# **ENVIRONMENTAL ISSUES FACING PORTS**



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### **AGENDA**

- Framework of Environmental Laws
  - Exposure
  - Impacts
  - Claims
- Hypothetical
- Spot the Issues
- Environmental Audits
- Risk Management

# "WHAT ENVIRONMENTAL ISSUES?"



### **EXPOSURES & LIABILITIES**

Public Ports typically have limited exposure under the common law

Sovereign Immunity under State Laws

**Eleventh Amendment Immunity** 

Port's real exposure to suit is from other Governmental Agencies

Third-Party suits under Superfund and similar remedial statutes



# ENVIRONMENTAL LIABILITIES FOR PORT OPERATIONS

- Environmental Claims most frequently arise under:
  - CERCLA
  - RCRA
  - OPA
  - Clean Water Act and State law equivalents
  - State Superfund and equivalents
- Strict Liability Applies
- Joint & Several Liability Often Applies
- CDFs have RCRA exemption, but may be subject to other regulations and claims

#### **BASES OF STRICT LIABILITY**

- Ports can be alleged liable under the following theories:
  - "Owner" of lands abutting waterways, CDFs and submerged lands which may reflect historical operations and legacy pollutants
  - "Operator" of wharves, docks, CDFs, warehouses, loading facilities
  - "Transporter" if dredging impacted sediments or as Local Sponsor with the US Army Corps of Engineers
  - "Generator" if Port's facilities have contributed to contamination historically or presently
- Proximity to waterways and wetlands can give rise to heightened environmental scrutiny and greater potential impact on eco-system

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### NATURAL RESOURCE DAMAGES

- Fundamentals of NRD
- What are resources?
- What is an injury?
- What is being compensated or sought?
- Who can bring these claims?
- What kinds of damages?
- Trends?

# EMERGENCE OF SIGNIFICANT NATURAL RESOURCES DAMAGES CLAIMS



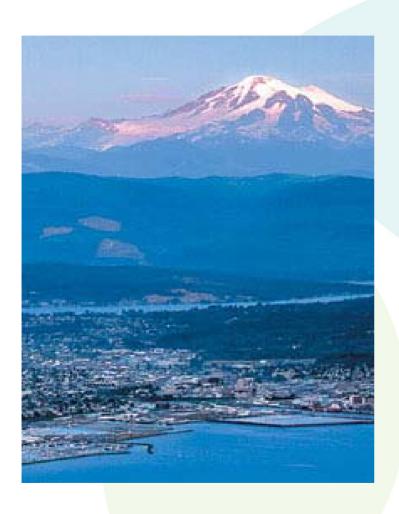


- 1989 Exxon Valdez
- 11 million gallons of crude into Prince
   William Sound
- Huge ecological impacts
- Huge clean-up costs
- Exxon settled
   Natural Resources
   Damages for
   almost \$1 Billion

# PARADIGM SHIFT?

- As a result, many expected a crush of NRD
- NOAA/DARP: Obtained more than \$300 million for coastal restoration projects since 1990, but NRD did not materialize as "the next big thing"
- NOAA and DOI continue to do an admirable job of assessing damages to natural resources
  - Funding issues
  - Increased emphasis on States
- States and Tribes becoming much more active

# SIGNIFICANCE OF NRD TO PORTS



- Confluence of commerce and environment
- Industrial facilities, shipping, and terminals coexist with natural resources
- Industry naturally builds up around ports, railroads & transportation hubs
- Rivers, bays, lakes, oceans (and tributaries, wetlands and groundwater that feed them) become the highway for commerce

# PORTS' NATURAL RESOURCES

- Port's natural resources are also held in public trust
- Includes the ecosystem, plants, animals and organisms
- Ports are particularly susceptible to environmental remediation and NRD claims



# PORTS' EXPOSURES AND RIGHTS

- Contaminated urban/industrialized waterways can require huge remediation efforts/costs
- Necessary focus on sediments and waterways
- Ports have unique status and damages (contamination impacts ports' business)
- Look to Port's rights and standing (legislative solutions)
- Ports must assert their rights and defend against generator claims in contribution
- NRD Claims can be truly significant in terms of exposure and business impacts

# NATURAL RESOURCES TRUSTEES

- Federal Trustees
  - Department of Interior (terrestrial resources)
  - Department of Commerce/NOAA (marine resources)
- States
- Tribes
- Overlapping jurisdiction and trusteeship
- Know who you are dealing with and their objectives



### LEGAL AUTHORITY FOR NRD CLAIMS

- Trustees have authority to assert NRD Claims under federal environmental statutes
  - CERCLA (hazardous substances)
  - OPA (petroleum products)
  - Clean Water Act
  - Others of limited application
- State laws (e.g., New Jersey Spill Act)
- Common law/Public Trust Doctrine

#### **CERCLA LIABILITY**

- Ports can be exposed as owners/operators of facilities and/or submerged lands, generators or possibly transporters
- Liability under CERCLA extends to typical Removal and Remediation costs
- Liability also extends to "damages for injury to, destruction of, or loss of natural resources resulting from a release of hazardous substances"

# **OIL POLLUTION ACT**

- OPA establishes liability for natural resources damages resulting from releases of petroleum
- OPA applies to discharge of oil "into or upon navigable waters or adjoining shorelines...."
- OPA provides for the recovery of damages for "injury to, destruction of, loss of or loss of use of natural resources, including the reasonable costs of assessing the damage...." 33 U.S.C. § 2702(b)(2)(A).
- OPA applies to discharges of oil and resulting damage occurring after August 18, 1990.

# WHAT ARE NATURAL RESOURCES?



 CERCLA and DOI natural resource damage assessment rules define natural resources to include:

"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 ..., any State or local government, any foreign government, and Indian Tribe..."

42 U.S.C. § 9601(16); see also 43
C.F.R. § 11.14(2).

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#### INJURY TO A RESOURCE

- Terms "injury, destruction or loss" not defined in CERCLA
- DOI regulations: injury is a measurable, adverse change (either long- or short-term), in the chemical or physical quality or viability of a natural resource
- E.g., injury to fish & aquatic organisms existed because PCB exceeded tolerance levels set by FDA. <u>Acushnet</u> River, 716 F. Supp. 676 (D. Mass. 1989)
- Injury that results in a change in baseline conditions (i.e., conditions but for the release).
   43 C.F.R. § 11.14(e).
- Identification vs. quantification

# DIFFERENT THAN CLEANUP/REMEDIAL CLAIMS

- Cleanup/response is primary
- Risk based
- Human health & environment
- Superfund and other State/federal schemes
- More legal authority/case law
- More accepted for cleanup

## NRD CLAIMS



- Federal Scheme: residual to cleanup/response
- Focus on natural resources
- Brought by natural resource trustees
- Damages for actual injuries
- Can cover cleanup-like actions to break pathways; but restoration is more comprehensive



#### NRD CLAIMS

- Claims exist where a release of a hazardous substance or oil results in an actual adverse effect on the resource or on the services provided by that resource to the public
- Injury above baseline
- Actual damages
- Environmental statutes: strict, joint and several liability
- Arguments for several liability and divisibility of the harm

### NATURAL RESOURCE DAMAGES

- Trustees may seek to recover damages for the injury to the resource caused by the effects of contamination and the effects of the remedial actions taken at the site
- Damages include
  - Cost of restoration and/or replacement (actions taken with respect to the same resource or type of resource)
  - Acquisition of an equivalent resource (actions taken to replace the equivalent of the services to humans/environment provided by those resources)

# WHAT DAMAGES CAN BE SOUGHT?

- The cost or value to <u>make the public whole</u> for their losses of natural resources caused by the release of hazardous substances and/or petroleum products
- The cost or value to "restore, rehabilitate, replace, or acquire the equivalent" of the injured natural resource and their services.



### **MEASURE OF DAMAGES**

- Can be very contentious/controversial
- Damages include three broad elements
  - Cost of restoration, replacement or acquisition of equivalent resources
  - Other compensable values (including interim loss of use of the resource and lost "non-use" values)
  - Assessment Costs

#### **DAMAGE CALCULATIONS**

- Difficulties in calculating damages to resources
  - Lack of information on baseline
  - Valuing resources that do not have an obvious economic value
- Equivalency Analysis
  - "resource to resource" and "service to service" valuations
  - Can be criticized as technically indefensible
- Contingent valuation/surveys
  - Ability to capture a much greater suite of values and damages
  - Difficult and contentious

# **IMPACTS TO PORTS**

# ENVIRONMENTAL LIABILITIES FOR NEIGHBORING FACILITIES

- Port's neighbors tend to be large industrial, manufacturing and commercial operations
- Ports are often landlords for industrial tenants
- Historical contamination of waterways (pre-1970)
- As a local sponsor and navigation district, Ports can be blamed for allowing contamination of neighbors and facilitating activities
- Ports and local taxpayers can be left holding the liabilities as former corporate operators restructure, sell assets and vanish

#### **ASSERT YOUR RIGHTS**

- Status as local government affords unique remedies
- Port status as landowner affords great power over litigation, forum and remediation
- Traditional damages analysis should not apply to Ports
- Port status as public entity and economic engine for community creates jurors likely to be responsive
- Environment is the touchstone. Make the case about:
  - ➤ Defendants' Releases and Environmental Injury
  - **▶** Remediating Legacy Pollutants
  - ➤ Corporate Responsibility for the Pollution

#### **AVAILABLE THEORIES OF RECOVERY**

- Negligence, Trespass and Private Nuisance
- Gross Negligence and Per Se Violations
- Superfund, OPA and RCRA
- Water Code Violations
- Strict Liability for Intentional Discharges
- Purpresture
- Common Law Obstruction of Navigation
- Public Nuisance: Imminent Danger to the Environment
- Breach of Contract
- Fraud and Negligent Misrepresentations

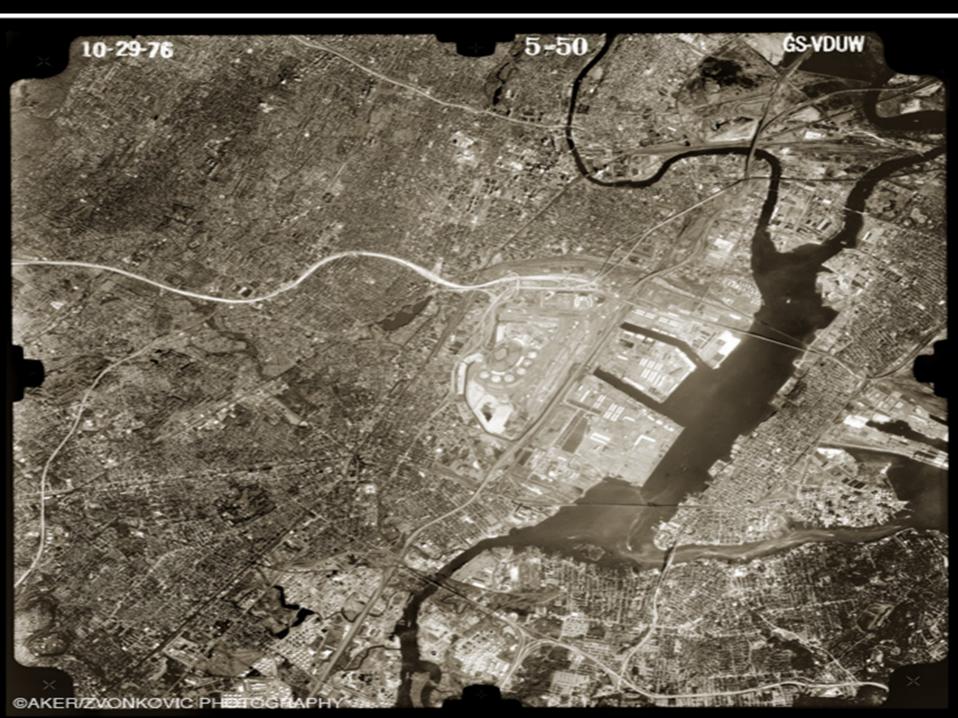
#### DAMAGES AND RELIEF AVAILABLE

- Compensatory damages to reimburse costs &
- Injunctive order requiring remediation
- Property Damages:
  - > Loss of use of current and future CDFs
  - ➤ Market value of property or loss of income
  - Remediation costs of waterways
- Exemplary damages and penalties
- Attorneys fees and litigation costs
- Indemnity from Future Costs and Third-Party Claims

# PUBLIC TRUST

#### INTERSECTION OF ECONOMY & ENVIRONMENT

- Waters of the State are vital public resources
- Intersection of the Environment & Economy
  - Navigation & Commerce
  - Industry & Jobs
  - Tax base & Growth
  - Development & Redevelopment
- Contamination that damages the State's economy, ecology, and environment is compensable



### PUBLIC TRUST DOCTRINE

The Public Trust Doctrine and New Jersey common law provide that "the State is responsible, as trustee of the state's natural resources, to manage these natural resources for the benefit of the present and future citizens of New Jersey." Arnold v. Mundy, 6 N.J.L. 1, 10 Am. Dec. 356 (1821).

Trust doctrine extends to "dominion and sovereignty over lands covered by tidal waters." N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97 (1973), aff'd, 133 N.J. Super. 375 (App. Div. 1975), rev'd on other grounds, 69 N.J. 102 (1976).

## FOUNDATIONS OF PUBLIC TRUST DOCTRINE

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof...." Neptune city v. Avon-by-the-Sea, 61 N.J. 296, 304 (1972) (citing Central R.R. Co. v. Illinois, 146 U.S. 387 (1892)).

# NAVIGABLE WATERS ARE A VITAL ECONOMIC RESOURCE

"The original purpose of the [public trust] doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food." N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. at 101-102 (quoting Arnold v. Mundy, 6 N.J.L 1, 71 (1821)

### As Trustee, the State is Charged with the Protection of the Resource

"The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the state must be empowered to bring suit to protect the corpus of the trust – i.e., the waters – for the beneficiaries of the trust – i.e., the public." N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. at 103 (quoting Maryland v. Amerada Hess, 350 F. Supp. 1060, 1067 (D. Md. 1972)).

### **COMMON LAW DAMAGES & INJUNCTIVE RELIEF**

"The State has not only the right, but also the affirmative fiduciary obligation, to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus." N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. at 103 (rejecting the argument that the State is only entitled to injunctive relief, noting "it would appear to this court unreasonable and injudicious to impose the fiduciary duties of a trustee upon the State while withholding the ability to have the corpus reimbursed for a diminution attributable to a wrongdoer.")

### HYPOTHETICAL

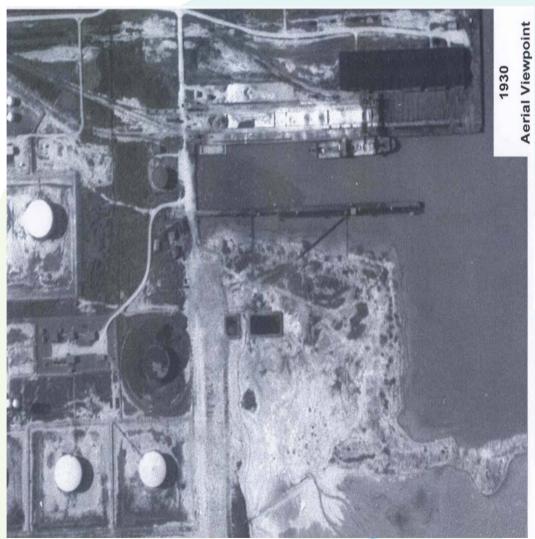
### **EXAMPLE: PORT OF TEXAS CITY CASE**

- Hydrocarbon Contamination discovered at depth in soils and groundwater of Port of Texas City's South Slip
- Hydrocarbons discovered releasing into South Slip
- Port put the Site into Texas' Voluntary Clean-Up Program;
   sought contribution from pipeline operators/refineries
- Historic operations of numerous refineries, chemical companies and transporters; maze of pipelines running adjacent to the South Slip
- All defendants insisted that it was someone else's product
- Pipeline operators sought to put the burden on the Port to prove proportionate allocation and percentage of responsibility of each defendant

### PORT OF TEXAS CITY: SOUTH SLIP



# PORT OF TEXAS CITY: SOUTH SLIP (HISTORICAL)



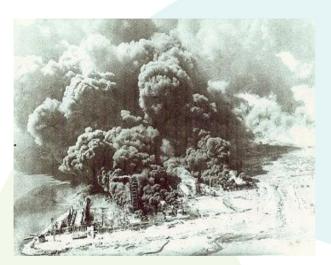
### SOUTH SLIP: PLUME MAPS/VOLUMES



### PROBLEM WAS FROM PIPELINES



# DEFENDANTS BLAMED TEXAS CITY DISASTER: 1947









April 16,1947 (Courtesy National Board of Fire Underwriters)



### SOUTH SLIP: PLUME MAP/CONSTITUENTS



### PTC: Causes of Action

- RCRA Injunction and Prospective Remediation Costs
- Public Nuisance: Imminent Danger to the Environment
- Breach of Contract (Lease and Easement Agreements)
- Negligent Maintenance of Pipelines: No Maintenance or Cathodic Protection in Saltwater, Tidal Environment
- Oil Pollution Act: Joint and Several Liability for Releases

## RECOVERY/DAMAGES SOUGHT IN LITIGATION

- Compensatory damages to reimburse Port for expenses arising from contamination
- Future costs of remediation projects
- RCRA Injunctive order requiring defendants to investigate and remediate South Slip
- Injunction and Declaratory Judgment to Prevent Imminent Releases to Galveston Bay and endangerment of the Environment
- Attorneys fees and litigation costs

### PORT OF TEXAS CITY: RESULTS

- Individual Settlements with Six Defendants
- Port managed & closed remediation of Plume 1 in Voluntary Cleanup Program
- Remediation Project included:
  - ➤ Construction of containment wall around the South Slip
  - ➤ Long term recovery of hydrocarbons in Plume 1
- One defendant assumed/managing remediation of Plume 2 in VCP

### PORT OF TEXAS CITY: RESULTS

### **Defendants' Payments:**

- Paid all Port expenses, attorneys' fees and litigation costs
- Paid for construction of containment wall around South Slip
- Paid for all groundwater wells, treatment and remediation work
- Established Environmental Remediation
   Trust to cover all future O&M Costs and
   Contingencies

#### CONCLUSION

- Avoid suit from Governments
- Engage Environmental Issues and Regulatory Agencies proactively
- If third-party claims are asserted: Look to your Port's sovereign immunities first
- If Governmental actions look eminent, engage neighboring sources and generators
- In all cases, avail yourself of those remedies particular to Ports to shift exposure & liabilities



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