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Beyond Response Costs—Liability for Natural Resource Damages

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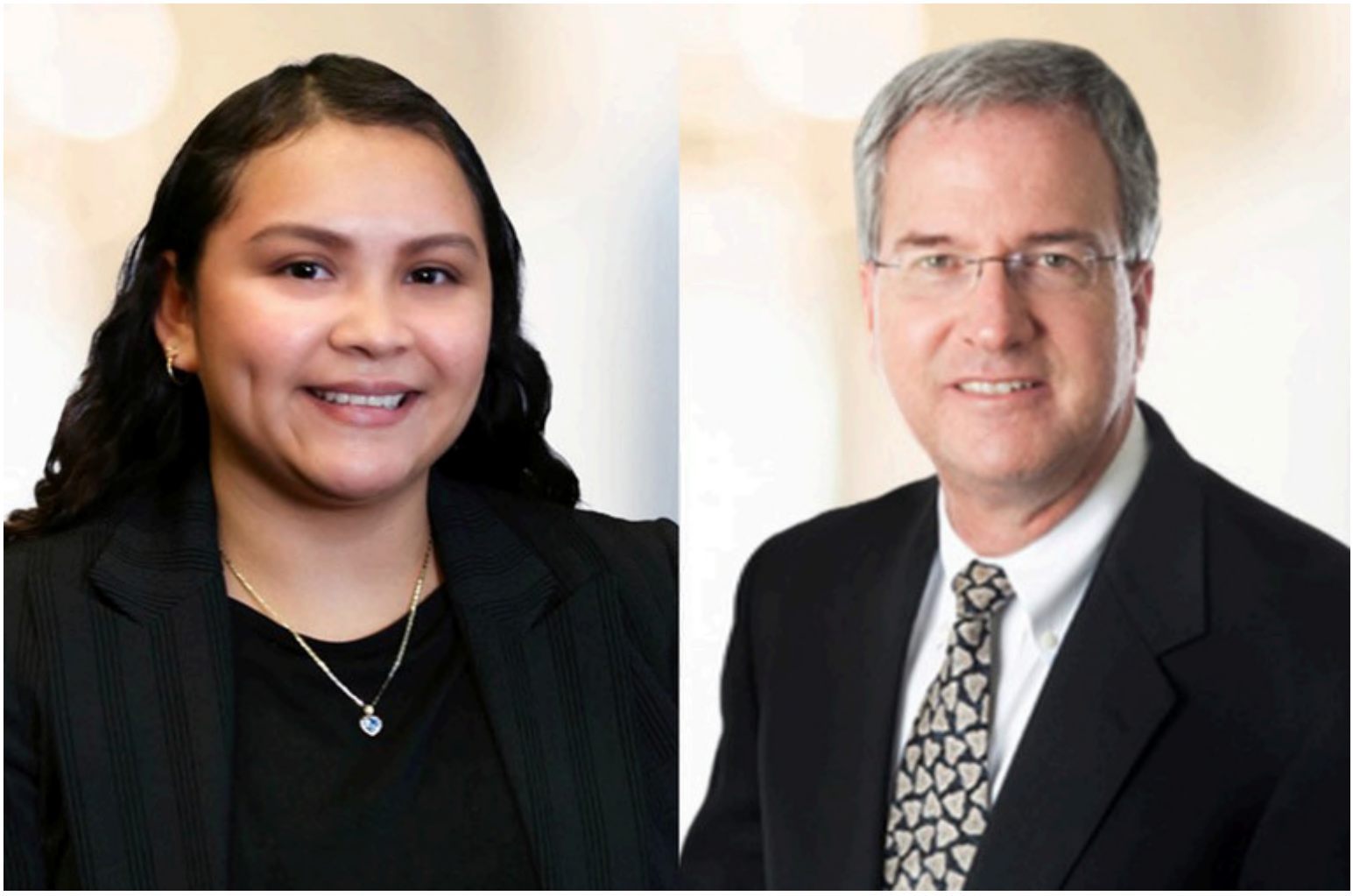

Ingrid Lopez-Martinez (L) and Robert F. Walsh (R) of White and Williams. Courtesy photos

Federal and state environmental laws impose liability on responsible parties not only for the investigation and remediation of contamination caused by releases of hazardous substances, but also for the resulting damage done to "natural resources." The ability to recover "natural resource damages" is one of the most potent claims regulators and other interested parties possess under environmental laws. Experience shows that trustees of natural resources are becoming more aggressive in pursuing these costly claims against responsible parties. This article will provide a general overview of the legal basis for NRD claims, discuss the growing prevalence of such claims, and briefly review insurance coverage issues.

What Are Natural Resource Damages?

Natural resource damages (NRD) are a species of environmental damage recognized under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. Section 9601 et seq.—the federal superfund statute. Under CERCLA, a party responsible for the discharge of a hazardous substance is strictly liable for response costs, which generally means the costs to investigate and remediate the contamination to approved levels (e.g., RI/FS and site remediation). NRD refers to the injury, destruction, or loss of natural resources, and is distinct from response costs. See CERCLA Section 107(a)(4)(C).

Both CERCLA and the Oil Pollution Act (OPA) define natural resources very broadly as essentially any element of the natural environment—land, water in all its forms and locations, air, as well as wildlife including fish. See CERCLA Section101(16); OPA Section1001(20). For purposes of liability, the natural resource must be in some sense a public resource, i.e. something owned by, managed by, or held in trust by the United States, a state government, a Native American Tribe or other public entity. Under CERCLA Sectin107(f)(1), “trustees” of natural resources are the parties who suffer when natural resources are damaged by releases of hazardous substances, and the trustees are the parties who can claim for NRD.

How NRD Is Measured

There are three basic measures or elements of natural resource damages. First, is the cost of restoring injured natural resources to their baseline condition. (This is distinct from response costs, which are focused on meeting mandated cleanup levels, not “restoration” of resources). The second element is compensation to the trustee for the loss of resources it suffered while the resources were damaged and until they are restored to baseline condition. The third element is the reasonable cost for conducting a damage assessment. Under CERCLA, damage assessments conducted in accordance with the applicable regulations carry a rebuttable presumption of correctness.

The methods of measuring the first two elements of NRD can be complex and a detailed discussion is beyond the scope of this article. Measuring the loss of use of a resource can be particularly complicated as it relies on measurements of the economic value to the public of both the active use of the resource (such as for recreation) and the nonuse value, such as knowledge and appreciation of the resource’s ongoing existence.

In January 2024, the Office of Restoration and Damage Assessment, Interior introduced 43 C.F.R. Part 11, which would revise the natural resource damage assessments for releases of hazardous substances under CERCLA and the Clean Water Act. The department proposed the regulation to re-formulate the less cumbersome and faster “Type A” Assessments for negotiated NRD

settlements, which use tools for measuring natural resource damages that are tailored to incidents of a smaller scale. “Type B” Assessments, in contrast, are for NRD assessments much larger in scope than “Type A” and require a more extensive set of investigations and studies to support. Public comments for the proposed “Type A” regulation revision were closed on March 5, 2024.

The proposed regulation would increase the damages amount for which the Type A procedure can be used. Currently, the rebuttable presumption accorded damages evaluated using the Type A procedure is limited to damages of $100,000 or less, which excludes all but the very smallest of natural resource damage assessments. Under the proposed revised regulation, Type A procedures may be used for claims of up to $3-$5 million depending on the circumstances. As such, if the proposed rules are adopted, Trustees may be incentivized to pursue smaller scale NRD claims against a wider array of responsible parties.

State NRD Claims

Although NRD claims initially emerged as part of CERCLA and OPA, many states have enacted statutes authorizing claims for NRD under state law. States are increasingly aware they can use NRD recoveries as an additional source of funding for environmental and recreational projects at a time when state budgets are being stretched by all manner of competing demands.

In recent years, New Jersey has been particularly aggressive in pursuing NRD recoveries under its Spill Compensation and Control Act, N.J.S.A. 58:10-23.11. In August 2018 under Gov. Phil Murphy, the state kicked off a significant expansion of NRD efforts, filing 20 new NRD lawsuits over a several year period. At the same time, the State sent a message to responsible parties encouraging them to come to the settlement table early to receive a discount and avoid litigation costs. A somewhat controversial aspect of the New Jersey program has been the use of well-resourced outside law firms working on a contingent fee basis. As a result, New Jersey has secured sizable NRD recoveries, including $225 million from Exxon relating to former refinery properties; $75 million from Solvay for PFAS contamination; and approximately $35 million in restoration projects from BASF at the former Ciba-Geigy Toms River manufacturing site.

Pennsylvania has also been active in pursuing NRD claims under statutory and common law theories. In recent years the commonwealth, with the help of contingency-fee arrangements, has brought NRD claims. See *Commonwealth v. Monsanto,* 269 A.3d 623 (2021 Pa. Commw.). In 2013, outside counsel for the commonwealth settled claims, including NRD claims, against Consol Energy for $37 million regarding a dam failure in a state park.

As one would expect, NRD claims involving PFAS contamination have begun to mount. So far, one of the largest claims has been the state of Minnesota’s claim against 3M involving PFAS

contamination in the Twin Cities area. 3M settled for $850 million, which includes the cost of certain environmental "restoration" projects. Also, Delaware settled for $50 million with Dupont and related companies. To date, at least 30 states and Washington, D.C. have filed actions against PFAS manufacturers for damages, often including claims for NRD.

Insurance Coverage Issues

The availability of insurance coverage for NRD liabilities varies by policy and, again, a detailed discussion of the many issues that could emerge is beyond the scope of this article. Pollution legal liability policies typically include natural resource damages within the definition of "property damage" covered by the policy. PLL policies are usually issued on a "claims made" basis and thus any NRD claim submitted under the policy would be subject to the requirement that the claim be made and reported during the policy period. Also, issues relating to whether the insured was aware of a potential claim prior to the policy period and exclusions for known circumstances and conditions or similar exclusions may come into play. See e.g., *Handy & Harman v. Beazley United States Services*, 2023 N.J. Super. Unpub. LEXIS 299 (N.J. App. Div. March 22, 2023) cert. den. 296 A.3d 1060 (N.J. 2023) (enforcing a "Prior or Pending Litigation Exclusion" and a "Specified Coverage and Contamination Exclusion" in a PLL policy as to an NRD claim). See also, *Santa Clara Valley Water District v. Century Indemnity,* 306 Cal. Rptr. 3d 724 (Cal. App. 2023) (enforcing "no voluntary payment provision" against NRD coverage claim).

Coverage for NRD claims would typically not be available under current commercial general liability policies due to the application of the pollution exclusion. However, because NRD claims may involve long-standing contamination from releases that occurred decades ago, the claims may implicate legacy CGL policies, i.e., pre-1985-1986 policies. As an initial consideration, NRD claims often emerge later in the evolution of a site, well after response action has been taken, and responsible parties may have entered into a settlement with their legacy insurers that released the NRD claim before it emerged. Another major issue under legacy policies is the potential application of the "sudden and accidental" pollution exclusion, which may vary by the applicable state's law and the facts of the claim. Finally, because NRD claims often involve environmental impacts over time, the issues of "trigger" of coverage (the requirement that property damage occur during the policy period) and allocation of covered damages to triggered policies will be important.

In conclusion, one can expect an ever-increasing number of NRD claims to be filed by trustees going forward, which is a matter of concern for both responsible parties and liability insurers.

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