



## **NC Court of Appeals Ruling Limits Potential Damages for Groundwater Pollution May 2016**

A ruling by the NC Court of Appeals could have significant implications for how damages are determined for property damage in groundwater pollution cases. The case, *BSK Enterprises Inc. v. Beroth Oil Co.*, came about after the defendant gas station owner discovered that several underground storage tanks on its property had leaked petroleum. The plume of groundwater contamination extended to the property of a nearby coffee business that used well water. Although benzene and other petroleum constituents were discovered in groundwater, DENR found that the contaminant levels were sufficiently low that there was no health risk from use of the business's well. Accordingly, it approved a plan that would allow the contamination at the coffee business property to naturally attenuate.

The owner of the coffee business sued the gas station owner, with claims for nuisance, trespass, and violation of the NC Oil Pollution and Hazardous Substance Control Act (OPHSCA). The coffee business sought nearly \$1.5 million in damages, which was its estimate of the cost to actively remediate all groundwater contamination at its property. However, the property was valued at only \$180,000, and the jury determined that the contamination reduced the value by \$108,000. The court awarded the business owner \$108,000 for the diminution in its property value.

Both parties appealed. The gas station owner claimed, among other things, that because a property owner does not own the groundwater, it cannot sue for damage to the groundwater. The gas station owner also argued that the coffee business's damages, if any, should be limited to the cost of connecting to the public water supply, which the owner had declined to do. In contrast, the coffee business maintained that it should recover the \$1.5 million estimated cost to actively mitigate contamination at the site.

The Court of Appeals upheld the \$108,000 damages award for the reduction in property value. The court found that although no person can own groundwater, persons nevertheless have a right to use the groundwater on their property. Accordingly, a person may file nuisance and trespass claims, as well as claims under the OPHSCA, if a third party causes petroleum contamination of the groundwater under their property. It further held that under the OPHSCA, a party whose groundwater is contaminated by petroleum pollution has no duty to mitigate its damages by connecting to a public water supply. Regarding the amount of the damage award, the court held that it was proper to base the damages on the diminution in the property value because the property was owned by a business. However, if the property were a private home, the court noted that it may be appropriate to award damages based on the cost of cleaning up the property – even if those costs exceeded the value of the property.

This decision provides clarity on the complicated issue of potential property damage awards in cases of groundwater pollution. Although the case involved petroleum products, much of the court's ruling would apply to other types of contaminants as well. The court's order was issued on March 1,

and it is likely that one or more of the parties will seek review in the NC Supreme Court. We will continue to follow this case and report any new developments.