

# Environmental & Energy Law Monitor

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## NJDEP Steps Up Efforts to Collect Natural Resource Damages in New Jersey

In the past couple of years, the New Jersey Department of Environmental Protection (“NJDEP”) filed more than 100 lawsuits against companies seeking compensation for restoration of damages to natural resources caused by the companies’ discharge of chemicals to the environment. NJDEP also sought compensation for the public’s loss of use of those natural resources.

These actions were based on state statute, common law claims such as claims for nuisance and trespass, as well as the public trust doctrine. Under the public trust doctrine, the State, as trustee of the state’s natural resources, is required to manage the State’s natural resources to the benefit of its citizens and to ensure that they are not injured or impaired. Natural resources include all land, air, water, flora and fauna and the activities and services provided by these resources. When companies discharge hazardous substances to the environment causing damage to these natural resources, NJDEP attempts to recover Natural Resource Damages, commonly known as “NRDs,” in addition to requiring the company to clean up the contamination.

While the lawsuits initiated by NJDEP work their way through the courts, recent decisions have clarified several issues that have been the cornerstone of NJDEP’s NRD policy. Specifically, the courts ruled that:

1. NJDEP can seek compensation for the restoration of NRDs under New Jersey’s Spill Compensation and Control Act, known as the Spill Act, and that parties causing NRDs are strictly liable. The significance of this decision is that a company can be required to compensate NJDEP for NRDs even though the discharge of chemicals that caused the damage to the natural resources was not intentionally caused or in violation of any law at the time the discharge occurred.
2. The Spill Act allows NJDEP to seek compensation for the loss of use of a natural resource such as the public’s inability to use a stream for recreational purposes because it is contaminated. Under this ruling, NJDEP can seek damages for the time period during which the public was deprived of the ability to use such natural resources. The impact of this decision increases significantly NJDEP’s demand to liable parties for damages and requires that the NRDs be restored as quickly as possible to minimize the damages arising from loss of use of the natural resource.
3. NJDEP’s formula to calculate a monetary value for the damage done to natural resources was unreliable. The Court held that NJDEP did not follow the required rule making process to

establish the reliability of the formula and failed to produce sufficient scientific support to sustain the damages it was seeking. The ruling will make it more difficult for NJDEP to prove its case in future lawsuits involving NRDs.

4. Liability under the Spill Act for NRDs extends to discharge of hazardous substances that occurred prior to the enactment of the Spill Act. The impact is that discharges that occurred years ago can now be subject to a cost recovery action by NJDEP.
5. The Public Trust Doctrine, the basis upon which NJDEP seeks to recover NRDs, has been expansively interpreted to include private land such as land upland from the tidal zone on coastal property.

It is expected that a number of other issues impacting NJDEP's NRD program will be resolved in the upcoming years. If a company is sued for NRDs, it should review its insurance coverage and acquisition documents. These documents may allow the company to seek reimbursement from other responsible parties or its insurer for any damages paid to the NJDEP for NRDs. Similarly, if a company is considering purchasing a business or real property, it must also take into consideration during contract negotiations NRD issues. Only by being proactive will a company be best prepared to address potential NRD claims.

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