

2010

The Value Of A Pelican: An Overview Of The Natural Resource Damage Assessment Under Federal And Louisiana Law

Melissa Trosclair Daigle

Follow this and additional works at: <http://digitalcommons.maine.maine.edu/oclj>

Recommended Citation

Melissa T. Daigle, *The Value Of A Pelican: An Overview Of The Natural Resource Damage Assessment Under Federal And Louisiana Law*, 16 Ocean & Coastal L.J. (2010).

Available at: <http://digitalcommons.maine.maine.edu/oclj/vol16/iss2/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

THE VALUE OF A PELICAN: AN OVERVIEW OF THE NATURAL RESOURCE DAMAGE ASSESSMENT UNDER FEDERAL AND LOUISIANA LAW

*Melissa Trosclair Daigle*¹

I. INTRODUCTION

On April 20, 2010, the drilling rig *Deepwater Horizon* exploded while finishing an oil well located approximately fifty miles off the coast of Louisiana. When the rig sank two days later, oil began pouring into the Gulf of Mexico. The well was capped with a temporary device on July 15, 2010, and declared “effectively dead” on September 19, 2010, but states and local governments along the Gulf of Mexico will continue to see untold amounts of damage to property and natural resources as oil that is suspended in the water column or lying on the seafloor washes up on land.² As of November 2, 2010, in Louisiana alone, 3,407 birds were collected dead, with 1,488 showing visible signs of oil; 134 sea turtles were collected dead, with 7 showing visible signs of oil and 108 pending oil determinations; and 62 mammals were collected dead, with 3 showing visible signs of oil.³ But these numbers do not capture the true

1. Legal Coordinator, Louisiana Sea Grant Law & Policy Program.

2. For a timeline of the containment and sealing process, please review the Wall Street Journal timeline. *Deepwater Horizon Rig Disaster Timeline*, WALL ST. J., Apr. 29, 2010, <http://online.wsj.com/article/SB1000142405274870430230457521388355525958.html#articleTabs%3Dinteractive>. One example of continued oiling can be seen at Bay Jimmy, located in Plaquemines parish in Louisiana. Rick Jervis, *Oil Cleanup Not Over in Louisiana's Bay Jimmy*, USA TODAY, Oct. 19, 2010, http://www.usatoday.com/news/nation/environment/2010-10-19-oil19_ST_N.htm#. Oil has washed up several times, including in late October 2010 and March 2011 (the oil from the March 2011 event is still being tested to confirm origin). *Id.*; Tracy Kuhns, *Louisiana Bayoukeeper Talks About Recent Oil in the Gulf*, BP SLICK (Mar. 21, 2011, 1:04 PM), <http://bpoilslick.blogspot.com/2011/03/louisiana-bayoukeeper-talks-about.html>.

3. U.S. Fish & Wildlife Serv., *Deepwater Horizon Response Consolidated Fish and Wildlife Collection Report*, U.S. FISH & WILDLIFE SERVICE (Nov. 2, 2010),

impact of the *Deepwater Horizon* oil spill. It is impossible to get an accurate count of the birds, fish, insects, reptiles, and mammals that died and sank to the ocean floor or decomposed unseen in the marsh, or of the microscopic organisms that inhabit the range of ecosystems that were affected by the spill. Additionally, large areas of in-shore and off-shore fishing grounds were closed to both commercial and recreational fishermen, greatly reducing public access to the natural resources of the five Gulf states.⁴

After the *Exxon Valdez* spill in 1989, local communities in Alaska struggled with the immediate impacts of the spill—the containment and cleanup—and with the legal avenues available to recover for impacts to natural resources, both in the short and long terms.⁵ In response to this, the Oil Pollution Act of 1990 (OPA) was passed.⁶ In 1991, Louisiana passed the Louisiana Oil Spill Prevention and Response Act (LOSPRA) as a state counterpart to OPA.⁷ These two acts deal with a variety of oil spill-related issues, including recovering for damage to personal property and lost income. They also provide for federal and state governments to recover for damages to natural resources from an oil spill or the threat of an oil spill. The assessment and recovery process, known as the Natural Resource Damage Assessment (NRDA), is both time-consuming and complicated on even the smallest of scales. The process already has begun in response to the *Deepwater Horizon* spill and is expected to take several years to complete. The ultimate goal of the NRDA and subsequent restoration is to make whole the natural resources and the public's loss of the use of those resources that are damaged or destroyed after a discharge of oil.⁸ This is most directly achieved by returning

<http://www.fws.gov/home/dhoilspill/collectionreports.html>. These numbers reflect fish and wildlife that have been reported to the Unified Area Command from the U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration, incident area commands, rehabilitation centers, and other authorized sources operating within the *Deepwater Horizon* impact area. These numbers do not represent a final determination of the cause of death. Across the Gulf of Mexico, the numbers are: 6,104 birds collected dead, with 2,263 showing visible signs of oil; 609 sea turtles collected dead, with 18 showing visible signs of oil, and 272 pending oil determination; and 100 mammals collected dead, with 4 showing visible signs of oil. *Id.*

4. The five Gulf states are Texas, Louisiana, Mississippi, Alabama, and Florida.

5. See William H. Rodgers, Jr. et al., *The Exxon Valdez Reopener: Natural Resource Damage Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135 (2005).

6. 33 U.S.C. §§ 2701-2762 (2006).

7. LA. REV. STAT. ANN. §§ 30:2451-30:2496 (2010).

8. This interpretation is utilized by a number of organizations and courts. See *Natural Resource Damages Act (NRDA)*, LOUISIANA OIL SPILL COORDINATOR'S OFFICE, www.losco.state.la.us/ps_nrda.htm (last updated Oct. 5, 2010); *Deepwater Horizon*

injured natural resources to their pre-spill condition and providing compensation to the public for the loss of use from the time of the spill through the recovery period. However, when returning the specific natural resource to its pre-spill condition cannot be accomplished for some reason, there are a variety of other methods that can be utilized to achieve the goals of the NRDA process. These methods will be discussed in more detail below.

It is important to remember that OPA and LOSPRA were written in response to the *Exxon Valdez* spill. That is not to say that a disaster on the scale of the *Deepwater Horizon* was not a concern; however, what happened in Alaska was clearly on the minds of those crafting the legislation, and there are many indications of this in both laws. Because of the extent of the *Deepwater Horizon* spill, both in amount of oil discharged and area affected, the NRDA process will be tested in ways that were likely not contemplated during its drafting. Numerous local governments, five states, and the federal government will have to work together to achieve the goals of OPA and the corresponding individual state oil spill acts, including LOSPRA. This Article will look at the authorization for natural resource damage assessments as provided by OPA and LOSPRA and then examine in detail the NRDA process as provided by the Code of Federal Regulations and the Louisiana Administrative Code.

II. THE OIL POLLUTION ACT OF 1990

OPA provides for the United States and states to recover for damages to natural resources. Specifically, the United States, a state, an Indian tribe, or a foreign government can recover for “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage”⁹ “Natural resources” is defined by OPA 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

Natural Resource Damage Assessment Process, LOUISIANA SEA GRANT, www.laseagrant.org/nrda/index.htm (last visited Mar. 26, 2011); *Gulf Spill: Damage Assessment*, NOAA, www.gulfspillrestoration.noaa.gov/assessment/ (last visited Mar. 26, 2011).

9. 33 U.S.C. § 2702(b)(2)(A).

...”¹⁰ Additionally, ecosystem services, such as those provided by wetlands in maintaining water quality and providing protection from storms, are also recognized as being a natural resource.¹¹ The natural resources must belong to, be managed by, be controlled by, or appertain to the group making the claim for damages, whether that is the United States, a state, an Indian tribe, or a foreign government.

A trustee is appointed to act on behalf of the public in the claims process. The president designates the federal trustees; the governor of each state designates state and local trustees; the governing body of any Indian tribe designates its trustees; and the head of any foreign government designates its trustees.¹² Each trustee assigned will assess natural resource damages covered by his trusteeship and “develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under [his] trusteeship.”¹³ The federal trustee is authorized to assess damages to natural resources under a state’s or tribe’s trusteeship if the state or tribe requests this and provides reimbursement.¹⁴

OPA provides guidelines on how to measure damages to natural resources. Damages include “the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; the diminution in value of those natural resources pending restoration; plus the reasonable cost of assessing those damages.”¹⁵ Double recovery is not allowed.¹⁶ The plans developed by the trustees can only be implemented “after adequate public notice, opportunity for a hearing, and consideration of all public comment.”¹⁷ Any monies recovered by the trustee are to be placed in a “revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee” in the development and implementation of the plan.¹⁸ If there are funds remaining after this, they are to be deposited in the Oil Spill Liability Trust Fund.¹⁹ Similarly, the fund may be used to cover costs incurred by trustees while assessing the damage to natural resources and

10. *Id.* § 2701(20).

11. James Peck, *Measuring Justice for Nature: Issues in Evaluating and Litigating Natural Resource Damages*, 14 J. LAND USE & ENVTL. L. 275, 278 (1999).

12. 33 U.S.C. § 2706(b)(2)-(5).

13. *Id.* § 2706(c)(1)(A), (c)(1)(C), (c)(2)(A)-(B), (c)(3)(A)-(B), (c)(4)(A)-(B).

14. *Id.* § 2706(c)(1)(C).

15. *Id.* § 2706(d)(1)(A)-(C).

16. *Id.* § 2706(d)(3).

17. *Id.* § 2706(c)(5) (2006).

18. *Id.* § 2706(f).

19. *Id.*

developing and implementing the plan, as long as their actions are determined to be consistent with the National Contingency Plan.²⁰

III. LOUISIANA OIL SPILL PREVENTION AND RESPONSE ACT

OPA allows states to implement their own laws and regulations related to oil spills,²¹ and in 1991, Louisiana passed LOSPRA. The legislature passed this act with the intention that the act would help it fulfill “its duties to protect, conserve, and replenish the natural resources” of the state.²² LOSPRA establishes the Louisiana Oil Spill Coordinator’s Office in the Department of Public Safety, under the State Police. LOSPRA names the coordinator’s office and the State Police and Louisiana Department of Environmental Quality as the primary state responders for oil spills. The state can recover oil spill prevention and response costs, and, as provided in OPA, recover loss of state public natural resources damages and loss of ecological services from the responsible party, through various state trustees.

Under LOSPRA, the definition of natural resources includes all items listed in OPA, and adds shellfish, fowl, and vegetation.²³ While this does not increase the coverage of OPA, it does place emphasis on three inhabitants of the coastal landscape that are extremely valuable to Louisiana. The definition of damages to natural resources under LOSPRA includes “injury to, destruction of, or loss of natural resources” and “the reasonable and any direct, documented cost to assess, restore, rehabilitate, or replace injured natural resources, or to mitigate further injury, and their diminution in value after such restoration, rehabilitation, replacement, or mitigation.”²⁴ LOSPRA also provides for two additional definitions not found under OPA that deal with the assessment procedure. The “comprehensive assessment method” is used “to make a reasonable and rational determination of injury and cost-effective restoration alternatives to natural resources resulting from an unauthorized discharge of oil” through “sampling, modeling, and other appropriate scientific procedures.”²⁵ The “negotiated assessment” is a “restoration plan agreed upon by the coordinator, in consultation and

20. *Id.* § 2712(a)(2), (j)(1).

21. *Id.* § 2718.

22. LA. REV. STAT. ANN. § 30:2453A (2010).

23. *Id.* § 30:2454(17).

24. *Id.* § 30:2454(5)(a).

25. *Id.* § 30:2454(30).

agreement with any other state trustees, and the responsible party.”²⁶ These two definitions were added by legislative amendment in 1995.²⁷

LOSPRA also contains a provision dealing specifically with natural resource damages. This provision requires the coordinator to develop, as an initial matter, an inventory of the state’s natural resources.²⁸ This inventory must identify and catalog the physical locations, the seasonal variations in location, and the current condition of natural resources; provide for data collection related to coastal processes, abandoned pits, facilities, sumps, reservoirs, and oil spills; and identify the recreational and commercial use areas that are most likely to suffer from an unauthorized discharge of oil.²⁹ Next, the coordinator is required to adopt procedures for the assessment of damages to natural resources.³⁰ These procedures must provide for coordination among all “trustees, spill response agencies, potentially responsible parties, experts in science and economics, and the public,” as well as “[i]dentify appropriate sampling and data collection techniques” and also “[e]stablish plans that will satisfy the goals of restoring, rehabilitating, replacing, or acquiring the equivalent” of the damaged natural resource.³¹

The coordinator has sixty days from the completion of cleanup to determine whether “[a]ction to restore, rehabilitate, or acquire an equivalent natural resource is required,” and whether an expedited assessment may be used or a comprehensive assessment is necessary.³² He may, however, ask for an extension if needed. In order to recover for damages to natural resources, the coordinator must consult with other state trustees and determine whether to assess these damages based on guidance found in the state oil spill contingency plan and state administrative code.³³ Once the coordinator determines the amount of damages, he can create a rebuttable presumption of such by submitting a

26. *Id.* § 30:2454(31).

27. 1995 La. Sess. Law Serv. 740 (West).

28. LA. REV. STAT. ANN. § 30:2480C(1) (2010).

29. *Id.*

30. *Id.* § 30:2480C(5).

31. *Id.* § 30:2480C(6)(a), (7)(b), (7)(d). LOSPRA also provides for the establishment of an expedited assessment procedure for discharges of oil that have limited observable mortality and where restoration can be quickly initiated or where the oil discharged is less than one thousand gallons. *See id.* § 30:2480C(8). Because this procedure will not be utilized in response to the *Deepwater Horizon* disaster, its examination is not necessary for present purposes.

32. *Id.* § 30:2480C(8)(b)(i)-(iv).

33. *Id.* § 30:2480A.

written report to the court.³⁴ The report can show either the estimated amount that will be spent or the actual amount spent by the state.³⁵

IV. THE NATURAL RESOURCE DAMAGE ASSESSMENT PROCESS IN DETAIL

The NRDA process will normally be conducted in three phases: the field investigation or pre-assessment, the comprehensive assessment or restoration planning, and the recovery of damages or restoration implementation. The specifics of each phase, discussed below, can be found in the Code of Federal Regulations and the Louisiana Administrative Code. The primary federal natural resource agencies involved are the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service, which is part of the U.S. Department of Interior. The state natural resource agencies involved are the Louisiana Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Environmental Quality. The coordinator's office coordinates and participates with these agencies' NRDA activities and serves as the lead administrative trustee for the joint federal-state NRDA. As seen in the case of the *Deepwater Horizon* spill, oil spills can involve resources that cannot be easily categorized as federal or state natural resources; the clearest example of this is marine life that moves freely between state and federal waters, affecting the food chains of both areas. The Louisiana NRDA provisions recognize that problems can arise when dealing with multiple guidelines and multiple agencies across both federal and state government. The state NRDA rules are to be interpreted and implemented in a way that is consistent with federal law, and any conflict must be resolved in favor of federal law.³⁶ Specifically, "the [Louisiana oil spill] coordinator and state natural resource trustees are encouraged to cooperate and coordinate their actions with the federal trustees, and in cooperation with the potentially responsible party, to make the environment and the public whole for injuries resulting from unauthorized discharges."³⁷ The rules also make clear that the federal trustees are not bound by the state NRDA rules and can submit a claim separate from the state claim, as long as there is no double recovery.³⁸ The state also allows the state trustees to

34. *Id.*

35. *Id.* § 30:2480B.

36. LA. ADMIN. CODE tit. 43, xxix, § 101B (2007).

37. *Id.*

38. *Id.* § 101C.

pick from a variety of NRDA procedures available, including the state procedures, the federal procedures, or a combination of the two.³⁹

A. Field Investigation and Pre-assessment

Pre-assessment of damages resulting from a discharge of oil will provide information necessary for trustees to determine whether or not to pursue damage assessment and restoration. Regardless of which set of procedures (federal or state) the state trustees decide to use, according to the state rules, they must begin by conducting a field investigation.⁴⁰ The field investigation is done in order to determine if a NRDA is necessary, and if so, to determine the appropriate scope.⁴¹ The state trustees can use any method for the field investigation that is most helpful, including sampling and data collection, and they must provide an opportunity for the responsible party to be involved.⁴² One key difference between the state NRDA process and the federal NRDA process is that Louisiana allows two distinct types of claims to be made: one for injury to a natural resource and one for loss of services from a natural resource.⁴³ The rules set out two situations in which the trustees can find that an injury to the natural resource occurred: first, when the natural resource is directly or indirectly exposed to an unauthorized discharge of oil, there is a pathway between the natural resource and the oil, and reliable and valid methods indicate adverse effects on the resource due to its exposure to the oil;⁴⁴ and second, when the natural resource is adversely affected by response activities by an actual or threatened discharge of oil.⁴⁵ To recover for loss of service from a natural resource, the trustees have to find that “the ability of the natural resource to provide services has been reduced as the result of an unauthorized discharge of oil or response activities associated with the unauthorized discharge or substantial threat of an

39. *Id.*

40. *Id.*

41. LA. ADMIN. CODE tit. 43, xxix, § 117A (2007).

42. *Id.* § 117B. In fact, the responsible party is to be given an opportunity to be involved in all stages of the state NRDA process. Responsible parties can assist in identifying the natural resources most at risk and protective measures for responding to the discharge. The invitation to participate should be in writing, and written response is required to confirm participation. The parties will enter into a written agreement regarding the terms of participation. *Id.* §§ 115A-B. The same is required under the federal procedure. *See* 15 C.F.R. § 990.14 (2010).

43. *See* tit. 43, xxix § 119.

44. *Id.* § 119A(1)-(3).

45. *Id.* § 119A(4).

unauthorized discharge.⁴⁶ Loss of service can also occur if public use of the natural resource has been reduced due to the discharge of oil.⁴⁷

The first step in the federal pre-assessment process is to ensure that jurisdiction exists to pursue restoration under OPA. In order to proceed, the trustees have to verify that: (1) an incident occurred; (2) the incident is not permitted under a permit issued under federal, state, or local law, from a public vessel, or from an on-shore facility subject to the Trans-Alaska Pipeline Authorization Act;⁴⁸ and (3) the natural resources that the trustee has authority over may have been, or may be, injured as a result of the incident.⁴⁹ All three conditions listed above must be met to proceed with the assessment.⁵⁰ If all three are met, the trustees must next determine if injuries have or are likely to result from the incident, if response actions have not adequately addressed or are not expected to address the injuries resulting from the incident, and if feasible primary or compensatory restoration actions exist to address the potential injuries.⁵¹ Pre-assessment may include an initial evaluation of the extent of injury, including preliminary data collection and analysis, and the development of a damage assessment plan. If the decision is made to move to restoration planning, the second phase of the NRDA process, a notice of intent to conduct restoration planning will be published in the Louisiana Register as public notice.⁵² The notice must include a discussion of the pre-assessment analysis, including, but not limited to, the facts of the incident, the natural resources that are or expected to be affected, and the potential restoration actions, if available.⁵³

B. Comprehensive Assessment and Restoration Planning

Restoration planning is done in order to determine the injuries or losses, the extent and timeframe of those losses, what should be restored, available methods for restoration, and the appropriate extent of restoration.⁵⁴ This is called the “comprehensive assessment” under the state process.⁵⁵ Once the state coordinator and the trustees have

46. *Id.* § 119B(1).

47. *Id.* § 119B(2).

48. 43 U.S.C. §§ 1651-1656 (2006).

49. 15 C.F.R. § 990.41(a) (2010).

50. *Id.* § 990.41(b).

51. *Id.* § 990.42(a).

52. *Id.* § 990.44(a), (c), (d).

53. *Id.* § 990.44(b).

54. *See id.* 15 C.F.R. §§ 990.50-990.56 (2010).

55. LA. ADMIN. CODE tit. 43, xxix, § 121(H)(1) (2007).

determined that a NRDA is necessary, they have are free to choose from a number of assessment procedures, subject to a number of requirements. First, they must “consider the unique characteristics and the location of the natural resources” that have been affected.⁵⁶ They also must ensure that the chosen method will not result in projects that are “disproportionate to the value of the natural resource before the injury.”⁵⁷ In addition, the assessment must utilize “generally accepted scientific and technical standards and methodologies that have been demonstrated to produce valid and reliable assessment results.”⁵⁸ Finally, if additional criteria are met, there are specialized assessment procedures for expedited assessments⁵⁹ and negotiated assessments.⁶⁰ Once it is decided that an assessment should be completed, the state must provide the responsible party with a written notice of intent to conduct restoration planning at least ten days before the assessment begins.⁶¹

Keeping costs down are clearly important under the state procedures, as cost measures are administered throughout the state rules. The cost of the project must be reasonable, and the cost of the assessment must be kept to a minimum and have a “direct connection to the value of and/or level of services provided by the injured resources” before the discharge.⁶² More technologically advanced (and expensive) methods can be used only if they are expected to increase the quantity or quality of information gathered.⁶³ LOSPRA imposes additional requirements on the state oil spill coordinator for projects covering damage to state natural resources. The coordinator must “ensure that the cost of any restoration, rehabilitation, replacement, or acquisition project shall not be disproportionate to the value of the natural resource before the injury,” echoing the requirements under the Louisiana Administrative Code.⁶⁴ Similarly, the most cost-effective method to achieve the goals of the NRDA process must be used, and the coordinator must take into

56. *Id.* § 121(B).

57. *Id.*

58. *Id.* § 121(G).

59. Expedited assessments can be implemented only when the unauthorized discharge of oil caused only limited observable mortality, the full extent of the damage can be determined within twelve months, and the restoration plan can be implemented with twelve months of completion of the response actions. LA. ADMIN. CODE tit. 43, xxix, § 121(H)(2) (2007).

60. Negotiated assessments occur when the state trustees and the responsible party agree on a certain assessment method. *Id.* § 121(H)(3).

61. *Id.* § 123(B).

62. *Id.* § 121(C).

63. *Id.* § 121(D).

64. LA. REV. STAT. ANN. § 30:2480(F) (2010).

consideration “the quality of the actions undertaken by the responsible party in response to the spill incident, including but not limited to containment and removal actions and protection and preservation of natural resources.”⁶⁵ The rules provide that the coordinator and trustees have twenty months to complete the comprehensive assessment from written notification of the completion of response efforts.⁶⁶ However, the state trustees can request more time by showing that the full impact of the discharge cannot be determined within that timeframe.⁶⁷

Generally, the restoration plan can utilize restoration, rehabilitation, replacement or acquisition, and natural recovery.⁶⁸ There are six requirements for the restoration plan under the state rules.⁶⁹ The plan must include an analysis of the various options for restoration, including what would occur naturally if no restoration plan were implemented.⁷⁰ It must be cost-effective and utilize existing technology, so that the plan is likely to be successful.⁷¹ In addition, the costs of the plan cannot be disproportionate to the value of the natural resources and services before being damaged.⁷² The plan should be flexible and allow for corrections in execution and provide for monitoring to determine its effectiveness.⁷³ Finally, the public should receive notice of the plan and have an opportunity to comment on it.⁷⁴ For the federal process, the first step is to determine if an injury has occurred.⁷⁵ Evidence of injury includes, but is not limited to, “adverse changes in: survival, growth, and reproduction; health, physiology, and biological condition; behavior; community composition; ecological processes and functions; physical and chemical habitat quality or structure; and public services.”⁷⁶ The second step is to determine (1) “that an injured natural resource has been exposed to oil, and a pathway can be established from the discharge to

65. *Id.*

66. *Id.* § 30:2480(E).

67. *Id.*

68. LA. ADMIN. CODE tit. 43, xxix, § 125(A) (2007).

69. *Id.* § 125(B)(1)-(6).

70. *Id.* § 125(B)(1).

71. *Id.* § 125(B)(2).

72. *Id.* § 125(B)(3).

73. LA. ADMIN. CODE tit. 43, xxix, § 125(B)(4)-(5) (2007).

74. *Id.* § 125(B)(6).

75. 15 C.F.R. § 990.51(a) (2010). NRDA defines injury as “an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service. Injury incorporates the terms ‘destruction,’ ‘loss,’ and ‘loss of use’ as provided in OPA.” *Id.* § 990.30.

76. *Id.* § 990.51(c).

the exposed natural resource”; or (2) that an injured “natural resource or impairment of a natural resource service has occurred as a result of response actions to a substantial threat of a discharge of oil.”⁷⁷ Evidence of a pathway includes, but is not limited to, “the sequence of events by which the discharged oil was transported from the incident and either came into direct physical contact with a natural resource, or caused an indirect injury.”⁷⁸

Additionally, the trustees must determine “the degree and spatial and temporal extent of the injuries” relative to a baseline established prior to the injury.⁷⁹ The trustees may quantify the injuries in terms of: (1) “the degree and spatial and temporal extent of the injury to a natural resource”; (2) “the subsequent translation of that adverse change to a reduction in services provided by the natural resource”; or (3) “the amount of services lost as a result of the incident.”⁸⁰ Trustees must also estimate the time for natural recovery without restoration, but including any response actions.⁸¹

Federal regulations provide that “[t]rustees must consider a reasonable range of restoration alternatives before selecting their preferred alternative.”⁸² Each alternative must contain primary and/or compensatory restoration components that, as a package, make the environment and the public whole.⁸³ Alternatives must be considered technically feasible and in accordance with applicable laws, regulations, or permits.⁸⁴ Evaluation of the alternatives include examining issues such as the costs, the extent to which each is to meet the goals and objectives in restoration and/or compensation, the likelihood of success, and the affect of each on public health and safety.⁸⁵ Additionally, the trustees have the option of using a regional restoration plan or existing restoration project if either of these is the preferred alternative among all restoration options and fulfill the requirements of OPA.⁸⁶ The regional plan or an existing plan can only be selected as the restoration project if the project received public review and comment (or would be subject to public review and comment), will provide adequate compensation of the

77. *Id.* § 990.51(a).

78. *Id.* § 990.51(d).

79. *Id.* § 990.52(a).

80. *Id.* § 990.52(b).

81. *Id.* § 990.52(c) (2010).

82. *Id.* § 990.53(a)(2).

83. *Id.*

84. *Id.*

85. *Id.* § 990.54(a).

86. 15 C.F.R. § 990.56(a) (2010).

injuries to natural resources, addresses the same or comparable natural resources as the ones injured, and can be scaled to reflect the impact of the incident.⁸⁷

Two documents will be published for public comment during this phase: the draft restoration plan and the final damage assessment and restoration plan, which will specify the value given to the natural resource damages incurred and specify the project or projects the responsible party will perform to make the public whole. The draft restoration plan should include, along with other factors, a summary of the injury assessment procedures used; a description of the nature, degree, and spatial and temporal extent of injuries resulting from the incident; the goals and objectives of restoration; the range of restoration alternatives considered; and an identification of the trustees' tentative preferred alternative.⁸⁸ The final restoration plan will include all the information from the draft restoration plan, any responses to public comments, and an indication of changes made, if applicable.⁸⁹

C. Recovery of Damages and Restoration Implementation

The goal of restoration is to make the environment and the public whole after an injury or loss of natural resources and associated services as a result of a discharge of oil. In order to accomplish this, the trustees will implement restoration activities designed to restore injured resources to their pre-spill condition and seek compensation for the loss of injured resources or services. Litigation or negotiation with the responsible party may be pursued to fund these activities and compensate the public for lost use. LOSPRA gives the coordinator twenty months from completion of cleanup to finish the comprehensive assessment procedure; however, the trustees may petition the coordinator for more time if they can show that "the full impact of the discharge on the affected natural resources cannot be determined" within that timeframe.⁹⁰ If the state trustees are operating under the state procedures for the NRDA, once the restoration plan is completed, "the coordinator must present a written demand to the responsible party."⁹¹ The responsible party can then choose to reimburse the trustees for the costs associated with the development of the plan and implement the plan themselves,

87. *Id.* § 990.56(b).

88. *Id.* § 990.55(a)-(b).

89. *Id.* § 990.55(d).

90. LA. REV. STAT. ANN. § 30:2480E (2010)

91. LA. ADMIN. CODE tit. 43, xxix, § 129A (2007).

with trustee oversight, or provide the trustees with funds to so that the trustees may implement the plan.⁹² LOSPRA provides that the responsible party then has sixty days from completion of the assessment to make full payment or initiate restoration, rehabilitation, replacement, or mitigation of damages.⁹³ If the responsible party disputes the findings of the assessment, whether it be individual findings or the assessment as a whole, the parties can enter into mediation, which will be treated as settlement negotiations.⁹⁴ Once the mediation has ended, the sixty-day period for full payment or initiation of restoration, rehabilitation, replacement, or mitigation will begin.⁹⁵ If the responsible party fails to pay, the Oil Spill Contingency Fund becomes liable for all natural resource damages.⁹⁶

If the parties reach agreement under the federal procedures, the trustees will present a written demand to the responsible parties.⁹⁷ The responsible party can then implement the plan or provide the trustees with funds, allowing the trustees to implement the plan.⁹⁸ The responsible parties then have ninety days to respond, slightly longer than the timeframe provided under state law, and if they do not agree to the plan within the time provided, the trustees can file a judicial action for damages or seek funding from the fund.⁹⁹ If sums are recovered, they are placed in a revolving trust account, which can be used to reimburse the trustees or implement the final restoration plan (or regional restoration plan, if one was created).¹⁰⁰

V. CONCLUSION

Two of the questions I hear most often when I talk to coastal residents are: How much is a pelican worth? And, when do I get my check for not being able to fish (recreationally) this summer? Because the NRDA process will often result in a monetary value being put on the restoration of affected resources, the public will often think that each

92. *Id.* § 129A(1)-(2). These costs may include salary, fringe benefits, overhead, transportation, lodging, per diem costs, costs for sampling and analysis, and costs for laboratories, contractors, and other expert. *See id.* § 129B(1)(a)-(d).

93. *Id.* § 129G.

94. *Id.*

95. *Id.*

96. *Id.* § 129G.

97. 15 C.F.R. § 990.62(a) (2010).

98. *Id.* § 990.62(b)(1)-(2).

99. *Id.* § 990.64(a).

100. *Id.* § 990.65(a).

affected individual organism is counted. However, the value of the damage is established by looking at the affected ecosystem—or in this case, ecosystems—as a whole. This is a more manageable process than putting a value on each animal lost, as the state is not required to keep a freezer full of dead organisms to prove impact. This process is especially helpful in situations like the *Deepwater Horizon* spill, where the true death toll of organisms cannot be known. Additionally, the public needs to understand that they will not receive reimbursement for their lost fishing trips, but rather that the state or local government will receive such reimbursement in order to restore the damaged ecosystems so that the public will be able to have access to these resources in the future.¹⁰¹

Another pressing issue is that of double recovery. As pointed out above, both OPA and LOSPRA make it clear that double recovery is not allowed. This will be difficult with respect to the *Deepwater Horizon* spill for multiple reasons. First, many of the natural resources affected—fowl, fish, crustaceans—occupy both federal and state waters; some traverse this area over the course of a year due to their reproductive or migration cycles, some on a daily basis as they travel offshore to feed. If, for example, the shrimp industry is impacted in the next five years with reduced catches, would that be classified as a loss to federal natural resources, or state natural resources, or will the federal and state trustees have to come to an agreement about how to split the loss? Second, there can be potential overlap between public and private claims for recreational and commercial losses due to damages to natural resources.¹⁰² For example, commercial fishermen may recover for lost income during the period of the closure of the fishery due to the spill. But if the fishery is negatively affected in the future (once the area is reopened), should that impact be recoverable by fishermen as lost income or by the state or federal government as lost natural resources? It will be interesting to see how this plays out as the *Deepwater Horizon* spill NRDA progresses.

The NRDA process, especially in the case of *Deepwater Horizon*, is complicated and will take time to complete. As Niki Pace and Nicholas

101. This does not include lost income that is made off of the resources. A charter captain can recover for the lost income due to not being able to take people fishing, but the individuals who would have taken that trip cannot recover themselves for their lost ability to access the natural resources. In essence, the state recovers for them through the NRDA.

102. See Carol A. Jones, Theodore D. Tomasi & Stephanie W. Fluke, *Public and Private Claims in Natural Resource Damage Assessments*, 20 HARV. ENVTL. L. REV. 111, 159-163 (1996).

Lund will discuss in their article “Deepwater Horizon Natural Resource Damages Assessment: Where Does the Money Go?” states have the responsibility under the public trust doctrine to engage in an accurate assessment of natural resource damages.¹⁰³ Additionally, there is only a limited timeframe in which the public can engage in the process and voice their opinions about the proposed restoration process. These two issues make it vitally important for the public to both understand and follow the steps in the NRDA as they relate to the *Deepwater Horizon* NRDA.

103. Niki Pace & Nicholas Lund, *Deepwater Horizon Natural Resource Damages Assessment: Where Does the Money Go?*, 16 OCEAN & COASTAL L.J. 327 (2011).