

2022 Environmental and Energy Law Forecast

NEW JERSEY

Governor Murphy's Second Term Environmental Priorities

Bruce S. Katcher, Esq.

With the beginning of his second term this year, it seems probable that Governor Murphy's environmental priorities will focus largely on the continued implementation priorities he identified at the outset of his administration as opposed to new ones. To that end, climate change and environmental justice (and more broadly - community-based environmental concerns) will continue to occupy center stage; however, each of those issues encompass a myriad of ancillary issues that present their own challenges. Notably, very little mention of these issues was made in the Governor's State of the State Address delivered on January 11, 2022.

Climate Change

With respect to climate change, the first wave of Protecting Against Climate Threats (PACT) rules will be finalized by the NJDEP over the course of the year, including those aimed at reducing greenhouse gas emissions at electric generating facilities and those aimed at resiliency and land use regulatory changes designed to tackle the challenges presented by sea level rise, stormwater and flooding.

Along with those regulatory developments, continued (and expanded) programmatic emphasis on promoting the use of electric vehicles (EVs), EV charging infrastructure and port electrification is expected. The longstanding initiative to promote solar energy development will continue alongside the new initiative to promote wind energy development. The administration is promoting both the environmental and economic benefits of wind energy, with heavy emphasis on the development of the huge Wind Port in Salem County. This hub-style marshalling port project will manufacture parts for and serve as a parts marshaling location for offshore wind projects in New Jersey and all along the east coast. Full scale construction is anticipated to occur in 2022 into 2023.

The administration will also face increasing pressure coming from some public sectors for a fossil fuel power plant construction moratorium and a ban on additional natural gas pipeline construction.

Environmental Justice

Environmental Justice (EJ) will also see the roll out a major regulatory package to implement the New Jersey EJ Law, which is likely to come under heavy scrutiny by both business and environmental justice advocates during the coming year. While the applicability of the EJ law is limited to certain designated permits and facilities, EJ is also likely to be promoted across multiple agencies under existing programs based on the mandates of the Governor's Executive Order #23 which requires that "all Executive branch

departments and agencies shall consider the issue of Environmental Justice” in their decision-making. These initiatives will be monitored closely by the Governor’s EJ Interagency Council.

With the Governor having made it clear that much new state investment will be targeted to EJ communities, the administration will also participate in defining the range of projects, priorities and investments for the newly available federal funding under the 2020 federal infrastructure legislation a significant portion of which will be directed to address pressing environmental and public health issues in these communities. This will include replacing aging lead water pipes, cleaning up Superfund sites, acquiring new electric school buses, upgrading public transit systems and the electric grid, as well as a variety of other funding programs.

Other

As if the above were not enough, we expect the administration, through the NJDEP, to continue to focus on implementation of the new Dirty Dirt Law, response to the public concern over the perceived threat to public health presented by per- and polyfluoroalkyl substances (PFAS), the ongoing initiative to secure redress for damage to natural resources at contaminated sites, and enhanced recycling efforts.

New Jersey Site Remediation Program Faces Key Issues in 2022

Bruce S. Katcher, Esq.

A variety of issues promise to receive heightened attention under the New Jersey Site Remediation Program (SRP) in 2022.

PFAS and other Emerging Contaminants

There is likely to be a continuing emphasis on addressing per- and polyfluoroalkyl substances and other contaminants of emerging concern (CECs), in dealing with the remediation of contaminated sites. This applies to ongoing cases where the SRP has emphasized that each site must be evaluated for the presence of CECs to the same extent as other contaminants during the investigatory phases of remediation. With respect to “closed” cases where biennial certifications of engineering and/or institutional control remedy effectiveness are required, that process must also include an evaluation of CECs where that may not have been considered during earlier phases of the case. The NJDEP has published guidance addressing this issue and a list of categories of sites at which such an evaluation is presumptively required.

Environmental Justice

Environmental justice considerations will probably receive a new emphasis. Although New Jersey’s Environmental Justice (EJ) Law excludes “any authorization or approval necessary to perform a remediation” from the list of permits required to undergo a statutory EJ review, the Governor’s Executive Order #23 requires that “all Executive branch departments and agencies shall consider the issue of Environmental Justice and make evaluations and assessments in accordance with that guidance, to the extent not inconsistent with law.” Therefore, parties conducting remediations in areas meeting the definition of overburdened community under the EJ Law would be advised to at least consider the impacts of their remediation on the community, and, where required, develop inclusive public participation plans.

SRRA Reforms

The NJDEP has embarked on a stakeholder process to address a number of issues that were raised as concerns during the process of amending the Site Remediation Reform Act (SRRA) in 2019 but were put

aside to be addressed administratively rather than legislatively. Among the objectives of this initiative will be an update to the remedial action permit (RAP) process to expedite the issuance of RAPs where possible through the creation of a general permit process for the issuance certain routine RAPs.

Miscellaneous

Finally, a variety of other issues will take on importance during the coming year. Watch for approaching regulatory or mandatory deadlines in May 2022, the application of the deadline extensions granted during the COVID-19 public health emergency that ended on June 4, 2021, the implementation of the NJDEP's revisions to its Fill Material Guidance issued in late October 2021, and the NJDEP's less forgiving approach to the submission of deficient documents by LSRPs.

New Jersey Environmental Justice: Issues to Watch in 2022

Jill Hyman Kaplan, Esq. and Zachary J. Koslap, Esq.

Environmental Justice Administrative Order

Just over a year after Governor Phil Murphy signed New Jersey's Environmental Justice Law (EJ Law), the New Jersey Department of Environmental Protection (NJDEP) [issued an administrative order](#) on September 22, 2021 designed to implement an environmental justice review process until the EJ Law regulations can be adopted and go into effect. The order applies to facilities as defined in the EJ Law located in overburdened communities that seek authorizations covered under the EJ Law. Among other requirements, the order requires applicants to hold public hearings "consistent with" the EJ Law, establishes 60-day public comment periods for permit applications, "strongly encourages" applicants to engage directly with community members in advance of the comment period, and requires NJDEP to apply "special conditions" as may be necessary to avoid or minimize environmental or public health stressors to the overburdened community. The order indicates that NJDEP can only exercise its authority under the order to the extent consistent with existing law and regulations (i.e., not including the EJ Law).

Public Involvement

Issuance of the order came months after NJDEP completed a series of stakeholder meetings designed to provide background on the EJ Law and solicit input on key aspects of the law in anticipation of rulemaking. NJDEP also has launched a Community Engagement Series, which began on November 15 in Burlington City. The series is designed to be a year-long effort to encourage community engagement in environmental justice issues.

EJ Law Regulations

[As we reported](#) at the time of its passage, the EJ Law seeks to address cumulative environmental and public health stressors in overburdened communities, which the law defines as communities in which (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a state recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency. The coming year will see the proposal for public comment of what promises to be an extensive set of regulations aimed at implementing the substantive requirements of the EJ Law in these communities. The substantive requirements will reflect the information developed at the stakeholder meetings referenced above and the internal deliberations at NJDEP. The key EJ Law requirements that will be the subject of those regulations are briefly summarized below.

Under the EJ Law, certain types of facilities seeking covered permits for new or expanded facilities from NJDEP in an overburdened community must develop an environmental justice impact statement (EJIS) as part of any permit application. The purpose of the impact statement is to assess the potential environmental and public health stressors associated with the proposed new or expanded facility. The applicant must then hold an environmental justice public hearing to accept comments from members of the overburdened community on the impact statement and the proposed new or expanded facility.

For the issuance of new permits, if NJDEP finds that issuance of the permit would “together with other stressors cause or contribute to adverse cumulative environmental or public health impacts” in the community “that are higher than those borne by other” comparative geographic units, then NJDEP **must** deny the permit. If NJDEP makes the same finding in the context of existing facility expansions or permit renewals, then NJDEP may only apply permit conditions on the construction and operation of the facility to protect public health.

All the various aspects of the EJIS process, the stressor evaluation, what types of facilities and permits are covered and which are excluded, the public hearing process, the geographic unit comparison, the nature of permissible permit conditions and much more will need to be addressed in the regulations.

Although NJDEP has not officially announced when it expects to issued the proposed regulations, the agency’s informal statements indicate that the proposal should be expected in the New Jersey Register sometime during the first quarter of 2022, followed by a public comment period and the agency’s subsequent review and response to those comments.

New Jersey Remains Focused on PFAS

John F. Gullace, Esq. and Jessica D. Hunt, Esq.

New Jersey was among the first in the nation to promulgate standards to regulate per- and polyfluoroalkyl substances (PFAS) and has some of the most stringent standards in the nation. In the coming year, it is likely to bring particular attention to PFAS in wastewater discharges, the remediation of contaminated sites and water supply systems.

PFAS Source Evaluation and Reduction Requirements Survey

Over the past year, New Jersey has been attempting to understand the sources of PFAS in New Jersey, especially including wastewater discharges. On March 17, 2021, the New Jersey Department of Environmental Protection (NJDEP) sent a PFAS Source Evaluation and Reduction Requirements Survey to Category B NJPDES Discharge to Surface Water Permittees (industrial/commercial dischargers) and Category L NJPDES Significant Indirect User Permittees (dischargers to sanitary sewers) to evaluate potential sources of PFAS. Certain wastewater utilities in the state have also sent out surveys.

Permittees that received the survey were asked to identify their use of Class B firefighting foam, their handling, storage, use, application or manufacture of certain materials that are known to contain PFAS, and whether the permittee was using materials containing PFAS. Based on the responses to the initial PFAS survey, on August 18, 2021, the NJDEP sent a request for information to select Category B NJPDES Discharge to Surface Water Permittees and select Category L NJPDES Significant Indirect User Permittees, to require the collection of two samples for 12 PFAS at least 30 days apart and to submit the

monitoring data to the NJDEP by December 15, 2021. The information requests appear to be the first step in New Jersey's effort to quantify the use of PFAS in the state, and additional investigation by the NJDEP is likely.

PFAS As a Contaminant of Emerging Concern in the Site Remediation Program

New Jersey has also been focused on remediating PFAS contamination. On August 5, 2021, the NJDEP [published guidance for the remediation of contaminants of emerging concern](#) (including PFAS) if they are identified at a site undergoing remediation. Under the guidance, licensed site remediation professionals should evaluate every site currently undergoing remediation to determine if PFAS is a contaminant of concern and if further investigation or clean up is required. The NJDEP's biennial certification form for sites undergoing monitoring and maintenance has also been revised to require an evaluation of contaminants of emerging concern at sites subject to a post-RAO remedial action permit. While the guidance does not necessarily require sampling, multiple lines of evidence must be used to determine if sampling and subsequent remediation is required, and the results of this evaluation must be included in the next remedial phase report (or biennial certification) for the Department's review.

Water Supply Systems

Finally, New Jersey's requirement that public water supply systems sample for PFAS has resulted in many public supply systems detecting PFAS in their drinking water. Addressing PFAS in drinking water can be expensive and litigation brought by the owners of these systems against parties allegedly responsible for the discharge of PFAS is on the rise – a trend that will continue in the coming year.

Significant NJDEP Organizational Changes

Bruce S. Katcher, Esq.

Several significant changes in the administration of the New Jersey Department of Environmental Protection (NJDEP) promise to play out during 2022.

New Leadership

As of mid-2021, the NJDEP has a new Commissioner, Shawn LaTourette. Commissioner La Tourette previously served as legal and regulatory policy adviser to former Commissioner Catherine R. McCabe, Chief of Staff, Deputy Commissioner, and he became acting Commissioner in January 2020 when Commissioner McCabe left the agency. Given this background, he promises to bring much needed stability and experience with the inner workings of the agency to the Commissioner position during Governor Murphy's second term.

Compliance and Enforcement Reorganization

At the end of 2021, the Commissioner began to make significant changes in the NJDEP's approach to compliance and enforcement. These changes focus on realigning the air, water, solid waste and land resource protection (formerly land use) enforcement staffs to their respective media areas under the Assistant Commissioners for Air, Water Resources, Site Remediation/Solid Waste, and Land Resource Protection, respectively. The agency feels that the integration of planning, permitting, compliance and enforcement under their respective media areas will facilitate compliance and enforcement while promoting a unified policy vision.

In addition, a new Office of Enforcement Policy will be created to ensure consistency of enforcement among the media programs. A new Chief Enforcement Officer will head that office and develop an agency-wide enforcement agenda aimed at achieving the NJDEP's major priorities, including environmental justice, air quality, resource protection, and implementation of the Dirty Dirt Law and the legislature's past revisions to waterfront public access requirements.

New Office of Community and Economic Development

The agency is establishing a new Office of Community and Economic Development, to be headed by Elizabeth Dragon, formerly the Assistant Commissioner of Compliance and Enforcement. The Office is intended to improve the NJDEP's services to communities and play an important role on the Governor's Council on the Green Economy. To this end, it will aim to direct those funds controlled by the NJDEP toward investments in communities in accordance with the agency's overall programmatic priorities.

Resiliency Planning in New Jersey

John F. Gullace, Esq.

On October 29, 2019, Governor Murphy issued Executive Order 89 (EO 89) in response to the anticipated severe impacts of climate change on New Jersey. Among the work set in motion by EO 89 was the development of a Statewide Climate Change Resilience Strategy (EO 89 at ¶ 4) and an update to the State Development and Redevelopment Plan (EO 89 at ¶ 7). In 2021, legislation and action under EO 89 resulted in (a) modification of the Municipal Land Use Law to require local master plans to include climate change-related hazard vulnerability assessments; (b) the development of an NJDEP web-based resource titled "[Resilient New Jersey: Local Planning for Climate Change Toolkit](#)" which is a resource for integrating climate change into local land use decisions and planning efforts to ensure "investments made today withstand the conditions of tomorrow and make it easier to adapt as the climate continues to change;" and (c) the issuance of the "New Jersey Climate Change Resiliency Strategy" on October 12, 2021 with its six priorities for the state. Separately, on December 13, 2021, NJDEP issued a natural and working lands strategy scoping document to begin gathering input on how best to manage natural lands and farmland to fight climate change.

Finally, throughout 2021, NJDEP has been working on extensive revisions to its Land Resource Protection (aka "Land Use") regulations to implement changes consistent with the NJDEP's broad based Protection Against Climate Threats (PACT) initiative. These changes will be proposed during the first quarter of 2022 and will affect future development in the coastal area, waterfront development, flood hazard area, and requirements relating to wetlands and stormwater, all of which will have a significant bearing on resiliency planning.

In response to the threats posed by climate change, New Jersey has embarked upon an ambitious, forward looking program to educate, coordinate, and manage future development and land use to prepare for rising sea levels, heavier rainfall, more severe storms and extreme weather, and generally more frequent and significant flooding. These steps are anticipated to spawn greater regulation of local land use by the state as we head into 2022 and beyond.

NJDEP Proposes Rules for the Reduction of CO₂ Emissions

Michael Dillon, Esq. and Michael C. Nines, P.E., LEED AP

On December 6, 2021, the New Jersey Department of Environmental Protection (“NJDEP” or “Department”) published proposed new rules and amendments to the Department’s Air Pollution Control Regulations at N.J.A.C. Chapter 7:27 for the control and prohibition of carbon dioxide (CO₂) emissions (the “Proposed Rule”). The Proposed Rule would reduce CO₂ emissions from: (1) certain fossil fuel-fired electric generating units (EGUs) through the application of output-based emission limits, (2) certain commercial and industrial fossil fuel-fired boilers based upon an additional permit requirement, and (3) No. 4 and No. 6 fuel oil by banning its sale and use. The Proposed Rule also would amend certain general provisions of the Department’s Air Pollution Control Regulations that could have far-reaching implications for all facilities that emit CO₂, as further discussed below.

The Department developed the Proposed Rule as part of its implementation of relevant provisions of the Global Warming Response Act (GWRA), N.J.S.A. 26:2C-37 et seq., which requires New Jersey to reduce greenhouse gas (GHG) emissions to 80 percent of 2006 levels by 2050, the so-called “80x50 goal.” The Department, however, has cautioned that the Proposed Rule not be viewed as the definitive step for reducing GHG emissions in accordance with the GWRA and has noted that NJDEP will be proposing additional rulemakings aimed at other stationary and mobile sources of GHG emissions.

Read the full details in our [January 6 Special Alert](#).

New Jersey Proposes Regulations for Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards

Carol F. McCabe, Esq.

On January 3, 2022 the New Jersey Department of Environmental Protection (NJDEP) published a significant proposed rulemaking that would affect owners and operators of cargo handling equipment at ports and intermodal rail yards (the CHE Rule).

Part of the NJDEP’s continuing Protecting Against Climate Threats (aka PACT) initiative, the proposed CHE Rule would seek to reduce emissions of greenhouse gases and other pollutants from diesel-fueled mobile sources, following similar rules promulgated by the California Air Resources Board in 2006. Under the CHE Rule, non-road equipment designated as “yard trucks” and “non-yard trucks” would be required to meet the most current engine standards, and in-use equipment would be required to be replaced or retrofitted over a phased-in compliance period. Notably, the CHE Rule would apply to both public and private port operators and would require replacement or control of pre-1998 and Tier 0 in-use equipment as soon as two years from the effective date of the rule.

NJDEP is requesting comments on the rule during a 60-day comment period ending on March 4, 2022 and will hold a public hearing on February 9, 2022. A final rule could be adopted by the end of 2022 or early 2023.

NJDEP's Advanced Clean Truck and Fleet Reporting Rules Begin to Take Effect

William Hitchcock, Technical Consultant and Matthew C. Sullivan, Esq.

On December 20, 2021, as part of its Protecting Against Climate Threats initiative, NJDEP announced that it had adopted the new Advanced Clean Truck and Fleet Reporting Rules (the ACT Rules) that were first proposed in April. The newly adopted rules incorporate a portion of California's Advanced Clean Trucks regulation by reference, with a few minor modifications as well as a one-time reporting requirement for fleet owners, operators, brokers, and carriers.

The Advanced Clean Trucks regulations adopted in California in 2020 require manufacturers of on-road vehicles with a Gross Vehicle Weight Rating (GVWR) above 8,500 lbs to meet increasing sales targets for Zero and Near-Zero Emissions Vehicles (ZEVs and NZEVs). When a ZEV or NZEV is produced and sold to the ultimate purchaser, a credit is generated for the manufacturer. The credits may be banked for future use or traded, sold, or transferred between manufacturers. Manufacturers that have not met the annual sales targets for ZEVs and NZEVs may then use these credits to offset their annual sales deficit. This cap and trade program is designed to incentivize the sale of ZEVs and NZEVs, thereby reducing overall emissions from heavy duty trucks, which account for a disproportionate share of emissions from the transportation sector.

In NJDEP's ACT Rules, the ZEV and NZEV sales targets and generation of deficits will apply to manufacturers of on-road vehicles above 8,500 pounds GVWR manufactured in model year 2025 and subsequent years for sale in New Jersey on or after January 1, 2025. However, manufacturers may begin generating, banking, and trading ZEV and NZEV credits beginning with model year 2022 vehicles. In addition, the Act Rules will not apply until California receives a waiver from EPA that would allow it to implement its Advanced Clean Trucks regulations in lieu of less stringent federal requirements pursuant to 43 USC §7543.

As noted above, the ACT Rules also establish a one-time reporting requirement designed to gather information about the operations of entities that own and/or use medium- and heavy-duty vehicles in NJ, so that NJDEP will be better informed if it takes future actions to accelerate the sale and use of ZEVs in the medium- and heavy-duty weight classes. The information to be reported includes general information about the entity as well as vehicle and usage information at the facility level. The rule contains five categories of entities that are required to report this information. Generally, any large entity with more than \$50 million in revenue that operates one or more vehicles over 8,500 lbs Gross Vehicle Weight Rating in NJ, or any entity that operates a fleet of 50 or more vehicles over 8,500 lbs Gross Vehicle Weight Rating in NJ, will be required to report using an online portal.

The online reporting system is not yet available, and the report is not due until April 1, 2023. However, the report is designed to capture a "snapshot" of the entity's fleet as it existed at any time in 2022. As such, entities covered by the fleet reporting aspect of the ACT Rules may wish to begin collecting information on their fleets or discussing arrangements with their service providers, subsidiaries, and corporate parents to understand exactly which vehicles are owned by whom and determine responsibility for reporting the required information.

If you have any questions about the application of the ACT Rules or wish to discuss your facility's reporting requirements in more detail, please contact [Matt Sullivan](#) or [Will Hitchcock](#).

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 © 2022. Manko, Gold, Katcher & Fox, LLP www.mankogold.com