

New Jersey Launches New Environmental Enforcement and NRD Initiative

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New Jersey state officials are putting businesses on notice that Natural Resource Damage (“NRD”) lawsuits and other enforcement actions are coming down the pipeline. On Wednesday, August 1, 2018, Governor Phil Murphy’s administration announced three NRD lawsuits, the first to be filed by the state since 2008. Many more are expected as the administration seeks monetary and other damages to restore New Jersey’s natural resources, including alleged damages to groundwater, wetlands, and other impacted environmental media and resource services.

The NRD lawsuits were announced in tandem with three other environmental enforcement and cost recovery actions. They will be prosecuted by the State Attorney General, with the assistance of outside counsel.

All six suits involve sites in different counties located throughout the state—with different histories, contaminants, and purported damages to various natural resource services. In general, the state relies on New Jersey’s Spill Act, Water Pollution Control Act, and various common law claims, similar to its last generation of NRD suits some ten years ago.

The three NRD-specific suits deal with the Pohatcong Valley Superfund Site in Warren County, a former petroleum refinery in Woodbridge, and the onetime site of a manufactured gas plant in Atlantic City. New Jersey is seeking NRDs for the injuries to the groundwater, surface water, sediments, wetlands, and biota, and is seeking to recover its “cleanup and removal” costs from the alleged responsible parties. Notably, the Pohatcong Valley Superfund Site action may present special issues that relate to the interaction between federal law and state law claims.

By filing these lawsuits, the Murphy administration is following through on its policy originally revealed in its Transition Team report, which stated that protecting New Jersey’s water and natural resources, as well as preserving the state’s open spaces and improving its urban environment, should be public priorities. The administration views aggressive pursuit of NRD claims as an effective strategy to both protect the state’s natural resources and “help fund needed environmental restoration and protection projects.” The move is also consistent with NJDEP Commissioner Catherine McCabe’s record during her extensive tenure at the US Department of Justice, Environmental Enforcement Section, and at the US EPA. Commissioner McCabe stated that NRD cases are “a primary mechanism for restoring our natural environment when it has become polluted or damaged by industrial or other human activities.”

At this point, there is no information publicly available on whether the suits were launched without prior notice to the defendants or followed a series of failed negotiations.

What we do know is that the state is aggressively moving to hold industry and businesses liable not only for the cost of cleaning up any chemical

spills or discharges, but also for compensating the public for the loss or impairment of natural resources.

Key questions remain:

- How will the state approach the assessment of alleged injuries and the valuation of damages?
- Will the state seek damages without litigation?
- Will claims be limited to those circumstances where the state is the sole trustee for natural resources, or will it extend to sites that may have multiple trustees with competing or additional claims?

No doubt other questions will arise.

Based on the state's announcement, it will look to have industry and businesses not only pay to clean up any spills and discharges of hazardous substances, but also compensate the public for the loss and restoration of natural resources. Therefore, it would be prudent for all concerned to monitor the progress of the state's revitalized NRD initiative and be aware that more lawsuits of this nature may be coming.

Additionally, those responsible parties that are in the midst of a remedial investigation and cleanup should remain mindful that a NJ Licensed Site Remediation Professional cannot resolve a responsible party's potential NRD liability when issuing a Response Action Outcome.

If you have any questions about this topic, please contact the authors, an attorney in the Environment & Energy practice, or your lawyer at McCarter & English, LLP.