

# **NATURAL RESOURCE DAMAGES & EARLY RESTORATION**

## ***RESTORE AMERICA'S ESTUARIES 5<sup>TH</sup> NATIONAL CONFERENCE ON COASTAL AND ESTUARINE HABITAT RESTORATION***



JACKSON GILMOUR & DOBBS, PC

**MICHEAL W. DOBBS**  
mdobbs@jgdpc.com

# NATURAL RESOURCE DAMAGES

- Fundamentals of NRD
- What are resources?
- What is an injury?
- What is being compensated or sought?
- Who can bring these claims?
- What kinds of damages?



# **WHAT ARE NRD – NATURAL RESOURCE DAMAGES**



# WHAT ARE NATURAL RESOURCE DAMAGES?

Damages for injury to, destruction of, or loss of natural resources. They include:

- Return services to baseline or restoring the natural resource (primary)
- Lost of services (compensatory)
- Recoverable damages often include the reasonable costs of assessing NRD

Only available to federal, state and tribal trustees.



# WHAT ARE NATURAL RESOURCES?



- CERCLA and DOI natural resource damage assessment rules define natural resources to include:

“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 ..., any State or local government, any foreign government, and Indian Tribe...”

42 U.S.C. § 9601(16); *see also* 43 C.F.R. § 11.14(2).



# INJURY TO A RESOURCE

- Terms “injury, destruction or loss” not defined in CERCLA
- DOI regulations: injury is a measurable, adverse change (either long- or short-term), in the chemical or physical quality or viability of a natural resource
- E.g., injury to fish & aquatic organisms existed because PCB exceeded tolerance levels set by FDA. Acushnet River, 716 F. Supp. 676 (D. Mass. 1989)
- Injury that results in a change in baseline conditions (i.e., conditions but for the release). 43 C.F.R. § 11.14(e).



# INJURY TO A RESOURCE

Other examples of NRD:

- Kills
- Reduced reproduction
- Altered development
- Impaired feeding mechanisms
- Decreased defense to diseases
- Disruption of ecosystem structure
- Disruption of ecosystem function



# DIFFERENT THAN CLEANUP/REMEDIAL CLAIMS

- Cleanup/response is primary
- Risk based
- Based on Protection of human health & environment



# **LEGAL FRAMEWORK FOR RECOVERY OF NATURAL RESOURCE DAMAGES**



JACKSON GILMOUR & DOBBS, PC

# LEGAL AUTHORITY FOR NRD CLAIMS

- Authority to assert NRD Claims under federal environmental statutes
  - CERCLA (hazardous substances)
  - OPA (petroleum products)
  - Clean Water Act
  - Others of limited application
- State laws



# OIL POLLUTION ACT

- OPA establishes liability for natural resources damages resulting from releases of petroleum
- OPA applies to discharge of oil “into or upon navigable waters or adjoining shorelines....”
- OPA provides for the recovery of damages for “injury to, destruction of, loss of or loss of use of natural resources, including the reasonable costs of assessing the damage....” 33 U.S.C. § 2702(b)(2)(A).



# CERCLA LIABILITY

- Strict Liability for hazardous substances at a “facility.”
- Responsible Parties (RPs):
  - owners (current or former)
  - operators (current or former)
  - generators or arrangers of waste at the site
  - transporters of waste to the site
- Liability under CERCLA extends to typical Removal and Remediation costs
- Liability also extends to “damages for injury to, destruction of, or loss of natural resources resulting from a release of hazardous substances”



# NATURAL RESOURCES TRUSTEES

- Federal Trustees
  - Department of Interior (terrestrial resources)
  - Department of Commerce/NOAA (marine resources)
- States (various trustees within each state based on managed resource)
- Indian Tribes

Overlapping jurisdiction and trusteeship



# NRD CLAIMS



- Federal Scheme: residual to cleanup/response
- Focus on natural resources
- Brought by natural resource trustees
- Damages for actual injuries
- Can cover cleanup-like actions to break pathways; but restoration is more comprehensive



# WHAT DAMAGES CAN BE SOUGHT?

- The cost or value to make the public whole for their losses of natural resources
- Recoverable damages include three broad elements
  - Primary Restoration: cost of restoration, replacement or acquisition of equivalent resources
  - Compensatory Restoration: including interim loss of use of the resource and lost “non-use” or passive values
  - Assessment Costs



# DAMAGE CALCULATIONS

- Difficulties in calculating damages to resources
  - Lack of information on baseline
  - Valuing resources that do not have an obvious economic value
- Equivalency Analysis
  - “resource to resource” and “service to service” valuations
  - Can be criticized as technically indefensible
- Contingent valuation/surveys
  - Ability to capture a much greater suite of values and damages
  - Difficult and contentious

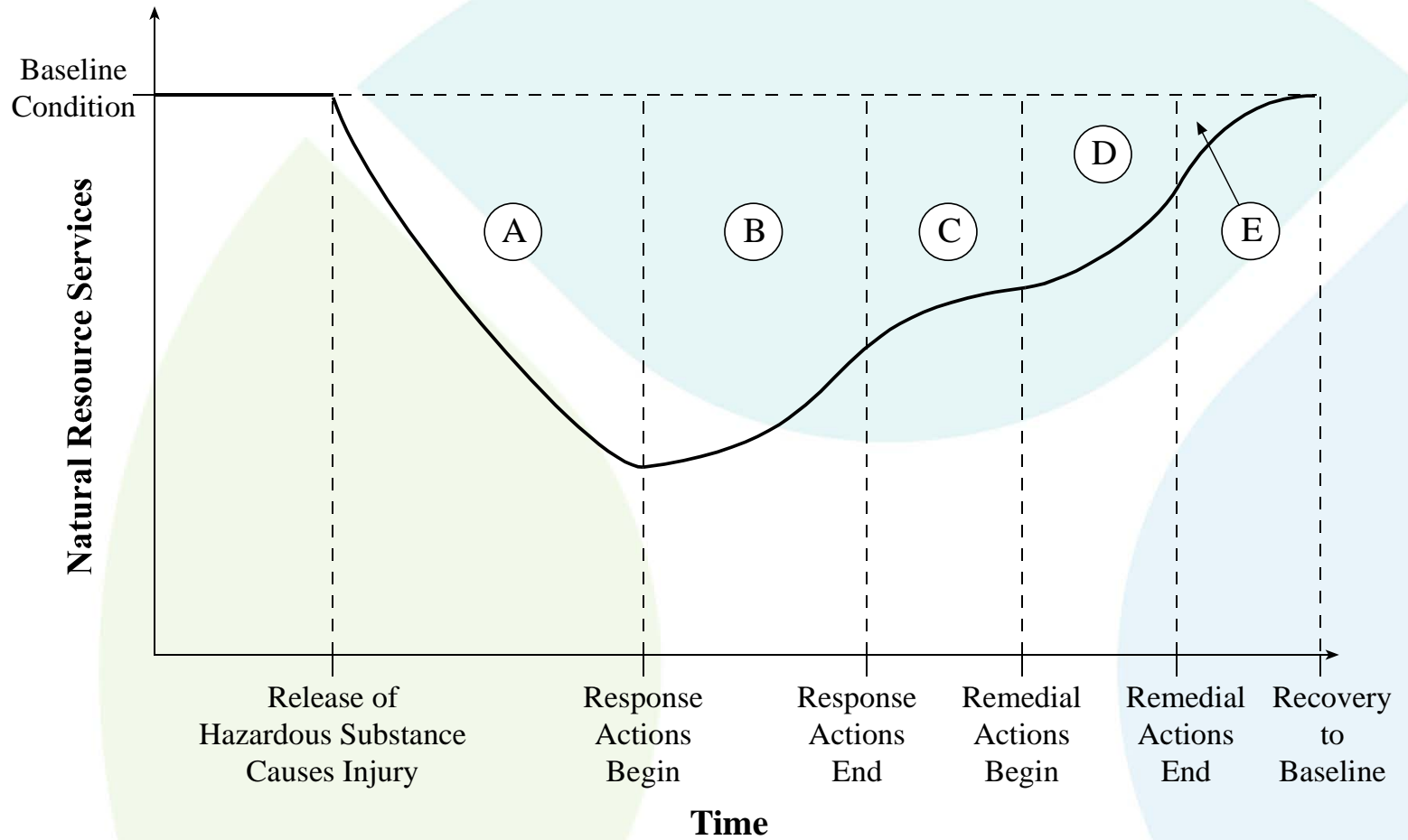


# EARLY RESTORATION



JACKSON GILMOUR & DOBBS, PC

# RETURN TO BASELINE



# KEY ISSUES FOR EARLY RESTORATION

- Allows participation in a cooperative NRD Assessment process
- Reduces future damages and irreparable loss of service
- Often provides a visible and measurable early benefit
- Credits & Multipliers





JACKSON GILMOUR & DOBBS, PC

**[WWW.JGDPC.COM](http://WWW.JGDPC.COM)**