

### 2023 Environmental and Energy Law Forecast

#### NEW JERSEY

##### **New Jersey Environmental Justice Permit Review Program Expected to Kick Off in 2023**

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Over two years ago, Governor Murphy signed New Jersey's landmark Environmental Justice Law (EJ Law), which requires the New Jersey Department of Environmental Protection (NJDEP) to engage in a specialized and rigorous EJ permitting review process pursuant to regulations to be adopted by the agency. The process is intended to address cumulative environmental and public health stressors associated with locating certain new or expanded facilities in areas the law designates as "overburdened communities" before it may issue environmental permits covered by the law (see our summary of the EJ Law [here](#)). The EJ Law does not go into effect until the final regulations are issued, which, as described below, is expected to occur early in 2023 and could create much uncertainty for covered facilities.

Covered facilities primarily include major sources of air pollution, a wide range of solid waste and recycling facilities, and scrap metal facilities. Covered permits include most individual permits, registrations or licenses issued under a broad range of state environmental laws. The EJ Law defines overburdened communities as those census tracts 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.

Under the EJ Law persons seeking any of the applicable permits from NJDEP for covered new or expanded facilities in an overburdened community must develop an Environmental Justice Impact Statement (EJIS) as part of any permit application. The EJIS must assess the potential environmental and public health stressors associated with the new or expanded facility, and with the existing source. 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" communities in the State, county or other geographic units as determined by NJDEP, then NJDEP *must* deny the permit (an exception is made for certain facilities serving a compelling public interest, although permits for such new facilities may be conditioned). 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.

The EJ regulations address the details of the implementation strategies for the substantive requirements of the law. They were proposed in June 2022 following a stakeholder process. The proposed regulations then went through an extensive public comment process, which included over 1,500 comments. The

regulations and NJDEP's responses to public comments are expected to be issued in final form early this year and trigger the commencement of the EJ review process for covered facilities and permits.

Pending the finalization of the regulations, NJDEP has been overseeing a hybrid environmental justice review process as mandated under a [2021 administrative order](#) issued by the agency. The order, which purports to have been issued under the authorization of pre-EJ Law environmental permitting programs, applies to the same facilities as defined in the EJ Law that seek the same authorizations covered under the EJ Law located in the same overburdened communities. 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, 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. Although there have been a number of public hearings under the administrative order, as of this writing no permits have been issued to entities that have gone through this process. Thus, it is difficult to predict what permit conditions NJDEP may impose under the administrative order or, when issued, the finalized EJ regulations.

Once the regulations are finalized, we expect that obtaining permits will require even more advanced planning and interaction with the affected community. Additionally, facilities should prepare for unpredictable timelines for permit issuance, and uncertainty in the conditions that may be imposed on a new or existing facility's permit for any facility covered by the EJ Law. If the final regulations are substantially similar to the proposed regulations, NJDEP will have the discretion to impose conditions that range from on-site conditions pertinent to the subject matter of the permit to off-site conditions that are unrelated to the subject matter of the permit. Given the limited language of the EJ Law versus the expansive nature of the proposed regulation, the final regulations, which are not expected to change much from the proposal, could be legally challenged on the basis that they go beyond what the statute authorizes. For example, it is possible that challenges could be mounted to the definitions of a new facility, expanded facility, what constitutes the appropriate geographic point of comparison and what constitutes a compelling public interest to authorize NJDEP's issuance of a permit for a new facility. If you would like to learn more about the impact of the regulations or how they apply, please reach out to MGKF's [Jill Kaplan](#) or [Carol McCabe](#).

## **NJDEP Land Resource Protection Program to Focus on Climate Change Rules in 2023** **Bruce S. Katcher, Esq.**

2023 promises to be a very active year for climate change rules under the NJDEP's Land Resource Protection Program under NJDEP's Protecting Against Climate Change (PACT) initiative:

- The Inland Flood Protection Rule, which was issued in proposed form on December 5, 2022, with finalization expected as soon as May 2023. This rule would revise both the Flood Hazard Area rules as applied to inland flooding by non-tidal streams and rivers and the Stormwater Management (SWM) Rules to address more severe rainfall events caused by climate change.
- The Resilient Environments and Landscapes (REAL) Rule, which NJDEP expects to propose in the second quarter of 2023 and finalize by the first or second quarter of 2024. This rule will incorporate

climate change considerations, like sea level rise, into a wide variety of regulatory programs including Coastal Zone Management, Freshwater Wetlands, Flood Hazard Area, and SWM rules.

We previously summarized the salient aspects of the Inland Flood Protection Rule [here](#). Major changes would include use of future precipitation estimates in calculating flood and SWM requirements, expanding flood hazard areas, and increasing design flood elevations (DFE) by two feet above current requirements for future construction. Grandfather provisions are included.

The major elements of the REAL Rule were revealed by Vince Mazzei, Assistant Commissioner for Watershed and Land Management, in a late December webinar. Five feet would be added to the current DFE requirements for future shore construction, based on NJDEP's estimate of a five-foot sea level rise by 2100, combined with an estimated life of most new buildings of approximately 75 years. Flood hazard areas would expand, and the rule would add a new regulatory area – an inundation risk zone (IRZ) – including the area between the current shoreline and the projected year 2100 shoreline. Building would not be prohibited in the IRZ (assuming that flood hazard area and other applicable requirements were met), however, a new risk assessment and alternatives analysis would be required together with a deed notice of building risks based on this analysis.

Other changes would correct inconsistencies between the state program and the National Flood Insurance Program, address renewable energy (especially habitat and infrastructure issues raised by wind energy), encourage nature-based solutions for SWM and water quality, remove SWM exemptions for urban redevelopment, impose new riparian zone protections for headwaters and barrier island baysides, and add wetlands, transition area and wildlife habitat protections. Finally, the proposal would modify the land use permitting process for coastal and inland areas, including replacement of permits-by-rule with a new permit-by-registration process, eliminate or combine some permits-by-certification with general permits, require that certifications be completed by a licensed engineer or architect, and add or modify various permit notice requirements. Mazzei offered to meet with interested parties in January to provide pre-proposal comments.

## **New Jersey to Remain Focused on PFAS in 2023**

***Nicole R. Moshang, Esq., Thomas M. Duncan, Esq., and Brandon P. Matsnev, Esq.***

In 2022, New Jersey advanced significant regulatory, litigation and legislative initiatives applicable to per- and polyfluoroalkyl substances (PFAS) that will carry into 2023 (and beyond). The main initiatives are addressed below.

### **PFAS Sampling Requirements for NJPDES Permits**

[Last year we reported](#) that the New Jersey Department of Environmental Protection (NJDEP) sent PFAS Source Evaluation and Reduction Requirements Surveys to certain NJPDES permittees. Specifically, these surveys asked Category B and L NJPDES permittees to identify their use of Class B firefighting foam and of certain materials that are known to contain PFAS. NJDEP then sent follow-up Requests for Information to a group of NJPDES permittees based on responses to the initial survey, requiring the permittees to collect two effluent samples for 12 PFAS compounds at least 30 days apart and submit the data to NJDEP.

NJDEP’s investigation of PFAS compounds in the state remains in full swing. On March 23, 2022, NJDEP sent additional Requests for Information, adding two compounds to the original 12, to a second group of permittees based on responses to the initial survey, with data submission due by August 5, 2022. On October 5, 2022, NJDEP sent Requests for Information to a third group of permittees, adding the GenX compounds to the 14-compound list, with data due to be submitted by February 3, 2023. Monitoring results are available on the Division of Water Quality’s webpage, under the new “PFAS” tab, along with an FAQ document concerning the three Requests for Information. According to NJDEP’s PFAS webpage, “in the near future, it will also be necessary to investigate to probable sources, reduce/eliminate the sources found (such as product substitution, operational controls, or treatment), and take other actions to protect surface water and sludge quality.”

### **NJDEP Interim Soil Remediation Standards for PFNA, PFOA, PFOS, and GenX**

On October 17, 2022, NJDEP issued a public notice in the New Jersey Register establishing interim soil remediation standards (SRSs) for the ingestion-dermal exposure pathway for perfluorononanoic acid (PFNA), perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), and hexafluoropropylene oxide dimer acid and its ammonium salt (GenX). NJDEP also established interim soil leachate remediation standards for the migration to groundwater exposure pathway for PFNA, PFOA, and PFOS. These standards are summarized in the table below. These new interim standards, set forth below, were effective upon publication with no phase-in period.

<b>Compound</b>	<b>CAS No.</b>	<b>Soil Remediation Standard Ingestion-Dermal Residential (mg/kg)</b>	<b>Soil Remediation Standard Ingestion-Dermal Nonresidential (mg/kg)</b>	<b>Soil Remediation Standard Migration to Groundwater (mg/kg)</b>	<b>Soil Leachate Remediation Standard Migration to Groundwater (µg/L)</b>
<b>PFNA</b>	375-95-1	0.047	0.67	AOC/Site-Specific	0.26
<b>PFOA</b>	335-67-1	0.13	1.8	AOC/Site-Specific	0.28
<b>PFOS</b>	1763-23-1	0.11	1.6	AOC/Site-Specific	0.26
<b>GenX</b>	13252-13-6, 62037-80-3	0.23	3.9	N/A	N/A

Further evaluation of the interim SRSs can be found in our Special Alert [here](#). NJDEP held a training session on the new interim SRSs on November 10, 2022. The presentation materials can be found [here](#), under “PFAS Interim Soil Standards.”

These new standards are likely to impact many remediation projects in 2023.

### **NJ PFAS Litigation**

We also expect that PFAS related litigation will continue to expand in 2023. A recent opinion issued by Judge Becker on December 14, 2022, in the matter of *NJDEP et al., v. Solvay Specialty Polymers USA, LLC*, No. G-L-1239-20, Superior Court of Gloucester County, highlights the potentially significant geographic reach and scope of future PFAS litigation in New Jersey.

In November 2020, NJDEP filed a complaint against defendants Solvay Specialty Polymers USA, LLC (Solvay) and Arkema Inc. (Arkema) (collectively defendants) seeking natural resource damages for discharges of PFAS from defendants' manufacturing facility located in West Deptford, New Jersey. NJDEP alleged that defendants discharged PFAS from their facility through air emissions, spills to soil and groundwater and direct discharges to the Delaware River, which NJDEP claimed resulted in damages to New Jersey's natural resources. *Id* at 2. NJDEP alleged in its complaint that defendants' contamination to the Delaware River flowed from the river through its pathways inland and thus gave rise to claims for damages to both the river itself and inland resources, however, NJDEP filed a motion to reserve adjudication of the in-river claims for another day (having filed those claims mainly to avoid running afoul of New Jersey's Entire Controversy Doctrine under R. 4:30A, which requires parties to assert all known claims as between the parties in one action) . In support of its motion, NJDEP argued that carving out and reserving the in-river claims for a subsequent action was necessary to prevent delay in the adjudication of the remediation and restoration of New Jersey's natural resources that NJDEP is obligated to protect for the benefit of state residents.

In opposition to NJDEP's motion to sever, defendants principally argued that severance of the in-river claims would be inefficient for both defendants and the judicial system. The defendants reasoned that they are entitled to seek discovery from, and to join as parties to the current case, a large number of other potentially responsible third parties, and that reserving in-river claims for later litigation will create an unnecessary duplication of effort.

The Court agreed with NJDEP and found that reserving the in-river claims for future litigation would promote judicial efficiency, fairness, and avoid the confusion and complexity that would result if the in-river claims were included in the current litigation. *Id.* at 2, 4-5. The Court reasoned that the geographic area in question covered three states that would likely implicate other trustees' claims, present numerous complex questions of law and fact and expand to multiple third parties in various states with alleged discharges to the Delaware River. *Id.* at 4.

Although the Court granted NJDEP's motion to sever, the Court noted that the parties could seek discovery regarding potential third parties and substances and indicated that defendants could seek leave to bring third parties into the current litigation if discovery revealed a connection between the third party and inland natural resource damages. *Id.* at 6.

While it is yet to be seen if the door has been left open to expand the litigation beyond the current parties and claims, given the large geographic area at issue, multiple pathways, and numerous potential sources of PFAS impacts, it seems almost certain that complex, multi-party PFAS litigation is on the horizon both in this case and others NJDEP may bring to address PFAS contamination in New Jersey

### **NJ PFAS Legislation**

Concerning legislation, at this time there are six proposed bills related to PFAS. One of these, S-2712, introduced in May 2022, would ban the sale of class B firefighting foam containing intentionally added PFAS. 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 December 15, 2022, the bill was approved by and reported out of the Senate Environment and Energy (Senate EE) Committee. It could become law in 2023, although, as currently written, it would only become effective two years after passage.

The other five proposed bills, S-3176-80 (and related Assembly bills), were part of a comprehensive PFAS legislative package introduced in October 2022 as addressed [here](#). Only one has thus far received Senate EE Committee approval: S-3176, which would direct NJDEP to conduct a study to determine the feasibility of a uniform MCL for the entire class of PFAS compounds. It would further direct NJDEP to investigate and potentially recommend treatment technologies for PFAS. The bill was referred to the Budget and Appropriations Committee on November 3, 2022.

The remaining four bills remain under the EE Committee's consideration. S-3177 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 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. S-3179 would require that public water systems promptly notify residents of PFAS exceedances. Finally, S-3180 would mandate that water suppliers or purveyors proactively designate alternate water sources in the event they discover PFAS exceedances in current sources. These bills, if enacted, would create an extensive new and complex regulatory program for NJDEP to administer at substantial cost to the agency and industry.

## **New Jersey Site Remediation - Key Issues for 2023**

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

What was formerly known as the Site Remediation and Waste Management Program underwent a rebranding and reorganization in 2022. It is now reorganized and known as the Contaminated Site Remediation and Redevelopment Program (CSRRP), emphasizing both the site remediation and brownfields redevelopment aspects of the program. Responsibility for the solid waste program has been transferred to the Air Quality, Energy and Materials Sustainability Program. CSRRP is headed by recently appointed Acting Assistant Commissioner, David Haymes.

### **Contaminants of Emerging Concern**

The new year promises to see continued attention to contaminants of emerging concern, especially per- and poly-fluoralkyl substances (PFAS) and 1,4 dioxane (as previously reported [here](#) and further addressed [below](#).) NJDEP established interim soil remediation standards for various PFAS in October 2022 and attention to these standards will be important in 2023. Soil and groundwater remediation standards for 1,4 dioxane already existed.

### **Proposed Rules – SRRA 2.0 and RAPs**

Assistant Commissioner Haymes has also announced that his program is planning to issue a new proposed rule in 2023 to incorporate the requirements of the 2019 amendments to the Site Remediation Reform Act (a.k.a. SRRA and summarized [here](#)) into the Administrative Requirements for the Remediation of Contaminated Sites and the Technical Regulations.

That rule proposal is also expected to contain changes to the remedial action permit (RAP) program designed to reduce delays in the issuance of RAPs (a longstanding problem). This may include the possibility of a new general permit program applicable to a variety of RAPs that are relatively straightforward and routine (e.g., for deed notices) and the use of a single permit, instead of dual permits, for projects where both soil and groundwater permits are needed. Other process changes mentioned by

Haymes that may be implemented without a rule change would include improvements in permit reviews to identify administrative deficiencies early in the process, including application submission through an electronic portal designed to automatically reject certain administratively deficient applications, a new FAQ web section to provide more guidance on common deficiencies, and cross training of permit reviewers so that one person could handle both soil and groundwater issues instead of the current split responsibility.

### **Possible Changes to Groundwater Quality Criteria**

While not, strictly speaking, a planned revision to CSRRP regulations, Kimberly Cenno, Bureau Chief of the Bureau of Environmental Analysis, Restoration and Standards indicated at a recent conference that the Division of Water Monitoring and Standards was considering various revisions to the groundwater quality criteria and the assumptions on which they are based. She indicated that there could be updates to 65 standards including 50 that would be more stringent with seven of those changing by an order of magnitude or more. These criteria serve as the basis for the groundwater remediation standards in the CSRRP.

### **New Jersey Solid Waste Program Focus Shifts to Sustainability in 2023**

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

The NJDEP solid waste program underwent a subtle but meaningful rebranding in 2022. Formerly known as the Division of Solid and Hazardous Waste Management, it is now known as the Division of Sustainable Waste Management (DSWM) and is housed under the Assistant Commissioner for Air, Energy and Material Sustainability. A noticeable focus on sustainability will characterize the DSWM's 2023 priorities. Moreover, there is some synergy in the reorganization, given that the Air and Solid Waste programs are likely to be the most involved in the new Environmental Justice permitting process.

Speaking at the 21st Annual NJDEP-AWMA Regulatory Update Conference in November, the new Division Director, Janine MacGregor, noted the increased emphasis on sustainability as a consequence of new and pending legislation over the last few years and identified a variety of Division priorities in 2023, including:

- Recycled Content Law – Enacted at the beginning of 2022, this law imposed minimum recycled content requirements on certain manufacturers of containers and packaging products in an effort to create or expand the market for recyclables. The DSWM is currently developing regulations to implement this program.
- Food Waste Reduction and Recycling - There are two primary laws that the DSWM is charged with implementing:
  1. The Food Waste Reduction Law (enacted in 2017) which requires NJDEP to develop a plan to reduce food waste in New Jersey by 50 percent by 2030;
  2. The Large Generator Food Waste Recycling Law (enacted in 2020), which requires certain large generators of food waste to separate and recycle it.

DSWM is currently finalizing its Food Waste Reduction Plan and is planning to issue the Plan and proposed regulations on food waste recycling and food waste energy production and composting in early 2023.

- Get Past Plastic Initiative – This is the program that implements the law passed in 2020 that, among other things, bans single use plastic carryout bags and polystyrene foam food serve products and

containers in New Jersey. The law is currently being implemented without regulations and the DSWM expects to propose those in the second half of 2023.

- Extended Producer Responsibility (EPR) requirements – EPR, which is a concept that is intended to reduce waste by making product manufacturers and distributors responsible for their products and packaging at the end of life, is a concept currently under consideration in New Jersey. S-426, pending in the NJ Senate, would require manufacturers of certain containers to develop and implement a product stewardship plan. DSWM is advising Senator Smith on the bill and researching how similar laws work elsewhere.
- Advanced Recycling – This is an emerging technology that turns used solid plastic into its gas or liquid raw materials to be remanufactured into new plastic for use in plastic products or packaging. DSWM is currently researching these technologies and how other states are regulating them, including whether the entities should be regulated as manufacturers, recycling or solid waste facilities.

Other programs on which the DSWM is currently working, as reported by Director MacGregor, are the following (all of which have elements of waste reduction/reuse/recycling):

- Electronic -Waste – DSWM is working on regulations to strengthen and streamline the manufacturer reporting program with a rule proposal expected in early 2023.
- Recycling Rules – DSWM is working on revising the exemptions from the recycling regulations with an eye toward evening the playing field between those recyclers that are and are not exempted. A rule proposal is expected in early 2023.
- Dirty Dirt Law – This is the law that requires certain entities in the business of providing fill and soil recycling services to be licensed under the A-901 program. Regulations are expected to be proposed in the summer of 2023.

## **New Utility Benchmarking and Reporting Requirements for Commercial Buildings** **Technical Consultant Will Hitchcock and Bruce S. Katcher, Esq.**

For the first time, certain owners of commercial buildings over 25,000 square feet will be required to report the building's energy and water usage to the New Jersey Board of Public Utilities (BPU). These benchmarking reports will be due annually with the first report due by October 1, 2023, covering utility usage from the 2022 calendar year. This program is being developed by the BPU as required by New Jersey's Clean Energy Act of 2018 and is substantially similar to energy benchmarking programs already in place in other states and municipalities, including Philadelphia.

The list of covered buildings will be constructed from the state's Tax Assessment Database and therefore buildings owned by tax exempt entities will not be covered. Owners of covered buildings should receive a notification from the BPU by July 1, 2023. Utility usage would be reported using EPA's ENERGY STAR Portfolio Manager online application, and a number of exemptions may be available upon application, including exemptions for new buildings (through the first year of operations), buildings to be demolished, unoccupied buildings, and others. The BPU will be establishing procedures to obtain data from the water



and energy utilities and, where needed, to obtain tenant consent. The data will eventually be reported out to the public in a format to be determined, although, according to the BPU, the public reports will not be available for five years.

The BPU is currently holding stakeholder meetings and accepting public comments on the proposed program until January 30, 2023. We have assisted several of our clients with exemption applications and the preparation and submittal of ENERGY STAR benchmarking reports under Philadelphia's existing benchmarking program.

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