Environmental Gatekeepers: Natural Resource Trustee Assessments and Frivolous *Daubert* Challenges

by Allan Kanner

Allan Kanner is the founding member of Kanner & Whiteley, LLC.

I. The Natural Resource Trustee

In natural resource damage (NRD) cases of any complexity, federal, state, or tribal trustees are responsible for using science in assessing injuries and determining appropriate remedies based on the best available evidence for a specific incident at a specific site.[1] Because natural and man-made disasters are complex events, they require a particular skill set to ensure that the resulting assessment is handled responsibly, efficiently, and effectively. The U.S. Congress, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA),[2] expressly delegated such responsibility to various natural resource trustees, generally state and federal environmental agencies.

Following a disaster such as an oil spill, it is the responsibility of the trustees to make hard choices based not only on science, but also law and policy. Having been legislatively delegated the responsibility to assess and make these complex choices, they should not be easily second-guessed. Trustees are often challenged under traditional trial evidence standards; however, given their unique congressionally delegated position, the better challenge would be under an "abuse of discretion" standard. Judges are not equipped to be arbiters of trustee science as is required by traditional evidence rules. Trustees and their science are as unique as the natural disasters they work to remedy, and therefore warrant treatment commensurate with such legislative delegation.

For example, in the OPA, Congress provided for the designation of federal, state, Indian tribe, and foreign trustees by the president, governors, and governing bodies, respectively.[3] The Act notes that "[t]he president, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources."[4] Each trustee is required to "develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship."[5] Importantly, restoration, not recovery of monetary damages, is the ultimate goal of most environmental statutes.

Because an environmental disaster impacts complicated ecosystems, it requires complex assessment and a restoration plan that contemplates not only economic impacts, but also ecological and proximate consequences, as well as the appropriate application of laws, regulations, and policy. These considerations coalesce in the natural resource damage assessment (NRDA), which is designed to take stock of, create a restoration plan for, and ultimately value the damages to the natural resources at issue.[6] Trustees are charged with determining baseline conditions, the best path toward restoring the resources to that baseline, and, in some cases, valuing the destruction and creating compensatory restoration plans in the event that the resources cannot be restored to such a baseline.[7] The regulations that accompany environmental statutes offer guidance and provide methods by which to achieve habitat-to-habitat restoration.[8]

Under the OPA, the trustee is charged with assessing the environmental damages, including the cost of restoring, rehabilitating, or replacing the resource; the

Author's Note: The views expressed herein are those of the author and do not reflect the views of the firm's clients.

1. *See* Allan Kanner, *Natural Resource Restoration*, 28 Tul. Envtl. L.J. 355 (2015). Simple restorations may be handled under Type A procedures, which are "standard procedures for simplified assessments requiring minimal field observation." 43 C.F.R. §11.14(ss).
2. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405; 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001.
3. 33 U.S.C. §2706(b).
4. *Id.* §2706(b)(1).
5. *Id.* §2706(c).
6. *Id.* §2706(b)-(g).
7. *Id.*
8. *See, e.g.*, 15 C.F.R. §990.53.

diminution in value or loss of use of the resources pending restoration; and the reasonable cost of assessing the damage, all of which will be determined with "respect to plans adopted under subsection (c)" for restoration.[9] Notably, the plan for restoration, not the final monetary calculation, is the primary consideration in the damage assessment. In furtherance of the goal of restoring damaged resources, trustees are charged with contemplating important policy, law, and scientific considerations in order to devise the best restoration response to a natural disaster. Their efforts in an NRDA set the stage for possible litigation, but more importantly, develop a path to restoration of the public trust.

The public trust doctrine,[10] first established in case law in *Illinois Central R.R. Co. v. Illinois*,[11] recognizes that states and the federal government[12] hold certain natural resources in trust for the people of the state, which is an imposition of affirmative duties to protect the same.[13] A state may not alienate property that falls within the public trust, and must maintain and improve it to promote the public's use and enjoyment.[14] As such, the public trust is separate and distinct from a typical property right or property tort claim.[15]

According to the federal environmental statutes, federal and state trustees are responsible for the maintenance, restoration, and expansion of the public trust.[16] The OPA defines natural resources as including:

> 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 (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.[17]

This definition alone indicates that any damages to natural resources are separate and distinct from traditional property damages and must account for the unique characteristics of the encompassed resources and damaged ecosystems. Trustees are given significant deference when determining how best to manage this responsibility.

Should NRD reach litigation, defendants unhappy with the results of an NRDA will often challenge the trustees' findings, generally under the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which lays out the manner in which expert testimony and opinions may be challenged and excluded by way of the Federal Rules of Evidence.[18] In *Daubert*, the U.S. Supreme Court liberalized the way in which courts consider expert testimony. It found that the new Federal Rule of Evidence 702 governing expert testimony was far more flexible than the previous "general acceptance" of scientific methods standard.[19]

Though the Court laid out a new standard by which courts consider the admissibility of expert testimony, it did not grant them the ability to analyze the science itself; rather, they remain a gatekeeper of admissible evidence and must look only to the methods.[20] Natural resource trustees are inherently experts by virtue of Congress' delegation of authority. It would follow that, if the methods utilized by these experts are already regulated, then they have already been deemed legally sufficient, obviating the need for a *Daubert* challenge.

If litigation ensues, responsible parties should not be afforded a "do-over" whereby the federal judge is asked to second-guess the choices the trustees made in the course of the NRDA. Applying the *Daubert* standard makes little sense where Congress has expressly delegated scientific determinations to an expert agency. The expert agency is the best equipped to protect the unique properties of the public trust. *Daubert* also makes little sense given the site-specific nature of many of these environmental disasters. Most NRDAs involve imperfect information about the precise nature of the injuries to natural resources.

In chronic disasters arising from historic contamination, for example, records and data are inescapably incomplete. New Jersey courts will defer to the state's Department of Environmental Protection (DEP), its designated trustee, because "cleanup of hazardous wastes is a complex problem, involving the delicate balance of environmental protection with concerns for the State's

9. 33 U.S.C. §2706(d).
10. *See generally* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y F. 57 (2005).
11. 146 U.S. 387 (1892).
12. Juliana v. United States, No. 6:15-cv-01517-TC, 46 ELR 20072 (D. Or. Apr. 8, 2016).
13. *See generally* Kanner, *supra* note 10.
14. *Id.*
15. *See id.* at 66-75. The public trust has been expanded since its early adoption during the colonial period to encompass wildlife and their habitats, land use, and even the air. It is a continually evolving doctrine:
    > Just as what constitutes nuisance has changed over time, so too has the public trust doctrine slowly been "molded and extended" to satisfy the needs "of the public it was created to benefit." Careful, predictable expansions of the doctrine, therefore, are not novel legislative decrees, but constitute a firmly embedded exercise of state duty.

    Id. (internal citation omitted).
    > Further, and distinct from a traditional property right that allows its bearer to do as he or she pleases with the land and its fruits, the public trust doctrine imposes affirmative duties on the states to protect its resources. Under the public trust doctrine, the state "may not destroy or relinquish its control over public resources except under certain, very narrow circumstances." Importantly, though states may have broad discretion when implementing this fiduciary duty to natural resources imposed by the public trust, they are not free to alienate or extinguish the trust. The public trust is inherent in statehood. *Id.* at 75-76.
16. Kanner, *supra* note 1.
17. 33 U.S.C. §2071(20).
18. 509 U.S. 579, 23 ELR 20979 (1993).
19. *Id.* at 588-89.
20. *Id.* at 595, 597.

economy and public health. As the Legislature has recognized, so complicated a subject calls for the expertise of an administrative agency."[21] Each site has its own set of data gaps and corresponding need for DEP to make assumptions, judgment, and models. Even acute disasters, such as the 2010 *Deepwater Horizon* explosion and subsequent oil spill in the Gulf of Mexico, can be so broad and complex that making assumptions or developing models based on limited data points is inevitable.[22]

For example, before the *Deepwater Horizon* oil spill, there were no generally accepted studies embracing the totality of the issues facing the trustees, only very limited studies of very limited applicability. It was the responsibility of the trustee to make significant science and policy decisions to determine the best way to approach the largest oil spill in Gulf of Mexico history.[23] Such decisions are not made lightly and often require significant amounts of time; even so, trustees' decisions will be challenged by those facing liability for the damages of the spill. As discussed below, Congress provides trustees an opportunity to gain a rebuttable presumption in any administrative or judicial proceeding under CERCLA and OPA in order to make trustee decisions and determinations less vulnerable to collateral attack.[24]

Despite their expert status, trustee injury and damage assessments and site-specific restoration plans are often challenged for a variety of political and economic reasons. For our purposes here, the focus is on the responsible party that frames its complaint as a *Daubert*-type challenge, often citing the assumptions, inferences, or methodology used by the trustees at a particular site. However, when trustees elect to follow broad guidelines laid out in regulations accompanying natural resource statutes, they are entitled to a rebuttable presumption in a court of law.[25]

Given the unique status of a natural resource trustee; the inescapably complex, intensive, and site-specific nature of the NRDA process; and the guidelines for assessment in the environmental regulations, a *Daubert* challenge is inappropriate to the extent that it second-guesses scientific choices of the trustee. Such challenges should be dismissed so long as the trustee has complied with all regulatory guidelines. The environmental statutes and regulations themselves perform the intended gatekeeping function of a *Daubert* challenge under Federal Rule of Evidence 702. The Supreme Court has stated that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony."[26] Because governing regulations direct trustee science, *Daubert* factors are not relevant. Rather, a court should review trustee actions under an arbitrary and capricious standard.

II. *Daubert* and Rule 702

Traditionally, when scientific evidence is presented in a typical damages trial, it is information that will, among other things, prove whether or not the product was defective,[27] what caused a particular health condition,[28] or how a car engine might perform under specific circumstances.[29] Some contend that this evidence can be manipulated to confuse the jury; judges are instructed to protect the jury from such confusion.[30] However, environmental statutes adopted by Congress have rendered NRD cases unique. As can be clearly seen, the role of Federal Rules of Evidence 702 and 703 are of limited applicability when assessing the admissibility of an NRDA.

Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In other words, it is the responsibility of the expert witness to aid the finder of fact in understanding the evidence being presented. In an NRDA, trustees rely on numerous experts in multiple scientific fields to assist in assessing the injury and determining the appropriate remedy. A *Daubert* challenge to the trustee's findings conceivably challenges the entire team of experts, and would subject each member

21. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 451 (N.J. 1992). *See also* City of Newark v. Natural Res. Council, 82 N.J. 530, 540 (N.J. 1980) (court relied on administrative expertise in upholding maps drawn by DEP); GAF Corp. v. Department of Envtl. Prot., 214 N.J. Super. 446, 452-53 (N.J. Super. Ct. App. Div. 1986) (court upheld DEP's bioassay methodology to determine fee for pollution discharge permits).
22. Nevertheless, applicable rules and regulations require trustees to act appropriately—for example, to sample and test according to "generally accepted methods." 43 C.F.R. §11.64.
23. For example, trustees chose to study damages to some indicator species but not others in order to make the study more manageable, cost effective, and timely. National Oceanic and Atmospheric Administration (NOAA), *Deepwater Horizon* Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement 1-11 (2016), *available at* http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1_Introduction-and-Executive-Summary_508.pdf. Though it could be argued that each exposed species required separate studies, this approach would have significantly increased the cost and time required to complete the assessment compared to the choice to proceed with indicator species. Congress intended for the trustee, not responsible party challenges and judges, to make these decisions.
24. 42 U.S.C. §9607(f)(2)(C) (CERCLA); 33 U.S.C. §2706(e)(2) (OPA).
25. *See* 33 U.S.C. §2706(e)(2).
26. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 150, 29 ELR 20638 (1999).
27. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 23 ELR 20979 (1993).
28. *See generally* Wendell v. GlaxoSmithKline, LLC, 858 F.3d 1227 (9th Cir. 2017) (overturning the district court's exclusion of expert testimony as too narrow a reading of the *Daubert* standard).
29. *See generally* Adams v. Toyota Motor Corp., 867 F.3d 903 (8th Cir. 2017) (holding that a mechanical engineer's testimony was admissible as he was qualified as an expert, followed protocols and methodology Toyota recommended, and his modifications were subject to cross-examination).
30. *Daubert*, 509 U.S. at 595; *see also* Fed. R. Evid. 403, 702, 703, 706.

of this team to individual evidentiary challenges, which is not only asinine, but completely undermines the efficiency requirements of the environmental statutes themselves. To challenge an NRDA is to challenge the science of an entire team of experts and a collaborative process that often includes the challenger themselves.

Typically, in a non-NRD case, if an expert wishes to present his or her opinion, Rule 703 requires that such evidence be based on sound science or facts and data that the expert has personally observed:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[31]

Importantly, the typical natural resource trustee would have been directing all studies, research, and decisionmaking processes throughout the NRDA and, therefore, would generally meet all of the requirements of Rule 703 to the extent possible with unique pollution disasters. NRDAs are made more unique by the fact that, in general, responsible parties are given an opportunity to and willingly participate in some or all aspects of the assessment process.[32] The trustee's authority is a direct delegation from Congress, and, as such, it must be involved in the gathering of all relevant evidence.

Daubert[33] liberalized the way in which courts consider expert testimony. Prior to this landmark case, the standard for admittance of expert testimony was based on the scientific community's "general acceptance" of the method by which the evidence was obtained.[34] In *Daubert*, the Supreme Court held that the new Rule 702 did not require such strict adherence to the "general acceptance" standard, noting that publishing in peer review literature, which was at issue in the case, was "not a *sine qua non* of admissibility, it does not necessarily correlate with reliability . . . and in some instances well-grounded but innovative theories will not have been published. . . . Some propositions, moreover, are too particular, too new, or of too limited interest to be published."[35] Nowhere is this more true than in an NRDA following an unprecedented environmental disaster.

The *Daubert* Court emphasized that while general acceptance is no longer the standard for admissibility of expert testimony, it is not completely without merit.[36] Chief Justice William Rehnquist explained, "A 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.'"[37] Along with general acceptance, the Court laid out guiding questions for a judge to consider when deciding whether or not an expert's testimony is admissible following a *Daubert* challenge.

Importantly, the questions laid out in the *Daubert* standard are not exhaustive, nor do they need to be answered in the affirmative. In determining the admissibility of expert evidence, a court can consider:

1. Whether a theory or technique can be tested;
2. Whether it has been subject to peer review and publication;
3. Whether there is a high known or potential rate of error and whether there are standards controlling the technique's operation;
4. Whether the theory or technique enjoys general acceptance within a relevant scientific community.[38]

Given the highly variable and unique characteristics of any given ecosystem, asking these questions is not sensible in the context of evaluating the admissibility of either an injury assessment or the determination of an appropriate remedy; as such, there is no reason that a challenge to a trustee's analysis should be gauged under this standard. Because the rebuttable presumption is only granted upon use of the enumerated methods in the OPA or CERCLA regulations, and the agencies delegated rulemaking authority coordinate the government's scientific functions, thereby rendering them a collective "expert,"[39] it should follow that methods enumerated in such regulations are generally accepted and have been tested and approved enough to be codified.

III. Trustee Deference and the Rebuttable Presumption

Because the goal of the environmental statutory framework is restoration rather than recovery of traditional economic damages, and because public trust "property" is inherently unique, OPA, CERCLA, and their accompanying regulations have granted trustees' NRDAs a rebuttable presumption in a court of law so long as a trustee's methods comport with the recommended processes.[40] *Black's Law Dictionary* defines a rebuttable presumption as a "species

31. Fed. R. Evid. 703.
32. Kenneth O. Corley & Ann Al-Bahish, *Understanding Natural Resource Damages*, 59 Rocky Mtn. Min. L. Inst. 2-1, §2.05 (2013).
33. *Daubert*, 509 U.S. 579.
34. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
35. *Daubert*, 509 U.S. at 593.
36. *Id.*
37. *Id.* (internal citation omitted).
38. *Id.* at 593-94.
39. The trustee agencies who participated in the NRDA following the *Deepwater Horizon* disaster were NOAA (within the U.S. Department of Commerce), the U.S. Department of the Interior, the U.S. Environmental Protection Agency, and the U.S. Department of Agriculture, as well as the designated trustees of the states of Alabama, Florida, Louisiana, Mississippi, and Texas.
40. *See generally supra* note 1. State law often obtains the same or similar result. For example, New Jersey's Spill Compensation and Control Act delegates broad discretion to the DEP. N.J. Stat. Ann. §58:10-23.11a.

of legal presumption which holds good until disproved."[41] Much like the old standard "innocent until proven guilty," the rebuttable presumption has a burden-shifting effect that requires a defendant to show that a trustee's analysis fails to accurately account for damages, rather than a trustee proving that its assessment or injuries is accurate.

As long as trustees' science and methodologies comport with those set forth in the regulations, the trustee's findings and conclusions of injury and damages will receive a rebuttable presumption, or, in other words, the burden of proof will shift to the defendant. In theory, if the responsible party does not proffer evidence rebutting the trustee, the trustee's findings are taken as true and accurate. If the responsible party wants to contest the assessment or determination of the remedy, its options are limited to the extent that it may not second-guess normative or policy judgments of the trustee or applicable legal requirements.

The OPA provides in §2706(e)(2):

> Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) of this section by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

The regulations promulgated pursuant to the rebuttable presumption provisions of CERCLA and the OPA present various methodologies a trustee may use to assess natural resource injuries and damages in order to take advantage of the rebuttable presumption.

The OPA regulations are promulgated by the National Oceanic and Atmospheric Administration (NOAA) and include a few methodologies determined to be scientifically sound for trustees to utilize in assessing the damage to ecosystems caused by oil spills.[42] For example, trustees typically utilize methods such as habitat equivalency analysis, which was codified in the regulations by 2008,[43] to assess the damage and determine the best route to restoration.[44] The rebuttable presumption is rendered meaningless if the responsible party can relitigate scientific choices under *Daubert*.

Such challenges should not be entertained or, in the alternative, the requirements of such challenges should be deemed automatically met by virtue of congressional delegation of authority to the natural resource trustee. A *Daubert* attack is distinct from presenting new evidence, which is the responsibility of a defendant once the burden of proof is shifted to them. The environmental statutes delegate authority to the trustee to act as a gatekeeper for sound science; any intervention by the judge not only impinges the authority of the trustee, it undermines the statutes themselves.

There are other instances in which Congress has recognized the importance of a rebuttable presumption to ensure that vulnerable populations and individuals are sufficiently protected. For example, the Federal Railroad Administration (FRA) has the authority to disqualify an employee when he or she has violated "one or more rules, regulations, orders, or standards promulgated by FRA, which render the respondent unfit to perform safety-sensitive functions."[45] Once a willful violation has been established, there is a "rebuttable presumption that the respondent is unfit to perform the safety-sensitive functions described in §209.303."[46] Further, "[w]here such presumption arises, the respondent has the burden of establishing that . . . he or she is fit to perform the foregoing safety-sensitive functions."[47] Agencies, as experts in their fields, are the best equipped to make safety determinations. Just as the FRA has jurisdiction over railroad safety, NOAA and the U.S. Department of the Interior have similar jurisdiction over the safety and well-being of the public trust and environment.

Other agency rebuttable presumptions have addressed the use of *Daubert* challenges in connection with agency assessments. One such example is that of the Black Lung Benefits Act, which endows a coal miner with a rebuttable presumption of total disability from pneumoconiosis, or black lung disease, for purposes of claiming black lung benefits so long as they "worked for at least 15 years in underground coal mines, if a chest x-ray does not show the presence of complicated pneumoconiosis, and 'if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment.'"[48] The statutory language itself specifies the manner in which the Secretary of Labor may rebut the presumption, and the regulations promulgated by the U.S. Department of Labor establish that this rebuttable presumption must be rebutted by a protesting coal mine operator as well.

The regulation reads as follows:

> (d) Rebuttal—
> (1) Miner's claim. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—
> (i) Establishing both that the miner does not, or did not, have:
> (A) Legal pneumoconiosis as defined in §718.201(a)(2);and

41. "Rebuttable Presumption," Black's Law Dictionary, *available at* http://thelawdictionary.org/rebuttable-presumption/.
42. *See* 15 C.F.R. §§990.50-.56.
43. Discussion of the precise bounds of each method is beyond the scope of this Comment. However, it is important to note that a consensus as to the propriety of the methodologies enumerated in the regulations has existed since the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit case *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 19 ELR 21099 (D.C. Cir. 1989).
44. *See generally* Allan Kanner, *Issues Trustees Face in Natural Resource Damage Assessments, Part I*, 8 J. Envtl. Protection 503 (2017); Allan Kanner, *Issues Trustees Face in Natural Resource Damage Assessments, Part II*, 8 J. Envtl. Protection 482 (2017).
45. 49 C.F.R. §209.305.
46. *Id.* §209.329.
47. *Id.*
48. West Virginia CWP Fund v. Bender, 782 F.3d 129, 133 (4th Cir. 2015) (citing 30 U.S.C. §921(c)(4)).

(B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (see §718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.[49]

The presumption of total disability, therefore, can only be rebutted by ruling out any possible causal relationship between the black lung disease and the miner's total disability. Decisions regarding black lung benefits rest with administrative law judges (ALJs) and the Benefits Review Board (BRB).

Importantly, courts have held that *Daubert* does not apply in black lung cases. The court in *Peabody Coal Co. v. McCandless* explained the reasoning:

> [I]t makes little sense to use scientific standards in performing the gatekeeping function and then permit the dispute on the merits to be resolved by arbitrary considerations, such as who wore the latex gloves or had superior credentials. *Daubert* does not apply directly in black lung cases, because it is based on Fed. R. Evid. 702, which agencies need not follow. Agencies relax the rules of evidence because they believe that they have the skill needed to handle evidence that might mislead a jury (citation omitted). They have a corresponding obligation to *use* that skill when evaluating technical evidence.[50]

Similar to an ALJ or the BRB, natural resource trustees were appointed by acts of Congress to protect trust resources given their particular expertise, and, as such, should be entitled to this type of expert status. The entire NRDA process is far more intensive than the decision-making process of the ALJ or the BRB. It involves hundreds of hours of analysis, significant environmental surveys and testing, and experts across multiple environmental fields, and it even includes the responsible parties throughout the process. The natural resource trustees were appointed by Congress to process this information, and much like the BRB, are expected to use their demonstrated skills to make reasoned decisions regarding damages and restoration. Agencies, as experts in their field, *should* be trusted to make technical decisions based on sound science. As such, *Daubert* challenges are misplaced in the NRDA context.

IV. The Rebuttable Presumption Reflects Trustee Authority

The NRDA process is a long and complex one that involves not only science, but law and policy considerations. The process often involves interrelated scientific conclusions. Congress recognized the complexity of NRDAs and the discretion required by the trustees, and, accordingly, provided for a rebuttable presumption that serves to expedite settlement or litigation. Further still, NRD statutes and regulations encourage would-be defendants to participate in the NRDA process to ensure that their findings align with those from the trustee's assessment. Most responsible parties recognize the broad authority granted to trustees and the benefits of expeditious resolution of NRD matters, and, therefore, are willing to cooperate with the trustee during the assessment process.[51]

A rebuttable presumption is meant to stymie frivolous and time-consuming challenges. There is extensive commentary[52] and the provisions of OPA themselves that indicate that expeditious resolution of litigation and restoration to pre-disaster conditions is paramount. For example, in order to avoid finger-pointing between the various responsible parties to delay litigation, OPA has provided for strict joint and several liability as well as separate provisions for contribution actions.[53] *Daubert* challenges in the face of a rebuttable presumption only serve to undermine expedited resolution of the case by allowing defendants to delay proceedings by relitigating complex scientific choices made by trustees. In addition, responsible parties attempt to relitigate law and policy choices in the guise of a *Daubert* challenge.

The rebuttable presumption makes the *Daubert* challenge obsolete in the context of NRDA. NOAA interprets the rebuttable presumption "to mean that the responsible parties have the burdens of presenting alternative evidence on damages and of persuading the fact finder that the damages presented by the trustee are not an appropriate measure of damages,"[54] which shifts both the burden of production and persuasion to the responsible party. While some have argued that this interpretation is not authoritative,[55] it comports with Congress' intention to expedite the resolution of NRD cases by giving the natural resource trustees the widest latitude available to present, prove, and resolve their cases. In light of this presumption, if such challenge is permitted, the defendant should be required to meet the

49. 20 C.F.R. §718.305(d).
50. 255 F.3d 465, 469, 31 ELR 20800 (7th Cir. 2001).
51. Corley & Al-Bahish, *supra* note 32.
52. David W. Robertson, *The Oil Pollution Act's Provisions on Damages for Economic Loss*, 30 Miss. C. L. Rev. 157, 175 n.58 (2011) (citing to and quoting 135 Cong. Rec. H7955 (daily ed. Nov. 1, 1989) (statement of Rep. James Quillen (R-Tenn.) calling for "full, fair, and swift compensation for everyone injured by oil spills," and stating that "residents of States will be fully compensated for all economic damages"); 136 Cong. Rec. H336 (daily ed. Feb. 7, 1990) (statement of Rep. Tom Carper (D-Del.) arguing to "ensure that those people or those businesses that are damaged by these spills are fairly and adequately compensated")); E. Donald Elliott & Mary Beth Houlihan, A Primer on the Law of Oil Spills, Presentation at the ALI-ABA Advanced Environmental Law Conference 5 (Feb. 2011), http://ssrn.com/abstract=2007604.
53. *See* Elliott & Houlihan, *supra* note 52, at 5.
54. Natural Resource Damage Assessments, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).
55. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984), articulated the deference standard for agency action. One author has suggested that *Chevron* deference would arguably not apply here as NOAA is interpreting a congressionally created presumption for evidentiary purposes rather than fulfilling its regulatory obligations. Yen P. Hoang, *Assessing Environmental Damages After Oil Spill Disasters: How Courts Should Construe the Rebuttable Presumption Under the Oil Pollution Act*, 90 Cornell L. Rev. 1469, 1490 (2011). However, this argument lacks any understanding of the trustees' regulatory obligations.

same burden under the *Daubert* standard as the trustee in proving that the trustee's science is inaccurate. The definition of "rebuttable presumption" and Rule 702 demand it.

The Court in *Daubert* emphasized repeatedly that its analysis of Rule 702 is not meant to judge the accuracy of the science, but rather the focus "must be solely on principles and methodology, not on the conclusions that they generate" and, ultimately, the "Rules of Evidence [are] designed not for the exhaustive search for cosmic understanding but for the *particularized resolution of legal disputes*."[56] This is precisely what Congress left to the trustee's expertise.

The Supreme Court has recognized that the regulatory authority delegated to the various environmental agencies is properly placed given their unique expertise. It has noted that "judges lack the scientific, economic, and technological resources" necessary to deal with "issues of this order."[57] Generally, when defendants challenge trustees' analysis in court, they are first and foremost challenging the complex mix of law, fact, policy, inferences, assumptions, and unavoidable data gaps that are part of NRDA, not the actual science, but still insist that trustees "prove or not prove" each choice they have made based on a rigorous scientific standard, despite the inherently nonscientific or mixed nature of many of these decisions.[58] These are precisely the determinations the Supreme Court has stated are inappropriate for a judge to make. Because the methodologies themselves are codified in the regulations and statutes by the agencies that are so qualified, the rigorous scientific standard should be considered satisfied.

When responsible parties make these challenges in the context of an NRD case, they can only conceivably be challenging the trustee's particular findings, which the Supreme Court has noted is not the purpose of the Rules of Evidence. Further still, the very definition of a *rebuttable* presumption requires that the evidence presented be *disproved*. Defendants cannot merely state that the science is inaccurate without first presenting the case as to why, as required by the rebuttable presumption. Defendants have missed the opportunity to challenge the regulatory methods, as the notice-and-comment period under the Administrative Procedure Act's arbitrary and capricious standard has passed.[59]

A *Daubert* challenge can only conceivably challenge the science without considering, much less acknowledging, the legal and policy drivers that are inextricably interwoven into and direct a trustee's final conclusions.[60] The rebuttable presumption indicates congressional faith in the trustee's ability to consider and manage all three prongs of his or her responsibility. If the trustee has complied with federally promulgated methods, such methods should be considered accepted by the scientific community and presentable to a trier of fact. The judge need only determine that the trustee has complied with the methodologies set forth in the applicable regulations. Any other action by the judge would be a usurpation of the trustee's congressionally delegated authority and go far beyond the gatekeeping function that the *Daubert* standard intends to provide. It would directly contravene the statutorily delegated authority of the scientific agencies that adopted the regulations, essentially making the judge the regulating authority, which at best delays and confuses litigation and at worse is a violation of the separation of powers.

V. The Better Challenge

Rather than challenge the admissibility of trustees' NRDAs under *Daubert*, the better challenge for responsible parties to make in an NRD case would be that the trustee's analysis was arbitrary and capricious. There is no question that a trustee is a fiduciary, and the arbitrary and capricious standard is the proper challenge for an abuse of discretion of a fiduciary. As noted previously, the natural resource trustees are charged with maintaining and expanding the public trust. The public trust is no different than a common-law trust. Natural resource trustees

> must preserve and maintain trust assets (the natural resources in their care) for the use of the trust's beneficiaries (the public and future generations) . . . must use sound judgment in ensuring that trust assets are preserved and productive, and must act in the best interest of the beneficiaries and serve the essential purpose of the trust.[61]

As such, they have certain fiduciary duties dictated by traditional trust law. The Supreme Court held in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*[62] that "[u]nder the common law of trusts . . . trustees are understood to have all 'such powers as are necessary or appropriate for the carrying out of the purposes of the trust.'"[63] It went on to note that "[o]ne of the fundamental common-law duties of a trustee is to preserve and maintain trust assets . . . and this encompasses 'determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries.'"[64] With this duty comes the responsibility of the trustee to "'use reasonable diligence to discover the location of the

56. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595, 597, 23 ELR 20979 (1993).
57. American Elec. Power, Inc. v. Connecticut, 131 S. Ct. 2527, 2539-40, 41 ELR 20210 (2011).
58. Kanner, *supra* note 1.
59. 5 U.S.C. §553.
60. Given the law and policy drivers that accompany any NRDA, one may plausibly argue that these considerations are more opinion than anything else. The challenge would still fail because experts "may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. As trustees are on-the-ground decisionmakers, they obviously observe the evidence being developed and ultimately presented in the NRDA. When the court determines whether expert opinion is admissible, it "does not need to rise to the level of the expert and is not invited to assess the reasonableness of the specific inferences, it must check that the parameters assuring reliability are met." Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 Pepp. L. Rev. 3, 570 (2013). Once again, the regulations ensure reliability.
61. Kanner, *supra* note 1, at 381.
62. 472 U.S. 559 (1985).
63. *Id.* at 570 (quoting 3 Austin W. Scott, The Law of Trusts §186, at 1496 (3d ed. 1967)).
64. *Id.* at 572 (citation omitted).

trust property and to take control of it without unnecessary delay.'"[65]

Such duties prescribe the extent of discretion a natural resource trustee has in carrying out their responsibilities. Generally, "[a] trustee . . . has discretion (i.e., is to use fiduciary judgement) with respect to the exercise of the powers of trusteeship. That is, a power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties."[66] In the event that a natural resource trustee oversteps its bounds or fails to adequately protect the res of the trust (i.e., natural resources), the solution would be an arbitrary and capricious challenge, rather than an evidentiary challenge under *Daubert* that would act to limit or exclude a trustee's testimony, opinions, or science. Courts are equipped to find and have found improper execution of trustee duties in the public trust context.[67]

In particular, in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, the court noted that "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary."[68] An incomplete or insufficient restoration plan would undoubtedly impair the public trust and the judiciary should be able to make such a determination. Unlike a review of methodology, which is far beyond the scope of the Federal Rules of Evidence, an abuse of discretion challenge is well within the powers of the judiciary and better serves the purpose of the environmental statutes: restoration and maintenance of the public trust. While an expert agency is far better equipped to consider scientific, economic, and policy drivers behind regulations and restoration plans, the judiciary is fully capable of determining whether or not a natural resource trustee has violated his or her common-law fiduciary duties to the public.

VI. Conclusion

Environmental disasters wreak havoc on ecosystems and public trust resources. The environmental statutory regime in place today aims to remedy these disasters and restore the public trust as efficiently as possible. In order to do so, natural resource trustees, agencies made up of experts in their respective scientific fields, have been given broad authority to assess injuries to natural resources, choose an appropriate remedy, and develop restoration plans. Environmental statutes such as the OPA and CERCLA have extensive provisions and congressional commentary that indicate that many features encourage expedited restoration, including joint and several liability, separate contribution proceedings, and, importantly, the rebuttable presumption.

Daubert-type evidentiary challenges to trustee findings therefore are inappropriate as they second-guess the extensive time and effort put into complying with such provisions. Rather, the proper standard is review of trustee action in the fiduciary context. If a trustee's actions have been arbitrary and capricious, it is reasonable for a court to find that it has abused its discretion. However, a court is not equipped to comprehensively evaluate trustee findings, a unique mix of law, policy, and science, under traditional evidence rules. It exceeds the authority of the judiciary and undermines the purpose of the environmental statutes themselves.

65. *Id.* (citation omitted).
66. Restatement (Third) of Trusts §87 cmt. a.
67. Kanner, *supra* note 1, at n.167.
68. 671 P.2d 1085, 1093 (Idaho 1985).