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Natural Resource Damage – Corporate Hazard Ahead

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The nation faces no shortage of contaminated sites requiring remediation. The federal National Priorities List (NPL) includes 1,237 contaminated sites, *see* <<http://www.epa.gov/superfund/sites/npl/newfin.htm>>, and most states have their own lists of contaminated sites as well. (The state in which I practice, New Jersey, lists thousands of such sites in its report on “Known Contaminated Sites in New Jersey.” *See* <<http://www.nj.gov.dep.srp/kcs-nj>>.) Recently, the Environmental Protection Agency (EPA) announced that because of declining annual funding for Superfund, no new waste sites would be added to the NPL and that it would not begin expensive new cleanups of sites on the NPL until those now in progress are completed. The Superfund, created by Congress in 1980, is broke, with the special tax on oil and chemical companies designed to replenish the Superfund having expired a decade ago. States are facing their own budgetary problems. In these lean times, where will the agencies find the money to address contaminated sites? One worrisome answer is suggested by the recent activities of New Jersey’s Department of Environmental Protection (NJDEP).

Over the past several years, NJDEP has dusted off natural resource damages (NRDs) as a legal tool and begun aggressively pursuing companies to recover such damages. While both cleanup costs and NRDs seem to address the same problem – the costs to the public of dealing with associated contaminated sites – in theory, at least, they are distinguishable. Rather than reimbursing the government for costs incurred in remediating the contaminated site and its environs, NRDs are intended to compensate the public for the loss of the use of the natural resource while the contamination was in place. Thus, natural resource damages are not tied to actual cost of remediation. Because of the overlap between remediation and natural resource restoration, however, it remains to be seen whether this distinction will hold up in



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practice.

In the past, efforts to recover natural resource damages were generally limited to large cases involving oil spills or major remediation projects performed under the federal Superfund program. New Jersey has changed the focus with its aggressive program introduced in September 2003 with the release of its Natural Resource Damage Policy Directive. The NRD Policy Directive announced an accelerated effort to safeguard the public’s right to compensation for natural resource injuries in view of the running of a four year statute of limitations under the 2001 Spill Act Amendments. NJDEP was concerned with the potential expiration of 4,000 NRD claims.

Under the Policy Directive, NJDEP set out a screening process for sites presenting a potential NRD claim. That encompasses the 112 New Jersey sites on the NPL, over 9,000 sites on New Jersey’s “Known Contaminated Sites” list, and an estimated 10,000 sites with leaking underground storage tanks. This screening step is being coordinated by NJDEP’s Natural and Historic Resources and Site Remediation Programs. In

addition, New Jersey hired (on a contingency basis) outside legal counsel, using their own experts.

The theory behind NRDs is simple; evaluation of such damages is not. Where some action completely destroys a public resource, it is easy to see how the government would want the responsible party to pay for the replacement of the resource. Thus, if an oil spill kills a known number of commercially valuable fish, the responsible party would be asked to pay the value of the fish, on an analogue of the “you broke it, you bought it” principle.

More commonly, though, a resource is not completely destroyed. Instead, its value to the public is reduced over the period of time while the contamination remains unaddressed. In such cases, the government may seek a different measure of damages: the value of all or a portion of the services lost to the public for the time period from the discharge or release until the injured resource is restored (or its equivalent is acquired) so that the level of services provided to the public is returned to its baseline (pre-contamination) level. For example, a contaminated aquifer could not be used for drinking water, depriving the public of its use for a certain period of time. Or contamination in a lake made fish unsafe to eat, depriving the public of recreation and/or food from that lake for a certain period of time. Assessments of this component of NRDs can yield staggering figures, especially at the many sites that have suffered degradation over decades.

This last point is well illustrated by NJDEP’s preferred method for calculating lost-services damages for contaminated groundwater. For parties willing to engage in settlement discussions, NJDEP will apply a novel settlement valuation formula developed and applied by the Office of Natural Resource Restoration. *See* <http://www.nj.gov.dep/nrr/nri/nri_gw.htm#calc>. This formula has never been formally promulgated as a regulation. Nevertheless, the ground water damage formula is intended to be widely used as a settlement tool. The formula determines ground water damages by using a volumetric calculation of the extent of the contamination and a temporal factor to consider the number of years that the

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ground water has been impacted. A dollar amount is then assigned based on the per-gallon replacement cost of finished water. In essence, New Jersey assumes that any contamination equals damage and then measures that damage to the raw water reserve based upon the price of water at the tap.

The threat of such enormous liability for lost services over periods that can stretch over multiple decades provides a great incentive to potentially responsible parties to cooperate with federal and state authorities with respect to restoration-based damages. In many cases, natural resource trustees can seek *both* restoration *and* lost-use damages. See, e.g., 43 C.F.R. §§ 11.13(e)(3), 11.84(g)(1) (regulations governing certain damage assessments conducted by U.S. Department of the Interior). For example, a discharge might degrade a wetland, reducing its productivity for many years. Restoration-based damages would consist of money damages for the cost of returning the wetland to its pre-discharge condition (or money for, or direct implementation of, the acquisition of an equivalent wetland that will be preserved from development). Lost-use damages would consist of the value of the services that the public lost during the time the wetland was still degraded. Where lost-use damages could potentially reach an astronomical level, responsible parties can find themselves agreeing to pay what they believe to be excessive amounts for the more easily calculable (and, in the agency's eyes, more politically attractive) restoration-based damages.

The NJDEP Policy Directive announces a preference for performance of restoration work and resource protection in lieu of money damages, but the settlements being negotiated by outside counsel have been predominantly for money damages. See <http://www.nj.gov/dep/nrr/reports/nrd_update200312.htm>. NJDEP has repeatedly stated that the NRD program will emphasize restoration of natural resources and settlement of damage claims, not litigation. For example, to assure the enhancement/ preservation of ground water resource services, NJDEP envisions the acquisition of aquifer recharge areas, water re-use or recycling projects, infrastructure improvements to control stormwater and enhance ground water recharge, reforestation efforts to improve infiltration and water retention and other methods to

enhance the water resource. For lost recreational uses, enhancements to public access, creation of or improvements to state or local parks, or the provision of other alternate recreational opportunities may be considered an acceptable restoration project.

The NRD initiative created an unintended chilling effect on potential brownfield developers poised to redevelop underutilized and/or abandoned contaminated properties. Notwithstanding protective provisions in the New Jersey Brownfields Act, such developers were still vulnerable to potentially costly NRD claims. To address such concerns the Legislature recently amended the Spill Act to give landowners who purchased their property after 1997 protection from liability for NRDs, so long as they acquired the property after the discharge, are not responsible for the discharge and did not assume liability for NRDs. See P.L. 2005, c.4. Unlike many "innocent purchaser" protections, the new provision covers even those landowners who were aware of the contamination when they acquired the property.

Among the first targets of the NJDEP's 2003 Policy Directive were sixty-six companies at 18 sites located along the Passaic River in Essex and Passaic Counties. These parties were issued a joint NRD directive that compels the ordered parties to implement two tasks: the "assessment of natural resource injuries," and the "interim compensatory restoration" of the river. Failure to comply with the directive will result in the Department's performing the required actions and then suing the ordered parties for up to three times the "cost of arranging for the cleanup and removal of hazardous substances that were discharged."

Although the directive clearly mandates action, it appears to mix concepts. Parties are being ordered to provide an "assessment" of the river and then perform "interim compensatory restoration." At first glance, these actions appear to be a departure from the traditional Spill Act directive that mandated the cleanup and removal of hazardous substances. Thus, the Directive suffers from an inherent inconsistency raising the suspicion that the Directive is simply a device to generate revenue, not a tool for compelling parties to actually replace damaged natural resources. NJDEP Commissioner Bradley Campbell fed that suspicion by estimating that the NRD liability at

the Passaic River site exceeds \$900 million. He has been negotiating with the companies, apparently using the \$900 million damage estimate as a threat to encourage companies to agree to more modest restoration projects, such as wetlands restoration, river access, or walkways. Clearly, he has been encouraged by a major NRD settlement in late 2003 with three companies responsible for chromium contamination in a number of sites throughout Hudson and Essex Counties. This settlement amounted to \$17 million in NRD settlement payments. The Department announced that the money would be used for restoration projects and land purchases, such as wetland creation/enhancement, non-point pollution control projects and purchase of aquifer recharge areas.

To date, NRDs have gone toward non-remediation, restoration-type projects, such as acquisition of aquifer recharge areas and wetlands enhancement. See <http://www.nj.gov/dep/nrr/reports/nrd_update200312.htm> (NJDEP's 2003 report on NRD settlements). But as the Passaic River Directive suggests, the enormous amounts potentially at stake, and NJDEP's constant and ever-growing need for funds to do traditional remediation work, raises the troubling possibility that NRDs could be used to replace dwindling remediation funding. Restoration of a resource, e.g., dredging of contaminated sediments to remove the source of contaminants that wind up in fish and shellfish, can look an awful lot like remediation to the untrained eye. Even easier to imagine is the use of NJDEP-ordered, private-party NRD assessments to replace, in part, the traditional remedial investigations that have always guided remediation efforts.

NJDEP's NRD initiative raises an entirely new set of issues and concerns for owners of, and others with any connection with, contaminated sites in New Jersey. Counsel will be well advised to monitor developments closely, to watch for signs that NJDEP might seek effectively to transform NRDs into a new remediation funding source. While the federal NRD program is not administered by the EPA, the same risk exists at the federal level, with its exhausted Superfund, as well as in the many other states with their own remediation programs.

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