# EXPERTISE AND DISCRETION: NEW JERSEY'S APPROACH TO NATURAL RESOURCE DAMAGES

by Allan Kanner

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With a Department of Environmental Protection that predates the U.S. Environmental Protection Agency, New Jersey has always been at the forefront of combating pollution, which is to be expected of a state with a strong industrial history. It became only the third state to consolidate all environmental protection and conservation into one cohesive agency on April 22, 1970, the country's inaugural Earth Day.[1] Unlike many other states, New Jersey saw itself as ground zero in the war against irresponsible environmental pollution. It intended to launch and administer "aggressive environmental protection and conservation efforts."[2]

Six years later, New Jersey paved the way for environmental protection nationwide when it passed the New Jersey Spill Compensation and Control Act (Spill Act), once again predating the federal government's efforts and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3] Given its pioneering history, New Jersey's natural resource damage law, including the Spill Act and the public trust doctrine, remains more robust than its federal counterparts and offers an incomparable example of the success of state-based environmental protection and conservation.

Since its foundation in 1970, the New Jersey Department of Environmental Protection (NJDEP) has continually sought to keep alive its founding purpose of "aggressive environmental protection and conservation efforts." In 2003, then-Commissioner Bradley M. Campbell issued the 2003-07 Policy Directive on Natural Resource Damages, indicating that the NJDEP would continue to mount more aggressive enforcement by addressing more than 4,000 potential natural resource damage claims, doubling down on the Department's raison d'être.[4] Importantly, the top policy priority, echoing the emphasis on protection and conservation, is restoration. "For all claims, the Department's preference is for the performance of restoration work and resource protection in lieu of payment of money damages, provided that reasonable allowance is made for monitoring and oversight to ensure accountability."[5]

Environmental statutes differentiate between remediation and restoration;[6] and the fact that the NJDEP has a written policy to favor more robust and protective restoration that contemplates a holistic approach to addressing environmental damage indicates that it will exercise its expertise and broad discretion in obtaining that remedy, even in the face of protracted site remediation. It is this emphasis that distinguishes the Spill Act and NJDEP policies from federal counterparts such as CERCLA, which statutorily requires complete remediation before restoration can be considered.[7]

In recent years, the NJDEP has continued to emphasize aggressive enforcement to restore the natural resources of the state. In March 2019, after filing four new natural resource damages (NRD) lawsuits, Commissioner Catherine R. McCabe highlighted the fact that the NJDEP continues

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1. New Jersey Department of Environmental Protection (NJDEP), *About NJDEP*, https://www.nj.gov/dep/about.html (last updated Jan. 25, 2018).
2. *Id.* New Jersey has a long tradition of appreciating the public value of natural resources, including its famous Jersey Shore and the Pine Barrens. The Pinelands Protection Act was passed in June 1979 to protect this relatively undeveloped and ecologically unique area.
3. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405. Other federal laws have natural resource provisions, including the National Marine Sanctuaries Act, 16 U.S.C. §1433, and the Oil Pollution Act, 33 U.S.C. §2706(f), ELR Stat. OPA §1006.
4. NJDEP Policy Directive 2003-07 (Sept. 24, 2003), https://www.nj.gov/dep/commissioner/policy/pdir2003-07.htm.
5. *Id.*
6. Edward H.P. Brans, Liability for Damage to Public Natural Resources 67 (2001).
7. *See* Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 399, 410-12 (N.J. 2014).

> to take aggressive actions to hold polluters accountable and protect public health and the environment. It is imperative that these companies pay for the damages that they have caused and for the environmental risks they have created. We will continue to take strong measures such as these to protect the residents of the state, particularly those living in communities where the most harm has occurred.[8]

This sentiment echoes the foundational environmental law ideal: the polluter-pays principle, which emphasizes shifting the burden of environmental pollution and costs of a clean environment from the government and taxpayers to the polluting party.[9] Such an emphasis further establishes New Jersey and its NRD programming as a leader in environmental preservation and restoration.

There are two main components to this robust NRD program, namely the Spill Act and a strong public trust doctrine. As noted above, the Spill Act was enacted as "a pioneering effort by government to provide monies for a swift and sure response to environmental contamination."[10] The Act declares that the state is "the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction,"[11] and gives teeth to this authority by holding any and all persons who are responsible for the discharge of hazardous substances strictly liable, without regard to fault, for all cleanup and removal costs.[12] It is abundantly clear that the expertise and discretion of the NJDEP as trustee, exercised on a site-specific or incident-specific basis, is the best guarantee of swift, cost-effective, and appropriately scaled primary and compensatory restoration projects in the public interest.[13] That same broad discretion also allows the trustee to strive for full compensation at trial, but to settle for less than a "best day in court" approach.[14]

Though there are similarities between the Spill Act and the subsequent federal Superfund statute, CERCLA,[15] namely an emphasis on trustee discretion and expertise,[16] there are stark contrasts that render the Spill Act a more efficient and effective statute for achieving remediation and, more importantly, restoring and compensating the public trust for damages associated with the discharge of hazardous substances. The New Jersey Supreme Court highlighted some of these differences in *New Jersey Department of Environmental Protection v. Dimant*,[17] noting that "[t]here are important differences between CERCLA and the Spill Act that require some pause before assuming that an alignment in standards is appropriate."[18] Arguably, the most significant differences are CERCLA's apportionment provisions and deviations from pure strict joint and several liability, discussed below, as well as the sequencing of actions to enforce the statute.[19] While striving for the same result, the Spill Act's structure, timing, and broad application render it a more effective means by which to efficiently and completely remedy environmental damage.

Generally speaking, the damage happens to New Jersey's public trust resources, and this broad structure gives New Jersey the adequate latitude to properly serve and protect the peoples' public trust resources. New Jersey embraces a broader public trust doctrine than most other jurisdictions. Multiple New Jersey courts have unequivocally stated the right, and more importantly the duty, of the state to protect its natural resources for not only its own interest, but that of the citizens of the state.[20] The public trust has been recognized as an important aspect of New Jersey law since it was first affirmed by a New Jersey court in 1821.[21] The public trust interest even survives the transfer of public lands to private entities.[22] When the public trust doctrine is used in tandem with the Spill Act their impact cannot be understated, given the dearth of Spill Act case law.

8. Press Release, New Jersey Office of the Attorney General, AG Grewal, DEP Commissioner Announce 4 New Environmental Lawsuits Focused on Contamination Allegedly Linked to DuPont, Chemours, 3M (Mar. 27, 2019), https://www.nj.gov/oag/newsreleases19/pr20190327a.html. [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in the lawsuit concerning ExxonMobil's Lail property.]
9. NJDEP, *supra* note 1. Most environmental law at both the state and federal levels is premised on the polluter-pays principle, meaning the risk and cost associated with environmental pollution is shifted entirely to the polluter rather than the government and taxpayers. The Organisation for Economic Co-Operation and Development (OECD) explains that the principle is "to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources." OECD, *Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies*, annex para. 1, Doc. C(72)128 (May 26, 1972), *available at* 1972 WL 24710. The shifting is often accomplished by providing for strict joint and several liability within the statutory framework.
10. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 398, 37 ELR 20129 (N.J. Super. Ct. App. Div. 2007) (quoting Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 144 (N.J. 1997)); N.J. Stat. Ann. §§58:10-23.11 et seq. (1977). [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]
11. N.J. Stat. Ann. §58:10-23.11a (1998).
12. *Id*. §58:10-23.11g(c)(1).
13. Allan Kanner, *Environmental Gatekeepers: Natural Resource Trustee Assessments and Frivolous* Daubert *Challenges*, 49 ELR 10420 (May 2019).
14. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 48 ELR 20020 (N.J. Super. Ct. App. Div. 2018). [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]
15. 42 U.S.C. §§9601-9675.
16. For example, under CERCLA and the U.S. Department of the Interior's promulgated regulations, the "assessment procedures are not mandatory," indicating trustee discretion, but are required if a trustee wishes to avail itself of the rebuttable presumption provided for in the statute. 43 C.F.R. §§11.10, 11.11 (2018); 42 U.S.C. §9607(f)(2)(c).
17. 212 N.J. 153, 42 ELR 20201 (N.J. 2012).
18. *Id*. at 178.
19. *See* 42 U.S.C. §§9601-9675.
20. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 2 ELR 20519 (N.J. 1972); N.J. Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co., 125 N.J. Super. 97, 103 (N.J. Super. Ct. Law. Div. 1973), *rev'd on other grounds*, 69 N.J. 102 (N.J. 1976); Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth., 68 N.J. 451, 477, 6 ELR 20356 (N.J. 1975); N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 499, 13 ELR 20837 (N.J. 1983).
21. Arnold v. Mundy, 6 N.J.L. 1, 53 (N.J. 1821).
22. *Borough of Neptune City*, 61 N.J. 296.

Under the Spill Act, the natural resource trustee has the duty to make the public whole for losses suffered due to harm to natural resources, especially (but not exclusively) related to the release of contamination. New Jersey's natural resource restoration program is grounded in the public trust doctrine, which originates from a body of common law providing that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens,"[23] and enhanced by statute.[24] Under the public trust doctrine, "[t]he State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus."[25] Because of this obligation, trustees must have the flexibility to take into account the broad range of contaminants, habitat types, and resources found at different hazardous material sites to ensure full determination of the injury and then restoration to the public.[26]

Working in unison, the public trust doctrine, the Spill Act, and public policy favoring complete natural resource restoration have made New Jersey a leader in environmental protection, lending it well to being a model for not only other states but also the federal government. This Comment will address some of the more significant differences between federal and New Jersey law that allow the Spill Act to function in a more efficient manner, including its extensive use of the public trust doctrine, its strong restoration policy, its retroactive application, and its broad strict joint and several liability provisions, while also highlighting provisions that make environmental statutes at both the state and federal levels unique.

## I. The Spill Act

As noted above, the Spill Act is a broad statute that should be "liberally construed to effect its purposes,"[27] "which includes protection of the public health, safety and welfare . . . protection and preservation of the State's land, waters, and natural resources."[28] The Act is "quite comprehensive in its scope," and vests the NJDEP with "broad implied powers"[29] and the responsibility of using those powers to achieve its purposes. Courts have routinely ensured that the Spill Act is given the widest latitude possible to fulfill its purpose. For example, in *New Jersey Department of Environmental Protection v. Exxon Mobil Corp.* (*Exxon*), the appellate division rejected a constricted interpretation of the Spill Act in favor of "lending the Act an expansive reading"[30] confirming the long-standing interpretation in prior New Jersey cases that indicated that "provisions of the Spill Act are to be given an expansive reading to accomplish the act's goals."[31]

The provisions themselves are written broadly to ensure it is unquestionable that the statute should be read, as the courts have noted, expansively. For example, New Jersey's definition of "cleanup and removal costs" is consistent with the broad authority given to the NJDEP under the Spill Act and the Department's own authorizing legislation.[32] Among the items encompassed within the "cleanup and removal costs" for which a responsible party is liable is "the cost of restoration *and* replacement, where practicable, of any natural resource damaged or destroyed by a discharge."[33] The costs of physical restoration are part of the "cleanup and removal costs" provided for under the Spill Act.[34] The breadth of the law mirrors the scope of the problem that the legislature sought to have the NJDEP address. In addition, the Spill Act expressly retains common-law actions to facilitate comprehensive cleanups.

Like the expansive definitions, the breadth of the New Jersey trustee's discretion is plain on the face of the Spill Act. This discretion extends to matters such as the assessment of injury, the identification of pre-discharge conditions, and the determination of an appropriate remedy at a given site.[35] This discretion is also rooted in New Jersey's common law and the public trust doctrine. In addition, the trustee may, but is not required to, promulgate appropriate regulations[36] or use litigation to achieve the Act's purpose.[37] New Jersey has artfully united the most powerful tools in an environmental litigation arsenal, the public trust doctrine and broad trustee discretion, under the Spill Act.

23. N.J. Admin. Code tit. 7, §7:36-2.1 (2019); *see also* N.J. Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co., 133 N.J. Super. 375 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 69 N.J. 102 (N.J. 1976); Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 312 (1984).
24. Spill Compensation and Control Act (Spill Act), N.J. Stat. Ann. §§58:10-23.11 to -23.24(1977); Water Pollution Control Act, N.J. Stat. Ann. §§58:10A-1 to -20 (1977).
25. *Jersey Cent. Power & Light Co.*, 125 N.J. Super. at 103; *Hackensack Meadowlands Dev. Comm'n*, 68 N.J. at 477 ("In this area [of environmental concern] the State not only has a right to protect its own resources, but also has the duty to do so, in the interests of its citizens, as well as others."); *Ventron Corp.*, 94 N.J. at 499.
26. Kanner, *supra* note 13.
27. N.J. Stat. Ann. §58:10-23.11x (1977); *see Ventron Corp.*, 94 N.J. at 493-504.
28. N.J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 161, 42 ELR 20201 (N.J. 1972).
29. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 400, 37 ELR 20129 (N.J. Super. Ct. App. Div. 2007) (internal citations omitted).
30. *Id.* at 403.
31. Metex Corp. v. Fed. Ins. Co., 290 N.J. Super. 95, 114 (N.J. Super. Ct. App. Div. 1996) (citing In re Kimber Petroleum Corp., 110 N.J. 69, 18 ELR 20933 (N.J. 1988)).
32. *See* E.I. DuPont DeNemours & Co. v. N.J. Dep't of Envtl. Prot., 283 N.J. Super. 331, 342 (N.J. Super. Ct. App. Div. 1995).
33. N.J. Stat. Ann. §58:10-23.11u.b(4) (1977) (emphasis added); *see also Exxon Mobil Corp.*, 393 N.J. Super. at 404.
34. *Exxon Mobil Corp.*, 393 N.J. Super. at 405.
35. The statutory grant of discretion to trustees is discussed in Kanner, *supra* note 13.
36. N.J. Site Remediation Indus. Network v. N.J. Dep't of Envtl. Prot., No. A-5472-97T3, 2003 WL 22053346 (N.J. Super. Ct. App. Div.), *cert. denied*, 165 N.J. 528 (N.J. 2000).
37. N.J. Soc'y for Envtl., Econ. Dev. v. Campbell, No. MER-L-343-04 (N.J. Super. Ct. Law Div. 2004).

## II. Public Trust

The public trust doctrine refers to the common-law doctrine that the state holds the natural resource of the state "in trust for the people."[38] The public trust extends to navigation, commerce, fishing, and "recreational uses, including bathing, swimming and other shore activities."[39] First propounded by the Romans, the public trust doctrine has been recognized across the common law around the world as giving the public, "by the law of nature," the common right to "the air, running water, the sea, and . . . the shores of the sea."[40] The doctrine has been expanded over the decades to cover more than the water bottoms and shore of the early case law.[41]

Since being recognized by the courts in 1821 in *Arnold v. Mundy*,[42] the public trust doctrine in New Jersey has continued to evolve and expand to suit the needs of the people of the state. The court in *Arnold* held that the public trust included land between the high and low tidewater levels, dispelling the notion that the doctrine might apply just to tidal waters. Still more, the public trust doctrine has been applied in New Jersey not only to the resources themselves, such as marshes and upland forests, but also to the public's right to recreational uses, for example in the tidal lands, including bathing, swimming, and other shore activities.[43] Such expansion and evolution is in line with and has been observed by the courts.

For instance, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court opined: "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet the changing conditions and needs of the public it was created to benefit."[44] It has gone so far as to hold private property rights, *jus privatum*, subservient to the public trust, *jus publicum*. In *National Ass'n of Home Builders v. New Jersey Department of Environmental Protection*, the court held that title to riparian property or

> public trust property is subject to the public's right to use and enjoy the property, even if such property is alienated to private owners . . . This right of the public to use and enjoy such "public trust lands" does not disappear simply because the land that was once submerged is filled in.[45]

In that case, the public trust doctrine took precedence over the private riparian landowner despite the fact that the state did not expressly retain its right as a public trustee in the conveying instrument.

This evolution and expansion mirror the broad scope of the Spill Act and in fact work to enhance it. Unlike many statutes that limit the application of common-law doctrines under the guise of preventing double recovery, the Spill Act expressly retains and enhances New Jersey's common-law public trust doctrine and the common law generally.[46] When passing the Spill Act, the legislature specifically, and for good reasons, reserved the common law as part of the state's authority to protect the environment.[47] Common-law remedies remain available "in addition to" statutory causes of action for environmental injury.[48]

Public trust law vests the state with control over the *res* of the trust, the natural resources of the state, and bestows upon the state affirmative duties to act as a fiduciary to the trust corpus.[49] "[Trustees] hold and administer the properties; they and they alone represent both the donors and the beneficiaries."[50] The natural resources at particular sites are "held, protected, and regulated for the common benefit" by the state.[51] The U.S. Supreme Court has held that the public trust is inalienable, and thus the rights held by the state in the resources at particular sites cannot be transferred to another party.[52] In addition, New Jersey courts have held that even historic grants are subject to revisions based on contemporary views of the public trust.[53]

The Spill Act incorporates the totality of the *res* of the public trust when defining the resources it seeks to protect. It states, in part:

38. City of Long Beach v. Liu, 203 N.J. 464, 474-76 (N.J. 2010) (quoting Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 316-17 (N.J. 1984)).
39. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 2 ELR 20519 (N.J. 1972).
40. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 51 (N.J. 2005).
41. *See* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y F. 57 (2005).
42. 6 N.J.L. 1 (N.J. 1821).
43. *Borough of Neptune City*, 61 N.J. at 309.
44. *Id.*
45. 64 F. Supp. 2d 354 (D.N.J. 1999).
46. N.J. Stat. Ann. §58:10-23.11v (1977).
47. *Id.*
48. N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 493, 13 ELR 20837 (N.J. 1983).
49. Allan Kanner, *Natural Resource Restoration*, 28 Tul. Envtl. L.J. 355, 360-61 (2015).
50. Trustees of Rutgers Coll. in N.J. v. Richman, 41 N.J. Super. 259, 292-93 (N.J. Super. Ct. Ch. Div. 1956) (quoting Austin W. Scott, *Education and the Dead Hand*, 34 Harv. L. Rev. 1 (1920)).
51. *Arnold v. Mundy,* 6 *N.J.L.* 1, 71 (N.J. 1821).
52. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452, 453 (1892) (stating that the "trust devolving upon the state for the public, . . . can only be discharged by the management and control of property in which the public has an interest" and that "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties"); *see also* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (N.J. 1994) (finding the public's rights held in tidewater property are not lost as a result of grants or leases); O'Neill v. State Highway Dep't, 50 N.J. 307 (N.J. 1967). The "State's rights as public trustee exist even if the property has been alienated." N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, 2008 WL 4177038 (N.J. Super. Ct. Law Div. Aug. 29, 2008).
53. *E.g.*, East Cape May Assocs. v. N.J. Dep't of Envtl. Prot., 343 N.J. Super. 110 (N.J. Super. Ct. App. Div. 2001); Karam v. N.J. Dep't of Envtl. Prot., 308 N.J. Super. 225 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 157 N.J. 187 (N.J. 1999); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 51 (N.J. 2005); National Ass'n of Home Builders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 358-59 (D.N.J. 1999).

> New Jersey's lands and waters constitute a unique and delicately balanced resource; . . . the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; . . . the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State[;]

and "the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State."[54] As such, natural resources are broadly defined in the Spill Act to include "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State,"[55] or, in other words, public trust resources.[56]

The Spill Act identifies the NJDEP as the trustee of the natural resources of the state, charged with protecting, maintaining, and growing the public trust.[57] The Department is also charged with assessing damages and determining the best restoration remedy. The NJDEP, as trustee, therefore has the authority to carry out the purpose of the public trust doctrine (i.e., to protect the state's natural resources for the benefit of its citizens).[58]

As recognized by the appellate division: "The common law remains important in DEP's litigation efforts, especially for filling in any gaps in relief that the statutes may fail to cover, so justice demands that polluters not be allowed to erode DEP's broad enforcement authority."[59] The public trust stems from this common law, which makes these founding principles paramount in the trustee's arsenal of remedies for NRD. For example, bulldozing a stream to block the future flow of hazardous wastes is clearly covered by the common law, likely as a public nuisance, but it also is meant to facilitate discharges of hazardous substances, which presents a release or threat of release, activating the applicable language in the Spill Act that may reach the same remedies as it relates to bulldozing the stream.[60]

54. N.J. Stat. Ann. §58:10-23.11a.
55. *Id.* §58:10-23.11b.
56. New Jersey has emphasized the importance of these resources elsewhere in its environmental protection laws, going so far as to state in its Green Acres Program administered by the NJDEP that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens." N.J. Admin. Code tit. 7, §7:36-2.1 (2019).
57. N.J. Stat. Ann. §58:10-23.11a (1998).
58. *See* Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) ("Under the common law of trusts, . . . trustees are understood to have all 'such powers as are necessary or appropriate for the carrying out of the purposes of the trust.'") (quoting 2 Austin Scott, The Law of Trusts §186, at 1496 (3d ed. 1967)).
59. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. A-0314-09T2, slip op. at 11 (N.J. Super. Ct. App. Div. May 31, 2011). [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]
60. Federal common law is generally not thought to be useful in a CERCLA case. The federal courts treat federal public law as displacing federal common law, though it provides savings clauses for state laws. 42 U.S.C. §9614(a), §9652(d). The Spill Act is quite different from CERCLA in that it expressly anticipates a robust role for common law.

The duties owed by a public trustee do not differ from those of a private trustee.[61] New Jersey courts have adopted §174 of the Restatement (Second) of Trusts, which states that "[t]he fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care."[62] The comments to §174 of the Restatement of Trusts clarify that if the trustees were selected because they have specialized knowledge or training, they will be held to that standard of skill and care: "[I]f the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill."[63]

### A. *Is There a Federal Public Trust Doctrine Equally Applicable Under CERCLA?*

By and large, courts have been reluctant to recognize an extensive federal public trust and common-law recoveries under CERCLA; that is not to say it is impossible, however it highlights, yet again, a difference that underscores the robust nature of the Spill Act's application. Recent cases have suggested that the public trust may apply to the federal government,[64] and the federal government is responsible for assigning natural resource trustees for purposes of various environmental statutes,[65] but there is no definitive definition of the federal public trust. As such, state statutes like the Spill Act generally address the public trust in a more robust manner than their federal counterparts. Recognizing the states' unique domain over the public trust and the natural resources within their borders, the federal environmental statutes provide savings clauses for state law to ensure that their broad authority remains intact to the greatest extent possible.[66]

### B. *The Trustee at Work*

Between the mandates of the Spill Act and application of the public trust doctrine, following a disaster or discovery of chronic NRD, trustees are legally responsible to conduct a natural resource damage assessment (NRDA).[67] Trustees

61. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 368 N.J. Super. 425, 438 (N.J. Super. Ct. App. Div. 2004), *aff'd as modified sub nom.* 183 N.J. 519 (N.J. 2005).
62. Restatement (Second) of Trusts §174 (1959); *see also* F.G. v. MacDonell, 150 N.J. 550, 564 (N.J. 1997); McKelvey v. Pierce, 173 N.J. 26, 57 (N.J. 2002).
63. Restatement (Second) of Trusts §174 (1959).
64. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 46 ELR 20175 (D. Or. 2016).
65. *See* Oil Pollution Act, 33 U.S.C. §2706(b); Clean Water Act, 33 U.S.C. §1321(f)(5); CERCLA, 42 U.S.C. §9607(f)(2).
66. *See* CERCLA, 42 U.S.C. §9614(a); Oil Pollution Act, 33 U.S.C. §2718(a); Clean Water Act, 33 U.S.C. §1370; Resource Conservation and Recovery Act, 42 U.S.C. §6929.
67. Transcript of Trial at 3:18-21, N.J. Dep't of Envtl. Prot. v Exxon Mobil Corp., Nos. UNN-L-3026-04 (N.J. Super. Ct. Law Div. July 22, 2014) (testimony of Exxon Mobil's expert witness Dr. Ginn on cross-examination). [Editor's Note: Allan Kanner represents the New Jersey Department of En-

are given the discretion to enter into a cooperative agreement with the responsible party; however, absent such agreement, the trustee conducts the entire NRDA itself, and is afforded a presumption of regularity in fulfilling its statutory mandate.[68]

## III. Deference to the NJDEP

Like the federal courts that generally defer to agency action at the federal level,[69] the New Jersey courts routinely defer to New Jersey state agencies, especially the NJDEP. Under traditional administrative law, "[t]he grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals."[70] Such a mandate leads to significant deference. While a "court is not *bound* by an agency's interpretation of a statute . . . [the] Supreme Court has placed 'great weight on the interpretation of legislation by the Administrative Agency to whom enforcement is entrusted.'"[71] Courts have routinely recognized the special expertise of the agency, stating that "[w]here two or more reasonable permissible alternatives exist, the choice exercised by the administrative agency charged with the responsibility of implementing a statute, will not be disturbed on appeal."[72] Deference extends to such agency interpretations unless they are "manifestly unreasonable or at variance with plain statutory terms or judicial interpretations."[73]

That being said, if an agency's decisions are challenged, there is a significant hurdle for both the challengers and the courts to overcome. "[T]he burden of proving unreasonableness falls upon those who challenge the validity of the action."[74] The reviewing court "should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence."[75] The federal environmental statutes went so far as to build in a rebuttable presumption to ensure this deference to a trustee following an NRDA.[76]

Deference to environmental agencies is traditionally attributed to the fact that these agencies, both at the state and federal levels, are considered experts in their relevant fields and promulgate rules that must take significant technical and scientific consideration into account.[77] The NJDEP, by virtue of its designation as the natural resource trustee and the technical nature of the statutes it is responsible for enacting and natural resources it is charged with protecting, therefore receives significant deference from the courts.[78] Courts observe that the "cleanup of hazardous wastes is a complex problem, involving the delicate balance of environmental protection with concerns for the State's economy and public health. As the Legislature has recognized, so complicated a subject calls for the expertise of an administrative agency."[79] Case law has also recognized the "vastly more complex hazard posed by the unseen and unknown contamination of natural resources,"[80] which calls for specific expertise. These technical and scientific considerations have given rise to traditional jurisprudential doctrines like the *Chevron* two-step analysis under the Administrative Procedure Act and the primary jurisdiction doctrine, which will allow a court to defer to an agency's judgment if the issue involves an agency's special competence, particular expertise, or its "fact finding prowess."[81]

Part of the reason for deference to trustee expertise is tied to the site-specific nature of most NRD cases and the trustee's responsibility to integrate law, policy, and

vironmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]

68. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 13 ELR 20672 (1983).
69. Many have predicted that the current Supreme Court has signaled a desire to reexamine the seminal deference cases, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), and begin to limit this traditional practice.
70. Muise v. GPU, Inc., 332 N.J. Super. 140, 158 (N.J. Super. Ct. App. Div. 2000) (holding the Board of Public Utilities to be entitled to deference in its interpretation of its enabling statute).
71. In re Terminated Aetna Agents, 248 N.J. Super. 255, 285 (N.J. Super. Ct. App. Div. 1990) (quoting Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 69-70 (1978)).
72. In re N.J. Med. Malpractice Reinsurance Recovery Fund Surcharge, 246 N.J. Super. 109, 126 (N.J. Super. Ct. App. Div. 1991).
73. Union Ink Co., Inc. v. AT&T Corp., 352 N.J. Super. 617, 630 (N.J. Super. Ct. App. Div. 2002).
74. Smith v. Ricci, 89 N.J. 514, 525 (N.J.), *appeal dismissed*, 459 U.S. 962 (1982).
75. In re Application of Virtual-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (N.J. 2008); *see also* Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (N.J. 2009).
76. For a more detailed discussion of this presumption, see Kanner, *supra* note 13.
77. In re Freshwater Gen. Permit No. 7, 405 N.J. Super. 204 (N.J. Super. Ct. App. Div. 2009) (finding the NJDEP's conclusion that ice rink that created approximately a quarter-acre of impervious cover and disturbing more than an acre of land was not a "major development" under N.J. Admin. Code §7:8-1.2, was entitled to deference. "A strong presumption of reasonableness accompanies an administrative agency's exercise of statutorily-delegated responsibility." (citing Gloucester Cty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (N.J. 1983))).
78. SJC Builders, LLC v. N.J. Dep't of Envtl. Prot., 378 N.J. Super. 50, 54 (N.J. Super. Ct. App. Div. 2005). Courts grant deference to agency expertise on technical matters where such expertise is a pertinent factor. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (N.J. 2001).
79. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 451 (N.J. 1992). *See also* City of Newark v. Nat. Res. Council, Dep't of Envtl. Prot., 82 N.J. 530, 540 (N.J. 1980) (court relied on administrative expertise in upholding maps drawn by NJDEP); GAF Corp. v. N.J. Dep't of Envtl. Prot., 214 N.J. Super. 446, 452-53 (N.J. Super. Ct. App. Div. 1986) (upholding NJDEP's bioassay methodology to determine fee for pollution discharge permits).
80. Buonviaggio v. Hillsborough Twp., 122 N.J. 5, 9 (N.J. 1991). *Id.* at 10 ("DEP exerted its extraordinary administrative powers under the Spill Fund"; . . . "pursuant to its 'broad implied powers' under the Act") (referring to *In re Kimber Petroleum Corp.*, 110 N.J. 69, 18 ELR 20933 (N.J. 1988), and *In re J.I.S. Indus. Servs.*, 110 N.J. 101, 18 ELR 20951 (N.J. 1988)). *Accord* N.J. Site Remediation Indus. Network v. N.J. Dep't of Envtl. Prot, No. A-5272-97T3 (N.J. Super. Ct. App. Div. 2000) (reasoning that the legislature granted NJDEP expansive authority to address and recover NRD in contamination cases).
81. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984); Columbia Gas Transmission Corp. v. Allied Chem. Corp., 652 F.2d 503, 519 n.15 (5th Cir. 1981).

science.[82] Deference should be extended to an agency's decision that "rests upon factual findings or policy judgments that involve technical matters within the special expertise of the agency."[83] The NJDEP, as the designated natural resource trustee, "'has been delegated discretion to determine the specialized and technical procedures for its tasks.'"[84]

This deference is significant when considering the fact that each damaged site has its own set of data gaps and corresponding need for the NJDEP to make assumptions, judgment calls, and use of modelling.[85] It is important to note that this goes beyond the current physical characteristics of a site and its unique ecological history and subsequent sequence of discharges and migration, which are factors that impact investigative options, but includes considerations of restoration options in line with New Jersey policy. There is neither a single best way to investigate damages nor a single best approach to a restoration plan. Rather, a range of potential choices are available and the trustee needs to exercise discretion and expertise in assessing these choices in light of applicable law, science, and policy.[86]

## IV. Remediation Versus Restoration

In cases dealing with environmental disasters, accidents, and historic contamination, attorneys always take pains to distinguish between remediation and restoration for purposes of advancing an NRD claim. Remediation focuses on cleaning up a site, whether it be removal of soils or filtering of water, but does not deal with putting the site back into the condition it would have been in had the disaster or accident never occurred. Restoration, on the other hand, focuses on the holistic approach to achieving that pre-discharge condition to the extent possible.

While both are important for the recovery of the environment, restoration aligns far more with the ultimate goals of the Spill Act and the federal environmental statutes, though the Spill Act provides mechanisms that enable more efficient restoration than its federal counterparts. Courts have highlighted the NJDEP's "preference 'for the performance of restoration work and resource protection in lieu of payment of money damages,'" which they consider to be a "'forward-looking' approach seeking natural resource improvements to make up for historical lost use, instead of a 'backward-looking' settlement of a dollar judgment owing."[87] This distinction highlights the major differences between restoration and remediation.

New Jersey recognizes an important distinction between restoration and remediation. The Spill Act allows for the recovery of cleanup and removal costs, which encompasses both remediation and restoration. Remediation, which under the Spill Act expressly exempts the payment of NRD, is meant to restore the site to "risk-based," otherwise known as regulation-based, standards (i.e., what the site should be in order to be in compliance with relevant permits and regulations).[88] Restoration then contemplates restoring the site to pre-discharge conditions, or the natural state of the resources themselves in the absence of a discharge. It also involves compensatory restoration, which includes the compensation for the interim lost value and use of the natural resources.

The Superior Court of New Jersey recognized in *Exxon* that "'remediation' to risk-based standards is different from 'restoration' of natural resources to pre-discharge conditions (primary restoration) . . . Remediation, then, is just one of the processes covered by the broad definition of 'cleanup and removal costs' . . . ."[89] The court explained that limiting recoverable damages under the Spill Act to only include remedial and removal costs, a step in the direction of restoration, "fails to make the public whole for its loss," and "creates a disincentive for polluters to undertake timely remedial action." It concluded that only allowing primary restoration damages would be "inconsistent with the purpose and obvious meaning of the act."[90]

The federal view of restoration as compared to remediation is not vastly different. Courts have noted that "customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment."[91] Such an evaluation fits well within the definition of "restoration" used in New Jersey's Spill Act. But while restoration is viewed in a similar light under the federal and Spill Act regimes, the timing with which claims for such restoration can be made is significantly different.

For example, a major procedural difference between New Jersey's Spill Act and CERCLA is the timing in which an agency may pursue restoration damages. The Spill Act allows the trustee to pursue restoration damages while site remediation is ongoing,[92] while CERCLA requires

82. Kanner, *supra* note 13.
83. Medical Soc'y of N.J. v. Bakke, 383 N.J. Super. 498, 510 (N.J. Super. Ct. App. Div. 2006). Indeed, the agency has the "staff, resources and expertise to understand and solve those specialized problems." Bergen Pines Cty. Hosp. v. N.J. Dep't of Human Servs., 96 N.J. 456, 474 (N.J. 1984).
84. In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (N.J. Super. Ct. App. Div. 2004) (quoting City of Newark v. Nat. Res. Council, Dep't of Envtl. Prot., 82 N.J. 530, 540 (N.J.), *cert. denied*, 449 U.S. 983 (1980)).
85. Kanner, *supra* note 49, at 378-79.
86. *See* Kanner, *supra* note 13.
87. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 402, 37 ELR 20129 (N.J. Super. Ct. App. Div. 2007).
88. *Id.*
89. *Id.* at 406.
90. *Id.*
91. Utah v. Kennecott Corp., 801 F. Supp. 553, 568, 23 ELR 20257 (D. Utah 1992).
92. *See* N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, 2006 WL 1477161 (N.J. Super. Ct. Law Div. May 26, 2006). [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]

that remediation be completed before restoration may be pursued. This is largely because under the federal scheme, restoration damages are seen as residual damages that cannot be ascertained before restoration is complete.[93] CERCLA provides that "an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities)."[94] The statute further provides that "[i]n no event" may such an action be commenced "before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study" under 42 U.S.C.A. §9604(b) or §9620.[95]

Conversely, New Jersey recognizes that, generally speaking, restoration has different goals from site remediation and relies on different ecological assessments.[96] The very definition of "remediation" in the Spill Act excludes "payment of compensation for damage to, or loss of, natural resources."[97] An NRD case seeks recovery for "damage to" and "loss of" natural resources. It therefore focuses on the remedies available for those damages and losses, which include "restoration and replacement," irrespective of "remediation."[98] As such, the Spill Act provides the necessary avenues for recovery of these damages as early and efficiently as possible, indicating that, despite arguments to the contrary, primary restoration is not duplicative of defendants' remediation obligations.[99]

## V. Retroactivity

Retroactive application of a statute has significant implications for the extent and quantity of damages any given environmental agency may recover in an NRD case. The Spill Act, unlike CERCLA, is fully retroactive. CERCLA will only address pollution that postdates 1980. This has important implications for a trustee's determination of the baseline, or the pre-pollution condition of the natural resources, which will then influence any studies performed during the pendency of an NRDA. Further, it will significantly impact the calculation of damages, including the restoration damages, discussed above, that contemplate loss of use, which are based largely on the duration of impact prior to actual restoration.

For example, pre-pollution baselines at historic contamination sites in New Jersey, such as a manufactured gas plant, may go back to the turn of the century. Under the federal regime, however, damages can only be calculated post-1980, leaving the previous 80 years of damage without a remedy. The Spill Act, however, is fully retroactive, allowing the trustee to take into consideration the entire century of damage.

This retroactivity makes sense in terms of the history of environmental protection that originated in common property tort law. The court in *Exxon* took pains to explain that "'[t]orts against the environment find their origins in the law of nuisance and trespass,'"[100] and that the Spill Act "has been viewed as a codification of the common law cause of action in nuisance, under which 'the State has the right to obtain damages for an injury to public resources or the environment.'"[101] It further explained that "[i]ndeed, our Supreme Court has held that the Spill Act did 'not so much change substantive liability as it establishe[d] new remedies for activities recognized as tortious both under prior statutes and the common law.'"[102] Then, in *N.J. Dep't of Envtl. Prot. v. Ventron*, the New Jersey Supreme Court also reminded us that responsible parties violated numerous applicable (though generally unenforced) environmental laws on the books at the turn of the century and thereafter.[103]

In *Exxon*, after the court had ruled in favor of retroactivity of the Spill Act, defense experts nevertheless criticized the state trustee's decision to assess baseline as the pre-discharge condition of the property at the turn of the century, before the responsible party's industrial activities fully commenced.[104] As a policy choice, this makes perfect sense if the trustee's goal is to restore the injured resources and it is allowed by law, and, as noted extensively above, is in line with the broad authority and discretion granted to the NJDEP.[105] Given the decision on retroactivity, the trustee's policy of seeking up to the maximum restoration damages in litigation is legally appropriate.

## VI. Strict Joint and Several Liability

A significant tool in the broad powers and authority of the NJDEP is the Spill Act's strict joint and several liability.[106] It states:

93. *Kennecott* Corp., 801 F. Supp. at 568 ("As a residue of the cleanup action, in effect, [NRD] are thus not generally settled prior to cleanup settlement." (quoting In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1035, 19 ELR 21210 (D. Mass. 1989)), *appeal dismissed*, 14 F.3d 1489 (1st Cir.), *cert. denied*, 513 U.S. 872 (1994).
94. 42 U.S.C.A. §9613(g)(1)(B).
95. *Kennecott* Corp., 801 F. Supp. at 568 (quoting In re Acushnet River & Bedford Harbor, 712 F. Supp. 1019, 1035, 19 ELR 21210 (D. Mass. 1989)).
96. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 406, 37 ELR 20129 (N.J. Super. Ct. App. Div. 2007).
97. N.J. Stat. Ann. §58:10-23.11b (2019).
98. *Exxon Mobil Corp.*, 393 N.J. Super. at 406.
99. *See id*. As the court noted, allowing for the recovery of these damages simultaneously ensures there is incentive for timely remediation.
100. *Id*. at 353.
101. *Id.*
102. *Id.*
103. 94 N.J. 473, 13 ELR 20837 (N.J. 1983).
104. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. L-3026-04 consolidated with No. L-1650-05 (N.J. Super. Ct. Law Div. Jan. 22, 2009). [Editor's Note: Allan Kanner represents the New Jersey Department of Environmental Quality as Lead Counsel in this lawsuit concerning ExxonMobil's Bayway/Bayonne sites.]
105. In re Kimber Petroleum Corp., 110 N.J. 69, 74, 18 ELR 20933 (N.J. 1988) (highlighting the fact that NJDEP is vested with "broad implied powers" to implement its goals).
106. *See* Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 146 (N.J. 1997) (discussing 1979 Spill Act Amendments); *see also Ventron Corp.*, 94 N.J. at 502.

> [A]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c. 141 (C.58:10-23.11f).[107]

As the *Dimant* court recognized:

> [T]he Spill Act and CERCLA differ significantly with respect to liability. The Spill Act renders parties liable, jointly and severally, for damages, and CERCLA permits divisibility among responsible parties. *Compare* N.J.S.A. 58:10-23.11g(c)(1) (imposing joint and several liability on any person or entity in any way responsible for discharge of hazardous substance), *with Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-615, 129 S. Ct. 1870, 1880-81, 173 L. Ed. 2d 812, 825 (209) (interpreting CERCLA as providing for apportionment among responsible parties when reasonable basis exists for determining individual contributions). Thus, liability under the Spill Act carries significantly different and potentially more severe consequences than CERCLA liability.[108]

The Spill Act once again provides a more streamlined and far-reaching regime than its federal counterparts. Notably, by providing for strict joint and several liability, responsible parties cannot slow down remediation, restoration, or litigation by pointing fingers at one another prior to initiating cleanup, a tactic that serves only the polluters' interests. The Spill Act, like the Oil Pollution Act, obviates the need for this finger-pointing by providing for a separate contribution action that allows responsible parties to apportion damages separate and apart from the main action.[109] Whereas in federal cases, where a defendant can show reasonable basis for apportioning harm among different causes, apportionment may be appropriate, which only serves to slow down the progress of restoration.[110] However, it is rare that a defendant can demonstrate distinct injuries caused by different sources warranting apportionment. Despite this, the Spill Act still unequivocally provides a more efficient restoration remedy.

## VII. Causation

The Spill Act and CERCLA diverge in their application of causation standards, and in this instance, the Spill Act is arguably more restricted despite the fact that neither provides specific causation language. Both the Spill Act and CERCLA, as indicated by their legislative histories, reject a proximate causation test in favor of more lenient causation standards.[111] However, unlike CERCLA, which only requires "some connection" between a release of a hazardous substance and the related costs incurred, the Spill Act requires that there be a "reasonable nexus or connection [that] must be demonstrated by a preponderance of the evidence."[112]

This nexus originates in the Spill Act's definition of discharge and the way in which joint and several liability attaches. The lower court in *Dimant* explained that "[d]ischarge liability under the Spill Act does not result from passive migration of hazardous materials already present in the soil or in the groundwaters," nor is "placement of hazardous waste stored in containers a 'discharge'"; rather, "a discharge is some action resulting in an environmental effect *caused* by an interaction with the environment."[113] Further, "clean up and removal costs" are those costs that are "direct costs *associated with* a discharge, and those indirect costs that may be imposed by the department . . . *associated with* a discharge, incurred by the State or its political subdivisions."[114]

The court in *Dimant* has read these phrases of connection together with prior case precedent to establish that "some nexus between the use or discharge of a substance and its contamination of the surrounding area is needed to support a finding of Spill Act liability."[115] The New Jersey Supreme Court went on to explain that in an action for damages under the Spill Act:

> A reasonable nexus or connection must be demonstrated by a preponderance of the evidence. As the Third Circuit noted, in a case that the Appellate Division cited favorably . . . while a plaintiff need not "trace the cause of the response costs" to each defendant in a multi-defendant case involving a contaminated site, it is not enough for a plaintiff to simply prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site and "ask the trier of fact to supply the link."[116]

The court did recognize, however, that in the instance of an injunction, "proof of the existence of a discharge" is sufficient to obtain prompt relief.[117]

107. N.J. Stat. Ann. §58:10-23.11g.c(1) (2019).
108. N.J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 178-79, 42 ELR 20201 (N.J. 2012).
109. N.J. Stat. Ann. §58:10-23.11g.c(2) (2019).
110. Coeur d'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1120 (D. Idaho 2003) (citing Restatement (Second) of Torts) (1965).
111. *See Dimant*, 212 N.J. at 179.
112. *Id.* at 182.
113. N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 544 (N.J. Super. Ct. App. Div. 2011).
114. *Id.*; *see also* N.J. Stat. Ann. §58:10-23.11b (2019).
115. *Dimant*, 418 N.J. Super. at 543.
116. *Dimant*, 212 N.J. at 182.
117. *Id.*

CERCLA, on the other hand, requires only some connection between the pollution and the costs incurred.[118] Courts have opined that "[t]o require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute."[119] A trustee operating under CERCLA need not provide "proof of ownership" or release of specific hazardous materials that cause injury,[120] rather he or she "need only demonstrate that defendant's release was a contributing factor to the injury."[121] This is not as burdensome as the Spill Act's standard, which requires "a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site."[122]

## VIII. Injury and Damages

One of the most significant purposes of the Spill Act is to "provide liability for damages sustained within this State as a result of any discharge" of hazardous substances.[123] Important to the application of this purpose is the Act's and applicable regulations' definitions of "injury" and "damages." Injury is defined as "any adverse change or impact of a discharge on a natural resource or impairment of a natural resource service, whether direct or indirect, long term or short term, and includes the partial or complete destruction or loss of the natural resource."[124]

Determination of damages therefore relies on the breadth of the injury. These damages are defined in the New Jersey technical regulations as "the amount of money the [NJDEP] has determined is necessary to restore, rehabilitate, replace or otherwise compensate for the injury to natural resources as a result of a discharge."[125] These definitions comport with the broad discretion given to the NJDEP as the trustee of the state's natural resources and further the goal of the Department's 2003-07 Policy Directive favoring primary restoration.

Similar to the Spill Act, the federal definition of injury is flexible and encompasses exposure, harm, and causality.[126] Specifically, the federal NRDA regulations split the types of injury definition into resource categories, like surface water, groundwater, and air, and indicate that an injury has occurred if there is any measured change in the physical or chemical quality of the resource based on listed criteria.[127] Importantly, CERCLA itself lacks clarity on the issue of damages and injury, with courts noting that the statute itself is "not a paradigm of clarity or precision."[128] CERCLA defines damages as "damages for injury or loss of natural resources," which has been interpreted to mean the "monetary quantification stemming from an injury."[129] While uncertainties have been raised in the interpretation of the Spill Act and associated regulations, the Act provides substantial guidance to the trustee.

Despite these differences, both the federal and state statutes offer broad discretion to trustees to quantify and measure injury and damages. Neither the federal government nor the state limits itself to equating injury only to exceedances of standards, criteria, and other limits. Rather, they have multiple methods of assessment at their disposal. As the 2003-07 Policy Directive noted, "responsible parties might alleviate the effects on the public of the loss of use of natural resources by providing 'substitute resources or resource services,' which could be 'both in-kind and out-of-kind.'"[130]

This language mirrors the widely accepted NRDA techniques called habitat equivalency analysis (HEA) and resource equivalency analysis, which were codified along with other methodologies in federal regulations for both the National Oceanic and Atmospheric Association and the U.S. Department of the Interior in 2008, and have been widely accepted and used since the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit case *Ohio v. U.S. Department of the Interior*.[131] HEA "is a method by which to determine damage costs that focuses primarily on habitat-to-habitat restoration rather than attempting to pin a market value price tag on a given resource. It contemplates the whole ecosystem rather than compartmentalizing specific aspects."[132] In all, both federal statutes and the Spill Act give trustees wide latitude to determine the best methods by which to calculate the damages that will allow them to properly restore natural resources and compensate the public trust.

118. *Dimant*, 418 N.J. Super. at 542.
119. United States v. Wade, 577 F. Supp. 1326, 1332-33, 14 ELR 20096 (E.D. Pa. 1983) ("[T]o require plaintiffs, under CERCLA to fingerprint waste is to eviscerate the statute."); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1402, 16 ELR 20763 (D.N.H. 1985) (CERCLA "does not require the government to match the waste found to each defendant as if it were matching fingerprints" at a crime scene); United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 993, 14 ELR 20272 (D.S.C. 1984) (stating that the identification of all waste types and the conglomerate of materials at the dumpsite would cost approximately five times the cost of removal); United States v. Monsanto, 858 F.2d 160, 170, 19 ELR 20085 (4th Cir. 1988) (citing United States v. Wade, 577 F. Supp. 1326, 1332, 14 ELR 20096 (E.D. Pa. 1983)); In re Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897-98, 20 ELR 20204 (D. Mass. 1989); Coeur d'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003) (holding that the burden is on defendants to demonstrate a reasonable basis to apportion harm).
120. *Monsanto*, 858 F.2d at 169-71; *Acushnet River & New Bedford Harbor*, 722 F. Supp. at 897-98 (noting that although some of the hazardous materials released were federally permitted to be released, unless defendants could prove that the harm from such release was divisible from the overall harm, defendants would be jointly and severally liable).
121. *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1124.
122. *Dimant*, 212 N.J. at 182.
123. N.J. Stat. Ann. §58:10-23.11a (1977).
124. N.J. Admin. Code tit. 7, §7:26E-1.8 (2019).
125. *Id.*
126. 43 C.F.R. §11.62 (2018).
127. *Id.*
128. *Acushnet River & New Bedford Harbor*, 716 F. Supp. at 681 (quoting Artesian Water Co. v. New Castle Cty., 851 F.2d 643, 648, 18 ELR 21012 (3d Cir. 1988)).
129. *Id.*
130. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 395, 37 ELR 20129 (N.J. Super. Ct. App. Div. 2007).
131. Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 19 ELR 21099 (D.C. Cir. 1989).
132. Allan Kanner & Caitrin Reilly, *Like a Phoenix Rising From the Ashes: Melding Wildfire Law Into a Comprehensive Statute*, 33 J. Envtl. L. & Litig. 47, 52 (2018).

## IX. Enumerated Defenses

The Spill Act enumerates only three defenses (in addition to an "innocent purchaser" defense, available if the discharge occurred prior to the purchase and the purchaser was not aware of the discharge following an appropriate inquiry): "an act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act."[133] Notably, the existence of a discharge permit is not an enumerated defense to the Spill Act.

In *Exxon*, the court held that the "permitted discharges defense" asserted by defendant "is a defense that goes to liability, not to damages."[134] The court explained in part that "the permitted hazardous substance discharge exception under [N.J. Statutes Annotated §58:10-23.11(c)] merely allows for such a discharge without being in violation of the prohibition on the discharge of hazardous substances, and thereby expose a permit-holder to other enforcement provisions and other requirements either statutory or regulatory."[135] The Spill Act provides:

> The discharge of hazardous substances is prohibited. *This section shall not apply to discharges of hazardous substances pursuant to and in compliance with the conditions of a Federal or State permit* or to any discharge of petroleum to the surface waters of the State that occurs as a result of the process of recovering, containing, cleaning up or removing a discharge of petroleum in the surface waters of the State and that is undertaken in compliance with the instructions of a federal on-scene coordinator or of the commissioner or the commissioner's designee.[136]

This provision relates to the general prohibition of any discharge and, by its own terms, does not apply to the Spill Act's liability provisions.[137] Thus, "the exception applies only to the general prohibition of hazardous substances discharges and not to the overall Spill Act including the statutory remedy of natural resources damages."[138] The definition of "discharge" contained in the Act also does not exempt permitted discharges,[139] nor does the strict liability provision.[140]

This contrasts with the federal scheme, where, under CERCLA, there is such a statutory defense available in connection with permitted releases; but that defense specifically preserves "the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance."[141] It is important to note, however, that the CERCLA exception to liability for permitted discharges is not absolute.[142]

Other release-related defenses that responsible parties may raise include de minimis releases, or those that they would argue do not have a significant impact on natural resources. The New Jersey Supreme Court in *Dimant* clearly established that there is no such exception in the Spill Act: "There is plainly no *de minimis* exception to the Spill Act's prohibition against the discharge of a hazardous substance."[143] As such, any level of contamination may be actionable as an injury, which conforms with the broad definitions of injury and damages, strict joint and several liability, and the policies favoring complete restoration of the public trust, discussed above.

Conversely, CERCLA explicitly provides for a de minimis exception.[144] The Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. United States* explained that a potentially responsible party would be required to establish this de minimis exception through apportionment.[145] Once again, the Spill Act provides a more efficient, effective, and thorough avenue through which to restore natural resources.

## X. Conclusion

New Jersey has a long history with industry, which called for significant changes in environmental policy and law. From that history emerged a comprehensive statute that paved the way for changes at the federal level. However, while New Jersey law provides salient differences from federal law, which may include different approaches to NRDA, all trustees act as fiduciaries and use their expertise

133. N.J. Stat. Ann. §58:10-23.11g.d(1) (2019).
134. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, slip op. (N.J. Super. Ct. Law Div. June 17, 2014) (Hogan, J.) [hereinafter Order & Opinion] (granting plaintiffs' motion in limine to prohibit evidence related to permitting, finding that the permitted discharges defense was not available in the context of a trial for damages where liability had already been established).
135. *Id.* at 3.
136. N.J. Stat. Ann. §58:10-23.11(c) (1977) (emphasis added).
137. Order & Opinion, *supra* note 134, at 3.
138. *Id.*
139. N.J. Stat. Ann. §58:10-23.11b (2019).
140. *Id.* §58:10-23.11g.c(1).
141. 42 U.S.C.A. §9607(j).
142. *See* In re Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 20 ELR 20204 (D. Mass. 1989) (ruling that once the government plaintiffs established at trial that non-permitted releases were a "contributing factor to an injury to natural resources and that the injury is indivisible," the defendant would be jointly and severally liable for all the resulting injury unless it can prove that the injury is divisible by establishing which releases were federally permitted and what portion of the natural resource damages are allocable to the permitted releases); *see also* United States v. Rohm & Haas Co., 939 F. Supp. 1142, 1155, 27 ELR 20243 (D.N.J. 1996).
143. N.J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 42 ELR 20201 (N.J. 2012) (citing Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 150 (N.J. 1997) (rejecting possibility of "*de minimis*" discharge exception of Spill Act, but expressing expectation that NJDEP would not arbitrarily exercise authority against persons for minimal discharges); Universal-Rundle Corp. v. Commercial Union Ins. Co., 319 N.J. Super. 223, 240-41 (N.J. Super. Ct. App. Div.) (noting *Marsh*'s conclusion as to lack of existence of "de minimis exception" to Spill Act's application), *cert. denied*, 161 N.J. 149 (N.J. 1999).
144. 42 U.S.C. §9706(o).
145. 556 U.S. 599, 39 ELR 20098 (2009).

and the legal tools available to them to exercise their discretion in order to promote the public interest in restoring natural resources.

The use of deference doctrines, strict joint and several liability, and favoring restoration of the public trust over simple remediation makes environmental law some of the strongest statutory power in agency hands. New Jersey has taken great strides in ensuring its statutory mandates are executed to the fullest extent of the law, and shows no signs of backtracking. As its natural resource programming continues to grow and evolve, New Jersey will continue to be at the forefront of environmental protection.