



Natural Resource Damages: NJDEP Throws Down the Gauntlet

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MAKING GOOD ON THE PROMISE IT HAS made repeatedly during the last few years, the New Jersey Department of Environmental Protection (DEP) recently announced several new initiatives to recover natural resource damages (NRD) with respect to 4,000 contaminated sites and brownfields in New Jersey. The enormous cost of these NRD claims will be borne by New Jersey business, at a time when business can ill-afford a new tax.

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NRD can simply be described as compensation to the state for natural resources that have been damaged by a discharge of hazardous substances. In practice, however, dealing with DEP's new NRD initiatives will be far from simple.

In its first wave of NRD enforcement, DEP recently contacted approximately 100 businesses that are responsible for the remediation of contaminated sites. DEP has "invited" these companies to meet and to settle the state's NRD claims, principally with regard to groundwater damage. The claims for damages are in addition to the parties' obligation to remediate the groundwa-

ter. DEP has demanded a response within 10 business days of receipt of the agency demand, as well as an agreement to toll any applicable statute of limitations that would be a defense to NRD liability. Failure to respond within this time is treated as a rejection, inviting civil prosecution.

A 'Novel Approach'

In a novel approach, the State Attorney General's office has retained special outside counsel to assist DEP in prosecuting and settling these NRD claims. This "flamboyant" plaintiff's attorney from New Orleans will be compensated on a tiered contingency basis that is based on the value of the NRD recovery or settlement. For example, special

counsel will receive at least 20 percent of the first \$10 million recovered, 17.5 percent of the next \$15 million recovered and 15 percent of any amount recovered over \$25 million for each NRD case that is settled after the state has initiated a lawsuit.

DEP says that these 100 NRD cases are merely the first wave of prosecution. Many additional "invitations" to companies to settle NRD claims are anticipated.

On September 19, DEP also issued a Directive pursuant to the Spill Compensation and Control Act to 66 entities that may be responsible for NRD relating to the lower Passaic River. "Directive No. 1" requires these businesses responsible for sites along the river to enter into an Administrative Consent Order with DEP, to identify injured natural resources and to estimate the monetary value of the state's NRD claims. "Interim restoration" of the lower Passaic River also will be required in order to restore wetlands, recreational and commercial fishing, swimming, and boat access.

In a similar action, the federal Environmental Protection Agency has given notice to many of the same companies of their responsibility to pay for a federal study of environmental impacts to a 17-mile stretch of the river. The cost of all of this work in the lower Passaic River will be staggering.

Finally, on September 24, Commissioner Campbell signed Policy Directive 2003-07, which describes DEP's new NRD program. This policy explains, among other things, that DEP will use a formula to calculate the monetary value of NRD for groundwater. DEP prefers, however, that responsible parties actually conduct restoration projects in lieu of monetary payments to the state. For example, acquisition of aquifer recharge areas, water reuse or recycling projects, and enhancements to public access to natural resources will be considered by DEP.

Significantly, DEP has stated that it will no longer issue a No Further Action letter for groundwater at a site until any NRD claims are resolved. DEP also has announced that it will refrain from pursuing certain NRD claims, including those against small businesses with a limited ability to pay, certain classes of low risk sites, and parties that can establish the "innocent purchaser" defense to liability—not an easy task to accomplish.

DEP's enforcement of NRD is likely to have far-reaching impacts, as the first wave of NRD cases are litigated or settled and additional waves of NRD enforcement are

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overlooking the New Jersey Turnpike in Cranbury, N.J., with the lease to Firestone of a 500,000 sq.-ft. facility in Frazier, Penn., and with the sale of a 1.6 million sq.-ft. Firestone tire manufacturing facility in Memphis, Tenn. In all, Firestone has played a significant role in contributing to the more than five million sq.-ft. of industrial space.

AGCD received five American Graphic Design Awards from Graphic Design: USA, which honors the best U.S. firms for excellence in communication and graphic design. Earlier this year, AGCD also received 12 awards from the NJ Art Directors Club (five medals and seven Certificates of Recognition); four trophies from the NJ Ad Club's Jersey Awards; two Gold Medals and one Silver from the Admissions Marketing Awards Competition (more awards in that contest than any other firm in the state), and four IMPACT Awards from the Business Marketing Association. ■

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the potential habitat for T&E species is now, more than ever, as important as the Phase I environmental site assessment on speculative property transactions or development deals.

Specifically, a T&E species on or in the vicinity of a proposed project can trigger potential permit denials, loss of time, significant development alterations, potential fines, restorations, takings, strong public opposition, increased costs and litigation for a proposed project. However, most, if not all, of these potentially costly matters can most likely be avoided with a little upfront data acquisition and a habitat evaluation (i.e. site inspection) by a qualified individual. Therefore, one should give consideration to T&E due diligence before development plans are put forward. ■

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undertaken. After all, DEP has issued NRD demands with respect to only about 100 sites, leaving approximately 4,000 additional sites to be addressed. DEP encourages parties responsible for NRD at these sites to voluntarily contact DEP to settle their NRD claims.

Members of the regulated community are advised to consider the impact of NRD on their business. Parties required to clean up contaminated sites, developers and real estate trusts, lenders, insurers and other portfolio managers all should evaluate existing NRD risk and consider NRD when transacting new matters. Various defenses and settlement strategies should be considered when addressing NRD with DEP. With these new, aggressive initiatives, DEP certainly has grabbed the business community's attention. ■

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