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NEW DEP COMMISSIONER

The Senate Judiciary Committee unanimously supported approval of Catherine McCabe as the new Commissioner of DEP, voting the nomination out of Committee on May 14, 2018. The full Senate is expected to consider McCabe's nomination as early as June 7, 2018. During the Judiciary Committee interview process, Acting Commissioner McCabe expressed concern regarding a number of issues including "New Jersey being a densely populated state", "constant pressure on natural resources", "New Jersey's past industrial history", "decaying water infrastructure", "drinking water contaminants", "Governor Murphy's steps regarding climate change", "directing DEP and BPU to rejoin RGGI", and the importance of avoiding "building in the flood plains". She also stressed the need to hear and share different views and perspectives and apply balance in any DEP decision-making, stating that the Administration would focus on continuing to implement common-sense in the decision-making process while putting a premium on customer service to minimize delays in business opportunities. It remains to be seen how this balance will be implemented and achieved throughout Commissioner McCabe's tenure under the current Administration.

AFFORDABLE HOUSING METHODOLOGY

I/M/O Princeton and West Windsor

In March 2018, the New Jersey Superior Court of Mercer County issued a lengthy decision that could have broad implications for municipalities with respect to their affordable housing obligations. The decision, *In the Matter of the Application of the Municipality of Princeton and In the Matter of West Windsor Twp.*, is the first case to apply a specific methodology for the apportionment of low- and moderate-income housing obligations within the State. The decision also set new-construction affordable housing obligations for Princeton and West Windsor, each of which did not settle its litigation, of 753 units and 1,500 units, respectively.

Assignment Judge Mary C. Jacobson's decision and order establishes the methodology and fair share affordable housing obligations for Princeton and West Windsor's Third Round housing cycle, which encompasses the Gap Need (1999-2015) and the Prospective Need (2015-2025). As a result, each municipality must create a housing plan that provides a realistic opportunity to satisfy its affordable housing need. These plans will be considered at separate compliance hearings that Judge Jacobson has scheduled for late July 2018. Municipalities around the State that have yet to settle their cases had been awaiting

this decision, since other "Mount Laurel" judges in New Jersey will undoubtedly rely upon Judge Jacobson's decision outlining in detail the methodology used to calculate the number of affordable housing units that municipalities will be obligated to provide.

SPILL ACT LIABILITY: CORPORATE VEIL-PIERCING

Morris Plains Holding v. Milano French Cleaners

In a recent unpublished decision, the Appellate Division upheld the imposition of liability under the Spill Act on the sole shareholder of a dry cleaning business. The plaintiff in *Morris Plains Holding VE, LLC v. Milano French Cleaners, Inc.*, the owner of a shopping center that had assumed the cleanup of contamination, filed suit against a dry cleaning tenant and its sole shareholder after the defendant dry cleaning business failed to complete the remediation, closed, and filed for bankruptcy. Apparently there were no issues regarding the validity of the corporation. However, the trial judge held the sole shareholder jointly liable with the corporation for all remediation costs.

On appeal, the shareholder argued that imposing Spill Act liability on him improperly pierced the corporate veil. The Appellate Division disagreed, finding the evidence produced at trial "firmly established" the judge's findings that the sole shareholder was "everything vis-à-vis this business: its sole shareholder, the operator of the business, the person responsible for overseeing and handling the PCE used, and the person charged with ensuring legal and regulatory compliance." Because the Spill Act broadly imposes liability on persons "in any way responsible," N.J.S.A. 58:10-23.11(a)(2)(a), the court found legislative intent to "expand the scope of liability without regard for corporate veils and the like." Relying on the "in-any-way-responsible language," the court rationalized that the legislature did not intend for a shareholder of a close corporation to pollute

property, seek bankruptcy protection for the business, and then simply "walk away from the problem."

The court's broad imposition of liability and seeming disregard for the corporate veil could be noteworthy for owners of small businesses faced with potential environmental liability. The court's holding may lead to an erosion of the corporate form as a shield to individual liability under the Spill Act where there is a "reasonable nexus" between the discharger and the contamination.

The decision should be interpreted in the context of the underlying facts, which involved the sole shareholder wearing many (or in this case all) hats, including the handling of the constituent contaminants and causing the discharge that required remediation. Regardless of the underlying factual setting, the decision likely will motivate plaintiffs in environmental cost recovery actions to pursue individual shareholders.

FLOOD MAPPING

After Super Storm Sandy, FEMA issued advisory maps in advance of the preliminary maps to help guide rebuilding efforts. When these advisory maps were issued for Atlantic, Hudson, Monmouth, and Ocean counties in late 2012, residents and officials were surprised by the substantial expansion of the V-zone and argued that FEMA did not take town and neighborhood-specific conditions into account. Since the V-zone has significantly stricter building standards, the advisory maps had costly implications for rebuilding. In June 2013, however, FEMA released preliminary flood insurance rate maps (FIRMs) that reduced the V-zone depicted in the advisory maps by at least forty-five percent.

In 2017, municipalities were given an opportunity to adopt the preliminary FIRMs or await the final maps. Perhaps preferring the certainty of the existing mapping, Highlands, Little Silver, Matawan and Monmouth

Beach in Monmouth County, Point Pleasant Beach in Ocean County, and a number of municipalities in Cape May County decided to adopt preliminary FIRMs, rather than awaiting FEMA's remapping. As a result, these towns must specifically adopt the new FIRMs by ordinance effective on or before June 20, 2018. Neighboring municipalities not adopting the new FIRMs but located on the same FIRM panel as an adopting municipality must amend their effective ordinance to reflect the new panel date of June 20, 2018, for consistency. This is not the same as adopting a new FIRM map however.

FEMA anticipates releasing the new final maps in 2021, which should be adopted in 2022. Similarly, the National Geodetic Service anticipates replacing the North American Datum of 1983 (NAD 83) and the North American Vertical Datum of 1988 (NAVD 88) with new datums in 2022.

DEP RELEASES UPDATED IEC GUIDANCE

DEP updated its Immediate Environmental Concern (IEC) Technical Guidance in May 2018 (Version 2.0). Specifically, Section 4.1, Potable Well IEC Technical Guidance Procedures, was revised by the addition of a new Subsection 4.1.1, Identification, detailing the obligations of

an investigator when contamination is discovered in a potable well, which is either a public supply well or a production well, that is used for human consumption.

This update to the IEC guidance comports with DEP's existing Off-site Source Ground Water Investigation and Comingled Plume guidance. Nonetheless, builders/developers engaged in due diligence review of redevelopment parcels and their consultants should familiarize themselves with this update and with the IEC notification requirements under SRRRA applicable to persons responsible for conducting remediation and LSRPs.