DEFINITIONS

Baseline – the objective of natural resource damage provisions in State and federal law is to return injured resources to their baseline conditions. Baseline is defined as the condition of the resource if the contamination had not occurred.

Damages – In this context, "damages" refers to a sum of money claimed or awarded in compensation for a loss or injury. "Natural resource damages" can be obtained for injury to, destruction of, loss of, or loss of use of natural resources. This includes the reasonable costs of assessing the damages. "Compensatory" natural resource damages can also be obtained to compensate the public for the interim losses: lost use of natural resources and services for the entire time they were injured until they are fully restored.

Injury – In statute, "injury" is an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Natural resource damages can be obtained for "injuries" to natural resources due to releases of hazardous substances.

Natural Resources – As defined in Superfund law, natural resources are land, fish, wildlife, biota, air, water, groundwater, 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 or Indian tribe, or any foreign government. NRDP works on behalf of the Governor of Montana on natural resources owned, controlled, or held in trust by the State of Montana.

Natural Resource Services – natural resource damages can also apply to the services that natural resources provide. These include physical and biological functions performed by the resource, including human use and functions that resources may provide to other resources (for example, surface water is a natural resource and it also provides drinking water and habitat services to wildlife).

Operable Unit 3 – The Libby Asbestos Superfund site has eight operable units (OUs). OUs address geographic areas, specific problems, or specific media where cleanup must occur. Libby OU3 is the property in and around the Zonolite Mine owned by W.R. Grace and any area impacted by the release of hazardous substances from the mine property. This includes the mine site itself, the Kootenai River, Rainy Creek, Rainy Creek Road, and forested areas around the mine site that are contaminated. The natural resource damages were obtained for the injuries to natural resources in or relating to OU3.

Remedy – the terms "remedy," "remediation," and "remedial actions" refer to the cleanup operations under Superfund. The goal of remediation is to clean up the site to levels that are protective of human health and the environment. This does not necessarily include returning the natural resources to their baseline conditions.

Restoration – can be described as picking up where remediation leaves off: restoring the natural resources to the conditions they would be in if the contamination had not occurred.

Trustee – natural resources are held in trust for the public, and the Governor of Montana acts as the trustee for State resources. All decisions about how to use natural resource damages are ultimately up to the Trustee.

BACKGROUND

Who is NRDP?

We are a State program and we work on behalf of the Governor (the Trustee for natural resources in Montana) to restore natural resources that are injured by releases of hazardous substances. We work under "natural resource damage" provisions in Superfund law and the Oil Pollution Act with the goal of returning natural resources to their baseline conditions – or what they would have been if the contamination had not occurred. NRDP was established in 1990 to pursue natural resource damages related to the mining operations in Butte and Anaconda. We now work in multiple locations in Montana, currently ranging from Glendive to Libby.

Libby Asbestos Operable Unit 3

Operable Unit 3 (OU3) of the Libby Asbestos Superfund Site consists of the former vermiculite mine and adjoining forested lands, located approximately 7 miles northeast of Libby, Montana. It also includes any area impacted by the release of hazardous substances from the mine property (e.g., Rainy Creek and Kootenai River). Hazardous substances released by the mine include asbestos, which contaminated the vermiculite ore, and non-asbestos materials such as metals and polycyclic aromatic hydrocarbons. Historic operations at the mine site included blast and drag line mining and dry and wet milling. Potential sources of contamination to natural resources include exposed mine benches, waste rock piles, mined materials used as road fill around the mine, fine tailings in Rainy Creek and the Fine Tailings Impoundment (behind the KDID), surface water runoff, and a former landfill. Currently, W.R. Grace (with oversight from EPA and DEQ) is evaluating potential cleanup options for OU3.

Injured Resources

NRDP used the data collected during the Superfund process to evaluate the nature of injuries to State natural resources and lost services relating to OU3. Elevated contaminant concentrations were found in surface water (Fleetwood Creek, Fleetwood Pond, Carney Creek, and lower Rainy Creek), seep water, groundwater, sediment pore water, and sediments. Contamination was mostly due to asbestos, with non-asbestos contaminants also found in surface water, groundwater, and sediments. The release of these hazardous substances resulted in the injuries listed below.

Natural resources injured:

- Surface water, seeps, groundwater,
- Sediment and sediment pore water,
- Small and large mammals,
- Birds,
- Fish,
- Reptiles,
- Amphibians,
- Aquatic and terrestrial invertebrates,
- Aquatic and terrestrial plants, and
- Wetland and upland habitats.

Natural resource service losses:

- Habitat services for biological resources,
- Fishing, particularly recreational fishing below the ordinary high-water mark,
- Drinking water supply,
- Non-consumptive uses such as wildlife viewing, photography, outdoor recreation activities below the ordinary high-water mark,
- Primary and secondary contact recreational activities (swimming and boating) below the ordinary high-water mark, and
- Option and existence values.

Natural Resource Damages for Libby OU3

Under Superfund law, the State was able to recover damages for these injuries to State resources and the damages were awarded as part of the March 2023 settlement agreement between the State of Montana and W.R. Grace. This Settlement Agreement required W.R. Grace to pay the State $18.5 million in natural resource damages over the next 10 years. The first installment ($5 million) was paid to the State in October 2023 and there will be nine more annual payments of $1.5 million each (plus 4.19% interest), the first due in April 2024.

The natural resource damages are intended to compensate the public for injuries to State natural resources resulting from the release of hazardous substances in or relating to OU3. These natural resource damage funds must be used to restore, replace, rehabilitate, or acquire the equivalent of those injured resources. In general, the State is looking to spend the natural resource damages on the following three restoration action categories:

- Aquatic/riparian habitat,
- Terrestrial habitat, and
- Recreation.

Remedy and Restoration

Natural resource damages must be used to restore, replace, rehabilitate, or acquire the equivalent of the injured resources (resources injured by the hazardous substance releases in or relating to OU3). These funds are intended to restore the injured resources to their baseline conditions and to compensate the public for the lost use in the interim.

Cleanup activities (also referred to "remedy") are ongoing at OU3. The goal of remediation is to clean up the site to levels that are protective of human health and the environment. Remedial activities often result in partial restoration of natural resources, but the cleanup is not *required* to return the natural resources to their baseline conditions. Restoration through natural resource damages is meant to close that gap – pick up where remediation leaves off and return the natural resources to their baseline conditions.

Because the final remedy for OU3 has not yet been selected, the full extent of the remaining injury is not yet known. However, some early restoration (projects implemented prior to selection and completion of the final remedy) can be done in the meantime to begin to compensate the public for the interim losses of the resources and services.