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NEWS & ANALYSIS

Industry Files Litigation Against New Jersey Opposing Aggressive Natural Resource Initiatives

by E. Lynn Grayson

An industry coalition filed suit in March 2004, against the state of New Jersey opposing highly criticized tactics, including the state's use of a New Orleans-based firm known for representing plaintiffs in toxic tort and related litigation, to recover money damages for natural resource claims. The action seeks to end the state's plan to rely upon contingent fee attorney Allan Kanner to sue more than 80 companies for alleged damages to natural resources. The lawsuit highlights industry concerns over the aggressive program recently launched by the New Jersey Department of Environmental Protection (NJDEP) to recover for alleged losses and injuries resulting from natural resource damages (NRDs).

Federal and state trustees often lack sufficient resources to appropriately address legally and technically complex NRD matters.¹ NJDEP's new initiative seeks to overcome this common problem, in large part by attempting to shift the necessary assessment and restoration work to private parties as well as by encouraging speedy resolution of legal liability issues. This innovative effort by NJDEP imposes unique legal challenges on targeted private parties as well as significant potential financial burdens.

In late September 2003, over 4,000 parties received the Notice of Intent to Initiate Litigation for Natural Resource Damages signed by Peter Harvey, Attorney General of New Jersey, and Bradley Campbell, NJDEP's Commissioner.² The letter advised parties, for the first time, that each was legally responsible for NRDs caused by hazardous discharges. The correspondence also permitted 10 days for a response and promised litigation seeking recovery for NRDs, penalties, costs, interests, and all other relief possible if a timely response was not received.

The letter resulted from the joint efforts of NJDEP's Site Remediation Program as well as the Office of Natural Resource Restoration. Working to ensure the public's right to compensation for natural resource injuries, NJDEP has developed a program that boasts some rather unique, legally

questionable aspects. NJDEP sought and received new legislation extending the applicable statute of limitations to bring NRD claims to four years beginning January 1, 2002, or completion of a preliminary site assessment, site investigation, or remedial investigation, whichever is later.³ Moreover, NJDEP's litigation threat against parties failing to cooperate is bolstered by the state's retention of the law firm Kanner and Associates, P.C., and the designation of Kanner as special counsel. While plaintiffs firms (such as Kanner's) commonly represent parties on a contingent fee basis, it is unclear how NJDEP intends to pay for Kanner's services given the statutory limitations imposed upon funds collected for NRDs.⁴

Federal and state legal authorities provide a complex regulatory scheme to assess and restore natural resources.⁵ NJDEP relies upon these statutes and regulations for guidance but its new program appears more based upon its Technical Requirements for Site Remediation (Tech Regs)⁶ as well as Policy Directive 2003-07.⁷ Since 1997, the Tech Regs have required parties to perform a baseline ecological evaluation and, depending upon the outcome, possibly complete an ecological risk assessment. More recent amendments to the Tech Regs allowed NJDEP to collect monetary damages for injured natural resources in addition to performing assessment work. NJDEP's primary focus is on alleged damages to groundwater designated as an environmentally sensitive resource—NJDEP considers groundwater to be injured when contaminants are at levels above state groundwater quality standards.⁸ A possible explanation for the groundwater focus is this is a natural resource most often considered the sole responsibility of the state without the need for federal trustee involvement or oversight.⁹

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1. For a comprehensive discussion of the law and techniques associated with the body of federal law, science, and economics constituting NRD assessment, see VALERIE ANN LEE & PJ BRIDGEN, NATURAL RESOURCE DAMAGE ASSESSMENT DESKBOOK: A LEGAL AND TECHNICAL ANALYSIS (Env'tl. L. Inst. 2002). State NRD programs are described in E. Lynn Grayson et al., *The Business Dilemma: 21st Century Natural Resource Damage Liabilities for 20th Century Industrial Progress*, 31 ELR 11356 (Nov. 2001).
2. NJDEP, Notice of Intent to Initiate Litigation for Natural Resources Damages (Sept. 19, 2003). See also Press Release, NJDEP, DEP to Address More Than 4,000 Potential Claims for Natural Resource Damages Statewide (Sept. 24, 2003), available at http://www.nj.gov/dep/newsrel/releases/03_0131.htm#list (last visited Apr. 12, 2004).

3. New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §§58:10-23.11 et seq.
4. For the NJDEP's explanation of the state's relationship with Kanner and Associates, see NJDEP, *Natural Resource Damages, Frequently Asked Questions, What Is the Department's Relationship With Allan Kanner and Associates, P.C.?*, at http://www.state.nj.us/dep/nrr/about/faq.htm#rel_kanner_assoc (last visited Apr. 12, 2004).
5. See generally LEE & BRIDGEN, *supra* note 1; Grayson et al., *supra* note 1.
6. N.J. ADMIN. CODE tit. 7 §§26E-1.1 et seq. See Grayson et al., *supra* note 1, at 11363.
7. NJDEP, POLICY DIRECTIVE 2003-07, NATURAL RESOURCE DAMAGES (2003), available at <http://www.nj.gov/dep/commissioner/policy/pdir2003-07.htm> (last visited Apr. 8, 2004).
8. See NJDEP, *Natural Resource Damages, Frequently Asked Questions, How Is the Information From the Remedial Investigation Used to Assess Natural Resource Injury and Determine the Scope of the Restoration?*, at http://www.state.nj.us/dep/nrr/about/faq.htm#ri_info_used (last visited Apr. 12, 2004).
9. See *id.* ("Injury to groundwater resources is solely the responsibility of the [s]tate.").

Policy Directive 2003-07 presents the standards and process that will be used in developing and resolving NRD claims. The policy provides greater detail about the state's natural resource initiatives, including the screening process, settlement policies, interaction with other NJDEP programs and excluded claims. As to excluded claims, the policy recognizes that the cost of pursuing certain classes of claims will exceed any potential benefit in terms of restoration or recovery. For that reason, NJDEP will not pursue the following three types of claims:

- (1) sites or claims for which the only responsible parties are residential homeowners residing at the site where the claim arises¹⁰;
- (2) sites or claims for which the only responsible parties are small businesses with a limited ability to pay¹¹; or
- (3) sites that meet the qualifying criteria for NJDEP's "Cleanup Star" program.¹²

The industry coalition lawsuit demonstrates continuing opposition to NJDEP's unique NRD initiatives. Indeed, the state's legal tactics do appear to be questionable given the numerous authorities already available to NJDEP to pursue NRD claims. State trustees, such as NJDEP, have traditionally relied upon common law's public trust doctrine to obtain damages and injunctive relief from parties responsible for discharges that injure natural resources.¹³ The public trust doctrine recognizes that some types of natural resources are held in trust by the government for the benefit of the public. Historically, the doctrine protected submerged lands, shoreline, and other navigable waters. It evolved over time to allow recovery by state trustees for NRDs associated with discharges to navigable waterways as well as injuries to many other natural resources.

As the state trustee, NJDEP has additional authority to recover for NRDs under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹⁴ the Clean Water Act,¹⁵ or the Oil Pollution

Act (OPA) of 1990.¹⁶ NJDEP also has authority under the state's Spill Compensation and Control Act to commence an action against a responsible party for the costs of restoration and replacement, where practicable, of natural resources damaged by a discharge.¹⁷

The industry lawsuit was filed in Superior Court in Mercer County by an industry coalition consisting of the American Petroleum Institute, the New Jersey Chemical Council, Fuel Merchants Association, Chamber of Commerce, Business and Industry Association, and the Society for Environmental Economic Development. The lawsuit contends that NJDEP has employed legally questionable tactics to recover money damages for alleged NRDs. While the lawsuit cannot address every concern posed by the new NRD efforts, the most troubling legal facets of the program include the legislatively authorized extension of the statute of limitations applicable to NRDs and the aggressive enforcement approach to recover money damages through the New Orleans-based firm. On the technical side, NJDEP's actions to "streamline" the traditional NRD assessment process appears inconsistent with federal NRD authorities and guidance but clearly support the department's objective to rapidly resolve, hopefully through settlement, outstanding NRD matters.

The NJDEP's innovative NRD scheme to advance alleged claims and recover damages clearly works. NJDEP's NRD *2003 Settlement/Restoration Report*¹⁸ confirms the program's success over the past 10 years. Since its inception in 1993, NJDEP's "Office of Natural Resource Restoration (ONRR) has settled oil spill cases and hazardous waste site cases that totaled over \$42 [million] in damages (settlements are final but not yet executed for approximately \$22 million)."¹⁹ In the report, the ONRR confirms that \$17 million in settlement monies have been used to restore injured resources. In addition, the "ONRR has acquired and performed restoration on approximately 1,910 acres of aquifer recharge area, wetlands, and valuable wildlife habitat and set them aside as public open space."²⁰ The ONRR also confirms that about 100 active cases in various stages of assessment or negotiation are ongoing. It is interesting to note that all settlements occurred between 1993 and 2002, except the Hudson/Essex Co. Chromium Sites matter, which was settled in 2003—the largest settlement documented in the report (\$17 million). This observation shows that NJDEP was successful with its NRD matters even before embarking on its present aggressive enforcement approach.

A particularly troubling aspect of NJDEP's new program is the reliance on information provided to the state by parties voluntarily conducting cleanups. In fact, it appears that parties that have cleaned up a site, or are in the process of doing so, are the state's initial targets. NJDEP's actions seem inconsistent with cooperative industry outreach efforts to remediate impacted properties and brownfields sites. Given

10. See NJDEP, POLICY DIRECTIVE 2003-07, *supra* note 7 (Excluded Claims). See also NJDEP, *Natural Resource Damages, Frequently Asked Questions, Will the Department Pursue Natural Resource Damages Against Homeowners?*, at <http://www.state.nj.us/dep/nrr/about/faq.htm#homeowners?>

No, the [d]epartment will not pursue homeowners, at their place of residence, for restoration of natural resources injured by hazardous discharges. The [d]epartment may, however, pursue other persons responsible for the hazardous substances that were discharged at a residential site, including, without limitation, suppliers of the hazardous substances, such as fuel oil and heating oil, that are discharged at a residence, and persons that transported the hazardous substance to that residence.

11. See NJDEP, POLICY DIRECTIVE 2003-07, *supra* note 7 (Excluded Claims).

12. *Id.*

13. For a discussion of the use of the public trust doctrine in NRD programs, see Grayson et al., *supra* note 1, at 11362, 11363-64; Cynthia Carlson, *Making CERCLA Natural Resource Damage Regulations Work: The Use of the Public Trust Doctrine and Other State Remedies*, 18 ELR 10299 (Aug. 1988).

14. 42 U.S.C. §9607(a)(4)(c), (f)(1), (f)(2)(A), ELR STAT. CERCLA §107(a)(4)(c), (f)(1), (f)(2)(A). See LEE & BRIDGEN, *supra* note 1, at 29-84, 172-209, 253-80; Grayson et al., *supra* note 1, at 11361-62.

15. 33 U.S.C. §1321(f)(5), ELR STAT. FWPCA §311(f)(5) (states trustees can "act on behalf of the public" to recover damages). See LEE & BRIDGEN, *supra* note 1, at 119-34.

16. 33 U.S.C. §2702(b)(2)(A), ELR STAT. OPA §1002(b)(2)(A) (states are trustees and can recover NRDs). See LEE & BRIDGEN, *supra* note 1, at 85-119.

17. N.J. STAT. ANN. §58:10-23.11 et seq.

18. OFFICE OF NATURAL RESOURCE RESTORATION, NJDEP, 2003 SETTLEMENT/RESTORATION REPORT (2004), available at http://www.state.nj.us/dep/nrr/reports/nrd_update200312.htm (last visited Apr. 8, 2004).

19. *Id.*

20. *Id.*

the aggressive, adversarial nature of the natural resource matters pursued to date, it seems certain that parties will more carefully examine any voluntary work with NJDEP in light of the increased risks of adverse action.

While NRD claims present complex legal and technical cases, most environmental professionals agree that cooperative approaches where trustees and responsible parties work

together to resolve NRD concerns is the preferred course of action. NJDEP's new program seems more focused on enforcement and litigation against the same responsible parties that have cooperated to cleanup sites in the past. Regardless of the outcome of the recent litigation, industry now knows that cooperating with NJDEP may be a thankless and costly venture.