New Jersey case law clearly provides that costs associated with remediation of environmental contamination qualify as "damages" under typical CGL language, regardless of whether the expenses are characterized as traditional money damages or equitable relief.[131] Therefore, under New Jersey law, it appears clear that costs associated with responding to and remediating natural resources injuries, pursuant to the Directive, would be considered "damages" generally, and, specifically, property damage under typical liability polices.

Moreover, "loss of use" damages are contained in the definition of property damage or treated as related to property damage under common CGL forms. The pre-1966 Insurance Services Office ("ISO") standard form CGL primary policy specifically included "loss of use" of injured or destroyed property, while the post-1973 ISO standard form CGL policy specifically included "loss of use" of tangible property in the definition of covered property damage. However, the 1966 ISO standard form CGL policy neither stated that "loss of use" was covered nor included "loss of use" in its definition of what constituted covered property damage.[132] Nevertheless, the 1966 ISO form, references "loss of use" in the definition of "damages": "damages includes . . . loss of use of property resulting from property damage."[133] Additionally, language that explicitly refers to "loss of use" damages in the definition of property damage often appears in either the insuring agreements or jackets of CGL policies issued after 1966. Thus, it is highly probable that NRD claims of "loss of use" would be considered property damage under the typical CGL policy.

2. Notice and Tender

Many PRPs targeted by the Directive and Notices of Intent to Initiate Litigation have previously settled or litigated significant coverage claims for cleanup costs, and the question becomes whether they must provide their insurers additional notice of the new NRD claims or risk forfeiting coverage.

Many comprehensive general liability policies contain notice provisions, such as that contained in ISO form GL 01-73:

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[131] *See, e.g., Morton Int'l.*, 629 A2d at 846; *see* Sagendorf v. Selective Ins. Co. of Am., 679 A.2d 209, 211-18 (N.J. Super. Ct. App. Div. 1996) (holding, per *Morton*, costs of monitoring and remediating groundwater contamination, as a result of a DEP directive, qualified as damages under insured's CGL, garage and umbrella policies); Strnad v. North River Ins. Co., 679 A.2d 166, 169 (N.J. Super. Ct. App. Div. 1996) (costs of investigating and monitoring groundwater were "damages" under applicable insurance policies).

[132] *See* B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes, Vol. 1, §7.03[b][1], at 364 (11th ed. 2002) [hereinafter Ostrager & Newman].

[133] *See* ISO Comprehensive General Liability Form, at "Definitions," p. GA-4 (Feb. 1, 1966 ed.).

4. The Insured's Duties in the Event of Occurrence, Claim or Suit.

(a) In the even of an **occurrence**, written notices containing particulars sufficient to identify the insured and . . . . reasonably obtainable information with respect to the time, place and circumstances thereof . . . shall be given by of for the **insured** or the company . . . . as soon as practicable;

(b) If claim is made or suite is brought against the **insured**, the **insured** shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.[134]

Courts in New Jersey and elsewhere recognize that such provisions create separate obligations to provide notice of the occurrence (or accident if applicable), notice of the claim for damages and notice of any action brought to recover those damages.[135] This distinction, however, is unlikely to benefit insurers of New Jersey PRPs for two reasons. First, NRD are likely to be viewed as nothing more than an additional element of damages arising out of the "occurrence" that caused the contamination, such that notice of NJDEP's original claim for cleanup costs may be deemed to satisfy the notice requirement with respect to NRD.[136] Second New Jersey courts require an insurer to show a "likelihood of

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[134] ISO Form GL 00 00 01 73, Condition 4(a)-(b), reprinted in I Susan J. Miller & Phillip Lefebvre, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED at 451.4 (1995) (bold-faced type indicates use of a term defined elsewhere in the policy).

[135] *See* Allstate Ins. Co. v. Grillon, 251 A.2d 777, 779 (N.J. Super. Ct. App. Div. 1969) ("[U]sually such notice provisions require notice of the occurrence of the accident, notice of claim for damages and notice of bringing of an action thereon."); Olin Corp. v. Ins. Co. of No. Am., 966 F.2d 718, 722 (2d Cir. 1992) (notice provisions create "two distinct notice obligations: (i) to provide notice of an occurrence as defined by the policies, and (ii) to provide notice of claims or suits filed").

[136] In determining the number of occurrences implicated by a claim, New Jersey courts look to the number of causes for the claimed injury, rather than on the number injuries claimed by the policyholder. *See generally* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994); Doria v. Ins. Co. of No. Am., 509 A.2d 220, 222-23 (N.J. Super. Ct. App. Div. 1986). New Jersey courts have generally held that property damage from the continuous, gradual release of hazardous materials arise from a single occurrence. *See, e.g.*, Ciba-Geigy Corp. v. Liberty Mut. Ins. Co., No. L087515087 (N.J. Super. Ct. Jan. 28, 1998), *reprinted in* 12 MEALEY'S LITIG. REP. No. 13, Section B (Feb. 3, 1998) (property damage due to different contaminants disposed of at different locations on insured's site at different times arose from a single occurrence); O-I Brockway Glass Container, Inc. v. Liberty Mut. Ins. Co., No. 90-2797, 1994 WL 910935 (D.N.J. Feb. 10, 1994) (a company's continuous disposal of waste at one site for period of twenty years constituted a single occurrence).

appreciable" prejudice to prevail on a late notice defense.[137] This is a high standard, which in practice, is rarely satisfied. In jurisdictions without a prejudice requirement, however, the notice requirement may play a larger part in the defense to NRD coverage claims.[138]

It must be noted, however, that with respect to NRD complaints or Notices of Intent to Initiate Litigation, a New Jersey PRP cannot disregard its notice obligation wholesale. NRD claims still constitute separate claims from the underlying remediation and, under New Jersey law, a carrier has no obligation to pay for pre-tender defense costs.[139] The duty to defend is triggered by facts *known* to the insurer.[140] Therefore, "when the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is only liable for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend."[141] To avoid being estopped from seeking reimbursement for defense costs, New Jersey policyholders will have every incentive to promptly tender NRD claims. This "pre-tender" rule has been applied widely in other jurisdictions.[142]

Practically speaking, however, it is unlikely that many PRPs targeted under the Passaic Directive will fail to notify their insurers of NRD claims. That Directive specifically urges PRPs "to contact [their] insurers and notify them of the issuance of this directive and Notice to Insurers."[143] Moreover, the PRPs targeted by the Passaic Directive, and many of the Notices of Intent to Initiate Litigation, are highly sophisticated, may have negotiated significant insurance settlements or previously litigated regarding the sites at issue and are fully familiar with their coverage programs.

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[137] *See, e.g.* Cooper v. Government Employees Ins. Co., 237 A.2d 870, 773 (N.J. 1968); Sagendorf v. Selective Ins. Co. of Am., 679 A.2d 709, 715 (N.J. Super. Ct. App. Div. 1996).

[138] In New York, for example, an insurer need not show prejudice, but only that notice was inexcusably late. See, e.g. Am. Home Assur. Co. v. Int'l Ins. Co., 684 N.E.2d 14 (N.Y. 1997). Under New York law, "delays of for one to two months are routinely held 'unreasonable.'" Martinson v. Mass. Bay Ins. Co., 947 F. Supp. 124, 131 (S.D.N.Y. 1996). New York courts would likely apply the timely notice requirement strictly with respect to both the occurrence (again the contamination) and the claim (the suit or demand for NRD). *See, e.g.*, Ogden Corp. v. Avondale Indus., 924 F.2d 36, 43 (2d Cir. 1991) (coverage barred because timely notice of a cost recovery complaint did not cure late notice of pre-suit demand for contribution by plaintiff).

[139] *See, e.g.*, SL Indus., Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266, 1272-73 (N.J. 1992).

[140] *Id.* at 1271.

[141] *Id*.

[142] *See generally* 22 Holmes' Appleman on Insurance 2d § 139.7 (2002); *see also* Onder v. Allstate Ins. Co., 2002 U.S. Dist. LEXIS 11344 (S.D. Cal., June 10, 2002), at 15-16; Legacy Partners v. Travelers Ins. Co., 2002 U.S. Dist. LEXIS 5620 (N.D. Cal., Mar. 28, 2002), at *8-9 (applying Texas law); Milwaukee Guardian Ins. v. Reichhart, 479 N.E.2d 1340, 1343 (Ind. Ct. App. 1985); Towne Realty v. Zurich Ins. Co., 548 N.W.2d 64, 65 (Wis. 1996).

[143] Directive, *supra* note 59, ¶ 319.

3. Duty to Defend

The relevant question is: when, if ever, does an NJDEP Directive implicate an insurer's duty to defend or pay defense costs. Under New Jersey law, government directives threatening to assess treble damages for the prospective cleanup of environmental damages, trigger an insurer's duty to defend because of their "*in terrorem* and coercive effect."[144]

The Directive clearly constitutes a coercive demand or "*in terrorem*" threat of legal action under New Jersey's standard. In the Directive, NJDEP demands that the PRP conduct an assessment and remediate the lower Passaic River watershed, and expressly states: "Failure to comply with this Directive and Notice to Insurers will increase the potential liability of Respondents to the Department in an amount equal to three times the cost of arranging for the clean up and removal of hazardous substances . . . ."[145] The Notices of Intent to Initiate Litigation, which were received by hundreds of PRPs not targeted by the Directive, state that NJDEP has "concluded" that the PRP is "legally responsible for the natural resource damages caused by hazardous discharges" at a given site.[146] The notice further threatens that failure to respond within ten business days will result in "litigation to recover all natural resource damages, penalties, costs, interest and other relief to which the State of New Jersey is legally entitled . . . ."[147]

Accordingly, the Directive and the Notices of Intent trigger an insurer's obligation to defend or pay defense costs under New Jersey law. PRPs in certain other jurisdictions, however, may not be able to obtain a defense until the NRD trustee initiates suit.[148]

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[144] *See* Broadwell Realty Servs., Inc. v. Fidelity & Cas. Co. of N.Y., 528 A.2d 76, 81-81 (N.J. Super. Ct. App. Div. 1987), *overruled on other grounds*, Morton Int'l. Inc. v. Gen. Acc. Ins. Co. of Am., 629 A.2d 831 (N.J. 1993). *Accord*, Gov't Interinsurance Exch. v. City of Angola, 8 F. Supp. 2d 1120 (N.D. Ind. 1998) (term "suit" as used in section of CGL policy broad enough to include demands by administrative agency that city remedy environmental contamination); *accord*, Coakley v. Maine Bonding & Cas. Co., 618 A.2d 777 (N.H. 1992).

[145] Directive, *supra* note 59, ¶¶ 304-06.

[146] Redacted Notice of Intent to Initiate Litigation from Bradley M. Campbell, Director of the New Jersey Department of Environmental Protection and Attorney General Peter C. Harvey, on file with authors (the target company's name was omitted to protect client confidentiality).

[147] *Id*.

[148] There is a split of authority on the issue of whether a PRP letter or other administrative demand constitutes a "suit," thereby triggering an insurer's defense obligation. *See generally* APPLEMAN ON INSURANCE § 4527 (2004 Supp.). *See also* Technicon Elec. Corp. v. Am. Home Assur. Co., 141 A. 2d 124 (N.J. Super. Ct. App. Div. 1988).

All NRD-related expenses may not constitute "defense costs." The characterization of any NRD-related cost as defense or indemnity will likely be analyzed under the standard applied to remedial investigation costs set forth in *General Accident Insurance Co. v. N.B. Fairclough & Son*.[149] In *Fairclough*, the New Jersey Supreme Court placed the burden of proof upon the policyholder to overcome a presumption that costs relating to environmental site investigations are indemnity rather than defense.[150] That presumption can be overcome through review of evidence relating to the following factors:

(1) the relative risk that the PRP bore if it did not [perform the investigation]; for example, how realistic was the threat of treble damages?;

(2) the extent to which the details of the [investigation] may have been mandated by the environmental agencies;

(3) the extent to which the [investigation] provides a means by which the insurance company, or the policyholder, would be relieved of or be able to mitigate potential claims for damages; and

(4) the cost of producing the [investigation] in relation to the policy limits provided.[151]

Applying these factors, it is likely that costs of performing baseline ecological evaluations and NRD assessments under the Directive will be viewed as defense costs. NRD awards and the cost of restoration projects, however, would likely be considered as indemnity.

4. The "Owned Property" Exclusion

In New Jersey, the owned property exclusion may not likely apply to most of the NRDs sought under the Directive because New Jersey courts hold that injury to groundwater

[149] 672 A.2d 1154 (N.J. 1996).

[150] *Id.* at 1162.

[151] *Id.*

contained on an owned site is third party property damage.[152] Also, the Directive by its terms addresses damage to the Passaic River itself, which is not owned by any PRP, and damage to down stream properties due to migration of contamination through the river to downstream properties.[153] Therefore, because groundwater and off-site watercourses and land are involved, it appears clear that the "owned property" exclusion would not bar coverage for costs associated with complying with the Directive.[154] PRPs in a limited number of other jurisdictions, however, may be barred from seeking coverage unless they can demonstrate that the NRD claims are intended to compensate for impairment of off-site groundwater.[155]

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[152] *See, e.g.*, Sagendorf v. Selective Ins. Co. of Am., 679 A.2d 709, 717 (N.J. Super. Ct. App. Div. 1996) ("Coverage for monitoring and remediation of such groundwater [ground water beneath insured's land whether it migrated off-site or not] was not barred by either the 'owned property,' property 'used by' or property in the 'care, custody or control of' the insured exclusions."); F.L. Smidth & Co. v. Travelers Ins. Co., 679 A.2d 170 (N.J. Super. Ct. App. Div. 1996); Reliance Ins. Co. v. Armstrong World Indus., Inc., 678 A.2d 1152, 1158-62 (N.J. Super. Ct. App. Div. 1996); *accord*, Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d 1551 (N.D. Cal. 1992) (need not contaminate off site groundwater); Reese v. Travelers Ins. Co., 129 F.3d 1056 (9th Cir. 1997) (applying Cal. Law) (potential liability existed under insured's CGL policy with regard to action alleging groundwater contamination arising from insured's operations, which was concededly covered property damage not excluded under policy's owned property exclusion.); Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994) (applying Wisconsin law); N.H. Ball Bearings v. Aetna Cas., 848 F. Supp. 1082 (D.N.H. 1994) (applying New Hampshire law) *rev'd on other grounds*, 43 F.3d 749 (1st Cir. 1995).

[153] The Directive is intended to accomplish restoration, or obtain compensation with respect to the "Passaic River watershed", *see* Directive, supra note 59, ¶ 2, the bottomed sediments of the Passaic River, *see id*. ¶ 3, and the bio-accumulation of dioxin and mercury due to contaminant migration. *See id*. ¶¶ 5-6.

[154] Similarly, the "alienated property" exclusion was found to merely extend the "owned property" exclusion to property that was no longer owned by the insured. *F.L. Smidth & Co.*, 679 A.2d at 174. Accordingly, this exclusion was found equally inapplicable to groundwater contamination. *Id.*

[155] Am. States Ins. Co. v. Hanson Indus., 873 F. Supp. 17 (S.D. Tex. 1995) (under Texas law, coverage under liability insurance policies for contamination of insured's property and groundwater was barred by owned property exclusion because property damage was specifically limited to contamination on site; although groundwater on site had been contaminated, water wells near property had been tested and did not show detectable levels of contamination); Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001) (Contamination of groundwater on insured's land was not "property damage" within the meaning of excess liability policies, unless "the contaminated groundwater . . . directly affected groundwater outside the borders of the insured's land . . . insured owned the groundwater.").

It must be remembered that NRD claims are not limited to groundwater. "[L]and, fish, wildlife [and] biota" fall within the definition of "natural resources" under Newer Jersey and federal law.[156] The Policy Directive also states a preference for restoration of resources, rather than penalties, and many of NJDEP's past settlements involve restoration of forest land or replacement through the use of a "land swap," pursuant to which a PRP either purchases and preserves or, in the case of wetlands creates, a replacement land space.[157]

On site restoration projects and land swaps that compensate for damage to land, forest resources or perhaps, threatened animal species may fall in whole or in part within the "owned property" exclusions. The exclusion clearly bars damage to soil and vegetation on a PRP's own property.[158] Thus, like remediation costs directed to on-site soil and vegetation, NRD to compensate for loss of these resources should also be barred from coverage. Costs related to the restoration or replacement of destroyed wildlife, however, may be on a different footing because New Jersey courts consider wildlife and fish within the State's jurisdiction as held "in the public trust."[159] Thus, it is likely that a New Jersey court would find that non-domesticated animals are not "owned property" of a PRP.

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[156] *See supra* notes 48-51 and accompanying text.

[157] *See* NRD Policy at "Preference for Restitution" and "Substitute Resources." **S**ignificant restoration settlements include agreements by Chevron U.S.A., Inc. and ConocoPhillips Co. to preserve more than 4,600 acres of wildlife habitat and aquifer recharge areas, to resolve their respective liabilities at 1,200 sites. *See New Jersey: Oil Companies Settle New Jersey Charges Stemming from Groundwater Pollution Cases,* 36 BNA Env. Rep. 2533 (Dec. 9, 2005). Previously, Sun Pipeline had agreed to fund a 50-acre forest restoration project and "neotropical bird research," in addition to $450,000 in NRD to compensate for a natural gas pipeline fire. Exxon has also committed to restore a 200-acre wetland in Jersey City, and 83 acres of wetland throughout the state, in addition to its $5.78 million NRD settlement for a petroleum discharge into the Arthur Kill. *See* Restoration Report, *supra* note 58.

[158] *See See* Muralo Co., Inc. v. Employers Ins. of Wausau, 759 A.2d 348 (N.J. Super. Ct. App. Div. 2000); Universal-Rundle Corp. v. Commercial Union Ins. Co., 725 A.2d 76 (N.J. Super. App. Div. 1999); *see generally* Ostrager & Newman, *supra* note 132, at §10.03[b]

[159] N.J. Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co., 308 A.2d 671, 672 (N.J. Super. Ct. L. Div. 1973) (authorizing DEP to recover a penalty to compensate for a fish kill caused by a discharge of cold water into a creek).

5. Bar to Recovery of Fines and Penalties

The Directive contains the penalty provisions, threatening, among other things, to recover up to $50,000 per each day a PRP fails to comply, as well as treble damages.[160] New Jersey courts have held that similar fines and penalties imposed upon insureds for violations of NJDEP directives are *not* covered by insurance as a matter of public policy.[161] Therefore, any of the penalties imposed under the penalty provisions of the Directive, would constitute "penalties" under CGL policy terms and, as such, would not be considered covered damages. In many other jurisdictions, fines and penalties associated with NRD claims would similarly be unrecoverable.[162] However, a growing number of jurisdictions allow coverage, in whole or in part, for punitive damages awards.[163]

6. The "Sudden and Accidental" Pollution Exclusion

The effect of the "sudden and accidental" pollution exclusion on NRD demands will vary by jurisdiction.

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[160] The Directive provides, in relevant part:

306. Failure to comply with this Directive and Notice to Insurers will increase the potential liability of Respondents in an amount equal to three times the cost of arranging for the clean up and removal of hazardous substances that were discharged….

307. Pursuant to N.J. STAT. ANN. § 58:10-23.11u (West 2006), the Department may issue an order to require compliance with the Spill Compensation and Control Act. Failure by Respondents to comply with this Directive may result in the issuance of an order by the Department, which will subject Respondents to penalties of up to $50,000 per day and each day of violation constitutes an additional, separate and distinct violation of the Spill Compensation and Control Act.

See Directive, *supra* note 59 at ¶¶ 306-307.

[161] *See*, *e.g.*, Township of Gloucester v. Maryland Cas. Co., 668 F. Supp. 394, 401-02 (D.N.J. 1987) (holding insurance policies did not provide coverage for fines and penalties that the DEP imposed upon insured for violations of state environmental regulations). *See also* Johnson & Johnson v. Aetna Cas. & Sur. Co., 667 A.2d 1087, 1091 (N.J. Super. Ct. App. Div. 1995) ("New Jersey sides with those jurisdictions which proscribe coverage for punitive damage liability because such a result offends public policy and frustrates the purposes of punitive damage awards.").

[162] A substantial minority of jurisdictions, including New Jersey, completely prohibit recovery of punitive damage awards and fines or penalties. *See generally* 18 HOLMES' APPLEMAN ON INSURANCE 2D § 126.1, at C (2001). *See also* Zurich Ins. Co. v. Shearson Lehman Hutton Inc., 642 N.E.2d 1065, 1070 (N.Y. 1994); PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999).

[163] *See generally* 18 HOLMES' APPLEMAN ON INSURANCE 2D § 126.1, at C (2001). *See also* Baker v. Armstrong, 744 P.2d 170, 174 (N.M. 1987); Price v. Hartford Accid. & Indem. Co., 502 P.2d 522, 525 (Ariz. 1972); Am. Home Assur. Co. v. Safeway Steel Prods. Co., 743 S.W.2d 693, 705 (Tex. Ct. App. 1987). Cieslewicz v. Mut. Serv. Cas. Ins. Co., 267 N.W.2d 595, 600 (Wis. 1978) (stating in dicta that the trend since 1970 seems to be toward permitting punitive damages). *See generally*, JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE, Ch. 7 (2000 & Supp. 2005).

In New Jersey, "sudden and accidental" pollution exclusions will only preclude coverage if it can be shown that the insured intentionally discharged a known pollutant.[164] Factors relevant to this determination are: the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.[165]

Obviously, this is a highly fact sensitive analysis, and one cannot say in isolation whether a given insurer can disclaim coverage under the standard, sudden and accidental pollution exclusion[166] for a particular NRD claim. However, experience indicates that it is difficult to prove intent by an insured to cause specific harm to environment.

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[164] Morton Int'l., Inc. v. Gen. Accid. Ins. Co. of Am., 629 A.2d 831 (N.J. Super. Ct. App. Div. 1993). The sudden and accidental pollution exclusion has been interpreted to mean "unexpected and unintended" by other jurisdictions. *See* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 590 (Wis. 1990) (phrase "sudden and accidental" in pollution exclusion clause in standard form CGL policy meant unexpected and unintended damage); Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co., 881 P.2d 201 (Wash. 1995) ("Sudden and accidental" means "unexpected and unintended."); Am. Nat'l. Fire Ins. Co. v. B & L Trucking & Constr. Co., 920 P.2d 192 (Wash. Ct. App. 1996).

However, several jurisdictions apply the language as written and would appear to bar coverage for NRDs that arise out of a prolonged discharge of contaminants. *See* Hartford Acc. & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484 (10th Cir 1992) ("Sudden and accidental" in liability policy's pollution exclusion means abrupt or quick and unexpected or unintended in context of Utah law.).

[165] *Morton Int'l.,* 629 A.2d at 880.

[166] This exclusion, which was introduced by the insurance industry in the early 1970s, typically states:

> This insurance does not apply … to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases or waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere of any water course of body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

See *Morton Int'l,* 629 A.2d at 847.

This exclusion must be contrasted to the "absolute" pollution exclusion, which contains no "sudden and accidental" exception. A common version of this exclusion, which became common in the mid-1980s, states:

> POLLUTION EXCLUSION
>
> (This insurance does not apply to:)
>
> "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants …
>
> Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant including, smoke, vapor, soot, fumes acids, alkalis, chemicals and waste material. Waste material includes materials which are intended to be or have been recycled, reconditions or reclaimed.

See George J. Kenny & Frank A. Lattal, New Jersey Insurance Law § 9:30-2 (2d ed. 2000). The absolute pollution exclusion is discussed in detail immediately below.

However, PRPs facing claims for NRDs in other jurisdictions may have greater likelihood of proving that the claims do not fall within the exception to the sudden and accidental pollution exclusion if fact or expert evidence demonstrates that the specific resource damage was caused by a pollution event that was "sudden" or "accidental."[167]

[167] *See, e.g.*, Technicon Elec. Corp. v. Am. Home Assur. Co., 533 N.Y.S.2d 91 (N.Y. Super. Ct. App. Div. 1998) (sudden and accidental is to be given its ordinary meaning.); Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800 (Tex. App. 1999) (sudden does not mean "unexpected" or "unforeseeable" and is unambiguous.); Mesa Operating Co. v. Cal. Union Ins. Co., 986 S.W.2d 749 (Tex. App.1999) (sudden does not mean unexpected or unintended; the term accidental already encompasses those concepts. Discharge that continues over a lengthy period of time is not "sudden" within meaning of "sudden and accidental" exception to pollution exclusion of CGL policy.); Smith v. Hughes Aircraft Co., 22 F.3d 1432 (9th Cir. 1993) (sudden and accidental is ambiguous and connotes a temporal quality under Arizona law.); Travelers Cas. & Sur. v. Superior Ct., 75 Cal. Rptr. 2d 54 (Ct. App. 1998) (plain language of phrase "sudden and accidental" discharge of pollutants in exception to pollution exclusion means an abrupt, unintended, and unexpected discharge of pollutants.). The law is unclear in certain jurisdictions. *Compare* Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146 (7th Cir. 1994) (under Indiana law, term "sudden" within meaning of pollution exclusion clause of CGL policy unambiguously means abrupt as well as unexpected or unintended . . . sudden must mean more than simply "unexpected" or "unintended" if it is to be given any significance independent of the term "accidental"), *with* Am. States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) ("Sudden and accidental" was ambiguous and must be interpreted in favor of the insured.).

7. The "Absolute" Pollution Exclusion Clause?

New Jersey courts have found absolute pollution exclusions to be clear and unambiguous.[168] Insurers, therefore, should be reasonably confident that, under New Jersey law, they will not face liability for NRD claims under policies issued to PRPs that contain absolute pollution exclusions. In a limited number of jurisdictions, however, the result might be different.

To circumvent the application of the pollution exclusion, some insureds have argued that "personal injury" coverage independently provides coverage for environmental claims. They argue that coverage is available for pollution based on the phrase "wrongful entry or eviction, or other invasion of the right of private occupancy" contained in the definition of "personal injury."[169] New Jersey courts, however, have consistently rejected this attempt to

[168] *See* Byrd v. Blumreich, 722 A.2d 598, 600 (N.J. Super. Ct. App. Div. 1998). Accordingly, they have held this exclusion to be valid and enforceable, thereby precluding coverage for environmental claims. Vantage Dev. Corp. v. Am. Env't. Tech. Corp., 598 A.2d 948, 952 (N.J. Super. Ct. App. Div. 1991) (absolute pollution exclusion excluded coverage for remediation expenses); U.S. Bronze Powders, Inc. v. Commerce & Indus. Ins. Co., 679 A.2d 674, 677 (N.J. Super. Ct. Law. Div. 1996) (holding exclusion unambiguously excludes coverage for all environmental claims, despite fact that myriad of possible contaminants or chemicals were not specifically listed). *Cf.* S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 680 A.2d 1114, 1117-18 (N.J. Super. Ct. App. Div. 1996) (Although absolute pollution exclusion was otherwise valid and enforceable, a claim involving the construction of a home, which contained allegedly defective septic systems, was held not to be the kind of activity to which the absolute pollution exclusion applied.).

[169] *See generally* George Kenny & Frank Lattal, N.J. Insurance Law, §9-51 at 336 (1st ed. 1993).

avoid the consequences of absolute pollution exclusions.[170] This theory has similarly been rejected in the majority of decisions that have addressed it.[171]

In sum, there will likely be no coverage for NRD under a Directive when coverage is excluded by the absolute pollution exclusion. The fact that a given insurance policy may also cover "personal injury" does not alter this result.

8. Voluntary Payments

Generally, liability insurance policies contain a clause or provision that prohibits the insured from voluntarily assuming an obligation.[172] In New Jersey, however, absent a showing that the policyholder acted in bad faith, "an exclusion barring coverage for the insured's

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[170] For example, in *U.S. Bronze Powders, Inc.*, 679 A.2d at 677 (App. Div. 1996) and *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 679 A.2d 1206, 1213 (N.J. Super. Ct. App. Div. 1996), the Appellate Division held that coverage was barred under the absolute exclusion for environmental contamination despite the personal injury provision. Specifically, the *J. Josephson* court noted, "[t]he weight of authority holds that, in the presence of a pollution exclusion clause, personal injury coverage is not available for damages caused by environmental pollutants." *J. Josephson*, 679 A.2d at 1228. To hold otherwise would "render meaningless" the absolute pollution exclusion. *See U.S. Bronze*, 679 A.2d at 677.

[171] *See, e.g.*, Cty. of Columbia v. Cont'l Ins. Co., 634 N.E.2d 946, 949-50 (N.Y. 1994) (CGL insurance policies' personal injury endorsement provision should not be construed to provide coverage for injuries arising from pollution-generated property damage when such pollution-related claims were eliminated from coverage by policies' pollution exclusion.); Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co., 172 F.3d 702 (9th Cir. 1999) (Under California law, trespass and nuisance claims arising out of insured tenant's contamination of land involved "property damage," subject to pollution exclusion of CGL policy, and could not be recast as personal injury claim unburdened by exclusion.); Robert E. Lee & Assoc., Inc. v. Peters, 557 N.W.2d 2d 457 (Wis. Ct. App. 1996). (groundwater and environmental contamination from gasoline spill at gas station was not a personal injury arising out of "wrongful entry" under CGL insurance policy's personal injury provision.); Northbrook Indem. Ins. Co. v. Water Dist. Mgmt. Co., 892 F. Supp 170 (S.D. Tex. 1995) (Under Texas law, residents' alleged injury from exposure to well water contaminated with toxic and hazardous substances, including benzene, discharged from well operated and tested by insured water district management company did not involve "wrongful entry" and therefore, was not within "personal injury" coverage of commercial general liability (CGL) insurance policy.); *see also* Bituminous Cas. Corp. v. Kenworthy Oil Co., 912 F. Supp. 238 (W.D. Tex. 1996) (Under Texas law, groundwater pollution was outside CGL insurance policy's personal injury coverage for wrongful entry; reading personal injury coverage to extend to property damage, including damage which would be covered under Coverage A for bodily injury or property damage, would render absolute pollution exclusion meaningless.); Titan Hold. Synd., Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990); *But see* Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926 (Ind. Ct. App. 1999) (Absolute pollution exclusion was not unambiguous with respect to environmental cleanup claims and had to be construed against insurer; pollution exclusions in insured's CGL policies did not apply to the policies' personal injury coverage provisions, where the policies had separate and independent insuring agreements for bodily injury, . . . personal injury, and medical expenses where each agreement was subject to a separate and independent set of exclusions, and the personal injury agreements did not contain pollution exclusions.).

[172] GEORGE KENNY & FRANK LATTAL, N.J. INSURANCE LAW, §2-16:14 at 54 (1st ed. 1993).

voluntary assumption of an obligation only applies where the insurer can establish 'appreciable prejudice.' "[173] Furthermore, courts have held that the prohibition against voluntary payment is inapplicable when the insured was under a legal obligation to enter into an administrative consent order with the NJDEP to remediate contaminated property.[174]

Accordingly, it is unlikely that coverage for NRDs will be barred when the insured cooperates with the NJDEP regarding a Directive. The Directive and the threatening nature of NJDEP's actions, not the least of which is a threat of increased damages and penalties for those who do not "cooperate," likely preclude application of the cooperation clause. Moreover, under the prejudice standard it may be difficult for insurers to show how they could have gotten a better deal with the NJDEP than that entered into by the policyholder. These arguments may, however, be more viable in jurisdictions without a prejudice requirement.[175]

9. The Number of Occurrences

New Jersey law focuses on the cause or causes that give rise to the harm in determining the number of occurrences, making it likely that a claim for NRD will not constitute a separate "occurrence" from the underlying contamination that gave rise to environmental cleanup.[176] The number of occurrences must be analyzed from "the point of view of the cause or causes of the accident rather than its effect." [177]

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[173] Ohaus v. Continental Cas. Ins. Co., 679 A.2d 179, 184 (N.J. Super. Ct. App. Div. 1996).

[174] Federal Ins. Co. v. Purex Indus., 972 F. Supp. 872, 885 (D.N.J. 1997) ("New Jersey law is clear that remediation costs incurred under ECRA are not voluntary payments").

[175] Presently New York, and possibly Georgia, appear not to have some form of prejudice requirement in the context of a claim on the breach of the duty to cooperate. Tennessee recently began requiring an insurer to prove prejudice arising from an insured's alleged breach of cooperation. *See* David L. Leitner et al., Law and Practice of Insurance Coverage Litigation, Ch. 36 (2002 & Supp. 2005), "The Duty to Cooperate." For example, an NRD claim brought in New York would presumably be subject to the requirement that notice be "reasonable." Utica Mut. Ins. Co. v. Gruzlewski, 630 N.Y.S.2d 826 (Sup. Ct. App. Div. 1995).

[176] *See* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 989-91(N.J. 1994); Doria v. Ins. Co. of N. Am., 509 A.2d 220, 222 (N.J. Super. Ct. App. Div. 1986); Bacon v. Miller, 271 A.2d 602, 604 (N.J. Super. Ct. App. Div. 1971).

[177] *See* Wilkinson v. Providence Wash. Ins. Co., 307 A.2d 639 (N.J. Super. Ct. Law. Div. 1973).

Ciba-Geigy Corp. v. Liberty Mutual Insurance Co.,[178] decided under the "cause" test, is illustrative. The *Ciba-Geigy*, court found eight separate disposal locations to be a single occurrence because "[a]ll of Ciba's waste was from its continuous manufacturing processes and should be treated as a single occurrence."[179] This was despite allegations that Ciba had caused separate injuries to the environment, including damage to the soil, groundwater, and a nearby river.[180] All of those damages would fall within the broad definition of "natural resource damages" supporting the conclusion NRD will be held to be additional damages and not a separate occurrence.

In sum, under New Jersey's "cause test," NRD would likely be considered another "effect" from a single cause, for example dumping waste in an unlined lagoon. NRD claims do not represent a separate occurrence but rather additional damages resulting from an underlying occurrence. The analysis may vary in other states that apply the "effects" test.[181]

10. Trigger of Coverage

Under New Jersey law, environmental damage claims are generally subject to a continuous trigger.[182] For the reasons set forth below, it is likely that the continuous trigger theory will apply to a New Jersey NRD claim, as for any other environmental claim.

First, a continuous trigger has been applied to environmental claims under the statutes that NJDEP cites as authority for the NRD claims. A continuous trigger has been applied to the same type of damages described in the Directive with respect to claims under the Spill Act, which is the enabling statute for the NRD Policy and the Directive.[183] Likewise, a

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[178] No. L 87515-87 (N.J. Super. Ct. Law Div. Jan. 28, 1998), *reprinted in* 12 MEALEY'S LITIG. REP.: INS. No. 13, Section B (Feb. 3, 1998).

[179] *Id.* at B-8.

[180] *Id.* at B-21-24.

[181] *See generally* OSTRAGER & NEWMAN, *supra* note 132, at § 9.02.

[182] *See, e.g.*, Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998).

[183] *See* Marotta Scientific Controls, Inc. v. RLI Ins. Co., No. 87-4438, 1990 U.S. Dist. LEXIS 20167, at *29 (D.N.J. June 5, 1990). The damage definitions are materially identical. *Compare* N.J. ADMIN. CODE tit. 7:26E-1.8 (Nov. 7, 2005 Supp) *with* N.J. STAT. ANN. § 58:10-23.11b (West 2006). The New Jersey Spill Act defines "cleanup and removal costs" as those "associated with a discharge, incurred by the State in the (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to public health, safety or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources," and "natural resources" as "all land, fish, shellfish, wildlife, biota, air, waters and other such resources." N.J. STAT. ANN. § 58:10-23.11b (West 2006). The definition of "natural resources" provided in the Technical Requirements includes "all land, fish, shellfish, and other wildlife, air, waters and other such resources." N.J. ADMIN. CODE tit. 7:26E-1.8 (Nov. 7, 2005 Supp).

"continuous trigger" has been applied to claims under CERCLA, the Federal Oil Pollution Act of 1990, the Clean Water Act and the Brownfield Act.[184] These have all been cited as empowering the State to seek compensation for natural resource damages.[185]

Accordingly, it is virtually certain that a continuous trigger will be applied to NRD claims because that trigger theory has been applied to damages claims for the types of resources at issue with NRD claims asserted under the Directive. A major component of natural resource damages is damage to groundwater and surface waters.[186] A continuous trigger has been applied to damage of these resources.[187] In the NRD context, an insured would have to show that a release of pollutants linked to natural resources damage and a continuous progressive deterioration of the damaged resource(s) over a period of time.[188]

The courts will likely find the public policy rationale for applying a continuous trigger in environmental claims applies equally to NRD. The New Jersey Supreme Court recently commented in the *Quincy Mutual* case that "the continuous trigger theory would be better suited to address the public interest in enhancing available insurance coverage for environmental damages and would give courts the opportunity to better channel the available resources into remediation of environmental harms."[189] The same rationale applies to NRD claims.

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[184] N.J. Stat. Ann. § 58:10B-1 (West 2006); N.J. Site Remediation Indus. Network v. N.J. Dept. of Envtl. Prot., No. A-5272-97T3 (N.J. Super. Ct. App. Div., April 17, 2000), *certif. denied*, 760 A.2d 782 (N.J. 2000).

[185] *See, e.g.*, U.S. Mineral Prods. Co. v. Am. Ins. Co., 792 A.2d 500, 518 (N.J. Super. Ct. App. Div. 2002); *see also* Universal-Rundle Corp. v. Commercial Union Ins. Co., 725 A.2d 76, 86 (N.J. Super. Ct. App. Div. 1999); Sayre v. Ins. Co. of No. Am., 701 A.2d 1311, 1312-13 (N.J. Super. Ct. App. Div. 1997).

[186] *See* N.J. Dept. of Envtl. Prot. Policy Directive 2003-07, dated Sept. 24, 2003; Gail Howe Connell, *NJDEP Develops Program to Assess Natural Resource Damages*, 8-3 New York/New Jersey Environmental Compliance Update, May 1990.

[187] *See, e.g., Universal-Rundle Corp.*, 725 A.2d at 86 (using a continuous trigger regarding soil and groundwater contamination); Astro Pak Co. v. Fireman's Fund Ins. Co., 665 A.2d 1113, 1118 (N.J. Super. Ct. App. Div. 1995) (applying a continuous trigger where leachate from landfill contaminated the adjoining Raritan River); Hatch Corp. v. W.R. Grace & Co., 801 F. Supp. 1334, 1346 (D.N.J. 1992) (using a continuous trigger where the insured pumped effluent directly into streams and ditches draining directly into the Passaic River).

[188] New Jersey courts have consistently held that environmental property damage is progressive and indivisible. *See, e.g.*, Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 799 A.2d 499, 506 (N.J. 2002); *Astro Pak*, 665 A.2d at 1117.

[189] *Quincy Mut.*, 799 A.2d at 506.

Lastly, a continuous trigger would maximize the amount of available insurance coverage, a consideration not likely to be ignored by the New Jersey courts.[190] In other jurisdictions, a different result may occur, depending on controlling law. A manifestation trigger would provide minimal, if any, coverage.[191] An exposure trigger would result in a longer period of coverage because damages would be allocated to policies on the risk from the first date on which contamination that caused the NRD was discharged through the end of the discharge or, in some jurisdictions, until the contamination caused by the discharge is remediated.[192]

11. Special Issues Relating to Loss of Use Claims

A complicating factor in determining the trigger period for NRD claims is that here, unlike other environmental claims, the State may seek compensation for the loss of use of its natural resources. For example, the State could seek compensation for the loss of use of a river for swimming, fishing and recreational boating. Accordingly, the question arises as to which coverage period responds to the "loss of use" damages. For example, if contamination of a river began in the early 1960s but is "swimmable" up to 1970, do the policies in the 1960s respond to the "loss of use"? The very limited case law on this topic indicates that, under a general liability policy, the loss of use damage relates back to the underlying property damage that caused the loss of use.

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[190] *See id.* at 515

[191] For example, courts in North Carolina and Rhode Island have applied a manifestation trigger to environmental property damage claims. *See* Home Indem. Co. v. Hoechst Celanese Corp., 494 S.E.2d 774, 779 (N.C. 1998) (holding that the discovery rule mandates that for insurance purposes, property damage "occurs" when it is manifested or discovered.); Tuk-Awa of R.I., Inc. v. Aetna Cas & Sur. Co., 723 A.2d 309 (R.I. 1998). In those cases, damages were allocated to a single year, the year in which the insured discovered the property damage giving rise to the claim. Thus, for NRD claims, in manifestation trigger states, the trigger date would be the date the insured becomes aware of the NJDEP's claim for natural resource damages. In practical terms, this means that the NRD claims against most of the current PRPs in New Jersey would trigger only claims made EIL coverage. NRD claims by either the EPA or NJDEP would, in all likelihood, not even be referred to in directives, PRP notices or pleadings served prior to 1985, when the absolute pollution exclusion became common.

[192] *See* SCOTT M. SEAMAN & KATHLEEN H. JENSEN, THE HANDBOOK ON ALLOCATION / APPORTIONMENT OF LOSSES INVOLVING COMPLEX INSURANCE COVERAGE CLAIMS, Ch. 2, "Policies Required to Respond to a Loss – The Issue of Trigger of Coverage" at 2-2 (2000). ("[C]ourts applying an exposure trigger find that contracts on the risk during the period when the environment was exposed to pollutants . . . or the person was exposed to harmful substances, such as asbestos, are triggered. Courts applying a manifestation or discovery trigger hold that only those contracts on the risk on the date that the property damage or bodily injury is discovered are triggered.' Thus, since the exposure trigger theory generally implicates the greater number of policies, it would similarly result in a greater amount of insurance coverage over a greater period of time.") (citations omitted).

In *American Home Assurance Co. v. Libbey-Owens-Ford Co.*,[193] the court determined that "loss of use" and other consequential damages relate back to the trigger period that applies to the underlying occurrence. Therefore, policies triggered by an underlying occurrence are responsible for consequential damages even when those damages occurred after the policy period. As a result, the *American Home* policyholder, who was found liable for various consequential damages, including loss of use, could only access limits of its 1973 policy, despite the fact that the claimants' loss of use of the newly constructed Hancock Tower in Boston allegedly continued through June 1975.[194] All of the loss of use damages were deemed to fall within the trigger period of January 1973 to September 1973, reducing the coverage for the loss of use damage to the one policy limit.

Relating back loss of use to the underlying property damage is a practical standard in the NRD context. Otherwise, the court must determine when, for example, the river became unusable for fishing and swimming and arguably how much "loss of use" occurred in each year. It seems more realistic that courts would adopt a "bright-line" methodology such as that set forth in *American Home* in an effort to conserve both judicial and economic resources and provide significant coverage for the insured.

However, there is little case law regarding the trigger for loss of use damages in the context of third-party, general liability coverage. Accordingly, this is an open issue and loss of use could present a different spread period than other NRD.

12. The "Start Date" of Allocation

The start date for the continuous trigger will likely depend on the source of the contamination. When damage to a natural resource is the result of operations of an owned site, the start date will be when the natural resource was first harmed. In light of the very broad definition of natural resources, including soil and groundwater, the start date could be the same as for any other environmental matter. If the natural resource damage results from dumping at a third party landfill, the start date under the recent New Jersey Supreme Court decision in *Quincy Mutual* will be the date of first dumping.

Under New Jersey law, the start date for environmental damage is the insured's initial release or deposit of toxic contamination into the environment rather than the date the groundwater at issue was impacted.[195] This might have practical implications for NRD when the date of land-based operations or dumping significantly pre-dates the impact on

[193] 786 F.2d 22, 25-26 (1st Cir. 1986).

[194] *Id.*

[195] *See, e.g.*, Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 799 A.2d 499, 515 (N.J. 2002).

the natural resource at issue, such as a river or bay. However, there is case law supporting the argument that the start date of allocation should be the date of first impact to groundwater when, unlike the policyholder in *Quincy Mutual* that knowingly used an unlined landfill, the PRP deposits waste in a landfill that it reasonably believed to be impervious.[196]

Thus, when natural resources are damaged by contamination migrating from an owned site, the start date will likely be the date the natural resource was actually impacted.[197] When the damage is caused by leachate from an unlined landfill, the *Quincy Mutual* "date of dumping" standard will be used. Where it proves difficult to establish when the natural resource first became damaged, a court may default to the bright line "date of dumping/ date of operation" standard.

The coverage blocks for New Jersey NRD claims will tend to be longer because, unlike CERCLA, the Spill Act contains no statutory "retroactive cut-off" date. The NJDEP has the authority to seek natural resource damages under the Tech Regs, which do not provide a retroactive cut-off date. Likewise, the enabling statute for the Tech Regs, New Jersey's Spill Act, allows for enforcement regarding pre-Act discharges.[198]

13. The "End" Date of Allocation

The "end" or cutoff date under New Jersey's continuous trigger is the manifestation of damage or the date when the policyholder could no longer transfer risk to the insurance industry for the claimed loss, whichever arises first.[199] Environmental damages "manifest" when the policyholder is first made aware of the damage.[200] Arguably, the manifestation date is the date the policyholder became aware of the pollution generally, and not the NRD damages specifically. In either case, the manifestation date will likely be after 1986, the year the absolute pollution exclusion was typically added to CGL coverage.

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[196] The *Quincy Mutual* court was influenced by the policyholder's knowing deposit of municipal waste into an unlined landfill owned and operated by a third-party, which demonstrates that the policyholder had not intended to place the waste in a "presumably impervious" location. 799 A.2d at 506. In *Astro Pak*, however, coverage was triggered at the moment the contamination actually impacted the surrounding land and water. *Astro Pak*, 665 A.2d at 1117-18. In *Astro Pak*, although the insured's hazardous materials had been placed on the property of a third party, the waste had been placed in a landfill with a "supposedly impervious barrier" that was intended to prevent contamination of its surroundings. *Id.*

[197] *See* State Dept. of Envtl. Protection v. Signo Trading, Inc., 612 A.2d 932 (N.J. 1992).

[198] *See* Handy & Harman v. Borough of Park Ridge, 695 A.2d 747, 751 (N.J. Super. Ct. App. Div. 1997).

[199] *See* Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116, 1121 (N.J. 1998).

[200] *Astro-Pak*, 665 A.2d at 1116-17 (holding manifestation date is the date the insured actually knew about the escape of the pollution).

As discussed more fully above, the absolute pollution exclusion clause likely bars coverage for NRD claims. Accordingly, in many instances, the trigger period applicable to NRD claims will likely terminate when the insured could no longer purchase coverage for NRD, that is the 1986 policy period.

14. The Effect of EIL Coverage

A question arises as to whether the availability of Environmental Impairment Liability ("EIL") coverage should extend the coverage block past the traditional 1986 end date. Recently, the New Jersey Appellate Division held that the availability of EIL coverage does increase the spread period but only by one year — the year of the implicated EIL coverage.[201] The EIL coverage is treated as if it were simply another year of CGL coverage.

EIL coverage also raises the question of whether such policies are primary to CGL coverage. This would not alter the trigger period, but could have a dramatic effect on the amount of damages allocated to the CGL policy years. Although one New Jersey case has discussed the impact of EIL coverage on allocation, it failed to specifically address the treatment of EIL policies for priority purposes.[202]

Courts in other jurisdictions have adopted a bright line rule placing EIL coverage as primary to CGL.[203] However, in New Jersey, the priority between EIL and CGL remains an open issue.

B. *The Impact on Releases and Commutations*

Insurers are concerned about NRD claims in part because they may force insurers to pay a second time on claims which they believed were fully resolved through settlements and releases from their insureds. This lack of finality can undermine an insurer's ability to accurately reserve for future losses and render past settlements with reinsurers incomplete. Large NRD recoveries on closed files might place smaller companies in jeopardy or render inaccurate their representations to insurance regulators. While these concerns are legitimate, it is likely that many insurers will find themselves adequately protected under past settlement agreements for the reasons discussed below.

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[201] *See* Champion Dyeing & Finishing Co., v. Centennial Ins. Co., 810 A.2d 68 (N.J. Super. Ct. App. Div. 2002).

[202] *Id.*

[203] Rhone-Poulenc Inc. v. Int'l Ins. Co., No. 94-3303 (7th Cir. June 18, 1996), *reprinted in* 10 Mealey's Litig. Rep.: Ins. No. 39, Section D (Aug. 20, 1996); W.R. Grace & Co. v. Maryland Cas. Co., No. 86-5622, (Mass Super. Ct. July 13, 1990), *reprinted in* 4 Mealey's Litig. Rep.: Ins. No. 18, Section A (July 31, 1990).

In New Jersey, and elsewhere, there is a strong public policy that favors settlement of litigation.[204] Absent a showing of fraud or other compelling circumstances, courts will enforce settlements as written.[205] A "subsequent change in decisional or statutory law" does not invalidate a settlement agreement.[206]

Whether a specific release or buyback agreement provides adequate protection depends upon the specific language used. Releases are interpreted according to general contract principles.[207] Accordingly, "[a] contracting party is bound by the apparent intention he or she outwardly manifests to the other party."[208]

In this light, considerable protection may be afforded by three types of releases commonly found in environmental coverage settlements: site releases, environmental releases and policy buybacks.

1. Site Release

Environmental site releases typically attempt to release an insurer from all coverage claims arising out of operation of a site or, at times, environmental cleanup costs arising out of operations relating in any way to a site. A site release may provide, for example, that the insured will "release, acquit and forever discharge [the Company]… from *any and all claims and or potential claims for coverage*, whether for defenses or indemnity, *relating to or arising out of the site; whether presently known or unknown*, under any policy of insurance issued to the INSURED by [the Company]."[209]

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[204] *See* Borough of Haledon v. Borough of N. Haledon, 817 A.2d 965, 975 (N.J. Super. Ct. App. Div. 2003). This principle is widely accepted. *See also* Boggle v. Potter, 360 P.2d 650, 654-55 (N.M. 1961); Gonzales v. Atnip, 692 P.2d 1343, 1344 (N.M. Ct. App. 1984); Envtl. Control, Inc. v. City of Santa Fe, 38 P.3d 891, 897 (N.M. Ct. App. 2001); Denberg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1001 (N.Y. 1993); Nicholson v. Barab, 285 Cal. Rptr. 441, 448 (Ct. App. 1991); Fisher v. Superior Ct., 163 Cal. Rptr. 47, 51 (Ct. App. 1980); Hastings v. Matlock, 217 Cal. Rptr. 856, 864 (Ct. App. 1985); Herstam v. Deloitte & Touche, LLP, 704 P.2d 238, 246 (Ariz. Ct. App. 1996); Shell Oil Co. v. Christie, 607 P.2d 21, 21 (Ariz. Ct. App. 1979); D'Angelo v. Cornell Paperboard Prods. Co., 120 N.W.2d 70, 75 (Wis. 1963); Radlein v. Industrial Fire & Cas. Ins. Co., 345 N.W.2d 874, 883 (Wis. 1984); Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992); Transport Ins. Co. v. Faircloth, 898, S.W.2d 269, 280 (Tex. 1995); Waters v. Hedberg, 496 A.2d 333, 337 (N.H. 1985).

[205] *Borough of Haledon*, 817 A.2d at 975; N.J. Mfrs. v. O'Connell, 692 A.2d 51, 51 (N.J. Super. Ct. App. Div. 1997).

[206] *N.J. Mfrs*., 692 A.2d at 53-54.

[207] Domanske v. Rapid-Am. Corp., 749 A.2d 399, 402 (N.J. Super. Ct. App. Div. 2000). *See also*, Term Indus. v. Essbee Estates, Inc., 451 N.Y.S.2d 128 (Sup. Ct. App. Div. 1982); Weddington Prods., Inc. v. Flick, 71 Cal. Rptr.2d 265 (Ct. App. 1998); Fort Wayne Prods., Inc. v. Bank Bldg. & Equip. Corp., 309 N.E.2d 464 (Ind. Ct. App. 1974); State Farm Mut. Auto. Ins. Co. v. Avery, 57 P.2d 300 (Wash. 2002); Steward v. Mathes, 528 S.W. 2d 116, 118 (Tex. Ct. App. 1975).

[208] *Domanske*, 749 A.2d at 402.

[209] Redacted excerpts from a settlement agreement containing this language are on file at Riker, Danzig (emphasis supplied).

2. Environmental Release

Full environmental releases typically attempt to release an insurer from all known or unknown environmental claims by an insured for all of its operations. For example, an insured may agree to "remise, release, and forever discharge [the Company] . . . from all . . . actions, causes of action, suits, . . . and liabilities involving 'environmental claims,' whether presently known or unknown to INSURED under a policy of insurance issued by [the Company]."[210] The term, "environmental claims," is usually a defined term. One definition is "*any and all lawsuits, claims and demands* that may be asserted against the INSURED *by state or federal agencies* or private parties *on account of actual, alleged or threatened discharges of contaminants or pollutants* (including gasoline, oil and all petroleum products or waste materials . . . ."[211]

3. Policy Buybacks

The policy buyback, or commutation, attempts to completely release the insurer from liability of any kind under an insurance policy and, in fact, to treat the policy as if it had never been issued. A simple buyback agreement can state that the Insured "agrees to release, acquit and forever discharge [the Company] . . . *from any and all claims and/or potential claims for coverage*, whether for defense or indemnity, relating to or arising out of any claim, *whether presently known or unknown*, under any policy of insurance issued to Insured by [the Company]."[212] The language may be amplified by statements that that "this release is *not limited to environmental claims* and *shall extend to any rights that INSURED might otherwise have* . . . [and] [b]y settling, *INSURED is foregoing any future claim that it is entitled to insurance coverage based upon a policy issued prior to the Effective Date of this Agreement* . . ."[213] Although none of the above types of releases expressly includes NRD claims, all of them are likely broad and general enough to encompass NRD claims. For example, the NJDEP Directive implicates the named respondents because hazardous material was discharged from sites for which the respondents are allegedly responsible. Accordingly, to the extent that these same sites are included in Site Releases they would fall into the category of "claims and/or potential claims . . . relating to or arising out of [that] site."[214] In this regard we note that, in the context of insurance coverage litigation,

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[210] *Id*.

[211] *Id*. (emphasis supplied).

[212] *Id*. (emphasis supplied).

[213] *Id*.

[214] *Id*. *See* Site Release excerpt *supra*.

New Jersey courts have consistently interpreted the phrase "arising out of" in a broad manner to include "conduct 'originating from,' 'growing out of' or having a 'substantial nexus' for which coverage is provided."[215]

An even more compelling argument against the availability of coverage is present in the Policy BuyBack, which by its very terms states that the insured, by settling, "is foregoing any future claim that it is entitled to insurance coverage . . . ,"[216] under any applicable policies.[217] Similarly, the Environmental Release, although it is not as broad as the Policy BuyBack, expressly provides that the "release shall extinguish any and all rights that [the insured has] or might have in the future," regarding environmental liabilities, "whether for claims now known or that may be asserted in the future."[218] Thus, depending on the language of a given buyback agreement or release, an insurer of a PRP under the Directive may be protected from further liability with respect to the new NRD claims.

C. *New Jersey's "Entire Controversy" Doctrine*

The "entire controversy" doctrine is a procedural rule of New Jersey law that may prevent PRPs who were aware of potential NRD claims at the time of settling of an earlier coverage claim from renewing litigation against their insurers to obtain coverage for current NRD claims.

New Jersey law disfavors the splitting of claims and, therefore, New Jersey's entire controversy doctrine requires a litigant to present "all aspects of a controversy in one legal

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[215] Cty. of Hudson v. Selective Ins. Co., 752 A.2d 849, 853 (N.J. Super. Ct. App. Div. 2000) (*quoting* Westchester Fire Ins. Co., v. Continental Ins. Co., 312 A.2d 664, 669 (N.J. Super. Ct. App. Div. 1973)). *See also* Am. Motorists Ins. Co. v. L-C-A Sales Co., 713 A.2d 1007, 1010 (N.J. 1998) (recognizing "[t]he critical phrase 'arising out of,' which frequently appears in insurance policies, has been interpreted expansively by New Jersey courts in insurance coverage litigation"). This is the majority rule. *See, e.g.*, Baca v. N.M. State Hwy. Dept., 486 P.2d 625, 628 (N.M. Ct. App. 1971); U.S. Fire Ins. Co. v. N.Y. Marine & Gen. Ins. Co, 706 N.Y.S.2d 377, 377 (Sup. Ct. App. Div. 2000); Raymond Corp. v. Nat'l. Union Fire Ins. Co., 775 N.Y.S.2d 102, 104-05 (Sup. Ct. App. Div. 2004); Hertz Corp. v. Gov't Employees Ins. Co., 673 N.Y.S.2d 483, 485 (Sup. Ct. App. Div. 1998); Fibreboard Corp. v. Hartford Acc. & Indem. Co., 20 Cal. Rptr. 2d 376, 383 (Ct. App. 1993); Acceptance Ins. Co. v. Syufy Enterprises, 81 Cal. Rptr. 2d 557, 563 (Ct. App. 1999); Vitton Constr. Co. v. Pacific Ins. Co., 2 Cal. Rptr. 3d 1, 4 (Ct. App. 2003); Aide v. Chrysler Fin. Corp., 699 N.E.2d 1177, 1182 (Ind. Ct. App. 1998); Farmers Ins. Co. v. Till, 825 P.2d 954, 955 (Ariz. Ct. App. 1991); Tomlin v. State Farm Mut. Auto. Liab. Ins. Co., 290 N.W.2d 285, 286-91 (Wis. 1980); McCarthy Bros. Co. v. Continental Lloyds Ins. Co., 7 S.W.3d 725, 729 (Tex. Ct. App. 1999); Carter v. Peerless Ins., 160 .2d 348, 352-53 (N.H. 1960); Allstate Ins. Co. v. Crouch, 666 A.2d 964, 966 (N.H. 1995).

[216] Redacted excerpts from a settlement agreement containing this language are on file at Riker, Danzig.

[217] *See* Policy BuyBack excerpt, *supra*.

[218] Redacted excerpts from a settlement agreement containing this language are on file at Riker, Danzig. *See* Site Release excerpt *supra*.

proceeding."[219] "The doctrine has been applied to bar subsequent claims involving the same commonality of facts where parties for strategic reasons have withheld claims concerning a prior action, seeking two bites at the same apple."[220] However, the entire controversy doctrine is inapplicable where the arguably related claims "ha[d] not arisen or accrued during the pendency of the original action,"[221] or the party against whom the doctrine is being invoked did not have a "fair and reasonable opportunity to litigate the claim."[222]

Accordingly, if an insured PRP was aware of allegations of natural resource claims and did not include them in a settlement of coverage litigation, the insured would be barred nonetheless, under the entire controversy doctrine, from raising this claim in a subsequent lawsuit. However, to the extent the prior litigation did not involve natural resource claims, or even suggest such damages, it is unlikely that the entire controversy doctrine would be a current NRD claim.

IV.
New Jersey's NRD Initiative: The Start Of A National Trend?

In the authors' view, industry is right to be concerned that the New Jersey NRD initiative may be the beginning of a trend that may manifest itself in increased NRD claims in other states and, possibly, at the federal level. However, it is unlikely that many states will pursue the claims with as much gusto as New Jersey in the short term due to the uncertainty regarding what New Jersey's final NRD regulations will require or the newly-elected Governor's attitude toward NRD enforcement. At a minimum, other states will wait to see what technical and policy choices are reflected in the formal regulations, due to be issued later this year. Second, other state natural resource trustees may be deterred by lack of financing, lack of political will or lack of NJDEP's overriding concern that perhaps billions of dollars of potential NRD recoveries will evaporate due to expiration of a statute of limitations.

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[219] Hobart Bros. Co. v. Nat'l. Union Fire Ins. Co., 806 A.2d 810, 816 (N.J. Super. Ct. App. Div. 2002), *certif. denied*, 814 A.2d 635 (N.J. 2003) (*quoting* Malaker Corp. Stockholders Prot. Comm. v. First Jersey Nat'l. Bank, 395 A.2d 222, 238 (N.J. Super. Ct. App. Div. 1978).

[220] Hillsborough Township Bd. of Ed. v. Faridy Thorne Frayta, P.C., 728 A.2d 857, 861 (N.J. Super. Ct. App. Div. 1999).

[221] McNally v. Providence Wash. Ins. Co., 698 A.2d 543, 548 (N.J. Super. Ct. App. Div. 1997). *Cf. Hobart Bros.*, 806 A.2d 819-20 (in remanding case for further proceedings as to whether insured's failure to join insurer in prior proceeding was inexcusable and, therefore, barred by the entire controversy doctrine, court found that all claims to recover environmental costs from insurers arose from a single controversy because they involved the responsibility for cleaning up the site at issue).

[222] *Id.* at 817-18.

That being said, several factors suggest that New Jersey's bold NRD assault may mark the beginning of a wider trend.

First, New Jersey has historically been on the forefront of environmental law. Over the last thirty years, New Jersey, perhaps more than any other state, has been the focal point of many important legislative and court battles over environmental issues.[223] New Jersey has lobbied for creation of the first national reserve in the Pinelands region and creation of the "Pinelands Commission" in 1979, to preserve, limit development and promote preservation of over twenty-two percent of the land in the state.[224] New Jersey's Spill Act, which was enacted in 1976, served as a model for CERCLA, an act sponsored by then Congressman and future New Jersey Governor James Florio.[225] In June 2005, the New Jersey Legislature enacted the Highlands Water Protection and Planning Act (the "Highlands Act") which limits development to specific areas within a 750,000-acre region in the Northern portion of the state, and imposes temporary development restrictions while a Highlands Commission is formed and drafts permanent regulations.[226] ISRA and the 1998 Tech Regs, discussed above, are further examples of New Jersey's regulatory innovation.

Second, as discussed above in section II.E., there are several states that have, like New Jersey, adopted unique NRD regulations or have recovered significant NRD awards. These states are most likely to follow New Jersey's lead and increase their efforts to recover NRD. It is reported that site owners in Texas and New Hampshire have been advised informally that their state environmental agencies intend to launch NRD initiatives similar to that in New Jersey.[227]

Third, the first challenge to New Jersey's contingent fee arrangement with Allen Kanner has failed. Thus, for the time being, this "special counsel" agreement helps resolve what was historically one of the main impediments to natural resource prosecution: lack of funding to bring complex, expert-intensive NRD claims.

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[223] *New Battleground*, *supra* note 1, at 1.

[224] *See generally* New Jersey Pinelands Commission, *A Summary of the New Jersey Pinelands Comprehensive Management Plan*, *available at* http://www.state.nj.us/pinelands/cmp.htm (last visited August 16, 2004).

[225] *See* Rusk et al., *supra* note 8, § 11.02, at 364; *New Battleground supra* note 1, at 1.

[226] *See* Thomas Jay Hall, *The Highlands: Off Limits to Growth – Passage of the Highlands Act Will Have a Major Impact on the Land Use Decision-Making Process in New Jersey*, NEW JERSEY L. J. (June 21, 2004).

[227] Donald W. Richardson, *Claim Managers Brace for Flood of Natural Resource Damages Actions*, CLAIMS MAGAZINES (August 2003), *available at*, http://www.claimsmag.com/Issues/Aug03/braceforflood (last visited July 30, 2003).

Fourth, regardless of the ultimate success of the NRD initiative, there is no clear indication that NJDEP will change its aggressive NRD policy in the near future. Governor Corzine is rated as "pro environment" by several watchdog groups.[228] However, program spending, a $5 billion budget deficit and New Jersey's high property tax burden were significant campaign issues and may constrain Governor Corzine's ability to take an aggressive stance on environmental enforcement.[229]

Additional uncertainty is caused by Governor Corzine's appointment of a new NJDEP Commissioner, Lisa Jackson,[230] and of Zulima Farber[231] to replace Peter Harvey as Attorney General. Jackson's selection has drawn praise from environmental groups and business lobbyists due to her reputation for being fair and open-minded and from NJDEP staffers who appreciate that Jackson has spent several years at NJDEP and is not a selection from outside the agency.[232] Farber, a private practitioner and former State Public Advocate and Public Defender, does not have a developed environmental record and stated at her confirmation hearing that tackling public corruption, and not environmental enforcement, was

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[228] According to the Sierra Club, in 2005 Senator Corzine voted "pro-environment" on every vote held through June of 2005 relating to environmental issues, *available at*, http://whistler.sierraclub.org/votewatch/votesByLegislator.do?lid=SUS31730 (last visited June 28, 2005). In 2002, Corzine received a score of 100 percent on the National Environmental Scorecard released by the League of Conservation Voters and the New Jersey Environmental Federation based upon a survey rating the environmental record of every member of Congress in 2001. The scorecard combined the evaluations of experts from numerous environmental and conservationist groups of the voting records of U.S. Representatives and Senators with regard to environmental health, safety protection and resource conservation. Corzine Gets an "A" on the Environment: Receives a Perfect Grade in National Environmental Scorecard, *available at* http://corzine.senate.gov/press_office/record.cfm?id=186677 (last visited June 28, 2005); *see also Corzine Pushes for Repeal of 'Fast-Track'*: The New Jersey chapter of the Sierra Club was the first major special interest group to endorse Corzine when he became the presumptive Democratic gubernatorial nominee after acting Gov. Richard Codey announced he was not seeking the office, *available at*, http://sierraactivist.org/print.php?sid=46703 (last visited June 28, 2005).

[229] *See* Joe Donohue, *Budget Blues: Bill Comes Due for Years of Fiscal Irresponsibility* The Star Ledger (Feb. 6, 2006); *The Big Money Crunch*, New Jersey Record (Jan. 31, 2006), at Opinion section.

[230] *Incoming New Jersey Governor Replaces High-Profile Head of DEP*, Clean Air Report (Jan. 12, 2006) (Inside Washington Publisher), 2006 WLNR 576596.

[231] *See Corzine Nominates Former Public Advocate to be Attorney General, AP Alert – Politica*, 1/11/06 AP Alert Politics 19:4 (Jan. 11, 2006).

[232] Alex Nussbaum & Colleen Diskin, *Corzine Taps Regulator DEP Chief; Nominates Rutgers Official for Public Advocate's Position*, Bergen Record (Jan. 6, 2006).

her top priority.[233] Thus, the ultimate direction the Corzine administration may take on NJDEP's NRD initiative is unclear.

However, several factors argue against a dramatic increase in NRD claims nationwide. NRD claims are expensive to maintain as a plaintiff and state trustees are likely to take a "wait and see" approach.

The dismissal of the New Mexico attorney general's claim in *General Electric* is likely to dampen the enthusiasm of other states' trustees. However, the long term impact of the *General Electric* decision on New Mexico's widely watched NRD initiative is, however, uncertain because dismissal of a single claim does not necessarily sound the death knell for NRD claims in New Mexico, much less nationwide.

As they say, the proof of the pudding is in the eating. If New Jersey is ultimately successful in a significant number of NRD suits, more litigation is likely to follow.[234] If PRPs are successful in defeating or substantially limiting New Jersey NRD recoveries, the feared NRD "trend" will die on the vine. Only when success demonstrates that prosecution of these complex claims is financially viable, will other states follow suit and commit substantial resources to NRD proceedings. Significantly, the Attorney General's office appears to have filed few complaints with Allen Kanner as co-counsel since the rash of filings in May 2004.[235]

Second, the ultimate form and impact of NJDEP's NRD initiative will be uncertain until final regulations are promulgated and withstand any industry challenges.

Third, few, if any, other states have New Jersey's pressing incentive of expiration of a statute of limitations, which upon June 1, 2007 would result in the loss of hundreds of millions of dollars of potential NRD awards.

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[233] Jennifer Moroz, *Attorney General's Office in Dire Straits; Many Observers Say it is Serious Need of an Overhaul, Especially the Division of Prosecutor's Corruption*, PHILADELPHIA INQUIRER (Jan. 29, 2006), at Philadelphia Section.

[234] In an analogous phenomenon, tobacco lawsuits by the states were uncommon until, the attorneys general of Florida, Mississippi, Texas and Minnesota reached high-dollar settlements with tobacco companies in 1997. Through sharing of resources throughout 1997 and 1998, the attorneys general of the remaining states were able to reach a $240 million master settlement agreement with several tobacco companies. *See generally* Arthur LaFrance, *The Changing Face of Law and Medicine in the New Millennium: Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM J.L. & MED. 187 (2000); Lisbeth Pedersen, *Tobacco Litigation Worldwide: Follow Up Study to Norwegian Official Report 2000:16 'Tort Liability for the Norwegian Tobacco Industry,'* Norwegian Agency for Health and Social Welfare (2002), at 21.

[235] *See* Section II.D.3. *supra*.

Fourth, New Jersey's position on the vanguard of environmental law is in part due to the state of New Jersey's environment. New Jersey has historically been highly industrialized, within a small geographic space. For that reason, it is not surprising that New Jersey has the highest number of present and former Superfund sites per capita of any state.[236] Environmental issues are, therefore, among the top political issues in New Jersey.

Furthermore, the re-election of President Bush also suggests that the EPA is unlikely to launch significant new NRD initiatives. The President's 2007 Budget cut funding for environmental protection by 4 percent[237] and the pace of enforcement under the EPA slowed during the first Bush administration.[238]

V.
Conclusion

In sum, industry and its insurers are wise to watch the development of New Jersey's NRD initiative. Both face potentially significant economic exposure as a result of New Jersey claims alone. However, this attention need not lead to a circle-the-wagons mentality. The various legal, political, and economic factors that have prompted New Jersey to take an aggressive stand on NRD claims may not be widely generalized to the rest of the country. Therefore, the situation should be monitored to see if the "sleeping giant" really has awakened.

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[236] *See Governor McGreevy Opposes EPA Plan to Roll Back Environmental Protections in New Jersey*, Governor's Office Press Release, dated July 9, 2002, *available at*, http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=764 (last visited Aug. 23, 2004); Melissa Milgrom, *Industrial Strength: Julie Bergmann's on a Mission. Can a Tough Girl From New Jersey Feed the EPA to Make Superfund Sites, Live and Breathe Again*, Metropolis (May 2003), *available at*, http://www.metropolismag.com/html/content_0503/bar/ (last visited July 29, 2004); New Jersey Dept. of Envtl. Protection Site Remediation and Management Programs, *New Jersey Superfund Sites on the Natural Priorities List* (June 1, 2004), *available at*, http.//www.nj.go/dep/srp/superfund/npl/.

[237] *See* Lisa Lambert, *Bush Seeks 4 pct Cut in U.S. Environment Budget*, Reuters (Mon., Feb. 6, 2006), *available at*. http://today.reuters.com/investing/financeArticle.uspx?type=bondsNews&storyID=2006-02-06T233751Z-01-N06169338-RTRIDST-0-BUDGET-BUSH-EPA.XML (last visited Feb. 8, 2006). The 2006 budget also cut the Environmental Protection Agency's discretionary budget authority by 6%, over 2005 levels, to $7.6 billion. *See* Office of Management and Budget, Budget of the United States Government Fiscal Year 2006. The 2005 budget had similarly cut enforcement funding by 7%. Chris Baltimore, *Bush Budget Cuts Environmental Funding by 7 Pct* (Reuters, February 2, 2004).

[238] *Id.* (noting that EPA intended to close 40 sites during 2004, which was less than the average annual closure rate of 86 sites per year under the Clinton EPA).