COMMENTARY

ENVIRONMENTAL LAW

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Can Natural Resource Damages Make Sense?

The Pennsylvania Supreme Court's fractured decision in *Robinson Township v. Public Utility Commission*, 83 A.3d 901 (Pa. 2013), has refocused attention on the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. That raises the prospect of pressure on state agencies that are natural resource trustees to assert natural resource damages claims. NRD claims are not, or at least should not be, like cleanup claims. Courts should be much more reluctant to defer to "expert" agencies in NRD cases because expertise may not be possible, even in principle.

NRDs compensate for harms to public natural resources that a cleanup cannot alleviate. If public land becomes contaminated and unusable, one can clean it up, but one cannot restore the use during the period between the release that caused the contamination and the successful completion of the cleanup. Moreover, environmental cleanups rarely achieve a pristine or even a prerelease condition. They mitigate risk to an acceptable level, but may leave environmental resources somehow altered.

In a private context, if a defendant were to dump her trash all over her neighbor's backyard, she would have to clean up the trash (the remediation), compensate for the loss of the use of the backyard in the interim period, and compensate for any permanent diminution in the value of the property. The latter two are analogous to NRDs. However, NRDs are damages to property that everybody owns collectively, so thinking about how to measure them becomes a brain-twister. How much is a reduction in the population of songbirds worth? How much is contamination that causes a fish consumption advisory worth?

Article I, Section 27 of the Pennsylvania Constitution sets out the trust relationship between the state and "public natural resources." It provides:

"The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people."

The *Robinson Township* plurality held that each state and municipal agency has an affirmative constitutional duty to "conserve and maintain" those resources. Thus, the legislature could not constitutionally keep a municipality from exercising land use regulation over oil and gas activities to fulfill that conservation and maintenance obligation.

Robinson Township's plurality opinion expressed what may be a new, more expansive view of that trust obligation. We cannot yet know exactly what the case means. Some take the position that a plurality opinion binds no one. However, the case surely raises the question whether the conservation and maintenance obligation implies a duty to obtain compensation for damages to the public trust corpus.

Ecological services are in the eye of the beholder. Why is one community of plants and animals better than another one?

Several federal statutes make NRDs available to federal, state and tribal natural resource trustees. Most claims have arisen under the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act and the Oil Pollution Act of 1990. CWA and OPA claims often arise from oil spills; most notoriously at present, the spill at the Macondo well in the Gulf of Mexico. CERCLA claims have arisen at various large, and sometimes not-so-large, historical contamination sites and river sediment sites. The Pennsylvania Hazardous Sites Cleanup Act establishes an independent basis for an NRD claim.

We have almost no experience with NRD claims by the Pennsylvania trustees. They participated in an assessment of NRDs for the Athos II spill in the Delaware River and for the Palmerton Zinc Superfund Site. The Pennsylvania Departments of Environmental Protection and Conservation and Natural Resources, the Fish and Boat Commission and the Game Commission acted as natural resource trustees in those cases. Federal trustees typically include the secretary of the Interior acting through the Fish and Wildlife Service and the secretary of Commerce acting through the National Oceanographic and Atmospheric Administration, but can extend to many other federal agencies.

The point of natural resource damages is to collect enough money or projects provided in-kind to "restore, replace or acquire the equivalent of" the natural resource services that have been injured.

While some would say that that means the injured resources should be put back exactly as they were before any release, that is not in practice the way any case can work. The remedial programs clean up the release. If there is anything left after that work, NRDs should not fund a "super-cleanup." Once one abates a public nuisance, one does not come back and clean it up some more.

So, an NRD assessment has to identify and to value the services that have been lost. Losses generally come in two broad categories: ecological services and human use services.

Ecological services are the services that a resource provides to other ecological resources. If a release damages a wetland so that water quality in a stream degrades, harming the fish population, that is an ecological service loss.

Human use services are services provided by natural resources directly to people. In the same example, if anglers like to fish in the stream, then the loss of fish may make the stream unsuitable for fishing or it may make each individual recreational fishing trip less enjoyable.

Trustee agencies would like one to believe that valuing losses is scientific and analogous to making remedial decisions. I would argue that science only gets one so far in valuing NRDs.

Ecological services are in the eye of the beholder. Why is one community of plants and animals better than another one? Who is to say that one species of wetland plant or worm or insect or fish is more desirable than another? Those are human value judgments. A carp is every bit as fully evolved as a trout. We just like the trout better. Therefore, science can measure differences between ecological communities as the result of a release, but cannot order them, let alone value them. The tastes of the human beings who experience the stream or the birds or whatever resource ultimately receives the ecological services determine what has value and what does not.

Similarly, the value of human use service losses depend critically on the tastes and preferences of the people who experience the loss. Is being unable to watch birds in Wetland A a devastating loss, or does Wetland B just over the hill substitute? Perhaps playing golf substitutes.

Further, NRD claims have to lead to restoration projects. The projects compensate the public for losses to the public. The public is not singular. It is a collection of people, and that collection changes over time. The identity of the individuals changes and each individual himself or herself changes over time. Enhanced birdwatching opportunities in 2014 do not compensate a person for lost birdwatching opportunities in 1994 if that person has moved, lost interest in birds or become too old.

One cannot conduct a study and determine which projects exactly compensate for losses. No amount of science or economics will tell you that this trail is worth the loss of that fishing spot for 10 years ending this year. In this way, NRDs resemble pain-and-suffering damages for personal injury, except there is no single plaintiff to consult. When a plaintiff is injured and in pain for months, that plaintiff has suffered compensable damage. How much money compensates is a matter for the jury. We have rules of thumb for the proper amount—three times "specials," for example—but they are not scientific. Those rules of thumb just represent a rough approximation of what juries often do. Juries are consulting their sense of fairness.

So too with NRDs. Courts or juries will have to determine what is fair compensation. They will be told by trustees and defendants that fancy experts know the answer. But scientists and economists can only inform a damages or restoration determination; they have no special expertise on what the public ought to receive in compensation.

Lawyers have to remind courts to be wary of the usual deference to administrative agencies. When the DEP says that damages are $10 million, that is not like saying that one has to address groundwater with a concentration above a threshold to protect health. The former is a dressed-up fairness statement. The latter is a risk calculation whose reasoning is transparent. •

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