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2024 Environmental and Energy Law Forecast

NEW JERSEY

New Jersey's Focus on PFAS Regulations and Enforcement Initiatives are Expected to Continue in 2024

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New Jersey advanced significant regulatory, litigation, and legislative initiatives applicable to per- and polyfluoroalkyl substances (PFAS) in 2023 that will likely continue into 2024 and beyond. The main initiatives are addressed below.

New Jersey Legislation

[Last year we reported](#) on six proposed bills (and related Assembly bills) that were part of a comprehensive PFAS legislative package designed to create an extensive regulatory PFAS program in New Jersey. One of these, S-2712/A-4125, the Assembly and the Senate both unanimously passed in December 2023. In 2024, Governor Phil Murphy will consider whether to sign the bill into law. S-2712/A-4125 would prohibit the sale, manufacture, distribution, or use of Class B fire-fighting foam containing intentionally added PFAS, effective two years after the bill is signed into law. Certain industrial facilities with specific safety requirements would have a four-year transition period and oil refineries and petroleum terminals would have an eight-year transition period. The bill would also allocate \$250,000 to the New Jersey Department of Environmental Protection (NJDEP) to create a grant program to help small fire departments pay for removing any old foam stocks. A violation would be considered an unlawful practice under the state's Consumer Fraud Act and would subject the violator to monetary penalties, including punitive damages and treble costs.

On January 8, 2024, the Assembly and Senate both unanimously passed S-3176/A-4760, which would require NJDEP, together with the Drinking Water Quality Institute, to conduct a study to determine whether maximum containment levels (MCLs) for PFAS in drinking water should be established for the entire class of PFAS or for individual subclasses rather than individual PFAS, and to study treatment technologies for PFAS in water and wastewater.

S-3179/A-4759 passed unanimously in the Assembly on June 30, 2023, and was referred to the Senate Budget and Appropriations Committee on November 27, 2023. S-3179/A-4759 would establish a ten-day written customer notification requirement for any public water system (PWS) that exceeds any PFAS MCLs and for periodic notice updating the status of any remediation. Where customers are landlords, the landlords would be subject to a three-day written notice to every tenant who has a lease agreement with the landlord and is served by the PWS (unless the tenant is a direct customer of the PWS) and post the

notice in a conspicuous location near the entrance of the rental premises (except for certain single-family residences).

The remaining three bills are still pending before the Senate Environment and Energy Committee. S-3177/A-4758 would, among other things, ban PFAS-containing cosmetics, carpet treatment products, and food packaging, and would require PFAS-containing cookware to be appropriately labeled. S-3178/A-4761 would require NJDEP to assess current MCLs in place to ensure they adequately protect children, and to consider whether MCLs should be implemented for presently unregulated PFAS compounds. Finally, S-3180/A-4762 would mandate that water suppliers or purveyors proactively designate alternate water sources in the event they discover PFAS exceedances in current sources.

New Jersey PFAS Ground Water Quality Standards

New Jersey's MCLs for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) will likely change in 2024. New Jersey has been at the forefront of regulating PFAS, being one of the first states to propose and adopt regulations setting an MCL for perfluorononanoic acid (PFNA) (13 parts per trillion (ppt)) in 2018, followed closely by the adoption of MCLs for PFOA (14 ppt) and PFOS (13 ppt) in 2020. An MCL is an enforceable standard, defined as the maximum level allowed of a contaminant or mixture of contaminants in water that is delivered to any use of a public water system.

In March 2023, the Environmental Protection Agency (EPA) [proposed](#) regulations to establish new MCLs for six PFAS compounds: PFOA and PFOS, perfluorohexane sulfonic acid (PFHxS), hexafluoropropylene oxide dimer acid (HFPO-DA) and its ammonium salts (commonly known as GenX chemicals), PFNA, and perfluorobutane sulfonic acid (PFBS). For both PFOS and PFOA, the EPA proposed MCLs of 4 ppt. Public comment on the proposed regulation ended on May 30, 2023. The EPA has indicated on their website that a Final Rule may be implemented as soon as [January 2024](#).

NJDEP automatically incorporates changes to the federal MCLs if they are lower than the standard adopted by New Jersey. N.J.A.C. 7:10-5.1. Once EPA finalizes the [federal MCL](#) and NJDEP incorporates those standards, it sets in motion a chain reaction requiring NJDEP to update several of its own standards. NJDEP will be required to update its Ground Water Quality Standards (GWQS) to mirror the new MCLs. N.J.A.C. 7:9C-1.7(c)3i. Similarly, once the GWQS are updated, they automatically become the groundwater remediation standards. N.J.A.C. 7:26D-2.2(a).

PFAS Sampling Requirements for NJPDES Permits

[Last year we reported](#) on the NJDEP's efforts to identify and reduce sources of PFAS in industrial wastewater in New Jersey by issuing to certain NJPDES permittees a survey to gather information regarding potential sources of PFAS and operational processes. NJDEP also issued a follow up Request for Information to gather wastewater sampling data from certain surveyed permittees. Monitoring results are available on the [NJDEP's webpage](#), along with an FAQ document concerning the Requests for Information.

NJDEP's investigation of PFAS compounds in the state remains in full swing. On January 17, 2023, NJDEP Commissioner Shawn LaTourette signed [Administrative Order \(AO\) 2023-01](#) seeking to encourage Wastewater Treatment Plants (WWTPs) to cooperate and share data and information with the NJDEP by assuring the owners and operators of WWTPs that it would "not take an enforcement action for an unpermitted discharge against [WWTPs] based upon PFAS data submitted to [it] solely pursuant to this

Order.” AO 2023-01 is retroactive to January 1, 2021 and shows a continued effort by NJDEP to identify and reduce sources of PFAS in 2024 and beyond.

New Jersey Litigation and Settlement Initiatives

On March 14, 2023, Commissioner LaTourette issued [AO 2023-08](#) representing another step in NJDEP’s evolution of natural resource damages (NRD) enforcement. AO 2023-08 memorialized some of NJDEP’s policy determinations underlying its NRD enforcement efforts by outlining its expansive authority to pursue assessment and restoration of any “injured or altered natural resource, including those injured by any past, present, or future discharges of hazardous substances, contaminants, or other pollutants.”

AO 2023-08 seeks to improve NJDEP’s policies and procedures for voluntarily resolving potential NRD liabilities with responsible parties. AO 2023-08 also directed the Office of Natural Resource Restoration (ONRR) and the Contaminated Site Remediation and Redevelopment Program to establish protocols and procedures to encourage responsible parties to resolve potential NRD liability during the remediation process, which may include the identification of information necessary to initiate the collaborative process, guidelines for submittal of information to NJDEP, and the development of relevant forms to facilitate information sharing, such as new or amended site remediation forms. Notably, AO 2023-08 is intended to be prospective in nature and will not affect any ongoing collaborative processes, settlement discussions, or administrative or legal actions concerning alleged injuries to natural resources.

AO 2023-08 directed NJDEP to establish procedures that enhance public engagement in the planning, design, and implementation of natural resource restoration projects throughout the state. To aid in such engagement, AO 2023-08 created the Natural Resource Restoration Advisory Council (NRRAC) for the purpose of providing insight and feedback about potential natural resource restoration projects and assisting NJDEP in communicating restoration project objectives and outcomes to the public. NRRAC will be comprised of members of the public, NJDEP, the regulated community, and environmental advocacy groups. It is expected that members of NRRAC will be selected sometime in 2024. AO 2023-08 also requires ONRR to establish a public dashboard on the NJDEP website that identifies each restoration project administered by NJDEP, its status, funding source, and any other relevant information.

On August 7, 2023, NJDEP announced a proposed settlement with Solvay Specialty Polymers USA, LLC (Solvay) resolving its PFAS remediation and NRD claims for Solvay’s alleged discharges of PFAS during its operation of a manufacturing facility located in West Deptford, New Jersey. *See NJDEP et al., v. Solvay Specialty Polymers USA, LLC*, No. G-L-1239-20, Superior Court of Gloucester County. Touting the settlement as “[t]he first of its kind to address PFAS contamination in New Jersey” the proposed settlement obligates Solvay to provide financial commitments of nearly \$393 million, including an NRD component of \$75 million.

In announcing the proposed settlement, New Jersey made clear that it remains committed to pursuing future claims for PFAS impacts. As stated by Attorney General Platkin, “[t]oday we send a clear message to any corporation that exposes our New Jersey communities to PFAS toxins or injures our natural resources with any hazardous substance: you will face consequences for your actions. You have our promise.” Commissioner LaTourette reinforced this message promising that NJDEP “will continue to pursue PFAS manufacturers for the widespread harm their chemicals have caused across our state.”

Notably, the Solvay settlement included an NRD component, which NJDEP announced will be used for natural resource restoration projects “to be identified and pursued in close collaboration with the affected communities pursuant to AO 2023-08.”

New Jersey is also expanding its emerging contaminants enforcement initiatives beyond just PFAS to also include 1,4 dioxane. On March 23, 2023, NJDEP filed a complaint in state court to address 1,4-dioxane contamination across the state. The complaint names alleged manufacturers and distributors of 1,4-dioxane and seeks to require them to be responsible for the cleanup and removal of the chemical. The suit alleges both environmental and consumer fraud claims and seeks NRDs, punitive damages, and other damages and penalties. Like its initiatives relating to PFAS, NJDEP has made clear its intention to continue to focus on existing and new emerging contaminants, stating that NJDEP will “take every appropriate action to protect public health, safety, and the environment from 1,4-dioxane contamination.”

We expect that New Jersey will continue its efforts, which started in 2018, to address PFAS and other emerging contaminants through litigation and its NRD initiatives in 2024.

New Jersey Environmental Justice Update

Jill Hyman Kaplan, Esq., Jessica D. Hunt, Esq. and Brielle A. Brown, Esq.

On April 17, 2023, the New Jersey Department of Environmental Protection (NJDEP) published the long-awaited environmental justice regulations, codified at N.J.A.C. 7:1C (EJ Rules). The final rule was published two years after Governor Murphy signed New Jersey’s Environmental Justice Law (EJ Law), which requires NJDEP to evaluate the impact of certain types of facilities located or proposed to be located, in whole or in part, in an overburdened community as part of the environmental permitting process.

The EJ Rules apply when three criteria are present: (1) the proposed new or existing facility is one of eight specific facility types (i.e., major sources of air pollution, resource recovery facilities or incinerators, sludge processing facility, combustor or incinerator, sewage treatment plant with a capacity greater than 50 million gallons per day, transfer stations or other solid waste facilities, recycling facilities that intend to receive at least 100 tons of recyclable materials per day, scrap metal facilities, landfills, or medical waste incinerators); (2) the applicant seeks an individual permit for a new or expanded facility under NJDEP’s regulations or the renewal of a major source permit; and (3) the facility is located or proposed to be located, in whole or in part, in an overburdened community, or an adjacent zero-population block group.

Applicants subject to the EJ Rules will be required to prepare an environmental justice impact statement (EJIS) as part of their permit application that identifies and analyzes (1) existing environmental and public health stressors as identified in [NJDEP’s EJ Mapping, Assessment and Protection Tool](#) (EJMAP), (2) the presence or absence of adverse cumulative stressors, (3) potential environmental and public health stressors associated with the facility being permitted, (4) whether the facility can avoid causing a disproportionate impact, (5) the control measures that the facility proposes to implement to avoid or address any disproportionate impact, and (6) if applicable, how a new facility will serve a compelling public interest. Applicants will also be required to hold a public hearing and provide an opportunity for the public to submit written comments on the EJIS in addition to any public participation required by NJDEP’s regulations on the substantive permit application.

For new facilities, if NJDEP finds that the facility 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” the State or County 50th percentile (excluding other overburdened communities), then NJDEP must deny the permit unless there is a compelling public interest, in which case, NJDEP can impose permit conditions on the construction or operation of the facility. Compelling public interest is narrowly defined in the EJ Rules to only allow new facilities that demonstrate that the facility primarily serves an essential environmental, health or safety need of the individuals in the overburdened community, and there are no other means reasonably available to meet those needs. In contrast, if NJDEP makes the same finding in the context of an existing facility seeking a permit for an expansion or a permit renewal, then NJDEP may only apply permit conditions on the construction and operation of the facility to protect public health. A new facility is (1) any facility that has not commenced operation as of April 17, 2023, or (2) a change in use of an existing facility. NJDEP considers an existing facility that has operated without a valid approved registration or permit prior to April 17, 2023 to be a new facility. An existing facility is similarly defined as a facility, or any portion thereof, that, as of April 17, 2023, possesses a valid approved registration or permit from the Department for its operation or construction and is in operation.

Implementation of the EJ Rules is still in its early stages. Applicants should evaluate, as soon as possible, whether their project will be subject to the EJ Rules in order to plan the additional time associated with undertaking the required evaluations, public participation, and NJDEP’s review. If you would like to learn more about the impact of EJ Rules or how they apply, please reach out to MGKF’s [Jill Kaplan](#) or [Jessica Hunt](#) or call 484-430-5700.

New Jersey Site Remediation – Key Issues for 2024

Thomas M. Duncan, Esq. and Natalia P. Teekah, Esq.

2024 will see some major changes in the New Jersey Site Remediation Program that will directly impact both the remediation process and the standards with which responsible parties must comply. The state’s main initiatives are addressed below.

Ground and Surface Water Quality Standards & Remediation

On January 2, 2024, the New Jersey Department of Environmental Protection (NJDEP) through its Division of Water Monitoring, Standards and Pesticide Control (DWMSPC) promulgated a new rule amending the Ground Water Quality Standards (GWQS) at N.J.A.C. 7:9C in connection with Class-IIA waters. NJDEP is proposing to amend GWQS and practical quantitation levels which will result in changes to GWQS for 65 of the 73 affected constituents, with the GWQS for eight constituents remaining unchanged by the GW Rule. [See our article providing further detail on the new GWQS.](#)

NJDEP’s DWMSPC is also expected to promulgate revised Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B in early 2024. The revised standards are expected to provide new criteria for PFNA, PFOA, PFOS and 1,4-dioxane, and update or add criteria for 94 toxic substances, with some constituents potentially becoming more stringent by an order of magnitude or more.

Changes to the GWQS and SWQS that result in criteria becoming more stringent by an order of magnitude or more could impact active remediation at sites with groundwater contamination and/or a groundwater to surface water pathway. Closed sites that have received No Further Action letters or Response Action

Outcomes (RAOs) or sites with approved Remedial Action Workplans may be subject to additional remediation. Any sites with Classification Exception Areas will need to be reevaluated at the next biennial certification to ensure that they remain in compliance given NJDEP's new standards.

Expedited Review and the Remediation Process Improvement Initiative

In mid-2023, NJDEP created a pathway for remedial action permit (RAP) applicants to request that NJDEP prioritize their application review by releasing a Prioritized Initial RAP Application Addendum in furtherance of its goal to reduce RAP application processing times. If the subject site can be classified under one of the five types of RAPs described in the Addendum, applicants may either submit the Addendum with their initial RAP application or provide the Addendum by email if the initial RAP application is already pending before NJDEP.

NJDEP has also been working closely with the Site Remediation Professional Licensing Board to revise rules applicable to Licensed Site Remediation Professionals (LSRPs) for consistency with 2019 amendments to the Site Remediation Reform Act. NJDEP promulgated rule updates effective November 20, 2023, aimed at correcting errors and inconsistencies in the original January 2016 rules.

These changes are part of a larger effort to allow LSRPs to undertake additional responsibilities that previously fell within NJDEP's purview. NJDEP's Contaminated Site Remediation & Redevelopment Program (CSRRP) is currently involved in a Remediation Process Improvement Initiative (RPII) aimed at addressing certain steps in the remediation approval process that have historically delayed the issuance of RAOs and led to unpredictable timeframes for redevelopers. The RPII aims to develop guidance and training to assist LSRPs to avoid common errors seen in the Remedial Action Permit (RAP) approval process and increase transparency in the approval submission process to resolve deficiency letters and technical disagreements more efficiently.

The CSRRP is also expected to promulgate a new certification process for initial RAP applications to allow LSRPs to certify the existence of certain conditions at a site to allow the CSRRP to issue permits upon receipt of a complete certification. The CSRRP will still audit a percentage of RAPs and conduct a review on those applications for which a certification has not been received. Applications that have received a Notice of Incompleteness will have 60 days to resolve outstanding issues and submit a new certification. The CSRRP is also investigating allowing permits-by-certification as a future electronic service and anticipates this new process will help alleviate its backlog of RAP applications. The CSRRP will promulgate the soil certification first and then the groundwater certification; LSRPs and persons responsible for conducting the remediation will receive further correspondence outlining the new certification process. NJDEP has not yet released details on when new certifications can be expected.

Brownfield Development Area Designation

The CSRRP has reinstated the voluntary Brownfield Development Area (BDA) Program, which allows for BDA designation in communities with multiple brownfield sites. BDA designation allows selected communities to design and implement remediation and reuse plans for multiple properties simultaneously and encourages coordination between municipalities, developers, owners of contaminated property, and potentially responsible parties. Applications can be submitted by local Steering Committees comprised of representatives from municipalities, counties, redevelopment agencies, housing and improvement authorities and other stakeholders. Applications will be accepted through April 30, 2024.

Proposed Changes to New Jersey Groundwater Standards

Michael Dillon, Esq. and Technical Consultant Will Hitchcock

On January 2, 2024, NJDEP published a [proposed rulemaking](#) that contains significant changes to the Ground Water Quality Standards (GWQS) promulgated at N.J.A.C. 7:9C. The proposed revised standards are applicable to Class II-A groundwater designated for potable use, which is the default designation for all groundwater in New Jersey. As such, these standards frequently dictate the allowable concentration of chemicals in groundwater at remediation sites and for NJPDES Discharge to Groundwater permits. The proposed changes include significant reductions to many of the GWQS and are expected to result in increased remediation costs as well as reevaluation and potentially additional remediation at previously closed sites.

The proposed rulemaking includes changes to the health-based Groundwater Quality Criteria based on updated toxicological information, changes to the Practical Quantitation Levels (PQLs) that can be reliably achieved by groundwater testing laboratories, changes to numeric rounding procedures, and additional statutory language that will allow NJDEP to more quickly enact these changes in the future by referencing drinking water standards already promulgated.

The GWQS for each chemical is based on the higher of the health-based Groundwater Quality Criteria and the PQL. A reduction in the GWQS may therefore result from a reduction in the Groundwater Quality Criterion (indicating the chemical is more toxic than previously thought), or from a reduction in the PQL (indicating the chemical is now measurable at lower concentrations), or both. We've noted substantial reductions in the proposed PQLs for many compounds which, in practice, may or may not be achievable by most laboratories using common analytical methods. The resulting GWQS will dictate the allowable concentration of the chemical in Class II-A groundwater at remediation sites and for permitted discharges to groundwater. Of the 65 proposed GWQS, 50 will become more stringent, and 13 will become less stringent.

Additionally, New Jersey's [Site Remediation Program requires remediators](#) to reevaluate previously closed sites for chemicals where any applicable GWQS has been reduced by an order of magnitude or more. This reevaluation will, at a minimum, extend the aerial extent and duration of Classification Exception Areas (CEA) used to prevent use of contaminated groundwater, and in many cases may require additional groundwater remediation to meet the reduced GWQS. The changes also have the potential to increase natural resource damage penalties calculated by NJDEP. The following GWQS are proposed to decrease by an order of magnitude or more:

Chemical	Current GWQS (ug/L)	Proposed GWQS (ug/L)
1,1-biphenyl	400	5.0
Cobalt	100	2
Cyanide (free)	100	5.0
1,3-dichlorobenzene	600	5
Heptachlor epoxide	0.2	0.020
Methoxychlor	40	0.1
Vinyl chloride	1	0.035

NJDEP is aware of thousands of remediation sites, both active and closed, that are contaminated by one of these seven chemicals, and expects the proposed GWQS reductions to have potentially significant economic impacts on these sites.

A virtual public hearing on the proposed rulemaking has been scheduled for January 30, 2024, and written comments on the proposed rulemaking may be submitted electronically until March 2, 2024. If you are interested in learning more about the proposed changes, wish to submit comments, or want to better understand how these changes may impact your ongoing or previously completed remediation project, please contact [Michael Dillon](#) or one of [our in-house technical consultants](#).

Inland Flood Protection and Coastal Zone

John F. Gullace, Esq.

Flooding remains a major policy concern in New Jersey and will receive significant focus in 2024. After the remnants of Tropical Storm Ida caused major flooding in New Jersey in September 2021, the state's flood related regulatory process was accelerated, resulting in the promulgation of an Inland Flood Protection rule in 2022 as an emergency rule intended to take effect immediately. Although the emergency rule-making process ultimately did not occur, NJDEP published a set of new rules amending the Stormwater Management rules (N.J.A.C. 7:8) and the Flood Hazard Area Control Act rules (N.J.A.C. 7:13), known as the Inland Flood Protection Rule, for public comment on December 5, 2022, which were adopted on June 2, 2023, and became effective on July 17, 2023.

At the core of the new Inland Flood Protection Rule is the recognition that existing flood mapping based on historical data is an inadequate predictor of future flooding and that flooding will become increasingly severe during the 50 to 100-year useful life of any structure built today. Accordingly, under the new rule, construction projects using existing flood mapping will be required to design to the higher of two feet above existing NJDEP flood maps or three feet above existing FEMA flood maps. These rules will apply wherever a permit or authorization is required for the project. Development and infrastructure projects seeking approvals in 2024 will need to be cognizant of these new requirements.

New Jersey's State Floodplain Administrator, Vincent Mazzei, advised late last year that the flood hazard rules applicable to Coastal Zone Flooding are likely to be published in the first quarter of 2024. These rules are expected to focus on flood impacts from rising sea levels and inundation. Coastal Zone flood mapping taking into account anticipated changes in sea level are already publicly available and highlight the significant threat that NJDEP seeks to confront through these new rules.

On July 3 2023, New Jersey also enacted the Flood Risk Notification Law (P.L., Chapter 93), which requires sellers of real property and landlords to make disclosures about flood risks.

Flooding and mitigating risks from flooding will continue to be a focus in New Jersey as regulations are developed to implement the Flood Risk Notification Law, as the Coastal Zone Flooding regulations are proposed, and as the newly adopted Inland Flood Protection Rule begins to be implemented. Watch for flooding to drive policy discussions, and project approvals in 2024 and the years to come.

Alternative Energy Developments in New Jersey

Alice F. Douglas, Esq. and Michael Dillon, Esq.

On July 5, 2023, the United States Department of the Interior's Bureau of Ocean Energy Management (BOEM) granted its third approval of a commercial-scale offshore wind energy project, known as Ocean Wind 1, which envisioned the construction of up to 98 wind turbines and up to 3 offshore substations off the coast of New Jersey.

Following BOEM's decision, New Jersey residents filed suits in federal and state court challenging the project. The project developer, Orsted, filed its own suit against two New Jersey counties, citing permitting delays. By October, Orsted announced that it would "cease development" of Ocean Wind 1 and Ocean Wind 2 due to "high inflation, rising interest rates and supply chain constraints," but emphasized its progress on other projects in its portfolio.

Another large-scale wind energy project slated for development off the coast of New Jersey, known as Atlantic Shores Project 1, is facing similar challenges, but for the time being, is expected to begin construction in 2024.

In connection with its ambitious goal of producing 30 giga-watts of offshore wind power in the United States by 2030, the Biden Administration has approved three more commercial-scale wind energy projects since its approval of Ocean Wind 1, including Empire Wind 1 and Empire Wind 2, which would entail construction of up to 147 wind turbines off the coast of New York and New Jersey. On January 3, 2024, however, Empire Wind project developers, Equinor and bp, announced a "project reset" on Empire Wind 2, citing "inflation, interest rates and supply chain disruptions" preventing the project from achieving financial viability. Progress on Empire Wind 1 currently appears unaffected by this decision.

Additional alternative energy project proposals aimed at achieving federal and state clean energy goals, including large-scale wind and solar developments in New Jersey, are expected in 2024. Litigation and macroeconomic challenges during the siting, planning, and construction phases are likely to follow, as evidenced by the projects mentioned above.

If you are interested in reading more about this topic, please see the [July 2023 MGKF Litigation Blog](#), discussing neighboring residents' challenges to large-scale wind energy projects across the United States.

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