



2020 Environmental and Energy Law Forecast

NEW JERSEY FORECAST

Site Remediation Program Reform in 2020

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Last year saw the first significant set of revisions to the New Jersey Site Remediation Reform Act since it was enacted in 2009, aka SRRA 2.0. 2020 portends further fine tuning of those revisions in the way of implementing regulations and the possibility of other reforms as industry stakeholders continue to press for further changes in site remediation program requirements via regulation. In either event, a regulatory package seems likely to be proposed in the coming year.

Examples of areas that SRRA 2.0 implementing regulations might address include what are the documents and other information that municipalities have a right to request from the party responsible for conducting the remediation (PRCR); what are the contents of the written summary status report that a PRCR may provide when faced with a public inquiry about its remediation; further detail on how a PRCR may qualify for relief from direct oversight when a mandatory time frame is missed; when might both signs and letters to surrounding property owners be required instead of just one or the other (as currently required); and how will NJDEP encourage green remediation.

Examples of areas not directly addressed by SRRA 2.0 but in which industry is likely to continue to press for reform in the coming year include making the remedial action permit process more efficient through the use of mechanisms such as general permits, permits by rule or other mechanisms; simplifying the process for remediation of historic fill and historically applied pesticides; elimination of unnecessary limitations on the use of alternative fill; reform of remediation requirements for innocent developers and greater use of sound risk based principles in making remediation decisions.

Regulating and Remediating PFAS in New Jersey

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New Jersey DEP proposed its own regulations for PFOA and PFOS in 2019. In April, NJDEP proposed amending the Safe Drinking Water Act regulations to establish MCLs for PFOA of 14 ppt and for PFOS of 13 ppt; establishing groundwater quality criteria for PFOA of 14 ppt and PFOS of 13 ppt; and adding PFOA and PFOS to the List of Hazardous Substances. The agency also published interim groundwater quality standards for PFOA and PFOS of 10 ppt, which are in effect while its rulemaking proceeds. The Department has one year from the date of publication to take final action on a proposed rule, so the proposed regulations for PFOA and PFOS will likely be finalized in the first half of 2020. NJDEP is also requiring PFAS generally to be considered in conjunction with site remediations. New Jersey also grabbed

headlines with orders and lawsuits filed against manufacturers associated with PFAS in the State. In 2020, we expect New Jersey to continue to be at the forefront of efforts to regulate and remediate PFAS.

Natural Resource Damages in 2020

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We can expect the Murphy Administration's heightened focus on natural resource damages (NRDs) to continue in 2020. Last year, the New Jersey Department of Environmental Protection (NJDEP) and Attorney General's Office initiated eight lawsuits seeking NRDs—double the number filed in 2018. Some of the lawsuits filed in 2019 were not the “traditional” NRD cases practitioners are accustomed to seeing. Rather, the State expanded its allegations of impacted natural resources in some cases to include air, sediments and soils, forests, and even wetlands. Similarly, the state expanded the counts it alleged to include abnormally dangerous activity, strict products liability for defective design and failure to warn, as well as tortious interference. While the State will likely continue to include similar non-traditional allegations in future NRD recovery actions, it is unclear at this time whether it will ultimately be successful.

Decisions on motions challenging the State's claims will continue to shape how NRD cases are litigated in New Jersey. Two motions to dismiss challenging whether the state can bring a claim for trespass over land it does not own resulted in a split among sister trial courts. See *New Jersey Department of Environmental Protection v. Hess*, MID-L4579-18 (N.J. Super. Ct. Law Div. Dec. 21, 2018) (granting motion to dismiss common law trespass claim because State lacked exclusive possession over the land); *New Jersey Department of Environmental Protection v. Deull Fuel*, No. ATL-L-1839-18 (N.J. Super. Ct. Law Div. Aug. 8, 2019) (denying motion to dismiss common law trespass claim because Public Trust Doctrine supersedes exclusivity element of trespass). The State sought interlocutory appeal of the trial court's decision in *Hess*, which is pending before the Superior Court, Appellate Division. It is likely that the appellate court will render its decision in 2020, thereby resolving the split and shaping not only how litigation will proceed in the other pending NRD lawsuits but impacting what claims the State asserts in future NRD cases. It is anticipated that motion practice will continue to shape the law with respect to NRDs in the coming year.

While 2019 was a big year for the initiation of NRD litigation, efforts to address NRDs through legislation have seemingly stalled. During the New Jersey Senate Environmental and Energy Committee's meeting on January 24, 2019, the NRD Task Force provided an update on the group's efforts. After that update a year ago, the Task Force has not publicly provided any additional updates nor has any legislation been proposed regarding NRDs.

Although it is unclear whether there will be any developments regarding NRD legislation in 2020, it can be expected that the Murphy Administration will continue to bring lawsuits seeking to recover NRDs in the new year.

Environmental Justice in New Jersey in 2020

Maria C. Salvemini, Esq.

Last year we reported on the Murphy Administration's efforts in carrying out the 2018 Executive Order which directed the New Jersey Department of Environmental Protection (NJDEP) to develop guidance “for all Executive branch departments and agencies for the consideration of Environmental Justice in implementing their statutory and regulatory responsibilities.” Exec. Order No. 23 (Apr. 20, 2018), 50 N.J.R. 1241(b) (May 21, 2018). Although it was expected that the draft guidance would be finalized in 2019, this was not the case. NJDEP held draft guidance document listening sessions in the early months of last year

and public comments were accepted on the draft until March 22. As of this date, however, the guidance document remains in draft and there are no updates on the Office of Environmental Justice's website.

Efforts to address Environmental Justice via legislative action have similarly stalled since early 2019. Bill S-1700, which imposed obligations on DEP with respect to "burdened communities," was introduced into the Senate and referred to the Senate Environment and Energy Committee in 2018. The bill, as amended, was approved by the Environment and Energy Committee and sent to the Senate Budget and Appropriations Committee in late January 2019. Since that time, however, the bill has not moved so its fate will depend on whether it is reintroduced in the next legislative session.

While agency and legislative action stalled in 2019, on October 25 the Attorney General's Office and NJDEP announced the filing of six environmental justice lawsuits involving sites in Newark, Trenton, East Orange, Kearny, and Camden, as discussed elsewhere in this Forecast.

Practitioners and industry members can expect to see a continued focus on environmental justice in New Jersey in 2020, but whether that will solely be through the initiation of additional litigation by the Murphy Administration or by agency or legislative action is unclear.

New Jersey's Climate Change Resilience Strategy

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On October 29, 2019—the seventh anniversary of Superstorm Sandy—New Jersey Governor Phil Murphy signed Executive Order No. 89 to address climate change concerns in the state. Executive Order No. 89 is the main driver that initiated a state focus on climate change in late 2019 which is anticipated to gather steam moving into 2020. Exec. Order No. 89 (Oct. 29, 2019), 51 N.J.R. 1707(a) (Dec. 2, 2019). The Executive Order establishes a Chief Resilience Officer, Climate and Flood Resilience Program within the Department of Environmental Protection (DEP), an Interagency Council on Climate Resilience, Statewide Climate Change Resilience Strategy, and a State Development and Redevelopment Plan. David Rosenblatt, the DEP Assistant Commissioner for Climate and Flood Resilience, has been designated as the Chief Resilience Officer. The Executive Order tasked the Climate and Flood Resilience Program with developing and delivering a Scientific Report on Climate Change to address current and future effects of climate change in the state.

While 2019 kicked off New Jersey's focus on climate change impacts within the state, we can expect to see many of the obligations imposed by Executive Order 89 play out in 2020. For example, the new year will bring the development of a Statewide Climate Change Resilience Strategy "to promote the long-term mitigation, adaptation, and resilience of New Jersey's economy, communities, infrastructure, and natural resources throughout the State in a manner consistent with the Scientific Report on Climate Change." Exec. Order No. 89. The Strategy must include recommendations of actions the state should take to mitigate and adapt to the effect of climate change, including but not limited to the following measures:

- Identify methods to strengthen resilience;
- Provide guidance and strategies for Executive Branch departments and agencies, municipalities, and regional planning agencies;
- Promote long-term water and energy resource security;
- Reduce the risk of wildfires in state forests;
- Reduce the risks to the health of New Jersey residents that may accompany climate change;

- Support sustainable and resilient economic development;
- Identify financing mechanisms, strategies, and opportunities for coordination to support climate resilience measures, mitigation, and adaptation; and
- Any other measures the Chief Resilience Officer determines necessary to prepare for, mitigate, and adapt to the impact of climate change.

Additionally, the Statewide Climate Resilience Strategy must include a Coastal Resilience Plan that recommends “a specific long-term strategy for climate change resilience and adaptation in the coastal areas of the State, i.e., tidal and non-tidal waters, waterfronts, and inland areas along the coast.” The Chief Resilience Officer with the aid of the Interagency Council must provide The Statewide Climate Change Resilience Strategy to the Governor by September 1, 2020. Subsequently, state agencies and municipalities will need to grapple with issues of how to implement the Strategy.

Stormwater Utilities – Progress Expected in 2020

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In early 2019, the Clean Stormwater and Flood Reduction Act was signed into law by Governor Murphy. The Act authorizes (but does not require) counties and municipalities to establish stormwater utilities “for the purposes of acquiring, constructing, improving, maintaining, and operating stormwater management systems” and to impose fees on property owners or occupants to cover the costs of managing stormwater that enters the stormwater management system or waters of the State. Given the heavy flooding that some major New Jersey municipalities have experienced in recent years, the addition of this enabling legislation has been viewed by some as a major advance toward addressing this problem, though viewed by others as nothing more than a new taxing mechanism.

To date there has not been much activity associated with the passage of this legislation. This could change in the coming year as a renewed emphasis is placed on resiliency planning by the Murphy Administration (see article above). To that end, in a recent stakeholder invitation, NJDEP indicated that during 2019 it had begun the process to develop guidance in a number of areas crucial to establishing stormwater utilities as required by the Act. That included researching existing stormwater utilities across the country, holding preliminary conversations with other State agencies and interested parties and beginning to develop the framework for a website to serve as a guidance repository. Stakeholder meetings are expected to begin in January.

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