

# Natural Resource Damages Under the OPA: A Backgrounder

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As mentioned in the previous article, *Who Will Clean Up the Oil Spill?*, under the Oil Pollution Act of 1990, responsible parties are liable for both the removal costs associated with the clean up of the oil spill and certain damages that result from the incident. Covered damages include injury to property, economic losses due to injury to property, loss of profits and revenues, loss of use, and damage to natural resources.<sup>1</sup> Because natural resource damage claims may only be pursued by designated natural resource “trustees,” they are a bit of a different animal from the other types of damage claims which may be pursued by individuals and businesses.

After an oil spill, the responsibility for assessing damages to natural resources and developing and implementing a restoration plan falls to the natural resource trustees.<sup>2</sup> Trustee agencies, which are appointed by either the president or the governor, are often different from the agencies tasked with initially responding to the spill. The National Oceanographic and Atmospheric Administration (NOAA) is the designated natural resource trustee for marine resources. In Mississippi and Alabama, the natural resource trustees are the Mississippi Department of Environmental Quality and the Alabama State Lands Division.

If response actions are not adequate to address injuries to natural resources, trustees are authorized to seek “damages for injury to, destruction of, loss of, or loss or use of, natural resources, including the reasonable costs of assessing the damage.”<sup>3</sup> Injury “means an observable or measurable adverse change in natural resources or impairment of a natural resource service.”<sup>4</sup> NOAA’s Damage Assessment, Remediation, and Restoration Program (DARRP) “uses a variety of economic and non-economic science-based methodologies to assess these natural resource injuries,”<sup>5</sup>

including an analytical framework known as “Habitat Equivalency Analysis.” When trustees follow NOAA’s guidelines, the damage assessment is entitled to a “rebuttable presumption” in subsequent administrative and judicial proceedings.<sup>6</sup> Essentially this means that the responsible party bears the burden of disproving the trustees’ assessment.

Once damages have been assessed by the trustees and a restoration plan selected, trustees are required to submit a written demand to the responsible parties to either (1) implement the plan subject to trustee oversight and reimburse the trustees for assessment and oversight costs or (2) advance the trustees funds to cover the direct and indirect costs of assessment and restoration.<sup>7</sup> For offshore facilities, the responsible party is the lessee of the area where the spill occurred. BP is the responsible party for the *Deepwater Horizon* spill. Responsible parties have ninety days to respond to the trustee’s demand. If a responsible party fails to respond, trustees may file suit against the party or seek compensation from the Oil Spill Liability Trust Fund.

Efforts are already underway to assess the impact of the *Deepwater Horizon* spill on natural resources in the Gulf of Mexico. While it is too early to tell the extent of the damages, the price tag is expected to be quite high. The NRD settlement reached in the *Exxon Valdez* spill, for instance, was \$900 million.☛

## Endnotes

1. 33 U.S.C. § 2702(b)(2).
2. *Id.* § 2706(c).
3. *Id.* § 2702(b)(2)(A).
4. 15 C.F.R. § 990.30.
5. DARRP, Environmental Economics – Introduction, <http://www.darrp.noaa.gov/economics/index.html>.
6. 15 C.F.R. § 990.13.
7. *Id.* § 990.62(b)(1).