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NJDEP Vision Statement and Priorities Promise a More Effective and Customer-Friendly Department

One of the hallmarks of the Christie administration is a recognition that the State runs an enormous budget deficit and must learn to become more responsive and business-friendly in order to grow the economy. In particular, the New Jersey Department of Environmental Protection ("NJDEP") is a target of significant institutional change. The NJDEP has to manage increasing regulatory responsibilities each time additional environmental legislation is adopted, but has faced a dwindling budget and a significant reduction in staff in recent years. The confluence of increased work and decreased resources has caused long delays in the Department's ability to respond to the regulated community.

The Christie administration has recommended policy, cultural and procedural overhauls across the Agency in an effort to transform the current "unsustainable" situation and has brought in new leadership to implement its view. Significantly, Christie's NJDEP Commissioner, Bob Martin, is considered highly experienced in business management, reflecting the administration's goal to change the culture of the NJDEP. To implement this transformation, Commissioner Martin recently issued two separate documents to highlight change in departmental philosophy - a Vision Statement and a List of Program and Transformation Priorities ("List of Priorities").

The Vision Statement and List of Priorities boldly assert that the Department's core mission remains the protection of the environment, but that it will do so "while playing a key role in positively impacting the economic growth of the state." To achieve this mission, NJDEP leadership is seeking to institute a departmental culture change to perform efficiently, elevate customer service and manage through the use of metrics. The Vision Statement is presented as an aspirational goal for the Department, while the List of Priorities identifies issues that should be addressed by NJDEP personnel in the near term.

Commissioner Martin has stated that "these documents will serve as our blueprints for reforming the DEP, making it a modern, easier to navigate agency that works with people and reduces red tape while strongly emphasizing our mission to protect the state's environment." The Vision Statement and List of Priorities, however, lack details and specific actions for meeting those objectives, and instead provide only broad management concepts.

As set forth in these documents, NJDEP plans to direct its limited resources to its top priorities by using data assessment and performance metrics to measure success and drive priorities, while eliminating unnecessary programs, simplifying regulations and providing flexibility in its permitting processes. Senior officials have been directed to provide clear direction to managers and staff as to the Department's priorities, encourage stakeholder input in the establishment of policy and regulation and integrate economic considerations into statutes and regulations. Managers and staff have been directed to incorporate economic analysis into their decision-making processes by measuring a realistic assessment of potential environmental gain and public health advancement against the economic impact of a decision.

Although the Vision Statement and List of Priorities are goal-setting documents, NJDEP has formulated and already begun implementing programs that reflect these new priorities. Specifically, the Department is seeking to provide the regulated community with "Compliance Assistance." For example, NJDEP plans to streamline its permitting and approval processes by expanding the Office of Permit Coordination to ensure well-coordinated reviews of complex projects between Agency programs, providing new assistance to smaller businesses, advancing more meaningful pre-application meetings, identifying and minimizing environmental impacts early in the process, identifying projects or portions of projects with limited probability of success early in the process to help regulated entities avoid expending funds on those aspects, facilitating dialogue with applicants during the permit evaluation process, and using technology to speed the process.

Similarly, as discussed later in this Environmental Update, the Department has established a program whereby Licensed Site Remediation Professionals ("LSRPs") can meet with experienced NJDEP staff to address technical issues related to remediation projects. The purpose of this program is to ensure that LSRPs can coordinate projects they are overseeing with departmental perspectives on difficult technical problems in order to eliminate problems in the future.

The Department has also asserted that substandard submissions from regulated entities contribute to delay in the permitting process, and plans to adopt policies that will make applicants and their consultants more responsible for the quality of submittals. Where conflicts arise between the Department and the regulated community, the NJDEP will seek to resolve the issues in the newly-created Office of Dispute Resolution, as discussed later in this edition.

The NJDEP has referred to its current culture as a burning platform that requires an immediate start to the transformation process. The transformation, if successful, will result in a faster, more predictable and more flexible permitting process.

NJDEP Creates Office of Dispute Resolution

As discussed on earlier in this *Environmental Update*, the NJDEP has issued a Vision Plan and Priorities Statement setting forth a goal of making NJDEP a more responsive agency. Although the Vision Plan and Statement are light on concrete examples of how NJDEP intends to reform itself, on September 27, 2010 the Department announced the formation of an Office of Dispute Resolution, a key feature of Commissioner Bob Martin's reforms and designed to promote economic growth in New Jersey. The purpose of the Office of Dispute Resolution is to avoid litigation by finding common ground between NJDEP and the regulated community in disagreements.

NJDEP decisions regarding permits or enforcement actions often lead to appeals in state courts or requests for hearings by the Office of Administrative Law ("OAL"), which itself can be a lengthy and procedure-bound process for resolving disagreements between the Department and the applicants or petitioners. The Office of Dispute Resolution was set up to resolve informally issues that may arise between NJDEP and the regulated community in areas such as permit issuance disagreements, penalty assessments and alleged failures to comply with permit conditions. The Office, however, will not have any authority to resolve challenges to NJDEP rules, regulations or informal policies, nor disputes between private parties.

A party that seeks a hearing before the OAL to challenge an NJDEP determination may at the same time request that the case be considered for alternate dispute resolution within the Office of Dispute Resolution. OAL will coordinate with the Office of Dispute Resolution, and will not schedule a hearing while the mediation is occurring. Parties seeking mediation with NJDEP may include legal counsel as part of the process. The Office's mediator between the regulated community and NJDEP is Tina Layre, known to many in the field as a conscientious NJDEP veteran with experience in site remediation, cost recovery and enforcement issues. Although Ms. Layre is an NJDEP-appointed mediator, her role is to act as an impartial third party to assist the parties in solving their dispute.

NJDEP Offers Site-Specific Technical Consultation to Assist LSRP Decision-Making

In connection with its implementation of the Site Remediation Reform Act and other amendments, the NJDEP has established a new program to allow LSRPs to obtain the assistance of experienced NJDEP staff to address technical questions and decisions relevant to remediation projects under LSRP supervision. This "Technical Consultation" will be provided by NJDEP during face-to-face meetings, with experienced staff reviewing data and other information necessary to assist LSRPs on questions relating to ground water, soil, laboratory analysis and other technical issues.

The Technical Consultation is part of the Department's new "compliance assistance" approach to the regulated community emphasized by Governor Christie's administration and by NJDEP during the period of transition to the new LSRP program. During the early years of the LSRP program when some uncertainty is unavoidable, this will allow LSRPs and remediating parties to move forward with greater confidence on difficult remediation decisions for

sites over which they have responsibility. For example, at sites with more complex site remediation issues, such as identifying background contamination, delineating groundwater impacts in deep bedrock, or identifying contribution to "commingled" plumes of contaminants, the input of NJDEP might be useful to identify or work through scopes of work or end-points necessary to resolve such issues. In addition, although not intended as a dispute resolution mechanism, with respect to some sites or circumstances where LSRPs disagree about the proper remediation of a site, NJDEP input may provide an objective view that can be useful to the parties.

If you are an LSRP or a remediating party facing a difficult site remediation question, or are involved in a transaction or adversarial matter requiring greater certainty with respect to an LSRP's decision, this new tool may be helpful. The Technical Consultation process is offered by NJDEP free of charge. It may not be used to address regulatory or administrative requirements and is not available for "existing cases" that have not opted into the LSRP program. A further drawback to the program is that the Technical Consultation may not be considered "Department approval" of any proposal, plan or matter addressed. Thus, any remediation reports or Response Action Outcome submitted to the Department still would be subject to auditing or other "additional review" as any other case.

Federal Court Abstains From Hearing Case Where NJDEP Heavily Involved

In this decision by the United States District Court for the District of New Jersey, a citizen suit brought under the Resource Conservation and Recovery Act ("RCRA") and the Federal Water Pollution Control Act ("CWA") by two environmental groups, Raritan Baykeeper, Inc. d/b/a NY/NJ Baykeeper and Edison Wetlands Association (collectively, "Baykeeper"), was dismissed without prejudice on the basis of abstention, the principle that the United States federal courts must abstain from hearing a case where federal review would be disruptive of a state regulatory scheme. See Raritan Baykeeper, Inc. v. NL Industries, Inc., 713 F.Supp.2d. 448 (D.N.J. 2010). In reaching its decision, the court recognized the split in authority regarding whether or not abstention is appropriate in RCRA and CWA cases, but ultimately applied the doctrine in defendant NL Industries, Inc.'s favor, thereby dismissing the suit brought by Baykeeper. The court elected not to disrupt an ongoing remediation and redevelopment scheme with considerations that could have been raised under other circumstances and earlier in the process.

NL Industries manufactured titanium dioxide at the site (the "NL Site") from 1935 until 1982. It began investigating the NL Site in 1988 in accordance with the Environmental Cleanup Responsibility Act (now known as the Industrial Site Recovery Act), later entering into an Administrative Consent Order ("ACO'). The investigation and cleanup are proceeding under the ACO. The NL Site was later designated as in need of redevelopment, acquired by the Sayreville Economic and Redevelopment Agency via eminent domain, and an agreement was negotiated governing the sale and responsibilities for environmental liabilities. Pursuant to this agreement, NL Industries retained responsibility only for remediation of the Raritan River sediments adjacent to the NL Site, and responsibility for remediation of the NL Site itself was assumed by others. Despite the fact that the terms of these arrangements were made available to the public, no comments were received regarding their adequacy.

NL Industries performed under the ACO, sampling the river sediments in the vicinity of the site, reporting to the NJDEP and responding to comments as needed. NJDEP ultimately concluded that off-site sources identified by NL Industries and past industrial activity at the NL Site itself contributed to the contamination, but that no remedial action was required because, without a "regional approach," efforts by NL Industries would be "short lived and of little ecological significance." No further investigation of conventional contaminants in the sediments was required, although NJDEP did require further investigation of radionuclides. Subsequent to NJDEP's findings, the United States Environmental Protection Agency ("EPA") issued a Record of Decision requiring remediation of the Raritan River sediments at two sites upstream of the NL Site. This remediation will require dredging and off-site disposal of contaminated river sediments.

Baykeeper brought suit for an injunction requiring immediate remediation of the river sediments adjacent to the NL Site and for a determination regarding the source of the contamination. The relief sought, however, was contrary to previous findings of the NJDEP, namely that immediate remediation is not necessary given the off-site sources and requirement for a regional remedial approach, an existing pre-approved redevelopment plan for one of the on-site source areas and a determination regarding the lack of impact from another alleged on-site source area. The Agency findings were the driving force behind the Court's decision to dismiss the matter on abstention grounds.

This case is significant because it demonstrates that where the plans for remediation and redevelopment of a property have been subject to extensive public oversight and opportunity to comment, a federal court may decline to retain jurisdiction where federal adjudication could result in rulings that contradict those of the agency with superior expertise in the applicable field.

Property Owner Has No Spill Act Liability for Passive Migration of Contamination During Ownership

Under the Spill Compensation and Control Act, N.J.S.A. 58:10-23 et seq. (the "Spill Act") with limited exceptions, current owners of property are liable to address contamination located on or emanating from the owned property. Liability of prior and interim owners under the statue, however, is not as clear, but courts have generally determined that absent evidence of a discharge during ownership there is no liability. The Appellate Division recently considered whether there was enough evidence to hold a prior owner liable under the Spill Act. Northern International Remail and Express Co. v. Lester Robbins, Trustee, 2010 WL 4068204 (App. Div. Aug. 18, 2010).

Specifically, the property owner purchased the property in 1976, after the operations known to have caused solvent contamination in soil and ground water ceased. Between 1976 and 1991, the property owner leased portions of the property to at least two tenants, both of whom were registered as generators of hazardous waste; however, no evidence was produced to establish what hazardous wastes were generated by the tenants or that there were any discharges of hazardous substances at the property during these tenancies. In 1991, the property was sold to the plaintiff, who was seeking contribution toward the cleanup and removal costs incurred to address the contamination in this action.

Plaintiffs argued that the prior owner was liable under the Spill Act because, based upon its tenants' status as registered generators of hazardous waste, there must have been discharges, although it could adduce no evidence of any such releases. The Appellate Division rejected this argument, and held that evidence of the generation of hazardous waste at a site, without more, is not sufficient to confer Spill Act liability on the owner. Rather, for a property owner to have Spill Act liability there must be an actual discharge of hazardous substances during that owners' period of ownership. The fact that there may be passive migration of pre-existing contamination during ownership is insufficient to hold a property owner liable under the Spill Act. Thus, the evidence must establish that a discharge occurred during that owner's period of ownership in order to confer Spill Act liability.

Demolition of Home as Part of Remediation Process is Covered Cost Under Insurance Policy

In insurance coverage cases involving environmental remediation, insurance carriers often assert the "owned-property" exclusion as a basis to exclude from coverage damage caused to property owned by the insured. The Appellate Division recently considered the application of the owned-property exclusion where, in response to contamination from a leak from a home heating oil tank, the selected remedial action involved demolishing the house in order to remove impacted soil that was the source of ground water contamination. The Proformance Ins. Co. v. Riggins, Inc., 2010 WL 1657385 (App. Div. April 27, 2010).

Recognizing well-settled New Jersey law holding that ground water is third-party property, one of the homeowner's insurance carriers conceded that it was responsible for costs relating to the remediation of ground water contamination, including soil excavation. However, the carrier sought a determination that coverage was not provided under the owned-property exclusion of its policy for the costs of compensating the insured for rebuilding the house or backfilling the excavation. The Appellate Division denied the carrier's claim for relief, finding that the damage to the owned property (i.e., the home) was not caused by an "occurrence" (i.e., the contamination) under the policy, but rather by selection of the most economical way to remediate. Accordingly, the Court held that where the damage to the insured property is caused by the remediation process, as opposed to the initial contamination, the owned property exclusion does not apply to exclude coverage.

Applicant Must Continuously Own Property Through Final Approval to be Eligible for an Innocent Party Grant under the Brownfield and Contaminated Site Remediation Act

Under the Brownfield and Contaminated Site Remediation Act ("BCSRA"), Innocent Party Grants ("IPG") are available to owners of contaminated property to defray the cost of remediation where the applicant is not responsible for the contamination. The Supreme Court of New Jersey, however, has recently determined that in order to be eligible to receive an IPG, an applicant must own the subject property through final approval of a grant application. TAC Assocs. v. New Jersey Dept. of Envt'l Prot., et al.,202 N.J. 533 (2010). In this case, the Plaintiff, TAC Associates ("TAC"), owned an industrial site in Raritan Township from the mid-1970s until January 2004 when it sold the property. A presale investigation under the Industrial Site Remediation Act revealed the presence of hydrocarbons on the property. In response, TAC and the property buyer established remediation trust accounts in anticipation of remediation costs. These trust accounts, however, were largely depleted before the contamination was fully remediated.

In 2008, despite the fact that it no longer owned the property, TAC applied to the NJDEP for an IPG under the BCSRA. Pursuant to N.J.S.A. 58:10B-5, "[g]rants may be made from the [Hazardous Discharge Site Remediation Fund] to persons who own real property on which there has been a discharge of a hazardous substance or a hazardous waste and that person qualifies for an innocent party grant pursuant to [N.J.S.A. 58:10B-6]" (emphasis added). NJDEP determined that TAC was ineligible for a grant because it no longer owned the property at issue.

TAC filed an appeal arguing that the statute does not require an applicant to be the present owner of the property at the time of the application. The Appellate Division agreed with TAC's argument and reversed NJDEP's decision.

The Supreme Court subsequently determined that NJDEP's interpretation of the statute requiring an applicant to own the property at the time of the application was "unassailable." The Court opined that the statute, on its face, clearly requires ownership at the time of the IPG application. The Court then expanded its decision and held that an applicant for an IPG must own the subject property not only at the time of the application, but also, until the applicant obtains final approval for the grant. Accordingly, innocent property owners who endeavor to apply for an IPG under the BCSRA should take note that they are required to continuously own their property through final approval of their application in order to be eligible to receive an IPG.

EPA Update

EPA Rule Increases Protection From Lead-Paint Poisoning And Extends Deadline For Required Training

A new EPA rule removes an "opt out" provision in the Lead Renovation, Repair and Painting Rule (RRP) that permitted contractors to disregard lead-safe work practices in pre-1978 homes where no children under the age of six were present. Accordingly, commencing on July 6, 2010, all contractors performing renovation, repair or paint work in pre-1978 homes must adhere to lead-safe work practice requirements, including dust control, site clean up and work area containment.

The new rule requires certification of those involved in the construction and remodeling industry. EPA has certified 254 trainers, who have conducted more than 16,000 courses and trained an estimated 320,000 renovators in lead-safe work practices. In order to accommodate contractors unable to access classes easily, no enforcement actions were taken until October 1, 2010. In addition, enforcement will not be taken against renovation workers if they applied to enroll in a certified class by September 30, 2010 and complete training by December 31, 2010.

EPA Issues Greenhouse Gas Reporting Requirements For Certain Emissions Sources

In an effort to better understand Greenhouse Gas ("GHG") emissions and to enable the development of more effective policies and programs concerning their reduction, EPA is finalizing reporting requirements under its mandatory program for underground mines, industrial wastewater treatment systems, industrial waste landfills and magnesium production facilities.

Collection of emissions data will commence on January 1, 2011. The first annual reports will be submitted to EPA on March 31, 2012. Under the Clean Air Act, all emissions data are public. The public will be provided with data following submission of the first annual GHG reports

NJDEP Update

Innovative NJDEP Grant Program Helps Dry Cleaners Reduce Use of Harmful Air Pollutant

NJDEP is offering dry cleaners a grant to assist them in the replacement of dry cleaning machines that use harmful chemicals for environmentally friendly machines. Dry cleaning machines that use Perchloroethylene ("PCE"), also known as Tetrachloroethylene, in the dry cleaning process are being targeted in order to dramatically reduce the amount of the toxic chemical emitted into the air. PCE can seep through walls and into adjacent apartments or businesses and is one of the more difficult pollutants to tackle if it gets into ground water through spills or leaks.

NJDEP Commissioner Bob Martin embraced this step towards the improvement of air quality in New Jersey, stating that, "we are reducing toxic emissions while also easing the burden on small business owners who are being asked to make sacrifices for the public good." Of the approximately 1,700 dry cleaners in New Jersey that use PCE in their dry cleaning processes, priority for the grant monies will be given to those located in residential settings and those located within 50 feet of day care centers.

The cost of replacing a dry cleaning system is approximately $45,000 to $60,000, and each NJDEP grant is anticipated to be approximately $25,000, with an additional $15,000 available to dry cleaners that opt for wet cleaning. Twenty-six applications for grants have been received by NJDEP, and 23 applications have been approved. A proposed rule will ban PCE dry cleaners from residential or day care settings by 2014. Federal law will outlaw such machines by 2020.

Environmental Justice Review of Solid Waste Definition Still Underway

In October 2008, the EPA proposed a revision to its definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"), which would make it much easier and more efficient for parties to reclaim and recycle hazardous secondary materials. These are materials produced by a manufacturing process that otherwise would be treated as hazardous waste if discarded (e.g., byproducts, spent materials and sludges). This revised definition, known as the "DSW Rule," is on hold pending an expanded environmental justice review.

Currently, when being sent to be recycled, hazardous secondary materials are subject to regulation as hazardous waste. The purpose of the DSW Rule is to facilitate the safe reclamation and recycling of hazardous secondary materials, thereby reducing the amount of hazardous waste which ultimately would be incinerated or disposed of in landfills. Subject to certain conditions, the DSW Rule will no longer define hazardous secondary materials being

recycled as hazardous waste, and such materials therefore will be subject to less stringent regulation. This Rule would result in fewer restrictions for the regulated community, such as allowing storage of such hazardous materials for longer periods or permitting transportation of such materials to an off-site recycler without a hazardous waste manifest.

The DSW Rule did not take effect as planned because the Sierra Club filed an objection to the DSW Rule in 2009. The Sierra Club argued in part that deregulating the hazardous waste recycling industry would increase threats to public health with a disproportionate effect on low-income and minority communities. In response, EPA held a public meeting in June 2009 to discuss among stakeholders whether to proceed with the rule as originally planned. Based upon that meeting, EPA is undertaking an expanded analysis of the environmental justice impacts of the DSW Rule to determine whether its implementation would in fact result in a disproportionate impact upon disadvantaged communities; this review still is underway. Although it has no plans to repeal the DSW Rule, EPA has indicated that it may clarify or revise the Rule based upon the results of the environmental justice review. EPA has indicated that it will open up the environmental justice review to stakeholder engagement and further public comment before implementing a final rule.

Legislative Update

SIGNED INTO LAW BY THE GOVERNOR

- S82 - Provides that the municipal development regulations in effect at the time of a land-use development application will govern, which will allow pending applications to move forward without being affected by changing requirements.
- A2928 - Appropriates $821 million in no-cost and low-cost loans for crucial water and sewer infrastructure projects across the state.
- S2036 - The "Offshore Wind Economic Development Act" establishes a renewable energy certificate program, and authorizes a tax credit program for qualified wind energy facilities.

INTRODUCED IN SENATE

- S1986 - This bill would prohibit State agencies and departments from adopting new rules and regulations that exceed federal standards, unless authorized by State law.
- S2013 - This bill would amend the current law concerning State agency rule-making by changing the chapter expiration dates of rules from five years to seven years and would establish a new procedure for the re-adoption of rules without substantive changes.

- S2014 - This bill would establish new procedures in the Administrative Procedure Act to allow substantial changes to agency rule-making.
- S2108 - This bill would increase the Spill Compensation and Control Act cap on liability from $50 million to $1 billion for major facilities.
- S2126 - This bill would permit the development of solar facilities and structures on closed landfills and quarries, providing no environmental controls are disturbed.

INTRODUCED IN ASSEMBLY

- A2722 - This bill purports to implement suggestions from the Governor's Red Tape Review Committee regarding modifications to the process followed by the Office of Administrative Law with regard to contested case hearings. The bill proposes a change to OAL procedures regarding telephone and video conferences, delegation of final decision authority, oral decisions, electronic filings and settlements.
- A2464 (Passed in Assembly) - This bill requires all State agency rules to be published in the New Jersey Register, and with limited exceptions prohibits the enforcement of regulatory guidance documents.
- A2147 - Would establish the "Solar Roof Installation Warranty Program" in the NJ Economic Development Authority and appropriate $2 million from "Global Warming Solutions Fund."
- A2218 - This bill proposes to expand programs in BPU to include low-interest loans and grants to municipalities for energy efficient programs and innovative energy technologies.
- A2239 - The "Retrofitted Green Building Tax Credit Act" would provide tax credits for owners who retrofit buildings to meet certain "green building" standards.
- A2240 - The "Green Building Tax Credit Act" would provide tax credits for property developers and owners who design and construct buildings that meet certain "green building" criteria. The tax credits could be applied toward corporation business taxes, gross income taxes, and potentially other specified taxes.

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