



ENVIRONMENTAL PREDICTIONS UNDER NJ GOVERNOR MURPHY

A timely Article by Marty M. Judge Esquire and Mitchell H. Kizner, Esquire which first appeared in the *New Jersey Law Journal* on January 1, 2018

From climate change and clean energy, to new standards for emerging contaminants, projections on what environmental policy may look like in Governor Murphy's administration.



On Jan. 16, Phillip Murphy will be sworn in as the next governor of New Jersey. As a Democrat, candidate Murphy's platform leaned heavily toward his party's traditional focus on environmental protection and clean energy promotion as areas of promised emphasis in his administration.

However, in politics, it is rare that circumstances play out exactly as a candidate would have intended. The new administration inherits a distressed state economy that may limit just how robust of an environmental program it will be able to afford. Meanwhile, the tax reform legislation in Congress (which, as this article is written, threatens to punish high income and property tax states like New Jersey by limiting or even removing that deduction) may further tie Murphy's hands to find additional money to pay for all promised environmental initiatives. Meanwhile, the policies of the United States Environmental Protection Agency (USEPA) and the Trump administration, which combine relaxed environmental enforcement at the federal level with, paradoxically, a reduction in funding to the states to take up the slack, could further erode the new administration's ability to implement everything that has been promised.

With this backdrop, we offer the following projections on what environmental policy may wind up looking like in Governor Murphy's administration.

Climate Change and Clean Energy

Based on its platform, the new administration expects to be heavily focused on climate change reduction and clean energy initiatives at or near the top of its environmental priorities. To begin, Murphy's platform stated that he would restore the Office of Climate Change within the New Jersey Department of Environmental Protection (NJDEP). The governor-elect also promised that he would immediately bring New Jersey back to the Regional Greenhouse Gas Initiative (RGGI) after Governor Christie withdrew from RGGI in the prior administration. (RGGI is a voluntary cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont to cap and reduce carbon dioxide emissions from the power sector.) Aside from RGGI, increasing cooperation between New Jersey and other states with similar goals and interests on other cross-boundary environmental issues can also be generally anticipated-especially if USEPA can no longer be counted upon to take the lead for national or multi-state actions under Trump. Indeed, the prospect of New Jersey joining other states in litigation attacking what may be claimed as failures by USEPA to enforce or implement federal environmental laws-for example, greenhouse gas restrictions-is also quite imaginable.

Solar and Wind Energy and Accessibility of Electric Vehicles

Incoming Governor Murphy has promised to increase the amount of electricity that utilities are required to purchase from local wind and solar sources, leading to the goal of 100 percent carbon-free electricity in New Jersey by 2050. He also has set ambitious interim goals for increases in wind and solar power in the state for 2021 and 2030. Murphy additionally plans to increase the accessibility of electric vehicles, including providing more charging stations. It remains to be seen if these goals can be achieved, particularly if, as expected, the federal government declines to or only minimally assists with logistics and funding.

Offshore Drilling

Governor-elect Murphy opposes offshore drilling near New Jersey. This will put his administration at odds with the Trump administration, which favors fossil fuel expansion and widespread exploration, including in areas previously deemed taboo. The prospect of strong disagreements on this subject, including litigation, is likely.

Fracking

According to his platform, Governor-elect Murphy will seek to ban fracking in New Jersey and the Delaware River, although there has been little to indicate that allowing such fracking would produce usable quantities of natural gas or oil in these areas anyway. Murphy also proposes to ban the storage of fracking waste in the state. Any such ban would need to be carefully considered and appropriately implemented or else it might engender Commerce Clause challenges under such cases as *Philadelphia v. New Jersey*.

Shore Protection

Governor-elect Murphy also promises to focus on shore protection, such as dune building, tighter construction codes and other infrastructure protections, to protect against sea level rise and storm surge. Although Murphy's platform states that he hopes to fund some of these initiatives with federal assistance, it remains to be seen whether any money will be forthcoming from the Trump administration to assist with these goals. Another unanswered question is whether the new governor will seek to restrict new development at the shore generally, whether by way of regulatory or policy changes under existing

laws like the Coastal Area Facility Review Act, or by asking for legislative changes to these laws. Should this occur, it may serve to stifle development along the shore, which has actually been gaining steam as the state continues to recover from the 2008 market collapse and Superstorm Sandy in 2012.

Environmental Contamination and NRD Recovery

Following ratification of the constitutional amendment that was also on the recent ballot, Governor-elect Murphy and presumably also the legislature will act swiftly to implement policies and laws to restrict the use of revenue gained from legal settlements related to natural resource damages (NRD) to projects that restore or replace damaged or lost natural resources, instead of using those funds as general revenue to balance the budget. In practical terms, this could mean that the settlement of such cases will become more difficult, expensive and time consuming, especially if the State insists on liable parties developing such programs themselves instead of the State's continuing to accept cash settlements. Overall, some expansion of the existing NJDEP land use bureaucracy that already focuses on environmental "mitigation," including expansion of the Office of Natural Resource Restoration, can also be predicted.

Open Space

Murphy's platform further focused on expanding the preservation of open space and stated that he would seek to "depoliticize" key environmental staff and commissions- including those that protect the Highlands and Pinelands-and restore New Jersey as a leader in smart planning. While the exact details of Murphy's plan were not provided, the hope is that this is not signaling a return to policies from prior administrations that sought to use existing environmental laws as a de facto statewide land-use law to control or regulate development-arguably, a much broader and different purpose than those laws ever intended. A reversion to prior efforts like the controversial "Big Red Map" or the use of Water Quality Management Planning Regulations as a means to effect statewide "smart growth" without appropriate legislative backing could be problematic.

Site Remediation

The Licensed Site Remediation Professional (LSRP) program began with a statutory change in 2009-enactment of the Site Remediation Reform Act (SRRA)-and it has successfully remediated thousands of sites that would likely have languished under the old NJDEP oversight system. Now that the election is over, industry groups are expected to propose tweaks to make this program more efficient (i.e., what is being called SRRA 2.0), while rumors are afoot that some environmental groups may be planning a white paper asking for outright repeal of the program or at least greater NJDEP oversight over LSRP approved cleanups. It is unclear how the Murphy Administration would react to these competing positions, as there are obvious tensions between the need for fiscal belt tightening and the desire for broader environmental oversight. But with the normal shifting of agency middle management whenever there is an administration change, there may be sentiment among some NJDEP staff who may now gain internal leverage for greater agency scrutiny of LSRP approvals.

Emerging Contaminants, and Adoption of New Standards

The new administration is expected to take a more active role in proposing new and stricter cleanup and drinking-water standards for so-called "emerging contaminants," which are basically a broad category of chemicals for which there has not previously been good science allowing the setting of levels deemed safe for human exposure or consumption. (Recently announced proposals under the Christie administration for the setting of drinking water standards for several chemicals within the category of per- and polyfluoroalkyl substances (PFASs) are but a few examples.) However, with the reduction of science funding under Trump's USEPA, it is likely that NJDEP and other state agencies and programs will need to undertake more of the hard science to develop defensible standards for such chemicals. From the perspective of New Jersey's universities and its historical strength in research and development, this could be a positive. It would also presumably be welcomed by the environmental

community. However, from the perspective of those conducting cleanups, adding new contaminants to what is already a long list of chemicals that may need to be addressed at a typical site will have impacts on the cost, difficulty and timing of completion of site remediation projects. Additionally, the possible need for new treatment technologies among water purveyors and sewage treatment operators for previously unregulated chemicals could further strain what are already tight budgets.

Compliance and Enforcement

Finally, it is likely that there will be a stronger emphasis on enforcing all existing environmental laws, and in proposing stronger new laws, than was the case in the prior administration. This may be further driven by reduced environmental enforcement at the federal level. Since many state and federal environmental laws already overlap, and since the enforcement of many federal laws has already been delegated by USEPA to NJDEP anyway, it can be expected that a shift toward stronger compliance and enforcement will generally lead to more inspections, violation notices, fines, penalties, and maybe even criminal prosecutions under the Murphy administration than in the most recent past.

Judge is a shareholder with Flaster Greenberg in Cherry Hill, and chair of the firm's Environmental and Real Estate Departments. Kizner is a shareholder at the firm, and a member of the Litigation and Environmental Law Practice Groups.

RT is pleased to present this timely and comprehensive article from Flaster Greenberg on the new leadership of NJ DEP.

Gary Brown



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DIRECTORY

Corporate Headquarters
215 West Church Road
King of Prussia, PA 19406
Phone: (610) 265-1510 / FAX: (610) 265-0687

New Jersey
Pureland Complex, Suite 306
510 Heron Drive, P.O. Box 521
Bridgeport, NJ 08014
Phone: (856) 467-2276 / FAX: (856) 467-3476

Southwest Pennsylvania
591 East Maiden Street
Washington, PA 15301
Phone: (724) 206-0348 / FAX: (724) 206-0380

E-mail: RTENV@AOL.COM

World Wide Web: HTTP://RTENV.COM
24 HOUR URGENT LINE SERVICE 800-725-0593

Directory

Corporate Headquarters

215 West Church Road
Suite 301
King of Prussia, PA 19406
Phone: (610) 265-1510
FAX: (610) 265-0687

New Jersey

510 Heron Drive
P.O. Box 521
Suite 306, Pureland Complex
Bridgeport, NJ 08014
Phone: (856) 467-2276 FAX:
(856) 467-3476

Southwest Pennsylvania

591 East Maiden Street
Washington, PA 15301
Phone: (724) 206-0348
FAX: (724) 206-0380

E-mail: RTENV@AOL.COM / World Wide Web: [HTTP://RTENV.COM](http://RTENV.COM)
24 HOUR URGENT LINE SERVICE: 800-725-0593

RT Environmental Services, Inc., 215 W. Church Road, King of Prussia, PA 19406

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