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Remediation of Contaminated Sites in NJ During COVID–19 Pandemic: Executive Orders and Rule Proposals

NEW JERSEY EXECUTIVE ORDER NO. 122 – SITE REMEDIATION

New Jersey Governor Murphy recently signed [Executive Order No. 122](#) (E.O. 122) directing, among other things, that all non-essential construction activity in the Garden State cease until further notice by 8:00 PM on April 10, 2020. The Executive Order expressly excepted certain types of “essential construction projects” from this directive, which are allowed to proceed (with various specified protective measures in place), including:

- 2.m. Any work on a non-essential construction project that is required to **physically secure** the site of the project, ensure the structural integrity of any buildings on the site, **abate any hazards** that would exist on the site if the construction were to remain in its current condition, **remediate a site**, or otherwise ensure that the site and any buildings therein are appropriately protected and safe during the suspension of the project; and
- 2.n. Any **emergency repairs necessary to ensure the health and safety of residents**.

These provisions of E.O. 122 appear to allow a non-essential construction project to proceed if it is being undertaken to address an environmental emergency (such as a leaking underground storage tank), remediate a discharge of contamination, and/or respond to a threat to human health and safety. Even so, the decision to proceed with such a projects is a business decision that should be carefully assessed on a case-by-case basis.

Responsible parties performing site field work to remediate contamination in New Jersey should be able to continue with those activities, so long as the lists of worksite protective measures set forth in Paragraphs 3 and 4 of E.O. 122 are adopted. Also, if remediation of contamination and/or a response to an environmental emergency is coupled with redevelopment, responsible parties should be able to perform the remediation and/or abate the emergency, but E.O. 122 does not authorize any new construction to commence, unless that construction is excepted by E.O. 122 as “essential.”

EXTENSION OF ADMINISTRATIVE TIME FRAMES FOR ENVIRONMENTAL COMPLIANCE

To date, New Jersey has not issued any blanket extension of permits or environmental compliance deadlines, including mandatory time frames applicable to the remediation of contaminated sites governed by New Jersey statutes like the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et. seq. and the Industrial Site Recovery Act, N.J.S.A. 13:1K-8 et seq. Extension requests for such mandatory time frames are governed by N.J.A.C. 7:26C-3.5, which requires the submission of an extension request 60 days prior to the end date of the mandatory remediation time frame. This provision also identifies the information that must be included in support of an extension request, including the reasons that extra time is needed to complete the work, and the steps taken to minimize the extra time needed to complete the work. **The rules authorize NJDEP to issue an extension of a mandatory time frame when there are “other**

circumstances beyond the control of the person responsible for conducting the remediation, such as fire, flood, riot or strike." N.J.A.C. 7:26C-3.5 (d)(3). Even if NJDEP does not direct any automatic extensions of mandatory time frames, this language is likely broad enough to cover a request for an extension due to the COVID-19 pandemic. Keep in mind, however, that the extension request must still be timely filed, and must document both the reasons that extra time is needed and the steps taken to minimize the need for extra time.

The U.S. Environmental Protection Agency recently [issued temporary guidance](#) for considering potential slowdowns or shutdowns of remedial field work at federal Superfund and Resource Conservation Recovery Act (RCRA) sites across the nation in light of the COVID-19 pandemic. EPA expects its regional offices to coordinate and collaborate with individual states regarding the status and progress of such work. In particular, EPA has encouraged its regional offices to share EPA's interim guidance with the states, and to employ the considerations set forth in that guidance in state-lead Superfund and RCRA cleanups. As noted above, however, New Jersey has not issued any guidance of its own in this regard to date.

NEW JERSEY EXECUTIVE ORDER No. 127 - EXTENDING TIME FRAMES FOR RULEMAKING

PROPOSED REMEDIATION STANDARDS AND DRINKING WATER STANDARDS FOR PFOS AND PFOA

Governor Murphy recently signed Executive Order No. 127 (E.O. 127) extending time frames for administrative rulemaking, which extension applies to rules that will expire during the COVID-19 Public Health Emergency declared in Executive Order No. 103 (E.O. 103). Agencies have one year to adopt a proposed rule, otherwise the rule proposal expires, provided there is an exception for substantial changes between the rule proposed and the rule adopted, which expires eighteen (18) months from the notice of proposal in the Register. E.O. 127 extends notices of rule proposals subject to the one-year expiration date until 90 days after the last day of E.O. 103, **if the notice of proposal was published in the Register on or after April 15, 2019, and the notice of rule proposal would otherwise expire without the benefit of such an extension.**

DRINKING WATER MAXIMUM CONTAMINANT LEVEL FOR PFOS AND PFOA

On April 1, 2019, NJDEP proposed rules setting Maximum Contaminant Levels (MCLs) in drinking water for perfluorooctanoic acid (PFOA) of 0.014 micrograms per liter ($\mu\text{g}/\text{l}$), and for perfluorooctanesulfonic acid (PFOS) of 0.013 $\mu\text{g}/\text{l}$. Additionally, NJDEP proposed to amend the Ground Water Quality Standards at N.J.A.C. 7:9C to establish a specific ground water quality standard for PFOA of 0.014 $\mu\text{g}/\text{l}$ and a specific ground water quality standard for PFOS of 0.013 $\mu\text{g}/\text{l}$. E.O. 127 does not appear to extend the rulemaking time frame for this proposed rule, however, and the time to adopt the proposed rule may have expired under the one-year time frame. Even so, it is anticipated that NJDEP may publish the adoption notice in the May 2020 Register. If the proposed rule is adopted, regulated parties will likely scrutinize NJDEP's adoption notice to determine whether or not the agency timely complied before the rule proposal expired.

NJDEP PROPOSES TO AMEND EXISTING REMEDIATION STANDARDS

On April 6, 2020, NJDEP published a [rule proposal](#) which, if adopted, will make extensive changes to New Jersey's remediation standards, codified at N.J.A.C. 7:26D et seq. Persons responsible for remediation of contaminated sites in New Jersey may be affected by the proposed changes, which include:

- NJDEP proposes to codify remediation standards for exposure pathways that are not in the existing rules, including soil and soil leachate remediation standards for the migration to ground water exposure pathway, and indoor air remediation standards for the vapor intrusion exposure pathway. This codification would establish a basis for enforceability, as current screening levels are not legally enforceable.

- The proposed rules separate existing soil remediation standards based on direct human contact into standards for the ingestion-dermal exposure pathway and inhalation exposure pathway.
- Under the proposed rules, whether the residential or nonresidential standard applies depends solely on the *use of the property* (as opposed to a person's exposure time).
- The proposed rules expand NJDEP's processes for establishing interim remediation standards and for updating remediation standards to include soil and soil leachate for migration to groundwater and indoor air.
- The proposed rules expand the process by which a party responsible for conducting remediation may request an alternative remediation standard to include soil and soil leachate for migration to groundwater and indoor air.
- The proposed rules delete remediation standards for some existing chemicals and add remediation standards for new chemicals.
- NJDEP has proposed numerical changes to the existing remediation standards. The soil remediation standards for some contaminants are proposed to be more stringent by a factor of ten or more. This will have an impact on some remediations that are otherwise closed.

Written comments on the Remediation Standards rule proposal may be submitted to NJDEP until **August 5, 2020**. NJDEP anticipates holding a public hearing on the proposal, with the date and time of such a hearing yet to be determined in light of the COVID-19 pandemic.

Parties responsible for the remediation of contaminated sites in New Jersey should review the Remediation Standards rule proposal to determine whether any site remediation requirements or permitting may be impacted.

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