

2007

The Illegality of Contingency-Fee Arrangements When Prosecuting Public Natural Resource Damage Claims and the Need for Legislative Reform

Julie E. Steiner

Western New England University School of Law, jsteiner@law.wne.edu

Follow this and additional works at: <http://digitalcommons.law.wne.edu/facschol>



Part of the [Environmental Law Commons](#)

Recommended Citation

32 Wm. & Mary Envtl. L. & Pol'y Rev. 169 (2007)

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

**THE ILLEGALITY OF CONTINGENCY-FEE
ARRANGEMENTS WHEN PROSECUTING PUBLIC
NATURAL RESOURCE DAMAGE CLAIMS AND THE NEED
FOR LEGISLATIVE REFORM**

JULIE E. STEINER*

Introduction. 169

I. The Rise of Contingency-Fee Representation Under CERCLA. 173

II. The Illegality of Contingency-Fee Representation When Prosecuting Public Natural Resource Damage Actions. 182

 A. CERCLA’s Express Statutory and Regulatory Language. 182

 1. CERCLA Provisions Permitting Attorney’s Fee Recovery. 182

 2. CERCLA’s Use Restriction. 186

 3. Reasonable Costs of Assessment. 186

 B. CERCLA’s Underlying Legislative Purpose. 189

 C. Debunking the Tobacco Analogy: Public Natural Resource Damage Actions Are Different From Traditional Torts. 194

 D. CERCLA’s Preemptive Effect on State, Territorial or Common Natural Resource Damage Laws. 202

III. A Proposal for Legislative Reform. 206

INTRODUCTION

Riding in like the cavalry with government banner flying high, contingency-fee lawyers have snatched the distressed “sleeping giant”¹

* Associate Professor of Legal Writing, St. John’s University School of Law. Environmental, Land Use and Natural Resource Department, Kirkpatrick & Lockhart, Preston Gates Ellis, LLP (2004-2007). Environmental and Natural Resources/Litigation Departments, Dewey Ballantine LLP (presently Dewey & LeBoeuf, LLP) (1995-2004). I thank Donald W. Stever and B. David Naidu, Esqs., and Professors Akilah Folami, Theresa Hughes, Mary Lyndon, Michael Simons, and Philip Weinberg for their advice. I further thank Jane Black, Frank DiCarlo, Jason Strauss, and the Editorial Board of the William & Mary Environmental Law and Policy Review, for their invaluable research and editing assistance.

¹ Ken Stier & Mark J. Magyar, *NRD: The New Battlefield in Environmental Litigation*, N.J. REP., Apr. 2004, available at <http://www.njreporter.org/archive/nrd.html> (quoting

that is the public natural resource damage action.² Hailed by some as the saviors of an otherwise languishing public action, and encouraged by the promise of gargantuan damage awards,³ these private attorneys have entered into “special counsel”⁴ agreements with state Attorney Generals’ offices to bring claims to compensate the public for injury, destruction or harm caused to the public’s natural resources.⁵ Under this agreement,

remarks by Richard Stewart, Professor, New York University School of Law, that “[t]his is the sleeping giant [sic] of environmental liability”; Peter L. Gray, *The Rise of Natural Resource Damage Claims: States and Plaintiffs’ Attorneys Leading the Charge*, ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSLETTER (ABA), Apr. 2007, at 5 (“Natural resource damage (NRD) actions have long been regarded as the sleeping giant of Superfund.”).

² Natural resource damages (or “NRDs”) are defined as “injury to, destruction of, or loss of natural resources.” Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) (2000); accord CERCLA §§ 101(6), 111(b), 42 U.S.C. §§ 9601(6), 9611(b) (2000). Natural resources are defined broadly to include “land, fish, wildlife, biota, air, water, ground water, drinking water supplies,” and similar resources. CERCLA § 101(16), 42 U.S.C. § 9601(16) (2000). For a more detailed discussion of CERCLA’s damage measurement, see *infra* Parts II.A and B.

³ For example, in early 2000, New Jersey sought \$950 million in natural resource damages from sixty-six companies alleged to have contributed to contamination in the lower Passaic River. Marilynn R. Greenberg & Steven T. Senior, *Natural Resource Damages Loom Large in New Jersey*, METROPOLITAN CORP. COUNCIL, Dec. 23, 2003, at 21. See also Gerald F. George, *Litigation of Claims for Natural Resource Damages*, in ENVIRONMENTAL LITIGATION 397, 399-400 (ALI-ABA 2000) (“[T]he most recent ‘megabuck’ natural resource damage lawsuit to make headlines involves a \$260 million suit filed by the New Mexico Office of Natural Resource Trustee”). Loosely termed “bounty hunters,” such contingency-fee attorneys take a substantial percentage of the overall damage recovery. See, e.g., Greenberg & Senior, *supra*. One attorney retained by the State of New Jersey to pursue natural resource damages resulting from pollution to the Passaic River “will receive at least 20% of the first \$10 million recovered, 17.5% of the next \$15 million recovered and 15% of any amount recovered over \$25 million for each NRD case that is settled after the state has initiated a lawsuit.” *Id.*

⁴ The arrangement has been alternatively referenced by such terms as “independent counsel,” “outside counsel” and “special Attorney General.” For convenience, all titles will be collectively referenced herein as “special counsel.”

⁵ Eric G. Lasker, *Superfund Law Preempts Contingent-Fee Arrangements in Natural Resource Damages Suits*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), July 15, 2005, at 1-2.

[T]he . . . more ominous aspect of the New Mexico litigation, however, is the State’s retention of outside counsel on a contingent fee basis to pursue NRD [natural resource damage] claims under CERCLA and state law theories. The willingness of plaintiffs’ class action firms to “front” the costs of NRD litigation for states—in particular for the ubiquitous groundwater claims—could mean that the number of state NRD claims will explode.

George, *supra* note 3, at 400.

special counsel brings a natural resource damage action on behalf of the public and fronts the litigation costs, but deducts a percentage of the public's damage recovery to pay the attorney's contingency fee; the remainder goes into a fund⁶ to be allocated by the government's natural resource damage "trustee."⁷

As discussed in Part I of this article, the natural resource "giant" was induced into its slumber because under-funded governments had generally failed to bring these types of costly, complex claims for residual environmental harm.⁸ Congress, which had otherwise structured a sound scheme for natural resource damages in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), failed to insert a provision permitting recovery of litigation-related attorney's fees and costs. Additionally, with the passage of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),⁹ Congress cut off the availability of most Superfund¹⁰ money associated with the litigation of these claims.¹¹ Moreover, government attention was preoccupied by more pressing matters

⁶ See, e.g., Professional Services Contract Between the Territory of the Virgin Islands, Department of Property & Procurement and the Law Offices of John K. Dema P.C., at 2-3 (2004).

⁷ As explained in greater detail in Part II.C below, CERCLA authorizes the United States and the individual states, territories and tribes to designate an official to serve as the natural resource "trustee" with standing to sue on behalf of the public for injuries to the natural resources within their respective trusteeship. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2000); 65 Fed. Reg. 6012, 6013 (Feb. 9, 2000) (codified at 43 C.F.R. pt. 11).

⁸ Anthony R. Chase, *Remedying CERCLA's Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine into Natural Resource Damage Action*, 11 VA. ENVTL. L.J. 353, 355 (1992) ("Some critics suggest that until recently, these provisions have 'done little more than gather dust.'") (quoting Erik D. Olson, *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,551 (1989)). "Olson charges that the natural resource damage program has not lived up to its potential primarily because federal agencies have lacked the will, the resources or both to make the program work." *Id.* at 355 n.14.

⁹ Pub. L. No. 99-499, 100 Stat. 1772 (1986).

¹⁰ Congress passed CERCLA or "Superfund," in response to a growing national concern about the release of hazardous substances from abandoned waste sites. See, e.g., *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 548 (W.D.N.Y. 1988). CERCLA (1) provides the necessary authority for the federal government to respond to hazardous substance releases to remove threats to the environmental and public health; (2) creates the "Superfund" "to finance cleanup and response efforts"; and (3) creates "a liability scheme to ensure that those responsible" for hazardous substance releases "pay for the response costs and for damage to natural resources." *Id.* CERCLA was broadly amended in 1986 by SARA. *Id.* (citing SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986)).

¹¹ See *infra* note 39 and accompanying text.

relating to the remediation of stagnating hazardous waste sites.¹² As a result, numerous natural resource damage claims were expiring, and the injection of the contingency-fee arrangement into the litigation process was recognized for its catalyzing effect on state prosecution of such actions.¹³

But is the current trend of outsourcing the public's natural resource damage action to private lawyers the correct solution to fill CERCLA's funding void? The arrangement has been criticized for improperly diverting millions of dollars that should lawfully have gone toward public natural resource restoration to pay an attorney's fee.¹⁴

In Part II, this article explores the complex structure of and restorative purpose underlying, CERCLA's natural resource damage provisions.¹⁵ The author concludes that such contingency-fee arrangements violate the express language of, and legislative intent underlying, CERCLA, which limits a trustee's ability to "use [a natural resource damage award] only to restore, replace, or acquire the equivalent of [the damaged] natural resource" ("use restriction").¹⁶ Moreover, because broad state, territorial and common laws that permit recovery for natural resource damages are often raised in addition to, or in place of, a federal CERCLA damage claim,¹⁷ there is a corollary issue regarding the legality of paying a contingency fee from one of those broader laws that typically do not contain use restrictions. The author posits, however, that because Congress did not include litigation-related attorney's fees in the natural resource damage measurement, and because Congress intended that the recovery serve as a "make whole" restorative remedy, CERCLA's comprehensive natural resource damage regime would be undermined if a damage recovery is

¹² See Kevin R. Murray et al., *Natural Resource Damage Trustees: Whose Side Are They Really On?* 5 ENVTL. L. 407, 414 (1999) ("Since CERCLA was enacted . . . the predominant emphasis of the act has been on the government's ability to clean up a site and hold PRPs strictly liable for the government's response costs.") (citing Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Damages: Recovery Under State Law Compared with Federal Laws*, 20 ENVTL. L. REP. (ENVTL. L. INST.) 10,134, 10,134 (Apr. 1990)).

¹³ See, e.g., George, *supra* note 3, at 400; Gray, *supra* note 1, at 3.

¹⁴ See George, *supra* note 3, at 400; Lasker, *supra* note 5, at 1-2.

¹⁵ This article is limited to addressing the interplay between contingency-fee representation in natural resource damage lawsuits, the express language and underlying purpose of CERCLA, and attendant public policy issues. This article does not address whether parallel arguments can be advanced under natural resource damage provisions contained in the Oil Pollution Act, §§ 1001, *et seq.*, 33 U.S.C. §§ 2701, *et seq.*, or the Clean Water Act, §§ 101, *et seq.*, 33 U.S.C. §§ 1251, *et seq.*

¹⁶ CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2000).

¹⁷ See *infra* note 140.

depleted by paying a contingency fee under the authority of such broad state, territorial or common laws. Congress carefully crafted CERCLA's natural resource damage regulations to ensure that the damage award would be sufficient to accomplish, and would in fact apply toward, resource restoration; CERCLA preempts state, territorial, or common natural resource damage laws that conflict with this objective.¹⁸

Having concluded that such an arrangement is illegal under CERCLA as currently structured, yet recognizing that CERCLA is flawed because it fails to provide the appropriate financial incentives to facilitate government efforts to bring natural resource damage claims, in Part III the author proposes legislative reform to permit the recovery of the government's reasonable litigation-related fees and costs when prosecuting CERCLA natural resource damage actions. Such reform will enable governments to bring natural resource damage claims and to lawfully recoup the litigation costs from the natural resource damage award.

Because CERCLA's present scheme does not permit payment of most attorney's fees,¹⁹ however, the current use of contingency-fee attorneys to prosecute such actions must cease. Pending reform, natural resource damage actions must be prosecuted by either salaried government counsel or, alternatively, special counsel paid a comparable salary or a reasonable fee drawn from a lawful government appropriation.

I. THE RISE OF CONTINGENCY-FEE REPRESENTATION UNDER CERCLA

The government's ability to recover damages for harm to the public's natural resources finds its genesis in the common law.²⁰ Prior to

¹⁸ See *infra* Part II.D.

¹⁹ This article distinguishes between a limited class of "assessment-related attorney's fees," described *infra* in Part II.A.3, which are included in CERCLA's natural resource damage measurement, and "litigation-related attorney's fees," which are not included in CERCLA's natural resource damage measurement. The author posits that assessment-related attorney's fees are recoverable, while litigation-related attorney's fees are not.

²⁰ John Carlucci, *Natural Resource Damages at Contaminated Sites*, 13 NAT. RESOURCES & ENV'T 473, 473 (1999) ("The notion that governmental entities are entitled to recover damages for injuries to natural resources is rooted in common law."); Terry Fox, *Natural Resource Damages: The New Frontier of Environmental Litigation*, 34 S. TEX. L. REV. 521, 536 (1993) ("The common law public trust doctrine paved the way for the evolution of federally based protections of natural resources."); Judith Robinson, Note, *The Role of Nonuse Values in Natural Resource Damages: Past, Present, and Future*, 75 TEX. L. REV. 189, 190 (1996) ("The ability of the government to collect damages for public resources

CERCLA's enactment, litigants were forced to contend with what was generally understood to be ineffective common law remedies for residual harm to environmental natural resources.²¹ Among other failings, the common law damage measurement was deemed inadequate to compensate for residual injury to natural resources.²²

CERCLA was enacted in 1980,²³ partially as a response to these recognized shortcomings in traditional common law remedies.²⁴ CERCLA's central goal, however, was "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."²⁵ As such, CERCLA was primarily designed to identify and remediate hazardous waste sites and impose the costs of the cleanup on the potentially responsible parties ("PRPs").²⁶

CERCLA also includes the lesser known natural resource damage scheme that is the focus of this article. CERCLA's natural resource damage

has its roots in the common-law public trust doctrine, which provided the basis for the natural resource damage provisions in CERCLA . . .").

²¹ See Carlucci, *supra* note 20, at 473 ("Over time, limitations inherent in various common law doctrines underscored the need for a more formalized acknowledgment of natural resource damage (NRD) claims.").

²² See, e.g., S. REP. NO. 96-848 at 13-14 (1980) (stating that "traditional tort law presents substantial barriers to recovery" and that "compensation ultimately provided to injured parties is generally inadequate"); H.R. REP. NO. 96-172, pt. 1, at 17 (1979) ("[C]ommon law remedies [are] . . . inadequate to compensate victims in a fair and expeditious manner."). See generally Fox, *supra* note 20, at 536-37 ("While the common law public trust doctrine provides a useful and necessary basis for natural resource damage recovery, future natural resource damage claims will probably be pursued under federal statutes because they clearly provide a broader statutory basis for the recovery of natural resource damages.").

²³ Pub. L. No. 95-510, 94 Stat. 2762 (1980).

²⁴ *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 455 (D.C. Cir. 1989) ("The legislative history illustrates . . . that a motivating force behind the CERCLA natural resource damage provisions was Congress' dissatisfaction with the common law."); see also *infra* Part II.C.

²⁵ *United States v. Colorado*, 990 F.2d 1565, 1570 (10th Cir. 1993) (quoting H.R. REP. NO. 96-1016, pt. 1, at 22 (1980), as reprinted in 1980 U.S.C.C.A.N. 6119, 6120). Accord *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) ("CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution.").

²⁶ *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (CERCLA was "principally designed to effectuate the cleanup of toxic waste sites [and] to compensate those who have attended to the remediation of environmental hazards."). CERCLA defines four categories of PRPs: (1) current "owner[s] and operator[s] of a vessel or a facility"; (2) former owners or operators at the time of a hazardous substance disposal; (3) anyone who "arranged for disposal or treatment"; and (4) anyone who "accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release." CERCLA § 107(a), 42 U.S.C. § 9607(a) (2000).

provisions are designed to compensate the public for residual injury,²⁷ understood as the difference between a natural resource in its baseline condition and the resource after remediation.²⁸ Under this damage scheme, CERCLA imposes liability upon PRPs for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.”²⁹ This damage measurement compensates for “natural resource injuries that are not fully remedied by response actions as well as public economic values lost from the date of the discharge or release until the resources have fully recovered.”³⁰

Within this damage scheme, CERCLA provides a mechanism for states, territories and tribes to designate an official natural resource “trustee,” and gives the trustee legal standing to seek natural resource damages on behalf of the public.³¹ As the statutorily-authorized representative of the public’s natural resources, the trustee “shall act on behalf of the public”³² with respect to the resources under the trusteeship.

CERCLA was designed to resolve environmental liability by encouraging settlement.³³ The government can settle natural resource damage

²⁷ CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

²⁸ See Natural Resource Damage Assessments, 59 Fed. Reg. 52749 (Oct. 19, 1994). “Baseline” conditions are those “that would have existed . . . had the discharge of oil or release of the hazardous substance under investigation not occurred.” 43 C.F.R. § 11.14(e) (2006).

[N]atural resource damages settlements follow or are contemporaneous with cleanup settlements. This is so because, customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment.

In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1035 (D. Mass. 1989).

²⁹ CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

³⁰ Natural Resource Damage Assessments, 59 Fed. Reg. 52,749, 52,749 (Oct. 19, 1994).

³¹ CERCLA § 107(f), 42 U.S.C. § 9607(f) (2000).

[SARA] created a mechanism for states to appoint natural resource trustees to bring lawsuits seeking natural resource damages. . . . In SARA, Congress provided an express means for states to bring natural resource damage actions by permitting the states to designate ‘natural resource trustees.’ . . . The amended legislation regularizes the procedure by which states may identify those with responsibility to protect their natural resources directly through natural resource damages claims.

Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 472-73 (D. Mass. 1991). Natural resource damage trustees are designated by, respectively, the President and the Governors of the State or Territory. CERCLA § 107(f)(2), 42 U.S.C. § 9607(f)(2).

³² CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

³³ See, e.g., *United States v. Mallinckrodt, Inc.*, No. 2002/1488, 2006 WL 3331220, at *3

liability and grant a settling party a “covenant not to sue”³⁴ for future natural resource damages *if* the potentially responsible party agrees “to undertake appropriate actions necessary to protect and restore the natural resources damaged by [the] release or threatened release of hazardous substances.”³⁵

Although CERCLA established a goliath of a natural resource damage scheme, few claims were brought.³⁶ Initially after CERCLA’s enactment, governments concentrated on remedying priority sites and used CERCLA’s cost recovery provisions to recover the costs expended on those efforts.³⁷ This approach was in large measure an artifact of necessity because the regulatory authorities were faced with an urgent threat to human health and the environment caused by a large number of unaddressed hazardous waste sites.³⁸

Another factor contributing to the lack of natural resource damage claims is Congress’s failure to insert a provision permitting recovery of the

(E.D. Mo. 2006) (noting “CERCLA’s objective of encouraging settlement”); *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 909 (E.D. Wis. 2004).

³⁴ CERCLA § 122(j)(2), 42 U.S.C. § 9622(j)(2) (2000).

³⁵ *Id.*

³⁶ *See* Gray, *supra* note 1, at 3 (noting that in the years since Superfund was enacted, “there have been only a handful of reported NRD cases brought by the United States. Likewise, until the mid- to late-1990s, state prosecution of NRD claims were equally rare.”); Greenberg & Senior, *supra* note 3 (“For years these claims . . . have been called the ‘sleeping giant.’ [The New Jersey Department of Environmental Protection] recently transformed this sleeping giant into an 800-pound gorilla.”); Stier & Magyar, *supra* note 1 (quoting remarks by Richard Stewart, Professor, New York University School of Law, that “[t]his is the sleeping giant [sic] of environmental liability . . .”); John Tomlin, *Waking the Sleeping Giant: Analyzing New Jersey’s Pursuit of Natural Resource Damages from Responsible Polluting Parties in the Lower Passaic River*, 23 PACE ENVTL. L. REV. 235 (2006) (citing 5 MICHAEL B. GERRARD, ED., ENVTL. L. PRAC. GUIDE § 31.04A (2004)).

³⁷ Murray et al., *supra* note 12, at 414 (“Since CERCLA was enacted . . . , the predominant emphasis of the act has been on the government’s ability to clean up a site and hold PRPs strictly liable for the government’s response costs.”) (citing Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Damages: Recovery Under State Law Compared with Federal Laws*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,134, 10,134 (Apr. 1990)).

³⁸ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (“CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances.”) (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997)); *see also Colorado v. U.S. Dep’t of the Army*, 707 F. Supp. 1562, 1567 (D. Colo. 1989) (“CERCLA was enacted to clean up inactive hazardous waste disposal sites. It established ‘a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.’”) (quoting *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1071 (D. Colo. 1985)).

government's reasonable litigation-related attorney's fees. When Congress passed SARA in 1986, it also eliminated the availability of most Superfund money associated with the litigation of these claims.³⁹ The complex and costly nature of the natural resource damage action, however, taxed the resources of under-funded and understaffed Attorneys General offices and trustees.⁴⁰ The costs involved with prosecuting such actions, particularly the costs associated with performing an assessment of the natural resource injury, have been criticized as prohibitively high.⁴¹ Some commentators have noted that, "because [NRD] trustees are not permitted to use Superfund resources for NRD assessments, trustees are left to finance their own costs, which may amount to millions of dollars. Due to a lack of budgetary funding, this obstacle may be insurmountable for some government agencies."⁴² Consequently, the natural resource damage provisions were largely overlooked and, neglected, the natural resource damage "giant" laid down to sleep.⁴³

³⁹ Chase, *supra* note 8, at 355 ("Yet despite such an apparently sound statutory framework and broad reach, CERCLA's damage provisions have failed to fulfill their promise."). The enactment of SARA in 1986 effectively "cut off the availability of Superfund money for restoration of injured natural resources." Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 445 n.11 (D.C. Cir. 1989). See also 26 U.S.C. § 9507(c)(1)(A)(ii) (2000); CERCLA §111(c)(1)-(2), 42 U.S.C. § 9611(c)(1)-(2) (2000). The trustee is barred from obtaining funds until it has first "exhausted all administrative and judicial remedies to recover the amount of such claim from persons who may be liable" under § 107 as PRPs. *Id.* at § 111(b)(2)(A), 42 U.S.C. § 9611(b)(2)(A).

⁴⁰ ASS'N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, SURVEY OF STATE REMEDIAL PROGRAM ACTIVITIES IN NATURAL RESOURCE DAMAGES 2 (1997) (noting that most state natural resource damage programs have been in the developmental stages, constrained by limited staffing and funding, as well as inadequate coordination with neighboring state and federal natural resource damage programs); E. Lynn Grayson & Sarah H. Halpin, *What Businesses Need to Know About Natural Resource Damage Claims*, 12 BUS. L. TODAY, Nov.-Dec. 2000, at 16, 17 ("Natural resource damage cases historically seemed almost too burdensome for underfunded federal and state trustees lacking in resources and litigation support.").

⁴¹ See Grayson & Halpin, *supra* note 40, at 18-19.

⁴² Murray et al., *supra* note 12, at 427-28. See also James A. Chalmers & Suzanne M. Stuckwisch, *Recent Developments in Natural Resource Damage Claims: Smoke or Fire?* 15 ENVTL. COMPLIANCE & LITIG. STRATEGY, Mar. 2000, at 1 ("The relatively small number of NRD actions filed is a direct consequence, therefore, of the fact that the trustees carry a heavy burden in case development, combined with very limited budgets. At the federal level, NOAA and DOI have together typically only had \$20 million to \$30 million annually with which to pursue NRD actions, and most state trustees have had correspondingly low, or no, budgets for these purposes.").

⁴³ See *supra* notes 1, 36.

After a lengthy period of hibernation, trustees are focusing renewed effort on prosecuting natural resource damage claims.⁴⁴ This trend is at least partly attributable to the willingness of contingency-fee attorneys to fund and power the litigation.⁴⁵ For example, in the Professional Service Contract between the Territory of the Virgin Islands, Department of Property & Procurement, and special counsel John K. Dema, P.C., the parties provide:

WHEREAS, the Government . . . does not presently

have the funding to advance expenses and currently pay the customary charges of the skilled counsel involved; and

WHEREAS, it is acknowledged by the Attorney General that the prosecution of natural resource damage and penalties claims involves many novel and difficult questions of proof and law, all of which further add to the uncertainty of a successful outcome and, therefore, the certainty of compensation under a contingent fee agreement.⁴⁶

⁴⁴ Lasker, *supra* note 5, at 1; *see also* Murray et al., *supra* note 12, at 414 (“After . . . years of environmental regulation under CERCLA, government agencies are looking beyond remediation and paying ‘increased attention to another component of CERCLA liability’—NRDs.”) (quoting Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Damages: Recovery Under State Law Compared With Federal Laws*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,134, 10,134 (1990)).

⁴⁵ *See* Gray, *supra* note 1, at 3 (“One reason for New Jersey’s willingness to bring so many NRD claims [i.e., over three dozen filed since 2000] may be its decision to use private lawyers to pursue these claims on a contingent fee basis, and thereby minimize its cost to litigate these claims.”); Allan Kanner & Tibor Nagy, *The Use of Contingency Fees in Natural Resource Damage and Other Parens Patriae Cases*, 19 *Toxics L. Rep. (BNA)* No. 32, at 745 (2004) (“Recently, many state and tribal governments have hired private attorneys on a contingent fee basis to prosecute natural resource damage (NRD) claims against polluters The enormous costs and risks associated with prosecuting these claims combined with limited budgets for such initiatives has fueled this trend”). Allan Kanner and Associates was special counsel to the State of New Jersey and the Quapaw Nation in their NRD suits. *Id.* at 745 n.3.

⁴⁶ Professional Services Contract Between the Territory of the Virgin Islands, Department of Property & Procurement and the Law Offices of John K. Dema, P.C. at 2 (2004). New Mexico has a similar arrangement with special counsel. *See also* State of New Mexico Professional Services Contract for Natural Resource Damage Claim Litigation (June 1999) (“The Office of Attorney General is the legal counsel and representative of the Office of the Natural Resources Trustee and the Natural Resources Trustee, Dr. William M. Turner . . . , but it is without adequate financial and personnel resources to pursue such litigation without retaining private attorneys who are willing to risk their time, energy and financial assets in pursuit of such litigation against responsible parties.”). Law firms seeking these types of contingency-fee arrangements use these arguments to market their services. *See*,

The contingency-fee special counsel arrangement invigorated the government's ability to bring natural resource damage claims. Critics, however, charge that the contingency-fee arrangement between these governments and their special counsel violates the express language of, legislative intent underlying, and tightly-knit statutory scheme of, CERCLA.⁴⁷ In particular, the arrangement violates the use restriction contained in Section 107(f)(1) of CERCLA, which mandates that "[s]ums recovered by the . . . trustee under this subsection *shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resource.*"⁴⁸ The argument is that the trustee may only deduct certain statutorily-permissible types of costs—not including litigation-related attorney's fees⁴⁹—from a natural resource damage recovery, at which point the remainder becomes a public fund to be safeguarded by the trustee and only used in a manner consistent with CERCLA's use restriction.⁵⁰ Because contingency-fee agreements contemplate diverting a significant percentage of a damage recovery to pay the attorney's fee, the contingency-fee arrangement has been criticized for illegally *depleting* the public's damage recovery in violation of CERCLA's use restriction.⁵¹

Opponents further argue that once the public's recovery is drained by the payment of the contingency fee, the fund is impoverished to the point where the remainder may be insufficient to fund projects that would restore the injured natural resources.⁵² As a result, actual restoration of

e.g., *Above and Beyond Natural Resources Damage*, DISCLOSURE (Richardson Patrick Westbrook & Brickman, LLC), Summer 2006, at 2 ("In these days of budget shortfalls, . . . local governments lack the resources and expertise to pursue these complex and novel [NRD] claims. RPWB is helping to fill that important need.").

⁴⁷ See generally Gray, *supra* note 1; Lasker, *supra* note 5.

⁴⁸ CERCLA §107(f)(1), 42 U.S.C. § 9607(f)(1) (2000) (emphasis added).

⁴⁹ But, as discussed in Parts II.A and B below, this does include a narrow class of assessment-related attorney's fees. The contingency fee is not justified by CERCLA's allowance of assessment-related attorney's fees.

⁵⁰ See generally Lasker, *supra* note 5.

⁵¹ See *id.* at 2.

⁵² *Id.* at 4 ("To the extent that any portion of an NRD recovery is used for payment of private attorneys, the remaining NRD recovery would by definition be insufficient to restore the injured natural resources."). The author recognizes that because CERCLA's natural resource damage measurement includes values above restoration (i.e., interim loss of use and reasonable costs of assessment), see CERCLA §§ 107(a)(4)(C), 107(f)(1), 42 U.S.C. §§ 9607(a)(4)(C), 9607(f)(1) (2000), there may theoretically be recoveries that can account for a contingency fee while still funding restoration activities. However, the underlying point that the damage recovery may be insufficient stands, as does the argument that Congress

the injured natural resource may not be accomplished.⁵³ And, even if certain restoration projects are funded as a result of this special counsel arrangement, the public did not receive the totality of the funding to which it was entitled because the trust fund was depleted by the payment of the attorney's fee.⁵⁴ On policy grounds, opponents charge that such arrangements thwart non-monetary restorative settlements, grant attorneys an impermissible stake in the outcome of the litigation, and create a situation where governments improperly use the remaining damage pool as general treasury funds because the pool is no longer sufficient to fund full restoration of the resource.⁵⁵

Conversely, those seeking to justify the contingency fee argue that the arrangement serves the important public benefit of facilitating the government's ability to bring actions that might otherwise have expired because governments would not have the funds or staff to pursue natural resource damage claims.⁵⁶ Without the assistance of special counsel, natural resource damage claims would not be prosecuted by counsel competent to handle the scientific complexity of a natural resource damage action,⁵⁷ or would expire under the applicable statute of limitations.⁵⁸

Advocates liken the arrangement to the tobacco context,⁵⁹ where the legality of similar arrangements between special contingency-fee counsel and state Attorney Generals' offices were challenged and mostly upheld.⁶⁰ Using traditional public trust law arguments, those in support

intended that the public would receive the full benefit of an undepleted damage recovery.

⁵³ Lasker, *supra* note 5, at 4.

⁵⁴ *See id.*

⁵⁵ *See, e.g.*, Motion to Intervene in Motion by Dean C. Plaskett, Trustee for Natural Resources of the Territory of the Virgin Islands, to Disburse Natural Resource Damage Settlement Monies to Acquire Property, Comm'r of the Dep't of Planning & Natural Res., Dean C. Plaskett v. Esso Standard Oil, S.A., No. 1:98-cv-00206 (D.V.I. July 30, 2004); Gray, *supra* note 1, at 6-8.

⁵⁶ *See, e.g.*, Kanner & Nagy, *supra* note 45 (citing "the enormous costs and risks associated with prosecuting these claims combined with limited budgets for such initiatives" as justification for contingency fees).

⁵⁷ *See id.*

⁵⁸ *See* Transcript of Hearing, N.J. Soc'y for Envtl. & Econ. Dev. v. Campbell (*NJ SEED*), No. 343-04 (N.J. Super. Ct. June 18, 2004) (Sabatino, J.), *reprinted in* William H. Hyatt, Jr. et al., *Natural Resource Damages: New Developments at the State Level*, in HAZARDOUS SUBSTANCES, SITE REMEDIATION, AND ENFORCEMENT 281, 365 ex.E (ALI-ABA, 2005). ("[T]here could indeed be as many as 4,000 sites throughout the state [of New Jersey] that are affected by a looming statute of limitations . . .").

⁵⁹ *Id.*

⁶⁰ *See, e.g.*, Philip Morris, Inc. v. Glendening, 709 A.2d 1230 (Md. 1998); San Francisco v.

of the arrangement argue that a trustee can withdraw the reasonable costs incurred to create or protect the trust corpus.⁶¹ They further argue that the contingency fee constitutes a cost-effective method of pursuing such actions and is monetarily more appropriate than hourly billing methods.⁶²

To date, this has barely been discussed beyond a select group of specialty practitioners, and efforts to raise the issue have been sparse, at best.⁶³ Presently, numerous states, territories and tribes of record have retained special counsel on a contingency-fee basis to handle public natural resource damage litigation.⁶⁴

Because millions of public trust fund dollars earmarked for resource restoration are at stake, the issue of whether a contingency fee

Philip Morris, Inc., 957 F. Supp. 1130, 1134 (N.D. Cal. 1997) (upholding validity of contingency-fee contract in tobacco litigation).

⁶¹ Kanner & Nagy, *supra* note 45, at 746-47.

⁶² *Id.* at 748-49.

⁶³ *See generally* Defendant United States' Motion to Strike Demand For Attorney's Fees at 11, *New Mexico v. Gen. Elec. Co.*, No. 99-1118 (D.N.M. June 5, 2004) (arguing that contingency-fee representation is impermissible for natural resource damage actions under the plain language of CERCLA's use restriction and the "American Rule" prohibiting recovery of attorney's fees absent an express legislative provision permitting recovery of such fees); Brief of the United States as *Amicus Curiae* Regarding Federal Preemption of Territorial Law Regarding Use of Natural Resource Damage Recovery, Comm'r of the Dep't of Planning & Natural Res., *Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206206 (D.V.I. Feb. 14, 2005) (arguing that CERCLA's use restriction constitutes the only permissible uses of natural resource damage recoveries by a trustee and the use restriction preempts conflicting state, territorial or common laws). Neither court decided the merit of these issues. In *Esso Standard Oil*, the trustee withdrew his application to divert natural resource trust funds after the United States intervened and filed its *amicus* brief objecting to the trustee's action, thus, mooting the issue. Notice of Withdrawal of Plaintiff's Motion to Provide Information to Court Regarding the Proposed Disbursement of Settlement Monies, and Withdrawal of Plaintiff's Appeal of the October 8, 2004, Order Granting Motion of Britain H. Bryant to Intervene by Plaintiff, No. 1:98-cv-00206 (D.V.I. Mar. 1, 2005). In *New Mexico v. General Electric Co.*, the court never decided the contingency fee issue because it initially reserved judgment on the matter and the federal defendants were subsequently dismissed from the action. Order Regarding Matters Heard July 27, 2000 at ¶4, *New Mexico v. Gen. Elec. Co.*, Civ. No. 99-1118 (D.N.M. July 27, 2000). *See also* Hyatt Jr. et al., *supra* note 58, at 292-93.

⁶⁴ Gray, *supra* note 1, at 3 (naming special counsel in the United States Virgin Islands, New Jersey and New Mexico); Kanner & Nagy, *supra* note 45, at 745 (demonstrating that, for example, New Hampshire, New Jersey, New Mexico, the United States Virgin Islands and the Sovereign Nations of the Quapaw and the Coeur d'Alene have retained special counsel on contingency to handle natural resource damage actions); *see also* *Esso Standard Oil, S.A.*, No. 1:98-cv-00206 (D.V.I. 1998) (retention of special counsel on contingency to assist the government of the Virgin Islands).

may lawfully be drawn from a natural resource damage recovery compels judicial review.

II. THE ILLEGALITY OF CONTINGENCY-FEE REPRESENTATION WHEN PROSECUTING PUBLIC NATURAL RESOURCE DAMAGE ACTIONS

A.

CERCLA's Express Statutory and Regulatory Language

The first step in evaluating the legality of contingency-fee representation in the context of natural resource damage claims prosecution is to determine whether there is anything in the text of CERCLA or its implementing regulations that directly addresses the government's ability to recover attorney's fees. "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."⁶⁵ Thus, where there is unambiguous statutory language, it must be presumed that "the legislative purpose is expressed by the ordinary meaning of the words used."⁶⁶

As discussed below, three types of CERCLA provisions are germane to the issue of attorney's fee recovery. First, in four other provisions of CERCLA, Congress expressly provided for litigation-related attorney's fee recovery, but did not do so in the provisions relating to natural resource damage actions. Second, CERCLA's natural resource damage provisions contain the use restriction governing the "only"⁶⁷ permissible uses by the trustee of the damage recovery. Third, CERCLA provides for recovery of certain other types of costs associated with natural resource damage actions, including the "reasonable costs of assess[ment]," but does not provide for litigation-related attorney's fee recovery.⁶⁸ Each of these CERCLA components is addressed below.

1. CERCLA Provisions Permitting Attorney's Fee Recovery

Congress provided for litigation-related attorney's fee recovery in four provisions of CERCLA. First, in CERCLA's citizen suit provision, a substantially prevailing party in a civil action who demonstrated that

⁶⁵ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)).

⁶⁶ *Richards v. United States*, 369 U.S. 1, 11 (1962).

⁶⁷ CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2000) ("Sums recovered by a State as trustee under this subsection shall be available for use *only* to restore, replace, or acquire the equivalent of such natural resources by the State.") (emphasis added).

⁶⁸ *Id.* § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

there was a violation of, or that the President or another officer failed to perform a non-discretionary duty under, CERCLA, may be awarded court-discretionary “costs of litigation (including reasonable attorney and expert witness fees).”⁶⁹ Second, under CERCLA’s abatement action section, a party who was erroneously ordered to pay response costs may, in a court’s discretion, be awarded “appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.”⁷⁰ Section 2412(d)(2)(a) of title 28 specifically includes “reasonable attorney fees” in the definition of “fees and other expenses.”⁷¹ Third, under CERCLA’s employee whistleblower protection provision, an applicant who has demonstrated in an administrative hearing that he has been subjected to discriminatory workplace treatment because he disclosed a statutory violation that resulted in an order to abate may request “a sum equal to the aggregate amount of all costs and expenses (including the attorney’s fees) determined by the Secretary of Labor to have been reasonably incurred.”⁷²

Finally, in a government response cost enforcement actions, PRPs are liable to the government for response costs,⁷³ and Congress altered the term “response” with SARA to “include enforcement activities related thereto.”⁷⁴ While this provision does not reference attorney’s fees as clearly as the other three above-referenced provisions, courts concur that the government may seek litigation-related attorney’s fees and costs associated with a response cost enforcement action because of the statutory language permitting recovery for “enforcement activities.”⁷⁵

Conversely, Congress drafted no such parallel provision for litigation-related attorney’s fees in CERCLA’s natural resource damage provisions. Liability is for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury,

⁶⁹ *Id.* § 310(f), 42 U.S.C. § 9659(f); *see also* briefs cited *supra* note 63.

⁷⁰ *Id.* § 106(b)(2)(E), 42 U.S.C. § 9606(b)(2)(E).

⁷¹ 28 U.S.C. § 2412(d)(2)(A) (2000).

⁷² CERCLA § 110(c), 42 U.S.C. § 9610(c) (2000).

⁷³ *Id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).

⁷⁴ SARA, Pub. L. No. 99-499, § 101(e), 100 Stat. 1613, 1615 (1986) (codified at 42 U.S.C. § 9601(25) (2000)).

⁷⁵ *See, e.g.*, *United States v. Dico, Inc.*, 266 F.3d 864, 878 (8th Cir. 2001) (holding government entitled to recovery attorney’s fees in response cost action because “the language of the statute provides that attorney fees are recoverable as response costs under CERCLA.”); *United States v. Domenic Lombardi Realty, Inc.*, 334 F. Supp. 2d 105, 106 (D.R.I. 2004) (“[C]ourts have held that, as part of its recovery of response costs, the government may seek reimbursement for attorney’s fees because they are ‘costs of removal’ under 42 U.S.C. § 9607(a)(4)(A). . . . [T]he terms response, removal, and remedial action ‘include enforcement activities related thereto’”).

destruction, or loss resulting from such a release.”⁷⁶ While the natural resource damage assessment regulations include “[a]dministrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources” planned or undertaken,⁷⁷ there is no similar provision for litigation-related attorney’s fees.

The fact that Congress provided for litigation-related attorney’s fee recovery in four other CERCLA provisions, but did not similarly provide for attorney’s fee recovery for natural resource damages, reflects that Congress excluded litigation-related attorney’s fee recovery.⁷⁸

Because CERCLA does not expressly provide for attorney’s fees for natural resource damage actions, under what has come to be known as the “American Rule,”⁷⁹ attorney’s fees are not recoverable. As discussed in *Alyeska Pipeline Services v. Wilderness Society*, absent explicit statutory authorization, under the American Rule, a prevailing party in litigation is not entitled to recover attorney’s fees as costs or otherwise.⁸⁰ In *Alyeska*, the Supreme Court addressed whether environmental groups which sued to bar construction of the trans-Alaska pipeline were entitled to an award of attorney’s fees. Based on the American Rule, the Supreme Court

⁷⁶ CERCLA § 107(a)(4), 42 U.S.C. §9607(a)(4)(c).

⁷⁷ Natural Resource Damage Assessments, 43 C.F.R. § 11.15 (2006).

⁷⁸ Congress well knows how to make explicit whether federal courts have authority to award attorney’s fees, as ERISA’s fee-shifting provision demonstrates. . . . Indeed, it is the domain of Congress to determine the circumstances under which attorney’s fees are to be awarded When Congress has provided the remedies for a cause of action and the act does not explicitly provide for attorney’s fees, courts are not to imply them.

First Trust Corp. v. Bryant, 410 F.3d 842, 856 n.11 (6th Cir. 2005) (citations omitted). *See, e.g., Aetna Cas. & Sur. Co. v. Liebowitz*, 730 F.2d 905, 908 (N.Y. 1984) (rejecting attorney’s fee award for a non-final civil RICO claim, reasoning “when [Congress] desired to permit attorney’s fees to be awarded to a plaintiff . . . , it knew how to say so”). Even if the explanation for the absence of a fee-shifting provision for litigation-related attorney’s fees is attributed to congressional oversight, a court should not attempt to resolve this statutory deficiency by reading a right to such attorney’s fees into CERCLA as presently structured. As shown herein, CERCLA’s natural resource damage scheme is so tightly knit that the withdrawal of a fee would impermissibly drain the resulting pool of funds.

⁷⁹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245 (1975) (superseded by statute, Civil Rights Attorney’s Fees Award Act of 1976, Pub. L. No. 94-599, 20 Stat. 2641, *as recognized in Perez v. Rodriguez Bou*, 575 F.2d 21, 24 (1978)); *First Trust*, 410 F.3d at 856 n.11 (“[T]he Supreme Court has made clear that in the United States the prevailing litigant is ordinarily not entitled to collect attorney’s fees under our so-called ‘American Rule.’”).

⁸⁰ *Alyeska*, 421 U.S. at 245; *see also Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

rejected the argument that litigants who seek to enforce important public policy legislation as “private attorney[s] general”⁸¹ are entitled to recover attorney’s fees:

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. . . . But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys’ fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.⁸²

Congress provided for litigation-related attorney’s fees in other provisions of CERCLA, but did not similarly provide for such fees when prosecuting a natural resource damage action. Under the “American Rule,”

⁸¹ Although *Alyeska* involved a different “private attorney general” situation (*i.e.*, a private environmental group voluntarily undertook legal action) than the situation that is the focus of this article (*i.e.*, contingency-fee attorneys entering into official Professional Service agreements with the Attorney General’s office prior to initiating legal action), the Court’s analysis addressing when attorney’s fees have statutorily been shifted applies with equal force to the situation at hand.

⁸² *Alyeska*, 421 U.S. at 263. The Court also stated that “[u]nder this scheme of things, it is apparent that the circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.” *Id.* at 262. In *Key Tronic Corp.*, the Supreme Court also held that private parties were not entitled to most types of attorney’s fees when bringing a CERCLA cost recovery action because, under the American Rule,

attorney’s fees generally are not a recoverable cost of litigation ‘absent explicit congressional authorization.’ Recognition of the availability of attorney’s fees therefore requires a determination that ‘Congress intended to set aside this longstanding American [R]ule of law.’ Neither CERCLA § 107, the liabilities and defenses provision, nor § 113, which authorizes contribution claims, expressly mentions the recovery of attorney’s fees.

511 U.S. at 814-15 (citations omitted). An important factor underpinning the Supreme Court’s opinion in *Key Tronic* is that, when Congress amended CERCLA through SARA in 1986, Congress added a provision that included an award of attorney fees in other sections of CERCLA, but did not do so in the context of the private party cost recovery action at issue in that case. The Court found that “[t]hese omissions strongly suggest a deliberate decision not to authorize such awards.” *Id.* at 818-19.

because Congress did not statutorily provide for attorney's fee recovery, such fees are not recoverable.

2. CERCLA's Use Restriction

CERCLA contains the following use restriction: “[s]ums recovered by the . . . trustee under this subsection *shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources.*”⁸³ A straightforward interpretation of CERCLA's use restriction is that a trustee may only apply a natural resource recovery for one of the three purposes in CERCLA's use restriction: restoration, replacement, and acquisition of an equivalent resource.⁸⁴ A logical corollary to that straightforward interpretation, then, is that use of a natural resource recovery to pay an attorney's fee, which is not one of the three permissible uses, is a violation of CERCLA's use restriction.

3. Reasonable Costs of Assessment

CERCLA and its implementing regulations permit the government to recover other types of costs associated with natural resource damage actions. Section 107(a)(4)(C) makes a PRP liable for “damages for injury to, destruction of, or loss of natural resources, *including the reasonable costs of assessing* such injury, destruction, or loss resulting from such a release.”⁸⁵

The Department of the Interior (“DOI”) is the designated administrative agency charged with promulgating “regulations for assess[ment] of natural resource damages resulting from a . . . release of a hazardous substance under [CERCLA].”⁸⁶ The DOI regulations governing the assessment of natural resource damages⁸⁷ define “assessment” or “natural resource damage assessment” as “the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to

⁸³ CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2000) (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Id.* § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) (emphasis added).

⁸⁶ Natural Resource Damage Assessments, 59 Fed. Reg. 52749 (Oct. 19, 1994).

⁸⁷ 43 C.F.R. pt. 11 governs the assessment of damages to natural resources under CERCLA. It supplements 40 C.F.R. pt. 300 (the regulations governing the National Oil and Hazardous Substances Pollution Contingency Plan, or “NCP”), and it provides “standardized and cost-effective procedures for assessing natural resource damages,” which, if followed by the trustee, are “accorded the evidentiary status of a rebuttable presumption” of validity. 43 C.F.R. § 11.11 (2006).

determine damages for injuries to natural resources”⁸⁸ “Reasonable cost,” moreover, “means the amount that may be recovered for the cost of performing a damage assessment.”⁸⁹ “Damages means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.”⁹⁰ Finally, in section 11.15, entitled “What [D]amages [M]ay a [T]rustee [R]ecover,” DOI specified particular categories of recoverable costs when a trustee pursues natural resource damage actions.⁹¹ These categories include the reasonable “[a]dministrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken.”⁹²

⁸⁸ 43 C.F.R. § 11.14(aa).

⁸⁹ *Id.* § 11.14(ee).

⁹⁰ *Id.* § 11.14(l). Nowhere in the separate definitions of “injury,” “destruction,” or “loss,” are attorney’s fees contemplated. *See generally id.* § 11.14(v),(m),(x) (defining “injury,” “destruction” and “loss,” respectively).

⁹¹ In an action filed pursuant to section 107(f) . . . of CERCLA, . . . a natural resource trustee who has performed an assessment in accordance with this rule may recover:

- (1) Damages as determined in accordance with this part and calculated based on injuries occurring from the onset of the release through the recovery period, less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;
- (2) The costs of emergency restoration efforts under Sec. 11.21 . . . ;
- (3) The reasonable and necessary costs of the assessment, to include:
 - i. The cost of performing the preassessment and Assessment Plan phases and the methodologies provided in subpart D or E of this part; and
 - ii. Administrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken; and
- (4) Interest on the amounts recoverable as set forth in section 107(a) of CERCLA.

Id. § 11.15(a).

⁹² *Id.*

In response to comments “question[ing] whether attorney’s fees were recoverable assessment costs,” DOI confirmed that a narrow set of assessment-related attorney’s fees are a component of the damage measurement:

The [DOI] believes that trustee officials will generally need the assistance of an interdisciplinary team of experts when performing natural resource damage assessments. The regulations do not restrict recoverable assessment costs to the expenses of particular types of professionals. The [DOI’s] regulations provide that recoverable assessment costs are ‘limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site-specific efforts taken in the assessment of damages.’ 43 C.F.R. 11.60(d)(2). Therefore, if attorneys are involved in work specifically allocable to an assessment, the resulting attorneys’ fees are recoverable as assessment costs under the regulations.⁹³

Such attorney’s fees, however, are limited to those related to site-specific efforts undertaken to assess natural resource damages, i.e., assessment-related attorney’s fees. Remarks made by Representative Jones of North Carolina during the SARA House debate reference this:

[T]he amendment to Section 107(f) clarifies that sums recovered by trustees are to be used only to restore the natural resources. . . . The amendment reflects the restitutionary nature of the natural resource regime of CERCLA. The natural resource regime is not intended to compensate public treasuries. Nor are recovered damages to be diverted for general purposes. The purpose of the regime, rather, is to make whole the natural resources that suffer injury from releases of hazardous substances. *Of course, the trustees may use such sums to reimburse them for the costs associated with recovering such damages, including the costs of damage assessments.*⁹⁴

⁹³ Natural Resource Damage Assessments, 59 Fed. Reg. 52749, 52754 (Oct. 19, 1994).

⁹⁴ 132 CONG. REC. 29766 (1986) (statement of Rep. Jones) (emphasis added).

Proponents of contingency-fee arrangements cite this language as evidence that Congress intended to permit litigation-related attorney's fee recovery when bringing a natural resource damage action.⁹⁵ Given the context in which Representative Jones's remarks were made, however, his statement is most logically understood as referring to assessment-related attorney's fees and other reasonable costs associated with the natural resource *assessment* process, not a statement that litigation-related attorney's fees are recoverable. To read the last sentence of Representative Jones' remark as somehow sanctioning the recovery of litigation-related attorney's fees would undermine the full tenor of his preceding statements (i) emphasizing the use restriction, and (ii) reinforcing the fact that a natural resource damage recovery must not be used for general purposes or to compensate the public treasury.⁹⁶ Indeed, as shown in Part II.B below, if a damage recovery that did not include litigation-related attorney's fees in its measurement is depleted to pay a contingency fee, then the resulting pool will likely be insufficient to accomplish restoration.⁹⁷

None of these provisions permit litigation-related attorney's fees as a component of the measure of recoverable natural resource damages. Thus, in the entire text of CERCLA and its implementing regulations, provision is made for certain categories of recoverable costs, including a narrow set of assessment-related attorney's fees, but not for litigation-related attorney's fees.

B. *CERCLA's Underlying Legislative Purpose*

As explained above, a strong argument can be advanced that CERCLA's statutory language unambiguously reflects that attorney's fees are not recoverable when bringing a natural resource damage action. Because the statutory language is clear, there is no need to analyze the legislative history of CERCLA's natural resource damage provisions.⁹⁸

⁹⁵ See Kanner & Nagy, *supra* note 45, at 748.

⁹⁶ See 132 CONG. REC. 29766 (1986) (statement of Rep. Jones).

⁹⁷ See *supra* note 52.

⁹⁸ "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into a statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)). See also *Consumer Prod. Safety Comm'r v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

Even assuming *arguendo* that the express language of CERCLA is ambiguous regarding the recoverability of litigation-related attorney's fees, however, CERCLA's legislative history reflects that Congress did not intend to deplete a natural resource damage recovery to pay such fees. As explained below, CERCLA's natural resource damage provisions, most particularly the use restriction, are part of a tightly-woven, conscious congressional design to further actual restoration of the injured natural resource; withdrawal of a contingency fee from the damage recovery conflicts with the congressional intent that the damage award suffice to accomplish, and in fact apply toward, restoration, replacement or acquisition of an equivalent natural resource.⁹⁹

Congress's primary purpose in enacting CERCLA's natural resource damage provisions was to restore the injured resource (the "Restorative Purpose").¹⁰⁰ When analyzing whether Congress intended to permit contingency-fee representation when bringing a public natural resource damage action, it is critical to understand that Congress intended that the natural resource damage provisions work to further this Restorative Purpose.¹⁰¹

This Restorative Purpose was codified into CERCLA's use restriction.¹⁰² A comparison of the use restriction as originally enacted in

⁹⁹ [I]t is dictated by the plain terms of CERCLA, and the House Committee on Merchant Marine and Fisheries report indicates that it was part of a *conscious design*. That report states that the excess over restoration costs must be used to acquire the equivalent of the damaged resource—even though the original resource will eventually be restored.

Ohio v. Dep't of the Interior, 880 F.2d 432, 454 n. 34 (D.C. Cir. 1989) (citation omitted) (emphasis added).

¹⁰⁰ In *New Mexico v. General Electric Co.*, the Tenth Circuit stated that the Restorative Purpose was the "obvious objective" of Congress in enacting CERCLA's use restriction. 467 F.3d 1223, 1245-47 (10th Cir. 2006). The D.C. Circuit has made a similar observation:

[CERCLA's use restriction] obviously reflects Congress' apparent concern that its [R]estorative [P]urpose for imposing damages not be construed as making restoration cost a damages ceiling. But the explicit command that damages 'shall not be limited by' restoration costs also carries in it an implicit assumption that restoration cost will serve as the basic measure of damages in many if not most CERCLA cases.

Ohio v. Dep't of the Interior, 880 F.2d at 445-46. The Congressional Record supports both circuits. See 126 CONG. REC. 30970 (1980) (statement of Sen. Williams) ("The legislation will provide for the restoration of natural resources which have been damaged . . .").

¹⁰¹ Senator Gravell remarked that "[t]he most important aspect to this bill from a national viewpoint is the provision of funds for the restoration, rehabilitation and replacement of natural resources." 126 CONG. REC. 16, 21377 (1980).

¹⁰² See, e.g., H.R. REP. NO. 99-253, pt. 4, at 50 (1985) ("It is clear from [the] language [of

1980¹⁰³ and the revised use restriction as amended by SARA¹⁰⁴ is informative. In the revised version, Congress retained the use restriction and added a provision clarifying that if any damages are recovered that are in excess of the amount required to fully restore the natural resource, the additional recovery must be applied to acquire an equivalent resource.¹⁰⁵

Senator Bob Smith emphasized the importance of CERCLA's Restorative Purpose during a 1995 push for CERCLA reform:

§ 107(f)(1)] that the primary purpose of the resource damage provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances.”).

¹⁰³ The original 1980 language was:

Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.

CERCLA § 107(f), 42 U.S.C. § 9607(f) (1976 & Supp. IV 1980).

¹⁰⁴ The language as amended by SARA provides as follows:

Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources.

CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (2000).

¹⁰⁵ It is clear from [the] language [of § 107(f)(1)] that the *primary purpose* of the resource damage provisions of CERCLA is the *restoration or replacement of natural resources* damaged by unlawful releases of hazardous substances. . . . [T]he final clause [dealing with use of damages to acquire a suitable equivalent resource] is necessary because a situation could arise in which the amount of damages caused by a release of hazardous substances *is in excess of the amount that could realistically or productively be used to restore or replace those resources. That is, the total amount of damages may include the costs of restoration and the value of all the lost uses of the damaged resources . . . from the time of the release up to the time of restoration. Since the damages contemplated by CERCLA include both, the total amount of damages recoverable would exceed the restoration costs alone.*

The Committee therefore intends [that] *any excess funds recovered shall be used, in such an instance, for the third purpose spelled out in the language of the amendment, which is to 'acquire the equivalent of the damaged resource.'*

H.R. REP. No. 99-253, pt. 4 at 50 (1985) (emphasis added).

Restoring Natural Resources—The sole purpose of [NRD]s is to provide for the rapid restoration and replacement of significant natural resources that have been damaged by contact with hazardous materials. Financial compensation from persons who caused these damages should be used solely for the purpose of restoring or replacing these resources, and should not serve as a means of seeking retribution or punitive damages from potentially responsible parties.¹⁰⁶

Moreover, Congress contemplated that the damage recovery would

in fact be sufficient to restore, replace, or acquire the equivalent of the injured resource.¹⁰⁷ An interpretive case is *Ohio v. Department of the Interior*,¹⁰⁸ in which the D.C. Circuit held that CERCLA's implementing regulations as initially drafted were contrary to CERCLA's requirement that damages be *at least sufficient* to fund the cost of restoration, replacement, or acquisition of the equivalent of the damaged resource:

By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at all. It would be odd indeed for a Congress so insistent that all damages be spent on restoration to allow a 'lesser' measure of damages than the cost of restoration in the majority of cases. Only two possible inferences about congressional intent could explain the anomaly: [e]ither Congress intended trustees to commence restoration projects only to abandon them for lack of funds, or Congress expected taxpayers to pick up the rest of the tab. The first theory is contrary to Congress' intent to effect a "make-whole" remedy of complete restoration, and the second is contrary to a basic purpose of

¹⁰⁶ 141 CONG. REC. 18724 (daily ed. July 13, 1995) (document submitted by Sen. Bob Smith).

¹⁰⁷ Representative Jones remarked that "[t]he purpose of the regime . . . is to make whole the natural resources that suffer injury from releases of hazardous substances." 132 CONG. REC. 29767 (1986). Senator Mitchell stated that "we do not want damage to natural resources to await the workings of that [common-law tort litigation] process; we want prompt, full compensation in such cases so we can replant trees in the park . . ." 126 CONG. REC. 30942 (1980).

¹⁰⁸ 880 F.2d 432 (D.C. Cir. 1989). In *Ohio v. Department of the Interior*, the court was called upon to address the congressional purpose and legislative history of CERCLA's natural resource damage regime when reviewing regulations initially promulgated by DOI that limited natural resource damages "to 'the lesser of (a) the cost of restoring or replacing the equivalent of an injured resource, or (b) the lost use value of the resource . . ." *Id.* at 438.

the CERCLA natural resource damage provisions—that polluters bear the costs of their polluting activities. It is far more logical to presume that Congress intended responsible parties to be liable for damages in an amount sufficient to accomplish its restorative aims.¹⁰⁹

Congress’s scheme incorporates other provisions to ensure the

Restorative Purpose is accomplished. Congress limited standing to sue for natural resources damages to a designated public trustee.¹¹⁰ As discussed in Part II.C below, the trustee is duty bound, as guardian of the public trust, to safeguard the entrusted funds and apply them in a manner that comports with CERCLA’s use restriction. Moreover, CERCLA’s settlement scheme ensures that the Restorative Purpose underlying CERCLA is accomplished. Section 122(j)(2) limits the government’s ability to provide a settling party with a covenant not to sue for future natural resource damage liability unless a PRP “agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.”¹¹¹ Additionally, Congress ensured that there would be no “double recovery” for natural resource damages.¹¹² Thus, when state trustees bring natural resource damage suits and improperly deplete the damage recovery to pay a contingency fee, other trustees are barred from suing for the same injury to make up the amount that was depleted and the “make whole” remedy is destroyed.¹¹³

¹⁰⁹ *Id.* at 444-45. The court in *Puerto Rico v. SS Zoe Colocotroni* also recognized that CERCLA prefers actual restoration or replacement of injured resources over an award of monetary damages:

[W]e think the appropriate primary standard for determining damages in a case such as this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures.

628 F.2d 652, 675 (1st Cir. 1980).

¹¹⁰ See CERCLA § 107(f)(1)-(2)(B), 42 U.S.C. §9607(f)(1)-(2)(B) (2000).

¹¹¹ *Id.* § 122(j)(2), 42 U.S.C. § 9622(j)(2).

¹¹² *Id.* (“There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource.”).

¹¹³ See *id.*; John Carlucci, *supra* note 20, at 475 (“CERCLA’s bar on double recovery for natural resource damages, including assessment costs, offers a strong incentive for trustees to cooperate with each other on assessments.”).

In 1986, Congress added language to section 107(f)(1) of CERCLA prohibiting double recovery for NRDs. This provision limits a trustee from

As articulated above, Congress intended that the measure of damages would be sufficient to accomplish full restoration of the injured natural resource. Congress did not make litigation-related attorney's fees part of the measure of a PRP's damage liability, and Congress created a sophisticated recovery scheme designed to ensure that the full recovery would apply in a manner that is consistent with CERCLA's use restriction. A monetary damage award that is diminished by a substantial percentage to pay a contingency fee where the PRP did not pay the litigation-related attorney's fees as part of the measure of damages improperly diverts funds from the intended goal: actual restoration of the injured resource.

C. *Debunking the Tobacco Analogy: Public Natural Resource Damage Actions Are Different From Traditional Torts*

Although efforts to challenge the legality of contingency-fee based arrangements in the context of the "Big Tobacco" lawsuits rarely met with success,¹¹⁴ there are far more compelling reasons to find that contingency-fee arrangements are illegal when bringing a public natural resource damage action. Advocates of the contingency-fee arrangement, however, rely heavily on the tobacco line of cases,¹¹⁵ where courts addressed the

seeking CERCLA NRDs for an injury to a natural resource within its trust when another trustee has already won or settled a CERCLA NRD claim based upon that same injury.

Patrick H. Zaepfel, *The Reauthorization of CERCLA NRDs: A Proposal For a Reformulated and Rational Federal Program*, 8 VILL. ENVTL. L.J. 359, 418 (1997); While states have primary trusteeship over their jurisdictional natural resources, there is concurrent [f]ederal trusteeship over natural resources aris[ing] out of [f]ederal responsibilities to manage and protect living and non-living natural resources includ[ing] the National Oceanic and Atmospheric Administration (NOAA) (for marine resources), the U.S. Department of the Interior (DOI) (for inland fish and wildlife and natural resources on public lands), and the Environmental Protection Agency (EPA) (for ground water).

Quarles v. United States ex re. Bureau of Indian Affairs, 2005 WL 278211 at *5 (N.D. Okla. 2005).

¹¹⁴ See, e.g., *Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) (upholding validity of contingency-fee contract in tobacco litigation); *San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997).

¹¹⁵ See, e.g., *Kanner & Nagy*, *supra* note 45, at 750 (analogizing contingency-fee representation to the "overwhelming weight of authority" upholding such arrangements in the tobacco context). See generally Plaintiff State of New Mexico's Response to Defendant United States' Motion to Strike Demand for Attorney Fees at 2, *New Mexico v. Gen. Elec. Co.*, Civ. No. 99-1118 (D.N.M. June 5, 2004) (justifying legality of contingency-fee agreement as necessary "[t]o effectively and efficiently litigate this type of large, complex, toxic tort

legality of contingency-fee representation by private counsel to assist state Attorneys General seeking to recoup public money expended to identify and treat tobacco-related illnesses.¹¹⁶

First, it is inappropriate to automatically address natural resource damage actions like traditional torts because CERCLA's natural resource damage provisions were enacted to counter congressional *dissatisfaction* with the litigious and monetary-damage oriented tort system.¹¹⁷ As

cause of action"). Some of the same attorneys who previously represented states in the tobacco litigation context have surfaced as special counsel in the natural resource damage arena using a modified Professional Service Contract modeled after the prototype upheld in the tobacco litigation:

[I]t appears the contract at Exhibit 1 [*i.e.*, the Professional Service Contract] was modeled after the contract entered into by the State with at least one of the five firms here (the Turner Branch Law Firm) in connection with the State's litigation against the tobacco industry.

Defendant United States' Memorandum in Support of Motion to Strike Demand for Attorneys' Fees at 9, Civ. No. 99-1118 (D.N.M. 2004) (citations omitted).

¹¹⁶ In the late 1990s, numerous states entered into contingency-fee based contractual arrangements with private attorneys to recoup the states' costs associated with tobacco-related health issues. *See, e.g., Philip Morris, Inc. v. Glendening*, 709 A.2d 1230. Similar to the natural resource damage arrangement, in the tobacco context "the attorneys general sought private counsel to represent the [s]tates . . . because the public law offices lacked the resources necessary to mount what was believed would be a long and expensive legal battle with the tobacco companies." Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow From Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 58 (2003). *See also, e.g., Glendening*, 709 A.2d at 1231 ("[O]ne of the stated purposes for retaining outside counsel was to minimize the state's commitment of personnel and financial resources to the lawsuit."). *But see* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 39 (2000) (contending that "contingent fee lawyers should not be used to pursue government litigation, even if the tobacco litigation is viewed in hindsight as a successful use of such arrangements.").

¹¹⁷ 126 CONG. REC. 30942 (1980) (statement of Sen. Mitchell) ("we do not want damage to natural resources to await the workings of that [common-law tort litigation] process; we want prompt, full compensation in such cases . . ."). *See also* S. REP. NO. 96-848 at 13-14 ("[T]raditional tort law presents substantial barriers to recovery . . . [C]ompensation ultimately provided to injured parties is generally inadequate"); 126 CONG. REC. 26347 (1980) ("Existing environmental, common, compensatory, and liability laws are not adequate . . . [They] provide little or no relief for cleanup and compensation.") (statement of Rep. Weiss); H.R. REP. NO. 172, pt.1, at 17 (1979) ("[C]ommon law remedies . . . [are] inadequate to compensate victims . . . in a fair and expeditious manner").

[O]ur examination of CERCLA's legislative history indicates . . . Congress' dissatisfaction with the common law provided a central motivation for enacting CERCLA.

. . . .

[S]upport for the proposition that Congress adopted common-law damage standards wholesale into CERCLA is slim to nonexistent. . . . The

explained by one commentator: “[D]espite the continuing validity of state recovery actions, Superfund was enacted to provide a unifying standard for natural resource damage recovery in the midst of diverging state approaches and as a response to congressional dissatisfaction with state common law remedies.”¹¹⁸ CERCLA’s natural resource damage regime should be contextually understood as a response to the inadequacies of traditional tort and not in rote fashion be lumped in with such torts.¹¹⁹

Moreover, unlike traditional tort, CERCLA’s natural resource damage provisions are part of a complex statutory framework.¹²⁰ As discussed in Parts II.A and B above, Congress created an elaborate statutory system governing natural resource damage recovery designed to ensure that the recovery is sufficient to cover and in fact applies toward the Restorative Purpose. This system governs the measure of natural resource damage recovery and, through a complex interplay involving the totality of CERCLA’s natural resource damage provisions, governs the use of such damage recovery to ensure the Restorative Purpose is achieved. With regard to the measure of damages, Congress specified what damages and costs may be recovered from a PRP, and, because a PRP’s natural resource damage liability does not include litigation-related attorney’s fees,¹²¹ it is improper to deduct such fees from a natural resource damage award. Even where there is excess recovery above the cost of restoration or replacement, Congress intended that the excess be spent to acquire an equivalent

legislative history illustrates, however, that a motivating force behind the CERCLA natural resource damage provisions was Congress’ dissatisfaction with the common law. Indeed, one wonders why Congress would have passed a new damage provision at all if it were content with the common law.

Ohio v. Dep’t of the Interior, 880 F.2d at 446, 455.

¹¹⁸ Michael W. Jones, *Natural Resource Damage Assessments for Oil Spills: Policy Considerations Underlying the Evolution of the Department of the Interior’s Regulations*, 1 VILL. ENVTL. L.J. 491, 497 (1990).

¹¹⁹ Even though natural resource damage actions are sometimes referred to as environmental torts, the general understanding is that the remedy goes beyond traditional torts. See, e.g., William D. Brighton, *Natural Resource Damages Under CERCLA*, in COURSE OF STUDY: HAZARDOUS SUBSTANCES, SITE REMEDIATION AND ENFORCEMENT 331, 333 (ALI-ABA 2006) (“Although a number of commentators and a few district courts have used this label in describing NRD claims, it is a misnomer. In creating the natural resource damages cause of action, Congress clearly intended to go beyond common law remedies.”).

¹²⁰ See Parts II.A and B above.

¹²¹ See *supra* Part II.A.

resource.¹²² Congress created CERCLA's use restriction to ensure that damage recoveries are applied toward the Restorative Purpose.¹²³

Yet, in one of the only cases addressing the legality of a contingency-fee arrangement when prosecuting a natural resource damage action, the court never addressed the impact of CERCLA's use restriction, complex recovery scheme, or the preemptive effect of CERCLA on state law when it upheld the legality of the contingency agreement based, in large measure, on an analogy to the tobacco line of cases.¹²⁴

Courts have invalidated contingency-fee agreements where the arrangement would violate a statutory provision such as that contained in CERCLA's use restriction. For example, in *Meredith v. Ieyoub*, the Supreme Court of Louisiana invalidated a contingency-fee contract in the context of an environmental enforcement action where the contingency fee would violate a similar statutory provision:

¹²² CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1); *see also supra* notes 105-06.

¹²³ CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1); *see also supra* note 102.

¹²⁴ Transcript of Hearing, N.J. Soc'y for Envtl. & Econ. Dev. v. Campbell (*NJ SEED*), No. 343-04 (N.J. Super. Ct. June 18, 2004) (Sabatino, J.), *reprinted in* Hyatt, Jr. et al., *supra* note 58, at 365 ex.E. In *NJ SEED*, the Superior Court of New Jersey upheld the legality of a contingency-fee agreement between special counsel and the State of New Jersey for purposes of bringing public natural resource damage actions under the New Jersey Spill Act (New Jersey's state analog to CERCLA) and common law in a case involving contamination in the Lower Passaic River. The court's ruling draws heavily from the rationale of Judge Litner in the tobacco context and cites his opinion extensively:

In this regard, the Court concurs with the reasoning of Judge Litner in sustaining the appointment of special counsel for the State to pursue Medicaid losses from tobacco companies.

. . . .

In the tobacco matter, Judge Litner noted the public benefit of the Attorney General taking advantage of the expertise and resources which would be brought to an extraordinary and non-recurring litigation such as the tobacco liability matters.

. . . .

So too, here there is a public benefit

. . . .

The Court disagrees with plaintiffs as did Judge Litner in the tobacco litigation that the special counsel statute requires an up-front appropriation for such services.

. . . .

[T]he law of trust would allow counsel for the trust to receive reasonable compensation out of the principal for their services as fiduciaries in restoring or maximizing the trust property. Again, all of this is in accord with the reasoning of Judge Litner in approving the contingent fee for special counsel in the tobacco litigation.

Id. at 110-11, 113, 118, *reprinted in* Hyatt, *supra* note 58, at 377-78, 381.

The language of the statute is clear and unambiguous: '[a]ll sums recovered through judgments' means *all* sums, not all sums remaining after the Attorney General has paid his contingency fee lawyers. If the Legislature had intended to allow the Attorney General the right to deduct the fees of contingency fee lawyers from judgments or settlements in environmental cases before paying the remainder into the state treasury, surely it would not have clearly directed that 'all sums recovered' be paid into the state treasury.¹²⁵

¹²⁵ *Meredith v. Ieyoub*, 700 So. 2d 478, 482 (La. 1997). States have invalidated the use of contingency-fee contracts in other contexts as well. See *Ieyoub v. W.R. Grace & Co.-Conn.*, 708 So. 2d 1227, 1229 (La. App. 3 Cir. 1998) (following the reasoning of *Meredith*, the court invalidated a contingency-fee contract between the Attorney General and a private law firm handling civil claims against an asbestos manufacturer over placement of asbestos in government buildings); *People ex rel. Clancy v. Superior Court* (Ebel), 705 P.2d 347, 348 (Cal. 1985) (invalidating contingency-fee agreement between a city government and a private attorney hired to bring nuisance abatement actions). In *North Dakota v. Hagerty*, the court upheld the legality of a contingency-fee agreement between the State and private attorneys for the purpose of bringing asbestos claims: "In view of th[e] long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistants attorneys general on a contingent fee agreement *unless such agreements are specifically prohibited by statute.*" 580 N.W.2d 139, 148 (N.D. 1998) (emphasis added). In *Hagerty*, there was no statutory provision akin to CERCLA's use restriction, but the court's rationale suggests that had there been such a statutory restriction, the court would have invalidated the contingency-fee agreement. In *Philip Morris Inc. v. Glendening*, the court was persuaded by the fact that "the gross recovery from the tobacco litigation is not 'State' or 'public' money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the State Treasury," and that "there is a strong indication that the Legislature did not intend to impose strict conditions under which assistant counsel may be specially employed." 957 F. Supp 1130, 1135 (N.D. Cal. 1997). And, *San Francisco v. Philip Morris Inc.*, the court upheld a contingency-fee contract in the tobacco context, persuaded by what it called a "meaningful distinction" between classic-tort tobacco suits, in which contingency fees are permissible, and "public" tort actions, such as that at issue in *People ex rel. Clancy v. Superior Court*, in which the court invalidated a contingency fee contract:

The [c]ourt also finds that the civil tort nature of this action meaningfully distinguishes it from *Clancy*. This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiff's role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers.

957 F. Supp 1130, 1135 (N.D. Cal. 1997) (discussing *People ex rel. Clancy v. Superior Court* (Ebel), 705 P.2d 347, 348 (Cal. 1985)) (emphasis added). Conversely, the opposite is true in the natural resource damage situation and thus cases like *Glendening* and *San Francisco* have no comparable analogy to natural resource damage actions. First, unlike sums

This analysis is consistent with case law addressing contingency fees in the context of New York's "Big Tobacco" lawsuits. In *New York v. Philip Morris Inc.*, the court upheld a contingency-fee arrangement because, inter alia, "any fee award would come solely out of defendant tobacco companies' pockets and would not affect the State's recovery in any fashion."¹²⁶ Thus the court was persuaded by the fact that the tobacco companies paid the State's private attorney's contingency fee *over and above* the damage measure.

Third, unlike traditional torts, natural resource damage actions are brought by a formal public trustee who is obligated to safeguard and properly apply the entrusted funds.¹²⁷ As discussed below, the trustee acts on behalf of the public and, as guardian of the public trust, has a concomitant duty to safeguard natural resource damage funds to ensure that they are in fact applied toward the Restorative Purpose.

The trustee has a statutory duty under CERCLA, and a common law duty rooted in the public trust and *parens patriae* doctrines, to restore, where possible, injured natural resources. Statutorily, the trustee must act to (1) assess the damage to natural resources, (2) recover such damages from PRPs, and (3) apply any recovery in a manner that comports with the use restriction.¹²⁸ The trustee, as "the authorized representative,"¹²⁹ acts "on behalf of the public" with respect to the trust disposition.¹³⁰ This duty comports with CERCLA's use restriction: "[s]ums recovered by a . . . trustee . . . shall be available for use only to restore, replace, or acquire the equivalent of such natural resources."¹³¹ Although any person is entitled to bring a cost recovery action, "[o]nly those Federal, State, and Indian tribe officials designated as natural resource trustees may recover natural resource damages."¹³²

recovered for tobacco claims, "sums recovered" for natural resource damage claims are by definition public funds and there is an express mandate about how that recovery is spent which would be undermined by the payment of the fee. See CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1); *id.* § 107(f)(2)(A)-(B), 42 U.S.C. § 9607(f)(2)(A)-(B). Second, unlike traditional torts, natural resource damage actions are public in nature and they fall squarely into the category of cases where a sovereign seeks to vindicate the rights of its residents or exercise governmental powers.

¹²⁶ *New York v. Philip Morris, Inc.*, 308 A.D.2d 57, 66 (N.Y. App. Div. 2003) (emphasis added).

¹²⁷ CERCLA § 107(f), 42 U.S.C. § 9607(f) (2000).

¹²⁸ *See id.*

¹²⁹ *Id.* § 107(f)(1), 42 U.S.C. § 9607(f)(1).

¹³⁰ *Id.* § 107(f)(2), 42 U.S.C. § 9607(f)(2).

¹³¹ *Id.* § 107(f)(1), 42 U.S.C. § 9607(f)(1).

¹³² Natural Resource Damage Assessments, Type A Procedures, 65 Fed. Reg. 6012, 6013

Under the public trust and *parens patriae* doctrines which underpin the trustee's standing to sue for natural resource damage in state, territorial and common law, the trustee has the same duty. The public trust doctrine recognizes that the government holds certain lands in trust for the benefit of the public.¹³³ "As trustee, the government has a 'duty to manage trust resources in a manner that is consistent with the trust.' When that trust is violated, suit can be brought to recover damages to the resources."¹³⁴ Similarly, under the authority of *parens patriae*, or "parent of the country," a state has standing to sue to prevent or repair harm to its quasi-sovereign interests.¹³⁵

By entrusting the action to a public trustee, Congress added a procedural safeguard to CERCLA to ensure the recovery would be applied to achieve the Restorative Purpose. The trustee serves as guardian of the public's trust and must protect the trust corpus to ensure it is properly applied.¹³⁶ The Ninth Circuit recognized this protective check on recovery in *Alaska Sport Fishing Association v. Exxon Corp.*:

Given the [R]estorative [P]urposes behind the CWA and CERCLA, it simply makes no sense to reserve a portion of lost-use damages for recovery by private parties. *Unlike trustees, private parties are not bound to use recovered sums for the restoration of natural resources, or the acquisition of equivalent resources.*¹³⁷

(Feb. 9, 2000) (codified at 43 C.F.R. pt. 11); accord CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

¹³³ Murray et al., *supra* note 12, at 420-21.

¹³⁴ *Id.* at 421 (quoting Cynthia Carlson, *Making CERCLA Natural Resource Damage Regulations Work: The Use of the Public Trust Doctrine and Other State Remedies*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,299, 10,302 (Aug. 1988)).

¹³⁵ See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264-66 (1972).

¹³⁶ See generally *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980) (upholding district court's rejection of trustee's "draconian" damage assessment plan because it "was not a step that a reasonable trustee of the natural environment would be expected to take as a means of protecting the corpus of the trust.").

¹³⁷ *Alaska Sport Fishing Ass'n. v. Exxon Corp.*, 34 F.3d 769, 772 (9th Cir. 1994) (emphasis added). In *Alaska Sport*, the plaintiff, an association of sport fisherman, sought recovery of damages for the "lost-use" of fisheries due to the Exxon-Valdez oil spill. *Id.* at 769-70. The court ruled that the plaintiff, a private party, had no authority under the Clean Water Act or CERCLA to seek such damages when the trustee, who is duty-bound to apply the recovery in a manner that comports with the use restriction, had already asserted natural resource damage claims. *Id.* at 770, 772. The D.C. Circuit followed this reasoning in

Congress believed it protected the public's recovery by putting the trust into the hands of a designated trustee who is bound to, and in fact would, follow the use restriction. As Murray and his co-authors explain:

NRD trustees have access to very large amounts of money, which only they, as government trustees, have standing to collect. Additionally, the trustees, as government officials, are aware of other environmental needs within the state or department they represent as well as the wishes of other entities that have an interest in seeing the recovered funds spent a certain way. Thus, a potential conflict of interest is created by the opportunity for trustees (1) to collect funds from particular sites and use those funds for the benefit of another environmental need or (2) to increase the government coffers *Congress obviously foresaw this conflict and incorporated a provision that it evidently thought would prevent abuse. Section 107(f)(1) of CERCLA provides that any recovery by the trustee shall be retained by the trustee 'for use only to restore, replace, or acquire the equivalent of [damaged] natural resources.'*¹³⁸

As discussed above, there are substantial differences between natural resource damage actions, which are public actions brought by statutorily-designated trustees who are obligated to apply all sums recovered toward restoration of the natural resources, and traditional torts.¹³⁹ As such, it is inappropriate to draw an automatic analogy to the use of special contingency-fee counsel relationships in other tort contexts.

Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior. "Persuaded in part by the Ninth Circuit's reasoning in *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994)," the court reiterated the Restorative Purpose underlying CERCLA and "the correlative need to funnel damage recovery through public trustees rather than to private litigants." *Kennecott Utah Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1228 (D.C. Cir. 1996).¹³⁸ Murray et al., *supra* note 12, at 424-25 (emphasis added).

¹³⁹ These same arguments apply to counter another position advanced to justify the contingency-fee arrangement. Proponents argue that Congress intended to create a trust and trustees may, under traditional trust law, recoup the reasonable costs incurred to create or protect the trust corpus. Kanner & Nagy, *supra* note 45, at 746-47. Again, CERCLA established a statutory framework to counteract congressional dissatisfaction with traditional common law doctrine, did not include litigation-related attorney's fees in a damage measurement calculated to fully address the public's natural resource damage injury, and ensured that the damage recovery funnel through a designated trustee who is obligated to use the damage recovery only to restore, replace, or acquire an equivalent resource. Using traditional trust doctrine to permit a trustee to deplete a damage recovery to pay a contingency fee thwarts Congress's natural resource damage scheme.

D.

CERCLA's Preemptive Effect on State, Territorial or Common

Trustees frequently bring natural resource damage claims under broad state, territorial and/or common laws that do not contain use restrictions similar to that in CERCLA.¹⁴⁰ This situation raises the issue of whether a trustee may avoid CERCLA's use restriction by paying the contingency fee from a damage recovery under one of these broader legal theories. As explained below, however, the stronger argument is that any such state, territorial or common law that (1) provides for a natural resource damage recovery and does not contain a use restriction, and/or (2) does not include litigation-related attorney's fees as part of the damage measurement, is in conflict with CERCLA's carefully structured natural resource regime and is consequently preempted.¹⁴¹

The Supremacy Clause of the United States Constitution¹⁴² preempts state laws that "interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution."¹⁴³ Federal laws can preempt state laws either explicitly or by implication.¹⁴⁴ Express preemption occurs when the statutory language reflects a congressional intent to displace state law.¹⁴⁵ A federal law implicitly preempts state laws if (i) the federal regulation so occupies the field that Congress must have intended to leave no room for state laws ("field preemption"),¹⁴⁶ or (ii) there is an actual conflict between state and federal law such that "it is impossible to comply with both . . . or the state law stands as an obstacle to the accomplishment of Congress's objectives" ("conflict preemption").¹⁴⁷

It has been held that CERCLA is not so comprehensive as to expressly preempt state environmental laws or implicitly work field

¹⁴⁰ See, e.g., *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1236 (10th Cir. 2006); *Comm'r of the Dep't of Planning & Natural Res., Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206 (D.V.I. 1998).

¹⁴¹ Conversely, any state, territorial or common natural resource damage law that (1) provides for a measure of damages akin to that in CERCLA, (2) restricts the trustee's use of the funds to restoration, replacement or acquisition of an equivalent resource, and (3) includes litigation-related attorney's fees as an additional component of the damage measurement, is not preempted by CERCLA.

¹⁴² U.S. CONST. art. VI, cl. 2.

¹⁴³ *United States v. Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (alternation in original)).

¹⁴⁴ *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

¹⁴⁵ See *United States v. Denver*, 100 F.3d at 1512.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; accord *Int'l Paper v. Oullette*, 479 U.S. 481, 491-92 (1987).

preemption.¹⁴⁸ CERCLA can, however, preempt state and common environmental laws under a theory of conflict preemption.¹⁴⁹

Congressional intent is the determinative factor when analyzing whether federal law preempts state law.¹⁵⁰ Congressional intent is ascertained “by examining the statutory language and the structure and purpose of the statute.”¹⁵¹

In *New Mexico v. General Electric Co.*, the Tenth Circuit held that CERCLA’s natural resource damage provisions preempted New Mexico’s attempts to seek an unrestricted monetary natural resource damage award under state and common law.¹⁵² “The restrictions on the use of NRDs in

¹⁴⁸ See, e.g., *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998); *United States v. Colorado*, 990 F.2d 1565, 1579 (10th Cir. 1993).

¹⁴⁹ Courts have held that CERCLA preempts conflicting state and common laws relating to, inter alia, statutes of limitations, restitution, and indemnity. See *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1144 (9th Cir. 2002) (holding that discovery-based statute of limitations under state law is expressly preempted by CERCLA); *Bedford Affiliates*, 156 F.3d at 427 (holding that state and common law restitution and indemnification actions created an actual conflict with CERCLA’s “carefully crafted settlement system” and were therefore preempted); *United States v. Denver*, 100 F.3d at 1512-13 (holding that CERCLA preempts city and county zoning ordinance prohibiting maintenance of hazardous waste in areas zoned for industrial use because it stood as an obstacle to CERCLA’s objectives); *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) (holding that state law claims for restitution, unjust enrichment, subrogation and indemnification are preempted by section 107 of CERCLA). In order to demonstrate that an actual conflict exists, the claimant must demonstrate that “compliance with both federal and state regulations is a physical impossibility” or that “the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁵⁰ *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125 (D.N.J. 1991) (“Congressional intent determines whether state action is preempted by federal law.”).

¹⁵¹ *Id.*

¹⁵² 467 F.3d 1223, 1247 (10th Cir. 2006). New Mexico first filed a claim in federal district court for natural resource damages under CERCLA, and filed a separate lawsuit in state court alleging various state and common law natural resource damage claims, including trespass, public nuisance and negligence. *Id.* at 1236. The action was removed to federal court and consolidated with the federal action. *Id.* After a period of extensive discovery, the Attorney General filed “(1) a motion to dismiss all CERCLA claims and federal defendants from the NRD lawsuit, and (2) a motion to remand the remaining state law claims to state court.” *Id.* at 1237. The court granted the Attorney General’s motion to dismiss, but denied the motion to remand. Thus, all that remained were state and common law claims in federal court. Although the court in *New Mexico v. General Electric Co.* did not go so far as to hold that New Mexico’s public nuisance and negligence theories were entirely preempted, the court held that such claims were preempted to the extent the state sought to obtain an unrestricted monetary damage award, which “cannot withstand CERCLA’s comprehensive NRD scheme.” *Id.* at 1247-48.

§ 9607(f)(1) represent Congress's considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste. We cannot endorse any state law suit that seeks to undermine that judgment."¹⁵³ After explaining that the "obvious objective" of CERCLA's natural resource damage provisions was to restore or replace the injured resource, the court held:

Consistent with this objective, we hold CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource.¹⁵⁴

Significantly, the court's analysis rejects *any* trust disposition, including diminishing a natural resource damage recovery to pay attorney fees, that goes toward anything other than the Restorative Purpose:

Finally, in a case where an NRD claim is premised upon both CERCLA and state law, a portion of the recovery if earmarked for the state law claims could be used for something other (*for example, attorney fees*) than to restore or replace the injured resource. The remainder of the NRD recovery . . . would then be insufficient to restore or replace such resource. *Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for some purpose other than to "restore, replace, or acquire the equivalent of" the injured groundwater would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1).*¹⁵⁵

The court further rejected the state's argument that CERCLA's savings clauses¹⁵⁶ support the state's ability to pursue an unrestricted monetary award under state and common law:

¹⁵³ *Id.* at 1247.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1248 (emphasis added).

¹⁵⁶ CERCLA contains the following savings provisions: (I) "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State," CERCLA § 114(a), 42 U.S.C. § 9614(a) (2000); and (ii) "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants," *id.* § 302(d), 42 U.S.C. § 9652(d).

[W]e reach this conclusion notwithstanding CERCLA's saving clauses because we do not believe Congress intended to undermine CERCLA's carefully crafted NRD scheme through these savings clauses.

....

An interpretation of the saving clauses that preserved the state's NRD claim for money damages in its original form would seriously disrupt CERCLA's principle aim of cleaning up hazardous waste.¹⁵⁷

This preemption argument finds additional support in an *amicus*

curiae brief submitted by the United States Department of Justice ("DOJ") on a related issue involving whether the Government of the Virgin Islands could lawfully use a natural resource damage recovery relating to groundwater injury—and thus earmarked to restore the groundwater resource—to purchase a stretch of beach on a different part of St. Thomas.¹⁵⁸

The Government of the Virgin Islands' request was challenged by Intervenor Britain H. Bryant on the ground that, in accordance with CERCLA's use restriction, the purchase would effect an unlawful diversion of natural resource damage funds from a settlement that could lawfully only go toward restoration, replacement, or acquisition of a groundwater resource.¹⁵⁹ The Virgin Islands' trustee asserted that because he settled territorial and common law claims in addition to the CERCLA claim, and because there is no parallel restriction under territorial law or common law that the trustee only apply the funds to restore, replace, or acquire the equivalent of the damaged resource, the trustee was entitled to avoid CERCLA's use restriction by diverting the funds under the broader authority of territorial or common law.¹⁶⁰

Although DOJ authored the brief to respond to a different issue than the legality of contingency fees, the broad wording of the brief

¹⁵⁷ *New Mexico v. Gen. Elec. Co.*, 467 F.3d at 1247-48. See also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872-74 (2000) (stating that the court will not "read general 'saving' provisions to tolerate actual conflict" between federal and state laws); *AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (holding that a savings clause is not intended to nullify specific provisions of the statute that contains it).

¹⁵⁸ Brief of the United States as *Amicus Curiae* Regarding Federal Preemption of Territorial Law Regarding Use of Natural Resource Damage Recovery, Comm'r of the Dep't of Planning & Natural Res., *Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206-RLF (D.V.I. Mar. 1, 2005).

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 6.

suggests that the United States' position applies with equal force to the contingency-fee context:

[T]erritorial law, to the extent it allows [the trustee] to use its NRD trust money for anything other than to restore, replace or acquire the equivalent of the injured natural resources . . . , stands as an obstacle to accomplishment of the Congressional objective to restore natural resources, and therefore is preempted by CERCLA.¹⁶¹

DOJ explained that CERCLA's use restriction "lies at the heart of CERCLA's NRD scheme, because it ensures that the trustees designated to act on behalf of the public in fact serve the public's collective, long-term interests in preserving and rebuilding our natural heritage."¹⁶² The issue was never judicially resolved because the Trustee of the Virgin Islands withdrew his motion to divert the natural resource damage recovery after the United States filed its *amicus* brief.¹⁶³

The congressional design of CERCLA's carefully-crafted natural resource damage scheme is undermined if a contingency fee is paid from a natural resource damage recovery.¹⁶⁴ Thus, state, territorial and common laws that provide for natural resource damages, do not include litigation-related attorney's fees in the measure of damages, and do not contain a parallel to CERCLA's use restriction, are in conflict with, and consequently preempted by, CERCLA.

III. A PROPOSAL FOR LEGISLATIVE REFORM

The history of the floundering natural resource damage cause of action reflects that there is a void in CERCLA's natural resource damage provisions. As shown above, the current attempt to facilitate such claims by outsourcing them to contingency-fee attorneys illegally disrupts the congressional scheme. As a result, millions of public dollars are diverted from

¹⁶¹ *Id.* at 4.

¹⁶² *Id.* at 2.

¹⁶³ See Notice of Withdrawal of Plaintiff's Motion to Provide Information to Court Regarding the Proposed Disbursement of Settlement Monies, and Withdrawal of Plaintiff's Appeal of October 8, 2004 Order Granting Motion of Britain H. Bryant to Intervene, Comm'r of the Dep't of Planning & Natural Res., Dean C. Plaskett v. Esso Standard Oil, S.A., No. 1:98-cv-00206-RLF (D.V.I. Mar. 1, 2005).

¹⁶⁴ See *supra* Parts II.A and B.

natural resource restoration to instead pay an attorney's fee. Congress meant for natural resource damage actions to take place, however. Congress's natural resource damage scheme is otherwise well-structured, but this history demonstrates that CERCLA lacks the appropriate financial incentives to enable governments to bring these claims.

What is needed to resolve this dilemma is legislative reform to permit the recovery of the government's reasonable litigation-related attorney's fees and costs when prosecuting CERCLA natural resource damage actions. This will enable governments to bring natural resource damage claims and to lawfully recoup the litigation expense from the natural resource damage award.

At the same time, Congress should clarify its position on whether contingency-fee representation is appropriate when governments prosecute natural resource damage claims.¹⁶⁵ Although a comprehensive analysis of the policy arguments for and against contingency-fee representation is beyond the scope of this article, there are substantial issues on both sides of the debate.¹⁶⁶ Proponents of the arrangement argue that it furthers public policy because: (i) there are high costs and litigation risks associated with such actions; (ii) contingency-fee arrangements are monetarily more efficient than hourly or in-house fees; (iii) contingency-fee arrangements avoid the staffing shortages that affect some resource-challenged state Attorneys General's offices; (iv) contingency-fee attorneys are monitored

¹⁶⁵ If Congress amends CERCLA to provide for the recovery of the government's reasonable litigation costs, it is likely that such actions would be prosecuted by the appropriate Attorney General's office without resort to special counsel. It is possible, however, that governments might still outsource the action to contingency-fee counsel. Thus, Congress should provide guidance about whether contingency-fee arrangements are appropriate.

¹⁶⁶ It is important to distinguish between arguments based on public policy, which inform whether as a matter of policy attorney's fees *should* be recoverable when prosecuting a natural resource damage action, from arguments based on CERCLA's express language and underlying legislative intent, which inform whether attorney's fees *are in fact* recoverable. As explained by the Supreme Court in *Alyeska*:

We do not purport to assess the merits or demerits of the 'American Rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy *has been viewed as desirable* in a variety of circumstances. *But* the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs . . .

421 U.S. 240, 270-71 (1975) (citations omitted) (emphasis added).

by the state Attorney General to avoid any concerns attendant to the contingency-fee counsel's financial stake in the outcome; (v) state Attorney Generals typically do not specialize in complex natural resource damage litigation; and (vi) lawyers paid on an hourly basis have an incentive to bring frivolous claims.¹⁶⁷

Conversely, there are substantial policy arguments against contingency-fee arrangements when prosecuting natural resource damage actions. First, because of the public nature of a natural resource damage action, attorneys with a direct financial stake in the outcome of the litigation should perhaps not be positioned to prosecute it.¹⁶⁸ If a PRP proposes a non-monetary settlement that benefits the public and furthers restoration of the injured resource, the contingency-fee attorney has an incentive to reject it in favor of a monetary damage award.¹⁶⁹ Thus, while the attorney's personal incentive to maximize monetary recovery often overlaps with the public good in other contingency-fee contexts, it conflicts with CERCLA's goal of encouraging actual restoration of the injured resource.¹⁷⁰

Second, while permitting contingency-fee representation in the arena of public natural resource damage actions might enable trustees to bring actions that otherwise would not have been pursued, it also works the more insidious effect of avoiding the political checks and balances that come along with "budget-based political accountability."¹⁷¹ Professor Howard M. Erichson argues that although contingency fees may allow government to bring litigation it might not otherwise have had the fiscal ability to prosecute,

¹⁶⁷ Kanner & Nagy, *supra* note 45, at 745-50.

¹⁶⁸ Erichson, *supra* note 116, at 36 ("The primary reason contingent fee arrangements should not be used for government lawsuits is that government legal authority should not be given to someone with a direct financial stake in a matter."); *see also* David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DEPAUL L. REV. 743, 747 (2000) ("Based on the idea that the Attorneys General are the representatives of the people, allowing an employee of the office to receive a great windfall as a result of his duty to the state, is in conflict with the purpose of the office.").

¹⁶⁹ Imagine a situation involving damage to a groundwater resource where a PRP offers to settle the claim by funding an alternative water source such as the construction of a public water treatment facility. Even where such a creative settlement comports with CERCLA's use restriction, furthers the Restorative Purpose of CERCLA and benefits the public, an attorney paid on contingency will have an incentive to reject it in favor of a monetary award.

¹⁷⁰ *See* CERCLA §107(f)(1), 42 U.S.C. §9607(f)(1) (2000).

¹⁷¹ Erichson, *supra* note 116, at 39.

[t]he problem is that government checks and balances depend largely on purse-strings, and contingent fees make those purse-strings disappear or at least put the strings beyond the reach of the legislative branch. . . . Contingent fees allow the [A]ttorney [G]eneral's office to pursue litigation without worrying about the budget, and thus without the immediacy of budget-based political accountability.¹⁷²

Third, “[u]nlike private attorneys, the Attorneys General are . . .

instilled with a higher public duty and obligation.”¹⁷³ One commentator describes a heightened “public interest serving role” on the part of attorneys who represent the government.¹⁷⁴ Political cronyism, however, often determines who gets appointed as special counsel.¹⁷⁵ Political contributions and personal connections have all factored into the decision-making process of selecting special counsel.¹⁷⁶ This combines to erode confidence in the public officials tasked to safeguard the public's trust.

Fourth, because governments will be positioned to recoup their reasonable litigation-related fees and costs, the classic justification of necessity due to underfunded and understaffed Attorney General offices would no longer be compelling.¹⁷⁷ Moreover, court tolerance is waning for these

¹⁷² *Id.* See also Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1152 (2001) (“Th[e] requirement that all funds belong to the state and must be deposited in the treasury is one of two complementary governing principles implicit in our state and federal constitutional order, the other being the prohibition of any expenditure of any public money without legislative authorization.”).

¹⁷³ Dahlquist, *supra* note 168, at 743-44.

¹⁷⁴ Berenson, *supra* note 116, at 13 (quoting Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C.L. REV. 789, 790 (2000)).

¹⁷⁵ Dahlquist, *supra* note 168, at 777-78; see also Gray, *supra* note 1, at 6 (recognizing contingency-fee arrangements have been criticized for creating “serious conflicts of interest for State attorneys general who may have received large campaign contributions from the same private attorneys.”); Little, *supra* note 172, at 1151 & n.41 (noting commentators who have “focused on the pattern of attorneys general hiring their own former law firms or close cronies” as special counsel).

¹⁷⁶ See *supra* note 175.

¹⁷⁷ Indeed, even without formal legislative reform, more of a financial commitment to fund the government's ability to bring such claims appears to have already begun. See, e.g., Hyatt et al., *supra* note 58 at 285 (“Overall, the devotion of resources, combined with better organization within the States and coordination with other States seem to indicate that State NRD programs are becoming more efficient.”). Furthermore, the underlying assumption that states, territories and tribes are unable to bring such action in the first

types of arguments. In *New Mexico v. General Electric Co.*, the Tenth Circuit recognized, but was not persuaded by, the argument that the vast costs associated with the natural resource damage assessment process serve as a financial bar to the trustee's ability to bring such actions.¹⁷⁸

Fifth, there is conflicting information regarding whether contingency-fee representation, when translated into an hourly figure, is reasonable. According to Professor Lester Brickman:

Under both ethical codes and fiduciary principles, fees must be 'reasonable.' Contingency fees are designed to—and do—yield higher effective hourly rates than do hourly rate fees to reflect the risks that lawyers bear. These higher rates of return, however, are justified under ethical codes and fiduciary principles only if they are commensurate with the risks assumed by lawyers of nonrecovery or low recovery.

. . . .

instance is not always true. Most states have functional environmental enforcement programs staffed with trained, specialty attorneys. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 5-12.523, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title5/12menv.htm#5-12.523 (last visited Oct. 25, 2007) (Coordination with State Programs).

¹⁷⁸ We are well aware that NRD assessment is a costly proposition. According to two commentators, after its 1986 amendments, CERCLA 'cast trustees adrift to finance their own damage assessment before filing claims against polluters—a costly proposition, given that damage assessments typically cost millions of dollars. This lack of funding has created a virtually insurmountable obstacle considering that agency budgets have historically authorized little or no funding for NRD assessments.' Still, given the [Attorney General's] original multi-billion dollar claim against GE and ACF, a few million dollars seems not so significant a cost to take advantage of CERCLA's rebuttable presumption of NRDs, especially where the reasonable costs of assessment are recoverable from PRPs.

New Mexico v. General Elec. Co., 467 F.3d 1223, 1242 n.28 (10th Cir. 2006) (internal citations omitted) (emphasis added). Even with the resources of special counsel, it seems that special counsel does not always invest in a formal natural resource damage assessment to accord it the statutory rebuttable presumption. See AMY W. ANDO ET AL., ILL. DEP'T OF NATURAL RES., NATURAL RESOURCE DAMAGE ASSESSMENT: METHODS AND CASES (2004), available at www.uluc.edu/main_sections/info_services/library_docs/RR/RR-108.pdf. Ando and her co-authors evaluated how state agencies with natural resource damage programs chose to conduct damage assessments, and determined that out of 88 sample cases, a natural resource damage assessment on the entire injury had been performed in only 33 cases. *Id.* at 10. Moreover, trustees applied "a range of assessment methods," from a habitat equivalency analysis to a more limited "tool of the trustee's own design." *Id.*

By use of a zero-based accounting system under which tort lawyers apply standard contingent-fee rates to the entire recovery obtained in tort cases rather than just to the component of the recovery that represents the value that they have added to claims, contingent-fee lawyers . . . obtain inordinately high rates of return, not infrequently amounting to thousands and even tens of thousands of dollars an hour. Often these enormous fees are obtained in cases where lawyers bear no meaningful risk of low or no recovery.¹⁷⁹

Because contingency-fee agreements illegally drain the public's

natural resource damage recovery to pay an attorney's fee, pending legislative reform, the current use of such arrangements must cease. Such actions must be prosecuted by either salaried government counsel or, alternatively, special counsel paid a comparable salary or a reasonable fee,¹⁸⁰ drawn from a lawful government appropriation.

¹⁷⁹ Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 655-60 (2003) (citations omitted). *But see generally* Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. L. Q. 477 (2004). Although a comprehensive study of whether contingency fees are "reasonable" when bringing public natural resource damage actions is beyond the scope of this article, it matters little to the author's conclusion that litigation-related attorney's fees cannot be deducted from a natural resource damage recovery. To the extent there is an automatic assumption, however, that contingency fees are "reasonable," it is important to understand that there is conflicting data on the subject and those seeking to analyze the data should be aware of the debate.

¹⁸⁰ *See* Dahlquist, *supra* note 168, at 745-46 ("Traditionally, the compensation for the services of a Special Assistant was based on an amount comparable to the salary of full time Assistant Attorneys General, or a comparable 'reasonable' hourly amount."). Contrast, by way of example, the \$92,000 hourly recovery of some of the attorneys handling the tobacco litigation on contingency. *Id.* at 777.