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COMMENT

Waking the Sleeping Giant: Analyzing New Jersey's Pursuit of Natural Resource Damages from Responsible Polluting Parties in the Lower Passaic River

JOHN TOMLIN*

I. INTRODUCTION

The authority for the government to wield its power to pursue natural resource damages from private parties is vast, and mostly unexploited.¹ This unused power has been referred to as the "sleeping giant" of federal statutory authority.² On September 19, 2003, the commissioner of New Jersey's Department of Environmental Protection issued Directive No. 1 (the Directive), which ordered sixty-six "responsible parties" to "arrange for a natural resource damage assessment and interim restoration" of eighteen contaminated sites along the Lower Passaic River.³ The Directive represents part of New Jersey's aggressive approach to the pursuit of natural resource damages in the state.⁴ The Directive, together with enormous and recent private settlements with the

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1. 5 MICHAEL B. GERRARD ED., ENVTL. L. PRAC. GUIDE § 31.04A (2004).

2. *Id.* (quoting remarks made at Seminar, *Natural Resource Damage Claims and Litigation Conference, Exec. Enterprises, Inc.*, Wash., D.C. (Oct. 10-11, 1990)).

3. *In re Lower Passaic River*, Directive 2003-01, Cover Page (Sept. 19, 2003) [hereinafter *The Directive*], http://www.nj.gov/dep/nrr/directives/passaic_dir01.pdf.

4. Press Release, N.J. Dep't of Env'tl. Prot., DEP to Address More Than 4,000 Potential Claims for Natural Resource Damages Statewide, Commissioner Campbell Orders Passaic River Restoration: Parties Responsible for Pollution Must Assess and Restore Natural Resource Injuries (Sept. 24, 2003) [hereinafter *Press Release*], available at http://www.nj.gov/dep/newsrel/releases/03_0131.htm.

federal government,⁵ demonstrates that the sleeping giant is waking, and industry had better beware.

This comment will review the federal and state statutory authority under which the New Jersey Department of Environmental Protection (NJDEP) is pursuing natural resource damages (NRDs) from the eighteen sites along the Lower Passaic. In addition, this comment will discuss some of the issues that may be raised by the parties targeted by the Directive. These issues include NJDEP's use of a private New Orleans law firm to litigate against the responsible parties; NJDEP's assessment of groundwater natural resource damages; NJDEP's reliance on information voluntarily provided by parties during previous environmental programs; and erosion of the good faith relationship that exists between the government and industry for remediation of sites.⁶

Part I will describe the current conditions of the Lower Passaic River, while also providing the general location of the sites targeted by NJDEP. Part II will introduce the reader to NRDs through an overview of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)⁷ and associated federal case law. Part III will describe NJDEP's aggressive approach to pursuing NRDs and introduce the reader to the New Jersey Spill Compensation and Control Act (Spill Act)⁸ and the Technical Requirements for Site Remediation (Tech Regs),⁹ which provide NJDEP with the authority to enforce the Directive.¹⁰ Part III will also analyze the various issues raised by the implementation of the Directive.¹¹ Part IV will conclude the comment and summarize the analysis of the Directive.

5. Resources, Comty., and Econ. Dev. Div., U.S. General Accounting Office, *Report to the Government, Committee on Commerce, House of Representatives*, 1996 ENVTL. L. INST. AD-3123 [hereinafter *Report to the Government*]; Resource, Comty., and Econ. Dev. Div., U.S. General Accounting Office, *Superfund: Outlook for and Experience with Natural Resource Damage Settlements*, 1992 ENVTL. L. INST. AD-2948 [hereinafter *Superfund Settlements*].

6. E. Lynn Grayson, *Industry Files Litigation Against New Jersey Opposing Aggressive Natural Resource Initiatives*, 34 ENVTL. L. REP. (Envl. Law Inst.) 10,566 (2004).

7. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000).

8. N.J. STAT. ANN. § 58:10-23.11 (West 2004).

9. N.J. ADMIN. CODE § 7:26E (2004).

10. The Directive, *supra* note 3.

11. Grayson, *supra* note 6.

A. The Passaic River

The Passaic River has been described as one of America's filthiest rivers.¹² Moreover, in 2003, "[t]he Lower Passaic River earned the poorest rating on the U.S. Environmental Protection Agency's Index of Watershed Indicators."¹³ "The Passaic River, covering parts of northeastern New Jersey and southeastern New York, drains almost 935 square miles and is the second largest river in New Jersey"¹⁴ The Lower Passaic River is completely located in New Jersey, and stretches seventeen miles from the Dundee Dam in Paterson to Newark Bay.¹⁵ The sites targeted in the Directive are all within the vicinity of the Lower Passaic, in the general area of the intersection of highways US-1 and I-95.¹⁶

Since 1666 the Passaic River has been the center point of commercial and industrial development in Newark.¹⁷ Consequently, numerous point and non-point source discharges have been pouring contaminants into the Passaic River watershed for a very long time.¹⁸ As a result, "the poisoning of the Passaic River has been slow, ugly and sure."¹⁹ The discharges from industries along the river have contained heavy metals (such as mercury and lead), pesticides (such as dichlorodiphenyltrichloroethane (DDT)), polychlorinated biphenyls (PCBs), polyaromatic hydrocarbons, dioxin, and a multitude of other hazardous materials.²⁰ Many of these contaminants will persist in the environment for a very long time and can bio-accumulate in the ecological food chain.²¹

High concentrations of these hazardous materials have been found in both the bottom sediment and water column of the Passaic River.²² Mercury, dioxin, and PCB contamination have also been found in fish and shellfish from the river.²³ The alarming concentration of these contaminants in organisms has forced both the NJDEP and the Department of Health and Senior Services, to

12. Michael Gordon & Sal M. Anderton, *Environmental Symposium Cleaning Up Newark: Rebuilding for the Twenty-First Century, Protecting the Passaic: A Call to Citizen Action*, 29 SETON HALL L. REV. 76, 80 (1998).

13. The Directive, *supra* note 3, at 7.

14. Press Release, *supra* note 4.

15. *Id.*

16. *Id.*

17. Gordon & Anderton, *supra* note 12, at 78.

18. The Directive, *supra* note 3, at 5.

19. Gordon & Anderton, *supra* note 12, at 77.

20. The Directive, *supra* note 3, at 5-6.

21. *Id.*

22. Press Release, *supra* note 4.

23. The Directive, *supra* note 3, at 6.

issue public consumption advisories.²⁴ Moreover, recreational and commercial fishing have been banned, and "the lower Passaic River is not likely to support swimming for the foreseeable future."²⁵

In September 2003, the terrible condition of the Passaic River prompted then-New Jersey Governor James E. McGreevey to find that New Jersey's "quality of life and economy suffer every time we lose the benefit and use of natural resources to contamination."²⁶ Governor McGreevey stated that "[i]t is unfair to New Jersey's residents and environmentally conscientious businesses to tolerate any damage to natural resources caused by polluters. Those responsible *simply must be held accountable*."²⁷ In support of the Governor's finding, NJDEP Commissioner Bradley M. Campbell issued the Directive and held sixty-six companies accountable.²⁸

II. OVERVIEW OF FEDERAL AUTHORITY FOR NATURAL RESOURCE DAMAGES

Federal authority for pursuing NRDs can be found in several statutes, including CERCLA,²⁹ the Clean Water Act,³⁰ and the Oil Pollution Act (OPA).³¹ In addition, the common law provides authority to pursue NRDs through the public trust doctrine.³² Under this doctrine the state is considered to be the trustee of its natural resources and is responsible for management of the natural resources for the present and future citizens of the state.³³ Furthermore, under the public trust doctrine, the state has a fiduciary obligation to seek restitution whenever its natural resources are damaged.³⁴

Although there are several sources of federal authority for pursuing NRDs, this comment will focus only on CERCLA, be-

24. *Id.* at 6-7.

25. *Id.* at 7.

26. Press Release, *supra* note 4.

27. *Id.* (emphasis added).

28. *Id.*

29. 42 U.S.C. § 9601.

30. See Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251, 1319 (2000).

31. See Oil Pollution Act, 33 U.S.C. §§ 2701, 2702 (2000).

32. See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

33. *State Dep't of Env'tl. Prot. v. Jersey Cent. Power & Light Co.*, 308 A.2d 671, 673 (N.J. Super. Ct. Law Div. 1973), *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).

34. *Id.* at 674.

cause an analysis of CERCLA will provide the reader with a broad overview of NRD recovery methods. In addition, focusing on CERCLA will expose the reader to the complicated methods required by the federal statutes to assess NRDs, thus allowing a comparison to the assessment methods required by New Jersey's statutes.

A. CERCLA: The Sleeping Giant

Congress enacted CERCLA in 1980 to address sites that were contaminated by past disposals of hazardous wastes.³⁵ Significantly, the model used in developing CERCLA was the New Jersey Spill Compensation and Control Act, enacted in 1977.³⁶

Under CERCLA, EPA has two methods of cleaning up hazardous sites: It can act on its own behalf and clean up sites where there has been a release or threatened release of hazardous substances, or it can order Potentially Responsible Parties (PRPs) to clean up the site.³⁷ CERCLA identifies four classes of PRPs: (1) current owners and operators of a facility; (2) owners or operators of the facility at the time the hazardous material was released; (3) any party who arranged for the disposal or treatment of a hazardous substance; and (4) any party who transported hazardous material to disposal or treatment facilities.³⁸ However, if the government chooses to clean up the site itself, it may pay for the costs out of a self-created "Superfund."³⁹ In turn, the government may sue PRPs for the costs it incurs, and thereby replenish the fund.⁴⁰

Defenses to CERCLA are limited to statutory and affirmative defenses.⁴¹ For example, statutory defenses include the "petroleum exclusion defense," in which petroleum and petroleum by-products are excluded from the definition of "hazardous substance."⁴² Affirmative defenses include a limited list in which the PRP must prove that the release or threatened release and resulting damages were caused only by: (1) an act of God; (2) an act of war; or (3) an act or omission by a third party not related to the

35. Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83, 86 (1994).

36. *Id.* at 92.

37. *Id.* at 86.

38. 42 U.S.C. § 9607(a)(1)-(4).

39. McKinstry, *supra* note 35, at 90.

40. *Id.*

41. *Id.*

42. *Id.* at 88.

PRP, if the PRP can demonstrate that it (a) exercised due care, and (b) took precautions against foreseeable acts by the third party.⁴³ Courts have generally found that this limited list of defenses excludes common law affirmative defenses.⁴⁴

1. The Natural Resources Damage Provision of CERCLA

Section 107(a)(4)(C) of CERCLA makes PRPs 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."⁴⁵ This section has been described as the "sleeping giant" of CERCLA liability.⁴⁶ CERCLA broadly defines "natural resources" as:

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 the United States . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.⁴⁷

In 1992 the United States General Accounting Office (GAO) estimated that there were sixty sites across the nation that could have NRD claims of at least \$5 million each.⁴⁸ Furthermore, the GAO estimated that "up to twenty of these sites may have claims exceeding \$50 million."⁴⁹ As of April 1995 settlements from five of the largest NRD cases in the country totaled \$83.8 million.⁵⁰ In 1996 the GAO reported that settlements had been reached at sixty additional sites, resulting in a total of \$33.8 million.⁵¹ These recent enormous settlements indicate that the sleeping giant is waking, and industry had better beware.

43. 42 U.S.C. § 9607(b).

44. *United States v. Kramer*, 757 F. Supp. 397, 410 (D.N.J. 1991).

45. 42 U.S.C. § 9607(a)(4)(C) (emphasis added).

46. 5 GERRARD, *supra* note 1, § 31.04A(1) (quoting remarks made at Seminar, *Natural Resource Damage Claims and Litigation Conference*, Exec. Enterprises, Inc., Wash., D.C. (Oct. 10-11, 1990)).

47. 42 U.S.C. § 9601(16).

48. *Superfund Settlements*, *supra* note 5.

49. *Id.* (emphasis added).

50. *Id.*

51. *Report to the Government*, *supra* note 5.

2. Federal Officials Act as Trustees for Natural Resources

The President of the United States and the governor of each state must designate officials who will act as “trustees” for the natural resources.⁵² The trustees are then required to assess and recover damages to the natural resources.⁵³ CERCLA requires that the trustee officials, and not PRPs, assess the damages to the natural resources.⁵⁴ Unlike CERCLA, New Jersey’s Directive shifts the assessment work to the PRPs.⁵⁵

The trustees’ assessment of damages carries a rebuttable presumption in administrative proceedings or in court, if the assessment is carried out “in accordance with the regulations promulgated under . . . this [Act].”⁵⁶ Unlike general response costs claimed under CERCLA incurred in remediating a site, liability for damages to natural resources cannot be from the *threat* of a release of hazardous materials; the damages must have already occurred.⁵⁷ In addition, damages can be recovered “for those natural resource injuries that are not fully remedied by response actions.”⁵⁸ This means that trustees can seek damages for injuries to resources that remain after cleanup of the site (otherwise known as residual injuries).⁵⁹ “Residual injuries occur when (1) a cleanup leaves significant contamination in the environment; or (2) animal populations have been reduced or wildlife habitat has been destroyed and cannot recover quickly without human intervention.”⁶⁰ Furthermore, damages can also include “public economic values lost.”⁶¹

3. NJDEP’s Use of Outside Counsel on a Contingency Fee Basis

Section 107(f)(1) of CERCLA requires that damages recovered for injured natural resources may only be used to “restore, replace, or acquire the equivalent of [the injured] natural resources.”⁶²

52. 42 U.S.C. § 9607(f)(2).

53. 42 U.S.C. § 9607(f)(1)-(2).

54. *Id.*

55. Grayson, *supra* note 6; see also The Directive, *supra* note 3, at 54.

56. 42 U.S.C. § 9607(f)(2)(C).

57. 5 GERRARD, *supra* note 1, § 31.04A(2)(a).

58. 59 Fed. Reg. 52,749 (Oct. 19, 1994).

59. *Superfund Settlements*, *supra* note 5.

60. *Id.*

61. 59 Fed. Reg. at 52,749.

62. 42 U.S.C. § 9607(f)(1).

NJDEP points to several federal statutes that provide authority for the Directive and *specifically* indicates that CERCLA is one of those statutes.⁶³ Yet NJDEP's aggressive pursuit of NRDs seems to fly in the face of section 107(f)(1) of CERCLA. This is because the agency has hired Allan Kanner and Associates, P.C. (Allan Kanner) "as outside counsel to assist in evaluating natural resource injury claims."⁶⁴ Allan Kanner will provide legal services to NJDEP on a contingency fee basis.⁶⁵ The firm will receive "20% of the first \$10 million recovered, 17.5% of the next \$15 million recovered and 15% of any amount recovered over \$25 million for each NRD case that is settled after the state has initiated a lawsuit."⁶⁶ Therefore, the damages that NJDEP recovers from the Directive will not be used to restore or replace injured natural resources, as required by CERCLA, but will instead be used to pay huge contingency fees to Allan Kanner.

4. Overview of the Department of Interior's Natural Resources Damage Assessment Regulations

CERCLA requires that the President, through designated federal officials, promulgate regulations to establish uniform procedures to assist in assessing natural resource damages.⁶⁷ In 1991, the Department of Interior (DOI) promulgated rules that established these procedures, consisting of four phases: (1) pre-assessment, (2) assessment plan, (3) assessment, and (4) post-assessment.⁶⁸ Although trustees do not have to follow these procedures, if an assessment is performed in accordance with the regulation, the assessment is "entitled to a rebuttable presumption of accuracy in a proceeding to recover damages from a responsible party."⁶⁹ The burden of persuasion is on the PRP to show that the assessment and valuation methods were unreliable or inaccurate.

63. N.J. Dep't of Env'tl. Prot., Office of Nat. Resource Restoration, Frequently Asked Questions [hereinafter Frequently Asked Questions], *available at* <http://www.nj.gov/dep/nrr/about/faq.htm> (last visited Sept. 28, 2005).

64. *Id.*

65. Samuel P. Moulthrop et al., Riker Danzig Scherer Hyland Perritti LLP, Environmental Update: Taking Stock of Natural Resource Damages in New Jersey (May 2004) [hereinafter Environmental Update], <http://www.riker.com/articles/index.php?id=3518>.

66. *Id.*

67. 42 U.S.C. § 9651(c)(1).

68. 5 GERRARD, *supra* note 1, § 31.04A(4).

69. *Ohio v. U. S. Dep't of the Interior*, 880 F.2d 432, 439 (D.C. Cir. 1989).

rate.⁷⁰ NJDEP's Directive requires PRPs to carry out assessment procedures that are very similar to the phases in the DOI regulations.⁷¹ NJDEP has therefore mandated a similarity between the requirements in the Directive and DOI regulations, with hopes of receiving a rebuttable presumption in court.

i. Pre-Assessment and Assessment Plan Phases

The pre-assessment phase is a screening tool used by trustee officials to assess whether future assessment actions are necessary, based on specific criteria.⁷² Officials use available information to make a rapid decision on whether an assessment phase is warranted.⁷³ If the pre-assessment phase indicates that an assessment is warranted, the trustee must develop an assessment plan.⁷⁴ This plan is used to determine whether it is feasible to actually assess the damages to the natural resources,⁷⁵ which will ensure that only "reasonable and necessary costs [are] incurred."⁷⁶ A lead authorized official is designated, and a notice of intent to perform an assessment is sent to all PRPs.⁷⁷

The public and PRPs each have an opportunity to comment within thirty days on the proposed assessment.⁷⁸ PRPs are also invited to participate in the development of the assessment plan.⁷⁹ The assessment plan must include the geographic area to be assessed, sampling locations within those geographical areas, sample and survey design, numbers and types of samples to be collected, analyses to be performed, and a detailed discussion of how standards will be met.⁸⁰ This iteration process between the government trustees and the PRPs is lacking in the Directive, which requires the sixty-six responsible parties to come up with their own assessment plan and implement interim restoration.⁸¹

70. Danielle Marie Stager, *From Kepone to Exxon Valdez Oil and Beyond: An Overview of Resource Damage Assessment*, 29 U. RICH. L. REV. 751, 762 (1995).

71. The Directive, *supra* note 3, at 54.

72. 43 C.F.R. §§ 11.13(a), 11.20 to .25 (2004).

73. *Id.* § 11.13(a).

74. *Id.* § 11.30(a).

75. *Id.* § 11.30(b).

76. *Id.* § 11.30(c).

77. *Id.* § 11.32(a)(2)(iii)(A).

78. *Id.* § 11.32(a)(2)(iii)(B).

79. *Id.* § 11.32(a)(2)(iii)(A).

80. *Id.* § 11.31(2).

81. The Directive, *supra* note 3, at 54-55.

ii. Assessment Phase

The assessment phase consists of three stages: (a) injury determination, (b) quantification, and (c) damage determination.⁸²

a. Injury Determination

CERCLA requires that the regulations provide two types of assessment procedures for injury determination: Type A and Type B.⁸³ Type A procedures are "standard procedures for simplified assessments requiring minimal field observation."⁸⁴ Type B procedures are "site-specific procedures for conducting detailed assessments in individual cases."⁸⁵ Type A procedures involve minimal field work.⁸⁶ In fact, the only procedure published for Type A is a computer program used for coastal and marine environments.⁸⁷ On the other hand, Type B procedures are field work intensive,⁸⁸ involving intrusive testing and sampling to determine site-specific facts.⁸⁹

b. Quantification

The natural resource injury quantification is assessed for groundwater, surface water, air, soil, and organisms, each with specific methodologies for assessment.⁹⁰ The trustee must determine that a natural resource is injured and trace an exposure pathway back to the site of discharge.⁹¹ To determine the extent of injuries, the trustee figures out the baseline conditions.⁹² Baseline conditions are "the loss of services that the injured resource would have provided had the discharge or release not occurred."⁹³

c. Damage Determination

The last stage of the assessment phase is damage determination.⁹⁴ This phase determines the monetary value of "restoration,

82. Stager, *supra* note 70, at 758.

83. 42 U.S.C. §§ 9601, 9651(c).

84. *Id.*

85. Stager, *supra* note 70, at 759.

86. *Id.*

87. *Id.* at 760-61.

88. 5 GERRARD, *supra* note 1, § 31.04A(5).

89. *Id.* See also 43 C.F.R. §§ 11.13(e)(1)-(3) (2004).

90. 43 C.F.R. § 11.62(a).

91. See *id.* § 11.62.

92. *Id.* § 11.13(e)(2).

93. *Id.*

94. *Id.* § 11.80(a).

rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources and the services those resources provide.”⁹⁵ Trustees must also consider “a reasonable number of possible alternatives for the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources.”⁹⁶ These considerations are then documented in a restoration and compensation determination plan.⁹⁷

5. *Ohio v. Department of the Interior*⁹⁸ and Its Effect on DOI Regulations

DOI published a proposed rule for regulations concerning Type A and Type B procedures in 1985, three years after the statutory deadline.⁹⁹ After an extended comment period, the final rule was published on August 1, 1986.¹⁰⁰ This rule contained general NRD assessment regulations and Type A/Type B procedures.¹⁰¹ Specifically, DOI’s regulations provided that damages for natural resources were to be determined by “the *lesser of*: restoration or replacement costs; or diminution of use values.”¹⁰² This was known as the “lesser of” rule.¹⁰³ The state of Ohio and environmental groups challenged this rule as an undervaluation of damages; the Circuit Court of Appeals for the District of Columbia agreed.¹⁰⁴

DOI’s “lesser of” rule was based on the theory that the damage assessment will be wasteful when the lost-use value of the injured resource is exceeded by the cost of restoring the natural resources.¹⁰⁵ The court found that the “lesser of” rule was contrary to the context of the CERCLA statute and the intent of Congress.¹⁰⁶ It reasoned that Congress demonstrated a “distinct preference for using restoration costs as the measure of damages [which] precludes a ‘lesser of’ rule.”¹⁰⁷

95. *Id.* § 11.80(b).

96. *Id.* § 11.82(a).

97. *Id.* § 11.81(a).

98. *Ohio v. U.S. Dep’t of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

99. *Id.* at 440.

100. *Id.*

101. *Id.*

102. *Id.* at 441 (citing 43 C.F.R. § 11.35(b)(2) (emphasis added)).

103. *Id.*

104. *Id.* at 438.

105. *Id.* at 443.

106. *Id.* at 444.

107. *Id.*

The Circuit Court of Appeals also reviewed the hierarchy of assessment method found in the DOI regulations.¹⁰⁸ This method calculates the lost “use values” of damaged natural resources based on market values of such resources.¹⁰⁹ The court found that this method was not a reasonable interpretation of CERCLA and held that market values are only factors that can be considered in calculation of lost use.¹¹⁰

In addition, the Circuit Court of Appeals reviewed and upheld several other relevant provisions of DOI regulations, including allowing trustees to authorize PRPs to conduct the assessment of the natural resource damages themselves,¹¹¹ limiting liability of PRPs having to pay for assessment costs,¹¹² and using a 10-percent discount rate to calculate the present value of future injury.¹¹³ The court also remanded the record to DOI for a clarification of its interpretation of its own regulations concerning the applicability of CERCLA natural resource damage provisions.¹¹⁴

Consequently, DOI published final regulations with the four procedures discussed above. The new regulations disposed of the “lesser of” rule and allowed the measurement of damages to be “the approximate cost of the selected alternative for restoration, rehabilitation, replacement and/or acquisition of equivalent resources, plus the ‘compensable value’ of the services lost to the public.”¹¹⁵ However, this has increased the potential liability of PRPs because they must now pay for “both corollary economic losses *and* cleanup costs under CERCLA.”¹¹⁶

6. Damage Assessment

i. Passive or Non-Use Valuation

Damage assessment is very difficult because it is an attempt to determine the value of nature.¹¹⁷ For example, how much is a tree or bird really worth?¹¹⁸ As discussed above, the Circuit Court

108. *Id.* at 462.

109. *Id.*

110. *Id.* at 462-64.

111. *Id.* at 466.

112. *Id.* at 468.

113. *Id.* at 465.

114. *Id.* at 461.

115. 5 GERRARD, *supra* note 1, § 31.04A(4).

116. Stager, *supra* note 70, at 770 (emphasis added).

117. *Id.* at 773.

118. *Id.*

of Appeals found that the value of these resources cannot be determined solely on market factors.¹¹⁹ As such, non-use or passive-use values are being used to assess natural resource damages.¹²⁰ Non-use values are based on the idea that “people may experience satisfaction from knowing the natural environment is protected from irreversible allocation decisions.”¹²¹ The non-use values are measured by the contingent valuation method.¹²² The method involves using public opinion polls to ask people how much they would pay to protect a resource.¹²³ The total value of the resource is calculated by multiplying the dollar amounts by the number of people potentially affected by a chemical release.¹²⁴ These numbers can be used by trustees when they determine the liability of PRPs.¹²⁵ DOI developed the contingent valuation method, and the Court of Appeals for the District of Columbia approved it.¹²⁶ For example, the contingent valuation method determined that the damages from the Exxon Valdez spill were \$3 billion,¹²⁷ which probably went a long way “to[ward] convinc[ing] Exxon to settle at \$1.1 billion before the survey [could be] introduced as evidence.”¹²⁸

However, as with any survey, the method has several potential problems. For example, the value that people place on the natural resource could depend on how the questions are worded; the hypothetical situations could be inaccurate or not related to the actual damage; and the peoples’ evaluations are on what they say they would do, not what they have actually done.¹²⁹ Despite these uncertainties, the method has wide support, and experts have issued guidelines on how to structure the survey.¹³⁰

119. *Ohio*, 880 F.2d at 463.

120. Stager, *supra* note 70, at 774.

121. Emery N. Castle et al., *Natural Resource Damage Assessment: Speculations About a Missing Perspective*, 70 LAND ECON. 378, 381 (1994).

122. Stager, *supra* note 70, at 774-75.

123. *Id.*

124. *Id.* at 775.

125. *Id.*

126. *Id.*

127. John Lancaster, *Value of Intangible Losses from Exxon Valdez Spill Put at \$3 Billion*, WASH. POST, Mar. 20, 1991, at A4.

128. Stager, *supra* note 70, at 776.

129. *Id.*

130. *Id.*

ii. Limits on Liability

The liability of PRPs for damages and response costs is capped at \$50 million.¹³¹ However, if the chemical release was a result of negligence, misconduct, or a "violation of . . . safety, construction or operating standards or regulations," the PRP may be responsible for the "full and total costs of response and damages."¹³² In addition, PRPs can be liable for punitive damages if they fail to properly provide removal or remedial action after an order to do so.¹³³ Note, however, that damages cannot be recovered for releases that wholly occurred before the enactment of CERCLA on December 11, 1980.¹³⁴

iii. Statute of Limitations

CERCLA provides that all actions for natural resource damages must be "commenced within three years after the later of the following: (A) the date of the discovery of the loss and its connection with the release in question; or (B) the date on which regulations are promulgated under [42 U.S.C. § 9651(c)]."¹³⁵ In *State of California v. Montrose Chemical Corp.*,¹³⁶ the court held that the date the regulations were promulgated under section 42 U.S.C. § 9651(c) was based on when DOI published the Type B regulations.¹³⁷ As such, the three year period started on March 20, 1987.¹³⁸ In addition, if the site is listed on the National Priorities List (Superfund Site), then the action must be commenced within three years of the completion of site remediation.¹³⁹

III. POTENTIAL ISSUES WITH DIRECTIVE NO. 1

A. An Aggressive Pursuit of NRDs

NJDEP has primary responsibility for administering environmental programs in New Jersey.¹⁴⁰ NJDEP is required by statute to promulgate rules and regulations to protect human

131. 42 U.S.C. §§ 9601, 9607(c)(1).

132. 42 U.S.C. § 9607(c)(2).

133. 42 U.S.C. § 9607(c)(3).

134. 42 U.S.C. § 9607(f)(1).

135. 42 U.S.C. § 9613(g)(1).

136. 104 F.3d 1507 (9th Cir. 1997).

137. *Id.* at 1511.

138. *Id.*

139. *Id.* at 1512.

140. See N.J. Dep't of Env'tl. Prot., Office of Nat. Resources Restoration, Program Overview [hereinafter Overview], <http://www.nj.gov/dep/nrr/about/overview.htm> (last visited Sept. 16, 2005).

health and the environment from exposure to hazardous materials found at contaminated sites.¹⁴¹ The commissioner of NJDEP is designated as the state trustee for the protection of natural resource damages, and the NJDEP's Office of Natural Resource Restoration (ONRR) represents the commissioner in this capacity.¹⁴² The primary mission of ONRR is to provide for the assessment and restoration of New Jersey's natural resources that have been injured by the release of oil and hazardous substances.¹⁴³

Since its inception in the early 1990s, ONRR has recovered over \$42 million in damages for oil spill and hazardous waste site cases.¹⁴⁴ ONRR has used approximately \$17 million of that money to acquire and restore approximately 1910 acres of aquifer recharge areas, wetlands, and wildlife habitat, and set them aside as public open space.¹⁴⁵ ONRR has also funded the construction of a learning center at Island Beach State Park and the restoration of a Civil War-era pier at Fort Mott State Park.¹⁴⁶ Settlement monies have also been used to fund research in habitat restorations, hiking trails, erosion controls, and streamside cleanups.¹⁴⁷

The recent aggressive program to pursue NRDs was initiated under former Governor James E. McGreevey's leadership.¹⁴⁸ During the first year of his administration, NRD recoveries "exceeded the total for the six prior years combined."¹⁴⁹ In September 2003, in support of Governor McGreevey's aggressive program, NJDEP Commissioner Bradley M. Campbell announced a large-scale directive to address over 4000 potential claims for NRDs state-wide.¹⁵⁰ Moreover, on September 19, 2003, the commissioner ordered sixty-six responsible parties to "arrange for a natural resource damage assessment and interim restoration" of eighteen

141. N.J. STAT. ANN. § 58:10-23.11(t) (West 2004).

142. N.J. Dep't of Env'tl. Prot., Office of Nat. Resources Restoration, Trustees [hereinafter Trustees], <http://www.nj.gov/dep/nrr/about/trustees.htm> (last visited Sept. 23, 2005).

143. Overview, *supra* note 140.

144. N.J. DEP'T OF ENVTL. PROT., OFFICE OF NATURAL RES. RESTORATION, 2003 SETTLEMENT/RESTORATION REPORT [hereinafter SETTLEMENT REPORT], http://www.nj.gov/dep/nrr/reports/nrd_update200312.htm (last visited Sept. 23, 2005).

145. *Id.*

146. *Id.*

147. *Id.*

148. Press Release, *supra* note 4.

149. *Id.*

150. *Id.*

contaminated sites along the Lower Passaic River.¹⁵¹ This order is called Directive No. 1.¹⁵² Former Governor McGreevey stated that “New Jersey’s environment, quality of life and economy suffer every time we lose the benefit and use of natural resources to contamination,” and that “[t]hose responsible simply must be held accountable.”¹⁵³ Furthermore, Commissioner Campbell stated that “[a]n accelerated effort is needed to ensure that the statute of limitations for outstanding claims does not expire and result in the loss of the public’s right to compensation.”¹⁵⁴

NJDEP’s 2003 Settlement/Restoration Report shows the high number of large settlements for NRDs from 1993 until the fourth quarter of 2003.¹⁵⁵ However, the Directive was issued in the fourth quarter of 2003,¹⁵⁶ and a review of NJDEP’s website reveals that only one settlement has occurred subsequently.¹⁵⁷ The recovered damages were for groundwater natural resource injuries, and the settlement occurred in November 2003.¹⁵⁸ No other settlements have been posted.¹⁵⁹ The lack of recently published settlements indicates that industry is now reluctant to settle with the government, due to the legal issues raised by the issuance of the Directive.

B. The Directive

NJDEP issued Directive No. 1 on September 19, 2003, pursuant to the Spill Act.¹⁶⁰ The Directive generally describes the Lower Passaic River and NJDEP findings regarding contaminants in the river’s water column and sediment.¹⁶¹ It also generally indicates NJDEP’s and the Department of Health’s prohibitions with regard to the consumption of fish and recreational swimming in the river.¹⁶² The Directive identifies eighteen “Hazardous Discharge Sites that Have Contaminated the Lower Passaic River.”¹⁶³ For each site, the Directive describes the layout of the

151. The Directive, *supra* note 3, at Cover Page.

152. *Id.*

153. Press Release, *supra* note 4.

154. *Id.*

155. SETTLEMENT REPORT, *supra* note 144.

156. The Directive, *supra* note 3, at Cover Page.

157. *See* SETTLEMENT REPORT, *supra* note 144.

158. *Id.*

159. *See id.*

160. The Directive, *supra* note 3, at Cover Page.

161. *Id.* at 5-6.

162. *Id.* at 6-7.

163. *Id.* at 4.

site and site operations and identifies the responsible parties and site ownership.¹⁶⁴

1. Undermining the Cooperation Between Industry and Government

Under the heading “Discharge Liability,” the Directive contains the following wording for each site: “The [NJDEP] has determined that hazardous substances were discharged at [name of site] and that those hazardous substances are emanating and/or have emanated into the Lower Passaic River.”¹⁶⁵ A review of the footnotes contained in the Directive shows that this determination was based on investigation and/or remediation reports compiled and submitted to the NJDEP by the responsible parties themselves.¹⁶⁶ The Directive then indicates that “[t]he [NJDEP] has determined that [name of responsible parties] (“Respondents”) are persons in any way responsible, pursuant to the Spill Compensation and Control Act, for the hazardous substances that were discharged at [name of site].”¹⁶⁷ Therefore, the NJDEP has used the data in environmental reports provided to them by industry (who may even be conducting voluntary cleanups) for the basis of NJDEP claims in the Directive.¹⁶⁸ Not only will this mean that industry will think twice about any voluntary work with NJDEP in the future, but it undermines any cooperative approaches between industry and government to resolve NRD problems.¹⁶⁹ This is especially troublesome, considering that “most environmental professionals agree that cooperative approaches [are] the preferred course of action.”¹⁷⁰

2. Shifting the Responsibility of NRD Assessment to Industry

Under the heading “Cleanup and Removal of Discharges,” the NJDEP indicates the following: “Respondents are strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs”; that “cleanup and removal costs include all costs associated with a discharge incurred by the [NJDEP],” and that:

164. See, e.g., *id.* at 7-8.

165. See, e.g., *id.* at 8.

166. See, e.g., *id.*

167. See, e.g., *id.*

168. Telephone interview with Lynn Grayson, Partner, Jenner & Block LLP, in Chi., Ill. (Feb. 3, 2005) [hereinafter Telephone Interview].

169. Grayson, *supra* note 6, at 10,567-68.

170. *Id.* at 10,568.

whenever any hazardous substance is discharged, the [NJDEP] may, in its discretion, act to clean up and remove or arrange for the clean up and removal of the discharge, or may direct any person in any way responsible for the hazardous substances to clean up and remove, or arrange for the clean up and removal of those hazardous substances.¹⁷¹

NJDEP bases these findings on provisions found in the Spill Act.¹⁷² The application of these provisions in the Directive appears to be the legal basis for which the NJDEP is attempting to "shift the necessary assessment and restoration work to private parties," away from the government.¹⁷³ This is contrary to CERCLA, which requires that trustee officials, and not PRPs, assess the damages to the natural resource.¹⁷⁴ Because they are the designated trustees, the commissioners of the Department of Environmental Protection and ONRR should assess NRDs along the Lower Passaic.¹⁷⁵ Furthermore, the Directive does not point to any explicit language in the Spill Act which gives NJDEP authority to shift the assessment work to PRPs.¹⁷⁶

3. Attaining a Rebuttable Presumption and Leveraging the Powerful Tech Regs

The Directive also specifies phases in which the assessment of natural resources must be carried out.¹⁷⁷ These phases appear to reflect the rules promulgated by DOI for NRD assessment including: injury identification, injury quantification, and value determination.¹⁷⁸ As discussed previously, if an assessment is performed in accordance with DOI regulations, the assessment is "entitled to a rebuttable presumption of accuracy in a proceeding to recover damages from a responsible party."¹⁷⁹ This is probably why the assessment phases set out in the Directive are so similar to the phases in DOI regulations.

The Directive also requires that respondents "implement interim compensatory restoration for natural resources that have

171. The Directive, *supra* note 3, at 54.

172. *Id.*

173. Grayson, *supra* note 6, at 10,566.

174. *Id.* at 10,567.

175. Trustees, *supra* note 142.

176. The Directive, *supra* note 3, at 5.

177. *Id.* at 54.

178. See 43 C.F.R. § 11.62 (2004).

179. 42 U.S.C. §§ 9601, 9607(f)(2)(C). See also *Ohio v. U.S. Dep't. of the Interior*, 880 F.2d 432, 439 (D.C. Cir. 1989).

been injured,” which must “focus on restoring the economic and ecological services that the natural resources in the Lower Passaic River ecosystem provided prior to being injured, including, without limitation, recreational and commercial fishing, swimming, boat access points”¹⁸⁰ The Directive focuses the interim restoration on “ecological services” because the Tech Regs set out specific steps to evaluate ecological injury.¹⁸¹ As will be discussed later, these Tech Regs are a “powerful weapon” in New Jersey’s aggressive approach towards recovering NRDs.¹⁸²

4. Heavy Consequences and Increased Litigation

Through the Directive, NJDEP requires that responsible parties sign an administrative consent order to provide “assurance that the cleanup and removal of the directives described above will be performed in a timely and proper fashion.”¹⁸³ Furthermore, the respondents were required to respond within forty-five calendar days after the date of the Directive to let NJDEP know what they intended to do.¹⁸⁴ If the respondents failed to arrange for an assessment of NRDs or to implement interim compensatory restoration, the NJDEP, in accordance with the Spill Act, would carry out the work on its own and then sue the respondents.¹⁸⁵ NJDEP threatens to sue for “three times the cost of arranging for the clean up and removal of hazardous substances that were discharged,” in addition to placing a lien on respondents’ property.¹⁸⁶ The NJDEP also threatens respondents with penalties of up to \$50,000 per day if they fail to comply with the Directive, and indicates that the respondents may also be found liable under the state’s Water Pollution Control and Solid Waste Management Acts.¹⁸⁷ These costly consequences of failing to comply with the Directive will force industry to turn to the court for a determination of their rights. Therefore, by issuing the Directive, NJDEP will increase the volume of litigation, instead of streamlining the process of recovering NRDs.

180. The Directive, *supra* note 3, at 55.

181. See N.J. ADMIN. CODE § 7:26E (2004).

182. E. Lynn Grayson, *The Business Dilemma: 21st Century Natural Resource Damage Liabilities for 20th Century Industrial Progress*, 31 *Envtl. L. Rep.* (Envtl. Law Inst.) 11,356 (2001).

183. The Directive, *supra* note 3, at 55.

184. *Id.*

185. *Id.*

186. *Id.* at 55-56.

187. *Id.* at 56.

There are several New Jersey statutes that establish NJDEP's authority to pursue NRDs, including the Water Pollution Control Act,¹⁸⁸ the Industrial Site Recovery Act,¹⁸⁹ and the Brownfield and Contaminated Site Remediation Act.¹⁹⁰ However, it appears that NJDEP relies mostly on the Spill Act for authority in the Directive.¹⁹¹ As such, the Spill Act and some of the issues that may arise as a result of its application in the Directive are discussed in further detail below.

C. The Spill Compensation and Control Act

The Spill Act was enacted in 1977 and later used as a model for CERCLA.¹⁹² The Spill Act regulates the cleanup of contaminated sites by requiring parties "in any way responsible" for the discharge of hazardous substances, without regard to fault, to clean up and remove that discharge.¹⁹³ Section (f) of the Spill Act gives NJDEP the authority to issue a directive (such as the Directive), to require a responsible party to carry out the remediation.¹⁹⁴ However, this section does not mention natural resource damages.¹⁹⁵ NJDEP can also carry out the remediation itself and sue for reimbursement, which subjects the responsible party to treble damages.¹⁹⁶ Additionally, and similar to CERCLA, the Spill Act creates a fund that can be used by NJDEP to finance the cleanup of sites.¹⁹⁷ However, unlike CERCLA, the Spill Act expressly regulates the discharge and associated cleanup of petroleum.¹⁹⁸

1. Challenging Inclusion in the Directive and Arguing Federal Preemption Will Both Be Uphill Battles

The Spill Act has very limited defenses: "[A]n act or omission caused solely by war, sabotage, or God, or a combination thereof,

188. N.J. STAT. ANN. § 58:10A-1 (West 2004).

189. *Id.* § 13:1K-6.

190. *Id.* § 58:10B-1.

191. The Directive, *supra* note 3, at Cover Page.

192. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 358-59 (1986).

193. N.J. STAT. ANN. § 58:10-23.11(f)(a)(2).

194. *Id.* § 58:10-23.11(f)(a)(1).

195. *Id.*

196. *Id.* See also *id.* § 58:10-23.11(g)(c).

197. *Id.* § 58:10-23.11(i).

198. *Id.* § 58:10-23.11(b).

shall be the only defenses” available.¹⁹⁹ Furthermore, courts have resisted allowing responsible parties to successfully challenge NJDEP’s finding of liability or cleanup method.²⁰⁰ It is therefore going to be very difficult for the sixty-six responsible parties named in the Directive to challenge their inclusion in that Directive. It may also prove challenging for the responsible parties named in the Directive to argue that CERCLA preempts the sections of the Spill Act as applied in the Directive. This is because section 114(a) of CERCLA explicitly requires that “nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.”²⁰¹ Case law has supported this section of CERCLA by rejecting most preemption challenges.²⁰²

2. Previous Settlement of NRD Claims with the United States May Prohibit State Action; However, Past Consent Decrees May Come Back to Haunt Industry

Section 113(f)(2) of CERCLA provides that a party “shall not be liable for claims for contribution regarding matters addressed in [a] settlement.”²⁰³ This section, together with a “strong congressional intent to encourage settlements,” prohibits action based upon state law against parties who have resolved their liability with the United States.²⁰⁴ However, state action will be prohibited only to the extent that the settlement specifically addressed the contested issue.²⁰⁵ Therefore, if any of the sixty-six parties named in the Directive have previously settled liability claims with the United States regarding natural resource damages, they may be able to argue that the application of the Spill Act in the Directive is preempted. However, it has been “stan-

199. *Id.* § 58:10-23.11(g)(d)(1).

200. *See, e.g.,* Woodland Private Study Group v. New Jersey, 616 F. Supp. 794 (D.N.J. 1985); *In Re Kimber Petroleum*, 539 A.2d 1181 (N.J. 1988); N.J. Dep’t of Env’tl. Prot. v. Mobil Oil Corp., 587 A.2d 657 (N.J. Super. Ct. App. Div. 1991).

201. 42 U.S.C. §§ 9601, 9614(a).

202. *See, e.g.,* New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185 (D.N.M. 2004) (finding that CERCLA does not and was not intended to completely preempt the field of compensation and recovery for injury to natural resources resulting from pollution by hazardous substances).

203. 42 U.S.C. § 9613(f)(2).

204. McKinstrey, *supra* note 35, at 105.

205. *See, e.g.,* United States v. Pretty Prod., Inc., 780 F. Supp. 1488 (S.D. Ohio 1991).

dard practice" for the contract documents in environmental remediation consent decrees to explicitly exclude future toxic tort litigation, criminal activity, and *NRD claims*.²⁰⁶ This means that any of the sixty-six parties who used these types of consent decrees will now be exposed to additional liability, even though they have already settled with the government after cleaning up the contaminants (often voluntarily) on their sites.²⁰⁷

D. The Technical Requirements for Site Remediation

In addition to the Spill Act, regulatory guidance for investigations to characterize natural resource injuries in New Jersey is found in the Tech Regs.²⁰⁸ The Tech Regs prescribe the phases for investigation and remediation at contaminated sites,²⁰⁹ and are part of New Jersey's Site Remediation Program.²¹⁰ Remediation phases include a preliminary assessment site investigation, remedial investigation, remedial alternative analysis, and remedial action.²¹¹ At the end of each phase, the private party either submits a report to NJDEP for a determination that "no further action" is necessary, or continues to the next phase until "no further action" is required.²¹² A "no further action" letter will be issued by NJDEP "if an investigation reveals the absence of all contaminants, or the presence of contaminants which are below applicable cleanup standards."²¹³ In other words, a "no further action" letter will be issued if NJDEP considers the site to be fully remediated.

1. The Steps Required to Receive a "No Further Action" Letter Will Force Industry to Address NRDs

It is the "no further action" letter required by the Tech Regs that "provides [the] powerful weapon for [New Jersey] to compel restoration of damaged natural resources."²¹⁴ Normally, under the federal program, a state trustee must initiate administrative

206. Telephone Interview, *supra* note 168.

207. *Id.*

208. N.J. ADMIN. CODE § 7:26E (2004).

209. Mark K. Dowd, *New Jersey's Reform of Contaminated Site Remediation*, 18 SETON HALL LEGIS. J. 207, 219 (1993).

210. Frequently Asked Questions, *supra* note 63.

211. *Id.*

212. Dowd, *supra* note 209, at 221.

213. *Id.*

214. Grayson, *supra* note 182.

proceedings or an action in court to recover NRDs.²¹⁵ However, the Tech Regs require that in order for a private party to receive a “no further action” letter, the party “*must* assess and restore any damaged natural resources that may be present at the site.”²¹⁶ Consequently, in order for a site to be considered fully remediated, the responsible party is forced to take concrete steps towards restoring damaged natural resources.²¹⁷ This requirement further benefits New Jersey because the state is saved from having to initiate an administrative proceeding or an action in court.

2. To Receive a “No Further Action” Letter, Industry Will Have to Conduct a Baseline Ecological Evaluation, Conduct a Risk Assessment, and Determine Groundwater Injuries

The Tech Regs define natural resource injuries as either ecological injuries or groundwater injuries.²¹⁸ Ecological injuries are determined through a two-step process: a baseline ecological evaluation and an ecological risk assessment.²¹⁹ As discussed previously, PRPs must assess natural resource injuries before their sites will be considered remediated.²²⁰ Therefore, in order to receive a “no further action” letter, the sixty-six responsible parties will have to determine groundwater natural resource injuries, carry out an ecological evaluation, and then perform a risk assessment.

The baseline ecological evaluation is the first step used to determine if natural resource injuries potentially exist at the site.²²¹ This is determined by three criteria: (1) the presence of “a contaminant of ecological concern,” which includes contaminants that can biomagnify or bioaccumulate or exceed applicable standards; (2) the presence of an “environmentally sensitive natural resource” at or near the site which includes groundwater; and (3) a pathway that links the contaminant with the sensitive natural resource (i.e., groundwater), which links a discharge on the land to surface

215. *Id.*

216. *Id.* (emphasis added).

217. *Id.*

218. Frequently Asked Questions, *supra* note 63.

219. *Id.*

220. Grayson, *supra* note 182.

221. N.J. ADMIN. CODE § 7:26E-3.11(1-3).

water.²²² If the three criteria are met, then the party must conduct an ecological risk assessment.²²³

The ecological risk assessment involves an evaluation of the likelihood that adverse ecological effects to natural resources are occurring or may occur.²²⁴ These ecological effects occur because of the response of organisms and the ecosystem to the presence of hazardous materials.²²⁵ The results of the ecological risk assessment are incorporated into a remedial action work plan which is used to determine the scope of the restoration required.²²⁶ This means that the sixty-six responsible parties will have to go through a baseline ecological evaluation *and* an ecological risk assessment just to figure out the scope of the "interim restoration" required by the Directive.

3. The Parties Named in the Directive Cannot Approach NJDEP with a Good Faith Effort to Resolve Groundwater Natural Resource Damages

Injuries to groundwater are the sole responsibility of the state.²²⁷ This means that NJDEP will not have to coordinate assessment of damages to groundwater resources with federal agencies such as DOI, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration.²²⁸ The Tech Regs set out procedures to characterize groundwater injury.²²⁹ The responsible party must first delineate the horizontal impact of the hazardous material in the groundwater.²³⁰ NJDEP then uses this information in "The Ground Water Injury Calculation," developed by ONRR.²³¹ The calculation takes into account variables

222. Frequently Asked Questions, *supra* note 63.

223. *Id.*

224. *Id.*

225. N.J. ADMIN. CODE § 7:26E-4.7(b)(3).

226. *Id.*

227. Frequently Asked Questions, *supra* note 63.

228. *Id.*

229. N.J. ADMIN CODE § 7:26E-4.

230. *Id.* § 7:26E-4.4.

231. N.J. Dep't of Envtl. Prot., Office of Nat. Resources Restoration, Natural Resource Injury Assessment—Groundwater [hereinafter Groundwater], http://www.nj.gov/dep/nrr/nri/nri_gw.htm (last visited Sept. 30, 2005).

such as plume size, duration of injury, groundwater recharge rates, and water rates.²³²

NJDEP specifies that if PRPs voluntarily approach ONRR to settle NRD liability, the Groundwater Injury Calculation will be used to value ground water damages.²³³ However, NJDEP states that “[n]on-volunteers will not be given the option to use the ONRR ground water formula and will be subject to a *more rigorous valuation of ground water injury*.”²³⁴ NJDEP defines a volunteer as a person who approaches the agency “with a good faith effort to resolve their natural resource damage liability.”²³⁵ Yet, if any of the parties named in the Directive approach NJDEP in good faith to resolve their liability, they will *not* be treated as volunteers, because the Directive supersedes the volunteer program.²³⁶ Although it appears that this “more rigorous valuation” may be based on the vertical extent of contamination and the actual duration of the damage, the formula has not been made public.²³⁷ It is therefore unclear as to what valuation method will be used to determine the monetary value of damages to groundwater on the eighteen sites named in the Directive.²³⁸ The published Groundwater Injury Calculation and its potential impact on the sixty-six parties is discussed below, as it may provide the foundation for the unpublished, “more rigorous valuation.”²³⁹

4. Because the Eighteen Sites are Located in the Lower Passaic Watershed, Groundwater Monetary Damages Will Be Very High

The groundwater injury calculation used by NJDEP provides an efficient means of determining the monetary value of groundwater resource damages.²⁴⁰ It also allows the responsible party to use existing site remediation data, so that minimal additional

232. N.J. Dep’t. of Env’tl. Prot., Office of Nat. Resources Restoration, Sample Groundwater Calculation [hereinafter Sample], http://www.nj.gov/dep/nrr/nri/gw_injury_calc_200305.pdf (last visited Sept. 30, 2005).

233. Frequently Asked Questions, *supra* note 63.

234. *Id.* (emphasis added).

235. *Id.*

236. *Id.*

237. Environmental Update, *supra* note 65; see also N.J. Dep’t. of Env’tl. Prot., Office of Nat. Resource Restoration, Natural Resource Restoration, <http://www.nj.gov/dep/nrr/> (last visited Sept. 30, 2005).

238. See Environmental Update, *supra* note 65.

239. See *id.*

240. See Groundwater, *supra* note 231; see also Frequently Asked Questions, *supra* note 63.

sampling and studies are required.²⁴¹ However, the calculation may oversimplify the process of determining groundwater injury.²⁴² Furthermore, the water rate variable appears to be based mostly on market factors, which is contrary to *Ohio v. Department of the Interior*.²⁴³

NJDEP provides the formula and worksheet for the Groundwater Injury Calculation on its website.²⁴⁴ The critical variable appears to be the "water rate," because it places a dollar figure on the groundwater injury calculation.²⁴⁵ The water rate is in dollars per 1000 gallons of groundwater.²⁴⁶ The rate is determined by the New Jersey Statewide Water Supply Plan, which is developed by the New Jersey Board of Public Utilities.²⁴⁷ Water rate values are based on the location of the site.²⁴⁸ If the site is located in an area where water supply is deemed "Deficit/Critical" by the New Jersey Board of Public Utilities, the water rate value will be significantly higher than a site that is located in an area where the water supply is deemed "Surplus."²⁴⁹ This designation is "based upon the prospective scarcity of this important resource [groundwater], with a higher injury designation for those areas projected to be in a deficit by the year 2040."²⁵⁰ Based on a comparison of a map in the Directive, which shows the location of the sixty-six sites, to the New Jersey Statewide Water Supply Plan, it appears (not surprisingly) that all of the sites listed in the Directive are within a "Deficit/Critical" designation.²⁵¹ Therefore, the sixty-six sites will probably have to use a water rate of \$6.18 per 1000 gallons of in-

241. See Frequently Asked Questions, *supra* note 63.

242. Telephone Interview, *supra* note 168.

243. See *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 463-64 (D.C. Cir. 1989) (finding that market values are merely factors which can be considered in calculation of natural resource damages).

244. Sample, *supra* note 232.

245. See N.J. Dep't. of Env'tl. Prot., Office of Nat. Resources Restoration, New Jersey Water Supply Planning Area Water Rate Table [hereinafter Rate Table], http://www.nj.gov/dep/nrr/nri/2002water_rate.pdf (last visited Sept. 30, 2005).

246. *Id.*

247. N.J. Dep't. of Env'tl. Prot., Office of Nat. Resources Restoration, New Jersey Statewide Water Supply Plan (1996) [hereinafter Water Supply Plan], http://www.nj.gov/dep/nrr/nri/plan_area_map.pdf.

248. See Rate Table, *supra* note 245.

249. See *id.*

250. Water Supply Plan, *supra* note 247.

251. Compare "Area 6" in Water Supply Plan, *supra* note 247, with The Directive, *supra* note 3.

jured groundwater, if this formula is used.²⁵² This is the second-highest water rate in the state.²⁵³

IV. CONCLUSION

The Lower Passaic is heavily contaminated²⁵⁴ and restoration of the natural resource damages in the river is a necessary step in reviving the watershed to a safe and unpolluted condition.²⁵⁵ New Jersey's aggressive program to recover NRDs appears to have been successful in the past in taking this necessary step, based on numerous settlements from 1993 to 2003.²⁵⁶ However, the Directive was issued in late 2003, and it will raise several critical issues that may undermine the future success of New Jersey's NRD program.²⁵⁷ A key issue that will undermine the program is that the Directive may destroy good faith relationships between the government and private parties.²⁵⁸ Not only does the Directive rely on data in environmental reports provided to NJDEP by industry, but the Directive also removes the iterative process between industry and government by shifting the responsibility for assessment to industry.²⁵⁹ Furthermore, the Directive does not allow industry to voluntarily approach NJDEP to discuss groundwater damage settlements.²⁶⁰ In addition, government-industry relationships will be further eroded because industry will be distrustful of NJDEP's use of outside counsel on a contingency-fee basis.²⁶¹ Moreover, use of a contingency-fee basis is not in accordance with CERCLA, which requires that recovered damages be used to restore or replace natural resources.²⁶²

Furthermore, if any of the responsible parties have already remediated their sites, or are in the process of doing so, they will be forced to assess and restore natural resource damages in order to obtain a "no further action" letter from NJDEP.²⁶³

252. See Rate Table, *supra* note 245.

253. *Id.*

254. Gordon & Anderton, *supra* note 12, at 77-78.

255. *Id.* at 77-80.

256. SETTLEMENT REPORT, *supra* note 144.

257. Telephone Interview, *supra* note 168.

258. *Id.*

259. The Directive, *supra* note 3, at 54.

260. The Directive, *supra* note 3; see also Frequently Asked Questions, *supra* note 63.

261. Grayson, *supra* note 6.

262. *Id.*

263. Grayson, *supra* note 182.

These assessments will have to include complicated ecological risk assessments.²⁶⁴ In addition, responsible parties may have entered into consent decrees for remediation in the past, and assumed that they had addressed the environmental liability at their sites.²⁶⁵ However, since these consent decrees often excluded NRDs, industry will be forced to reassess the environmental liability for each of their sites.²⁶⁶

In addition to undermining the government-industry relationship and raising several legal issues, the Directive explicitly indicates that PRPs will face treble damages and liens on their property if they do not follow the Directive.²⁶⁷ These factors will leave industry with no choice but to go to court to determine their rights.²⁶⁸ Hence, instead of streamlining the recovery of NRDs, the Directive will result in increased litigation.²⁶⁹ Consequently, although an aggressive method of recovering NRDs is undoubtedly needed in New Jersey to restore the Lower Passaic, NJDEP will find that the Directive was not the most suitable approach to the problem.

264. See N.J. ADMIN. CODE § 7:26E-4.1 to -4.8.

265. Telephone Interview, *supra* note 168.

266. *Id.*

267. The Directive, *supra* note 3, at 55.

268. Telephone Interview, *supra* note 168.

269. *Id.*