

2017 Environmental and Energy Law Forecast

NEW JERSEY FORECAST

Changes in Store for the New Jersey Site Remediation Program

Bruce S. Katcher, Esq.

2017 may see a number of changes to New Jersey's Site Remediation Program – both legislative and regulatory.

First, modification of the Site Remediation Reform Act ("SRRA"), the law that established the licensed site remediation professional ("LSRP") program in 2009, is a distinct possibility. This effort, often referred to as SRRA 2.0, may examine a variety of issues including the following:

- Providing greater flexibility under the direct oversight provisions that place sites that miss certain mandatory deadlines under an extremely restrictive regime of direct New Jersey Department of Environmental Protection ("NJDEP") oversight (versus LSRP oversight);
- Expanding the limited nature of financial assurance mechanisms for engineering controls under remedial action permits and direct oversight;
- Defining the degree of deference afforded by LSRPs to previously issued NJDEP no further action letters when an LSRP is subsequently re-evaluating a site, for example, when the site is sold post-NFA and triggers a new round of compliance with the Industrial Site Recovery Act;
- Developing a flexible mechanism to vary the timing of mandatory and regulatory deadlines to facilitate cleanup and redevelopment of brownfields sites;
- Assessing whether historic fill ought to be regulated differently than other discharges and if so how;
- Determining whether contamination associated with the historic application of pesticides ought to be considered a discharge or subject to special statutory treatment distinct from other types of contamination; and
- Considering whether pre-1993 purchasers of property should be subject to the same liability regime as post-1993 purchasers (as determined by the Appellate Division in *New Jersey Schools Development Authority v. Marcantuone*) and concurrently, whether a bona fide prospective purchaser defense similar to that under CERCLA ought to be afforded under the Spill Act.

Second, it is also possible that some of these issues could be addressed through regulatory mechanisms. For example, NJDEP has been taking a flexible view of its discretion under the direct oversight provisions. In this regard, NJDEP included specific language to this effect in a recently published consent judgment noting that, "[a]t the sole discretion of the Department, the Department may adjust the Direct Oversight requirements pursuant to N.J.A.C. 7:26C-14.4." Such discretion could include relieving "innocent" developers that undertake to remediate a site from compliance with the direct oversight provisions.

Third, NJDEP is also planning a variety of regulatory changes during 2017. Most importantly, sometime in the spring of 2017 the agency expects to propose a set of comprehensive amendments to the remediation standards for the first time since they were adopted in June 2008. In preliminary discussions of the changes under consideration, NJDEP has indicated that it is looking at dropping as many as thirteen contaminants from the list, adding at least sixteen contaminants and evaluating three contaminants of interest (dioxins, extractable petroleum hydrocarbons, and 1,4 dioxane). Remediation concentrations for contaminants on the list may change, falling by more than an order of magnitude, which may trigger the need to re-evaluate completed remediations in some cases. In addition, NJDEP is planning to propose a new set of regulations for underground heating oil tanks that are not covered by the N.J.A.C. Chapter 14B regulations (also known as "unregulated heating oil tanks" or UHOTS) in early 2017. Neither the UHOT regulations nor the remediation standard changes are likely to be adopted in final before 2018.

Changes Coming for Dirty Dirt in New Jersey

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New Jersey has made it a priority to encourage the recycling and reuse of dirt, concrete and other building materials, but the New Jersey Department of Environmental Protection ("NJDEP") has come to the realization that the regulatory framework put in place to encourage such recycling has also encouraged the importation of contaminated building material, the reuse of contaminated soil at remediation sites and the infiltration of unscrupulous dirt brokers. The recycled material coming out of Class B Recycling Facilities is not always in fact clean fill; and the backfill brought to a remediated site via a dirt broker is sometimes more contaminated than the soil that was removed. Accordingly, at a recent symposium, NJDEP management explained that "clean fill" is a misnomer and that NJDEP needs to move to a concept of appropriate fill depending upon the use. Whether by regulation or by statute, this year we expect to see continued focus on this issue and proposals to regulate dirt brokers and to ensure that the material reused at a remediation site is sampled and determined to be suitable for that particular site.

What's in the Air for 2017 in New Jersey?

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2017 promises to be an active year for air regulatory developments in New Jersey. In early January, the New Jersey Department of Environmental Protection ("NJDEP") proposed amendments to its air regulations governing Reasonably Available Control Technology obligations for sources of volatile organic compounds ("VOC") and nitrogen oxides ("NOx"). The rules are intended to help the state meet the National Ambient Air Quality Standard for ozone through the regulation of VOC emissions from industrial cleaning solvents; miscellaneous metal and plastic parts coatings; paper, film and foil coatings; and fiberglass boat manufacturing materials. These rules reflect recommendations from federal Control Techniques Guidelines. The proposed rulemaking also targets NOx emissions from existing simple cycle

combustion turbines combusting natural gas and compressing gaseous fuel at Major NOx facilities (compressor turbines) and from stationary reciprocating engines combusting natural gas and compressing gaseous fuel at Major NOx facilities (compressor engines). NJDEP will hold a public hearing on the rule on February 13, 2017 and will accept comments submitted by March 4, 2017. A copy of the proposal can be found [here](#).

Separately, NJDEP has announced its consideration of another air regulatory effort called the Resiliency, Air Toxics and Exemptions rulemaking. At a meeting with industrial stakeholders in December, NJDEP indicated that it would be considering revisions to certain aspects of its Chapter 27 air regulations which would: 1) incorporate resiliency measures regarding the use of emergency equipment conducting construction, repair and maintenance; 2) update toxic valuations using current scientifically based values; 3) incorporate new permit exemptions for specified equipment and operations; 4) repeal Subchapters 30 and 31 (pertaining to outdated NOx trading programs); and 5) undertake minor cleanup of existing rules. The Department described the goals for each item, solicited input on the changes from the group of industrial stakeholders, and indicated its intent to begin working on the proposal early this year. Materials from the December stakeholder meeting are available at the Department's website [here](#), under "past meetings."

PFCs and Other Chemicals to Receive Increased Regulatory Attention in New Jersey in 2017

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The group of chemicals referred to as perfluorinated chemicals ("PFCs") are likely to receive increased regulatory scrutiny by the New Jersey Department of Environmental Protection ("NJDEP") in 2017. PFCs have been historically used in a wide variety of products to make them resistant to stains, grease and water and have also been used in some firefighting materials (such as foam). They are extremely persistent in the environment and have been showing up in municipal drinking water supplies in New Jersey.

NJDEP recently initiated procedures to adopt the 2015 recommendation of the New Jersey Drinking Water Quality Institute (DWQI) to set a new drinking water standard for perfluorononanoic acid (PFNA) of 0.013 parts per billion (ppb) which should take 12 to 18 months to complete. The DWQI also made a recommendation in 2016 to set a drinking water standard for another PFC, perfluorooctanoic acid ("PFOA"), at 0.014 ppb, and this chemical is likely to be the next one in the NJDEP regulatory hopper. These standards would be lower than existing U.S. Environmental Protection Agency and NJDEP guidance levels and could ultimately become groundwater remediation standards as well as drinking water standards.

In addition, the legislature is currently considering a bill that would mandate that NJDEP adopt new or increased standards for sixteen chemicals (including PFNA, perchlorate, radon-222 and formaldehyde), for which the DWQI has made recommendations since 1985, but for which NJDEP has failed to promulgate or increase standards. If enacted, this legislation would obligate NJDEP follow a similar procedure for future DWQI recommendations.

Trends in Resolving Your Environmental Disputes with the State of New Jersey

John F. Gullace, Esq.

The New Jersey Department of Environmental Protection (“NJDEP”) wants you to know that there are faster ways to resolve your environmental non-compliance, including some that you will like, and some that you will not. For instance, NJDEP is experimenting with the issuance of “tickets” and the agency is very pleased with the results. Currently, “tickets” are being issued primarily for failure to comply with mandatory deadlines under the Site Remediation Reform Act (SRRA), for example, failure to timely retain an LSRP. The benefit to the state of this ticketing process is speed. Instead of plodding through traditional enforcement actions that can take several years, the NJDEP “tickets” are heard in municipal court like speeding tickets and are resolved within a few months. NJDEP is evaluating whether to expand its use of tickets as an enforcement mechanism.

NJDEP’s desire to promptly resolve non-compliance is being seen in other ways as well. NJDEP management is encouraging several alternatives to protracted litigation. To promptly resolve non-compliance, NJDEP recommends the early negotiation of Administrative Orders on Consent. NJDEP has also been publicizing its willingness to consider small Special Environmental Projects (“SEPs”) to resolve penalties. The change here is NJDEP’s willingness to consider SEPs as small as a few thousand dollars and NJDEP’s greater flexibility in evaluating the nexus between the harm and the SEP. You might be able to resolve an air violation in a community by performing a stormwater project in the same community. Finally, if you are unable to resolve your dispute with NJDEP’s program personnel, NJDEP is encouraging the regulated community to engage the Office of Alternative Dispute Resolution to help untangle and put to rest its disputes with NJDEP. We expect this trend favoring quick, flexible resolutions to continue at NJDEP through at least the end of this year since the message is coming from the highest levels at NJDEP and we would not expect a policy shift before a change in administration a year from now.

Political Changes to Affect NJDEP in 2017 and Beyond

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As a state that has viewed itself as being a role model for other states when it comes to environmental regulation, New Jersey politicians have begun to position New Jersey as a place that must stand tough in view of the anticipated rollback of federal environmental regulations by the Trump Administration. Former Governors Jim Florio (D) and Christine Todd Whitman (R) have both reportedly taken this position, and called for the election of a new administration at the state level – elections to replace Governor Christie are scheduled to take place in November 2017 – that will press for strong environmental programs at the state level and lobby the federal government to preserve existing protections.

At present, the leading candidate for governor is reported to be a Democrat, Phil Murphy, CEO of the non-profit New Start New Jersey, and former Goldman Sachs executive. If elected, it is possible that some of the administrative reforms instituted by NJDEP Commissioner Martin to make the NJDEP more “user friendly” and to eliminate duplicative and unnecessarily inflexible regulation where appropriate, might come in for re-examination. In addition, practices such as the use of funds from programs like the Clean Energy Program for purposes of plugging revenue holes in the general budget would likely come to an end, and Christie-disfavored programs like New Jersey’s participation in the Regional Greenhouse Gas Initiative (RGGI), are likely to be revived. The current leading Republican contender, Lt. Governor Kim Guadagno,

known for her work on the current administration's Red-Tape Commission, could be expected to build on the practices of her predecessor.

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