

Targeting Natural Resource Damages

The stage is set for the New Jersey Department of Environmental Protection to seek to recover natural resource damages (NRD) from persons legally responsible for contaminated sites in New Jersey. Commissioner Bradley Campbell has said that the State has NRD claims, yet unaddressed, at up to 9,000 contaminated sites. Given that, the prudent real estate developer should evaluate its portfolio for NRD risk and consider NRD issues when transacting new real estate matters.

In June 2002, DEP extracted a \$4.9 million settlement from a brownfields redeveloper of a project in Northern New Jersey. The agency claims that others have begun voluntarily negotiating NRD settlements. Not to be upstaged, environmental groups are urging DEP to exact the full measure of NRD and are advocating the right of citizens to bring suit if the State demurs. In a novel approach, the attorney general's office has retained outside counsel to evaluate and perhaps prosecute the claims.

NRD are described as compensation for, or restoration of, injury to natural resources, above and beyond monies or work required to remediate. Natural resources are defined under New Jersey law as all land, air, water, flora and fauna owned, held in trust or otherwise controlled by the State. Historically, the Federal and State governments have acted as "trustees" of natural resources and asserted authority under the common law Public Trust Doctrine and statutory law to seek recovery of NRD from parties responsible for contamination.

One example of NRD is payment for or undertaking a wetlands restoration project as compensation for wetlands destroyed by a discharge. The State also may recover NRD for "lost use" of a resource (e.g. lost fishing hours with respect to a river impaired by a discharge) or "bequest" value (e.g. the loss of wildlife species or habitat, whether or not they serve any public use). Determining the appropriate value of these claims requires an interdisciplinary assessment.

DEP seems to be focused for now on NRD for injury to groundwater—an easy target for settlements—because in most such cases, Federal NRD trustees don't have jurisdiction over contaminated groundwater. The agency has developed a mathematical formula to calculate the value of groundwater NRD claims for settlement purposes, with the current Administration eliminating various exceptions to this liability that the previous Administration had

allowed. The agency may be concerned, however, that its approach is amenable to challenge on a number of legal and technical bases, since it is threatening to utilize a more "robust" NRD formula for claims that are resolved via litigation rather than voluntary settlement.

The agency's stated goal in the case of groundwater is to obtain payments to perform aquifer-recharge or similar projects or, preferably, to have the parties undertake them. DEP's approach also suggests that, with some exceptions, it is unlikely to coordinate settlement of its claims with those of Federal NRD trustees, rendering final resolution of claims more difficult.

Given the aggressive public statements of agency representatives, DEP is likely to construe broadly its authority to seek NRD. Indeed, it has adopted regulations requiring any party remediating a site to assess injury to natural resources resulting from the discharge of contaminants or, more surprisingly, from the proposed remedy itself. Moreover, DEP has stated that it may re-open "old" or closed site remediation cases. The legislature recently revived stale NRD claims, extending the State's time to bring suit until the later of December 31, 2005, or completion of the preliminary assessment, site investigation and remedial investigation.

DEP has developed a policy to exempt "non-labile brownfield redevelopers" from claims. On closer examination, the policy seems to offer little new or more favorable since a "non-labile" developer already has available a statutory defense to liability, i.e., the New Jersey Spill Act's innocent purchaser defense. And given the agency's stance, it is likely to construe this defense narrowly. Our experience shows that, despite the hype of brownfields incentives and reforms, establishing a legal entitlement to the innocent purchaser defense can be very difficult.

It remains to be seen whether DEP's NRD program will be a blockbuster. If the agency pursues NRD as aggressively as its public statements suggest, real estate developers will need all available legal arguments and defenses to minimize liability. ■

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Marilynn R. Greenberg (mgreenberg@riker.com) is a partner and Steven T. Senior is an associate in the environmental practice group of Riker, Danzig, Scherer, Hyland & Perretti LLP's Morristown office.