

The Power Of Private Actions For Natural Resource Damages

By **Matthew Conley and Charles Dennen**

Once considered a sleeping giant, claims and demands for natural resource damages, or NRD, have increased in regularity. Large settlements with the states of Minnesota and New Jersey, as well as recent budgetary issues arising from the COVID-19 pandemic, have caused many natural resource trustees to put a greater emphasis on NRD.

Simultaneously, many states, including Louisiana, Maryland, California and Pennsylvania, have chosen to retain outside counsel to litigate NRD lawsuits on a contingency-fee basis. New Jersey, in particular, has filed more than a dozen NRD lawsuits in the last two years with the assistance of outside attorneys, who are often motivated to increase damages beyond what the facts may justify.

These enforcement efforts, and the headline-catching numbers involved, will inevitably cause responsible parties, or RPs, and property owners to focus on their potential NRD exposure — and their ability to recover NRD from other RPs. This article provides an overview of the various avenues by which private parties may recover NRD, either in the first stance or by way of contribution.

NRD Authority and Standing

Generally considered a statutory remedy, NRD are available to any governmental entity designated as a natural resource trustee.

For example, under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — commonly known as the Superfund law — a trustee is defined as any "federal, state or Indian official who ... is designated to 'act on behalf of the public as [a] trustee[] for natural resources." [1] CERCLA defines natural resources broadly to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" natural resource trustees. [2]

At the state level, governments often rely on the public trust doctrine to enact environmental legislation, [3] and, in some circumstances, assert NRD claims. The public trust doctrine generally provides that certain natural resources within a state belong to the citizens of the state, and must be available for public use and enjoyment.

Common examples of trust resources include coastal beaches, wildlife and the land beneath navigable waters. State and tribal trustees often argue that, under the public trust doctrine, they have a fiduciary obligation to seek the restoration of, or compensation for, a trust resource injured by unlawful discharges.



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Whether, and the extent to which, a trustee may seek NRD for injuries to privately owned resources is far from clear. The U.S. Court of Appeals for the D.C. Circuit found that "Congress quite deliberately excluded purely private property from the ambit of the [NRD] provisions," but that CERCLA's NRD provisions may apply to privately owned resources over which the government exercises "a substantial degree of ... regulation, management or other form of control."^[4]

The U.S. Department of the Interior has advised that such an assessment must be made on case-by-case basis.^[5] The law surrounding state trusteeship over private property is similarly unsettled. At least one court has found that the trustee may rely on statutory authority to recover NRD for environmental impacts to any lands, including "private uplands," in its jurisdiction.^[6]

With respect to private parties, "CERCLA does not permit private parties to seek recovery for damages to natural resources held in trust by the federal, state or tribal governments."^[7] However, private parties often do assert claims, and recover damages, for injury to their own property, including natural resources ostensibly held in trust by one or more governmental trustees.

For example, property owners may assert common law and statutory claims seeking NRD or NRD-like relief (e.g., loss of use, cost to restore) due to an alleged injury to groundwater, wetlands or other trust resources on or under their property. One day soon, we might see a property owner attempt to quantify damages through a benefit transfer, equivalency analysis or another methodology typically reserved for NRD assessments.

Third-Party Practice and Contribution Claims for NRD

Multiple parties are often responsible for injury to natural resources in the public trust, which may require significant third-party practice, particularly where trustees seek to impose joint and several liability on a single responsible party.^[8] Importantly, private parties are not permitted to assert Section 107 cost recovery claims under CERCLA. Rather, private parties may assert a contribution claim under Section 113, but only in specific circumstances.

With respect to NRD, the U.S. District Court for the District of New Jersey's 2008 decision in *Champion Labs. Inc. v. Metex Corp.*^[9] is instructive. There, Champion Labs entered into a consent judgment with the New Jersey Department of Environmental Protection, or NJDEP, resolving its NRD liability to the state trustee arising from groundwater contamination. Champion Labs thereafter brought contribution claims against an adjacent property owner under Sections 113(f)(1) and 113(f)(3)(B) of CERCLA.

The court dismissed Champion Labs' claim under Section 113(f)(1) because, "to properly assert a contribution action under [that] section ... [Champion Labs] must first have been sued under section 106 or section 107 of CERCLA."^[10] With respect to the Section 113(f)(3)(B) contribution claim, the central issue was whether the consent judgment resolving NRD liability with the NJDEP resolved Champion Labs' CERCLA liability for a response action, thus providing for a right of contribution.

Turning to the terms of the consent judgment, the court found that the agreement specifically resolved Champion Labs' CERCLA liability for NRD, including "compensation for the restoration of, the lost value of, injury to, or destruction of groundwater and groundwater services."^[11] The court then rejected the defendant's argument that

compensation for the restoration of groundwater was "not a cost for a response action to clean up a site under CERCLA."^[12]

Importantly, and as noted by the U.S. Court of Appeals for the Seventh Circuit, it is arguably impossible to bring a Section 113 contribution claim for a release that occurred prior to CERCLA's enactment in December 1980.^[13] This is because preexisting liability under CERCLA for a response action is necessary to bring a Section 113 claim, and federal trustees are not permitted to bring NRD actions for pre-1980 releases. With respect to state law, statutes are often less clear and such limitations on NRD contribution claims are an open question.^[14]

Although not an NRD case, the U.S. Court of Appeals for the Third Circuit's recent decision in *NJDEP v. American Thermoplastics Corp.* regarding the interplay between federal and state response costs and their impact on private-party contribution claims is noteworthy.^[15] There, Carter Day Industries entered into a settlement only with the NJDEP — not the U.S. Environmental Protection Agency — regarding all costs related to a landfill site.

Subsequently, Compaction, a private-party RP, asserted a CERCLA contribution action against CDI, seeking recovery of response costs paid to the EPA. CDI argued that its settlement with the NJDEP conferred contribution protection for Compaction's contribution claim for the response costs paid to the EPA, and the district court agreed.

On appeal, the Third Circuit reversed and remanded, holding that CDI's settlement with the NJDEP related only to the NJDEP's response costs — meaning Compaction's contribution claim for response costs it paid to the EPA was not precluded. This case could have broad implications on the structure of NRD settlements involving states or the EPA, and RPs planning to assert an NRD contribution action under Section 113 should take note of its impact.

NRD Citizens Suits

Another possible NRD enforcement mechanism available to private parties is a citizen suit. Many federal environmental statutes contain citizen suit provisions, which allow private citizens or groups to file lawsuits in an effort to enforce federal environmental laws, regulations or permits. Examples of federal statutes with commonly invoked citizen suit provisions include CERCLA, the Resource Conservation and Recovery Act and the Toxic Substances Control Act.

There are two general categories of citizen suits: (1) suits by private citizens against other private citizens alleged to be violating a federal environmental law; and (2) suits by private citizens against the executive branch, often the EPA, alleging that the federal government has not carried out a mandatory duty in implementing an environmental law.^[16]

Thus, citizen suits can be used by private citizens or organizations to seek compensation against dischargers or polluters for harm caused to the public without the need to involve the federal or state government. Notably, because citizen suit provisions are meant to remedy harm to the public, they cannot be used to redress harm to individuals or private citizens or groups.

Additionally, although citizens cannot directly sue RPs for injury to trust resources outside their property, in certain jurisdictions, as well as in Europe, citizens may have standing to sue the government if it fails in its trustee responsibilities to protect a natural resource or

remedy an environmental injury.

For example, the Pennsylvania Environmental Defense Foundation sued the commonwealth of Pennsylvania under a provision of Pennsylvania's constitution, which codified the individual right to a preserved environment and the trustee's obligation to conserve and maintain the environment.[17] The Pennsylvania Supreme Court found that the General Assembly failed to fulfill its trustee obligations by allocating revenues from oil and gas leases on state-owned lands for general budgetary purposes rather than for environmental conservation.

Practical Implications of Various Types of NRD Actions

There are a number of potential impacts related to NRD for RPs and property owners to bear in mind. Of course, RPs and property owners facing an NRD action brought by a trustee will often seek to mitigate their liability by attempting to prove that the impact to the natural resources is not as significant as alleged.

Part of that mitigation effort may be to point the finger at other RPs. As discussed above, third-party practice and contribution claims provide potential avenues for the original RP to reduce its share of the liability.

In this respect, it is important to keep up to date on recent legal developments.[18] In particular, an RP that settles with one trustee or governmental entity may not receive protection from later lawsuits, thereby negating any effort by the RP to mitigate its own exposure.

Maybe even more significant for property owners is the potential availability of affirmative causes of action to recover damages for injuries to natural resources on private property. A citizen suit, where permitted, may allow a property owner to obtain a sizable recovery when the damage to natural resources impacts the greater public.

Relatedly, a property owner and/or RP has causes of action available that provide for NRD-like recovery for injury to resources that are outside or arguably overlap with the public trust. Either or both of these approaches are powerful tools for mitigating liability or initiating affirmative actions designed to achieve large damage recoveries.

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Disclosure: Dennen was counsel to CDI before both the District of New Jersey and the Third Circuit in NJDEP v. American Thermoplastics. The case has been remanded to the district court for further proceedings, but the issue of contribution protection discussed in the article has been decided and is no longer being litigated.

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[1] Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior, 134 F.3d 1095, 1098 n.1 (D.C. Cir.

1998) (quoting 42 U.S.C. § 9607(f)(2)). Designated "trustees" under CERCLA and the Oil Pollution Act include the secretary of the U.S. Department of the Interior, the secretary of the U.S. Department of Commerce and other federal agencies.

[2] 42 U.S.C. § 9601(16).

[3] For example, New Jersey's Spill Compensation and Control Act authorizes the state to recover NRD for the cost and restoration of trust resources damaged by the discharge of a hazardous substance. N.J.S.A. § 58:10-23.11u.b(4).

[4] *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 461 (D.C. Cir. 1989) (noting privately-owned "tideland property" as a potential example).

[5] *Natural Resource Damage Assessments*, 59 Fed.Reg. 14,262, 14,268 (Mar. 25, 1994) (providing that whether "a particularly privately owned resource constitutes a natural resource under CERCLA is best addressed on a case-by-case basis"); see also *Comm'r of Dep't of Planning & Nat. Res. v. Century Aluminum Co.*, No. 05-62, 2012 WL 1901297, at *11 (D.V.I. May 24, 2012) (finding that groundwater beneath private land is not a "purely private resource" and thus potentially subject to NRD).

[6] *New Jersey Dep't of Env'tl. Prot. v. ExxonMobil Corp.*, No. UNN-L-3026-04, 2009 WL 2494754 (N.J. Super. Law Div. July 24, 2009).

[7] See *Nat'l Ass'n of Mfrs*, 134 F.3d at 1113.

[8] It is not clear whether NRD claims under CERCLA are, similar to cleanup remedies, subject to joint and several liability. However, federal trustees have made, and continue to make, that assertion. See, e.g., *U.S. v. Asarco Inc.*, No. 91-342-N-EJL, 1999 WL 33313132, at *1 (D. Idaho Sept. 30, 1999) ("The United States contends ... [that] the Defendants are jointly and severally liable for the injury to natural resources").

[9] *Champion Labs. Inc. v. Metex Corp.*, No. CIV. 02-5284 (WHW), 2008 WL 1808309 (D.N.J. April 21, 2008).

[10] *Id.* at *5.

[11] *Id.* at *7.

[12] *Id.* Note that a defendant subject to a pending Section 107 claim by a trustee may bring a declaratory judgment action to determine contributory liability. See, e.g., *Sensient Colors Inc. v. Kohnstamm*, 548 F. Supp. 2d 681, 686, 690 (D.Minn. 2008).

[13] See *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 710 (7th Cir. 2014).

[14] See, e.g., *New Jersey Dep't of Env'tl. Prot. v. ExxonMobil Corp.*, UNN-L-3026-04, slip op. (N.J. Super. Law Div. Jan. 22, 2009).

[15] *New Jersey Dep't of Env'tl. Prot. v. Am. Thermoplastics Corp.*, --- F.3d ---, 2020 WL 5360998 (3d Cir. 2020). Charles Dennen, one of the authors of this article, was counsel to CDI before both the District of New Jersey and the Third Circuit. The views expressed herein are the author's and are not made on behalf of CDI.

[16] *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental*

Law, 24 Wake Forest L. Rev. 851, 870 (1989).

[17] Pa. Env'tl. Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017).

[18] See Am. Thermoplastics Corp., --- F.3d ---, 2020 WL 5360998.