

Strategies for Addressing Contaminated Sediments and Environmental Exposures

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Fort Worth Dallas

Texas

Mississippi

Alabama

South Carolina

Georgia

Louisiana

Austin

Jacksonville

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Houston

BP / Deepwater Horizon Spill

Florida

Nassau

Havana

SKYTRUTH

175 mi

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Impacts of Contaminated Sediments on Ports

- Disproportionate impact on Ports (in type and scale)
- Ports typically pay more than their “fair share” of remediation and restoration (NRD) costs
- Contamination also hits Ports’ function and purpose
 - Increased costs of testing, dredging and disposal
 - Property damages to uplands, submerged lands and natural resources
 - Impacts on authorized navigation depths and maintenance
 - Potentially reduced traffic, fees, revenues and profits
 - Indirect impacts on jobs and regional economy
- You can change this dynamic

Agenda

- Remediation and Restoration Costs
 - Basic Liability Scheme
 - Why there is disproportionate exposure for ports
- Sources of Contamination and Exposure to Ports
- Ports Unique Ability to Shift Risks and Avoid Costs
 - Assert your claims and recover your damages
 - Protect yourselves through your agreements
- A Couple of Recent Examples

Bases of Port Exposures and Liabilities

- Primary exposure is under federal and state environmental statutes (occasionally the common law)
- Ports are typically alleged liable under the following theories:
 - “Owner” of lands abutting waterways, CDFs, and tidelands and submerged lands (housing legacy pollutants)
 - “Operator” of port facilities, CDFs, fueling terminals
 - “Transporter” if dredging impacted sediments or as Local Sponsor with the US Army Corps of Engineers
- Ports are potentially liable for the costs of investigating and remediating any contamination that they caused or on property which they own.

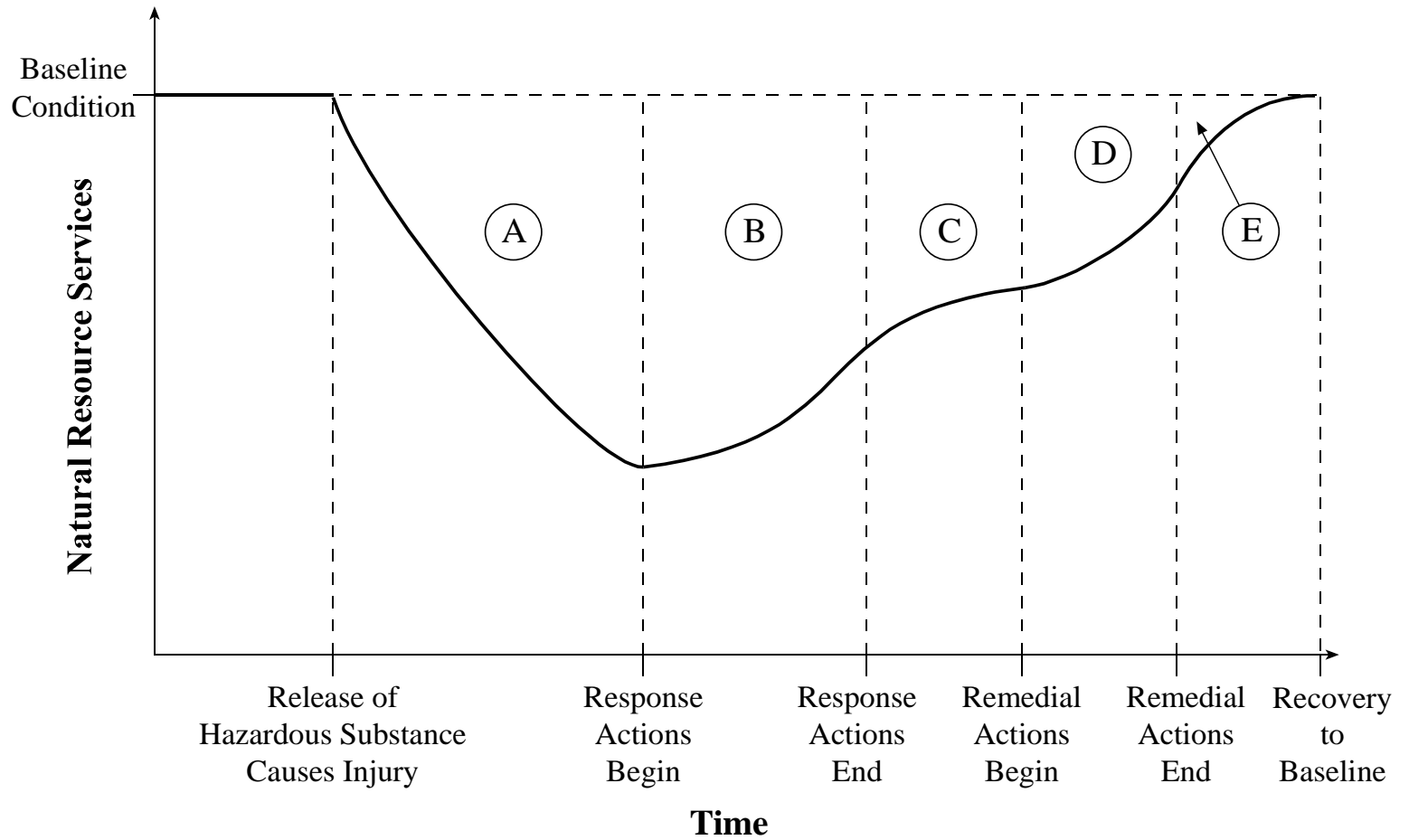
Plus Liabilities of Neighboring Facilities

- Port's neighbors tend to be industrial, manufacturing and maritime operations
- Ports are often landlords for industrial tenants and users of tidelands and submerged lands
- Historical “background” of regional operations and contamination rests *in situ*
- Ports easily blamed for allowing contamination of tenants and facilitating polluting activities (*i.e.*, landlord, received rent, encouraged development, didn't monitor tenants)
- Ports and local taxpayers are often left holding the “orphan” share of liabilities as former operators and tenants restructure, sell their assets, or vanish

Natural Resource Damages

- In addition to remediation costs, ports can be held liable for natural resource damages
- NRD focusses on restoring or replacing the injured resource
 - Primary Restoration
 - Compensatory Restoration
- Loss of Human Uses
- NRD claims sit with designated Trustees
- Ports *can* bear a disproportionate exposure

Return to Baseline



Environmental Liabilities for Port Operations

- Environmental Claims most frequently arise under:
 - CERCLA, State Superfund & Equivalents
 - RCRA and Removal Actions
 - OPA for oil spills and hydrocarbons
 - Clean Water Act and state law equivalents
- Strict liability applies
- Joint and several liability almost always applies among responsible parties
- Ports bear disproportionate liability for “orphan” shares and background contamination

Change the Dynamic

- Ports should not suffer disproportionately or pay for the contamination of others
- Status may afford unique standing and remedies
- Port status as public landowner affords great power over litigation, forum and remediation
- Port status as economic engine for community creates potentially sympathetic judges and jurors
- Ports can shift the balance by
 - Enforcing the public's rights
 - Seeking property damages, increased costs and lost revenues and profits

Costs & Damages Available Under OPA

- Response Costs and Natural Resources Damages

AND

- Property Damages (*Injury to or economic loss resulting from destruction of real property*)
- Lost Governmental Revenues (*net loss of taxes or governmental income “due to” the injury to real property, personal property or natural resources*).
- Increased Costs of Public Services
- Lost Profits and Earning Capacity (*Damages equal to the loss of profits or impairment of earning capacity due to the injury to property or natural resources*)

Recoverable Damages in Legacy Actions

- Reimbursement of Remediation and Restoration Costs
- Injunctive & Equitable Relief (abatement of the nuisance)
- Property Damages
 - Loss of use of current and future CDFs
 - Market value of property or loss of income
- Lost revenues, fees and income
- Exemplary damages and penalties
- Attorneys fees and litigation costs
- Indemnity from Future Costs and Third-Party Claims

Claims and Tools to be Made Whole

- Trespass and Private Nuisance
- Negligence and Gross Negligence
- Statutory and Per Se Violations
- Strict Liability for Intentional Discharges
- Common Law Obstruction of Navigation/Purpresture
- Disgorgement Theories & Unjust Enrichment
- Public Nuisance: Imminent Danger to the Environment
- Public Trust and Natural Resource Damages
- Breach of Leases, Contracts, Tariff and Indemnities
- Insurance

Two Recent Examples

- *San Diego v. General Dynamics and Lockheed Martin*
 - Assert Leases, Indemnity, Common Law, Purpresture
 - Good Science & Accurate Data to the Water Board
 - Remediate to the Port's satisfaction and protect the Port against impacts on future dredging and development costs caused by the contamination and the remedy
- *San Diego v. Monsanto et al*
 - PCB contamination throughout the Bay
 - Focus on the public nuisance created by marketing PCBs with knowledge of impacts in marine environment and disposal
 - Paradigm Shift

Order Denying Monsanto's Motion to Dismiss

- “The tidelands and submerged lands of the Bay are public trust lands.” Order Denying Monsanto’s Motion to Dismiss, p. 21.
- “The Port District was granted the authority over “control, regulation, and management of the harbor of San Diego upon the tidelands and lands lying under the inland navigable waters of San Diego Bay.” Id.
- “The Port District was given the power to “protect, preserve, and enhance” the Bay.” Id. (the Port holds the public lands “for the establishment and maintenance of those lands for open space, ecological preservation, and habitat restoration.”)
- “The Court finds that the Port District has alleged sufficient facts to seek damages for “the injury to and loss of use of natural resources deriving from the presence of PCBs in and around the Bay, including the cost of restoring those natural resources.”

Review and Revise Your Agreements

- Agreements with Industry and Users
- Tariffs
- Contracts with tenants (leases, easements, access agreements)
- Response Plans
- Protect the Port from:
 - Spill Liabilities
 - Costs and Damages caused by a spill
 - Lost Revenues & Profits
 - Consequential Damages

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