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QUESTIONS AND ANSWERS

Ask an attorney

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I understand recent changes to New Jersey's site remediation program will affect when the State may bring natural resource damages claims against potentially responsible parties. How might these changes affect my company's exposure?



Christopher Ball



Lynn R. Rauch

Considerable attention has been paid to how the recently enacted Site Remediation Reform Act (SRRA) reforms the way contaminated sites will be cleaned up in New Jersey, largely related to privatization of the clean-up process and transfer of primary oversight responsibility for most clean-ups from the New Jersey Department of Environmental Protection (NJDEP) to Licensed Site Remediation Professionals.

SRRA's modification of the time within which the State may pursue claims for Natural Resource Damages (NRD) has received far less attention, and less attention than warranted given its potential impact on private parties' liability for NRD claims, and DEP's aggressive prosecution of NRD claims in recent years.

NRD claims are based on the NJDEP Commissioner's role as the State's "trustee" of public land, water and living resources, which are held

in trust by the government for the benefit of its citizens. Through NRD litigation, the State seeks compensation for costs of restoring injured resources above and beyond actual costs of a remediation, as well as for losses allegedly felt by citizens from impacts to resources. Many NRD claims relate to damage to ground water, which

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can require significant time to clean up and result in lengthy associated remedial actions.

Potentially responsible parties (PRPs) retain exposure to NRD liability until the expiration of the applicable statute of limitations, which requires the State to bring NRD claims within a prescribed timeframe, after which the claims are generally barred and the specter of potential liability is lifted.

Prior to SRRA's enactment, the State was required to bring NRD claims within five and a half years of completion of a remedial investigation for the subject site. Under SRRA, the State now has five and a half years from the date of completion of the remedial action for all media at the site.

Because remedial investigations are frequently completed long before completion of remedial actions - which, for large or complex sites may span many years if not decades -- many clean-ups will face dramatically

protracted exposure under the new program. In sum, keying the new statute of limitations to completion of remedial actions, rather than investigations, could render PRPs vulnerable to NRD claims for a significantly extended time.

While this extension does not apply to sites for which the statute of limitations has already expired, going forward the prolonged ability of the State to assert NRD claims should be accounted for by parties undertaking clean-ups and considering sale, purchase or lease transactions involving the site. Drafting of provisions parsing the burdens and responsibilities for addressing environmental conditions, and negotiation of the scope and length of indemnification obligations assume increased importance and merit greater precision under SRRA.

In addition, since the limitation period runs from the completion of remedial action for all environmental media at a site, PRPs and their consultants should

carefully consider how to delineate the "site" for purposes of clean-ups and their completion.

Parties potentially responsible for NRDs would be well-advised to evaluate the impact of the longer limitations period on the State's ability to pursue claims against them. Please contact the authors (lrauch@mgkflaw.com or cball@mgkflaw.com) with questions regarding your potential liability under SRRA, and steps that can be taken to minimize your exposure.

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