

Environmental Update

COURT CHALLENGE OF PURSUIT OF NRD CLAIMS

As you may know, the New Jersey Department of Environmental Protection (“NJDEP”) attempts to recover compensation for Natural Resource Damages (“NRD”) from parties characterized as “polluters.” The tool NJDEP has used to pursue these claims is its September 24, 2003, policy directive that sets forth, in general terms, the process to address the more than 4,000 potential NRD claims NJDEP says exist. NJDEP’s calculation of ground water injuries is in accordance with an existing ground water formula, which is extremely confusing and based on the assumption that almost all ground water has the potential to be potable.

In response to the threat of these huge looming damage claims, on February 9, 2004, six business and industry trade groups filed a suit against NJDEP Commissioner Bradley M. Campbell and Attorney General Peter C. Harvey, challenging the method and means being used by NJDEP to collect NRD claims. In their court papers, the trade groups assert that their members have historically been subject to NJDEP’s environmental regulations and face a substantial threat of injury as a result of the NRD initiative.

Generally, the suit challenges two aspects of the New Jersey NRD program. First, the trade groups assert that NJDEP failed to promulgate and adopt standards to assess and quantify ground water NRD in accordance with the New Jersey Administrative Procedures Act. By ignoring the requirements of this Act, NJDEP’s actions to date have not been subject to review and comment by the regulatory community. Second, the trade groups challenge NJDEP’s retention of outside counsel to prosecute NRD claims under a contingency fee retainer arrangement, which is contrary to New Jersey law. The relief sought by the lawsuit is a court order compelling NJDEP to promulgate and adopt methods of quantifying ground water NRD claims in accordance with the requirements of the law. This suit also seeks an order declaring the retainer agreement between the Attorney General’s office and the outside counsel to be null and void.

The relief sought is extremely important given that NJDEP has wasted no time in issuing demand letters to parties it deems responsible for NRD resulting from alleged discharges of hazardous substances. In those letters, NJDEP has “invited” parties to negotiate potential NRD liability regarding ground water under the current formula, or else face calculation of damages under a more stringent, yet-to-be-developed formula. In light of this lawsuit, many parties are likely to be unwilling to step forward to discuss settlement of NRD ground-water claims until the court has issued its decision. Unfortunately, from the transactional side, these latest developments will result in further delays to parties seeking to close their transactions. As previously informed, NJDEP will not issue any No Further Action (“NFA”) determinations until it completes a full review of ecological assessments and resolves potential NRD claims. The litigation will not change NJDEP’s position. Therefore, parties should carefully consider their urgency to close pending transactions when deciding whether to approach NJDEP now to resolve NRD claims or to wait until the litigation is resolved.

If you have received any communication with regard to NRD or wish to discuss how these issues may affect your pending transactions, please communicate with either Heidi S. Minuskin, Esq., (973)425-8738, or James D. Ray, Esq., (973)425-8707 of our environmental practice group.

~ March 2004

The information provided in this Update should not be relied upon as legal advice or a legal opinion on any specific set of facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have. This Update may be considered Advertising under the court rules of certain states. ©McElroy, Deutsch & Mulvaney, LLP 2004.