



Natural Resource Damages (NRD) - Are You Covered?

It's a New Day, says the NJ Attorney General!

This is the largest single-day environmental enforcement action in New Jersey in at least a decade. Today is just the beginning — we are going to hold polluters accountable, no matter how big, no matter how powerful, no matter how long they've been getting away with it. And we are sending a message to every company across the state: if you pollute our natural resources, we are going to make you pay”.

New Jersey Attorney General Gubir S. Grewal and Department of Environmental Protection Commissioner Catherine R. McCabe announced on August 1, 2018.

- ✓ **Six environmental lawsuits were filed in August 2018 in New Jersey** with eight more filed in December 2018. The state has signaled there are more to come and has **retained 18 private law firms to assist in the pursuit of these claims.**
- ✓ New Jersey Governor Phil Murphy (D) has sent a **clear message that environmental enforcement, natural resource damage, and environmental justice are priority issues for his administration.** All signs indicate the recent activity is the tip of the iceberg and more action should be expected against all responsible parties, not just the “big names” or “deep pockets”.

NRD in a Nutshell

It's National in Scope and Authorized by Federal and Many State's Environmental Laws

Natural Resource Damage (NRD) is a federal statutory liability scheme outlined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as “Superfund”, and the Oil Pollution Act (OPA). Many states, including New Jersey, have explicitly incorporated Natural Resource Damage within state level regulation pertaining to contamination spills and, it's fair to say, that several state programs are robust, and many other states are currently considering increased NRD activity. These NRD provisions typically:

- ✓ Require the **cleanup of contaminants which pose a threat to human health and the environment.**
- ✓ Include provisions that holds “responsible parties” liable, and in some instances “strictly liable” for “**damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss....**”
- ✓ Provide **legal mechanisms for natural resources to be restored to the state they were in before injury from environmental contaminants.**



- ✓ Under these provisions, **compensation will be sought from the party responsible for the contaminant release in instances where natural resources are not restored.**

In New Jersey, for example, the **Spill Compensation and Control Act (Spill Act)** was adopted to address discharges of petroleum products and other hazardous materials. It dictates who must investigate and cleanup a spill, what parties are liable, and the types of damages that are recoverable. Recovery of NRD is included within its scope, which includes broad language and can be stricter than Federal laws.

Impact: New Jersey’s “new” Natural Resource Damage (NRD) program is likely to impact **purchasers and sellers of properties** in the state as well as **Brownfield redevelopments**. Undoubtedly, other states will be closely watching these developments as they continue to aggressively pursue NRD claims in their states.

Since New Jersey has signaled that it is prioritizing groundwater – particularly in urban areas where there are social justice issues, those engaged in or contemplating acquisition or redevelopments will have to proceed with even more thoughtful and careful pre-acquisition/development planning. **Environmental Due Diligence and proper allocation of environmental liabilities** is critical for all parties involved and not just in New Jersey.

In the US, States like NJ Have Recovered NRD Damages Before ... and More than \$1 Billion!

In 2003, New Jersey implemented an aggressive NRD enforcement program and retained outside law firms to assist. Like the current enforcement initiative, lawsuits were filed against major responsible parties.

- ✓ New Jersey and ExxonMobil settled a claim involving the former Exxon Bayway Refinery for \$225 million.
- ✓ The 2003 enforcements were not just about the “big” companies. In addition to a controversial groundwater damage calculation, New Jersey withheld “no further action letters” (NFA) on ALL open cases until the natural resource damage claims were settled.
- ✓ The 2003 initiative is estimated by some industry sources to have resulted in the recovery of over \$1 Billion in NRD fines.
- ✓ The current initiative appears modeled on the 2003 approach but may be more effective as New Jersey can learn from past mistakes.

Beyond New Jersey, other notable recoveries for injuries to natural resources include:

- \$8.1B - BP Deepwater Horizon oil spill (settlement agreement with the five Gulf States (Alabama, Florida, Louisiana, Mississippi and Texas) and the United States)
- \$900M - Exxon Valdez (Alaska)
- California has recovered more than \$275M since the Department of Fish and Wildlife’s Office of Spill Prevention and Response (OSPR) was created in 1991;



- Colorado has covered more than \$50M since 1983 when it began to pursue these claims;
- Rhode Island recovered more than \$11M to assess and restore lost fishery stocks and coastal marine habitat impacted by the spill of 820,000 gallons of heating oil from the running aground of a tug and tanker in 1996.
- For the Bunker Hill Mining Superfund Site in the Coeur d’Alene Basin of Idaho - Asarco paid \$67.5M and Hecla Mining paid \$59.72M settlement of their respective NRD liabilities;
- Since 1996 Iowa has recovered more than \$800,000 solely in fish kill restitutions;
- Since 1992, Massachusetts has negotiated more than \$60M in NRD settlements.
- The St. Louis River/Interlake/Duluth Tar site located on the north bank of the St. Louis River in the city of Duluth was the subject of a recent \$8.2M NRD settlement with three potentially responsible parties;
- The Fox River Green Bay Natural Resource Trustee Council in Wisconsin allocated \$35M of the settlements with potentially responsible parties to restoration projects. The Sheboygan River and Harbor Fund Superfund Site announced a \$4.5M settlement between the trustees and the potentially responsible parties in December of 2017.

The sample above and the “new” New Jersey initiative make clear that NRD settlements are and will continue to be actively pursued by virtually all the states and the federal government. Significantly, these numbers above do not include the costs incurred by potentially responsible parties in defending against the underlying claims— costs which alone can be in the millions of dollars.

Are You Covered? It’s a Problem

Standard GL/Property Coverage Include Pollution Exclusions

Natural resource damage claims are linked to pollution events or releases of “pollutants”. Coverage under traditional property and casualty insurance policies may not adequately protect property owners, developers, and financial institutions, among others, from these claims. As such, **pollution exclusions on property and GL policies should be expected to apply.**

Even if insurance coverage may exist for NRD under old GL policies issued prior to the implementation of the absolute pollution exclusion, many companies have already settled with their insurers through buy-backs or releases obviating a chance of recovery for newly filed claims.



The Solution

Coverage is Available Under Dedicated Environmental Insurance Products

The **Property Damage** definition in most standard Environmental Insurance policies **affirmatively includes Natural Resource Damage** coverage. Therefore, these policies can provide coverage for Natural Resource Damage claims and the associated defense costs.

“Environmental Insurance products provide coverage for unknown, pre-existing and new releases of pollutants. Products are specifically written and customized to address case-by-case environmental exposures to ensure coverage for environmental risks”,

Veronica W. Benzinger, Chief Broking Officer, Aon Environmental Services Group (ESG)

**Aon Environmental Services Group,
Empowering Results
“Helping Clients Manage their
Environmental Footprint,
...and Keep their Balance Sheets Clean!**

Aon’s Environmental Services Group brings the deep expertise to ensure that our clients have affirmative coverage to address these (re) emerging NRD claims as well as other Environmental Risks. We welcome the opportunity to meet with you and assist in the identification and analysis of risk as well as offer solutions to mitigate your organization’s pollution-related risks.

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