State Of The Environmental Law In New Jersey Under The McGreevey Administration

*Interview with **Edward A. Hogan**, Partner with Norris McLaughlin & Marcus, P.A.*

Editor: Please tell us about your background.

Hogan: I earned my B.S. degree from St. Peter's College, my M.F.S. degree from Yale University School of Forestry and Environmental Studies, and my J.D. from Georgetown University Law Center. For the past 20 years, I helped manufacturers, commercial and industrial landlords, and highly regulated service businesses in all aspects of environmental law and litigation. I have been active with a number of professional associations and have chaired the Environmental Law Section of the New Jersey State Bar Association, Environmental Issues Committee of the Commerce and Industry Association of New Jersey, the Environmental Quality Committee of the New Jersey Business and Industry Association, and the New Jersey OSHA and Industry Communications Alliance.

Editor: What aspects of environmental laws and regulations under the McGreevey Administration are receiving the greatest attention?

Hogan: The four areas having great impact on New Jersey business are the natural resources damage claims, heightened enforcement of current environmental laws, changes to the regulations governing the remediation of contaminated sites, and the administration's plans for Smart Growth.

Editor: Why are natural resource damage claims now becoming a concern?

Hogan: The Federal Government under the Superfund statute and the State of New Jersey under the Spill Compensation and Control Act have, as trustees of natural resources, the ability to make damage claims on behalf of the public for natural resources that have been harmed by the discharges of hazardous substances. These claims are in addition to cleanup performed by responsible parties. Over the past 20 years or so, the State has sought damages approximately 100 times, most typically where there was an obvious and acute impact to the environment, such as in the case of major oil spills.

The Spill Compensation and Control Act never had a statute of limitations until 1992. At that time, the legislature imposed a ten-year limitation on the State of New Jersey to bring natural resource damage claims. In 2000 the Department of Environmental Protection began to earnestly prepare cases for litigation, realizing that the statute of limitations was going to bar claims for pre-1992 discharges. Just before the deadline was about to run, the legislature extended the limitations period. The McGreevey administration has now made it a priority to pursue these claims.

Edward A. Hogan

Editor: In light of the State's current budget and staffing constraints, what avenues are being explored by the McGreevey Administration to pursue litigation that would impose damages for environmental harms?

Hogan: The McGreevey Administration has contracted with an out-of-state plaintiff's attorney to develop a strategy for pursuing these claims. It is widely anticipated that one or more private plaintiff's law firms would be retained to handle these matters on a contingent basis, much like the tobacco class action lawsuits have been pursued. Reports have circulated that suits will be filed to recover damages at several thousand properties. This, of course, is a great concern in the business community since the State will be ceding its prosecutorial discretion to a private party whose only incentive is to maximize recovery.

Editor: What approach is the McGreevey Administration pursuing in its enforcement actions?

Hogan: The current administration has made strong environmental enforcement a centerpiece of its message. In its raid on businesses operating in Camden, the Department of Environmental Protection sent a strong message that polluters will be fined and, if necessary, shut down. The focus on certain neighborhoods or industry sectors is meant as a general deterrent to the business community as a whole and has been taken quite seriously.

Editor: In February, the Department of Environmental Protection adopted sweeping changes to the regulations governing remediation of contaminated sites. What are the most significant aspects of these changes?

Hogan: Last month, the New Jersey Department of Environmental Protection ("NJDEP") adopted sweeping changes to the regulations governing the remediation of contaminated sites, the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. Although these revisions encompass numerous aspects of the site remediation process, perhaps the most significant involve the procedures associated with Classification Exception Areas ("CEA") and Deed Notices, the institutional controls which permit elevated levels of contaminants to remain at a site after active remediation has been completed. These institutional controls have been pivotal to cost-effective redevelopment of "Brownfields," under-utilized properties for which redevelopment would be economically impractical without such regulatory relief.

CEAs temporarily condone exceedances of the Ground Water Remediation Standards ("GWRS"), typically for the projected period necessary for natural attenuation and degradation processes to achieve GWRS. The obvious advantage has been that such an approach is considerably more cost-effective than attempting to reach GWRS through the application of active remedial technologies.

Deed Notices, often in conjunction with engineering controls such as pavement caps, allow elevated levels of soil contamination to remain permanently on-site. The Deed Notice binds the current property owner to certain notice requirements as well as to the obligation to inspect and maintain any engineering controls.

The changes impose a number of new procedures. While NJDEP approves CEAs only after groundwater contamination is fully delineated and the projected natural degradation and attenuation calculated, confirmation sampling has only been required at the end of the CEA period if the property is in a groundwater use area. Now, the original responsible party must always perform sampling at the conclusion of the CEA period to demonstrate that the GWRS have been achieved. Moreover, the original responsible party must submit detailed inspection and protectiveness evaluation reports every two years throughout the entire CEA period.

These new provisions will present a number of logistical difficulties for responsible parties. Such parties must now revisit and re-evaluate the subject area every two years. In many circumstances, these investigations were triggered because the property was being sold or the business operations terminated, and thus access and cooperation from the current owners may not always be readily available. The requirement for final confirmatory ground water sampling will pose a dilemma: leaving monitoring wells open for several years so that they might be utilized for confirmation sampling but recognizing that they could very well be damaged or vandalized, thereby posing an excellent conduit to introduction of new contaminants from the surface, or closing monitoring wells once the CEA is granted and later having to reinstall monitoring wells in order to perform confirmatory sampling.

The new requirements for Deed Notices now clarify that the obligation for regular maintenance and biennial reporting is a joint and several obligation of the current owner and the original responsible party. The rather well-settled principle that the Deed Notices "ran with the land" and thus the obligations for inspection and maintenance were that of the current property owner is now disrupted by the NJDEP's position that the original responsible party shares those obligations in perpetuity. Moreover, a subsequent non-responsible party property owner selling a Deed Noticed property must now notify NJDEP in order to extricate himself from the regulatory obligations and the attendant penalty exposure.

The NJDEP has specifically made all of these requirements *retroactive* to all previously approved CEAs and Deed Notices. Thus, those who completed remediations by utilizing CEAs or Deed Notices will need to revisit matters they understood to be completed by the issuances of No Further Action letters.

Editor: What initiatives is the McGreevey Administration pursuing to promote Smart Growth?

Hogan: Commissioner Campbell recently released a second draft of the "big map" identifying areas where growth will be encouraged and areas where it will not. This is of obvious concern to business who have interest in expanding or redeveloping their operations or properties. The State is adopting policies that will focus incentives and infrastructure in areas already developed, making it more difficult to develop sensitive rural areas.

Editor: What actions can a business take to address their concerns about the administration of environmental laws?

Hogan: Business rarely take sufficient time and energy to address issues proactively. In particular, the State's Administrative Procedure Act presents powerful opportunities to comment upon, and hence potentially influence, the rules and regulations proposed by State agencies.

Companies can obviously participate in both the legislative and regulatory process individually. However, they can often benefit from the synergies of working with other companies through participation in their trade and professional organizations. Not only does collective activity help protect company self-interest, it also promotes good government and makes New Jersey a friendly place for business.

Editor: Where can a reader find more information?

Hogan: As a frequent speaker and author, I can readily supply information on a wide variety of environmental topics. I can be reached at eahogan@nmmlaw.com.