

Enforcement Enhancement Act

Legal Alert

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Substantially Increases Civil Penalties And Possible Criminal Liability For Violations Of Environmental Permitting Laws

On January 4, 2008, Governor Corzine signed into law the Enforcement Enhancement Act, P.L. 2007, c. 246, that amends the enforcement provisions in 10 existing statutes - mostly environmental permitting laws. As described in the NJDEP's March 2008 Compliance Advisory Enforcement Alert, the purpose of the Act is to bring the enforcement provisions in these statutes "up to current standards so that they can now be addressed by enforcement actions that are consistent, efficient, timely, and can be brought into the Office of Administrative Law." While that is not an incorrect statement, the new law is very much of a sleeping giant that may catch parties unaware of greatly increased civil liability, and even potential criminal liability, if they are not careful.

NJDEP lobbied for enactment of this law because it did not feel that some of the existing environmental statutes contained sufficient enforcement "teeth" to deter non-compliance with those laws. For example, there had allegedly been prior instances in which unscrupulous developers had filled in freshwater wetlands without obtaining permits because the cost of paying a penalty for doing so - only a few thousand dollars, with no daily multiplier for a continuing violation - was substantially less than the cost either to obtain the necessary permits or to redesign a development so as not to have impacts on wetlands. Although federal law has long contained onerous sanctions for similar conduct, and people have been criminally prosecuted under federal law as well, federal protection does not extend to so-called "isolated" wetlands which are uniquely subject to state control.

The Enforcement Enhancement Act amends the following 10 environmental statutes, many of which contain permitting and other provisions that are or could be applicable to developer, industrial, institutional, manufacturing, retail, and/or construction businesses and entities:

- Waterfront Development Act, N.J.S.A. 12:5-1 et seq.;
- Pesticide Control Act of 1971, N.J.S.A. 13:1F-1 et seq.;
- Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.;
- Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.;
- Coastal Area Facility Review Act N.J.S.A. 13:19-1 et seq.;
- Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq.;
- Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.;
- Safe Dam Act, N.J.S.A. 58:4-8.1 et seq.;
- Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.; and

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- Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

According to the NJDEP March 2008 Compliance Advisory Enforcement Alert, before the Enforcement Enhancement Act was signed into law, "several of the statutes lacked sufficient penalty assessment authority to provide for a deterrent to future violations as well as compel compliance in a timely manner. In some situations, violations could have continued as a 'cost of doing business' with a corresponding delay in compliance resulting in negative impacts to the environment." NJDEP purports that the Act accomplishes the following four things:

- uniformly increases maximum penalty amounts to \$25,000 per violation per day;
- authorizes daily penalty assessments for continuing violations;
- authorizes the recovery of compensatory damages for any loss or destruction of natural resources;
- clarifies criminal provisions for purposeful, knowing, and reckless violations or falsifications.

The uniform application of a maximum penalty of \$25,000 per violation per day substantially raises the penalty ceilings in many of the amended statutes by orders of magnitude from their prior ceilings, although the same ceiling has long applied under other environmental laws, such as the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Also, while other statutes like the SWMA and the WPCA have long specified that each day of a continuing violation constitutes a separate penalty event, the concept of daily penalty assessments of up to \$25,000 is a further enhancement of the civil liability provisions in many of the amended statutes. And, in lieu of issuing an administrative order to assess a civil administrative penalty, the NJDEP has the option of asking a court to fix a penalty of up to \$25,000 per day, in which event the court is further empowered to "assess against the violator the amount of economic benefit accruing to the violator from the violation." In the case of filled in wetlands, for example, the economic benefit attributable to the violation could make even a \$25,000 per day penalty seem small in comparison.

Additionally, while other environmental laws have previously authorized the recovery of compensatory damages for the loss or destruction of natural resources (e.g., the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.), that is an entirely new concept in the amended statutes. This may portend new initiatives from the NJDEP, substantially expanding the scope of its current NRD program; at the very least, this could become a more routine demand in future Administrative Orders and Notices of Civil Administrative Penalties issued by the NJDEP for violations of the amended statutes.

However, the Enforcement Enhancement Act goes even further, as it also authorizes the recovery, among other things, of the "reasonable costs of any investigation, inspection, or monitoring survey which led to the discovery of the violation, and for the reasonable costs of preparing and bringing a civil action," in addition to other provisions. So, there could and probably will now be applications to recover the NJDEP's counsel fees, investigation costs, and even expert witness fees in bringing civil enforcement claims under some or all of these laws.

It should also be noted that NJDEP's statement that the new law merely "clarifies" criminal provisions in existing laws is very much a misnomer, because many of these statutes never imposed criminal liability for a violation of their terms. All of the amended statutes now contain language authorizing the NJDEP Commissioner both to assess civil penalties and to petition the Attorney General to commence a criminal

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action for purposeful, knowing, and even reckless violations or falsifications. Furthermore, the amended language states that "recourse to any of the remedies available under this section shall not preclude recourse to any of the other remedies," so it is conceivable that in an egregious enough situation, there could be both civil and criminal prosecutions brought against the violator for the same misconduct. Therefore, parties should especially be alerted to this new and potentially harsh exposure to criminal liability. It is also suggested that parties would be well counseled to avoid making statements or providing information to investigating authorities without the benefit of attorney advice, lest they inadvertently waive any self-incrimination privileges that they may otherwise have.

This Client Alert contains just a brief summary of this new law and does not purport to address or comment upon all provisions. For a full understanding of the Enforcement Enhancement Act, and its possible legal effect on you and your business, please contact any member of the Flaster Greenberg Environmental Department.

ATTORNEYS MENTIONED

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