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How To Deal With NJDEP Violations

The Editor interviews Martha N. Donovan, Member, Norris McLaughlin & Marcus, P.A.

Editor: Please tell our readers about your practice.

Donovan: We have nine attorneys who practice environmental law full time. Edd Hogan and I are the Co-Chairs of the department. While practicing litigation, I also do some regulatory compliance, some real estate, and some mergers and acquisitions. I do a little bit of this and that, because you cannot handle litigation unless you understand the underlying law. Edd Hogan coordinates what everyone else is working on and makes sure we are on the cutting edge of whatever new legal issues arise. We also have one attorney who does full time environmental land use. He deals with all of the various aspects of CAFRA, wetlands and those kinds of things. We have another litigator who does all of the Natural Resource Damage related litigation. Our deep department does all aspects of environmental law, including Spill Act and Superfund litigation, real estate transactions, corporate transactions, audits, compliance, air permits, water permits, and enforcement actions.

Editor: What areas of environmental law currently are having the greatest impact on corporations in New Jersey?

Donovan: The Industrial Site Recovery Act (ISRA) has never gone away. It is still just as important a statute as it ever was. You cannot purchase or sell a business or property, or cease operations, or



Martha N. Donovan

do anything that's considered a trigger under ISRA, without considering all of its implications and all of the historic implications of the people who came before you. Every time we are involved in a site or a case, ISRA almost always arises. Because of that, businesses are always going to be concerned about site remediation issues.

Another aspect that we have been very involved with as a firm is all of the booming Brownfields redevelopment going on around the state pursuant to the Brownfield and Contaminated Site Remediation Act (Brownfields Act). It's certainly at the top of the list for the folks at NJDEP because they want to encourage redevelopment. It forces companies to take something other than pristine property and provides lots of economic incentives to do so. As the Brownfields

law progresses, as developable property in New Jersey decreases, and as land use regulations become more stringent, I think we're going to see a lot of new building going on in urban areas so that we reuse the land that has been left fallow.

Editor: Can you explain to me some of the requirements for redevelopment under the Brownfields Act?

Donovan: Under the Brownfields Act, a developer who enters into a redevelopment agreement potentially may recoup up to 75% of his or her cleanup costs. The New Jersey Commerce and Economic Growth Commission and the Department of Treasury, in consultation with NJDEP, negotiate and approve redevelopment agreements if the project is appropriate and reasonable and there is a clear indication that, but for the availability of the funding, the developer is not going to do the project. The remediation standards are the same whether you're in a Brownfields site or not, but you can try to minimize the cost of remediation by using engineering and institutional controls, i.e. asphalt caps and deed restrictions. In some of these blighted areas, that's the type of remediation that you're going to want to do anyway.

Editor: What do you think will be the priorities of the Corzine Administration with respect to the environment?

Donovan: Certainly, in his campaign, Governor Corzine made it clear that he is very concerned about the Fast Track Law, the law which allows developers to obtain permits quickly to expedite pro-

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jects. He will try to ameliorate that in some way so pristine areas of the state are not gobbled up by development while other non-pristine parts are left in poor condition. The state has been actively involved in encouraging redevelopment, and I do not see that changing under the Corzine administration.

Also, the budget has to be a priority for Corzine. He has to bridge a gap of billions of dollars. My fear is that environmental regulations, particularly enforcement regulations, will be used to bridge some of that budget gap. Recently, NJDEP proposed regulations pursuant to the Grace Period Law, N.J.S.A. 13:1D-127, *et seq.*, which might indicate its intention to assess penalties for even minor violations.

Editor: I understand that you were heavily involved in getting NJDEP to apply the Grace Period Law and promulgate regulations. Could you please tell us a little about that?

Donovan: The purpose of the Grace Period Law was to let companies fix minor environmental problems without being penalized. It's kind of a no harm, no foul approach to environmental law. The act was passed in 1993. However, as of ten years later, NJDEP had not promulgated regulations implementing the act. Then, our client, Marisol, Incorporated, challenged penalties that were assessed against it for labeling violations. Both of these alleged violations were "minor" for purposes of penalty assessment, and Marisol corrected both of them on the day of the NJDEP inspection.

Nevertheless, NJDEP refused to forgive these violations under the provisions of the Grace Period Law. NJDEP relied on an old internal guidance document, created *prior* to the enactment of the Grace Period Law to determine that Marisol's minor violations warranted penalties. Pursuant to that document, these alleged violations were "high priority" and therefore, according to the NJDEP, automatically not entitled to Grace Period treatment.

On appeal, in *NJDEP v. Marisol, Inc.*, 367 N.J. Super 614 (App. Div. 2004), the Court noted that the purpose of the Grace Period Law is to expedite correction of minor violations rather than to impose penalties. As a result, the Appellate Division independently applied the Grace

Period's statutory criteria to the facts surrounding these alleged violations. It determined that they both qualified for Grace Period treatment and that no penalties should attach.

In finding that these two alleged violations did warrant Grace Period treatment, the Appellate Division noted that the Grace Period Law required NJDEP to adopt implementing regulations by a date certain but that NJDEP had not done so. The court ordered NJDEP to promulgate implementing regulations pursuant to the Grace Period Law. NJDEP proposed regulations in August 2005. The proposed regulations list different violations and whether they are minor or non-minor.

The problem now is that by enumerating certain violations the proposed regulations turn the Grace Period Law on its head by assessing penalties for violations that never should have been considered in the first instance. For example, under ISRA if you fail to file the General Information Notice, which is nothing more than a form that says "Hey, I'm going to close operations, or sell property," within 5 days after the triggering event, NJDEP is going to hit you for a penalty. How does that help the environment? Also, it appears to us that NJDEP has set up the regulations in such a way that, if it could find two or three different kinds of penalties that apply to a single violation, the business could be hit with more than one penalty at a time. They're not small penalties – some are more than \$25,000 a pop. Our fear is that the reason this is being done is to bridge the budget gap.

Editor: Are there other monetary concerns for businesses in New Jersey?

Donovan: Another issue that is of importance to businesses doing any sort of remediation in the state is oversight costs. In 1993, NJDEP promulgated the Oversight Regulations at N.J.A.C. 7:26C-9, pursuant to which NJDEP can submit invoices to parties performing remediations for reimbursement of costs NJDEP incurs, such as overhead, salaries, etc., in reviewing the party's reports. After the regulations were adopted, DuPont challenged them in court. However, because there was no other way that NJDEP was going to have the funding to review the reports, the Appellate Division found authority for the regulations in the Spill

Act and the Water Pollution Control Act. In 2002, almost ten years after the regulations were promulgated, the legislature provided a ceiling for these costs by adding a provision to the Brownfields Act that prohibits NJDEP from charging more than 7 1/2% of the actual costs of the remediation. Obviously, 7 1/2% can still be enormous.

The invoices from NJDEP themselves are indecipherable. They will have an amount like \$50,000 for a period of time, but no explanation. The Oversight Regulations set forth how to challenge the invoice. First, you must challenge it in writing within 30 days of its receipt; otherwise it all becomes due and payable. Then, NJDEP will give you an informal hearing. If you have to, you can appeal to the Appellate Division. It's imperative that businesses make sure that their consultants and their own personnel know that, if they receive an invoice, they should submit a written objection immediately, because you are not going to know what you're paying – you will not have a clue from the bill. It's better to be safe than sorry. Challenge it, and NJDEP will have a meeting with you. You might be able to negotiate it, or NJDEP might withdraw it altogether.

Editor: What other issues are looming for businesses in New Jersey?

Donovan: The new lobbying laws that became effective in January raise a question as to what it means to lobby NJDEP. If you write a letter on behalf of a client, is that lobbying? What's a proceeding? Who falls within these requirements? It's a huge issue that all law firms and consultants are considering right now.

Editor: Any last words of advice to businesses involved with NJDEP?

Donovan: You have to think outside the box. There may be a solution short of litigation. One thing people do not do enough of is call the agency and say "We've got an issue and we need to sit down and talk with you." Businesses need to do more of that. All of the folks at NJDEP are there to do a job. Meeting them face to face, eyeball to eyeball in my experience, is more likely to result in a solution than any letter writing campaign, any litigation, or anything else.