

2021 Environmental and Energy Law Forecast

NEW JERSEY

New Jersey Site Remediation Program Faces Key Issues in 2021

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The Site Remediation Program (SRP) is slated to see several key issues occupy the agenda in 2021. These are summarized below:

1. Expected Finalization of Major Rulemaking Revising Soil Remediation Standards

In April 2020, NJDEP published a major proposal to revise the remediation standards for contaminated sites. That proposal will likely be finalized during the second quarter of 2020 and will have a number of implications for sites undergoing remediation.

As it stands, the proposal (summarized in our [April 8, 2020 Alert](#)) would revise and codify as regulatory standards for the first time both impact to groundwater soil remediation standards (including soil and soil leachate levels) and vapor intrusion standards. In contrast, both are currently contained in and applied through guidance documents without express regulatory imprimatur. It would also replace the direct contact soil remediation standards with separate soil remediation standards for the inhalation exposure pathway and the ingestion-dermal exposure pathway for both residential and non-residential scenarios. Finally, the proposal includes revised procedures for setting alternate remediation standards, adds and removes standards for some constituents and increases and decreases several standards. No changes were proposed to the groundwater remediation standards.

For those standards which are revised to be more stringent by an order of magnitude or more, remediations which were complete and for which a No Further Action (NFA) letter or Response Action Outcome (RAO) had been issued by NJDEP or an Licensed Site Remediation Professional (LSRP), respectively, will need to be re-evaluated to determine whether they continue to be protective of human health or the environment and if not, additional remediation may be required. Also, for remediations not yet complete, the new standards will apply except for matters where a remedial action workplan incorporating the old standards was approved by the Department or an LSRP or a remedial action report was submitted with the old standards, in which case a similar order of magnitude analysis of the remedial action and possible further remediation would be required. In addition, more rigorous evaluation of exposure pathways may be necessary while the remediation process is ongoing given that both the inhalation and dermal exposure pathways must be evaluated for compliance with their respective standards. The Department's existing phase-in rules should be consulted to further determine when the new standards first apply to ongoing cases.

2. May 7, 2021 Deadline for Completion of Remedial Actions

A large number of outstanding SRP cases could be facing a deadline to complete remediation by May 7, 2021 which could create complications for LSRPs, remediating parties and the NJDEP.

When the Site Remediation Reform Act (SRRA) was enacted in 2009, special provisions were included to apply to older pending cases that were designed to bring those cases to completion. These provisions focused attention on cases for which a discharge was identified prior to May 7, 1999 or which should have been discovered by that date under certain specified statutory or enforcement requirements. This subjected a large number of outstanding cases to a statutory deadline for the remedial investigation (RI) of May 7, 2014 which, pursuant to the mandatory timeframes set forth in the applicable SRP regulations, subjected these old cases with multimedia contamination to a remedial action completion deadline of May 7, 2021. (Cases which qualified for a two-year statutory extension of the RI deadline are not covered by the 2021 deadline.)

When these cases are combined with other post-May 7, 1999 cases which, in the ordinary course of the remediation process, are facing mandatory deadlines on the same date, this could result in a very large number of cases for which remediation must be complete (i.e., a RAO has been issued by a LSRP) by May 7, 2021. In turn, this could lead to a large backlog of submissions for remedial action permits which must be approved by NJDEP before a RAO can be issued for cases utilizing institutional or engineering controls, thereby resulting in delays in the issuance of RAOs beyond the May 2021 deadline. Similarly, while an extension process is available under the SRP regulations, it may be difficult to justify further extensions of this timeframe for cases that are already considered to be very old by NJDEP.

If the deadline is missed, this could result in cases falling into NJDEP direct oversight status (which requires the posting of financial assurance in the form of a trust fund and affords NJDEP the authority to select the remedial action) and potential civil penalties. While limited relief from some of the direct oversight requirements may be available under the 2019 SRRA amendments, including an administrative consent order to adjust certain of the direct oversight requirements, the strictures of such orders are certainly not preferable to meeting the deadline or obtaining an extension. (See our [June 2019 Special Alert](#)).

This situation is further complicated by the temporary rule promulgated by NJDEP on August 17, 2020 that extended a number of SRP deadlines, including this one, by 270 days as long as the Governor's COVID Public Health Emergency Declaration Executive Order 103 remains in effect (see our [August 2020 Special Alert](#)). If EO 103 is still in effect on May 21, 2021, the deadline is extended, however, if EO 103 expires before that date, the deadline is not extended. All of this makes planning particularly important and dictates that careful consideration be given to completion of affected remedial actions, early filing of remedial action permit applications and seeking extensions where necessary. Parties responsible for conducting remediations and their LSRPs should be in the process of considering how to approach these deadlines where applicable.

3. Potential for New Standards

As we've previously reported (see our [June 2020 Special Alert](#)), NJDEP adopted maximum contaminant levels and groundwater quality standards for two more perfluoroalkyl substances (PFAS) in 2020 - perfluorooctanoic acid (PFOA) at 0.014 micrograms per liter ($\mu\text{g/l}$) and perfluorooctanesulfonic acid (PFOS) at 0.013 $\mu\text{g/l}$. A standard for a third PFAS - perfluorononanoic acid (PFNA) - was previously set in 2018.

These standards were based on the MCL recommendations of the New Jersey Drinking Water Quality Institute (DWQI). The DWQI is presently considering proposing a recommended MCL for 1,4 dioxane at .33 µg/l which could eventually lead to a slight lowering of the groundwater quality standard which is presently set at .4 µg/l. It is possible that the DWQI could also turn its attention to setting MCLs for additional PFAS in the coming year. Finally, with all the attention being focused on PFAS by the NJDEP and the Attorney General (see the articles elsewhere in this Forecast regarding [natural resource damages](#) and additional [regulation of PFAS](#) in New Jersey), it would not be surprising to see NJDEP begin the process to propose soil remediation standards for selected PFAS in 2021.

NJ Claims for Natural Resource Damages Likely to Continue in 2021

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Natural resource damages (NRD) appear to remain a priority of the Murphy administration, and consistent with the past two years, we expect to see additional NRD cases filed in the coming year. Because of the State's heightened focus on environmental justice (EJ) concerns, it is likely that new NRD actions will involve sites in or near EJ communities. Last year, the New Jersey Department of Environmental Protection (NJDEP) and the Attorney General's Office initiated three new lawsuits seeking to recover NRD, bringing the number of NRD cases filed since the State revitalized its NRD initiative in August 2018 to a total of 15. The State has engaged private counsel in almost all the NRD cases and is expected to continue to do so moving forward.

Moreover, we expect that the State will continue its trend of asserting unconventional claims for relief in new NRD cases. As we projected in our [2020 Forecast](#), the State expanded its counts in the 2020 lawsuits to include unconventional claims for relief such as strict liability and negligence. Further, the State has even amended its Complaints in earlier filed NRD actions to add these counts. In addition, recent Complaints have sought NRD for alleged per- and polyfluoroalkyl substances ("PFAS") contamination, which is not surprising given NJDEP's adoption of maximum contaminant levels and groundwater remediation standards for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) that became effective in June 2020 and the 2018 adoption of such standards for perfluorononanoic acid (PFNA).

We also anticipate that motion practice in the pending NRD cases will further shape the State's ability to bring and litigate NRD recovery actions. In April 2020, the New Jersey Appellate Division released a highly anticipated decision in which the court affirmed the dismissal of the State's common law trespass claim for lack of exclusive possession over the subject property. *New Jersey Department of Environmental Protection v. Hess*, A-2893-18T2 (N.J. Super. App. Div. Apr. 7, 2020). A more in-depth discussion of the *Hess* opinion can be found [here](#). With numerous dispositive motions challenging the State's common law and statutory claims for relief as well as its right to a jury trial pending in both state and federal courts, it is likely that there will be trial—and maybe even appellate—decisions this year which will further define the State's ability to bring and litigate cases seeking NRD.

Whether NJDEP will promulgate any regulations for the calculation of NRD in 2021 also remains unclear. Although last year NJDEP officials indicated that the agency is working on guidance related to NRD, there has been little information regarding what that guidance may concern and/or when it will be made available to the regulated community. The agency's failure to promulgate such regulations has drawn sharp criticism from New Jersey courts in the past and, given the continuing lack of properly promulgated criteria for

calculating NRD, seems almost certain to leave the State open to further criticism by the courts concerning its approach to NRD recovery.

New Jersey's New Environmental Justice Law Set to Resonate Throughout 2021

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As reported in our [September 21, 2020 Alert](#), on September 18, 2020 New Jersey became one of the first states in the country to enact legislation (The Environmental Justice Law) that establishes a rigorous environmental justice review process for applicants seeking environmental permits from the New Jersey Department of Environmental Protection (NJDEP) for certain facilities in overburdened communities. The legislature's stated intent in passing the law, was to limit the placement or expansion of covered facilities requiring environmental permits in communities that have borne a disproportionate share of adverse environmental and public health consequences in the state.

The Environmental Justice Law was signed by Governor Murphy around the same time that NJDEP issued guidance to implement the Governor's Executive Order 23, which directs the agency to advance environmental justice initiatives across state agencies. This combination of measures promises to resonate throughout 2021 and beyond as NJDEP moves to put into place a new set of regulations and the other agencies move to adopt policies and procedures to implement the new law and guidance.

The Environmental Justice Law applies to applicants seeking to obtain "individual permits" for named categories of new or expanded facilities in communities that the law considers to be overburdened based on minority, low-income or limited English proficiency demographic criteria spelled out in the law. Among the categories of facilities included are:

- (1) major sources of air pollution;
- (2) resource recovery facilities or incinerators;
- (3) sludge processing facilities;
- (4) large sewage treatment plants
- (5) transfer stations or other solid waste facilities and certain large recycling facilities
- (6) scrap metal facilities;
- (7) landfills, and
- (8) medical waste incinerators (except those at hospitals and universities).

The process set forth in the law requires these applicants to develop an environmental justice impact statement that assesses the potential environmental and public health stressors associated with the proposed new or expanded facility, including any stressors that cannot be avoided if the permit is granted, as well as existing stressors in the community. The applicant must then conduct a public hearing in the overburdened community and transmit a transcript of the hearing and any written comments received to NJDEP.

After NJDEP reviews the application, the environmental justice impact statement, and the comments received at the public hearing, NJDEP must deny an application for a new permit if NJDEP finds that the approval of the permit would, together with existing environmental or public health stressors, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community

that are higher than those borne by other communities (as determined by NJDEP) within New Jersey. An exception is available for facilities that serve a compelling public interest in the overburdened community. For permit renewals and the expansion of an existing facility, NJDEP may attach conditions to (but cannot deny) the permit if it makes similar findings that the permit would cause or contribute to adverse cumulative environmental public health stressors.

The new process cannot be implemented until NJDEP issues final regulations governing the process. NJDEP has yet to propose the regulations but it has started to conduct stakeholder meetings and solicit comments. NJDEP has announced that it will continue to hold stakeholder meetings in 2021, beginning in January. Although the deadline for the initial round of comments has passed, NJDEP has indicated that it will continue accepting comments prior to its issuance of proposed regulations, which is not expected until the second quarter of 2021, followed by an extended public comment period on the proposal. In light of this schedule, final regulations would not be expected until late 2021 or early 2022, however, it is not too early for affected facilities to begin to consider the potential impact of the new law on future development and permitting decisions.

New Jersey PACT – Regulatory Activity to Expect in 2021 for Control of Greenhouse Gas Emissions and Land Use Regulation

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This year will be busy for NJDEP, with the state's wide-ranging efforts to address climate change moving into a rulemaking phase. New Jersey's Protecting Against Climate Threats (PACT) initiative was launched via Governor Murphy's Executive Order No. 100 in early 2020, promising via NJDEP regulation to:

- Establish a greenhouse gas monitoring and reporting program to identify all significant sources of statewide greenhouse gas emissions, including carbon dioxide and short-lived climate pollutants, and monitor progress toward the limits set forth in New Jersey's Global Warming Response Act;
- Establish criteria to govern and reduce emissions of carbon dioxide and, where necessary, short-lived climate pollutants, including but not limited to, black carbon, hydrofluorocarbons, and methane; and
- Integrate climate change considerations, such as sea level rise, into all of NJDEP's regulatory and permitting programs, including but not limited to, land use permitting, water supply, stormwater and wastewater permitting and planning, air quality, and solid waste and site remediation permitting.

Commissioner McCabe's Administrative Order No. 2020-01 established aggressive timeframes for these and other PACT-related actions, and NJDEP embarked on significant stakeholder efforts in 2020 to address these directives. Initial rulemaking proposals are expected to address air emissions and land use issues, as discussed below.

Enhanced Greenhouse Gas Regulation – Stationary and Mobile Sources

Stakeholder meetings were held throughout the year, with meetings in September and October focused on the development of regulatory standards for greenhouse gas emissions from various sectors, including

utilities, the transportation sector, cargo handling, oceangoing vessels, and stationary sources. In a December stakeholder session, NJDEP previewed upcoming rulemakings that will be proposed in April 2021 which, according to the agency, are expected to include the following:

- **Electricity Generating Units (EGUs).** Existing fossil-fuel fired EGUs will be subjected to CO₂ emission limits, expressed as an efficiency standard, that will ratchet down over time. New base load EGUs will be subject to a CO₂ emission limits based on rate achieved by the most efficient combined cycle units. New non-base load and modified EGUs will be subject to case-by-case review.
- **Commercial and Industrial Boilers.** NJDEP expects to work toward a phasedown of small fossil-fuel fired commercial and industrial boilers (< 5MMBtu/hr) via imposing permit conditions for permit approval and requiring boiler fleet owners to submit a boiler fleet report and replace small, older fossil-fuel combustion boilers with non-fossil fuel boilers.
- **Heavy Fuel Sales Ban.** NJDEP intends to institute a ban on the sale of No.4 and No.6 heavy liquid fuels, with an exception for marine vessels.
- **Advanced Clean Truck and Fleet Reporting.** California's rules applicable to Class 2b (delivery vans) and Class 8 (long haul tractor trailers) are expected to be adopted by reference, to include a manufacturer zero-emission truck sales requirement starting in model year 2025 in New Jersey and increasing through model year 2035. Reporting requirements for large fleet owners will also support future development of zero emission fleet purchase requirements and assess infrastructure needs.
- **Low NO_x Rule.** NJDEP also expects to adopt by reference the California Medium and Heavy-Duty Vehicle Omnibus Rule and establish stricter NO_x limits for some medium-duty and all heavy-duty engines and vehicles, taking effect in model year 2025. The rule includes longer warranty requirements to ensure that future emissions controls are covered by the manufacturer using original manufacturer parts.
- **Medium-Duty Vehicle Inspections.** This expected rule will establish standards and test procedures for inspections of Class 2b through Class 5 medium-duty diesel vehicles (such as large pickup trucks, step vans and delivery trucks).
- **Cargo Handling Equipment.** California's diesel fleet modernization rule will be adopted by reference to require existing diesel-powered cargo handling equipment at ports and intermodal rail yards to upgrade to cleaner technology and require that new purchases meet the tightest standards (i.e. Tier 4), likely phased in starting in 2023. Required transition to full electric will be considered for a future rulemaking, as will a requirement for the provision of shoreside power for oceangoing vessels.

Land Resource Regulation – Sea Level Rise and Inland Flooding

NJDEP has also been active in the stakeholder process to incorporate climate change considerations into its land resource protection rules, with new proposed regulations anticipated to be published as early as the first quarter of 2021. The primary focus of NJDEP's PACT land use regulations will be on addressing the impact of sea level rise and more extreme rainfall events associated with climate change, as NJDEP estimates that approximately 35 percent of the state's land area is subject to flooding, including in already heavily developed areas of the state. The following land resource protection programs are expected to be impacted by regulatory changes as announced by the agency at a December stakeholder session:

- **Flood Control.** NJDEP is currently considering proposing a variety of new regulations aimed at mitigating the impact of sea level rise and flooding concerns, that will likely cut across multiple land development regulatory programs.
 - **“Inundation Risk Zone”** - The potentially most significant new regulation is the development of an “Inundation Risk Zone,” consisting of land beyond current floodplain boundaries that is mostly dry, but that is expected to be inundated daily by tidal waters or permanently by the year 2100. It remains unclear precisely how NJDEP intends to utilize or implement the Inundation Risk Zone into its regulatory permitting and compliance programs – but the potential ramifications for coastal development in New Jersey could be significant, potentially limiting or imposing new requirements on development in these areas that make development impractical, or possibly affecting landowners' ability to acquire flood hazard insurance for their properties.
 - **“Coastal Buffer Zone”** – NJDEP is also considering proposing a new “coastal buffer zone” consisting of area adjacent to beaches, dunes, or coastal bluffs along the Atlantic Ocean or the Delaware Bay/River that is vegetated, and that acts as a transition between the coastal area and upland development. The “coastal buffer zone” would overlap with the “inundation risk zone” but with differing regulatory goals - the “coastal buffer zone” will focus on increasing the width of beaches and use of dunes to buffer upland development from coastal hazards and flooding.
 - **Adjustment of Floodplains and Flood Hazard Areas** – NJDEP has also suggested that it will propose an adjustment of the 100-year floodplain to make it reflect expected future conditions, rather than historic flood levels (which is the current basis for FEMA floodplain mapping), and which forms the basis for many land development protocols and restrictions in tidal and fluvial areas.
 - **Tidal areas** - NJDEP is considering creation of a “Climate Adjusted Flood Elevation,” that will expand the tidal flood area by adding an additional 5 feet to the FEMA 100-year flood elevation
 - **Fluvial Areas** – NJDEP is considering two options: (1) utilizing the FEMA 500-year flood elevation to require design flood plus 2 feet, or the FEMA 100-year flood elevation plus 3 feet; or (2) calculating the flood hazard area limits using hydrologic and hydraulic calculations based on 125 percent of the 100-year storm.

- **Elevation Standards** – NJDEP is looking to require that new residential and critical infrastructure will require the first floor to be constructed 1 foot above the new “Climate Adjusted Flood Elevation.”
- **Rebuilding requirements** – NJDEP has also proposed potentially more stringent requirements to rebuild or reconstruct property damaged by flooding that will require more than NJDEP’s current restrictions, and which prohibit any habitable space below the FEMA 100-year flood elevation.
- **Stormwater Management.** NJDEP is considering amending the threshold for what is considered to be “major development” that triggers stormwater management planning and permitting requirements and is also considering adopting new standards to apply to redevelopment projects that reconstruct impervious surfaces on a property.
- **Dam Safety.** NJDEP is also expected to publish proposed regulations to increase the freeboard height requirements for dam construction under NJDEP’s Dam Safety Standards, likely doubling the current requirement from one foot to two feet.
- **Permits-by-Registration.** NJDEP is proposing to replace “permits-by-rule” by a “permits-by-registration” system, that would allow NJDEP to better track cumulative impacts and address standards in impaired watersheds. It is currently unclear which permits-by-rule would be converted to permits-by-registration, or whether current permits-by-rule will be converted into general permits.

As these multiple examples from just NJDEP’s air and land use regulatory programs demonstrate, NJDEP is set to roll out potentially significant PACT-related changes in 2021. Affected industry sectors should monitor and track the PACT initiative as it progresses into the rulemaking phase, evaluate the potential impact of new regulations, and provide input to NJDEP during applicable comment periods.

2021 Impact of NJDEP 2020 C-1 Water Quality Designations for Additional Waterways

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In April 2020, NJDEP finalized the reclassification of 600 miles of rivers and streams to Category 1 or “C1” status – which is the second highest antidegradation classification of a water body under NJDEP’s surface water quality regulations, and which requires that the water be “protected from any measurable change in water quality” because of its “exceptional significance” to ecological values, recreational uses, water supplies, or fisheries resources. This was the first reclassification of state rivers and streams since 2008.

The newly reclassified rivers and streams cut across 67 different municipalities, and multiple counties, including, but not limited to the Cooper River in Camden County; Woodbury Creek and Still Run in Gloucester County; the Salem River in Salem County; the Cohansey and Maurice Rivers in Cumberland County; the South Branch of the Raritan River in Somerset and Hunterdon Counties; Jacobs Creek in Mercer County; Tuckerton and Westecunk Creeks in Ocean County; the Pequest River in Warren County; and the Ramapo River in Bergen County.

This reclassification will affect permitting across multiple industrial and commercial sectors in 2021 – particularly as development and capital projects ramp up as the economy reopens after COVID-19. Existing projects may need to reevaluate the impact of their activities as well. For example, wastewater discharges into C1 waters must meet more stringent water quality standards, which will impact existing and newly proposed discharges to these waterways. In addition, C1 waters and all upstream tributaries also have a 300-foot riparian zone land development buffer requirement on either side of the waterway under the Flood Hazard Area Control Act regulations, that may further restrict any planned land development projects, including infrastructure projects, located near these newly-designated water bodies.

New Jersey in Forefront in Regulation of PFAS Despite Ongoing Legal Challenge

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[As noted elsewhere in this Forecast](#), the New Jersey Department of Environmental Protection (NJDEP) adopted ground water quality standards (GWQS) and maximum contaminant levels (MCLs) effective June 1, 2020, for two of the most prominent per – and polyfluoroalkyl substances (PFAS): perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). These new standards (0.014 ug/L for PFOA and 0.013 ug/L for PFOS) bring these emerging contaminants under much of the same regulatory umbrella already established in New Jersey for another PFAS chemical, perfluorononanoic acid (PFNA) and continues to secure New Jersey's spot as one of the most proactive states in the regulation of PFAS contaminants. Indeed, New Jersey's standards, as discussed below, are significantly lower than the recommended guidance set by the United States Environmental Protection Agency (EPA) of a screening level of 0.04 ug/l and Lifetime Drinking Water Health Advisory level of 0.07 ug/l, placing New Jersey well ahead of a growing national trend of states that have begun to regulate PFAS.

New Jersey's efforts to regulate PFAS in ground water dates back to July 2015, when the New Jersey Drinking Water Quality Institute issued a recommended health-based MCL for PFNA of 0.013 ug/L. The recommendation served as the basis for NJDEP's adoption of an interim specific ground water quality standard of 0.01 ug/L for PFNA on November 25, 2015, and subsequent amendments to both NJDEP's GWQS and the Discharge of Petroleum and Other Hazardous Substances regulations to add PFNA to the list of Hazardous Substances (N.J.A.C. 7:1E) in January 2018. On September 4, 2018, NJDEP amended the MCL for PFNA in the GWQS rules to 0.013 ug/L, consistent with the newly established MCL for PFNA of 0.13 ug/L.

The recent adoption of standards and MCLs for PFOA and PFOS has similarly generated amendments to various environmental regulations, including adding both as Hazardous Substances under the Discharge of Petroleum and Other Hazardous Substance rules (N.J.A.C. 7:1E), and amending the GWQS (N.J.A.C. 7:9C), the Private Well Testing Act rules (N.J.A.C. 7:9E), the Safe Drinking Water Act rules (N.J.A.C. 7:10), and the New Jersey Pollutant Discharge Elimination System rules (N.J.A.C. 7:14A). Finally, the newly adopted GWQS also become ground water remediation standards (N.J.A.C. 7:26D-2.2(a)).

The adoption of the new standards should not come as a surprise however, and in fact many sites likely already considered their impact in ongoing site remediation in response to NJDEP's adoption of interim specific groundwater quality standards for PFNA back in 2015 and PFOA and PFOS in March of 2019. Indeed, under the Technical Requirements for Site Remediation (N.J.A.C. 7:26E), in evaluating a contaminated site, LSRPs were already required to consider whether there were any historic or current use

of emerging contaminants, which include PFNA, PFOA and PFOS, regardless of whether the contaminant is listed as a hazardous substance. This evaluation would have to be documented in the preliminary assessment for the site and, where such substances are documented, could lead to a site or remedial investigation of groundwater and possible remedial action. [See [NJDEP's website for details on Emerging Contaminants](#)].

The ultimate fate of the new PFOA and PFOS standards remains uncertain. A coalition of public utilities, businesses and trade and business associations filed a petition with the New Jersey Appellate Division on October 1, 2020, arguing that NJDEP did not comply with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, in adopting the PFOA and PFOS regulations, and further that the standards are arbitrary and capricious and not based on sound and rational scientific evidence. The coalition's petition also sought immediate relief in the form of a stay of the regulations pending the Appellate Court's full review of the legal challenges presented. On January 4th, 2021, the Appellate Division issued a one-page order denying the requested stay, leaving some doubt on whether the Appellate Division's decision on the merits will change course. A decision on the merits of the challenge could come in 2021.

New NJ Brownfields Tax Credit Program Enacted Under Economic Recovery Act of 2020 ***Bruce S. Katcher, Esq.***

At the end of 2020, the legislature passed and on January 7, 2021, Governor Murphy signed into law a massive new economic development law – the Economic Recovery Act of 2020. Among the variety of new economic development incentives is the Brownfields Redevelopment Incentive Program Act (BRIPA), which provides for the awarding of tax credits to brownfields developers to promote the redevelopment of brownfields in New Jersey.

Under BRIPA, an eligible developer (i.e., one not responsible for the contamination) of a redevelopment project may submit an application to the Economic Development Authority (EDA) and NJDEP for approval of tax credits to compensate for remediation costs, including both the cost of remediating soil and groundwater and also the cost of addressing contamination in building structures (e.g., asbestos, lead paint PCBs, etc.).

To be eligible, the project must have a project financing gap – meaning that the developer has contributed at least 20 percent of the project's capital itself and the project has a capital shortfall that cannot be satisfied from other sources. The developer must also demonstrate that the project is not economically feasible without the credit, the municipality will provide a letter of support, workers will be paid prevailing wage and, with limited exceptions, remediation (except for preliminary assessment and investigative work) has not yet commenced.

Applications will be reviewed by EDA (in consultation with NJDEP) through a competitive process and a variety of factors may be considered as part of that process. Among those factors is whether the project reduces environmental and public health stressors in an overburdened community, another reflection of the state's commitment to apply environmental justice principles.

The remediation may be performed under a memorandum of agreement or other oversight document with the NJDEP or pursuant to the NJDEP's LSRP program. Once the application is approved by EDA and prior

to starting remediation, the developer must enter into a redevelopment agreement with EDA. The agreement will specify the amount of the credit, the date of completion for the remediation, the project remediation cost and require six-month progress reports. Conditions include compliance with EDA's affirmative action requirements and green building standards, A labor harmony agreement may be required for certain retail and distribution establishments in the project and NJDEP is subrogated to the rights of the developer to recover any remediation costs from third parties. The credits are transferable one time.

A total of up to \$50 million per year in credits is available through the first six years of the seven-year program. Credits will be awarded in an amount not to exceed 40 percent of actual remediation costs, 40 percent of projected remediation costs as set forth in the redevelopment agreement, or \$4 million, whichever is least.

The above summary only begins to scratch the surface of this new program, and full implementation will have to await the promulgation of new regulations - an expedited process of temporary regulations is provided under the law; however, it appears likely that BRIPA will generate a lot of interest among brownfields redevelopers in 2021 as they consider how to factor the new incentives into their plans.

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