

State-by-State Guide to NRD Programs in All 50 States and Puerto Rico

Brian D. Israel, Esq.
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001
202.942.6546
Brian.Israel@arnoldporter.com

July 18, 2019

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

State-by-State Guide to NRD Programs in All 50 States and Puerto Rico

Brian D. Israel
Arnold & Porter
202.942.6546
Brian.Israel@arnoldporter.com

INTRODUCTION

States may pursue natural resource damage (NRD) claims pursuant to the key federal statutes or, in some cases, pursuant to independent state authority. Over the years, many states have played a critical role in the prosecution of NRD claims. Furthermore, as can be seen below, it is fair to say that state programs are evolving rapidly. Several state programs are fairly robust and many other states are currently considering increased NRD activity.

This guide provides an overview of the NRD programs in all 50 states plus Puerto Rico. The overview of each respective program includes a discussion of applicable statutory authority, principal state trustee(s), major matters and settlements where that information is available, contact information, and important reference material.

The information in this guide was generally derived from self-reporting by the state trustees. In 2006, Arnold & Porter contacted every state trustee and solicited information regarding the trustee's NRD program. Specifically, we requested information regarding the following: (i) the nature and history of the trustee's efforts, (ii) the number of employees involved and their roles, (iii) the state's NRD budget, (iv) the damage assessment methodologies used, (v) authority to employ private counsel, (vi) the types of injuries frequently seen, (vii) the amounts recovered in past actions, (viii) the major pending matters, (ix) whether the state was currently pursuing groundwater claims, and (x) the applicable state statutes, if any.

In general, the state trustees were very responsive and willing to provide information. Many state trustees responded in writing, although in some cases information was gathered by telephone. To the extent the trustee responded in writing, these responses are on file with the author. Additional information was obtained from the internet.

This 50-state guide was comprehensively updated in 2008, 2012, 2013, 2015, 2016, 2017, 2018 and most recently in July 2019. Arnold & Porter requested from each state information regarding recent developments and major matters. In addition, where possible, we updated contact information, delegation authority, staffing/budget data, and other aspects of the guide.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

ABOUT THE AUTHOR

Brian D. Israel is the chair of the Environmental Practice Group at Arnold & Porter Kaye Scholer LLP and is a partner in the firm's Washington, D.C., office. Mr. Israel's practice focuses broadly on environmental litigation and counseling, and he is one of the nation's leading lawyers for Natural Resource Damages (NRD) claims. Mr. Israel represents several Fortune 500 companies in some of the largest and most complex NRD matters across the country. He also represents clients in regulatory enforcement matters and contaminated properties, including toxic tort lawsuits.

Mr. Israel has spoken and written extensively about environmental law issues, including NRD, and he serves as co-chair of the annual NRD conference hosted by Law Seminars International. In 2017, he was recognized as an Energy & Environmental Trailblazer by the *National Law Journal*. Mr. Israel is a co-author of *NATURAL RESOURCE DAMAGES: A GUIDE TO LITIGATING AND RESOLVING NRD CASES*, published by the ABA in 2019.

Prior to joining Arnold & Porter, Mr. Israel was an honors trial attorney in the Environmental Enforcement Section of the U.S. Department of Justice, where he handled several high-profile environmental cases, including a large NRD claim related to the impacts of DDT disposal. In 1998, Mr. Israel was awarded the Distinguished Service Award for his accomplishments in a Clean Air Act jury trial. Mr. Israel received his BA in Environmental Philosophy from New College, University of South Florida, in 1991, and received his JD from New York University in 1995, where he graduated cum laude.

ACKNOWLEDGEMENT

The author would like to thank Leigh Logan of Arnold & Porter for her tireless efforts and assistance in updating this state NRD guide.

Please contact the author (brian.israel@arnoldporter.com) or Leigh Logan (leigh.logan@arnoldporter.com) if you would like to receive future versions of this guide or if you have corrections or other suggested updates to particular NRD programs.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[1] Alabama

[a] Overview

The natural resource trustees in Alabama are the Commissioner of the Department of Conservation and Natural Resources (ADCNR) and the State Geologist of the Geological Survey of Alabama (GSA), with the Commissioner of ADCNR serving as the lead trustee. The State Lands Division serves as the state lead in developing and implementing Alabama's Natural Resource Damages Assessment program. The trustees do not have dedicated NRD staff but use staff members from within their departments as necessary. The state does not use private attorneys to bring NRD claims. Alabama's trustees prefer to use habitat based assessment methods, although other methods are employed as necessary. The state is considering implementing a groundwater program.

[b] Major Matters

Shelby County Train Derailment — In May 2006, a CSX train derailed in Shelby County, Alabama, resulting in a soybean spill into Little Creek, which flows into Yellow Leaf Creek. According to the state, this led to the damage of aquatic life, including fish, mussels, and snails. A cooperative settlement resulted in payment of \$491,976 by CSX to the Fish and Wildlife Division of ADCNR, which will be used to compensate for the investigation and value of the aquatic loss. Additionally, a portion of the settlement will support propagation and stocking efforts of freshwater species such as mussels and snails.

Anniston PCB Site — The Anniston plant, located in and around Anniston, Alabama, allegedly produced PCBs from approximately 1929 to 1971. PCBs were allegedly disposed into landfills adjacent to the site and a nearby creek. The Anniston PCB Site is in the process of being remediated. NRD is currently being assessed as well. NRD trustees include ADCNR, GSA, and the U.S. Department of the Interior (DOI), as represented by the U.S. Fish and Wildlife Service (USFWS). A Stage I Assessment Plan was released in March 2010 and assessed the following resources for potential injury: surface water, groundwater, geological resources such as floodplain soils, and biological resources such as fish and birds.

Ciba-Geigy McIntosh Plant NPL Site — According to trustees—USFWS, the National Oceanic and Atmospheric Administration (NOAA), ADCNR, and GSA—historic disposal practices at the 1,500-acre Ciba-Geigy McIntosh Plant, located in McIntosh, Alabama, released hazardous substances—including DDT, DDE, and DDD—that contaminated soils, surface water, groundwater, and sediments in the Tombigbee River floodplain and Mobile Bay watershed. The site was listed on the National Priorities List in 1984. On October 2, 2013, a consent decree between the trustees and defendant BASF Corporation was entered, whereby BASF Corporation agreed to pay \$5 million in total settlement costs, broken down as follows: \$3.2 million to plan, implement, and oversee natural resource restoration projects in the Mobile Bay watershed;

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

\$500,000 to ADCNR for ecosystem restoration in the Mobile Bay watershed through support of the Alabama Aquatic Biodiversity Center; and \$1.3 million to the federal trustees for past assessment costs.

Deepwater Horizon — On April 20, 2010, an explosion on the offshore drilling rig, *Deepwater Horizon*, caused a fire and led to the subsequent sinking of the rig into the Gulf of Mexico, resulting in the release of oil into the Gulf. The wellhead was capped in mid-July 2010. The natural resource trustees that are engaged in this matter include NOAA, DOI, U.S. Environmental Protection Agency, U.S. Department of Agriculture, ADCNR, GSA, Florida Department of Environmental Protection, Louisiana Coastal Protection and Restoration Authority, Louisiana Oil Spill Coordinator's Office, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, Louisiana Department of Natural Resources, Mississippi Department of Environmental Quality, Texas General Land Office, Texas Parks and Wildlife Department, and Texas Commission on Environmental Quality. Very shortly after the incident occurred, one of the responsible parties, BP Exploration & Production Inc. (BPXP), began engaging in cooperative studies with the trustees to assess NRD caused by the oil release. Technical Working Groups were created for potentially impacted natural resources, and over 160 cooperative studies were undertaken including for birds, marine mammals (*e.g.*, dolphins), sea turtles, marshes, oysters, offshore water column, offshore benthic habitats, and human use. In April 2011, BPXP and the trustees entered into a Framework Agreement whereby BPXP committed to provide up to \$1 billion toward early restoration projects to address NRD caused by the incident. Between 2012 and 2016, five phases of early restoration projects were approved by the trustees and BPXP, encompassing 65 projects at an estimated \$866 million.

On April 4, 2016, a consent decree, which resolves the United States' Clean Water Act penalty claim against BPXP, all NRD claims of the United States and the five Gulf States, as well as certain other federal and state claims, was approved by the court in MDL 2179. Pursuant to the consent decree, BPXP will pay \$8.1 billion over 15 years for NRD (which includes the \$1 billion previously committed for early restoration), up to \$700 million for adaptive management and to address natural resource conditions that are presently unknown, and \$350 million for NRD assessment costs incurred by the trustees. The consent decree can be found here: <https://www.justice.gov/enrd/file/838066/download>.

In February 2016, the trustees released their Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. The plan allocates settlement funds to address habitat, water quality, living coastal and marine resources, recreational opportunities, and monitoring, adaptive management, and administrative oversight to support restoration implementation. For more information about this matter, *see* <http://www.gulfspillrestoration.noaa.gov/> or <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[c] Contact Information

Alabama Department of Conservation and Natural Resources: Will Brantley, Natural Resource Manager, 64 North Union Street, Montgomery, AL 36130. Tel: (334) 242-5502. E-mail: Will.Brantley@dcnr.alabama.gov. Web: <http://www.outdooralabama.com/>.

Geological Survey of Alabama: Bob Mink, Deputy Director, 420 Hackberry Lane, P.O. Box 869999, Tuscaloosa, AL 35486-6999. Tel: (205) 349-2852 (x3589). E-mail: bmink@gsa.state.al.us. Web: <http://www.gsa.state.al.us/>.

[2] Alaska

[a] Overview

The Commissioners of the Department of Environmental Conservation (DEC), the Department of Natural Resources, the Department of Fish and Game, and the Department of Law (DOL), all serve as natural resource trustees for Alaska, with trustee representatives from each of these agencies serving on behalf of the Commissioners. Alaska currently does not have a dedicated NRD program but is exploring the development of one. NRD activities are managed through DEC's Division of Spill Prevention and Response, which houses the Prevention, Preparedness and Response Program (PPRP) charged with addressing releases of oil and hazardous substances, and the Contaminated Sites Program (CSP), which oversees cleanups at legacy sites. These programs have 66 and 52 full-time employees, respectively.

Since 1995, PPRP has settled three cases under federal statutes with state participation, and two cases are currently pending. In 2011-2012, CSP explored the development of an approach to assess damages for contaminated groundwater at legacy sites, including the possible application of a simplified groundwater injury model. This effort is currently on hold. Alaska does not use private attorneys to pursue NRD claims. Alaska's state NRD statutes can be found at ALASKA Stat. §§ 46.03.760 (d)(2), 46.03.780, and 46.03.820.

[b] Major Matters

T/V Exxon Valdez — On March 24, 1989, the 986-foot oil tanker vessel, *T/V Exxon Valdez*, ran aground on Bligh Reef spilling approximately 11 million gallons of crude oil into Prince William Sound, Alaska. The oil allegedly contaminated portions of the shoreline of Prince William Sound, the Kenai Peninsula, lower Cook Inlet, the Kodiak Archipelago, and the Alaska Peninsula. In 1991, the responsible party entered into a consent agreement with the state of Alaska and the United States, whereby the responsible party—Exxon Corporation—agreed to pay \$900 million, allocated as follows: (1) past response and cleanup costs (not to exceed \$142 million); (2) litigation costs (not to exceed \$75 million for costs incurred on or before March 12, 1991, and not to exceed \$1 million per month for costs incurred after March 12, 1991); and (3) NRD. Potentially injured resources included migratory birds and seabirds, threatened and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

endangered species, marine mammals, anadromous fish, and shoreline including designated wilderness lands. The settlement contained a reopener window between September 2002 and September 2006, during which the trustees could make a claim for up to an additional \$100 million to address injuries from the spill that were not known or foreseeable at the time of the settlement in 1991. In June 2006, the U.S. Department of Justice and DOL asserted a claim under the reopener provision by providing Exxon with a detailed project plan for the cleanup of lingering oil at an estimated cost of \$92 million. Recent research funded by the *Exxon Valdez* Oil Spill Trustee Council indicates resources injured by the spill have largely recovered and the presence of lingering oil at discrete locations in the spill area is not having a continuing adverse effect on water quality or wildlife in the area. In October 2015, state and federal attorneys dropped all claims to the reopener, putting an end to state and federal claims against Exxon Mobil. Further information on the *Exxon Valdez* oil spill can be found at <http://www.evostc.state.ak.us>.

M/V Kuroshima — On November 26, 1997, a 368-foot refrigerated cargo vessel—*M/V Kuroshima*—broke away from its anchorage in winds exceeding 100 knots and struck Second Priest Rock, damaging several of the vessel's fuel tanks, before running aground in Summer Bay. About 39,000 gallons of Bunker C fuel oil spilled from the freighter with much of the oil blowing upstream into Summer Bay Lake. The remaining oil allegedly stranded along Summer Bay's shoreline. Potentially impacted resources included birds, shoreline vegetation, shellfish, intertidal biota, salmonids, other Summer Bay Lake resources, and lost recreational services. In March 2002, the responsible parties entered into a consent decree with the trustees which included payment of \$644,017 for NRD restoration and \$57,145 in past assessment costs.

M/V Selendang Ayu — In December 2004, the *M/V Selendang Ayu* ran aground and broke apart off the northwestern coast of Unalaska Island, spilling approximately 354,218 gallons of intermediate fuel oil, marine diesel fuel, and thousands of metric tons of soybeans into the Bering Sea. IMC Shipping Co., the operator of the *M/V Selendang Ayu*, settled with the state of Alaska for oil spill cleanup costs, wreck removal, and lost tax revenue from the decline in local fishing. On January 27, 2012, IMC Shipping was granted a liability limitation of \$23,853,000 from the U.S. Coast Guard. State and federal trustees are currently submitting a claim to the U.S. Coast Guard for past and future NRD restoration and assessment costs. Potentially impacted resources include migratory birds, threatened and endangered species, marine species, anadromous fish, and lost recreational services. A claim for NRD assessment and restoration costs was submitted to the National Pollution Funds Center on February 6, 2016, and is currently under review. A final assessment plan was released in October 2016.

Adak Petroleum Diesel Spill — On January 11, 2010, while the T/V *Al Amerat* was offloading #2 diesel fuel to Adak Petroleum LLC's underground storage tank, the fuel overflowed into secondary containment. The fuel allegedly overwhelmed the containment sump unit, resulting in a release of approximately 142,000 gallons into Helmet Creek and Adak's small boat harbor. In September 2013, Adak Petroleum entered into a consent decree with trustees—the National

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Oceanic and Atmospheric Administration, DOI, and the state—which included payment of \$277,027 for past NRD costs and held Adak Petroleum liable for stream restoration and future monitoring costs of same. Birds, fish, their habitat, and lost recreational services were the resources potentially affected.

[c] Contact Information

Alaska Department of Environmental Conservation: Jody Barthlow, M.S., Environmental Program Specialist III, Prevention, Preparedness and Response Program Scientific Support Unit, 555 Cordova Street, Anchorage, AK 99501-2617. Tel: (907) 269-3084. Fax: (907) 269-7687. E-mail: jody.barthlow@alaska.gov. Web: <http://dec.alaska.gov/spar/ppr/ssu.htm>.

Alaska Department of Environmental Conservation: Sally Schlichting, Environmental Program Manager I, Contaminated Sites Program, 410 Willoughby Avenue, Juneau, AK 99811-1800. Tel: (907) 465-5076. Fax: (907) 465-5218. E-mail: sally.schlichting@alaska.gov. Web: <http://dec.alaska.gov/spar/csp/index.htm>.

Alaska Department of Law: Steve Mulder, Chief Assistant Attorney General, Environmental Section Supervisor, 1031 W. 4th Avenue, Suite 200, Anchorage, AK 99501-1994. Tel: (907) 269-5274. E-mail: steve.mulder@alaska.gov. Web: <http://www.law.state.ak.us/>.

Alaska Department of Law: Jennifer Schorr, Assistant Attorney General, Environmental Section, 1031 W. 4th Avenue, Suite 200, Anchorage, AK 99501-1994. Tel: (907) 269-5274. E-mail: jennifer.schorr@alaska.gov. Web: <http://www.law.state.ak.us/>.

[3] Arizona

[a] Overview

Arizona's natural resource trustee is the Director of the Arizona Department of Environmental Quality. The state has no budgeted NRD funding but allocates resources on an as-needed basis. To date, Arizona has resolved two NRD claims. Arizona does not have authority to use private attorneys to pursue NRD claims, nor does it have an independent state NRD statute.

[b] Major Matters

ASARCO LLC — In the midst of ASARCO's bankruptcy in 2009, ASARCO and the state of Arizona settled claims regarding three historic mining sites for \$30 million. The NRD portion of the settlement, according to the terms filed with the United States Bankruptcy Court for the Southern District of Texas, included about \$4 million in unsecured claims and the transfer of approximately 1,000 acres, valued between \$3 million and \$4 million, to the Arizona Game and Fish Commission for the preservation of wildlife.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Freeport-McMoRan Corp Morenci Mine — In April 2012, Freeport McMoRan agreed to pay a \$6.8 million settlement for potential injuries to natural resources that resulted from hazardous substance releases at and from the company's Morenci Mine site in eastern Arizona. In 2000 and 2001, tailings ponds at the copper mine site were found to be toxic and potentially responsible for death and other injuries to migratory birds through exposure and ingestion. Modeling of injuries preceding these events identified a future loss of wildlife productivity. Settlement negotiations began in 2003 between the state of Arizona, the U.S. Fish and Wildlife Service, and Freeport-McMoRan Corporation and its subsidiaries. Settlement funds will be used for the restoration of aquatic and wildlife populations and their habitat. A scoping meeting to discuss potential restoration projects was held in April 2013.

[c] Contact Information

Arizona Department of Environmental Quality: 1110 W. Washington Street, Phoenix, AZ 85007. Tel: (602) 771-2203 or (800) 234-5677. Web: <http://www.azdeq.gov/index.html>.

[4] Arkansas

[a] Overview

Arkansas has state statutory authority for NRD claims codified at ARK. CODE ANN. §§ 8-4-103(b), 8-5-702(e), 8-6-204(b)-(c), 8-7-204(b)-(c), 8-7-806(d)-(e). Arkansas statutes provide for a Natural Resources Damages Advisory Board*, which is tasked with developing projects for the restoration, rehabilitation, replacement, and acquisition of natural resources; requesting proposals for natural resource-related projects; reviewing and evaluating proposals for natural resource-related projects; and selecting projects for the restoration, rehabilitation, replacement, and acquisition of natural resources. The statute governing the Board's powers and duties is ARK. CODE ANN. § 8-12-104.

[b] Major Matters

Vertac Chemical Corporation Superfund Site — The Vertac Chemical Corporation Superfund Site, located in Jacksonville, Arkansas, was a former pesticide and herbicide plant that operated from 1948 until 1987, which manufactured, among other things, Agent Orange. Dioxin was created as a by-product of the manufacturing process, which contaminated the site and migrated into Bayou Metro. In addition to paying a \$1 million settlement to the U.S. Fish and Wildlife Service to reforest and restore the damaged natural resources (bottomland hardwoods, waterfowl, migratory birds, songbirds, and bald eagles), Hercules, the former owner and operator of the site, settled separately with the state for \$1 million. The intended purpose of this settlement was to purchase riparian lands to serve as buffer corridors to control pollution. Further, Hercules agreed to restore Lake Dupree.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Mayflower Pipeline — On March 29, 2013, an ExxonMobil Pipeline Co.'s Pegasus pipeline ruptured in the town of Mayflower, Arkansas, resulting in the spill of an estimated 150,000 gallons of raw tar sands crude oil in a neighborhood and an adjacent waterway. A consent decree between the United States of America, the state of Arkansas, ExxonMobil Pipeline, and Mobile Pipe Line Company was entered in August 2015, whereby the defendants agreed to pay \$5.07 million in civil penalties, legal fees, and an environmental remediation project. Currently, the state is taking the lead in investigating potential NRD.

*The Arkansas Department of Environmental Quality is one of various state agencies that comprise the Natural Resource Damage Advisory Board.

[c] Contact Information

Arkansas Department of Environmental Quality: 5301 Northshore Drive, North Little Rock, AR 72118-5317. Tel: (501) 682-0923. Fax: (501) 682-0880. Web: <http://www.adeq.state.ar.us>.

[5] California

[a] Overview

California's natural resource trustees for purposes of CERCLA and OPA are the California Secretary for Natural Resources and the Secretary for Environmental Protection for resources within the purview. The Secretaries have delegated state trustee authority to the Director of the California Department of Fish and Wildlife, the Director of the Department of Parks and Recreation, the Wildlife Conservation Board for purposes of implementing restoration plans developed pursuant to OPA or CERCLA, the Director of the Department of Toxic Substances Control, and the State Water Resources Control Board. Additional trustees are authorized to act under state law, including the State Lands Commission and the University of California. The Department of Fish and Wildlife's Office of Spill Prevention and Response (OSPR) was created in 1991 pursuant to the Lempert-Kenne-Seastrand Oil Spill Prevention and Response Act, Government Code §§ 8670.1 et seq. OSPR has a dedicated NRD unit within the Resource Restoration Program that employs three toxicologists, two economists, and two environmental biologists. OSPR also employs five staff attorneys. On large cases these staff members work cooperatively with attorneys and scientists from other state and federal agencies. OSPR has carried caseloads of up to 5 large cases and 15-20 smaller cases. Since OSPR's inception, over \$215 million in damages collected through NRD assessment settlements has been used to fund restoration projects. To date, the state has litigated or settled 26 larger and 89 smaller NRD cases. Total damages recovered from these cases are exclusive of fines, penalties, and assessment costs; this total represents total NRD recovered by all trustees, including federal trustees.

California usually assesses NRD using habitat or resource equivalency analysis for resources and benefits transfer information for recreational losses. California has on occasion retained private

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

counsel to bring NRD claims. The Department of Toxic Substances Control is currently evaluating NRD for groundwater impacts, similar to New Jersey's groundwater initiative. The Department of Fish and Wildlife is not a trustee for groundwater, but has pursued NRD in cases involving contaminated groundwater when it was surfacing and impacting wildlife and habitat (e.g., Guadalupe Dunes).

California has numerous state-law authorities for pursuing NRD claims, including CAL. GOV'T CODE § 8670.56.5(h), CAL. FISH & GAME CODE §§ 2014, 12011, and 12016, CAL. HAR. & NAV. § 151, and CAL. HEALTH & SAFETY CODE § 25189.1. Under the Government Code, responsible parties are strictly liable, jointly and severally, for NRD "that arise out of, or are caused by a spill or inland spill." CAL. GOV'T. CODE § 8670.56.5(a), (h), & (i). Furthermore, parties liable for civil penalties for the unlawful disposal of hazardous waste face additional liability for restoration, rehabilitation, and replacement of natural resources damaged "as a result of the disposal of the hazardous waste." CAL. HEALTH & SAFETY CODE § 25189.1(a)(2).

[b] Major Matters

Below are detailed descriptions of a few of California's largest NRD claims. A chart to follow provides basic information about other large NRD matters that California has resolved.

Montrose Chemical Corp. — According to the state, from the 1940s to the 1970s, the Montrose Chemical Plant discharged an estimated 1,800 tons of the pesticide dichloro-diphenyl-trichloroethane (DDT) into Los Angeles County sewers, which eventually made its way to the Pacific Ocean. Montrose also allegedly dumped hundreds of tons of DDT-contaminated waste directly into the ocean near Santa Catalina Island. Other responsible parties disposed of large quantities of PCBs into the ocean via the local sewer system. These discharges resulted in harm to fish, breeding problems in raptors, including bald eagles, and other negative effects on the marine ecosystem. The state and federal trustees litigated their NRD claims in federal district court, leading to several important published opinions. Ultimately, the NRD case against the industrial DDT potentially responsible parties settled for \$30 million after the commencement of trial. A final restoration plan for birds and fish, and the habitats on which they depend, was released in October 2005.

Cantara Loop/Dunsmuir Chemical Spill — A train accident in 1991 caused a chemical tank car to spill 19,000 gallons of the herbicide metam sodium into the Sacramento River. Effects of the spill extended for over 20 miles to Lake Shasta. The primary resources affected were in-stream and riparian habitats and fish; recreational use was also affected. The state and federal trustees settled the NRD portion of the case with the responsible party, Southern Pacific Railroad, for \$14 million. After 12 years, restoration activities were completed in 2007.

American Trader Oil Spill — In 1990, the tanker American Trader ran over its anchor, causing it to spill an estimated 416,598 gallons of crude oil near Huntington Beach in Orange County. In addition to affecting fish and recreational use of Huntington Beach, the spill killed an estimated

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

3,400 birds. The recreational injury component of the case was tried, and a jury awarded the trustees \$13.2 million. The biological injury component (i.e., effects on fish and birds) settled for \$2.8 million for seabird projects plus \$300,000 in water pollution monitoring projects. A restoration plan for this site has been finalized. Biological restoration activities are complete, while the recreational component has one final project still in progress.

Cosco Busan Oil Spill — On November 7, 2007, M/V *Cosco Busan*, a cargo vessel, struck a tower of the Bay Bridge between Treasure Island and San Francisco, which resulted in a release of approximately 53,000 gallons of bunker fuel. The tide caused the oil to move throughout the Bay and into the ocean. Over 70 studies were conducted that determined impacted resources to include birds, fish, shoreline habitats, and human recreational activities. In September 2011, responsible parties Regal Stone Limited and Fleet Management Ltd. agreed to pay \$44.4 million for NRD, penalties, and reimbursement to government entities for response activities incurred as a result of the spill. Approximately \$32.3 million of the settlement will fund NRD project restoration: \$5 million for bird restoration; \$4 million for habitat restoration; \$2.5 million for fish and eelgrass restoration; \$18.8 million for recreational use improvements; and \$2 million for planning, administration, and oversight. Restoration planning was completed in 2012, and restoration projects are in progress. In 2014, over \$15 million was used to fund over 50 restoration projects.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
Castro Cove/Chevron Richmond	Early 1900-1987	Chevron refinery released 13 million gallons of wastewater, including oil and mercury discharges, per day into cove	Benthic invertebrates, fish, mammals, birds, intertidal and sub-tidal mudflats	\$2.85 million
Apex Houston Oil Spill	1986	The tank barge Apex Houston lost a hatch cover and released 25,800 gallons of crude oil	Birds (10,577 estimated killed)	\$5.4 million
Shell/Martinez Oil Spill	1988	A leaking tank released 400,000 gallons of crude oil into a nearby creek, migrating into a marsh and into the bay	Wetland habitat, fish	\$10.8 million

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
American Trader Oil Spill	1990	The hull of an oil tanker was punctured and caused 416,598 gallons of crude oil to spill	Birds (3,400 estimated killed), fish, recreational beach use	\$16.3 million
Exxon Mobil/Santa Clara River Oil Spill	1991	A pipeline broke, resulting in over 74,000 gallons of crude oil being spilled into the Santa Clara River	Fish, riparian vegetation, birds, mammals	\$2.7 million
Avila I Oil Spill	1992	A pipeline broke, releasing about 24,200 gallons of crude oil, which then flowed into the Pacific Ocean	Birds (84 recovered), sea otters, and fish	\$1.4 million
McGrath Oil Spill	1993	A pipeline broke, releasing 87,150 gallons of crude oil, which entered McGrath Lake and the Pacific Ocean	Birds (206 collected), riparian habitat, coastal habitat	\$1.4 million
ARCO/Santa Clara River Oil Spill	1994	A pipeline broke, causing over 190,000 gallons of crude oil to spill into the river and continuing for 16 miles downstream	Fish, riparian vegetation (100 estimated acres destroyed), birds, mammals, other riparian and aquatic animals	\$7.1 million
SS Cape Mohican Oil Spill	1996	96,000 gallons of Intermediate Fuel Oil were released from the SS Cape Mohican while in drydock; 40,000 gallons spilled into the San Francisco Bay	Birds (593 estimated killed), recreational beach use, shoreline habitat, fisheries	\$3.625 million

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
M/V Kure/Humboldt Bay Oil Spill	1997	A fuel tank was ruptured when the M/V Kure collided with a loading dock in Humboldt Bay, causing thousands of gallons of bunker fuel oil to spill into the bay	Birds (3,950 estimated killed), saltmarsh, mudflats, kayaking, camping, surfing	\$4.82 million
Torch/Platform Irene Oil Spill	1997	An undersea pipeline ruptured, releasing oil into the ocean; surface slicks formed and washed ashore	Birds (over 700 estimated killed), sandy and rocky shoreline habitat, recreational beach use	\$1.9 million
T/V Command Oil Spill	1998	3,000 gallons of Intermediate Bunker Fuel were discharged from a damaged oil tanker	Birds, shoreline habitat, recreational beach use	\$3.9 million
M/V Stuyvesant/Humboldt Oil Spill	1999	2,000 gallons of Intermediate Fuel Oil 180 were spilled into the Pacific Ocean	Birds (2,405 estimated killed), coastal beaches, shrimp, fish, beach use	\$6.71 million
East Walker River Oil Spill	2000	An overturned tanker truck spilled 3,600 gallons of #6 fuel oil, impacting 15 miles of river	Fish, macroinvertebrates, fishing, other wildlife	\$358,000
Avila II Oil Contamination	Chronic through 2000	Over several decades, numerous pipeline leaks created an underground plume of oil products	Recreational beach use, intertidal wildlife and habitat, birds, fish	\$6 million

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
Cantara Loop/Dunsmuir Chemical Spill	2001	A train accident caused a chemical car to fall in the river, spilling 19,000 gallons of herbicide metam sodium	Instream habitat and wildlife, riparian habitat, human use	\$14 million
Kinder-Morgan/Suisun Marsh Oil Spill	2004	A pipeline ruptured, causing 70,000 gallons of diesel to spill into the Suisun marsh	Brackish marsh habitat, marsh birds and wildlife	Restoration plan: reintroduce tidal flow in the marsh and control invasive weed; \$1.15 million settlement
Searles Valley Minerals/Searles Lake (Trona)	Chronic and Continuing	Hypersaline industrial wastewater is discharged into large ponds	Birds (over 2,000; many have died from salt toxicosis, salt encrustation, and oiling)	Mitigation plan plus \$550,000 and \$10k per year for 40 years for a more than 100 acre wetland creation project
Guadalupe Oil Field Contamination	Chronic	Over several decades, pipeline leaks caused at least 80 plumes of diluent; 12 million gallons of diluent have been released into dunes, beaches, groundwater, and the Pacific Ocean	Dune habitat, wetlands, groundwater, intertidal habitat	\$9 million

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
Montrose CERCLA Site	Chronic	Over several decades, 1,800 tons of DDT were released into sewers emptying into the Pacific Ocean; also, DDT-contaminated waste were dumped and PCBs were flushed into the ocean	Breeding failures in raptors, contaminated fish, impacts to marine ecosystem	\$30 million
Iron Mountain Mine CERCLA Site	Chronic	Over many decades, acid mine drainage ran into several creeks, reservoirs and the Sacramento River	Fish, invertebrates, riparian habitat, fisheries (salmon kills)	\$9 million
New Almaden Mine CERCLA Site	Chronic	Mining operations caused the release of mercury into the Guadalupe River watershed and south San Francisco Bay	Anadromous and other fish species, riparian and saltmarsh birds, aquatic invertebrates	\$6.75 million
Cosco Busan Oil Spill	2007	The <i>Cosco Busan</i> struck the Bay Bridge, spilling 58,000 gallons of Intermediate Fuel Oil	Birds, marine mammals, fish, habitat, and human use	\$32.3 million
Dubai Star/San Francisco Bay Spill	2009	T/V <i>Dubai Star</i> spilled over 400 gallons of Intermediate Fuel Oil	Shoreline, birds, human use	\$850,000

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

California Site	Incident Year	Incident Summary	Injured Resources	NRD Settlement/Recovery
S.S. Jacob Luckenbach Oil Spill	Episodic, 1992 (and perhaps as early as 1972) - 2007	<i>S.S. Jacob Luckenbach</i> collided with another vessel in 1953 and sank in 180 feet of water with about 457,000 gallons of fuel	Birds (51,569 estimated killed from 1990 to 2003) and sea otters	\$22.7 million
Leviathan Mine CERCLA Site	Continuing since 1954	Several creeks contaminated by acid mine drainage	Riparian habitat, instream habitat and wildlife, including fish and invertebrates, and fishing	Case in Progress
Refugio Beach Oil Spill	2015	Pipeline ruptured near Refugio State Beach, spilling over 100,000 gallons of crude oil, much of which ran under highway 101, down a hillside and entered the ocean	Birds, fish and subtidal habitats, marine mammals, shoreline habitats, human use	Case in Progress

Source: California Department of Fish and Wildlife Website, Natural Resource Damage Assessment (NRDA) and Restoration, <https://www.wildlife.ca.gov/OSPR/NRDA>.

[c] Contact Information

California Department of Fish and Wildlife: Thomas Cullen, Administrator, Office of Spill Prevention and Response (OSPR), 1700 K Street, Suite 250, Sacramento, CA 95811. Tel: (916) 324-98916 (office); (916) 445-9326 (administrative assistant). E-mail: thomas.cullen@wildlife.ca.gov. Web: <https://www.wildlife.ca.gov/OSPR/NRDA>.

California State Lands Commission: Jennifer Lucchesi, Executive Officer, 100 Howe Avenue, Suite 100-South, Sacramento, CA 95825-8202. Tel: (916) 574-1800. Fax: (916) 574-1810. E-mail: Jennifer.Lucchesi@slc.ca.gov. Web: <http://www.slc.ca.gov/>.

California Department of Toxic Substances Control: 1001 I Street, P.O. Box 806, Sacramento, CA 95812-0806. Tel: (800) 728-6942. Web: <http://www.dtsc.ca.gov/>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[6] Colorado

[a] Overview

The state trustees in Colorado are the Attorney General (AG), the Executive Director of the Department of Public Health and Environment (DPHE), and the Executive Director of the Department of Natural Resources (DNR). There is no dedicated NRD program office in Colorado. Rather, activities are conducted by various employees of the DPHE and DNR, as well as the AG's office, as needed. NRD activity commenced in Colorado in 1983, and the state has handled about 11 matters since then. The total NRD recovery to date as reported by the state is approximately \$50 million. NRD recoveries are placed in a state fund, which the Colorado General Assembly then appropriates for "the restoration, replacement, or acquisition of the equivalent of natural resources that have been injured, destroyed, or lost as a result of a release of a hazardous substance." COLO. REV. STAT. § 25-16-104.7(1). While the state has authority to retain private lawyers, it has not done so for NRD claims. Colorado is not currently planning an NRD groundwater initiative.

[b] Major Matters

California Gulch Site — The California Gulch Superfund Site is comprised of 12 operable units located in the town of Leadville, Colorado, the adjacent mining district in Lake County, and the watershed of California Gulch which flows to the Arkansas River, and has been undergoing a very large, cooperative remediation effort since 1990. According to the DPHE, the NRD resources that may require restoration include surface water and habitat loss. Though the recovery was complicated by ASARCO's bankruptcy, the Bankruptcy Court and the District Court for the Southern District of Texas rejected the company's argument that the Bankruptcy Court did not have jurisdiction to approve the settlement. *See in re ASARCO LLC*, Civ. No. CC-09-91, 2009 WL 1392627 (S.D. Tex. May 15, 2009). In December 2009, as part of its reorganization, ASARCO paid \$194 million for natural resource recovery at more than a dozen contaminated sites, with \$5.9 million paid to each state and federal trustee. Most of the cleanup is complete. For more information, see <http://www2.epa.gov/region8/california-gulch>.

Rocky Mountain Arsenal — Another large NRD matter in Colorado is the 17,000-acre Rocky Mountain Arsenal site near Denver. This site is a former weapons and chemicals manufacturing site that is being redeveloped into a National Wildlife Refuge pursuant to a 1992 act of Congress. The massive investigation and cleanup have been proceeding for over two decades. Most of the cleanup is being conducted pursuant to an agreement amongst several federal agencies and Shell Oil Company, but not the state. The District Court for the District of Colorado approved two consent decrees submitted by the state, Shell, and the U.S. Army settling all NRD claims for \$27.4 million and a donation of a 100-acre plot owned by Shell and located north of the site to the First Creek Corridor Greenway. For more information on the Rocky Mountain Arsenal, and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

for copies of the consent decrees, *see* <https://www.colorado.gov/pacific/cdphe/rocky-mountain-arsenal>.

Rocky Flats — The Rocky Flats plant was established in 1951 to manufacture nuclear weapons for the nation’s defense, and it operated until 1994. The site is approximately 6,500 acres, and the primary contaminants involved at the site include plutonium, uranium, volatile organic compounds, metals, radionuclide materials, nitrates, and asbestos. The alleged natural resource injuries include groundwater, surface water, and biota and their associated habitats, such as prairies and wetlands. This matter was settled for \$10 million, and requires the Department of Energy, the potentially responsible party, to either purchase “essential mineral rights,” pay \$10 million to the trustees, or a combination of the two. To date, \$5.5 million of the NRD funds have been spent to purchase three parcels of mineral rights, and \$2.5 million have been awarded to five projects that will purchase mineral rights at the Rocky Flats site, remove weeds, purchase surrounding land, and restore the native vegetation. The remaining \$2 million will be used as determined jointly by the state and federal trustees. The fourth five-year review, completed in 2017, concluded that the Rocky Flats site continues to be protective of human health and the environment.

Suncor — On November 27, 2011, a citizen reported an observance of an oily sheen on the water and shoreline near the confluence of Sand Creek and South Platte River in Commerce City, Colorado. The oil released to Sand Creek and South River Platte was allegedly from a plume of groundwater contamination originating at the Suncor Refinery plant. Potentially injured resources include aquatic and riparian habitat, wetland habitat, waterfowl, and groundwater. On February 27, 2014, a consent decree between the United States, the state of Colorado, and Suncor Energy (U.S.A.) Inc. was approved, with Suncor agreeing to pay over \$1.8 million to cover NRD.

[c] Contact Information

Department of Public Health & Environment: 4300 Cherry Creek Drive South, Denver, CO 80246-1530. Tel: (303) 692-2000. E-mail: cdphe.information@state.co.us. Web: <http://www.cdphe.state.co.us/>.

Colorado Attorney General’s Office: David Kreutzer, Hazardous & Solid Waste & CERCLA Litigation Unit, 1525 Sherman Street, 3rd Floor, Denver, CO 80203. Tel: (720) 508-6000. E-mail: David.Kreutzer@coag.gov. Web: <http://www.coloradoattorneygeneral.gov/>.

[7] Connecticut

[a] Overview

Connecticut has no formal NRD program. The Commissioner of the Department of Energy and Environmental Protection (DEEP) oversees the state’s involvement with NRD issues but has not

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

officially been designated as natural resources trustee by the Governor. As Connecticut's program is informal, there is no dedicated staff or budget for NRD issues. Nonetheless, Connecticut has pursued at least four NRD cases to settlement, including a major matter involving General Electric. Connecticut, through DEEP and the Office of the Attorney General, works with federal trustees in assessing NRD. Under Conn. Gen. Stat. § 22a-16, any person may institute an action for protection—through declaratory or equitable relief—of the public trust in natural resources. When the Attorney General brings such an action, a judge may order payments for investigation, remediation, mitigation, and restoration. Conn. Gen. Stat. § 22a-16a. Connecticut does not use private attorneys to pursue NRD claims.

[b] Major Matters

Housatonic River — Connecticut's largest NRD case to date involves General Electric's plant in Pittsfield, Massachusetts. The plant, which began operating in 1903, allegedly released PCBs into the Housatonic River, from which they made their way into the Connecticut River and ultimately Long Island Sound. The PCBs were trapped behind dams, causing high concentrations to accumulate in river sediments. The PCB contamination resulted in fish consumption advisories being imposed in 1977. Connecticut and Massachusetts split the \$15 million settlement designated for restoration projects in each state, and restoration is ongoing. The funds for Connecticut grew to \$9 million in an interest-bearing account; \$7 million will be used to fund 27 projects for the following restoration categories: (1) aquatic natural resources (approximately \$1.7 million); (2) riparian and floodplain natural resources (approximately \$2.8 million); and (3) recreational use of natural resources (approximately \$2.6 million).

Quinnipiac River Basin — Alleged pollution from the Old Southington Landfill Superfund Site, a 12-acre former municipal landfill that operated from approximately 1920 to 1967, was deemed by trustees to be the cause of injured groundwater resources in the Quinnipiac River Basin. According to a consent decree entered in November 2009, \$2.75 million in settlement funds will be paid to the state to replace a source of drinking water lost due to the alleged pollution. Defendants also paid \$537,000 to the U.S. Department of the Interior (DOI) for past assessment costs as well as wetland habitat restoration. A Final Restoration Plan and Environmental Assessment was issued in October 2013.

Lordship Point — Beginning in the 1920s and until its closure in 1986, the Remington Gun Club operated a skeet shooting range at Lordship Point, which is located at the mouth of the Housatonic River estuary. Trustees—DEEP, DOI, and the National Oceanic and Atmospheric Administration—estimate that approximately 4.8 million pounds of lead gun shot contaminated 29 acres of fringe salt marsh and upland areas, and 12 acres shallow water tidal habitats adjacent to the site. Other resources allegedly affected include blue mussels, black ducks, and recreational activities. A settlement was achieved in 2004 with the responsible party providing \$218,000 for restoration of tidal flats and salt marsh and restoring a coastal grassland habitat at the site. Trustees plan to combine funds from this matter with funds received from the Raymark

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Industries, Inc. site (see below) to conduct their preferred restoration project, which focuses on salt marsh restoration in the Stewart McKinney National Wildlife Refuge.

Raymark Industries, Inc. — Raymark Industries, Inc. manufactured automotive parts on a 34-acre property located in Stratford along the Housatonic River estuary from 1919 to 1989. Manufacturing waste was allegedly disposed both on-site and in Ferry Creek via a culvert from on-site waste lagoons. Lagoon waste sludge was also allegedly used as fill on residential, commercial, and municipal properties in Stratford. Federal and state trustees assessed NRD to be approximately \$20 million, but the matter went through bankruptcy proceedings and Connecticut's settlement was a one wherein remediation and NRD were addressed collectively. Trustees secured approximately \$524,000 to cover restoration of potentially injured resources, including fish, aquatic wildlife, and salt marsh. Trustees plan to combine funds from this site with funds received from the Lordship Point site (see above) to conduct their preferred restoration project, which focuses on salt marsh restoration in the Stewart McKinney National Wildlife Refuge.

[c] Contact Information

Connecticut Department of Energy and Environmental Protection: Richard A. Jacobson, Director - Wildlife Division, 79 Elm Street, Hartford, CT 06106-5127. Tel: (860) 424-3482. E-mail: rick.jacobson@ct.gov. Web: <http://www.ct.gov/deep/site/default.asp>.

[8] Delaware

[a] Overview

The trustee for Delaware is the Secretary of the Department of Natural Resources and Environmental Control (DNREC). Currently, the trusteeship is delegated jointly to three trustees: the Trustee for Resources (in the Division of Fish and Wildlife), the Trustee for Response (in the Division of Watershed Stewardship), and the Trustee for Administration (in the Division of Waste and Hazardous Substances (DWHS)). Case management authority for individual cases may be delegated to other individuals within the respective divisions.

Much of the NRD work is conducted by administrative case managers within the Site Investigation and Restoration Section (SIRS, the state Superfund program) in the DWHS, in cooperation with the trustees for Resources and Response or their designees, as well as the federal (typically National Oceanic and Atmospheric Administration and U.S. Fish and Wildlife Service) or outside state trustees (when applicable). DNREC may also engage consultants to assist with NRD matters.

A Deputy Attorney General handles NRD legal matters; Delaware has not retained private lawyers to pursue NRD claims. Generally the state favors the cooperative assessment process

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

and pursues integrated remediation and restoration as well as “up-front” restoration (restoration in anticipation of unquantified claims).

The state, through the Secretary of the Department of Natural Resources and Environmental Control (Secretary), may bring an action to recover NRD. DEL. CODE ANN. tit. 7, § 9109(d). Under Delaware law, facilities who release hazardous substances are jointly and severally liable for the resulting NRD. *Id.* § 9105(b). The Secretary also has the authority to establish procedures for NRD assessments. *Id.* § 9104(b)(2)(n).

[b] Major Matters

The state is at various stages in at least 30 NRD matters involving injuries to wetlands, groundwater, surface water, birds, benthic organisms, fish, oyster, and crabs, as well as losses of recreational services. Eleven of those matters are in some phase of restoration, including restoration planning and post-restoration monitoring.

These claims include five National Priorities List sites: Wildcat Landfill Superfund Site (in post-restoration monitoring); Halby Chemical (in post-restoration monitoring); DuPont Newport (restoration completed summer 2008); Koppers Newport (remediation design has been restricted by tribal claims to the site); and Army Creek Landfill (in restoration planning).

Cases under the Delaware Hazardous Substance Cleanup Act (HSCA, 7 *Del. C.* Chapter 91) include the DuPont Edge Moor Plant/Hay Road Landfill (assessment in progress and potential up-front restoration projects being evaluated under a cooperative assessment agreement), Burton Island Coal Ash Disposal Site, and the Amoco New Castle Area Sites (in negotiations for cooperative assessments for each; some up-front restoration performed at Amoco), and claims against multiple potentially responsible parties (PRPs) at Fox Point State Park.

In addition, the state is pursuing OPA NRD claims for releases at the Indian River Power Plant and at the former Motiva refinery (both in post-restoration monitoring), and spills from the vessels *Athos I* and *Bermuda Islander*. *Athos I* restoration projects are in progress or in post-restoration monitoring. A draft restoration plan for *Bermuda Islander* was released in January 2013.

Athos I — While attempting to dock at a New Jersey refinery in 2004, the *Athos I* struck a submerged anchor and discharged approximately 265,000 gallons into the Delaware River and its tributaries. NRD was sought by state trustees—Delaware, Pennsylvania, and New Jersey—and federal trustees—U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration. In September 2010, the trustees settled for \$27.5 million out of the National Pollution Funds Center because the PRPs had exceeded the limits of their liability during the response phase. Restoration projects are in progress or are in post-restoration monitoring. The Final Restoration Plan and Environmental Assessment was released in September 2009 and is available at https://darrp.noaa.gov/sites/default/files/case-documents/AthosFinalRP_0.pdf.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[c] Contact Information

A DNREC internet site for locating information related to environmental enforcement is the Delaware Environmental Navigator: <http://www.nav.dnrec.delaware.gov/DEN3/>.

The current trustee for Administration is Tim Ratsep, DNREC SIRS, 391 Lukens Drive, New Castle, DE 19720. Tel: (302) 395-2600. Fax: (302) 395-2601.

[9] Florida

[a] Overview

The Department of Environmental Protection (DEP) is the NRD trustee in Florida. NRD claims related to coastal oil spills are overseen by the Office of Emergency Response, while claims related to hazardous waste sites are handled by the Division of Waste Management. Florida first began pursuing NRD claims for oil spills in 1992.

The Office of Environmental Response (OER) has 16 full-time employees, but none of them work exclusively on NRD, nor is any portion of OER's budget earmarked for NRD cases. For oil spills, administrative orders are issued assessing damages based on a formula codified at chapter 376 of the Florida Statutes. OER has settled more than 2,500 NRD claims related to oil spills since it began work in 1992.

Within the Division of Waste Management, NRD activity is primarily handled by the Waste Site Cleanup Section, which has 15 employees, none of which work exclusively on NRD issues. Staff members from other sections may also work on NRD issues as appropriate. At the time of publication, Florida had no active CERCLA NRD proceedings; however, the Division of Waste Management estimates that approximately 20 percent of Florida's 49 Superfund sites potentially have NRD issues. NRD settlements have already been negotiated at about one-third of those sites. The Division of Waste Management uses a variety of assessment methodologies as appropriate. Most of DEP's NRD settlements at these Superfund sites have resulted in wetlands restoration, mitigation, and/or the establishment of new offsite wetlands.

Florida does not usually use private attorneys and is not currently considering a groundwater initiative. Its state NRD statutes are codified at FLA. STAT. ANN. §§ 376.121 (oil spills), 403.727 (hazardous waste). As stated in § 376.121: "It is the state's goal to recover the costs of restoration from the responsible parties and to restore damaged natural resources to their pre-discharge condition." Florida recognizes "the difficulty historically encountered in calculating the value of damaged natural resources" and, accordingly, has created a compensation schedule for oil spills that takes into account, *inter alia*, the volume of the pollutant discharge, characteristics of the pollutant, and "the type and sensitivity of the natural resources affected" *Id.* § 376.121. If a responsible party opts out of the compensation schedule, no responsible party is known, or DEP is cooperating with a federal agency, then NRD

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

can be instead calculated under the OPA of 1990. *Id.* In Florida, responsible parties are jointly and severally liable. *See Id.* §§ 376.12(4) (providing that “[e]ach responsible party is liable . . . for all natural resource damages that result from the discharge;” 403.727(8) (permitting responsible parties of “pollution conditions” to seek contribution from other parties).

[b] Major Matters

Tampa Bay Oil Spill — In August 1993, two tank barges and a freight ship collided in Tampa Bay, resulting in the release of 330,000 gallons of fuel oil. As a result of the collision, one of the tankers caught fire and spilled an additional 32,000 gallons of various petroleum products. According to the state, the oil eventually made its way to shore, soiling approximately 12.5 miles of beaches. Several shellfish beds also had to be closed to fishing because of hydrocarbon levels in the shellfish. State and federal trustees settled NRD claims with respect to the spill in 1999 for \$3.1 million. All restoration projects have been completed.

Sapp Battery — This site was a battery salvage facility near Alford. Allegedly improper disposal practices led to metals contamination in soil, surface water, and groundwater, which migrated to nearby wetlands. Cost recovery efforts by the state for interim remedial actions implemented by DEP at the site and negotiations to address NRD resulted in a \$1.2 million settlement with the responsible parties.

Whitehouse Oil Pits Superfund Site — DEP worked with the U.S. Fish and Wildlife Service (USFWS), which developed the trustee claim for NRD by calculating the number of acre-credits required to compensate for lost use and recovery time for an adjacent impacted wetland. The settlement resulted in the responsible party providing \$77,000 to cover assessment costs and restoration of a nearby wetland under the City of Jacksonville’s Rail-to-Trails program.

Alafia River — In 1997, a phosphogypsum stack breached, discharging about 50 million gallons of process water into the Alafia River system. The process water lowered the pH of the Alafia River for several days, allegedly damaging freshwater wetlands, fish, crab, shrimp, surface waters, oysters, and birds. Mulberry Phosphates Inc. settled DEP’s NRD claims for at least \$3.6 million. Restoration efforts funded by this settlement have included a 1998 restocking of the river with fish, a \$2.3 million wetland restoration, and a \$1.3 million estuarine wetland restoration and oyster reef creation. A report issued in February 2012 recommends mitigation through cleanup of a site 15 miles from the spill.

Office of Emergency Response NRD Claims — OER filed a claim for NRD resulting from 23 coastal oil spills of unknown origin, which occurred between 1992 and 1999. OER submitted the claims to the U.S. Coast Guard Oil Spill Liability Trust Fund. The injuries were pooled and divided into three regional restoration plans, which were subsequently approved and funded.

Deepwater Horizon — On April 20, 2010, an explosion on the offshore drilling rig, *Deepwater Horizon*, caused a fire and led to the subsequent sinking of the rig into the Gulf of Mexico,

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

resulting in the release of oil into the Gulf. The wellhead was capped in mid-July 2010. The natural resource trustees that are engaged in this matter include the National Oceanic and Atmospheric Administration, U.S. Department of the Interior, U.S. Environmental Protection Agency, U.S. Department of Agriculture, Alabama Department of Conservation and Natural Resources, Geological Survey of Alabama, Florida DEP, Louisiana Coastal Protection and Restoration Authority, Louisiana Oil Spill Coordinator's Office, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, Louisiana Department of Natural Resources, Mississippi Department of Environmental Quality, Texas General Land Office, Texas Parks and Wildlife Department, and Texas Commission on Environmental Quality. Very shortly after the incident occurred, one of the responsible parties, BP Exploration & Production Inc. (BPXP), began engaging in cooperative studies with the trustees to assess NRD caused by the oil release. Technical Working Groups were created for potentially impacted natural resources, and over 160 cooperative studies were undertaken including for birds, marine mammals (*e.g.*, dolphins), sea turtles, marshes, oysters, offshore water column, offshore benthic habitats, and human use. In April 2011, BPXP and the trustees entered into a Framework Agreement whereby BPXP committed to provide up to \$1 billion toward early restoration projects to address NRD caused by the incident. Between 2012 and 2016, five phases of early restoration projects were approved by the trustees and BPXP, encompassing 65 projects at an estimated \$866 million.

On April 4, 2016, a consent decree, which resolves the United States' Clean Water Act penalty claim against BPXP, all NRD claims of the United States and the five Gulf States, as well as certain other federal and state claims, was approved by the court in MDL 2179. Pursuant to the consent decree, BPXP will pay \$8.1 billion over 15 years for NRD (which includes the \$1 billion previously committed for early restoration), up to \$700 million for adaptive management and to address natural resource conditions that are presently unknown, and \$350 million for NRD assessment costs incurred by the trustees. The consent decree can be found here: <https://www.justice.gov/enrd/file/838066/download>.

In February 2016, the trustees released their Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. The plan allocates settlement funds to address habitat, water quality, living coastal and marine resources, recreational opportunities, and monitoring, adaptive management, and administrative oversight to support restoration implementation. For more information about this matter, *see* <http://www.gulfspillrestoration.noaa.gov/> or <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

[c] Contact Information

For coastal oil spills: John Johnson, Director, Office of Emergency Response, Department of Environmental Protection, 3900 Commonwealth Blvd., MS 659, Tallahassee, FL 32399-3000. Tel: (850) 245-2010. Fax: (850) 245-2882. Web: <http://www.dep.state.fl.us/oer/default.htm>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

For Superfund-related NRD: Miranda McClure, Bureau of Waste Cleanup, Division of Waste Management, Mail Station 4520, Department of Environmental Protection, 2600 Blairstone Road MS 4520, Tallahassee, FL 32399-2400. Tel: (850) 245-8941. Fax: (850) 245-8976. E-mail: Miranda.McClure@dep.state.fl.us. Web: <http://www.dep.state.fl.us/waste>.

[10] Georgia

[a] Overview

Georgia's natural resources trustee is the Commissioner of the Department of Natural Resources. Georgia has no formal NRD program but pursues NRD claims as they arise using appropriate staff. To date, Georgia has only settled one case, but it is actively evaluating other possible NRD claims. Georgia does not use private attorneys to pursue NRD claims, but it has been approached by private attorneys in the past. Georgia has no specific state NRD statute and mostly relies on federal law to pursue NRD claims.

[b] Major Matters

R.J. Schlumberger — The Sangamo–Weston plant site, a capacitor manufacturing plant in Pickens, South Carolina, operated from 1955 to 1987. According to the state, during this time significant PCB contamination was released from the plant into Twelvemile Creek, Lake Hartwell, and surrounding areas. Schlumberger Technology Corp. is the corporate successor to Sangamo-Weston. In January 2006, Schlumberger settled NRD claims brought by Georgia and South Carolina, as well as the federal government, for \$11.8 million. Schlumberger agreed to spend an additional \$8-10 million to remove two hydroelectric dams from Twelvemile Creek and to conduct restoration projects.

Brunswick LCP — In 2003, the state, along with the federal trustees, entered into a cooperative assessment agreement with Honeywell International Inc. to evaluate the extent of any NRD at the 813-acre LCP Chemicals Superfund Site in Brunswick, Georgia. The cooperative agreement included numerous provisions regarding the development of cooperative studies, the procedures regarding study data, the method of funding studies, reservation of rights and termination, and the establishment of a coordinating committee. Cleanup activities are currently ongoing. Once injury assessments have been completed, the trustees will develop a draft damage assessment and restoration plan.

[c] Contact Information

Georgia Department of Natural Resources: 2 Martin Luther King, Jr. Drive, SE, Suite 1252, East Tower, Atlanta, GA 30334. Tel: (404) 656-3500. Fax: (404) 656-0770. Web: <http://www.gadnr.org>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[11] Hawaii

[a] Overview

In 1991, the Governor of Hawaii designated the Director of Health and the Chairperson of the Board of Land and Natural Resources (BLNR) within the Department of Land and Natural Resources (DLNR) as trustees for the state. Hawaii does not have a dedicated office for NRD claims. Rather, each division of DLNR handles its own cases, subject to approval by BLNR. The state refers to the following authority for NRD: Article XI of the Hawaii State Constitution; Title 12 of the Hawaii Revised Statutes; Title 13 of the Hawaii Administrative Rules. While the state previously did not have authority to retain private lawyers to bring cases on the state's behalf, it recently hired a private firm to handle environmental claims against Matson, the company who accepted responsibility for a September 2013 spill of 233,000 gallons of molasses into Honolulu Harbor, allegedly killing more than 26,000 fish and other marine life, and damaging coral reefs.

[b] Major Matters

Examples of recent NRD cases handled by the Hawaii DLNR include the unauthorized harvesting of koa and alleged injuries to coral. In September 2008, one company agreed to pay \$397,000 for damaging coral within the Molokini Shoal Marine Life Conservation District in 2006. In 2007, an operator of a tour boat agreed to pay \$7,300 in a settlement for illegally entering a reserve area and damaging coral heads with an anchor in 2005. Finally, the BLNR approved a \$130,000 settlement proposal with a boating company that allegedly dropped its anchor on a coral reef in Makena Bay in 2007.

M/V Cape Flattery — In February 2005, the bulk carrier *M/V Cape Flattery* ran aground on a coral reef off Barber's Point, Oahu. Efforts to free the ship and prevent an oil spill allegedly damaged over 20 acres of coral reef and harmed fish, algae, sea urchins, and other reef animals. State and federal trustees—the Hawaii Department of Health, DLNR, the National Oceanic and Atmospheric Administration, and the U.S. Department of the Interior—entered into a Memorandum of Understanding with the responsible parties—Cape Flattery Limited and Pacific Basin (HK) Limited—in which the responsible parties agreed to cover future assessment costs and to pay about \$300,000 in past assessment costs. The responsible parties completed two emergency restoration projects. On March 27, 2013, a settlement was reached and a consent decree was lodged, which requires a total payment of \$7.5 million by the responsible parties. Over \$5.8 million of the settlement funds will be used toward NRD restoration projects.

[c] Contact Information

Hawaii Department of Land and Natural Resources: Kalanimoku Building, 1151 Punchbowl Street, Honolulu, HI 96813. Tel: (808) 587-0400. E-mail: dlnr@hawaii.gov. Web: <http://hawaii.gov/dlnr>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[12] Idaho

[a] Overview

The Governor is Idaho's natural resources trustee, although he or she does delegate trustee authority to other state officers on a case-by-case basis. For instance, the Governor has delegated trustee authority to the Directors of the Departments of Fish and Game and Environmental Quality regarding the Bunker Hill Mining Superfund Site. Idaho has no dedicated NRD office, but it does have limited staff within the Departments of Fish and Game and Environmental Quality who focus on the issue. Idaho began pursuing NRD claims with respect to mining sites in 1983. Since then, Idaho has settled a total of five NRD cases, with restoration work in two cases, Blackbird Mine and Bunker Hill, ongoing. Idaho has not used private attorneys to pursue NRD claims in the past, but may consider doing so in the future. There is no state statute specific to NRD recovery.

[b] Major Matters

Bunker Hill Mining Superfund Site — This site in the Coeur d'Alene Basin was historically one of the largest mining sites in the world. In all, according to the state, more than 100 million tons of mining waste were deposited in the area's river system. More than 15,000 acres of wildlife habitat contain sediments/soils which are acutely toxic to waterfowl, and lead poisoning is responsible for a significant number of waterfowl deaths each year. Twenty-one of the 24 species of birds evaluated are at risk from the elevated metals. The state reports that due to the contamination, about 20 miles of streams are unable to sustain a reproducing fish population and about 10 miles of tributaries have virtually no aquatic life at all. In 1987, the state settled some of its NRD claims for \$4.5 million. Subsequent NRD cases were filed by other trustees, however, including the federal government and the Coeur D'Alene tribe. In December 2009, EPA announced a \$1.79 billion bankruptcy settlement with ASARCO, about \$494 million of which was allocated to the Bunker Hill Superfund Site. Of that total, \$67,500,000 was allocated to trustees for NRD costs. *In Re Asarco, LLC*, No. 05-21207 (Bank. S.D. Tex. 2009) (amended settlement agreement and consent decree regarding residual environmental claims for the Coeur d'Alene, Idaho, Omaha, Nebraska, and Tacoma, Washington environmental sites). In June 2011, a settlement agreement was reached to address the liabilities of the Hecla Mining Company. Under the agreement, Hecla will pay \$59,720,000 in NRD to the United States, the Coeur d'Alene Tribe, and the state of Idaho. *United States v. Hecla Ltd.*, No. 96-0122-N-ELJ, No. 91-0342-N-EJL, No. 94-0206-N-HLR (D. Idaho 2011) (consent decree). On January 19, 2012, the trustees settled with seven mining companies, which have to pay \$59,625 plus an apportioned amount of future proceeds from ore smelting operations, not to exceed \$1 million per settling defendant and for which 25% is to be apportioned for NRD. *United States and Coeur D'Alene Tribe v. Alice Consolidated Mines, Inc. et al.*, No. 11-00446-REB (D. Idaho 2010) (consent

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

decree). In February 2018, the Coeur d'Alene Basin trustees published the final Restoration Plan and Environmental Impact Statement for public comment.

Blackbird Mine Superfund Site — Another large mining site in the Panther Creek watershed, this site involved alleged injuries to surface water and wildlife, particularly the threatened Chinook salmon. The case settled in 1995, with the state and federal trustees imposing a series of restoration projects on the responsible parties, valued at \$60 million.

Southeast Idaho Phosphate Mine Site — The Southeast Idaho Phosphate Mine Site encompasses approximately 17,000 acres within portions of Bannock, Bear Lake, Bingham, and Caribou Counties in the southeast region of Idaho near Soda Springs, and contains 16 major open pit phosphate mines. In 2015, the Southeast Idaho Phosphate Mine Site Trustee Council was formed, which included federal, state, and tribal trustees. The Trustee Council released its Preassessment Screen on June 15, 2015 and determined that the criteria to perform an NRD assessment have been met.

[c] Contact Information

Idaho's Department of Environmental Quality: 1410 N. Hilton, Boise, ID 83706. Tel: (208) 373-0502. Fax: (208) 373-0417. Web: <http://www.deq.idaho.gov>.

[13] Illinois

[a] Overview

The Illinois co-trustees for NRD claims are the Illinois Department of Natural Resources (IDNR) and the Illinois Environmental Protection Agency (IEPA). IDNR employs three staff members to work exclusively on NRD claims, and IEPA participation is largely through their various remedial programs. The co-trustees work cooperatively on NRD matters with other state agencies providing additional technical and legal support. The Illinois NRDA program coordinates cases, decision making, and information exchange through its bi-monthly meeting of State Trustee Agencies and Office of Attorney General (known as Natural Resources Trustee Coordinating Council). Generally, Illinois trustees follow U.S. Department of the Interior or National Oceanic and Atmospheric Administration procedures when pursuing NRD under federal authorities. Illinois also frequently uses habitat equivalency analysis. While Illinois pursues NRD under federal authorities since there is no state statute authorizing NRD recovery, the state does pursue natural resource injuries under other state statutes in state court.

Illinois has settled 17 NRD/Natural Resource Injuries cases (complete and partial) for a total recovery of over \$7 million, and it is currently pursuing approximately eight additional matters. The bulk of the funds recovered by Illinois have been applied to restoration projects. A majority of the settled matters involved chemical or oil spills that occurred after 1995; two recent settlements include Superfund sites. Pending matters are a mixture of cases involving recent

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

spills and NRD assessments being conducted in conjunction with the remediation of Superfund sites. The state is represented by the Office of the Attorney General and does not use private counsel.

[b] Major Matters

The Former Indian Refinery — The facility at the Former Indian Refinery site, located on approximately 990 acres south of Lawrenceville, Illinois, operated as a petroleum refinery from the early 1900s until the mid-1990s and produced various petroleum products. The area is bounded by residential neighborhoods, cropland, bottomland forested wetlands, the Embarras River, and an unnamed tributary of Indian Creek. According to the state, as a result of manufacturing, a variety of waste products were generated and disposed of or released to various areas on- and off-site, including the floodplain of the Embarras River. Contaminants such as acidic sludge, PAHs, benzene, toluene, ethyl-benzene, xylene, cadmium, lead, and other metals were detected in surface water, soils, and in groundwater on or adjacent to the site. The site was placed on the National Priorities List in 2000 and is currently being remediated by Chevron/Texaco, a potentially responsible party (PRP), with oversight by the IEPA. In November 2004, Chevron/Texaco agreed to fund a cooperative NRD assessment at the site. The NRD assessment was coordinated with the federal and state trustees along with the remedial investigation/feasibility study, the first time such coordination formally occurred in Illinois. The various natural resources allegedly injured at this site include groundwater, surface water, air, soils, and biota. In 2011, the trustees reached a settlement agreement with Chevron/Texaco that transferred approximately 2,300 acres of land near the refinery to Illinois for restoration and habitat enhancement and provided \$1.7 million for habitat enhancement and groundwater management. A restoration plan for the site was finalized in November 2014, and restoration is ongoing.

Saline Branch and Salt Fork River — Two fish kills were identified in the Saline Branch Drainage District (SBDD) and the Salt Fork Vermillion River (SFVR) four days apart from one another in July 2002. According to the state, the fish kills were the result of toxic levels of ammonia entering the stream system. An investigation indicated that the University of Illinois at Urbana-Champaign and one of its contractors, CEDA Inc., discharged wastewater containing ammonia into the Urbana Champaign Sanitary District's sewer system, and the Sanitary District released the partially-treated wastewater to the SBDD in Urbana, which drains into the SFVR. The ammonia release resulted in potential damage to nearly 10 miles of the SBDD and approximately 32.4 miles of the SFVR. An NRD settlement was agreed upon by all parties in February 2008, whereby the defendants agreed to pay \$491,000 to cover NRD and costs associated with the incident. Of that, \$450,000 will be used to fund NRD restoration projects along the SBDD and SFVR watersheds. The trustees have worked together to create a restoration concept, including implementing projects in phases. The Phase I Restoration Plan was published in July 2014, and restoration efforts are underway within the Saline Branch at Crystal Lake Park, owned by the Urbana Park District. The approved restoration project

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

involves the unique opportunity to implement both instream and floodplain restoration. The project components include the design and construction of pool and riffle structures and rain gardens, monitoring activities, and educational outreach. Phase II efforts will focus on the SFVR; further evaluation and development of restoration alternatives for Phase II are underway.

Copper Slough - Swift Transportation Inc. — In October 2000, a vehicle accident involving a Swift Transportation, Inc. box van resulted in the release of an undisclosed amount of diesel fuel, laundry detergent, non-chlorine bleach, and fabric softener into Copper Slough and the Kaskaskia River near Champaign, Illinois. The diesel fuel was captured within a mile of the release, while the remaining contaminants traveled a distance of 15.9 miles, allegedly causing injury to Illinois' natural resources. According to the state, the spill impacted surface water, streambed, shoreline, and caused the death of aquatic life throughout the reach, including an estimated loss of 344,800 fish. The parties settled in October 2009 with Swift agreeing to pay \$176,759 to the Natural Resource Restoration Trust Fund. The trustees are working to finalize a restoration plan.

Rock River - Chicago Central and Pacific Railroad — In June 2009, a train derailed near Cherry Valley, including 19 tank cars carrying denatured ethanol. According to the consent order entered by the parties in March 2015, the denatured ethanol consisted of a mixture of 90-92% ethanol and 8-10% natural gasoline. The defendant, Chicago Central and Pacific Railroad (CCP), estimated that approximately 57,035-79,323 gallons of denatured ethanol were released onto the surrounding soils and into a nearby unnamed tributary to the Kishwaukee River. Potentially impacted resources include groundwater, other surface waters, and fish. The trustees offered CCP the opportunity to integrate the cleanup of the derailment site with natural resource injury assessment activities, simultaneously assessing natural resource injuries and characterizing ecological risks associated with releases from the site. Through a cooperative assessment approach, natural resource restoration projects were developed to benefit aquatic resources of the Rock River. The consent order requires CCP to pay \$275,500 to cover the cost of implementation and oversight of the restoration projects. Two of three restoration projects were completed in Fall 2015.

Spoon River Tributaries — In April 2003, approximately 12,000 gallons of 28% nitrogen solution were released from an above-ground storage tank located on the Ehnle Farm in Bradford. Trustees state that the release discharged into an unnamed tributary of the East Fork of the Spoon River, killing an estimated 132,224 fish and other aquatic life. Habitats potentially impacted by the release include surface water, streambed, shoreline, and riparian corridors. An NRD assessment estimate was made by the trustees for the purpose of estimating injury amounts and planning for restoration. The matter was settled in January 2009, with defendants agreeing to pay \$138,126 to the state to cover NRD assessment costs and restoration. Trustees are working together in the restoration planning and implementation processes to seek recovery for damages to natural resources.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Marathon Oil Company — Marathon operates common carrier pipelines for transporting crude and refined petroleum products. From 1977 to 1999, according to the state, numerous spills and leaks from the pipeline have occurred impacting 29 counties in southern Illinois. Allegedly affected resources included soil, surface water, groundwater, and wildlife. The parties settled in 2001 for a total of \$300,000. Marathon will pay \$263,000 for injuries and loss to natural resources, \$25,000 to IDNR for educational activities regarding natural resource restoration projects, and \$12,000 to IDNR for reimbursement of investigation costs. Restoration projects include restoring prairies, re-establishing resident amphibian and reptile habitat, restoring forest barrens, creating wetlands, and controlling invasive plant species, and monitoring of restoration is ongoing.

Vesuvius USA Corporation — In June 2001, Vesuvius USA's factory malfunctioned, allegedly causing furfural, an industrial chemical derived from agricultural byproducts, to spill into three tributaries of the Embarras River. Vesuvius and the state trustees settled the NRD claims for \$154,648, which was used by the state for natural resource restoration and educational programs.

Williams Pipeline Company — Williams' pipeline leaked approximately 10,000 gallons of gasoline and diesel oil into an unnamed tributary of the Salt Creek. Williams settled with the state trustees for \$105,000, which will fund a two-phase restoration plan. The first phase seeks to restore Salt Creek and its accompanying wetlands, while the second phase compensates individuals, such as farmers, who were damaged as a result of the spill.

[c] Contact Information

Illinois Department of Natural Resources: Tom Heavisides, Contaminant Assessment Section Manager, Ecosystems and Environment Division. One Natural Resources Way, Springfield, IL 62702-1271. Tel: (217) 785-5500. Fax: (217) 524-4177. E-mail: Tom.Heavisides@illinois.gov. Web: <https://www.dnr.illinois.gov/programs/NRDA/Pages/default.aspx>.

Illinois Environmental Protection Agency: James (Greg) Richardson. 1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276. Tel: (217) 782-5544. E-mail: James.Richardson@Illinois.gov. Web: <http://www.epa.state.il.us/>.

[14] Indiana

[a] Overview

Trustee responsibilities in Indiana are shared between the Department of Natural Resources (DNR) and the Department of Environmental Management (IDEM). A Memorandum of Understanding exists between the Indiana trustees and the U.S. Fish and Wildlife Service (USFWS), under which the three agencies agreed to work jointly on all NRD claims. Between the two state agencies, three staff members work full time on NRD issues, with support from additional staff members as needed. Indiana state statutes concerning NRD include IND. CODE

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

§§ 14-22-10-6 (Liability for Destruction of Wild Animals by Pollutant); 13-25-4-8 (Liability for Natural Resources Injured, Destroyed, or Loss by Hazardous Materials); and 13-24-1-4 (Liability for Petroleum Releases). Indiana has hired private counsel to investigate its NRD claims.

[b] Major Matters

White River — In December 1999 and January 2000, Guide Corp. allegedly used excessive chemicals to treat waste water, which it subsequently discharged to the City of Anderson's publicly-owned treatment works. The resulting toxic discharge, according to the state, killed approximately 4.6 million fish in the White River. Guide settled with state and federal authorities for a total of nearly \$14 million, \$6.25 million of which was for NRD. Restoration projects included fish restocking, ecological studies, education, and property acquisition, and are nearly complete.

Grand Calumet — Over a period of decades, several factories, refineries, and other facilities released pollutants to the Grand Calumet River, resulting in degradation of the river sediments and water quality; wildlife had also been affected. The eastern five miles of the Grand Calumet River were particularly affected by releases from U.S. Steel's Gary Works, according to the state. Contaminants of concern include PCBs, oil, benzene, cyanide, and heavy metals. U.S. Steel settled with state and federal authorities in 1998. In addition to a \$30 million dredging project, U.S. Steel will support restoration of in-stream habitat for fish and aquatic invertebrates in the river, enhance riparian habitat along the waterway, and provide monitoring. The company also agreed to acquire 216 acres of land to be added to state and national parks. An additional cooperative settlement for NRD was reached in 2004 for \$56 million. This settlement involved state and federal trustees and nine defendant companies (Atlantic Richfield Company, BP Products North America, E.I. DuPont de Nemours, Exxon Mobil Corporation, GATX Corporation, Georgia Pacific Corporation, ISPAT-Inland, U.S. Steel, and LTV Steel). The terms of the settlement include a cash payment of \$53,653,000, acquisition of 233 acres of land to be protected, and \$2.7 million to be paid to IDEM and USFWS for reimbursement of their assessment work. Restoration is ongoing.

American Chemical Services — American Chemical Services (American) manufactured chemicals, including barium naphtherate, brominated vegetable oil, lacquers and paints, liquid soldering fluid, and polyethylene solutions in polybutene. On-site, two incinerators, according to the state, burned approximately two million gallons of industrial waste a year from 1966 until the 1970s. Allegedly, waste from the chemical production and incinerators were disposed in about 400 drums on-site, as well as a larger off-site disposal area that held at least 20,000 to 30,000 punctured drums. American and the state trustees entered into a consent decree in 2000 that settled the state's NRD claims in exchange for a \$630,000 settlement which included \$300,000 for restoration projects, \$250,000 for the purchase of replacement habitat, \$50,000 for additional restoration projects, and \$30,000 in NRD assessment costs. Restoration is now complete.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

I. Jones Recycling, Inc. — This former waste recovery and reclamation facility received over 400,000 gallons of hazardous waste that remained on the property when the facility closed in 1984. A roof collapse in 1985 allegedly caused a 10,000 gallon tank to rupture, spilling 5,000 to 6,000 gallons of waste, approximately 1,500 of which migrated into the local sewer system. Resources that were potentially injured included aquatic invertebrates, birds, amphibians and reptiles, aquatic and terrestrial plants, and surface waters and sediments. State trustees received \$31,308.93 for restoration and natural resource replacement programs.

Lakeland Disposal Landfill — According to the state, the Landfill received over a million gallons of waste, some of which were improperly disposed. These wastes leaked into the groundwater, surface water, and sediments. The state and the U.S. Department of the Interior settled their NRD claims against Lakeland for \$200,000, which will be used for restoring and replacing damaged natural resources. IDEM's restoration plan, which includes restoring or replacing approximately 50 acres of contaminated habitat, was released and given final approval in May 2009.

Waste Inc. Landfill — Waste Inc. operated a landfill that accepted about 128,000 tons of commercial, industrial, and hazardous waste containing PCBs. Allegedly, the landfill was unlined and did not have dikes to control runoff. Therefore, liquid wastes drained into the underlying aquifer, and runoff flowed into a nearby creek and surrounding wetlands. In 1999, the state trustees and Waste Inc. entered a consent decree settling the state's NRD claims for \$597,000 that was to be used for restoration and replacement of damaged natural resources.

[c] Contact Information

Indiana Department of Natural Resources: Carl Wodrich, Director of Ecological Services, 402 W. Washington Street, W261, Indianapolis, IN 46204-2739. Tel: (317) 232-1291. Fax: (317) 233-9376. E-mail: CWodrich@dnr.IN.gov. Web: <http://www.in.gov/dnr/>.

Indiana Department of Environmental Management: Anne Remek-Kominowski, Senior Environmental Manager, Natural Resource Damage Program, 100 N. Senate Avenue, Room IGCN 1307, Indianapolis, IN 46204. Tel: (317) 233-0447. Fax: (317) 234-0428. E-mail: aremek@idem.IN.gov. Web: <http://www.in.gov/idem/>.

[15] Iowa

[a] Overview

Iowa does not have a dedicated office for NRD claims. This function is performed by the Fisheries, Wildlife and Field Services Bureaus in conjunction with the Legal Bureau, all within the Iowa Department of Natural Resources (IDNR). The state has been conducting NRD activity since 1996. There is no authority in Iowa to retain private counsel for NRD matters. A person in control of a hazardous substance is strictly liable for NRD caused by the hazardous material,

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

including the assessment of the damages. IOWA CODE § 455B.392. This includes damage to wildlife. *Id.* §§ 481A.130-31. In addition, any person liable for water pollution is also required to pay restitution for injury to or loss of wild animals caused by the pollution. *Id.* § 481A.151.

[b] Major Matters

Iowa's NRD program is exclusively focused on fish kill restitution. Since 1996, there have been over 150 claims for restitution for fish kills. The total recovery since 1996 is over \$800,000. In 2017, the state had six fish kill matters totaling just under \$12,000 in NRD claims. The program is handled through the Fisheries, Field Services, and Legal Bureaus. The Fisheries Bureau is notified of a fish kill by a field office. A natural resources technician investigates and assesses the damage. The value of the fish is calculated and sent to the Legal Bureau, along with the administrative costs. The Legal Bureau requests restitution from the entity causing the fish kill.

Guttenberg, Iowa Train Derailment — On July 9, 2008, a train derailed near Guttenberg, Iowa, along the west bank of a side channel for the Upper Mississippi River. Some of the derailed cars contained diesel fuel and other petroleum products that discharged into the Upper Mississippi River. According to the trustees, natural resources were also impacted as a result of response activities; for instance, a large boulder on the railroad tracks was blasted into the river, which subsequently landed on a mussel bed. A settlement was reached in December 2014, with the responsible party agreeing to pay approximately \$625,000. A portion of the settlement will be used to restore and restock the allegedly injured mussel bed. A draft restoration plan was released by trustees in November 2015.

[c] Contact Information

Iowa Department of Natural Resources: Ed Tormey, General Counsel, Legal Services Bureau, Wallace Bldg. – 3rd Floor, 502 E. 9th Street, Des Moines, IA 50319. Tel: (515) 725-8373. Email: Ed.Tormey@dnr.iowa.gov. Web: <http://www.iowadnr.gov>.

[16] Kansas

[a] Overview

Kansas has a dedicated program for NRD claims and specific statutory authority for pursuing NRD claims, and is covered by the Bureau of Environmental Remediation Policy #BER-ARS-044, while also relying on federal authority. The state trustee designated by the Governor is the Secretary of the Kansas Department of Health and Environment (KDHE). The Kansas Dry Cleaning and Superfund Programs provide primary technical and administrative support to the trustee for NRD actions. KDHE has been pursuing NRD claims for over 20 years, primarily using habitat equivalency analysis to estimate compensatory damages. In some cases, the U.S. Fish and Wildlife Service, as the federal trustee, and KDHE jointly implement the NRD program in Kansas. In March 2014, KDHE worked together with the Kansas Department of Wildlife,

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Parks, and Tourism to begin implementation of NRD assessment activities at the state's Farlington State Fish Hatchery. Specifically, KDHE will provide funding to construct a facility that will serve as a hatchery for native freshwater mollusks and fish, which will be used for the state's restocking and restoration efforts. The state is handling three cases currently, including two joint cases that are subject to a consent decree. State-only NRD recoveries are placed in a specially created state trust fund for restoration actions, and joint recoveries are placed in a federal trust fund and shared by the state and federal trustees. Recoveries in the state trust fund are tracked separately so the state can disburse the appropriate amount of funds per case for restoration actions.

[b] Major Matters

Cherokee County Superfund Site — This site covers 115 square miles in southeast Kansas. Over 100 years of zinc and lead mining left piles of mine tailings covering 4,000 acres. Run-off from these piles then entered local streams and contaminated the groundwater. Cyprus Amax Minerals Company, a responsible party, settled the United States' Clean Water Act claims and Kansas' NRD claims for a total of \$1.2 million in 2008. A 2012 settlement among E.I. du Pont de Nemours and Company, another responsible party, and the state and federal trustees included \$253,000 for NRD from releases of lead, cadmium, and zinc at the Waco Subsite, a section of the larger Superfund site. Affected resources include groundwater, surface water, sediments, terrestrial resources, resident and migratory birds, fish, macroinvertebrates, and other biota.

Below is a chart providing information about the largest NRD cases Kansas has resolved. Cases are listed in the order from the largest to smallest settlement, and the chart includes a column that indicates whether the case was a state-only or joint settlement.

Kansas Site	Settlement Type	Contaminant	Injured Resources
ASARCO - mine sites - Cherokee County Superfund Site	State	Cadmium, lead, and zinc	Soil, terrestrial organisms, and aquatic organisms in Spring River and tributaries
Phelps Dodge (Cyprus Amax) - mine sites - Cherokee County Superfund Site	Joint	Cadmium, lead, and zinc	Soil, terrestrial organisms, and aquatic organisms in Spring River and tributaries
El Paso - former Conoco site - statewide	State	Petroleum products and by-products	Groundwater

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

El Paso - former refineries - Butler and Sedwick counties	State	Petroleum products and by- products	Aquatic organisms in West Branch Walnut and Chisholm creeks
U.S. Steel (National Zinc) - former smelter - Montgomery County	Joint	Cadmium, lead, and zinc	Soil, terrestrial organisms, and aquatic organisms in Drum Creek
Magellan - pipeline - Kingman County	Joint	Anhydrous ammonia	Aquatic organisms - fish kill on approximately 13 miles of Smoots Creek and tributary
Eagle Picher - former smelter - Cherokee County	State	Cadmium, lead, and zinc	Soil, terrestrial organisms, and aquatic organisms in Short Creek

[c] Contact Information

Kansas Department of Health and Environment: Leo Henning, Director, Bureau of Environmental Remediation, 1000 SW Jackson, Suite 410, Topeka, KS 66612-1367. Tel: (785) 296-1660. Fax: (785) 291-3266. E-mail: leo.henning@ks.gov. Web: <http://www.kdheks.gov>.

[17] Kentucky

[a] Overview

Kentucky's natural resources trustee is the Secretary of the Energy and Environment Cabinet. Until the Russellville Plant matter (see below), Kentucky did not have significant NRD activity. Kentucky does not have a state NRD statute.

[b] Major Matter

Russellville Plant — The Russellville plant was operated by Rockwell International Corporation (Rockwell) from 1957 to 1989 for manufacturing gas meter components and typewriter housings. A lagoon at the plant was used by Rockwell to hold liquid wastes from its manufacturing processes, which included PCBs. According to the state, these PCBs entered the groundwater, streams, and rivers beneath and near Russellville, which allegedly injured natural resources located in Town Branch and Mud River. In 2007, NRD was assessed and settled for \$2.5 million, the largest ever NRD settlement for the state.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[c] Contact Information

Kentucky Energy and Environment Cabinet: 300 Sower Blvd., Frankfort, KY 40601. Tel: (502) 564-3350. Fax: (502) 564-7484. Web: <http://www.eec.ky.gov/>.

[18] Louisiana**[a] Overview**

Louisiana has a dedicated NRD office, the Louisiana Oil Spill Coordinator's Office (LOSCO), which was created in 1991. LOSCO has 12 employees and handles NRD claims related to oil spills. Since its inception, LOSCO has pursued over 20 NRD claims for spills and other oil discharges, generally resulting in a requirement that responsible parties perform restoration projects. LOSCO is funded by a two cent per barrel tax on all oil transported to or from vessels at Louisiana marine terminals, and it operates under the Louisiana Oil Spill Prevention and Response Act of 1991, LA. REV. ST. ANN. § 30:2451, et seq., which authorizes the Oil Spill Coordinator to determine the amount of NRD resulting from unauthorized discharges of oil. *Id.* § 30:2480(A). By submitting the damages assessment to court in a written report, the coordinator's determination creates a rebuttable presumption of the amount of damages, however the "facts surrounding the cause of the unauthorized discharge of oil as set out in the report shall be subject to de novo review." *Id.* § 30: 2480(B). LOSCO has promulgated regulations for NRD assessment codified at LA. ADMIN. CODE tit. 43, §§ 101-25. Although responsible parties in Louisiana face the same liability scheme as established by the OPA of 1990 (P.L. 101-380), "[n]o state trustee or responsible party may invoke the jurisdiction of any court over a disputed natural resource damage assessment claim unless and until the assessment claim has been referred to mediation pursuant to this Section." LA. ADMIN. CODE tit. 43, § 133(A); *see also* LA. REV. ST. ANN. § 30: 2480(C)(9).

Additionally, several other Louisiana agencies, including the Department of Environmental Quality (LDEQ), the Department of Natural Resources (LDNR), the Department of Wildlife and Fisheries (LDWF), and the Coastal Protection and Restoration Authority of Louisiana (CPRA) are also NRD trustees. LDEQ is the lead state trustee for CERCLA matters. Louisiana does not use private attorneys to pursue NRD claims.

[b] Major Matters

T/V Westchester Oil Spill — In 2000, the T/V *Westchester* grounded in the Mississippi River, causing approximately 500,000 gallons of crude oil to spill into the river downstream from New Orleans in Plaquemines Parish. The potentially responsible parties (PRPs), Marine Oil Trader 3, Ltd. and Ermis Maritime Corp., cooperatively settled with the federal and state trustees by agreeing to implement restoration projects related to the natural resources damaged by the spill. The resources allegedly injured included fish, shellfish, birds, and loss of recreational use. With trustee oversight, the settlement called for the PRPs to implement a marsh restoration project and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

making a cut into the riverbank, which will allow sedimentation and vegetative colonization to occur and form marsh. This marsh will provide the habitat necessary for shrimp, fish, and other aquatic species, as well as a nesting and foraging habitat for birds and wildlife. The settlement also called for the building of a dock to enhance recreational use, such as fishing and hunting.

Sonat Goins Oil Spill — In 1997, Sonat was conducting exploratory drilling operations when one of its wells experienced a blowout. According to the state, it took eight days to contain the incident, and during the process, over 13,000 gallons of oil and over 600,000 gallons of brine were released. Impacted resources included soil, sediment, surface water, vegetation, and habitats, such as riparian and bottomland hardwood wetlands, and various pine forests. Over 58 acres were affected. Sonat and the federal and state trustees worked cooperatively on the NRD assessment for this matter, and Sonat agreed to fund the compensatory restoration, which is the enhancement of almost 300 acres of Red-cockaded habitat.

Marathon Pipeline — This matter involved a spill of 475,000 gallons of gasoline into the Blind River, resulting in alleged injuries to fish, wildlife, and air and water quality. As part of a settlement, Marathon purchased property to secure replacement resources and provided public education.

Texaco Pipeline — In 1997, a Texaco pipeline ruptured, spilling nearly 275,000 gallons of oil into Lake Barre. According to the state, the spill resulted in oil slicks covering large tracts of marsh and dead wildlife. NRD was assessed using the habitat equivalency analysis method developed for the North Cape oil spill (see entry under Rhode Island). Restoration efforts included planting 18.6 acres of marsh and the payment of assessment costs.

Calcasieu Estuary & Bayou Verdine — Oil and gas refining near Bayou Verdine, a tributary ultimately flowing into the Calcasieu Estuary, has been ongoing since the 1920s. These facilities allegedly released hazardous substances into the soil and water including heavy metals, PAHs, and VOCs, which impacted assorted benthos and other marine resources. Emergency sediment removal took place from 2002 to 2003 and prompted recovery action under CERCLA by state and federal natural resource trustees against ConocoPhillips and Sasol North America, the current refinery owners and operators. The trustees jointly released their final Damage Assessment and Restoration Plan and Environmental Assessment on March 26, 2010, which primarily proposes dredging contaminated sediments as well as estuarine marsh creation and enhancement. On March 24, 2011, the United States District Court for the Western District of Louisiana approved a consent decree awarding \$1.2 million in past NRD assessment costs, an additional \$750,000 for monitoring, and construction of a restoration project selected by the trustees in accordance with the Restoration Plan. See *United States v. ConocoPhillips Co.*, No. 2:10 CV1556, 2011 WL 113703 (W.D. LA, Mar. 24, 2011).

Deepwater Horizon — On April 20, 2010, an explosion on the offshore drilling rig, *Deepwater Horizon*, caused a fire and led to the subsequent sinking of the rig into the Gulf of Mexico,

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

resulting in the release of oil into the Gulf. The wellhead was capped in mid-July 2010. The natural resource trustees that are engaged in this matter include the National Oceanic and Atmospheric Administration, U.S. Department of the Interior, U.S. Environmental Protection Agency, U.S. Department of Agriculture, Alabama Department of Conservation and Natural Resources, Geological Survey of Alabama, Florida Department of Environmental Protection, Louisiana CPRA, LOSCO, LDEQ, LDWF, LDNR, Mississippi Department of Environmental Quality, Texas General Land Office, Texas Parks and Wildlife Department, and Texas Commission on Environmental Quality. Very shortly after the incident occurred, one of the responsible parties, BP Exploration & Production Inc. (BXP), began engaging in cooperative studies with the trustees to assess NRD caused by the oil release. Technical Working Groups were created for potentially impacted natural resources, and over 160 cooperative studies were undertaken including for birds, marine mammals (*e.g.*, dolphins), sea turtles, marshes, oysters, offshore water column, offshore benthic habitats, and human use. In April 2011, BXP and the trustees entered into a Framework Agreement whereby BXP committed to provide up to \$1 billion toward early restoration projects to address NRD caused by the incident. Between 2012 and 2016, five phases of early restoration projects were approved by the trustees and BXP, encompassing 65 projects at an estimated \$866 million.

On April 4, 2016, a consent decree, which resolves the United States' Clean Water Act penalty claim against BXP, all NRD claims of the United States and the five Gulf States, as well as certain other federal and state claims, was approved by the court in MDL 2179. Pursuant to the consent decree, BXP will pay \$8.1 billion over 15 years for NRD (which includes the \$1 billion previously committed for early restoration), up to \$700 million for adaptive management and to address natural resource conditions that are presently unknown, and \$350 million for NRD assessment costs incurred by the trustees. The consent decree can be found here: <https://www.justice.gov/enrd/file/838066/download>.

In February 2016, the trustees released their Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. The plan allocates settlement funds to address habitat, water quality, living coastal and marine resources, recreational opportunities, and monitoring, adaptive management, and administrative oversight to support restoration implementation. For more information about this matter, *see* <http://www.gulfspillrestoration.noaa.gov/> or <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

Shell Green Canyon Block 248 — On July 5, 2018, a consent decree was lodged in the Eastern District of Louisiana that requires Shell Offshore Inc. to pay over \$3.8 million to cover NRD assessment costs incurred by the Trustees and restoration projects that will be Trustee-sponsored. According to a complaint filed against Shell Offshore, oil was leaked from a piping system utilized in an oil production system located in the Gulf of Mexico 97 miles off the coast of Louisiana. The leak was reported by Shell Offshore to DOI, and it was estimated that 80,892 gallons of oil were discharged. According to the Trustees, natural resources potentially at risk of

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

injury included larval fish, invertebrates, marine mammals, and birds. The Trustees are currently scoping restoration projects to restore habitats for the potentially injured resources.

Hess Breton Sound Block 51 — In June 2005, oil allegedly discharged from one of Hess's storage tanks on its offshore platform in Block 51 of Breton Sound, Louisiana. According to a proposed consent decree lodged on November 9, 2018, an estimated 12 barrels of crude oil spilled into Breton Sound, contaminating the waterway and the shoreline. This discharge allegedly killed over a thousand juvenile pelicans and injured their nesting habitat. According to the proposed consent decree, Hess will pay a total of \$8,723,394.88 to the trustees, with \$93,394.88 to reimburse the Trustees for NRD assessment costs, and \$8,630,000 to be used for Trustee-sponsored restoration projects, oversight, and management.

[c] Contact

Louisiana Oil Spill Coordinator's Office: Gina Muhs Saizan, Natural Resource Specialist, P.O. Box 66614, Baton Rouge, LA 70896. Tel: (225) 925-6606. Fax: (225) 925-7068. Web: <http://www.losco.state.la.us/nrda.html>.

Louisiana Department of Environmental Quality: Herman Robinson, Executive Counsel, Legal Division, 602 N. Fifth Street Baton Rouge, LA 70802. Tel: (225) 219-3960. E-mail: Herman.Robinson@la.gov. Web: <http://www.deq.louisiana.gov>.

Louisiana Department of Wildlife and Fisheries: Terry Romaine, P.O. Box 98000, Baton Rouge, LA 70898-9000. Tel: (225) 765-2394. E-mail: tromaine@wlf.louisiana.gov. Web: <http://www.wlf.louisiana.gov/>.

Louisiana Coastal Protection and Restoration Authority: P.O. Box 44027, Baton Rouge, LA 70804-4027. Tel: (225) 342-7308. Fax: (225) 342-9417. Web: <http://coastal.la.gov/>.

[19] Maine

[a] Overview

Maine has multiple natural resources trustees, including the Department of Environmental Protection (DEP), the Department of Inland Fisheries and Wildlife, the Department of Marine Resources, and the Department of Agriculture, Conservation and Forestry. The Commissioner of DEP is the lead trustee for NRD matters. Maine began NRD work shortly after launching its Superfund program, which was developed in the mid-1980s. At that time, NRD was in its early stages, so there were no mechanisms in place to accurately assess specific damages. Consequently, NRD was included in the general settlement of the consent decrees for various Superfund sites. For these sites, past response costs, future oversight costs, and NRD were a part of one total settlement. With regard to marine oil spills, Maine began its NRD work in the early 1990s. The state also seeks NRD for loss of use of groundwater. Under Maine law, parties are

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

strictly, as well as jointly and severally, liable for NRD, ME. REV. STAT. ANN. tit. 38, §§ 552, 1316-C, 1367. Maine obtains authority to pursue NRD claims pursuant to *id.* tit. 38, §§ 347-A (1), 552, 1367; *id.* tit. 5 § 191, in addition to CERCLA.

[b] Major Matters

Julie N Oil Spill — Maine's first major NRD case was the *Julie N* oil spill in 1996. The tanker *Julie N* struck a bridge and spilled nearly 180,000 gallons of heavy fuel oil into the Fore River. Some of the oil made its way to Stroudwater Marsh and Long Creek. Fortunately, 78 percent of the oil was recovered. Affected resources included surface water, sediments, marine vegetation, and birds. The restoration plan included 130 acres of habitat enhancement, as well as habitat acquisition. The settlement was valued at \$1 million plus response costs.

F. O'Connor Superfund Site — This site operated as a salvage and electrical transformer recycling facility in the early 1950s. In 1972, it was discovered that oil from the site had migrated to Riggs Brook. A settlement was reached in 1994 between the potentially responsible party (PRP) and the state, which required the PRP to pay \$125,000 toward NRD for alleged groundwater damage caused by PCBs and solvents.

Maine Yankee — From 1972 until 1997, Maine Yankee operated a nuclear power plant on Bailey Point Peninsula in Wiscasset, Maine. Operations of this plant contributed to asserted long-term damage to groundwater resources at and nearby the site. Contaminants from the site include petroleum and solvents, as well as radiological materials. The restoration plan and settlement agreement called for \$930,000 to be allocated to several projects in the area of the site. These compensatory funds will cover: land conservation easements to preserve 543 acres of land and shorelines; restoration of 216 acres of a salt marsh; removal of fish passage barriers; repairing a fish ladder; trail extensions; and restoration, creation, or preservation of aquatic resources and their uplands.

S.D. Warren Facility — This site, located in Westbrook, Maine, operates as a pulp and paper mill but formerly operated as hazardous waste storage area for waste solvents generated from the manufacture of coated papers. According to the state, Kimberly-Clark has assumed responsibility for certain environmental issues at the site, and it entered into a settlement agreement with the state to cover injury to the groundwater at the site. Specifically, Kimberly Clark will provide \$110,000 to allow the purchase of 3.88 acres of land next to the Presumpscot River in order to develop trails throughout the area, and \$50,440.00 to fund the restoration, enhancement, and/or the creation of the trail system and the canoe/kayak launch area.

Portland-Bangor Waste Oil Site — The Portland-Bangor Waste Oil (PBWO) site, located in Ellsworth, Maine, was operated as a waste oil collection and recycling facility from 1963 to 1980. According to the state, soils and groundwater at the site and nearby properties became contaminated as a result of operations at the site. In October 2013, state trustees issued an NRD Compensation Plan which would allow the DEP to collect \$500,000 from a Waste Motor Oil

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Revenue Fund that was established in 2007 to pay response costs related to PBWO disposal sites. NRD at the site is limited to loss of use of groundwater—DEP estimates that over 1.7 billion gallons of groundwater are contaminated—and the compensation will be provided to the City of Ellsworth for local projects to protect water resources from contamination.

Gulf-Chevron Terminal Facility — On July 7, 2016, a consent decree was approved allowing Chevron USA, Inc., Texaco, Inc., and other defendants, to settle NRD claims totaling over \$922,000. According to the government, various oil discharges occurred at the Gulf-Chevron Terminal Facility Site, located in Hampden, Maine, beginning at least as early as the 1970s. In July 2006, the U.S. Coast Guard observed a sheen on the Penobscot River, the largest river in Maine, which was attributed to the Site. PAHs have been found in river sediment. Allegedly impacted resources include migratory fish, including the endangered Atlantic salmon and shortnose sturgeon, as well as river herring and striped bass, all of which use the Penobscot River as a migratory corridor and juvenile rearing habitat. In accordance with the consent decree, defendants will pay approximately \$43,000 to DOI and NOAA for NRD assessment costs, and \$880,000 for restoration. Federal and state trustees are in the process of evaluating restoration opportunities.

[c] Contact Information

Maine Department of Environmental Protection: 17 State House Station, Augusta, ME 04333-0017. Tel: (207) 215-8597 or (800) 452-1942. Web: <http://www.maine.gov/dep/index.shtml>.

Maine Department of Agriculture, Conservation and Forestry: 22 State House Station, Augusta, ME 04333-0022. Tel:(207) 287-3200. Fax: (207) 287-2400. Web: <http://www.maine.gov/dacf/>.

Maine Department of Inland Fisheries and Wildlife: 284 State Street, Augusta, ME 04401. Tel: (207) 287-8000. Fax: (207) 287-8094. Web: <http://www.state.me.us/ifw/>.

Maine Department of Marine Resources: 21 State House Station, Augusta, ME 04333-0021. Tel: (207) 624-6550. Fax: (207) 624-6024. Web: <http://www.maine.gov/dmr/>.

[20] Maryland

[a] Overview

The Department of Environment and the Department of Natural Resources are co-trustees for Maryland. Maryland has no dedicated office, employees, or budget for pursuing NRD claims. Maryland does not have a state NRD statute.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

68th Street Dump Superfund Alternative Site — Between the 1950s and early 1970s, commercial and industrial substances such as solvents, paints, and automobile tires were allegedly dumped in seven former landfills located adjacent to wetland areas and surface water at this 239-acre site in Rosedale, Maryland. Resources at potential risk from the hazardous waste releases include migratory fish such as American shad, Hickory shad, blueback herring, alewife and American eel; and estuarine habitats, such as wetlands. On November 29, 2017, the U.S. District Court for the District of Maryland approved a settlement resolving EPA's clean-up requirements under CERCLA, as well as claims for NRD at the site. In addition to requiring responsible parties to finance and perform a \$51.5 million EPA-approved cleanup, the companies responsible for the injuries must pay \$630,000 for an off-site 75-acre reforestation project to compensate for NRD incurred or to be incurred at the site, and \$240,000 to reimburse the past costs to state and federal trustees in assessing those damages. The responsible parties will also finance and perform on-site restoration projects to address NRD, including the installation of in-stream trash racks at five locations for a 20-year operational period, invasive species control, wetlands enhancement, stream restoration, and the exclusion of motor vehicles.

PEPCO Spill — The state has had just one NRD matter related to an oil spill, resulting in claims against Potomac Electric Power Company (PEPCO) and its pipeline contractor, ST Services. The spill occurred in April 2000 at PEPCO's Chalk Point power plant when 140,000 gallons of oil were released into Swanson Creek, a tributary of the Patuxent River, resulting in alleged damage to 76 acres of wetlands and 10 acres of shoreline. Maryland, along with federal trustees, pursued an NRD claim, which resulted in a \$2.7 million settlement for restoration of wetlands, oyster beds, waterfowl nesting areas, and terrapin habitats, as well as \$318,000 for assessment costs.

Spectron, Inc. Superfund Site — This site, located on eight acres in Elkton, Maryland, operated as a solvent recycling facility from 1961 to 1988 and is now abandoned. Contamination containing VOCs allegedly leaked into site soils and groundwater. The site was added to the National Priorities List in 1994 and is in the process of being remediated pursuant to CERCLA. In 2007, a consent decree was executed between the U.S. Environmental Protection Agency, natural resource trustees, and 95 potentially responsible parties entailing a \$21.8 million settlement, \$507,300 of which will be given to federal and state trustees for NRD. After reimbursement for past restoration planning, \$455,000 will be used for restoration activities. According to the state, contamination and oil from the site migrated to Little Elk Creek, which injured various fish as well as benthic organisms and their habitat. A restoration plan was finalized in June 2008. However, property access issues prevented implementation of the selected project at Scotchman Creek in the Elk Creek watershed. In September 2015, the trustees finalized an amended restoration plan, which provides for the use of settlement funds to assist with the removal of Bloede dam on the Patapsco River in Baltimore and Howard Counties, Maryland. The project, scheduled for groundbreaking in 2018, will open over 65 miles of

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

spawning habitat for migratory fish, including blueback herring, alewife, American shad, and American eel..

[c] Contact Information

Maryland Department of the Environment: Stephanie Cobb Williams, Deputy Counsel, 1800 Washington Boulevard, Baltimore, MD 21230-3572. Tel: (410) 537-3040. Fax: (410) 537-3943. E-mail: stephaniecobb.williams@maryland.gov. Web: <http://www.mde.state.md.us/Pages/Home.aspx>.

Maryland Department of Natural Resources: Jennifer Wazenski, Principal Counsel, 580 Taylor Avenue, Tawes State Office Building, Annapolis, MD 21401. Tel: (410) 260-8350. E-mail: jennifer.wazenski@maryland.gov. Web: <http://dnr.maryland.gov/Pages/default.aspx>.

[21] Massachusetts

[a] Overview

The Secretary of the Executive Office of Energy and Environmental Affairs (EEA) has been designated by the Governor as trustee for natural resources of the Commonwealth of Massachusetts. The Secretary has the authority under the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, MASS. GEN. LAWS Ch. 21E, Section 5, Ch. 21A, Section 2A, and federal environmental statutes to assert a claim for NRD. In Massachusetts, responsible parties are jointly and severally liable for NRD resulting from releases or threatened releases of hazardous materials. *Id.* § 5(a). The statute of limitations provision for NRD claims in Massachusetts stipulates that claims be filed within three years after the date of the discovery of the damage or loss and its connection with the release in question, or three years after the date the commonwealth discovers that the person against whom the action is being brought is a person liable pursuant to this chapter for the release or threat of release that caused the damage, whichever is later. *Id.* § 11A. Alternatively, if the state incurs response costs, NRD claims may be filed within five years from the date at which the state incurs all response costs, or five years from the date when the state determines a party responsible for a release for which it has incurred response costs, whichever is later. *Id.*

Within EEA, the Massachusetts Department of Environmental Protection (MassDEP) administers the NRD Program. A network of technical, policy, and legal staff are involved in NRD case screening, assessment, restoration, and program development. There is one full-time NRD Coordinator.

[b] Major Matters

AVX/New Bedford Harbor Superfund Site — Pursuant to a supplemental consent decree filed in October 2012, AVX Corp. will pay \$366.25 million plus interest for cleanup of PCBs in New

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Bedford Harbor. This order came 20 years after the first settlement over AVX's alleged pollution of the harbor (cited in the chart below) and is the largest single-site Superfund settlement in history. From the 1940s through the 1970s, South Carolina-based Aerovox (now AVX) maintained an electronics plant that, according to the state, leaked PCBs into the Acushnet River, which empties into the harbor. Of concern to the trustees is the resulting dangers associated with locally-caught seafood. With the settlement funds, the trustees hope to finish remediation of the harbor in five to seven years. Further, as part of the cleanup remedy, in November 2012, the U.S. Environmental Protection Agency (EPA) approved construction of a 28-acre marine terminal in New Bedford. Since construction will likely cause loss of a freshwater wetland and salt marsh, intertidal and subtidal habitat, and millions of shellfish, EPA is requiring restoration of these resources to mitigate their loss. In 1992, the responsible parties paid \$20.2 million in NRD, and more than 37 restoration projects have occurred since 1998. Restoration is ongoing. For more information, *see* <http://www2.epa.gov/new-bedford-harbor>.

Since 1992, Massachusetts, working in cooperation with federal trustees, has negotiated 20 NRD settlements and recovered over \$63 million. Restoration planning has been completed for at least seven of these settlements. Below are the 20 settled matters and the recovery by the state:

Massachusetts Site	Settlement Year	Injured Resources	NRD Recovery
New Bedford Harbor	1992	Water column, sediments, shellfish, birds, anadromous fish, recreational fishing, beach usage	\$20,200,000
Charles George Landfill	1993	Groundwater, wetlands, migratory birds, migratory fish	\$1,353,440
PSC Resources	1995	Surface water, wetlands, migratory birds, soil, groundwater	\$157,256
Nyanza/Sudbury River	1998	Surface water (riverine habitat), wetlands, fisheries, other wildlife, recreational use	\$3,100,000
Hallmark/Mystic River	1999	Surface water (riverine habitat), recreational use	\$26,801
General Electric / Housatonic River	2000	Surface water, riverbank and floodplains, fisheries, wildlife, aquatic life, vegetation, recreational fishing and boating	\$15,000,000
Colrain Acid Spill/ North River	2003	Surface water, fisheries, aquatic resources	\$30,000
Posavina Oil Spill / Chelsea Creek	2004	Shoreline, marine communities, wetlands/salt marsh	\$148,615
Holyoke Coal Tar Deposits/CT River	2004	Surface water, fisheries, rare freshwater mussels	\$345,000

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Massachusetts Site	Settlement Year	Injured Resources	NRD Recovery
Textron Systems Corporation/Mass. Military Reservation Superfund Site	2007	Groundwater	\$1,300,000
Global/Irving Chelsea Creek oil spill	2008	Surface water, shoreline, wetlands/salt marsh	\$212,500
Coal Tar/Island End, Chelsea Creek	2009	Fish	\$300,000
Rubchinuk Landfill Site	2010	Community use	\$747,000
Sutton Brook Disposal Area Superfund Site	2010	Groundwater, biological resources and their habitats (such as surface water, sediment, and soil resources)	\$1,650,000
Fireworks Site/Tronox	2010/2014	Fish, soil, sediment, and wetlands	\$6,800,000
Blackburn & Union Privileges Superfund Site	2011	Groundwater, biological resources and their habitats (such as surface water, sediment, and soil resources)	\$1,094,000
Bouchard B-120 Buzzards Bay Oil Spill	2011	Aquatic and shoreline, Ram Island shoreline, recreation and shellfish, and piping plovers	\$19,376,393
Jefferson Development/Taunton Dam	2011	Fish, watershed	\$25,000
GM Assembly Plant in Framingham	2012	Streambed, banks and surrounding wetlands; birds, wildlife, and benthic macroinvertebrates	\$157,426
Pharmacia Corp./Bayer CropScience Superfund Site	2012	Wetland, river, and lake habitat; fish, turtles, amphibians, and migratory birds	\$4,250,000
Industri-Plex Superfund Site	2013	Aberjona River sediment, wetlands, floodplains, fish and wildlife	\$4,200,000
Upper Mystic River Oil Spill	2014	Shoreline habitat, wildlife, biota, air, and surface water	\$55,100
Getty Petroleum Marketing, Inc.	2015	Groundwater (funds were from a bankruptcy settlement for several Getty sites)	\$41,065

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Massachusetts Site	Settlement Year	Injured Resources	NRD Recovery
Reed and Barton Corp., Taunton	2016	Sediment	\$236,447

Source: Massachusetts Department of Environmental Protection Website, MA NRD All Case Settlements, <https://www.mass.gov/service-details/massachusetts-natural-resource-damages-program-settlements>.

[c] Contact Information

Massachusetts Department of Environmental Protection: Karen Pelto, Natural Resource Damages Coordinator, One Winter Street, 6th Floor, Boston, MA 02180. Tel: (617) 292-5785. E-mail: Karen.Pelto@state.ma.us. Web: <http://www.mass.gov/eea/agencies/massdep/cleanup/nrd/>.

[22] Michigan

[a] Overview

In Michigan, the Department of Natural Resources (MDNR), in conjunction with the Attorney General and the Department of Environmental Quality (MDEQ), acts as the natural resources trustee. Michigan has no dedicated office for NRD and no NRD budget. One staff member at the MDNR and two staff members of the MDEQ work on NRD issues. The state is currently pursuing at least four NRD claims. Michigan does not use private attorneys.

Michigan's main NRD statute is MICH. COMP. LAWS § 324.20126a, which imposes joint and several liability. A number of other Michigan environmental statutes also include NRD provisions: §§ 324.5530(3) (air pollution); 324.9121(6) (soil erosion and sediment control); 324.3115(2) (water resources); 324.11546(3) (solid waste management); 324.21323b(1)(c), 324.21323(f) (leaking underground storage tanks); 324.11151(9) (hazardous waste); 324.31525(5), 324.31525(7) (dam safety).

[b] Major Matters

Kalamazoo River — Due to industrial activities along the Kalamazoo River and Portage Creek, an NRD assessment is currently ongoing with respect to PCB contamination in those waterways. The main resources of concern are surface water, groundwater, fish, and birds. Use values to be assessed include wildlife viewing, fishing, and dredging or dam removal restrictions. A final Restoration Plan and Environmental Assessment for Operable Unit 1 was released in August 2013, and the trustees published a Final Restoration Plan and Programmatic Environmental Impact Statement for Restoration in August 2016. The Record of Decision was published in November 2016 indicating an alternative selection that will address aquatic habitat restoration, riparian and wetland habitat restoration, dam removal for river and fish passage restoration, and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

habitat conservation actions in the Kalamazoo River. Restoration is underway in conjunction with the PCB removal action.

Saginaw River and Bay — For many decades, various industrial facilities and wastewater treatment plants allegedly released PCBs into the Saginaw River in Michigan. Even after the use of PCBs was banned in the 1970s, on-site contamination continued to release the contaminant, which damaged the river and Saginaw Bay. The trustees have alleged that this contamination may have injured resources, including fish, wildlife, birds, and impacted recreational use. The trustees of the site, the U.S. Fish and Wildlife Service, the Saginaw Chippewa Tribe, and the state, reached an NRD settlement with General Motors Corporation and the cities of Bay City and Saginaw in 1998. The settlement called for various activities such as dredging the contaminants from the river, acquiring and restoring coastal wetlands and lakeplain prairies, restoration of water flow between Saginaw Bay and the marsh, and the creation of boat launches and nature viewing areas. Additionally, the potentially responsible parties (PRPs) were required to provide the trustees with \$3 million for monitoring and evaluation and \$2 million to reimburse the trustees for their assessment costs. According to the state, the total settlement is worth \$28.2 million. A Final Restoration Plan and Environmental Assessment for the Green Point Area restoration project was released on June 10, 2016.

Tittabawassee River — The Tittabawassee River is an ongoing NRD assessment in Michigan involving dioxins. According to the state, Dow Chemical (Dow) is the primary PRP. The trustees have entered a Memorandum of Agreement (MOA) with Dow relating to NRD assessment activities. Specifically, Dow has agreed to fund or implement trustee activities as provided for in the MOA. An NRD assessment plan prepared for the MDEQ was released in April 2008, and a draft River Assessment was finalized by MDNR Fisheries Division in September 2009.

Verona Well Field — The city of Battle Creek's groundwater became contaminated, according to the state, after the improper disposal of solvents in leaking containers and directly onto the ground. Nine of the 21 underground storage tanks, for example, at one facility were found to be leaking. In 1981, Battle Creek health authorities detected VOCs in the municipal water supply. In 1989, the state trustee and the U.S. Environmental Protection Agency received a partial settlement of the contamination from one PRP, Grand Truck Western Railroad, for \$607,490. A settlement with another PRP, Dick Thomas and the Thomas Solvent Companies, allocated \$200,000 of the total \$611,000 settlement to NRD.

Talmadge Creek and Kalamazoo River Oil Spill — In July 2010, a pipeline operated by Enbridge Energy ruptured near Marshall, Michigan, releasing over 800,000 gallons of oil into Talmadge Creek and the Kalamazoo River. This spill affected a short segment of the creek, but closed approximately 40 miles of the river to all recreational use or activities pending completion of oil recovery efforts. Potentially impacted resources include fish, wildlife, wetlands, and other habitat in and around the Talmadge Creek and Kalamazoo River. In May 2015, Enbridge and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

the state reached a settlement which requires Enbridge to implement work related to NRD restoration and compensation that has been estimated by the state to cost at least \$58 million, in addition to paying the state for the costs of oversight of cleanup and restoration. In December 2015, a consent decree between all trustees and Enbridge was approved by the court requiring Enbridge to pay an additional nearly \$4 million for NRD assessment and restoration. A Final Damage Assessment and Restoration Plan was released in October 2015.

[c] Contact Information

Michigan Department of Natural Resources: Jessica Mistak, Supervisor, Habitat Management Unit, Fisheries Division, 6833 Hwy. 2, 41, M-35, Gladstone, MI 49837. Tel: (906) 789-8212. Fax: (906) 786-1300. E-mail: mistakj@michigan.gov. Web: <http://www.michigan.gov/dnr>.

Michigan Department of Environmental Quality, Remediation Division: Judith Alfano, P.O. Box 30426, Lansing, MI 48909-7926. Tel: (517) 284-5061. Fax: (517) 335-4887. E-mail: alfanoj@michigan.gov. Web: <http://www.michigan.gov/deq>.

Michigan Department of the Attorney General: Polly Synk, Section Head, Environment, Natural Resources, and Agricultural Division, P.O. Box 30755, Lansing, MI, 48933. Tel: (517) 373-7540. Fax: (517) 373-1610. E-mail: synkp@michigan.gov. Web: <http://www.michigan.gov/ag/>.

[23] Minnesota

[a] Overview

The Department of Natural Resources and the Pollution Control Agency (PCA) are co-natural resource trustees in Minnesota. There are two staff members (1.9 full time equivalent) who spend time on NRD issues. Minnesota has settled 16 NRD cases and is currently pursuing 8 more. All of these cases involve harm to surface or groundwater and air. In addition to the state's NRD program, the PCA runs the Minnesota Closed Landfill Program. As part of that program, the PCA collects NRD related to closed landfills. For additional discussion of the Minnesota Closed Landfill Program, including the methodologies used to calculate NRD, *see* "Natural Resource Damages" by Brian D. Israel, in Gerrard (ed.), *Environmental Law Practice Guide: State and Federal Law* (Matthew Bender & Co., Inc.), § 32B.08[4]. Minnesota's NRD statute, the Environmental and Response Liability Act, is codified at MINN. STAT. §§ 115B.01-.20 and 116.

[b] Major Matters

Enbridge Energy Site — In January 2009, a consent decree was entered in litigation between natural resource trustees and Enbridge Energy Limited Partnership (Enbridge) relating to the alleged natural resource injuries and damage caused by an oil spill in July 2002. At that time, a pipeline owned by Enbridge allegedly released approximately 6,000 barrels of crude oil (the

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

equivalent of about 250,000 gallons) into a forested wetland within the watershed of a tributary of the Mississippi River. Potentially affected resources include wetland habitats for birds and wildlife and forested wetlands. Under the consent decree, Enbridge has to pay \$16,300 to the trustees for past assessment costs (\$1,400 will go to the state), remove a forest road within the Chippewa National Forest, restore forested wetlands within the same forest, and retrofit 10 diesel school buses owned by the tribal trustee with diesel oxidation catalyst devices. Enbridge previously reimbursed the trustees \$112,000 in past assessment costs. *United States v. Enbridge Energy Ltd. P'ship.*, Case No. 0:08-CV-5878 (PJS/RLE) (D. Minn. 2009) (consent decree).

St. Louis River/Interlake/Duluth Tar Site — The St. Louis River/Interlake/Duluth Tar (SLRIDT) site is located on the north bank of the St. Louis River in the city of Duluth, Minnesota, four miles upstream of Lake Superior. The site had been used for industrial purposes since at least the 1890s. Tar and chemical operations on the site ceased in 1948, and the iron plant stopped operating in 1961. The site is comprised of 255 acres of land and river embayments, wetlands, and shipping slips. The SLRIDT site was added to the National Priorities List in 1983. According to the federal and state trustees, natural resources potentially affected by operations at the sites include sediment in all water portions of the site. On November 16, 2017, a consent decree was approved with three potentially responsible parties agreeing to pay \$8,200,000 to cover NRD, of which \$6,476,742 will fund trustee-sponsored restoration, and \$1,723,258 will reimburse the trustees for assessment costs. The final Restoration Plan and Environmental Assessment was released in February 2018, and the preferred alternative focuses on enhancement and restoration of the shallow sheltered embayment at Kingsbury Bay, Kingsbury Creek watershed protection, and wild rice restoration in the St. Louis River estuary.

3M Company — In 2010, the state filed a complaint against 3M Company pursuant to Minnesota's Environmental Response and Liability Act as well as its Water Pollution Control Act claiming that 3M's production of per- and poly-fluorinated chemicals had damaged drinking water and natural resources in the southeast Twin Cities metropolitan region. On February 20, 2018, a settlement between the state and 3M was announced resolving the state's NRD claims and requiring 3M to provide the state with an \$850 million grant. It is estimated that after legal and other expenses are paid, \$720 million will be invested in improving the quality and quantity of drinking water (first priority) and enhancing natural resource projects (second priority).

[c] **Contact Information**

Minnesota Department of Natural Resources: 500 Lafayette Road, St. Paul, MN 55155-4040.
Tel: (651) 296-6157 or (888) 646-6367. Web: <http://www.dnr.state.mn.us/index.html>.

Minnesota Pollution Control Agency: 520 Lafayette Road, St. Paul, MN 55155-4194. Tel: (651) 296-6300 or (800) 657-3864. Web: <http://www.pca.state.mn.us/>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[24] Mississippi

[a] Overview

The Executive Director of the Department of Environmental Quality is the Mississippi natural resources trustee. Mississippi has no dedicated NRD budget or staff but dedicates resources on an as-needed basis. Since its inception in 1992, Mississippi's NRD program has handled approximately 15 claims, all but one of which settled informally. The majority of Mississippi's NRD cases were in the 1990s; only two cases have been settled or resolved since 2000. In one major case, Mississippi used habitat equivalency analysis to assess damages. Mississippi is not currently pursuing any groundwater NRD cases. The state has the authority to retain private counsel to pursue NRD claims. Mississippi has a limited NRD statute that imposes liability on responsible parties to restock fish and replenish wildlife when loss of fish or wildlife has been caused by a violation of the state's environmental statutes. MISS. CODE ANN. § 49-17-43.

[b] Major Matters

Genesis Pipeline Spill — In December 1999, a pipeline owned by Genesis Pipeline USA, L.P., ruptured spilling 336,000 gallons of crude oil into the Leaf River. According to the state, the spill caused significant damage to surface water, sediments, shoreline habitats, and wildlife. In addition to paying \$20 million in cleanup costs, Genesis settled NRD claims by the state and federal trustees for a total of \$3 million and the purchase of at least three acres to replace damaged habitat. The NRD recovery is primarily being used for streambed and wetland restoration, as well as a wood duck nesting project and groundwater monitoring.

Deepwater Horizon — On April 20, 2010, an explosion on the offshore drilling rig, *Deepwater Horizon*, caused a fire and led to the subsequent sinking of the rig into the Gulf of Mexico, resulting in the release of oil into the Gulf. The wellhead was capped in mid-July 2010. The natural resource trustees that are engaged in this matter include the National Oceanic and Atmospheric Administration, U.S. Department of the Interior, U.S. Environmental Protection Agency, U.S. Department of Agriculture, Alabama Department of Conservation and Natural Resources, Geological Survey of Alabama, Florida Department of Environmental Protection, Louisiana Coastal Protection and Restoration Authority, Louisiana Oil Spill Coordinator's Office, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, Louisiana Department of Natural Resources, Mississippi Department of Environmental Quality, Texas General Land Office, Texas Parks and Wildlife Department, and Texas Commission on Environmental Quality. Very shortly after the incident occurred, one of the responsible parties, BP Exploration & Production Inc. (BPXP), began engaging in cooperative studies with the trustees to assess NRD caused by the oil release. Technical Working Groups were created for potentially impacted natural resources, and over 160 cooperative studies were undertaken including for birds, marine mammals (*e.g.*, dolphins), sea turtles, marshes, oysters, offshore water column, offshore benthic habitats, and human use. In

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

April 2011, BPXP and the trustees entered into a Framework Agreement whereby BPXP committed to provide up to \$1 billion toward early restoration projects to address NRD caused by the incident. Between 2012 and 2016, five phases of early restoration projects were approved by the trustees and BPXP, encompassing 65 projects at an estimated \$866 million.

On April 4, 2016, a consent decree, which resolves the United States' Clean Water Act penalty claim against BPXP, all NRD claims of the United States and the five Gulf States, as well as certain other federal and state claims, was approved by the court in MDL 2179. Pursuant to the consent decree, BPXP will pay \$8.1 billion over 15 years for NRD (which includes the \$1 billion previously committed for early restoration), up to \$700 million for adaptive management and to address natural resource conditions that are presently unknown, and \$350 million for NRD assessment costs incurred by the trustees. The consent decree can be found here: <https://www.justice.gov/enrd/file/838066/download>.

In February 2016, the trustees released their Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. The plan allocates settlement funds to address habitat, water quality, living coastal and marine resources, recreational opportunities, and monitoring, adaptive management, and administrative oversight to support restoration implementation. For more information about this matter, *see* <http://www.gulfspillrestoration.noaa.gov/> or <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

[c] Contact Information

Mississippi Department of Environmental Quality: Lisa Thompson Ouzts, Senior Attorney, P.O. Box 2249, Jackson, MS 39225. Tel: (601) 961-5340. Fax: (601) 961-5349. E-mail: lisa_ouzs@deq.state.ms.us. Web: <http://www.mdeq.ms.gov/>.

[25] Missouri

[a] Overview

The Director of the Department of Natural Resources (MDNR) is the natural resources trustee in Missouri. The Department is in the process of hiring two full time technical staff to conduct NRD technical work in addition to the four staff that share responsibilities with other programs.. Missouri's costs related to NRD are paid from its Natural Resources Protection Fund. Since 1998, Missouri has concluded five NRD cases, including one that was litigated in state court. Missouri usually uses habitat equivalency analysis to assess damages. The state has also relied on the New Jersey groundwater formula for some bankruptcy claims, and it released a Statewide Groundwater Restoration Plan in May 2015. Missouri does not use private attorneys to pursue NRD claims. Missouri Revised Statutes § 644.096 provides for NRD recovery for damage to water resources.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Jasper County Lead Mining Superfund Site — This site, also known as the Oronogo-Duenweg Mining Belt, involves hundreds of lead and zinc mines in southwestern Missouri. A preliminary site assessment prepared by the MDNR estimates that large areas of land and surface water are contaminated with lead, zinc, and cadmium above applicable standards. Concentrations of these contaminants in shallow groundwater aquifers exceed background levels by as much as an order of magnitude. A finalized NRD assessment plan was released in June 2009. As part of a settlement entered in December 2009 in the course of ASARCO's bankruptcy, the U.S. Department of the Interior (DOI) and the state will receive \$20.1 million in NRD to Jasper and Newton counties. A final Restoration Plan and Environmental Assessment was released in July 2018.

Cominco/Halliburton — MDNR received a cooperative settlement totaling \$49,000 for seven lead and copper metal concentrate spill sites for which Cominco American, Inc. and Halliburton Energy Services, Inc. are allegedly responsible. Of note, these settlements occurred at the instigation of the potentially responsible parties (PRPs).

Newton County Mine Tailings Superfund Site — This site is located in the Tri-State Mining District but pertains only to NRD located in the Ozark Uplift in Missouri. This site was used for lead and zinc mining from approximately 1850 to 1950. Primary contaminants allegedly released at the site include cadmium, lead, and zinc. Due to extensive groundwater contamination, the site was placed on the National Priorities List in 2003 and is currently being remediated. It is estimated that injured groundwater exceeds 680,000 acre-feet, and impacted land estimates are as high as 804 acres. The state claims that the natural resources that have been injured are groundwater, surface water, sediments, aquatic and terrestrial plants and organisms, aquatic mammals, fish, aquatic and terrestrial invertebrates, and migratory birds. In early 2008, the federal and state trustees provided a Notice of Intent to Perform an NRD Assessment to the PRPs at this site, inviting them to participate in the assessment. A finalized NRD assessment plan was released in June 2009. As part of a settlement entered in December 2009 in the course of ASARCO's bankruptcy, DOI and the state will receive \$20.1 million in NRD to Jasper and Newton counties.

Southeast Missouri Lead Mining District — A final NRD assessment plan was released for this area in January 2009. It is comprised of four different mining sites: Big River Mine Tailings Superfund Site, Sweetwater Mine/Mill Complex, West Fork Mine/Mill Complex, and Glover Smelter. Like the other mining sites described above, the sites in this district were mined extensively for zinc and lead for over 100 years, allegedly leading to releases of contaminants such as cadmium, lead, zinc, and nickel. Federal and state trustees are currently focusing on surface water, geological resources, groundwater, and aquatic and terrestrial biota as impacted natural resources. The trustees have sent an Notice of Intent to all PRPs inviting them to participate in assessment activities. As part of a settlement entered in December 2009 in the

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

course of ASARCO's bankruptcy, DOI and the state received \$41.2 million in NRD for five sites within the mining district and are in the process of conducting restoration planning. A final Restoration Plan and Environmental Assessment for this area was released in June 2014, and a Strategic Restoration Implementation Plan was released in December 2015.

[c] Contact Information

Missouri Department of Natural Resources: Tim Rielly, Restoration and Assessment Manager, P.O. Box 176, Jefferson City, MO 65102-0176. Tel: (573) 526-3353. E-mail: tim.rielly@dnr.mo.gov. Web: <http://dnr.mo.gov/env/hwp/sfund/nrda.htm>.

[26] Montana

[a] Overview

The Montana Natural Resource Damage Program (NRDP) office was established in 1990. The office consists of three attorneys, seven environmental scientists, a restoration program chief, a program specialist, and one administrative support person. Montana's Governor serves as the state's sole trustee. The state seeks NRD under CERCLA, OPA, and its state superfund statute, the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), MONT. CODE §75-10-701 et seq. Under the Montana Code, responsible parties are jointly and severally liable for the "injury to, destruction of, or loss of natural resources caused by the release or threatened release" of hazardous substances, as well as the NRD assessment. MONT. CODE § 75-10-715(1), (2)(b). However, a responsible party "has a defense and is not liable" for those costs "incurred or encumbered" by the state prior to providing the responsible party with notice of the state's intent to perform remedial actions. *Id.* § 75-10-715(5)(a). In the 1990s, the state retained outside counsel but does not currently.

[b] Major Matters

Upper Clark Fork Basin — The NRDP is responsible for litigating the *Montana v. ARCO* matter, originally filed in 1983 in U.S. District Court, but stayed until 1991. The lawsuit alleged that decades of mining and mineral processing operations in and around Butte and Anaconda released substantial quantities of hazardous substances into the Upper Clark Fork River Basin between Butte and Milltown and that these hazardous substances extensively degraded the area's natural resources. After 1991, the state commenced an NRD assessment and restoration plan. The assessment alleged widespread injuries to natural resources including 600,000 acre-feet of groundwater, fish injuries, and wildlife habitat injuries. In total, the state's claim was \$764 million, \$342 million of which was restoration cost damages, \$410 million of which was compensable value damages, and \$12 million of which was assessment and legal costs. In 1999, the state and ARCO reached a settlement of many of these claims. Specifically, ARCO agreed to pay approximately \$129 million (plus \$9 million in interest) for NRD in the Clark Fork Basin. This settlement did not include three areas of the Basin: Smelter Hill Uplands, Butte Area One,

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

and the Upper Clark Fork River site. In 2008, the state and ARCO reached a second settlement totaling \$72.5 million for restoration of the remaining three sites. NRDP will receive further proceeds under the settlements after certain remedy completions. Also, in 2005, the state received an additional \$3.9 million plus \$2.5 million in land and water rights from the NorthWestern Corporation related to the Milltown site. Between 2000 and 2012, the state approved 122 restoration grant projects totaling \$119.6 million under a grants program. In 2012, the state issued several Basin restoration plans which included over \$140 million in restoration actions. These restoration plans now direct the restoration efforts in the Upper Clark Fork River Basin, which include flow augmentation, conservation easements and public acquisitions, riparian and wetland habitat protection and improvement, fish passage improvements, fish entrainment reduction, sediment reduction and bank stabilization, enhancement of grasslands, shrub-grasslands, and forests, and water system improvements.

East Helena Site — Operations at the East Helena site included more than a century of smelting, which, the state alleges, resulted in groundwater injury as well as injury to other natural resources and their services. In 2009, the state and the United States settled environmental claims, including NRD claims, with ASARCO for \$100 million as a part of its bankruptcy case, which was placed into a custodial trust for cleanup and restoration. An additional \$5.9 million was paid to the state for compensatory NRD claims. ASARCO also agreed to convey 232 acres to the state to be used for wildlife habitat restoration, recreation, and open space. NRDP has begun preliminary restoration efforts, and continues to monitor and comment on custodial trustee activities and expenditures.

Upper Blackfoot Mining Complex/Mike Horse Dam — The Mike Horse Mining and Milling Company (Mike Horse) built the Mike Horse Dam across the Beartrap Creek in order to contain tailings generated from its flotation mine. The dam partially failed in 1975 due to heavy rains, and contaminated tailings located behind the dam within Beartrap Creek were washed into the Upper Blackfoot River. A 2005 U.S. Forest Service Dam Safety report concluded that the dam was no longer safe and should be removed, along with the tailings and wastes it contained. In 2008, state and federal officials settled environmental claims, including NRD claims, with ASARCO and ARCO, successors in interest to Mike Horse, for \$37 million. According to the settlement, ASARCO and ARCO each paid the state \$8 million, the state received a \$19.77 million claim in ASARCO's bankruptcy, the U.S. Forest Service received \$1 million to oversee the state's restoration project, and the state received a \$230,000 claim in ASARCO's bankruptcy for its incurred costs. A second settlement with ASARCO in 2009 resulted in \$10 million placed into a custodial trust for perpetual water treatment of adit discharges from the abandoned mines. NRDP is designing and integrating restoration with the remedy actions, and monitors and comments on custodial trustee activities and expenditures.

2011 Yellowstone River Oil Spill — In July 2011, a pipeline owned by the ExxonMobil Pipeline Company ruptured near Laurel, Montana, resulting in the discharge of approximately 63,000 gallons of crude oil into the Yellowstone River and floodplain. This occurred at the peak of an

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

extended high water event, which is estimated to occur only once every 35 years. According to the state, this spill affected the Yellowstone River and its floodplain for approximately 85 miles downstream. The state's claim for impacted natural resources and natural resource services includes riverine aquatic habitat and supported biota, including fish; terrestrial habitat and supported biota; birds; large woody debris piles; and services provided by natural resources. A consent decree between the parties was entered by the court in December 2016 with ExxonMobil agreeing to settle NRD claims by paying approximately \$2,500,000 to federal trustees, and nearly \$9,500,000 to the state. ExxonMobil previously reimbursed trustees over \$1,600,000 in assessment costs. The Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Assessment was issued by the state and the U.S. Department of the Interior (DOI) in January 2017. NRDP is preparing to begin restoration implementation and has been engaging with the public regarding recreation projects.

2015 Yellowstone River Oil Spill — In January 2015, a pipeline owned by Bridger Pipeline LLC released approximately 30,000 gallons of Bakken crude oil into the ice-covered Yellowstone River, approximately seven miles upstream of Glendive. Oil sheen was reported as far downstream as Crane, Montana (59 river miles downstream). A second phase of the oil spill occurred in mid-March 2015 when the ice began to breakup. According to the state, impacted natural resources include the following: fish and other aquatic organisms; birds; wildlife; surface water and riverine aquatic habitat; supported biota, including fish; terrestrial habitat; shoreline habitat; and natural resource services provided by these resources. NRDP is coordinating with DOI on NRD assessment activities, and a notice of intent was issued in October 2016. The trustees issued a partial claim for past and future NRD assessment costs on March 16, 2017, but Bridger declined to make payment. The trustees have since presented the partial claim to the National Pollution Funds Center.

[c] Contact Information

Montana Natural Resource Damage Program, Montana Department of Justice: Harley R. Harris, Lawyer/Program Manager, 1720-9th Avenue, P.O. Box 201425, Helena, MT 59620-1425. Tel: (406) 444-0205. Fax: (406) 444-0236. E-mail: nrdp@mt.gov. Web: <https://doj.mt.gov/lands/>.

[27] Nebraska

[a] Overview

The natural resource trustee in Nebraska is the Director of the Department of Environmental Quality. Nebraska has not enacted a state NRD statute separate from federal law. To date, Nebraska has not actively pursued NRD claims.

[b] Contact Information

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Nebraska Department of Environmental Quality: Annette Kovar, Legal Counsel, 1200 "N" Street, Suite 400, P.O. Box 98922, Lincoln, NE 68509-8922. Tel: (402) 471-2186. Fax: (402) 471-2909. Web: <http://www.deq.state.ne.us/>.

[28] Nevada

[a] Overview

The Administrator of the Division of Environmental Protection and the Director of the Department of Wildlife are co-trustees for natural resources in Nevada. Nevada has no formal NRD program, and very little staff time is dedicated to NRD matters. Despite the informality of its program, Nevada is pursuing a handful of NRD matters in conjunction with federal and tribal trustees. The state does not use private attorneys to pursue NRD claims and does not have a state NRD statute.

[b] Major Matters

The Leviathan CERCLA Site — The Leviathan Mine site is located on the California/Nevada border south of Lake Tahoe. Mining has existed on the site since the late nineteenth century, but open-pit sulfur mining did not begin until 1951. Acid mine drainage has severely polluted Leviathan Creek. The potentially responsible party (PRP) has been identified as the Atlantic Richfield Company (ARCO). Impacted resources allegedly include instream habitat and wildlife (fish, macroinvertebrates), riparian habitat, tribal resource uses, and recreational uses, such as fishing. A Final NRD Assessment Plan was issued in 2003. The trustees are the state of California, the state of Nevada, the United States, and the Washoe Tribe. The NRD recovery is still in progress.

Rio Tinto Mine — An abandoned copper mine, the Rio Tinto Mine is a 280-acre site located in Mountain City, Nevada. Beginning in 1931, copper ore was mined, and mine tailings and process residues were allegedly disposed in and around Mill Creek, which runs through the site and into East Fork Owyhee River. On May 20, 2013, federal, state, and tribal trustees settled NRD claims with the PRPs for \$709,527.81 to be paid to the U.S. Department of the Interior for assessment costs, and \$150,000 to be paid to the Shoshone-Paiute Tribes of the Duck Valley Reservation for NRD, assessment costs, and oversight of the consent decree.

[c] Contact Information

Nevada Division of Environmental Protection: 901 S. Stewart St., Suite 4005, Carson City, NV 89701-5249. Tel: (775) 687-9373. Web: <http://www.ndep.nv.gov/>.

Nevada Department of Wildlife: 1100 Valley Rd., Reno, NV 89512. Tel: (775) 688-1569. Web: <http://www.ndow.org/>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[29] New Hampshire

[a] Overview

The Department of Environmental Service and the Department of Resources and Economic Development are the natural resource trustees in New Hampshire. New Hampshire does not currently have an NRD program, although one is in development. New Hampshire has worked with federal trustees in the past on NRD issues. As part of its NRD activities, New Hampshire has investigated NRD related to air pollution. Under New Hampshire law, responsible parties are strictly liable for “cleanup and restoration of the [oil spill] site and surrounding environment and corrective measures” N.H. REV. STAT. ANN. § 146-A:3-a.

[b] Major Matter

Coakley Landfill Superfund Site — The Coakley Landfill Superfund Site is located in the Towns of Greenland and North Hampton, New Hampshire, and is comprised of a 27-acre landfill and 65 acres of surrounding wetlands and woodlands. Disposal activities at the site began in the 1970s and allegedly contaminated the site and surrounding wetlands with VOCs and metals, including zinc, aluminum, lead, mercury, and nickel. While the U.S. Fish and Wildlife Service (USFWS) was the sole trustee for this matter, it partnered with over 30 entities, including the state, to raise funds to restore 338 acres of degraded salt marsh. The total cost of the restoration, which was completed in 2005, was \$1.5 million, and USFWS was able to recover \$250,000 in a bankruptcy settlement with the responsible parties. Restoration monitoring continued through 2008.

[c] Contact Information

New Hampshire Department of Environmental Services: Peter Demas, Legal Coordinator, Commissioner’s Office & Enforcement, 29 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095. Tel: (603) 271-2464. Fax: (603) 271-2867. E-mail: Peter.Demas@des.nh.gov. Web: <http://des.nh.gov/>.

[30] New Jersey

[a] Overview

The Commissioner of the Department of Environmental Protection (NJDEP) is New Jersey’s natural resources trustee. The Office of Natural Resource Restoration is the office within the NJDEP dedicated to NRD issues, which was established in the early 1990s. New Jersey has state NRD authority under the New Jersey Water Pollution Control Act, N.J. STAT. ANN. § 58:10A-10, and the New Jersey Spill Compensation and Control Act, *id* § 58:10-23.11g. In New Jersey, responsible parties are strictly liable, jointly and severally, for the “costs of restoration and replacement...of any natural resources damaged or destroyed by a discharge.” *Id.* § 58:10-23.11g. In 2003, New Jersey embarked on a major natural resource initiative and claims to be

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

systematically evaluating all contaminated sites in New Jersey for possible NRD liability. In 2017, New Jersey voters approved an amendment to the New Jersey State Constitution that mandates that funds recovered from NRD settlements are to be used to repair, replace, or restore damaged natural resources or to permanently preserve the state's natural resources. The amendment also requires that the funds used for these purposes be in the immediate area of where the natural resource injuries occurred. N.J. CONST. art. VIII, § II, ¶ 9.

New Jersey uses a variety of NRD assessment methodologies. In 2003, New Jersey pioneered a simplified groundwater NRD assessment formula which multiplied the assumed size of the plume by a known or assumed groundwater recharge rate times a certain dollar per gallon. See "Natural Resource Damages" by Brian D. Israel, in Gerrard (ed.), *Environmental Law Practice Guide: State and Federal Law* (Matthew Bender & Co., Inc.), § 32B.08[4]. The state's groundwater formula was rejected as an insufficient measure of damages at trial. *N.J. Department of Environmental Protection v. Exxon Mobil Corp.*, Docket No. MER-L-2933-02 (N.J. Super. Ct. Law Div. Aug. 24, 2007). The court held that the state failed to introduce sufficient expert testimony to support the various assumptions in the model. Absent a rulemaking, therefore, the groundwater formula was held to be insufficient for evidentiary purposes. As of February 2018, it does not appear that the state has commenced a formal rule making process, although the state has been utilizing a new modified groundwater formula. The modified groundwater formula converts alleged groundwater damages to discounted acres, as opposed to dollars, but otherwise retains many of the same features (and problems) of the original groundwater formula.

For many years, New Jersey was prominent in litigating and settling NRD claims across the state, including numerous groundwater matters. After a decade of no new NRD cases, however, the state filed three new lawsuits to recover NRD in August 2018, and the state's governor plans to continue aggressively pursuing NRD matters. In fact, NJDEP created a new position—the Deputy Commissioner for Legal and Regulatory Affairs—who will oversee NJDEP's revived efforts to recover NRDs. The three NRD lawsuits involve the Pohatcong Valley Superfund Site, a former Hess petroleum refinery in Middlesex County, and the Deull Fuel Company property in Atlantic City. Following on the heels of those lawsuits, the state filed six additional NRD lawsuits in December 2018 and March 2019 regarding the Puchack Wellfield Superfund Site in Pennsauken, ExxonMobil's Lail site in Gloucester County, and sites in Salem County, Pompton Lakes, and Sayreville Borough. In May 2019, the state filed a lawsuit against 3M, DuPont, and others over alleged hazards caused by their firefighting foam products, and is also seeking NRD. New Jersey also continues to use private law firms to pursue many, although not all, of its NRD claims.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Lower Passaic River — The state has launched an ambitious plan to bring claims related to the Lower Passaic River, which some observers estimate to be valued at as much as \$950 million.¹ In September 2003, NJDEP issued a directive to 66 potentially responsible parties (PRPs) ordering them to conduct an NRD assessment in the Lower Passaic River. The Passaic River, which flows into Newark Bay, is among the most industrialized waterways in New Jersey, and the state's directive purported to address as many as 4,000 potential NRD claims. The use of directive authority to require an NRD assessment was unprecedented and has been subject to legal challenge. If NJDEP's directive authority is upheld, the recipients will have to either perform an assessment or face the possibility of treble damages for the assessment costs should the state do the work. Several companies have been found liable in state court under the New Jersey Spill Compensation and Control Act. New Jersey's Attorney General, along with special counsel from private law firms, represents New Jersey in the ongoing litigation.

Exxon Litigation regarding Compensatory Damages — In June 2007, the Appellate Division of the Superior Court of New Jersey held that the state could assert a claim under the New Jersey Spill Act for the loss of use of natural resources caused by the release of hazardous substances. 393 N.J. Super. 388 (Law Div. 2007). In doing so, the court reversed a lower court's ruling that found that there was no strict liability under the Spill Act for such damages. The Appellate Division relied, in part, on the state's long history of asserting claims for natural resource restoration as reflected in numerous technical rules and guidance documents. The court also relied upon the expansive scope of the state statute and the legislative directive to construe the statute liberally. Within this context, the court accepted the NJDEP's interpretation of the statute. In particular, the court was persuaded by the definition of "cleanup costs" which includes "reasonable measures to prevent or mitigate damage to the public health, safety or welfare." According to the court, "mitigation" of environmental harm includes compensation for past natural resources that were adversely impacted by the contamination. To be sure, this decision was a significant development for the state. Nonetheless, many legal questions remain about the state's program including the proper use of the state's well-known groundwater valuation

¹ See generally *In re Lower Passaic River*, Directive No. 1: Natural Resource Injury Assessment & Interim Compensatory Restoration of Natural Resource Injuries (N.J. Dep't of Env'tl. Protection Sept. 19, 2003), available at http://www.state.nj.us/dep/nrr/directives/passaic_dir01.pdf; see also Edward F. McTiernan, et al., *An Overview of New Jersey's Natural Resource Damage Program*, *Environmental-Resource.com* (Nov. 15, 2004), available at <https://www.gibbonslaw.com/Files/Publication/b9867a64-bab0-4725-b359-294552e52897/Presentation/PublicationAttachment/91290554-c930-4f17-89e1-335b836e1b39/nj-naturalresource.pdf>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

formula, the extent to which the state is precluded by CERCLA from using money recovered for attorney's fees, and the viability of numerous other defenses.

Almost seven years after that decision, in 2014, the case proceeded to a bench trial to determine the amount of NRD owed by Exxon. According to court records, the state assessed NRD to be \$8.9 billion: \$2.6 billion to restore the damage caused by the operations conducted for over 100 years at the Bayonne and Bayway refinery facilities in question and \$6.3 billion in compensatory damages for loss of use of natural resources, estimated to be more than 1,500 acres of wetlands, marshes, meadows, and waters. When it was expected that the Judge was close to a decision, the Governor twice petitioned the court to postpone a ruling because settlement talks were underway. In April 2015, a proposed consent judgment, pursuant to which Exxon will pay \$225 million to settle its NRD liability, was lodged. The settlement was approved by the court in August 2015. According to state legislation approved in December 2018, \$50 million was designated to cover restoration projects.

In re Former Owens-Illinois Closure Site — Owen-Illinois, who operated a glass container facility in Glassboro Borough, New Jersey, settled the state's NRD claims related to its alleged contamination of groundwater for \$20,000. Owen-Illinois's parent company, AH Packaging Company, previously entered into an administrative consent decree with the state regarding remediation of the facility; this \$20,000 settlement only resolved the NRD groundwater claims.

In re Phelps Dodge Site — According to the state, hazardous waste discharge into the groundwater at three different sites damaged the groundwater. The state's NRD based on groundwater contamination was settled for \$40.5 million, \$38,000 of which went to "attorneys' fees, consultants' and experts' fees, other litigation costs, and interest."

In re Jimmie's Raceway Service Station — From 1942 until the present, a gasoline station has been located on the site. According to the settlement agreement, contaminated soil was first discovered around the openings to the underground storage tanks in 1997 and then from 1998 until 2003 there had been reports of gasoline discharges. Groundwater and soil samples from the site revealed the presence of benzene, toluene, ethylbenzene, and other hazardous substances. In June 2009, the state entered into three separate settlement agreements with three PRPs totaling \$250,000, \$100,000 of which went to attorneys' fees and past remediation costs.

Athos I — While attempting to dock at a New Jersey refinery in 2004, the *Athos I* struck a submerged anchor and discharged approximately 265,000 gallons into the Delaware River and its tributaries. The trustees consist of the states of Delaware, New Jersey, the Commonwealth of Pennsylvania, U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration. In September 2010, the trustees were awarded \$27.5 million dollars from the National Pollution Funds Center for settlement after the PRP's liability was limited to the expense of the initial response. New Jersey received \$20.3 million of the settlement and will be using the funds to restore wetlands and grasslands crucial to wildlife and the oyster industry.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Restoration projects are in progress or are in post-restoration monitoring. The Final Restoration Plan and Environmental Assessment was released in September 2009 and is available at https://darrp.noaa.gov/sites/default/files/case-documents/AthosFinalRP_0.pdf.

Combe Fill South Landfill Superfund Site — This Superfund site spans 65 acres and operated as a municipal landfill from the 1940s until 1981 and accepted domestic, non-hazardous industrial, and other wastes. According to the state, over the years VOCs from these wastes infiltrated the underlying aquifer and contaminated the drinking water, as well as the nearby Trout Brook. NJDEP and the U.S. Environmental Protection Agency (EPA) both filed separate suits in 1998, which were later consolidated, against PRPs regarding past and future cleanup costs and NRD. In January 2009, EPA, U.S. Department of the Interior (DOI), and NJDEP settled their environmental claims, including NJDEP's NRD claims, with approximately 300 PRPs for a total of \$61-69 million. The number of municipal third party defendants that enter into the consent decree will ultimately determine the final settlement amount. Nonetheless, included in this settlement was \$3,218,700 for NRD, which will be administered by NJDEP and DOI for restoration projects.

Nicol Site — The Nicol Site, located in Manchester, New Jersey, is a 45-acre site where Thomas Nicol Asphalt Company Inc. (TNA) manufactured asphalt products from 1966 until 1981. According to the state, TNA then leased the property to South Brunswick Asphalt (SBA). In a complaint filed against TNA and SBA pursuant to New Jersey's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24, NJDEP alleged that investigations indicated that hazardous chemicals were found in potable well water for a nearby residential neighborhood, which were similar to the chemicals found in soil and groundwater samples taken at the site. In August 2016, NJDEP reached a proposed settlement with TNA and SBA for \$10,000,000. Of that, \$500,000 will be paid to cover NRD.

[c] Contact Information

New Jersey Department of Environmental Protection, Natural and Historic Resources, Office of Natural Resource Restoration: Mail Code 501-01, P.O. Box 420, Trenton, NJ 08625-0420. Tel: (609) 984-5475. Fax: (609) 984-0836. E-mail: onrr@dep.state.nj.us.
Web: <http://www.state.nj.us/dep/nrr/>.

[31] New Mexico

[a] Overview

The Governor of New Mexico appointed the Secretary of the New Mexico Environment Department as the state's trustee, and the trustee through the Office of the Natural Resources Trustee (ONRT) implements the New Mexico Natural Resource Damage Assessment and Restoration Program. ONRT was established in 1993 and currently has four staff members. New Mexico's state NRD statute is the Natural Resources Trustee Act, NMSA 1978, §§ 75-7-1

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

et seq. The state does not have a groundwater initiative for NRD, nor does it hire private counsel to pursue NRD claims.

[b] Major Matters

The ONRT maintains a website at <https://onrt.env.nm.gov/> with information regarding past and current state NRD assessment activities and restoration projects. Below are a few of its major cases.

Albuquerque ATSF Site — This site involved NRD related to a former Atchison Topeka & Santa Fe Railway railroad tie treating plant. The damages were primarily related to injuries to groundwater and wildlife habitat. The state and federal trustees settled their NRD claims for \$1.1 million, which was used for restoration projects that enhanced or preserved groundwater and migratory bird habitat.

Chino, Cobre, and Tyrone Mines — New Mexico's ONRT, together with the U.S. Department of the Interior (DOI), settled two NRD cases relating to the release of hazardous substances at Freeport McMoRan's mining sites in the state. In February 2011, the company agreed to pay \$13 million for damage to groundwater resources. In February 2012, Freeport McMoRan agreed to pay \$5.5 million in damages and to transfer 715 acres of land to New Mexico State Parks for damage to wildlife and wildlife habitat. The Final Groundwater Restoration Plan was released in January 2012 and identified 18 potential restoration projects. The trustees have kept the public involved in the restoration process, which is ongoing.

Chevron Molycorp Mine — The Chevron Molycorp Mine is a major molybdenum mine and milling facility located in Questa, New Mexico. According to the state, contamination caused by runoff and mine tailings has affected the surrounding area, including the Red River, and potentially impacted surface water, groundwater, terrestrial habitat, aquatic invertebrate, and fish. A settlement was reached in August 2014 whereby Chevron Mining Inc. will pay \$2.5 million for restoration of groundwater resources, and \$1.5 million for restoration of habitat resources. Further, Chevron Mining will transfer 225 acres of ranch land to DOI's Bureau of Land Management and will reimburse state and federal trustees for unpaid assessment costs. Prior to settlement, Chevron Mining paid \$3.4 million for the cooperative, restoration-based natural resource damage assessment activities undertaken by the trustees. The consent decree outlining the settlement was approved by the court on September 30, 2015. The site's final Restoration Plan and Environmental Assessment was released in May 2018.

Sparton Technology Site — Sparton Technology operated an electronics manufacturing facility in Albuquerque, New Mexico. Discarded solvents and plating wastes from the site reportedly resulted in substantial soil and groundwater contamination in the vicinity of the facility. In 2000, the state settled its NRD claims against Sparton for \$1 million, primarily for injury to groundwater. The settlement funds are being used for groundwater restoration projects.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

State of New Mexico v. General Electric Company, et al, 467 F.3d 1223 (10th Cir. 2006) — New Mexico brought a claim in 1999 seeking \$5 billion in NRD resulting from contaminated groundwater at the South Valley Superfund Site in Albuquerque, New Mexico. In January 2006, several of the responsible parties settled with the state for \$7.5 million. The site has been undergoing groundwater remediation since the late 1980s under the direction of the U.S. Environmental Protection Agency (EPA) (and with the concurrence of the New Mexico environmental agency). Notwithstanding these cleanup efforts, New Mexico asserted that it had suffered, or would suffer in the future, significant NRD, for which it was entitled to compensation. The state sought to recover funds not for restoration but for the general treasury. The court had three main holdings. First, the Tenth Circuit held that the NRD provisions of CERCLA provide that money recovered is “available only to restore, replace, or acquire the equivalent of such natural resources...” In other words, a state may not use an NRD claim to obtain funds for purposes unrelated to the natural resource injury. To the extent that New Mexico was seeking “an unrestricted award of money damages,” the Tenth Circuit held that its claim was preempted by the CERCLA NRD regime. Otherwise, according to the court, states could recover NRD but fail to achieve the restoration purposes inherent in the statute. The Tenth Circuit also indicated that it would be improper to use NRD recoveries to pay attorney fees. Second, the Tenth Circuit held that the state’s claim was an impermissible attack on the EPA remedy and that it therefore lacked jurisdiction to hear the challenge. The basis of this holding was Section 9613(h) of CERCLA which provides (with certain exceptions) that once a remedy has been selected, no challenge to the cleanup may occur prior to the completion of the remedy. Finally, the Tenth Circuit accepted the general proposition that the state was entitled to interim loss damages. However, since the resource in question was the ability to appropriate groundwater, and since it was uncontested that the maximum extraction of groundwater was being accomplished from the area, the court found that there was no lost use resulting from contamination. Accordingly, the court affirmed the lower court’s grant of summary judgment on the state’s loss-of-use damages theory.

In June 2009, Governor Bill Richardson and the state’s trustee announced that treatment of the groundwater had begun. \$4.8 million of the settlement will be used to fund this project.

[c] Contact Information

New Mexico Office of the Natural Resources Trustee: 5500 San Antonio Dr. NE, Albuquerque, NM 87190. Tel: (505) 222-9546. Web: <https://onrt.env.nm.gov/>.

[32] New York

[a] Overview

The Commissioner of the Department of Environmental Conservation (NYDEC) is New York’s natural resources trustee. The NYDEC has a Natural Resource Damages Unit devoted to NRD

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

issues. The NRD Unit's staff includes a biologist, an economist, and a lawyer. The NRD Unit is primarily funded by NRD recoveries, and is an active program. In most cases, NRD claims are primarily handled by attorneys in NYDEC's Office of General Counsel, but some cases are referred to the New York State Office of the Attorney General when there is a need to litigate. According to the state, New York's NRD program has recovered nearly \$40 million, the bulk of which is being used for restoration projects. Most of the restoration activity has been in New York City or on Long Island.

New York has a state NRD statute codified at N.Y. NAV. Law § 181. New York imposes strict liability for NRD and responsible parties are liable for "the cost of restoration and replacement...of any natural resource damaged or destroyed by a discharge." N.Y. NAV. Law § 181. New York primarily applies the same limits on liability as the OPA of 1990. N.Y. NAV. Law. § 181(3).

[b] Major Matters

Hudson River — In 1997, state and federal trustees issued a Preassessment Screen for NRD in the Hudson River. The screen addressed NRD from several pollutants, but of particular concern was PCB contamination allegedly related to General Electric's plants in Fort Edward and Hudson Falls. According to the state, the natural resources that have been exposed to PCBs include surface water, sediments, groundwater, floodplain soils, air, and biota, such as fish, birds, mammals, amphibians, and invertebrates. Following the Preassessment Screen, the trustees initiated a full scale NRD assessment. That effort is currently ongoing. In January 2010, the federal and state trustees published a report on PCB contamination in the Hudson River's floodplain, and in January 2013, they released a report compiling PCB contamination data through 2008. A study plan for mussel injury investigation was released in June 2014, and investigations regarding avian injury were conducted in 2015. In April 2015, the trustees released a report stating that the fishery closures and health advisories that have been imposed at the site do constitute an injury to natural resources. A revised Injury Determination Report for the site was published in January 2018. Additional information about the Hudson River NRD assessment can be found on NYDEC's webpage at: <http://www.dec.ny.gov/lands/25609.html>.

St. Lawrence River in Massena — This site involves PCB contamination in a river. According to the state, three potentially responsible parties (PRPs)—General Motors, Alcoa, and Reynolds—are jointly funding an NRD assessment. This process is being conducted under the supervision of state, federal, and tribal trustees, and the parties reached a settlement agreement in March 2013, whereby the PRPs would pay \$19.4 million for alleged injuries to natural resources, recreational fishing, and Mohawk culture. Most of this settlement will be combined with a bankruptcy settlement of \$1.5 million paid by General Motors, to fund restoration efforts. A total of \$20.3 million is slated for restoration work. Work at this site is also ongoing.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Lake Ontario System — In 1983, the state filed a lawsuit against Hooker Chemical, the predecessor to Occidental Chemical Corporation (Occidental), and in June 2006, an NRD claim was settled which represented the final claim from that lawsuit. Occidental operated its main chemical manufacturing plant on Buffalo Avenue, in Niagara Falls, which, in addition to some of its other sites owned or operated by Occidental, allegedly released dangerous chemicals into the Lake Ontario system. As a result, the fish in the system became contaminated, which then led to a loss of recreational sportfishing. The NRD claim was settled for \$12 million, to be paid by Occidental in \$2.4 million increments over five years, and the funds will be used to restore and enhance recreational sportfishing as well as restoring and enhancing the fishery itself. This is one of the largest NRD settlements for lost recreational fishing use. For more information on the Lake Ontario System restoration *see* <http://www.dec.ny.gov/outdoor/40068.html>.

Onondaga Lake Superfund Site — The U.S. Department of the Interior (DOI), NYDEC, and the Onondaga Nation are conducting an assessment of NRD in and around Onondaga Lake (Lake), located near the city of Syracuse in Onondaga County, New York. In 2009, these parties, along with Honeywell International Inc., entered into a Cooperative Assessment and Funding Agreement regarding the assessment of NRD related to the Onondaga Lake Superfund Site, New York. In 1996, an NRD assessment plan was published by NYDEC, which describes the state's anticipated approach for addressing NRD in the Lake. In October 2012, DOI, NYDEC, and the Onondaga Nation published a final NRD Assessment Plan Addendum, which outlines the approach the governments will "follow to conduct scientific studies, evaluate data and information, and plan and scale restoration projects to address past, present, and future injuries to natural resources." This report also identifies the contaminants of concerns, potentially impacted resources, and PRPs at the site. The final report is available at https://www.fws.gov/northeast/nyfo/ec/files/onondaga/OnondagaLake_FinalDamage_Assessment_Plan_Oct_2012.pdf. In August 2017, the trustees finalized the site's Natural Resource Damage Assessment Restoration Plan and Environmental Assessment (RP/EA) identifying a number of proposed restoration projects for the site. The final RP/EA can be found at [https://www.fws.gov/northeast/nyfo/ec/files/onondaga/Onondaga%20RP%20EA%20and%20Appendices%208-11-2017_reduced%20\(2\).pdf](https://www.fws.gov/northeast/nyfo/ec/files/onondaga/Onondaga%20RP%20EA%20and%20Appendices%208-11-2017_reduced%20(2).pdf). On March 14, 2018, a settlement worth a total value of \$26 million was entered in the U.S. District Court for the Northern District of New York. The settlement requires Honeywell to implement and maintain 20 restoration projects that will restore and protect wildlife habitat and water quality and enhance recreational activities at the Lake. Additionally, Honeywell will pay over \$6 million for restoration and preservation programs overseen by the trustees.

Akzo Nobel Site — In March 1994, two sections of the ceiling of the Retsof Salt Mine, the largest salt mine in the United States and the second largest salt mine in the world, collapsed. This collapse allowed a continuous flow of groundwater into the mine, causing it to be completely flooded with saturated brine. According to NYDEC, this incident reduced potable groundwater supplies, impacted local residential water wells, and resulted in land subsidence. The state made NRD claims pursuant to state common law, and on December 23, 2014, Akzo Nobel, Inc.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

entered into a settlement agreement with NYDEC, the New York State Department of Law through the Attorney General (OAG), and Livingston County, New York, whereby Akzo Nobel agreed to pay \$20,000,000 to address impacted resources. On August 29, 2016, NYDEC, OAG, and the County of Livingston finalized a Memorandum of Understanding for coordination of the settlement funds to be allocated as follows: 1) \$11,000,000 dedicated to surface water and water supply infrastructure, repair, and maintenance; 2) \$5,000,000 dedicated to surface water and water supply improvements; 3) \$3,000,000 dedicated to monitoring groundwater and subsidence in the affected area; and 4) \$1,000,000 for a contingency fund to address potential future harm.

[c] Contact Information

New York Department of Environmental Conservation, Fish, Wildlife & Marine Resources, 625 Broadway, Albany, NY 12233-4750. Tel: (512) 402-8924. Web: <http://www.dec.ny.gov/regulations/2411.html>.

[33] North Carolina

[a] Overview

The Secretary of the Department of Environmental Quality (DEQ) has been designated as North Carolina's natural resources trustee. Persons who discharge oil into state waters are strictly, and jointly and severally, liable to the state for NRD under N.C. Gen. Stat. §§ 143-215.90, 143-215.93, 143-215.94.

[b] Major Matters

Weyerhaeuser Plymouth Mill — The Weyerhaeuser Plymouth Mill site operates an active wood and paper products manufacturing facility whose operations began in 1937. Wastes from site operations include dioxins, furans, and mercury, and were allegedly released into nearby creeks. Together with the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Department of the Interior, DEQ is assessing potential injury to natural resources due to the alleged release of hazardous substances at or around the site. One of the primary resources impacted at the site is fish populations, and in November 2006, a Phase I Final Restoration Plan was released identifying a restoration action, that has since been implemented, in order to restore fish stocks. The potentially responsible party, Weyerhaeuser, is working with the trustees to cooperatively develop an NRD assessment and restoration plan.

Kerr-McGee Chemical Corp. — From the mid-1930s until 1974, Kerr-McGee operated a wood treatment processing plant in Navassa, North Carolina. According to the trustees—NOAA, the U.S. Fish and Wildlife Service (USFWS), and DEQ—the treatment plant was creosote-based, and hazardous substances, such as PAHs, contaminated on-site soils, groundwater, and marsh sediments as a result. Alleged impacted natural resources include wetlands and habitats for natural resources within the Cape Fear River watershed. On January 23, 2015, an environmental

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

settlement totaling \$5.15 billion, plus interest, was finalized between the United States, Anadarko Petroleum Corp., and Kerr-McGee that would allow funds to be disbursed to Kerr-McGee sites across the nation that require cleanup. According to the U.S. Department of Justice, it is the largest payment for the cleanup of environmental contamination ever obtained in a lawsuit brought by the United States. Falling on the heels of that settlement, it was announced on February 4, 2015, that the trustees will receive two disbursements in the approximate amounts of \$13 million and \$9 million to restore natural resources and habitats affected by the operations at this site. Prior to that announcement, the trustees had previously received \$915,836 for NRD. Restoration planning is underway.

Dan River Coal Ash Spill — On February 2, 2014, a stormwater pipe collapsed at the Duke Energy Dan River Steam Station in Eden, North Carolina, releasing an estimated 39,000 tons of coal ash and 27 million gallons of ash pond water into the Dan River. DEQ requested assistance from the U.S. Environmental Protection Agency, which deployed on-scene coordinators and entered a unified command structure, which included agencies who are also the trustees for this matter—USFWS, DEQ, and the Virginia Department of Environmental Quality. Duke Energy is working cooperatively with the trustees on the NRD assessment and restoration to evaluate the impact of the spill on natural resources. The trustees believe that the spill may have injured fish and wildlife resources. A final NRD Assessment Plan was released in December 2015.

[c] Contact Information

North Carolina Department of Environmental Quality: 1601 Mail Service Center, Raleigh, NC 27699-1601. Tel: (919) 733-4984. Fax: (919) 715-3060. Web: <http://deq.nc.gov/>.

[34] North Dakota

North Dakota does not appear to have a state NRD statute or program.

[35] Ohio

[a] Overview

The trustee for Ohio is the Director of the Ohio Environmental Protection Agency (OEPA). There are no state laws providing NRD authority; the state pursues NRD under CERCLA, *see, e.g.,* OHIO REV. CODE ANN. § 3734.282 (<http://codes.ohio.gov/orc/3734.282>) (providing that funds recovered for NRD under CERCLA are to be paid into a state fund for hazardous waste cleanup). NRD activities are coordinated out of the central office, and the Division of Environmental Response and Revitalization (DERR). Efforts continue on guidance development for project based settlements using habitat and resource equivalency assessment (*e.g.,* HEA, REA) and pursuing NRD assessments. OEPA has been conducting NRD activity since the early 1990s. Currently, Ohio is actively pursuing several significant matters.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Dover Chemical Corporation — OEPA and the U.S. Department of the Interior (DOI) represented by the U.S. Fish and Wildlife Service (USFWS) (collectively, the trustees) are conducting an NRD assessment to address potential injuries to natural resources resulting from the alleged release of hazardous substances from Dover Chemical Corporation to Sugar Creek, the Sugar Creek buried valley aquifer, the Tuscarawas River, and other areas where hazardous substances have come to be located. Dover Chemical has been identified as a potentially responsible party (PRP) that may be responsible for releases of hazardous substances from the site as it operated a manufacturing facility on the property since 1950. In August 2010, Dover Chemical sued the trustees for declaratory relief to stop the NRD assessment process. The trustees responded with motions to dismiss, whereupon the court agreed that Dover's claims were not ripe and that the court lacked subject matter jurisdiction over Dover's claims, thereby granting the trustees' motions. *Dover Chemical Corp. v. U.S. Fish and Wildlife Service, et al.* No. 5:10cv1700, 2011 WL 2461896 (N.D. Ohio, June 17, 2011).

Fernald Uranium Products: United States Department of Energy Fernald Site — The Fernald site is a former uranium foundry covering over 1000 acres, located 18 miles northwest of Cincinnati. The U.S. Department of Energy (DOE) spent over \$4.4 billion remediating the site. All remediation other than groundwater was completed in late 2006. The trustees at the site are DOE, DOI, and OEPA. Ohio sued DOE in 1986 claiming \$206 million in NRD injuries, although the lawsuit was placed on hold shortly thereafter. In 2008, DOE and Ohio reached a settlement agreement addressing the NRD claim. The settlement called for \$13.75 million to be deposited into a restoration account for damages to groundwater, restoration of the entire site, and conservation easements on the property. The restoration funds may be used on- or off-site. To date, funds have been used for on-site restoration including the creation of vernal pool wetlands and the reforestation of a riparian corridor. Off-site funds have been utilized to purchase over 920 acres of conservation and agricultural easements. The acquisition of off-site easements continue. The main webpage for information related to the Fernald settlement is http://epa.ohio.gov/derr/ACRE/FFS/swdo_ffs/fernald.aspx.

Ashtabula River — The Ashtabula River has been remediated under the Great Lakes Legacy Act (GLLA) and the Water Resources Development Act (WRDA). The contaminated sediment dredging projects were completed in June 2008 at a cost of about \$75 million. Additional work under GLLA for habitat mitigation was planned for spring 2009. More GLLA dredging was initiated in fall 2012 using the U.S. Army Corps of Engineers' Strategic Navigation Dredging authority. Areas upstream and downstream of the original project will be dredged starting in 2012 and resuming in 2013. A separate GLLA dredging project will also be performed in spring 2013 to dredge about 10,000 cubic yards of sediment from the area known as the North Slip at Jack's Marina. The trustees are USFWS and OEPA. The National Oceanic and Atmospheric Administration and the Ohio Department of National Resources are participating in support of the respective federal and state trustees. The trustees have resolved the NRD claim through a

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

negotiated restoration project-based settlement. Agreements have been reached with the federal government (Environmental Defense Section) and a group of PRPs. Trustees negotiated separately with another PRP apart from the group. All of the agreements were incorporated into a consent decree which was entered on July 12, 2012. The NRD settlement is valued at \$5.5 million. A Final Natural Resource Restoration Plan and Environmental Assessment for the Ashtabula River and Harbor site was released to the public on September 14, 2009. Restoration work is nearing completion; over 300 acres have been purchased and placed under environmental covenants for protection of wetland, riparian, and woodland habitat. The Ashtabula River and Harbor NRD web site is <http://www.fws.gov/midwest/es/ec/nrda/AshtabulaRiverNRDA/index.html>.

Ottawa River — The Ottawa River has been remediated under the GLLA. A sediment dredging project which removed approximately 240,000 cubic yards of contaminated sediment from the Ottawa River and approximately 10,000 cubic yards from the tributary, Sibley Creek, was completed in 2010. According to the state, decades of manufacturing activity and waste disposal and sewer discharges have resulted in the release of hazardous substances to the Ottawa River and its watershed. This has allegedly resulted in severely degraded fish and benthic invertebrate communities from approximately river mile nine to the mouth of the Ottawa River, and potentially into northern Maumee Bay. The Ohio Department of Health and OEPA have issued fish consumption and contact advisories for areas of the Ottawa River. As a result, the trustees are conducting an NRD assessment in the lower portion of the Ottawa River (Ottawa River Assessment Area). The assessment will address injuries to natural resources that have occurred due to the release of hazardous substances.

On February 21, 2017, a consent decree was entered by the court in *United States v. Aerojet Rocketdyne Holdings, Inc.*, Civil Action No. 3:16-cv-02022, which names non-federal defendants. Concurrently, a consent decree filed by the state of Ohio in a related lawsuit (*State of Ohio, ex rel. DeWine v. Aerojet Rocketdyne Holdings, Inc. et al.*, Civil Action No. 3:16-cv-02027), which names the same non-federal defendants as in the U.S. lawsuit, but adds federal entities as well, including the United States, the U.S. Navy, Air Force, Army, and the Department of Commerce, was also entered. The consent decrees call for recovery of NRD, including the costs associated with injuries to or loss of natural resources in the Ottawa River Assessment Area (including fish, invertebrates, birds, surface water, and sediments, as well as loss of use of fishing and recreation), restoration of same, plaintiffs' past assessment costs, and future oversight costs. Non-federal defendants have agreed to restore property located adjacent to the Cedar Point National Wildlife Refuge in Ottawa County, estimated to cost \$1,100,000, which they will then donate to DOI and USFWS. Additionally, they have agreed to pay \$250,000 for additional restoration projects to be determined by USFWS and OEPA, and pay \$1,311,372 in past NRD assessment costs. Federal defendants have agreed to pay \$270,623 to cover past NRD assessment costs as well as future restoration projects to be determined. The Ottawa River and NRD web site is at: <http://www.fws.gov/midwest/es/ec/nrda/Ottawa/index.html>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Ohio River — Elkem Metals Company, Ferro Invest II LLC, Ferro Invest III Inc., and Eramet Marietta Inc. (collectively “Companies”) settled NRD claims based on the Companies’ alleged contamination of the Ohio River and injury to mussels, fish, and snails. The \$3.25 million settlement, entered in 2006 between the Companies and DOI, OEPA, and the state of West Virginia, included \$2.04 million for restoration of damaged natural resources.

Nease Chemical Superfund Site — Between 1961 and 1973, portions of the 44-acre Nease Chemical Superfund Site were owned and operated by a chemical manufacturing plant that produced specialty products. An environmental investigation revealed that hazardous substances allegedly derived from these products were found in the groundwater, soil, sediments, and flood plains/wetlands in the area, as well as in the fish in the Middle Fork Little Beaver Creek. On September 9, 2016, a consent decree between the United States, the state of Ohio, and Rutgers Organic Corporation (ROC) was lodged in federal court that resolves completion of the cleanup of the site as well as NRD. The trustees—USFWS and OEPA—have initiated an NRD assessment and allege that contaminants from the site have injured 1) nearby floodplain soils, sediments, surface and groundwater, and aquatic/wetland and terrestrial plants; 2) benthic, aquatic, and terrestrial invertebrates; 3) fish; 4) migratory birds, including waterfowl, and their supporting ecosystems; and 5) mammals. Pursuant to the consent decree, ROC has agreed to pay \$570,680 for reimbursement of past assessment costs to DOI (\$195,000) and the state of Ohio (\$375,680), as well as the trustees’ future assessment costs, including the oversight of the restoration projects. In addition, ROC has agreed to conduct restoration at the Site, including removal of a low-head dam and restoration of adjacent streamside habitat, which will cost approximately \$150,000. It will also fund a \$366,000 trust to conserve lands in the Little Beaver Creek watershed.

[c] Contact Information

Ohio Environmental Protection Agency: Brian Tucker, Division of Emergency and Remedial Response, Lazarus Government Center, P.O. Box 1049, 50 West Town Street, Suite 700, Columbus, OH 43216-1049. Tel: (614) 644-3120. E-mail: brian.tucker@epa.state.oh.us. Web: <http://www.epa.state.oh.us/>.

[36] Oklahoma

[a] Overview

The Oklahoma trustee for NRD claims is the Secretary of the Environment with most of the NRD enforcement activity occurring at the Department of Wildlife Conservation. The Department commenced NRD work in the mid-1980s related to the Tar Creek Superfund Site, described below. There are no dedicated full-time employees and no budget for the NRD program in Oklahoma.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Tar Creek Superfund Site — The principal NRD site in Oklahoma is the 40 square mile Tar Creek Superfund Site in Ottawa County, Oklahoma. The site is related to lead and zinc mining that occurred in the Tri-State Mining District (Oklahoma, Kansas, and Missouri) from the early 1900s to the mid-1970s. According to a 2000 report commissioned by the Governor, “[n]atural resources potentially affected by contaminants at the site include, in part, federal and state threatened and endangered species, migratory birds, surface water, ground water, drinking water, plants, fish, biota, wildlife, cultural, agricultural, and terrestrial resources. Natural resources specific to the Tribes include, in part, natural resources used in traditional, cultural, spiritual and/or subsistence practices, such as medicinal herbs, furbearing animals, plants and fish used for ceremonial purposes.” Cleanup work continues, funded incrementally. Estimates for NRD have exceeded several hundred million dollars. A Final Assessment Plan was issued in April 2009, and a Draft Programmatic Restoration Plan and Environmental Assessment was released in March 2017.

In litigation related to the Tar Creek site, in July 2008, the U.S. District Court held that an NRD trustee could not assert a claim for interim lost use until the U.S. Environmental Protection Agency (EPA) had selected a remedy, so long as EPA was diligently proceeding with a remedial investigation and feasibility study. *Quapaw Tribe v. Blue Tee Corp.*, No. 03-CV-0846-CVE-PJC, 2008 WL 2704482 (N.D. Okla. July 7, 2008). In this case, the Quapaw Tribe argued that it could assert an NRD claim for interim lost use prior to a EPA remedial decision since such a claim does not interfere with the EPA decision making process. Quapaw relied, in part, on the *New Mexico vs. GE* decision, discussed above. The court rejected this argument in favor of the plain language of the CERCLA statute which provides that “in no event may an action for damages...be commenced...before selection of the remedial action” if the EPA is diligently proceeding with the remedial investigation and feasibility study. 42 U.S.C. § 9613(g). The court was also not persuaded with the argument that EPA had failed to act diligently. Finally, the court was unwilling to allow the Quapaw Tribe to recover future NRD assessment costs until the matter was ripe.

Double Eagle Superfund Site — The Double Eagle facility had refined motor oils from 1929 to 1980 and now stores, dehydrates, and sells waste oils. About 2,500 cubic yards of waste oils are in unlined or leaking surface impoundments, which has contaminated the groundwater. In 2007, BNSF Railway Company and the 3M Company, both of which sent hazardous waste to the site, settled the state’s NRD claims, along with the U.S. Department of the Interior’s CERCLA claims. See 72 Fed. Reg. 58124 (Oct. 12, 2007) (providing notice of BNSF Railway Company’s \$300,000 settlement, which included settling Kansas’s NRD claims); 72 Fed. Reg. 58122 (Oct. 12, 2007) (providing notice of the 3M Company’s settlement for \$50,000, which settled Kansas’s NRD claims).

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Tyson Foods, Inc. — On July 22, 2009, the Northern District of Oklahoma dismissed the Oklahoma’s NRD against Tyson Foods, Inc. because the state failed to join the Cherokee Nation as a required party under FED. R. CIV. P. 19. *State v. Tyson Foods, Inc.*, 258 F.R.D. 472 (N.D. Okla. 2009). And the Tenth Circuit upheld the District Court’s denial of the Cherokee Nation’s motion to intervene. *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223 (10th Cir. 2010). The state’s NRD claims were based on Tyson’s and 12 other poultry companies’ alleged contamination of the Illinois River watershed by the over 345,000 tons of poultry waste these facilities produce each year. The watershed underlies the Cherokee Nation’s land. The state initiated proceedings on behalf of the Cherokee Nation after the Cherokee Nation consented to the state pursuing a claim on its behalf.

[c] Contact Information

Oklahoma Secretary of the Environment: 3800 North Classen Boulevard, Oklahoma City, OK 73118. Tel: (405) 285-9213. Fax: (405) 530-8999. Web: <http://www.environment.ok.gov/>.

Oklahoma Department of Wildlife Conservation: P.O. Box 53465, Oklahoma City, OK 73152. Tel: (405) 521- 3851. Web: <http://www.wildlifedepartment.com/>.

[37] Oregon

[a] Overview

Oregon’s natural resources trustees are the Department of Environmental Quality (ORDEQ) and the Department of Fish and Wildlife. These agencies began working on NRD claims in 1993. Neither department has any staff dedicated full time to NRD issues, and the state has no budget dedicated to NRD. In addition to state-only cases, Oregon has worked with federal trustees on a number of cases. The total recovery of Oregon’s state program from 1987 to 1996 (when the trustees stopped tabulating this data) was nearly \$1.2 million from 14 cases. Most of these were fish kills caused by various spills. Some groundwork has been laid to update the state’s NRD assessment program and associated rules, but it still needs to be developed into a Legislative Concept package to finalize doing so. ORDEQ is a participant in the West Coast Joint Assessment Team, which works to coordinate NRD assessment activities amongst federal, state, and private entities working in NRD, and provides a forum for the development of tools and guidance for conducting NRD assessments. Oregon has a state statute authorizing NRD recovery, OR. REV. STAT. § 468b.395, and a regulation for assessing NRD, OR. ADMIN. R. 635-410-0035.

[b] Major Matters

Portland Harbor— Since the early 1900s, various industries along the lower Willamette River have allegedly released dozens of contaminants into the river and the area around it. Contaminants of concern include PCBs, PAHs, metals, pesticides (*e.g.*, DDT), dioxins, and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

furans. Portland Harbor, which encompasses a nearly 11-mile stretch of the lower Willamette River, was declared a Superfund site by the U.S. Environmental Protection Agency (EPA) in 2000. In 2002, federal, state, and tribal trustees formed the Portland Harbor Natural Resource Trustee Council to coordinate damage assessment activities at the site, plan for the restoration of natural resources through the NRD assessment process, and seek compensation from potentially responsible parties (PRPs). Resources allegedly impacted include fish, birds, mammals, water, sediments, soils, and invertebrates, as well as the loss of use of natural resource services. The Trustee Council has developed a phased approach for the NRD assessment process that began in 2007, in hopes that it will reach settlements with PRPs around the time EPA issues its Record of Decision for the cleanup process. Phases 1 and 2 involve restoration planning while Phases 3 and 4 involve restoration implementation. To date, a final assessment plan was finalized in June 2010, and field studies for osprey, salmon, and lamprey were also conducted. A draft addendum to the assessment plan covering lost ecological and human use services was released in March 2018. The Final Programmatic Environmental Impact Statement and Restoration Plan (PEIS/RP) was published in May 2017, and the Record of Decision for the PEIS/RP was finalized in May 2018.

Whitaker Slough Cleanup — Electroplating activities, including the containment of electroplating wastewater, allegedly contaminated the Whitaker Slough, a tributary that comprises part of the Columbia Slough. The responsible parties entered a settlement with ORDEQ for \$50,000 to cover NRD claims for habitat restoration in the Columbia Slough.

Johnson Lake — Owens Brockway Glass Container Inc. (Owens) entered a proposed settlement agreement with ORDEQ over Owens' alleged contamination of the Columbia Slough near Johnson Lake from overflow from Owens' settling ponds and storm water discharges from Owens' property. The negotiated settlement included \$100,000 "to fund investigation, removal or remedial actions in the Columbia Slough."

Union Carbide Site — Three potentially responsible parties entered into a consent decree with ORDEQ settling NRD claims relating to waste from carbide and ferroalloy processing contaminating the Columbia Slough for \$300,000. Half of this settlement is designated for the "investigation, removal or remedial actions in the Columbia Slough." The other half is for sediment remediation. For a copy of the consent decree, *see* <http://www.deq.state.or.us/Webdocs/Controls/Output/PdfHandler.ashx?p=a5f47f98-b752-4186-a71f-abbe93109fa2.pdf>.

[c] **Contact Information**

Oregon Department of Environmental Quality: Don Pettit, Senior Emergency Response Planner, 811 SW Sixth Avenue, Portland, OR 97204-1390. Tel: (503) 229-5373. E-mail: pettit.don@deq.state.or.us. Web: <http://www.oregon.gov/DEQ/>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Oregon Department of Fish and Wildlife: Jon Germond, Habitat Resources Program Manager, Wildlife Division, Tribal Liaison, 4034 Fairview Industrial Drive SE, Salem, OR 97302. Tel: (503) 947-6088. Fax: (503) 947-6330. Email: Jon.P.Germond@state.or.us. Web: <http://www.dfw.state.or.us/>.

[38] Pennsylvania

[a] Overview

The NRD trustees in Pennsylvania are the Pennsylvania Game Commission, the Pennsylvania Department of Conservation and Natural Resources (DCNR), the Pennsylvania Fish and Boat Commission, and the Pennsylvania Department of Environmental Protection. The trustees work together depending upon the site and the nature of the impacted resources. The Game Commission reports that two to three employees work on NRD matters, and the Department of Conservation and Natural Resources reports that approximately four employees work on NRD matters. In addition to the federal statutes, the Pennsylvania Hazardous Sites Cleanup Act (HSCA) provides authority for NRD claims. Under HSCA, liability is strict for parties that “significantly contribute” to NRD through the release or threatened release of a hazardous substance, including “the reasonable costs of assessing injury, destruction or loss resulting from such a release.” 35 PA. CONS. STAT. § 6020.702(a). NRD claims are reviewed on a case-by-case basis to determine whether to retain private counsel.

[b] Major Matters

Palmerton Zinc Superfund Site — This site, which includes a portion of the Appalachian Trail, is located near an historic zinc smelting facility in Carbon, Lehigh, and Northampton counties. The Palmerton Zinc Natural Resource Trustee Council, which includes all four Pennsylvania trustees in addition to federal trustees, investigated the site alleging that injuries to both aquatic and terrestrial resources were caused by zinc and other metals. In August 2009, the trustees executed a settlement agreement with five companies to compensate for the alleged NRD. The settlement includes a \$21 million payment as well as the transfer of 1,200 acres to the Pennsylvania Game Commission. A restoration plan has been developed and is being implemented by the trustees. On May 24, 2013, the Trustee Council announced the acquisition of two tracts of land using funds from the \$21 million settlement. A 90-acre tract will be used to protect migratory bird and coldwater fish habitat, and a 354-acre tract will be used to protect and enhance fish and wildlife habitat as well as offer recreational use, such as bird watching, hiking, and hunting. In 2015, the trustees awarded settlement funds to two additional projects: (1) Resolution 19 will provide \$751,030 to address a number of trail gaps and repair existing portions of the Appalachian Trail and spur trails within the Lehigh Gap region; and (2) Resolution 20 will provide \$237,000 to establish two new boating and fishing access areas along Lehigh River as part of the Lehigh River Water Trail. In addition, trustees have been working with PA Audubon to identify additional matching funds to help protect additional lands within the Kittatinny Ridge corridor

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

near Palmerton. Recently, the Trustee Council approved Resolution 22, which is a request from East Penn Township for \$34,562.50 for upgrades to a boat launch on the Lehigh River. Trustees indicated that the “release of Trustee matching funds is contingent on commitment of other funding necessary to complete the improvement project,” and approved a DCNR matching grant in January 2017.

Athos I — While attempting to dock at a New Jersey refinery in 2004, the *Athos I* struck a submerged anchor and discharged approximately 265,000 gallons into the Delaware River and its tributaries. NRD was sought by state trustees—Delaware, Pennsylvania, and New Jersey—and federal trustees—U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration. In September 2010, the trustees settled for \$27.5 million out of the National Pollution Funds Center because the potentially responsible parties (PRPs) had exceeded the limits of their liability during the response phase. Restoration projects are in progress or are in post-restoration monitoring. The Final Restoration Plan and Environmental Assessment was released in September 2009 and is available at https://darrp.noaa.gov/sites/default/files/case-documents/AthosFinalRP_0.pdf.

Sinnemahoning Creek Watershed — On June 30, 2006, a train operated by Norfolk Southern Corporation (Norfolk Southern) derailed, resulting in a spill of sodium hydroxide. According to the state, the spill caused damage to the natural resources of Big Fill Run, Sinnemahoning-Portage Creek, and the Driftwood Branch of Sinnemahoning Creek. Northern Southern settled with the state, agreeing to pay \$7.35 million for NRD. At least half of funds will be used towards projects benefiting recreational fishing and boating and aquatic resources. The Pennsylvania Fish and Boat Commission is currently seeking applications for eligible restoration projects.

Metal Bank Superfund Site — This site is located on the western shore of the Delaware River in Philadelphia, Pennsylvania. During the late 1960s and early 1970s, electrical transformer salvage operations were performed at the site, resulting in the alleged release of PCBs to soils and groundwater. The site was listed on the National Priorities List in 1983, and cleanup began in 2008, with most work being completed in 2010. NRD is being sought by state and federal trustees, who have invited PRPs to cooperatively work with them to improve potentially injured resources. An NRD assessment began in 2011 and is ongoing, and restoration projects are being explored.

[c] **Contact Information**

Pennsylvania Department of Environmental Protection: Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101. Tel: (717) 787-2814. Web: <http://www.dep.pa.gov/Business/Land/SiteRemediation/Pages/Natural-Resource-Damage-Assessment.aspx>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Pennsylvania Game Commission: 2001 Elmerton Avenue, Harrisburg PA 17110-9797.
Tel: (717) 787-4250. Web: <http://www.pgc.state.pa.us>.

Pennsylvania Fish and Boat Commission: 1601 Elmerton Avenue, P.O. Box 67000
Harrisburg, PA 17106-7000. Tel: (717) 705-7800. Web:
<http://www.fish.state.pa.us/mpag1.htm>.

Pennsylvania Department of Conservation and Natural Resources: Rachel Carson State Office
Building, P.O. Box 8767, 400 Market Street, Harrisburg, PA 17105-8767. Tel: (717) 787-2869.
Web: <http://www.dcnr.state.pa.us/>.

[39] Puerto Rico

[a] Overview

In NRD cases involving the Commonwealth of Puerto Rico, the Department of Natural and Environmental Resources of Puerto Rico (DNER) acts as the trustee on behalf of the Commonwealth. Puerto Rico relies on federal law to bring NRD claims, but it also has in place Puerto Rican Law 147 (Coral Reef Conservation Act of 1999) that allows it to protect coral reefs as a natural and protected resource.

[b] Major Matters

T/B Morris J. Berman Oil Spill — Tank Barge *Morris J. Berman* ran aground in San Juan, Puerto Rico on January 7, 1994. According to the government, the grounding crushed a coral reef, and the barge subsequently discharged approximately 800,000 gallons of fuel oil into the surrounding waters, beaches, and parklands. Impacted resources include corals and loss of use of beaches and historic sites. In a settlement finalized in December 2000, the responsible parties agreed to pay \$83.5 million to the United States to reimburse the costs of removal and cleanup as well as injuries to natural resources and NRD assessment costs. Specifically, \$60 million of the settlement was deposited into the Oil Spill Liability Trust Fund. As a part of restoration, trustees built the Condado Coral Reef Trail, which is comprised of three underwater educational trails adjacent to a public beach.

M/V Fortuna Reefer — The *M/V Fortuna Reefer* grounded off the coast of Mona Island, Puerto Rico on July 24, 1997. On September 11, 1997, the National Oceanic and Atmospheric Administration (NOAA), DNER, and Rama Shipping Company, Ltd. entered into a settlement agreement under which Rama Shipping agreed to pay \$1,250,000 to cover natural resource restoration projects and to pay trustees for past and future NRD assessment costs. According to a Memorandum of Understanding between the trustees, \$650,000 of that settlement will pay for immediate emergency restoration of injured coral reefs, with \$400,000 provided as additional emergency restoration funds, if needed. Of the \$400,000, at least \$150,000 will be reserved for

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

planning and implementation of compensatory restoration. The majority of the remaining \$200,000 will be used to reimburse the trustees for assessment and administrative costs.

T/V Margara — On April 27, 2006, the oil tanker *T/V Margara* ran aground on a shallow coral reef near Bahia de Tallaboa in Puerto Rico. While attempting to remove and refloat the ship, it grounded again, resulting in additional injury to the reef. NOAA and DNER are trustees for this site and estimate that approximately two acres of reef were affected by the groundings. Some of the impacted coral species are listed as threatened under the Endangered Species Act. Emergency restoration was conducted between 2006 and 2008, which saved approximately 10,500 corals and addressed some restoration needed at the site. A final restoration plan was released in May 2015, which involves stabilizing the injured area with limestone and boulders, and transplanting approximately 1,500 corals onto the site. Additional restoration planning is underway.

M/T Genmar Progress — On August 29, 2007, oil was discharged from the Motor Vessel *Genmar Progress*, a flagged oil tanker owned by GMR Progress LLC and operated by General Maritime Management (Portugal) Lda. (collectively, defendants), while anchored in Guayanilla Bay, Puerto Rico. According to the trustees—the U.S. Department of the Interior, the U.S. Fish and Wildlife Service, and DNER—approximately 45,000 gallons of oil was released. In 2010, trustees and the defendants entered into a Joint Stipulation and Settlement Agreement whereby defendants agreed to pay removal costs as well as \$662,345 in NRD assessment costs already paid or approved by the trustees. On March 21, 2016, a proposed consent decree was lodged in federal court under which defendants agreed to pay \$2,750,000 for NRD claims, with \$83,090 to cover assessment costs and \$2,666,910 to cover restoration of alleged injured resources.

LNGC Matthew — A liquefied natural gas tanker, the *LNGC Matthew*, grounded on December 15, 2009, and allegedly struck and damaged coral reef habitat off the shore of Puerto Rico near Guayanilla. Potential additional damage occurred when the tanker was extracted, and trustees allege that over 3,000 square meters of coral reef and associated resources were harmed as a result. A final restoration plan was released in March 2017. On June 28, 2017, a proposed consent decree was lodged whereby the owner of the tanker agreed to pay \$1,900,000 to cover NRD assessment (\$192,000) and restoration costs (\$1,708,000).

T/V Port Stewart — On October 28, 2009, a 176-meter tanker vessel, the *T/V Port Stewart*, grounded near the entrance to the Yabucoa Channel in Puerto Rico, allegedly damaging coral reef habitat. According to a consent decree approved in July 2017, the grounding and extraction resulted in potential damage to over 500 square meters of resources. The owner of the vessel, Port Stewart GmbH&Co. Kg of Germany, has agreed to pay \$550,000 in NRD, with \$128,000 to NOAA and \$10,000 to DNER to cover NRD assessment costs, and \$412,000 to be deposited into a fund for costs related to restoration. A final restoration plan was released in March 2017.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[c] Contact Information

Department of Natural and Environmental Resources: P.O. Box 366147, San Juan, Puerto Rico 00936. Tel: (787) 999-2200. Web: <http://drna.pr.gov/>.

[40] Rhode Island

[a] Overview

Rhode Island's Natural Resources Trustee is the Director of the Department of Environmental Management. Two staff members within that agency work on NRD issues, but it does not have dedicated NRD staff. Rhode Island's first NRD case was the North Cape Oil Spill in 1996; it was also the first time the state required natural resources restoration. Besides the North Cape spill, the state has only pursued a handful of other claims, mostly related to former military installations. Rhode Island does not use private attorneys to pursue NRD claims. Under Rhode Island law, responsible parties are strictly liable for "the sum of money required to restock injured land or waters, to replenish a damaged or degraded resource, or to otherwise restore the environment of the state to its condition before the injury." R.I. GEN. LAWS § 46-12.5.1-7(B).

[b] Major Matters

North Cape Oil Spill — This incident involved the spill of approximately 828,000 gallons of home heating oil from the barge North Cape off the coast of southern Rhode Island. According to the state, this spill killed at least nine million lobsters and caused certain areas to be closed to lobstering for five months following the spill. Nearly 2,300 birds were allegedly killed, as well as millions of clams, crabs, and fish. The trustees estimated these resources would take five years or more to recover. The trustees also quantified injuries to recreational interests, namely boating. Although the short-term impacts were severe, the trustees concluded there was little or no long-term impact. The trustees focused on restoration, requiring the potentially responsible party (PRP) to, among other things, stock Block Island Sound with 1.5 million adult lobsters to accelerate the lobster population's recovery. Pursuant to a consent decree, the PRP will also pay the trustees \$8 million to fund additional NRD activities and \$3.3 million to reimburse the trustees for the costs required to assess the damage after the spill. All restoration projects were completed in early 2016, and project performance monitoring is ongoing.

Calf Pasture Point and Allen Harbor Landfill — Rhode Island initiated an NRD claim against the federal government for resource damages to the environment at Calf Pasture Point and Allen Harbor Landfill in 2001. Both sites are part of the Naval Construction Battalion Center Superfund Site in North Kingstown, Rhode Island. According to the state, the main damaged resource at Calf Pasture Point was groundwater contamination due to chlorinated VOCs. At Allen Harbor Landfill, the resources allegedly damaged included the groundwater, wetlands, and shellfish in the harbor resulting from hazardous waste dumping in the landfill. After some proceedings, Rhode Island settled both claims for \$1.415 million in 2005. At this time, the state

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

is in the process of utilizing this money to protect and/or repair damages to those same resources in the Town of North Kingstown.

Buzzards Bay — In April 2003, the Bouchard B-120 barge spilled approximately 98,000 gallons of oil into Buzzards Bay. In May 2011, the responsible party, Bouchard Transportation Co., Inc. settled with federal, state (including both Rhode Island and Massachusetts), and tribal trustees for \$6 million to cover potential NRD. Approximately \$4.8 million is slated to restore resources potentially injured by the spill: shoreline and aquatic resources, piping plovers, and lost recreational use. This settlement, however, did not include assessment costs and trustee claims related to bird injuries other than piping plovers. On January 24, 2018, another consent decree was entered with Bouchard agreeing to pay \$13.3 million, plus interest, to reimburse trustees for assessment claims and to cover potential injuries to wildlife resources, such as loons, sea ducks, and other migratory birds, as well as their habitats. Restoration is ongoing, and the trustees are engaging the public regarding potential restoration projects.

Davis Liquid Waste Superfund Site — The Davis Liquid Waste Superfund Site is a 10-acre site that accepted liquid and chemical wastes throughout the 1970s, which were allegedly dumped into unlined lagoons and seepage pits. The site was added to the National Priorities List in 1983, and has been undergoing groundwater remediation. On March 20, 2013, seven potentially responsible parties (PRPs) reached a settlement with trustees whereby the PRPs agreed to pay an initial payment of \$750,000 to cover NRD assessment and restoration of groundwater resources. If that payment is not enough to bring the groundwater up to state drinking water standards, the PRPs will be required to pay additional monies.

[c] Contact Information

Rhode Island Department of Environmental Management: Mary E. Kay, Executive Counsel, 235 Promenade Street, Providence, RI 02908. Tel: (401)222-6607. Web: <http://www.dem.ri.gov/>.

[41] South Carolina

[a] Overview

The Governor, the Director of the Department of Natural Resources, and the Director of the Department of Health and Environmental Control (DHEC) share trusteeship responsibilities in South Carolina. South Carolina has no dedicated NRD office but draws from the resources of the trustee agencies as necessary; NRD work is assigned to specific legal and remediation staff determined by resources at issue, in addition to their other duties. The state is currently pursuing several NRD claims. Resources involved in past cases have included groundwater, surface water, migratory birds, benthic organisms, saltmarsh, recreational shellfishing, and freshwater fisheries. South Carolina primarily uses habitat equivalency analysis for NRD assessments. It uses a modified form of the New Jersey methodology for groundwater NRD. NRD may be assessed under South Carolina law. S.C. CODE ANN. § 48-1-90 (providing that liability for “any

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

person who discharges organic or inorganic matter into the waters of this state . . . to the extent that the fish, shellfish, aquatic animals, wildlife or plant life indigenous to or dependent upon the receiving waters or any property are damaged or destroyed . . .”). The state does not hire private counsel to pursue its NRD claims. Currently, South Carolina has no plans to make changes to how it handles NRD claims.

[b] Major Matters

Twelvemile Creek/Lake Hartwell — The Sangamo–Weston plant site, a capacitor manufacturing plant in Pickens, South Carolina, operated from 1955 to 1987. During this time, according to the state, significant PCB contamination was released from the plant into Twelvemile Creek, Lake Hartwell, and surrounding areas. Schlumberger Technology Corp. is the corporate successor to Sangamo-Weston. In January 2006, Schlumberger settled NRD claims brought by state and federal trustees with respect to the site for \$11.8 million. Schlumberger agreed to spend an additional \$8-10 million to remove two hydroelectric dams from Twelvemile Creek and to conduct restoration projects.

Cooper River/Charleston Harbor — On October 24, 2012, the federal and state natural resource trustees settled NRD claims arising from the September 2002 release of 12,500 gallons of fuel oil from the container ship *M/V Ever Reach* into Cooper River and Charleston Harbor. The settlement addressed shoreline habitats, sediments, migratory birds, shellfish bed closure, and a disruption to recreational shrimp baiting. Under the consent decree, Evergreen International must pay \$821,000 in past damage assessment costs, \$121,000 for lost recreational use, and future costs of monitoring and overseeing the restoration project. The trustees completed a final restoration plan and environmental assessment in May 2012.

ExxonMobil - Nine Sites — On June 26, 2019, a consent decree was lodged in the District of South Carolina with ExxonMobil Oil Corporation named as the settling defendant. According to the state, ExxonMobil is allegedly responsible for contamination and resulting NRD at nine various sites located in South Carolina. These sites include the following: Atlantic Phosphate Works Site, GCW Ponpon Site, Lambs Fertilizer Site, Port of Baldwin Mines Site, Stono Phosphate Site, Swift Agrichem Site, VCC Blacksburg Site, VCC Greenville Site, and Wando Phosphate Site. Pursuant to the consent decree, ExxonMobil will pay \$6,374,529 toward trustee sponsored restoration projects and \$214,682 for past assessment costs.

[c] Contact Information

South Carolina Department of Natural Resources: Shannon Furr Bobertz, Chief Counsel, P.O. Box 167, Columbia, SC 29202-0167. Tel: (803) 734-4006. Fax: (803) 734-3911. Web: <http://www.dnr.sc.gov/>.

South Carolina Department of Health and Environmental Control: 2600 Bull Street, Columbia, SC 29201. Tel: (803) 898-3432. Web: <http://www.scdhec.gov/>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[42] South Dakota

[a] Overview

South Dakota's natural resources trustee is the Secretary of the Department of Environment and Natural Resources. South Dakota has no dedicated NRD staff. South Dakota has pursued one claim in conjunction with federal and tribal trustees. South Dakota does not have a state statute authorizing NRD recovery and does not use private attorneys to pursue NRD claims.

[b] Major Matter

South Dakota v. Homestake Mining Company — This site involved alleged damage to surface and groundwater, primarily from metals. The settlement required Homestake to transfer back to the state certain water rights and to pay \$4 million in damages, a third of which went to the state.

[c] Contact Information

South Dakota Department of Environment and Natural Resources: Joane Lineburg, Environmental Scientist III, Groundwater Quality Program, 523 East Capitol, Pierre, SD 57501. Tel: (605) 773-3296. E-mail: DENRINTERNET@state.sd.us. Web: <http://denr.sd.gov/>.

[43] Tennessee

[a] Overview

The Commissioner of the Tennessee Department of Environment and Conservation (TDEC) has been designated by the Governor as trustee for the state. TDEC has one staff member dedicated to NRD issues but will use other staff as necessary. Tennessee may pursue NRD claims under federal authority and multiple Tennessee statutes, including DEC's Enabling Act, the Water Quality Control Act, the Solid Waste Disposal Act, the Hazardous Waste Management Act, the Air Quality Act, the Radiological Health Service Act, and the Petroleum Underground Storage Tank Act. Tennessee uses administrative processes to handle cases under state authority using streamlined assessments and simplified injury calculations for groundwater and surface waters.

[b] Major Matters

Obed Wild and Scenic River Site (Pryor Oil Well Blowout) — On July 19, 2002, while the Howard/White Unit No. 1 oil well was being drilled to test for commercial oil production, oil began to discharge from the well and into White and Clear Creeks, both tributaries of the Obed Wild and Scenic River. After the discharge, the well caught fire and burned vegetation and soils. The trustee council for this site, which includes the U.S. Department of the Interior (DOI), represented by the National Park Service, and TDEC, has secured funds from the National Pollution Funds Center (NPFC) in the amount of \$699,176 for damage assessment and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

implementation, oversight, and administration of restoration projects to restore stream services (\$460,689), forest resources (\$9,018), and lost visitor use (\$73,496). The trustees completed the restoration for this case in 2014.

U.S. Department of Energy's Oak Ridge Reservation (ORR) — TDEC worked cooperatively with federal co-trustees (DOI and the Department of Energy) as well as the Tennessee Valley Authority (TVA) to settle an NRD claim for injuries to the Lower Watts Bar Reservoir. Executed on September 23, 2010, the Administrative Order on Consent provides compensation through the 3,000 acre Black Oak Ridge Conservation Easement and \$50,000 for recreational fishing restoration projects to compensate for injuries caused by the alleged release of hazardous substances (PCBs and mercury) and radioactive compounds onto the reservation back in the 1940s. TDEC continues to work cooperatively with the other trustees to assess the injury for the balance of the ORR.

Tennessee Valley Authority Kingston Ash Spill — On December 22, 2008, a dike failed at the TVA Kingston Fossil Plant, located in Roane County, Tennessee, allegedly causing an estimated 5.4 million cubic yards of coal ash to spill onto surrounding land and water. The Trustee Council released the Restoration and Compensation Determination Plan in Spring 2015, and the Administrative Order on Consent (AOC) was signed on July 27, 2015. The AOC requires TVA to provide \$750,000 to fund recreational and ecological restoration in the Emory, Clinch, and Watts Bar Watersheds in addition to on-site recreational and ecological restoration performed directly by TVA.

[c] **Contact Information**

Tennessee Department of Environment and Conservation: Debbie Duren, Natural Resource Trustee Program Manager, 761 Emory Valley Road, Oak Ridge, TN 37830-7072. Tel: (865) 220-6596. E-mail: debbie.duren@tn.gov. Web: www.tn.gov/environment.

[44] **Texas**

[a] **Overview**

Three state agencies in Texas have been designated as NRD trustees: the Texas General Land Office (GLO), the Texas Parks and Wildlife Department (TPWD), and the Texas Commission on Environmental Quality (TCEQ). The Governor of Texas designated GLO as a natural resource trustee in 1991; TPWD was designated in 1990; and TCEQ (then the Texas Water Commission) was designated in 1988. The state does not have a unified budget for NRD assessments. Each trustee agency addresses personnel and operational costs for NRD within their agency's unique budgets. The state reports that it typically pursues cooperative and restoration-focused NRD assessments. State trustees have the "authority to pursue claims for injury to, destruction of, or loss of natural resources as a result of a release of a hazardous substance or a discharge of oil, seek restoration or replacement of such natural resources, and pursue recovery of reasonable

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

assessment costs.” 30 TEX. ADMIN. CODE §7.124(a)(2). State trustees have never utilized and are not currently considering the use of private attorneys to bring forward cases on the state's behalf.

Potential NRD cases associated with hazardous substance releases from waste sites are typically identified through the Texas trustees’ participation in Texas’ remediation process known as the Texas Risk Reduction Program (TRRP). Within this remediation process, active trustee participation is solicited during the Ecological Risk Assessment phase. Trustee participation is formally established under a trustee-TCEQ Memorandum of Understanding (MOU) entered into in 2001. This MOU may be found at 30 TEX. ADMIN. CODE §7.124. The state reports that “evaluating a site for potential NRDA liability during the remediation process promotes an integrated approach to selecting the most appropriate and effective remediation alternative. This early cooperative involvement of the trustees within the remediation process provides an effective means by which cases can be efficiently settled, benefiting all parties.”

The state uses special NRD rules for oil spills in coastal environments (Title 31 Texas Administrative Code, Chapter 20) to address assessment procedures for determining, quantifying, and valuing natural resource injury and loss of services. The state reports that “the rules were developed through an innovative negotiated rulemaking process involving members of industry, conservation organizations, and State and Federal trustees.”

[b] Major Matters

Deepwater Horizon — On April 20, 2010, an explosion on the offshore drilling rig, *Deepwater Horizon*, caused a fire and led to the subsequent sinking of the rig into the Gulf of Mexico, resulting in the release of oil into the Gulf. The wellhead was capped in mid-July 2010. The natural resource trustees that are engaged in this matter include the National Oceanic and Atmospheric Administration, U.S. Department of the Interior, U.S. Environmental Protection Agency, U.S. Department of Agriculture, Alabama Department of Conservation and Natural Resources, Geological Survey of Alabama, Florida Department of Environmental Protection, Louisiana Coastal Protection and Restoration Authority, Louisiana Oil Spill Coordinator’s Office, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, Louisiana Department of Natural Resources, Mississippi Department of Environmental Quality, Texas GLO, TPWD, and TCEQ. Very shortly after the incident occurred, one of the responsible parties, BP Exploration & Production Inc. (BPXP), began engaging in cooperative studies with the trustees to assess NRD caused by the oil release. Technical Working Groups were created for potentially impacted natural resources, and over 160 cooperative studies were undertaken including for birds, marine mammals (*e.g.*, dolphins), sea turtles, marshes, oysters, offshore water column, offshore benthic habitats, and human use. In April 2011, BPXP and the trustees entered into a Framework Agreement whereby BPXP committed to provide up to \$1 billion toward early restoration projects to address NRD

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

caused by the incident. Between 2012 and 2016, five phases of early restoration projects were approved by the trustees and BPXP, encompassing 65 projects at an estimated \$866 million.

On April 4, 2016, a consent decree, which resolves the United States' Clean Water Act penalty claim against BPXP, all NRD claims of the United States and the five Gulf States, as well as certain other federal and state claims, was approved by the court in MDL 2179. Pursuant to the consent decree, BPXP will pay \$8.1 billion over 15 years for NRD (which includes the \$1 billion previously committed for early restoration), up to \$700 million for adaptive management and to address natural resource conditions that are presently unknown, and \$350 million for NRD assessment costs incurred by the trustees. The consent decree can be found here: <https://www.justice.gov/enrd/file/838066/download>.

In February 2016, the trustees released their Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. The plan allocates settlement funds to address habitat, water quality, living coastal and marine resources, recreational opportunities, and monitoring, adaptive management, and administrative oversight to support restoration implementation. For more information about this matter, *see* <http://www.gulfspillrestoration.noaa.gov/> or <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

Malone Service Co. Disposal Facility — The Malone Service Co. site is a former 150-acre disposal facility for waste oil and chemicals along the Galveston Bay shoreline in Texas City. From 1964 to 1996, businesses and federal agencies sent more than 480 million gallons of waste to the site. Allegedly hazardous substances released from the site—including chlorinated solvent, phenols, PAHs, chromium, and lead—contaminated groundwater and migrated to Galveston Bay. The hazardous substances potentially damaged upland-woodlands habitat, freshwater marsh habitat, and saltwater marsh habitat. On September 24, 2012, state and federal trustees settled with the PRPs including Alcoa Inc., Chevron, Exxon Mobil, FMC Corp., Halliburton, Marathon Oil, Occidental Chemical, Texaco, Texas Instruments, Goodyear Tire and Rubber Co., and Union Carbide, among others. The consent decree gave the trustees \$3.12 million for future assessment and restoration and for past assessment costs. Assessment and planning for mitigation and restoration is ongoing.

Other — Currently, the state is actively involved in 43 NRD cases in varying stages of assessment or restoration. It has settled 41 cases, and 4 others have agreements in principal, pending settlement. It has initiated or completed construction of 55 restoration projects.

The total amount recovered by the trustees for damages to natural resources for settled NRD cases is estimated at more than \$32 million. This value includes those sums recovered in cash settlements as well as the estimated cost of restoration projects implemented by responsible parties. The state reports the following breakdown of amounts recovered:

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Summary of Texas NRD Assessment Settlements by Restoration Category		
Restoration Category	Estimated Cost	Acres
Beach Use	\$1,096,000	-----
Recreational Fishing	\$2,200,000	-----
Dune Construction	\$1,105,000	1
Estuarine Wetlands Construction, Enhancement and Preservation	\$19,723,600	1,673
Oyster Reef Construction	\$2,300,000	11
Rookery Acquisition and Preservation	\$130,000	105
Freshwater Wetlands Construction, Enhancement and Preservation	\$1,351,000	1,113
Riparian Habitat Construction	\$1,300,000	26
Bottomlands Forest Acquisition and Preservation	\$1,180,000	859
Prairie Construction, Enhancement and Preservation	\$268,000	283
Upland Habitat Construction, Enhancement and Preservation	\$690,000	60
TOTAL	\$31,343,600	4,129

The following chart provides the annual breakdown of NRD recoveries in Texas:

Summary of Texas NRD Assessment Settlements by Fiscal Year		
FY	Acres of Habitat	Estimated Cost¹
1992	875	\$2,000,000
1994	105	\$130,000

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

1995	256	\$1,300,000
1996	35	\$3,000,000
1997	20	\$200,000
1998	49	\$1,012,500
1999	107	\$50,000
2000	134	\$2,845,000
2001	498	\$3,290,000
2002	110	\$720,000
2003	233	\$1,960,000
2004	2	\$38,100
2005	1,706	\$14,798,000
TOTAL	4,129	\$31,343,600

[c] Contact Information

Texas General Land Office: Richard Seiler, MC 113, Natural Resource Trustee Program, P.O. Box 13087, Austin, TX 78711-3087. Tel: (512) 239-2523. Web: <http://www.glo.texas.gov/coast/coastal-management/nrda/index.html>, <http://www.tceq.texas.gov/remediation/nrtp/nrtp.html>, and https://tpwd.texas.gov/landwater/water/environconcerns/damage_assessment/.

[45] Utah

[a] Overview

Utah's natural resource lead trustee is the Deputy Director of the Department of Environmental Quality. The Director of the Department of Natural Resources is a co-trustee. No additional overview information was reported.

[b] Major Matters

Red Butte Creek Oil Spill — On June 11, 2010, crude oil spilled into Red Butte Creek and flowed to other waterways from the rupture of a pipeline owned by Chevron Pipeline Company. A second spill occurred from another rupture in the pipeline six months later. In 2011, the state reached a \$3.5 million settlement with Chevron as part of an enforcement action and waiver of NRD claims. Of that, \$3 million will be used for mitigation projects to enhance and protect waterways that may have been affected by the two releases or otherwise relate to the releases.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

Ensign-Bickford Trojan Facility — Discharges from this explosives manufacturing facility in Spanish Fork allegedly created a groundwater plume extending approximately three miles from the plant. In 2007, the state reached a settlement with Ensign-Bickford, including approximately \$2.58 million to be placed in a trust fund for NRD and \$9.375 for groundwater treatment.

Southwest Jordan Valley — In 1986, the state filed a claim against Kennecott Utah Copper Corporation for injuries to surface and groundwater reportedly related to historical mining activities in the southwestern section of Salt Lake Valley. A consent decree was reached in 1995, which required Kennecott to complete source control work, to provide \$28 million for restoration of groundwater, and to pay the state \$9 million in compensation for lost use of groundwater while restoration activities are ongoing. A final restoration plan was approved in 2004.

[c] Contact Information

Utah Department of Environmental Quality: 195 North 1950 West, P.O. Box 144810, Salt Lake City, UT 84114-4810. Tel: (801) 536-4400. Web: <http://www.deq.utah.gov/>.

[46] Vermont

[a] Overview

The Vermont Agency of Natural Resources (ANR) is the natural resources trustee in Vermont. Act 154, passed in 2016, authorizes the Secretary of ANR to assess NRD, which includes the “cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the injured, damaged or destroyed natural resources or the services the natural resources provided.” Act 154 also provides the Secretary the authority to adopt rules to implement provisions of the Act. As of July 2017, ANR is working in consultation with interested stakeholders on finalizing proposed rules, and the final rulemaking is expected to become effective by March 1, 2018. Vermont does not have a dedicated NRD office to administer NRD claims or the new rulemaking. Rather, the state will rely on existing regulatory processes and will co-administer existing ANR programs with regulatory oversight of Vermont’s natural resources. Vermont may rely on outside experts and consultants to assist with large or complex NRD claims. Prior to the passage of Act 154, Vermont engaged in NRD assessments through partnerships on Superfund site restoration with federal entities such as the U.S. Environmental Protection Agency (EPA), and through settlement with private parties.

[b] Major Matter

Pine Street Canal Superfund Site — Located in the City of Burlington, Vermont, this 80-acre Superfund site includes a former coal gasification plant, an abandoned canal and turning basin used to transport lumber in the 1800s, and wetland and upland habitats. According to the state, studies conducted in the early 1980s found high levels of contaminants (*e.g.*, coal tar, VOCs, and

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

cyanide) in the canal and surrounding wetlands. As a result, potentially impacted resources included aquatic invertebrates, which the state then alleged adversely impacted other wetland-dependent resources, such as amphibians and migratory birds. Settlement between state and federal trustees and the responsible party was achieved in 1998, whereby the responsible party agreed to restore 6 acres of wetland and protect 26 acres of wetland and upland. Restoration was completed in 2002, and monitoring was concluded in 2006.

Vermont Asbestos Group Mine — The Vermont Asbestos Group mine (VAG) site is located on approximately 1,550 acres within the Towns of Lowell and Eden, Vermont. Asbestos mine features (quarries, pit lakes, waste rock, and tailings) cover approximately 650 acres of the site. Major mining activities at the site took place primarily from 1936 through 1993, when mining operations ceased. According to the state, asbestos mining and milling processes at the site have resulted in the accumulation of approximately 36 million tons of asbestos-laden mine waste rock and tailings. Erosion of the mine waste has allegedly caused habitat destruction to downstream wetlands and streams. Erosion control measures were installed by the EPA Removals Program in 2007 and 2008 and are currently being maintained by the current owner of the property; these measures have reduced the volume of asbestos-laden waste rock and tailings from entering downstream wetlands and streams. At this time, there are not sufficient resources for a long-term remedy to stabilize the waste rock and tailing piles and remediate the impacted wetlands and streams.

As part of a 2009 bankruptcy settlement agreement with a former operator of the VAG mine, \$850,000 was awarded to state and federal natural resource trustees for restoration of NRD at the site. The U.S. Fish & Wildlife Service (USFWS) (on behalf of the Department of the Interior as federal trustee) and Vermont ANR as state trustee entered into a Memorandum of Understanding in 2015 and began the process of developing possible restoration projects at or near the VAG site. Implementation of restoration is anticipated to commence in 2018.

[c] Contact Information

Vermont Agency of Natural Resources, Waste Management & Prevention Division, One National Life Drive, Davis 2, Montpelier, VT. Tel: (802) 241-3600. Fax: (802) 244-1102. Web: <http://anr.vermont.gov/>.

[47] Virginia

[a] Overview

Virginia's natural resource trustee is the Secretary of Natural Resources. Virginia does not have its own NRD statute. No additional overview information was reported.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Tazewell County Spill — In 1998, a tanker truck overturned in Tazewell County, Virginia, spilling more than 1,300 gallons of Octocure 554-revised, a rubber accelerant, into a tributary of the Clinch River. According to the state, the spill damaged aquatic habitat along a six-mile stretch of the river and destroyed populations of three endangered species of freshwater mussels, as well as causing injuries to other aquatic life and other natural resources. The state and federal trustees settled with the responsible party, Certus Inc., in 2003 for \$3.8 million in restoration work, primarily aimed at restoring the affected mussel populations and their habitat. Certus also agreed to reimburse the trustees for their assessment costs.

Powell River — On October 24, 1996, approximately six million gallons of coal slurry was released to the Power River watershed due to an alleged failure in a coal slurry impoundment associated with a coal processing plant owned by Lone Mountain Processing, Inc., in Lee County, Virginia. According to the state, coal fines, clay, and associated contaminants extended more than 20 miles downstream, potentially impacting fish, endangered mussels, supporting aquatic habitat, and bats and migratory birds. On March 5, 2001, the responsible party entered into a consent decree with the trustees, agreeing to pay \$2.5 million for NRD. A Restoration Plan and Environmental Assessment was completed in 2003, and restoration has included land acquisition, propagation of mussel and fish populations, and outreach and education.

Dan River Coal Ash Spill — On February 2, 2014, a stormwater pipe collapsed at the Duke Energy Dan River Steam Station in Eden, North Carolina, releasing an estimated 39,000 tons of coal ash and 27 million gallons of ash pond water into the Dan River. The NC Department of Environmental Quality (NCDEQ) requested assistance from the U.S. Environmental Protection Agency (EPA), which deployed on-scene coordinators and entered a unified command structure, which included agencies who are also the trustees for this matter—U.S. Fish & Wildlife Service (USFWS), NCDEQ, and the Virginia Department of Environmental Quality (VDEQ). Duke Energy is working cooperatively with the trustees on the NRD assessment and restoration to evaluate the impact of the spill on natural resources. The trustees believe that the spill may have injured fish and wildlife resources. The site's NRD Assessment Plan was finalized in December 2015.

DuPont Waynesboro Facility — Beginning in 1929, E.I. du Pont de Nemours and Company (DuPont) operated a facility located in Waynesboro, Virginia, that manufactured acetate flake until 1977. According to EPA, mercury— which was used in making acetate flake—has been detected in sediments, soils, fish, and wildlife at and downstream from the facility. DuPont and the trustees have cooperatively engaged in NRD studies and assessments since 2005. On July 28, 2017, a consent decree between DuPont, the U.S. Department of Justice, and trustees U.S. Department of the Interior (DOI) and Virginia Secretary of Natural Resources, was entered in District Court to resolve NRD claims that mercury releases from DuPont's facility allegedly impacted over 100 miles of river and floodplain in the South River and South Fork Shenandoah

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

River watershed including sediment, fish, birds, mussels, and amphibians. Pursuant to the settlement— reportedly the largest NRD settlement for the state— DuPont will pay over \$42 million to the trustees to cover restoration projects, over \$214,000 for assessment costs, and it will fund the design and implementation of renovations to the Front Royal Fish Hatchery, estimated to cost up to \$10 million. Restoration projects have been selected, and nine land conservation projects will be funded by the settlement as well. More on the restoration can be found at https://www.fws.gov/northeast/virginiafield/environmentalcontaminants/dupont_waynesboro.html.

Kinder Morgan Terminals — On or about January 22, 2016, approximately 75,222 gallons of jet fuel A were allegedly released from the Kinder Morgan Terminals South Hill Terminal, located in Chesapeake, Virginia. The release was due to the transfer of fuel to an incorrect tank, which resulted in overfilling. According to the trustees, the release impacted migratory avian species. In January 2018, the Federal Register published notice of a proposed settlement agreement between the responsible party, Kinder Morgan, and trustees, whereby Kinder Morgan will pay DOI \$15,000 to cover NRD assessment costs, and \$100,000 for restoration. The Damage Assessment and Restoration Plan was released in June 2017.

Dominion Energy Virginia Crystal City Substation — In January 2016, approximately 13,500 gallons of mineral oil dielectric fluid was released when a transformer ruptured at the Dominion Energy Virginia Crystal City Substation, located in Arlington, Virginia. It is reported that a little more than 13,000 gallons were recovered from spill containment facilities and response actions, but an undetermined amount of oil was observed in Roaches Run Waterfowl Sanctuary and in or along the Potomac River. According to the trustees—USFWS, the National Park Service, DC Department of Energy and Environment, and VDEQ—various bird species, including great blue heron, lesser scaup, Canada goose and mallard, were oiled as a result of the release. Further, a nearby parking area was closed for over two weeks due to response actions, preventing visitors from accessing recreational opportunities. A settlement agreement was finalized in January 2018 with Dominion Energy Virginia agreeing to pay \$390,385 for restoration projects. Prior to the settlement agreement, Dominion Energy Virginia paid \$88,361.75 to trustees for past assessment costs. A final Damage Assessment and Restoration Plan was released in March 2018.

[c] Contact Information

Virginia Secretary of Natural Resources: P.O. Box 1475, Richmond, VA 23218. Tel: (804) 786-0044. Fax: (804) 371-8333. Web: <https://naturalresources.virginia.gov>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[48] Washington

[a] Overview

The lead natural resources trustee in Washington is the Department of Ecology. However, trustee responsibility is also shared by the Department of Natural Resources and the Department of Fish and Wildlife.

Three ecology programs assess and recover NRD: the Spill Prevention, Preparedness & Response Program (SPPRP), the Toxic Cleanup Program (TCP), and the Nuclear Waste Program (NWP).

The SPPRP is an office within the Department of Ecology dedicated to NRD issues arising from oil spills. For oil spills, there is a Resource Damage Committee composed of the Department of Ecology (lead), the Department of Natural Resources, the Department of Fish and Wildlife, the State Parks and Recreation Commission, the Department of Health, the Office of Archaeology and Historic Preservation, and interested tribes. Washington has a relatively well-established NRD program that began pursuing NRD claims in the mid- to late-1980s. Washington handles between 30 and 40 oil spill claims annually. Although Washington has pursued hundreds of oil spill claims, none have yet gone to court.

Washington primarily relies on habitat equivalency analysis for assessing NRD for cases other than oil spills. The state has also developed its own formula for assessing NRD from oil spills, and oil spill damages and credits are assessed according to the Washington Oil Spill Compensation Schedule. Washington uses federal procedures when working with federal trustees, such as the National Oceanic and Atmospheric Administration.

Washington's state statutes on NRD are Model Toxics Control Act, WASH. REV. STAT. ch. 70.105D, Water Pollution Control Act RCW 90.48, and the Oil and Hazardous Substance Spill Prevention and Response Act (OHSSPR), WASH. REV. STAT. ch. 90.56. Liability for "natural resource damages resulting from the release or threatened release of hazardous substances" is strict and joint and several. *Id.* § 70.105D.040(2). Liability for NRD caused by unauthorized releases of oil into state waters is also strict. *Id.* § 90.56.370(1). Washington does not use private attorneys to bring NRD claims.

[b] Major Matters

Miscellaneous — According to the state, TCP pursues NRD claims in partnership with agencies of the U.S. Department of Commerce, U.S. Department of the Interior, local Native American tribes, and the Washington State Department of Fish and Wildlife. As such, settlements have been made with potentially responsible parties (PRPs) at the Tulalip Landfill, the Eagle Harbor Superfund Site, and the Holden Mine Superfund Site. Assessments and negotiations are ongoing at the Elliott Bay and Commencement Bay Superfund Sites, discussed below. Additionally, TCP

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

assesses and recovers NRD pursuant to the state's Model Toxics Control Act (WASH. REV. STAT. ch. 70.105D) and implementing regulations (WASH. ADMIN. CODE ch. 173-340). *See* <http://www.ecy.wa.gov/biblio/9406.html>.

Commencement Bay — Commencement Bay is the harbor for Tacoma, Washington, located at the southern end of Puget Sound. A number of industrial and commercial activities are located on waterways that feed the bay, including pulp and lumber mills, shipbuilding facilities, chemical production facilities, aluminum smelting facilities, and oil refineries. According to the state, contaminants originating from these facilities discharge into the waterways and the bay. The nearshore area of Commencement Bay is an important habitat for numerous marine species, including Chinook Salmon, flat fish, and marine birds. Over 400 PRPs have been identified. NRD assessment activities began in 1991 and are ongoing. Some restoration work has been done, and although the case is still ongoing, several PRPs, especially those along the Hylebos waterway, have entered settlement agreements. According to the trustees, there have been over 19 settlements, and more than \$70 million from settlement funds have been used for restoration projects. Extensive additional information is available at <https://darrp.noaa.gov/hazardous-waste/commencement-bay>.

Elliott Bay/Duwamish River — Elliott Bay is an eight square mile bay in central Puget Sound, which encompasses the waterfront of downtown Seattle. The major commercial district of Seattle is located on the southeastern shore of the Bay. The bay receives discharges and storm water runoff from metropolitan Seattle. Natural resources that have allegedly been impacted include wildlife (fish, birds, mammals), water, sediment, and recreational uses. NRD assessment activities at the site are ongoing, led by the Elliott Bay Trustee Council, officially formed in 2005, which includes federal, state, and tribal trustees. To date, there have been a few settlements. The first was with Pacific Sound Resources to address NRD related to a former wood treating facility located at the Wyckoff/Eagle Harbor Superfund Site. With this settlement, approximately \$3,380,000 is being used to fund restoration associated with the facility. A second settlement was with the City of Seattle in 1991 concerning sewer discharges. As part of the 1991 City of Seattle settlement, \$5 million was used for habitat development and restoration, which is complete, in addition to providing real estate worth up to \$5 million. In 2010, a settlement with The Boeing Company addressed NRD in the Lower Duwamish Waterway, whereby Boeing agreed to implement a habitat restoration project in lieu of monetary damages, pay \$360,000 to fund permanent stewardship of the project, plus reimburse trustees over \$1,900,000 for past assessment costs. Most recently, on September 22, 2016, trustees and the City of Seattle entered into another consent decree covering the City's liability for NRD not addressed in the 1991 consent decree. This settlement is significant in that it is the first where a defendant has purchased restoration credits to resolve its liability for NRD that were financed and constructed by a restoration development company. Specifically, the City will purchase 28 discounted service acre-year credits from Bluefield Holdings, a company that develops restoration projects, worth approximately \$3,500,000. An Environmental Assessment for the Bluefield Holdings, Inc. Site 2 Shoreline Restoration Project Credits Purchase was released on

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

November 25, 2016. Further, the City will reimburse trustees approximately \$91,000 to cover past assessment costs. On June 17, 2019, a bankruptcy settlement agreement was entered whereby the Trustees have an allowed general unsecured claim of \$1,000,000 for NRD against Kaiser Gypsum Company. A draft Injury Assessment Plan was released for public comment on July 31, 2018. More information can be found at <https://darrp.noaa.gov/hazardous-waste/lower-duwamish-river>.

Hanford — The Hanford Nuclear Reservation is a former Department of Energy (DOE) production site for nuclear materials located in southeast Washington. The Nuclear Waste Program is the lead state trustee for the Hanford Natural Resource Trustee Council, which is currently conducting an NRD assessment for the Hanford site. Members of the NRD council include federal, state, and tribal trustees. The state is also a party in litigation against DOE, in which it, along with the other trustees, are seeking a declaratory judgment regarding the liability of the U.S. for an NRD injury assessment at Hanford. *Confederated Tribes and Bands of the Yakama Nation v. United States*, 616 F.Supp. 2d 1094 (E.D. Wash. 2007). In October 2006, the United States moved to dismiss the claim on the grounds that the remedial decisions had not yet been made by the U.S. Environmental Protection Agency. The court, on September 4, 2007, held that the timing limitation in CERCLA related to claims for damages only, not assessment costs. Accordingly, the trustees were able to assert a claim for recovery of their NRD assessment costs. This decision has potential far-reaching implications since it could allow trustees to obtain funding for NRD assessments before litigating damages. On the other hand, the impact of the decision may be limited by the fact that, to date, it represents an isolated interpretation of the statute. In one recent case, a U.S. District Court declined to follow the Yakama decision, distinguishing a claim for past assessment cost from a claim for future assessment costs. See *Quapaw Tribe v. Blue Tee Corp.*, No. 03-CV-0846-CVE-PJC, 2008 WL 2704482 (N.D. Okla. July 7, 2008). On January 31, 2013, the federal, state, and tribal trustees released the finalized Hanford Natural Resource Damage Assessment Injury Assessment Plan.

Skykomish Facility — BNSF Railway Company (BNSF) owns a former maintenance and fueling facility in Skykomish, Washington, that was in operation from the 1890s until 1974. According to the state, bunker C and diesel fuel discharges over the years leaked into the water table and contaminated the groundwater. Since 2005, over 350,000 cubic yards of contaminated soil were removed, over 218,000 gallons of fuel were removed from the facility and recycled, five homes were temporarily relocated, and two wetlands have been cleaned and restored. According to a consent decree with the Department of Ecology, BNSF will provide \$5.5 million for NRD. Cleanup was expected to continue through 2014.

Tenyo Maru — On July 22, 1991, the Chinese freighter *Tuo Hai* collided with the *Tenyo Maru*, a Japanese fishing vessel. As it sank, the *Tenyo Maru* released 354,800 gallons of intermediate fuel oil and 97,800 gallons of diesel. The fuel affected coastal waters and ecologically valuable shoreline, killing about 4,300 seabirds. The responsible parties reached a settlement in 1994 with the trustees, including the Department of Ecology and the Makah Indian Tribe. The \$9

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

million settlement included \$5.16 million for restoring, rehabilitating, replacing, or acquiring the equivalent of injured natural resources. Restoration was completed in August 2006 and continues to undergo monitoring.

Crystal Mountain Emergency Generation Facility — According to the state, 18,200 gallons of diesel fuel were released from an emergency back-up generator into the soil near Crystal Mountain Ski Resort. Rain eventually moved about 7,971 gallons of the fuel into the nearby Silver Creek. Pursuant to a 2008 consent decree, Puget Sound Energy, the responsible party, paid \$512,856.59 for NRD and \$49,614.47 to reimburse NRD assessment by the site's trustees, which included the state of Washington. 73 Fed. Reg. 79,167 (Dec. 24, 2008).

Port Gardner — The Port Gardner Bay and Snohomish River Estuary have been contaminated with hazardous substances and oil, allegedly the result of various industrial and municipal processes since the early 1900s. Federal, state, and tribal trustees allege that affected natural resources include fish, shellfish, wildlife, marine sediments, and resources of cultural significance. A consent decree between the trustees and three potentially responsible parties (PRPs)—Jeld-Wen, Kimberly-Clark, and Weyerhaeuser—was entered on April 5, 2018. Using discounted service acre-years (DSAYs) to describe the scale of the injuries, trustees allocated 1,019 DSAYs between the three PRPs, estimated to be over \$3.9 million in cash damages. The total settlement is \$4 million, and also includes past assessment costs. On June 3, 2019, a proposed consent decree with the Port of Everett was lodged, whereby the Port of Everett will restore 338 acres of salmon habitat, and the U.S. Navy will pay \$789,840 towards project construction. The consent decree also requires payment of \$839,427 in past assessment costs, up to \$110,500 in interim costs, and \$23,000 in future costs. A Final Damage Assessment Restoration Plan and Environmental Assessment was released in December 2016.

[c] Contact Information

Nuclear Waste Program: 3100 Port of Benton Boulevard, Richland, WA 99354. Tel: (509) 372-7950. Fax: (509) 372-7971. E-mail: Hanford@ecy.wa.gov. Web: <https://ecology.wa.gov/Waste-Toxics/Nuclear-waste/Natural-resources-protection>.

Spills Prevention, Preparedness, and Response Program: P.O. Box 47600, Olympia, WA 98504-7600. Tel: (360) 407-7114. Fax: (360) 407-7288. Web: <https://ecology.wa.gov/About-us/Get-to-know-us/Our-Programs/Spills-Prevention-Preparedness-Response>.

Toxics Cleanup Program: C.E. Thompson, P.O. Box 47600, Olympia, WA 98504-7600. Tel: (360) 407-7234. Fax: (360) 407-7154. Web: <https://ecology.wa.gov/About-us/Get-to-know-us/Our-Programs/Toxics-Cleanup>.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[49] West Virginia

[a] Overview

It appears the Division of Natural Resources is the trustee agency in West Virginia. West Virginia does not have a state NRD statute, nor does it have an office or personnel dedicated to NRD. No additional overview information was reported.

[b] Major Matters

Ohio River — A settlement was announced in March 2006 between federal and trustees for the states of West Virginia and Ohio regarding discharges to the Ohio River from the Eramet Marietta Inc. facility in Marietta, Ohio. Under the agreement, Eramet and three other PRPs will pay \$2.04 million towards restoration of native freshwater mussels, snails, and fish in the Ohio River and \$460,000 in past assessment costs. The final Restoration Plan and Environmental Assessment was released in August 2007.

Consol Energy/Dunkard Creek — Between June 2007 and September 2008, Consol allegedly discharged mining wastewater containing chloride in excess of that allowed by its Clean Water Act permits. From May to November 2009, trustees state that Consol discharged chloride and total dissolved solids at levels above accepted tolerances for the protection of aquatic life. In September 2009, a species of golden algae bloomed in Dunkard Creek, killing thousands of fish, mussels, and amphibians. A consent decree among Consol and the state and federal trustees provides \$500,000 in NRD to West Virginia. Additionally, Consol must pay a \$5.5 million civil penalty and construct a \$200 million centralized wastewater treatment plant.

[c] Contact Information

West Virginia Division of Natural Resources: 324 Fourth Avenue, South Charleston, WV 25305. Tel: (304) 558-3315. Fax: (304) 558-2768. Web: <http://www.wvdnr.gov/admin/default.shtm>.

[50] Wisconsin

[a] Overview

Wisconsin's natural resources trustee appears to be the Department of Natural Resources (WDNR). Wisconsin has no general NRD recovery statute, although it authorizes its Department of Justice to defend the state against NRD claims, WIS. STAT. § 165.25(6)(e), and statutes provide that individuals who violate certain prohibitions, *e.g.*, obstructing or diverting a navigable water without a permit, may be required to undertake natural resources restoration, *id.* § 30.298(5). WIS. STAT. §299.95 provides for cooperation between WDNR and Wisconsin's Attorney General in pursuing NRD claims.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[b] Major Matters

Fox River/Green Bay — The Fox River/Green Bay Natural Resource Trustee Council (Council) supervises and has allocated over \$35 million of the settlements with potentially responsible parties (PRPs) for restoration projects. The NRD claims arise from the historic contamination of the Fox River and Green Bay from PCB and other discharges from about 20 paper mills as early as 1853, and the production of carbonless copy paper starting in the 1950s. The Council is composed of the WDNR, U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), Menominee Indian Tribe of Wisconsin, Oneida Tribe of Indians of Wisconsin, and the state of Michigan. Examples of the PRPs who have settled include Georgia-Pacific Corp. for \$7 million and Appleton Papers Inc. for \$40 million over 40 years. Additionally, in January 2019, a proposed consent decree between two PRPs—P.H. Glatfelter Company and Georgia-Pacific Consumer Products L.P.—and the government was lodged, whereby the PRPs agreed to pay \$500,000 for NRD restoration and/or NRD assessment costs. Restoration is ongoing, but has thus far included wetland restoration, land acquisition, fisheries projects, and trail and boat launches. An Update to the Restoration Plan and Environmental Assessment was released in July 2016. For more information, see <http://www.foxrivernrda.org/>.

Ashland Lakefront — Industrial activities along Chequamegon Bay have contaminated sediment along the lakefront in Ashland, Wisconsin. Federal, state, and tribal trustees and Northern States Power Company (NSPC) announced a settlement on August 8, 2012 to compensate the trustees for damages to natural resources. NSPC will transfer 400 acres of land within the Bad River Reservation to the Bad River Band of the Lake Superior Tribe of Chippewa Indians for the improvement of natural resources in the area. NSPC will also transfer 990 acres along the Iron River in Bayfield County, Wisconsin to the WDNR for the improvement of natural resources in the Iron River watershed. The parcels have been valued at \$1.9 million.

Sheboygan River and Harbor Superfund Site — This site is located on the western shore of Lake Michigan about 55 miles north of Milwaukee, Wisconsin, and includes the lower 14 miles of Sheboygan River, which has been designated a Superfund site. Due to industrial activities along the Sheboygan River, PCBs, heavy metals, and oil residues have been found in the waterway and surrounding environment. Trustees for the site are WDNR, USFWS, and the National Oceanic and Atmospheric Administration, which allege that contamination from the site impacted invertebrates, fish, amphibians, birds, mammals, and loss of human use. On December 12, 2017, the trustees and three PRPs—Tecumseh Products Co., Thomas Industries, Inc., and Wisconsin Public Service Corp.—announced settlements totaling \$4.5 million. Pursuant to the consent decrees, which were approved by the court on April 19, 2018, the PRPs will pay \$1,295,500 to Sheboygan County to reimburse it for partial costs incurred in acquiring the Amsterdam Dunes restoration project, \$2,532,500 to be used on preservation and restoration activities as detailed in a proposed Restoration Plan and Environmental Assessment filed contemporaneously with the proposed settlement, and the remainder to reimburse trustees for their work at the site.

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.

[c] Contact Information

Wisconsin Department of Natural Resources: 101 South Webster Street, Madison, WI 53703-7921. Tel: (608) 266-2621. Fax: (608) 261-4380. Web: <http://dnr.wi.gov/>.

[51] Wyoming

[a] Overview

Wyoming has no formal NRD program, staff, rules, or policies. The Wyoming Environmental Quality Act, WYO. STAT. ANN. § 35-11-903(a) allows the state to collect additional money for the value of lost "fish, aquatic life, game or bird life." Since 1973, the state NRD provision has been used at least once, in the early 1980s. In that matter, the state collected approximately \$50,000 to collect the value of fish lost in a gasoline spill. The amount was calculated based on the cost of restocking the area of the fish kill with trout.

[b] Contact Information

Wyoming Department of Environmental Quality: 200 West 17th Street, Cheyenne, WY 82002. Tel: (307) 777-7937. Fax: (307) 777-7682. E-mail: wyodeq@wyo.gov. Web: <http://deq.wyoming.gov/>.

Wyoming Game and Fish Department: 5400 Bishop Boulevard, Cheyenne, WY 82006. Tel: (307) 777-4600. Web: <https://wgfd.wyo.gov/>.

AUTHOR'S NOTE: This guide will be updated regularly. Any errors will be corrected upon notice. Corrections or additional information can be provided to the author (brian.israel@arnoldporter.com) or Leigh Logan (leigh.logan@arnoldporter.com). The current version of this guide is available at the environmental practice homepage of Arnold & Porter Kaye Scholer LLP (www.arnoldporter.com).

The "State-by-State Guide to NRD Programs in All 50 States" is part of the chapter "Natural Resource Damages" by Brian D. Israel of Arnold & Porter Kaye Scholer LLP. Copyright © 2006 Matthew Bender & Co., Inc. Reproduced with permission from *Environmental Law Practice Guide: State and Federal Law*, published by Matthew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved.