

# Environmental Alert

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## New Jersey To Require Testing Of Private Wells

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**U**nder the recently enacted New Jersey Private Well Testing Act, beginning in September 2002, buyers and sellers of property using a private well for potable water supply will be required to test the well prior to closing of title. Furthermore, landlords using a private well for potable water supply will be required to test the potable water every five years and provide the test results to their tenants.

The testing data will be provided to and compiled by the New Jersey Department of Environmental Protection ("NJDEP"). The Department will then report on areas where potable groundwater exceeds applicable standards without revealing the exact location of the exceedence. Companies who use or have used the same or similar chemicals detected in potable groundwater will likely be subject to increased scrutiny.

### **Real Estate Sales**

Contracts for the sale of real property must include a contractual provision that the on-site private potable water well will be tested prior to closing. This requirement applies to contracts for the sale of (1) real property which has a potable water supply from a private well located on the property and (2) any other real property which has a potable water supply systems with less than 15 service connections or that does not regularly serve an average of at least 25 individuals daily (sixty days out of the year). The buyer and seller must certify

in writing at closing that each has received and reviewed a copy of the water test results.

### **Testing Requirements And Validity of Results**

In general, the potable water must be tested for bacteria (total coliform), nitrates, iron, manganese, lead, pH, and all volatile organic compounds (VOCs) for which maximum contaminant levels (MCLs) have been established. Currently, MCLs have been established for twenty-seven VOCs. The well water tests must also include a short term 48-hour gross alpha test to screen for the presence of radium, provided that NJDEP determines that there are a sufficient number of certified laboratories available to perform the test. NJDEP can limit the area where the short term test will be required until there is a sufficient number of certified laboratories.

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*"Testing must be performed by a laboratory certified by NJDEP to test for drinking water contaminants."*

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NJDEP, in consultation with the Drinking Water Quality Institute, may establish additional testing parameters for specific counties or specific areas and may exclude or limit by geographic area or geologic formation any of the above specified parameters that NJDEP determines is not significant in a county or in a specific area within a county.

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Testing must be performed by a laboratory certified by NJDEP to test for drinking water contaminants. The Department will also establish standardized private well water test reporting forms which must be utilized by the certified laboratory. NJDEP will also establish, for each parameter, the time period for which a test result will remain valid.

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*“...residential property with contaminated potable private wells will be difficult to sell...well will also impair a buyer’s ability to obtain a loan for the property or for the current owner, including lessors, to refinance loans on the property. As a result, the value of the property may be significantly impaired.”*

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### ***Small Public Water Systems***

By March 2004 and every five years thereafter, the landlord of any real property that uses a private well for potable water supply (assuming that testing is not currently required under any other State law), must test that water supply for the parameters identified above. The landlord must provide a written copy of the results to each tenant on the property and must provide a copy of the most recent test results to each new tenant.

### ***Reporting Requirements And Public Disclosure Of Data***

The certified laboratory is also required to report the water test results directly to NJDEP. Water test results may not be disclosed to anyone other than the buyer and seller, landlord and tenant, NJDEP, and county and local health officials, except by court order.

After receiving a report of an exceedence, the Department must report such exceedence within five business days to the county health department, health agency, or designated health officer. The county, in turn, at its sole discretion, may issue a general notice to owners of real property served by private wells located in the vicinity of the real property with the exceedence and recommending that such owners have their own private wells tested for the parameters at issue. However, the location of the private well with the exceedence cannot be identified to nearby property owners. Specifically, the Act provides that water test results “shall be confidential and shall not be open for public examination, inspection, or copying, except that general compilations of water test results data arranged or identified by county and municipality or appropriate geographic areas therein, which do not include specific address or location information, may be made available to the public.”

### ***Data Compilation***

NJDEP is required to compile data from the testing of private wells for use by the Department, counties, municipalities and other governmental entities for purposes of studying groundwater supplies or contamination in New Jersey. NJDEP is also required to publicize the requirements of the Act and make available to the general public “a general compilation of water test results data arranged or identified by county and municipality or appropriate geographic areas therein, but which does not include specific address or location information.”

### ***Implications***

Depending on the type and concentration of contaminants, residential property with contaminated potable private wells will be difficult to sell. A contaminated well will also impair a

buyer's ability to obtain a loan for the property or for the current owner, including lessors, to refinance loans on the property. As a result, the value of the property may be significantly impaired. Local and county health officials may investigate potential sources of contamination and recommend to nearby property owners to test their potable wells. Along with the NJDEP, health officials may assist property owners in connecting the impacted properties to a municipal water supply and seek reimbursement from nearby PRPs under the New Jersey Spill Compensation and Control Act.

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Finally, rather than specifically identifying the exact location of an exceedence, NJDEP's general data compilations will only broadly describe the area of an exceedence. With various state and federal agencies and public interest groups now providing chemical usage information on their web sites, any entity in proximity of an area identified as exceeding applicable standards that uses the chemical at issue, or even a related chemical, could become the focal point of environmental groups, the media and personal injury lawyers. The stigma of being identified as being responsible for polluting potable groundwater is difficult, if not impossible, to erase.

*For more information regarding this act or other Safe Water Drinking Act compliance issues, please contact Michael J. Caffrey, an associate in the Environmental Law & Litigation Practice Group, at 973.597.2546 or you may e-mail him at [mcaffrey@lowenstein.com](mailto:mcaffrey@lowenstein.com). We would also be pleased to provide you with advice respecting your other environmental compliance issues. If we can be of assistance in this regard, please call Richard F. Ricci, Chair of the Environmental Law & Litigation Practice Group, at 973.597.2462 or you may e-mail him at [rricci@lowenstein.com](mailto:rricci@lowenstein.com).*