

New Jersey – Environmental Matters To Watch In 2020

Greenhouse Gas Monitoring Rule – New Executive Order And NJDEP Regulations

On January 27, 2020, Governor Phil Murphy signed Executive Order 100 requiring the NJDEP to promulgate Protecting Against Climate Threats (PACT) regulations within two years. NJDEP Commissioner Catherine McCabe also signed Administrative Order No. 2020-01, which mandates the agency to, among other things, propose regulations that establish a greenhouse gas (GHG) monitoring and reporting program to identify significant sources of GHG emissions. The NJDEP held a stakeholder meeting on February 21, 2020. A rule proposal is anticipated to be published in the New Jersey Register by January 2021, with a final rule adopted by July 2021. The NJDEP will be using the 2018 Statewide Greenhouse Gas Emission Inventory, published in October 2019, as a baseline for the annual inventory that the NJDEP will be proposing. The NJDEP will be requesting information about GHG emissions from various sectors, including refineries, oil storage facilities, natural gas pipelines, and fuel wholesale/retail distributors. The NJDEP stated that the first report will be required in 2022 with 2021 data, and discussed tracking emissions starting in January 2021 in order to be in compliance, although the final rule is not expected until July 2021.

Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA)

The NJDEP published a rule proposal to list PFOS and PFOA as a “hazardous substance” under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (the “Spill Act”) and N.J.A.C. 7:1E and to establish maximum contaminant limits (MCL) under the New Jersey Safe Drinking Water Act of 13 ppt and 14 ppt, respectively. The proposed rule adoption is Spring 2020. When the MCLs for PFOS and PFOA are adopted, the standards will become the Ground Water Quality Standards for purposes of remediating contaminated sites. Until adoption, the NJDEP has published Interim Specific Ground Water Quality Standards (ISGWQS) for PFOS and PFOA of 10 ppt, which are in effect for the remediation of contaminated sites.

Although PFOS and PFOA are not yet listed as “hazardous substances,” the NJDEP requires the assessment of “contaminants,” when conducting a Preliminary Assessment Report under applicable statutes and regulations, such as the Industrial Site Recovery Act, N.J.S.A. 13:1K-8 et seq. The definition of “contaminants” is broader than the definition of “hazardous substances,” under NJDEP regulations, which means PFOS and PFOA use, storage, disposal and discharges must be evaluated as part of the Preliminary Assessment (PA) process. The NJDEP is revising its site remediation reporting forms to include a certification by the responsible party that it evaluated PFOS and PFOA as part of the PA process. If a Preliminary Assessment Report was issued before the publication of the ISGWQS, the NJDEP is still requiring responsible parties to evaluate PFOS and PFOA and report the assessment in the next milestone report to be filed with the agency. If the assessment requires sampling to be conducted, and PFOS and/or PFOA is detected above the ISGWQS, the responsible party is required to report the discharge to the NJDEP, which will assign a new case number for the PFOS/PFOA discharge and apply new remediation time frames. Although the PFOS/PFOA discharge is assigned new remediation time frames, remediation of the discharge, particularly soil, is essentially stalled until a soil analytical method is approved.

The only analytical method for PFOS/PFOA authorized by the NJDEP is a method to sample for drinking water. The NJDEP has not adopted an analytical method for groundwater or for soil. We anticipate that any analytical methods adopted by the NJDEP will track the methods ultimately approved by the USEPA.

Although the EPA recently published an advance notice of rulemaking to establish MCLs for PFOS and PFOA in drinking water, any MCL adopted by the EPA that is higher than the NJDEP's proposed MCL for PFOS and PFOA likely will not be adopted by the NJDEP.

Natural Resource Damages

Since 2018, under the Murphy administration, the NJDEP has filed 12 lawsuits seeking natural resource damages (NRD). The complaints typically include claims under the Spill Act and Water Pollution Control Act, and the common law claims of public nuisance, trespass, and negligence. Under the Spill Act, the NJDEP seeks compensation for loss of use of the service of the natural resource and primary restoration of the natural resource. Most of the targeted sites are undergoing active remediation and involve legacy contamination. In one case, the responsible party settled its alleged NRD liability to the NJDEP for the site, but the agency sued alleging new discharges occurred after the settlement or the responsible party failed to continue to remediate the contamination. Three of the NRD cases involve PFOA/PFOS sites and others involve petroleum and chlorinated volatile organic chemicals, including impacts to potable water supplies. To date, a court has not upheld the NJDEP's formula for calculating alleged loss of use of groundwater. Recent court decisions also have clarified the NJDEP's burden of proof to recover NRDs in that the NJDEP must prove the extent of an alleged natural resource injury and cannot assume that any amount of contamination results in a 100% service loss, the position the NJDEP typically takes in its NRD cases. It is anticipated that additional NRD cases will be filed by the NJDEP under the Murphy administration.

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