



Natural Resource Damages in New Jersey

Six Years After Litigation Revival, More Guidance Needed

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New Jersey's Natural Resource Damages (NRD) litigation program has historically ebbed and flowed. The current litigation push, which began in 2018 with a declaration by state officials of a "New Day" in environmental enforcement, has focused on pursuing NRD claims—sometimes in concert with Environmental Justice (EJ) initiatives—with a goal of incentivizing more voluntary NRD settlements by responsible parties. However, the New Jersey Department of Environmental Protection (NJDEP) would likely see more voluntary NRD settlements if it provided more guidance and certainty as to how these damages will be calculated.

What Are Natural Resources and Who Owns Them?

NRD is a form of relief, typically in the form of monies or in-kind environmental projects or conservation efforts, payable to an NRD "trustee"—typically a state, tribe, and/or federal government—as compensation for injury to, destruction of, or loss of natural resources such as wetlands, biota, wildlife, plants, groundwater, drinking water supplies, and other related resources.¹ NRD may also include the reasonable cost of assessing these injuries. NRD trustees may demand restoration beyond regulatory remediation and cleanup standards—as well as compensation for the loss of use or services provided by a resource. As one would imagine, assessing and valuing "lost use" or "lost services" can be a highly subjective exercise, and numerous competing formulae and methodologies have been used to calculate NRD.

Natural resources are generally held in trust for the public by the appropriate government body. For example, federal trustees include the Secretaries of the Departments of Commerce and Interior. State trustees are designated by the state's governor to act on behalf of the public for certain natural resources within a

state's boundaries. In New Jersey, the state has NRD authority under different statutes, primarily the Spill Compensation and Control Act (Spill Act), which appoints the state as the trustee of natural resources and provides for the restoration and replacement of natural resources as part of cleanup and removal costs. The New Jersey Water Pollution Control Act also recognizes the state's role in protecting natural resources. The Office of Natural Resource Restoration (ONRR) within the NJDEP oversees NRD issues, and the Commissioner of the NJDEP serves as the Trustee. In addition to the statutory authority, the state sometimes asserts common law authority over natural resources through the public trust or *parens patriae* doctrines.

Context and History

While New Jersey had early authority to assert NRD claims under the Spill Act, which was first enacted in 1977, NJDEP did not establish an NRD program until the 1990s with the creation of the Office of Natural Resource Damages (a predecessor to ONRR). At the outset, NJDEP officials adopted an approach similar to the federal government—*i.e.*, often working cooperatively with responsible parties

(and co-Trustees) to jointly assess NRD and achieve a voluntary resolution (typically in the context of surface water discharge incidents, landfills, and Superfund sites).²

New Jersey's current NRD litigation scheme started around 2003 when the NJDEP's then-Commissioner made NRD claims a focus of a broader enforcement effort, which relied, in part, on outside, contingency-fee counsel to prosecute NRD claims. Among other efforts, the NJDEP issued the Passaic River Directive (directing 66 companies to assess and restore 18 sites within the Lower Passaic River watershed),³ issued a new NRD



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Policy Directive, and sent approximately 4,000 Notices of Intent to initiate litigation to potentially responsible parties (RPs) targeted under the NRD Policy Directive. The NRD Policy Directive announced NJDEP’s plan to collect NRD for groundwater and other resources, established a screening process, and informed RPs that the NJDEP would be using a generalized (and unpromulgated) formula to calculate and settle NRD.⁴

The NJDEP initiated over 100 NRD lawsuits from 2006 to 2008. While many of the lawsuits concerned relatively small operations and NRD demands, some were much larger in scope. For instance, in 2007, the NJDEP filed a statewide NRD lawsuit against nearly 50 defendants historically involved in the manufacture, blending and distribution of methyl tertiary butyl ether (MTBE), a former gasoline blending component, seeking damages for alleged injuries to all “waters of the State.”⁵ During Gov. Chris Christie’s administration, from 2010 to 2018, no new NRD cases were filed, but NJDEP continued to take an aggressive approach to prosecuting pending NRD litigation. During this time, the state recovered over \$500 million in NRD judgments and settlements—a significant source of revenue for the NJDEP and state.

One of the largest of these settlements related to the Bayway/Bayonne litigation matter⁶ in which the NJDEP advanced a novel theory that the Spill Act’s NRD scheme applied retroactively over a century,⁷ and argued that any detectable contamination in a natural resource was a *de facto* injury constituting a complete, 100% loss in natural resource value and services. As part of the 2015 settlement, the responsible party, ExxonMobil, paid \$225 million while retaining its obligation to perform the remediation and cleanup activities required by the NJDEP; however, the settlement was not without controversy. First, certain environmental

groups and community members advocated that the settlement should have been higher since the state had initially sought \$8.9 billion in damages. Second, the state’s budgeting of the proceeds would see \$50 million being set aside for “resource restoration projects,” with the rest being deposited into the state’s general fund. Another \$50 million reportedly went to pay the state’s out-of-state counsel. In 2017, an amendment was added to the state Constitution to require the state to use NRD recoveries to repair, replace, or restore damaged natural resources in the vicinity of where the natural resource injuries occurred.⁸

The NRD Litigation Pivot in 2018

In 2018, after nearly a decade of no new NRD lawsuits, New Jersey’s Attorney General and the NJDEP announced a “New Day” in environmental enforcement and initiated six new actions on Aug. 1, 2018—three of which involved NRD claims. Political pressure had been mounting for the state to restart NRD litigation, but there was still no publicly open and transparent effort to regulate and assess NRD as done by the federal government. Instead, the government continued to maintain a litigation-based approach, initiating over 20 NRD lawsuits between 2018-2023. The uptick in NRD cases came hand-in-hand with a focus on EJ matters, with the state filing more than 50 EJ lawsuits since 2018. Most of the NRD lawsuits are specific to individual sites, as opposed to statewide or multi-site actions; however, some lawsuits target multiple parties for alleged wide-spread contamination.⁹ Moreover, the state continues to rely almost exclusively on outside counsel working on a contingency fee basis, which stirs further controversy.

Generally, responsible parties are “encouraged to contact the Office of Natural Resource Restoration to explore vol-

untary settlement” of their NRD liabilities and avoid litigation.¹⁰ The above-discussed lawsuits are seemingly intended to “send a message” to the regulated community—i.e., voluntarily approach ONRR to settle NRD or face the prospect of an NRD lawsuit that seeks a much larger damages award. In a press release regarding a recent voluntary NRD settlement, the former NJDEP Commissioner and the New Jersey Attorney General touted their “robust [NRD] litigation program,” which “*brings everyone to the [settlement] table – even outside of those pending lawsuits.*”¹¹

While the ONRR promises a “discount” for those who come forward to settle their NRD liability, the department provides little clarity on how it will assess or value such NRD liability. Hence, RPs are often unable to meaningfully plan and account for potential NRD settlements, which deters some RPs from initiating settlements for fear that the liabilities will be unpredictably high.

To help facilitate NRD settlements, and to address industry’s concerns, New Jersey State Sen. Bob Smith convened a NRD Taskforce in 2018 to discuss potential NRD regulations and objective standards for evaluating and calculating recoverable NRDs. The Task Force was comprised of the regulated community, NRD practitioners and environmental advocacy groups.¹² Despite being invited and present at the meetings, NJDEP officials declined to meaningfully participate in the discussion and kept a low-profile during sessions. Meanwhile, public dissatisfaction with the NRD process—and with settlement terms—continued to grow.

Local Governments and the Public Become More Vocal

One instance of public dissatisfaction was the 2023 settlement related to the Ciba-Geigy Superfund Site in Toms River.

As part of the settlement, the responsible party, BASF, was required to permanently preserve approximately 1,000 acres to protect groundwater resources in perpetuity, compensate the public for groundwater injury, and compensate the public for ecological injuries by designing and implementing nine restoration projects. The total investment for BASF would reportedly amount to approximately \$35 million to \$40 million, in addition to a \$500,000 cash payment.¹³ Despite the notice and comment period being extended twice to provide a total of 120 days—and some of the comments being incorporated into the settlement—many people felt that there was insufficient public outreach and engagement on the settlement arrangement. Still others felt the deal only benefited the NJDEP and/or insufficiently compensated the local community. The settlement was ultimately approved, but the prolonged negotiations delayed the start of the restoration.

Recent litigation settlements have faced similar challenges. For example, in May 2023, NJDEP, with the help of a mediator, negotiated a settlement agreement with responsible parties Handy & Harman and Cycle Chem to resolve NRD claims for historical contamination at a site in Montvale. However, the Bergen County municipality moved to intervene—objecting not to the proposed settlement payment, but the possibility that upwards of 43% of the \$14 million in proceeds would go to outside counsel and the NJDEP’s administrative fees (rather than the local community). Montvale argued that the 2017 constitutional amendment precludes the state from paying more than 10% of settlement to outside counsel. While the court denied Montvale’s motion to intervene, Montvale was permitted to file an *amicus* brief opposing settlement. The proposed settlement offer was finally approved on

May 16 for \$14 million but the court did not express any opinion on the validity of Montvale’s constitutional concerns.¹⁴

Similarly, another settlement matter, which would require the responsible party Solvay to pay \$75 million for NRD and perform comprehensive remediation activities, along with other compensation payments, was announced in June 2023; however, concerns expressed by the local municipalities delayed the approval process for eight months. After prolonged discussions with the local community and government leaders, the NJDEP was only able to seek court approval for a revised settlement agreement in January. The settlement approval was further delayed by interventions and objections filed in February, but it was finally approved on March 6.¹⁵

Lack of Settlement Guidance—Until Now?

Thus, the question remains: has the “New Day” in environmental enforcement had the impact that NJDEP and the current administration envisioned? While certainly an effective and powerful enforcement tool, in reality, very few of the NRD settlements announced in recent years were voluntary—most involved litigation initiated during or prior to 2018. As noted, one reason for the limited number of voluntary settlements may be a lack of discernible and predictable NRD policy, which makes it difficult for companies to estimate and reserve for potential liabilities that, absent regulatory guidance, are not always quantified in a reliable and consistent fashion.¹⁶ The lack of guidance similarly makes it difficult for courts to determine the fairness of proposed settlements. NJDEP’s already strict cleanup standards require significant expenditures, and the absence of a known protocol for settlement may be deterring potential RPs from coming forward on

their own and incurring potentially large NRD liabilities—or becoming a litigation target should negotiations fail.

The public’s concerns, coupled with the industry’s calls for more objective standards for NRD assessment, led the NJDEP to issue an Administrative Order 2023-08 (AO 2023-08) regarding Natural Resource Restoration Policy on March 14, 2023. The AO included a Natural Resource Restoration Policy, outlined a specific collaboration process for NRD Assessment and Restoration, and created a Natural Resource Restoration Advisory Council, which is required to make certain information public. The AO also directs the ONRR and the Contaminated Site Remediation and Redevelopment (CSRR) program to “establish protocols and procedures,” and seeks to improve NJDEP’s “policies and practices for voluntarily resolving potential NRD liabilities with responsible parties.” While the AO sets laudable goals, it stops short of providing actual, implementable guidelines and does not change the process or ability for the NJDEP to instigate litigation to recover NRD. Today, nearly a year later, NJDEP has not issued any new guidance or written policy to help effectuate the AO’s goals. The regulated community, local governments, and other stakeholders would benefit from the NJDEP building on this AO to provide more concrete and substantive guidance or regulations regarding NRD policies and valuation. ■

Endnotes

1. N.J.S.A. 58:10-23.11b (Definitions).
2. N.J.S.A. 58:10-23.11b (Definitions).
3. *In the Matter of the Lower Passaic River et al.*, Directive Number 2003-01 Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resource Injuries, available at nj.gov/dep/

- nrr/directives/passaic_dir01.pdf.
4. Press Release: DEP to Address More Than 4,000 Potential Claims for Natural Resource Damages Statewide (Sept. 24, 2003), available at nj.gov/dep/newsrel/releases/03_0131.htm.
 5. In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, S.D.N.Y., No. To date, the state has collected more than \$400 million in settlements from the MTBE litigation defendants, which remains pending today—17 years later. See, e.g., casetext.com/case/nj-dept-of-envtl-prot-v-atl-richfield-co-in-re-methyl-tertiary-butyl-ether-mtbe-prods-liab-litig-8.
 6. *N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, 453 N.J. Super. 588, 673 (Law Div. 2015)
 7. *State v. Ventron*, 94 N.J. 473 (1983) was the first case to hold that certain aspects of Spill Act applied retroactively.
 8. N.J. CONST. art. VIII, § II, ¶ 9.
 9. See, e.g., Press Release: “Lawsuit Filed by AG, NJDEP, and Division of Consumer Affairs Accuses Five Oil and Gas Companies of Misleading the Public About Their Products and Climate Change” (Oct. 18, 2022), available at njoag.gov/lawsuit-filed-by-ag-njdep-and-division-of-consumer-affairs-accuses-five-oil-and-gas-companies-of-misleading-the-public-about-their-products-and-climate-change/; see also Press Release: “Acting AG Platkin, DEP Commissioner LaTourette Announce Natural Resource Damages Lawsuit against Monsanto and other Corporate Defendants over PCB Contamination” (Aug. 4, 2022), available at nj.gov/dep/newsrel/2022/22_0805.htm.
 10. Pre-Litigation Settlement of Liability, ONRR Website, available at nj.gov/dep/nrr/prelitigation.htm.
 11. Press Release, DEP Reaches \$4.2 Million Settlement with Wyeth Over Somerset Superfund Site, Oct. 30, 2020 (available at nj.gov/dep/newsrel/2020/20_0045.htm) (emphasis added).
 12. Archer Client Advisories, New Jersey Ramps-Up NRD Program under Governor Murphy (Aug. 2, 2018), available at archerlaw.com/en/news-resources/client-advisories/new-jersey-ramps-up-nrd-program-under-governor-murphy.
 13. Jean Micle, *Environmental chief promised Toms River BASF cleanup decision months ago. So where is it?*; Asbury Park Press (Aug. 14, 2023), available at app.com/story/news/local/land-environment/2023/08/14/njdep-toms-river-basf-ciba-geigy-cleanup-settlement/70570690007/.
 14. *NJDEP et al. v. Handy & Harman et al.*, Docket No. BER-L-8605-19 Motion to Enter Judgment (Nov. 22, 2023); See also, Consent Judgment available at njoag.gov/ag-platkin-dep-commissioner-latourette-resolve-montvale-groundwater-natural-resource-damage-case/.
 15. *NJDEP et al. v. Solvay Specialty Polymers USA LLC et al.*, Docket No. GLO-L-001239-20, Intervention and Stay (Feb. 12, 2024). Despite the numerous settlement challenges, some parties have settled claims over certain sites: Exxon paid New Jersey \$9.5 million to resolve another NRD lawsuit for its Lail property—a 12-acre site in East Greenwich Township and Paulsboro, see *N.J. to get \$9.5M after accusing Exxon of dumping cancer-causing chemicals* (Aug. 2022), available at nj.com/news/2022/08/nj-to-get-95m-after-accusing-exxon-of-dumping-cancer-causing-chemicals.html.
 16. NJDEP typically uses equivalency analyses (resource equivalency analysis (REA) or habitat equivalency analysis (HEA)) to estimate damages. However, these “simplified” methodologies, while instructive for settlement discussion, rely heavily on subjective opinion or assumptions and can be manipulated to maximize or minimize damage estimates.