

THE FPMT NEWS

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Environmental Cleanup Costs

The Government Giveth and Taketh Away

Perhaps nothing is more vexing to business and property owners than the cost of cleaning up their polluted properties. There are, however, government funds available that may help pay cleanup costs. In addition, old general liability insurance policies from the 1980s or earlier are like gold and may pay for cleanup.

Discharge Site Remediation Fund

Under one government program, the Hazardous Discharge Site Remediation Fund, businesses are eligible for an outright grant of 50% of the cleanup costs, and/or a low interest loan for environmental clean up costs. A business is eligible if: 1) contaminated property was acquired prior to December 31, 1983; 2) contaminants discharged were not used by the business; and 3) the business did not discharge any contaminant where the discharge was discovered.

Underground Storage Tank Fund

Under another government program, owners or operators of underground storage tanks are eligible for a grant for tank upgrade and remediation of contamination. Funding may be up to \$500,000. In order to be eligible for a conditional hardship grant for remediation, the applicant shall have owned or operated the subject tank at the time of tank closure. The applicant must have a taxable income no more than \$200,000 and a net worth, exclusive of the applicant's primary residence and pension, of no more than \$200,000.

General Liability Insurance Coverage

Old General Liability Insurance Policies are often overlooked as a source to pay for

environmental cleanup costs. Insurance policies issued prior to the mid 1980's may cover environmental cleanup costs and legal costs to defend against liability for environmental contamination. Business and property owners should locate old insurance policies or other evidence of such policies such as insurance certificates or premium checks.

If you are a small or mid-sized business or own real estate that may be contaminated, you may wish to review you options to obtain funding to pay for environmental costs.

Natural Resource Damages DEP Pursuit of Claims

The government created the programs discussed above to help businesses pay for remediation. Unfortunately, the government also created programs designed to increase liability for pollution. Recently, the New Jersey Department of Environmental Protection ("DEP") launched a new initiative to recover compensation "on behalf of the citizens of New Jersey" for the lost use of natural resources caused by pollution. Potential targets include owners or operators of properties with environmental contamination. This initiative will impact business and real property owners throughout New Jersey.

According to DEP, "Natural Resource Damage" ("NRD") is the dollar value of the total restoration that is necessary to compensate the residents of New Jersey for the injury to natural resources. Injuries can be both ecological injuries to wetlands, wildlife, ground water or surface water and human use injuries such as the closure of a waterway to fishing,

a beach to swimming or an aquifer to drinking water supply. In addition, restoration may include compensation for the natural resource services lost from the beginning of the injury through the full recovery of the resource.

DEP intends to pursue over 4,000 outstanding and potential NRD claims. Letters were sent to "targets" offering the opportunity to settle.

The NRD program is designed to recoup money for environmental damage above and beyond the cost of cleanup. Thus the fact that a No Further Action Letter was issued for a site does not prevent DEP from now pursuing NRD. In fact, cases that were closed but issued a classification exception area for groundwater are targets for DEP NRD claims.

Also, the Attorney General retained outside counsel to prosecute NRD claims. The structure of the contingency fee agreement with the outside counsel creates obvious incentive for counsel to initiate aggressive enforcement against property owners throughout the state. Industry groups have filed a law suit seeking to compel DEP to promulgate rules regarding NRD, and to void the retainer agreement between the Attorney General and outside counsel

DEP says it prefers amicable agreements to resolve NRD claims that provide for restoration work and resource protection in lieu of payment of money damages, provided that a reasonable allowance is made for monitoring and oversight. Yet, DEP has a formula that establishes monetary damages. According to DEP, the "formula" is

lenient as compared to potential damage assessments and a party that approaches DEP in good faith to resolve its NRD claim will obtain the benefit of the "lenient" formula. According to DEP, others will be subject to a more rigorous damage assessment.

Quantifying natural resource damages may be a difficult task and expensive for DEP and businesses defending the actions. The NRD initiative may emulate failed policy formulas of the past where litigation fees and costs could exceed benefits.

With over 4,000 potential sites, large business will not be the only targets. It is likely that small and mid-sized business will also be involved either by DEP targeting or by contribution actions filed by targeted companies. Indeed, DEP launched the "Passaic River Directive" to recover NRD from 66 companies for alleged injuries to the Lower Passaic River watershed. Interim restoration of natural resources was ordered.

If you are a business or property owner with contaminated property and wish further information regarding NRD or other environmental issues, please contact us.

For more information or to learn about our law firm's services and experience, our telephone number is (201) 569-5959.

Contact partners;

Arthur L. "Scott" Porter (aporter@fpmtlaw.com); Alan C. Thomas (athomas@fpmtlaw.com); J. Roger Masi (jrmasi@fpmtlaw.com); or Jay D. Fischer (jfischer@fpmtlaw.com). Howard Davis is Chair of Office of Environment Law (hdavis@fpmtlaw.com). Our address in New Jersey is 440 Sylvan Avenue (Route 9W), Suite 130, Englewood Cliffs, NJ 07632-2701.

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