

MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2018 Environmental and Energy Law Forecast

NEW JERSEY FORECAST

What's New in NJDEP?

Bruce S. Katcher, Esq.

Along with the election of a new governor in New Jersey, we will also have a new Commissioner heading up the New Jersey Department of Environmental Protection (NJDEP) – Catherine McCabe – a former U.S. Environmental Protection Agency official. Ms. McCabe, the Commissioner-designee until her nomination is approved by the New Jersey Senate, is an attorney with a distinguished career in government service. She began that service as an assistant attorney general in the New York Attorney General's office, followed by a 22-year stint at the U.S. Department of Justice, focusing on environmental litigation and enforcement, where she rose to the position of Deputy Chief of the Environmental Enforcement Section in 2001.

She moved to EPA in 2005 where she became the Deputy Assistant Administrator of the Office of Enforcement and Compliance and Assurance, followed by a four-year stint as a judge on EPA's Environmental Appeals Board. Her next stop was Deputy Regional Administrator of EPA Region 2 and she was selected by President Obama to serve as Acting EPA Administrator at EPA headquarters at the end of his administration and continued in that role until Scott Pruitt was confirmed to head EPA in February 2017. She returned to Region 2 as the Acting Regional Administrator until she was selected to head NJDEP by then-Governor-elect Murphy in December.

In announcing her nomination, the Governor emphasized that he “wanted someone who . . . is tough on polluters, who is understanding of those living in environmentally sensitive areas, who recognizes that our twin goals of a resilient and responsible future, and a strong and fair economy, are not mutually exclusive.” Murphy also indicated that he expects McCabe to lead New Jersey to a nationally and globally prominent role on environmental issues. She certainly has a record of experience that would suggest that she is up to the job set out for her by the Governor. Whether the regulated community will be as welcoming remains to be seen.

What is the Environmental and Energy Agenda for the Murphy Administration in New Jersey?

Bruce S. Katcher, Esq.

In late November 2017, we published a [Special Alert](#) with our predictions on what may be the environmental and energy initiatives under the new Murphy administration. In brief, the following initiatives are likely to be at or near the top of the agenda:

1. Greenhouse Gas
 - a. Re-entry into the Regional Greenhouse Gas Initiative and (RGGI)
 - b. Possible expansion of RGGI objectives into transportation
 - c. Support of the U.S. Climate Alliance and the Paris Accords
2. Electric Vehicle Use and Infrastructure
 - a. Promotion of electric vehicles and infrastructure
 - b. Pursuit of California zero-emission vehicle program
3. Renewable Energy and Storage
 - a. Wind – vigorous effort to promote off-shore wind
 - b. Solar – promote increased investment in solar to once again position New Jersey as a solar leader among the states
 - c. Portfolio Standards – support a move to 100 percent clean energy by 2050
 - d. Storage – promote clean energy storage
 - e. Siting – promote renewable siting to minimize adverse environmental impacts
4. Nuclear – Murphy indicated support for nuclear as an energy source during the campaign, however many of the environmental groups supporting him are not on board.
5. Fracking – support for initiatives that would disincentive fracking
6. Resiliency – Continue to support resiliency efforts including smart grids, microgrids and advanced metering as well as protection of the shore from damaging storms.
7. Urban toxics, diesel emissions, environmental justice and ports – The Governor-elect's campaign materials emphasize the importance of addressing disproportionate environmental impacts on low income and politically vulnerable communities. Thus, these areas are expected to be a focus of these efforts.
8. Land Use Regulation
 - a. Smart Growth – An important plank of the Murphy platform was to return New Jersey to a leadership role in smart planning.
 - b. Status of recent regulatory changes – Land use regulatory revisions adapted over the last several years could be a target for re-evaluation.
 - c. Highlands and Pinelands – The composition of both Commissions could face change and some key recent decisions (e.g., re pipelines in the pinelands and septic density in the Highlands) could face re-examination.
9. Site Remediation – this topic is addressed under a separate article in this Forecast [here](#).
10. Strategic state leadership on environmental issues where EPA retreats – Expect New Jersey to take a leading role on issues such as climate change where EPA is retrenching.

Changes in Store for Site Remediation Program and SRRA?

Bruce S. Katcher, Esq.

While it is unclear whether the new administration will make significant changes in the site remediation regulatory program, it seems likely that an effort to amend the Site Remediation Reform Act (SRRA) will at least begin in 2018. Now that over eight years have passed since the statute was enacted in 2009, it is obvious that the statute is in need of fine tuning. Examples of issues that could be addressed in that process include the following:

1. Remedial Action Permits: Improvements to the remedial action permit process to
 - a. Clarify that the process should not be used by NJDEP as a substitute for remedy review but instead only to review the post-remedy monitoring and maintenance program,
 - b. Eliminate the requirement that an owner that acquired a property after a discharge occurs and implements a remediation must remain a permittee indefinitely and have permittee status eliminated after it sells the property, and
 - c. Authorize the issuance of permits by rule and general permits based on LSRP certification that would eliminate the extensive delays in NJDEP permit issuance that are created under the current system of individual permits.
2. Financial Assurance: Reform the options for financial assurance for engineering controls to allow self-guarantees and surety bonds (including with respect to remediation funding sources under the Industrial Site Recovery Act as to the latter) and reduce the term of financial assurance mechanisms, with allowance for renewal as appropriate.
3. Direct Oversight: Creation of a process to terminate direct oversight for cases where parties proceed in good faith to correct a deficiency that caused them to be in direct oversight and to expand the litigation settlement carve out to include matters settled administratively by consent order.
4. Liability Reform: Provide more clarity as to and expand liability relief for innocent purchasers (e.g., see the bona fide prospective purchaser relief available under federal Superfund law) and volunteers.
5. Historic pesticides/historic fill: The status of these conditions and when they require remediation is in need of clarification and greater flexibility than what is provided under existing law.

On the regulatory/guidance side, issues that may be in line for attention include the following:

1. Reform of the agency's fill guidance to enable the use of alternate fill above the floodplain and relax the "like-on-like" limitation in appropriate circumstances
2. Clarification of situations in which LSRP's must evaluate so-called "contaminants of emerging concern" and what standards to apply in addressing the remediation of such contaminants (see the article elsewhere in this Forecast for further information on the issue of emerging contaminants).
3. Application of the agency's direct oversight enforcement policy as more and more sites run afoul of missing deadlines and falling into "mandatory" direct oversight
4. Finalization of the agency's rule proposal to specify the remediation requirements for discharges from "unregulated heating oil tanks".
5. Re-examination of recent changes to soil and groundwater remediation standards and updating of default values for soil impact to groundwater standards.

Contaminants of Emerging Concern Such as PFAS to Receive Increased Attention in New Jersey

John F. Gullace, Esq.

The New Jersey Department of Environmental Protection (NJDEP) Site Remediation and Waste Management Program recently launched [a webpage dedicated to "Contaminants of Emerging Concern."](#) According to NJDEP, the new webpage "focuses on Per- and Polyfluoroalkyl Substances (PFAS)" such as perfluorooctanoic acid (PFOA); Perfluorononanoic Acid (PFNA); and Perfluorooctanesulfonic Acid (PFOS). NJDEP later announced at a technical conference that hundreds of PFAS are present in the environment;

are detrimental to human health and the environment in very low concentrations; and are actively being studied by NJDEP. The import of these comments from NJDEP is that the State is developing standards for many other PFAS.

According to NJDEP, contaminants of emerging concern such as PFAS, “if discharged to the waters or onto lands of the State, are pollutants that must be remediated using a Licensed Site Remediation Professional (LSRP). When the remedial objective for a site is an entire site final remediation document and the site is currently or was formerly occupied by facilities that stored, handled, and used contaminants of emerging concern, LSRPs must consider these contaminants of concern during the investigation and remedial action. LSRPs must evaluate the site for potential spills and releases through air, water, and waste discharges.” We expect the administration of Governor Murphy and Commissioner McCabe to support and expand these efforts to establish cleanup standards for PFAS, often in the parts per trillion.

The regulated community may challenge these efforts by NJDEP to establish cleanup standards for PFAS. On December 19, 2017, the Superior Court of New Jersey, Appellate Division, issued an unpublished opinion in *Chemistry Council of New Jersey v. NJDEP*, No. A-1439-15T4, that invalidated the Interim Specific Ground Water Quality Criteria (ISGWQC) for PFNA adopted by NJDEP. According to the court: “The record here shows that these interim criteria have become de facto a permanent regulatory scheme without the agency complying with the requirements of the [Administrative Procedures Act] APA. As such, these measures are declared invalid.” Opinion at 15. Although the court’s opinion may be moot as to PFNA in light of rulemaking initiated by NJDEP in 2017 and finalized on January 16, 2018, which set a final standard for PFNA, the message from the court is clear. Any effort by NJDEP to regulate other PFAS must more promptly trigger the formal rulemaking process under the APA, with its attendant opportunity for comment and, potentially, litigation. In 2018, we expect to see new cleanup standards for previously obscure PFAS, new rules, and potentially litigation as NJDEP and the regulated community grapple with how to address these contaminants of emerging concern.

NJDEP’s Direct Oversight of Contaminated Properties Undergoing Remediation Will Continue to Evolve in 2018

John F. Gullace, Esq.

Properties that are in the New Jersey Department of Environmental Protection (NJDEP) Site Remediation Program (SRP) are required to complete various cleanup activities by specified deadlines under the auspices of a Licensed Site Remediation Professional (LSRP). If the remediation of a site fails to stay on schedule, the site may become subject to the onerous Direct Oversight (DO) requirements of the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS). N.J.A.C. 7:26C-14. In 2017, we saw a significant increase in the number of sites subjected to DO, either at the discretion of NJDEP or by operation of law. Regardless of the mechanism by which DO was imposed on sites, NJDEP has also developed mechanisms to avoid or relax the DO requirements, where NJDEP believes it is warranted. Two forms of Administrative Consent Order were developed by NJDEP as a result.

Where a site faces deadlines that will not be met and a prospective purchaser wishes to acquire the contaminated property, but only if it will not be subject to DO, NJDEP has developed a Pre-Purchaser Administrative Consent Order (ACO) which must be negotiated and fully executed by the purchaser and NJDEP prior to the acquisition. This form of ACO effectively extends the deadlines that would otherwise trigger DO. Another mechanism being used in circumstances where DO has been triggered at a site,

perhaps innocently, are ACOs where adjustments to the DO requirements are earned and the site is allowed to proceed through the remediation process largely under the auspices of an LSRP. The details of such orders vary depending upon the circumstances of each site.

Absent the change in administration in Trenton, we would have expected this flexible approach to DO to expand as more and more sites are deemed by NJDEP to have triggered DO; however, it's unclear whether the new administration will look favorably on this flexibility when DO has been triggered or is likely to be triggered. Equally, it's unclear whether non-governmental organizations (NGOs) might challenge any ongoing efforts by NJDEP to "relax" the strictures of DO. This will be an emerging issue to watch in 2018.

What's in the Air for 2018 in New Jersey?

Carol F. McCabe, Esq.

NJDEP has been active in 2017 on the air front, and we'll likely see some of NJDEP's initiatives carry over into 2018. On the permitting front, NJDEP has recently announced several new general permits: GP-016A, which covers minor source manufacturing and material handling equipment with potential emissions below reporting thresholds, is intended to constitute a more flexible and workable replacement for existing general permits governing abrasive blasting, woodworking and small emitters; GP-018 and general operating permit GOP-008 for boiler(s) or heater(s) with a rated capacity greater than or equal to 5 MMBtu/hr and less than 10 MMBTU/hr, are intended to replace the current general permit for boiler(s) or heater(s) each less than 10 MMBTU/hr. Additional general permit actions are anticipated to include revisions to general permits governing fuel dispensing facilities, portable equipment, boilers and heaters with a rated capacity equal to or greater than 10 MMBtu/hr and less than 50 MMBtu/hr and non-MACT plating operations.

Several rulemaking actions have been completed, including the recently published rules that adopt federal VOC control technique guidelines for paper, film and foil coatings, fiberglass boat manufacturing materials, miscellaneous metal and plastic parts coatings, and industrial cleaning solvents, as well as NOx RACT standards governing existing simple cycle combustion turbines combusting natural gas and compressing gaseous fuel at major NOx facilities and from stationary reciprocating engines combusting natural gas and compressing gaseous fuel at major NOx facilities. A rule addressing federal PM2.5 New Source Review permitting requirements and the removal of certain startup, shutdown and malfunction provisions was recently finalized, as was a rule repealing t-butyl acetate (TBAC) reporting requirements and addressing the decommissioning of Stage II vapor control systems.

NJDEP's Resiliency, Air Toxics and Exemptions (RATE) rulemaking was proposed for public comment, and was adopted in final on January 16, 2018. The RATE rulemaking is intended to: 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. In light of the RATE rule's proposed tightening of reporting thresholds for a large number of hazardous air pollutants, this rule has potentially significant ramifications for many facilities in New Jersey.

NJDEP has also announced new developments in the world of modeling and risk assessments. Certain changes to its risk screening worksheet have been made, including the addition of sulfuryl fluoride as a pollutant for which risk screening must be conducted and the adoption of California's risk factor for those

assessments. N-Propyl Bromide is also being considered for inclusion, while the unit risk factor for ethylene oxide has changed from 8.8E-5 per $\mu\text{g}/\text{m}^3$ to 3E-3per $\mu\text{g}/\text{m}^3$ and the unit risk factor for trichloroethylene has changed from 2E-6 per $\mu\text{g}/\text{m}^3$ to 4.8E-6 per $\mu\text{g}/\text{m}^3$. Reference concentrations for several pollutants, including benzene and trichloroethylene, have also been changed. A description of all the recent changes can be found [here](#). NJDEP has also announced impending revisions to Technical Manuals 1002 and 1003, governing the preparation of protocols and procedures for air modeling and risk assessment protocols. These revisions are being developed in conjunction with a small, invitation-only group of stakeholders and will be subject to public comment prior to finalization.

And, the new administration can be expected to move forward aggressively to reinstate and possibly develop new greenhouse gas initiatives. All this and more in 2018!

Please feel free to forward this information to your colleagues and encourage them to subscribe to our mailing list.

This alert is intended as information for clients and other interested parties. It is not intended as legal advice. Readers should not act upon the information contained herein without individual legal counsel.

Portions of this email may contain attorney advertising under the rules of some states.

Copyright © 2018. Manko, Gold, Katcher & Fox, LLP www.mankogold.com