Is it Closing Time for Reopener Provisions in CERCLA Natural Resource Damages Settlements?

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Natural resource damages (NRD) have been critically referred to as the "sleeping giant" of environmental liability.[1] The specter of potentially outsized recoveries continues to loom large, especially after the *Deepwater Horizon* oil spill thrust such claims into the public consciousness in a way not experienced since the *Exxon Valdez* oil spill and at a scale that makes even the most financially-solid responsible party shudder. Conceived as a civil remedy to make the public whole for injured natural resources through restoration projects that aim to restore, replace, or acquire natural resources equivalent to or greater than those injured by a spill or release of hazardous substances, the inherent uncertainty of an NRD assessment exercise makes it practically difficult and plagued with unpredictability. The real specter for NRD, though, may not be the unpredictability, potential size, or even the growing number of such claims, as it is the little-known fact that too many NRD cases—particularly under CERCLA—linger unresolved for far too long, often more than a decade, delaying restoration benefits to the public and racking up transaction costs without real return.

Though there are many reasons for the generational durations of many NRD assessment and negotiation processes, particularly under CERCLA, those reasons include orthodoxies that are simply vestigial. Among these is the default insistence to include reopener provisions in settlements. Meant to protect the public from potential post-settlement realities that eventually reveal the inadequacy of a resolution, in truth, reopener provisions are almost never invoked. Yet, because they undermine the corporate imperative of finality in managing liabilities, reopeners can be a real impediment to reaching settlement. Thus, if restoration is the main purpose of NRD, and earlier restoration is a shared goal between the trustees as representatives of the public and responsible parties, it is high time to rethink reopeners.

Despite how frequently they are used, the underlying statutory basis for including reopeners in CERCLA NRD settlements is suspect. Section 122 of CERCLA authorizes settlement when it is practicable and in the public interest to do so, and generally governs all settlements under the statute. 42 U.S.C. § 9622. Section 122(f)(6) provides:

> **(f) Covenant not to sue**
> . . .
> **(6) Additional condition for future liability**
> **(A)** Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), *a covenant not to sue a person concerning future liability* to the United States *shall include an exception to the covenant* that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the *covenant where such liability arises out of conditions which are unknown at the time the President*

> *certifies under paragraph (3) that remedial action has been completed at the facility concerned* (emphasis added).

This provision serves as the apparent statutory basis for reopeners in CERCLA NRD settlements, evidenced by the close tracking of this language in most NRD consent decrees. However, when read as a whole and when meaning is given to the term "remedial action," section 122(f)(6) can and should be limited only to response action settlements, not NRD settlements.
Not incidentally, a later subsection of section 122 specifically mentions NRD, including covenants not to sue in the NRD context, but reopener language is absent:

> **(j) Natural resources**
> . . .
> **(2) Covenant not to sue**
> An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

Thus, the specific provision relating to NRD separately addresses covenants not to sue in NRD consent decrees, and that provision neither requires a reopener nor references the reopener in section 122(f)(6). When read independently, the NRD-specific provision supports the view that reopeners are not statutorily required.

Moreover, very little interpretation of section122(f)(6) exists, and what exists is mixed. Only one district court case from 1989, *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1036 (D. Mass. 1989), directly addresses whether section 122(f)(6) applies to a purely NRD consent decree (that is, not a typical settlement involving both the response action and NRD). There, the court acknowledged that section 122 lacks clarity with respect to whether subsection (f)(6) applies only to response actions, given that subsection (j) refers to NRD separately. Although the court noted that section 122(f)(6) seems to apply only in the context of a "cleanup settlement," the court also discussed that Congress likely did not foresee a situation in which the NRD was tried before the response cost claim, and held that section 122(f)(6) was applicable based on congressional intent:

> Even though Congress, never anticipating the circumstances of the instant matter, had no intent one way or the other whether the two provisions in question should apply to the Proposed Decree, this Court holds that they do apply in order to fulfill the more general intent of Congress with respect to the proper manner of settling CERCLA actions.

The court concluded that the lack of a reopener is inconsistent with section 122(f)(6) and the intent of Congress to "fully restore the damaged natural resources" and is therefore against the public interest. Of course, if the intent of Congress is to fully restore damaged natural resources, and reopener provisions impede settlements and are never used, neither such intent nor the public interest is served. Perhaps that reality accounts somewhat for the fact that no other cases have supported this position.

The U.S. Court of Appeals for the Eighth Circuit took a different view a few years later, finding that section 122 addresses distinct categories of settlements—response actions in section 122(f) and NRD in section 122(j). In determining whether section 122(f)(6) applied to cost recovery actions in *United States v. Hercules, Inc.,* 961 F.2d 796, 799 (8th Cir. 1992), the court construed section 122 as a whole and ultimately concluded that the reopener portion of the statute is limited to response actions:

> Subsections (a) through (f) of CERCLA § 122, however, consistently refer to agreements for actual remedial action as opposed to agreements for the recovery of costs occasioned by environmental damage. In contrast, subsections (g) through (i) of CERCLA § 122 address cost recovery settlements, and subsection (j) applies to natural resource damage settlements. *Reading the statute as a whole, it contemplates different types of settlements. The provisions limiting remedial action cleanup settlements, CERCLA § 122(a)-(f), are separate* from those addressing cost recovery settlements, CERCLA § 122(g)-(i). To interpret the statute as Hercules argues would render several subsections of the statute redundant because the topics are repeated within the statute (emphasis added).

Even though it is only a single, dated district court-case interpretation that requires a reopener in consent decrees for NRDs, trustees have largely become wedded to it. A 2004 Department of Interior (DOI) policy memo unequivocally states that section 122(f)(6) requires a reopener for NRD consent decrees: "For NRDAR settlements under [CERCLA], settlements must include a re-opener, as required by CERCLA Section 122(f)(6), unless there is a justification for a complete release due to extraordinary circumstances… . . . [citing *Acushnet*]." Dept. of Interior, *Documentation for Natural Resource Damage Assessment and Restoration Settlements and Covenants Not to Sue* (May 7, 2004). Similarly, in the U.S. Fish and Wildlife Service's 2018 guidance on NRD assessments and restoration activities, section 122(f)(6) is cited as requiring NRD consent decrees to include a reopener: "Unless there are extraordinary circumstances that the AO, Solicitor, or Department of Justice (DOJ) justifies in writing, settlements should include the reopener required by section 122(f)(6) of CERCLA. A reopener allows the Department to make a later claim if we discover certain new information or unknown conditions at a later date." U.S. Fish & Wildlife Svc., *Part 573 Response to Discharges of Oil and Releases of Hazardous Substances and NRDAR, Ch. 3 Natural Resource Damage Assessment and Restoration Activities*, 573 FW 3 (July 10, 2018).

But, again, the argument for requiring a reopener based on section 122(f)(6) is premised on a single district court case from almost three decades ago that acknowledges alternative interpretations.

Fundamentally, basic principles of statutory construction belie attempts to require a reopener akin to section 122(f)(6): (1) NRD settlements are addressed in section 122(j), a separate subsection pertaining specifically to NRD that includes its own requirements for a covenant not to sue, which has been upheld by the Ninth Circuit in *State of Ariz. v. Components Inc.,* 66 F.3d 213, 216 (9th Cir. 1995) and in at least one other district court, *United States v. Atlas Lederer Co*., 494 F. Supp. 2d 629, 639 (S.D. Ohio 2005); (2) the language of section 122(f)(6) suggests that it is limited to response actions; and (3) section 122(f)(6) starts with exceptions to the reopener that apply only to response actions.

Thus, between a statutory interpretation argument, supporting case law, and a few successful NRD consent decrees without reopeners that have not been judicially challenged on that basis, there is freedom to reconsider the default inclusion of reopeners. That freedom should be exercised as we collectively look for ways to unburden the public trust from unnecessarily protracted processes and bring restoration benefits sooner.

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Endnote

[1] *See* Ken Stier & Mark J. Magyar, *NRD: The New Battleground in Environmental Litigation* 2004 Pub. Pol'y Center of N.J. 1 (attributing the phrase "sleeping giant" to professor Richard Stewart at New York University Law School).