

**NATURAL RESOURCES DAMAGES ASSESSMENTS  
AND CLAIMS IN THE GREAT LAKES BASIN**

**PART I**

**THE LAW OF NATURAL RESOURCES DAMAGES ASSESSMENTS**

By

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**INTRODUCTION TC "INTRODUCTION" \f C \l "1"**

This is the first of a two-part article which reviews the law and practice of assessment, calculation and settlement of Natural Resources Damages (“NRD”) claims in Michigan. This first part of the Article describes how NRD claims have developed under Michigan State law and under Federal law (as applied in U.S. Environmental Protection Agency (“EPA”) Region V), [1] including statutory, regulatory, and case law developments. While the scientific and economic issues of how to assess injuries to natural resources and calculate NRD damages is beyond the scope of this article, a brief discussion of some of the valuation issues is provided. Part II of this article will review and comment on a number of the NRD settlements that have occurred in the Great Lakes Basin, and provide a digest of NRD settlements identified by the authors. [2] Part II of this article closes with a practical commentary on negotiating and resolving NRD disputes based on past settlements and the authors’ experiences in negotiating NRD settlements.

Claims for NRD were created by Federal legislation in the late 1970s and early 1980s, [3] and in Michigan in 1990 with the amendment of former Act 307. [4] Typical NRD claims in Michigan arise from discrete oil and chemical spills to surface water, sediments contamination from past industrial and municipal

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discharges, and pollution from historical mining operations, all of which are relevant within Michigan. NRD Assessments and settlements did not become common in Michigan until the latter half of the 1990s, although there were earlier settlements under the Michigan sport fishing statute [5] which recovered what were essentially natural resources damages. Considering the number of "Superfund" sites (Federal and State) and International Joint Commission designated Areas of Concern in the Great Lakes adjoining Michigan, as well as the Great Lakes Water Quality Agreement and Great lakes Basin Compact efforts for many years, NRD claims could reasonably be expected to be more prevalent than they have been. [6]

### **I. OVERVIEW OF NRD LAW**

#### **A. MICHIGAN STATUTES AUTHORIZING NRD CLAIMS**

Until the amendment to Act 307 in 1990, [7] Michigan statutes provided little authority for the recovery of natural resources damages. Settlement decrees and agreements before 1990 [8] involved pollution to streams that killed fish and relied on the sport fishing statute [9] to assess damages. That statute provides that illegal taking of fish shall be penalized based on the weight of fish "taken." [10] These fish "taking" claims evolved in the early 1990s, as the Michigan Department of Natural Resources ("MDNR", now Michigan Department of Environmental Quality or "MDEQ") began to rely on §6(1) of the Water Resources Commission Act ("WRCA"), [11] which prohibited discharges into waters of the State that were injurious to the public health, safety, or welfare. The WRCA also prohibited discharges that affected uses of the waters, injured the value of riparian lands, or became injurious to animals, fish, birds, aquatic life, or plants. The WRCA provided for civil and criminal penalties. [12] For example, in one Administrative Consent Order entered in 1991, the defendant agreed to restock the affected waterway, pay \$28,000 for loss of fisheries resources, and pay a civil penalty of \$25,000, with both payments made to the General Fund of Michigan. [13]

Michigan's Act 307 was amended in 1990 to permit the recovery of natural resources damages, [14] similar to those under the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") [15]. It was amended again and recodified as Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), [16] and contains the most complete provisions for natural resources damages among Michigan's laws. Natural resources damages under Part 201 include "damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release." [17] The State may recover interest from

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measuring the injury, destruction, or loss resulting from the release. [17] The State may recover interest from the date of either a written demand for payment of NRD or the filing of a suit to recover, whichever is earlier. [18] Sums recovered for NRD must be used only to restore, repair, replace, or acquire the equivalent of the natural resources injured or acquire substitute or alternative resources." [19] This section also prohibits double recovery for NRD. [20] It does not appear that the State may recover enforcement costs for NRD, because the defined term "response activity" does not include reference to NRD assessments, as compared to health assessments, which are included. [21]

When Part 201 was amended in 1995, [22] the controversy over an NRD assessment technique known as the contingent valuation method ("CVM") was underway. Because of concerns with regard to the validity of CVM, and the effect it could have on the magnitude of damages, the Legislature added §104 [23] to Part 201 which provided limitations on the methods for NRD assessments. Under §104, contingent valuation or other valuation methods to quantify "non-use" values in natural resource damage calculations are not permitted until MDEQ promulgates by rule valuation techniques that "satisfy principles of scientific and economic validity and reliability." [24] Although Part 201 requires that the State promulgate rules controlling assessment of NRD, [25] it has not yet done so. There is no present schedule for developing such rules. [26]

Beginning in the mid-1990s, natural resources damages or NRD mitigation claims were introduced into a number of Michigan's other environmental statutes. These statutes included NREPA Part 55, Air Pollution Control; [27] NREPA Part 91, Soil Erosion & Sediment Control; [28] NREPA Part 31, Water Resources Protection; [29] NREPA Part 115, Solid Waste Management; [30] NREPA Part 213, Leaking Underground Storage Tanks; [31] NREPA Part 111, Hazardous Waste Management Act; [32] and NREPA Part 315, Dam Safety. [33] There is some variation among these statutes and thus they should be reviewed individually if potentially applicable to a specific site or event.

In addition, the Michigan Environmental Protection Act ("MEPA") [34] provides an alternative approach to mitigating NRD in certain circumstances, although money damages are not available under MEPA. MEPA provides that a person may bring suit to protect natural resources injured or threatened with injury by another person, as well as to seek declaratory or injunctive relief to protect or restore the threatened or injured resource. [35] Under recent caselaw, attorneys' fees may not be recovered by a successful MEPA plaintiff. [36]

**B. FEDERAL STATUTES AUTHORIZING RECOVERY OF NRD**

Three federal statutes provide the basis for most federal NRD claims. [37] The first of these is CERCLA. Section 107 of CERCLA addresses “hazardous substances” and provides for the recovery of “injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss....” [38]. Determination of both direct and indirect injury, destruction, or loss and must consider a variety of factors including “replacement value, use value and ability of the ecosystem or resource to recover.” [39]. When NRD assessments are performed pursuant to the regulations they “shall have the force and effect of a rebuttable presumption on behalf of the trustee” in any proceeding to recovery NRD. [40] Implementing regulations promulgated by the U.S. Department of the Interior (“DOI”) are found at 43 CFR §11 and DOI performs the NRD assessment, not USEPA. In an NRD action under CERCLA the natural resources trustee is the plaintiff. In most circumstances, the federal trustee is DOI.

The basic format for DOI’s assessment approach is laid out in CERCLA §151, [41] which provides for (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short and long-term injury, destruction, or loss. [42] Section 151 requires that the regulations identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss, and take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

The second federal NRD authority is the Oil Pollution Act of 1990 (“OPA”). [43] It provides recovery for injury to and loss of use of natural resources due to oil pollution, including reasonable costs of assessing the damages. [44] The United States, State, Indian Tribe, or Foreign Trustee of the affected resource may bring NRD claims under OPA. [45] Damages include loss of subsistence use by any one who uses natural resources, loss of revenue from taxes, royalties and fees, loss of profits or impairment of earning capacity due to the injury, and cost of increased public services as a result of injury. [46] Measures of damages include costs of replacing, acquiring, or repairing the injured resource; diminution of resource value pending restoration; and reasonable costs of assessing damages. [47] Damages determined pursuant to

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pending restoration, and reasonable costs of assessing damages. [47] Damages determined pursuant to regulations promulgated under the OPA have a rebuttable presumption of accuracy. [48] At sites with mixed oil and hazardous substances contamination, OPA will defer to the DOI process. Recovered funds are held in trust for restoration of the injured resource, with any excess going to the Oil Spill Liability Trust Fund. [49]

The third federal statutory program providing authorizing NRD is the Clean Water Act ("CWA"). [50] Under the CWA, owners and operators of vessels and on-shore facilities are liable for costs of removal of pollutants, which include Federal and State costs for the restoration or replacement of natural resources damaged or destroyed. [51] The CNA assessment process follows the DOI regulations.

## **II. DEVELOPMENTS IN THE LAW**

### **A. MICHIGAN**

#### **1. NREPA Part 201**

Only one case has been decided with direct application to NRD claims under Part 201. The application of the statute of limitations under Part 201 was addressed in *Shields v. Shell Oil Company* [52] in a cost-recovery context, but the holding applied to NRD claims as well. Part 201 as amended in 1995 provided that the limitations period for filing cost-recovery and NRD actions that accrued prior to July 1, 1991 was July 1, 1994, and for costs and damages accrued after July 1, 1991, within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility: except subsequent actions for recovery of response activity costs may be brought at any time during the response activity, if begun not later than 3 years after the date of completion of all response activity at the facility. [53]

In *Shields*, plaintiff appealed the trial court's order dismissing his third-party complaint against defendant Shell Oil company to recover response activity costs for environmental contamination. Defendant's tanks were removed in 1987 pursuant to a property sale and the area around them was later found to be contaminated. The trial court concluded that a cause of action accrues "when the wrong on which the claim was done regardless of the time the damage results." [54] Because it concluded that all of the elements of plaintiff's claim accrued in 1987 when Shields purchased the property, regardless when the damages (*i.e.*, the response costs) occurred, the court held that the action was barred. The Michigan Court of Appeals affirmed the trial court.

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The Supreme Court peremptorily reversed the court of appeals, vacated the trial court's June 2, 1997 order, and remanded the *Shields* case back to the trial court. [55] The Court held that under both the former and amended versions of §140, Part 201's statute of limitations [56], only response activity costs incurred before July 1, 1991 were subject to the July 1, 1994 limitation period. [57] Likewise, claims for NRD which were incurred by 1991 were time-barred in 1994. For most older sites in the State, this means that the claims under Part 201 for NRD damages which had occurred by July 1, 1991 were thus time-barred if not asserted by July 1, 1994.

### **2. MEPA**

Although damages *per se* are not awarded under the Michigan Environmental Protection Act ("MEPA"), [58] it is relevant because part of the relief which can be granted under MEPA is mitigation, restoration, or replacement of damaged natural resources. Hence, while money damages are not provided by MEPA, an injunction requiring restoration of resources will require the unsuccessful defendant to spend an amount roughly equivalent to a damage award for NRD. It should be noted that there are types of natural resource damages under an NRD claim that are not recoverable under MEPA, for example, lost use of the resource.

A recent decision, *Nemeth v. Abonmarche Development, Inc.*, [59] is of interest because it invalidated a court-developed rule that was interpreted to require a showing that the impacted resource was rare, irreplaceable, or of state-wide significance. *See, e.g., Trout Unlimited Muskegon-White River Chapter v. City of White Cloud*, [60] and *Attorney General v. Huron County Road Comm'n.* [61] *Nemeth* established a new rule for situations in which there are statutes or rules intended to protect a natural resource. A *prima facie* case is made when a plaintiff shows that the defendant has violated Michigan statutes or rules which are intended to protect natural resources or prevent pollution or degradation of the environment. The Court specifically held that "the MEPA does not require air, water, or other natural resources to be 'scarce' or 'unique' to be protected from actual or likely pollution, impairment, or destruction." [62] This holding will allow more resource impairment and restoration suits under MEPA.

The issue of adequacy of proof of permanent injury under MEPA was addressed in *Cipri v.*

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*Bellingham Frozen Foods, Inc.* [63] The court of appeals, affirming the trial court's denial of equitable relief, concluded that natural resources restoration was not required because plaintiff had failed to prove that the lake was not recovering naturally. Evidence relied on by the court included expert testimony that the lake now supported fish life, that it posed no threat to health and safety, and that deposits of organic materials creating high oxygen demands occur naturally in all lakes. Plaintiff's expert could not support his estimate of the quantitative effects that his restoration plan would have on oxygen levels, and the court noted that his plan was still being tested. The court of appeals also agreed with the trial court that the jury's advisory award of \$90,000 was not indicative (apparently because of its amount) of a finding of long-term damage to the lake.

### **B. FEDERAL TC "A. FEDERAL" \F C \L "3"**

#### **1. DOI NRD Regulations for CERCLA and CWA TC "1. DOI NRD Regulations for CERCLA and CWA" \f C \l "4" \_**

The Department of Interior's NRD regulations apply to NRD assessments under both CERCLA and CWA. [64] The DOI original NRD assessment regulations [65] were subject to a series of court challenges [66] that lead to substantial revisions to the rules in 1994 and 1996. [67] DOI's initial regulations included simplified "Type A" procedures for coastal and marine environments. The coastal and marine procedures were promulgated in 1986 [68] and challenged in *Colorado v. DOI*, where the Type A procedures were vacated in part, based on a prior successful challenge to the more detailed "Type B" procedures in *Ohio v. DOI*. [69] Following those decisions, DOI spent almost seven years revising their Type A procedures and adding to them sub-models for assessing NRD in the Great Lakes. [70] Trustees had the ability to settle cases in the interim without Type A or Type B procedures, because a trustee is not required to use the procedures except to benefit from the rebuttable presumption provided in CERCLA §107(f)(2)(C). [71]

#### **2. Summary of DOI Regulations for NRD Assessments TC "2. Summary of DOI Regulations for NRD Assessments" \f C \l "4"**

The current DOI NRD assessment regulations were promulgated in 1996. [72] The 1996 regulations apply to NRD assessments initiated after the effective date of the regulations. [73] The regulations establish a planned and phased approach intended to ensure that all analyses are "appropriate, necessary, and sufficient to assess damages for injuries to natural resources." [74] The process begins with a pre-assessment phase that includes notification and coordination activities and a pre-assessment screen. The purpose of the pre-

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assessment screen is to determine whether NRD injuries exist and are sufficiently large that it is cost-effective to do a full assessment and seek recovery. [75]

If an assessment is merited, the trustee prepares an Assessment Plan and elects to perform a Type A or Type B NRD assessment. [76] A Type A assessment is a simplified assessment process using procedures set out in Subpart D of the regulations. [77] Two Type A procedures have been developed, one for coastal and marine environments and one for Great Lakes environments. [78] Both consist of computer models that have area-wide values for relevant factors built into them. The models are described in technical documents identified in the regulations. [79] Type B assessments are full-blown, "from-the-ground-up" NRD assessments. The regulations provide extensive guidance for the process and factors to be considered in a Type B assessment. [80] The Type B process consists of an injury determination phase; an injury quantification phase; and a damage determination phase for calculation of compensation for the injuries quantified in the preceding phase. In the case of either Type A or Type B assessments, use of the procedures and review of results is a matter for NRD assessment experts.

The DOI regulations provide for money damages, including the damages to natural resources calculated in the damages assessment, emergency restoration efforts, reasonable and necessary costs of assessments, administrative costs for and incidental to the assessment, [81] and interest from the date NRD are demanded in writing. Costs and damages from the date of the injury to the date of restoration are expressed in terms of present value as of the date of assessment is performed. [82] Acceptable damage calculation methodologies are set forth in Subpart E of the rules. [83]

These DOI regulations provide for notices to PRPs during the preliminary assessment process, [84] after the damage determination phase when a Restoration and Compensation Determination Plan describing the analysis and selection of either restoration or replacement of injured resources [85] is completed, [86] and after the completion and release of \_\_\_the Report of Assessment. [87] Provisions for public notice and review are also provided in the DOI regulations. [88]

### **3. Challenges to the Revised DOI Regulations**

In 1999, in *National Association of Manufacturers v. United States Department of the Interior*, [89] the

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National Association of Manufacturers (“NAM”) filed a comprehensive challenge to the regulations establishing the Type A NRD assessment procedures. NAM claimed that the rules violated CERCLA and the Administrative Procedures Act [90] for several reasons. First, the Type A procedures permitted damages to be calculated without on-site verification that a natural resource had in fact been injured and that the injury was in fact attributable to the particular release in question. Second, the regulations did not require consideration of an alternative to restoration of an adversely affected resource in calculating natural resource damages. Third, the regulations failed to relate selected restoration alternatives to the "services" provided by the resource. Fourth, the regulations allowed for recovery of purely speculative losses regarding the affected resource’s ability to assimilate future releases. Fifth, they also authorized recovery of private losses related to commercial fishing and hunting. Sixth, the databases and computer models were not the "best available procedures" for determining NRD and invalidly relied on outdated studies and information or suspect methodologies. Seventh, the rules permitted the trustee(s) to use both Type A and Type B procedures in combination to assess NRD from a single release. Eighth, the rules provided for calculation of NRD resulting from releases or discharges of oil, notwithstanding the enactment of the OPA which authorizes the National Oceanic and Atmospheric Administration ("NOAA") to regulate oil releases or discharges. Finally, NAM objected to use of the contingent valuation method (“CVM”) to estimate losses not calculable through market mechanisms. The D.C. Circuit Court of Appeals rejected all of NAM’s objections. It held that trustees could select the assessment method on a case-by-case basis. Addressing the objection to CVM, the Court held that Congress had authorized trustees to recover a range of values for environmental goods and services, even those not traded on the market.

In *United States v. ASARCO, Inc.*, [91] the court held that a challenge to an NRD assessment is not limited to the administrative record, in part because the creation of a rebuttable presumption under CERCLA §107(f)(2)(C) implies that Congress expected an evidentiary hearing. Further, defendants were entitled to a jury trial on their challenge because challenges were not limited to record review. [92]

In a subsequent decision in *ASARCO*, the court addressed the circumstances under which the statute of limitations for NRD claims begins to run. [93] The statute of limitations for NRD damages under CERCLA §§113(g)(1)(A) and (B) [94] is three years after the later of either the discovery of the NRD and its connection with the release in question, or the date on which regulations are promulgated under CERCLA. [95]

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However, if the facility is listed on the National Priorities List ("NPL"), then the statute of limitations is three years after the completion of the remedial action (excluding operation and maintenance).<sup>[96]</sup> The natural resources trustee in *ASARCO* had failed to file suit within three years of the date of discovery of the NRD loss. The NRD were associated with an area outside of the site as listed on the NPL, but within a much larger area which the USEPA later claimed comprised the site. If, in the context of the suit, the area with NRD was outside the NPL site, then CERCLA §113(g)(1)(A) applied and the trustee's claim was too late and barred. If the impacted area was within the NPL site, however, the action was timely because the remedial action at the site had not been completed. The trial court held that the USEPA's action to expand the NPL site did not extend the running of the statute of limitations, because the area for which NRD were sought was outside the site as listed on the NPL but within a much larger area which the U.S. EPA later claimed comprised the site. The court of appeals vacated this decision on the ground that matters related to NPL listings were within the exclusive jurisdiction of the court of appeals for the D.C. circuit, and hence the trial court did not have jurisdiction to determine the site's boundaries as listed on the NPL.<sup>[97]</sup> The defendants were required to raise their challenge to the expansion of the NPL site before the D.C. Circuit Court of Appeals.

In *Kennecott Utah Copper Corp. v. U.S. Dept of the Interior*,<sup>[98]</sup> plaintiffs challenged DOI's revised Type B regulations released in March 1994, claiming that the regulations violated procedural requirements and were substantively defective on 11 grounds. The court of appeals rejected all of Kennecott's claims except its claim with regard to the statute of limitations. The court voided the regulation authorizing the DOI to bring suit within three years after regulations would have been promulgated,<sup>[99]</sup> because that rule would have provided an indefinite and unacceptable tolling of the statute of limitations. The Court held that the latest date on which DOI's NRD regulations were "promulgated" for the purpose of triggering the statute of limitations was the date on which the Type A regulations were first published in the *Federal Register*,<sup>[100]</sup> which was in 1987.<sup>[101]</sup>

In *State of California v. Montrose Chemical Corp.*,<sup>[102]</sup> the United States and California sued Westinghouse and Montrose Chemical under CERCLA for clean up of DDT and PCB releases that had harmed the marine environment. As natural resource trustees, plaintiffs sought to recover natural resource damages for the damages to the marine environment. The court of appeals followed *Kennecott* and held the claim was barred because the regulations were promulgated in 1987 and the claims in *Montrose Chemical* were untimely asserted.

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On the question of the recoverability of attorneys' fees in NRD actions under CERCLA, the United States has argued recently in a case pending in New Mexico that such fees are not recoverable. [103] In that case, private attorneys were retained by New Mexico (because its attorney general refused to file suit) to bring an NRD action against a group of PRPs that includes two Federal agencies. The United States on behalf of those two agencies contended that sums recovered by New Mexico as trustee could be used only to restore, replace, or acquire the equivalent of such natural resources. The United States noted that CERCLA permits private recovery of attorneys' fees only under CERCLA §§106(b)(2)(E) (when a PRP recovers costs incurred responding to an erroneous CERCLA §106 order), 110(c) ("whistle blower" suits), and 310(f) (citizens' suits). [104] The Government further argued that, while attorneys' fees also fall within the definition of "response costs" in removal and remedial actions, NRD were *not* defined as response costs under DOI's NRDA regulations. [105] Finally, relying on *Alyeska Pipeline Service v. Wilderness Society*, [106] the United States argued that attorneys' fees are not permitted under the "American Rule" unless expressly authorized by statute. [107]

### **4. NOAA NRD Assessment Regulations for OPA TC "4. NOAA NRD Assessment Regulations for OPA" \f C \l "4"**

In 1996, after five years of rule-making, NOAA, pursuant to OPA, [108] promulgated final rules for the assessment of NRD, which are codified at 15 C.F.R. §§990 *et seq.* [109] The regulations provide that assessments made in accordance with these regulations have a rebuttable presumption of validity in any administrative or judicial proceeding under OPA. [110] The broad purpose of the regulations is to provide an assessment process for both developing a restoration plan for the injured resource and pursuing implementation or funding from responsible parties. [111] The regulations provide for notice to the public and notice to and involvement by potentially responsible parties ("PRPs"). [112] The trustee must invite responsible parties to participate in the assessment process, and the regulations specify the timing and process for involving them. [113] Trustees must "objectively" consider comments by responsible parties. [114] Responsible parties may request the use of assessment procedures different than those chosen by the trustee, which procedures must meet the standards set by the regulation. [115] In addition, in such a case, the PRPs must advance the costs of the assessment procedure they prefer and agree not to challenge the results of their proposed procedures. [116]

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The OPA regulations supercede the assessment regulations promulgated under CERCLA and the CWA with regard to oil discharges covered by OPA. [117] The development of a restoration plan results in a Final Restoration Plan supported by a Record of Decision ("ROD"). [118] Trustees may settle NRD claims at any time, so long as the settlement is consistent with the OPA, with particular consideration of the settlement's adequacy to restore or replace damaged resources. [119] The regulations for acceptable assessment procedures are broad and boil down to procedures that are capable of providing information necessary to analyze the resources impacted, are cost-effective, and are "reliable and valid for the particular incident." [120]

Under the NOAA regulations, "injury" incorporates the terms "destruction," "loss," and "loss of use." [121] "Reasonable assessment costs" include the trustee's costs in performing the assessment; administrative, legal, and enforcement costs to carry out the assessment; monitoring and oversight costs; and public participation-related costs. [122] Note by comparison, that the definition of "costs" in the DOI regulations includes only administrative costs and not legal or enforcement costs. [123] Thus, it is possible that in a case under OPA, the United States could take the position that legal fees incurred to collect an NRD damages claim are recoverable, in contrast to the *New Mexico* case, *supra*, where the United States argued that attorneys' fees are not recoverable under the DOI regulations.

"Restoration" under NOAA's regulations includes "primary restoration," which includes actions that return the injured natural resources or services to baseline conditions, and "compensatory restoration," which is any action taken to compensate for interim losses of natural resources and services until full recovery. [124] "Services" means the functions performed by the resource for the benefit of another natural resource or the public. [125] The "value" of a natural resource or service includes "the value individuals derive from direct use of the natural resource, . . . as well as the value individuals derive from knowing a natural resource will be available for future generations." [126]

Restoration planning by NOAA has three phases: pre-assessment, restoration planning, and restoration implementation. [127] The first two phases set out the steps and minimum activities required to assess the impacts to resources and to develop a plan to restore them. The restoration implementation phase begins with a demand on responsible parties to implement the restoration plan or to provide funds in the amount of the trustee's estimate for the costs of implementing the plan. [128] Responsible parties have 90 days thereafter to

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respond. All future costs must be discounted to the date of the demand and past costs must be compounded forward likewise. [129] The discount rates must approximate the government's cost of borrowing funds. All sums paid in settlement must be repaid to the trustee for its assessment and costs of implementing the Final Restoration Plan. [130] Actions against responsible parties to recover NRD must be filed within three years after the Final Restoration Plan is made publicly available. [131]

Use of the contingent valuation methodology ("CVM") to estimate non-use or passive-use losses under OPA was challenged unsuccessfully in *General Electric Co. v. U.S. Dept. of Commerce*. [132] Although NOAA's rules as promulgated do not identify CVM as an NRD assessment technique, an appendix to the rule explicitly authorized use of CVM. [133] Plaintiff challenged the procedure as arbitrary and capricious because the contingent valuation study done did not consider a NOAA study [134] which cautioned that strict standards should be used in applying CVM procedures. The court of appeals held that contingent valuation studies, if properly performed, could be used and that, if PRPs wished to challenge the basis or results of a particular study, they could do so at trial. The court declined to decide the challenge that passive-use recovery was inappropriate for temporary losses on the ground that, while consideration of such losses was appropriate, the factual record for calculating such losses at the site in question was not adequate for appellate review. [135]

### **5. Federal Legislative Developments TC "5. Federal Legislative Developments" \f C \l "4"**

Efforts since the Superfund Amendments and Reauthorization Act of 1986 ("SARA") [136] to amend CERCLA to address perceived problems with the statute have been numerous and almost entirely unsuccessful. [137] A recent Congressional analysis indicates that one of the biggest stumbling blocks to reforming CERCLA is the failure to achieve a consensus regarding NRD. [138] The analysis identifies three major areas of disagreement: the methodologies used to calculate NRD, [139] whether NRD defendants have the burden of disproving an NRD Assessment [140] and whether a challenge to an Assessment must be limited to the Administrative Record compiled by the Agency or Trustee during the NRD Assessment. The last attempt to address NRD issues in the 106<sup>th</sup> Congress, S. 1537 introduced by Senators Chafee and Bob Smith, Jr., did not even receive committee consideration. [141]

### **C. POTENTIAL NRD ISSUES TC "C. POTENTIAL NRD ISSUES" \f C \l "2"**

With few Michigan or federal decisions interpreting NRD statutory provisions, there are a number of

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areas open to dispute. First, both NREPA Part 201 and CERCLA provide that sums recovered as NRD must be retained only to restore or replace the equivalent resource, or to acquire substitute or alternative resources. [142] What is unclear is whether the substitute or alternative resources must be located at or proximate to the site of the injured resource. There may be circumstances where there is neither opportunity nor need to replace or substitute resources in the vicinity of the injured resource. Are there recoverable NRD damages associated with substitute or alternative resources acquired at an unrelated or distant location?

In the case of typical groundwater "pump and treat" remedies, where the treated water is not productively used, other questions arise. Is it a defense to an NRD claim for loss of use of an aquifer because the selected remedy wastes the reclaimed natural resources, *i.e.*, the treated water? [143] Groundwater pump and treat remedies with no use of the treated water direct the treated water to surface waters. If that water were injected into the aquifer or used for drinking water, would it not have the effect of replacing or restoring the injured aquifer? If the ROD considered but rejected this option for non-technical reasons, is it a natural resource loss for which PRPs should be liable? Does CERCLA §107(f)(1) apply only in permit situations or can it be read more broadly to apply to any situation where U.S. EPA has approved the action taken? In the case of groundwater contamination, if NRD are calculated in part based on the costs of replacing and producing water from alternate sources, and the treated water from the remedy is not used, the treated water should be recognized as a cost-savings available to the water authority which, if it were to use the water, would achieve a cost-savings in the avoidance of its own pumping to produce an equivalent amount of water, thereby mitigating the NRD claim.

Under Michigan law, there is a question as to the calculation of interest on NRD. The Federal NOAA regulations permit the use of present value techniques to bring damages since the time of the release causing the injury up to current dollars. [144] Michigan has no similar regulations, but, at least at the Verona Wellfield site, the State also brought past costs up to current dollars. [145] Where an NRD claim covers damages from a long period pre-suit, this present value calculation can add a very substantial amount to the claim. Under Part 201, interest runs on NRD claims from the date a written demand for recovery is made or from the filing of suit, whichever is earlier. [146] This is generally consistent with Michigan's interest computation rule applicable to tort cases, which provides for the computation of interest from the date of filing suit. [147] The

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purpose of an award of interest is to compensate for the lost use or time value of money. [148] Compounding sums expended or damages incurred in the past up to present value also reflects the lost use or time value of money; hence, by bringing NRD claims up to current dollars, the State effectively demanded interest before interest was allowed to run under the statute. It can be argued that this statutory provision on the computation of interest represented legislative policy to discourage the delayed filing of NRD claims by the State by limiting interest recovery.

### **CONCLUSION TO PART I**

NRD are now part of Michigan's principal environmental statutes. Most NRD claims have been brought under Part 201 and the WRCA and its successor, NREPA Part 31. The statute of limitation under Part 201 probably bars NRD claims under Part 201 at sites identified before 1991. However, CERCLA and the OPA provide the State with essentially identical claims under federal law.

### **SELECT BIBLIOGRAPHY TC "SELECT BIBLIOGRAPHY" \f C \l "1"**

#### 1. Selected Technical References Cited in DOI NRDA Regulations\*

Appendix 1 (Travel Cost Method), Appendix 2 (Contingent Valuation (Survey) Methods), and Appendix 3 (Unit Day Value Method) only of Section VIII of "National Economic Development (NED) Benefit Evaluation Procedures" (Procedures), which is Chapter II of Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1984, DOI/WRC/-84/01 (NTIS PB No. 84-199-405).

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\*Copies of each of the cited documents are available from the National Technical Information Service ("NTIS"), 5285 Port Royal Road, Springfield, VA 22161; PB96-501770; ph: (703) 487-4650.

#### 2. Hupp, C. and Panourgias, L., *An Overview of Natural Resources Damages Claims Under Federal and*

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*State Laws*, 12 MICH. ENV. L. J. 4 (1995).

3. U.S. General Accounting Office, Superfund: Outlook and Experience with Natural Resource Damage Settlements, GAO/RECD-96-71, April 1996.
4. Arrow, K., Solow, R., Portney, P., Leamer, E., Raner, R., and Schuman, H., *Report of the NOAA Panel on Contingent Valuation*, (January 15, 1993).
5. Carson, R. *et al.*, *Was the NOAA Panel Correct About Contingent Valuation?*, RESOURCES FOR THE FUTURE, Discussion Paper 96-20 (May, 1966).
6. *Valuing Natural Assets: The Economics of Natural Resource Damage Assessment* (Kopp, R.J. and Smith, V.K., Eds.) (RESOURCES FOR THE FUTURE, 1993).
7. *Revealing the Economic Value of Protecting the Great Lakes*, NORTHEAST-MIDWEST INSTITUTE AND NOAA (Washington, D.C., 2000).
8. Guidance on Scaling Compensatory Restoration Actions (Oil Pollution Act of 1990), NOAA (December 18, 1997), contains further information on the planning and development processes for creating restoration plans for injured resources and calculating interim use losses. It provides in depth discussion, useful examples, and an extensive bibliography with abstracts.

\*Copies of each of the cited documents are available from the National Technical Information Service ("NTIS"), 5385 Port Royal Road, Springfield, VA 22161, PB 96-501770; telephone (703) 487-4650.

A number of the above documents can be found at [www.bodmanlongley.com](http://www.bodmanlongley.com). Follow the links to the Newsletter & Articles webpage.

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*DISCLAIMER: The opinions of the authors expressed herein do not necessarily state or reflect those of their law firms or clients.*

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*www.juris.org/cuems,*

*are provided for information only, and shall not be considered legal advice.*

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- [1] *See generally*, U.S. General Accounting Office, Superfund: Outlook and Experience with Natural Resource Damage Settlements, GAO/RECD-96-71, April 1996. Our research indicates that no comprehensive report of NRD settlements has been published since this report.
- [2] *See* Appendices A ("NRD Settlements and Assessments List") and B ("NRD Settlements Summaries Table") to Part 201 of this article. To the extent that these settlements are available in textual form, they have been added to the environmental law collection maintained by the State Bar of Michigan's Environmental Law Section, at Wayne State University <http://www.lib.wayneedv/lawlibrary/collections/superfund.html>.
- [3] Clean Water Act, 33 USC 1321(f)(4), *as added by the* Clean Water Act amendments of 1977, Pub L 95-217; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC 9601 *et seq.*
- [4] 1982 PA 307, MCL 299.601 *et seq.*, as amended by 1990 PA 233, 234 adding, among others, 12(f) to Michigan Environmental Response Act, MCL 299.612(f). For an overview of Michigan NRD law as of the early 1990s, *see* Hupp, R. Craig, and Panourgias, L., *An Overview of Natural Resources Damages Claims Under Federal and State Laws*, 12 Mich Env L J 4 (1993) at [www.bodmanlongley.com](http://www.bodmanlongley.com) (follow links to Newsletters & Articles webpage).
- [5] MCL 324.48740(1)(a) & (1)(d) (before re-codification, MCL 305.13) provide for criminal penalties for individuals convicted of taking fish illegally: \$10 per pound of game fish, and \$5.00 per pound for non-game fish. If proceeds are collected by court action, they go to a game and fish protection fund.
- [6] *See also*, Draft Great Lakes Strategy of the Great Lakes Water Quality Agreement, 66 Fed Reg 30187 (June 5, 2001).
- [7] 1990 PA 233, 234.
- [8] *See* Appendix A to Part II for a list of these NRD settlements and assessments.
- [9] MCL 324.48740(1)(a) & (1)(d).
- [10] *Id.*
- [11] 1929 PA 245, MCL 323.1 *et. seq.*, *repealed by* 1994 PA 451 and recodified at NREPA Part 31, MCL 324.3101 *et. seq.*
- [12] MCL 323.6, recodified as MCL 324.3109.
- [13] *In the Matter of Water Pollution, The Upjohn Company*, Final Order No. DFO-SW91-003 (March 13, 1991).
- [14] 1990 PA 233 & 234, adding 12(f) to the Michigan Environmental Response Act ("MERA" or "Act 307"), MCL 299.612(f).

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- [15] 42 USC 9601 *et seq.*
- [16] 1994 PA 451 (effective March 30, 1995), MCL 324.20101 *et seq.*
- [17] MCL 324.20126a(1)(c).
- [18] MCL 324.20126a(3).
- [19] MCL 324.20126a(4).
- [20] *Id.*
- [21] MCL 324.20101(ee) & (ff).
- [22] 1995 PA 71 (effective June 5, 1995).
- [23] MCL 324.20104.
- [24] *Id.*
- [25] MCL 324.20104.
- [26] Personal telephone conversation with Lynelle Marolf, MDEQ-ERD (October 1, 2001).
- [27] 1994 PA 451, MCL 324.5530(3).
- [28] MCL 324.9121(6), *as amended by* 2000 PA 504.
- [29] MCL 324.3115(2) (Attorney General may recover NRD from a person who knowingly discharged a substance in violation of law, permit or rules).
- [30] MCL 324.11502(9), *added by* 1996 PA 359; (definition of "corrective action" includes "the taking of other actions related to the release as may be necessary to . . . mitigate injury to the ...environment, or natural resources . . .") A solid waste facility owner must maintain funds or financial assurance mechanisms to cover the costs of "corrective action." MCL 324.11523(1)(b); MCL 324.11546(3) (Attorney General may seek restoration costs for violations of statute or rules).
- [31] MCL 324.21302(d) ("corrective action" includes "the taking of other actions related to the release as may be necessary to prevent, minimize, or mitigate injury to the ...environment, or natural resources . . . ").
- [32] MCL 324.11151(9) (Attorney General may recover NRD for any violation of a permit, requirement or rule under Part 111).
- [33] MCL 324.31525(5) and (7) provide, respectively, for criminal penalties for willful violations leading to serious damage to natural resources and for a court order compelling a person who violates this part "to restore the site affected by the violation as nearly as practicable to its original condition."
- [34] MCL 324.1701 *et seq.*

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- [35] MCL 324.1701.
- [36] *Nemeth v Abonmarche Development, Inc.*, 457 Mich 16; 576 NW2d 641 (1998).
- [37] The Marine Protection, Research, and Sanctuaries Act of 1972, Title III, 16 USC 1431, 1432, and 1443, *as amended by the National Marine Sanctuaries Act*, and the Anadromous Fish Conservation Act, 16 USC 757, also provides for restoration for certain impacted natural resources in limited circumstances.
- [38] 42 USC 9607(a).
- [39] 42 USC 9651(c)(2).
- [40] 42 USC 9607(f)(2)(C).
- [41] 42 USC 9651(c)(2) (1994).
- [42] *See* discussion of the scope of a "Type B" NRDA for the Kalamazoo River, Michigan site in Part II of this article.
- [43] 33 USC 2701 *et seq.* (1994).
- [44] 33 USC 2702(a) & (b) (1994).
- [45] 33 USC 2701(a) & (b) (1994).
- [46] 33 USC 2706(a) & (b) (1994).
- [47] 33 USC 2702(b)(2) (1994).
- [48] *Id.* at 2701(b)(2)(A) and 33 USC 2706(d)(1) (1994).
- [49] 33 USC 2706(f) (1994).
- [50] 33 USC 1251 *et seq.* (1994).
- [51] 33 USC 1321(f) (1994).
- [52] 237 Mich App 682; 604 NW2d 719 (1999), *vac and rem*, 463 Mich 939; 621 NW 2d 215 (2000).
- [53] MCL 324.20140(2) (prior to June 29, 2000 curative amendment).
- [54] *Id.* at 690; 604 NW 2d at 725.
- [55] *Shields v Shell Oil Company*, 463 Mich 939; 621 NW 2d 215 (2000).
- [56] Part 201, 140; MCL 324.20140.
- [57] As a result of the Court of Appeals' *Shields* decision, MCL 324.20140; was amended by the Michigan Legislature to provide that recovery of response activity costs incurred prior to July 1, 1991, would be allowed only if filed by July 1,

## NATURAL RESOURCES DAMAGES ASSESSMENTS

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1994. The legislation applied retroactively and provided that the amendment was curative and intended to original intent of the legislature. The Supreme Court's decision is consistent with the amendment.
- [58] MCL 344.1701 *et seq.*
- [59] 457 Mich 16; 576 NW2d 641 (1998).
- [60] 209 Mich App 452; 532 NW2d 192 (1995).
- [61] 212 Mich App 510; 538 NW2d 65 (1995), *leave to app. den., ordered not precedential*, 451 Mich 909; 550 NW 2d 525 (1996).
- [62] *Nemeth, supra*, 457 Mich at 34-35; 576 NW 2d at 650.
- [63] 235 Mich App 596; NW 2d 620 (1999).
- [64] 43 CFR 11.10 (2000).
- [65] 43 CFR 11 (1987) (originally promulgated at 51 Fed Reg 7725 (Aug. 1, 1986)).
- [66] *Colorado v U.S. Dept of Interior*, 880 F 2d 481 (DC Cir 1989); *Ohio v US Dept of Interior*, 880 F 2d 432 (DC Cir 1989).
- [67] 59 Fed Reg. 14281 (Mar 25, 1994); 61 Fed Reg 20560 (May 7, 1996).
- [68] 51 Fed Reg 27725 (Aug 1, 1986).
- [69] *Colorado v DOI, supra*, 880 F 2d at 491.
- [70] 61 Fed Reg 20609 (May 7, 1996) (codified at 43 CFR Part 11, Subpart C).
- [71] 43 CFR 11.10 (2000) (referencing 42 USC 9607(f)(2)(C)).
- [72] 61 Fed Reg 20560 (May 7, 1996).
- [73] *Id.*
- [74] 43 CFR 11.13(a) (2000).
- [75] 43 CFR 11.13(b) (2000).
- [76] 43 CFR 11.13(c) (2000).
- [77] 43 CFR 11.13(d) (2000) (referencing 43 CFR 11, Subpart D).
- [78] 43 CFR 11.40(a) (2000).
- [79] 43 CFR 11.18(4) & (5) (2000); the technical references are set forth in the Selected Bibliography at the end of Part I of this article.
- [80] 43 CFR 11, subpart E (2000).

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- [\[81\]](#) 43 CFR 11.15 (2000). This definition is narrower than the scope of damages under OPA. Compare to 15 CFR 990.30 (2000) (referring to 33 USC 2702(b) (1994)).
- [\[82\]](#) 43 CFR 11.80 *et. seq.* (2000).
- [\[83\]](#) 43 CFR 11.83 (2000).
- [\[84\]](#) 43 CFR 11.32(a)(2) (2000).
- [\[85\]](#) 43 CFR 11.81(a) (2000).
- [\[86\]](#) 43 CFR 11.81(d) (2000).
- [\[87\]](#) 43 CFR 11.91(a) (2000).
- [\[88\]](#) 43 CFR 11.43 (2000).
- [\[89\]](#) 134 F 3d 1095 (DC Cir 1998).
- [\[90\]](#) 5 USC 551, *et seq.* (1994).
- [\[91\]](#) No. CV 96-0122, 1998 US Dist LEXIS 6172 (D Idaho, Mar 31, 1998).
- [\[92\]](#) Comments in the rulemaking process under the OPA offer support for "record review" in challenges to NRDA under NOAA's regulation. *Id.* at 10, *citing* 61 Fed Reg 440, 478-479 (Jan 5, 1996).
- [\[93\]](#) *United States v ASARCO, Inc*, No CV-96-0122-N-ELJ, 1998 WL 798897 (D Idaho, Sept 30, 1998).
- [\[94\]](#) 42 USC 9611(g)(1)(A) & (B) (1994).
- [\[95\]](#) CERCLA 151(c), 42 USC 9651(c) (1994).
- [\[96\]](#) 42 USC 9611(g)(a) (1994).
- [\[97\]](#) 214 F 3d 1104 (9<sup>th</sup> Cir 2000).
- [\[98\]](#) 88 F 3d 1191 (DC Cir 1996).
- [\[99\]](#) 43 CFR 11.91(e).
- [\[100\]](#) *Kennecott*, 88 F 3d at 1209-13.
- [\[101\]](#) 52 Fed Reg 042 (March 20, 1987).
- [\[102\]](#) 104 F 3d 1507 (9<sup>th</sup> Cir 1997). Plaintiffs sought to recover NRD under 42 USC 9607(a)(4)(C) (1994).
- [\[103\]](#) *New Mexico v General Electric Co.*, No. 99-1118 (D NM, April 6, 2000), as reported in 31 Env't Rep. (BNA) 872 (May 5, 2000).
- [\[104\]](#) 42 USC 9606(b)(2)(E), 9610(c), & 9659(f), respectively.
- [\[105\]](#) *New Mexico v General Electric supra* 31 Env't Rep Cas (BNA) at 873-74

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- [102] *See* *Northwest v. United States*, 497 U.S. 132, 141 (1990).
- [106] 421 US 240, 95 S Ct 1612, 44 L Ed 2d 141 (1975).
- [107] *Id.*
- [108] 61 Fed Reg 40 (Jan 5, 1996).
- [109] NOAA's Guidance on Scaling Compensatory Restoration Actions (Oil Pollution Act of 1990), NOAA (December 18, 1997), contains further information on the planning and development processes for creating restoration plans for injured resources and calculating interim use losses. It provides in depth discussion, useful examples, and an extensive bibliography with abstracts.
- [110] 15 CFR 990.13 (2000).
- IBC [111] *See also*, O'Connor, Craig R., NOAA's Approach to NRDA: What Do Trustees Want?, Paper Presented at the Second Annual Conference on NRDA (October 4-5, 1999).
- [112] 15 CFR 990.10 (2000).
- [113] 15 CFR 990.14 (2000).
- [114] *Id.*
- [115] *Id.*
- [116] *Id.*
- [117] 15 CFR 990.20 (2000).
- [118] 15 CFR 990.23 (2000).
- [119] 15 CFR 990.25 (2000).
- [120] 15 CFR 990.27 (2000).
- [121] 15 CFR 990.30 (2000).
- [122] *Id.*
- [123] 43 CFR 11.15 (2000).
- [124] *Id.*
- [125] *Id.*
- [126] *Id.*
- [127] 15 CFR 990, Subparts D, E, & F (2000).

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[128] 15 CFR 990.62 (2000).

[129] 15 CFR 990.63 (2000).

[130] 15 CFR 990.65 (2000).

[131] 15 CFR 990.64(b), implementing 33 USC 2717(f)(1)(B) & 2712(h)(2) (1994).

[132] 128 F 3d 767 (DC Cir 1997).

[133] *Id.* at 772-73.

[134] Arrow, K., Solow, R., Portney, P., Leamer, E., Raner, R., and Schuman, H., Report of the NOAA Panel on Contingent Valuation, Appendix I to Advance Notice of Proposed Rulemaking at 58 Fed Reg 4601-14 (Jan. 15, 1993). A subsequent private study, following the NOAA study's recommendations, concluded that the use of contingent valuation pursuant to the recommended guidelines did provide reliable results. Carson, R., *et al.*, "Was the NOAA Panel Correct About Contingent Valuation?," Discussion Paper 96-20, Resources for the Future, (May, 1996).

[135] *General Electric*, 128 F 3d at 774.

[136] Pub L 99-499.

[137] With the notable exception of the Financial Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, which added "secured creditor" protections to CERCLA 101(20)(E) through (G). Pub L 104-208, Title II, 2501 *et seq.*, 110 Stat 3009-462 (1996).

[138] Reisch, M., "Superfund and Natural Resource Damages," Congressional Research Service Report to Congress (January 8, 2001). For examples of prior NRD legislation reform efforts, *see U.S. Senate Subcommittee on Superfund* (March 5, 1997) (statement of Terry D. Garcia, Acting Asst. Sec., NOAA) (testimony provides background of some recent restoration initiatives and discusses draft proposal for NRD under CERCLA); *U.S. Senate Subcommittee on Superfund* (September 4, 1997) (statement of Terry D. Garcia, Acting Asst. Sec. NOAA) (testimony discusses draft proposal for reforming NRD provisions of CERCLA, including cost-effective criterion and restoration-based approach).

[139] Particularly controversial are inclusion of non-use values in calculation of NRD and the use of contingent valuation to estimate values where there is no market-based value available.

[140] This is currently the case under 42 USC 9607(f)(2)(C) (1994). Some argue that the burden should shift to the government to prove its assessment correct.

[141] Reisch, *supra*.

[142] MCL 324.20126a(4), and USC 9607(f)(1) (1994).

[143] *See* the discussion of the Verona Wellfield NRD Assessment for an example of this situation, *infra*.

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- [\[144\]](#) 43 CFR 11.84 (2000); 15 CFR 990.63(b) (2000).
- [\[145\]](#) Author, based on review of NRD demand for the site asserted during settlement negotiations.
- [\[146\]](#) MCL 324.20126a(3).
- [\[147\]](#) MCL 600.6013 & 600.6455.
- [\[148\]](#) *The People v \$176,598.00 U.S. Currency*, 242 Mich App 342; 618 NW 2d 922 (2000).