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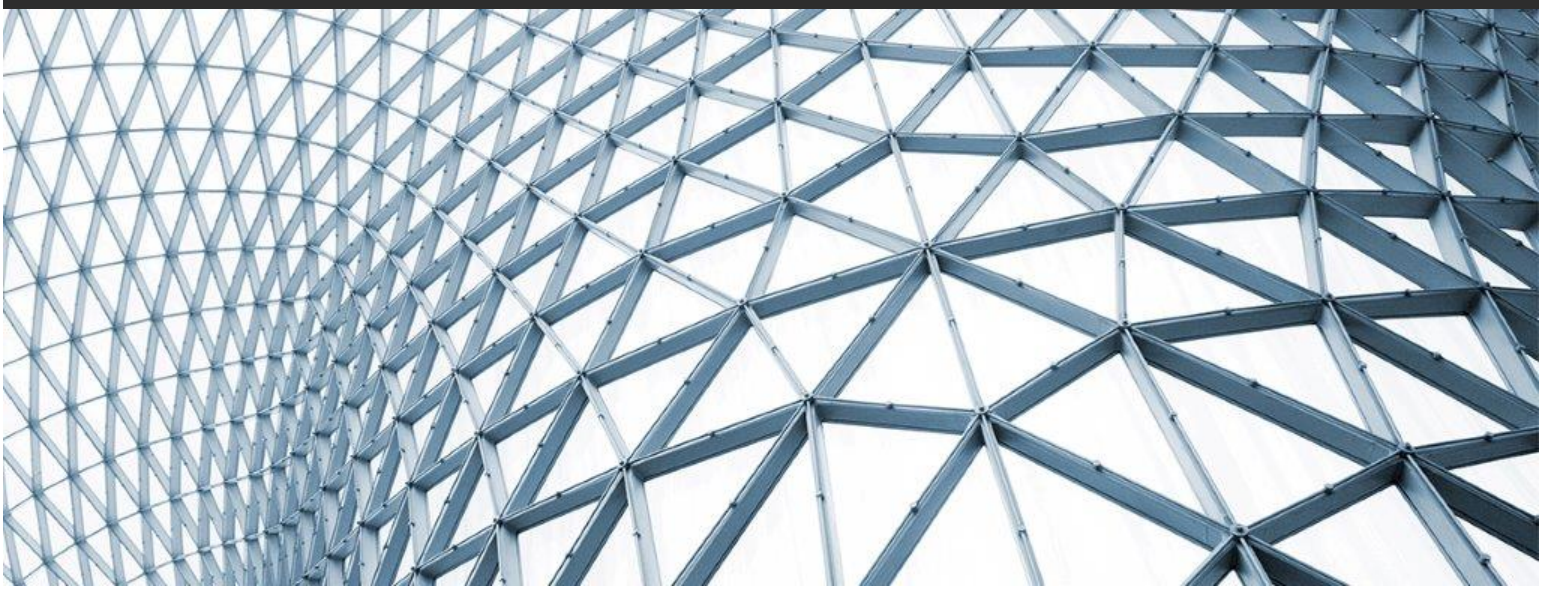
Potential New Tools to Sue for a Faster Cleanup



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Soil or groundwater cleanups can take a long time. When one person conducts the cleanup and another has an interest in its completion, the two can disagree over the pace of the project. That is typically a three-party issue involving the regulator—for example, the Environmental Protection Agency or the Department of Environmental Protection. Resolving the dispute by litigation poses challenges. Last month, the Commonwealth Court offered some guidance on some of those challenges in *Delaware Riverkeeper Network v. Department of Environmental Protection*, No. 525 M.D. 2017 (Pa. Commw. Ct. July 25, 2018), permitting citizen suit claims against the DEP to obtain a faster cleanup and a direct claim under the Environmental Rights Amendment.

In Pennsylvania, one has an obligation to clean up soil and groundwater contamination on one's land or for which one is otherwise responsible under a number of legal authorities. We often write in these

columns about the Superfund programs under the federal Comprehensive Environmental Response, Compensation, and Liability Act or the Pennsylvania Hazardous Sites Cleanup Act and the Land Recycling Program under "Act 2," the Pennsylvania Land Recycling and Environmental Remediation Standards Act. However, the Clean Streams Law imposes a more general obligation to address conditions on land that can cause surface water or groundwater pollution, and other programs also can require cleanup in specific situations.

These multiple programs intentionally sweep multiple responsible parties into their ambit. In that way, a higher likelihood exists that private assets will be available to accomplish a cleanup.

As a result, private parties often have overlapping interests in a cleanup. For example, a buyer and a seller may both be responsible for contamination on a property. Alternatively, a neighbor may have an interest in a property's condition.

Parties in these situations may enter into agreements over who will undertake the cleanup. Often, clear rules do not exist about what a cleanup would entail and, even if that were known with certainty, rules may not set out the schedule on which the remediator has to achieve the cleanup goals.

The party doing the cleanup often wants to do less or to do whatever is to be done more deliberately. Other persons interested in the cleanup may want more work done or may want work done with more alacrity. That is not always true. If all parties will share in the cost of the cleanup, they may be more aligned as to what gets done and when.

The potential tension between the person paying for a cleanup and everyone else with an interest in seeing a site "clean" implicates the regulators. The regulators often have the power to declare a cleanup sufficient or insufficient, timely or tardy.

Suppose one of the parties that is *not* primarily responsible for a cleanup wants to speed the process up and fails to reach agreement with the remediator on a new schedule. Enforcing the obligation to clean up can be tricky both for the proponent of faster work, and for the remediator.

The law does not generally prescribe a timeframe for achieving a cleanup. Indeed, Act 2 is premised, at least in part, on the proposition that most cleanups can wait until the commercial time is right. Rather than mandating a present obligation to clean up, Act 2 permits parties subject to at least a theoretical obligation to address contamination to achieve a remediation standard of their choosing on their own schedule. In this way, the statute diverts some economic gains from development of land to clean up. The time to make that diversion is when the market makes cleanup propitious, not on a schedule established by a command-and-control regulatory program.

So, if one is not satisfied with the pace of a remediation, one has to show that the person obligated to clean up has somehow failed diligently to pursue its obligations. If the regulator is not complaining, that can be hard to do.

If one has a contract calling for cleanup on some specific schedule, one can enforce the contract. But those sorts of provisions are few and far between in my experience, except for agreements to implement a cleanup on a schedule established before, or anticipated promptly after, the date of the contract. General indemnifications hold harmless clauses, and assumptions or retentions of liability rarely have dates. Accordingly, the U.S. Court of Appeals for the Third Circuit held that 14 years later, a seller had not breached its contractual obligation to the buyer to complete an investigation and remediation of a New Jersey site under the New Jersey Environmental Cleanup Responsibility Act and the successor Industrial

Site Recovery Act within a "reasonable time" in *Black Horse Lane Association v. Dow Chemical,* 228 F.3d 275 (3d Cir. 2000). The soil cleanup was completed in two years, but the groundwater efforts continued.

Notice of the risk posed to a person with a current interest in a site's cleanliness presented by a lawsuit to compel a faster cleanup. In order to obtain relief, a plaintiff seeking faster cleanup would have to show that the slower pace poses some sort of harm to the plaintiff. The slower pace represents the current condition of the property. A current owner, for example, does not necessarily want to be offering testimony that the current condition of its property presents a sufficiently significant problem to warrant relief. A neighbor does not always want to prove that the old industrial site next door is a health threat.

A proponent of faster cleanup may attempt to encourage the regulator to move the remediation along more quickly. This also poses risks. One does not always want to suggest to the regulators that one's property, or the property next door, is such a significant problem that the agency ought to devote scarce enforcement resources to accelerating the cleanup. Ordinarily, the private parties regard the regulator as the common opponent. It becomes a potentially unpredictable third party in this kind of situation, and one whose determinations often become part of the public record.

The DEP in particular does not always see its role as promoting faster cleanup. The DEP often takes the position that Act 2 puts the DEP into a passive evaluation role. The DEP receives submissions from the remediator. When they require evaluation under the statute, The DEP evaluates them. The DEP does not press the schedule in what the DEP regards as a voluntary program.

Nevertheless, the Pennsylvania environmental statutes (other than the Solid Waste Management Act) include citizen suit provisions that allow a private person with standing to sue the DEP for failure to perform a nondiscretionary duty. The plaintiffs in *Delaware Riverkeeper Network* did just that, alleging that the DEP had not diligently pursued cleanup of the Bishop Tube Site in Chester County. The DEP had commenced federal CERCLA litigation against certain allegedly responsible parties, but that case had been stayed for eight years and then un-stayed. Cleanup was not complete, and the environmental advocacy organizations sued Commonwealth Court.

The DEP filed preliminary objections in the nature of a motion to dismiss. The court overruled the preliminary objections, holding that the plaintiffs could sue under the citizen suit provisions of the Clean Streams Law and the Hazardous Sites Cleanup Act, 35 Pa. Stat. Ann. Sections 691.601, 6020.1115. The court seems to have held that the DEP has a nondiscretionary duty at least some of the time diligently to pursue a cleanup of a contaminated site.

The court's analysis seemed to conflate the claim that the DEP had not pursued a cleanup diligently with the bar to a citizen suit against a regulated entity when the regulator is "diligently prosecuting" an enforcement action. Nevertheless, the court relied to some extent on the Environmental Rights Amendment to the Pennsylvania Constitution, Pa. Const., art. I, Section 27, to hold that the DEP might have a nondiscretionary duty to procure a cleanup under its responsibility as trustee for the public natural resources. Moreover, it overruled preliminary objections to a claim directly under the Environmental Rights Amendment.

Plaintiffs in *Delaware Riverkeeper Network* did not sue the responsible parties. The court would not dismiss the claims for failure to join them. Thus, the court allowed the plaintiffs to proceed on claims seeking to force the DEP itself to clean up or to procure the cleanup from the responsible parties under the citizen provisions and the Environmental Rights Amendment.

The court did not publish its opinion in *Delaware Riverkeeper*, so it does not yet represent binding precedent. But it identified some potentially surprising new tools. Environmental advocacy groups can wield them. Others face risks, and may have to think twice.

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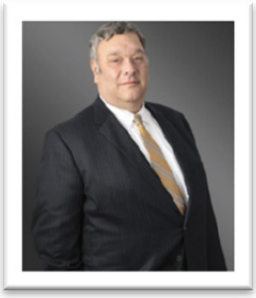

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