

NJ's Natural Resource Damage Order May Be Helpful For Cos.

By **Marc Rollo, Matthew Conley and Charles Dennen** (April 19, 2023)

On March 14, the New Jersey Department of Environmental Protection Commissioner Shawn LaTourette issued Administrative Order 2023-08 regarding the NJDEP's natural resource restoration policy.

The administrative order is another step in the evolution of the natural resource damage, or NRD, enforcement in New Jersey.

The order seeks to, among other things, improve the NJDEP's "policies and procedures for voluntarily resolving potential NRD liabilities with responsible parties" by providing technical assistance and incorporating NRD assessment into the regulatory remediation process.

The administrative order may prove to be a welcome development for much of the regulated community, which has for years sought more predictability and guidance regarding NRD liability at contaminated sites in New Jersey.

New Jersey has long been at the forefront of NRD litigation; however, the lack of transparency and consistency in the state's NRD program has been a frequent source of consternation among the regulated community. New Jersey, despite maintaining a very aggressive NRD litigation program, does not have NRD regulations or even written guidance by which responsible parties can gauge the scope of their potential liability, as viewed by the NJDEP.

This lack of programmatic transparency and predictability has also made it difficult for outside counsel to manage client expectations or accurately value a client's NRD liability. But with the issuance of the administrative order, a change for the better may be afoot.

During former New Jersey Gov. Chris Christie's two terms in office, the NJDEP and the New Jersey Attorney General's Office did not initiate a single NRD lawsuit. However, shortly after New Jersey Gov. Phil Murphy was elected, his Environment and Energy Transition Advisory Committee included among its priorities "[p]rotecting New Jersey's water and natural resources."

As part of this priority, the committee recommended that the new administration "aggressively pursue natural resource damage cases and ensure settlement funds remediate local impacts." To that end, the NJDEP has filed approximately 18 NRD lawsuits since Murphy took office in 2018.

Despite the Murphy administration's renewed focus on NRDs, other aspects of the NJDEP's NRD program have not developed, and voluntary settlements are infrequent.

Prior to the issuance of the administrative order, responsible parties were "encouraged to contact the Office of Natural Resource Restoration to explore voluntary settlement." Beyond that basic statement, responsible parties, stakeholders and the public were not provided with much, if any, guidance regarding voluntary settlements of NRD liability, including how



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such liability may be assessed or valued by the NJDEP.

Instead, state assessments of potential NRD liability typically only occurred in the context of lawsuits filed by the NJDEP, in which the NJDEP's outside attorneys and paid experts adopted aggressive, case-specific positions regarding natural resource injury determination and valuation, and outside attorneys attempted to stretch the application of long-standing legal theories.

With the issuance of the administrative order, the NJDEP appears intent on revamping its practices and policies with respect to voluntarily NRD settlements, with a goal of encouraging more cooperative and reasonable liability assessments.

Specifically, LaTourette determined that the NJDEP "should encourage responsible parties to assess and voluntarily resolve their NRD liabilities in the course of performing their contaminated site remediation obligations."

To facilitate this policy, the administrative order directs that the NJDEP's Office of Natural Resource Restoration and the Contaminated Site Remediation and Redevelopment Program — the recent successor to the Site Remediation Program — works to "establish protocols and procedures," potentially including "new or amended site remediation forms," that encourage responsible parties to assess and resolve potential NRD liabilities during the remediation process.

The Office of Natural Resource Restoration was further directed to "develop technical assistance to support the collaborative process and facilitate the assessment of natural resource injuries" by responsible parties.

It remains to be seen whether, and the extent to which, these newly formed "protocols," "procedures" and "technical assistance" will present a practical and workable solution.

In years past, the NJDEP employed a groundwater formula — i.e., a modified resource equivalency analysis — to facilitate NRD settlements for impacts to groundwater. That formula had limited applicability to other resources, and responsible parties that voluntarily resolved NRD liability using the groundwater formula would sometimes be surprised with an NRD lawsuit for other natural resources — e.g., sediment, surface waters.

Ultimately, with the issuance of the administrative order, there is hope that licensed site remediation professionals and the regulated community may finally have the long-sought guidance from the NJDEP necessary to assess and resolve NRDs in a reasonable and cost-effective manner.

That said, responsible parties that previously overlooked — or could not afford to resolve — potential NRD liability, may be forced to the negotiation table in light of the administrative order.

Beyond facilitating voluntary NRD settlements, the administrative order is also noteworthy in two other respects.

First, the commissioner directed that the NJDEP implement a series of initiatives intended to improve transparency and enhance public engagement regarding natural resource restoration projects funded, in part, by NRD settlements. This includes the creation of a Natural Resource Restoration Advisory Council.

The Natural Resource Restoration Advisory Council — composed of members of the public, the NJDEP, the regulated community and environmental advocacy groups — was created by the administrative order for the limited purpose of providing the NJDEP with insight and feedback regarding potential natural resource restoration projects and to assist the NJDEP in "communicating restoration project objectives and outcomes to the public."

The Natural Resource Restoration Advisory Council's creation may be in response to local outcry over a perceived lack of transparency and community engagement regarding the recently announced NRD settlement concerning the Ciba-Geigy Superfund Site in Toms River, New Jersey.

Finally, the administrative order is noteworthy in that it memorializes in an official statement — as opposed to a case-specific legal brief or expert report — some of the policy determinations underlying the NJDEP's NRD enforcement efforts. In the course of doing so, the NJDEP has taken a very expansive view of its trustee authority and its power to demand significant damages for any "altered natural resources."

The policy pronouncements also recognize that the "scope and scale of natural resource injuries may vary significantly" depending on a variety of factors, which the regulated community should always be mindful of when assessing its own potential NRD liability.

The administrative order also warns that the NJDEP reserves the right to pursue "unilateral assessment, restoration, or administrative or judicial actions," regardless of the collaborative process that is central to the order. Moreover, these policy statements are intended to be prospective only without impact on existing NRD litigation.

Nevertheless, current — and potential future — NRD litigants in New Jersey should take notice.

The administrative order is a potentially significant development in the NJDEP's NRD program.

It will hopefully yield much greater transparency and allow the regulated community to reliably assess their own potential NRD liability and engage with the NJDEP in a collaborative settlement process that eliminates the need to resort to costly and seemingly unending litigation.

With that said, only time will tell whether and how the policies announced in the order are implemented.

In this respect, responsible parties, stakeholders and the public are encouraged to pay close attention.

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