# Environmental Law Update: Uncertainty about the time limit for filing a groundwater contamination claim in North Carolina

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*What is the latest date upon which a private plaintiff must file a claim for personal injury or property damage based on groundwater contamination in North Carolina?*

Until recently, the answer to this question appeared to be well-settled at ten years from the last act or omission of a defendant that gave rise to the groundwater contamination. However, recent activity in the United States Supreme Court and the North Carolina General Assembly in June 2014, and the United States Court of Appeals for the Eleventh Circuit in October 2014, have caused some degree of uncertainty regarding if and when such claims may lapse.

Prior to June 20, 2014, Section 1-52(16) of the North Carolina General Statutes provided that an action "for personal injury or physical damage to claimant's property" must be brought within three years of the time the action accrues, but that the claim "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action" (emphasis added). This underlined clause is called a "statute of repose."

Except in a case alleging a claim for latent disease (*Jones v. United States*, 2010 U.S. Dist. LEXIS 119840 (E.D.N.C., Nov. 9, 2010)), this statute of repose has been consistently interpreted by state and federal courts to bar personal injury and property damages claims based on groundwater contamination filed more than ten years after a defendant's last act or

omission. See, e.g., *Rudd v. Electrolux Corp*, 982 F. Supp. 355 (M.D.N.C. 1997); *Hodge v. Harkey*, 178 N.C. App. 222 (2006).

In accord with this interpretation, in 2012 the United States District Court for the Western District of North Carolina dismissed a nuisance claim brought more than ten years after the last act or omission of the defendant that caused contamination of property near Asheville. *Waldburger v. CTS Corp*, 2012 U.S. Dist. LEXIS 13727 (W.D.N.C., Feb. 6, 2012). On appeal, the Fourth Circuit Court of Appeals disagreed, holding that the state statute of repose was preempted by the "discovery rule" found in the federal environmental statute CERCLA. *Waldburger v. CTS Corp*, 2013 U.S. App. LEXIS 13942 (4th Cir., July 10, 2013). But then, the United States Supreme Court subsequently held that CERCLA does not preempt the state statute of repose, again making clear that lawsuits for property damage in North Carolina must be brought within the ten-year time limit found in the state's statute of repose. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (June 9, 2014).

In quick response to the Supreme Court decision in *CTS Corp.*, the North Carolina General Assembly amended the statute of repose to exempt certain groundwater contamination actions. N.C. Sess. Law 2014-17 (June 20, 2014) and N.C. Sess. Law 2014-44 (June 30, 2014). As revised, the state statute of repose now includes this exception: "The 10 year period set forth in G.S. 1-52(16) shall not be construed to bar an action for personal injury, or property damages caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant, including personal injury or property damages resulting from the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant...." N.C. Sess. Law 2014-44; N.C. Gen. Stat. § 130A-26.3. Pursuant to N.C. Sess. Law 2014-44, the amendment was "effective when it becomes law and applies to actions filed, arising, or pending on or after that date...."

Thus, the amendment appeared to exempt groundwater contamination claims from the ten-year statute of repose, and appeared to apply retroactively to revive claims that had previously been barred but were filed on or after the date the revised Session Laws were enacted.

However, the United States Court of Appeals for the Eleventh Circuit recently held the amendment to the statute of repose cannot be applied retroactively to revive claims that had already been time-barred. *Bryant v. United States*, No. 12-15424 (11th Cir., Oct. 14, 2014). This decision was made on statutory interpretation and constitutional grounds and is contrary to the explicit language and intent of the Session Laws. Under the *Bryant* Court's analysis, potential groundwater contamination lawsuits that were time-barred prior to the General Assembly's amendments in June 2014 remain time-barred, but groundwater contamination claims where a defendant's last act or omission occurred after June 2004 may not be time-barred under the ten-year statute of repose. Further, the *Bryant* decision holds that the state statute of repose does not contain an exception for latent diseases, which is directly contrary to the 2010 decision of the Eastern District Court in Jones v. United States. The Eleventh Circuit in *Bryant* remanded the case for further proceedings in the lower courts.

Further developments on these and related issues are expected in the *Bryant* lower court proceedings as well as in state and other federal courts, the North Carolina General Assembly, and perhaps Congress.[1] These future developments will impact claimants and defendants in pending and prospective groundwater contamination litigation.

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[1] Senate bill S. 2542 was introduced by Senator Hagan on June 26, 2014. The bill would amend CERCLA to clarify that state statutes of repose are pre-empted by CERCLA, effectively reversing the holding of the U.S. Supreme Court in *CTS Corp*. But, even if this or a similar bill is enacted, a legislative amendment cannot apply retroactively to revive claims that have already been barred at the time the amendment is enacted, if the Eleventh Circuit's analysis in *Bryant* is correct.