



Natural Resource Damages & Assessments

Overview

For decades, Archer's Environmental Law Group has been at the forefront of complex and emerging Natural Resources Damages (NRD) issues in New Jersey and other jurisdictions throughout the country. Our attorneys provide skilled assistance at all stages of an NRD matter and routinely handle matters initiated by federal and state trustees. We advise on all aspects of NRD claims, from risk management and damage assessment analysis, to negotiating settlements with trustees, and litigating NRD liability before courts and administrative bodies, as well as alternative dispute resolution. At the federal level, Archer's attorneys have extensive experience navigating and litigating NRD matters under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund and the Oil Pollution Act (OPA), and have served as counsel in over 100 CERCLA Superfund sites throughout the country.

Our team represents clients in all aspects of the Superfund/CERCLA liability process, including negotiation of administrative orders and consent decrees, defense of cost recovery actions, participation in multi-party cost recovery actions, and defense of enforcement actions. Archer's attorneys routinely represent clients in connection with inquiries from the USEPA and the negotiation of administrative settlements regarding current and former manufacturing facilities, third-party waste disposal sites and large sediment sites. We litigate matters involving liability, cost allocation, and indemnity issues.

Whether as part of a litigation matter or hoping to avoid one, Archer's attorneys also have significant experience estimating potential NRD exposure for settlement or other purposes. Beyond monetary payment, NRD may include restoration projects that include land acquisition for aquifer recharge or resource conservation, rehabilitation of impacted wetlands or other habitats, or even public access and improvement projects. Archer's attorneys are available to assist and advise clients who wish to assess NRD and the options available to resolve potential NRD exposure.

Representative Experience

**Results may vary depending on your particular facts and legal circumstances.*

- Bayway Refinery and Bayonne Terminal: Archer represented the client, a multinational petroleum company, in landmark NRD litigation relating to historic contamination at the Bayway refinery in Linden,

NJ and the nearby Bayonne Terminal. The litigation spanned over 10 years and the State sought over \$8.9 billion in damages. Archer's attorneys acted as lead counsel for all pre-trial discovery, including written discovery, and taking and defending depositions. Archer also actively supported co-counsel Paul, Weiss, Rifkind, Wharton & Garrison LLP throughout the resulting 9-month trial. Upon completion of the trial, Archer played a lead role in settlement negotiations with the State, which resulted in a \$225 million settlement* that, despite significant political and public opposition that considered the settlement overly favorable to Archer's client, was judicially approved. Throughout the duration of the case, Archer worked directly, and on a daily basis, with the client's in-house counsel, as well as with its engineers, environmental remediation managers, and consultants, to ensure that the matter was appropriately and efficiently managed.

- **Ewing Groundwater Contamination:** In one of the first NRD matters prosecuted in NJ, Archer represented a multinational petroleum company in an NRD action relating to groundwater impacts from several gasoline stations in Ewing, NJ. Archer successfully argued that NJDEP's Surrogate Groundwater Injury Calculation was improper and obtained a favorable ruling for the client on summary judgment. The Court agreed with Archer's argument that the expert calculation was devoid of any admissible or relevant evidence as to natural resource damage. This ruling invalidated NJDEP's formula for calculating NRD for groundwater.
- **Paulsboro Terminal:** Archer attorneys defended the former owner and operator of a petrochemical terminal in an NRD action where outside counsel representing NJDEP sought more than \$85 million for primary restoration and compensatory restoration damages. Following extensive discovery that revealed significant flaws in the State's NRD calculations, the State agreed to settle the matter for roughly 1 percent of its original damage demand. In addition, Archer successfully pursued contribution claims against the subsequent owners of the terminal that allowed its client to further reduce its exposure.
- **New Jersey MTBE:** For more than 10 years, Archer attorneys have represented a multinational petroleum company in a landmark NRD action brought by NJDEP. The State, represented by outside counsel, seeks NRD for alleged injury to groundwater at thousands of properties across the state as a result of releases of the former gasoline additive MTBE. Archer has been instrumental in formulating a defensive strategy to NJDEP's innovative NRD claims, which are premised in product-liability theories. Our attorneys have conducted extensive discovery, including numerous depositions of NJDEP personnel, and have briefed complex issues addressing expert testimony, viability of certain claims, and the State's right to a jury, among others. To date, the State has recovered more than \$300M in NRD settlements* from the other defendants in this matter. Archer's attorneys challenged certain early settlements, which lead to important concessions by the State relating to allocation of settlement credit.
- **Port Reading Refinery:** In one of three NRD actions filed by NJDEP after a decade-long hiatus, Archer attorneys, representing another large petrochemical company, successfully obtained dismissal of NJDEP's common-law claims for trespass and strict liability, and for monetary damages under public nuisance. In dismissing the trespass claim, the Court agreed with Archer attorneys that NJDEP could not maintain the



claim under the Public Trust Doctrine, as the NJDEP had attempted to argue. The Court further found that the storage and processing of crude oil and refined petroleum products was not, in itself, an abnormally dangerous activity, and that NJDEP's strict liability claim was subsumed within the Spill Act claim. Finally, Archer successfully argued that NJDEP could not recover monetary relief for its public-nuisance claim, the only remedy for which is abatement. In obtaining this result, Archer attorneys paved the way for defending what is sure to be a number of new NRD cases filed by NJDEP.

- **Atlantic City Manufactured Gas Plant:** Archer was recently retained by a large utility to defend against an NRD action relating to a former manufactured gas plant in Atlantic City. This matter seeks NRD for alleged injury to sediments, wetlands, surface water, and other natural resources. Archer attorneys have moved to dismiss a portion of the State's common-law claims and are awaiting the Judge's decision.
- **Woodlands:** Archer attorneys represented a chemical and munitions manufacturing company in an NRD case brought by NJDEP under the Spill Act and the common law. Our client was one of several entities that formed a private study group for the area in question and performed remedial investigations at the site. We negotiated a favorable settlement with NJDEP, agreeing to pay a small portion of the amount that NJDEP had sought in damages and to contribute a modest amount to purchase a tract of land for preservation.
Pre-Litigation NRD Settlements: While Archer attorneys have the experience and skills to advocate for clients at all stages of a case, from pre-lawsuit investigations to appeals, we have represented a variety of clients in NRD matters and worked to obtain favorable settlements with NJDEP, saving the time and expense associated with litigation. Our clients include petrochemical suppliers and underground storage tank owners, and the solutions that we have negotiated run the gamut from monetary damages using NJDEP's Groundwater Injury Calculator to agreements to donate property for preservation.
- **Essex Chemical:** Represented by an Archer attorney at a prior firm, the defendant in this case did not dispute liability, but challenged NJDEP's estimate of primary and compensatory damages. NJDEP sought to force the defendant to undertake remedial action that would cost substantially more than the remedial efforts that the defendant was already undertaking pursuant to a Site Remediation Program. The trial court recognized that NRD damages could include non-use-related harm and loss, but in this case, failed to explain how it arrived at the values it used for otherwise invaluable resources. NJDEP had proposed that the defendant offset the injury to the groundwater by purchasing 15.4 acres of land. The trial court rejected this proposal, and the Appellate Division affirmed the decision on appeal.
- **Union Carbide:** Like the Essex Chemical case above, a defendant represented by an Archer attorney at a prior firm defeated NJDEP's effort to impose a primary restoration plan that was more costly remediation plan than the one that the defendant had already begun pursuant to the Site Remediation Program. In addition, the Court found that NJDEP failed to meet its burden for primary and compensatory restoration damages, as NJDEP did not adequately identify a loss for which the public must be compensated or provide any proof of lost services.
- **Pennsylvania MTBE:** In one of the first NRD actions ever initiated by the Commonwealth of Pennsylvania, Archer attorneys have represented a petrochemical company in a suit alleging damages caused by the



former gasoline additive MTBE. The complaint alleged NRD damages at thousands of properties throughout the state under both statutory and common-law theories. Archer attorneys successfully moved to have a number of the State's claims dismissed from the case.

- Puerto Rico: Archer attorneys represent two petrochemical companies in NRD litigation brought by the Commonwealth of Puerto Rico for alleged MTBE contamination in groundwater throughout the Commonwealth. Archer has conducted extensive discovery, including dozens of depositions of government personnel, and obtained favorable results from motion practice.

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