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NATURAL RESOURCES DAMAGES UNDER CERCLA: HERE THEY COME, READY OR NOT

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I. INTRODUCTION

The environmental bar can expect a plethora of “natural resource damage” claims to be interposed during the first few months of 1990, particularly in view of the imminent expiration of a three-year statute of limitations governing any such claims which ripened and were known prior to the implementation, in March of 1987, of regulations under the Superfund Amendments and Reauthorization Act of 1986 (“SARA”).1 In light of the staggering transactional costs attendant to litigation for removal and the heavy response costs under the federal legislation, it is imperative that some attention be focused upon the wisdom and effectiveness of this statutory scheme for the recovery of damages for injury to natural resources. Otherwise, there is the danger that the bar, the public, and the industrial community may become mired in a quicksand of litigation concerning a concept which is too difficult

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1 While natural resources damage relief under the Federal Superfund law is a little known and infrequently litigated remedy, it carries enormous potential to remunerate federal, state, and local governments for perceived damage to their natural resources as well as for the cost of clean-up, and at the same time imposes potentially unlimited monetary liability upon so-called “potentially responsible parties” as that phrase is defined in “CERCLA,” the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, §§ 101-308, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657 (1982 & Supp. V 1987)).
to limit and too easy to expand. This Article will provide a broad overview of the statutory and regulatory scheme governing natural resource damage claims, and attempt to raise some of the questions which must be confronted in the immediate future.

II. What are "Natural Resources"

In addition to providing for the recovery of removal costs or response costs incurred in responding to the release or threatened release of hazardous substances, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended by SARA, allows federal and state governments to commence an action against "potentially responsible parties" ("PRPs") to recover damages for injury to "natural resources." In prosecuting natural resource claims, the federal and state governments act as "trustees" for the public's interest in seeking recovery for injury to those resources. By providing this cause of action, Congress has expanded the more traditional, common law "public trust doctrine.

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4 Id. § 9607(a) (Supp. V 1987). This section sets forth the persons subject to liability for damages under the CERCLA. Id.
5 Id. § 9607(a)(4)(C). Section 9607(a)(4)(C) of CERCLA provides that potentially 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." Id. The Federal Water Pollution Control Act also permits the federal and state governments to institute claims for the recovery of damages to natural resources. Federal Water Pollution Control Act, 33 U.S.C. § 1321(f)-(g) (1982). Although these federal statutes provide a cause of action for damages for injury to natural resources, it is submitted that it may be virtually impossible to accurately assess such damages.
7 See Note, CERCLA's Natural Resource Damage Provisions: A Comprehensive and Innovative Approach to Protecting the Environment, 45 Wash. & Lee L. Rev. 1417, 1420-21, 1432-37 (1988) [hereinafter Note, CERCLA's Natural Resource Damage Provisions] (discussing background of public trust doctrine, and how that doctrine has been recognized and expanded by CERCLA's provisions). The "public trust doctrine" finds its origin in the seminal Supreme Court decision of Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), which held invalid a grant of submerged lands by the state on the ground that such a conveyance was inconsistent with the public trust. Id. at 453. The Court reasoned that state ownership of submerged lands under navigable water "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Id. at 462. For a comprehensive review of the background, purposes and limitations of the common-law "public trust doctrine," see D. Selmi & K. Manaster, State Environmental Law § 4.03 (1989); A. Tarlock, Law of Water Rights and Resources § 8.04 (1989); Note, The Public Trust Doctrine: A New Approach to Environmental Preservation, 81 W. Va. L. Rev.
In order to effectuate CERCLA's far-reaching remedial purposes, and consistent with the liberal construction to be accorded its provisions, the Act broadly defines the phrase "natural resources" as:

land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C. § 1801 et seq.] any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

This apparently comprehensive definition leaves room for the courts to determine whether the claimed injury is in fact damage to a "natural resource" within the meaning of CERCLA.

It appears that most CERCLA claims for natural resources damages are accompanied by, or involve, cost-recovery claims. As a result, it is not clear from the case law precisely what is being claimed a "natural resource" for which the government may act as a trustee to bring a damages claim. While coupling cost-recovery actions with natural resource damage claims is laudable, and perhaps even mandatory under the modern approach to res judicata, it is suggested that the courts should require some specific-
ity in pleading with respect to the type of "natural resources" for which recovery is sought, and for which the governmental entity may properly act as trustee.

In *City of New York v. Exxon Corp.*, New York City commenced an action under CERCLA against fifteen companies, both generators and transporters of hazardous wastes which were alleged to have been illegally dumped at five New York City landfills. In addition to seeking recovery for response costs, the City sought damages for injury caused to natural resources by the release of hazardous substances at the site. Judge Weinfeld specifically held that:

> [T]he waters of Jamaica Bay, Eastchester Bay, and Richmond Creek, along with the underground aquifers lying beneath the affected landfills, which are *under the control or management* of the City, are natural resources within the meaning of the statute, and damage to them may be compensated by an action under CERCLA.

The court's holding is fully consistent with the interpretation that CERCLA requires a "nexus" between the natural resource and governmental control.

In *Ohio ex rel. Brown v. Georgeoff*, an action was commenced to clean up a hazardous waste disposal site known as the "Deerfield Dump." The court held that Ohio's allegations that hazardous wastes were leaching from the Deerfield Dump and "'entering the stream which border [sic] the southern and western edges of the Dump, and or the groundwater underlying the Dump'" were sufficiently pleaded to withstand a motion to dismiss on the ground that the state had not sustained appropriate damages to its "natural resources.”

It is important that courts set forth which "natural resources" are addressed by their decisions and specify those for which the

1989) (discussing broadening claim preclusion doctrine).
13 *Exxon*, 633 F. Supp. at 618 (emphasis added).
14 See infra notes 88-94 and accompanying text.
16 *Id.* at 1301.
17 *Id.* at 1316.
government is entitled to act as trustee. The significance of such identification becomes evident later when the trustee applies the "damage assessment regulations" to arrive at a damage figure. The more precise the courts are in setting forth what resources are "natural resources" within the meaning of CERCLA, the more the trustee is compelled to focus on particular items in setting a damage award. Perhaps this would afford the judiciary some control over "natural resources" damage awards, which it otherwise appears to lack by reason of the assessment regulations.

Although there is an apparent scarcity of federal litigation involving claims for damages for injury to natural resources, the actions that have been brought do provide some insight, although in general terms, as to what constitutes "natural resources" within the meaning of section 101(16) of CERCLA. Interestingly, many

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18 See infra notes 48-66 and accompanying text.
19 See Habicht, The Expanding Role of Natural Resource Damage Claims Under Superfund, 7 Va. J. Nat. Resources L. 1, 17 (1987). Although there appears to be a dearth of natural resource cases, it has been observed that "[c]laims by federal and state governments are proliferating." Developments in the Law — Toxic Waste Litigation, 59 Harv. L. Rev. 1458, 1565 (1988). It is important to note that the federal district courts have exclusive original jurisdiction over all actions arising under CERCLA, including natural resource damage claims, "without regard to the citizenship of the parties or the amount in controversy." CERCLA, 42 U.S.C. § 9613(b) (Supp. V 1987).
more natural resource cases seem to have been brought by the states rather than the federal government.  

III. POTENTIAL PLAINTIFFS

A very real controversy has arisen under CERCLA regarding who is entitled to bring a claim for damages for injury to natural resources. While it appears clear that a private citizen is not a proper plaintiff for such a claim, it is unclear whether such a claim can be interposed by a governmental entity other than the United States government or a state government. CERCLA specifically provides that liability for damage to natural resources, "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 such State." However, the definition of "natural resources" refers to "such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States [and], any State or local government."  

Moreover, the statutory scheme, as amended by SARA, now provides a system whereby the trustee for natural resources may be appointed by the United States government and/or by the governor of each state. Such a trustee is specifically empowered to create a rebuttable presumption as to the validity of his evaluation regarding natural resources damages under CERCLA. Should one therefore conclude that a natural resources damage claim may be properly possessed only by the United States or a

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21 See Habicht, supra note 19, at 20. It is not yet settled how far a state's trusteeship extends, but it does seem to encompass at least those "traditional public resources." Id. at 22. It has been observed that the states have traditionally acted as "trustee" for the following "natural resources": "(1) property owned by the state, such as state parks or forests; (2) navigable waters in submerged lands; (3) air; (4) fish, game and other wildlife not in the possession of private individuals." Id. (footnotes omitted). Although this list is not exhaustive, it is illustrative of the extent of a states' trusteeship. Id.; see also A. TARLOCK, supra note 7, at § 8.04[1]. When a conflict arises as to which governmental entity is the proper trustee, it is not unusual for both governments to act as "co-trustees." See Habicht, supra note 19, at 20.


24 Id. § 9601(16) (emphasis added).

25 Id. § 9607(f)(2)(A).

26 Id. § 9607(f)(2)(B).

27 Id. § 9607(f)(2)(C); see infra notes 59-61 and accompanying text.
state government? While a superficial analysis might lead one to conclude that there is no room in the statutory scheme for claims by a local government, the sparse authority and analysis which does exist seems to indicate the contrary.

Two federal district courts have handed down decisions which allowed natural resources claims to be interposed by local governments. Although both were decided prior to the SARA enactments, their rationales seem to be strengthened by those amendments, particularly in light of their legislative history and the action (or inaction) of Congress while fully cognizant of the import of the decisions.

In Mayor of Boonton v. Drew Chemical Corporation, the natural resources claim was interposed by the Town of Boonton against a chemical company for damages allegedly sustained by the Town. According to Judge Ackerman, the town's natural resources claim was viable. He reasoned that while the statutory definition of the word "state" expressly includes all of the states, it does not purport to exclude anything; the term "include" being a term of enlargement, not limitation. Further, he considered it sig-

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31 Id. at 664-65. The facts of Boonton were succinctly set forth by the district court as follows:

Pepe Field is a 3.5 acre park located in Boonton. The property was acquired by Boonton in the early 1970's from the Bentley Estate which had owned it for many years. The area had originally been low and swampy but, according to plaintiffs, due to arrangements between the Bentley Estate and Drew Chemical, Drew had dumped waste from its industrial operations in the field for many years. The dumping activity ceased some time in the 1940's. . . . Boonton has taken a variety of steps to assess and mitigate any threat to public health from contamination of Pepe Field. The field is closed to the public. Town police monitor the site. The Town has constructed and currently maintains an on-site treatment facility which treats subsurface drainage from the site prior to its discharge into a nearby gravel curtain drain by application of hydrogen peroxide to the drainage from the field. Town employees check the filtration facility on a daily basis. To date, the Town has expended nearly $40,000.00 on this effort alone.

Pursuant to CERCLA, in December of 1982 the Environmental Protection Agency designated Pepe Field as a national priority toxic waste site for cleanup purposes.

Id. The precise nature of the alleged injury to natural resources is not stated, which is not considered unusual. See supra notes 9-21 and accompanying text.
significant that natural resources were described in CERCLA as those belonging to the United States, any state, or local government. After referring to other examples of expansive interpretations of the term “state,” and the general liberal construction of federal statutes, including CERCLA, the court concluded that such a claim could be properly interposed by a local government. Furthermore, Judge Ackerman relied upon the “authorized representative” language of CERCLA, and the fact that the Town of Boonton, as owner of the contaminated property, had been directed to effect the cleanup and thus could be considered the authorized representative of the state.

The following year, in City of New York v. Exxon Corporation, Judge Edward Weinfeld of the United States District Court for the Southern District of New York followed similar reasoning, concluding that New York City was a proper plaintiff to interpose a claim for damages for injury to natural resources. On defendant’s motion to dismiss the natural resources damage claim, Judge Weinfeld ruled that their argument was based “upon an overly literal reading of § 107(f).” As in Boonton, the Exxon court relied upon the inclusion of local governments in the definition of natural resources, and the fact that the claim need not be interposed by the state, but by an “authorized representative” of the state. The Exxon court noted that, “[i]t is not a settled question whether the source of such authorization is to be found under state law, but the ultimate determination is factual in character, and must await at least the presentation of a more complete record.”

With this background Congress, in the fall of 1986, considered the reauthorization of Superfund and amendments thereto. While expressly aware of the decisions in Boonton and Exxon, Congress declined to change the relevant language as to who rightfully pos-

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33 Boonton, 621 F. Supp. at 667.
35 Boonton, 621 F. Supp. at 667.
37 See id. at 618-19. In Exxon, a defendant had conspired to bribe a New York City sanitation employee “in order to gain access to five City landfill sites for the purpose of illegally disposing of industrial and chemical waste.” Id. at 613. The City alleged that the defendants proceeded to dispose illegally of hazardous substances which contaminated ground waters, surrounding bays and waterways. Id.
38 Id. at 619.
39 Id. (footnote omitted).
asses a claim for natural resource damages. The House proposed revisions that would have excluded units of local governments from the definition of "state." The Senate version, however, did not include such revisions, nor did the final enactment. According to the conference report, "[t]he conference substitute does not include the House amendment to the definition of 'State,' leaving it to the court's interpretation of this provision." According to at least one author, such a result has "indisputably" given congressional endorsement to the Boonton and Exxon results.

Although such a conclusion may indeed be subject to dispute, it does appear to have a strong basis in fact.

The SARA amendments also gave greater powers to the authorized trustee to engage in certain administrative proceedings and clothed certain conclusions with a rebuttable presumption of validity. These grants, however, do not necessarily vitiate the reasoning that such claims may rightfully be possessed by local governments, but simply seem to give the officially designated trustee additional powers which the local government would not appear to have.

An interesting result was achieved in New York v. Purex Industries, Inc., in which the defendants were sued by the State of New York, the County of Nassau, and the Town of Hempstead for alleged ground water contamination. Disposition was through a consent judgment which established a natural resources damage fund not for the benefit of the state, but rather "[t]o meet the cost in whole or in part of activities to benefit the environment and

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41 See Maraziti, supra note 29, at 10,038.
42 An interesting aspect to the Exxon case is the fact that the settlement of the main action against the 15 original defendants, along with a dismissal of the 300 or so third-party claims, was accompanied by a concurrent commencement of a joint administrative proceeding by the City of New York and the State of New York pursuant to Title 13 of Article 27 of the New York Environmental Conservation Law. N.Y. ENVTL. CONSERV. LAW §§ 27-301 to 27-1321 (McKinney 1984). While the joint commencement of this proceeding is unusual and may indeed be subject to challenge at the appropriate time, it appears that the state was joined in order to avoid or minimize assertions that the City is not the proper party to interpose such claims. In any event, it would clearly give support to Judge Weinfeld's earlier observation that the City of New York may, in fact, be acting as the authorized representative of the state in this proceeding. See City of New York v. Exxon Corp., 633 F. Supp. 609, 619 (S.D.N.Y. 1986).
43 See infra notes 59-60 and accompanying text.
people of the County of Nassau that would not otherwise be undertaken.\textsuperscript{45}

The vagueness in the stated purpose for the expenditures of the fund in \textit{Purex} demonstrates the point made earlier, that the entire area of natural resources damage is virgin territory that needs to be entered most carefully and sensibly to prevent it from being defoliated by those who will see neither the forest nor the trees.\textsuperscript{46}

While the issue is far from resolved, there appears to be persuasive authority that, at least under certain circumstances, a claim for damages for injury to natural resources may be properly interposed by a local government or municipality.\textsuperscript{47} This is particularly true where the natural resources claimed to be damaged are within the jurisdiction of a local government which is obligated to address the environmental problem. The inescapable, and perhaps unfortunate, conclusion is that claims for damage to natural resources are not possessed merely by the fifty-one identifiable federal and state governments but rather by an unknown number of entities. This conclusion renders the problems of vagueness and broadness of such natural resources damage claims all the more troublesome.

\textsuperscript{45} \textit{Id.} at 28-30. The agreement continued: "In utilizing such funds, to the extent practicable, priority shall be given to activities designed to improve groundwater activity." \textit{Id.} at 29. On November 30, 1989 a ground water remedial treatment plant commenced startup operations pursuant to the natural resources damage fund. \textit{Id.}

\textsuperscript{46} Another example of the potentially unlimited liability and total lack of standards regarding what is meant by damage to natural resources lies in the recently amended complaint in the well-known case New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir.), aff'd \textit{in part, modified in part}, 763 F.2d 49 (2d Cir. 1985). The amended complaint, which was served on an additional 100 parties in the Fall of 1989, includes a new damage claim for injuries to, and destruction of, natural resources. As stated in paragraph 54:

Based on the foregoing, the defendants are strictly, jointly and severally liable under section 107(a), of CERCLA, 42 U.S.C. § 9607(a), to the State of New York, acting through its authorized representatives [Thomas C. Jorling, New York Commissioner of Environmental Conservation, as Trustee for Natural Resources] for all damages sustained and to be sustained to the land, fish, wildlife, biota, groundwater, surface waters, air, and other such natural resources of the State.

Plaintiffs Amended Complaint at 17, New York v. Shore Realty Corp., 763 F.2d 49 (2d Cir. 1985) (Nos. 84-0864, 85-2270) (1985). No particulars have yet been produced by the State in support of this claim.

\textsuperscript{47} See Hanson & Babich, \textit{Municipalities and Hazardous Substances: Cleanup, Cost Recovery and Damages Under CERCLA}, 29 \textit{The Mun. Ar'r'y}, 1,1 (July/Aug. 1988). "To date few municipal governments have used CERCLA to its full potential to obtain environmental cleanups and to recover expenses and damages. . . . It has now been judicially recognized, however, that municipal enforcement authority under CERCLA is identical to state authority." \textit{Id.}
IV. Measurement and Limitation of Damages

CERCLA provides that any amounts recovered by the trustee for injury to natural resources must be used to “restore, replace, or acquire the equivalent of such natural resources.” The obvious difficulty that arises, however, is in assessing the extent of “damages” for injury to a natural resource.

In tort litigation, it has been widely observed that damage awards have become increasingly excessive. Although assessing damages for the replacement or repair of chattels may generally be done with some ease, determining “damages” for injury to a “natural resource” can prove much more problematic. CERCLA, by allowing recovery for natural resources before the expenditure of any money by the governmental trustee, has not made this difficult task any easier. Congress, in enacting CERCLA, recognized the difficult and complex nature of determining damages to a natural resource and required the promulgation of regulations to specifically address the damage assessment process.

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According to commentators, several values derived from natural resources may be included in assessment of damages:

- User values are the benefits individuals receive from direct use of a resource, including consumptive uses, such as fishing and hunting, and nonconsumptive uses, such as swimming and hiking;
- Opinion value is derived from individuals’ desire to preserve the option to use a natural resource, even if they are not currently using it;
- Bequest value is derived from the wish to preserve resources for the use of future generations; and
- Existence value is derived from the satisfaction of simply knowing that a resource exists, even if no use occurs.

Hanson & Babich, supra note 47, at 2 (quoting R. Rowe and W. Schulze, Natural Resource Damages in the Colorado Mountains: The Case of the Eagle Mine, Proceedings of AERE Session on Assessment of Natural Resource Damages Under CERCLA, Allied Social Science
In particular, CERCLA mandates that the assessment regulations: (1) set forth standardized procedures for simplified assessments and (2) provide "alternative protocols" for individual assessments.\textsuperscript{51} Importantly, the "measure of damages in any action [for natural resource damages] shall not be limited by the sums which can be used to restore or replace such resources."\textsuperscript{52} This provision, however, must apparently be read in light of section 107(c)(1)(D) of CERCLA,\textsuperscript{53} which limits the liability of a responsible party to response costs plus $50 million.\textsuperscript{54}

The Department of Interior ("DOI"), having been delegated the authority by the President,\textsuperscript{55} proposed regulations on August 1, 1986,\textsuperscript{56} which were later promulgated and amended after SARA.\textsuperscript{57} Generally, the DOI assessment regulations contain a "planned and phased approach" for the assessment of natural resource damages under CERCLA,\textsuperscript{58} and the assessment is undertaken by the trustee, not the courts.

An important evidentiary provision in CERCLA specifically provides that a trustee's damages assessment, if it complies with the DOI's damage assessment regulations, "shall have the force and effect of a rebuttable presumption on behalf of the trustee in

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\textsuperscript{51} 42 U.S.C. § 9651(c)(2) (1982).

\textsuperscript{52} Id. § 9607(f)(1) (Supp. V 1987).

\textsuperscript{53} Id. § 9607(c)(1)(D) (Supp. V 1987).

\textsuperscript{54} An exception to this "response costs plus $50,000,000" cap of liability exists if the damage was caused by willful misconduct or willful negligence. Id. § 9607(c)(2). CERCLA also provides exceptions to the liability cap if:

- the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or . . . such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers . . . .

\textsuperscript{55} Exec. Order No. 12,316, § 8(c), 46 Fed. Reg. 42,237, 42,240 (1981). Although the United States Environmental Protection Agency has been delegated general authority under CERCLA, the President delegated authority for the natural resource damage assessment regulations to the DOI. See id.

\textsuperscript{56} 43 C.F.R. § 11 (1988).


\textsuperscript{58} 43 C.F.R. § 11.13 (1987); see also Note, CERCLA's Natural Resource Damage Provisions, supra note 7, at 1426-31 (presenting comprehensive overview of multi-phases of DOI's damage assessment regulations). See generally Habicht, supra note 19, at 14-18 (discussing basic provisions and procedures of assessment regulations).
any administrative or judicial proceeding." This "rebuttable presumption" is significant since it seemingly removes from the judiciary the function of determining or assessing a damage award. Thus, the only meaningful judicial intervention in this regard would occur during a judicial review of the administrative determination of damages by the trustee. As discussed above, this is precisely why it is important for the courts to require specificity in pleading injury to "natural resources," and for courts to clearly define what constitutes a "natural resource" within the meaning of CERCLA.

It has been suggested that the assessment regulations merely codify rigid principles of common law property damages, and therefore restrict the trustee's ability to fully recover an amount adequate to restore damaged natural resources. On the other hand, the regulations have been applauded for their "melting together of two critical dimensions of what should be a unitary ad-

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61 See supra notes 9-21 and accompanying text.

62 On March 20, 1987, the DOI amended its regulations. See National Resource Damage Assessments, 43 C.F.R. § 11 (1988). While these regulations are helpful in setting some standards for the assessment of damage to natural resources, they fall far short in solving the broadness and vagueness problems regarding the precise nature of natural resources and the measurement of damages. Furthermore, the DOI's regulations are not mandatory upon a federal or state trustee unless he wishes to obtain the benefit of the rebuttable presumption. See id. § 11.10. Several commentators, however, have had provocative insights as to the value of a resource and its attending damage. See, e.g., Yang, Valuing Natural Resource Damages: Economics for CERCLA Lawyers, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,311, 10,313-14 (1984) (defining value of natural resource as its utility).

63 See Note, CERCLA's Natural Resource Damage Provisions, supra note 7, at 1421-22; Developments in the Law, supra note 19, at 1569. But see Habicht, supra note 19, at 18 (recognizing that if assessment regulations are followed, "damage assessments should proceed in an orderly fashion, and the damage awards should be kept within reasonable bounds").

ministrative process at a Superfund site—the remedial analysis and the natural resource damage assessment." The DOI is probably in a better position than the judiciary to determine, in a technical sense, the scope and extent of injury to a natural resource, and would therefore be better able to accurately ascertain the costs to "restore, replace, or acquire the equivalent" of such a resource, once the court conclusively determined what in fact was the "natural resource."

V. AVAILABLE DEFENSES

As a result of the recent increase in natural resource damage claims, several defenses, some specifically contained in CERCLA and others the product of creative argument, have been raised, discussed, and analyzed in the cases. The following discussion is a summary of these defenses and the issues they evoke.

A. Statute of Limitations

The statute of limitations, designed not to preclude valid claims but to avoid stale ones, may be an available defense in response to a claim for damages to natural resources under CERCLA. Section 107(f)(1) of CERCLA provides that "[t]here shall be no [natural resource] recovery . . . where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." Thus, so long as the release continues after December 11, 1980, this provision presents no bar to the government's recovery. More relevant, however, is the specific statute of limitations provision in SARA, section 112(d)(2), which reads as follows:

No claim may be presented under this section for recovery of the damages referred to in section 9607(a) of this title unless the claim is presented within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with

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65 Habicht, supra note 19, at 14.
67 See Developments in the Law, supra note 19, at 1555.
68 See generally 1 C. SCHRAPP & R. STEINBERG, RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS § 3.06 (1989) (broad overview of available defenses in natural resources damage actions).
the release in question. (B) The date on which final regulations are promulgated under section 9651(c) of this title.\textsuperscript{71}

While CERCLA empowered the President to promulgate regulations within two years of December 11, 1980—something he failed to do—the SARA amendments acknowledged this and provided that, "[n]otwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after October 17, 1986."\textsuperscript{72}

The DOI issued natural resource damage assessments as of August 1, 1986.\textsuperscript{73} However, following the adoption of SARA on October 17, 1986, the DOI amended its regulations on March 20, 1987.\textsuperscript{74} While these regulations are helpful in setting some standards for assessing damages to natural resources, they do not solve the problems of overbreadth and vagueness referred to above and apparently are not mandatory. The significant aspect of the March 20, 1987 promulgation date is that it might trigger the three-year statute of limitations period referred to in SARA section 112(d)(2) regarding any and all claims for natural resource damages where "[t]he date of the discovery of the loss and its connection with the release in question" predated March 20, 1987.\textsuperscript{75} Thus we can expect to see a flood of claims filed shortly before the end of the winter of 1990, just as a spate of CERCLA claims were filed shortly before December 11, 1983—three years from the enactment of CERCLA. It should be noted that although an argument can be made that the three years should not begin to run from March of 1987, but rather from September of 1987—the effective date of regulations—it is unlikely that the government will delay interposing a claim and risk an adverse determination on this issue.

Accordingly, it appears that government claims interposed after March 20, 1990 may be untimely as to damage to natural resources and releases of hazardous substances discovered prior to March 20, 1987. In any event, since the regulations have already been promulgated, only subsection (A) of section 112(d)(2) will be relevant to newly discovered claims, i.e., the three-year statute of limitations period will begin to run from "[t]he date of the discov-

\textsuperscript{71} Id. § 9612(d)(2).
\textsuperscript{72} Id. § 9651(c)(1).
\textsuperscript{73} See supra note 55 and accompanying text.
\textsuperscript{74} See 43 C.F.R. § 11.24 (1988).
ery of the loss and its connection with the release in question.  

Subsection (B) of that section is in effect "self-repealing."

B. "Federally Permitted Release"

Section 107(j) of CERCLA creates a "federally permitted release" defense in actions for response costs or natural resource damages.  

Section 101(10) of CERCLA provides a broad definition of "federally permitted releases" which includes discharges permitted under the various federal environmental laws, such as the Clean Air Act, the Solid Waste Disposal Act and the Safe Drinking Water Act. In addition, section 107(i) provides that there is no recovery for damage caused by the normal use of registered pesticides under the Federal Insecticide, Fungicide and Rodenticide Act.

The statute also specifically exempts recovery for any damages occurring as a result of any actions taken or omitted in accordance with the National Contingency Plan. A significant limitation on this defense, however, is that liability will arise if the damages are the result of gross negligence.

Additionally, state and local governments will be exempt from liability for costs or damages caused by their actions in response to the release or threatened release of hazardous substances not

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77 Id.
78 Id. § 9607(j). Section 107(j) of CERCLA provides, in relevant part, that "[r]ecovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section." Id.
79 Id. § 9601(10).
84 42 U.S.C. § 9607(d)(1) (Supp. V 1987). Section 107(d)(1) provides: Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.
85 Id. § 9607(d)(2).
under state control. However, if the state or municipality acts with "gross negligence or intentional misconduct" liability for costs or damages may attach.

C. "Nexus" Defense

It has been observed that the definition of "natural resources" in section 101(16) of CERCLA imposes a requirement of "a nexus between the natural resource and government 'control,' absent which, there is no actionable damage to a 'natural resource.'" This appears to be the approach that Judge Weinfeld took in City of New York v. Exxon Corp., in determining that the natural resources at issue in that case were "under the control or management of the City."

Although the statute appears clear on its face in this regard, at least one commentator has argued that "[n]o special 'nexus,' . . . should be required." It is submitted that this is the sounder view since it is well settled that the language in CERCLA, as a remedial statute, should be construed broadly so as to have a far-reaching effect. Support for the position that there should not be a nexus requirement can be found directly in the language of CERCLA. Section 107(f) specifically provides that the United States and any

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86 Id.
87 Id. The statute specifically states that "gross negligence" includes "reckless, willful, or wanton misconduct." Id.
88 Id. § 9601(16).
89 1 C. SCHRAF & R. STEINBERG, supra note 68, at § 3.06[2]; see also Breen, supra note 20, at 10,305-06 (arguing that "nexus" between natural resource and government acting as trustee is prerequisite to maintaining natural resource damage claim).
91 Id. at 618; see also supra notes 11-14 and accompanying text (discussing Exxon).
92 Developments in the Law, supra note 19, at 1566 (emphasis added).
93 See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is essentially a remedial statute"). It has been held that remedial statutes that are enacted for the public health and safety, such as CERCLA, are to be given "an extremely liberal construction." United States v. Conservation Chem. Co., 619 F. Supp. 162, 192 (W.D. Mo. 1985) (quoting 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 71.02, at 313 (1972)); see also Mayor of Boonton v. Drew Chem. Co., 621 F. Supp. 663, 666 (D.N.J. 1985) (after considering CERCLA "far reaching remedial statute," court expanded class of potential plaintiffs in natural resource damage actions to include towns); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("the remedial intent of CERCLA requires a liberal statutory construction designed to avoid frustration of the Act's purpose"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("To give effect to . . . congressional concerns, CERCLA should be given a broad and liberal construction").
state may seek damages “for natural resources within the State.” This language indicates no limit or restriction to the government’s power and appears contrary to the notion that a “nexus” is required. The broad language “within the state” appears to negate the requirement of a nexus between governmental control and the natural resource, instead requiring only the existence of the natural resource within the state’s boundaries.

VI. CONCLUSION

In other fora, the authors have criticized the CERCLA statutory scheme as being unwieldy and cost-ineffective. Such shortcomings are evident in complex cases involving 100, 200, and even in excess of 300 potentially responsible parties. In the typical scenario, each of these parties retains counsel and environmental consultants and litigates for a seemingly indefinite period of time until some form of settlement can be reached.

The economic unit of society which bears the burden of complying with this enormous environmental regulatory scheme can fairly pass its costs on to the consuming public. The transactional costs of litigation under CERCLA, however, are costs which have no direct benefit to society, contribute nothing to the cleanup of any environmental problem, and cannot fairly be passed on to the consuming public as an ordinary and necessary expense of doing business. Nevertheless, the consuming public is called on to bear the burden. If the benefits of removal and response to environmental problems cannot justify the concomitant costs, a fortiori the much more ephemeral concept of seeking recovery of damages for injury to the public’s natural resources cannot be justified.

We can begin to perceive the potential vastness of the problem when we consider compensating a government for injury to the natural resources of say, the Hudson River or New Bedford Harbor, by contamination of PCB’s; or of the Jamaica Bay, for contamination emanating from five New York City landfills; or for contamination of Hempstead Harbor, emanating from a variety of

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The potential damage claims are astronomical, the lack of sufficiently particular standards and guidelines is disastrous, and the potential for abuse by even well-meaning public servants is enormous. As with the development of case law regarding the concepts of response and removal costs under CERCLA and SARA, we look forward to case-by-case analyses of the anticipated natural resource damage claims to answer some of the perplexing questions which have been raised and focused on herein.
