

Agency Deference and Natural Resources Damages

By David G. Mandelbaum | November 20, 2025 | The Legal Intelligencer

A few weeks ago, the Court of Appeals for the First Circuit decided a natural resources damages case under the Oil Pollution Act with some interesting implications for NRD claims generally. *United States v. Ernst Jacob GmbH & Co. KG*, No. 23-1969 (1st Cir. Oct. 23, 2025). Those few who read this column regularly will recall that in September I considered an NRD case under the Comprehensive Environmental Response, Compensation and Liability Act *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals Ltd.*, No. 24-5565 (9th Cir. Sept. 3, 2025). We have precious few litigated NRD cases at all, so to have two appellate decisions in two months is rare and worth noting.

Confederated Tribes addressed proper valuation of injuries to natural resources with cultural significance, assuming liability. *Ernst Jacob* addresses two important issues: (a) which trustee has a right of action to sue over which resources and (b) who gets to decide whether an injury arises from a release or a threatened release.

Ernst Jacob arose from the grounding of a double-hulled oil tanker on a coral reef off the shore of Puerto Rico. The grounding and subsequent efforts to free the vessel damaged the reef. However, the accident did not result in any release of oil.

The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-20, establishes a response, cost recovery, and natural resources damages scheme for oil spills with many similarities to the federal scheme established by CERCLA for releases of hazardous substances and, therefore to the scheme set up by the Pennsylvania Hazardous Sites Cleanup Act. Response actions under both OPA and CERCLA must follow the National Contingency Plan (“NCP”), 40 C.F.R. pt. 300, for example. While there is a recent decision under OPA disregarding CERCLA precedent on the right to a jury trial, *United States v. ERR, LLC*, 35 F.4th 405 (5th Cir. 2022), many courts apply CERCLA precedent in OPA cases and OPA precedent in CERCLA cases.

The district court in *Ernst Jacob* granted summary judgment to the United States and against the defendant owners of the vessel. Defendants appealed, arguing first that the United States had not demonstrated the absence of a factual issue as to whether the coral reef was a natural resource subject to federal trusteeship. OPA allows the United States to recover damages for injuries to natural resources “belonging to, managed by, controlled by, or appertaining to the United States.” 33 U.S.C. § 2706(a)(1); *see also* 40 C.F.R. § 300.600. A state (and for this purpose, Puerto Rico is a state) may recover damages for injury to its natural resources as well.

Trusteeship does not require literal ownership. The United States (or a state) can be a trustee for a natural resource if that government “manages or controls” the resource. So, even a resource that no one

owns (like the air) or that a state owns (like a river) has been thought also to be a potential federal resource or to contain federal resources if the United States “manages or controls” them.

The issue in *Ernst Jacob* arose because a separate statute – the Federal Relations Act – assigned control over “bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes.” So, the defendants argued, the coral reefs at issue in *Ernst Jacob* were Puerto Rico’s natural resources, not federal resources. The court of appeals decided that a material factual issue existed as to whether the United States had exercised control over the reefs, precluding summary judgment.

Importantly for other NRD cases, the court of appeals rejected the argument that the reefs were federal resources because they were subject to federal regulation under several environmental statutes. “The mere fact that an agency has some regulatory authority over a natural resource, however, would not appear to suffice to show that it ‘manages or controls’ that resource.” That may be a departure from the way those few NRD cases to have elicited decisions have gone; for example, anadromous fish are almost universally treated as a federal resource. We shall see how the district court addresses the factual development of this issue on remand.

The defendants next argued that a factual issue existed as to whether the injuries to the reefs arose because of a “substantial threat of a discharge of oil” as required by OPA. Had the reefs been injured by a release of oil, there would have been no issue. But in this case, the reefs were hurt by the vessel and by the measures taken to get the vessel off the reefs. Those are real injuries, but they are only compensable if they occurred because of that threat of a discharge of oil.

The federal official in charge of the response, known under OPA and CERCLA as the “on-scene coordinator” made a determination that the measures taken and the injuries incurred were, in fact, caused by a substantial threat of a discharge of oil. The district court treated that determination as binding and therefore beyond factual dispute for purposes of summary judgment.

The court of appeals disagreed. To be sure, the on-scene coordinator might be delegated certain responsibilities to determine what actions should be taken. That determination would be an agency action, and a court ought to review it deferentially. But the determination as to whether those actions (some of which injured the reefs) were or were not in response to a “substantial threat of a discharge of oil” was an element of liability, not an agency action. The district court could not take that determination of an element of liability either as binding, or as binding if not arbitrary and capricious. The district court had to consider that issue *de novo*. Consequently, summary judgment was not appropriate on this ground as well.

Note that *Ernst Jacob* may be inconsistent with the HSCA NRD provisions. *Ernst Jacob* calls for the district court to make factual findings and on issues of liability not to defer to agency determinations. HSCA allows claims in a court or in the Environmental Hearing Board but requires all NRD issues to be decided exclusively on the administrative record.

The *Ernst Jacob* opinion reflects an antipathy to NRD liability. The *Confederated Tribes* decision assumed liability and endorsed a capacious view of valuing the damages. These results are not necessarily inconsistent, but the indirect tension between them points out that there is a lot of law we do not know about NRD claims because so few of them are adjudicated.

Reprinted with permission from the November 20 edition of The Legal Intelligencer © 2025 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877256-2472 or asset-and-logo-licensing@alm.com.

About the Author:

David G. Mandelbaum is a shareholder in the Environmental Practice of Greenberg Traurig. He maintains offices in Philadelphia and Boston. Mandelbaum teaches “Environmental Litigation: Superfund” and “Oil and Gas Law” in rotation at Temple Law School, and the Superfund course at Suffolk Law School in Boston. He is a Fellow of the American College of Environmental Lawyers and was educated at Harvard College and Harvard Law School. Contact him at mandelbaumd@gtlaw.com.

