

# **Natural Resource Damages: A Reality for Railroad Operators and Insider Tips to Help Prevent and Resolve Associated Liabilities**

**Presentation By**

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# Today's Presentation

- **Natural Resource Damages Overview**
- **Legal & Regulatory Requirements**
- **The NRD Process**
- **History of NRD and Railroad Companies**
- **Case Examples**
- **Guiding Principles for NRDA and Restoration**
- **Practical Solutions to Foster a Reasonable Resolution**
- **Future of NRD and Railroad Companies**
- **Summary Observations**
- **Questions**

# Natural Resource Damage Overview

- **What Does “Natural Resource Damages” Mean?**
- **Why Is NRD an Issue for Railroad Owners and Operators?**
  - NRD has prompted new regulatory actions
  - Potential liabilities at multiple stages of operations
- **What are the Key Statutes and Regulations?**
  - Who can bring NRD claims?
  - What limitations are there on NRD?

# Legal and Regulatory Requirements

- **Statutory**

- CERCLA defines NRD; NRD also present in CWA, OPA, other statutes
- “Natural Resource Trustee” and “Potentially Responsible Parties”
- Other Laws Applying to Railroads: Federal Railroad Safety Act, Emergency Planning and Community Right-to-Know Act, Rail Safety Improvement Act

- **Regulatory**

- U.S. DOI NRDA Regulations (CERCLA) "Type A" and "Type B" NRDA Regulations, 43 C.F.R. 11
- U.S. DOC/NOAA NRDA Regulations (OPA) NRDA Regulations 15 C.F.R. 990
- Recent regulatory activity (non NRD): Emergency orders; New Regulation: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains; New Regulation: Training, Qualification, and Oversight for Safety-Related Railroad Employees

# The Natural Resource Damage Assessment Process

- **Preassessment Phase**
  - Trustees discover/are notified of incident
  - Trustees conduct Preassessment Screen
- **Assessment Plan Phase**
  - Additional assessment is warranted
  - Assessment Plan is prepared

# The Natural Resource Damage Assessment Process (Continued)

- **Assessment Implementation Phase**
  - Identify “reasonable number” of possible restoration activities
  - Trustees select one or more of the various alternatives and develop Restoration and Compensation Determination Plan
- **Post-Assessment Phase**
  - Trustees present Report of Assessment present to PRPs
  - Post-assessment Restoration Plan prepared & submitted for public comment

# History of NRD and Railroad Companies

- Longstanding Strict Liability for “Ultrahazardous” Activities
- Derailments Most Common Cause of Liability
- Rail Yards

# Case Example

## *United States and the State of California v. Southern Pacific Transportation Co., et al.*

- Pesticide spill from a railroad car tank (1991)
- All aquatic life along a 42-mile stretch of the Upper Sacramento River allegedly destroyed, including a native trout fishery
- Total Settlement: \$36M (1995)
- NRD Portion: \$14M



# Case Example

## *United States, et al. v. the Burlington Northern and Santa Fe Railroad Company*

- Release of hazardous substances at/from the AT&SF Albuquerque Tie-Treater Superfund Site (operated from 1908 to 1972)
- Washdown waters, spills and leakage were disposed of in an unlined impoundment covering approximately 3.4 acres.
- NRD Settlement: \$1.09M (2005)

# Case Example

## *United States, et al. v. Dakota, Minnesota, and Eastern Railroad Corporation, d/b/a Canadian Pacific*

- Train derailment resulting in release of 4,400 gallons of diesel fuel and other petroleum products into the Mississippi River (2008)
- Trustees alleged damage to surface water, river sediments, and biological resources.
- NRD Settlement: \$625,000 (2014)



# Guiding Principles for NRDA and Restoration Practices

- **Timely and Cost-Effective Restoration**
- **Restoration Options Considered Early in the Process**
- **Conduct NRDA Using the Principles in Federal Regulations**
- **Determine Whether Injury is Linked to Release**
- **Quantify Lost Natural Resources as Reductions**
- **Use Cost-Effective Assessment Methods**
- **Collaboration and Transparency Between Parties**

# Practical Solutions to Foster Reasonable Resolution

- **Consider Key Legal Concepts that can Help Control Liability**
- **Lean on Federal and State Case Law**
- **Utilize Other Key Defenses of PRPs**
- **Engage PRP Principals**

# **Practical Solutions to Foster Reasonable Resolution (Cont.)**

- **Consider Coordination of Remediation/ Restoration Activities**
- **Explore NRD Settlements Before the Issuance of the Final ROD**
- **Look for Opportunities to Leverage Corporate Resources**
- **Consider Alternative Restoration Approaches**

# One Example of These Principles

## *United States, et al. v. Mosaic Fertilizer LLC*

- Federal and state law action regarding a release into Archie Creek Canal, Hillsborough Bay, & Tampa Bay
- Sixty-five million gallons of acidic process water released from the defendant's facility
- NRD Liability: \$140,726.28 – for assessment costs
- Non-Monetary Settlement: Exotic species removal at release site; restoration projects at two other sites on property; easement on restoration sites
- Look for opportunities for non-monetary settlements and leverage assets

# **Future of NRD and Railroad Companies**

- **Bakken Oil Transport**
- **Future Developments in Case Law**
- **New Regulations**
- **Increased Scrutiny**
- **Groundwater Resources as Growing Source of NRD Liability**
- **Monitoring and Sharing Successes/Lessons Learned**
- **Proactive vs. Reactive Approaches by PRPs**
- **Influence of Climate Change**

# Questions?



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