

**Natural Resource Damages, Non-Preemption and the Oil Pollution Act of  
1990**

Jessica M. Dominguez

## Introduction

The Oil Pollution Act of 1990 (OPA) contains a condition of non-preemption over state laws pertaining to oil spill response and recovery in state waters. This non-preemption clause gives state governments the unusual ability to enact its own legislation to prevent and respond to oil spills that cannot be overridden by the corresponding federal legislation under OPA.<sup>1</sup> This includes state legislation for the prevention and recovery of natural resource damages (NRD) resulting from an oil spill.

The jurisdiction of OPA is limited to spills that affect “navigable waters or adjoining shorelines or the exclusive economic zone” of the United States.<sup>2</sup> These waters vary in that they may be under federal, state, tribal and/or international stewardship. Coordinated recovery of NRD is encouraged under OPA and its implementing regulations for NRD claims. The National Oceanic and Atmospheric Administration (NOAA) promulgated the implementing regulations in 1996.<sup>3</sup> To a certain extent, coordination is required among federal, state, and tribal claimants when submitting NRD claims for recovery of costs to natural resources, especially when claims are submitted for reimbursement from a federal fund.<sup>4</sup> OPA also has a condition that prohibits double recovery,<sup>5</sup> which further emphasizes the need for effective coordination between claimants.

Upon considering this unique and complex situation the following question remained: if a state has exercised its right to enact its own legislation through which to recover damages, does

---

<sup>1</sup> Oil Pollution Act, 33 U.S.C. § 2718 (1990).

<sup>2</sup> 33 U.S.C. § 2702(a) (1990).

<sup>3</sup> Natural Resource Damage Assessments, 15 C.F.R. § 990 *et seq.* (1996).

<sup>4</sup> 33 U.S.C. § 2701 *et seq.* (1990); 15 C.F.R. § 990.14 (1996).

<sup>5</sup> 33 U.S.C. § 2706 (d)(3) (1990).

OPA's own non-preemptive legislation impede the cooperation between state, federal and tribal natural resource trustees that is encouraged by both OPA and its implementing NRD regulations?

The inherent need for cooperation and coordination for successful NRD recovery under OPA seems to be in conflict with the non-preemption given to individual state laws that regulate and recover NRD on their own terms. However, few states have chosen to enact their own oil spill response and recovery legislation that specifically addresses NRD recovery through state jurisdiction.

In an attempt to explore the potential conflict for those states that have enacted their own legislation, this paper will review the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act and how it interfaces with federal NRD provisions under OPA.<sup>6</sup> The questions addressed in this paper include whether it is more simple and/or beneficial for state trustees to recover damages locally under their own statute than it is to participate in a recovery action with federal and tribal trustees; how might a choice by state trustees to act locally affect the ability of federal and tribal trustees to file their own claims for NRD through OPA; and does the non-preemption clause, combined with the prohibition of double recovery for oil spill damages under OPA, result in a discouragement or even a direct contradiction of the cooperative intent of the natural resource damage provisions in the same act? How these questions are answered has broad implications for the use and functionality of OPA and its ability to successfully protect and restore the natural resources of the coastal United States from the damaging effects of an oil spill.

---

<sup>6</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E

## Background of OPA 1990 and the National Pollution Funds Center

In 1989, the *Exxon Valdez* grounded off the coast of Alaska, spilling eleven million gallons of crude oil into Alaska's Prince William Sound.<sup>7</sup> The oil spill severely damaged habitat and wildlife, and created a national demand for better regulation of fuel shipping in United States waters. The primary response of the United States government was the passage of OPA.<sup>8</sup> OPA addressed two of the major deficiencies in U.S. legislation that the *Exxon Valdez* event highlighted--the lack of resources and funds in the U.S. to respond to an oil spill and the narrow scope of federal law for compensable damages.<sup>9</sup>

Subchapter I of OPA, Oil Pollution Liability and Compensation,<sup>10</sup> establishes terms, procedures, and context for oil spill liability and compensation requirements.<sup>11</sup> In accordance with OPA,<sup>12</sup> NOAA promulgated regulations for the assessment of natural resource damages under the Act.<sup>13</sup> OPA also authorized the use of the Oil Spill Liability Trust Fund (OSLTF), created by Congress in 1986 and administered by the United States Coast Guard (USCG).<sup>14</sup> Federal, state, tribal, and international trustees have standing to submit NRD claims for reimbursement from the fund and the USCG is responsible for administering the fund and accepting or rejecting damage claims. The Internal Revenue Code describes the funding of the OSLTF<sup>15</sup> and is funded through taxes on the petroleum industry, the greatest source of which

---

<sup>7</sup> See also Exxon Valdez Oil Spill Trustee Council, <http://www.evostc.state.ak.us/> and U.S. Environmental Protection Agency, <http://www.epa.gov/oilspill/exxon.htm>.

<sup>8</sup> USCG, National Pollution Funds Center, Oil Pollution Act of 1990 (OPA), <http://www.uscg.mil/hq/npfc/About%20Us/opa.htm> (last visited Sept. 23, 2005).

<sup>9</sup> *Id.*

<sup>10</sup> Sometimes referred to as "Title I."

<sup>11</sup> Oil Pollution Act, 33 U.S.C. § 2701-2720 (1990).

<sup>12</sup> *Id.* at § 2706(e)(1).

<sup>13</sup> Natural Resource Damage Assessments, 15 C.F.R. § 990 *et seq.* (1996).

<sup>14</sup> Oil Pollution Act, 33 U.S.C. § 2712 (1990).

<sup>15</sup> 26 U.S.C. § 9509 (1986).

was a 5-cent per barrel tax on oil produced in and imported to the United States.<sup>16</sup> The OSLTF originally had a \$1 billion limit, which was recently increased to \$2.7 billion through the Energy Policy Act of 2005.<sup>17</sup> Funds from the OSLTF can be used in a number of ways, including oil removal costs, costs to conduct damage assessment and restoration, claims for uncompensated damages, and appropriations for operational and research activities to implement OPA.<sup>18</sup> There is an OSLTF funding limitation of \$500,000,000 per oil spill incident to restore natural resources following damage.<sup>19</sup>

The National Pollution Funds Center (NPFC) was created by the US Coast Guard in response to its mandate under OPA to administer the Coast Guard's responsibilities under Subchapter I of OPA, administer the OSLTF, ensure funding for federal response to oil spills, and to recover damage costs from responsible parties.<sup>20</sup> While there was some initial dispute as to whether the NPFC had the authority to adjudicate NRD claims, a 1997 Department of Justice decision stated that the NPFC may appropriate payments from the OSLTF for NRD claims without further appropriation through Congress.<sup>21</sup> The NPFC NRD Division was established in response to that decision to manage NRD claims to the OSLTF and outreach to NRD claimants.<sup>22</sup>

---

<sup>16</sup> USCG, National Pollution Funds Center, The Oil Spill Liability Trust Fund (OSLTF), <http://www.uscg.mil/hq/npfc/About%20Us/osltf.htm> (last visited Sept. 23, 2005).

<sup>17</sup> Energy Policy Act, Pub. L. 109-58 (2005), and referenced on USCG, National Pollution Funds Center, The Oil Spill Liability Trust Fund (OSLTF) (Sept. 23, 2005) *available at* <http://www.uscg.mil/hq/npfc/About%20Us/osltf.htm>.

<sup>18</sup> *See supra* note 16.

<sup>19</sup> 26 U.S.C. § 9509(c)(2)(A)(ii) (1986).

<sup>20</sup> *See supra* note 18.

<sup>21</sup> US DOJ Decision, Funds Available for Payment of Natural Resource Damages under the Oil Pollution Act of 1990 (Sept. 25, 1997) *available at* [http://www.usdoj.gov/olc/opaop\\_rm1.htm](http://www.usdoj.gov/olc/opaop_rm1.htm).

<sup>22</sup> USCG, National Pollution Funds Center, About Natural Resource Damage Funding, <http://www.uscg.mil/hq/npfc/> (last visited Aug. 4, 2005).

## Natural Resource Damage Assessment and Restoration

OPA defines “natural resources” as “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 (including the resources of the Exclusive Economic Zone), any State or local government or Indian tribe, or any foreign government.”<sup>23</sup> OPA and its enabling legislation for NRD assessments established broad NRD claim provisions.<sup>24</sup> Under OPA, natural resource damage can be recovered for “injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage.”<sup>25</sup>

It is the responsibility of appointed federal, state and tribal natural resource trustees to recover damages on behalf of the public.<sup>26</sup> Under OPA, individuals may not recover for NRDs. The President designates federal trustees, the governor of a state designates state trustees, and the governing body of the Indian tribe designates tribal trustees.<sup>27</sup> All three trustees have two major responsibilities. The first is to assess natural resource damages under the natural resource damage provisions of OPA. The second responsibility is to “develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent” of the natural resources injured.<sup>28</sup> Federal trustees have one additional function. They may “upon request of and reimbursement from a state or Indian tribe and at the federal officials’ discretion, assess damages for the natural resources under their trusteeship.”<sup>29</sup> This gives federal trustees the

---

<sup>23</sup> 33 U.S.C. § 2701(20).

<sup>24</sup> 33 U.S.C. § 2701-2761 and 15 C.F.R. § 990.

<sup>25</sup> 33 U.S.C. § 2702(b)(2)(a).

<sup>26</sup> 33 U.S.C. § 2706; Under certain circumstances foreign trustees can also submit claims to the NPFC for reimbursement. However, as this is not directly applicable to domestic NRD, the foreign trustee as claimant is not addressed in this paper.

<sup>27</sup> *Id.* at § 2706(b).

<sup>28</sup> 33 U.S.C. § 2706(c).

<sup>29</sup> *Id.* at § 2706(c)(1)(B).

ability to assess damages to non-federal resources under the trusteeship of state and/or tribal governments if asked to do so.

Natural resource damages can be recovered through the OSLTF for the cost of direct damage restoration, the cost of compensatory restoration, and/or the “reasonable” cost of assessing the damages.<sup>30</sup> The cost of direct restoration refers to the “restoration, rehabilitation, replacement, or acquisition of the equivalent” specifically mentioned as a trustee function under OPA.<sup>31</sup> The term “compensatory restoration” is the damage criteria under OPA described as “the diminution in value of those natural resources pending restoration.”<sup>32</sup> Compensatory restoration recognizes that in the time it takes to assess and restore direct damages, additional natural resource value may be lost.

OPA gives the United States District Courts “exclusive original jurisdiction” over all “controversies” relating to the Act, except where a state has elected the right to pursue litigation under its own jurisdiction.<sup>33</sup> This allows states with their own laws regarding NRD recovery to pursue litigation through whatever court that they designate under that legislation. The overlap of responsibility and jurisdiction, combined with the exclusion of double recovery, requires considerable coordination and cooperation on the part of the participating trustees who hope to successfully file a NRD claim under OPA.

The jurisdiction of OPA is limited to spills that affect “navigable waters or adjoining shorelines or the Exclusive Economic Zone” of the United States.<sup>34</sup> However, a single oil spill may result in injury to a variety of natural resources under the jurisdiction of multiple state,

---

<sup>30</sup> 33 U.S.C. § 2706(d)(1).

<sup>31</sup> 33 U.S.C. § 2706(c).

<sup>32</sup> 33 U.S.C. § 2706(d)(1)(B).

<sup>33</sup> 33 U.S.C. § 2717(b).

<sup>34</sup> 33 U.S.C. § 2702(a).

federal, and tribal trustees. In accordance with OPA,<sup>35</sup> NOAA promulgated regulations for the assessment of natural resource damages under the Act.<sup>36</sup> These regulations provide further guidance to natural resource trustees for the assessment of NRD under OPA. OPA gives the effect of “rebuttable presumption” to NRD claims submitted by natural resource trustees who have produced a claim by following the NOAA regulations.<sup>37</sup> This provision, theoretically, aids both the trustees and the NPFC NRD Division. Unless there is evidence to the contrary, a NRD claim submitted in accordance with the NOAA regulations will be presumed accurate. The claim will not require an in depth adjudication by the NRD Claims Division and will afford the trustee or trustees deference in legal proceedings. Coordination between natural resource trustees is encouraged under the NOAA regulations.<sup>38</sup> The NOAA regulations require the natural resource trustees to work together to ensure the fullest recovery of NRD without double recovery when an NRD crosses jurisdictional lines.<sup>39</sup>

### **Non-preemption and Natural Resource Damage Claims**

The non-preemption provision of OPA provides for both state and federal laws and regulations.<sup>40</sup> OPA allows a state to establish “additional liability requirements” with respect to oil discharge and removal activities, and also to maintain its own fund “to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil

---

<sup>35</sup> 33 U.S.C. § 2706(e)(1).

<sup>36</sup> 15 C.F.R. § 990 *et seq.*

<sup>37</sup> 33 U.S.C. § 2706(e)(2); Rebuttable presumption: A presumption that may be rebutted by evidence. Otherwise called a “disputable” presumption. A species of legal presumption which holds good until dissolved. And which standing alone will support a finding against contradictory evidence. BLACK’S LAW DICTIONARY (4<sup>th</sup> ed. 1951).

<sup>38</sup> 15 C.F.R. § 990.14.

<sup>39</sup> *Id.*

<sup>40</sup> 33 U.S.C. § 2718.

pollution”.<sup>41</sup> While the extent of this non-preemptive clause has been limited through a recent Supreme Court decision,<sup>42</sup> the non-preemption clause is still in force as a component of OPA and the ability of states to establish their own NRD legislation has thus far been maintained. The existence of state laws and their stringency varies. While states are free to claim NRDs under their own legislation, OPA still prohibits the double recovery of NRD under the Act.<sup>43</sup>

### **The Massachusetts Oil and Hazardous Materials Release Prevention & Response Act**

Under OPA, Massachusetts has the responsibility to designate a natural resource trustee and to assess and recover damages to resources under its trusteeship.<sup>44</sup> In Massachusetts, the Secretary of Environmental Affairs, head of the Executive Office of Environmental Affairs, has been appointed by the governor to be the official natural resource trustee for the Commonwealth.<sup>45</sup> The Secretary has authority to assess and claim for a NRD under OPA.<sup>46</sup> The Secretary also has authority to claim for a NRD under the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act (MOHMRPA).<sup>47</sup> The MOHMRPA, as passed by the Massachusetts legislature, provides that the Massachusetts Department of Environmental Protection “shall take all action appropriate to secure to the commonwealth the benefits of FWPCA, CERCLA, and other pertinent federal laws including the Oil Pollution Act.”<sup>48</sup>

---

<sup>41</sup> 33 U.S.C. § 2718(b)-(c).

<sup>42</sup> *United States v. Locke*, 529 U.S. 89 (2000). The result of this Supreme Court decision is the limitation of the OPA’s non-preemption clause by excluding its application to most cases of individual state regulation on tanker design and operations. The Court decision upheld federal maritime law preemption over state law.

<sup>43</sup> 33 U.S.C. § 2706 (d)(3).

<sup>44</sup> 33 U.S.C. § 2706.

<sup>45</sup> MA Executive Office of Environmental Affairs, Natural Resource Damages Assessment and Restoration, [http://www.mass.gov/envir/nrd/nrd\\_home.htm](http://www.mass.gov/envir/nrd/nrd_home.htm) (last visited on Dec. 6, 2005).

<sup>46</sup> 33 U.S.C. § 2706(b)(3).

<sup>47</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E

<sup>48</sup> *Id.* at §3(a).

The Commonwealth's MOHMRPA makes responsible parties directly liable to the Commonwealth for NRD incurred.<sup>49</sup> Under the Massachusetts Act, the responsible party for an oil spill is liable to the Commonwealth for "all damages for injury to and for destruction or loss of natural resources, including the costs of assessing and evaluating such injury, destruction or loss, incurred or suffered as a result of such release or threat of release."<sup>50</sup> Both the OPA and the Massachusetts Act authorize that the Superior Court Department of the Trial Court of Massachusetts has jurisdiction to secure compliance with both federal and state legislation under OPA.<sup>51/52</sup> Through the Superior Court, the Attorney General may, "bring an action to recover all costs incurred by the commonwealth in the assessment, containment and removal of any release or threat of release of oil or hazardous material."<sup>53</sup> The Act also provides that the Commonwealth has the right in certain circumstances to seek and recover more than the actual costs it incurs,<sup>54</sup> for example, where the responsible party has unreasonably or in bad faith failed to comply with requests issued under the Act. The court may award up to three times the full cost of the Commonwealth's response.<sup>55</sup> Legal action to recover NRD by the Commonwealth has to be initiated within three years of the damage being discovered and connected with the oil spill event, or within three years of the responsible party being identified; whichever is later.<sup>56</sup>

---

<sup>49</sup> *Id.* at § 5.

<sup>50</sup> *Id.* at § 5(a)(5)(ii) and §5(e).

<sup>51</sup> *Id.* at § 11.

<sup>52</sup> 33 U.S.C. § 2717(c). This section states: a State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

<sup>53</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E §11

<sup>54</sup> *Id.* at § 5(e).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at § 11A(3).

## Choices for Recovering Natural Resource Damages

OPA and the MOHMRPA establish two different routes for the Massachusetts Secretary of Environmental Affairs to recover NRD damages when the responsible party is either unwilling or unable to cover the cost. OPA requires that NRD claims first be presented to the responsible party,<sup>57</sup> and OSLTF regulations require that claims for funding from the OSLTF under OPA show that the responsible party is unknown, unable or unwilling to pay all or part of the damages before the Coast Guard can adjudicate a claim.<sup>58</sup>

Under the Massachusetts statute, the Commonwealth has the right, as authorized by OPA, to collect payment from responsible parties for damages to natural resources.<sup>59</sup> The state also has the right to collect costs above and beyond the cost of damages if the responsible party can be shown to have failed to comply with payment requests.<sup>60</sup> Therefore, state trustees have the potential to recover a greater payment through state litigation under the MOHMRPA than through the adjudication process for payment from the OSLTF under OPA.

The simplest means of recovering damages may be direct negotiation with a willing and able responsible party. If successful, recovery of damages may occur on a much shorter time frame than through either legal prosecution on the state level or claim preparation and adjudication on the federal level. Also, additional court related costs would not be incurred as they would through the state court system. However, given the likelihood that not every responsible party would be able or willing to pay for all of the potentially large NRD costs, the Massachusetts trustee could be forced to make a choice between the Massachusetts court system and the U.S. Coast Guard NPFC adjudication process.

---

<sup>57</sup> 33 U.S.C. § 2713 (a).

<sup>58</sup> 33 C.F.R. § 136.103.

<sup>59</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E § 5(a)(5)(ii)

<sup>60</sup> *Id.* at § 5(e).

Given those two choices, there seems to be multiple benefits for the Massachusetts natural resource trustee to recover NRD claims through the Massachusetts court system rather than through the NPFC NRD Division adjudication process. Under OPA and OSLTF statutes, the U.S. Coast Guard distributes to the states the amount of damages claimed from the OSLTF, with specific limitations on liability.<sup>61</sup> Under the Massachusetts statute, the state has the potential to gain up to three times the cost incurred if the court finds it justifiable.<sup>62</sup> OPA and its implementing regulations are highly specific to oil spill occurrences.<sup>63</sup> The Massachusetts statute covers multiple oil spill and hazardous material release scenarios under a single Act.<sup>64</sup> Considering the frequency of oil spills compared to the frequency of both oil and hazardous material releases combined, the Massachusetts Secretary of Environmental Affairs and other participating entities of the Commonwealth involved with an oil spill response are more likely to be familiar with procedures under the state statute than under the OPA.

Under the NOAA regulations and the NPFC's guidelines for NRD claim submissions, state trustees are encouraged to coordinate with federal and tribal trustees in the preparation and filing of a NRD claim with the US Coast Guard.<sup>65</sup> Under the Massachusetts statute, there are no specific requirements for coordination prior to successful NRD recovery.<sup>66</sup> However, as both the NPFC and the Massachusetts statute obtain authority through OPA, the prohibition against double recovery clause applies to both circumstances. This would seem to require at least an awareness of the NRD assessment activities of other trustees.

---

<sup>61</sup> 33 U.S.C. § 2701-2720; 26 U.S.C. § 9509 (1986).

<sup>62</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E §5(e)

<sup>63</sup> 33 U.S.C. § 2702(a).

<sup>64</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E §3(a)

<sup>65</sup> 15 C.F.R. § 990.14 (1996); USCG, National Pollution Funds Center, Natural Resource Damage Funding Guidelines (2002).

<sup>66</sup> Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E

All requests for funding to initiate NRD assessment must be made to the NPFC through a Federal Lead Administrative Trustee (FLAT), and state and tribal trustees must work through the FLAT.<sup>67</sup> The requirement establishes coordination between trustees from the beginning of an oil spill if initiate funding is required. It is also conceivable that if negotiations with a responsible party are being pursued, it would be in the trustees' best interest to do so in a combined and coordinated effort. This cooperation is evidenced in records of previous spill incidents in Massachusetts where there have been participants from both federal and state trustee organizations.<sup>68</sup> However, if the Commonwealth chooses to pursue damage recovery through the Massachusetts court system, there is the potential for increased burden to be placed upon Federal and any involved Tribal trustees who now have to show that their claims to the US Coast Guard are distinct from the damages claimed by the state trustee.

### **Implications for Utilization of the Oil Spill Liability Trust Fund for NRD Recovery**

The OSLTF is intended, in part, to provide funds for recovery from oil spill damages to natural resources when funds from the responsible party are not available.<sup>69</sup> In Massachusetts, the Secretary of the Executive Office of Environmental Affairs has two options for the recovery of NRD when the responsible party is either unknown or is unwilling or unable to pay. Whether the responsible party is known or not, the Secretary may coordinate with federal and tribal trustees to produce a claim package for submittal to the NPFC for adjudication under the federal

---

<sup>67</sup> USCG, National Pollution Funds Center, Natural Resource Damage Funding Guidelines c. 6 pg. 12 (2002). Executive Order 12777 introduced the Federal Lead Administrative Trustee (FLAT) concept to provide a focal point for addressing natural resource issues associated with a specific incident. The NPFC will only accept requests for Initiation from, and normally works directly with, the FLAT. State and Tribal Trustees must work through a FLAT. Those State and Tribal Trustees acting in the event of a spill may join with the designated Federal Trustees to name a FLAT.

<sup>68</sup> MA Executive Office of Environmental Affairs, Natural Resource Damages Assessment and Restoration, Massachusetts NRD Cases (Dec. 6, 2005) *available at* [http://www.mass.gov/envir/nrd/map\\_info.htm](http://www.mass.gov/envir/nrd/map_info.htm).

<sup>69</sup> 33 C.F.R. § 136.103.

statute and regulations for reimbursement from the OSLTF.<sup>70</sup> On the other hand, if the responsible party is known, payment of damages may be pursued via the Massachusetts court system pursuant to the relevant legislation.<sup>71</sup> This second choice also provides the opportunity for additional money to be awarded to the state in addition to reimbursement for the costs of recovery. In cases where the responsible party is known, there would seem to be more incentive for the state trustee for Massachusetts to pursue damage recovery through the state legislation.

Through MOHMRPA, a potentially larger payment for damages to state natural resources is possible. In addition, having a case heard locally in the Massachusetts court system, rather than as a co-claimant in federal district court, is advantageous. This situation has the potential to put non-state trustees at a disadvantage in recovering damages to natural resources under their stewardship. OPA prohibits double recovery of damages under the Act and the overlapping nature of natural resources and jurisdictional boundaries makes distinct damage assessment and NRD claims difficult. The difficulty in acting alone is recognized and reflected in the encouragement of cooperation in the NRD regulations.<sup>72</sup>

## **Conclusion**

Given that the Secretary of the Executive Office of Environmental Affairs has the choice to submit NRD claims in state court, in which the Commonwealth may be actively involved and where all damages would be paid directly to the Commonwealth, the incentive in most situations, at least where the responsible party is known but unwilling or unable to compensate for damages,

---

<sup>70</sup> Based on guidance in: Oil Pollution Act, 33 U.S.C. §§ 2701-2720 (1990), Natural Resource Damage Assessments, Final Rule 15 C.F.R. § 990 *et seq.* (1996), and 26 U.S.C. § 9509 (1986).

<sup>71</sup> Based on guidance in: Oil Pollution Act, 33 U.S.C. §§ 2701-2720 (1990) and Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E

<sup>72</sup> Natural Resource Damage Assessments, 15 C.F.R. § 990.14 (1996).

would be to recover damages under state law. Potential exceptions to this would be when the responsible party is unknown and there is no option for litigation, or when the natural resource damage costs are beyond what have been negotiated or court ordered from the responsible party.

The implications for federal and tribal trustees, in states that have their own statutes for NRD recovery, seem to put them at a disadvantage when attempting to recover damages. Natural resources, wildlife and their environments, rarely coincide with political boundaries of jurisdiction. It would seem very difficult, for instance, to determine how many fish were killed while under federal jurisdiction versus state jurisdiction for a given spill. If a state, like Massachusetts, chose to bring a responsible party to state court to recover damages, federal and tribal trustees may be left with either trying to settle their own separate negotiations with the responsible party or to submit a separate NRD claim to the NPFC NRD Claims Division for adjudication.

However, as noted in this paper, coordination among state, federal, and tribal trustees often happens by necessity early on in a spill response period. Additionally, it seems from a review of the few NRD cases that Massachusetts has addressed in post-OPA years, there has been at least support from the federal trustee. This could be due to situations of successful negotiations with responsible parties that did not require litigation or claims to the NPFC. Records are not clear regarding the specific methods of cost recovery that have been attempted.