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NJDEP Issues Administrative Order Revamping NRD Settlement Policies and Practices in New Jersey

Client Advisories

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On March 14, 2023, New Jersey Department of Environmental Protection (NJDEP) Commissioner Shawn LaTourette issued Administrative Order 2023-08 (AO 2023-08) regarding Natural Resource Restoration Policy. AO 2023-08, which can be found here, is another step in the evolution of the natural resource damage (NRD) enforcement in New Jersey. The Order seeks to, among other things, "improve" NJDEP's "policies and practices for voluntarily resolving potential NRD liabilities with responsible parties" by incorporating mechanisms for NRD assessment into the site remediation process.

Prior to the issuance of AO 2023-08, responsible parties (RPs) were "encouraged to contact the Office of Natural Resource Restoration to explore voluntary settlement." Beyond that basic statement, RPs, stakeholders and the public were not provided with much, if any, guidance regarding voluntary settlements of NRD liability, including how such liability may be assessed or valued by NJDEP. Instead, State assessments of potential NRD liability typically only occurred in the context of lawsuits filed by NJDEP, in which NJDEP's outside attorneys and paid experts adopt case-specific (and often aggressive) positions regarding natural resource injury determination and valuation. With the issuance of AO 2023-08, 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, Commissioner LaTourette determined that 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, AO 2023-08 directs that NJDEP's Office of Natural Resource Restoration (ONRR) and the Contaminated Site Remediation and Redevelopment (CSRR) program work to "establish protocols and procedures," potentially including "new or amended site remediation forms," that encourage RPs to assess and resolve potential NRD liabilities during the remediation process. ONRR was further directed to "develop technical assistance to support the collaborative process and facilitate the assessment of natural resource injuries" by RPs. The devil is in the details but this may prove to be a welcome development for LSRPs

and much of the business community, which has for years sought more predictability and guidance regarding NRD liability at contaminated sites in New Jersey. That said, RPs that previously overlooked, or could not afford to resolve, potential NRD liability may be forced to the negotiation table.

Commissioner LaTourette also has directed that 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 (NRRAC). Comprised of members of the public, NJDEP, the regulated community, and environmental advocacy groups, AO 2023-18 created NRRAC for the "limited" purpose of providing NJDEP with "insight and feedback" regarding potential natural resource restoration projects and to assist NJDEP in "communicating restoration project objectives and outcomes to the public." NRRAC'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, AO 2023-08 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 NJDEP's NRD enforcement efforts. In the course of doing so, NJDEP has taken a very expansive view of its trustee authority and its power to demand significant damages for any "altered natural resource." 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 attorneys in Archer's Environmental Law Group have extensive NRD experience in New Jersey. We have been instrumental in many of the State's landmark NRD litigation matters. We have helped numerous clients resolve NRD claims without litigation, including cost-effective strategies that address NRD as part of the regulatory process. Archer is well-equipped to assist companies that seek to engage with NJDEP regarding a "collaborative" assessment and resolution of NRD liability.

For questions about AO 2023-08, or for assistance addressing potential NRD liability, please contact Marc Rollo at mrollo@archerlaw.com or 856-354-3061, Matthew Conley at mconley@archerlaw.com or 856-673-3901, or Charles Dennen at cdennen@archerlaw.com or 856-673-3932.

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Related People

Matthew Conley

Partner

mconley@archerlaw.com

856.673.3901

Charles J. Dennen

Partner

cdennen@archerlaw.com

856.673.3932

Marc A. Rollo

Partner

mrollo@archerlaw.com

856.354.3061

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Attachments

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