

## Ask the Expert

**Q.**

My company received an administrative order from the NH Department of Environmental Services (DES) in 2004 for violations of environmental laws. We complied immediately with all of the requirements. Does that mean we are free and clear of the possibility of the state imposing a monetary penalty for those violations?




**Dana Bisbee is an attorney at Devine Millimet and chairs the firm's Environmental Law Practice Group. He may be reached at 603.695.8626 or dbisbee@devinemillimet.com**

**A.**

No. When it issues an administrative order, DES will (almost) always reserve the right to seek an administrative fine or civil penalty for violations of environmental laws, even if the violations are corrected immediately. DES and the Attorney General's Office have great latitude in deciding when it is appropriate to seek administrative fines or civil penalties. While DES has adopted a Compliance Assurance Response Policy that guides its enforcement actions, there is no requirement that the state seek a monetary penalty at the same time that it issues an administrative order. In fact, in a case decided on June 17, 2009, the NH Supreme Court ruled that the state could seek a civil penalty for wetlands and water quality violations that had occurred five years earlier. The court held that, absent clear legislative direction otherwise, the state is not bound by the general three-year statute of limitations that applies to personal actions. *State v. Lake Winnepesaukee Resort, LLC*, \_\_\_ N.H. \_\_\_ (Slip Opinion, June 17, 2009). While certain equitable principles and due process considerations may restrict the state's enforcement discretion, this case illustrates the possible reach of state penalty actions.

This case offers important reminders to companies and individuals who face DES enforcement actions. First, the state remains active in bringing enforcement actions for significant violations. Resource constraints may cause enforcement to be delayed, but DES and the AG's Office regularly issue administrative orders and seek monetary penalties. Second, even when violations

(or alleged violations) are corrected early on (as was done in the Lake Winnepesaukee Resort case), you cannot assume that DES or the AG's Office won't seek fines or penalties even years after a significant violation has been alleged—and fully addressed. In the right circumstances, it may be prudent to press for a determination from the state on whether penalties are being considered, and even to self-report a possible violation. (State and federal policies offer certain incentives for self-reporting). Finally, it may now be time for the Legislature to consider adopting a statute of limitations for environmental cases to avoid lengthy delay in the initiation of penalty actions. 



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