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NATURAL RESOURCE DAMAGES

This article by Frank Leone and Mark A. Miller of Hollingsworth LLP analyzes the decision of the U.S. Court of Appeals for the Seventh Circuit in NCR Corp. v. George A. Whiting Paper Co.. After a brief overview of the relationship between the Comprehensive Environmental Response, Compensation, and Liability Act's Section 107 cost recovery and Section 113 contribution provisions, the article examines what the case means for private parties seeking to bring claims against responsible parties to restore, replace or acquire the equivalent of damaged natural resources, a right normally reserved solely to the government.

Passing the Buck: Recent Developments in CERCLA Contribution Actions Seeking Natural Resource Damages

FRANK LEONE AND MARK A. MILLER

The Comprehensive Environmental Response, Compensation, and Liability Act[1] is the primary federal statutory vehicle for government and private parties to recover the costs of investigating and cleaning up environmental releases of hazardous substances. When it comes to damaged natural resources, such as water, fish and wildlife, CERCLA Section 107(a)(4)(D) further allows government trustees to bring claims against responsible parties to restore, replace or acquire the equivalent of the damaged natural resources.

The right to recover natural resource damages (NRD) belongs solely to the government. Private parties cannot recover such damages. However, a recent decision from the U.S. Court of Appeals for the Seventh Circuit, *NCR Corp. v. George A. Whiting Paper Co.*,[2] held that a party held responsible for NRD could recover some por-

[1] 42 U.S.C. § § 9601-9675.

[2] 768 F.3d 682, 79 ERC 1241, 2014 BL 266977 (7th Cir. 2014).

tion of those costs through a CERCLA Section 113 contribution action. The Seventh Circuit's opinion essentially allows a private party to recover NRD indirectly through Section 113, although it couldn't do so directly through Section 107, opening a new frontier in CERCLA litigation. This frontier raises questions of statutory interpretation, equities and expectations and can be expected to generate more litigation in the future.

(a) CERCLA's Cost Recovery and Contribution Provisions

Before proceeding to an analysis of *NCR Corporation*, a brief overview of CERCLA provides context to the issue of NRD contribution actions.

(1) CERCLA Section 107 Cost Recovery Actions

Section 107 imposes liability for releases of hazardous substances on the following categories of potentially responsible parties (PRPs): current owners and operators of facilities,[3] prior owners and operators of such facilities,[4] persons who arrange for the disposal or transportation for disposal of hazardous substances,[5] and those who transport hazardous substances for disposal.[6] Liability for response costs extends to all costs of removal or remedial action undertaken by federal, state or Indian tribe governments that aren't inconsistent with the National Contingency Plan (NCP),[7] and any other necessary response costs incurred by private parties consistent with the NCP.[8] Section 107 creates a strict liability regime[9] with limited statutory act of God, act of war and act of third party defenses.[10]

CERCLA Section 107(a)(4)(D) permits recovery of ''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.''[11] CERCLA defines natural resources as ''land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, any foreign government, [or] any Indian tribe.''[12] Natural resource damage recoveries are limited to costs to restore, replace or acquire the equivalent of the damaged resources.[13]

Under CERCLA's statutory language, only governmental ''trustees'' are permitted to recover NRD, i.e., (1) the United States Government; (2) any state if the natural resources are within, belong to, are controlled by or managed by the state; and (3) any Indian tribe if the natural resources belong to, are controlled by, managed by or held in trust for the Indian tribe.[14] Courts uniformly have held that private parties don't have standing to sue to recover NRD.[15]

The scope of assessed damages can vary wildly depending upon the extent of contamination and the impact to natural resources. On the relatively low end, for example, Honeywell agreed to pay $400,000 to settle NRD claims relating to polychlorinated biphenyl (PCB) contamination from the Richardson Hill Road Landfill Superfund Site in Delaware County, N.Y.[16] Pharmacia and Bayer CropScience agreed to a $4.25 million settlement to resolve NRD claims relating to arsenic and chromium contamination in Woburn, Mass.[17]

At the extreme end, trustees have requested NRD awards in the multi-billions. In one groundwater contamination case, for example, the trustee initially demanded $4 billion for NRD, which then fell to $1.2 billion, ''including $609,000,000 as the cost of water rights to nearly a quarter-million acre-feet of potable water that likely will never be purchased, and up to $609,000,000 for the construction of a 289,500 acre-foot 'replacement' surface storage reservoir that likely will

[3] 42 U.S.C. § 9607(a)(1).
[4] 42 U.S.C. § 9607(a)(2).
[5] 42 U.S.C. § 9607(a)(3).
[6] 42 U.S.C. § 9607(a)(4).
[7] 42 U.S.C. § 9607(a)(4)(A).
[8] 42 U.S.C. § 9607(a)(4)(B). CERCLA Section 107(a) allows private parties to recover response costs, including those incurred during a self-initiated environmental cleanup. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 138-39, 64 ERC 1385, 2007 BL 30716 (2007).
[9] *See, e.g., Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897, 37 ERC 1601 (5th Cir. 1993) (''CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm.'').
[10] 42 U.S.C. § 9607(b). Additional statutory defenses to Section 107 liability include defenses for contiguous landowners (Section 107(q)), bona fide prospective purchasers (Section 107(r)), secured creditors (Section 101(20)(E)), response action contractors (Section 119), as well as the statute of limitations (Section 113(g)) and contribution protection defenses (Section 113(f)(2)).
[11] 42 U.S.C. § 9607(a)(4)(C).
[12] 42 U.S.C. § 9601(16).
[13] 42 U.S.C. § 9607(f)(1). Department of Interior regulations set forth two basic methodologies to assess NRD costs. The first, Type A, is a simplified procedure where a handful of data points are entered into a computer model. *See* 43 C.F.R. § 11.40 et seq. The Type B methodology is more detailed and used in complex settings where the simplified Type A methodology wouldn't assess NRD adequately. *See* 43 C.F.R. § 11.60 et seq.
[14] *Id.*
[15] *See, e.g., NCR Corp.*, 768 F.3d at 709 (''Private parties lack standing to bring natural resource damages claims under Section 107; such actions can be initiated only by the federal government or a state or tribal government for lands in that government's possession or control, or held in public trust.''), *reh'g denied* (Nov. 5, 2014); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095, 1114, 45 ERC 1929 (D.C. Cir. 1998) (''It is true that CERCLA doesn't permit private parties to seek recovery for damages to natural resources held in trust by the federal, state or tribal governments''); *Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 680-81 (D.N.J. 1996) (municipality that isn't an NRD trustee lacks standing to assert a Section 107 claim for NRD or seek declaratory judgment for future NRD claims).
[16] *See* https://www.doi.gov/restoration/news/settlement-richardson-hill-road-landfill; *see also* Consent Decree at 9, *United States v. Alcoa, Inc.*, No. 7:13-cv-337-NAM-TWD (N.D.N.Y. Mar. 27, 2013) (Alcoa agreeing to pay $933,950 in past NRD assessment costs relating to polycyclic aromatic hydrocarbon, PCB, volatile organic compound, dibenzofuran, cyanide, and fluoride contamination at sites in New York).
[17] *See* http://www.justice.gov/opa/pr/companies-agree-425-million-natural-resource-damages-settlement-industri-plex-superfund-site; *see also* http://www.justice.gov/usao-sdny/pr/united-states-announces-55-million-settlement-gm-resolve-natural-resource-damage-claims (the trust responsible for the General Motors bankruptcy entered a settlement for $5.5 million in NRD relating to PCB contamination at the Onondaga Lake superfund site).

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never be built.''[18] And BP recently agreed to pay $7.1 billion to resolve NRD claims from the Deepwater Horizon oil spill.[19]

(2) CERCLA Section 113(f) Contribution Actions

Section 113(f) permits any PRP to seek contribution from any other PRP ''during or following any civil action'' under Section 106 or Section 107(a).[20] It also permits a PRP who has entered into an administrative or judicially approved settlement resolving its liability to the U.S. or a state to seek contribution from other PRPs.[21] If a party hasn't been sued under Section 107, subject to an order or enforcement action under Section 106, subject to an administrative or judicial enforcement action, or settled with the U.S. or a state, then it can cannot recoup response costs under Section 113(f). Section 113(f) only provides contribution, which exists solely among joint tortfeasors for the same harm.

In *Cooper Industries v. Aviall Services Inc.*, the Supreme Court held that a private party who hadn't been sued under CERCLA Section 106 or Section 107(a) couldn't bring a contribution action for remediation costs against other PRPs under Section 113(f).[22] The court also concluded that a PRP subject to a government enforcement action couldn't bring suit under Section 107 but is limited to a Section 113(f) contribution claim.[23] The court then held in *United States v. Atlantic Research Corp.* that a private party could bring a Section 107 action to recover costs it had incurred in voluntarily cleaning up a site (although it couldn't obtain reimbursement for response costs paid as part of a settlement or judgment).[24]

In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors the court deems appropriate.[25] By comparison, equity plays no role in an action under Section 107(a) because of its strict-liability nature. Note, though, that when there are multiple PRPs in a Section 107(a) action, the PRPs can assert counterclaims or cross claims under Section 113(f), which brings an equitable analysis into play[26] so the joint and several liability regime of Section 107 doesn't result in an inequitable allocation of liability.[27]

Section 113(f) doesn't specifically address whether a private party can recover NRD, as opposed to response costs, in contribution. The provision does state, however, that a PRP can seek contribution from any other PRP who is liable or potentially liable under Section 107(a), and Section 107(a) permits the recovery of NRD.

(b) Seventh Circuit Finds NRD Contribution Available Under Section 113(f)

NCR Corp. v. George A. Whiting Paper Co. involved PCB contamination in Wisconsin's Lower Fox River originating from a carbonless copy paper manufacturing plant NCR operated and other paper and recycling mills along the river.[28] As part of the manufacturing process, the carbonless copy paper was coated with an emulsion of Aroclor, a PCB-based mixture NCR used from 1954-1971. PCBs were lost during the production cycle, mixed with wastewater and then released into the river. The plant also sold ''broke,'' waste scraps from the paper production cycle, to recycling mills that processed the broke into new paper. During the recycling process, the mills separated usable paper fibers and dumped the resulting waste product (which included PCBs) into the river.

The Environmental Protection Agency and Wisconsin Department of Natural Resources targeted the river for remediation in 1998, and cleanup commenced. Following the EPA's issuance of a unilateral administrative order in 2007 concerning certain segments of the river, NCR assumed the bulk of remediation costs going forward. NCR then brought Section 107 and Section 113 claims against the recycling mills that also released PCBs to the river (although it was ultimately limited to a Section 113 action). The Fox River PRP Group, a coalition of PRP recycling mills (PRP Group), asserted a counterclaim against NCR to recover $9 million in funds the group paid pursuant to a settlement with the state of Wisconsin to assess natural resource damages. Ultimately, the government didn't respond to, comment on or use the PRP Group's NRD assessment.

On motions, the district court first held that as liable private parties, the PRP Group members couldn't assert

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[18] See *N.M. v. Gen. Elec. Co.*, 467 F.3d 1223, 1237, 63 ERC 1225 (10th Cir. 2006) (affirming summary judgment for the defendants).

[19] *See* http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html.

[20] 42 U.S.C. § 9613(f)(1). Section 106 of CERCLA, 42 U.S.C. § 9606, allows the Environmental Protection Agency to issue a unilateral administrative order requiring a PRP to abate an imminent and substantial endangerment arising from an actual or threatened hazardous substance release.

[21] 42 U.S.C. § 9613(f)(3)(B). Under Section 9613(f)(2), if a PRP enters into an administrative or judicially approved settlement, that PRP cannot be sued in contribution for matters covered by the settlement agreement.

[22] 543 U.S. 157, 165-66, 59 ERC 1545 (2004).

[23] *Id.* (''Section 113(f)(1) does not authorize Aviall's suit. The first sentence, the enabling clause that establishes the right of contribution, provides: 'Any person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title.' The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action.'' (quoting 42 U.S.C. § 9613(f)(1) (emphasis in original))).

[24] 551 U.S. 128, 138-39 (2007).

[25] 42 U.S.C. § 9613(f)(1).

[26] The equitable factors for apportioning liability can vary from case to case but often center around the ''Gore factors,'' which were suggested in a failed 1980 superfund amendment by then-Congressman Al Gore. *See, e.g., Exxon Mobil Corp. v. United States*, No. CIV.A. H-10-2386, 2015 BL 177310, at *44 (S.D. Tex. June 4, 2015) (listing the Gore factors).

[27] *See, e.g., Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 122, 79 ERC 1311, 2014 BL 256128 (D.D.C. 2014) (''A plaintiff who is also a PRP theoretically may avoid CERCLA liability altogether by imposing joint and several liability on a PRP-defendant under CERCLA § 107(a). However, the PRP-defendant can 'blunt any inequitable distribution of costs by filing a § 113(f) counterclaim' against the PRP-plaintiff. In such instances—as here—a court must determine the allocation of liabilities between the PRPs pursuant to CERCLA § 113(f)(1).'' (citation omitted) (quoting *Atl. Research Corp.*, 551 U.S. at 140)).

[28] 768 F.3d 682, 686 (7th Cir. 2014).

a Section 107(a) claim against NCR.[29] The court clarified, however, that private parties have standing under Section 113(f) to recover costs of NRD in contribution from other PRPs.[30] The court found after a bench trial that the PRP Group could recoup from NCR its NRD assessment cost ''overpayments'' (i.e., its NRD costs over and above its equitable share). The court rested on its prior ruling that NRD could be recovered under Section 113 and rejected NCR's argument that the NRD costs were ''unnecessary'' because the government didn't rely on the NRD assessment the costs funded.[31] The court also addressed whether non-compliance with NRD assessment regulations nullified damages:

> [NCR] cite[s] regulations governing best procedures for such assessments, but I am not satisfied that a PRP's effort to recover overpayments for NRD costs is an invitation to grade the efficacy of an NRD assessment, so long as the assessment was a *bona fide* effort. In other words, the question should be whether the assessment was a reasonable effort and expense undertaken at the time and under the circumstances, rather than an *ex post facto* review of those procedures some fifteen years later. The regulations cited by Plaintiffs, 43 C.F.R. § 11.10, are not mandatory, and thus the fact that the NRD assessment did not strictly comply with the regulation should not be fatal to the recovery of those expenses.[32]

On appeal, NCR did not challenge the district court's decision that a PRP can recover NRD costs in a Section 113(f) contribution action.[33] The court held that ''the question whether a party may *initiate* a Section 107(a) action for natural resource damages is separate from the question whether a party *subject to* a Section 107(a) action can then bring a Section 113(f) action for contribution based on its liability for natural resources damages.''[34] In other words, although the PRP Group members could not bring a Section 107 cost recovery action for NRD, because they were PRPs subject to Section 107 action they could bring a contribution claim against NCR, including a claim based on NRD liability. Even though NCR did not challenge the facial propriety of contribution for NRD under Section 113(f), the court opined that contribution was available: ''[S]ection 113(f) makes contribution available based on a party's being liable under Section 107(a); it does not make contribution contingent on the type of Section 107 damages at issue.''[35]

The court also rejected NCR's argument that NRD contribution was unavailable because Section 107(a)(4)(C), which premises liability on damages ''resulting from'' a release, imposes a causation requirement that must be met before a party can be held liable for NRD. That argument, the court stated, ''might have merit if the question were whether NCR should be held directly liable to the government for natural resource damages under section 107(a). . . . Here, the causation requirement of section 107(a)(4)(C) was satisfied when the *defendants* were found liable for natural resource damages. As liable parties under section 107, they could then seek contribution from NCR, a fellow PRP.''[36] The Seventh Circuit then remanded the case for further proceedings consistent with its order.[37]

(c) Other Case Law on Availability of NRD Contribution

Apart from the Seventh Circuit's *NCR Corp.* opinion, there is little case law addressing whether NRD are recoverable under CERCLA Section 113(f). In *Champion Laboratories, Inc. v. Metex Corp.*,[38] as one example, the plaintiff entered into a judicially approved settlement with the New Jersey Department of Environmental Protection for NRD and brought a contribution action under Section 113(f)(3)(B) against other PRPs to recover those costs. The court denied the defendants' Rule 12(b)(6) motion to dismiss, stating that the plaintiff had alleged sufficient facts at that stage of the litigation. The court acknowledged that a ''technical reading'' limited Section 113(f)(3)(B) to costs of ''response actions,'' which don't appear to include NRD. Nevertheless, the court concluded that the plaintiff's settlement with the NJDEP resolved its CERCLA liability and might have included response costs, and the plaintiff therefore could proceed with a contribution claim.[39] The court didn't express any opinion on the ultimate viability of the contribution claim.

Another court evaluating a PRP's insurers' motion to intervene in an action to approve a consent decree with a separate group of PRPs stated without elaboration that, ''[h]aving paid for the cleanup and settled government claims for response costs and natural resource damages, the [Plaintiff PRP] Group may seek contribution from [the defendant PRP.]''[40] And in *Asarco LLC v. NL Indus., Inc.*,[41] Asarco, while in bankruptcy, settled federal and state CERCLA claims, including claims for response costs and NRD. Asarco sought to recover contribution for all of its payments from other PRPs. The court stayed the action until the EPA chose a remedy but didn't address the validity of the NRD contribution claims. On May 22, 2015, the court granted Union Pacific's statute of limitations motion for summary judg-

[29] *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1045, 68 ERC 1404, 2008 BL 173261 (E.D. Wis. 2008).

[30] *See Appleton Papers, Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2011 BL 252699, at *3 (E.D. Wis. Sept. 30, 2011).

[31] *See Appleton Papers, Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2012 BL 165709, at *15 (E.D. Wis. July 3, 2012).

[32] *Id.* at *14, 15.

[33] *NCR Corp.*, 768 F.3d at 709.

[34] *Id.* (emphasis in original).

[35] *Id.*

[36] *Id.* at 710 (emphasis in original).

[37] In December 2014, the trial court entered a scheduling order with fact discovery concluding in September 2015 and expert discovery concluding in January 2016. *See* Order at 1-2, *Appvion, Inc. v. P.H. Glatfelter Co.*, No. 08-C-16 (E.D. Wis. Dec. 10, 2014). In March 2015, the trial court granted one of the defendant's motions for reconsideration of the 2011 ruling and held that NCR was liable for PCB contamination at one of the operable units, but it did not address NRD. *See Appvion, Inc. v. P.H. Glatfelter Co.*, No. 08-C-16, 2015 BL 57090 (E.D. Wis. Mar. 3, 2015).

[38] No. 02-5284 (WHW), 2008 BL 83557 (D.N.J. Apr. 21, 2008).

[39] *Id.* at *6.

[40] *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 85 (D. Me. 1988).

[41] No. 4:11-CV-00864-JAR, 2013 BL 63037 (E.D. Mo. Mar. 11, 2013).

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ment on Asarco's contribution claims, but again it didn't specifically address natural resource damages.[42]

Interestingly, most CERCLA consent decrees with the EPA provide the settling party with contribution protection, including for NRD.[43] While this is likely just a simple recognition that a PRP is statutorily exempt from contribution actions for matters covered by an administrative or judicially approved settlement,[44] it also may signal the government's belief that NRD could be recovered in contribution.

(d) Should Private Parties Be Allowed to Bring NRD Contribution Claims?

The *NCR* decision opens the door to PRPs seeking recovery of costs they have expended for NRD. How the opinion should be viewed going forward, and whether other courts should follow the Seventh Circuit's lead, is a matter of debate.

On the pro-contribution side of the analysis, Section 113(f) doesn't expressly bar private parties from recovering NRD. This silence could mean, as a matter of statutory construction, that Congress didn't expressly include NRD claims within the scope of Section 113(f) because such claims would be included in the purposeful breadth of the provision.[45] From a policy perspective, allowing contribution furthers one of the primary purposes of CERCLA's NRD provision, which is advancing the goals of restoration or replacement of natural resources.[46] It also is consistent with the CERCLA scheme of joint and several liability. Damages to natural resources will be restored more quickly because the majority of restoration funds will be available sooner, leaving PRPs free to decide which of them was assessed damages unfairly at a later time. A right of contribution thus advances the goal of making those who have some equitable responsibility for contamination pay the costs of restoration. And as a practical matter, PRPs are more likely to enter into consent decrees with trustees for NRD if they are allowed to recover at least a portion of those payments from third parties, again advancing CERCLA's goal of natural resources restoration.

From an anti-contribution perspective, CERCLA's plain language doesn't provide a right to contribution for NRD payments. Section 113 addresses only contribution for response costs.[47] Statutory construction rules could be applied to argue that the exclusion of NRD from the provision was purposeful, and NRD isn't to be read into Section 113(f).[48] As a matter of policy, private parties aren't permitted to seek NRD under Section 107.[49] Allowing a private party to seek contribution for NRD under Section 107 effectively allows PRPs to obtain NRD indirectly when they are barred from doing so directly. In such a regime, the government wouldn't have an incentive to seek NRD damages from all PRPs. It instead could focus on one party and put the burden on that party to redistribute damages.

In addition, recovery of NRD requires some showing of causation.[50] The *NCR Corp.* opinion ignored that requirement in allowing an NRD contribution action.[51] A PRP showing only that it has voluntarily made payments for unspecified natural resource damages hasn't established that those payments were for injury or damage ''resulting from'' the other PRP's release, and shouldn't be allowed to recover NRD contribution.

Allowing a private PRP contribution action also bypasses the Department of Interior regulatory assessment and damages requirements. A court deciding a trustee's NRD action would consider the trustee's compliance with those regulations. According to the *NCR* opinion, the plaintiff in a private action isn't required to

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[42] *See Asarco LLC v. NL Indus., Inc.*, No. 4:11-CV-00864-JAR, 81 ERC 1147, 2015 BL 162695 (E.D. Mo. May 22, 2015).

[43] *See, e.g.*, Consent Decree ¶ 26, *United States v. Magellan Ammonia Pipeline, L.P.*, No. 08-cv-02532 (D. Kan. Dec. 10, 2008) (''The Parties agree, and by entering this Consent Decree, this Court hereby finds, that the Settling Defendants are entitled as of the Effective Date, to protection from contribution actions or claims provided by Section 113 (f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or other applicable law for 'matters addressed' by this Consent Decree. The 'matters addressed' in this Consent Decree are all Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release incurred by the United States, the State of Kansas or the Settling Defendants.'').

[44] *See* 42 U.S.C. § 9613(f)(2) (''A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.'').

[45] *See Burns v. United States*, 501 U.S. 129, 136 (1991) (''As one court has aptly put it, '[n]ot every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.'' (quoting *Ill. Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983))).

[46] See *Ohio v. Dep't of the Interior*, 880 F.2d 432, 458, 30 ERC 1001 (D.C. Cir. 1989) (''the 'primary purpose' of CERCLA's natural resource damages provisions was restoration or replacement of natural resources'').

[47] *See* 42 U.S.C. § 9613(f)(1) (''In resolving contribution claims, the court may allocate *response costs* among liable parties using such equitable factors as the court determines are appropriate.'' (emphasis added)); *id.* § 9613(f)(3)(B) (''A person who has resolved its liability to the United States . . . for some or all of a *response action* or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution . . . .''(emphasis added)); *see also Atl. Research Corp.*, 551 U.S. at 139 (''[Section] 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a) . . . .'').

[48] *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (''Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.'').

[49] *See, e.g., Nat'l Ass'n of Mfrs.*, 134 F.3d at 1114.

[50] *See* 42 U.S.C. § 9607(a)(4)(C) (''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'' (emphasis added)); see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1154 n.7, 30 ERC 1599, 30 ERC 1649 (1st Cir. 1989) (''there must be a connection between the defendant and the damages to the natural resources''); *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1102-03, 57 ERC 1610 (D. Idaho 2003) (elements of a claim for NRD include ''that the injury to natural resources 'resulted from' a release of a hazardous substance''); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674, 24 ERC 1524 (D. Idaho 1986) (''[t]he proof'' in a natural resource damages claim ''must include a causal link between releases and . . . damages which flowed therefrom'').

[51] *See* 768 F.3d at 710.

show compliance with regulations but only that it made a *bona fide* effort to comply.[52] While not discussing NRD specifically, the court also noted that payments made pursuant to a consent decree presumptively are consistent with the NCP.[53] Thus, although a trustee must show compliance with the regulations or otherwise demonstrate recoverability of NRD, for a private party a proffer of an approved consent decree may be sufficient to allow contribution recovery.

Finally, if contribution for NRD is allowable, PRPs also may be more likely to settle for unreasonable amounts with NRD trustees knowing they can bring later contribution actions against other PRPs. A PRP could settle a case that includes a percentage allocation of the overall settlement amount to NRD with no assessment being performed to justify the NRD amount. Any contribution action for NRD then would be premised on the speculative amount the settling parties determined, with no requirement of proof the NRD liability and damages elements were met.

(e) Conclusion

CERCLA's primary goal is to ensure those responsible for environmental contamination are forced to bear the costs to return the environment to its pre-contamination state. The *NCR Corporation* opinion ostensibly furthers that goal with respect to natural resource damages. The opinion either reconfirms what already was understood about CERCLA contribution, or it plows new ground in allowing PRPs to bring claims under Section 113 to recover NRD costs. Pending further clarification by the courts, whether a PRP views the opinion favorably will depend entirely on its particular litigation posture. Has the PRP paid significant NRD damages? If so, it would welcome the opportunity to bring a contribution claim against other PRPs. Is the PRP a target of a contribution action? In that case it likely doesn't want to be responsible for any further damages. In either scenario, PRPs are well advised to consider the best arguments to further their individual goals in any NRD Section 113 contribution action.

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The opinions expressed here do not represent those of Bloomberg BNA, which welcomes other points of view.

[52] *See Appleton Papers*, 2012 BL 165709, at *14.
[53] *Id.* at *16.

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