



Corporate Environmental Liability Review

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AS GOVERNOR MCGREEVEY APPROACHES the end of his second year in office, his administration's approach to environmental issues has come into clear focus. From his efforts to mandate "Smart Growth" and control suburban sprawl through adoption of "the BIG Map" to the Attorney General's retention of a high-profile, out-of-state plaintiffs' attorney to pursue Natural

The new regulations will reportedly regulate activities which could impact the habitat of any one of 46 animals (including two species of beetles and three species of butterfly) on the State's endangered species list. This regulation of uplands outside of the CAFRA and Pinelands has the potential for regulating not only development but also recreation and grounds maintenance on all private and public property.

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Natural Resource Damages

For many years, the NJDEP has had authority to collect Natural Resource Damages (NRD), reparations for damages to State resources (e.g. surface water, groundwater, wildlife) by the release of hazardous substances. Historically, it has sought remediation and collected NRD only in acute situations such as oil spills into waterways. Earlier this summer, the Attorney General retained a well-known Louisiana-based plaintiffs' lawyer as special counsel to pursue such claims for the State on a contingent (up to 25 percent) basis.

Resource Damages and the Department of Environmental Protection's ("NJDEP") controversial enforcement "strike" in Camden, the tone and tenor of the State's approach to environmental policy has dramatically, if not ominously, changed.

Smart Growth

Volumes have been written about the complexity of implementing the Governor's vision for Smart Growth. The BIG Map continues to evolve as such desperate issues as the agriculture community's objection to classification of all existing farmland as no-growth areas, the role of municipal home rule, and harmonization of revised Council on Affordable Housing policies with the Supreme Court's Mount Laurel mandates, highlight the difficulty of the Smart Growth task.

The State and its special counsel have the potential for making claims at more than 10,000 locations at which groundwater contamination is or was documented. A four-year statute of limitations was enacted by the Legislature in January 2002 and thus, the State must pursue pre-2002 claims within the next two years or lose them.

The most recent development in the Smart Growth drama is the NJDEP's proposal of habitat protection regulations under the State's Endangered Species Act. Since the enactment of that statute 30 years ago, the only explicit protections for endangered species was a prohibition on their possession. Indirectly, habitat was protected through the sensitive area regulations: freshwater and coastal wetlands, stream encroachment, CAFRA and Pinelands programs.

While the NJDEP Commissioner has stated that homeowners or redevelopers will not be pursued, there are many thousands of already-remediated sites in which the "responsible party" was not culpable for the historic hazardous substance discharge but merely cleaned up because it was the property owner. Now the State and its "bounty hunters" will use the thousands of site remediation files as a roadmap for pursuing recovery from anyone that investigated and remediated groundwater that was ever measured with contaminants above the drinking water standards. Such claims will be prosecuted even though the contamination never interfered with any use. Many "good actors" who remediated conditions on their properties which they did not create are the very parties being pur-

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sued, reinforcing the adage that no good deed goes unpunished.

Enforcement and Site Remediation

Not all news out of Trenton is bad. While the enforcement arm of the NJDEP got off to a very rocky start with the business community when it staged a highly publicized enforcement “strike” in Camden, it has been responsive to criticism. This is best illustrated by the companion enforcement sweep planned for this November in Paterson. In Camden, the press briefings and Web postings highlighting the involvement of armed police officers reinforced the Department’s aggressive “strike” rhetoric, interpreted as an attempt to intimidate businesses still operating in Camden. By comparison, the Paterson strike has been announced in advance, and is being preceded by compliance workshops and coordinated with local Chambers of Commerce.

The Department’s efforts in encouraging compliance also include revised policies that encourage self-reporting of violations and which allow businesses to implement supplemental environmental projects as alternatives to monetary penalties.

On the site remediation side, the Department has worked aggressively to encourage the reuse of Brownfields properties. It has restructured its site remediation program to include a Brownfields office and reallocated its case managers to achieve greater efficiency. The Department also has engaged in a dialogue with the regulated stakeholders to identify opportunities to privatize certain aspects of the site remediation program to further expedite remedial projects. ■

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