

### 2019 Environmental and Energy Law Forecast

#### NEW JERSEY FORECAST

##### Changes in the Offing for the NJ Site Remediation Reform Act?

***Bruce S. Katcher, Esq.***

It finally seems likely that we'll see some changes to the Site Remediation Reform Act (SRRRA) in 2019, however the nature and extent of those changes continues to be a matter of speculation.

At the behest of Senator Smith, the "father" of SRRRA and the licensed site remediation professional (LSRP) program that it created, various stakeholder groups met with NJDEP throughout 2108, trying to come up with a set of consensus modifications to the ten-year-old statute.

Among the more controversial topics that have been explored, but which seem lacking in any consensus are (1) providing additional flexibility to adjust or exit from the direct oversight process, (2) expanding public notification requirements and public access to LSRP files, (3) expanding and clarifying discharge reporting obligations (including those for immediate environmental concerns and discharges discovered during a buyer's pre-purchase due diligence), (4) modifying the ISRA remediation funding surcharge requirement to cover those who provide a self-guarantee, (5) tightening the requirements surrounding what it means for an LSRP to exercise its "independent professional judgement" and several other LSRP Board sponsored changes designed to address what the Board perceives to be potential abuses of the LSRP program.

Among the above, only the changes addressing discharge reporting obligations, reportedly favored by Senator Smith notwithstanding the absence of consensus, seem to show some potential at this time, assuming the Senator sticks to his other reported intention of moving only consensus changes.

Non-controversial modifications, which seem likely to be part of any bill, include adding surety bonds as a permitted ISRA remediation funding source, reducing the number of required electronic copies of LSRP records to be submitted to NJDEP from three to one, eliminating language dealing with the former temporary LSRP licensing program, clarifying LSRP record retention requirements and a possibly a few minor changes to LSRP qualification requirements that could expand the pool of eligible LSRP candidates.

Other controversial topics proposed by stakeholders that NJDEP has declined to consider and seem unlikely to see the light of day under the current legislative effort are (1) liability relief for volunteer remediators and bona fide prospective purchasers, (2) improvements to the remedial action permitting process and financial assurance requirements, (3) greater flexibility for addressing "non-discharge conditions" such as historic fill, historically applied pesticides, etc., and (4) acceptance of risk-based remediation strategies.

The final shape of the legislation is expected to be determined during the first quarter of 2108, with a bill likely to be introduced in the first half of the year. We will continue to closely track its progress.

## **Establishing Standards for Per- and Polyfluoroalkyl Substances (PFAS) Levels**

***John F. Gullace, Esq.***

Per- and polyfluoroalkyl substances, collectively referred to by the abbreviation PFAS, continue to grab headlines as communities across the country worry about the safety of their drinking water. This family of more than 3,000 man-made compounds that made their way into manufacturing in the 1940s and 1950s are stable, mobile, persistent, bio-accumulative and seemingly ubiquitous. Public concern and the need to regulate PFAS has, in many respects, outpaced the study of PFAS, and regulators are grappling with determining the toxicity of individual PFAS compounds and establishing safe exposure levels.

In 2009, the Federal Government established a short-term provisional health advisory for two PFAS compounds - PFOS and PFOA - of 200 ppt and 400 ppt respectively. In 2016, the Federal Government upped the ante by issuing a lifetime health advisory for these two PFAS compounds of 70 ppt, but these are just advisory standards. Meanwhile in 2018, EPA conducted “listening sessions” around the country and Congress held hearings on the topic of regulating PFAS. By most estimations, EPA is still years away from setting maximum contaminant levels for individual PFAS compounds, but increasingly, EPA is requiring responsible parties to sample for PFAS compounds during five-year reviews at Superfund sites.

The States have been filling the void with a patchwork of inconsistent standards. As of last summer, 18 States had standards for one PFAS compound or another and New Jersey remained at the vanguard of State efforts to set limits on PFAS compounds in drinking water.

In September of 2018, New Jersey established a maximum contaminant level (MCL) for one PFAS compound known as PFNA. Under the New Jersey Safe Drinking Water Act, PFNA now has an MCL of 13 ppt and public water systems in New Jersey will begin sampling for PFNA during the first quarter of 2019. In addition, the New Jersey Drinking Water Quality Institute (DWQI) has recommended health-based MCLs for PFOA of 14 ppt and PFOS of 13 ppt, far lower than the Federal advisory levels of 70 ppt. We can expect these New Jersey DWQI recommendations to become MCLs.

In 2019, we can expect New Jersey to press forward with its aggressive health-based standards for other PFAS compounds in drinking water. Because New Jersey is at the forefront of the efforts to regulate and remediate PFAS, we will also likely see several technical issues play out in New Jersey as utilities grapple with sampling for PFAS compounds in the parts per-trillion and the best strategies for remediating PFAS contamination. Parties responsible for remediating contaminated sites will also be required to investigate and, if necessary, remediate PFAS to these very low levels. We can expect other States to follow New Jersey's lead in the efforts to address PFAS contamination and limit exposure to PFAS.

## **What's in the Air in New Jersey?**

***Carol F. McCabe, Esq.***

In 2019, we can expect continued high levels of activity in New Jersey's air quality program. NJDEP has been busy implementing the new reporting thresholds finalized in last year's RATE rulemaking, and has also finalized updates to Technical Manual 1002 *Guidance on Preparing an Air Quality Monitoring Protocol*,

and Technical Manual 1003 *Guidance on Preparing a Risk Assessment for Air Contaminant Emissions*. NJDEP also continues to work on changes and updates to its Risk Screening Worksheet, including clarifying changes to the Worksheet guidance and instructions governing use of the Worksheet in lieu of a refined health risk assessment. The Worksheet also clarifies that where a refined health risk assessment is required, the applicant may opt to have the Department perform the assessment (and the submittals that are required to support such assessment) or may opt to perform the assessment itself in accordance with Technical Manuals 1002 and 1003. Other updates to the Worksheet will focus on the methodologies used to determine the Worksheet's health risk outputs, with further discussion of these updates anticipated to occur at February's Industrial Stakeholder Meeting.

NJDEP continues to work on new and revised general permits, including the [revised general permit GP-016A \(Manufacturing and Materials Handling Equipment\)](#) and the [new GP-015A \(Plating, etching, pickling and electropolishing operations\)](#), which are now available for use. [Other general permits are also in the works for 2019](#). The Department announced a new Startup Shutdown and Malfunction guidance for permitting, available [here](#). With respect to new guidance from EPA, NJDEP has stated that it will not follow EPA's January 2018 Once In/Always In policy, but will continue to follow EPA's 1995 policy on this subject.

Most recently, NJDEP has announced its intention to commence a rulemaking process that will (1) clarify permit applicability for fumigation operations; (2) evaluate the addition of hydrogen sulfide, sulfur dioxide and n-propyl bromide to NJDEP's list of hazardous air pollutants governed under Subchapter 17; and (3) evaluate a requirement to report additional substances through emission statements, based on its review of the relative risk of substances emitted by permitted facilities not currently required to be reported. NJDEP has extended invitations to a stakeholder meeting in January to discuss these potential rulemaking items.

## New Jersey Taking Steps to Address Greenhouse Gas Emissions

### **Michael Dillon, Esq.**

The end of 2018 saw New Jersey continue to take aggressive steps to implement one of Governor Murphy's major policy priorities, reducing the state's greenhouse gas emissions. On December 17, 2018, NJDEP proposed two rules meant to provide a framework for reentering the Regional Greenhouse Gas Initiative (RGGI), a multi-state, market-based program that establishes a regional cap on CO<sub>2</sub> emissions and requires fossil fuel power plants with a capacity greater than 25 megawatts to obtain an allowance for each ton of CO<sub>2</sub> they emit annually. New Jersey had previously participated in RGGI beginning in 2008, but withdrew from the program in 2012 under the direction of the Christie Administration.

The proposed set of [RGGI Rules](#) would establish the New Jersey Carbon Dioxide (CO<sub>2</sub>) Budget Trading Program, a cap-and-trade program that would set a state-wide carbon budget for large fossil fuel electric generating units (EGUs) and would require such sources to possess CO<sub>2</sub> allowances equivalent to their annual emissions, which could be obtained through quarterly allowance auctions. EGUs with a generating capacity over 25 megawatts would need to possess adequate CO<sub>2</sub> allowances beginning in 2020. The rulemaking package would further establish the Global Warming Solutions Fund, which would provide for a set of standards for the allocation and use of funds generated through the sale of CO<sub>2</sub> allowances. A public hearing on the RGGI Rules is scheduled for **January 25, 2019**, with written comments on the rulemaking package due to NJDEP no later than **February 15, 2019**.

New Jersey is also focusing on the state's largest source of greenhouse gas emissions, the transportation sector, having announced at the end of December the state's plan to participate in the [Transportation Climate Initiative \(TCI\)](#), a regional program similar to RGGI that will attempt to reduce greenhouse gas emissions from mobile sources of pollution such as cars and trucks. In a [December 18, 2018 statement](#) ratified by nine Northeast states (including New Jersey and Pennsylvania) and the District of Columbia, TCI announced the commencement of a joint effort to establish a regional low-carbon transportation policy that "would cap and reduce carbon emissions from the combustion of transportation fuels through a cap-and-invest program or other pricing mechanism."

Participating TCI states could then use the proceeds from such program to reinvest in a low-carbon transportation infrastructure. The TCI is currently in the planning stages, but the group expects to develop a final policy by the end of 2019. Like RGGI, states will have the option to implement TCI's policy proposals through the adoption of rules in their respective jurisdictions. Participation in the TCI builds on the momentum of NJDEP's Green Drive initiative, a program that encourages the use of electric vehicles and the establishment of the necessary infrastructure through mechanisms such as tax incentives for the purchase and use of electric vehicles and grant programs for the installation of electric vehicle charging stations.

As 2019 progresses, we will continue to track New Jersey's development of the RGGI Rules and its participation in the TCI, as well as any other efforts to implement programs to address greenhouse gas emissions from sources within the state.

## **New Jersey and Natural Resource Damages in 2019**

***Nicole R. Moshang, Esq. and Maria C. Salvemini, Esq.***

This year practitioners and the regulated community will see how the natural resource damage (NRD) initiative that New Jersey kicked off in late 2018 will shape the law concerning NRD claims moving forward. NRDs compensate the state for injury to natural resources. In August 2018, New Jersey's Attorney General announced the filing of three lawsuits seeking NRDs—Pohatcong Valley Superfund, Port Reading refinery, and Deull Fuel Company—touting the move as a "New Day" in the state's environmental enforcement. The state announced the filing of another NRD lawsuit, the Puchack Wellfield matter, in December 2018. These four lawsuits are the first NRD cases that New Jersey has brought in a decade, although the state has publicly committing to pursuing additional NRD claims in the coming months.

The state's commitment to pursue additional enforcement claims, including NRD, is buttressed by the organizational changes recently announced at both the state's Attorney General's Office (AG's Office) and the New Jersey Department of Environmental Protection (NJDEP). Specifically, the AG's Office announced the creation of an Environmental Enforcement and Environmental Justice Section to handle the anticipated uptick in environmental enforcement actions. In addition, NJDEP announced the hiring of Shawn M. LaTourette to serve in the newly created position of Deputy Commissioner for Legal and Regulatory Affairs, who will be tasked with overseeing the revival of NJDEP's efforts to recover NRDs.

It seems likely, however, that NJDEP will be confronted with many of the same or similar legal challenges it faced in pursuing its earlier NRD initiative. Indeed, several early motions were filed in the three earliest filed NRD cases primarily challenging the scope and viability of the state's common law claims seeking NRD. For example, defendants in the *NJDEP v. Hess Corp.* case (relating to the Port Reading refinery)

moved to dismiss the state's trespass and strict liability claims, and to dismiss the public nuisance claim to the extent it sought monetary relief rather than abatement. In December 2018, the Superior Court granted with prejudice defendants' motion to dismiss the trespass claim, holding that the state did not have a claim because it lacked exclusive possession. With respect to public nuisance, the court found that the state could not recover monetary relief as a remedy because the only available remedy was abatement. Moreover, the court found that the state's strict liability claim failed because there was no binding New Jersey authority to support the proposition that the storage and processing of crude oil and refined petroleum products constitute an abnormally dangerous activity and that the state's strict liability claim was otherwise subsumed by its claims for statutory relief and remedy under the New Jersey Spill Compensation and Control Act. There are also motions to dismiss on similar grounds pending in the Pohatcong Valley and Deull Fuel matters, which are scheduled for oral argument in early 2019. The four NRD lawsuits will likely have a significant role in shaping how NRD cases are litigated in New Jersey.

Some of the anticipated legal challenges may be addressed through ongoing legislative efforts focused on developing objective standards for evaluating and calculating recoverable NRDs. Specifically, Senator Bob Smith convened an NRD Task Force comprised of NJDEP officials, industry representatives, NRD practitioners and environmental advocacy groups in the summer of 2018. The purpose of the Task Force was to develop suggestions on topics such as NRD policy and how to value NRDs. Although the state developed a formula to calculate groundwater injury previously in connection with its first NRD initiative launched in the early 2000s, it has been rejected by the courts (see *NJDEP v. Exxon*, Mer-L-2933-02 (N.J. Super. Law Div. Aug. 24, 2007)) and there are currently no regulations regarding how to calculate NRDs. At the December 2018 NJICLE Annual Review of New Jersey Environmental Law, representatives of NJDEP publicly announced that they are working to finalize an objective formula for calculating NRDs, at which point NJDEP intends to vigorously pursue NRD claims.

While the scope and precise form of New Jersey's NRD enforcement initiative is yet to be seen, it is certain that NRDs will be a factor in New Jersey for the foreseeable future and that the regulated community and practitioners should certainly be considering potential NRD impacts in their transactions and site remediation efforts.

## **Environmental Justice to Take on Increased Importance in New Jersey**

### ***Bruce S. Katcher, Esq.***

Beginning with an Executive Order signed by the Governor on April 20, 2018, the Murphy Administration signaled its intent to make Environmental Justice a centerpiece of the new Administration's environmental policy. That Order directed the NJDEP to "take the lead in developing guidance for all executive agencies for the consideration of Environmental Justice in implementing their statutory and regulatory responsibilities." The draft guidance was supposed to be completed within six months and the final guidance within ninety days thereafter.

While the completion of the draft guidance has been delayed, it is expected to see the light of day in early 2019 with final guidance to follow shortly thereafter. That delay has not impeded the Administration's efforts to pursue Environmental Justice aggressively, as evidenced by eight lawsuits announced by the Attorney General targeting environmental conditions in lower income and minority communities on December 7, 2018. The selected communities are in Camden, Flemington, Newark, Palmyra, Pennsauken, Phillipsburg, and Trenton.

These cases involve a variety of actions, including suits to recover natural resource damages, cleanup costs and civil penalties, actions to force responsible parties to clean up contaminated sites, and a case seeking the removal of illegally disposed of waste. The AG also announced the formation of a new Environmental Enforcement and Environmental Justice Unit and a nationwide leadership search for someone to head up the unit. Finally, he announced planned listening sessions with the Attorney General and the NJDEP Commissioner throughout the state in the coming months.

Thus, the coming year promises more aggressive environmental enforcement, particularly in Environmental Justice Communities as well as a new set of policy guidelines that will apply throughout the Murphy Administration.

## **New Jersey Stormwater Developments – New Utilities Legislation and Regs?**

### ***Bruce S. Katcher, Esq.***

In June 2018, a bill passed the New Jersey Senate (S-1073) that would authorize municipalities, counties and certain municipal or county authorities to establish stormwater utilities with related fees and other charges to recover the utility's costs for stormwater management. The fees would be collected from the owner or occupant of any property from which stormwater runoff originates and enters the stormwater management system. Credits against the fees would be available for any property which has installed and maintains stormwater best management practices that reduce, retain or treat stormwater onsite or property that installs, operates and maintains green infrastructure onsite. Contracts with private entities to plan, design, construct, operate and maintain the stormwater systems are authorized.

The companion bill, A-2694, was reported from the Assembly Telecommunications Committee in October 2018 and sent to the Assembly Appropriations Committee.

Business organizations have attacked the bills on the grounds that they will impose new taxes on industry which will be duplicative of existing permit requirements that impose costs of building and maintaining stormwater management equipment on the permittees.

Bills seeking to authorize the establishment of stormwater utilities have been introduced in several past legislative sessions without advancing to enactment. Whether this bill will yet see the light of day remains to be seen, however it seems to stand at least an even chance of passing the Assembly and being enacted into law in 2019.

Along a parallel track, NJDEP proposed changes to its stormwater regulations on December 3. The change that has attracted the most attention is the proposal to require new major developments to incorporate green infrastructure "to the maximum extent practicable" in order to meet groundwater recharge standards, stormwater runoff quantity standards, and stormwater runoff quality standards. This would replace the current requirement to incorporate nonstructural stormwater management strategies to meet these standards. Environmental groups have criticized the proposal for not addressing stormwater at existing developments, while developers have expressed hope for the increased flexibility that green infrastructure options may afford. Written comments on the proposal are due by February 1 and a final rule is expected before the end of the year.

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