

# Understanding and Protecting Natural Resources

by

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*“Some paintings become famous because, being durable, they are viewed by successive generations, in each of which are likely to be found a few appreciative eyes. I know a painting so evanescent that it is seldom viewed at all, except by some wandering deer. It is a river who wields the brush, and it is the same river who, before I can bring my friends to view his work, erases it forever from human view. After that it exists only in my mind’s eye.”<sup>1</sup>*

## I. INTRODUCTION

Over the years, environmental pollution has spawned a great deal of public and private litigation and related governmental investigations. One type of claim, however, has seen little contemporary litigation: claims for natural resource damages (“NRD”). The relative dearth of NRD claims being pursued is unusual given the breadth of available legal theories and the compelling public interest at stake. The goal of this article is to explain the importance of NRD programs and evaluate the process of bringing and defending NRD claims in the United States.

A strong NRD program benefits society in many diverse ways. Economic enhancement and increased protection for environmental, recreational and historical interests are but a few examples<sup>2</sup>. A U.S. Fish & Wildlife Service article espoused the benefits of a strong NRD program:

NRDAR [Natural Resource Damage Assessment and Restoration Program] ensures healthy fish and wildlife populations, as well as healthy lands and waters on which they depend. NRDAR ensures healthy wetlands, which support more species of wildlife than any other habitat type. Wetlands are especially important to commercial saltwater fish and shellfish. Wetlands benefit people by providing recreational opportunities, recharging groundwater supplies, reducing flood damage, and controlling erosion. The economic benefits of wetland resources are estimated at more than \$1 trillion annually. NRDAR benefits the nation’s 35 million anglers, 14 million hunters, and 63 million wildlife viewers who rely on healthy fish and wildlife populations for

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<sup>1</sup> ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).

<sup>2</sup> See generally <http://www.nj.gov/dep/nrr>.

their outdoor pursuits. NRDAR helps maintain a thriving economy by ensuring healthy resources that provide recreational opportunities. Fishing annually brings in \$38 billion; hunting, \$21 billion; and wildlife viewing, \$27 billion. These earnings represent about 1.4% of the Gross Domestic Product. NRDAR helps safeguard more than 2 million full- and part-time jobs related to fishing, hunting, and wildlife viewing. NRDAR benefits a nearly \$4 billion dollar per year commercial fishing industry.<sup>3</sup>

In addition, property owners and other real estate interests adjacent to restored areas benefit by removing stigmas that lower property values, promoting economic development and enhancing the use and enjoyment of property. The establishment of new natural resources, such as habitats for certain species, might create more development opportunities in other areas over time. Healthy natural resources are also important to Native American Tribes and help to maintain “their sovereign rights to land, water, fishing, hunting, and gathering, as well as cultural, spiritual, and traditional activities that depend on healthy resources.”<sup>4</sup> For all Americans, there remains a strong desire to leave things better for the next generation.

The overriding public interest in the preservation and reclamation of natural resources is one of the most important reasons for the development of NRD programs. As the nature of the public interest in natural resources has evolved, so has environmental legislation. The focus of the first significant environmental laws in the 1950s and 1960s was significantly different than the present day focus of environmental legislation. Initially, environmental efforts were prompted by preservationist ideals -- the desire to maintain the “great” natural resources and save such sites from exploitation. For example, in the 1960s, the proposed construction of a dam in the Grand Canyon raised awareness about environmental protectionism - - the need to preserve

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<sup>3</sup> U.S. Fish & Wildlife Service, *Beyond Cleanup: Restoring American’s Natural Heritage*, Jan. 1, 1998, available at <http://www.fws.gov/contaminants/Library.cfm>

<sup>4</sup> *Id.*

the legacy of our nation's natural resources. Legislation was directed primarily at the behavior of government agencies, as opposed to private individuals.<sup>5</sup> Congress enacted environmental legislation in order to "ensure that government agencies respected social and cultural values when pursuing development projects,"<sup>6</sup> rather than to address the illegal conduct of polluters and the consequences of their actions.

In effect, we have begun to move from a "great places" approach to natural resources to a "reclaiming" approach. While a few "great place" battles still continue, such as the effort to preserve the Arctic Wilderness, today environmental activism and legislation is inspired by the need to restore and prevent further exploitation of injured and diminishing natural resources such as the nation's coastal areas. Environmentalism is motivated less by the need for preservation and more by the desire for reclamation. People now understand two things about natural resources. First, natural resources can be salvaged, even in seemingly impossible industrial and urban locales. The technology and the capacity to reclaim and recreate natural resources have improved exponentially and will continue to improve. The Meadowlands in New Jersey is a classic example of this type of transformation potential.<sup>7</sup> Second, people take property rights

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<sup>5</sup> Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1158 (1995).

<sup>6</sup> *Id.*

<sup>7</sup> At one time the world's largest dump, "[t]he Hackensack Meadowlands is perhaps the largest urban wetland complex in the northeastern United States. It lies along the Hackensack River and is located within the New York-Newark metropolitan area. Given this location, the Meadowlands has been greatly impacted by urban and port development . . . The New Jersey Meadowlands Commission ("NJMC") is acquiring wetlands and management rights and making zoning changes . . . in an effort to protect the remaining wetlands. Plans are underway to restore the Hackensack Meadowlands ecosystem . . . Wetland restoration and enhancement efforts include restoring tidal flow, removing contaminated soils, creating open water areas, controlling invasive species . . . and regulating water levels . . . The main hope for the future of Meadowlands wetlands as well as for other urban wetlands is that as many as possible will be set aside as open space for our benefit and for future generations and that wetland restoration efforts will be accelerated to revitalize significantly impacted wetlands and to rebuild lost wetlands wherever practicable. Wetlands are natural resources that, among other things, increase the quality of life for urban residents

more seriously and also understand that the public's right to its property or "commons" is important for both monetary and nonmonetary reasons.<sup>8</sup> Finally, natural resources that were formerly viewed with little interest or real understanding, such as groundwater, have generated a special need for attention in light of the crucial role they will play in the future of this country's survival.<sup>9</sup>

The enactment of the Comprehensive Environmental Compensation, Response and Liability Act of 1980 ("CERCLA" or "Superfund")<sup>10</sup> was an attempt by Congress to respond to the massive pollution and contamination of the environment in the United States. However, as the past twenty-five years has demonstrated, CERCLA has not been effective in enabling the recovery of damages for pollution and restoring injured natural resources.<sup>11</sup> In fact, CERCLA has actually enabled polluters to prolong any meaningful cleanup of natural resources by permitting them to engage in years of ineffective and mostly useless remediation and feasibility studies.<sup>12</sup> Moreover, the response time of CERCLA is poor, thus prolonging what is already a tediously slow road to restoration.<sup>13</sup>

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across America." Ralph W. Tiner, John Q. Swords, & Bobbi Jo McLain, *Wetland Status and Trends for the Hackensack Meadowlands*, December 2002, available at <http://library.fws.gov/Wetlands/Hackensack.pdf>.

<sup>8</sup> See Allan Kanner, *The Public Trust Doctrine, Parens Patriae and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE J. ENVTL. L. & POL'Y F. **Error! Main Document Only.**57, 59 (2005). Historically, the public "common" was a public area used by villagers for livestock grazing. Additionally, the villagers had the right to "cut wood, to fish, and to cut peat or turf for fuel." *Id.* The common area was used and regulated by the villagers for purposes of mutual sustainability and benefit.

<sup>9</sup> *Id.*

<sup>10</sup> 42 U.S.C. §§ 9601-9675.

<sup>11</sup> See generally, Allan Kanner, *Rethinking Superfund*, 20 NAT'L ASS'N ENVTL. PROF'LS NEWS 19 (May-June 1995).

<sup>12</sup> Robert W. McGee, *Superfund: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y 165, 170 (1993).

<sup>13</sup> *Id.* at 169.

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The pursuit of NRD is the last chance to accomplish what the United States originally wanted to do with Superfund - - to cleanup the nation's natural resources and make the polluters compensate both the government and the public for the injuries that they have suffered and will continue to endure. Because our natural resources are being destroyed and disappearing at an alarming rate, NRD litigation has become increasingly important in order to preserve these natural assets for the public and for future generations.

## **II. BRINGING AN NRD CLAIM**

### **A. Who is the Proper Party to File Suit?**

When an injured natural resource is privately owned, property laws dictate that the owner of that natural resource is entitled to file suit and recover damages from a potentially responsible party ("PRP"). In the United States, the Constitution, statutes and common law protect private property rights. However, when natural resources owned by the public are damaged, questions arise as to who is entitled to sue for damages on behalf of the public and what type of behavior constitutes permissible use of public property. For example, an individual's right to operate a polluting facility on his private property must be balanced with the public's right to have a river adjacent to the property free from contamination. Ultimately, it is the governmental trustees who have both the responsibility and affirmative obligation to protect natural resources held in trust for the benefit of the public and to decide when and how to do so.

Natural resource trustees' responsibilities include assessing the extent of injury to natural resources and restoring natural resources. In order to execute these responsibilities, a trustee can negotiate with PRPs to obtain PRP-financed or PRP-conducted assessment and restoration of natural resource injury, sue PRPs for the costs of assessing and restoring the natural resource, or conduct the assessment

and restore natural resources and then seek reimbursement from PRPs, and, in limited circumstances, from Superfund.<sup>14</sup>

Both the federal and state governments are responsible for protecting and maintaining the natural resources that fall within their respective jurisdictions.<sup>15</sup>

### **1. State Trustees**

Traditionally, states have the responsibility of protecting natural resources for the benefit of the public. A state may use the common law public trust doctrine and police power authority to bring suit to recover damages for injured natural resources and to restore the same.<sup>16</sup> These common law doctrines evolved in recognition of the inherently broad authority states have over natural resources within their boundaries. For example, in *State of Georgia v. Tennessee Copper Co.*, United States Supreme Court Justice Oliver Wendell Holmes wrote that “the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”<sup>17</sup> Accordingly, as the Supreme Court later noted, a state may assert a claim to protect “the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.”<sup>18</sup>

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<sup>14</sup> Allan Kanner, *Tribal Sovereignty and Natural Resource Damages*, 25 PUB. LAND & RESOURCES L. REV. 93, 107 (2004).

<sup>15</sup> In some cases, these rights have been passed to citizens under appropriate circumstances (*i.e.*, through a federal citizen’s suit or pursuant to a state statute such as New Jersey’s Environmental Rights Act, N.J.S.A. 2A:35A-1, *et seq.*).

<sup>16</sup> See Kanner, *supra* note 8.

<sup>17</sup> 206 U.S. 230 (1907); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 604 (1982).

<sup>18</sup> *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

States exercise police power for the protection of public health and welfare pursuant to the powers reserved to states by the Tenth Amendment to the United States Constitution.<sup>19</sup> Through its police power a state may regulate the release of contaminants into the air,<sup>20</sup> protect the quality of water,<sup>21</sup> control land use through zoning regulations,<sup>22</sup> regulate storage and disposal of solid and hazardous substances,<sup>23</sup> and protect the public interest in wildlife.<sup>24</sup>

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<sup>19</sup> Similarly, the common law theory of *parens patriae* is illustrative of states' power and authority to protect the interests of its citizens. Through *parens patriae* suits, states have sought redress for injuries to "quasi-sovereign" interests. These "quasi-sovereign" interests include state interest in its general economy or environment, *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 56 (1890); interstate water management, *Wyoming v. Colorado*, 286 U.S. 494, 509 (1932); pollution-free interstate waters, *State of Missouri v. State of Illinois*, 180 U.S. 208, 241, (1901); protection of the air and earth from interstate pollutants, *State of Georgia v. Tennessee Copper Co.*, 206 U.S. at 238; and the general economy of the state, *State of Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447 (1945), *reh'g denied*, 324 U.S. 890 (1945).

<sup>20</sup> See, e.g., *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486 (1916); *Lees v. Bay Area Air Pollution Control District*, 48 Cal. Rptr. 295, 299-300 (Cal. Ct. App. 1966)(holding that the regulation of air pollution is "essential and represents a lawful and proper exercise of the police power); *State v. Burns*, 591 P.2d 563 (Ariz. Ct. App. 1979); ARIZ. REV. STAT. § 49-401A (1987).

<sup>21</sup> See, e.g., *Commonwealth of Pennsylvania v. Barnes and Tucker Company*, 319 A.2d 871, 885 (Pa. 1974)("abatement of water pollution is unquestionably a reasonable exercise of the police power in the abstract"); *Rochez Bros., Inc. v. Commonwealth of Pennsylvania*, 334 A.2d 790, 796 (Pa. Commw. Ct. 1975); *Morshead v. California Regional Water Quality Control Board*, 119 Cal. Rptr. 586, 589 (Cal. Ct. App. 1975)(holding that "prevention of water pollution is a legitimate government objective in furtherance of which the police power may be exercised").

<sup>22</sup> See, e.g., *Johnson v. Village of Villa Park*, 18 N.E.2d 887, 889 (Ill. 1938)("Cities and villages have the right to adopt zoning ordinances as an exercise of their police power and thereby impose a reasonable restraint upon the use of private property."); *People v. Johnson*, 277 P.2d 45, 49 (Cal. Ct. App. 1955)("[z]oning is inherent in the police power"); *Roselle v. Wright*, 122 A.2d 506 (N.J. 1956).

<sup>23</sup> See, e.g., *Meyers v. Town of Cornwall*, 192 N.Y.S.2d 734, 738 (N.Y. 1959)("a municipality may, in the exercise of its police power, adopt an ordinance which regulates the collection, storage or disposition of refuse and garbage"); *Department of Transportation v. PSC Resources, Inc.*, 419 A.2d 1151 (N.J. Super. Ct. Law Div. 1980); *State v. Byrd*, 708 So. 2d 401, 405 (La. 1998).

<sup>24</sup> *People v. K. Sakai Co.*, 128 Cal. Rptr. 536, 539 (Cal. Ct. App. 1976); *State v. Stewart*, 253 S.E.2d 638, 639 (N.C. Ct. App. 1979)("As the State's wildlife population is a natural resource of the State held by it in trust for its citizens, the enactment of laws reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the General Assembly."); *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*, 636 So. 2d 761, 765 (Fla. Dist. Ct. App. 1994); COLO. REV. STAT. § 33-1-101(1) (1986 as amended)("It is the policy of the state of Colorado that the wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors.")

The public trust doctrine has its origins in ancient common law.<sup>25</sup> During its early development in American jurisprudence, the doctrine was used to retain fisheries and land under navigable waters in trust for the use and benefit of the public.<sup>26</sup> The public trust doctrine was first applied in case law pertaining to disputes over navigable waters. These cases began with the premise that navigable beds, critical to commerce, were owned by the state and held in common by the state for public use. In the early American case of *Home v. Richards*,<sup>27</sup> the court held that the bed of a navigable river within the Commonwealth could not be granted to an individual.<sup>28</sup> The general scope of the doctrine is well articulated in the seminal United States Supreme Court case of *Illinois Central Railroad Co. v. Illinois*:

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by common law, we have already shown; . . . It is a *title held in trust for the people of the state*, that they may enjoy the navigation of the waters . . . and have liberty of fishing therein . . . The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost . . .<sup>29</sup>

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<sup>25</sup> See Kanner, *supra* note 8.

<sup>26</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); V. YANNAKONE, B. COHEN & S. DAVIDSON, ENVIRONMENTAL RIGHTS AND REMEDIES 1, § 2:3 (1972).

<sup>27</sup> 8 Va. (4 Call) 441 (Va. 1798).

<sup>28</sup> Over the years, because the doctrine was used in relation to waterways, some confusion arose about the public trust and its relation to riparians. See, e.g., *Groner v. Foster*, 27 S.E. 493 (Va. 1897) (emphasizing rights of riparians in navigable waters); *Taylor v. Commonwealth*, 47 S.E. 875 (Va. 1904)(reconciling rights of the riparian with public rights); *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655 (Va. Gen. Ct. 1846) (noting that navigable streams were the property of the Commonwealth, held for the public benefit). Nonetheless, the principle that government has a proprietary interest in natural resources survived. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 408 (1948); *Geer v. Connecticut*, 161 U.S. 519, 534 (1886), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

<sup>29</sup> 146 U.S. 387, 452-453 (1892)(emphasis added).

Although the public trust began with a more limited focus during an era of relatively weak environmental understanding, the trend over time has been to expand protection to an equally broad array of natural resources. Since the doctrine's first application to navigable beds, whose import to commerce is obvious, it has been extended to include state trusteeship over natural resources<sup>30</sup> with little or no commercial value, such as non-navigable waters,<sup>31</sup> and state parks.<sup>32</sup> Additionally, although the public trust doctrine speaks in terms of duties and not NRD, the nexus between resources that are recognized as being held in trust by the state is their importance to the general public, aesthetically as well as commercially. This importance supersedes the natural resources' potential value from exploitation by any one individual. More recent cases have recognized that the trust is active, not passive, and imposes a responsibility on states to preserve and promote the trust corpus.<sup>33</sup> Thus, a pattern has emerged in which states are directed to take a more proactive approach in order to fulfill their obligations and responsibilities with regard to the protection of natural resources.

Recognizing that the state has an important interest in conserving and protecting natural resources, the doctrine of *parens patriae* allows the state (in its capacity as "trustee") to bring

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<sup>30</sup> The legal fiction of state ownership of natural resources was abandoned in *Hughes* as being inconsistent with the Commerce Clause, however, the Supreme Court in that case recognized the important interest at stake. The Supreme Court stated, "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Hughes*, 441 U.S. at 337.

<sup>31</sup> See *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Ca. 1983), *cert. denied*, 464 U.S. 977 (1983).

<sup>32</sup> See Sax, *supra* n. 26, at 485; *Davenport v. Buffington*, 97 F. 234 (8th Cir. 1899); *Gould v. Greylock Reservation Commission*, 215 N.E.2d 114 (Mass. 1966).

<sup>33</sup> See, e.g., *National Audubon Society*, 658 P.2d at 724-725; *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927).

suit to protect those natural resources. This type of suit, recognized in many states,<sup>34</sup> allows the trustee (state) to sue to make the trust (natural resources) whole, whether by means of restoration or compensation. Despite the fact that many states have no case law directly addressing a state's *parens patriae* authority to sue, there is no evidence that any state has deemed the principle of *parens patriae* not to be a part of the state's law. Furthermore, many state constitutions, such as Louisiana, impose upon the state a duty to protect the environment.<sup>35</sup>

A somewhat analogous common law doctrine available to redress NRD is the doctrine of public nuisance. Public nuisance is defined as “an unreasonable interference with the rights common to the general public;” it is “a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience . . . .”<sup>36</sup> Moreover, it is not necessary that the individual be actually harmed.<sup>37</sup> Monetary damages for public nuisance, however, are not available. Depending on the jurisdiction, public nuisance may be statutorily defined, but nonetheless be available at common law.<sup>38</sup>

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<sup>34</sup> See, e.g., *Maine v. M/V Tamano*, 357 F. Supp. 1099 (D. Me. 1973); *Department of Natural Resources v. Amerada Hess*, 350 F. Supp. 1060, 1067 (D. Md. 1972); *Department of Fish & Game v. S.S. Bournemouth*, 307 F. Supp. 922, 925 (C.D. Cal. 1969); *Department of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976); *State v. Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974); *State Department of Fisheries v. Gillette*, 621 P.2d 764, 766-67 (Wash. Ct. App. 1980).

<sup>35</sup> LA. CONST. art. IX, § 1; see also PA. CONST. art I, § 27; FLA. CONST. art. X, § 11; HAW. CONST. art. XII, § 4

<sup>36</sup> RESTATEMENT (SECOND) OF TORTS § 821B (Tentative Draft No. 17, 1974).

<sup>37</sup> *Chicago v. Gunning System*, 73 N.E. 1035 (Ill. 1905)(holding that the fact that landowners had not been injured is not a defense).

<sup>38</sup> See, e.g., *Commonwealth of Pennsylvania v. Barnes and Tucker Company*, 319 A.2d 871 (Pa. 1974). The State of Pennsylvania brought an action in equity to require the owner of closed mine to treat acid mine drainage that was discharging from the mine. The state asserted claims based on statutory and common law public nuisance. The court held that “[t]he third and fourth based upon which the Commonwealth claims relief should be granted are the doctrines of statutory and common law public nuisances. We find that relief may be granted under either of these theories.” *Id.* at 880.

In a sense, the public trust doctrine and the public nuisance doctrine operate under the same principle. Both protect interests of the public in natural resources. The public trust doctrine protects natural resources held for all. Public nuisance protects those held by no one. In the case of *United States v. Luce*, the United States, as operator of a quarantine station for immigrants waiting to enter the country, brought a public nuisance action against a neighboring fish factory.<sup>39</sup> The government sought an injunction against the factory to abate foul smells that were making the quarantined individuals sick.<sup>40</sup> The court granted relief, enjoining the nuisance, in spite of the equitable right of the defendant.<sup>41</sup>

From this case, one can see the interaction of the public trust doctrine and public nuisance claims and their applicability to NRD with regard to the ability to file suit. In *Luce*, the court recognized that the United States had a responsibility to the quarantined individuals under its care.<sup>42</sup> This responsibility is analogous to the responsibility of the government to protect natural resources which are held under its care for the common good. The *Luce* court also allowed the government to sue prospectively to stop an activity that was harming those under its care.<sup>43</sup> Similarly, the government should be able to sue prospectively to protect natural resources under its care from damage, or, if the damage has already occurred, sue on behalf of the trust to recover compensation for injury.

## 2. Federal Trustees

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<sup>39</sup> 141 F. 385 (C.C.D. Del. 1905).

<sup>40</sup> *Id.* at 390.

<sup>41</sup> *Id.* at 422-423.

<sup>42</sup> *Id.* at 419.

<sup>43</sup> *Id.* at 422-23.

Pursuant to the public trust doctrine, as first discussed by the United States Supreme Court in *Martin v. Waddell*, “when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.”<sup>44</sup> On the contrary, there is no inherent right held by the federal government to act as trustee over natural resources. Historically, in order to pursue NRD, the federal government has been limited to actions permitted by legislative mandates that confer upon it trustee status over natural resources.<sup>45</sup> Despite this fact, the federal government has managed to carve out a significant role as trustee in the pursuit of NRD claims.

A variety of environmental legislation confers trustee status upon the federal government and its agencies. CERCLA,<sup>46</sup> the Oil Pollution Act (“OPA”)<sup>47</sup> and the Clean Water Act (“CWA”)<sup>48</sup> all permit the designation of both federal and state trustees to pursue NRD claims. The statutes do not identify specific trustees; however, particular trustees may be designated by other means. For example, pursuant to CERCLA, Executive Order 12580 and the amendment thereto designates certain federal trustees to implement the statute, including the Departments

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<sup>44</sup> 41 U.S. 367, 410 (1842).

<sup>45</sup> Laura Rowley, *NRD Trustees: To What Extent Are They Truly Trustees?* 28 B.C. ENVTL. AFF. L. REV. 459 (2001).

<sup>46</sup> 42 U.S.C. § 9607(f)(1).

<sup>47</sup> 33 U.S.C. § 2706(b).

<sup>48</sup> 42 U.S.C. § 1321(f)(5).

and Secretaries of State, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy and the Environmental Protection Agency.<sup>49</sup>

One of the biggest problems associated with federal trustees is that they are not bound by any specific rules or principles requiring them to balance public interests - - a fact that can give rise to actions by federal trustees that are inconsistent with the fiduciary nature of trusteeship. “Instead of holding federal statutory NRD trustees to a strict fiduciary duty, courts have granted them agency deference.”<sup>50</sup> Such inconsistency with principles of trusteeship and fiduciary duties is evidenced in cases where the trustee does not spend all monies recovered for NRD to restore or recreate the injured natural resource.<sup>51</sup> While a trustee’s decision to not spend any monies recovered on the restoration of the damaged natural resource clearly violates the duties imposed upon federal agents as trustees, the most minimal restoration efforts seem to “satisfy” a trustee’s fiduciary duty despite the fact that the natural resource remains polluted.<sup>52</sup> As a result, the public, as the beneficiary of the trust, is deprived of the full use and benefit of the natural resource and is left with no other recourse since damages have already been recovered for the natural resource’s injury.

### **3. Overlapping Authority**

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<sup>49</sup> See Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987) and No. 13016, 61 Fed. Reg. 45871 (Aug. 28, 1996)); see also 40 C.F.R. § 300.600 *et seq.*

<sup>50</sup> Rowley, *supra* note 45, at 486.

<sup>51</sup> “The best example of the futility in trying to identify where an NRD trustee has violated the bounds of the statutory authority, and thus violated its fiduciary duty, is found in the case of the 1989 Exxon Valdez oil spill. The Spill Trustee Council recovered nine hundred million dollars from the settlement of a suit under the CERCLA and CWA NRD provisions. Due to the magnitude of the disaster, the Spill Trustee Council used the money for a variety of purposes, but it is unclear whether all the uses were for the end result of natural resource restoration.” *Id.* at 487.

<sup>52</sup> *Id.* at 486.

Since federal trusteeship is derived from a number of overlapping federal statutes, more than one federal trustee will likely be involved at a given site, and overlaps with state and Indian tribe trustees frequently occur as well. The Superfund Amendments and Reauthorization Act of 1986 (“SARA”), which amended CERCLA, requires the EPA to notify trustees of possible natural resource impacts and to coordinate its investigatory work with the trustees.<sup>53</sup> Despite this fact, an initial obstacle in the pursuit of NRD is the coordination of trustee activities at a given site and the determination of which trustee, if any, will be the lead.

The construction of federal environmental laws seems to indicate that particular natural resources are the responsibility of the federal government and other natural resources fall within the ambit of state responsibility.<sup>54</sup> However, the language utilized in these statutes fails to clarify, for instance, whether natural resources located on federally-owned property belong to the federal government or the state wherein the property is located.<sup>55</sup> One of the primary problems with regard to multiple trustees is linking the contamination problem of a particular resource to a particular trustee. For example, the Department of the Interior (“DOI”) and the Department of Commerce both have trustee status with regard to the protection of migratory birds.<sup>56</sup> As a result, a state may share trustee status over natural resources when there has been an injury to migratory

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<sup>53</sup> See 42 U.S.C. § 9604(b)(2).

<sup>54</sup> Marc G. Laverdiere, *Natural Resource Damages: Temporary Sanctuary for Federal Sovereign Immunity*, 13 VA. ENVTL. L. J. 589, 592 (1994)(“For example, under CERCLA, liability for damaging these resources is ‘to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State.’”).

<sup>55</sup> *Id.*

<sup>56</sup> Thomas L. Eggert & Kathleen A. Chorostecki, *Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act*, 45 BAYLOR L. REV. 291, 305 (1993).

birds stemming from the contamination of wetlands.<sup>57</sup> Presumably, the federal government may recover damage to the birds, while the state trustee may recover damages for injury to the wetlands, however, due to the principles prohibiting a double recovery for NRD, the two trustees are precluded from both recovering for the birds and the wetlands.

While there are more attempts at coordination now, overlapping trustee authority still inhibits action. At some sites, parties have been unable to achieve prompt resolution of NRD issues at the time that remedial issues are being settled with the EPA or a state, due to the need for multiple trustee signoffs. The difficulty of resolving overlapping jurisdictional issues is evidenced in *United States v. Asarco, Inc.*, in which the plaintiffs, the United States, the Coeur d'Alene Tribe of Idaho and the State of Idaho filed suit pursuant to CERCLA and the CWA for injury to natural resources in northern Idaho resulting from the defendants' mining activities.<sup>58</sup> A number of defendants moved for summary judgment, asserting that a settlement agreement they had entered into with the State of Idaho precluded recovery by the Tribe or the United States.<sup>59</sup> The United States argued that the State of Idaho did not have the authority to settle the federal government's claims regarding the same natural resources.<sup>60</sup> The court agreed with the United States, stating "CERCLA does not give the state an exclusive right to bring a natural resource damages action if the state files the first lawsuit claiming natural resource damages and CERCLA does not prohibit more than one potential trustee from bringing a natural resource

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<sup>57</sup> *Id.*

<sup>58</sup> 1998 WL 1799392, No. CV 96-0122-N-EJL, CV 91-342-N-EJL (D. Idaho March 31, 1998).

<sup>59</sup> *Id.* at \*5.

<sup>60</sup> *Id.*

damages action.”<sup>61</sup> The court’s decision that the record was insufficient to establish “the scope of trusteeship of the plaintiff over the land and water at issue . . . [and] a more extensive factual record needs to be reviewed regarding whether or not USA was in privity with the State and/or the Tribe when the settlement agreements were entered with the defendants” demonstrates that the occurrence of overlapping trustee authority is not an issue that can easily be resolved.<sup>62</sup>

The overlap of trustee authority also underscores the differences by which various federal trustees and their state or Indian tribe counterparts value NRD injuries and consider early dollar settlements. All trustees will place a different value on the same natural resource. For instance, natural resources may hold cultural or spiritual worth for an Indian tribe that are not considered by the state or federal government when valuing those resources for purposes of calculating damages. Similarly, a state’s loss of revenue derived from fishing licenses would not necessarily be a consideration by the federal government when valuing the loss of a river to pollution.

#### **4. Municipal and Local Trustees**

Although the federal government, state government and Indian tribes are empowered to recover NRD, prior to the SARA Amendments to CERCLA, courts broadly read the NRD provision of the statute as granting municipalities standing to pursue NRD claims.<sup>63</sup> However, with the enactment of the amendments, courts’ interpretation of a municipality drastically changed:

As originally enacted, CERCLA called for authorized representatives of the state to act as natural resource trustees but did not outline a procedure for

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Mayor and Board of Aldermen of the Town of Boonton v. Drew Chemical Corporation*, 621 F. Supp. 663, 667 (D.N.J. 1985).

appointing such trustees. Under SARA, the governor of each state was charged with choosing an official to act on the public's behalf as trustee and to assess damage to natural resources . . . [T]his change turned out to be significant to the courts dealing with standing for municipalities. The courts interpreted this trustee-appointing mechanism to be the only way a municipality could be a natural resource trustee under CERCLA.<sup>64</sup>

In *Mayor and Council of the Borough of Rockaway v. Klockner & Klockner*, the municipality filed suit under CERCLA for recovery of costs associated with the defendants' contamination of groundwater wells.<sup>65</sup> The court ultimately determined that the SARA amendments had "clarified" the issue of standing with regard to CERCLA claims, stating that "only a 'state official,' specifically appointed by the governor of the state, may be an 'authorized representative' for purposes of bringing an action to recover for natural resource damages. SARA thus confirms Congress' intent that Section 107(f) inure only to the benefit of the states and not their political subdivisions."<sup>66</sup> Courts have reached a similar finding as to the standing of a municipality when a state statute is comparable or analogous to CERCLA.<sup>67</sup> Municipalities, however, are not completely deprived of standing in the context of NRD. If a municipality wishes to recover NRD under CERCLA or a similar state statute, it may still seek designation as

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<sup>64</sup> Michael J. Wittke, *Municipal Recovery of Natural Resource Damages Under CERCLA*, 23 B.C. ENVTL. AFF. L. REV. 921, 929 (1996).

<sup>65</sup> 811 F. Supp. 1039 (D.N.J. 1993).

<sup>66</sup> *Id.* at 1049; *see also* *Town of Bedford v. Raytheon Company*, 755 F. Supp. 469, 472-473 (D. Mass. 1991); *City of Toledo v. Beazer Materials and Services, Inc.*, 833 F. Supp. 646, 652 (N.D. Ohio 1993); *Borough of Sayreville v. Union Carbide Corporation*, 923 F. Supp. 671, 681 (D.N.J. 1996).

<sup>67</sup> *City of Portland v. Boeing Company*, 179 F. Supp. 2d 1190, 1202 (D. Or. 2001); *The Consolidated City of Indianapolis v. Union Carbide Corporation*, 2003 WL 22327832, No. 1:02-cv-1340-LJM-WTL, \*3 (S.D. Ind. Oct. 8, 2003).

“trustee” by the state. In the alternative, municipalities may seek NRD by asserting common law claims.<sup>68</sup>

## 5. Citizen Suits

As noted earlier in the article, an individual who owns a natural resource has standing as a property owner to file suit to recover for any NRD. However, a private party’s capability of filing suit to recover damages for publicly owned natural resources is severely limited. One of the only avenues by which a private citizen or entity may pursue a claim for injury to publicly-owned natural resources is through a citizen suit.<sup>69</sup> At the federal level, citizen suits generally occur in one of three contexts:

(1) suits brought by private citizens against persons alleged to be in violation of a federal environmental law; (2) suits brought by private citizens against the executive branch of the federal government, typically the Environmental Protection Agency (EPA) alleging that the federal government has failed to perform a nondiscretionary duty in implementing an environmental law; or (3) suits brought by private citizens against a federal agency directed at the agency’s own polluting activities.<sup>70</sup>

Because citizen suits are brought to vindicate rights held by the public, private individuals who pursue claims under these provisions do not have the same rights and relief as

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<sup>68</sup> Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L. J. 50, 75 (1993).

<sup>69</sup> “All major environmental laws, specifically the Clean Air Act, the Federal Water Pollution Control Act, commonly known as the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act, as well as a host of less well known environmental laws, such as the Toxic Substances Control Act, and the Surface Mining Control and Reclamation Act, contain essentially the same citizen suit provisions. They all trace their origin to section 304 of the Clean Air Act.” Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 313-314 (1998).

<sup>70</sup> Shay S. Scott, *Combining Environmental Citizen Suits & Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 372 (1994).

those afforded under private causes of action.<sup>71</sup> In addition, under the natural resource provisions of federal laws, individual plaintiffs are precluded from recovering NRD.<sup>72</sup> Thus, individual plaintiffs may file a citizen suit to compel a trustee to seek NRD; however, such plaintiffs may not recover NRD.

Likewise, some state statutes may also have similar citizen suit provisions that permit individuals to file actions for environmental contamination. The New Jersey Environmental Rights Act (“ERA”),<sup>73</sup> for example, permits an individual to file an action against “any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment” for injunctive or equitable relief.<sup>74</sup> The ERA, however, does not “confer any substantive rights . . . Rather, it grants private plaintiffs standing to enforce other New Jersey environmental statutes ‘as an alternative to inaction by the government which retains primary prosecutorial responsibility.’”<sup>75</sup> Under the ERA, a citizen may file suit to compel the government to act to recover environmental damages, however, the citizen may not personally seek damages. Although citizen suits may be a useful tool in compelling government action, they may not be used to recover NRD - - the power to bring actions to recover NRD is vested solely with governmental trustees.

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<sup>71</sup> *Id.* at 378. (“They thus do not include toxic tort suits for personal injury or property damage. They also do not include private suits for the personal losses suffered when public resources are damaged; for example, they do not include suits by fishermen when public fisheries are damaged by pollution. While losses to people from pollution are important, they are different from the losses to the environment itself.”).

<sup>72</sup> See, e.g., *In re Burbank Environmental Litigation*, 42 F. Supp. 2d 976, 980 (C.D. Cal. 1998)(“Under CERCLA, only natural resource trustees acting on behalf of the federal government, the state, and certain Indian tribes may bring an action for damage to natural resources.”).

<sup>73</sup> N.J.S.A. 2A:35A-1 et seq.

<sup>74</sup> N.J.S.A. 2A:35A-4.

<sup>75</sup> *Klockner & Klockner*, 811 F. Supp. at 1054 (quoting *Superior Air Products Company v. NL Industries, Inc.*, 522 A.2d 1025, 1032 (N.J. Super. App. Div. 1987)).

## B. CAUSES OF ACTION

### 1. State Statutory Causes of Action

In addition to NRD actions brought pursuant to federal laws, states may also bring actions under state statutes. It follows that if a state may sue on behalf of its natural resources, it may also legislate to protect them or provide for compensation in the event they are lost or destroyed. Accordingly, some forty-five states provide a public cause of action for damage to natural resources.<sup>76</sup>

These statutes vary widely in scope. New York's statute, for example, applies only to criminal violations;<sup>77</sup> the laws of Maine and Massachusetts apply only to oil spills.<sup>78</sup> The most comprehensive of these statutes arguably are those of California and Minnesota. California's statute provides liability for "any damage or injury to the natural resources of the state, including, but not limited to, marine and wildlife resources, caused by the discharge or leakage of petroleum, fuel oil, or hazardous substances."<sup>79</sup> Minnesota's statute holds any discharger of hazardous substances liable for "[a]ll damages for any injury to, destruction of or loss of natural resources."<sup>80</sup>

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<sup>76</sup> See William S. Roush, Jr., 2 TOXIC TORTS. PRAC. GUIDE § 25.11 (2005). For example, in *Com. of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), a Puerto Rican statute provided the basis for assessing damages for the discharge of oil. In that case, the circuit court stated, "where the Commonwealth of Puerto Rico has thus legislatively authorized the bringing of suits for environmental damages, and has earmarked funds so recovered to a special fund, such an action must be construed as taking the place of any implied common law action the Commonwealth as trustee, might have brought." *Id.* at 672.

<sup>77</sup> See N.Y. Env'tl. Conserv. Law. § 71-2723 (McKinney 1981).

<sup>78</sup> See, e.g., Maine Oil Discharge Prevention and Pollution Control Act, ME. REV. STAT. ANN. tit. 38 § 551 (1978); Massachusetts Rules for the Prevention and Control of Oil Pollution in the Waters of the Commonwealth § 9.02 (1973).

<sup>79</sup> CAL. HARB. & NAV. CODE § 293 (West Supp. 1989).

<sup>80</sup> MINN. STAT. ANN. § 115B.04 (1)(c) (West 1985).

A summary of these statutes indicates that most are aimed at protecting the natural resources under the public trust. However, when definitions of natural resources are too narrow, there are resulting limitations on the recovery of NRD. Accordingly, these statutes suffer some of the same problems as the public trust relative to the scope of natural resources protected. Even the most comprehensive statutes limit recovery to hazardous substance damage. The issue of scope is one of the greatest limitations on the recovery NRD. Thus, the question then follows: how should this problem be addressed?

New Jersey has managed to overcome the problem of scope by broadly defining natural resources in its Spill Compensation and Control Act (“Spill Act”). “Natural resources” are broadly defined as “all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State.”<sup>81</sup> Indeed, among the various state laws protecting natural resources, New Jersey has one of the most potent. The New Jersey Department of Environmental Protection is authorized by statute to commence civil actions for the “cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge.”<sup>82</sup> By enacting the Spill Act, the New Jersey Legislature intended to create additional remedies to protect the environment and compensate the public. The absolute liability provisions of the law are especially noteworthy. Defining natural resources to broadly encompass a wide variety of resources has proven to be successful in addressing the problem of scope with regard to any limitations upon NRD recovery.

## **2. Common Law Causes of Action**

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<sup>81</sup> N.J.S.A. 58:10-23.11b.

<sup>82</sup> N.J.S.A. 58:10-23.11u.b(4).

In addition to available statutory causes of action, state governments may pursue common law causes of action to recover for NRD.<sup>83</sup> To protect or sometimes compensate a natural resource held in common, the state may sue in its trustee capacity. In the case of natural resources held by no one, the state may sue to enjoin under a public nuisance theory. Such causes of action are especially useful to close the gap where federal statutes do not provide adequate relief.<sup>84</sup>

Public nuisance actions, for example, were traditionally used to obtain injunctive relief, enjoining certain behavior deemed to constitute an “unreasonable interference with a right common to the general public.”<sup>85</sup> Courts have increasingly held, however, that a state may utilize public nuisance actions to recover response costs incurred in the abatement of such a nuisance.<sup>86</sup> If the state would like to recover for a pecuniary loss arising from contamination of a natural resource, however, it must allege a “special injury.”<sup>87</sup> In *New Mexico v. General Electric Company*, the court discussed what constitutes a “special injury”:

To satisfy the “special injury” requirement in this case and establish any entitlement to compensatory damages on their common-law public nuisance claim,

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<sup>83</sup> For a more detailed discussion, *see generally*, Kanner, *supra* note 8.

<sup>84</sup> Federal statutes are sometimes less desirable than other theories with regard to the recovery of NRD. CERCLA, for example, has more defenses and involves a slow and rigid process, thus state law theories are often better. Furthermore, a plaintiff may recover more damages bringing common law claims, rather than bringing an action under CERCLA.

<sup>85</sup> RESTATEMENT (SECOND) TORTS § 821B (1979).

<sup>86</sup> *Town of East Troy v. Soo Line Railroad Company*, 653 F.2d 1123, 1132 (7th Cir. 1980)(permitting recovery of expenses incurred cleaning up groundwater contamination); *State of New York v. Shore Realty Corporation*, 759 F.2d 1032, 1043 n. 14 (noting in dicta that “New York law appears to provide the State with restitution costs in a public nuisance action.”); *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corporation*, 123 F. Supp. 2d 245 (D.N.J. 2000) (“This Court agrees that for abatement of a public nuisance, New Jersey law permits cost recovery.”)

<sup>87</sup> *New Mexico v. General Electric Company*, 335 F. Supp. 2d 1185, 1239 (D.N.M. 2004).

the Plaintiffs must show that the State has suffered some discrete physical harm or pecuniary loss apart from the more generalized injury to the public's interest that results from the public nuisance . . . Absent proof of some discrete "special injury" to the State's interest apart from the injury to the public's interest in unappropriated groundwater, Plaintiffs may be limited to equitable relief seeking the abatement of the claimed nuisance.<sup>88</sup>

New Jersey, in particular, has a rich common law tradition with respect to the imposition of liability for environmental injuries and the development of comprehensive and effective remedies.<sup>89</sup> The common law has continued to develop despite the enactment of statutory law on both the federal and state levels addressing environmental liabilities. *State v. Ventron* makes clear that common law remedies remain available notwithstanding collateral or supplementary statutory remedies.<sup>90</sup> *Ventron* also provides a comprehensive discussion of the history of New Jersey law on these remedies<sup>91</sup> and specifically notes that:

[T]oxic wastes are "abnormally dangerous," and the disposal of them, past or present, is an abnormally dangerous activity. We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril rather than at the expense of the innocent person who suffers harm as a result of it."<sup>92</sup>

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<sup>88</sup> *Id.* at 1240-1241; *see also Selma Pressure Treating Company v. Osmose Wood Preserving Company of America, Inc.*, 271 Cal. Rptr. 596 (Cal. Ct. App. 1990), the court held that "the State, acting in its capacity as property owner, and not merely in its representative capacity, can seek damages as well as injunctive relief . . ." *Id.* at 603. The court went on to determine that "the State does have a legally cognizable interest in the ground waters affected here which suffice to support a claim for damages." *Id.* at 606.

<sup>89</sup> New Jersey's proactive and continuous use of the common law in NRD recovery actions provides a valuable template for other states to utilize in their own NRD actions.

<sup>90</sup> *State, Department of Environmental Protection v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983).

<sup>91</sup> *Id.* at 157.

<sup>92</sup> *Id.* at 160 (quoting RESTATEMENT (SECOND) TORTS § 520 cmt. h, at 39 (1977)). Cases subsequent to *Ventron* have held that whether pollution activity is a basis for direct liability is to be determined on a case-by-case approach following the Restatement principles. *See T & E Industries Inc. v. Safety Light Corporation*, 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988), *aff'd as modified*, 587 A.2d 1249 (N.J. 1991); *Kenney v. Scientific, Inc.*, 497 A.2d 1310 (N.J. Super. Ct. Law Div. 1985).

The *Ventron* decision set forth what has become a founding principle in the development of environmental common law in New Jersey: “Those who poison the land must pay for its cure.”<sup>93</sup> In light of this principle, the New Jersey courts have emphasized that their primary concern in resolving environmental cases is to do so with underlying considerations of “reasonableness, fairness and morality” rather than the “formulary labels” which might be attached to particular causes of action.<sup>94</sup> In addition to strict liability, other traditional tort theories remain viable. Nuisance,<sup>95</sup> trespass,<sup>96</sup> negligence,<sup>97</sup> and fraud<sup>98</sup> have all been successfully asserted in New Jersey environmental cases. Punitive damages are available in environmental actions involving deliberate acts or omissions committed with the knowledge of a high degree of probability of harm, reckless indifference to consequences, or where there has been “such a conscious and deliberate disregard of the rights of others that his conduct may be called willful or wanton.”<sup>99</sup> Indeed, state statutory limitations on the availability of punitive damages have specifically excluded “environmental torts.”

### C. CAUSATION

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<sup>93</sup> *Ventron*, 468 A.2d at 160.

<sup>94</sup> *T & E Industries Inc.*, 546 A.2d at 577 (quoting *Berg v. Reaction Motors Div., Thiokol Chemical Corp.*, 181 A.2d 487 (N.J. 1962)); *Kenney v. Scientific, Inc.*, 497 A.2d at 1324.

<sup>95</sup> *Ventron*, 468 A.2d at 157-158, *overruling Marshall v. Welwood*, 38 N.J.L. 339 (N.J. 1876); *But see Kenney*, 497 A.2d at 1324.

<sup>96</sup> *Ventron*, 468 A.2d at 158.

<sup>97</sup> *Kenney*, 497 A.2d at 1324, 1328.

<sup>98</sup> *Ventron*, 468 A.2d at 166.

<sup>99</sup> *Id.*

When a common law claim for NRD is brought, a plaintiff must prove causation with respect to the claim as required by the common law. When a trustee brings NRD claims under federal legislation, the degree of causation must be gleaned from the statute. If the statute does not specify the standard of proof necessary for causation, it is left to the courts to determine what is required. In both cases, causation is not an especially difficult hurdle. The causation requirement ensures that the conduct complained of is appropriately linked to the wrong claimed—the natural resource injury, nuisance or trespass.

CERCLA, for example, does not specify the standard of proof necessary for showing that a particular discharge or release caused a particular injury to a NRD trustee seeking restoration under §107(a)(4)(c) must prove injury to natural resources “*resulting from*” a release of a hazardous substance. Courts have generally required only a minimal connection between the responsible party and the response costs incurred in connection with a release.<sup>100</sup>

In *Ohio v. DOI*, the D.C. Circuit held that CERCLA was ambiguous as to the standard of causation to be applied in determining whether a hazardous substance release caused a particular injury.<sup>101</sup> The court concluded that DOI’s position that the traditional common law standard of causation should be applied was a permissible reading of the statute.<sup>102</sup> Consequently, trustees must be able to meet traditional causation standards when showing that a particular spill or release caused or, at the very least, was a “contributing factor” to a particular injury.<sup>103</sup>

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<sup>100</sup> See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989).

<sup>101</sup> 880 F.2d 432, 470 (D.C. Cir. 1989).

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *Coeur D’Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003)(requiring use of “contributing factor” causation test in NRD action by Native American tribe and United States against mining © { \* } 25

In *National Association of Manufacturers v. DOI*, the court stated “CERCLA is ambiguous on the precise question of what standard of proof is required to demonstrate that natural resource injuries were caused by, or ‘resulting from,’ a particular release.”<sup>104</sup> The same court stated in *Kennecott Utah Copper Corp. v. DOI* that “[w]hile the statutory language requires some causal connection between the element of damages and the injury - the damages must be ‘for’ an injury ‘resulting from a release of oil or a hazardous substance’ - Congress has not specified precisely what that causal relationship should be.”<sup>105</sup> This may require proof of a causal link between the defendant’s release and the injured resource.<sup>106</sup>

In *Castaic Lake Water Agency v. Whittaker Corp.*,<sup>107</sup> the district court held that where perchlorate contamination originated at one site and allegedly migrated to the wells owned by plaintiff water providers at a different site, plaintiffs can satisfy their burden of production with respect to CERCLA causation by: (1) identifying perchlorate at their site; (2) identifying perchlorate at defendant’s site; and, (3) providing “evidence of a plausible migration pathway by which the contaminant could have traveled from the defendant’s facility to the plaintiff’s site.”<sup>108</sup> Where the plaintiffs satisfy this burden, the burden then shifts to the defendant to offer evidence “disproving causation.”<sup>109</sup>

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companies). In *Coeur d’Alene Tribe*, the court concluded that volumetric tailings production provided a sufficiently reasonable basis for apportionment to defeat joint and several liability. *Id.* at 1120-1121.

<sup>104</sup> 134 F.3d 1095, 1105 (D.C. Cir. 1998)(quoting *State of Ohio v. DOI*, 880 F.2d at 472).

<sup>105</sup> 88 F.3d 1191, 1224 (D.C. Cir. 1996).

<sup>106</sup> *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986).

<sup>107</sup> 272 F. Supp. 2d 1053 (C.D. Cal. 2003).

<sup>108</sup> *Id.* at 1066.

<sup>109</sup> *Id.*

In *Coeur D'Alene Tribe v. Asarco Inc.*, the district court adopted a “contributing factor” causation test for the recovery of NRD.<sup>110</sup> That is, where hazardous waste from multiple defendants has commingled, the plaintiff trustee has the burden of proving that each defendant’s release is a more than a *de minimis*, “contributing factor” to the natural resource injuries alleged by the trustee.

One last causation burden exists for trustees in the context of assessing NRD. The DOI’s NRD assessment (“NRDA”) regulations<sup>111</sup> require that trustees determine the baseline condition of the injured resource and then compare that baseline with the injured status of the resource to quantify injury. “Baseline” is defined under the DOI NRDA regulations as “the condition or conditions that would have existed at the assessment area *had the discharge of oil or release under investigation not occurred.*”<sup>112</sup> While the trustee has the burden of determining baseline under the NRDA regulations, defendants should ensure that the trustee is apprised of all appropriate conditions or factors impacting the resource other than the release of the hazardous substances at issue.

These cases demonstrate a key issue with regard to causation-that ultimately, causation is not difficult to prove. Furthermore, even if the contamination is mingled between multiple PRPs, it will not be difficult to show causation sufficient to prevail in a suit for NRD. These cases also show the potential interplay of substantive law and case management issues. For example, it should be sufficient to prove wrongful misconduct and some causation so as to establish the

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<sup>110</sup> 280 F. Supp. 2d at 1114.

<sup>111</sup> 43 C.F.R. § 11 (2005).

<sup>112</sup> 43 C.F.R. § 11.14(e) (2005)(emphasis added).

liability of a responsible party and thereby shift the cost of a comprehensive NRDA to the wrongdoer as opposed to the trustee.

#### **D. INJURY**

A natural resource injury is “any adverse change or impact of a discharge on a natural resource or impairment of natural resource services, whether direct or indirect, long-term or short-term, and include the partial or complete destruction or loss of the natural resource.”<sup>113</sup>

Clarity with regard to assertion of the type of injury to a natural resource is an essential component of bringing a successful claim for NRD. If a plaintiff does not clearly and specifically define and quantify the nature of the injury, there is a significant risk that a claim for NRD will fail. In *State of New Mexico v. General Electric Company*, the plaintiffs were prevented from recovering NRD due to their failure to clearly and accurately set forth the nature of the injuries they claimed.<sup>114</sup> Plaintiffs asserted a claim for the loss of drinking water services as a result of chemical contamination emanating from the defendants’ operations.<sup>115</sup> The court held that the drinking water standards promulgated by the New Mexico Water Quality Control Commission (“NMWQCC”) should be used to determine if there was an injury-the loss of drinking water services.<sup>116</sup> Under these rules, water must only meet the requisite standards with regard to the level of contaminants; the water need not be pristine in order to qualify as

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<sup>113</sup> Kanner, *supra* note 14, at 98.

<sup>114</sup> 335 F. Supp. 2d at 1212.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1210.

potable.<sup>117</sup> The plaintiffs, however, contended that the drinking water standards were not the proper means of identifying the injury. The court disagreed, stating:

In effect, then, Plaintiffs now argue *two* different theories of injury: (1) that “[t]he standard for drinking water quality for the groundwater involved in this lawsuit is the more stringent NMWQCC health-based toxic pollutant standard”; and (2) that “the groundwater and aquifer will remain injured unless and until it is restored to its pre-contaminated condition.” These two assertions, often made together, are not wholly congruent . . . In this case, it may well be that the State of New Mexico has suffered an *injury* to its interest in the groundwater underlying the South Valley Site, notwithstanding the fact that much of the groundwater meets the New Mexico drinking water standards, but it may be that the injury is *not* the total and permanent loss of drinking water services that Plaintiffs now assert. To date, however, Plaintiffs have proffered no significant probative evidence of any *diminution in value* of the groundwater, measured by the difference between its current condition and its formerly pristine state, apart from the alleged loss of drinking water services. No expert witness has testified as to the economic value of water that may prove to be drinkable, but still not pristine . . . Plaintiffs’ own characterization of their alleged injury selects the legal standard to be applied to measure the existence and extent of that injury. Drinkability does not equate with pristine purity under New Mexico law, and the court remains convinced that a loss of drinking water services must be measured by applying New Mexico drinking water standards.<sup>118</sup>

What this case demonstrates is that quantification of the type of natural resource injury is essential to a successful recovery. The plaintiffs may have had been successful had they considered what loss of use involves before asserting it as the primary injury.<sup>119</sup> It also demonstrates that NRD claims for injury relating solely to loss of use are generally weaker and

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1211-1212 (emphasis original).

<sup>119</sup> Credibility with regard to NRD claims is essential, especially when non-traditional injuries are being asserted. “Before a lawyer can persuade a jury or any fact-finder, it is necessary to start at the beginning and decide what the case is about. Surprisingly, many lawyers never really know this fact, or they (or their experts) change their game plan so often that it seems they have no plan . . . In short, the case should be as planned as possible before going to court.” ALLAN KANNER, ENVIRONMENTAL AND TOXIC TORT TRIALS § 1.01 (2d ed. 2004).

have a lower possibility of success than a claim for restoration where there is an injury by mere virtue of the existence of contaminants in the natural resource.

One of the most critical factors in recovering NRD is the distinct nature and extent of the injury and what that means for damages. It must be remembered that proving how a natural resource has been injured is not the same as proving what amount of damages should be recoverable.

## **E. DAMAGES**

### **1. Generally**

The method and manner of quantifying damages to a natural resource is perhaps the greatest challenge for NRD litigation, both presently and in the future.<sup>120</sup> “Damage is a legal concept determining what a liable party has to do or pay to make the public or environment whole for the injuries to natural resources.”<sup>121</sup> In addition, damages help to deter future misconduct.<sup>122</sup> NRD is defined by CERCLA as the compensation for the “[i]njury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury.”<sup>123</sup> CERCLA’s congressional hearings are filled with testimony that the NRD provisions should measure society’s full loss from damaged or destroyed natural resources, not just

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<sup>120</sup> Because of the complex nature of damages, the damages phase may be bifurcated from the rest of the trial. “Bifurcation of an action is appropriate where . . . there are complicated issues of liability that must be resolved prior to the assessment of damages.” *Witherbee v. Honeywell, Inc.*, 151 F.R.D. 27, 29 (N.D.N.Y. 1993).

<sup>121</sup> See Kanner, *supra* note 14, at 104.

<sup>122</sup> See, e.g. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)(quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)) (“[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”).

<sup>123</sup> 42 U.S.C. § 9601(6), 9607(a)(4)(C).

damages capable of market valuation.<sup>124</sup> This is fundamental to deterring wrongful conduct.<sup>125</sup> This broader concept is reflected in § 301(c)(2) of CERCLA, which requires damage assessment procedures to identify the extent of short- and long-term, direct and indirect injury, destruction, or loss.<sup>126</sup> Thus, Congress explicitly stated that recoverable injuries were not limited solely to use or market value but also indirect injury (*e.g.*, the intrinsic value of a natural resource). Comments also urged that the legislation shift the burden of any such losses from victims to responsible parties, consistent with concepts of strict liability.<sup>127</sup> If a response action fails to provide a complete and whole remedy for injury to a natural resource, damages may be recovered for such.<sup>128</sup> Any recovery had by a trustee for NRD “must be used to restore, replace, or acquire the equivalent” of the injured natural resources.<sup>129</sup>

There are three primary categories of damages for a trustee to consider: restoration, compensatory restoration, and assessment and other transaction costs.

#### **a. Restoration**

Restoration, or primary restoration costs, involves the cost of any action, or combination of actions, to restore, rehabilitate, replace, or acquire the equivalent of the injured natural

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<sup>124</sup> See, *e.g.*, OIL AND HAZARDOUS SUBSTANCES LIABILITY AND OIL POLLUTION LIABILITY: EXCERPTS FROM HEARINGS ON H.R. 29 AND H.R. 85 BEFORE THE SUBCOMM. ON COAST GUARD AND NAVIGATION OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, 96th Cong., 1st Sess. 119 (1979) (statement of James N. Barnes, Center for Law and Social Reform).

<sup>125</sup> See generally Allan Kanner & Tibor Nagy, *Measuring Loss of Use Damages in Natural Resource Damage Actions*, 30 COLUMBIA J. ENVTL. L. **Error! Main Document Only.**(2005) Vol. 30, No. 2, p. 417.

<sup>126</sup> 42 U.S.C. § 9651(c)(2).

<sup>127</sup> *Supra* note 123, at 213, 214, n. 23 (statement of Sarah Chasis, National Advisory Committee on Oceans and Atmosphere).

<sup>128</sup> See Kanner, *supra* note 14, at 102.

<sup>129</sup> 42 U.S.C. § 9607(f)(1).

resources and services in a “baseline state.” Essentially, this is the cost of restoration of the resource to its pre-damage condition, taking into account natural recovery. Replacement can be a viable action in this context, so long as the citizens of a state do not otherwise suffer. For instance, replacing a North Louisiana greenspace with an equivalent one in South Louisiana does little to assuage the damage to residents of North Louisiana. A state should have the right to full restoration of natural resources, however, even if it will ultimately be more costly than replacement. This idea is consistent with the notion that there is a preference for a complete restoration of the damaged natural resource, rather than the creation of an entirely new one.

#### **b. Compensatory Restoration**

In addition, there are use and non-use<sup>130</sup> compensatory restoration values that must be repaid. These damages involve the provision of additional restoration of injured resources in order to compensate for lost natural resource functions and services from the time of contamination through the time the resource is restored.<sup>131</sup> Compensatory restoration is not directly defined in the statutory language of the OPA and CERCLA, although it is discussed in the regulations developed under each of these statutes.

The OPA regulations, promulgated by the National Oceanic and Atmospheric Administration (NOAA) define restoration as “any action or combination of actions, to restore, rehabilitate, replace or acquire the equivalent of injured natural resources and services.” These same regulations identify “compensatory restoration” as included within restoration generally and define it as “action(s) taken to make the environment and the public whole for services losses that occur from the date of the incident until recovery of the injured natural resources.”<sup>132</sup>

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<sup>130</sup> “Nonuse values are values people may hold for natural resource services that are independent of any anticipated use of the resource.” William H. Desvousges and Janet C. Lutz, *Compensatory Restoration: Economic Principles and Practice*, 42 ARIZ. L. REV. 411, 412 (2000).

<sup>131</sup> 43 C.F.R. § 11.83 (2005).

<sup>132</sup> See Kanner, *supra* note 14, at 103 (citations omitted).

Due consideration must be given to discern the unique value of the natural resources of the state. Natural resources are more than mere property claims. They are inextricably interwoven into the fabric of our ecology and the quality of our lives as we steward them from one generation of our citizens to the next. Natural resources must be valued both in the present and prospectively. If these prospective consequences may, in reasonable probability, be expected to flow from the past harm, the state is entitled to be paid for them.<sup>133</sup> Loss of use, or benefit to polluter, both damage the people during the period of impairment and restoration. These damages should be equal to the benefit derived or savings to the parties damaging the natural resource. If, for instance, a natural resource was damaged by one thousand dollars to save or make one million dollars, this should be recaptured to the extent not otherwise covered. This item of damages forces the wrongdoer to internalize the costs of pollution by usage fee or unjust enrichment.<sup>134</sup>

### c. Costs

Another important measure of damages is the assessment and other transaction costs. These damages include all costs, expenses and fees incurred by the state, including due diligence and pre-litigation costs and attorney fees, in recovering the foregoing. Also included is the time value of money.<sup>135</sup> Compensation for transaction costs means full restoration. It is important to

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<sup>133</sup> See *Coll v. Sherry*, 148 A.2d 481, 486 (N.J. 1959).

<sup>134</sup> See Allan Kanner, *Unjust Enrichment in Environmental Litigation*, 20 J. ENVTL. L. & LITIG. **Error! Main Document Only.** p. 111 (Spring, 2005).

<sup>135</sup> See Natural Resource Damage Assessments, 43 C.F.R. Parts 11.84 (2001). Section 107 (a)(4)(c) provides that responsible parties may be held liable for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.” However, under section 107(f), a trustee may not recover for natural resource losses occurring before the date of CERCLA’s

note that costs are not necessarily available under non-CERCLA state law theories unless equity is involved.

## 2. Valuation

There are numerous approaches to determining value for NRD. One example is the valuation approach of the DOI.<sup>136</sup> While it seeks restoration as its goal, the DOI program sometimes works in the opposite direction, *i.e.* when a defendant is permitted to purchase a cheaper replacement rather than restore the natural resource. Like many tort cases, it places an emphasis on assessing damage in a monetary framework, as opposed to restoration, as the means to making the public whole, and thus is perceived by the regulated community to be punitive rather than productive.

On the other hand is the more Industry-friendly approach of NOAA. Under the NOAA approach, NRD now focuses on remediation of harm rather than monetization of claims. In addition, it utilizes an open process that requires public comment, and encourages cooperation with responsible parties rather than litigation. The NOAA regime is “restoration based,” that is, it establishes restoration of the damaged natural resources as the goal, and provides the agency and the responsible party a great deal of flexibility to develop a plan to move forward and

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enactment (December 11, 1980), or for losses identified in an environmental impact assessment, which are deemed to be authorized by permit or license. Likewise, under section 107(c), the trustee may not recover in excess of \$50 million unless a showing is made that the release resulted from willful misconduct or willful negligence, or from a violation of federal safety or operating standards.

<sup>136</sup> Under the DOI rules, the measure of damages “is the cost of restoration or replacement of the damaged resource. Additionally, compensable value, the value of the lost services of the resource during the time period from the injury until the baseline conditions have been reattained, is available for recovery at the discretion of the trustee. The trustee can chose between several valuation methods for estimating compensable value, including market valuation, appraisal, factor income, travel cost, hedonic pricing, unit value, contingent valuation, or other suitable valuation methods. The use of contingent valuation for measuring option and existence value is available only when the trustee determines there are no relevant use values.” James Peck, *Measuring Justice for Nature: Issues in Evaluating and Litigating Natural Resource Damages*, 14 J. LAND USE & ENVTL. L. 275, 302 (1999).

achieve it. In general, there is more room for disagreement regarding valuation of loss of use claims.<sup>137</sup>

## **F. DEFENSES**

Because the pursuit of NRD is relatively new territory, one of the areas with the greatest potential for development and change is the defenses to liability. As NRD cases are more frequently litigated, new, creative and complex defenses will be asserted. Plaintiffs can anticipate a variety of defenses that may be offered by defendants in NRD cases. A defendant may argue, for example, that if a groundwater resource is not currently being used by the public, then there has been no harm suffered if it is contaminated. Defendants may also contest liability when there are multiple polluters of a single resource, thereby making it difficult to attribute particular contamination to specific source. Furthermore, a defendant may argue that a remedy is not reasonable or proportionate to the harm, *i.e.* when restoration costs far exceed the market value of the property.

### **1. Statutory Defenses**

Most federal environmental statutes specifically enumerate defenses to liability available to a defendant in NRD actions. CERCLA, for example, provides that a person otherwise liable for contamination will not be liable in the event the damages resulting from the release or threat of release were caused “solely by-(1) an act of God; (2) an act of war; (3) an act or omission of a third party . . .”<sup>138</sup> Similar provisions are found in the CWA<sup>139</sup> and OPA<sup>140</sup> Because of their

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<sup>137</sup> See Kanner *supra* note 124.

<sup>138</sup> 42 U.S.C. § 9607(b).

<sup>139</sup> 33 U.S.C. § 1321(f)(1)(“Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligence . . . such

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limited application, however, these “formal” defenses are rarely successful. “Informal defenses,” such as those described below provide defendants with the opportunity to more successfully contest liability.

## 2. Applicability of CERCLA

One important issue with regard to defenses to CERCLA is the applicability of the statute. CERCLA does not apply retroactively. Section 107(f)(1) of CERCLA states “[t]here shall be no recovery . . . where such damages and the release of hazardous substance from which such damages regulated have occurred wholly before December 11, 1980 [enactment day of CERCLA].”<sup>141</sup> Thus, if NRD occurred on or before the December 11, 1980 date, a defendant is not liable under CERCLA.<sup>142</sup> “[W]here damages are readily divisible [between pre and post-enactment damages], the sovereigns cannot recover for such damages incurred prior to the enactment . . . In cases where the natural resource damages are not divisible and the damages or

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owner or operator of any vessel from which oil or a hazardous substance is discharged . . . shall . . . be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government . . .”). “CERCLA’s use of the word ‘omission’ in the phrase ‘act or omission’ of a third party suggests that the conduct of the third party must be wrongful. After all, an omission can only exist in relation to a duty to act. The Clean Water Act defense, however, expressly provides that the act or omission of the third party need not be negligent to qualify as the sole cause. The defense is available ‘without regard to whether any act or omission was or was not negligent.’ One significant difference between the third party defense of the Clean Water Act and CERCLA is that the CERCLA does not contain this exception, suggesting perhaps that one way to distinguish the causation of the defendant and the third party is that the defendant must prove that the third party’s conduct was somehow wrongful.”). James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL’Y 217, 311 (2000/2001).

<sup>140</sup> 33 U.S.C. § 2703(a)(“A responsible party is not liable for removal costs or damages under section 2702 of this title if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by-(1) an act of God; (2) an act of war; (3) an act or omission of a third party . . .”).

<sup>141</sup> 42 U.S.C. § 9607(f)(1).

<sup>142</sup> *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100, 1120 (D. Minn. 1982).

releases that caused the damages continue post-enactment, the sovereigns can recover for such non-divisible damages in their entirety.”<sup>143</sup>

In *Coeur d’Alene Tribe v. Asarco, Inc.*, the United States and the Coeur d’Alene Tribe sought to recover NRD associated with releases of mine wastes.<sup>144</sup> The defendants argued that no hazardous substance releases had occurred after CERCLA’s enactment in 1980, and no post enactment damages had occurred because environmental conditions in the Coeur d’Alene Basin had continuously improved.<sup>145</sup> The trustees argued that the contaminants continued to be released and re-released, and maintained that the critical date, for purposes of CERCLA, is when an injury is quantified.<sup>146</sup>

The court ruled that CERCLA’s “wholly before” limitation did not bar the plaintiffs from recovery.<sup>147</sup> The court found that “passive migration caused by leaching from variations in low and high water is a post-enactment release under CERCLA.”<sup>148</sup> Furthermore, the court concluded that the “passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a ‘release’ for purposes of CERCLA in this case.”<sup>149</sup> The court then relied on *Aetna Casualty and Surety Co., Inc. v. Pintlar Corp.*,<sup>150</sup> and

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<sup>143</sup> *In re Acushnet River and New Bedford Harbor Proceeding*, 716 F. Supp. 676, 685-686 (D. Mass. 1989).

<sup>144</sup> 280 F. Supp. 2d at 1114.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1113.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 948 F. 2d 1507 (9th Cir. 1991).

*In re Acushnet River and New Bedford Harbor Proceedings*,<sup>151</sup> to conclude that “damages” for purposes of the “wholly before” limitation are defined as the “monetary quantification of the injury.”<sup>152</sup> The court held that “damages occurred post-enactment when the federal government and Tribe began studying the ‘injury’ caused by the mining industry and how to clean up the injury to natural resources.”<sup>153</sup> Distinguishing the Ninth Circuit’s 2002 en banc decision in *Carson Harbor*,<sup>154</sup> the court ruled that the defendants’ releases did not occur “wholly before” 1980 because the continued, post-enactment passive migration of the contaminants constituted a “release” or “re-release” under the statute.<sup>155</sup> The district court further held that even if all of the defendants’ releases occurred before 1980, the plaintiffs’ claim would still not be barred by section 9607(f) because “the damages associated with such releases occurred post-enactment . . . the statute only excuses liability if the release *and* the damages both occur pre-enactment.”<sup>156</sup>

In *Montana v. Atlantic Richfield Company*, Judge Haddon reached the opposite conclusion on CERCLA’s “wholly before” limitation.<sup>157</sup> Montana brought an NRD action against Atlantic Richfield seeking to recover restoration costs at “upland areas” in the Clark Fork River Basin.<sup>158</sup> The court rejected the theory that damages do not occur until expenses are

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<sup>151</sup> 716 F. Supp. at 681.

<sup>152</sup> *Coeur d’Alene*, 280 F. Supp. 2d at 1114.

<sup>153</sup> *Id.*

<sup>154</sup> *Carson Harbor Village, Ltd. v. Unocal Corporation*, 270 F.3d 863 (9th Cir. 2001)(en banc).

<sup>155</sup> *Coeur d’Alene*, 280 F. Supp. 2d at 1113.

<sup>156</sup> *Id.* at 1114 (emphasis original).

<sup>157</sup> *Montana v. Atlantic Richfield Co.*, 266 F. Supp. 2d 1238 (D. Mont. 2003).

<sup>158</sup> *Id.* at 1239.

incurred or costs are quantified, finding that such a theory is “unpersuasive” and would render the “wholly before” limitation in the statute meaningless.<sup>159</sup> Instead, the court held that “damages accrue or occur, including restoration costs, when the underlying injury occurs.”<sup>160</sup> The court barred the state of Montana’s claim for restoration cost damages because such damages occurred wholly before December 11, 1980.

### **3. NRD and Site Remediation are the Same**

A defendant may also attempt to defend against its liability by taking advantage of the fact that most judges do not possess a significant degree of sophistication with regard to environmental issues. In the event a judge is not familiar with this highly specialized area of law, a defendant may attempt to blur the distinction between costs associated with site remediation and the recovery of NRD. There is, however, a clear distinction between the goals of remediation and those for the recovery of NRD. With regard to site remediation, a PRP is responsible for the costs associated with the remediation of the pollution. NRD is designed to compensate the public for the damage to its natural resources and the loss of use resulting from the resource’s contamination.

In an effort to avoid the payment of damages for the destruction of natural resources, a defendant may argue that the site remediation must be completed before NRD can be assessed. While a defendant engages in countless site assessments and feasibility studies, the loss of use of the natural resource and the continued degradation of the site is being ignored. Consequently, a defendant is actually attempting to postpone a realization of its liability under the guise of

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<sup>159</sup> *Id.* at 1243-1244.

<sup>160</sup> *Id.* at 1242.

“action.” However, as discussed earlier, site remediation can last for years without any actual cleanup occurring.

A defendant may argue that since it is engaged in site remediation, a cost-benefit analysis, which is often used in the context of site remediation, is appropriate for the assessment of NRD. However, no court has ever used a cost-benefit analysis to value NRD. If a cost-benefit analysis is used to determine the amount of money that is recoverable for NRD, the public will almost never be fully restored because the nonmonetary value of the natural resources cannot be fully and fairly calculated.

#### **4. Preemption of Federal Law**

When a trustee files a claim for NRD pursuant to state law, one common defense that a defendant may assert is that the law on which the claim is based is preempted by federal law. Generally, there are three ways in which a state law may be preempted by federal law. First, Congress can explicitly state in a federal statute that it preempts state law.<sup>161</sup> Second, state law that legislates in an area that Congress has exclusively reserved to the federal government will be preempted.<sup>162</sup> Third, state law will also be preempted if it conflicts with federal law.<sup>163</sup> “The presumption is that powers historically belonging to the states are not preempted by federal legislation unless that is the clear and manifest purpose of Congress.”<sup>164</sup> The fact that the states have historically been entrusted with the protection of natural resources lends credence to the argument that federal laws will rarely preempt state law claims for NRD.

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<sup>161</sup> *Attorney General v. Consumers Power Company*, 508 N.W.2d 901, 902 (Ct. App. Mich. 1993).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

In *In the Matter of Allied Towing Corporation*, a party who spilled oil into the Chesapeake Bay filed a complaint seeking limitation of liability pursuant to the Limitation of Liability Act<sup>165</sup> and § 1321(f) of the CWA.<sup>166</sup> The United States responded by filing a claim for cleanup costs and the State of Virginia also responded by filing a claim seeking civil penalties, cleanup costs and damages for injury to natural resources.<sup>167</sup> The court held that federal law does not supersede a valid exercise of a state's police power unless there is a specific manifestation of Congress's intent to preempt state law.<sup>168</sup> With respect to the interaction between the CWA and Virginia state statutes, the court stated:

Nothing in this scheme [of the CWA], however, conflicts with or otherwise preempts any state statute, such as Virginia's, imposing liability on the owner or operator of any vessel which illegally discharges oil, nor does it limit the amount of liability. Similarly, nothing in the FWPCA precludes the states from imposing civil penalties upon vessel owners or operators who violate state statutes by discharging oil illegally. It merely provides the states with an alternative federal remedy which assures that, either through the action and expenditure of the state or Federal Government, the natural resources of this country will be preserved."<sup>169</sup>

Preemption of state law often arises in the context of NRD when the resource that has been injured is a navigable body of water, thus seemingly invoking admiralty and maritime issues. However, courts have consistently held that state actions are not preempted by federal law when state law does not conflict with federal law and Congress has not specifically

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<sup>165</sup> 46 U.S.C. §§ 181-189 (1976).

<sup>166</sup> *In the Matter of Allied Towing Corporation*, 478 F. Supp. 398, 400 (E.D. Va. 1979).

<sup>167</sup> *Id.* at 400.

<sup>168</sup> *Id.* at 401.

<sup>169</sup> *Id.* at 403.

legislated the issue.<sup>170</sup> In general, federal environmental statutes are not enacted to supplant state statutory and common law causes of action; rather, they are meant to be supplements to ensure that trustees have adequate means by which they may seek and recover NRD.

## 5. Scope of the Public Trust Doctrine

When NRD claims are brought pursuant to the public trust doctrine, it is highly likely that a defendant will contest the scope of the doctrine's application. As noted in section II.A.1, *infra*, in early American cases, the public trust doctrine was initially applied to suits involving the protection of navigable waters.<sup>171</sup> The doctrine has evolved over time, however, and has been expanded to include the protection of, not only navigable waters, but other resources, including wildlife<sup>172</sup> and beaches.<sup>173</sup> Some states have even extended the doctrine to include recreational activities such as sailing, swimming, hunting and the enjoyment of scenic and aesthetic beauty.<sup>174</sup>

Despite the fact that there is a trend toward expansion, those who oppose an extension of the doctrine, contend that the inclusion of other resources is not consistent with the historic

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<sup>170</sup> *In re Ballard Shipping Company v. Beach Shellfish*, 32 F.3d 623, 631 (1st Cir. 1994)(holding that the Rhode Island Environmental Injury Compensation act that permits state law remedies for damage resulting from oil pollution is not preempted by federal maritime law); *In the Matter of Nautilus Motor Tanker Co., Ltd.*, 900 F. Supp. 697, 704 (D.N.J. 1995)(holding that New Jersey's common law with respect to the recovery of purely economic losses "is not preempted as impermissibly prejudicing federal maritime law). *But see State of Maryland v. Kellum*, 51 F.3d 1220, 1228 (4th Cir. 1995)(federal law preempts state natural resources code when it alters the rights and liabilities afforded to the parties under federal maritime law).

<sup>171</sup> For a more complete discussion of the evolution of the public trust doctrine, *see generally* Kanner, *supra* note 8.

<sup>172</sup> *In re Steuart Transportation*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

<sup>173</sup> *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 55 (N.J. 1972).

<sup>174</sup> *Hixon v. Public Service Commission*, 146 N.W.2d 577, 582 (Wis. 1966).

foundation of the doctrine.<sup>175</sup> A prime example of this debate is the issue of whether or not groundwater should be protected by the public trust doctrine.

The vital role groundwater plays in the survival and development of the United States is rapidly emerging as an important and visible issue in the American consciousness. Groundwater supplies approximately ninety-six percent of the water in the United States.<sup>176</sup> Moreover, at least fifty percent of the “of the domestic water used in the United States is derived from groundwater.”<sup>177</sup> In some areas, populations are one hundred percent reliant on groundwater.<sup>178</sup> Thus, it follows that groundwater is one of the nation’s most precious natural resources.

Opponents to the extension of the public trust doctrine assert that the traditional application of the public trust doctrine extended only to surface water; however, advances in science and technology demonstrate that there is a significant interrelationship between ground and surface water.<sup>179</sup> It follows from this fact and basic hydrogeologic concepts that contamination of surface water can ultimately lead to the contamination of groundwater. This understanding, coupled with the knowledge that the preservation of groundwater has become crucial to the survival of our communities, has paved the way for groundwater’s inclusion within the bounds of the public trust doctrine.

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<sup>175</sup> See Kanner, *supra* note 8.

<sup>176</sup> Albert P. Barker & Richard B. Burleigh, *Agricultural Chemicals and Groundwater Protection: Navigating the Complex Web of Regulatory Controls*, 30 IDAHO L. REV. 443, 449 (1993/1994).

<sup>177</sup> *Id.*

<sup>178</sup> Blake Johnston, Dara Lum & Susan Curtis, *Groundwater in the West*, 8 U. Denv. Water L. Rev. 328, 335 (2004).

<sup>179</sup> Kanner, *supra* note 8.

Additionally, it can be argued that the same reason the public trust was first applied to navigable waters, in order to foster the development of early American settlements, is precisely the same reason that the public trust doctrine should now encompass the protection of groundwater. Because the public trust doctrine “should not be considered fixed or static, but should be molded and extended to meet changing conditions and the needs of the public it was intended to benefit,”<sup>180</sup> the scope of the doctrine should remain broad and should extend to all resources that provide some benefit to the public, especially when basic human survival is dependent on such a resource.

## **6. Government Contractor Defense**

One of the greatest ironies when considering NRD is the fact that, frequently, pollution emanates from facilities that provide services or products that have significant value or are necessary to our society for purposes of economics and development. The pollution associated with these products or services may be characterized by polluters as a sort of “necessary evil.”<sup>181</sup> It follows that some of these services and products required by the general public are also required by the government. A government’s need for such products or services is especially critical, for example, when the country is engaged in a war. Furthermore, it has often been the case that such products and services are commissioned or rationed expressly by the government for use by the military during such times.

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<sup>180</sup> *Borough of Neptune City*, 294 A.2d at 54.

<sup>181</sup> This characterization of pollution begs the question of whether the evil was truly avoidable and necessary. There is a predisposition to assume that polluters “did not know any better” when polluting the environment prior to the enactment of environmental regulations. The reality, however, is that the notion of “necessary evil” cannot be taken at face value. Polluters must be held accountable for all of their actions, whether environmental regulations existed at the time of pollution or not.

When the government has requisitioned services or products from a defendant, a defendant might assert a government contractor defense to liability stemming from actions related to the provision of these services or products.<sup>182</sup> This defense is based on the notion that when a PRP is compelled to provide services or products for the United States any injury or damage arising as a result of performance of that obligation is excusable. The government contractor defense is “a matter of federal common law which displaces state law . . . Because federal procurement actively implicates ‘uniquely federal interests’ in ‘getting the Government’s work done,’ when the three referenced elements are present, state tort law significantly conflicts with federal interests and federal common law preempts it, providing a complete defense against state law claims.”<sup>183</sup>

In *Boyle v. United Technologies Corporation*, the United States Supreme Court thoroughly discussed the application of the government contractor defense.<sup>184</sup> In *Boyle*, a wrongful death suit was brought against an independent contractor who manufactured the helicopter and faulty escape-hatch system that ultimately resulted in a navy pilot’s death after the helicopter crashed off the coast of Virginia.<sup>185</sup> The court recognized the potential conflict

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<sup>182</sup> Courts have held that this is not a viable third party defense with respect to CERCLA. *See, e.g., United States v. Shell Oil Company*, 1992 WL 144296, No. CV. 91-0589-RJK, at \*10 (C.D. Cal. Jan. 16, 1992). In *Shell*, the oil company defendants argued “that the plaintiffs are not entitled to recover because defendants’ actions were undertaken pursuant to contracts between them and the United States . . . 42 U.S.C. § 9620 addresses the issues of government contractor liability in the CERCLA context. It provides that nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 . . . In light of § 9620 and the strict liability language of § 107, this affirmative defense is inappropriate and inconsistent with the third-party defense provided within § 107. As such, it is dismissed.”

<sup>183</sup> *Yeroshefsky v. Unisys Corporation*, 962 F. Supp. 710, 715 (D. Md. 1997)(citing *Boyle v. United Technologies Corporation*, 487 U.S. 500, 504, 512 (1988)).

<sup>184</sup> 487 U.S. 500 (1988).

<sup>185</sup> *Id.*

between federal interests and state tort law with respect to government procurement contracts.<sup>186</sup> The court examined the government contractor defense in the context of the Federal Tort Claims Act (“FTCA”),<sup>187</sup> which is a consent to suit against the United States for the negligent or wrongful conduct of Government employees, except as to those claims that are “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.”<sup>188</sup> Accordingly, government contractors are not subject to liability “when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”<sup>189</sup>

Perhaps the most significant requirement of this three part test in the context of NRD actions is the United States’ approval of “reasonably precise specifications.” The United States Supreme Court discussed the discretionary function exception in *Berkovitz v. United States*:

In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice . . . Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy . . .

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<sup>186</sup> *Id.* at 511.

<sup>187</sup> 28 U.S.C. § 1346(b).

<sup>188</sup> *Boyle*, 487 U.S. at 511 (quoting 28 U.S.C. § 2680(a)).

<sup>189</sup> 487 U.S. at 512.

In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.<sup>190</sup>

Thus, in order for the government contractor defense to apply, the government must have made a decision relating to the conduct at issue, *i.e.* the government must have exercised a discretionary function.

Courts have consistently held in environmental contamination cases where a defendant is asserting a government contractor defense that the United States never manifested the requisite approval of the manner and type of waste disposal activities that were responsible for the contamination of natural resources.

In *Lamb v. Martin Marietta Energy Systems, Inc.*, property owners brought a suit against a gaseous diffusion plant to recover for environmental damages caused by discharges of pollutants into the atmosphere, soil, bodies of water and ditches at the plant.<sup>191</sup> The defendant moved for summary judgment based on its relationship with the United States as a government contractor.<sup>192</sup> The defendants argued that the Department of Energy (“DOE”) exercised substantial control over operations at the facilities, and therefore, all activities fell within the discretionary function exception.<sup>193</sup> In denying the defendant’s motion for summary judgment, the court held that “[t]he defendants have failed to present specific evidence regarding the directions and orders that the DOE gave with respect to waste management units at the plant.”<sup>194</sup>

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<sup>190</sup> 486 U.S. 531, 536-537 (1988).

<sup>191</sup> 835 F. Supp. 959 (W.D. Ky. 1993).

<sup>192</sup> *Id.* at 962.

<sup>193</sup> *Id.* at 966.

<sup>194</sup> *Id.* at 968.

Therefore, the defendants did not satisfy the first element of the government contractor defense demonstrating that the pollution resulted from express approval and direction of the government.

In *Arness v. Boeing North American Inc.*, the plaintiffs filed suit against the defendant asserting violations of state environmental laws stemming from the release and disposal of trichloroethylene (“TCE”) which contaminated the groundwater, soil and subsurface soil of the area surrounding a facility which manufactured and tested rocket engines.<sup>195</sup> The defendant argued that the contamination resulted from rocket engine contracts that were performed pursuant to the specific direction and control of the United States.<sup>196</sup> The defendant argued that the United States had specifically required the use of TCE.<sup>197</sup> The court ultimately determined that the defendant failed to prove that he was “acting under” the direction of a federal officer, stating,

[The defendant’s] use of TCE did not cause Plaintiffs’ injuries. Rather, Plaintiffs’ injuries were allegedly caused by [defendant]’s negligent disposal and storage of TCE, which activities were not performed at the government’s behest . . . “[t]he government did not specify safeguards to prevent the release of TCE to the air and ground in these flushing procedures” . . . Furthermore, . . . [the defendant] does not submit any evidence that the government required . . . [the defendant] to store

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<sup>195</sup> In this case, the court examined the issue of governmental direction and control in light of defendants’ removal of the case pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which states that an action filed against “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress” may be removed to federal court. Although the court did not expressly address the likelihood that the defendant’s government contractor defense would actually succeed in light of the facts, the reasoning used by the court is parallel to that which a court would use to examine the discretionary function exception when considering the applicability of the government contractor defense.

<sup>196</sup> *Id.* at 1270.

<sup>197</sup> *Id.*

the TCE in a particular manner which resulted in the alleged release of TCE that caused Plaintiffs' injuries.<sup>198</sup>

In *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, the State of New Jersey filed an NRD action in New Jersey state court against ExxonMobil for contamination resulting from refinery operations, alleging violations of the New Jersey Spill Act and common law nuisance and trespass claims.<sup>199</sup> Defendant ExxonMobil Corporation removed the case to federal court, arguing jurisdiction under §1442, asserting the government contractor defense.<sup>200</sup> The court remanded the case, stating with regard to the government contractor defense that “it is not entirely clear that this defense, which sounds in products liability, would apply here, to an issue turning on the construction of state environmental law.”<sup>201</sup> In addition, the court stated that ExxonMobil’s claim that the Petroleum Administration for War exerted control over “the manufacture, production, storage, and transfer of petroleum products” failed to establish the government’s control over improper waste disposal methods, the action causing the injury of which the plaintiffs complained.<sup>202</sup>

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<sup>198</sup> *Id.* at 1275. Similarly, in *Bahrs v. Hughes Aircraft Company*, 795 F. Supp. 965 (D. Ariz. 1992), the defendant attempted to invoke federal jurisdiction by arguing it had acted under the direction of federal government when disposing of waste products that led to the contamination of the plaintiffs’ water supply. The court held that “[w]hile the government officials were undoubtedly most interested in the production of war materials, the record before this Court does not demonstrate the government’s necessary control over the method of waste disposal. The mere fact that the government possessed the power to exercise control over the project does not establish that the power was ever in fact exercised.” *Id.* at 970.

<sup>199</sup> *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, No. Hud-L 4415-04 (N.J. Super. Ct. filed Aug. 18, 2004).

<sup>200</sup> Notice of Removal at § 1.20, *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, No. Hud-L 4415-04 (N.J. Super. Ct. filed Aug. 18, 2004).

<sup>201</sup> *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, No. 04-CV-4897, slip op. at 7 (D.N.J. March 24, 2005).

<sup>202</sup> *Id.* at 8.

As demonstrated by the reasoning of the courts in the aforementioned cases, a defendant must provide specific evidence demonstrating that any discharges or improper waste disposal occurred with the express approval and direction of the federal government in order to satisfy the first prong of the requirements of the government contractor defense. Given the overall lack of success defendants have historically had with such a defense in environmental contamination cases, it is unlikely that it will succeed in future NRD cases.

A key consideration in this type of defense is absolute joint and several liability-it is ultimately irrelevant if a portion of NRD occurred during war. Furthermore, if a defendant raises this type of defense, he ultimately bears the burden of proof as to the degree of his contribution to the contamination.

## **7. Statutory Immunity**

Along the same lines as the government contractor defense, defendants may also assert defenses based on immunity provisions found in certain federal statutes regarding government contracts. The Defense Production Act, the National Defense Act, the Navy Purchase Act, and the First and Second War Powers Acts contain immunity provisions for defendant contractors performing contracts entered into pursuant to those statutes. The Defense Production Act (“DPA”), for example, states in relevant part: “No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . .”<sup>203</sup> For purposes of this analysis, the application of DPA immunity will be examined in the context of the numerous “Agent Orange” suits.

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<sup>203</sup> 50 U.S.C. App. § 2157.

In *Ryan v. Dow Chemical Company*, civilians in Vietnam filed a suit against “Agent Orange” manufacturers, claiming injuries resulting from exposure to the chemical defoliant.<sup>204</sup> The defendants argued that the case should be removed pursuant to § 1442, asserting the government contractor defense and immunity under the DPA.<sup>205</sup> Although the court ruled that the DPA was a “colorable” defense for purposes of removal, the court questioned the validity of such claims of immunity, stating “[t]here is a dispute as to whether section 707 [of the DPA] provides immunity against tort suits based in strict liability and negligence of the sort the civilian plaintiffs wish to pursue. On a previous occasion, this court was inclined to view section 707 as immunizing contractors only for contract damages, although it did not rule on the issue.”<sup>206</sup> The “previous occasion” referenced by the *Ryan* court, was the Eastern District of New York’s decision in *In re “Agent Orange” Product Liability Litigation*, in which the defendant manufacturers argued that, under the DPA, they should not be held liable for complying with “Agent Orange” production contracts entered into with the United States government.<sup>207</sup> As noted in *Ryan*, the *Agent Orange* court held that immunity under the DPA did not necessarily extend to liability for torts:

It is indisputable that the statutory ancestors of section 707 only immunized contractors from liability for breach of contract damages; the law was explicit on that point . . . It is telling that neither the Defense Production Act itself nor the legislative history made any reference to tort claims despite the fact that, as evidenced by this suit, the contracts “rated” under the Act “involve items, the production of which may . . . give[e] rise to the possibility of an enormous amount of claims. If section 707 is to be applied to tort claims at all, it should only be read

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<sup>204</sup> 781 F. Supp. 934 (E.D.N.Y. 1992).

<sup>205</sup> *Id.* at 938.

<sup>206</sup> *Id.* at 945.

<sup>207</sup> 597 F. Supp. 740, 843 (E.D.N.Y. 1984).

to bar claims for strict liability, not negligence. The former involve holding a defendant liable despite the fact that it may not have been at fault and the liability thus truly “result[s] . . . from compliance with . . . this Act.” Whether this last interpretation or one not applying section 707 to tort suits altogether is adopted, the Defense Production Act would not bar plaintiffs’ claims.<sup>208</sup>

Similarly, in *Hercules, Inc. v. United States*, the federal circuit examined the scope of immunity of section 707 of the DPA. In *Hercules*, manufacturers sued the United States government in order to recover expenses incurred as a result of *Agent Orange* litigation.<sup>209</sup> The defendants argued that because the government had compelled them to enter into contracts for the production of “Agent Orange” pursuant to section 101 of the DPA, the defendants were entitled to immunity under section 707 for both contract and tort suits.<sup>210</sup> The court disagreed, stating:

The language of section 101(a) makes it clear that the purpose of the statute is to authorize the President to dictate that preference be given the government contracts which are necessary to promote the national defense . . . Significantly, section 101(a) does not mention either the specific nature of performance under a DPA contract, or the subsequent use of goods produced under such a contract. Therefore, we conclude that, while the risk imposed by section 101(a) does include the possible need of a contractor to break its contracts with third parties in order to give preference to a DPA contract, it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users.<sup>211</sup>

Consistent with the court’s reasoning in *In re Agent Orange*, immunity under the DPA would not apply to defendants who improperly dispose of waste or discharge hazardous substances despite the existence of a contract with the government. Unless a contract with the

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<sup>208</sup> *Id.* at 845.

<sup>209</sup> 24 F.3d 188 (Fed. Cir. 1994).

<sup>210</sup> *Id.* at 202. 50 U.S.C. app. § 2071(a)(1964) authorizes the President “to compel contract performance as well as contract acceptance.” *Id.* at 202-203.

<sup>211</sup> *Id.* at 203.

government explicitly directs and authorizes the waste disposal and discharge methods to be undertaken by a defendant, it is difficult to see how the DPA can successfully be asserted as a defense to liability for NRD.

## **8. Standing to Bring NRD Claims**

Defendants may also contend that the state does not have sufficient standing to bring NRD claims. In *Department of Environmental Protection v. Jersey Central Power and Light Co.*, the State of New Jersey filed suit against a public utility engaged in the operation of a nuclear power plant.<sup>212</sup> The court held that the state, seeking to recover damages as *parens patriae* for damage to fisheries caused by the defendant's cooling water discharges during plant operations, had standing to seek both an injunction and damages.<sup>213</sup>

The court rejected the defendant's argument that the state did not have a proprietary right to the fish in its waters sufficient to support an action for damages.<sup>214</sup> Affirming the judgment of the lower court, the court stated that the State of New Jersey has "not only the right, but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in the trust corpus."<sup>215</sup> The court further said that "absent some special interest in some private citizen, it was

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<sup>212</sup> 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *aff'd.*, 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).

<sup>213</sup> *Id.* at 759.

<sup>214</sup> *Id.* at 758-759.

<sup>215</sup> *Id.* at 759.

questionable whether anyone but the state could be considered the proper party to sue for recovery of damages to the environment.”<sup>216</sup>

Some defendants have even gone so far as to question a state’s inherent right to protect its natural resources as a public trustee. In *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, the defendant made the following argument:

State ownership of natural resources derives from the sovereign rights of the British Crown and of the United States, and is governed by federal law, since under the equal footing doctrine these rights must be the same in all states. Plaintiffs’ expansive theories of natural resource ownership and damages go beyond the sovereign rights transmitted to New Jersey by the British Crown at independence in 1776, and would offend the equal footing doctrine if they were upheld.<sup>217</sup>

ExxonMobil essentially argued that New Jersey exceeded its authority by attempting to bring NRD claims pursuant to the New Jersey Spill Act and common law. This case is currently pending in New Jersey state court, however, given New Jersey’s historical pattern of upholding the State’s authority to bring NRD claims, it is unlikely this defense will be successful.

### **III. CONCLUSION**

The preservation, protection and reclamation of natural resources have become increasingly more important as the devastating impact of contamination is revealed. The multiplying number of NRD cases that are filed each year serves as a testament to this fact. The process of resolving these cases will force the courts and litigants to take a hard look at the available universe of approaches. Because of the highly specific nature of each NRD case, the

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<sup>216</sup> *Id.*

<sup>217</sup> Notice of Removal at 1.20(e), *New Jersey Department of Environmental Protection v. ExxonMobil Corporation*, No. Hud-L 4415-04 (N.J. Super. Ct. filed Aug. 18, 2004).

manner of application and the success of these claims will only be realized over time as NRD is examined on a case by case basis.