷²

Historically, there have not been many early restoration agreements.⁷³ Two of the biggest were an agreement to clean up the Fox River and Green Bay in Wisconsin⁷⁴ and the Deepwater Horizon early restoration agreement.⁷⁵ The Deepwater early restoration framework is a billion dollar agreement, and currently stands as the largest early restoration agreement in history.⁷⁶

If you look through the NRD statutes you will not see a provision in CERCLA or the Sanctuary Acts or the Park Act or the Clean Water Act that defines early restoration, and the term is undeveloped in federal regulations. Instead, this approach has developed organically as part of the NRD process. Though I cannot say that early restoration works well in every case, I can say that if you are doing a cooperative assessment and you know at the end of that remedial plan you will be replacing wetland or dredging, you should anticipate those requirements. You can carve out some or all of that future work, work you know is going to happen, and agree to perform those projects up front. This approach has benefits on all sides.

One significant benefit is that the public sees action. Public support and public knowledge benefits everybody. Public support benefits responsible parties by creating goodwill, or at least minimizing adverse public opinion. Public support benefits all of the trustees by demonstrating tangible progress on the ground. To see dirt turning. To see water being cleaned up. To see restoration commencing in the short term rather than waiting until the end of the process.

72. See generally ENVTL. L. INST., BP OIL DISASTER: RESTORATION AND RECOVERY; EARLY RESTORATION IN THE NATURAL RESOURCE DAMAGE ASSESSMENT PROCESS (2015); DEEPWATER HORIZON NAT. RES. TR., DEEPWATER HORIZON OIL SPILL PHASE I EARLY RESTORATION PLAN AND ENVIRONMENTAL ASSESSMENT ES1-ES5 (2012) <http://www.doi.gov/deepwaterhorizon/upload/Final-ERP-EA-ES-041812.pdf> (discussing early assessment).

73. See, e.g., Consent Decree: Natural Resource Damages, United States v. Kuroshima Shipping S.A., No. A02-0057 CV (JWS) (D. Alaska Mar. 18, 2002) (no early restoration agreement included in consent decree settling NRD claims in relation to *Kuroshima* fuel oil spill); Agreement and Consent Decree, United States v. Exxon Corp., Civil Action Nos. A91-082 CV, A91-083 CV (D. Alaska Oct. 9, 1991) (no early restoration agreement included in consent decree settling NRD claims in relation to *Exxon Valdez* oil spill); Memorandum of Agreement and Consent Decree, United States v. Alaska, Civil Action No. A91-081 CV (D. Alaska Aug. 29, 1991) (same).

74. The Fox River settlement provides responsible parties with a credit against their future liability for early restoration projects implement. Complaint ¶ 37, United States v. NCR Corp., No. 1:10-cv-00910, 2010 WL 4306044 (E.D. Wis. Oct. 14, 2010).

75. FRAMEWORK FOR EARLY RESTORATION ADDRESSING INJURIES RESULTING FROM THE DEEPWATER HORIZON OIL SPILL (2011), <http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/> (agreement between BP and the federal government and states on the Gulf of Mexico).

76. *Id.*

Not only does every involved party benefit in terms of public perception, but from a more practical viewpoint a responsible party is also mitigating any lost use issues. It takes time for a damaged resource to recover. The longer a resource is damaged, the larger the NRD claim.⁷⁷ Anything a responsible party can do to minimize lost-use minimizes NRD liability. This is an economic benefit to the responsible party and is an ecological benefit to the public.

Early restoration is a relatively new idea and many issues associated with early restoration still need to be worked out. How do you determine where an early restoration project fits in the overall assessment? How do you value early restoration? We need to think about these things, and creative and innovative people need to apply themselves to these issues.

I very much endorse the trend of trustees working with responsible parties on early restoration activities. This is the wave of the future and this is where NRD is trending now. At some point the federal government may develop regulations, but for now we need to think about this issue and work the concept of early restoration into our cases whenever possible.

CONCLUSION

I'm going to issue you a challenge. Every one of us has a responsibility when we're talking about natural resource damages. At some level it is not complicated. At some level it is quite straightforward: there has been a polluting event and the environment has been harmed; we are going to take some action to bring the environment back to where it would have been without the polluting event. That requires us to think about lost use and equivalent resources and restoration, land use restrictions, and issues like that.

That is a fairly simple idea, but we are in a world where the practice of what we do is more complicated than the law itself. I have said, for years, that you can read all of NRD law in a long weekend. That is still true. There are more cases now than when I said that the first time, but it is still true. This is rare in environmental law; you cannot say the same thing about the Clean Air Act or the Clean Water Act or the National Environmental and Policy Act, but you can about NRD.

Though the case law is limited, the practice of NRD law is uniquely complicated. That is why you are here. It is why companies that face NRD cases hire very skilled people. Implementing this relatively small body of law in practice is incredibly difficult. The thrill of applying environmental law and politics and economics and ecology into one big and complicated site is a challenge.

Another problem is associated with this challenge: trying to explain the complicated and interconnected issues to the public. It is relatively simple to

77. Even when full restoration is possible, the public may suffer loss of use or enjoyment of the injured resources from the time the injury occurred until restoration is complete. DOI regulations authorize Trustees to recover compensation for such lost services. *See* 43 C.F.R. § 11.80(b) (2015).

explain, for example, why violating a Clean Water Act permit is unlawful. The public understands that if you emit pollutants in violation of a Clean Air Act permit and people get sick, that is a problem. I think when we talk about natural resource damages we have done a poor job of explaining what we are doing. We need to explain to the public that sometimes you have to be patient, and you need to conduct scientific studies in the face of a catastrophic event. And we need to explain that even though scientists do not always agree on the best course forward, development of the science can have positive outcomes. We have not done a very good job explaining how this process is in the public's interest, and how NRD claims fit in the overall lexicon of environmental statutes.

Both individually and together we need to think about how to educate the public in some of these complicated areas. We need to figure out how to explain what we are doing and how we are approaching NRD issues to people who are affected in Mississippi, Arkansas, Louisiana, or anywhere else. Every company and trustee involved is better off if the public sees our work, is involved, and understands what we are doing.

I think there is a special place for NRD claims in the realm of environmental law. This is an outcome of the public trust doctrine that meets Leopold's challenge to us. It fills that void in a way that did not exist sixty years ago. NRD is a powerful tool that combines economic and public policy and law and science into one big cauldron of activity. One of our challenges is to increase the cooperative nature of our assessments. Another is to develop a significant place for early restoration. I am pleased to see the growth of state activity in this arena, and I challenge all of us, myself included, to do a better job explaining what is happening not just in oil spill cases, but across the United States.

I started with a quote and I'll end with a quote—this time from Margaret Mitchell in *Gone with the Wind*. Mitchell wrote that “[I]and is the only thing in the world that amounts to anything, for it's the only thing in this world that lasts. It's the only thing worth working for, worth fighting for—worth dying for.”⁷⁸ What was the famous line from *Gone with the Wind*? “Frankly, my dear, I don't give a damn.”⁷⁹ Well, we do, right? We are all here. We are here because we do give a damn about what happens. We agree with Mitchell that this land is, in fact, our land, and that all the adjoining shore land, and all the outer shelf, and all of the things that make up what we are. What we are blessed by in this country. That is what this is all about.

Thank you.

78. MARGARET MITCHELL, *GONE WITH THE WIND* (Macmillan Publishing Co. 1936).

79. *GONE WITH THE WIND* (Metro-Goldwyn-Mayer 1939) (quoting a line in the film, “[f]rankly, my dear, I don't give a damn”).