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New Jersey's Latest Environmental Lawsuits Could Expand Liability to Suppliers of Products that Are Discharged by Their Customers

By William L. Warren

NJDEP recently filed four NRD lawsuits against DuPont. Both the environmental press and the general news reported them as just another set of NRD complaints filed by New Jersey in connection with the reanimation of its NRD recovery program. After all, New Jersey filed six NRD suits in 2018 and another against ExxonMobil just a few weeks ago.

These four new lawsuits against DuPont, however, are materially different in many ways from any lawsuit that NJDEP has ever filed:

- The lawsuits seem to have been triggered as a result of polyfluoroalkyl substances ("PFAS") contamination.
- Two of the lawsuits name the seller of a useful product as a defendant even though it was the customer of the manufacturer that discharged the product into the environment.
- All four lawsuits seek recovery for damage to groundwater notwithstanding a groundwater NRD settlement entered into by NJDEP with DuPont in 2005.

These complaints in total involve more than 4,000 acres at four sites that hosted DuPont operations for over 100 years. Two of the sites are allegedly contaminated with PFAS. It appears that the PFAS contamination at these two sites gave rise to a close examination of all major DuPont sites in New Jersey and led to the additional lawsuits at the two non-PFAS sites.

Since the creation of NJDEP almost 50 years ago, three contaminants of concern have been the highest possible priority for senior management:

- Chromite ore processing residue in Hudson County.
- The styrene-acrylonitrile (san) trimer with respect to the alleged Toms River pediatric cancer cluster.
- Dioxin in Newark and the Passaic River.

I was centrally involved in each of these matters and have witnessed the enormous resources required to

address any contaminant that has the full attention of NJDEP senior management. When this happens companies find themselves under a microscope. It is not unusual for NJDEP to find problems not previously identified and to take aggressive steps to gain leverage, even if some of these steps do not actually address the contaminants of concern.

About 18 months ago, senior NJDEP managers focused on PFAS. These contaminants are now considered the number one environmental problem in New Jersey, and NJDEP's top administrators are directing significant resources to address these contaminants. Indeed, many people at NJDEP refer to PFAS as the "forever chemicals" because of their persistence in the environment. Two of the NRD complaints against DuPont address PFAS. The other two lawsuits that do not are probably collateral damage resulting from senior management's focus on DuPont as a result of the PFAS investigation.

The two PFAS lawsuits name 3M as well as DuPont as defendants. DuPont is alleged to have owned and operated the facilities from which PFAS were discharged into the environment. DuPont, therefore, is a traditional defendant liable under the New Jersey Spill Compensation and Control Act ("Spill Act"). 3M, however, is not at all a traditional Spill Act defendant. The complaints allege that 3M sold PFAS to DuPont for use in DuPont's manufacturing process. They do not allege that 3M had anything to do with the discharge by DuPont of PFAS into the environment. This is likely the first time that NJDEP has intentionally sued the manufacturer of a useful product for contamination caused by the purchaser of that product.

NJDEP has named 3M in four counts:

- Liability under the Spill Act
- Negligence
- Defective design
- Failure to warn

The first count is the most interesting. The Spill Act applies strict, joint and several liability to any person

“in any way responsible” for a discharge. If NJDEP can convince the New Jersey courts that the seller of a useful product is “in any way responsible” for the discharge of that product by its customer, the ambit of the Spill Act will have expanded exponentially. The three other counts, of course, are also quite problematic to the extent they expose the manufacturer of a useful product to environmental liability for the actions of the manufacturer’s customer.

Also of concern is NJDEP’s apparent disregard of its 2005 NRD settlement with DuPont. Almost 14 years ago, NJDEP entered into a Compensatory Restoration Administrative Consent Order (“CRACO”) with DuPont. Pursuant to that Consent Order, DuPont paid the State \$500,000 and agreed to undertake various projects in return for a release/covenant not to sue for groundwater NRD at each of the four sites that are the subject of its recent NRD complaints. Normally, a CRACO will immunize the respondent from liability. It appears, however, that senior NJDEP management’s concern about PFAS led the State to file these lawsuits notwithstanding the existence of the CRACO. In its complaints, NJDEP gives five reasons that the CRACO does not bar its claims:

- DuPont has failed to comply with the CRACO.
- DuPont concealed the nature and extent of the contamination at its facility.

- DuPont has attempted to provide contaminated property to fulfill its obligations under the CRACO.
- Additional injuries have been incurred since the CRACO became effective.
- Injuries to groundwater have resulted from remedial action implementation.

No doubt the CRACO issue will be aggressively litigated, but should NJDEP prevail it will bring into question the efficacy of past and future settlements with NJDEP.

Do these four complaints signal that NJDEP will regularly (i) sue companies on claims that it has previously settled or (ii) file lawsuits against sellers of useful products even though it was the customers of these sellers that discharged these useful products into the environment? Probably not; at least not in the near future. These lawsuits likely result from the PFAS-effect, which is *sui generis*. If, however, the courts permit NJDEP to sue manufacturers for the acts of their customers or to walk away from its settlement agreements, we will probably see at least some similar lawsuits filed by NJDEP.

Environment and Energy Group

Primary Contacts



William L. Warren

Of Counsel

Princeton

(609) 716-6603

William.Warren@dbr.com

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