Protecting the Passaic: A Call to Citizen Action†

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The emergence of environmental protection laws during the 1970s was an implied, if not an express, statement that government will take an active role in protecting its citizens from pollution, contamination, and other threats to the public health, safety, and welfare.[1] In New Jersey, a prime example of these dangers, caused by sheer recklessness and disregard for the public health, is the Diamond Alkali/Diamond Shamrock (Diamond) site in the Ironbound Section of Newark.[2] Years of contamination at Diamond's 80 Lister Avenue plant have added to the "witches' brew" of toxic contaminants that has earned the lower Passaic River the dubious distinction

† Editor's note: The symposium that gave rise to this article occurred on March 30, 1998. At that time, the United States Environmental Protection Agency (EPA) was still considering how the dioxin contamination at the Diamond Alkali Superfund Site would be remedied. Prior to the publication of this journal, however, the EPA gave final approval to a 1990 consent decree, which permits the on-site burial of dioxin waste at the Diamond Alkali site. *See* Tom Johnson, *Dioxin Site in Newark to be Sealed Underground*, STAR-LEDGER (Newark), Aug. 5, 1998, at 15.

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[1] *See* Township of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 91, 504 A.2d 19, 24-25 (App. Div. 1986) (citing N.J. STAT. ANN. § 58:10-23.11a (West 1992)).

[2] *See* Ellen K. Silbergeld et al., *Dioxin at Diamond: A Case Study in Occupational/Environmental Exposure*, *in* TOXIC CIRCLES 55, 55 (Helen E. Sheehan & Richard P. Wedeen eds., 1993). The Ironbound, or "Down-Neck," area of Newark is a stretch of land that is adjacent to a bend in the Passaic River as it flows east then south into the Newark Bay. *See id.* The area has long been home to industries such as foundries, mills, lumberyards, and breweries. *See id.* at 56. Today, the area is the thriving enclave for Newark's Portuguese community, its businesses, and popular eateries. *See* George E. Jordan & Barry Carter, *Contamination Won't Stop River Development: It's Full Speed Ahead on Newark Waterfront*, STAR-LEDGER (Newark), Apr. 7, 1998, at 1.

of being labeled one of the nation's twenty most-threatened rivers.[3] Today, the City of Newark is poised to revive its Downtown/Waterfront area, and the success of this effort depends upon the success of cleaning up and restoring the natural beauty of the Passaic River.[4]

This article will discuss the history and extent of the environmental damage done to the Passaic River. It will explain why federal environmental laws are ineffective for the recovery of natural resource damages to the river. This article then will explore the avenues available for the recovery of natural resource damages to the Passaic River under the New Jersey Environmental Rights Act[5] and the Spill Compensation and Control Act.[6]

I. THE PLIGHT OF THE PASSAIC

"The poisoning of the Passaic River has been slow, ugly and sure."[7] This is how one journalist has described the plight of North-

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[3] *See* Tom Johnson, *Overflowing with Pollution: Green Group Targets Passaic River*, STAR-LEDGER (Newark) Apr. 6, 1998, at 1. The Diamond Alkali Company operated an agricultural chemicals manufacturing plant at 80 Lister Avenue from 1957-1970. *See* Ironbound Health Rights Advisory Comm'n. v. Diamond Shamrock Chem. Co., 216 N.J. Super. 166, 168, 523 A.2d 250, 251 (App. Div. 1987) [hereinafter I.H.R.A.C.]. Between 1951 and 1969, the site served as a manufacturing plant for the defoliant chemical Agent Orange. *See* Silbergeld, *supra* note 2, at 56. A common by product of the various operations at the plant was 2,3,7,8 tetrachlodibenzo-p-dioxin (dioxin). *See id.* at 59. In 1983, dioxin was discovered in the Passaic and in the soil at and around the plant – and shortly thereafter the Diamond Shamrock plant was designated as a federal Superfund site. *See* Rudy Larini, *Officials Warn of Tainted-Fish Danger in the Passaic; High Dioxin Levels Found in Sediment from the Riverbed*, STAR-LEDGER (Newark), May 18, 1996, at 8. Subsequent testing of the river has found high concentrations of mercury, DDT, dioxin, and other chemicals along the lower Passaic River. *See id.*

[4] *See* Jordan & Carter, *supra* note 2, at 1. The opening of the New Jersey Performing Arts Center, the construction of a minor league ball park for the Newark Bears independent baseball team, and a proposed New Jersey Transit Rail-link from these sites to Penn Station constitute a three-part plan to anchor the city's downtown revitalization. *See* Diane C. Walsh, *Stepping Up to the Plate of Success; Newark Banks on Ballpark for Revitalization*, STAR-LEDGER (Newark), April 8, 1998, at 17. Along the river, plans for a proposed riverfront esplanade are underway with a national hotel chain and office building developer as part of the negotiations. *See* Jordan & Carter, *supra* note 2, at 1. However, the Commissioner of the New Jersey Department of Environmental Protection, Robert Shinn, has warned that, "No one's going to invest hundreds of millions of dollars on a waterfront that's polluted." *Id.* That warning, echoed by environmentalists, requires that the cleanup of the lower Passaic become a priority if developers and investors are to be lured to New Jersey's largest city. *See id.*

[5] N.J. STAT. ANN. §§ 2A:35A-1 to -14 (West 1987 & Supp. 1998).

[6] N.J. STAT ANN. §§ 58:10-23.11 to .24 (West 1992 & Supp. 1998).

[7] Johnson, *supra* note 3, at 1.

ern New Jersey's longest river. Since Robert Treat and his band of Puritans landed in Newark in 1666, the Passaic has been a focal point of commerce and industrialization in New Jersey's largest city. Due to its prime location, evidenced by the confluence of rivers, railways and highways in the area, the Ironbound section of Newark developed around its commercial base as a neighborhood where workers lived cheek by jowl with industry and its externalities.[8]

This close arrangement between workers and industry was the backdrop for the environmental catastrophe that was to affect the river and its neighborhood some three hundred years after Newark was settled. From 1951 to 1969, Diamond operated an agricultural chemical plant.[9] Diamond Alkali produced primarily hexachlorobenzene and trichlorophenol, 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), and 2,4-dichlorophenoxyacetic acid (2,4-D), a mixture of which was purchased throughout the 1960s by the Department of Defense to be used as the defoliant Agent Orange.[10] The manufacture of these chemicals yielded the toxic by-product dioxin, or 2,3,7,8-tetrachlorodibenszo-p-dioxin (TCDD). The amount of dioxin produced was in direct correlation to the temperature of the chemical reaction involved in the manufacture of the various chemicals.[11]

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[8] *See* Silbergeld, *supra* note 2, at 64-65. The Ironbound area of Newark contains a concentration of factories and industry interspersed with residential neighborhoods. *See id.* This uneasy balance caused community leaders, shortly after 1900, to comment that, "The air is pregnant with dangerous acid fumes, smoke, and "unforgettable odors," of the manufacturers of the district, of the lowly looking tenements, of the dilapidated looking homes, of the saloons, the dance halls, the clubs and the pool rooms and the moving picture theaters." *Id.* (citing JOSEPH A. RONEY, UPLIFTING DOWN-NECK 15 (2d ed. 1912)). Not much has changed in the neighborhood; as the Ironbound was typical of the social ills surrounding nineteenth century industrialization, it remains an unfortunate example of twentieth century environmental degradation.

[9] *See* I.H.R.A.C. v. Diamond Shamrock Chem. Co., 216 N.J. Super. 166, 168, 523 A.2d 250, 251 (App. Div. 1987). The plant, at 80 Lister Avenue, Newark, was an existing agricultural chemical facility when purchased by Diamond Alkali/Diamond Shamrock (Diamond) from Kolker Chemical Works, Inc. *See* Silbergeld, *supra* note 2, at 59.

[10] *See* Silbergeld, *supra* note 2, at 59. Production of Agent Orange varied throughout the 1960s, but ultimately the plant became one of the largest production facilities for the chemical in the United States. *See id.*

[11] *See id.* It was general knowledge among industry chemists by the 1950s that the temperature of the reaction had to be below 155 degrees Celcius to reduce the creation of the unwanted byproduct. *See id.* In fact, Diamond had specific knowledge of this information in 1959, according to the company's records. *See id.* Diamond was told by a German chemical manufacturer that dioxin was affecting the health of workers at its European plant and that the reaction temperature could control the formation of the byproduct. *See* Diamond Shamrock Chem. Co. v. Aetna, 258 N.J. Super. 167, 183, 609 A.2d 440, 447 (App. Div. 1992).

Throughout the course of production at the Lister Avenue plant, methods of treatment and control of waste and byproducts were primitive.[12] It was not until thirteen years after Diamond sold the property, however, that the scope of contamination in and around the plant would become known. In 1983, the New Jersey Department of Environmental Protection (DEP) and the United States Environmental Protection Agency (EPA) conducted tests of the soil, showing that the levels of dioxin on the site were as high as 51,000 parts per billion and 1000 parts per billion throughout the nearby residential and business areas.[13] Governor Thomas Kean declared a state of emergency in the vicinity of 80 Lister Avenue on June 2, 1983.[14]

II. DAMAGE FROM DIAMOND

Since the contamination at Diamond first became news in the early 1980s, there have been several lawsuits involving the environmental and health problems associated with the Diamond site and

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Despite this knowledge, Diamond continued to form dioxin at its Lister Avenue plant until its closure in 1969. *See* Silbergeld, *supra* note 2, at 61. The company determined that reducing the temperature during the reaction would decrease production efficiency. *See Diamond Shamrock*, 258 N.J. Super. at 183, 609 A.2d at 447. In February 1960, excessive temperature in the trichlorophenol autoclave during a reaction caused an explosion that killed one employee and destroyed the building. *See* Silbergeld, *supra* note 2, at 62. Other instances of excessive heat during reactions were documented and it is likely that each released some toxic substances into the atmosphere. *See id.* at 62-63.

[12] *See* Silbergeld, *supra* note 2, at 61. The Newark plant had no air emission controls until 1963. *See id.* Wastewater regularly flowed into the municipal sewers and into the river without treatment, and numerous acid spills into the river were reported in the 1950s and 1960s, estimated at up to 30 thousand gallons per day. *See id.* at 61-62. Former plant employees have testified that Diamond's waste disposal policy "amounted to 'dumping everything' into the Passaic River." *Diamond Shamrock*, 258 N.J. Super. at 183, 609 A.2d at 448. In fact, until 1956 all chemical waste products were discharged directly or eventually into the Passaic. *See id.* At one point, employees were ordered to wade into the river to "chop up" DDT deposits which had accumulated in the river so that they would not be seen by passers-by. *See id.* at 184, 609 A.2d at 448.

[13] *See I.H.R.A.C.*, 216 N.J. Super. at 169, 523 A.2d at 252. Dioxin concentrations in soil of one part per billion constitute an "unacceptable risk to human health." *Id.*

[14] *See id.* Thereafter, the Department of Environmental Protection (DEP) was ordered to "engage in emergency measures 'necessary to fully and adequately protect the health, safety and welfare of New Jersey citizens.'" *Diamond Shamrock*, 258 N.J. Super. at 186, 609 A.2d at 449. The Governor ordered restrictions on the outdoor display of food and other consumer goods, residential streets were vacuumed and cleaned, and train traffic in the area was prohibited. *See I.H.R.A.C.*, 216 N.J. Super. at 169, 523 A.2d at 252.

the lower Passaic River.[15] Fishing and crabbing bans have been instituted.[16] Millions of dollars have been spent in an effort to remediate the damage done to the river.[17] Costs associated with dredging the Newark Bay Estuary, into which the Passaic flows, have been and continue to be higher than expected due to the contamination.[18] The lower Passaic has been labeled one of America's filthiest rivers.[19] And now, the City of Newark is poised to invigorate its downtown area using the waterfront as a main ingredient.[20]

The damage to the Passaic has caused fishing and crabbing to be banned.[21] The high levels of dioxin, among other contaminants, found in the riverbed sediments make the seafood in the river unfit for human consumption. While it is certain that some fishermen continue to eat their catches from the Passaic, the harm, if any, caused by the consumption of this seafood is difficult to ascertain.[22] Equally difficult to determine is the loss of recreational opportunity due to the gross pollution of the river. During the past twenty years,

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[15] *See, e.g.*, *I.H.R.A.C.*, 216 N.J. Super. 166, 523 A.2d 250 (App. Div. 1987) (stating that a citizen advocacy group from Newark's Ironbound neighborhood sought to compel the State to develop a clean-up strategy); *Diamond Shamrock*, 258 N.J. Super. 167, 609 A.2d 440 (App. Div. 1992) (revealing that Diamond Shamrock sought coverage from its insurers for its liabilities associated with environmental damage surrounding its plant, not including damage to the river, and its part of a settlement with Vietnam War veterans arising from exposure to Agent Orange); Clean Ocean Action v. York, 861 F. Supp. 1203 (D.N.J. 1994), *aff'd in part, rev'd in part*, 57 F.3d 328 (3d Cir. 1995) (explaining how environmental organizations and fishing and boating interests challenged the issuance of a dredging permit to the Port Authority of New York and New Jersey (Port Authority) allowing the dumping of contaminated materials from the Passaic at an area known as the Mud Dump in the Atlantic Ocean off the coast of New Jersey).

[16] *See* Larini, *supra* note 3, at 8. Local EPA administrator Jeanne M. Fox stated, "I can't say this strongly enough, taking and eating seafood from these waters is just not a safe thing to do." *Id.* Since the first ban in 1982, fisherman routinely ignore the bilingual warnings placed around the riverbank advising against eating the fish and crabs in the river. *See id.*; *see also* Johnson, *supra* note 3.

[17] *See* Johnson, *supra* note 3, at 1. Billions of dollars have been invested into the cleanup and preservation of the river, primarily through upgrading sewage treatment facilities along the river. *See id.* Upper portions of the 90-mile river have indeed seen improved environmental and ecological conditions. *See id.*

[18] *See id.*

[19] *See* Larini, *supra* note 3, at 8.

[20] *See* Jordan & Carter, *supra* note 2, at 1. Construction is planned to begin this year on a $75 million waterfront esplanade. *See id.* The U.S. Army Corps of Engineers is overseeing the design and construction of what will become known as the Joseph Minish Waterfront Park and Historic Area, consisting of a two-mile esplanade, grassy areas, and landscaped plazas. *See id.*

[21] *See* Johnson, *supra* note 3, at 1.

[22] *See* Larini, *supra* note 3, at 8.

the Passaic has provided little, if any, recreation or entertainment to the several communities surrounding its lower six miles.

Furthermore, the $100 million fishing industry along the Jersey Shore has been impacted by the contamination of the river because it drains into Newark Bay. That industry's concerns peaked in 1993, when contaminated dredged materials from the bay were deposited into the ocean at the Mud Dump located six miles off the coast of Sandy Hook, New Jersey.[23] Environmental advocates and fishing and recreational interests along the Jersey Shore claimed that depositing the contaminated materials at the Mud Dump would endanger the viability of those industries as well as the beaches of the Jersey Shore.[24]

The Port Authority of New York and New Jersey (Port Authority) is constantly faced with the problem of having to deepen and widen its channels and berths to accommodate the ever larger ships entering the East Coast's busiest port.[25] The presence of contaminants in the dredged sediment has caused the disposal costs borne by the Port Authority to increase from $5 per cubic yard for clean sediment to anywhere from $35-$100 per cubic yard for the contaminated sediment.[26] In addition to this added expense, the Port Authority has faced delays in dredging, lost cargo, and legal disputes over the disposal of contaminants.[27] Each of these additional expenses are attributable to the contamination found in Newark Bay.

In addition, a $20 billion waterfront industry, anchored by the busiest port on the East Coast, the Port of Elizabeth, has felt the

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[23] *See* Clean Ocean Action v. York, 861 F. Supp. 1203, 1205-06 (D.N.J. 1994), *aff'd in part, rev'd in part,* 57 F.3d 328 (3d Cir. 1995). In May 1993, the Army Corps of Engineers issued a permit to the Port Authority allowing the dredging of up to 500,000 cubic yards of material from Port Elizabeth/Newark. *See Clean Ocean Action,* 57 F.3d at 330. The permit allowed the disposal of this material at the Mud Dump in the Atlantic Ocean off the coast of Sandy Hook, New Jersey. *See id.* However, this material contained dioxin, and local conservation, fishing, boating, civic, realty, and educational groups challenged the issuance of the permit and sought declaratory and injunctive relief to stop the dumping. *See id.* The District Court denied Clean Ocean Action's application for a temporary restraining order against the proposed ocean dumping. *See id.* Ultimately, the court found that the failure to dredge would cause catastrophic injuries to the shipping industry, longshoremen, and other workers in the ports, and the denial of injunctive relief was upheld. *See id.*

[24] *See The Dredging Dilemma,* J. COM., Jan. 6, 1997 at 67C.

[25] *See id.*

[26] *See id.* More than 450,000 cubic yards of the contaminated sediment was dumped at the Mud Dump pursuant to the permit issued in 1993 to the Port Authority that was in dispute in *Clean Ocean Action. See Clean Ocean Action,* 57 F.3d at 331.

[27] *See The Dredging Dilemma, supra* note 24, at 67C.

economic results of pollution. As noted in *Clean Ocean Action v. York*,[28] a failure to dredge would cause catastrophic injuries to the many interests associated with the port, presumably because the Port would become less competitive.[29] The Port Authority plans for the port to become the North American hub, but to do so, the port needs to have adequate water depth, land-side support, and labor to be passable to large cargo and passenger ships.[30] Regulatory and environmental pressures, as witnessed by the disposal costs of dredged materials, will continue to add to the Port Authority's expenses.

Similarly, the plight of the lower Passaic River has had an economic impact on the industry and communities adjacent to it. Arguably, the revival of Newark's Downtown has been delayed or otherwise adversely impacted by the expense, unsightliness, or other problems presented by the terrible condition of the Passaic.[31] A successful, effective cleanup can only have a positive economic effect on the downtown redevelopment effort. Logically, then, the present and past condition of the river has had some detrimental impact.

The economic impact to many interests in the State of New Jersey due to the environmental damage to the Passaic River has yet to be quantified, but it is likely severe, costly, and far-reaching. The State, as a trustee of natural resources, has neither endeavored to restore the natural resources of the Passaic, nor pursued damages for the destruction of those resources. Similarly, no party, public or private, has sought damages incidental to the contamination of the river. Given this inaction, it would be appropriate for private citizens to "step into the shoes" of the State and make a claim for natural resource damages via an applicable citizen suit provision.

III. THE FEDERAL SCHEME

Generally, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[32] provides a statutory scheme whereby private parties or the federal government can respond to a release of a hazardous substance or remediate a contaminated site

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[28] 861 F. Supp. 1208 (D.N.J. 1994), *aff'd in part, rev'd in part*, 57 F.3d 328 (3d Cir. 1995).

[29] *See Clean Ocean Action*, 57 F.3d at 330; *see also The Dredging Dilemma*, *supra* note 24, at 67C.

[30] *See The Dredging Dilemma*, *supra* note 24, at 67C.

[31] *See* Jordan & Carter, *supra* note 2. Clearly, a successful cleanup and revitalization of the river can only have a positive economic impact on the redevelopment efforts downtown.

[32] 42 U.S.C. §§ 9601-9675 (1994).

and ultimately recover their expenses. Private citizens who have incurred expenses consistent with the national contingency plan in response to a release of some hazardous substance may recover their costs.[33] Other private parties maintain their right to assert a claim for damages under common law theories such as nuisance or strict liability.[34] Additionally, CERCLA has a "citizen suit" provision that permits certain lawsuits by private citizens. The citizen suit provision, however, does not provide for a private right of recovery for natural resource damages.[35]

CERCLA makes a responsible party 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 [a release of a hazardous substance]."[36] The provision further states that such liability is to the United States Government, any state, and any Indian Tribe.[37] The President or any state may seek to recover for such damages, on behalf of the public, through a trustee of any damaged natural resources.[38] CERCLA's very broad definition of "natural resources" includes a great deal of public and private land, water, and wildlife interests.[39]

As previously noted, CERCLA does not permit private recovery of natural resource damages.[40] Rather, it requires that trustees, act-

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[33] *See* 42 U.S.C. § 9607(a)(4)(B).

[34] *See* KEVIN M. WARD & JOHN W. DUFFIELD, NATURAL RESOURCE DAMAGES: LAW AND ECONOMICS 107 (1992).

[35] *See* 42 U.S.C. § 9659. This "citizen suit" provision permits any person to commence a civil action against any other person, including any governmental entity, alleged to be in violation of some environmental standard, regulation, or law. *See id.* § 9659(a)(1). Additionally, it allows civil actions against the President or other officer of the United States when there is a perceived failure to act or perform some non-discretionary obligation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See id.* § 9659(a)(2).

[36] *Id.* § 9607 (a)(4)(C).

[37] *See id.* § 9607 (f)(1).

[38] *See id.* Any recovery procured by the trustee must be used only to "restore, replace, or acquire the equivalent of such natural resources." *Id.*

[39] *See id.* § 9601(16). "Natural resources" are defined as follows:

> 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, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

Id. This includes public land as well as private property subject to "a substantial degree of government regulation, management, or other form of control." WARD & DUFFIELD, *supra* note 34, at 101.

[40] Similarly, CERCLA does not provide for private recovery for personal injury,

ing on behalf of the United States, any state, or an Indian Tribe, recover for damage to resources "belonging to, managed by, controlled by, or pertaining to" the government.[41] Although early versions of CERCLA contained the private right to sue for natural resource damages, section 9607(f)(1) expressly empowers only an authorized trustee to commence an action for such damages.[42] This point has been underscored by a federal district court that concluded that no private right of action exists in this regard.[43]

The Superfund Amendments and Reauthorization Act of 1986 (SARA)[44] added a citizen suit provision to CERCLA that permits actions directly against violators of CERCLA or against the government for its failure to perform non-discretionary duties.[45] However, it is unlikely that private citizens can compel a cleanup or sue for natural resource damages in this fashion, because the government's duty under CERCLA is discretionary.[46] "CERCLA simply does not prohibit the release of hazardous substances nor, in the absence of a government order, require their cleanup if released."[47] Rather, the law authorizes the government to respond, or order a response by a responsible party, to a release, then seek recovery of the costs incurred.[48] Thus, in the absence of government action, CERCLA does

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property damage, or economic loss. *See* Artesian Water Co. v. New Castle County, 851 F.2d 643, 648-49 (3d Cir. 1988); *see also* Allied Towing Corp. v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1348 (E.D. Va. 1986).

[41] 42 U.S.C. § 9607(f)(1).

[42] *See* S. 1480, 96th Cong., 2d Sess. §4 (a)(2) (1980). This bill provided "liability for any injury to, destruction of, or loss of natural resources . . . or any loss of use of any natural resources . . . income or profits . . . without regard to the ownership [or management] of such property or resources." *Id.*

[43] *See* United States v. Southeastern Penn. Trans. Auth., No. 86-1094, 1986 WL 7565 (E.D. Pa. July 2, 1986), *3-5. The plaintiff sought to recover damages to natural resources pursuant to section 9607. The court held that such recovery would be contrary to the plain language of that section, which clearly does not confer such a right. *See id.* at *5.

[44] Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 42 U.S.C.).

[45] *See* Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 SW. L.J. 929, 930-31 (1990). Although the language in this citizen suit provision is similar to that of other federal environmental laws, this provision is of limited import because of the way CERCLA operates. *See id.* The distinction between this provision and that discussed above is that in 42 U.S.C. § 96007 (a)(4)(b), private citizens are authorized only to sue to recover costs incurred in response to a release of a hazardous substance. *See* Patrick Thomas Michael, III, *Natural Resource Damages Under CERCLA: The Emerging Champion of Environmental Enforcement*, 20 PEPP. L. REV. 185, 194 n.62 (1992).

[46] *See* Michael, *supra* note 45, at 194.

[47] Gaba & Kelly, *supra* note 45, at 937.

[48] *See id.* Section 9604 authorizes the government to "remove or arrange for the

not provide the requisite basis for a citizen suit to compel action, nor does it permit a citizen suit for the recovery of natural resource damages.

IV. THE NEW JERSEY SCHEME

New Jersey's analog to CERCLA is The Spill Compensation and Control Act (Spill Act), enacted in 1976.[49] The Spill Act is a highly structured statutory scheme. Unlike its federal counterpart, however, the Spill Act sets forth an express, absolute prohibition on the discharge of petroleum and other hazardous substances.[50] Furthermore, the Spill Act imposes strict joint and several liability upon any person who discharges or is in any way responsible for the discharge of a hazardous substance for all cleanup and removal costs "no matter by whom incurred."[51] The Spill Act also imposes strict liability for all "direct and indirect damages, no matter by whom sustained," including damage to natural resources and real or personal property.[52]

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removal of, and provide for remedial action relating to" a release of a hazardous substance. 42 U.S.C.A. § 9604(a)(1). Section 9606 states that the government may "secure such relief as may be necessary" to protect the public health, welfare, or environment, including the issuance of administrative orders. *Id.* § 9606(a). Neither of these provisions, which provide for government action under CERCLA, speak in mandatory language. *See* Gaba & Kelly, *supra* note 45, at 939.

[49] *See* N. J. STAT. ANN. § 58:10-23.11-50 (West 1992).

[50] *See id.* § 58:10-23.11(c)-(d). Additionally the Spill Compensation and Control Act (Spill Act) establishes the Spill Compensation Fund (Fund), which is strictly liable for cleanup and removal costs, no matter by whom sustained. Any expenditures made by the Fund shall constitute a debt of the responsible party to the Fund. *See id.* § 58:10-23.11(g)(c)(1).

[51] *Id* § 58:10-23.11(g)(c)(1). The Spill Act provides that cleanup and removal costs are:

> all costs associated with a discharge, incurred by the State or its political subdivisions or their agents or any person with written approval from the Department (of Environmental Protection) in removing or attempting to remove hazardous substances or taking reasonable measures to prevent or mitigate damage to public health, safety or welfare.

NEW JERSEY ENVIRONMENTAL LAW HANDBOOK, 4th Ed. at 55 (citing N.J. STAT. ANN. § 58:10-23-11(b)(d).

[52] *Id.* § 58:10-23.11(g). This provision requires the fund to be liable for cleanup and removal costs including, but not limited to:

> The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge . . . any income lost . . . [and] any reduction in value of such property; the cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge; [and] loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge.

Another critical environmental law in New Jersey is the Environmental Rights Act (ERA).[53] The ERA grants standing to private parties for the enforcement of the state's environmental laws.[54] Specifically, the ERA permits private plaintiffs "to bring before a proper forum particular problems involving alleged threats or damage to the environment."[55] Thus, the law provides "any person" with a right to enforce pollution and other environmental laws.

This right, however, has been limited by case law to situations in which "the government has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted."[56] For example, in *Howell v. Waste Disposal, Inc,.*[57] the Township instituted an action against the owner and operator of a landfill seeking injunctive relief, costs, penalties, and damages resulting from hazardous waste contamination to the surface and groundwater.[58] The court concluded that when confronted with a charge under the ERA, the court must first determine whether the State had "exercised properly its preemptive jurisdiction," or had "failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or . . . not given adequate and fair consideration to local or individual interests."[59] In such a case, private citizens may seek relief pursuant to the ERA.

Id. In a fashion similar to CERCLA, the Spill Act defines "natural resources" as "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State." *Id.* § 58:10-23.11(b).

[53] N.J. STAT. ANN. § 2A:35A-1 (West 1987).

[54] *See* Mayor and Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1054 (D.N.J. 1993). Subsequent case law has made clear that private litigants are limited under the Environmental Rights Act (ERA) to situations in which government action has been lacking or is inadequate. Thus, the government maintains "primary prosecutorial responsibility," but the ERA provides private parties with secondary rights under certain circumstances. *See* Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 94, 504 A.2d 19, 26 (App. Div. 1985).

[55] N.J. STAT. ANN. § 2A:35A-7b. The act expressly requires the courts to "adjudicate the impact of the defendant's conduct on the environment and on the interest of the public therein in accordance with this act." *Id.*

[56] *Howell*, 207 N.J. Super. at 96, 504 A.2d at 27; *see also Rockaway*, 811 F. Supp. at 1054 ("Thus, the primary goal of the ERA is to limit lawsuits by private litigants to those instances where the government has not acted.") (citing Superior Air Prod. v. NL Indus., 216 N.J. Super. 46, 58-59, 522 A.2d 1025, 1032 (App. Div. 1987); Allied Corp. v. Frola, 730 F. Supp. 626, 636 (D.N.J. 1990)).

[57] 207 N.J. Super. 80, 504 A.2d 19 (App. Div. 1985).

[58] *See id.* at 86, 504 A.2d at 21-22.

[59] *Id.* at 96, 504 A.2d at 27. The court continued by noting that behind the ERA is the recognition that when faced with conflicting interests, the State may fail to address adequately a particular problem, and that is when private citizens may step forward to seek relief under the ERA. *See id.*

Similarly, in *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chemical Co. (I.H.R.A.C.)*,[60] a citizens' group brought suit against Diamond Shamrock and the DEP pursuant to the New Jersey Environmental Rights Act and the Spill Act. This action sought to require the "defendants to clean up and remove all dioxin" in the area surrounding Diamond's 80 Lister Avenue plant.[61] The plaintiff relied upon the ERA in its claim that "the State was failing in its obligation to protect the public and environment by enforcing the laws" and sought specifically for the State to institute a medical testing and monitoring program.[62] The Appellate Division disagreed with this reliance on the ERA, noting that "such an interpretation would . . . violate the doctrine of separation of powers." Accordingly, the court concluded that the ERA does not provide private citizens with the right to compel a state agency to perform some discretionary function.

The New Jersey Environmental Rights Act states, in part:

> (a) Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.[63]

This has been understood to mean that individuals, in their capacity as private citizens, may sustain an environmental cause of action against any "person" in violation of the state's environmental laws.[64] Thus, although the ERA itself does not grant substantive

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[60] 216 N.J. Super. 166, 523 A.2d 250 (App. Div. 1987).

[61] *See id.* at 168, 523 A.2d at, 252. Upon submission, the trial judge found that DEP's proposed plan was "manifestly inadequate" and that it needed to develop a program to identify, test, and track certain "high risk" individuals such as plant employees and nearby residents. *See id.* at 170, 523 A.2d at 252. The State submitted such a plan, but noted that it did not have the resources necessary to implement it. *See id.* at 171, 523 A.2d at 252-53. On December 20, 1985, the trial judge affirmed that it was the duty of the DEP to render the site as clean and "safe as can feasibly be done." *Id.* at 172, 523 A.2d at 253. This included the responsibility of implementing the health plan submitted by the State at the court's request and developing the funding necessary to do so. *See id.*, 523 A.2d at 253-54. The State's appeal to the court's order provides the context for the *I.H.R.A.C.* lawsuit. *See id.* at 173, 523 A.2d at 254.

[62] *See id.* The State challenged the court order as beyond the judge's power. *See id.* I.H.R.A.C. countered by relying on the ERA, claiming the law afforded it the right to sue the State so as to compel it to undertake certain action toward the clean up and health assessment associated with the site. *See id.*

[63] N.J. STAT. ANN. § 2A:35A-4 (West 1987).

[64] *See I.H.R.A.C.*, 216 N.J. Super. at 173, 523 A.2d at 254. The ERA defines "person" to include "individuals, the State, any political subdivision of the State and any agency or instrumentality of the State or of any political subdivision of the

rights, it provides private individuals standing to enforce the law "as an alternative to inaction by the government."[65]

The ERA, therefore, constitutes umbrella legislation for individuals concerned with the effective enforcement of the state's environmental protection scheme. This law manifests the state's intention to protect its citizens and its natural resources from the threat of pollution and other public health and safety hazards. In the context of federal environmental law, however, private individuals lack enforcement authority to seek natural resource damages.

The State of New Jersey, pursuant to its role as trustee, should therefore file suit against Diamond Shamrock and other responsible parties for damages to the natural resources of the lower Passaic River and the Newark Bay. In the alternative, however, private citizens could "step into the shoes" of the State, pursuant to the ERA, and seek such damages as New Jersey's environmental laws permit.

State." N.J. STAT. ANN. § 2A:35A-3(a) (West 1987).

[65] Mayor and Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1054 (D.N.J. 1993) (citing Superior Air Prod. v. NL Indus., 216 N.J. Super. 46, 58, 522 A.2d 1025, 1032 (App. Div. 1987)).