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

by Julie E. Steiner

Editors' Summary: State governments are contracting with private contingency fee attorneys to pursue natural resource damage (NRD) claims as the government's "special counsel." This arrangement is hailed for funding the government's ability to bring NRD claims where such claims had previously stagnated. Others, however, charge that the lucrative special counsel contract is awarded to the Attorney General's political cronies, and that the arrangement illegally diverts millions of dollars away from its earmarked purpose of natural resource restoration to instead pay an attorney fee. This Article demonstrates that while the contingency fee arrangement facilitates the government's ability to pursue NRD damage claims, such alliances are improper under CERCLA. The Article suggests legislative reform to permit the recovery of the government's reasonable enforcement costs when prosecuting NRD claims.

Riding in like the cavalry with government banner flying high, contingency fee lawyers have snatched the distressed sleeping giant[1] that is the public natural resource damage (NRD) 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 general offices to bring claims to compensate the public for injury, destruction, or harm caused to the public's natural resources.[5] Under this agreement, special counsel brings an NRD action on behalf of the public and fronts the litigation costs, but deducts a percentage of the public's

Julie E. Steiner is an Associate Professor of Legal Writing at St. John's University School of Law. Professor Steiner previously represented industrial parties in natural resource damage cases.

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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 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 NRD Claims: States and Plaintiffs' Attorneys Leading the Charge*, Envtl. Litig. & Toxic Torts Comm. Newsl. (ABA), Apr. 2007, at 3 ("Natural resource damage (NRD) actions have long been regarded as the sleeping giant of Superfund.").

2. NRDs are "injury to, destruction of, or loss of natural resources." Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, 9607(a)(4)(C), ELR Stat. CERCLA §§101-405, 107(a)(4)(c); *accord* §§101(6), 111(b). Natural resources are defined broadly to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies," and similar resources. §101(16). 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 NRDs from 66 companies alleged to have contributed to contamination in the Lower Passaic River. Marilynn R. Greenberg & Steven T. Senior, *NRDs Loom Large in New Jersey*, Metro. Corp. Council, Dec. 23, 2003, at 21. *See also* Gerald F. George, *Litigation of Claims for NRDs*, *in* Envtl. Litig. 397, 399-400 (ALI-ABA 2000) ("[T]he most recent 'megabuck' NRD 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 NRDs 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 natural resource damage [NRD] 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. By Executive Order, the federal government is presently prohibited from entering into such contingency fee arrangements. Exec. Order No. 13433 (May 16, 2007), Protecting American Taxpayers From Payment of Contingency Fees.

damage recovery to pay the attorney's contingency fee; the remainder goes into a fund[6] to be allocated by the government's NRD trustee.[7]

As discussed in Part I of this Article, the natural resource giant was induced into its slumber because underfunded 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 NRDs in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), failed to insert a provision permitting recovery of litigation-related attorney fees and costs. Additionally, with the passage of the Superfund Amendments and Reauthorization Act (SARA) of 1986,[9] Congress cut off the availability of most Superfund[10] money associated with the litigation of these claims.[11] Moreover, government attention was preoccupied by more pressing matters relating to the remediation of stagnating hazardous waste sites.[12] As a result, numerous NRD 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 NRD 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 fee.[14]

In Part II, this Article explores the complex structure of, and restorative purpose underlying, CERCLA's NRD provisions.[15] The author concludes that such contingency fee arrangements violate the express language of, and legislative intent underlying, CERCLA, which limits a trustees ability to "use [an NRD 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 NRDs 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 fees in the NRD measurement, and because Congress intended that the recovery serve as a "make whole" restorative remedy, CERCLA's comprehensive NRD regime would be undermined if a damage recovery is depleted by paying a contingency fee under the authority of such broad state, territorial, or common laws. Congress carefully crafted CERCLA's NRD 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 NRD 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 NRD 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 NRD actions. Such reform will enable governments to bring NRD claims and to lawfully recoup the litigation costs from the NRD award.

Because CERCLA's present scheme does not permit payment of most attorney fees,[19] the current use of contingency fee attorneys to prosecute such actions must cease. Pending reform, NRD 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.

6. *See, e.g.*, Professional Services Contract Between the Territory of the Virgin Islands, Department of Property and 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 states 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. §107(f)(1); 65 Fed. Reg. 6012, 6013 (Feb. 9, 2000) (codified at 43 C.F.R. pt. 11).

8. Anthony R. Chase, *Remedying CERCLA's NRDs Provision: Incorporation of the Public Trust Doctrine Into NRD 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 ELR 10551 (Dec. 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.

10. Congress passed CERCLA, also referred to as 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, 18 ELR 20580 (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).

11. *See infra* note 39 and accompanying text.

12. *See* Kevin R. Murray et al., *NRD 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 [potentially responsible parties] strictly liable for the government's response costs.") (citing Lloyd W. Landreth & Kevin M. Ward, *NRDs: Recovery Under State Law Compared With Federal Laws*, 20 ELR 10134, 10134 (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 NRD 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 NRD provisions contained in the Oil Pollution Act, 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001, or the Clean Water Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

16. §107(f)(1).

17. *See infra* note 140.

18. *See infra* Part II.D.

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

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 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 NRD scheme that is the focus of this Article. CERCLA NRD 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 to designate an official natural resource trustee, and gives the trustee legal standing to seek NRDs 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 NRD liability and grant a settling party a "covenant not to sue"[34] for future NRDs if the PRP 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 an NRD scheme, few claims were brought.[36] Initially, after

20. John Carlucci, *NRDs 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, *NRDs: 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 NRDs: Past, Present, and Future*, 75 TEX. L. REV. 189, 190 (1996) ("The ability of the government to collect damages for public resources 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 NRD recovery, future NRD claims will probably be pursued under federal statutes because they clearly provide a broader statutory basis for the recovery of NRDs.").

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

24. Ohio v. Department of the Interior, 880 F.2d 432, 455, 19 ELR 21099 (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, 23 ELR 20800 (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, 28 ELR 21225 (1998) ("CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution.").

26. Meghrig v. KFC W., Inc., 516 U.S. 479, 483, 26 ELR 20820 (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." §107(a).

27. §107(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, 19 ELR 21210 (D. Mass. 1989).

29. §107(a)(4)(C).

30. NRD Assessments, 59 Fed. Reg. 52749, 52749 (Oct. 19, 1994).

31. §107(f).

> [SARA] created a mechanism for states to appoint natural resource trustees to bring lawsuits seeking NRDs. . . . In SARA, Congress provided an express means for states to bring NRD 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 NRDs claims.

Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 472-73, 21 ELR 20910 (D. Mass. 1991). NRD trustees are designated by, respectively, the president and the governors of the state or territory. §107(f)(2).

32. §107(f)(1).

33. *See, e.g.*, United States v. Mallinckrodt, Inc., No. 2002/1488, 2006 WL 3331220, at *3 (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. §122(j)(2).

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 natural resource damage cases brought by the United States. Likewise, until

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 NRD claims is Congress' failure to insert a provision permitting recovery of the government's reasonable litigation-related attorney 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 NRD action, however, taxed the resources of underfunded and understaffed attorney 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 NRD provisions were largely overlooked and, neglected, the NRD giant laid down to sleep.[43]

After a lengthy period of hibernation, trustees are now focusing renewed effort on prosecuting NRD 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 and 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]

the mid- to late-1990s, state prosecution of natural resource damage 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 sleepinggiant [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, Environmental Law Practice 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 Landreth & Ward, *supra* note 12).

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, 27 ELR 21211 (9th Cir. 1997)); *see also* Colorado v. Department of the Army, 707 F. Supp. 1562, 1567, 19 ELR 20815 (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, 15 ELR 20337 (D. Colo. 1985)).

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. Department of the Interior, 880 F.2d 432, 445 n.11, 19 ELR 21099 (D.C. Cir. 1989). *See also* 26 U.S.C. §9507(c)(1)(A)(ii) (2000); §111(c)(1)-(2). 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. §111(b)(2)(A).

40. Association of State & Territorial Solid Waste Mgmt. Officials, Survey of State Remedial Program Activities in Natural Resource Damages 2 (1997) (noting that most state NRD programs have been in the developmental stages, constrained by limited staffing and funding, as well as inadequate coordination with neighboring state and federal NRD 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 NRD Claims: Smoke or Fire?* 15 Envtl. Compliance & Litig. Strategy, Mar. 2000, at 1:

> The relatively small number of natural resource damage 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 natural resource damage actions, and most state trustees have had correspondingly low, or no, budgets for these purposes.

43. *See supra* notes 1, 36.

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'—natural resource damages.") (quoting Landreth & Ward, *supra* note 12).

45. *See* Gray, *supra* note 1, at 3 ("One reason for New Jersey's willingness to bring so many natural resource damage 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 NRD and Other Parens Patriae Cases*, 19 Toxics L. Rep. (BNA) 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, *supra* note 6. 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

The contingency fee special counsel arrangement invigorated the government's ability to bring NRD 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 §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 fees[49]—from an NRD 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 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 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 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 NRD claims.[56] Without the assistance of special counsel, NRD claims would not be prosecuted by counsel competent to handle the scientific complexity of an NRD 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 general offices were challenged and mostly upheld.[60] Using traditional public trust law arguments, those in support 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, terri-

to market their services. *See, 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. §107(f)(1).

49. But, as discussed in Parts II.A. and B. below, this does include a narrow class of assessment-related attorney fees. The contingency fee is not justified by CERCLA's allowance of assessment-related attorney 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 NRD measurement includes values above restoration, i.e., interim loss of use and reasonable costs of assessment, *see* §§107(a)(4)(C), 107(f)(1), 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 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 NRD Settlement Monies to Acquire Property, Commissioner of the Dep't of Planning & Natural Resources, 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., *NRDs: 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. 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 Attorneys Fees at 11, New Mexico v. General Elec. Co., No. 99-1118 (D.N.M. June 5, 2004) (arguing that contingency fee representation is impermissible for NRD actions under the plain language of CERCLA's use restriction and the "American Rule" prohibiting recovery of attorney 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, Commissioner of the Dep't of Planning & Natural Resources, 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 NRD 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

tories, and tribes of record have retained special counsel on a contingency fee basis to handle public NRD litigation.[64]

Because millions of public trust fund dollars earmarked for resource restoration are at stake, the issue of whether a contingency fee may lawfully be drawn from an NRD recovery compels judicial review.

II. The Illegality of Contingency Fee Representation When Prosecuting Public NRD Actions

A. CERCLA's Express Statutory and Regulatory Language

The first step in evaluating the legality of contingency fee representation in the context of NRD 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 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 fee recovery. First, in numerous other provisions of CERCLA, Congress expressly provided for litigation-related attorney fee recovery, but did not do so in the provisions relating to NRD actions. Second, CERCLA NRD 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 NRD actions, including the "reasonable costs of assess[ment]," but does not provide for litigation-related attorney fee recovery.[68] Each of these CERCLA components is addressed below.

1. CERCLA Provisions Permitting Attorney Fee Recovery

Congress provided for litigation-related attorney fee recovery in numerous other provisions of CERCLA. For example, in CERCLA's citizen suit provision, a substantially prevailing party in a civil action who demonstrated that there was a violation of, or that the president or another officer failed to perform a nondiscretionary duty under, CERCLA, may be awarded court-discretionary "costs of litigation (including reasonable attorney and expert witness fees)."[69] 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] 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 fees) determined by the Secretary of Labor to have been reasonably incurred."[72] 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 fees as clearly as the other three above-referenced provisions, courts concur that the government may seek litigation-related attorney 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 fees in CERCLA's NRD provisions. Liability is 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."[76] While the NRD 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 fees.

Britain H. Bryant to Intervene by Plaintiff, No. 1:98-cv-00206 (D.V.I. Mar. 1, 2005). In *New Mexico v. General Elec. 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. General 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 NRD 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).

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. §107(f)(1) ("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).

69. *Id.* §310(f); *see also* briefs cited *supra* note 63.

70. *Id.* §106(b)(2)(E).

71. 28 U.S.C. §2412(d)(2)(A) (2000).

72. §110(c).

73. *Id.* §107(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 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 attorneys fees because they are 'costs of removal' under §107(a)(4)(A). . . . [T]he terms response, removal, and remedial action 'include enforcement activities related thereto . . . .'"). Provision for attorney fee recovery is also contained in CERCLA's municipal solid waste exemption section, §107(p)(7); Fund subrogation provision, §112(c)(3); and recovery for failure to pay a settled claim provision, §122(h)(3).

76. §107(a)(4)(c).

77. NRD Assessments, 43 C.F.R. §11.15 (2006).

The fact that Congress provided for litigation-related attorney fee recovery in numerous other CERCLA provisions, but did not similarly provide for attorney fee recovery for NRDs, reflects that Congress excluded litigation-related attorney fee recovery.[78]

Because CERCLA does not expressly provide for attorney fees for NRD actions, under what has come to be known as the "American Rule,"[79] attorney 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 fees as costs or otherwise.[80] In *Alyeska*, the U.S. Supreme Court addressed whether environmental groups that sued to bar construction of the trans-Alaska pipeline were entitled to an award of attorney fees. Based on the American Rule, the Supreme Court rejected the argument that litigants who seek to enforce important public policy legislation as "private attorney[s] general"[81] are entitled to recover attorney 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 fees in other provisions of CERCLA, but did not similarly provide for such fees when prosecuting an NRD action. Under the American Rule, because Congress did not statutorily provide for attorney fee recovery, such fees are not recoverable.

2. CERCLA's Use Restriction

CERCLA contains the following use restriction: "Sums recovered by the . . . trustee under this subsection shall be retained by the trustee, . . . , 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 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 NRD 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 U.S. 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 NRDs[87] define "assessment" or "natural resource

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78.

> Congress well knows how to make explicit whether federal courts have authority to award attorneys fees, as ERISA's fee-shifting provision demonstrates. . . . Indeed, it is the domain of Congress to determine the circumstances under which attorneys fees are to be awarded . . . . When Congress has provided the remedies for a cause of action and the act does not explicitly provide for attorneys 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 fee award for a non-final civil RICO claim, reasoning "when [Congress] desired to permit attorneys 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 attorneys fees is attributed to congressional oversight, a court should not attempt to resolve this statutory deficiency by reading a right to such attorneys fees into CERCLA as presently structured. As shown herein, CERCLA's NRD 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 Attorneys fees Award Act of 1976, Pub. L. No. 94-599, 20 Stat. 2641, *as recognized in* Perez v. Rodriquez 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 attorneys 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).

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 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 fees when bringing a CERCLA cost recovery action because, under the American Rule,

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

83. §107(f)(1).

84. *Id.*

85. *Id.* §107(a)(4)(C).

86. 59 Fed. Reg. at 52749.

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

damage assessment" as "the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to 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 §11.15, entitled "What [D]amages [M]ay a [T]rustee [R]ecover," the DOI specified particular categories of recoverable costs when a trustee pursues NRD 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]

In response to comments "question[ing] whether attorney's fees were recoverable assessment costs," the DOI confirmed that a narrow set of assessment-related attorney 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 fees, however, are limited to those related to site-specific efforts undertaken to assess NRDs, i.e., assessment-related attorney fees. Remarks made by Rep. Walter Jones (R-N.C.) during the SARA U.S. House of Representatives' 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]

Proponents of contingency fee arrangements cite this language as evidence that Congress intended to permit litigation-related attorney fee recovery when bringing an NRD action.[95] Given the context in which Representative Jones' remarks were made, however, his statement is most logically understood as referring to assessment-related attorney fees and other reasonable costs associated with the natural resource *assessment* process, not a statement that litigation-related attorney fees are recoverable. To read the last sentence of Representative Jones' remark as somehow sanctioning the recovery of litigation-related attorney fees would undermine the full tenor of his preceding statements (i) emphasizing the use restriction, and (ii) reinforcing the fact that an NRD 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 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 fees as a component of the measure of recoverable NRDs. 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 fees, but not for litigation-related attorney 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 fees are not recoverable when bringing an NRD action. Because the statutory language is clear,

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cost-effective procedures for assessing NRDs," which, if followed by the trustee, are "accorded the evidentiary status of a rebuttable presumption" of validity. 43 C.F.R. §11.11 (2006).

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 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.*

93. 59 Fed. Reg. at 52754.

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

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

96. *See supra* note 94.

97. *See supra* note 52.

there is no need to analyze the legislative history of CERCLA NRD provisions.[98]

Even assuming, arguendo, that the express language of CERCLA is ambiguous regarding the recoverability of litigation-related attorney fees, however, CERCLA's legislative history reflects that Congress did not intend to deplete an NRD recovery to pay such fees. As explained below, CERCLA NRD 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' primary purpose in enacting CERCLA NRD 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 NRD action, it is critical to understand that Congress intended that the NRD 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 1980[103] and the revised use restriction as amended by SARA[104] 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]

Sen. Bob Smith (R-N.H.) emphasized the importance of CERCLA's Restorative Purpose during a 1995 push for CERCLA reform:

> 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 interpre-

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'n 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.").

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. Department of the Interior, 880 F.2d 432, 454 n.34, 19 ELR 21099 (D.C. Cir. 1989) (citation omitted) (emphasis added).

100. In New Mexico v. General Elec. 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, 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. Sen. Mike Gravell (D-Alaska) 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. 21377 (1980).

102. *See, e.g.*, H.R. Rep. No. 99-253, pt. 4, at 50 (1985) ("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.").

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.

§107(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.

§107(f)(1).

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).

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 re-

tive case is *Ohio v. U.S. Department of the Interior*,[108] in which the U.S. Court of Appeals for the District of Columbia 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: Either 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 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' scheme incorporates other provisions to ensure the Restorative Purpose is accomplished. Congress limited standing to sue for NRD 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 NRD 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 NRDs.[112] Thus, when state trustees bring NRD 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]

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 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 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 NRD Actions Are Different From Traditional Torts

Although efforts to challenge the legality of contingency fee 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 NRD action. Advocates of the contingency fee arrangement, however, rely heavily on the tobacco line of cases,[115] where courts addressed the legality of

leases of hazardous substances." 132 CONG. REC. 29767 (1986). Sen. George Mitchell (D-Me.) 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. F.2d 432, 19 ELR 21099 (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 NRD regime when reviewing regulations initially promulgated by DOI that limited NRDs "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.

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, 10 ELR 20882 (1st Cir. 1980).

110. *See* §107(f)(1)-(2)(B).

111. *Id.* §122(j)(2).

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

113. *See id.*; 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 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 rel. Bureau of Indian Affairs, No. 04-CV-572, 2005 WL 278211, at *5 (N.D. Okla. July 15, 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. General Elec. Co., Civ. No. 99-1118 (D.N.M. June 5, 2004) (justifying legality of contingency fee agreement as necessary "[t]o

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 NRD actions like traditional torts because CERCLA NRD provisions were enacted to counter congressional dissatisfaction with the litigious- and monetary damage-oriented tort system.[117] As 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 NRD 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]

Second, unlike traditional tort, CERCLA NRD 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 NRD 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 NRD recovery and, through a complex interplay involving the totality of CERCLA NRD 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 NRD liability does not include litigation-related attorney fees,[121] it is improper to deduct such fees from an NRD 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 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 an NRD 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]

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effectively and efficiently litigate this type of large, complex, toxic tort 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, New Mexico v. General Elec. Co., Civ. No. 99-1118 (D.N.M. June 5, 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.*, *Glendening*, 709 A.2d at 1230. Similar to the NRD arrangement, in the tobacco context "the attorneys general sought private counsel to represent the States . . . 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 legislative history illustrates, however, that a motivating force behind the CERCLA NRD 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, 880 F.2d at 446, 455.

118. Michael W. Jones, *NRD 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 NRD 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 NRDs 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.

122. §107(f)(1); *see also supra* note 105.

123. §107(f)(1); *see also supra* note 102.

124. Transcript of Hearing, New Jersey 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 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 NRD 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

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:

> The language of the statute is clear and unambiguous: ''All 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]

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, NRD 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 NRD 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: "Sums 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 NRDs."[132]

Under the public trust and *parens patriae* doctrines which underpin the trustee's standing to sue for NRD 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*

> 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 et al., *supra* note 58, at 377-78, 381.

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. 3d 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). 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*, 705 P.2d at 348). Conversely, the opposite is true in the NRD situation and thus cases like Glendening and San Francisco have no comparable analogy to NRD actions. First, unlike sums recovered for tobacco claims, "sums recovered" for NRD claims are by definition public funds and there is an express mandate about how that recovery is spent that would be undermined by the payment of the fee. *See* §107(f)(1); *id*. §107 (f)(2)(A)-(B). Second, unlike traditional torts, NRD 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).

127. §107(f).

128. *See id.*

129. *Id.* §107(f)(1).

130. *Id.* §107(f)(2).

131. *Id.* §107(f)(1).

132. 65 Fed. Reg. at 6013 (codified at 43 C.F.R. pt. 11); *accord* §107(f)(1).

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

134. *Id.* at 421 (quoting Cynthia Carlson, *Making CERCLA NRD Regulations Work: The Use of the Public Trust Doctrine and Other State Remedies*, 18 ELR 10299, 10302 (Aug. 1988)).

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 U.S. Court of Appeals for the Ninth Circuit recognized this protective check on recovery in *Alaska Sport Fishing Ass'n 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]

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 Kevin Murray and his coauthors 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 NRD 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.

D. CERCLA's Preemptive Effect on State, Territorial, or Common NRD Laws

Trustees frequently bring NRD 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 an NRD recovery and does not contain a use restriction, and/or (2) does not include litigation-related attorney 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 U.S. Constitution[142] 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 (1) the federal regulation so occupies the field that Congress must have intended to leave no room for state laws (field preemption),[146] or (2) 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

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, 10 ELR 20882 (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, 24 ELR 21378 (9th Cir. 1994). 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 CWA 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 NRD claims. *Id.* at 770, 772. The D.C. Circuit followed this reasoning in *Kennecott Utah Copper Corp. v. Department of the Interior*. "Persuaded in part by the U.S. Court of Appeals for the Ninth Circuit's reasoning in [*Alaska Sport Fishing Ass'n*, 34 F.3d at 769]," 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. Department of the Interior, 88 F.3d 1191, 1228 , 26 ELR 21489 (D.C. Cir. 1996).

138. Murray et al., *supra* note 12, at 424-25.

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 fees in a damage measurement calculated to fully address the public's NRD 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' NRD scheme.

140. *See, e.g.*, New Mexico v. General Elec. Co., 467 F.3d 1223, 1236 (10th Cir. 2006); Commissioner of the Dep't of Planning & Natural Resources, 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 NRD 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 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. City & County of Denver, 100 F.3d 1509, 1512, 27 ELR 20418 (10th Cir. 1996) (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604, 21 ELR 21127 (1991) (alternation in original)).

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

145. *See City & County of Denver*, 100 F.3d at 1512.

146. *Id.*

obstacle to the accomplishment of Congress' 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 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 U.S. Court of Appeals for the Tenth Circuit held that CERCLA NRD provisions preempted New Mexico's attempts to seek an unrestricted monetary NRD award under state and common law.[152] "The restrictions on the use of NRDs in §9607(f)(1) represent Congress' 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 NRD 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 NRD 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 clauses[156] support the state's ability to pursue an unrestricted monetary award under state and common law:

> [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 saving 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 U.S. Department of Justice (DOJ) on a related issue involving whether the government of the Virgin Islands could lawfully use an NRD 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]

147. *Id.*; *accord* International Paper Co. v. Oullette, 479 U.S. 481, 491-92, 17 ELR 20327 (1987).

148. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 426, 29 ELR 20229 (2d Cir. 1998); United States v. Colorado, 990 F.2d 1565, 1579, 23 ELR 20800 (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); *City & County of 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 §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.'" California 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 NRDs under CERCLA, and filed a separate lawsuit in state court alleging various state- and common-law NRD 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 natural resource damage 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.

153. *Id.* at 1247.

154. *Id.*

155. *Id.* at 1248 (emphasis added).

156. CERCLA contains the following savings provisions: (1) "[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," §114(a); and (2) "[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).

157. *New Mexico*, 467 F.3d at 1247-48. *See also* Geier v. American 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 NRD Recovery, Commissioner of the Dep't of Planning & Natural Resources, Dean C. Plaskett v. Esso Standard Oil, S.A., No. 1:98-cv-00206-RLF (D.V.I. Mar. 1, 2005).

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 NRD 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 the DOJ authored the brief to respond to a different issue than the legality of contingency fees, the broad wording of the brief suggests that the U.S. position applies with equal force to the contingency fee context: "Territorial 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]

The 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 NRD recovery after the United States filed its amicus brief.[163]

The congressional design of CERCLA's carefully crafted NRD scheme is undermined if a contingency fee is paid from an NRD recovery.[164] Thus, state, territorial, and common laws that provide for NRD do not include litigation-related attorney 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 NRD cause of action reflects that there is a void in CERCLA NRD 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 natural resource restoration to instead pay an attorney fee. Congress meant for NRD actions to take place, however. Congress' NRD 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 fees and costs when prosecuting CERCLA NRD actions. This will enable governments to bring NRD claims and to lawfully recoup the litigation expense from the NRD award.

At the same time, Congress should clarify its position on whether contingency fee representation is appropriate when governments prosecute NRD 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: (1) there are high costs and litigation risks associated with such actions; (2) contingency fee arrangements are monetarily more efficient than hourly or in-house fees; (3) contingency fee arrangements avoid the staffing shortages that affect some resource-challenged state Attorneys General offices; (4) contingency fee attorneys are monitored by the state Attorney General to avoid any concerns attendant to the contingency fee counsel's financial stake in the outcome; (5) state Attorneys General typically do not specialize in complex NRD litigation; and (6) 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 NRD actions. First, because of the public nature of an NRD action, attorneys with a direct financial stake in the outcome of the litigation should perhaps not be positioned to prosecute.[168] If a PRP proposes a non-monetary settlement that

159. *Id.* at 4.

160. *Id.* at 6.

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, Commissioner of the Dep't of Planning & Natural Resources, 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.

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 fees should be recoverable when prosecuting a NRD action, from arguments based on CERCLA's express language and underlying legislative intent, which inform whether attorney 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. at 270-71 (citations omitted) (emphasis added).

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

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 NRD 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] Prof. 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,

> [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 decisionmaking 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 state Attorney General offices would no longer be compelling.[177] Moreover, court tolerance is waning for these types of arguments. In *New Mexico*, the Tenth Circuit recognized, but was not persuaded by, the argument that the vast costs associated with the NRD 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 Prof. 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.
> . . . .
> 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

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* §107(f)(1).

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

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 are unable to bring such action in the first instance is not always true. Most states have functional environmental enforcement programs staffed with trained, specialty attorneys. *See* U.S. DOJ, United States Attorney's Manual 5-12.523 (2005), *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 natural resource damage 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 natural resource damages, 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). Even with the resources of special counsel, it seems that special counsel does not always invest in a formal NRD assessment to accord it the statutory rebuttable presumption. *See* Amy W. Ando et al., Illinois Dep't of Natural Resources, 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 NRD programs chose to conduct damage assessments, and determined that out of 88 sample cases, a NRD 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.*

> 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 NRD recovery to pay an attorney 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 NRD actions is beyond the scope of this Article, it matters little to the author's conclusion that litigation-related attorney fees cannot be deducted from a NRD 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.