RIKER DANZIG SCHERER HYLAND PERRETTI LLP

Environmental Update December 2015

Publication:

Riker Danzig Environmental Update December 2015

New Jersey Courts Expand Class of Persons Liable for Contamination Under Spill Act

The New Jersey courts continue to define and expand the class of persons liable for the cleanup of environmental contamination under New Jersey law by holding that the State of New Jersey and other "public polluters" may be liable because of their regulatory role and approval of activities that contributed to the environmental contamination. See N.L. Industries, Inc. v. New Jersey, Docket No.: A-0869-14 (N.J. App. Div. Aug. 26, 2015). Federal courts applying federal law, however, have generally declined to hold governmental entities liable for environmental contamination because of their regulatory role in certain activities.

N.L. Industries concerned heavy metal contamination in the Laurence Harbor area of Old Bridge Township, New Jersey, which has become known as the Raritan Bay Slag Site. The State and Old Bridge Township ("Township") entered into an agreement with the United States Army Corps of Engineers ("USACE") whereby the State and Township assumed responsibility for the maintenance, operation, and inspection of beachfill and levee structures in the area. Subsequently, a private developer acquired a portion of the Raritan Bay Slag Site and proposed to

construct a seawall and jetty to replace beachfill in the area. While this seems innocuous, the private developer used slag materials to construct the seawall. Slag is a byproduct of smelting operations that contain heavy metals, including lead. The State of New Jersey allowed the developer to construct the seawall using slag even though it knew of the heavy metals in the slag.

The Raritan Bay Slag Site was subsequently labelled a Superfund Site and placed on the National Priorities List because of the heavy metal contamination. In 2014, the EPA ordered NL Industries, Inc. ("NL") to conduct a $79 million cleanup at the Site because NL operated a lead smelting operation in nearby Perth Amboy, New Jersey and historical documents showed that a portion of the slag used to construct the seawall originated from the Perth Amboy facility.

NL then sued the State of New Jersey and other "public polluters" seeking contribution under the New Jersey Spill Compensation and Control Act ("Spill Act") for the cost of this cleanup. The Spill Act imposes strict liability on "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance." Liability is not limited to those who were active participants in the discharge of hazardous substances. Instead, liability extends to certain persons who had "some control over" the discharge of hazardous substances.

NL argued that the State is liable for cleanup costs because of its role in issuing permits and supervising the construction of the seawall and jetty. The lower court determined that NL sufficiently alleged facts showing that the State is a person "in any way responsible for the contamination," and specifically found that the State was potentially liable under New Jersey law because it: "(1) played a significant part in the planning and authorization of the construction of the [s]eawall and the western jetty; . . . (2) had actual knowledge that [the developer] intended to use the slag at the [Raritan Bay Slag] Site[;] (3) was actively operating and maintaining the [beachfill and levees in the area], which was supplemented by the addition of the Seawall; and (4) did not intervene to prevent or abate the environmental risk after the State was notified of the potential harms." The State appealed this decision and the New Jersey Appellate Division affirmed the lower court's decision with minimal discussion.

The key issue in determining liability in N.L. Industries was whether the State exercised sufficient control over the aspect of the construction activities that caused the contamination. While there is currently no bright line test to determine exactly how much control will trigger liability under the Spill Act, N.L. Industries may provide a roadmap for plaintiffs seeking to impose liability broadly, including on non-governmental entities that exerted control over the activities that caused contamination, even if they were only peripherally involved in those activities (such as architects and engineers that direct or design construction activities, financiers and lenders that impose conditions on development, and other similar parties). Moreover, as litigation over contaminated sediment sites (including the Raritan Bay Slag Site) ramp up in New Jersey and across the country, there are likely to be more clashes over the environmental liability of governmental entities acting in a regulatory role under both New Jersey and federal law.

Back to top.

New Jersey Supreme Court Refuses to Apply a Heightened Standard for "Blight" Under Redevelopment Law

This past Spring, the New Jersey Supreme Court made a significant ruling regarding the ability of municipalities to designate land for redevelopment under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A et seq., (the "Redevelopment Law"). In 62-64 Main Street, LLC, et al. v. Mayor and Council of the City of Hackensack, 221 N.J. 129 (2015), the Court determined that a property does not need to negatively affect the surrounding properties in order to be considered "blighted" and thus eligible for redevelopment. In doing so, the Court refused to expand the standard for "blight" and distinguished its earlier ruling in Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007), wherein it determined that a municipality could not designate a property for redevelopment under a particular subsection of the Redevelopment Law -- N.J.S.A. 40A:12A-5(e) -- unless the conditions on that property negatively affected the surrounding areas.

In 62-64 Main Street, LLC, plaintiffs owned five lots in the City of Hackensack on which stood two dilapidated buildings abutted by two poorly maintained and decrepit parking lots. Hackensack designated eleven out of twenty lots in a two-block area as "in need of redevelopment," including plaintiffs' five lots. In doing so, the Planning Board made specific findings that those lots met the statutory definitions of blight under sections 5(a), (b) and (d) of the Redevelopment Law, but did not specifically find a negative effect on the surrounding properties.

Plaintiffs filed an action in Superior Court, challenging Hackensack's classification of their lots as "blighted." Plaintiffs argued that a finding of blight under sections 5(a), (b), and (d) of the Redevelopment Law does not meet the constitutional definition of "blight" enunciated in Gallenthin. The trial court rejected plaintiffs' argument, concluding that Gallenthin merely corrected a constitutional defect of subsection (e) of N.J.S.A. 40A:12A-5 and did not render

other subsections of the Redevelopment Law constitutionally infirm. The trial court, moreover, determined that the substantial evidence presented by Hackensack supported the city's determination that the plaintiffs' properties were "in need of redevelopment." The Appellate Division reversed, holding that Gallenthin did indeed establish a heightened constitutional standard for blight, which "superimposes over the statutory definition of blight the need for an additional finding that property has suffered a 'deterioration or stagnation that negatively affects surrounding areas."'

In a 3-2 decision, the majority of the Supreme Court sided with the trial court and reversed the Appellate Division decision against Hackensack. In its opinion, the Court explained that it "did not suggest in Gallenthin that the definitions of blight in subsections (a), (b), and (d) of N.J.S.A. 40A:12A-5, which have been part of legislative schemes for more than sixty years, were constitutionally inadequate." It further added, "[w]e would not have concentrated in Gallenthin on the infirmity in subsection (e) – a single defective timber – if the whole statutory scheme was rotten." As such, Hackensack was not required to meet the heightened standard for "blight" set forth in subsection (e), which requires a finding that a property has negatively affected its surrounding properties in order to designate it ripe for redevelopment.

Critics of this opinion, including the dissenting justices, contend that this ruling will empower municipalities to more freely take properties through eminent domain or condemn properties for private redevelopment. Although there is likely some legitimacy to this concern, the majority opinion focused heavily on the substantial evidence proffered by Hackensack to support each of the criteria it relied upon to determine plaintiffs' properties were indeed "blighted." Therefore, municipalities should take care to establish specific facts in support of their redevelopment decisions.

Back to top.

$500 Million In Insurance Coverage Made Available by Court's Finding That Policies Were Freely Assignable

In a precedential decision, the New Jersey Appellate Division recently held that Givaudan Fragrances Corp. can seek $500 million in insurance coverage for contamination claims under an assignment of insurance policies from an affiliated company. Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co. et al., Docket No. A-2270-12T4 (App. Div. August 12, 2015). The insurance policies were issued to a prior company, Givaudan Corporation, that in the 1990s went through a series of complex corporate reorganizations, mergers and transfers. The named insured -- Givaudan Corporation -- ultimately became Givaudan Flavors Corporation ("Flavors"), but it was an affiliated company -- Givaudan Fragrance Corporation ("Fragrances") -- that assumed the assets and liabilities of Givaudan Corporation's fragrances division. Givaudan Corporation's insurance policies, however, were not part of the assets

transferred to Fragances. Nevertheless, Fragrances sought coverage under the policies for environmental claims arising from the former operation of a facility in Clifton, including for contamination claims relating to the Newark Bay Complex.

The defendant insurance carriers contended that Fragrances was not an insured under the policies and Fragrances brought a declaratory judgment action in 2009 to compel coverage. Defendants argued Fragrances was not a named insured, notwithstanding that the policies defined the named insured as "Givaudan Corporation and any subsidiary or affiliated companies which may now exist or hereafter be created" and both Flavors and Fragrances have the same parent corporation. In 2010, Flavors assigned to Fragrances all of Flavor's rights under the policies. The carriers refused to recognize the assignment based upon the assignment clause in the policies requiring the insurer's consent.

The Appellate Division reversed the trial court's grant of summary judgment to the carriers. The court found that once a loss occurs, an insured's claim under a policy may be assigned without the carrier's consent. Looking to the intent of the no-assignment clause, to protect the carrier from having to provide coverage for a different risk than what the carrier intended when issuing the policy, the court found that protection is no longer necessary once the loss occurs because the carrier's liability is fixed, regardless of the identity of the party to whom the claim is paid. Further, once the liability is fixed due to a loss, an assignment to collect a claim of money is not a transfer of the actual policy. As a result, Flavors did not need the carriers consent to assign its rights under the policies. Based upon the valid assignment, the Appellate Division reversed and remanded for further proceedings.

As a result of this decision, parties facing environmental claims should consider the availability of insurance even if the party facing the environmental claim is not the named insured. The ability to assign insurance coverage once a loss occurs may provide protection to affiliated companies or facilitate settlements of disputed claims among unrelated corporations.

Back to top.

EPA Evaluating Where to Focus Enforcement Efforts in 2017 Through 2019

The United States Environmental Protection Agency ("EPA") has published the National Enforcement Initiatives ("NEIs") under consideration for fiscal years 2017 – 2019. The Agency selects NEIs every three years in order to focus its limited resources on the most important environmental problems where noncompliance is a significant factor and where enforcement can have an impact. Issues designated as NEIs receive enhanced enforcement scrutiny as compared to the Agency's standard enforcement program. The EPA is considering continuing or expanding its six current NEIs, and is evaluating three additional NEIs.

The six current NEIs under evaluation for extension or expansion are:

(i) Reducing air pollution from the largest sources. Thus far the initiative has concentrated on insuring that large industrial facilities comply with the Clean Air Act when building new facilities or modifying existing facilities, and has focused on coal fired power plants and acid, glass, and cement manufacturing facilities. Under a continuation of this NEI, the EPA would pursue new cases and monitor progress under existing consent agreements.

(ii) Cutting toxic air pollution. This NEI has focused on the substantial illegal emissions of hazardous air pollutants from leaks, flares and excess emissions at industrial facilities. If this initiative is expanded, the EPA will focus on additional sources of emissions.

(iii) Assuring energy extraction and production activities comply with existing laws. The EPA has been working to assure that domestic land-based natural gas extraction and production is done in an environmentally-protective manner and in compliance with existing laws. If it continues this initiative, the EPA will evaluate the best way to address pollution problems in this rapidly developing and changing sector, including the greater use of advanced monitoring.

(iv) Reducing pollution from mineral processing operations. This NEI has been focused on the largest and highest risk mineral processing operations to ensure that they properly manage wastes and have sufficient financial assurance for eventual facility closure. Under a continuation of this initiative, the EPA would monitor the enforcement agreements and orders that were put in place as a result of recent efforts.

(v) Keeping raw sewage and contaminated stormwater out of the nation's waters. Under this NEI, the EPA has addressed significant water pollution problems stemming from Clean Water Act noncompliance, including raw sewage discharges, through the use of enforceable commitments to reduce pollution. If it continues this NEI, the EPA will continue to monitor these agreements and adapt them to changing circumstances.

(vi) Preventing animal waste from contaminating surface and ground water. This initiative has concentrated on the reduction of animal waste pollution that threatens the nation's waters, drinking water sources, and communities,

particularly rural communities where environmental justice is a concern. Specifically, the EPA has directed efforts toward animal agriculture operations that have a significant impact, or where action is necessary to ensure that all operators are on a level playing field. Under an expansion of this NEI, the Agency would evaluate the use of nutrient recovery technologies to reduce water pollution, the implementation of instream monitoring to demonstrate water quality and identify violations, and the use of new tools to identify significant violators.

The three new NEIs the EPA is considering are:

(i) Protecting communities from exposure to toxic air emissions. This initiative would be an expansion of the existing NEI concerning air toxics. Specifically, the EPA is considering whether to include emissions from organic liquid storage tanks, of which there are thousands operating at refineries, chemical plants, and other bulk storage facilities that are located in ozone nonattainment areas, communities of environmental justice concern, and other others with sensitive populations. The EPA is also considering whether to include toxic air emissions from the handling of hazardous waste at treatment, storage, and disposal facilities, and large quantity generators.

(ii) Keeping industrial pollutants out of the nation's waters. The NEI would concentrate on mining, chemical manufacturing, food processing and primary metals manufacturing, which, according to the EPA, contribute a disproportionate amount of the discharges that cause surface water and drinking water pollution.

(iii) Reducing the risks and impacts of industrial accidents and releases. The EPA would focus on approximately 2,000 facilities that produce, process, store, and use extremely hazardous substances that are acutely toxic or can cause serious accidents. These 2,000 are deemed "high-risk" because of their proximity to densely populated areas, the quantity and number of extremely hazardous substances they use, or their history of accidents. The goal of the proposed NEI is to increase industry attention to prevent accidents, instead of addressing problems after accidents have occurred.

The NEIs are significant because they broadcast the EPA's priorities and serve as a warning for targeted industries that more intense scrutiny and enforcement is on the horizon. Companies that operate within the scope of the NEI areas should evaluate their compliance and consider taking proactive steps to address noncompliance before becoming a subject of EPA scrutiny and enforcement action.

Back to top.

Highlights of the EPA's Newly Proposed Hazardous Waste Pharmaceutical Rule

The EPA has proposed regulations that will address the handling and disposal of hazardous pharmaceutical waste. Many entities that provide pharmaceuticals, including over-the-counter drugs, often face difficulties when trying to

determine how to properly dispose of returned, damaged or expired products. As a result of their ingredients, a number of these drugs may be regulated as a hazardous waste under the Resource Conservation and Recovery Act ("RCRA"), which has onerous requirements for the handling and disposal of such waste. The EPA proposal attempts to reform these requirements for pharmaceutical hazardous waste.

The proposal applies to healthcare facilities, pharmaceutical reverse distributors, and entities that treat, store and dispose of hazardous waste pharmaceuticals. The definition of a healthcare facility includes retail pharmacies and retail establishments that sell drugs, including over-the-counter drugs. The proposal reduces the requirements of RCRA that many of these entities face when managing hazardous waste pharmaceuticals.

The proposal distinguishes between pharmaceutical wastes that will be disposed of and those that will returned to a manufacturer for credit (reverse distribution or logistics), and sets up different standards for the handling of each. The proposal also includes a complete ban on the disposal of any hazardous waste pharmaceutical to a sewer system that passes through to a publicly-owned treatment works and standards to determine when containers or syringes with hazardous waste pharmaceutical residue can be managed as a non-hazardous waste.

Businesses that handle hazardous waste pharmaceuticals should continue to follow the progress of this EPA proposal. For many, the proposal will provide much needed clarity and reform to the proper management and handling of these types of wastes.

Back to top.

NJDEP Proposed Flood Hazard Area Control Rules Result in Comments From EPA and FEMA

On June 1, 2015, the New Jersey Department of Environmental Protection ("NJDEP") proposed changes to its Flood Hazard Area Control Act Rules ("Flood Hazard Rules"), N.J.A.C. 7:13-1.1 et seq., Coastal Zone Management Rules ("Coastal Rules"), N.J.A.C. 7:7E-1.1 et seq., and Stormwater Management Rules ("Stormwater Rules"), N.J.A.C. 7:8-1.1 et seq.

The NJDEP's rule proposal states that "comprehensive amendments" to the regulations will "reduce unnecessary regulatory burden, add appropriate flexibility, provide better consistency with federal, local, and other State requirements, and address implementation issues identified since the chapter's repeal and repromulgation in November 2007." The NJDEP also states that the "rulemaking is part of the Department's effort to transform the operations of the Division of Land Use Regulation in order to better prioritize and refocus permitting efforts on activities that are most likely to exacerbate flooding or pose risk to the environment."

Substantively, the proposed rule amendments will affect the location and applicability of riparian zones, adjust the

area of riparian zone disturbance that can be authorized under an individual permit, consolidate the Special Water Resource Protection Area and 300-foot riparian zone into a hybrid buffer with predictable standards, and eliminate duplicative requirements that are enforced by local Soil Conservation Districts, thereby reducing the riparian zone along certain regulated waters from 150 feet to 50 feet.

Some public comments have criticized the rule. Environmental groups assert that the proposed rule changes violate the Federal Water Pollution Control Act ("FWPCA"), including federal stormwater regulations and other federal and state requirements. They have asked the EPA to block the rule pursuant to its authority under the FWPCA. The EPA and the U.S. Federal Emergency Management Agency provided comments to the NJDEP voicing concerns that the amendments may adversely affect the buffer areas along streams and may decrease water quality and protections against flooding. The NJDEP responded that it will take into consideration all comments in finalizing the rule changes. Developers with waterfront projects should consider how the currently proposed amendments and eventual, final rule will affect permitting and other requirements.

Back to top.

Regulatory Update

United States Environmental Protection Agency

National EPA Advisory Committee Welcomes Hoboken Mayor Dawn Zimmer

On August 18, 2015, the EPA Advisory Committee ("the Committee") announced the addition of Hoboken Mayor Dawn Zimmer ("Mayor Zimmer") to their 30-member board. Judith A. Enck, EPA Regional Administrator lauded Mayor Zimmer's "strong track record on environmental protection, and particularly her efforts to make Hoboken a more sustainable city."

The Committee consists of locally elected and appointed officials and was formed with the intention of fostering an improved relationship between EPA and local government to affect positive environmental results through state and local initiatives. The Committee, which is selected from a range of diverse communities, consists of one subcommittee and five workgroups. The five workgroups address a range of issues such as air, climate, water, pollution and environmental justice.

Two prominent factors in Mayor Zimmer's selection were her leadership efforts during Hurricane Sandy as well as her determination to ensure effective preparation for Hoboken from future storms. Mayor Zimmer expressed the hope that the ideas shared would provide solutions to the great environmental challenges.

For additional information please visit www.epa.gov.

EPA Invests Close to $1 Million In Brownfields Grants in Camden

On June 22, 2015, EPA announced that the Camden Redevelopment Agency had been selected to receive $944,710.00 in Brownfields grants.

$200,000.00 of these grants will be used for the continued cleanup of an old city dump site at the Harrison Avenue Landfill Lot 18 for use as a public waterfront park. A portion of the site has already been remediated and is home to a Salvation Army Community Center.

A further $200,000.00 of these funds will be used to remediate the APM site, a former warehouse, laboratory and assembly plant, for the development of retail businesses.

An additional $200,000.00 of these grants will be used for the cleanup of the PCB contaminated former office space at Building 8 at 100 Cooper Street, which was formerly used for the manufacture of radios.

The remaining funds totaling $344,710.00 will be used for community outreach as well as seeking an environmental assessment concerning contamination at the Camden Laboratories property at 1667 Davis Street, which consists of vacant buildings and asphalt-paved parking areas.

This Brownfields grant brings the EPA's total investments in Camden to more than $6 million.

For more information please visit www.epa.gov.

New Jersey Department of Environmental Protection

New Jersey Voices Opposition to EPA's Clean Power Plan

In a letter to EPA Administrator Gina McCarthy, NJDEP Commissioner Bob Martin has requested an administrative stay and reconsideration of the EPA's Clean Power Plan ("111 (d) Rule"), stating that not only does the 111 (d) Rule exceed EPA's regulatory authority but contains "vague, ambiguous, uncertain provisions that remain unsolved" which hinder its implementation and will cause a burden to the citizens of New Jersey in the form of increased electricity costs.

The Clean Power Plan requires the EPA to develop regulations for categories of new sources, regardless of the location or existing air quality, which cause or contribute to air pollution and pose a danger to public health or welfare. States are required to develop plans for existing sources of noncriteria pollutants, which are subject to review and approval by the EPA.

New Jersey has aggressively worked to reduce carbon dioxide emissions, achieving a 33 percent reduction between 2001 and 2012, exceeding the 32 percent nationwide goal set by the EPA. According to the U.S. Energy Information Administration, New Jersey has the fifth lowest carbon emission rate nationwide. New Jersey's success in carbon emission reduction can be partially attributed to replacing coal with natural gas, renewable energy and energy efficiency.

Commissioner Martin described the Clean Power Plan as "cumbersome, … poorly designed, … counter-productive and unfair to the people of New Jersey," insofar as the rule punishes, rather than rewards, the State for previous good work. While some of the State's concerns have been addressed, Commissioner Martin maintains that the rule's carbon baseline-reduction targets will affect New Jersey disproportionately.

The EPA initially proposed the Clean Power Plan in June 2014. Approximately 4.3 million public comments were received, including comments from power-industry leaders who voiced concern regarding the likelihood of grid reliability, brownouts, rolling blackouts and an increase in electricity rates.

For more information please visit www.nj.gov.

$66 Million Grant Awarded For Flood Wall Construction to Protect Wastewater Pump Stations

On October 9, 2015, the Federal Emergency Management Agency ("FEMA") revealed its award of approximately $66 million to the Middlesex County Utilities Authority for the construction of flood walls and related infrastructure to protect their Sayreville wastewater pump station ($55 million) and Edison wastewater pump station ($10.6 million) from flooding and major storms.

Due to Superstorm Sandy's storm surge, MCUA's Sayreville and Edison wastewater pump stations suffered significant system failure, resulting in untreated water being discharged into the Raritan River and Raritan Bay.

The NJDEP, the New Jersey Environmental Infrastructure Trust ("NJEIT"), MCUA and various other entities have been working closely together in order to minimize the future occurrence of the impacts and disruptions experienced as a result of Superstorm Sandy.

The proposed perimeter of the Sayreville flood wall is 1,700 feet long with a height ranging from five feet to 14

feet above grade, while the proposed flood wall system for the Edison pump station is 65 feet long with a height of 23 feet above sea level.

The NJEIT and NJDEP will cover costs not met by the FEMA grants.

For more information, please visit www.nj.gov/dep or www.njeit.org.

Back to top.

New Jersey Legislative Update

Recently Introduced Environmental Bills

A4642 / S3014: Removes the tax cap on transfers of hazardous substances to fund emergency preparedness and response to certain spills. Status: Pending in Assembly Environment and Solid Waste Committee; pending in Senate Environment and Energy Committee.

SCR180: Determines that NJDEP's proposal to revise Flood Hazard Area Control Act Rules, Coastal Zone Management Rules, and Stormwater Management Rules is inconsistent with legislative intent. Status: Passed by Senate; not yet sponsored in Assembly.

Updated Status of Previously Reported Environmental Bills

A4307 / S2919: Increases required public notice from 30 days to 60 days for settlements entered into by the NJDEP pursuant to the Spill Compensation and Control Act. Status: Passed both Houses; A4307 substituted for S2919.

Back to top.

Attorneys:

Dennis J. Krumholz · Samuel P. Moulthrop · Jeffrey B. Wagenbach · Marilynn R. Greenberg · Steven T. Senior · Alexa Richman-La Londe · Laurie J. Sands · Jaan M. Haus · Matthew A. Karmel

Practice:

Environmental Law

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984
50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578
500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628
399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361
1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361
www.riker.com