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# New Impetus for Improving the Natural Resource Damages Process?

By William J. Walsh, Kenneth von Schaumburg, Karen C. Bennett, Jane C. Luxton / Sep 26, 2018

The natural resource damages (“NRD”) process empowers federal, state, and tribal “trustees” to act on behalf of the public, bringing legal claims intended to restore or replace natural resources injured by hazardous waste releases, including oil spills. The most famous recent NRD case resulted from the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, which ultimately led to a \$20.8 billion settlement that is currently providing funds for [multiple restoration projects throughout the region](#). While this was the largest NRD settlement in history, many other NRD cases and settlements have restored damaged resources all over the country. Yet, despite these successes, NRD programs, which at the federal level are administered by the Department of Interior (“Interior”) and the Department of Commerce’s National Oceanic and Atmospheric Administration (“NOAA”), are often criticized as slow, cumbersome, costly, and inadequately coordinated. For years, supporters and critics have called for change, and recently, with new impetus from Presidential regulatory reform directives, the Department of Interior issued an [Advance Notice of Proposed Rulemaking](#) (“ANPRM”), seeking comments on ways to improve the NRD process. Comments are due by October 26, 2018, and interested parties should make every effort to press for needed revisions to the process.

NRD claims are authorized by federal and state hazardous waste release laws such as the [Comprehensive Environmental Response, Compensation, and Liability Act](#) (“CERCLA” or “Superfund”) and the [Oil Pollution Act](#) (“OPA”). With regulatory regimes that developed separately under these statutes at Interior and NOAA, questions have arisen over time as to whether efficiencies could be realized by harmonizing the two approaches, taking the best from each. Similarly, NRD restoration planning demands many of the same steps required for compliance with the [National Environmental Policy Act](#) (“NEPA”), raising questions about potential benefits from avoiding duplication and consolidating these processes. Given widespread agreement that earlier restoration would minimize natural resource damage and accelerate restoration, these questions go to the fundamental purpose and success of NRD programs. The ANPRM tees up these and other important issues for public comment.

Information specifically requested includes comments on:

- Simplification of Interior Department regulations and alignment with NOAA NRD program requirements
- Suggestions for increasing the use of standardized NRD assessments aimed at less complex sites
- Ways to implement faster and more cost effective early restoration
- Approaches that would increase use of negotiated partial settlements to facilitate early restoration
- Development of techniques to encourage restoration “banking,” that is, work undertaken in advance of an NRD claim that quickly addresses resource injury
- Coordination of NRD and NEPA requirements

The ANPRM traces the new initiative to Executive Order 13777 of February 24, 2017, on [Enforcing the Regulatory Reform Agenda](#), which directs federal agencies to evaluate existing regulations and make recommendations regarding repeal, replacement, or modification in order to reduce burden and improve the regulatory process. (See Clark Hill Alert [here](#).) All indications point to serious governmental interest in undertaking some long-needed changes in the NRD process, and interested parties should not miss this opportunity to advocate as broadly as possible for improvements that reduce costs and enhance results in this important program.

Clark Hill is experienced in working with interested parties to develop informed strategies and effective implementation in complex regulatory matters, at all stages of the proceeding, including appellate challenges. For more information, please contact Jane C. Luxton, Karen C. Bennett, Kenneth von Schaumburg, William J. Walsh, or another member of Clark Hill's Environment, Energy & Natural Resources or Administrative Law Practice Groups.