

# New Jersey's Natural Resource Damages Initiative: Is the "Sleeping Giant" Waking Up?<sup>†</sup>

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## I. INTRODUCTION

Claims to recover the value of lost use of natural resources due to pollution, so-called "natural resource damages" or "NRD," have long been called the "sleeping giant" of environmental liability.<sup>1</sup> High profile NRD recoveries, such as the nearly \$1 billion NRD award against Exxon for the *Exxon Valdez* oil spill,<sup>2</sup> have shown that NRD awards can reach giant proportions. However, few NRD claims have been brought since they were first authorized

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<sup>1</sup> See Ken Stier & Mark J. Magyar, *NRD: The New Battleground in Environmental Litigation* 2004 PUB. POL'Y CENTER OF N.J. 1 [hereinafter *New Battleground*] (crediting the phrase "sleeping giant" to NYU law professor Richard Stewart); Rebecca Renner, *Calculating the Cost of Natural Resource Damage: Critics Label Superfund's Natural Resource Damage Assessments a Costly "Sleeping Giant,"* 32 ENVTL. SCI. & TECH. J. 86-A-90 (1998).

<sup>2</sup> See Exxon Valdez Oil Spill Trustee Council, Investment Policies, *available at* [www.evostc.state.ak.us/Policies/Downloadable/investment\\_policies.pdf](http://www.evostc.state.ak.us/Policies/Downloadable/investment_policies.pdf). (last visited Apr. 27, 2006) (describing management of \$900 million fund established for natural resource restoration, pursuant to 1991 settlement of the state and federal cleanup claims).



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by Congress in 1980,<sup>3</sup> and industry came to believe that the giant was “asleep.”<sup>4</sup> That situation has changed in New Jersey, where the Department of Environmental Protection (“NJDEP”) has announced a major initiative to address more than 4000 claims<sup>5</sup> and collect up to \$950 million<sup>6</sup> in NRD from 66 corporations.<sup>7</sup> This may well herald similar programs in other states.

The question of whether New Jersey’s initiative marks the beginning of a nationwide trend is important both to industry and its insurers for several reasons. First, NRD awards,

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<sup>3</sup> Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 — 9675 (2001).

<sup>4</sup> See Vicky L. Peters, *Has the “Sleeping Giant” Been Caught Napping: (Statute of Limitations for Natural Resource Damage Claims Under CERCLA)*, 15 NAT’L ENVTL. ENFORCEMENT J. 3 (2000).

<sup>5</sup> See Press Release, NJDEP, *DEP to Address More Than 4,000 Potential Claims for Natural Resource Damages Statewide: Commissioner Campbell Orders Passaic River Restoration: Parties Responsible for Pollution Must Access and Restore Natural Resource Injuries*, (September 24, 2003) [hereinafter 9/03 Press Release].

<sup>6</sup> Alexander Lane, *Jersey Seeks \$950 Million Over Pollution*, THE STAR LEDGER, October 29, 2003 at <http://www.nj.com/starledger/>.

<sup>7</sup> 9/03 Press Release, *supra* note 5.



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while few, can exceed the multi-million dollar cost of cleanups.<sup>8</sup> Second, NRD claims have the potential to revive “closed” environmental claims and undermine the finality of settlements with policyholders for sites that have been the subject of past coverage litigation. Finally, New Jersey is historically a trend-setting state on environmental issues and other states may follow suit if NJDEP is able to recover significant awards under its NRD initiative.

This article provides a brief overview and history of NRD claims and examines whether New Jersey’s current NRD initiative is likely to be the start of a nationwide trend. Section II examines the history, legal bases and elements of NRD claims, as well as several basic defenses. Section III discusses the treatment of NRD claims under established environmental coverage law and the effect of NRD claims on previously entered settlements, releases and commutations between NRD defendants and their insurers. The final section assesses whether New Jersey’s high profile NRD initiative signals the beginning of a nationwide trend.

We conclude that the industry and insurers would be wise to monitor the progress of New Jersey’s NRD initiative, but that there is no clear indication that other jurisdictions

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<sup>8</sup> See George A. Rusk, George L. Seay & David L. Trimm, *Natural Resource Damages: Liability Implications for the Mining & Energy Industries*, 23 ENERGY & MIN. L. INST. 366 (2003) [hereinafter Rusk, et al.] (“[T]he damages under NRDA regulations often exceed even the skyrocketing remediation costs that have become common place under CERCLA. Natural resource damages can range from \$1 million to \$1 billion, while the average cost of a superfund cleanup is about \$8-\$10 million.”).



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will follow New Jersey's lead. This is in part due to the appointment of a new NJDEP commissioner and NJDEP's promise to issue new NRD regulations for public comment. The release of these regulations will likely be followed by extensive industry comment and, perhaps, litigation. Thus, New Jersey's NRD enforcement program is likely to undergo significant changes over the next year, and other jurisdictions will likely wait to see how successful New Jersey is at collecting NRD penalties before devoting resources to beef up their own programs.

## II.

### THE HISTORY AND NATURE OF NATURAL RESOURCE DAMAGE CLAIMS

#### A. *The Concept of Natural Resource Damages*

NRD are intended to compensate the public for the loss or impairment of natural resources.<sup>9</sup> Natural resource damages consist of: (1) costs of restoring or replacing injured resources to a pre-contamination "baseline" condition; (2) compensation to the public for

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<sup>9</sup> See CERCLA, 42 U.S.C. § 9607(a)(4)(c) (2001); see generally Peter C. Harvey, *Natural Resource Damages: Restoring Our Children's Legacy in New Jersey*, 2 ALI-ABA COURSE OF STUDY MATERIALS § IV (U. Colo. School of Mines/ALI-ABA), June 2003 [hereinafter Harvey].

the reduction or elimination of the resources from the time of initial injury until complete restoration or replacement; and (3) any costs of the NRD assessment itself.<sup>10</sup>

An NRD claim is fundamentally different from a traditional cleanup action in that it seeks to value and compensate for the loss of “use” or “services” of a resource and not merely the cost of cleaning it up. The valuing of “lost use” or “lost services” is a highly subjective exercise. Without the guidance of a market price, one can attempt to value both “active” and “passive” uses.<sup>11</sup> “Active uses” include “consumptive” uses, such as drinking water, eating fish, and harvesting crops. “Non-consumptive” uses include activities such as swimming, hiking and camping.<sup>12</sup> Even harder to estimate are the more abstract “passive” or non-use values of lost resources. They include the value of knowing that a resource exists (so-called “existence value”) and the knowledge that a resource is available for the public’s use, even if it is not used (the “resource” or “option value”).<sup>13</sup>

The lack of a precise definition of what constitutes the “damage to” or “value of” a natural resource causes great concern in the wake of New Jersey’s NRD initiative. When a potentially responsible party (“PRP”) receives a two-page “Notice of Intent to Initiate Litigation” from the New Jersey Attorney General’s Office, it cannot tell the size of the potential damages being sought. PRPs may be justified in believing that the sky, or more accurately the ground and water — as well as the value all of their actual and potential uses — are the limits.

#### B. *The Authority of Natural Resource Trustees Over Trust Resources*

Federal and state NRD claims are extensions of the common law “public trust doctrine,” pursuant to which the government has the right to seek damages to resources to which no individual holds title. Such resources are deemed to be held by the government in trust for citizens.<sup>14</sup>

<sup>10</sup> See MARK REIS, *Superfund and Natural Resource Damages*, CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS (No. RS20772, Jan. 8, 2001), at CR 3; R. Craig Hupp & Charles M. Denton, *Natural Resources Damages Assessments and Claims in Michigan: Part II, Analysis of NRD Settlements*, available at <http://www.bodmanllp.com/publications/articles/pdfs/GreatLakesDamageAndClaimsPart2.pdf>; Harvey, *supra* note 8, at § III(6)(9) (last visited Aug. 2, 2004) [hereinafter *Michigan NRD II*].

<sup>11</sup> See *Michigan NRD II*, *supra* note 10, at 1.

<sup>12</sup> See *id.* at 1-2.

<sup>13</sup> See *id.* at 1.

<sup>14</sup> See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 (N.J. 1972); see generally Rusk et al., *supra* note 8, at 349.

This government's right to seek damages for harm to natural resources has been formalized at the federal level in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),<sup>15</sup> the Oil Pollution Act of 1990 (the "OPA"),<sup>16</sup> and the Federal Water Pollution Control Act, enacted substantially in 1972 (the "Clean Water Act").<sup>17</sup>

These federal NRD statutes allow the states to separately regulate state natural resources and seek damages for their impairment.<sup>18</sup> These statutes and the federal regulations promulgated thereunder, establish a "minimum regulatory floor below which state environmental laws cannot fall."<sup>19</sup> However, "[a] state is not precluded from adopting more stringent requirements than those imposed by EPA regulation."<sup>20</sup>

### C. *The Elements of a Natural Resource Damage Claim*

While the language of federal and state NRD statutes may vary, an NRD claim generally will not stand unless:

- (1) it is brought by the proper party;
- (2) the defendant is a responsible party;
- (3) there was a release or discharge of materials;
- (4) the discharged materials were hazardous substances;
- (5) the discharge caused damage to a natural resource; and
- (6) there is proof of the alleged damage to the natural resource.<sup>21</sup>

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<sup>15</sup> 42 U.S.C. § 9601 — 9675 (2001).

<sup>16</sup> 33 U.S.C. §§ 2701 — 2761 (2001).

<sup>17</sup> 33 U.S.C. §§ 1251 — 1371 (2001).

<sup>18</sup> See CERCLA § 107(f), 42 U.S.C. §§ 9607(f)(1) (2006); OPA § 1006(c), 33 U.S.C. § 2706 (2006); Clean Water Act, §§ 101-102, (2006).

<sup>19</sup> See Rusk et al., *supra* note 8, at 364; see also *Old Bridge Chems. v. N.J. Dep't of Env'tl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992); see generally Roslyn K. Meyers, *Advanced Chemical Fingerprinting in Hazardous Waste Liability under CERCLA*, 6 *FORDHAM ENVTL. L. J.* 253 (1995).

<sup>20</sup> See *Old Bridge Chems.*, 965 F.2d at 1296.

<sup>21</sup> See generally CERCLA § 107(a)(4)(c) & 107(f), codified at 42 U.S.C. §§ 9607(a)(4)(c), and 9607(f) (2006); New Jersey Spill Act, N.J. STAT. ANN. §§ 58:10-23.11b, 11c and 11f (West 2006) (the "Spill Act").

Each of these elements is discussed in further detail below.

### 1. The Proper Party Plaintiff: The Authorized Natural Resource Damage Trustee

Consistent with the public trust doctrine, NRD claims may only be brought by authorized federal or state natural resource “trustees.” Federal trustees include the Secretary of the Department of the Interior, the administrator of the National Oceanic and Atmospheric Administration (“NOAA”), Native American tribes, and their designees.<sup>22</sup>

Pursuant to CERCLA and the OPA, each state has designated a trustee who may enforce the state’s rights to obtain NRD under federal and state law.<sup>23</sup> In New Jersey, the Commissioner of the NJDEP is the designated natural resource trustee.<sup>24</sup>

Generally, private parties lack standing to bring NRD claims. NRD are not an element of damages recoverable under private party contribution or indemnification provisions under CERCLA or the New Jersey Spill Act.<sup>25</sup> One notable exception occurs in Arizona, which by statute authorizes citizens to sue the Director of Environmental Quality to compel that person to carry out his or her duties as a natural resource damage trustee.<sup>26</sup> However, this citizen suit provision has seldom, if ever, been utilized.<sup>27</sup>

### 2. The Proper Defendant: A “Responsible Party”

Liability for NRD is limited to parties who are responsible for the release or discharge of hazardous substances.

CERCLA imposes liability for NRD on several types of responsible parties: “owner[s] or operator[s],” “generators,” “arrangers,” and “transporters” of hazardous waste.<sup>28</sup> “Own-

<sup>22</sup> DEFENDERS OF WILDLIFE & CENTER FOR WILDLIFE LAW, *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity* (Monograph, Sept. 2000), available at, <http://www.defenders.org/states/publications/publication.pdf> (last visited Aug. 4, 2004) [hereinafter Public Action Monograph].

<sup>23</sup> For a convenient listing of these trustees by state, see E. Lynn Grayson et al., *The Business Dilemma: 21<sup>st</sup> Century Natural Resource Damage Liabilities for 20<sup>th</sup> Century Industrial Progress, Hazardous Substances, Site Remediation and Enforcement* ALI-ABA COURSE OF STUDY at Appendix, October 2003 [hereinafter Grayson et al.].

<sup>24</sup> See Spill Act, N.J. STAT. ANN. § 58:10-12.11(g) (West 2006); Solid Waste Management Act, N.J. STAT. ANN. § 1E-62-106 (West 2006).

<sup>25</sup> See CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2006); Rusk et al., *supra* note 8, at 350.

<sup>26</sup> See ARIZ. REV. STAT. §§ 49-264, 49-282 (2006); see generally Rusk et al., *supra* note 8, at 365.

<sup>27</sup> Several other states have citizen suit provisions with respect to environmental authorities’ obligations to perform cleanups which, again, are seldom used. For a general discussion of environmental citizen suits, see generally Public Action Monograph, *supra* note 22.

<sup>28</sup> See CERCLA §§ 107(a)(1), (2), (3) and (4), 42 U.S.C. §§ 9607(a)(1), (2), (3) & (4) (2006).

ers” or “operators” are parties that either have title to or operate vessels<sup>29</sup> and facilities,<sup>30</sup> with the exception of lenders who acquire title to perfect a security interest and do not exercise decision making control over environmental compliance or assume overall management responsibility.<sup>31</sup> An “arranger” is “any person who by contract . . . arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person.”<sup>32</sup> A “transporter” is “any person who accepts . . . hazardous substances for transport to disposal or treatment facilities.”<sup>33</sup>

New Jersey’s Spill Act is less concerned with the legal status of a defendant and imposes liability for NRD on “[a]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance.”<sup>34</sup>

### 3. A Release or Discharge

An NRD trustee must establish that a “release”<sup>35</sup> or “discharge”<sup>36</sup> of contaminants occurred under federal or state law. CERCLA broadly defines a “release” as any “spilling, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, dumping or disposal into the environment (including the abandonment or discarding of . . . closed receptacles . . .).”<sup>37</sup> In practice, a “release” means just about every conceivable manner in

<sup>29</sup> The term “vessel” means “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” CERCLA § 101 (28), 42 U.S.C.A. 9601 (28) (2006).

<sup>30</sup> Facilities are defined as “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.” CERCLA § 101 (9), 42 U.S.C.A. 9601(9) (2006). Facilities are further divided into “onshore” and “offshore” facilities. *See* CERCLA 101 (17) and (18), 42 U.S.C.A. §§ 9601(17) & (18) (2006).

<sup>31</sup> *See* CERCLA § 101 (20), 42 U.S.C. § 9601(20) (2006). CERCLA sets forth specific standards for determining whether a lender has assumed sufficient control over the operation of a vessel or facility to lose its status as an innocent security-holder. *See* CERCLA §§ 101(20)(D) and (E), 42 U.S.C.A. §§ 9601(20)(D) (2006) (state and local governments acquiring title through foreclosure) and 20(E) (private lenders).

<sup>32</sup> *See* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (2006).

<sup>33</sup> *See id.*, 42 U.S.C. § 9607(a)(4).

<sup>34</sup> *See* N.J. STAT. ANN. §§ 58:10-23.11(g)(c) (West 2006).

<sup>35</sup> *See* CERCLA §§ 10 (22), 104 & 107, 42 U.S.C. §§ 9601(22), 9604 & 9607 (2006).

<sup>36</sup> Spill Act, N.J. STAT. ANN. § 58:10-23.11f(3) (West 2006).

<sup>37</sup> CERCLA §101 (22), 42 U.S. § 96-7(22) (2006).



which a substance can be transmitted into the environment, including being blown by the wind<sup>38</sup> or carried on the clothes or bodies of workers.<sup>39</sup>

New Jersey's Spill Act applies to "discharges" of hazardous substances, and defines a discharge as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State . . . ."<sup>40</sup>

#### 4. A Hazardous Substance

The various federal and state statutes allow recovery of NRD only with respect to defined hazardous substances.

CERCLA, for instance, defines the term "hazardous substance" by referring to substances designated by name or described by characteristics as "hazardous" under other federal laws and accompanying regulations.<sup>41</sup> CERCLA's definition, however, explicitly excludes "petroleum" and certain related compounds.<sup>42</sup> NRD under federal law for petroleum contamination are further limited to discharges into the "navigable waters," (mainly interstate waters, tributaries and estuaries),<sup>43</sup> or the "territorial seas" of the United States.<sup>44</sup>

<sup>38</sup> See *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143 (D. Ariz. 1984) (classifying asbestos tailings blown off of a waste pile as a "release").

<sup>39</sup> See *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) *vacated in part on other grounds* (holding that mercury carried out of a manufacturing facility on clothes and bodies of workers and washed into plumbing and sewer systems amounted to a "release").

<sup>40</sup> N.J. STAT. ANN. § 58:10-23.11b (West 2006).

<sup>41</sup> Hazardous substances include those identified in EPA regulations promulgated under authority of CERCLA § 102, which are found at 40 C.F.R. §§ 302.4-302.5. CERCLA also incorporates by reference §§ 307(a) & 311(b)(2) of the Federal Water Pollution Control Act, Solid Waste Disposal Act § 3001, Clean Air Act § 112 and Toxic Substances Control Act § 7.

<sup>42</sup> See CERCLA § 101(14), 42 U.S.C. 9601(14) (2006).

<sup>43</sup> See Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2006).

<sup>44</sup> Enacted after the *Exxon Valdez* disaster, the OPA was passed to ensure that federal authorities had jurisdiction to compel the cleanup of oil discharges in coastal areas. See J. Terrence Ryan, *The Evaluation of Natural Resource Damage Assessments Under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation and Liability Act*, 6 *FORDHAM ENVTL. L. J.* 29, 32 (1994).

State laws, such as the New Jersey Spill Act, typically incorporate the definitions of “hazardous substance” found in federal environmental statutes.<sup>45</sup> However, state statutes generally do not incorporate CERCLA’s “petroleum exclusion” into the definition.<sup>46</sup>

### 5. Injury to a Natural Resource

An NRD claimant must demonstrate that injury occurred to a defined “natural resource.”<sup>47</sup> Federal statutes define that term broadly as “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, local government, . . . foreign government [or] Indian tribe.”<sup>48</sup> However, the various Federal trustees can act to protect these resources only within their proper areas of jurisdiction.<sup>49</sup>

New Jersey law similarly defines natural resources to include “all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held or in trust or otherwise controlled by the State.”<sup>50</sup> The commissioner of NJDEP has broad jurisdiction, as natural resource trustee, over the natural resources within New Jersey’s borders, because the “waters” held in trust by the state are broadly defined as “the ocean and its estuaries to the seaward limit of the State’s jurisdiction, all springs, streams and bodies of surface or groundwater, whether natural or artificial, within the boundaries of this State.”<sup>51</sup>

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<sup>45</sup> For example, Spill Act § 58:10-23.11b defines “Hazardous substances” in part as:

environmental hazardous substances . . . consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 311 of the federal Water Pollution Control Act Amendments of 1972, Pub.L.92-500, as amended by the Clean Water Act of 1977, Pub.L.95-217 ( 33 U.S.C. § 1251 et seq.); the list of toxic pollutants designated by Congress or the EPA pursuant to section 307 of that act; and the list of hazardous substances adopted by the federal Environmental Protection Agency pursuant to section 101 of the “Comprehensive Environmental Response, Compensation and Liability Act of 1980,” Pub.L.96-510 ( § 42 U.S.C. § 9601 et seq.); provided, however, that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of P.L.1976, c. 141 (C.58:10-23.11 et seq.).

<sup>46</sup> For example, the definition of “Hazardous substances” in New Jersey’s Spill Act explicitly states that “Hazardous substances . . . [include] petroleum products . . . .” N.J. STAT. ANN. §§ 58:10-23.11b (West 2006).

<sup>47</sup> See *Coeur D’Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 2d 1094. (D. Idaho 2003).

<sup>48</sup> CERCLA § 101(16), 42 U.S.C. § 9601(16) (2006); Oil Pollution Act § 1006(20), 33 U.S.C. § 2701(20) (2006).

<sup>49</sup> For example, the NOAA is a trustee for coastal, marine and estuarial resources, including, commercial and recreational fishery resources and species and National Estuarine Research Reserves. Other trustees include the secretaries of the departments of interior, agriculture, commerce and energy.

<sup>50</sup> N.J. STAT. ANN. § 58:10-23.11b (West 2006).

<sup>51</sup> *Id.*

## 6. Proof of Damages

Generally speaking, both federal and state law require the claimant to show proof of actual damage to a natural resource. This entails a showing of causation as well as quantification of damage to a natural resource.

The Spill Act authorizes NJDEP to seek restoration of or damages for natural resources “damaged or destroyed by [a] discharge.”<sup>52</sup> Under CERCLA, a federal trustee must show that a PRP’s release was a substantial or contributing factor in causing NRD.<sup>53</sup> This federal standard may be a guide for PRPs in New Jersey, where the standard of proof has not been determined. However, NJDEP must put forward some proof of nexus between a PRP’s discharge and resultant resource impairment. Methods of attacking an NRD claimant’s proofs of causation and related defenses are discussed below in section II.F.

### D. *The New Jersey NRD Initiative*

New Jersey’s approach to NRD has been and continues to be innovative in a number of respects. Since the 1998 amendments to New Jersey’s Technical Regulations for Site Remediation (the “Tech Regs”),<sup>54</sup> New Jersey has been the only state to require property owners to investigate whether any natural resources have been damaged on or near their properties prior to any property sale or transfer. The 1998 amendments were built upon New Jersey’s pre-existing requirement that, under the Industrial Site Recovery Act (“ISRA”),<sup>55</sup> property owners perform a “baseline ecological evaluation,” and provide for the remediation of any contamination found, prior to closing.<sup>56</sup> The results of this initial analysis of potential NRD will determine the scope of any restoration plan or NRD assessment.

The 1998 Tech Reg amendments potentially subjected thousands of New Jersey property owners to NRD liability and caused alarm in the business community. However, despite NJDEP’s initial statements that it would vigorously enforce the NRD ecological as-

<sup>52</sup> N.J. STAT. ANN. 58:10-23.11u.b.3 (West 2006).

<sup>53</sup> See *Coeur D’Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); In re *Acushnet River re: Alleged PCB Pollution*, 722 F. Supp. 893, 897 (D. Mass. 1999).

<sup>54</sup> N.J. ADMIN. CODE Ch. 26E, amended in relevant part at § 7:26E-3.11 (2-3-03 and 7-5-05 Supp).

<sup>55</sup> N.J. STAT. ANN. §§ 13:1K-6–13:1K35 (West 2006). ISRA is the successor to New Jersey’s groundbreaking Environmental Cleanup Responsibility Act, previously codified at N.J. STAT. ANN. §§ 13:1K-6—13:1K13.

<sup>56</sup> The NRD assessment required by the 1998 Tech Reg. amendments are to be conducted pursuant to guidance prepared by the National Oceanic Atmospheric Administration (“NOAA”) and the U.S. Department of Interior (“DOI”), the lead federal trustees. See 30 N.J. Reg. 2373, 2389 (July 6, 1998).

assessment requirement,<sup>57</sup> NJDEP prosecuted fewer than thirty NRD claims from 1999 through 2002.<sup>58</sup>

That changed in late 2003 when NJDEP fired several shots heard throughout the regulated community. Specifically, NJDEP made NRD claims a centerpiece of NJDEP enforcement efforts by (1) issuing the Passaic Valley Directive; (2) issuing a new NRD Policy Directive; and (3) sending 4,000 Notices of Intent to Initiate Litigation to PRPs targeted under the NRD Policy Directive.

### 1. Passaic Valley Directive

NJDEP's September 19, 2003 Passaic Valley Directive (the "Directive") ordered sixty-six companies allegedly responsible for contamination of significant sites located along the lower Passaic River to undertake a Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resource Injuries.<sup>59</sup> The Directive required the companies to: (1) identify injured natural resources, the extent of the injury, the quantity and quality of lost resource "services" and the monetary value of the injuries; and (2) post interim restoration reserves for these natural resource injuries. NJDEP's Directive did not require "remediation" as that term is defined by New Jersey law.<sup>60</sup> The Directive gave PRPs until November 3, 2003 to respond.

The financial ramifications of the Directive became clear when, at an October 24, 2003 meeting with several PRPs, NJDEP announced that it is seeking up to \$950 million in NRD under the Directive.<sup>61</sup>

The seriousness of NJDEP's efforts is demonstrated by the high level of coordination with the EPA. Pursuant to a "Memorandum of Understanding,"<sup>62</sup> the EPA issued "Notice[s] of Potential Liability for Response Actions" to forty of the PRPs impacted by the Directive,

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<sup>57</sup> See NJDEP SITE REMEDIATION NEWS (Dec. 1998).

<sup>58</sup> See OFFICE OF NATURAL RESOURCE RESTORATION 2003 SETTLEMENT/RESTORATION REPORT, available at, [http://www.state.nj.us/dep/nrr/reports/nrd\\_update200312.pdf](http://www.state.nj.us/dep/nrr/reports/nrd_update200312.pdf) (last visited Nov. 11, 2004) [hereinafter RESTORATION REPORT].

<sup>59</sup> NJDEP Directive No. 1, In the Matter of the Lower Passaic River (the "Directive"), Sept. 19, 2003, available at, [http://www.state.nj.us/dep/newsrel/release/passaic\\_dir01.pdf](http://www.state.nj.us/dep/newsrel/release/passaic_dir01.pdf) (last visited Aug. 23, 2004).

<sup>60</sup> "Remediation" means actions necessary to "investigate and cleanup or respond to any known, suspected, or threatened discharge." See N.J. ADMIN. CODE § 7:26E-1.8 (11-7-05 Supp).

<sup>61</sup> See Alexander Lane, *Jersey Seeks \$950 Million Over Pollution*, THE STAR LEDGER (Oct. 29, 2003), available at, <http://www.nj.com/starledger/>.

<sup>62</sup> The New Jersey Department of Transportation Office of Maritime Resources, the Army Corps of Engineers, and EPA are all signatories to the memorandum.

seeking to compel the PRP's to remediate the lower Passaic River under CERCLA. This level of coordination among federal and state trustees, while not wholly without precedent, is unusual.<sup>63</sup>

## 2. NJDEP's NRD Policy Directive

Also on September 24, 2003, NJDEP issued Policy Directive 2003-07. This "Natural Resource Damages" policy (the "NRD Policy") outlines NJDEP's plan to collect NRD for groundwater and other resources impacted by 4,000 of the State's 12,000 contaminated sites.<sup>64</sup> The NRD Policy, among other things:

- establishes a screening process by which NJDEP staff in the Site Remediation Program ("SRP") will evaluate the agency's open and closed site remediation cases and refer potential NRD claims to NJDEP's Office of Natural and Historic Resources for resolution.<sup>65</sup>
- announces NJDEP's intent to use a "settlement formula" for groundwater NRD claims, and a more "robust" formula when negotiating litigated claims;<sup>66</sup>
- states NJDEP's preference that the damage assessment calculated under the sample groundwater formula be used to determine the value and scope of actual restoration projects, rather than the monetary payments to the State;<sup>67</sup> and
- states that NJDEP intends to use "special counsel" to prosecute NRD.

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<sup>63</sup> The Texas General Land Office has similarly entered into a memorandum of agreement with various federal trustees. *See* Rusk, et al., *supra* note 8, § 11.02, at 365.

<sup>64</sup> *See* NJDEP 2003-07 Policy Directive, "Subject: Natural Resource Damages" (Sept. 24, 2003), *available at*, <http://www.state.nj.us/dep/commissioner/policy/pdir2003-07.htm> (last visited Aug. 23, 2004) (hereinafter "Policy Directive").

<sup>65</sup> To add teeth to the process, SRP will defer issuing No Further Action letters for remediation of any sites for which NRD claims have been identified but not resolved.

<sup>66</sup> The parameters in the settlement formula include the square footage of the groundwater contaminant plume, the water recharge rate in the area, the public water rate and the length of time that the groundwater will be impacted. *See* N.J. Dept. of Env'tl. Protection, Office of Natural Resource, Restoration Sample Ground Water Injury Calculation, *available at*, [http://www.state.nj.us/dep/nrr/nri/gw\\_injury\\_calc\\_200305.pdf](http://www.state.nj.us/dep/nrr/nri/gw_injury_calc_200305.pdf). (last visited Aug. 23, 2004).

<sup>67</sup> NJDEP states that it is open to resolving claims using land swaps to conserve aquifer recharge areas, water reuse and recycling projects, storm water infrastructure projects, reforestation and other similar projects.

Shortly thereafter, NJDEP formally retained Allen Kanner & Associates as “Special Counsel” to evaluate, negotiate, settle or litigate NRD claims on a lucrative, contingency basis.<sup>68</sup>

To date, NJDEP has issued approximately 4,000 Notices of Intent to Initiate Litigation to companies allegedly responsible for contaminated sites, thereby inviting them to settle groundwater NRD claims. The notices state that NJDEP is prepared to meet with responsible parties and their experts to discuss the NRD claims. The Notice demands that responsible parties provide, in advance, any evidence considered relevant to the evaluation of their NRD liability. PRPs have ten business days to respond. A response constitutes an agreement to toll any applicable statute of limitations that would be a defense to NRD liability. Failure to respond within ten days is treated as a rejection of NJDEP’s offer to negotiate, inviting civil prosecution. Case managers within the Site Remediation Program (“SRP”) have been instructed to evaluate each of their site remediations to determine whether NRD claims may exist. NJDEP representatives have informed PRPs that the SRP has finished review of approximately 2400 sites and abandoned many because they involve homeowners, public entities, or small contamination plumes. NJDEP believes, however, that it may have NRD claims at as many as 4,000 sites.

### 3. The First Litigated NRD Claims Under the New Initiative

On May 24, 2004, then New Jersey Governor James McGreevey, NJDEP Commissioner Bradley Campbell and New Jersey Attorney General Peter Harvey<sup>69</sup> announced at a press conference the filing of the first ten natural resource damage complaints against companies alleged to have polluted twelve sites in nine separate New Jersey counties. Six of these suits were filed for the Division of Law by “special counsel” Allan Kanner & Associates.

McGreevey stated that his “administration is holding polluters accountable [and has] made New Jersey a national leader in pursuing natural resource damages claims.”<sup>70</sup> He

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<sup>68</sup> Kanner’s fees are tiered, based upon the value of the NRD recovery or settlement and any other claims that are required to be brought as a result of the entire controversy doctrine, e.g., claims for cleanup costs. Kanner may receive at least 20% of the first \$10 million recovered, 17.5% of the next \$15 million recovered and 15% of any amount recovered over \$25 million for each NRD case that is settled after the state has initiated a lawsuit. *See* Special Counsel Agreement, between Peter C. Harvey, Attorney General of the State of New Jersey and Allen Kanner & Associates, dated July 9, 2003. DEP has also indicated that it will seek to recover Kanner’s fees as part of any settlement that consists of a restoration project.

<sup>69</sup> Both Commissioner Campbell and Attorney General Harvey are being replaced by recently elected Governor Jon Corzine. For a discussion of the potential impact of these high-level personnel changes on New Jersey’s NRD Initiative, see Section IV., *infra*.

<sup>70</sup> Office of the New Jersey Attorney General, *New Jersey Filing 10 Natural Resource Damage Suits*, News Release (May 20, 2004), available at, <http://www.state.nj.us/lps/newsreleases04/pr20040520c.html>. (last visited Apr. 27, 2006).

further stressed that “New Jersey is committed to protecting New Jersey’s environment for future generations.”<sup>71</sup> Attorney General Harvey stated that “[t]his is just the first wave of natural resource damage cases. Working with DEP, my office will be filing many more cases, through the Division of Law and through a group of experienced outside counsel . . . .”<sup>72</sup> Commissioner Campbell added that “New Jersey is sending a clear message that the polluters will be held accountable for damages to our state’s water resources and for diminishing our residents’ quality of life.”<sup>73</sup>

#### 4. Recent New Jersey NRD Settlements

Recently, NJDEP settled a number of significant NRD claims. Among them, in January 2006, Merck & Co., Inc. and Motiva Enterprises/Shell Oil Company agreed to pay, respectively, \$2.4 million and \$2.2 million for NRD at Merck properties and several hundred Shell service stations.<sup>74</sup>

International Matex Tank Terminals (“IMTT”) settled NRD claims brought against it by the NJDEP for \$3 million.<sup>75</sup> The claims arose out of contamination at a site used as a bulk storage and transshipment terminal for fuel and petrochemicals. As part of the settlement, IMTT is required to fund improvements to waterfront parks near the site, including wetlands restoration, observation decks, bike trails, canoe and kayak launches and other amenities. The state has a pending lawsuit against Exxon, a prior owner of the site, for NRD associated with its operations on the site.

NJDEP has accepted less sizable settlements, such as W.R. Grace and Hatco Corp.’s agreement to pay \$600,000 as part of a much larger \$13.8 million settlement.<sup>76</sup> The settlement is intended to fund the acquisition of thirty-four upland acres in the Raritan River Watershed, and is expected to address NRD associated with 3.46 acres of contaminated wetlands and a sixteen acre plume of contaminated groundwater.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Merck, Motiva/Shell Each Pay State Over \$2 Million for Ground Water Claims*, US STATE NEWS, 2006 WLNR 738142 (Jan. 12, 2006).

<sup>75</sup> See N.J. Dept. of Environmental Protection, *IMTT Provides \$3 Million to Settle Natural Resource Damages for Ground and Surface Water Contamination*, Press Release 05/05 (Apr. 29, 2005), available at, [http://www.state.nj.us/dep/newsrel/2005/05\\_0050.htm](http://www.state.nj.us/dep/newsrel/2005/05_0050.htm) (last visited Apr. 27, 2006).

<sup>76</sup> See N.J. Dept. of Environmental Protection, *DEP Approves \$13.2 Million Hatco Site Cleanup and Land Acquisition Settlement for Wetland and Ground Water Contamination*, Press Release 05-47 (Apr. 21, 2005), available at, [http://www.nj.gov/dep/newsrel/2005/05\\_0047.htm](http://www.nj.gov/dep/newsrel/2005/05_0047.htm) (last visited Apr. 27, 2006).

Finally, a company known as SP Industries recently settled NRD claims at its Vineland and Buena Vista, New Jersey sites for \$65,641 and \$56,586, respectively.<sup>77</sup> Other recently proposed settlements include Eagle Industries' agreement to remediate contaminated property in South Plainfield, New Jersey, and E. I. du Pont de Nemours and Company's agreement to pay \$2.8 million to remediate several sites around the state of New Jersey.<sup>78</sup>

#### E. *Status of NRD Programs Outside New Jersey*

Although most states' programs merely mimic the NRD provisions of CERCLA and the OPA, several states, like New Jersey, have enacted their own, more stringent NRD regulations.<sup>79</sup>

New Mexico preceded New Jersey in authorizing private attorneys to bring NRD actions on behalf of the New Mexico Natural Resources trustee.<sup>80</sup> Arizona law authorizes citizens to sue the Director of Environmental Quality for failing to carry out his or her duties as natural resource damage trustee and established a designated fund to pay for natural resource damages assessments by authorized trustees.<sup>81</sup> Texas preceded New Jersey in entering a memorandum with federal natural resource trustees, that grants the Texas General Land Office authority to initiate investigation of the existence and extent of damage to natural resources and interim losses on behalf of all participating trustees.<sup>82</sup> California's NRD program is stricter than the federal program because California has a more comprehensive list of hazardous substances and set of accompanying regulations. These regulations (the so-called "California List") broaden the reach of the California Department of Environmental Protection's ("CALDEP") enforcement jurisdiction, both with respect to compelling site cleanups and seeking NRD.<sup>83</sup>

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<sup>77</sup> See N.J. Dept. of Environmental Protection, *DEP Announces Natural Resource Damage Settlement: SP Industries Settles Liability for Injuries to Ground Water at Vineland Site*, Press Release 05-66 (May 26, 2005), available at, [http://www.state.nj.us/dep/newsrel/2005/05\\_0066.htm](http://www.state.nj.us/dep/newsrel/2005/05_0066.htm) (last visited Apr. 27 2006).

<sup>78</sup> See, *New Jersey Department of Environmental Protection Natural Resource Restoration Recently Proposed Settlements*, available at, <http://www.nj.gov/dep/nrr/settlements/> (last visited Sept. 8, 2005).

<sup>79</sup> See generally RUSK, et al., *supra* note 8.

<sup>80</sup> N.M. Stat. Ann. §§ 75-7-3, 75-7-4 (2006); see also RUSK, et al., *supra* note 8, §11.02, at 365. The first major claim brought in this manner, *State of New Mexico v. General Electric*, Case Nos. Civ. 99-1118 BSJ/KBM/CIV 95-1524 bsj/act (Consolidated) (D.N.M. 2004), was dismissed as a result of a June 2004 ruling, which is discussed below.

<sup>81</sup> See ARIZ. REV. STAT. §§ 49-264, 49-282 (2006); see generally RUSK, et al., *supra* note 8, §11.02, at 365.

<sup>82</sup> See Oil Spill Prevention Response Act of 1991, TEX. NAT. RES. CODE § 40.107 (Vernon 2006); See generally RUSK, et al, *supra*, note 8, §11.02, at 365.

<sup>83</sup> The regulations, *inter alia*, separate wastes into Hazardous, Extremely Hazardous and Restricted Hazardous categories. See CAL. HEALTH AND SAFETY CODE §§ 25117, 25115 and 25122.7 (2006); see also RUSK, et al., *supra* note 8, §11.02, at 365.



NRD trustees of several states have pursued NRD claims on a regular basis or have obtained large NRD settlements, either alone or in cooperation with federal trustees. In cooperation with federal trustees, CALDEP obtained a \$30 million NRD award in the landmark *Montrose Chemical* case<sup>84</sup> and a \$16.4 million NRD settlement with respect to the Guadalupe Oil Field site.<sup>85</sup> The state of Colorado cooperated with the EPA to obtain a \$5 million NRD recovery at the Summitville Mine site.<sup>86</sup> The Wisconsin DNR and Department of Interior jointly settled NRD claims for the Lower Fox River with Fort James Corporation for \$8.2 million (\$3.6 million in estimated restoration work and a \$4.6 million payment to the trustees for NRD).<sup>87</sup> The Michigan Department of Environmental Quality has consistently pursued NRD claims since the early 1990s, ranging from nominal values to \$500,000.<sup>88</sup> The State of Indiana displayed creativity by accepting donation of a 17-acre floodplain habitat to resolve NRD claims against Dow Chemical in connection with its Zionsville chemical plant.<sup>89</sup> The State of Idaho is also cooperating closely with the DOI and the Coeur D'Alene Tribe in the prosecution of the *Coeur D'Alene* cleanup litigation, where natural resource damages at the site have been estimated in the \$600 million to \$1.3 billion range.<sup>90</sup>

#### F. Available Defenses and Strategies for Responding to NRD Claims

PRPs appear to be relying on three strategies to respond to the NRD initiative: (1) challenges to NJDEP's quantification of the natural resource damages at issue at specific sites; (2) lobbying efforts; and (3) challenges to NJDEP's authority to pursue NRD claims

<sup>84</sup> See *Montrose Chem. Corp. of Cal. v. United States Env'tl. Prot. Agency*, 132 F.3d 90 (D.C. Cir. 1998); see generally Grayson, et al., *supra* note 23.

<sup>85</sup> NRD-related recovery consisted of a \$9 million payment to fund specific restoration projects and \$7.4 million in penalties, natural resource damages assessment costs and general litigation costs. The litigation costs, likely included costs for litigating cleanup responsibility. See *\$43.8 Million Settlement Reached in Guadalupe Oil Field Case*, CALEPA News Release (C-5-98), issued July 1998, available at <http://www.calepa.ca.gov/PressRoom/Releases/1998/C0598.htm>.

<sup>86</sup> Grayson, et al., *supra* note 23; Karl S. Lytz, *Recent Development in Superfund Natural Resource Damages Claims*, *Environmental Hot Topics for Business Lawyers*, American Bar Association Spring Meeting (Mar. 2001).

<sup>87</sup> See *United States v. Fort James Operating Corp.*, Civ. Act. No. 02-C-0602 (E.D. Wis., June 12, 2002), Consent Decree ¶¶ 8(a)-(b).

<sup>88</sup> See generally *Michigan NRD II* *supra* note 10, at Appendix B ("Digest of NRD Settlements").

<sup>89</sup> See Grayson, et al., *supra* note 23.

<sup>90</sup> See *Coeur D'Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); United States Environmental Protection Agency, Office of Solid Waste, *Availability of Natural Resource Damage Assessment Modeling* (December, 1996), available at, <http://www.epa.gov/epaoswer/hazwaste/ldr/mine/natural.pdf>.

through the announced directives. These PRP responses have caused NJDEP to begin reviewing the NRD Policy, which has led DEP to announce that it will issue formal regulations.<sup>91</sup>

### 1. Arguments Against the Proof and the Measure of Damages

Many PRPs caught in the new wave of NRD claims begin at a disadvantage because they have already been found to be liable for contamination at the affected sites or have accepted responsibility to clean them up. Nonetheless, the inherently subjective nature of NRD valuation and the history of the Passaic River may allow these PRPs to mount several factual and scientific challenges to their NRD claims. These challenges include:

#### a. *Lack of Proof of Causation of the Specific Contamination Giving Rise to NRD*

The Passaic River has been a center of major industrial activity for over a century, and many industrial concerns have operated on or near many of the sites. Accordingly, each PRP may have the ability to argue that NJDEP cannot show that it is specifically responsible for a discharge that resulted in damage to a natural resources requiring restoration or replacement.

#### b. *Lack of Proof of Loss of Use of Services*

Given that the Passaic River has been a site of major industrial manufacturing and municipal waste disposal for over a century, there has likely been little demand to use the river for fishing, swimming or recreation. Therefore a PRP may be able to show that the discharges from their site did not result in any quantifiable loss of use or impairment of the river as a resource. With the assistance of industrial historians and environmental experts, a PRP may further be able to argue that the valley was being put to its “best use,” that is the highest intended use, as shown by the collective decisions of various municipalities and the State to designate the Passaic River Valley as the site of heavy industry for the last one hundred years.

#### c. *Lack of a Scientific Basis for an Individual NRD Award*

As discussed above, the NJDEP is relying on its sample groundwater injury calculation as the cornerstone for enforcement and settlement negotiations. The sample calculation estimates the “surrogate dollar value for injuries to groundwater resources of the State [which] will provide the scope of a restoration project.” Pursuant to the calculation, NJDEP estimates the volume of the groundwater contamination plume, multiplies that figure by the

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<sup>91</sup> These regulations were originally expected in the fall of 2005. It is uncertain when they will ultimately be released.

market water rate set for the region by the New Jersey Statewide Water Supply Plan of 1996 and by the estimated number of years required to remediate the groundwater plume to New Jersey's cleanup standards. This approach is a "cut to the quick" analysis, which stands in sharp contrast to the federal requirement of a multiphase assessment, intended to determine the existence and extent of resource damage.<sup>92</sup>

New Jersey's approach assumes that there is an equal demand for use of every stock of groundwater and every type of natural resource, regardless of a site's location and history. However, that assumption is flawed in at least several circumstances, specifically:

d. *Industrial-Use Groundwater: New Jersey's Formula Inflates Values*

Industry critics object to the sample groundwater calculation because NJDEP places a high drinking water value on all groundwater, regardless of whether a PRP's discharge in any way hindered its use or lessened its value. For example, with respect to groundwater NRD, some aquifers may be essentially unusable for drinking water due to excess salinity or other geologic features that prevent access. Another PRP argument is that a lower use value should be assigned to water bodies that have not historically been used for drinking water purposes, but rather used for industrial purposes or only as a fire-fighting resource.

e. *Inflated Value for the Loss of Use of Historically Contaminated Water Bodies*

NJDEP's strong policy statements suggest that it would assign a high-value to waterfront property, regardless of historic use. A high NRD award might be appropriate where frequently used public beaches were contaminated. That would not necessarily make sense, however, for a contaminated beach located in an industrial area shunned by beachgoers for aesthetic reasons. In urban watersheds, like Lower Passaic River, there is similarly no demand for boating, bathing and fishing.

f. *Double Recovery Where Remediation Activities are Effective*

Critics question the appropriateness of collecting NRDs where remediation efforts at a site are ongoing or incomplete. The argument is that the PRP pays once to remediate the contamination and a second time to compensate the public for loss of a water body that may be wholly restored by the remediation process. This argument applies with greater force when the impact of contamination on the public is being addressed by the PRP during remediation, through provisions of alternate water supplies, and the like.

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<sup>92</sup> See generally, J. Terrance Ryan, *The Evolution of Natural Resource Damage Assessments under the Oil Pollution Act and the Comprehensive Environmental Response Compensation and Liability Act*, 6 FORDHAM ENVTL. LAW J. 29 (1994).

*g. Lack of “Lost Services” of Open Waterbodies*

Similarly, the formula is arguably inapt for damage to surface water bodies and rivers, such as the Passaic River, because the extent of contamination cannot be as clearly defined as a geographically limited aquifer.

Because NJDEP’s NRD claims are in their early stages, it is uncertain how much weight will be given to arguments of this type. However, similar arguments have succeeded in New Mexico, whose “special counsel”/private attorney general model New Jersey follows.

In *New Mexico v. General Electric Co.*,<sup>93</sup> (“*General Electric*”), the court dismissed New Mexico’s NRD claim against General Electric in two summary judgment orders. Its April 6, 2004 order dismissed certain elements of New Mexico’s claimed natural resource damages as speculative and unsupported at law. New Mexico claimed that General Electric and other PRPs had rendered unusable approximately 94 billion gallons of groundwater in the Middle Rio Grande Basin aquifer.<sup>94</sup> To support its demand, the New Mexico Environmental Department (“NMED”) applied a short-cut “market valuation” formula, which provided a “drinking water value” for “the volume of contaminated groundwater rendered unavailable for appropriation and damages for loss of use” of specific portions of the aquifer. New Mexico argued that the \$4 billion NRD figure produced by the formula represented the “replacement value” of the service provided by the impaired groundwater, including (1) active groundwater services to the city of Albuquerque, which drew water for fire protection from the aquifer; and (2) the *in situ* value of the aquifer as a reserve in times of drought.<sup>95</sup>

The court first addressed an issue that may prove important to New Jersey PRPs: whether NRD can be calculated by presuming that all ground water will be used for drinking water purposes, requiring a high cleanup standard.<sup>96</sup> The court rejected NMED’s argument that groundwater “must be considered ‘injured’ unless and until it is returned to its pre-polluted condition and fully complies with *all* human health standards which are applicable to water intended for public consumption.”<sup>97</sup> The court held that, “[u]nder New Mexico law . . .

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<sup>93</sup> Case Nos. Civ. 99-1118 BSJ/KBM/CIV 95-1254 BSJ/ACT (April 6, 2004, D.N.M.) (consolidated) [hereinafter “*General Electric I*”] and further proceedings at *New Mexico v. General Electric Co.*, 2004 U.S. Dist. LEXIS 18932 (D.N.M. June. 23, 2004).

<sup>94</sup> *General Electric I* at \*13 n.9.

<sup>95</sup> *Id.* at \*45.

<sup>96</sup> Specifically, the court addressed whether the EPA’s maximum contamination limits (“MCL’s”), *see* National Secondary Drinking Water Regulations, confirmed at 40 C.F.R. Part 143 (2002), or the higher effluent limitations from New Mexico’s permitting system, *e.g.*, the New Mexico Water Quality Control Commission Regulations, determined whether groundwater was lost to use.

<sup>97</sup> *General Electric I* at \*42.

water need not be pristine to be drinkable and use for drinking water purposes depends upon whether applicable water quality standards are met, not whether the water yet remains in its primordial state, untouched by any of the chemical remnants of the modern age.”<sup>98</sup> The court further found that NMED produced “no significant probative evidence of *any diminution in value* of the groundwater, as measured by the difference between its current condition and its formerly pristine state.”<sup>99</sup>

The court also agreed that there is no “loss of use” when the groundwater was unusable prior to the contamination. NMED’s claim for loss of extractive services failed as a matter of law “absent significant probative evidence of an actual loss of . . . a volume of . . . groundwater that the State could otherwise have made available for appropriation for the aquifer’s safe yield”<sup>100</sup> The state had no evidence to rebut the defendant’s hydrogeologist’s theory that the aquifer was still functioning at its maximum “safe yield”<sup>101</sup> despite the alleged loss of pumping capacity of the affected well. Further, the court found the loss of service claim “premature, or even speculative” in the absences of proof that anyone had lost the use of any volume of water.<sup>102</sup>

The *General Electric* court held that NMED was double-counting its damages by setting an independent value for the “loss of extra active services” and the “lost value of the ‘stock’ of groundwater as a drought reserve.” It held that “diminution of value” of the *in situ* groundwater and damages for lost extractive services “are simply two slices of the same pie.”<sup>103</sup> Together, these elements of damages simply measured the loss of use of a volume of groundwater “past, present and future.”<sup>104</sup>

Finally, the court ruled that NRD could not be calculated without determining the effects of ongoing site remediation. Specifically, NMED had not offered specific evidence to rebut the defendants’ showing that the remediation may successfully remove all contamination, or that any remaining contamination could be addressed at the time of extraction through wellhead treatment.<sup>105</sup>

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<sup>98</sup> *Id.* at \*44.

<sup>99</sup> *Id.* at \*43 (noting that “no expert witness has satisfied that as to the economic value of water that may prove to be drinkable, but not still pristine.”)

<sup>100</sup> *Id.* at \*50.

<sup>101</sup> NMED defines “safe yield” as “the amount of water that can be extracted from an aquifer on an annual basis without depleting the size of the aquifer in the ground . . . .” *Id.* at \*46-47, n.56.

<sup>102</sup> *Id.* at \*48-49.

<sup>103</sup> *Id.* at \*53.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*55-56.

As a result of the foregoing rulings, the court determined that trial in *General Electric* would be limited to the following issues: (1) the nature, location and extent of the contamination that is beyond the reach of CERCLA and the intended scope of the remediation at the site; (2) the volume of *in situ* groundwater, if any, that has been rendered unavailable for use as drinking water (*e.g.* as drought reserve) because of that contamination; (3) the cost of restoration of that volume of unavailable groundwater; and (4) the extent of the appropriate judicial remedy for the actual injury to the state's legally protected interest."<sup>106</sup>

When NMED produced no additional evidence in response to the court's order, the PRP defendants moved for summary judgment again, arguing that NMED could not prove any injury because all contamination at the site could be addressed under the existing site remediation plan imposed under CERCLA and the remedy imposed under EPA's record of decision was intended to be flexible and expand if additional contamination were discovered in the course of remediation.<sup>107</sup> NMED responded by arguing that NRD were necessary because the ROD did not provide for cleanup of the groundwater to New Mexico's higher cleanup standards for abatement of groundwater contamination; (2) that a "deep deep contamination plume" existed below the intended scope of the EPA remediation; and (3) that CERCLA allowed New Mexico to seek damages for the cost of remediation that is complementary to, but beyond the scope of the remediation required by the EPA.<sup>108</sup>

The court rejected each of NMED's arguments. NMED provided no affidavit or sworn testimony that showed that any of the contamination at issue involved only petroleum waste, and hence was beyond the reach of CERCLA, or clearly fell outside the scope of the expansive and adaptable remedy required by EPA.<sup>109</sup> The court found an expert opinion that a "deep deep contamination" existed to be a net opinion, in the absence of any supporting sampling data.<sup>110</sup> Finally, the court found that NMED had failed to produce "significant probative admissible evidence or specific facts showing that the alleged injury is either total or permanent."<sup>111</sup>

The *General Electric* decisions give industry and its insurers cause for guarded optimism. At least one federal court has closely reviewed expert evidence and held an NRD claimant to a high standard of proof to demonstrate quantifiable injury to a resource. The

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<sup>106</sup> *Id.* at \*64.

<sup>107</sup> *Id.* at \*19-24.

<sup>108</sup> *Id.* at \*24-26.

<sup>109</sup> *Id.* at \*62.

<sup>110</sup> *Id.* at \*53.

<sup>111</sup> *Id.* at \*74.

court was skeptical of the notion that NRD claims can exist when the affected resources are subject to ongoing remediation. By extension, the *General Electric* case may give ammunition to PRPs to argue that when a remedy at a site is final, there is no damage to a natural resource *per se* and the trustee is not entitled to NRD.

However, New Jersey PRPs may be unable to recreate the result in *General Electric* because the prosecution of that case may have been hampered by strategic decisions made early in the case that the historically aggressive NJDEP would be unlikely to repeat. Some fault the Attorney General's decision, against NMED's wishes, to fire the experienced assistant Attorney General, who had handled the case from inception, in favor of private contingent fee attorneys who had contributed heavily to the Attorney General's campaign.<sup>112</sup> New Mexico's natural resource trustee attributes the weakness of the NRD case to the Attorney General's failure to prepare a natural resource damage assessment prior to filing the case, contrary to the trustee's wishes.<sup>113</sup> The Attorney General's office states that it cannot perform NRD assessments without adequate funding from the legislature. The fact remains that other attorneys general may not repeat the mistake of attempting to go to trial without a quantitative natural resource damage assessment.<sup>114</sup>

Success by one PRP in New Mexico does not guarantee that other PRPs in New Jersey, or even in New Mexico for that matter, will prevail on similar arguments. *General Electric*, however, suggests that a successful defense strategy in an NRD case will require, at a minimum, the development of complex expert evidence regarding the existence and extent of impacts to groundwater and an attack on the valuation of any other affected resources.

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<sup>112</sup> *Editorial, Pollution Case Tossed: Time to Team Up and Rally*, THE SANTA FE NEW MEXICAN at A-7 (May 15, 2005); see also Ben Neary, *Environmental Official Calls AG's Help Weak*, THE SANTA FE NEW MEXICAN (June 4, 2004) [hereinafter *AG's Help Weak*] (citing republican challenger to New Mexico Attorney General Patricia Madrid, Rob Perry's criticism that the private firms handling the case had contributed "hefty cash contributions" to Madrid's 2002 campaign).

<sup>113</sup> See Ben Neary, *Governor, Madrid "Mishandled" Lawsuit*, THE SANTA FE NEW MEXICAN at B-1 (May 14, 2004) [hereinafter *Mishandled Lawsuit*]. After former natural resource trustee William Turner was unable to gain legislative funding for the assessments, Attorney General Madrid engaged in a public battle with Turner to gain the right to file the lawsuit without his approval, and eventually won that right in court. See *Editorial, State Loses Gamble in Pollution Lawsuit*, ALBUQUERQUE J. at A7 (May 22, 2004). *Mishandled Lawsuit, supra*. According to New Mexico Attorney General Patricia Madrid, the potentially fatal flaw to NMED's case was caused by lack of funding for NMED's natural resource program. See *Editorial, Pollution Case Tossed: Time to Team Up, Rally*, THE SANTA FE NEW MEXICAN at A4 (May 15, 2004).

<sup>114</sup> According to Attorney General Madrid, the potentially fatal flaw to NMED's case was caused by lack of funding for NMED's natural resource program. See *Editorial, Pollution Case Tossed: Time to Team Up, Rally*, THE SANTA FE NEW MEXICAN at A4 (May 15, 2004).

## 2. Legislative Relief Through Lobbying

Several industry groups considered or actually began to lobby the legislature to limit NJDEP's authority to pursue the NRD initiative under the NRD Policy. However, it appears that those efforts have thus far been modest. This was likely due, in part, to the uncertainty caused by the November 2004 election and the resignation of New Jersey Governor James McGreevy, which was announced on April 12, 2004, but not effective until November 15, 2004.<sup>115</sup> At that time it was unclear whether State Senate President Richard Codey would become Acting Governor on November 15 or whether a special election was required. That uncertainty was ended by a September 15, 2005 federal court ruling that a special election was not required.<sup>116</sup> The short term stability in the legislative landscape caused by Acting Governor Codey's assuming office, ended as a hotly contested November 2005 gubernatorial race in which Democrat Senator Corzine defeated Republican businessman, Doug Forrester.

Governor Corzine has not yet issued any policy statements or initiatives regarding NRD or environmental issues generally. As the Governor's agenda becomes clear, it is crucial for manufacturers and industry to carefully consider the form of relief they seek from the legislation with respect to NRD claims. Industry lobbying efforts resulted in the enactment in 2001 of a four-year statute of limitations for NRD claims under the Spill Act, which was to expire on December 31, 2005, or four years from the end of remedial investigation at a given site, whichever is later.<sup>117</sup> This statute of limitations has been cited as one of the primary motivations for the New Jersey initiative.<sup>118</sup> Indeed, the NJDEP's NRD Policy acknowledges that "[a]n accelerated effort is needed to ensure that an application of the current statute of limitations to NRD claims does not result in the loss of the public's right to compensation for natural resource injuries."<sup>119</sup> To preserve this right, the Legislature extended the limitations period for NRD claims for an additional eighteen months to June 1, 2007.<sup>120</sup>

Another reason for caution on the legislative front is the prospect of new NRD regulations. DEP has agreed to promulgate formal regulation in a settlement of an industry challenge to the NRD Policy, as discussed immediately below.

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<sup>115</sup> See generally Associated Press, *No Special Election to Replace McGreevy; Judge Dismisses Lawsuit Saying N.J. Has a Governor* (Sept. 15, 2004), available at, [www.MSNBC.com/Id/6012950](http://www.MSNBC.com/Id/6012950).

<sup>116</sup> *Id.*

<sup>117</sup> See N.J. STAT. ANN. 58:10B-17.1 (West 2006).

<sup>118</sup> See, e.g., E. Lynn Grayson, *Industry Files Litigation Against New Jersey Opposing Aggressive Natural Resource Initiatives*, 34 ENVTL. L. REP. 10566 (June 2004).

<sup>119</sup> 2003-07 Policy Directive, *supra*, note 64, available at <http://www.nj.gov/dep/commissioner/policy/pdir2003-07.htm> (last visited Aug. 23, 2004).

<sup>120</sup> See *Briefs*, WASTE NEWS (Jan. 2, 2006), 2006 WLNR 276113. The bill, A.4469, was signed into law on Dec. 21, 2005, ten days before the original statute of limitations was set to expire.



### 3. Challenges to NJDEP's Authority

NJDEP's authority to issue the NRD Policy was challenged in two important suits by several PRPs and six trade associations: *New Jersey Department of Environmental Protection v. ExxonMobil, Sun Refining, Arco Petroleum, et al.*<sup>121</sup> and *New Jersey Society for Environmental & Economic Development v. Campbell* (the "NJSEED Litigation").<sup>122</sup> These parties argued, *inter alia*, that NJDEP violated New Jersey's Administrative Procedure Act,<sup>123</sup> by failing to adopt the "sample groundwater formula" as an administrative rule, subject to public notice and comment. They also argued that the contingency fee contract given to Kanner & Associates violates, *inter alia*, the public trust doctrine and state statutory law. The ExxonMobil suit was the first challenge to NJDEP's authority for the NRD policy and litigated with such an intensity that it reveals that far more is at stake than the \$500,000 NRD demand issued to a single gas station in Ewing, New Jersey.

On June 17, 2004, Superior Court Judge Sabatino ruled on several motions for declaratory relief in the *NJSEED Litigation* and upheld NJDEP's use of Kanner & Associates, Judge Sabatino finding that the New Jersey Spill Act authorized the NJDEP to retain special counsel in order to fulfill its statutory mandate to enforce environmental law and seek natural resource damages.<sup>124</sup> Judge Sabatino certified the remaining challenges under the APA and the New Jersey Constitution for review by the Appellate Division.

Despite the failure of the challenge to Kanner's contingent fee arrangement, industry can take some hope from the fact that Judge Sabatino did not summarily reject the trade associations' argument that the NRD Policy is *ultra vires* under the New Jersey Constitution and various statutes.

NJDEP then moved to transfer the matter to the Appellate Division. However, the parties since have settled. As part of that settlement, NJDEP promised to propose formal NRD regulations subject to notice and comment, with the expectation the regulation would be released by the fall of 2005.<sup>125</sup> No new NRD regulations have been released to date.

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<sup>121</sup> Docket. No. MER-L-2933-02 (N.J. Super. Ct. Law. Div., Mercer County) (Sabatino, J.)

<sup>122</sup> Docket No. MER-L-343-04 (N.J. Super. Law Div., Mercer County) (Sabatino, J.).

<sup>123</sup> N.J. ADMIN CODE § 1:30-4.3(a) (Aug. 6, 2005 Supp.).

<sup>124</sup> N.J. Soc. for Envtl. & Econ. Dev. v. Campbell, Docket No. MER-L-343-04 (N.J. Super. Law Div., Mercer County) Order Regarding Special Counsel Issues and Transferring Remaining Issues to Appellate Division (Sabatino, J.).

<sup>125</sup> At a May 24, 2005 seminar at Rutgers' Cook College, John Sacco, Chief of NJDEP's Office of Natural Resource Restoration stated that NRD regulations will "hopefully" be proposed in fall 2005. *See, Natural Resource Damages Overview*, Seminar Materials, provided at Cook College, New Brunswick, N.J. (May 24, 2005).

When issued, NJDEP's regulations will address, among other things, the agency's preference for restoration projects rather than monetary NRD payments; scaling of NRD restoration projects; "short-form" methods to assess NRD; the role of use and "non-use" values in calculating claims and scaling NRD projects; and a "limited ability to pay" exemption from NRD and other situations where litigation or other costs of recovery may exceed the NRD claim.

The long term effect of the industry challenge to NRD initiative is uncertain, and the trade association lawsuit will be dismissed without prejudice and subject to refile once regulations are adopted.

Industry views this outcome as favorable and expects that the promulgation of NRD rules by NJDEP will give rise to more reasonable, predictable assessments of NRD in the future. This process will also provide industry with an administrative forum, subject to judicial review, to present technical, policy, and legal arguments to limit NRD claims. In that process, industry can raise the various conceptual problems with the groundwater calculation discussed above at section II.F., including, *inter alia*, distinctions between off-site and on-site injuries and reduction of claims where ground water and other resources are not available or suitable for economic use.

However, this optimism should be laced with caution because NJDEP's formal NRD regulations will be cloaked with a presumption of correctness, which attaches to an agency's interpretation of its own statutory authority.<sup>126</sup> The New Jersey Appellate Division rejected procedural challenges to the 1998 Tech Reg amendments.<sup>127</sup>

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<sup>126</sup> In re Adoption of N.J. Admin. Code § 7:26B, 608 A.2d 88 (N.J. 1992).

<sup>127</sup> Specifically, in *New Jersey Site Remediation Industry Network, et al. v. New Jersey Department of Environmental Protection*, Docket No. A-5272-97T3 [hereinafter Industry Network], the Appellate Division rejected arguments by various manufacturers and trade associations that the 1998 Tech Reg amendments were adopted in violation of the New Jersey Administrative Procedure Act ("APA"), violated the Hazardous Discharge Site Remediation Act ("HDSA"), and the Brownfield Act and constituted an improper assertion of judicial power by the NJDEP. The Appellate Division rejected these arguments because damage to or loss of use of a "natural resource" fell within the HDSA and Spill Act's definition of "remedial action" or "cleanup and removal costs," and NJDEP's power to act as a "trustee of the environment," which the court held implicitly requires a comprehensive study of ecological damage to be part of a remedial investigation.

### III.

#### THE INSURANCE RAMIFICATIONS OF NATURAL RESOURCE DAMAGE CLAIMS

NRD claims raise two main insurance-related issues. First, how do traditional policy provisions and coverage law impact NRD claims? Second, how do NRD demands impact previously “closed” environmental claims? These issues are discussed in detail below.<sup>128</sup>

##### A. Coverage Issues Raised By NRD Claims

Despite their potential size and seeming novelty, NRD claims fit squarely within established environmental coverage law. This can be seen by reviewing basic coverage law that has evolved on the terms and conditions of commercial general liability (“CGL”) policies in the context of environmental cleanup claims.

##### 1. “Property Damage”

NRD constitute “property damage” under typical CGL policies. For example, New Jersey case law has consistently held that environmental damages are “property damage.”<sup>129</sup> Given New Jersey’s broad definition of NRD, which includes damage to the soil, groundwater and surface water held in common for the citizens of New Jersey, the courts will likely view NRD as claims for environmental damages and, hence, “property damage” under established case law.<sup>130</sup>

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<sup>128</sup> We focus our discussion on New Jersey law because NJDEP’s NRD initiative makes it likely that New Jersey courts will be the first to address NRD-related coverage issues. Major variations from New Jersey law are also mentioned. We focus in particular on the states referenced in section II.E and New Mexico, which is the site of recent high-profile NRD litigations, all of these are most likely to emulate New Jersey’s NRD initiative.

<sup>129</sup> See, e.g., *Gen. Accid. Ins. Co. v. Morton Int’l. Intern. Inc.*, 629 A.2d 831 (N.J. 1993); *Carter Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998).

<sup>130</sup> The same will likely hold true for NRD claims brought under federal law and in states other than New Jersey. See generally APPLEMAN ON INSURANCE § 4521 (2004 Supp.) (“A number of courts have followed the traditional rule and held that response costs do not constitute damages. A majority of courts that have considered the question have held that response costs constitute damages, whether they are incurred by the insured as a result of conformance with an injunction or due to a restitution action by the government.”). See also *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (applying N.Y. law); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990); *Daniels v. Cincinnati Ins. Co.*, 800 F. Supp. 753 (S.D. Ind. 1992), *vacated on other grounds*, 148 F.R.D. 257 (S.D. Ind. 1993); *Boeing v. Aetna Cas. & Sur. Co.*, 784 P.2d 507 (Wash. 2001); *Wagner v. Milwaukee Mut. Ins. Co.*, 427 N.W.2d 854 (Wis. Ct. App. 1988), *overruled on other grounds*; *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990); *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (applying Idaho law); *Coakley v. Maine Bonding & Cas. Co.*, 618 A.2d 777 (N.H. 1992).