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A Research Guide to Natural Resource Damage under the Comprehensive Environmental Response, Compensation and Liability Act

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A RESEARCH GUIDE TO NATURAL RESOURCE DAMAGE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

*Kerry E. Russell**

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* Attorney, Lloyd, Gosselink, Fowler, Blevins & Mathews, Austin, Texas. J.D.
1990 University of Wyoming College of Law.

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I. INTRODUCTION

Hazardous waste sites, such as Love Canal, are scattered across the United States.¹ In response to the expanding threat to public health posed by these sites, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980.² CERCLA's primary objective is remediation of the worst hazardous waste sites as they are identified. Its liability provisions are virtually unlimited in scope and dollar amount.³ The initial legislation was expanded by the Superfund Amendments and Reauthorization Act (SARA) in 1986.⁴ CERCLA's liability provisions contain a subsection specifically directed towards natural resource damages resulting from disposal of hazardous waste at these sites.⁵ Natural resource damage claims are becoming an integral part of all hazardous waste site remediation efforts. This article is intended to assist the legal researcher in this new and rapidly expanding area of environmental law.

1. Note, *Defining the Appropriate Scope of Superfund Natural Resource Damages Claims: How Great an Expansion of Liability?*, 5 VA. J. NAT. RESOURCES L. 197 (1985).

2. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1988)).

3. 42 U.S.C. § 9607(a) (1988).

4. Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499 [H.R. 2005], 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9601 (1988)); see also *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 16, at 10,360 (Dec. 1986).

5. 42 U.S.C. § 9607(f) (1988).

The Alaska oil spill thrust natural resource damages from the shadows into the spotlight of environmental litigation.⁶ Authoritative case law is only now beginning to develop, so the researcher must rely primarily upon secondary sources for information and support. A major portion of this article is devoted to an analysis of currently available secondary sources.

This research guide is divided into five sections. The first two sections discuss relevant statutes, regulations and case law. The third section analyzes primary sources and the fourth section examines secondary sources. Finally, there is a discussion of currently available research tools that may prove beneficial to the researcher or practitioner now and in the future.

II. GENERAL OVERVIEW

Presently, traditional research sources such as ALR, West Digests, Am Jur and CJS are not particularly useful avenues for extensive research on this subject. Lag time on updates for these resources reduce their effectiveness in researching contemporary, rapidly developing areas of the law. Natural resource damage under CERCLA is just such an area. However, in-depth research on the topic should not bypass these traditional resources as they will soon begin to provide contemporary analysis of the subject.

Annotations to the statutes found in the USCS (Lawyers Coop.) and USCA (West) versions of the United States Code provide a good starting point for an initial survey of the past case law relating to this issue. These annotations are generally comprehensive to the date of the present Pocket Part.⁷ Due to the necessary time delay in updating the Pocket Part, they should not be relied upon to give the current status of case law on the subject.

Law review articles and the environmental loose-leaf services are currently the best sources for contemporary CERCLA information, particularly in the natural resource damage arena. The environmental loose-leaf services provide thorough analysis of CERCLA issues and cases on a monthly basis. Law review authors are becoming more prolific and knowledgeable on the subject. The weekly Environment Reporter loose-leaf series is helpful in updating the researcher on current activity. With their current environmental database expansions, both Westlaw and Lexis provide convenient and comprehensive access to a broad spectrum of resources on the subject of natural resource damage under CERCLA.

6. *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 19, at 10,551 (Dec. 1989).

7. Pocket Parts are updated on an annual basis. Notes on recent court decisions are updated with quarterly, non-cumulative pamphlets.

III. STATUTORY AND REGULATORY SUMMARY

As its name implies, CERCLA is a comprehensive environmental statute designed to remediate hazardous waste sites and concurrently require the parties responsible for the pollution (PRPs) to pay for all remediation costs.⁸ A federal trust fund (Superfund) was established by Congress to pay for remediation at those sites where no PRPs could be located.⁹ Although Congress provided full access to the Superfund for natural resource damages in the original 1980 act,¹⁰ that access was effectively severed by the 1986 SARA amendments.¹¹ The CERCLA limitation along with changes in the Internal Revenue Code effectively precluded access to Superfund for natural resource damage assessments.¹² The researcher should keep in mind the fact that recovery for natural resource damages is a separate issue from actual remediation of the hazardous wastes at a designated site.

Statutory directives related to natural resource damage are found at section 107 of CERCLA.¹³ This is the general liability section of the statute, with natural resource damage being found in subsections (a) and (f). PRPs are responsible for injury to or destruction of natural resources caused by their release of hazardous substances.¹⁴ The natural resource damage liability is in addition to all other costs of remediation. CERCLA also provides a specific definition of the term "natural resources."¹⁵ Liability only extends to natural resources owned or controlled by the federal or state governments.¹⁶

Procedural requirements for natural resource damage recovery are set out in the same section.¹⁷ There is a preliminary requirement for presidential designation of a natural resource trustee to act as the party with legal standing to initiate action against the PRPs. Although some courts have allowed municipalities to act as trustees,¹⁸ the plain words of the statute require either designated state or fed-

8. 42 U.S.C. § 9607(a)(4)(A) (1988).

9. *Id.* § 9611. The Hazardous Substance Superfund is authorized under the Internal Revenue Code, Title 26 of the United States Code, but is accessed through CERCLA.

10. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 111(b), 94 Stat. 2767, 2789 (1980).

11. 42 U.S.C. § 9611(b) (1988).

12. 26 U.S.C. § 9507(c) (1988). The Hazardous Substance Superfund under the Internal Revenue Code limits expenditures from the Trust Fund to those authorized under CERCLA section 9611. Section 9611 generally requires presidential approval and exhaustion of judicial and administrative remedies before the Trust Fund can be accessed for natural resource damages.

13. 42 U.S.C. § 9607(f) (1988).

14. *Id.* § 9607(a)(4)(C).

15. *Id.* § 9601(16).

16. *Id.* § 9607(f)(1).

17. *Id.* § 9607(f)(2).

18. See *Mayor & Bd. of Aldermen v. Drew Chem. Corp.*, 621 F. Supp. 663 (D.N.J. 1985); *City of New York v. Exxon Corp.* ("Exxon I"), 633 F. Supp. 609 (S.D.N.Y. 1986).

eral trustees. There is no private cause of action for recovery of natural resource damages. The designated trustee is authorized to bring concurrent action under the Clean Water Act (FWPCA).¹⁹

The statutory language holds both hazardous waste site owners and hazardous waste generators jointly and severally liable for damages.²⁰ Recent federal appeals court decisions have given this section of the statute an expansive reading.²¹ There is no logical reason why similar liability should not extend to natural resource damage claims since those claims also arise under section 107.²²

A major obstacle to trustee action continues to be lack of available funding for damage assessments. Without access to Superfund a trustee must look initially to the PRPs for funding. Although there have been few natural resource damage recoveries to date, it is expected that this type of claim will soon play a prominent part in CERCLA response and recovery actions.²³ A recent federal district court decision may pave the way for more aggressive trustee conduct by making natural resource restoration an integral part all CERCLA remediation actions.²⁴

Natural resource damage assessment regulations are mandated under CERCLA section 301(c).²⁵ The Department of the Interior (DOI) is the federal agency with responsibility for promulgating these regulations.²⁶ DOI's natural resource damage assessment regulations are found at 43 CFR Part 11.²⁷ There are two sets of regulations. Type A regulations cover simplified damage assessments where there is a minimal release of hazardous substances.²⁸ Type B regulations cover detailed damage assessments of major releases.²⁹

19. 42 U.S.C. § 9607(f)(2)(A) (1988). The Clean Water Act is codified at 33 U.S.C. § 1251 (1988).

20. 42 U.S.C. § 9607(a) (1988).

21. See *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 765 (5th Cir. 1988); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

22. 42 U.S.C. § 9607(f) (1988).

23. See *Local Governments: Opportunities to Recover for Natural Resource Damages*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 17, at 10,036 (Feb. 1987); *Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property?*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 19, at 10,051 (Feb. 1989).

24. See *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019 (D. Mass. 1989).

25. 42 U.S.C. § 9651(c) (1988). CERCLA regulations are listed at Title 40 of the Code of Federal Regulations. Hazardous wastes under CERCLA include specific chemical compounds listed at 40 CFR Part 300 as well as those wastes considered hazardous under previous federal statutes. Specific Department of the Interior (DOI) regulations are found at Title 43 of the Code of Federal Regulations. Authority for natural resource damage recovery is split between CERCLA and DOI regulations, with the specific regulatory directives found in these respective titles of the Code of Federal Regulations.

26. 40 C.F.R. § 300.72 (1990).

27. 43 C.F.R. § 11 (1990).

28. *Id.* § 11.40.

29. *Id.* § 11.60.

A trustee is not required to use the regulatory format in performing a natural resource damage assessment. However, if the trustee does opt for the DOI formula, a rebuttable presumption is created in favor of the trustee's assessment.³⁰ The rebuttable presumption doctrine provides a strong incentive for the trustee to follow the DOI regulations since that presumption shifts the burden of proof from the trustee to the PRP on the issue of the validity of the assessment.

DOI's initial set of natural resource damage assessment regulations required the use of a "lesser of" formula.³¹ This meant a trustee would be required to assess damages based on the lesser of (1) use value or (2) restoration or replacement cost. For example, if a furbearing animal were destroyed by the release, its assessed value would probably be based on the market value of its fur rather than the more expensive restoration or replacement value of the animal.

These initial regulations took little notice of aesthetic values. No consideration was given to the intrinsic value to the public of the existence of the natural resource for recreational use or enjoyment.

The District of Columbia Circuit Court of Appeals recently remanded these initial regulations to the DOI for modification.³² Resource valuation method was the main problem with both sets of regulations. The court held the "lesser of" valuation methodology to be contrary to the intent of Congress when it enacted CERCLA section 107(f).³³ In essence, the court required the consideration of aesthetic or public use and enjoyment values when assessing natural resource damages. This decision should result in resource restoration or replacement costs becoming the valuation baseline in natural resource damage assessments under CERCLA.

DOI has stated that it will not appeal the D.C. Circuit's decision, but will follow the court's directives in promulgating new natural resource damage assessment regulations.³⁴ If DOI's new regulations conform to the court's mandate, they should give natural resource trustees substantial leverage when negotiating with PRPs for payment of natural resource damage assessment costs.³⁵

30. 42 U.S.C. § 9607(f)(2)(C) (1988).

31. 43 C.F.R. § 11 (1989); 51 Fed. Reg. 27,674, 27,725 (1986); Amended 53 Fed. Reg. 5166 (1988); see also *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, *Envtl. L. Rep. (Envtl. L. Inst.) No. 19*, at 10,554 (Dec. 1989).

32. See *Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

33. *Id.* at 442; see also *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, *Envtl. L. Rep. (Envtl. L. Inst.) No. 19*, at 10,554 (Dec. 1989).

34. *Natural Resources Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, *Envtl. L. Rep. (Envtl. L. Inst.) No. 19*, at 10,556.

35. See *Natural Resource Damages: The Economics Have Shifted After Ohio v. United States Dep't of the Interior*, *Envtl. L. Rep. (Envtl. L. Inst.) No. 20*, at 10,127 (April 1990). Both proposed and final regulations can be found in the Federal Register. The Westlaw Federal Register database provides easy access to this resource.

In some instances state laws and regulations may be of interest to the researcher. In addition to acting as natural resource trustees under CERCLA, some states have their own hazardous waste statutes and regulations. State issues are not specifically addressed in this article, although a recent Environmental Law Reporter article provides an overview of analogous state laws.³⁶

With this introduction the researcher should realize that CERCLA is a highly technical environmental statute. This article is intended to provide an overview of the statutory and regulatory sections related to natural resource damages. Reference to the articles and cases examined in this guide should provide the background knowledge required for comprehensive research on the subject of natural resource damage under CERCLA. This guide should be of particular interest to the general practitioner involved for the first time in the defense of a client named as a PRP at a Superfund site.

IV. RELEVANT CASE LAW

Congress vested jurisdiction over individual CERCLA actions in the federal district courts.³⁷ Jurisdiction over challenges to implementing regulations lies with the District of Columbia Circuit Court of Appeals.³⁸ Final review is in the United States Supreme Court.

To date there has been only one general CERCLA case of note before the United States Supreme Court, and it did not address the issue of natural resource damage.³⁹ Various federal appeals courts have reviewed different aspects of CERCLA, but again there has been only a single review of the natural resource damage provisions. The only appeals court to directly address the issue was the D.C. Circuit when it struck down portions of the DOI regulations related to natural resource damage assessments.⁴⁰ Most precedential case law under CERCLA has come out of the federal district courts. The only case law directly addressing section 107(f) is the result of federal district court action.⁴¹

This lack of judicial interpretation of CERCLA's natural resource damage provisions is expected to change as trustees become more aggressive in protecting the natural resources under their care. Heightened public awareness of natural resource damages resulting from

36. *Natural Resource Damages: Recovery Under State Law Compared with Federal Laws*, *Env'tl. L. Rep.* (Env'tl. L. Inst.) No. 20, at 10,134 (April 1990).

37. 42 U.S.C. § 9613(b) (1988).

38. *Id.* § 9613(a).

39. See *Exxon Corp. v. Hunt*, 475 U.S. 355 (1985).

40. See *Ohio v. United States Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989); *Colorado v. United States Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989).

41. See *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019 (D. Mass. 1989); *City of New York v. Exxon Corp.* ("Exxon I"), 633 F. Supp. 609 (S.D.N.Y. 1986); *Mayor & Bd. of Aldermen v. Drew Chem. Corp.*, 621 F. Supp. 663 (D.N.J. 1985).

hazardous waste disposal should prod reluctant trustees into action. Stringent DOI damage assessment regulations should give trustees the tools they need to persuade PRPs that funding a natural resource damage assessment is in the PRPs best interest.

V. PRIMARY SOURCES

A. *Supreme Court*

1. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1985)

This case was the initial interpretation of CERCLA by the Supreme Court. The Court held that CERCLA preempted the New Jersey Spill and Compensation Control Act. The Court based its holding on CERCLA's section 114 ban on double (federal and state) compensation.

Although this case does not relate directly to natural resource damages, the researcher should be aware that it was the first Supreme Court decision on CERCLA and Shepardizing this case may provide a ready update on recent Supreme Court actions related to CERCLA.

2. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)

Many commentators believe the public trust doctrine is the legal basis for CERCLA's section 107 natural resource damage provision. This case was the original Supreme Court enunciation of the modern public trust doctrine in the United States.

The doctrine holds that the government (state or federal) is a trustee for certain lands and resources held in trust for the public. All normal trustee duties apply. The doctrine has been traditionally limited to lands under navigable waters.

3. *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988)

This case is the most recent Supreme Court decision related to the public trust doctrine. Here the Court expanded the traditional definition of the public trust doctrine established by *Illinois Central* to include submerged land not covered by navigable in fact water. The Court stated that navigability has never been the sole criteria for inclusion within the public trust.

Different commentators have viewed this case as either an expansion of or a restriction on the public trust doctrine. The researcher should not overlook Shepardizing this case for the current status of the public trust doctrine.

B. *Federal Appeals—General CERCLA*

The following cases do not relate directly to the issue of natural

resource damages. They are important, frequently cited judicial interpretations of CERCLA. The researcher should use them as access portals to recent judicial actions related to CERCLA.

1. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)

Defendant purchased property where hazardous waste was disposed of prior to the purchase. The court held that under CERCLA section 107 the owner of the site where a hazardous waste release occurs is liable for cleanup costs even if said owner was not responsible for the original disposal.

2. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)

Defendant was a generator of hazardous wastes stored at a supposed recycling facility. Both site owners and waste generators were held jointly and severally liable under CERCLA section 107(a) for cleanup costs at the site. The court affirmed the liability of the generator defendants.

3. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 765 (5th Cir. 1988)

Defendant builders, developers and lenders built a residential subdivision on an abandoned toxic waste site. Purchasers of lots and homes in the subdivision sued under CERCLA for damages and cleanup costs. The court held the defendants, as owners of the site when hazardous releases were occurring, liable for all response and remediation costs at the site under CERCLA section 107.

C. Federal Appeals—Natural Resource Damage

1. *Colorado v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989)

Plaintiffs petitioned for judicial review of Interior's promulgated Type A regulations for assessing natural resource damages under CERCLA. Type A rules are those required under CERCLA for simplified assessments of minor hazardous waste releases. The court held the rules were proper in their scope, but required further modification to reflect Congress' intention that lost use values not be the sole measure for natural resource damages. The court stated that the rules should incorporate restoration or replacement values. Although the court upheld the validity of the Type A regulations, it remanded them for modification consistent with the Type B regulations that were struck down in the *Ohio* case.

2. *Ohio v. United States Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989)

This is the companion case mentioned above where the court addressed the issue of the Type B regulations under CERCLA for valuation of natural resource damages. These regulations relate to extensive assessments of major hazardous waste releases. The court refused to allow Interior to use minimum lost use or market values as the sole measure to assess natural resource damages. The court held that restoration or replacement values are usually the proper measure of damages.

This decision established the proper measure of natural resource damages under CERCLA. The court stated that natural resource damages could not be assessed solely on the market value cost of the resource itself, rather, aesthetic values must be considered the base-line valuation.

Since Interior has stated there will be no appeal of these two decisions, the judicial precedent is established. Trustees under section 107 now have a powerful weapon to use against PRPs liable for natural resource damages. The researcher should update the revised regulations to be found at 43 CFR Part 11.

D. Federal District—General CERCLA

The following cases do not relate directly to the issue of natural resource damages. They are important, frequently cited judicial interpretations of CERCLA. The researcher should use them as access portals to recent judicial actions related to CERCLA.

1. *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)

This is the seminal case on judicial interpretation of CERCLA. Defendant operated a hazardous chemical site, which was subsequently sold for a housing development. The court held the defendant liable for all cleanup costs under CERCLA. The court stated that CERCLA should be given a "broad and liberal interpretation" to implement the will of Congress.

Reilly Tar has been followed in most of the federal circuit courts. Its "broad and liberal" language has been favorably cited in those same courts.

The CERCLA researcher should use *Reilly Tar* as a basis for any policy argument.

2. *United States v. Price* ("Price III"), 577 F. Supp. 1103 (D. N.J. 1983)

In this case a hazardous waste generator was held liable for site cleanup costs under CERCLA. The generator was held to strict liability under CERCLA even though his past hazardous waste disposal actions were not negligent. The court held that CERCLA section 106 liability was the only method whereby the PRPs could be held responsible absent an initial expenditure of Superfund money. However, the court incorporated the section 107 definition of liability into section 106.

This decision is particularly important for natural resource trustees assessing damages since access to Superfund is, in reality, not available for natural resource damage assessments. Based on this decision the trustee, acting as the designated representative of the United States, may be able to require PRPs to bear all costs related to the assessment using the section 107 definition of liability.

3. *United States v. Wade* ("Wade II"), 577 F. Supp. 1326 (E.D. Pa. 1983)

Defendants in this case challenged the joint and several liability provisions of CERCLA. Defendants were off-site hazardous waste generators. The court upheld the joint and several liability provisions of CERCLA, but stated that they were not mandatory. This decision allows proportioned liability if the facts establish such a result would be equitable.

Joint and several liability under CERCLA is still an unsettled question of law. The researcher should be aware of possible limitations on natural resource damage claims through proportional liability rather than joint and several liability.

4. *New York v. General Electric Co.*, 592 F. Supp. 291 (N.D. N.Y. 1984)

Defendant sold hazardous waste oils for off-site use on a dirt dragstrip. The court held the defendant liable under CERCLA, regardless of the sale, by stating that Congress intended for hazardous waste generators to be responsible for their pollution in any area where it came to be located.

This decision should apply to natural resource damages as well as any other type of damage resulting from hazardous waste disposal.

5. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 575 (D. Md. 1986)

This case extended CERCLA liability to a mortgage holder who

later purchased the hazardous waste site at a foreclosure sale. Lender liability under CERCLA was firmly established with this decision.

The researcher should be aware that CERCLA liability for natural resource damage is not limited to identified PRPs. With this decision, a financing institution may also be liable, depending upon the degree of control it exercises over the hazardous waste release.

E. Federal District—Natural Resource Damage

1. *Mayor & Bd. of Aldermen v. Drew Chemical Corp.*, 621 F. Supp. 663 (D.N.J. 1985)

Plaintiff (town) sued a chemical company under CERCLA section 107 for recovery of response costs related to a hazardous substance release on city property caused by the defendant company. The court held the town had standing to sue as a natural resource trustee even though the statute did not explicitly include municipalities within the designated trustee category.

Although this decision has not received widespread approval, there is some legislative history to suggest that Congress was aware of the decision when it passed SARA, and explicitly did not change the terms of the trustee category to rule out municipal trustees. For a discussion of this case refer to section VI.A.7. of this guide. If this decision is followed by other courts, it will expand the number of possible natural resource trustees.

2. *City of New York v. Exxon Corp.* ("Exxon I"), 633 F. Supp. 609 (S.D.N.Y. 1986)

This case is similar to *Drew Chemical* in that the court allowed a city standing to act as a natural resource trustee in recovering for damages to city property resulting from a release of hazardous substances.

3. *City of New York v. Exxon Corp.* ("Exxon II"), 697 F. Supp. 677 (S.D.N.Y. 1988)

This is the follow-up to *Exxon I* affirming the original decision. *Exxon I* and *Exxon II* have not received any greater approval than *Drew Chemical*. However, this series of three cases giving an expansive reading to section 107 must carry some weight since they are the only federal courts prior to the *Acushnet* decision that have directly addressed the issue of natural resource damages under CERCLA.

4. *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019 (D. Mass. 1989)

A third party wildlife organization was allowed to intervene in

this case to protest a proposed settlement decree between the federal natural resource trustee and a group of PRPs. The proposed decree would have used the "lesser of" formula in determining the amount of natural resource damages. The court recognized the need for a more realistic determination of damages and, thus, granted the permissive intervention of the third party. The court recognized a divergence of interest between the federal trustee and the wildlife organization in relation to the proper method of natural resource valuation.

If this decision receives widespread approval, it should place considerable pressure on natural resource trustees to require a realistic valuation of natural resources. National wildlife organizations looking over the trustee's shoulder will exert the pressure.

5. *City of Philadelphia v. Stepan Chemical Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989)

This case is factually similar to *City of New York v. Exxon Corp.* in that hazardous wastes were dumped in a city landfill. However, this court refused to allow the city standing to sue as a "state" under CERCLA section 107(a)(4)(A). The court quoted the *Drew Chemical* decision and then noted that decision was rendered under CERCLA section 107(f) while this decision relates to section 107(a)(4)(A). This court stated that it agreed with the overall philosophy of the *Drew Chemical* court giving CERCLA a broad and liberal interpretation.

Although this case on its face appears to be contrary to the earlier judicial interpretations of CERCLA section 107(f), that is not necessarily an accurate conclusion. The court went to considerable length to distinguish its decision from the earlier ones. The researcher should be wary of using this decision to limit the scope of natural resource damage claims under CERCLA.

VI. SECONDARY SOURCES

A. *Environmental Law Reporter (Environmental Law Institute)*

The *Environmental Law Reporter* contains extensive monthly updates and reviews of federal and state environmental issues. The News & Analysis articles are particularly valuable sources for the environmental law researcher. The *Environmental Law Reporter* has separate volumes on Litigation, Pending Litigation, News & Analysis, Administrative Materials, and Statutes.

Articles listed below came from the News & Analysis section and should be of interest to the researcher for both background and current information. The researcher should also be aware that the *Environmental Law Institute* publishes additional resource material on the topic such as the Superfund Desk Book, which is a compilation of relevant articles from the News & Analysis section.

1. *Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 11, at 10,101 (May 1981)

This article provides a concise overview of the original Superfund (CERCLA) enforcement scheme. It is excellent background material for the researcher who is new to CERCLA. It was written prior to any judicial interpretations of CERCLA or major EPA enforcement actions.

2. *Recovery for Natural Resource Damages Under Superfund: The Role of the Rebuttable Presumption*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 12, at 15,057 (Nov. 1982)

This article begins with an explanation of CERCLA's section 107 provisions. It then provides a detailed analysis of the importance of the rebuttable presumption if a natural resource trustee follows the DOI regulatory formula in assessing damages. This presumption is important when a highly technical issue such as a natural resource damage assessment is implicated because it places the burden upon the PRP to disprove the figures proposed by the trustee.

The researcher should pay particular attention to this article since it links the statutory provisions of CERCLA with the subsequent regulatory provisions.

3. *Municipal and Private Party Claims Under Superfund*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 13, at 10,272 (Sept. 1983)

This is an article written by the attorney for the City of Philadelphia in the *Stepan Chemical* case. It provides an analysis of the methodology involved in a natural resource damage claim under CERCLA section 107. It may be of more interest to the practitioner than the researcher.

4. *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 14, at 10,304 (Aug. 1984)

The author of this article was an attorney for federal natural resource trustees in a number of pre-SARA actions. He provides a comprehensive analysis of the requirements for asserting natural resource damage claims. This article is excellent background material on CERCLA section 107 from its legislative history to specific implementation.

5. *Valuing Natural Resource Damages: Economics for CERCLA Lawyers*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 14, at 10,311 (Aug. 1984)

This article provides an analysis of the various methods available for estimating natural resource values. It is written from an economist's perspective. While not particularly easy to read, it does provide a coherent economic explanation of valuation methods. The author argues in favor of the user value method which was generally discredited by the D.C. Circuit in the *Colorado* and *Ohio* cases.

6. *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 16, at 10,360 (Dec. 1986)

This is a rather long, but detailed description of the 1986 SARA legislation. It provides a section by section analysis of the legislative history of that enactment. It should prove valuable to any researcher exploring the legislative history of SARA.

7. *Local Governments: Opportunities to Recover for Natural Resource Damages*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 17, at 10,036 (Feb. 1987)

The author of this article provides a brief analysis of local government claims under CERCLA section 107(f). It pays particular attention to the *Drew Chemical* decision and its actual impact, if any, on congressional considerations during the SARA hearings.

8. *State Actions for Natural Resource Damages: Enforcement of the Public Trust*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 17, at 10,434 (Nov. 1987)

This article examines the impact of the public trust doctrine on CERCLA section 107(f), both before and after SARA. The authors argue for expansion of the public trust with actions brought under section 107(f). The footnotes in this article provide the researcher with extensive case history related to the public trust doctrine.

9. *Making CERCLA Natural Resource Damages Regulations Work: The Use of the Public Trust Doctrine and Other State Remedies*, Env'tl. L. Rep. (Env'tl. L. Inst.) No. 18, at 10,299 (Aug. 1988)

In this article the author criticizes the original DOI natural resource damage assessment regulations. She argues that trustees may obtain a more realistic monetary recovery for natural resource damages if they use state claims and the public trust doctrine rather than the DOI formula for recovery. This article is probably limited to historical value in light of the recent decisions of the D.C. Circuit in the *Colorado* and *Ohio* cases.

10. *Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property?*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 19, at 10,051 (Feb. 1989)

This article examines the recent Supreme Court decision and its impact on the public trust doctrine. The author cautions that the expansion of the public trust to inland, nonnavigable tidal waters is an environmental victory not without costs since its effect is to authorize petroleum production from these lands. The researcher should find this article informative because it presents contrasting viewpoints on the public trust issue.

11. . . . *But Were Afraid to Ask: Superfund Case Law, 1981-1989*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 19, at 10,430 (Oct. 1989)

This article is a comprehensive summary of CERCLA case law from 1981 to 1989. It is *mandatory* reading for the CERCLA researcher.

12. *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 19, at 10,551 (Dec. 1989)

The author of this article was an attorney representing environmental groups in the *Colorado* and *Ohio* cases. He provides an overview of the CERCLA natural resource damage program from beginning to present. The author concludes with an agenda for future actions in the wake of the D.C. Circuit decisions.

13. *Natural Resource Damages: The Economics Have Shifted After Ohio v. United States Dep't of the Interior*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 20, at 10,127 (Apr. 1990)

This article reviews the history of the D.C. Circuit decision that struck down the DOI's original natural resource damage assessment regulations. The authors analyze the relevant economic theories involved in the decision. Finally, they postulate that the ultimate impact of the decision will be to strengthen the position of trustees in natural resource damage actions under CERCLA.

The researcher should find that this article provides a concise, understandable review of the major economic theories underlying natural resource damage assessments. It pays special attention to the "lesser of" rule for natural resource damage valuation. It also details the different "use" methods of valuation and how they interact.

14. *Natural Resource Damages: Recovery Under State Law Compared with Federal Laws*, *Envtl. L. Rep. (Envtl. L. Inst.)* No. 20,

at 10,134 (Apr. 1990)

The authors of this article initially review the CERCLA and DOI natural resource damage provisions. This is followed by a summary table with the results of a review of all fifty states' damage provisions. The authors also describe the specific provisions from Connecticut, Montana, North Carolina, Pennsylvania, and Washington.

This article is of little benefit to the researcher interested only in federal application of natural resource damage claims. It does provide some insight into the relationship between state and federal actions.

B. Environment Reporter (BNA)

Subjects discussed in the Environment Reporter generally parallel those in the Environmental Law Reporter; however, there is more emphasis on state environmental laws. Federal environmental updates are weekly, compared to the monthly reviews contained in the Environmental Law Reporter. The Environment Reporter provides separate volumes on Decisions, Current Developments, Federal Laws, Federal Regulations, Monographs, State Air Laws, State Water Laws, State Solid Waste-Land Use, and Mining.

BNA also publishes Toxics Law Reporter, a weekly review of recent litigation in the hazardous waste arena.

Access to both loose-leaf services provides a contemporary understanding of the state of the current law in this area. Although the two services overlap, each contains enough unique information to justify access to both.

C. Law Review Articles

1. Note, *Defining the Appropriate Scope of Superfund Natural Resource Damages Claims: How Great an Expansion of Liability?*, 5 VA. J. NAT. RESOURCES L. 197 (1985)

This is a thirty page article that provides an extensive review of the natural resource damage provisions of CERCLA. It describes the relationship between sections 107, 111 and 301(c). The author then provides an analysis of the various methods of damage assessment and resource valuation.

The researcher should find this article easy to read and understand. The descriptions of resource valuation methods are understandable since they are presented in lay, rather than economic, terms.

2. Warren & Zackrison, *Natural Resources Damages Provisions of CERCLA*, 1 NAT. RESOURCES & ENVT. 18 (Fall 1985)

This is a four page article describing the natural resource damage provisions of CERCLA and their relationship with the rest of the statute. It provides the researcher with a quick, but cursory, overview of the statute.

3. Habicht, *The Expanding Role of Natural Resource Damages Claims Under Superfund*, 7 VA. J. NAT. RESOURCES L. 1 (1987)

This is a twenty-six page article on the post-SARA impact of the natural resource damage provisions of CERCLA. It provides a brief overview of the statutory sections. It also provides a cursory look at similar state statutes. The main focus of the article is directed towards litigation related to these sections of CERCLA. It provides a description of important state and federal litigation on the subject, with particular emphasis on impact of section 107 on PRPs.

Review of this article should prove valuable to the researcher who is interested in CERCLA natural resource damage litigation.

4. Grigalunas & Opaluch, *Assessing Liability for Damages Under CERCLA: A New Approach for Providing Incentives for Pollution Avoidance?*, 28 NAT. RESOURCES J. 509 (1988)

This is a twenty-four page article covering the original DOI Type A and Type B natural resource damage assessment regulations. It is a highly technical economic analysis of the CERCLA provisions, the implementing regulations and the economic impact of those regulations. Although these regulations are now being modified by DOI, the basic analysis in this article is still valid. The author's analysis is directed towards the economic incentives these regulations provide for PRPs to avoid destroying natural resources through the release of hazardous substances.

The researcher should have a firm grasp of CERCLA before approaching this article. It does describe the economic theories behind this section of CERCLA.

5. McKay, *CERCLA's Natural Resource Damage Provisions: A Comprehensive and Innovative Approach to Protecting the Environment*, 45 WASH. & LEE L. REV. 1417 (1988)

This is a twenty-nine page article reviewing CERCLA's natural resource damage sections and the original DOI implementing regulations. It analyzes the impact of the regulations on the public trust underpinnings of the statute. The author also describes the conflict between the regulations and congressional intent behind CERCLA section 107.

The researcher should find this article informative in light of the recent D.C. Circuit remand of the regulations. The footnotes in this article provide a valuable source of information for more extensive research of the subject.

6. Carson & Navarro, *Fundamental Issues in Natural Resource Damage Assessment*, 28 NAT. RESOURCES J. 815 (1988)

This is a twenty-one page article that focuses strictly on the natural resource damage assessment. It is highly technical and uses economic theories, mathematical formulas and statistical analysis to review the subject. It is not intended for the general researcher, but should prove informative for the person trained in the technical aspects of the subject.

7. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405 (1989)

This fifty-two page article provides probably the most extensive review to be found of all aspects of CERCLA's natural resource damage provisions. It describes both general and specific CERCLA provisions and their implementation from 1980 to 1988. It then examines CERCLA in light of other federal remedial and compensatory statutes. The author compares CERCLA to the common law and then examines the evidentiary aspects of the rebuttable presumption. There is an analysis of administrative and regulatory actions related to the natural resource damage provisions of CERCLA, as well as a review of judicial interpretation.

The researcher should consider this article "must reading" in researching the subject. It is well written and informative. The footnotes are extensive and provide easy access to further research.

8. Cicchetti & Peck, *Assessing Natural Resource Damages: The Case Against Contingent Value Survey Methods*, 4 NAT. RESOURCES & ENV'T 6 (1989)

This four-page article criticizes the contingent value survey method of assessing natural resource damages. Although the article is based on the original DOI regulations, the methodology may still be valid following DOI modification of the regulations.

9. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989)

This is a seventy-two page article analyzing the natural resource damage valuation procedure. It begins with a review of the applicable federal statutes (CERCLA and others). The author then describes, in detail, resource valuation methods including use value, extrinsic and

intrinsic value, market value, restoration and replacement costs, gross and net value, and other aesthetic values. The author also provides some insight into other alternatives that could be considered. Finally, the author reviews the original DOI regulations and their relationship to the various valuation methods.

The researcher should find this article easy to read in spite of its length. It provides a broad range of information on the subject.

VII. RESEARCH TOOLS

A. *Databases*

The various on-line and CD-ROM databases provide the researcher with the fastest access to a wide array of materials. Case law, periodicals and annotations are all available. The databases are constantly expanding. Westlaw and Lexis are similar in coverage, with some exclusive features on each service. Periodicals may be accessed either on-line or through the CD-ROM services, such as Info-Trac. As a cautionary note, some sources found using the print periodical services were not found with the database searches.

Legal Trac is similar to CLI, but contains, in addition, legal newspapers. Use similar search terms as those for CD-ROM and print databases.

The researcher should pay particular attention to the expanding regional library database services, such as CARL in Colorado and Wyoming. These library databases provide access to a large variety of books and periodicals.

1. Westlaw (West)

Database: ALLFEDS, ENV-TP and LRI.

Use as initial search terms: Natural /5 Resource /20 Damage /P CERCLA.

2. Lexis (Mead)

Database: GENFED, ALR, LAWREV, LEXREF, ENVIRN and HEALTH.

Use as initial search terms: Natural Pre/5 Resource W/20 Damage and CERCLA.

3. Nexis-OMNI (Mead)

Database: NEXIS, ASAPII and GOVDOC.

Use as initial search terms: Natural Pre/5 Resource W/20 Damage and CERCLA.

4. Regional Library Databases

Use as initial search terms the words Natural, Resource, Damage and CERCLA in the specific format required for the individual database.

B. Traditional Finding Tools

The researcher may find that the traditional finding tools are not especially helpful in the CERCLA area at the present time. This problem is due to the extended lag time for updating these resources. The annual supplements will provide most of the information presently available. Consequently, the current information will be limited and cursory. These resources will become increasingly valuable as they are revised.

1. Words and Phrases (West)

The researcher should be aware that the Pocket Part will likely contain the only information related to this subject.

Use the following words: Environment, Hazardous Waste, Natural Resource, and Toxic Substance.

2. ALR (Lawyers Coop.)

The ALR Federal series will likely contain the only information related to this subject. The only annotation currently available is found at Annotation, Governmental Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS §§ 9610 et seq.), 70 ALR Fed 329 (1984) and it is limited to general CERCLA information with nothing on natural resource damages.

Use the following Index topics: Natural Resources, Pollution, Environmental Law, and Hazardous Substances and Waste.

3. West Digest Series

The West Federal Practice Digest presently contains some information on the CERCLA topic, but nothing on natural resource damages. The Topics and Key Numbers listed below should be used for research in the Digest, Reporter systems and advance sheets.

West's Topics and Key Numbers system allows searches within narrowly focused areas. The system provides time efficient computer searching. Complete information on the system can be found in West publications or by calling West at 1-800-937-8529.

Use the following Topics and Key Numbers: Health and Environment, Key Number 25.5; Hazardous Waste, Key Number 25.5(5);

EPA, Key Number 25.7(18); Superfund, Key Number 25.15(3.1); Toxic Substances, Key Number 25.5(3).

4. Legal Encyclopedias

a. *CJS (West)*. This resource currently does not contain any information on this specific subject.

Use the following index topic: Health and Environment.

b. *Am Jur (Lawyers Coop.)*. This resource currently does not contain any information on this specific subject.

Use the following index topics: Environment and Conservation, Environmental Protection Agency, and Pollution.

5. Index to Legal Periodicals (Wilson)

This legal periodical service was started in 1908. Coverage is expanding and access is available in print, on-line (Westlaw & Lexis) and through CD-ROM (Info Trac/Legal Trac).

Subject Headings: Environmental Law, Environmental Protection, Hazardous Substances, Hazardous Waste Liability, Natural Resources, Pollution.

6. Current Law Index (IAC)

This legal periodical service was initiated in 1980. Coverage is more extensive than the Index to Legal Periodicals and access is available in print, on-line (Westlaw & Lexis) and through CD-ROM (InfoTrac/LegalTrac).

Subject Headings: Conservation of Natural Resources, Environmental Law, Environmental Protection, Hazardous Substances, Hazardous Wastes, Liability for Environmental Damages, Liability for Hazardous Substances Pollution Damages, Pollution, Pollutants.

7. Books

There are a number of casebooks and hornbooks available on environmental law in general. All but one of them suffer in the area of CERCLA due to their older publication dates. None of them address the natural resource damage issue directly. The only up-to-date treatise on CERCLA is the 2-volume set by Jackson Battle. The second volume is a newly published supplement that gives extensive coverage to contemporary CERCLA issues. It was used extensively in researching this Research Guide.

a. J. BATTLE, *WATER POLLUTION AND HAZARDOUS WASTES* (1986 & Supp. 1989). This is a 2-volume set. The first volume provides extensive coverage of the Clean Water Act (FWPCA) and the Resource

Conservation and Recovery Act (RCRA). There is some CERCLA background information in this volume. The second volume is a 1989 supplement that updates the FWPCA and RCRA. It also provides contemporary treatment of CERCLA, although natural resource damages are not specifically addressed. The set is published by the Anderson Publishing Company, Cincinnati, Ohio.

C. *Other Resources*

1. Organizations

There are a number of public interest environmental organizations. These organizations are sometimes valuable sources of current information on environmental issues. The three listed below are active participants in the natural resource damage issue on the national level. The researcher would be well advised to contact each of these organizations for updates on the subject of natural resource damage under CERCLA.

a. *Natural Resources Defense Council (NRDC)*. 40 West 20th Street, New York, New York 10168, (212) 949-0049.

b. *Environmental Defense Fund (EDF)*. 257 Park Avenue, South, New York, New York 10010, (212) 505-2100.

c. *National Wildlife Federation (NWF)*. 1400 16th Street, N.W., Washington, D.C. 20036, (202) 797-6800.

2. Practice Guides

All of the practice guides listed below contain extensive coverage on the general subject of hazardous waste law. They are all valuable to the practitioner, but perhaps less so to the researcher on the subject of natural resource damage under CERCLA. They do provide information on important case law, statutes and regulations that can be used as a basis for further research. None of them were used in researching this Research Guide, but they are reviewed for the benefit of practitioners and future researchers.

a. R. HALL, T. WATSON, J. DAVIDSON & D. CASE, *HAZARDOUS WASTE HANDBOOK* (5th ed. 1984). This is a single loose-leaf volume with its main focus on RCRA permitting. It does contain some information on CERCLA common law liability. It is published by Governmental Institutes, Inc., Rockville, Maryland and is updated annually or sooner, as necessary.

b. D. STEVER, *LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE* (1986). This is a two-volume set with a general focus on TSCA, FIFRA, RCRA, and CERCLA. It is published by Clark Boardman Company, Ltd., New York, New York and is updated annually or sooner, as necessary.

c. **J. STENSVARG, HAZARDOUS WASTE LAW AND PRACTICE (1986)**. This is a two-volume set with a specific focus on the definition of hazardous wastes under RCRA. It is published by John Wiley & Sons, New York, New York and is updated with annual cumulative supplements.

d. **LAW OF ENVIRONMENTAL PROTECTION (1987)**. This is a two-volume set edited by S. Novick, D. Stever and M. Mellon. It is a general overview of environmental law with a specific FWPCA (mentioned in CERCLA section 107(f)) section. It is published by Clark Boardman Company, Ltd., New York, New York under the Environmental Law Institute banner.

e. **SUPERFUND: A LEGISLATIVE HISTORY (1985)**. This is a three-volume loose-leaf set edited by H. Needham and M. Menefee. It is a comprehensive legislative history of the original CERCLA enactment. Although it does not contain any information on SARA, it is a valuable resource for the CERCLA researcher. It is published by the Environmental Law Institute, Washington, D.C.

f. **C. SCHRAFF & R. STEINBERG, RCRA AND SUPERFUND: A PRACTICE GUIDE (1989)**. This is a two-volume set limited to RCRA and CERCLA, with detailed emphasis on CERCLA. It is perhaps the best of the practice aids for the CERCLA practitioner or researcher. It is published by Garland Law Publishing, New York, New York and is updated annually or sooner, as necessary.

g. **R. STEINBERG & R. MAYS, ENVIRONMENTAL LAW FORMS GUIDE (1990)**. This is a five-volume loose-leaf set of litigation forms covering CERCLA, RCRA, TSCA and FIFRA. It should be of particular interest to firms with Superfund litigation sections. It is published by Garland Law Publishing, New York, New York.

VIII. CONCLUSION

As should now be apparent to the researcher, the topic of natural resource damage under CERCLA is in its infancy. With public recognition of natural resource damages associated with hazardous waste disposal, awakened by continuing publicity surrounding hazardous waste site contamination of the environment, the field should expand rapidly. Superfund sites are currently being identified across the United States. Since natural resource damage assessments are now a part of every CERCLA action, there is no end in sight to the requirement for legal research on this subject.

The researcher should view this guide as a basic research tool, because no single article on the subject can be considered comprehensive with the present legislative and judicial expansion of natural resource damage coverage under CERCLA.